International Commercial Arbitration: A Single Supranational System

A thesis submitted for the Degree of Doctor of Philosophy

By: Omar Said Imam Abasheikh

Brunel University London

Law School

September 2018

Declaration of Authorship

I, Omar Said Imam Abasheikh, declare that this thesis titled 'International Commercial Arbitration: A Single Supranational System' and the work presented in it is based on my original work, except for quotations and citations which have been duly acknowledged. I confirm that:

- This work was done wholly in candidature for a research degree at Brunel University and that it has not been, previously or concurrently, submitted for any other degree at this or any other institution.
- Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated.
- Where I have consulted the published work of others, this is always clearly attributed.
- Where I have quoted from the work of others, the source is always given.
- With the exception of such quotations, this thesis is entirely my own work.
- I have acknowledged all main sources of help.
- Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself.

Signed:

Date: 30 September 2018

Table of Contents

Abstract

This dissertation examines International Commercial Arbitration as it appears to have reached a turning point. Through the lens of institutional entrepreneurship opportunity and institutional change theory, the dissertation seeks to determine whether transforming arbitration from an unregulated process to a regulated system would enhance the practice. This question is vital at the present time as arbitration is blemished by increasing cost and time of arbitration proceedings, intervention by national courts in the arbitral process, diminishing party autonomy, and loss of privacy and confidentiality of the proceedings as shown by data from surveys conducted in the last decade or so, and also due to the potential threat posed by the growth of mediation and also litigation in specialist commercial courts. Commentary frequently highlights these issues, but many commentators seldom propose solutions because practitioners benefit from the institution's current chaotic arrangements where they could increase their fees and extend the proceedings for their financial gain. The dissertation shows that international commercial arbitration is a semi-institutionalised institution and would probably benefit from introduction of the regulative institutional pillar to make it fully institutionalised. An appeal procedure, a mechanism to make the process cost-effective, expeditious, and to reduce intervention by national courts in arbitration proceedings so that arbitrants can maintain privacy and confidentiality of their disputes appears desirable. It recommends establishment of a single supranational regulatory organisation called the 'International Centre for Arbitration of Commercial Disputes' (ICACD) to function as a bureaucratic structure in order to respond to the changing needs of the community and to enhance the institution's status and its functionality, such as to establish the 'International Arbitration Awards Review Council' (IAARC).

Acknowledgements

Fortune favours the brave!

By the grace of God, I have arrived at my final destination as far as academic achievement is concerned. I have completed a PhD. I am grateful to the almighty.

I am a product of my father and my mother. I thank them for bringing me into this world and for allowing me to learn and experience freely.

I thank my siblings for being there for me.

I thank my wife for taking care of our daughter, Tasniem, whilst I studied.

I am indebted to Tasniem for patiently waiting in the wings for my full attention. She will now have it! I dedicate this dissertation to her.

He who has created the universe also brought into this world Professor Dr. Benedict Abrahamson Chigara, to whom I am grateful for his profound advice and assistance combined with his wisdom. He has taught me to persevere and think like a philosopher.

If I am allowed to take any credit, my persistence would probably be the first of my qualities to get a mention. But I hope my motivation and determination to succeed will not go unnoticed. I am at the mercy of the Exalted for these qualities.

Abbreviations

International Court of Arbitration of the International Chamber of Commerce (ICC)

London Court of International Arbitration (LCIA)

German Institution of Arbitration (DIS)

Singapore International Arbitration Centre (SIAC)

Jerusalem Arbitration Centre (JAC)

Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

Swiss Chambers' Arbitration Institution (SCAI)

Vienna International Arbitral Centre (VIAC)

Russian Arbitration Association Court Arbitration Court (RAAAC)

International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC)

International Centre for Dispute Resolution (ICDR)

International Centre for Dispute Resolution of the American Arbitration Association (ICDR-AAA)

American Arbitration Association (AAA)

British Columbia International Commercial Arbitration Centre (BCICAC)

Arbitration Center of Mexico (CAM)

Brazilian Business Arbitration Centre (CAMARB)

International Conciliation and Arbitration Centre of Costa Rica (CICA)

Chinese International Economic and Trade Arbitration Centre (CIETAC)

Hong Kong International Arbitration Centre (HKIAC)

Indian Council of Arbitration (ICA)

Korean Commercial Arbitration Board (KCAB)

Japan Commercial Arbitration Association (JCAA)

Vietnam International Arbitral Center (VIAC) [Vietnam]

Philippine Dispute Resolution Center (PDRC)

Kuala Lumpur Regional Centre for Arbitration (KLRCA)

Dubai International Arbitration Centre (DIAC)

Qatar International Center for Conciliation and Arbitration (QICCA)

Bahrain Chamber for Dispute Resolution of the American Arbitration Association (BCDR-AAA)

Saudi Center for Commercial Arbitration (SCCA)

DIFC-LCIA Arbitration Centre (DIFC-LCIA)

Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC)

Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf (GCCCAC)

Arbitration Foundation of Southern Africa (AFSA)

Cairo Regional Centre for International Commercial Arbitration (CRCICA)

Lagos Regional Centre for International Commercial Arbitration (LRCICA)

Regional Centre for International Commercial Arbitration - Lagos (RCICAL)

Lagos Court of Arbitration (LCA)

Australian Centre for International Commercial Arbitration (ACICA)

International Centre for Settlement of Investment Disputes (ICSID)

White & Case LLP (W&C)

Berwin Leighton Paisner (BLP)

International Senior Lawyers Project (ISLP)

Queen Mary University of London (QMU)

PricewaterhouseCoopers (PwC)

Pinsent Masons (PM)

International Federation of Commercial Arbitration Institutions (IFCAI)

International Court of Justice (ICJ)

International Criminal Court (ICC)

Court of Arbitration for Sport (CAS)

World Intellectual Property Organization (WIPO) Arbitration and Mediation Center

World Trade Organization (WTO) Dispute Settlement Body (DSB)

World Health Organization (WHO)

Permanent Court of Arbitration (PCA)

International Conventions and Treaties, Legislation, Rules of Arbitration Centres and Rules Procedure

International Conventions and Treaties

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (10 June 1958) 330 U.N.T.S. 3; 21 U.S.T. 2517

European Convention on Human Rights and Fundamental Freedoms 1950 (ETS 5; 213 UNTS 221)

Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945)

European Convention on International Commercial Arbitration (21 April 1961) 484 U.N.T.S. 364 No. 7041 (1963-1964)

Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (26 September 1927) 92 L.N.T.S. 301 (1929)

United Nations Commission on International Trade Law Rules Model Law on International Commercial Arbitration 1985 (21 June 1985) 24 ILM 1302

Inter-American Convention on International Commercial Arbitration 1976 (30 January 1975) 14 I.L.M. 336

Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (14 October 1966) 575 UNTS 159; [1991] ATS 23; 4 I.L.M. 532 (1965); UKTS 25 (1967)

Geneva Protocol on Arbitration Clauses 1923 (24 September 1923) 27 L.N.T.S. 157 (1924)

Sixth Council Directive (77/388/EEC) of 17 May 1977, OJ 1977 L 145

Legislation

Arbitration Act 1996 [1996 c. 23]

Arbitration Act 1999 (SFS 1999:116)

Arbitration Act 1999 (SFS 1999:116)

Arbitration Law of the People's Republic of China 1994 (Order No. 31, Aug. 31, 1994, effective Sep. 1, 1995)

Bank Charter Act 1844 (7 & 8 Vict. c. 32)

Bank of England and Financial Services Act 2016 (2016 C. 14)

Belgian Judicial Code 10 October 1967 (Code judiciaire Belge 10 octobre 1967) sixième partie – L'arbitrage (Articles 1676 à 1723), 1967101057, 01-11-1970, 11360

Brazil Arbitration Law 1996 (Brazil - Law No. 9.307 of 23 September 1996)

Egyptian Arbitration Act 1994 (No. 27/1994)

Federal Arbitration Act 1925 (Pub. L. 68–401, 43 Stat. 883, 9 U.S.C.)

German Arbitration Law 1998, Burgerliches Gesetzbuch §§ 1025-1066 (1998)

Hong Kong Arbitration Ordinance 1997 [199, c. 341]

Netherlands Arbitration Act 2015, Burgerlijk Wetboek §§ 1020-1076 (2015)

New Code of Civil Procedure (nouveau code de procédure civile) Decree No 75-1123 of 5 December 1975 (le décret no 75-1123 du 5 décembre 1975 12521) as amended by Law No 2007-1787 of 20 December 2007 (la loi no 2007-1787 du 20 décembre 2007 20639); Livre IV: L'arbitrage, Titre Ier : L'arbitrage interne, Chapitre VI : Les voies de recours, Section 3: Dispositions communes à l'appel et au recours en annulation and Section 5: Autres voies de recours; (Book IV, Decree 2011-48 of 13 January 2011 modifying French Decree of May 14, 1980, No. 80-354, originally published in J.O., May 18, 1980, 1238

Swiss Private International Law Act 1987 (Chapter 12 of the 1987 Federal Act on Private International Law (18 December 1987 as amended 1st July 2013) (SR 291; 291 Loi fédérale du 18 décembre 1987 sur le droit international privé)

Uniform Arbitration Act 1956 [7 U.L.A. 100]

Wilberforce, 'Arbitration Bill' [H.L.], HL Deb 18 January 1996, vol 568 cols. 760-94, col. 778

Rules of Arbitration Centres

American Arbitration Association Appellate Rules 2013

American Arbitration Association International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) 2014

Arbitration Rules of the Institute of the Stockholm Chamber of Commerce 2017

Arbitration Rules of the London Court of International Arbitration 2014

Arbitration Rules of the Singapore International Arbitration Centre (hereinafter "SIAC") 2016

China International Economic and Trade Arbitration Commission Arbitration Rules 2015

Hong Kong International Arbitration Centre Administered Arbitration Rules 2013

ICSID Convention Arbitration Rules 2006

International Centre for Dispute Resolution- American Arbitration Association Optional Appellate Arbitration Rules 2013

London International Court of Arbitration Rules 1998

Rules of Arbitration of the International Chamber of Commerce 2012

Rules of Arbitration of the of the International Chamber of Commerce International Court of Arbitration 2017 (hereinafter "ICC")

UNCITRAL Arbitration Rules 1976 as revised in 2010 (31 UN GAOR Supp No 17, UN Doc A/31/17 (1976) and in 2013 (General Assembly resolution 68/109 adopted on 16 December 2013 (A/68/462)

Procedure Rules

Civil Procedure Rules 1998 (SI 1998/3132)

Federal Rules of Civil Procedure 1938 (as amended) (28 U.S.C.; B5.1.3, R12.9.3)

Victoria Evidence (Audio Visual and Audio Linking) Act 1997 section 3 (Act No. 4/1997, Victoria, Australia)

Case Law

ABB Lummus Global Ltd v Keppel Fels Ltd [1999] 2 Ll Rep 24

AKN and *another v ALC* and others and other appeals [2015] SGCA 18

Ali Shipping Corp. v Shipyard Trogir [1998] 2 All E.R. 136; 1 Lloyd's Rep. 643

AMCO Asia Corp. v Republic of Indonesia 23 I.L.M. 351 (1984)

ARO Lease BV v Inspecteur der Belastingdienst Grote Ondernemingen te Amsterdam C-190/95 [1997] ECR-I-4383

ASM Shipping Ltd v TTMI Ltd [2006] 1 CLC 656, [2005] EWHC 2238 (Comm.)

Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich [2003] APP.L.R. 01/29

Astro Nusantara International v PT Ayunda Prima Mitra (CACV 272/2015)

AT & T Corporation v Saudi Cable [2000] 2 All ER (Comm) 625 CA

AT&T Corp. Lucent Technologies, Inc. v Saudi Cable Co. [2000] 2 All ER (Comm) 625

Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals (1893) XXVIII(XXI) RIAA 265 <http://legal.un.org/docs/?path=../riaa/cases/vol_XXVIII/263-276.pdf&lang=O> accessed 12 February 2012

Bargues Agro Industries v Young Pecan Company (2006) Rev. Arb. 154; (2005) XXX Comm. Arb'n Ybk 499

Base Metal Trading v OJSC Novokuzmetsky Aluminum Factory, 283 F.3d 208, 212 (4th Cir. 2002)

Chapter 1

International Commercial Arbitration in Context

1.1 Introduction

International commercial arbitration is presented as an alternative dispute resolution (ADR) process. It is constructed by interaction of commercial entities and arbitrators, who are the "essential players"[1] and have come together to achieve joint objectives.[2] Their foundation is solidarity of interests, enterprising behaviour and organisations embodying a practice accepted by them. Their relationship is formed by a social contract.[3] These players have different sets of values and beliefs in the form of trade practices, political regimes, social orientation, cultural customs, economic disparity and legal structures.[4] They have established rules that structure their interactions. They make this process a social institution[5] and they give it legitimacy[6] because they are the source of its existence.

At the outset, it is necessary to look at what an 'institution' means. Scott writes that:

> "Institutions are social structures that have attained a high degree of resilience. [They] are composed of cultural-cognitive, normative, and regulative elements that, together with associated activities and resources, provide stability and meaning to social life. Institutions are transmitted by various types of carriers, including symbolic systems, relational systems, routines, and artifacts. Institutions operate at different levels of

[1] Emmanuel Gaillard, 'Sociology of International Arbitration' in David D. Caron, Stephan W Schill, Abby C Smutny and Epaminontas E Triantafilou (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 187, 187 [hereinafter "Gaillard (n 1)"]

[2] Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990), 4 [hereinafter "North (n 2)"]. See also Jon Elster, *Nuts and Bolts for the Social Sciences* (Cambridge University Press 1989), 13 [hereinafter "Elster (n 2)"]

[3] See John Rawls, *A Theory of Justice* (Harvard University Press 1971); David Gauthier, *Morals by Agreement* (Oxford University Press 1986); David Gauthier, 'Hobbes's Social Contract' in Graham AJ Rogers and Alan Ryan (eds), *Perspectives on Thomas Hobbes* (Oxford University Press 1988), 71-82

[4] Gaillard (n 1), 1. See also Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 Vand. J. Transnat'l L. 1335

[5] Gaillard (n 1), 1. See also Alan Wells, *Social Institutions* (Heinemann 1970), 3

[6] Gaillard (n 1), 1. See also George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012), 37 Yale J. Int'l L. 1, 2 [hereinafter "Bermann (n 6)"]

> jurisdiction, from the world system to localized interpersonal relationships. Institutions by definition connote stability but are subject to change processes, both incremental and discontinuous".[7]

Furthermore, he writes that institutions are "multifaceted, durable social structures, made up of symbolic elements, social activities, and material resources".[8] Knight writes "Social institutions are a set of rules that structure social interactions in particular ways".[9] North writes that:

> "Institutions are the rules of the game in society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic… Conceptually, what must be clearly differentiated are the rules from the players. The purpose of the rules is to define the way the game is played. But the objective of the team within that set of rules is to win the game… Modeling the strategies and skills of the team as it develops is a separate process from modeling the creation, evolution, and consequences of the rules".[10]

It would not be questionable to posit that international commercial arbitration is a social institution. It is crucial to determine, however, if this institution is composed of cultural-cognitive, normative, and regulative elements, has attained a high degree of resilience and provides stability and meaning to international commerce. Such enquiry necessitates exploration of its present, past and future. This includes examining its meaning, which would expose its theoretical and practical inherent features, character and qualities. Starting with its current status, it is the most preferred process for transnational dispute resolution.[11] Judging by this success,

---

[7] William R Scott, *Institutions and Organizations* (SAGE 1995), 33 [hereinafter "Scott 1995 (n 7)"]. See also William R Scott, *Institutions and Organizations* (2nd edn, SAGE 2001), 48 [hereinafter "Scott 2001 (n 7)"]

[8] William R Scott, *Institutions and Organizations: Ideas, Interests, and Identities* (4th edn, SAGE 2014), 57 [hereinafter "Scott 2014 (n 8)"] See also Roger Friedland and Robert R Alford, 'Bringing Society Back In: Symbols, Practices and Institutional Contradictions' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991) 232, 243

[9] Jack Knight, *Institutions and Social Conflict* (Cambridge University Press 1992), 2 [hereinafter "Knight (n 9)"]

[10] North (n 2), 3-5. See also Ronald L Jepperson, 'Institutions, Institutional Effects, and Institutionalization' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991) 143, 143 [hereinafter "Jepperson (n 10)"]

[11] Gary B Born, *International Commercial Arbitration* vol I (Wolters Kluwer 2009), 68. See also Claire Cutler, *Private Power and Global*

therefore, it would appear that there is no weakness in it for it would not have grown to such a standing. The actors' commentary about such an achievement, however, is crucial to discovering if this success conceals any imperfection about the institution.

1.2 Aim of Research

This research is inspired by Smit's observation in 1986 that there are far too many arbitration 'institutions';[12] and Holtzmann's[13] and Schwebel's[14] suggestion that the institution requires an appellate framework in the form of a court to review international arbitration awards and to implement their enforcement; and Paulsson's[15] suggestion that an arbitral tribunal should be appointed by a neutral body as opposed to each of the disputing parties selecting an arbitrator in a tribunal composed of two or three arbitrators. This leads to a theoretical examination of the current approaches and challenges in the field of international commercial arbitration.

It is necessary to conduct a theoretical study of legal theory and analytical philosophy of the changing nature of international commercial arbitration. The purpose is to determine if there is institutional entrepreneurship opportunity, meaning room for improvement, to enhance the institution and prepare it for the future. A specific agenda for change is proposed, that is the institution should become a system a system in its own right. It should be delocalised so as to make it more independent of national legal systems. This means that, to liberally serve the

---

Authority: Transnational Merchant Law in the Global Political Economy (Cambridge University Press 2003), 225; Richard Garnett and others, *A Practical Guide to International Commercial Arbitration* (Oceana Publication 2000), 1

[12] Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25(1) Colum. J. Transnat'l L. 9, 10 [hereinafter "Smit (n 12)"]

[13] Howard M Holtzmann, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur L Marriott, VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Graham and Trotman/Martinus Nijhoff 1995) 109, 109, 112, 114 [hereinafter "Holtzmann (n 13)"]

[14] Stephen M Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur L Marriott, VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Graham and Trotman/Martinus Nijhoff 1995) 115, 116 [hereinafter "Schwebel (n 14)"]

[15] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 (2) ICSID Review 339. See also Jan Paulsson, 'Are Unilateral Appointments Defensible?' (Kluwer Arbitration Blog 2 April 2009) <http://www.kluwerarbitrationblog.com/2009/04/02/are-unilateral-appointments-defensible/> accessed 13 September 2015; Andreas F Lowenfeld, 'The Party-Appointed Arbitrator: Further Reflections' in Lawrence W Newman and Richard D Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, JurisNet 2014), ch 19; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015), 1-2

interests of international commerce, it should be detached from national legal systems.

To substantiate or negate that this institution is due for change, and whether change would enhance it, this dissertation examines both the setup and operation of this institution. It is important to gather the views of academics, arbitrators and practitioners, in other words the actors in this institution, because the provide commentary on the idea, content, application and theories associated with the institution. It is the fundamental beliefs of these commentators that would persuade or dissuade any change in the institution. More importantly, analysing the relevant commentary in the field would lead to the identification of the presence of institutional entrepreneurship opportunity to change this institution and understand how such opportunity could be realised.

This chapter introduces international commercial arbitration and provides an overview of its basic principles. It describes the two forms of arbitration, namely '*ad hoc*' and 'administered arbitration'. It looks at the rise of international commercial arbitration not just as a process of dispute adjudication but as the most preferred one because of the 10 advantages associated with the institution.

Moreover, it examines how international commercial arbitration proceedings take shape. Starting with looking at how arbitral proceedings are commenced, how the arbitral tribunal is selected and formed, the way the case is presented by counsel to the tribunal, the tribunal's most important function of making a decision on the merits of the case and rendering a final and binding arbitral award. This paves the way for a definitional exercise of this institution is conducted to determine if the institution is a process or a system.

The law applicable to international commercial arbitration in general, as well as the law applicable to procedure, to the merits, and to the resultant arbitral awards is vital. Examination of the authority that underlies international commercial arbitration is the subject of Chapter 2.

Chapter 3 is an analysis of recent survey results to ascertain which elements of this institution its actors find advantageous and disadvantageous. For example, do users of this process prefer it

without an appeal layer or would they welcome a transnational appellate arbitral review body. This determination should permit the conclusion whether this institution is efficient as it is currently or whether if changed it would be more effective for the purpose intended.

Majority of international commercial disputes is conducted under the auspices of international arbitration centres. Chapter 4 looks at the setup, nature and function of these private bodies which administer the arbitration proceedings. In consideration of the survey results mentioned above clearly demonstrating that the international commercial community favours some centres over others, an elaborate investigation combined with a comparative assessment of the centres should expose whether the existence of over 200 such centres is necessary.

Chapter 5 presents recommendation as to how the institutional entrepreneurship opportunity identified in the preceding chapters should be executed. It is a delineation of how international commercial arbitration could be become a system and specify what would be its benefit. It is, in essence, a framework of how its delocalisation could be achieved.

1.3 Literature Review

In 1986 Smit boldly and bravely proffers that a pragmatic solution to the ever-expanding number of arbitration centres around the world would be that a single institution be established for international commercial arbitration. He questions "whether existing institutional arrangements for conducting international arbitrations are adequate".[16] He inquires the reason for having "many different institutions located in different countries"[17] when a single transnational institution could offer the impartial and neutral panel that arbitrating parties seek. He submits that a privately created and administered single world-wide institution "would provide the optimal means for eliminating present deficiencies and improving institutional international arbitration".[18]

[16] Smit (n 12), 10

[17] ibid

[18] ibid

To date, the allure, or not, of Smit's proposition remains unknown as it has been met only with silence by the international commercial arbitration community. No actor has taken it farther. Smit's idea is examined to determine its feasibility and how it could enhance the institution.

It should be made clear that Smit's reference to 'institutions' is to the arbitration centres and not international commercial arbitration as an institution. It is the idea of a single world-wide institution that is of interest herein because today there are approximately 207 arbitration centres in the world[19] and they do not come under any regulatory body to organise, control, and manage them. Smit's assertion is that there is no need for an expanding choice of arbitration centres. This appears to be true even 32 years later because Rogers writes that "not a month goes by without a new arbitral institution springing up".[20] A question arises as to whether there is logical explanation for why there are far too many arbitration centres and why more are being created.

In 1993, at the 'London Court of International Arbitration Centenary Conference', Holtzmann suggests an appellate framework in the form of a court to review the international arbitration awards and to implement their enforcement.[21] This is the second observation about the institution – that there is no organisation, besides national courts, to review and enforce arbitral awards. Holtzmann proceeds on the premise that "procedural rules and institutional practice will continue to be refined".[22] An appellate body would, however, certainly conflict with the very purpose of international commercial arbitration for the reason that an arbitration award is to be a final and binding decision of the arbitral tribunal.

Holtzmann's innovation is, however, to remove the functions of the municipal courts whose authority derives from the Convention on the Recognition and Enforcement of Foreign Arbitral

[19] Emilia Onyema, 'Effective Utililisation of Arbitrators and Arbitration Institutions in Africa by Appointors' <http://www.eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf> accessed 21 July 2012, 3 [hereinafter "Onyema (n 19)"]

[20] Catherine A Rogers, 'Innovative New Criteria for Appointment of Arbitrators at Commercial Arbitration Centre of Lisbon' [2010] Arbitrator Intelligence <http://www.kluwerarbitrationblog.com/blog/2015/07/10/innovative-new-criteria-for-appointment-of-arbitrators-at-commercial-arbitration-centre-of-lisbon/> accessed 10 June 2015. See also Nicholas Fletcher, 'International Arbitration Research based report on choice of venue for international arbitration' [2014] Berwin Leighton Paisner <http://www.blplaw.com/download/BLP_International_Arbitration_Survey_2014_FINAL.pdf> accessed 19 November 2015, 03 [hereinafter "BLP 2014 Survey (n 20)"]

[21] Holtzmann (n 13), 109, 112, 114

[22] ibid, 110

Awards 1958,[23] commonly called the New York Convention. Adopted by the United Nations diplomatic conference in New York on 10 June 1958. It entered into force on 7 June 1959. Holtzmann writes that arbitrants seeking to enforce awards or set them aside would apply to this new court. He reasons that this would rid negotiations by contracting parties on the place or seat of arbitration. In his outline of the compelling reasons for such a court, he strengthens his argument that it will ensure uniform standards and predictability.

At the same conference Schwebel presents a paper in which he sets out a more specific framework for the creation and operation of such a court and expresses that Holtzmann's proposal is "sound".[24] In comparison to Smit's idea, this one appears to have gained momentum. Drahozal, and Knull III and Rubins revive this argument and submit that an appeal court is needed to fulfill the function of reviewing both arbitral proceedings and the award to correct any errors by the initial decision-making body.[25] Due to the proliferation of international commercial arbitration cases, an appeal court is needed to fulfill the function of reviewing both arbitral proceedings to correct any errors by the initial decision making body – the arbitral tribunal and to resolve disputes on the enforceability of arbitral awards. Brower[26] and Gal-Or[27] endorse it.

In contrast, Born writes that finality increases efficiency because the case is decided in one instance rather than being subjected to layers of appeal.[28] Examination of arbitral awards or the arbitration proceedings may be beneficial as it would provide much needed source of security, guarantee and absolute finality about the dispute. However, it may be detrimental for it would change the landscape of this institution as a one-stop process for dispute resolution.

In 2010 Paulsson[29] provokes a debate by suggesting that the arbitral tribunal should be appointed

[23] June 10, 1958, 330 U.N.T.S. 3; 21 U.S.T. 2517

[24] Schwebel (n 14), 116

[25] Christopher R Drahozal, 'Judicial Incentives and the Appeals Process' (1998) 51 SMU L. Rev. 469, 469-70; William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11(4) Am. Rev. Int'l Arb. 531. See also Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005), 98, 100, 109, 150-153

[26] Charles N Brower, 'Charles N Brower Delivers Keynote Address at Premier Arbitration Conference' (2002) 13 World Arb. & Med. Rep. 270; Charles N Brower, 'A Crisis of Legitimacy' [2002] Nat'l L. J. B9

[27] Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) EJIL 43

[28] Gary B Born, *International Commercial Arbitration* vol II (Wolters Kluwer International 2014), 85 [hereinafter "Born 2014 (n 28)"]

[29] See n 15

by a neutral body in order to remove the "moral hazard" created by the traditional component of each arbitrant selecting an arbitrator in a tribunal composed of three arbitrators, the chairman then being appointed by the two party-selected arbitrators. In agreement with him is van den Berg.[30] Perhaps this mechanism causes more harm than good because of the evidence that party-appointed arbitrator often dissents and so the decision on the case is made by only two and not three arbitrators.[31] In response, Brower and Rosenberg defend this well-established "right of the parties to choose arbitrators" because it is significant to the legitimacy of arbitration.[32]

The institution appears to be more about the lawyers and arbitrators than about the commercial entities which they represent, for whom the process exists and is intended to serve, due to strategic action on their part.[33] In turn, the legitimacy, moral, commercial, and legal, that the actors distribute within the institution is undermined because the institution remains about the solidarity of interests of these actors excluding their clients. It is for that reason that any variation in the *status quo* is unlikely to be accepted by the majority of practitioners for it would not serve their interests somehow because "Interests and purposes are viewed as socially constructed, diminishing the prospects of action in opposition to institutionalized rules".[34] It is why neither

[30] Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush Arsanjani and Jacob Cogan (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff Publishers 2010) 821-843 [hereinafter "van den Berg (n 30)"]

[31] See for example *Companhia Paranaense de Energia (COPEL) v UEG Araucária Ltda* DJ 22 June 2004 11, TJPRJ (15 June 2004) and *Sierra Fishing Company and other v Hasan Said Farran and others* [2015] EWHC 140 (Comm); *Götaverken Arendal AB v General National Maritime Transport Company* International Chamber of Commerce case numbers 2977, 2978 and 3033, 13 August 1979, SO 1462, NJA 379

[32] Charles N Brower and Charles B Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29 Arb. Int'l 7, 7. See also Paul Friedland and Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' <http://www.arbitration.qmul.ac.uk/docs/164483.pdf> accessed 23 May 2013 [hereinafter "QMU-W&C 2012 Survey (n 32)"]. cf Burn George, 'International Arbitration Survey: Party Appointed Arbitrators' [2017] <https://www.blplaw.com/media/pdfs/Reports/BLP_Arbitration_survey_2017.pdf> accessed 27 May 2018

[33] 'Strategic action' within organisations or institutions will be passively discussed in Chapter 3 and Chapter 4 to explain the results of the surveys mentioned herein and how the arbitration centres developed as they have so as to understand fully how international commercial arbitration evolved into the practice that it is today. See Jens Beckert, 'Agency, Entrepreneurs, and Institutional Change: The Role of Strategic Choice and Institutionalized Practices in Organizations' (1999) 20(5) Organ. Stud. 777 [hereinafter "Beckert (n 33)"]; Thomas B Lawrence, 'Institutional Strategy' (1999) 25(2) J. Manag. 161 [hereinafter "Lawrence (n 33)"]; Neil Fligstein, 'Fields, Power, and Social Skill: A Critical Analysis of the New Institutionalisms' (2001) 2(4) J. Econ. Sociol. 28; Neil Fligstein, 'Social Skill and the Theory of Fields' (2001) 19(2) Sociol. Theory 105 [hereinafter "Fligstein (n 33)"]

[34] David Strang and Wesley D Sine, 'Interorganizational institutions' in Joel AC Baum (ed), *Blackwell Companion to Organizations* (Blackwell Scientific Publications 2002) 495, 497 [hereinafter "Strang and Sine (n 34)"]

Smit's nor Holtzmann's and Schwebel's proposals materialised in any form.

The institution is now at a stage where it is necessary to conduct a screening, diagnosis and progress monitoring exercise so as to hypothesise its future[35] because of the variety of actors with different values and beliefs that control it and the assortment of organisations that make up the institution. It is essential to look at how the actors in this community interact with each other and how its development and progress of the institution is in their hands. There is a need to look outward and identify common interests between these actors in order to connect them to the common goal of providing a service whereby international commercial disputes are adjudicated not in their self-interest and self-satisfaction,[36] but in a structure that fits the purpose and function of the institution; for example, with less national law and judiciary involvement.

Strong writes that as a result of increasing costs, delays and procedural formalities of international commercial arbitration the international corporate community is looking for another adjudicatory process for cross-border business disputes, such as mediation.[37] This possibility poses a real threat to the institution. Litigation remains undeveloped in many jurisdictions to attract international commercial parties. India, for example, has advanced economically, but it still takes many years to resolve matters through the courts.[38] In some jurisdictions, however, both arbitration and litigation is on offer for the international commercial entities. Singapore is one good example, as demonstrated by the launch of the Singapore International Commercial Court (SICC) on 5 January 2015. Many attractive alternatives exist and contracting parties may start to consider them sooner rather than later.

Institutions by nature signify stability[39] and are usually resistant to change, but they are still

[35] Sundaresh Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' (International Arbitration: The Coming of a New Age?, 21st International Council for Commercial Arbitration Conference, Singapore, 11 June 2012) <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> accessed 22 January 2017, para 2 [hereinafter "Menon (n 35)"]

[36] Sigvard Jarvin, 'The Role of International Commercial Arbitration in the Modern World' (2009) 75(1) Int'l J. of Arb. Med. & Disp. Man. 65, 69

[37] Stacie I Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' (2014) 45 Wash. U.J.L. & Pol'y 11, 11. See also Born 2014 (n 28), 85

[38] Born 2014 (n 28), 87

[39] Strang and Sine (n 34), 497

changeable as they weaken or disappear over time.[40] Suggestions advanced by Smit; Holtzmann, Schwebel, Paulsson, van den Berg, remain imaginary to date because they have not been actioned and positive response to them has not been forthcoming. The conviction that this institution is founded purely on party autonomy,[41] which is its regal foundation, makes these representations antithetical to the very concept of international commercial arbitration.

A crucial element appertaining to both the potential institutional entrepreneurship opportunity and the consequence of implementing such opportunity in and to this institution is to know at which stage of institutionalisation it is at. Tolbert and Zucker propose a general model of institutionalisation processes. They write that an institution is pre-, semi or fully institutionalised and that institutionalisation is a three-stage process: (1st) pre-institutionalisation (habitualisation); (2nd) semi-institutionalisation (objectification); and (3rd) institutionalisation (sedimentation).[42] Both formation and spread of institutions follow the sequential processes of institutionalisation.

They write that "institutionalization is almost always treated as a qualitative state: structures are institutionalized, or they are not".[43] Therefore, it is of great significance to establish if this institution is or not institutionalised. In fact, an institution is "the outcome or end state of an institutionalization process".[44] Impliedly, therefore, an institution which has not gone through the three-stage process of institutionalisation is not really an institution.

They define the three-stage processes of institutionalisation[45] as follows:

---

[40] Scott 2001 (n 7), 48, 110, 182

[41] Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24(3) J. Int'l Arb. 327, 328 [hereinafter "Pryles (n 41)"]. See also Nigel Blackaby and others, *The Law and Practice of International Commercial Arbitration* (4th edn, Sweet and Maxwell 2004), 8-9, 315 [hereinafter "Blackaby et al. 2004 (n 41)"]; Gary B Born, 'Keynote Address: Arbitration and the Freedom to Associate' (2009) 38(7) Ga. J. Int'l & Comp. L. 7, 15

[42] Pamela S Tolbert and Lynne G Zucker, 'The Institutionalization of Institutional Theory' in Stewart R Clegg, Cynthia Hardy and Walter R Nord (eds), *Handbook of Organization Studies* (SAGE 1996) 175 [hereinafter "Tolbert and Zucker (n 42)"]; See also Strang and Sine (n 34);

[43] Tolbert and Zucker (n 42), 175

[44] ibid, 180. See also Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise on the Sociology of Knowledge* (Penguin 1991) [hereinafter "Berger and Luckmann (n 44)"]; Alfred Schutz, *Collected Papers: the Problem of Social Reality* (Maurice Natanson ed, Martinus Nijhoff 1962) [hereinafter "Schutz (n 44)"]; Alfred Schutz, *The Phenomenology of the Social World* (Northwestern Press 1967)

[45] Tolbert and Zucker (n 42), 180-184

(1) Habitualisation is "the development of patterned problem-solving behaviors and the association of such behaviors with particular stimuli".

(2) Objectification is "the development of general, shared social meanings attached to these behaviors, a development that is necessary for the transplantation of actions to contexts beyond their point of origination".

(3) Sedimentation is "characterized both by the virtually complete spread of structures across the group of actors theorized as appropriate adopters, and by the perpetuation of structures over a lengthy period of time".

Institutionalisation is the "process by which social processes, obligations or actualities come to take on rule like status in thought and action".[46] It is the process of embedding conception of belief, norm, role, value or behaviour within a given environment, such as a social system, an organisation, or society as a whole.

Berger and Luckmann write that:

> "Institutionalization occurs whenever there is a reciprocal typification of habitualized actions by types of actors. Put differently, any such typification is an institution. What must be stressed is the reciprocity of institutional typifications and the typicality of not only the actions but also the actors in institutions. The typifications of habitualized actions that constitute institutions are always shared ones. They are available to all the members of the particular social group in question, and the institution itself typifies individual actors as well as individual actions. The institution posits that actions of type X will be performed by actors of type X. For example, the institution of the law posits that heads shall be chopped off in specific ways under specific circumstances, and that specific types of individuals shall do the chopping (executioners, say, or members of an impure caste, or virgins under a certain age, or those who have been designated by an

[46] John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) Am. J. Sociol. 340, 341 [hereinafter "Meyer and Rowan (46)"]

oracle)".[47]

In order to place this institution as pre-, semi or fully institutionalised, it is important to discover it. Discovering it and then categorising it should reveal what institutional entrepreneurship opportunity exist to change this institution. This entails studying key concepts of institutional entrepreneurship including institutions, institutionalisation, institutional stability, institutional change or institutional development and deinstitutionalisation. These concepts of institutional theory are pertinent to better analyse, understand, explain, control, and predict this institution.[48]

Studies such as those conducted by Strang and Sine explain that actors become institutional entrepreneurs due to the presence of enabling conditions such as institution-level conditions and/or actors' position in the relevant institution.[49] Institution-level conditions, such as jolts or crises, arising from social upheaval, technological disruptions, competitive discontinuities, or regulatory change, disturb the socially constructed institution-level. Presence of serious problems in the institution is another enabling condition. Occurrence of such disturbance or presence of problems enables embedded institutional entrepreneurship which leads to institutional change through new ideas.[50]

Equally, existence of numerous optional institutional orders or alternatives would enable institutional entrepreneurship that could ultimately lead to deinstitutionalisation because of the different features in the institutional orders.[51] Analysing the aforementioned commentaries,

[47] Berger and Luckmann (n 44), 72. See also Scott 2001 (n 7), 80

[48] Walter W Powell, 'Institutional Theory' in Cary L Cooper and Chris Argyris (eds), *The Concise Blackwell Encyclopedia of Management* (Blackwell 1998) 301

[49] Strang and Sine (n 34), 507

[50] Royston Greenwood, Roy Suddaby and Christopher R Hinings, 'Theorizing Change: The Role of Professional Associations in the Transformation of Institutionalized Fields' (2002) 45(1) Acad. Manag. J. 58, 60 [hereinafter "Greenwood et al. (n 50)"]. For discussion on other types of conditions that enable institutional entrepreneurship see Neil Fligstein and Iona Mara-Drita, 'How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union' (1996) 102(1) Am. J. Sociol. 1 (i.e. economic and political crisis); Nelson Phillips, Thomas B Lawrence and Cynthia Hardy, 'Inter-organizational Collaboration and the Dynamics of Institutional Fields' (2000) 37(1) J. Manage. Stud. 23 [hereinafter "Phillips et al. (n 50)"]; Kimberly A Wade-Benzoni and others, 'Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions' (2002) 27(1) Acad. Manag. Rev. 41 (complex and multi-faceted field-level problems)

[51] William H Sewell Jr, 'A Theory of Structure: Duality, Agency, and Transformation' (1992) 98(1) Am. J. Sociol. 1, 19. See also Elisabeth S Clemens and James M Cook, 'Politics and Institutionalism: Explaining Durability and Change' (1999) 25(1) Ann Rev. Sociol. 441, 448 [hereinafter "Clemens and Cook (n 51)"]

amongst others, would make it possible to identify if conditions necessary to enable institutional entrepreneurship are present or likely to emerge in this institution.

Presence of enabling conditions would give birth to entrepreneurs whom Strang and Sine properly describe as the "Powerful critiques" within and outside the institution who would "contend that core theoretical positions need to be rethought".[52] Elster explains that social institutions and social change is the result of human action, known as 'methodological individualism'.[53] Smit, Holtzmann, Schwebel, Paulsson and van den Berg, for example, would fall in this category for they confront the theoretical foundation of this institution.

Any change in an institution must be for a reason, which could be: due to inefficiency; to constrain monopoly; to harmonise collective action in order to eliminate diverse preferences and beliefs; to implement professional conduct etc. Today the institution has evolved into "a polarized model",[54] meaning that competing ideologies about it exist coupled with shared conceptions about it.[55] This is unsurprising as the institution is at its golden age.[56] It seems, therefore, that a philosophical inquiry is most appropriate at this juncture. Determining the reason for change in international commercial arbitration necessitates examination of other commentary.

In 2012, more than two decades since Smit, Schwebel, and Holtzmann present their innovations, Menon urges the international arbitration community to reflect on what has been done right, what could be improved, and "to plant the seeds of change so that our industry will remain vibrant and continue to play a critical role in the global administration of commercial justice".[57] This recommendation, together with those made by the three aforementioned commentators, is in line with the fact that "In part, the durability of institutions stems from the fact that they can

[52] Strang and Sine (n 34), 497-498

[53] Elster (n 2), 13. See also Lars Udehn, *Methodological Individualism: Background, History and Meaning* (Routledge 2014); Warren J Samuels, 'The Scope of Economics Historically Considered' (1972) 48(3) Land Economics 248, 249; Max Weber, *Economy and Society: An Interpretive Sociology* (Bedminister Press 1968), ch 1; Talcott Parsons, *The Structure of Social Action* (Free Press 1937), 43-51

[54] Gaillard (n 1), 1

[55] Geoffrey M Hodgson, 'Reclaiming Habit for Institutional Economics' (2004) 25 J. Econ. Psych. 651, 655 [hereinafter "Hodgson 2004 (n 55)"]

[56] Menon (n 35)

[57] ibid

usefully create stable expectations of the behaviour of others",[58] and "In other cases, however, institutional durability must result from additional factors, as the coordination game setup is not universal and players sometimes have incentives to defect or cheat".[59]

An alternative procedure for enforcement of arbitral awards or appeal of arbitration proceedings does not exist and so national court intervention is inevitable. On the premise, therefore, that "Generally, institutions enable ordered thought, expectation and action, by imposing form and consistency on human activities",[60] it would not be incorrect to suggest that additional factors could be introduced to this institution to ensure its durability. This means that they present an institutional entrepreneurship opportunity to address those four most significant concerns so as to allay the fears of those who cite them and those who would cite them if asked the same question. Mclean writes that:

> "As disputes substantively grow more complex, involve more stakeholders, and are fought for higher stakes, international arbitration must continue to offer a less time-consuming, more efficient alternative to cross-border litigation. As a result, practitioners, arbitrators, and the parties themselves will need to continue to advocate for a role in the evolution of the process to ensure its efficiency and effectiveness, in even the most complicated of circumstances. From both a social and economic standpoint, the search for more effective means to arbitrate cross-border disputes, and thus to meet the needs of a global economy engaged in an ever-changing array of business transactions, is unquestionably worth the endeavor".[61]

What this advice communicates is the need for human action, meaning called "agency".[62] Mclean counsels the international commercial arbitration community to make choices different

[58] Geoffrey M Hodgson, *Economics in the Shadows of Darwin and Marx: Essays on Institutional and Evolutionary Themes* (Edward Elgar 2006), 139 [hereinafter "Hodgson 2006 (n 58)"]

[59] Hodgson 2004 (n 55), 656

[60] Hodgson 2006 (n 58), 139

[61] David J Mclean, 'Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration' (2009) (30)4 U. Pa. J. Int'l L. 1087, 1087 [hereinafter "Mclean (n 61)"]

[62] Kaijun Guo and others, *The Changing Organisation: Agency Theory in a Cross-Cultural Context* (Cambridge University Press 2016), 25. See also Erasmus Mayr, *Understanding Human Agency* (Oxford University Press 2011)

to those which they presently make and apply the necessary authority to influence the coming into being more effective means to arbitrate cross-border disputes. In expressly identifying those agents with special knowledge[63] of the institution and the essential capacity to deliberate the considerations which qualify as reasons[64] for them to take intentional action to change it, Mclean connects his recommendation to practical reasoning, which is for the achievement of a more effective arbitration process. Mclean joins Smit and others in their thinking that the present setup of international commercial arbitration does require changing.

International commercial arbitration is described as the "new litigation"[65] due to the overwhelming adoption of practices which are generally associated with litigation. This leads to practitioners and academics to express their thoughts as to how this process is likely to or should take shape. Pair writes that "Recent doctrinal writings indicate an increasing trend toward harmonisation of international arbitral procedure".[66]

It would not be easy to deny that it is Smit who initiated the advocacy for the evolution of this institution. He submits that a single world-wide institution would eliminate deficiencies and improve international arbitration. In 2012 Bermann writes that international commercial arbitration should evolve into a new type of legal process in order to ensure its own efficiency, effectiveness and legitimacy.[67] In his descriptive and normative analysis of the approach by different jurisdictions to 'arbitrability', 'competence-competence', and 'severability', he posits that legal systems have a serious enough interest to develop and articulate an adequately workable framework to support the arbitration process in order to reconcile the values of efficacy and legitimacy therein and avoid legitimacy risks.

Today, neither a single world-wide institution nor an appellate framework in any form, besides

[63] Gertrude EM Anscombe, *Intention* (2nd edn, Harvard University Press 2000)

[64] James D Velleman, *The Possibility of Practical Reason* (University of Michigan Library 2014)

[65] Thomas Stipanowich, 'Arbitration: The 'New Litigation' (2010) (1) U. Ill. L. Rev. 53. See also Karl Bayer and Tracy McCormack, 'Arbitration: The New Litigation?' (Civil Litigation Conference, Texas, October 2010) <http://www.karlbayer.com/pdf/publications/2010-10-28_KarlBayer_Arbitration-The-New-Litigation.pdf> accessed 12 March 2014

[66] Lara M Pair, 'Cross-Cultural Arbitration: Do the Differences between Cultures Still Influence International Commercial Arbitration Despite Harmonization' (2002) 9 ILSA J. Int'l & Comp. L. 57, 61

[67] Bermann (n 6), 3, 50. See also Thomas M Franck, 'Legitimacy in the International System' (1988) 82(4) Am. J. Int. Law 705

national courts, to review the enforcement of international arbitration awards for international commercial arbitration exist. It is fundamental to understand why these two proposals never materialised.

To discover the underlying reason why the ideas of Smit, Holtzmann and Schwebel did not materialise, many reasons could be given for why a single world-wide institution and an appellate body do not exist in this institution. First is that "The world has used arbitration for centuries, but the increase in use of arbitration over the past twenty years has been dramatic".[68] International commercial arbitration is currently the most preferred process for adjudication of transnational disputes, a standing it has achieved due to its success in the last 50 years.[69] This is as a result of the historic shift from litigation in foreign courts to party appointed arbitral tribunals over the latter half of the 20th century.[70]

Thus, at the time that Smit and Holtzmann and Schwebel pitched their ground-breaking ideas to the international business and arbitration communities, the institution was in its maturation stage. Looking at Smit's idea, it is understandable why a single centre did not appear attractive. That is because many arbitration centres were being developed only at that time. It seems that the development stage of this institution continues. It remains that in Latin America, Africa and certain parts of Asia-Pacific, national court litigation is used for dispute resolution. What this communicates is that international arbitration is not truly international.

Asia saw its economy develop in the latter part of 20th century. With it came the development of international commercial arbitration centres, such as the China International Economic and Trade Arbitration Centre (CIETAC); Hong Kong International Arbitration Centre (HKIAC); and

[68] Christopher Coakley, 'The Growing Role of Customized Consent in International Commercial Arbitration' (2000) 29 Ga. J. Int'l & Comp. L. 127, 130 [hereinafter "Coakley (n 68)"]

[69] Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration - An Asia-Pacific Perspective* (Cambridge University Press 2011), 1, 3 [hereinafter "Greenberg, Kee and Weeramantry (n 69)"]; André de Albuquerque Cavalcanti Abbud, 'Fifty Years in Five? The Brazilian Approach to the New York Convention' in Joanna Jemielniak and Przemysław Mikłaszewicz (eds), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer-Verlag Berlin Heidelberg 2010), 281; Mark L Movsesian, 'International Commercial Arbitration and International Courts' (2008) 18 Duke J. Comp. & Int'l L. 423, 423

[70] Richard J Graving, 'The International Commercial Arbitration Institutions: How Good a Job are they Doing? (1989) 4 (2) Am. U. Int'l L. Rev. 319, 367

Singapore International Arbitration Centre (SIAC). Such occurrence is likely to replicate for African arbitration centres as the continent experiences economic boom.

Whether users of international commercial arbitration want a single international commercial arbitration centre or an appeal mechanism requires hard evidence in the form of empirical data. At the time that the dramatic increase in the use of arbitration was occurring limited data was available.[71] So, this is the second reason is that the proposals made by Smit, Holtzmann, Schwebel, Paulsson and van den Berg were not developed further. Rao et al. write that "institutional entrepreneurs can mobilize legitimacy, finances, and personnel only when they are able to frame the grievances and interests of aggrieved constituencies, diagnose causes, assign blames, provide solutions, and enable collective attribution processes to operate".[72]

To a large extent Smit does assign blame, provide solution, and enable collective attribution processes to operate. The same can be said for Holtzmann's and Schwebel's idea because they do point out that reliance on national courts would be eliminated. It would appear that these commentators did not have adequate evidentiary material to present to potential allies to source their related interest and values for their innovations.[73] Perhaps the right conditions to enable institutional entrepreneurship were not presented or did not exist to support any change. However, the extensive sources of information on the changing nature of the institution permits a hypothesis to be made regarding its future development for therefrom the right conditions to enable institutional entrepreneurship could be ascertained.

1.4 Hypothesis

Analysis of the literature review leads to the hypothesis that this institution is due for change and that change to the *status quo* would enhance it. To prove or disprove this, the theoretical

[71] Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International 2005) [hereinafter "Drahozal and Naimark (n 71)"]

[72] Hayagreeva Rao, Calvin Morrill and Mayer N Zald, 'Power Plays: How Social Movements and Collective Action Create New Organizational Forms' (2000) 22 Res. Organ. Behav. 237, 243

[73] Eva Boxenbaum and Julie Battilana, 'Importation as Innovation: Transposing Managerial Practices Across Fields' (2005) 3(4) Strat. Org. 355, 359-360. See also Fligstein (n 33), 8-9; Royston Greenwood and Roy Suddaby, 'Institutional Entrepreneurship in Mature Fields; The Big Five Accounting Firms' (2006) 49(1) Acad. Manag. J. 27, 29-30 [hereinafter "Greenwood and Suddaby (n 73)"]

framework that fits best is institutional entrepreneurship. Institutional entrepreneurship occurs when entrepreneurs create, change, maintain or destroy institutions in pursuance of their interests.[74] This research investigates what institutional entrepreneurship opportunity exist to bring about change in and to this institution that, if executed, would enhance it. The aim is to recommend the creation of a supranational regulatory organisation to implement change necessary, first, to eliminate deficiencies in the institution and, second, to put in place mechanism that would enhance its operational functionality.

1.5 Sources of Information on which this Research is Based

For this research to be complete and concrete, primary and secondary sources are studied. In order to present an accurate and clear picture of the changing nature of international commercial arbitration and to propose a specific agenda for change, however, the primary source of information for this research is results of surveys conducted in the last two decades or so. Survey results are crucial because they highlight the current and future challenges that the institution faces and they provide an understanding of the desires of the actors in the institution.

Queen Mary University of London (QMU) in collaboration with PricewaterhouseCoopers (PwC) for some, and with White & Case LLP (W&C) for others, and one with Pinsent Masons (PM), produced empirical data from surveys conducted in 2006;[75] 2008;[76] 2010;[77] 2012;[78] 2013;[79]

[74] Beckert (n 33). See also John Child, Yuan Lu and Terence Tsai, 'Institutional Entrepreneurship in Building an Environmental Protection System for the People's Republic of China' (2007) 27(7) Organ. Stud. 1013, 1016 [hereinafter "Child, Lu and Tsai (n 74)"]; Fligstein (n 33), 106; Raghu Garud, Cynthia Hardy and Steve Maguire, 'Institutional Entrepreneurship as Embedded Agency: An Introduction to the Special Issue' (2007) 27(7) Organ. Stud. 957, 966-969 [hereinafter "Garud, Hardy and Maguire (n 74)"]; Greenwood and Suddaby (n 73); Thomas B Lawrence and Nelson Phillips, 'From 'Moby Dick to 'Free Willy': Macro-Cultural Discourse and Institutional Entrepreneurship in Emerging Institutional Fields' (2004) 11(5) Organization 689, 690, 706 [hereinafter "Lawrence and Phillips (n 74)"]; David Levy and Maureen Scully, 'The Institutional Entrepreneur as Modern Prince: The Strategic Face of Power in Contested Fields' (2007) 27(7) Organ. Stud. 971 [hereinafter "Levy and Scully (n 74)"]; Vilmos Misangyi, Gary Weaver and Heather Elms, 'Ending Corruption: The Interplay among Institutional Logics, Resources, and Institutional Entrepreneurs' (2008) 33(3) Acad. Manag. Rev. 750 [hereinafter "Misangyi, Weaver and Elms (n 74)"]; Frank Wijen and Shahzad Ansari, 'Overcoming Inaction through Collective Institutional Entrepreneurship: Insights from Regime Theory' (2007) 27(7) Organ. Stud. 1079 [hereinafter "Wijen and Ansari (n 74)"]

[75] Gerry Lagerberg and Loukas A Mistelis, 'International arbitration: Corporate Attitudes and Practices 2006' <http://www.arbitration.qmul.ac.uk/research/2006/123975.html> accessed 12 December 2013 [hereinafter "QMU-PwC 2006 Survey (n 75)"]

[76] Gerry Lagerberg and Loukas A Mistelis, 'International Arbitration: Corporate Attitudes and Practices 2008' <http://www.pwc.co.uk/pdf/2008_international_arbitration_study.pdf> accessed 18 December 2013, 2, 5, 10 [hereinafter "QMU-PwC 2008 Survey (n 76)"]

2015[80] and [81] 2016.[82] These survey results are on corporate attitudes and practices towards arbitration obtained from counsel, arbitrators and corporate personnel in various sectors. Data from these surveys help to answer the question whether there is a need for an expanding choice of arbitration centres.

In the QMU-PwC 2006 Survey,[83] 103 respondents choose the International Court of Arbitration of the International Chamber of Commerce (ICC) (42%); London Court of International Arbitration (LCIA) (20%); and International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) (ICDR-AAA) (13%) as the most popular arbitration centres out of 10 institutions.[84] Of the 207 arbitration centres, only a handful appear needed.

In the QMU-PwC 2006 Survey the respondents list "the three most important reasons" and "three most significant concerns" associated with the use of international arbitration.[85] Listed as the four most important advantages of arbitration are 'flexibility'; 'enforceability of awards'; 'privacy'; and 'selection of arbitrators'.[86] Corporations participating in the survey responded that 'expense'; 'time'; 'national court intervention'; and 'lack of appeal structure' as the most significant concerns of arbitration.[87]

---

[77] Paul Friedland and Loukas A Mistelis, '2010 International Arbitration Survey: Choices in International Arbitration' <http://www.events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf> accessed 18 November 2015 [hereinafter "QMU-W&C 2010 Survey (n 77)"]

[78] QMU-W&C 2012 Survey (n 32)

[79] Gerry Lagerberg and Loukas A Mistelis, '2013 Corporate Choices in International Arbitration: Industry Perspectives' <http://www.arbitration.qmul.ac.uk/docs/123282.pdf> accessed 11 September 2015, 5, 8 [hereinafter "QMU-PwC 2013 Survey (n 79)"];

[80] Paul Friedland and Loukas A Mistelis '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 1 March 2016, 2, 5, 7, 10, 16, 24 [hereinafter "QMU-W&C 2015 Survey (n 80)"]

[81] QMU-PwC 2008 Survey (n 76)

[82] David McIlwaine and Loukas A Mistelis, '2016 International Dispute Resolution Survey: An insight into resolving Technology, Media and Telecoms Disputes' <http://www.arbitration.qmul.ac.uk/docs/189659.pdf> accessed 07 November 2017

[83] QMU-PwC 2006 Survey (n 75), 10

[84] ibid, 12. See also Justin Michaelson, 'The A-Z of ADR - Pt I' (2003) 153(7064) NLJ 181 [hereinafter "Michaelson (n 84)"]

[85] QMU-PwC 2006 Survey (n 75), 6

[86] ibid, 2, 6. See also QMU-PwC 2008 Survey (n 76), 2; 5, 10; QMU-W&C 2010 Survey (n 77); QMU-W&C 2012 Survey (n 32); QMU-PwC 2013 Survey (n 79), 5, 8; QMU-W&C 2015 Survey (n 80), 2, 5, 7, 10, 16, 24; Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (Kluwer Law International 1996), 30, 127-156 <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 18 December 2013; BLP 2014 Survey (n 20), 3

[87] QMU-PwC 2006 Survey (n 75), 2, 6, 7, 19. See also QMU-PwC 2008 Survey (n 76); 2, 3, 5, 7, 9, 11; QMU-PwC 2013 Survey (n 79), 1-9, 17, 19, 21, 22; QMU-W&C 2015 Survey (n 80), 2, 3, 5-7, 10, 14, 16, 24

On the premise of the aforementioned, it would seem that the achievement of international commercial arbitration could be concealing imperfection in the process. Five imperfections are identified, namely, that: (i) there are over 200 arbitration centres where only a few is required; (ii) an appeal option within the structure of the process is missing; (iii) intervention by the very national courts that the parties contract out from is still hugely present; the process could be (iv) more expensive and (v) more time consuming litigation than litigation.[88] It is interesting to see that the problems recognised by Smit and Holtzmann and Schwebel are true today, some 20 to 30 years later, as confirmed by the cited survey results.

Nevertheless, the institution does possess its own recognisable characteristics and reputation,[89] which derive from the four advantages highlighted, namely, flexibility; enforceability of awards; privacy; and selection of arbitrators. Yet, even these qualities are susceptible to change.

The four most significant disadvantages of international commercial arbitration listed by the respondents in the QMU-PwC 2006 Survey[90] could be sufficient to persuade some players in this institution to defect and to seek those "additional factors" that could ensure the durability of this institution from their perspective. This is particularly so as it appears implausible that the present setup of this institution would look to reduce, for example, the 'expense' incurred in arbitration proceedings because the majority of the actors, namely arbitrators, counsel, and arbitration centres, benefit greatly from the high costs, especially as the majority of the cost incurred for the arbitration process is on external legal services.[91]

---

[88] William Hart, Roderick D. Blanchard and Janis Walter, *Litigation and Trial Practice* (6th edn, Delmar Cengage Learning 2006), 602; Stuart Sime, *A Practical Approach to Civil Procedure* (19th edn, Oxford University Press 2016), 113, para 10.05; Lawrence W Newman and David Zaslowsky, 'Arbitrator Efficiency in International Arbitration' in Lawrence W Newman and Michael Burrows, *Practice of International Litigation* (2nd edn, JurisNet 2013) V-307, V-313

[89] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2012), 1-4

[90] See n 75

[91] Chartered Institute of Arbitrators (CIArb), 'CIArb Costs of International Arbitration Survey 2011' <http://www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf> accessed 5 February 2014, 2, 10, 11, 14 [hereinafter "CIArb 2011 Survey (n 91)"]. See also Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, JurisNet 2014), 1235; Diana Rosert, 'The Stakes Are High: A review of the financial costs of investment treaty arbitration' Research Report July 2014 International Institute for Sustainable Development <http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> accessed 13 August 2015, 8-14; ICC Commission Report, 'Decisions on Costs in International Arbitration' (2015) 2 ICC Dispute Resolution Bulletin 13 <http://www.store.iccwbo.org/icc-dispute-resolution-bulletin-issue-2> accessed 19 December 2016, 3, para 2

In 2015 the International Bar Association produced a report on 'The Current State and Future of International Arbitration: Regional Perspectives' in which Welsh writes that:

> "Nevertheless, international arbitration is on the rise in all six regions, *generating an increasing interest in the practice of it as well as concerns about some core issues*. As the practice of international arbitration begins to develop globally, two broad trends may be observed.
>
> First, *there is a growing standardisation of international arbitration practice*. The biggest indicators of this are the convergence of arbitral institutional rules and a greater number of arbitral seats where parties can expect a modern and pro-arbitration approach from the judiciary.
>
> Secondly, as international arbitration practice becomes more standardised, *the handling of international arbitration disputes tends to stay within a particular region* as certainty and confidence in the arbitration process within that region grows.
>
> *Practitioners are generally happy with the development of international arbitration within this structure. There is little appetite for a truly international framework, with a near universal rejection of concepts such as an a-national award and a supranational body to oversee the arbitration process and arbitral awards".*[92]

Welsh adds that in regions where arbitration is developed future generation of arbitration lawyers will face greater competition, but in regions where the practice is still developing there is better opportunity for the lawyers to establish themselves due to the pool of practitioners being much smaller. The report, which provides the perceptions of over 160 arbitration practitioners in more than 40 countries communicates that there is universal interest in the institution. However, there are concerns about its present structure. The practitioners "voice their ideas, concerns, proposals

[92] Angeline Welsh, 'Executive Summary' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) [hereinafter "Welsh (n 92)"] <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 7-8 [Italics are added for effect to highlight those aspects of the report's findings]

and perspectives on the evolution of international arbitration in their respective regions".[93]

A pro-arbitration approach from the judiciary across the continents supports the need for standardisation and regionalisation of international arbitration practice. Whilst this does not allude to a truly international framework for the arbitration process and arbitral awards, it suggests that the institution should be unified. This means that improvement to this institution is still conceivable. If there is no room for change in this institution, then the practitioners would not be expressing ideas, concerns, and proposals on its evolution. This explains why "growth in international arbitration is anticipated",[94] because national court litigation is still the dispute resolution process of choice in Latin America, Africa and certain parts of Asia-Pacific.

By virtue of this supposition, the conclusion in the IBA 2015 Subcommittee Report that "there is little appetite for a truly international framework", whether in the form of a supranational body or not, is very much unconsidered. The report is based on the developed world and discounts those regions where development of international arbitration has been slow and conceivably may never fully mature. Considering that the majority of economic development is presently happening in Africa, there is potential for growth of arbitration as happened in Asia.

It appears that the data from the 2006 to 2016 surveys bring into existence institution-level enabling conditions and make it clear that 'expense', 'time' 'national court intervention' and 'lack of appeal structure' as key disadvantages of arbitration[95] allude to change that could enhance the institution. Such data would permit the proposals made by Smit, Holtzmann and Schwebel, for example, to be revived. To understand if or not this is the case, it is crucial at this juncture to delineate the institution.

[93] Catherine Amirfar and Julien Fouret, 'Preface' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 6

[94] Welsh (n 92), 9

[95] QMU-PwC 2006 Survey (n 75), 2, 6, 7, 19. See also QMU-PwC 2008 Survey (n 76); 2, 3, 5, 7, 9, 11; QMU-PwC 2013 Survey (n 79), 1-9, 17, 19, 21, 22; QMU-W&C 2015 Survey (n 80), 2, 3, 5-7, 10, 14, 16, 24

1.6 Characterising International Commercial Arbitration

International commercial arbitration is a voluntary process that operates under two dimensions, namely, '*ad hoc'* and 'administered' arbitration. It is a unique dispute dissolution process. Its distinctiveness derives from two key elements: It is "… the only dispute resolution mechanism that consciously blends elements of both civil-law and common-law traditions, which allows a uniquely expansive and inclusive interpretation of what constitutes legal authority";[96] and "When parties draft an arbitration agreement they enjoy broad freedom to construct a dispute resolution system of their choice".[97]

The foundation of international commercial arbitration is party autonomy, which is strengthened by the fusion of civil law and common law traditions. This background makes it easy to appreciate the definition of institutional entrepreneurship given above, which is that actors with interest in particular arrangements create institutions for that purpose. Such freedom together with a cocktail of other significant factors, which will be discussed herein below, makes this institution the most preferred for adjudication of international commercial disputes.

To make the analysis of international commercial arbitration more tangible it is easier to visualise an umbrella and to call *ad hoc* and administered arbitration, the two forms of arbitration, the two stretchers and the advantages and disadvantages the 10 ribs.

1.6.1 Two Stretchers

Parties to an arbitration agreement firstly agree "on the form of arbitration reference to opt for."[98] This means that the parties specify in the arbitration clause or submission agreement that they will use *ad hoc* or administered arbitration. The former is where the parties take it upon themselves to organise the arbitration proceedings, from selecting a venue, appointing the arbitrator(s), deciding on which procedural rules, if any, to use to govern the proceedings, to

[96] Stacie I Strong, 'Research in International Commercial Arbitration: Special Skills, Special Sources' (2009) 20(2) Am. Rev. Int. Arb. 119, 156 [hereinafter "Strong (n 96)"]

[97] n 41

[98] Onyema (n 19), 4; Born 2014 (n 28), 26; Blackaby et al. 2004 (n 41), 46-47

finding suitable premises for the various procedural meetings and for the substantive and final hearing. The latter is where they notify their chosen administering arbitration centre that an arbitrable dispute has arisen and then leave all the administrative and bureaucratic processes in the hands of the organisation that proved itself capable of such tasks.

Corporations prefer administered arbitration.[99] Administered arbitration means that the proceedings are supervised by the body whose rules were chosen by the parties to regulate the particular arbitration. Copious international arbitration centres exist. The major ones[100] are the ICC; LCIA; ICDR-AAA; Swiss Chambers' Arbitration Institution (SCAI); CIETAC; Arbitration Institute of the Stockholm Chamber of Commerce (SCC); HKIAC; and SIAC. Less used centres are many. They include Cairo Regional Centre for International Commercial Arbitration (CRCICA); Vienna International Arbitral Centre (VIAC); and Lagos Regional Centre for International Commercial Arbitration (LRCICA), to name but a few.

Of the 207 arbitration centres in the world, there are various types.[101] Some are attached to a chamber of commerce, some are part of a trade or professional association, and others are independent. The common denominator is that they all administer arbitration references to varying degrees. In addition, all have their own arbitration rules under which they administer arbitration proceedings. Others administer arbitration under the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Arbitration Rules"). With such a variety, it is easy to see why arbitration occupies centre stage in the dispute resolution market.

It is crucial to note that there is no guarantee that the parties' request to the referenced arbitral centre will be accepted because an arbitration centre can reject a party's request for arbitration.[102] The power stems from the fact that a centre would not have expressly entered into the agreement. Perhaps it is easier to understand this from the contract law concept of 'invitation to

[99] QMU-PwC 2008 Survey (n 76), 4, 15

[100] <http://www.library.law.columbia.edu/guides/International_Commercial_Arbitration> accessed 20 October 2011

[101] Others include the Permanent Court of Arbitration ("PCA"); International Centre for Settlement of Investment Disputes (ICSID); World Intellectual Property Organisation Arbitration and Mediation Centre (WIPO); and Court of Arbitration of Sport (CAS). These might be mentioned in passing as they are not related to international commerce.

[102] Onyema (n 19), 5

treat/bargain'[103] or 'unilateral contract';[104] though not of any concern in this dissertation. In general, using arbitral centres tends to increase the cost of the arbitral proceedings.[105]

The alternative is *ad hoc* arbitration. This is where the arbitrating parties make all the necessary arrangements themselves. For example, they choose the rules which would allow them the maximum flexibility and cost-efficiency. Generally, this type of arbitration is conducted under the auspices of the UNCITRAL Arbitration Rules because they are freestanding and not attached to any particular arbitration centre. Also, the parties offer the supervision necessary for the proceedings, such as choosing and appointing arbitrator(s) rather than rely on the administrative assistance of a centre. As a result, it is often advanced that *ad hoc* arbitration is expeditious and less costly in comparison to the cost and time delays associated with administrative arbitration, though some commentators would disagree.[106]

Notwithstanding the freedom offered by *ad hoc* arbitration, administered arbitration is used more frequently. Lenehan's research on administered arbitration, namely, that of the ICC and *ad hoc* arbitration under the UNCITRAL Arbitration Rules[107] and finds that the ICC is probably the biggest dispute resolution centre in the world. However, no official record exists as to how frequently the UNCITRAL Rules are used due to the nature of this type of arbitration being unknown if and when they occur. One of the few similarities between these forms of arbitration is that the arbitrants select their own arbitrators who then appoint the chairman or presiding arbitrator. Another is that enforcement of arbitration awards deriving from either stretch of the arbitration umbrella is under the New York Convention.

---

[103] Hugh Beale (ed), *Chitty on Contracts: General Principles* (31st edn, Sweet & Maxwell 2012), 176-179, paras 2-007, 2-010 [hereinafter "Beale (n 103)"]; Andrew Burrows, *A Casebook on Contract* (4th edn, Hart Publishing 2013), 4ff. See also *Fisher v Bell* [1961] 1 QB 394

[104] Beale (n 103), 217-219, paras 2-07, 2-081. See also *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256

[105] CIArb 2011 Survey (n 91); Andrew Waters, 'Arbitration: What in-house Lawyers Need to Know the Costs of Arbitration August 2015' <http://www.wfw.com/wp-content/uploads/2015/08/WFW-ArbitrationNewsletter1-Costs.pdf> accessed 11 Mar 2016; Joseph R Profaizer, 'International Arbitration: Now Getting Longer and More Costly' (28 July 2008) NLJ <https://www.paulhastings.com/docs/default-source/PDFs/9833309df6923346428811cff00004cbded.pdf> accessed 21 September 2013

[106] Irene Welser, 'Efficiency – Today's Challenge in Arbitration Proceedings' <http://www.chsh.com/fileadmin/docs/publications/Welser/Welser_AYIA_2014.pdf> accessed 06 October 2015

[107] Eugene Lenehan, 'Arbitration Rules - International Chamber of Commerce versus UNCITRAL' (2006) 17(8) Cons. Law 13

1.6.2 10 Ribs

It is important to discuss the "symbolic elements";[108] or the "set of rules"[109] or "the humanly devised constraints that shape human interaction"[110] in this institution. As a *de facto* choice for commercial disputants, international commercial arbitration provides a dependable forum. The preeminence is due to the process being (1) autonomous, (2) neutral, (3) informal or flexible, (4) private, (5) confidential, (6) expeditious, (7) cost effective, (8) specialist (9) final and binding, and (10) enforceable. These 10 ribs make this institution particularly alluring.[111]

Strong[112] writes that to many people the arbitration agreement is the foundational source of authority in any given international commercial arbitration proceeding. Within such agreement the parties configure their own arbitral tribunal. In no particular order, they agree a number of elements. They specify whether the arbitration is to be *ad hoc* or administered. They specify the legal seat of the arbitration, i.e. in which jurisdiction the arbitral tribunal is to sit. The parties indicate the number of arbitrators who are to decide the dispute; and this could be one, two, or three, depending on the law applicable to the arbitration proceedings. They specify how the arbitrator(s) is/are to be selected and appointed – i.e. by the administering centre or by the parties choosing one each and the two party-appointed arbitrators then selecting and appointing a chairman of the tribunal.

The result of this wide choice given to the parties allows them to ensure the most important aspect of the process, which is a forum perceived as neutral. Proceedings conducted in a national court of one of the parties to a transnational commercial agreement could not operate successfully due to the potential partiality by a judge towards the domestic party,[113] thus

[108] Scott 2014 (n 8), 57

[109] Knight (n 9), 2

[110] North (n 2), 3-5

[111] Strong (n 96); Justin Michaelson and Jamie Maples, 'Taking Clients to ADR' (2005) 155 NLJ 725 [hereinafter "Michaelson and Maples (n 111)"]; Michaelson (n 84); Bermann (n 6), 2; QMU-PwC 2006 Survey (n 75), 2

[112] Strong (n 96), 140-141. See also Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009) 24 Am. U. Int'l L. Rev. 489, 492, 497, 518, 522; Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 71ff [hereinafter "Lew et al. (n 112)"]

[113] Nigel Blackaby and others, *Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press 2009) [hereinafter "Blackaby et al. 2009 (n 113)"], 31. See also Richard Garnett, 'International Arbitration Law: Progress Towards Harmonisation' (2002) 3 Melb.

rendering the foreign party lacking a neutral forum and the inability to enforce the national court's award domestically or abroad.

Ahead of discussing these ten elements, which are in fact the differences between arbitration and litigation, and also the other ADR processes such as mediation, conciliation, negotiation, adjudication, and early neutral evaluation, it is obligatory to mention that half of these elements would be considered as the advantages and the other half as the disadvantages of the institution. The QMU-PwC 2006 Survey[114] found that the institution is not as cost-effective nor as expeditious as often presented. The respondents were also not very keen on court intervention in the arbitration process for the simple reason that it increases the cost and the time for obtaining an award, but also it was in contradiction of the parties' choice of arbitration as their preferred process for adjudicating their dispute.

The entire arbitration procedure commences with the parties choosing not to refer their dispute to a court in any jurisdiction. This is the parties' expression of their autonomy. Michaelson and Maples write that "The parties' agreement to arbitrate is set out in an 'arbitration agreement'."[115] In discussing the notion of customised consent in international commercial arbitration, Coakley writes that "The most fundamental tenet of arbitration is the notion of voluntarily entering into a means of dispute settlement".[116]

The arbitration process is thus commenced by an insertion of an arbitration clause into commercial agreements, or entering into a separate agreement to arbitrate. This agreement is to opt for disputes arising out of or in connection with the commercial agreement in question to be decided by an arbitral tribunal rather than a national court of any of the parties thereof. This is party autonomy! The autonomy to tailor the arbitration gives the parties a great deal of control.

J. Int'l L. 400, 403; Gilles Cuniberti, 'Beyond Contract – The Case for Default Arbitration in International Commercial Disputes' (2008) 32(2) Fordham Int'l L.J. 417, 424-425; Michael Hwang and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (2012) 8 AIAJ 1, which focuses on highlighting the issue of corruption creeping in international commercial arbitration both at the arbitration tribunal level as well as post rendering of the award at the national court level. This is very likely to impact negatively on the future of international arbitration

[114] QMU-PwC 2006 Survey (n 75), 2, 7

[115] Michaelson and Maples (n 111)

[116] Coakley (n 68), 129. See also Blackaby et al. 2009 (n 113), 365, para 6.08; *Elektrim SA v Vivendi Universal SA & Ors (No 2)* [2007] 2 Lloyds Rep. 8 [19]; *Seismic Shipping Inc. & Anor v Total E & P UK Plc* [2005] 2 C.L.C. 182 [66]

This practice of voluntarily entering into an agreement to arbitrate is traceable to ancient Greece, though it is probably of greater antiquity.[117] The process, it appears, was no different to what it is now. It would start by parties trading between cities agreeing to arbitrate their disputes. An agreement between the Lacedaemonians and the Athenians not to make war states that the solution to any problem between them was to be referred to a method upon which they mutually consented to. In the context of commercial actors, the ability to choose their own neutral forum to decide their differences makes them more confident and thus readily commit to economic risks beyond their national boundaries.

The significance of this second rib cannot be underestimated because courts in developing countries lack the independence to make use of pre-established rules of law to decide cases. Corruption in the judiciary[118] is the primary concern, not to mention absence of sufficient practical training for judges and administrative staff in organising the workload to reduce delays and cost. De Palo and Costabile examine several countries from the Arab world, including Morocco, Syria, Jordan and Egypt.[119]

In Lebanon, for example, "the role of the courts in resolving commercial conflicts is negatively perceived because of the length of proceedings and the lack of judicial skill in handling commercial disputes".[120] In Morocco business people are hesitant to file claims before the local courts because of the high cost, length of time in achieving results, and the ripe corrupt practices within the judiciary. Yet, domestic arbitration organisations in these countries do not appear to be benefitting from this as they are practically unused. Even Egypt, which developed CRCICA nearly 30 years ago, seems not to have achieved leadership status in the institution. These difficulties remain today despite the European Commission project, launched in 2001, to

[117] Henry T King Jr and Marc A Le Forestier, 'Arbitration in Ancient Greece' (1994) Disp. Resol. J. 38, 40 [hereinafter "King Jr. and Le Forestier (n 117)"]

[118] Loukas A Mistelis and Crina Baltag, 'Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations' (2008) 2(5) World Arb. & Med. Rev. 83 – "National courts are a viable and reliable forum for dispute resolution, provided the judicial system is developed and judges well trained and perceived to be independent and fair."). See also Indira M Carr, 'Fighting Corruption through Regional and International Conventions: A Satisfactory Solution?' (2007) 15 J. Crime Crim. L. & Crim. Just. 121

[119] Giuseppe De Palo and Linda Costabile, 'Promotion of International Commercial Arbitration and other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries' (2006) 7 Cardozo J. Conflict Resol. 303 [hereinafter "Giuseppe De Palo and Linda Costabile (n 119)"]

[120] Giuseppe De Palo and Linda Costabile (n 119), 313

encourage and support the use and development of international commercial arbitration and other ADR processes in the Southern Mediterranean (MEDA) countries.

It is practically impossible to convince disputing parties whose relationship extends beyond their own borders to resolve their dispute in the other's state courts. Additionally, the lack of adequately trained and sufficiently equipped judges means that the required expertise is not readily on offer. The knock-on effect, which for commercial parties is a real turn-off, is that cases cannot be decided in a timely fashion. Neutrality provides the basis for basic fairness and purges the risk of bias. This is of great importance to the parties concerned because a foreign national engaged in a business transaction would be significantly disadvantaged in a national court of his counter-part because of legal formalities, cultural or linguistic differences, not to mention bias, challenges to enforcing an award, and the inefficiency of national courts, as highlighted above.

Thus, a neutral forum created through negotiable terms eradicates fear with regard to the independence of the arbitral tribunal and thus make the parties comfortable about the process. Fear of lack of independence on the part of national courts and judges led to the creation of international commercial arbitration, a "global, rather than parochial, adjudication system".[121]

Once a dispute has arisen and the arbitral tribunal is constituted, it is essential to establish the rules, *ad hoc* or administered, that are to govern the procedure of the tribunal. The disputants will have either specified these in the arbitration agreement or make it clear at the birth of a dispute. The parties propose or approve the timetable for how the proceedings are to take shape from the start to the end. All this is the application of party autonomy. Blackaby et al. write that "Parties to an arbitration are masters of the arbitral process to an extent impossible in proceedings in a court of law".[122] This is the third rib, which is informality or flexibility in respect of the proceedings.

This is why it is a private process of dispute resolution, as opposed to national and international

[121] Mclean (n 61), 1089. See also Simeon Djankov and others, 'Courts' (2003) 118(2) Q. J. Econ. 453

[122] Blackaby et al. 2004 (n 41), 8-9, para 1-13

courts, which are public institutions. This eliminates, or at the very least minimises, the possibility of the parties being exposed to negative publicity. Adjudicating an international commercial dispute between private parties where there may still be an ongoing relationship requires a fundamentally different approach so as to preserve the confidentiality of the dispute and the matters thereto. In arbitration "the disposition of the dispute and the proceedings themselves are typically private and confidential".[123] Confidentiality is the fourth rib.

The fourth rib corresponds to the fifth one, which is privacy; though they are not one and the same. It is essential for the parties who want a guarantee that commercially sensitive information does not become public knowledge. This is achieved by holding arbitral hearings behind closed doors. The result of which is that "no one other than the parties involved in the dispute ever sees the terms of the award issued by the tribunal",[124] for example.

In this regard it is important to understand the findings in such cases as *ESSO/BHO v Plowman*[125] and *Bulgarian Foreign Trade Bank Limited v A.I. Trade Finance Inc.*,[126] which demonstrate that the notion of confidentiality in arbitration is not always fully understood. The level of confidentiality offered by arbitration is incomparable to anything that the courts could ensure, generally speaking as there are measures that allow for confidentiality.

Besides constituting a neutral forum, keeping the matters private and achieving confidentiality, the parties control the speed at which the proceedings are conducted so as to expedite the rendering of the award. This, being the sixth rib, is the result of less formalised procedures, such as those for the discovery of evidence, simplification of the rules of evidence, the rules pertaining to the taking of testimony, the granting of interim measures and the determination of the substantive law. This tends to have an impact on the seventh rib, and that is saving cost. It is always asserted that generally the cost of arbitration is less than that of litigation.

For commercial parties cost efficiency is perhaps more important than many other factors. It is

[123] Strong (n 96), 150. See also Drahozal and Naimark (n 71), 3

[124] ibid, 142. See also Amy J Schmitz, 'Untangling the Privacy Paradox in Arbitration' (2006) 54 U. Kan. L. Rev. 1211, 1214

[125] [1995] 128 A.L.R.

[126] [2000] T 1881-99

argued that arbitrators offer expertise in a specific industry. Thus, they are able to appreciate the subject matter of the dispute. Quite often, these individuals possess the relevant technical knowledge and experience. What this eighth rib guarantees is a well-determined dispute and a well-reasoned decision. The quality of the decisions rendered in litigation cannot be compared to those of arbitration because judges often lack the expertise to understand the dispute.

The superior character of arbitration derives from the impartiality of the decision makers, who are more knowledgeable than judges because they have to deal with parties from all over the world and with different type of disputes. Not having to follow the laws of a single jurisdiction on procedure and substance permits arbitrators to think outside the box. Judges usually conform to their own national laws and codes of practice. A sole arbitration case could require the arbitrator(s) to have knowledge of and analyse five different legal systems, namely the law governing the actual contract subject of the arbitration dispute, the capacity of the parties, the substance of the dispute in question, law of situs, and the law of where the enforcement of the arbitration award will occur.[127]

Onyema distinguishes arbitration from "other alternative private mechanisms of dispute resolution which terminate in non-binding and non-self-enforcing outcomes".[128] The other forms of ADR, listed above, are neither binding nor final or enforceable. An arbitral tribunal's decision is final and binding on the parties. What this ninth rib of arbitration essentially means is that there is no appeal mechanism in international commercial arbitration. This, arguably, contributes to arbitration being expeditious and less expensive than litigation, which is the only other dispute resolution mechanism that produces a binding outcome. A final and binding decision produces the final and tenth rib, which is recognition and enforcement of the arbitral award.

Litigation does not currently offer international recognition and enforcement of judgments. Blackaby et al. write that the raison d'etre for arbitration is the guarantee that the arbitral award will be enforced in the relevant jurisdiction, and without such guarantee arbitration is in fact

[127] Blackaby et al. 2004 (n 41), 77-78

[128] Onyema (n 19), 2

pointless.[129] This guarantee is enshrined in the New York Convention. To date it is ratified by 159 out of the 193 member states of the United Nations.[130] The Convention facilitates the enforcement of arbitral awards and it is for this reason that the success of international commercial arbitration, to a large extent, can be attributed to this multilateral treaty.

The basis of the Convention is that courts of contracting states have a reciprocal obligation to give effect to agreements to arbitrate and to recognise and enforce arbitration awards as per article I(3) and article III. Though other international conventions apply to the cross-border enforcement of arbitration awards, the New York Convention is by far the most important. Strong writes that "there are good reasons for ranking international conventions and treaties first, the most significant of which is that the failure to adhere to certain procedures early on can diminish the international enforceability of an award".[131] Put simply, international agreements, treaties and conventions facilitate arbitration.

Equally, regional and multilateral mechanisms exist that facilitate enforcement of arbitral awards.[132] For example, the European Convention on International Commercial Arbitration[133] which was signed in Geneva on 21 April 1961, or the Inter-American Convention on International Commercial Arbitration 1976,[134] which is known as the Panama Convention, was signed on 30 January 1975 in Panama by members of the Organisation of American States. In some cases they supersede the New York Convention.

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States[135] is relevant to, as the name suggests, disputes arising between states and private individuals or corporations of other nations. Known as the Washington or ICSID

[129] Blackaby et al. 2004 (n 41), § 10. The finality of the arbitration process and enforceability of the final award raises interesting questions, which will be evaluated in Chapter 3. See also Pierre A. Karrer, 'Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?' in Gerald Aksen and Robert G Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005) 429

[130] <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 21 April 2018

[131] van den Berg (n 30), 119

[132] ibid, 132

[133] April 21, 1961, 484 U.N.T.S., 364 No. 7041 (1963-1964)

[134] 14 I.L.M. 336 (1975)

[135] 575 U.N.T.S. 159; [1991] ATS 23; 4 I.L.M. 532 (1965); UKTS 25 (1967)

Convention,[136] this treaty was signed in Washington on 18 March 1965. Due to the nature of arbitrations it regulates its system is an independent one as it provides the mechanism for the conduct of the arbitration and its enforcement provisions.

Furthermore, international agreements also regulate arbitrations where it is used as an adjudication process for transnational disputes which are not necessarily commercial. A good example is the Iran-United States Claims Tribunal which arose as a result of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, which was signed on 19 January 1981. Others include the Claims Resolution Tribunal for Dormant Accounts in Switzerland[137] and the International Commission on Holocaust Era Insurance Claims.[138]

Regardless of the abovementioned conventions as far as smoothing the progress of international commercial arbitration is concerned the first treaty that comes to mind is indeed the New York Convention, which is why it is widely accepted as the foundational instrument for international arbitration.[139] This provides the parties with the much-needed guarantee that the arbitral award that they obtain will be enforced.

For all the reasons described above, international arbitration has become the established process of settling both national and international commercial disputes. Coakley writes that between 1983 and 1988, commercial arbitration rose 84 percent.[140] The Second Circuit's judgment in the case of *Chelsea Square Textiles, Inc. v Bombay Dyeing and Mfg. Co.*[141] is that the mutuality to use arbitration to adjudicate disputes is dictated by industry custom. Additionally, this was a

[136] <http://www.cil.nus.edu.sg/1965/1965-convention-on-the-settlement-of-investment-disputes-between-states-and-nationals-of-other-states-2/> accessed 23 October 2011; <https://www.icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp> accessed 23 October 2011

[137] <http://www.crt-ii.org/_crt-i/frame.html> accessed 05 January 2012

[138] <http://www.icheic.org> accessed 15 January 2012

[139] van den Berg (n 30), 132

[140] Associated Press, 'Commercial Cases Increase 84% Since '83: Arbitration Up as Doubts on Litigation Grow' (New York, 29 December 1988) <http://www.articles.latimes.com/1988-12-29/business/fi-1400_1_commercial-arbitration-cases> accessed 19 February 2012, § 4 at 12'. See also Blackaby et al. 2004 (n 41)

[141] 189 F.3d 289, 292 (2d Cir. 1999)

good reason for governments and organisations in the developed world, particularly in Europe and the United States of America (USA), to wholeheartedly promote arbitration.

The position of the USA is illustrated by the case of *McMahon v Shearson/American Express, Inc.*[142] and the case of *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*[143] which made antitrust suits within USA arbitrable. For Europe, the New German Arbitration Law 1998[144] and the Netherlands Arbitration Act 2015[145] show the stance that countries are taking as far as arbitration is concerned.

The tremendous "increase in international trade and investment, coupled with the reluctance on behalf of parties to bring their disputes before a foreign court system"[146] caused the global arbitration market to mushroom. This resulted in the vertiginous growth in the number of arbitration centres to well over 200 worldwide. Supposedly, these centres provide a level playing institution because neither the administration staff of the centre nor the arbitrator(s) belonging to the centre have external interest in the proceedings in which they are involved.

Furthermore, the interference from politically or financially powerful individuals, which national courts could be subjected to, though largely in the developing world, is rather limited if not eliminated altogether. Slate writes that the success of arbitration is due to the "intellectual and operational support of the various administering institutions".[147] Coakley writes, however, that this global phenomenon, that is arbitration, will continue to thrive so long as litigation does not match it to satisfy commercial disputants.

It would be unjust to national courts, however, not to mention the crucial role they play in the arbitral process since "International commercial arbitration cannot function effectively without the assistance of national courts. Unless there is voluntary compliance, national courts cannot be

[142] 482 U.S. 220, 227-38 (1987)

[143] 473 U.S. 614, 628-40 (1985)

[144] Burgerliches Gesetzbuch §§ 1025-1066 (1998)

[145] Burgerlijk Wetboek §§ 1020-1076 (2015)

[146] William K Slate, 'International Arbitration: Do Institutions Make A Difference?' (1996) 31 Wake Forest L. Rev. 41, 43

[147] ibid

completely eliminated by an agreement to arbitrate".[148] The most important is that the parties who have opted out of national courts and obtained an award from an arbitral tribunal have no choice but to resort to the national courts to have the arbitral award enforced. This reality begs several questions. Why is the intervention of a domestic court necessary in the international commercial arbitration sphere? Why are the arbitration centres not able to offer this service to their clients; and indeed, can they offer it? Lastly, what is the force of an unenforced award?

The questions outlined above, and many others, will be answered as the umbrella of international commercial arbitration is opened for analysis, criticism and suggestions for how it could be better shaped to offer the full measure of advantages associated with this international dispute adjudication process. The 10 ribs will be closely examined to see whether without them the umbrella can remain intact. Stripping this institution off its flesh to reveal the strength of the skeleton on which it is built is crucial to its growth in the future. Looking at its history might shed some light on the shape that it should take in the future.

1.7 History of International Commercial Arbitration

Caron writes that "One way of introducing a institution is to provide an account of its development".[149] To understand the utility of international commercial arbitration, which has materialised into the most preferred and fastest growing process of transnational dispute resolution in the last 50 years, its history is important to measure its success. This process experienced a shift over the latter half of the 20th century. Coakley cites some case-law from USA to illustrate the length of time that arbitration has been an arbitration process.[150]

The history of international commercial arbitration, however, dates back to ancient times, in

[148] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982-1983) 57 Tul. L. Rev. 42 [hereinafter "de Vries (n 148)"]. See also Howard M Holtzmann, 'Arbitration and the Courts: Partners in a System of International Jurisdiction' [1978] Revue d'arbitrage 253 [hereinafter "Holtzmann (n 148)"]

[149] David D Caron, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 Berkeley J. Int'l Law 401 [hereinafter "Caron (n 149)"]

[150] Coakley (n 68), 130; *Cueroni v Coburnville Garage*, 52 N.E. 2d 16 (Mass. 1943), *Miller v Brumbaugh*, 7 Kan. 343 (1871) and *Hutchinson v Liverpool*, 26 N.E. 431 (Mass. 1891)

Europe, in Greece and Rome and in Asia.[151] In its earliest form, it can be traced back to the Arbitration Act of 1697 in England and the Constitution of 1791 in France. Malynes describes how commercial disputes were determined by merchants who acted as arbitrators.[152]

Macassey describes arbitration as "the aversion of business men to courts of law".[153] He asserts that from the beginning of cross-border trading merchants conducted their business under 'lex mercatoria'. This was neither national nor international law in the legislative or judicial sense but an unwritten code of customs and practices "habitually and uniformly observed by the merchants of every great trading city or country".[154] Notwithstanding the fact that this code was neither recognised nor enforceable in any national, regional or international court, it allowed the merchants to carry "not merely their goods but also their own law. It, and not the national law of their own country or of the country in which they happened to be, applied to them in regard to all commercial transactions".[155]

This is how this institution has become the international business community's preferred method of dispute resolution, because the merchants transported it to the world. This fits perfectly with Scott's description that "Institutions are transported by various carriers – cultures, structures, and routines – and they operate at multiple levels of jurisdiction".[156] Furthermore, this demonstrates that the very origin of this institution is institutional entrepreneurship as it is the activities of actors with interest in particular arrangements that led to its creation,[157] and any change thereto will depend on the same method.

[151] Derek Roebuck, *Ancient Greek Arbitration* (Holo Books The Arbitration Press 2001); Greenberg, Kee and Weeramantry (n 69), 3-17; King Jr and Le Forestier (n 117); Earl S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 U. Pa. L. Rev. 132, 134; Kaja Harter-Uibopuu, 'Ancient Greek Approaches Toward Alternative Dispute Resolution' (2002) 10 Willamette J. Int'l L. & Disp. Resol. 47; Jackson H Ralston, *International Arbitration from Athens to Locarno* (The Lawbook Exchange 2004)

[152] Gerard Malynes and others, *The Ancient Law Merchant* (3rd edn, F. Redmayne 1685)

[153] Lynden L Macassey, 'International Commercial Arbitration-Its Origin, Development and Importance' (1938) 24(7) ABA J. 518, 518 [hereinafter "Macassey (n 153)"]

[154] ibid

[155] ibid

[156] Scott 1995 (n 7), 33

[157] Steve Maguire, Cynthia Hardy and Thomas B Lawrence, 'Institutional Entrepreneurship in Emerging Fields: HIV/Aids Treatment Advocacy in Canada' (2004) 47(5) Acad. Manag. J. 657 [hereinafter "Maguire et al. (n 157)"]

The unwritten code and the merchants were supported by the Consular Courts, which were composed of the representatives who accompanied the merchants from their own countries to the great fairs held in other countries. However, with the exception of England, which had its own summary fair courts or Courts of Pie Powder, questions which were beyond the realm of these individuals were referred to courts held by "Consuls permanently established often with statutory autonomy in the home country or city of the national merchants in question".[158] The use of the Consular Courts and the fair Courts of Pie Powder died out following the decline of the great fairs.

This is because many states had by then begun to accept the unwritten code in its own right and without association with any national or international law. However, merchants were still reluctant to have their disputes heard by national commercial courts because of the many difficulties that the medieval courts presented. Deprived of their own courts the merchants were still unwilling to avail their disputes to the medieval courts because of their protracted procedures and dire delays in getting results. They were compelled to find a solution that would be expeditious, cost-effective, devoid of grievous technicalities and apply the customs of merchants. Inevitably they found arbitration.

Macassey writes that:

> "Hugo Grotius (1583-1645) in his well-known work De Arbitris said (Book III, Chap. XX, s. xlvii) there have always been two kinds of arbitrators-one elected to determine a question in the capacity of a Judge, when he must act in accordance with all the rules of law and judicial procedure which govern the discharge of the duties of a Judge; the other kind of arbitrator who (and Grotius quotes both Aristotle and Seneca) will hear the case and pronounce his award not in compliance with technical rules of law or procedure, but according to equity and reason. With the latter type of arbitrator merchants were well familiar".[159]

[158] Macassey (n 153)

[159] ibid

Arbitration is not only the process of choice for commercial combatants but it is also for disputing diplomats. On Wednesday 16 August 1893 The New York Times[160] reported on the Tribunal of Arbitration's decision regarding the Bering Sea fishery dispute between Great Britain and the United States in the 1880s.[161] Following the United States government's purchase of Alaska and the adjacent islands from Russia in 1867 a dispute arose as a result of the killing of seals on the Pribiloff Islands and in the adjacent waters. This act was prohibited by legislations passed by the Congress between 1868 and 1873[162].

America and Russia had seal nurseries on the Pribiloff Islands and on the Komandorski group, respectively, but Britain did not have access. Britain wanted a part in the sealing industry, but this was prohibited by legislation. This led to negotiations between the three states, which lasted from 1887 to 1890. The result of which was the disagreement on the regulation of sealing in the pelagic zone and the abandonment of the proposed joint convention. The diplomatic controversy was referred to arbitration following the proposal by Lord Salisbury in August 1890.

On 29 February 1892 a treaty signed at Washington D.C. stipulated that Great Britain and USA were to name two arbitrators each, and three others to come from the nomination of the president of the French Republic, the king of Italy, the king of Norway and Sweden. The seat of arbitration was Paris. The USA contended that Russia had passed the territorial sovereignty to them under the UKASE of 04 September 1821. The arbitration began in February 1893 and the award was rendered on 15 August 1893 in Britain's favour.

Whilst this much welcomed ADR process continued to flourish, the exponential growth, however, arrived in the 1920s with the introduction of inter-state conventions on arbitration. These appeared to have been the missing pieces in the jigsaw because the Geneva Protocol on

[160] Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals (1893) XXVIII(XXI) RIAA 265 <http://www.legal.un.org/docs/?path=../riaa/cases/vol_XXVIII/263-276.pdf&lang=O> accessed 12 February 2012 [hereinafter "Reports of International Arbitral Awards (n 160)"]; John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party* vol I (Government Printing Office 1898), 935; 'History of the Arbitration - The United States Has Every Reason to be Satisfied with the Decision of the Tribunal' *The New York Times* (New York, 16 August 1893) 2

[161] Reports of International Arbitral Awards (n 160)

[162] ibid

Arbitration Clauses 1923[163] and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927[164] proved to be the catalyst that inspired the spread of the process to the international stage. This stood on the great broad shoulders of the ICC in 1923.

This organisation pioneered international commercial arbitration and it is the world's leading arbitration centre. Its aim is to offer quick, inexpensive and binding decisions adjudicated by people with knowledge and experience in the institution and also applicable to the dispute and protect the parties' commercially sensitive information. Indisputably, however, the pinnacle of international commercial arbitration was the inception by the ICC of the New York Convention. In the context of the historical development of international commercial arbitration, the concluding chapter is the United Nations Commission on International Trade Law (UNCITRAL).

Established by the General Assembly through Resolution 2205 (XXI) of 17 December 1966 "to promote the progressive harmonisation and unification of international trade law",[165] the role of the Commission was to eradicate the obstacles connected with the flow of international trade which are created by disparities in national laws governing international trade. The important development hereof came on 21 June 1985 when the United Nations Commission on International Trade Law Rules Model Law on International Commercial Arbitration 1985 as amended in 2006 (UNCITRAL Model Law) was adopted. This deals with all aspects of arbitration. Even following its amendments in 2006 and 2010, however, this remains a model law, which means that states have a choice whether or not to adopt it, and when they do whether to ratify it in whole or in part.

Effectively, states implement it in their national legislation on arbitration. The lack of consistency in its adoption creates a disadvantage. On the other hand, of course, the flexibility makes it attractive and successful. Hence it has been adopted by about 100 nations.[166] This number was half before the 2006 amendments. Nevertheless, one could be forgiven for thinking

[163] (24 September 1923) 27 L.N.T.S. 157 (1924) [hereinafter "Geneva Protocol"]

[164] (26 September 1927) 92 L.N.T.S. 301 (1929) [hereinafter "Geneva Convention"]

[165] <http://www.uncitral.org/uncitral/en/about/origin.html> accessed 23 December 2011

[166] <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> accessed 23 December 2011

that perhaps the other countries which have ratified the New York Convention would have also been encouraged to implement the UNCITRAL Model Law in their national legislation had it been a treaty.

The success of the Model Law is further enhanced by the Case Law on UNCITRAL Texts (CLOUT), a database of abstracts of court decisions and arbitral awards relating to the United Nations Commission on International Trade Law Conventions and the Model Arbitration Law and case law relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG). This is a system designed for gathering and distributing court decisions and arbitral awards relating to the conventions and model laws with the intention of encouraging international awareness of the Commission's legal texts so as to ensure uniform interpretation and application.

1.8 Definition of International Commercial Arbitration

A general description of international commercial arbitration may be deemed sufficient to decipher if or not any enhancement is needed. A definition of it, however, would not only confirm if or not any enhancement is needed, but also specify what enhancement is actually needed.

To determine whether any change should occur in and to international commercial arbitration, in its functionality and legitimacy, it is crucial to learn more the type of institution that it is. This requires an understanding of how international commercial arbitration actually functions. It is important to know the definition of international commercial arbitration. For this, it is essential to explore the distinct characteristics of each stage of the course that disputing parties follow to adjudicate a dispute using this process.

From a definitional analysis standpoint, presenting international commercial arbitration as an institution would be a simplistic view. Schutz writes that "I do not understand …an institution without understanding what it means for the individuals who orient their behavior with regard to

its existence".[167] It is crucial to know what international commercial arbitration actually means, particularly to its commentators. This requires employment of a certain measure of philosophy of language to help understand "What is a word really"?[168] or "What is meaning"?[169] To understand the institution is to know what it means.

Wittgenstein's idea of meaning advances the 'representational theory',[170] also known as 'use theory', as later developed by Austin[171] and Ryle.[172] This places a burden on the sentence to convey the meaning of a word therein because the meaning of a word is its use in the language.[173] Meaning of a word or a phrase is, therefore, contextual – the way it is said as well as the context in which it is. Hence a word may have different meaning in different sentences communicating different contexts depending on the theory of meaning.[174]

Horwich's theory of meaning is predicated on the meaning of words being dependent on their use.[175] He distinguishes the explicit[176] and implicit[177] definitions of the word. In the former, a synonym for the word could give it a definition, whereas the latter relies on assertions in which

[167] Schutz (n 44), 10-11

[168] Ludwig Wittgenstein, *Philosophical Investigations* (Gertrude EM Anscombe tr, Wiley-Blackwell 1973), 108 [hereinafter "Wittgenstein 1973 (n 168)"]

[169] Paul Horwich, *Meaning* (Oxford University Press 2004), 1 [hereinafter "Horwich (n 169)"]

[170] Ludwig Wittgenstein, *Tractatus Logico Philosophicus* (Charles K Ogden tr, Chiron Academic Press 2016) [hereinafter "Wittgenstein 2016 (n 170)"]

[171] John L Austin, *How to Do Things with Words* (James O Urmson and Marina Sbisà eds, 2nd edn, Harvard University Press 1975)

[172] Gilbert Ryle, *The Concept of Mind* (1st edn, University of Chicago Press 2000)

[173] Wittgenstein 1973 (n 168), 43

[174] See, for example, Donald Davidson, *Inquiries into Truth and Interpretation* (2nd edn, Clarendon Press 2001), 23, 150; Percy W Bridgman, *The Logic of Modern Physics* (Macmillan 1927), 5. See also Stanley S Stevens, 'The Operational Definition of Psychological Concepts' (1935) 42(6) Psychol. Rev. 517; Stanley S Stevens, 'The Operational Basis of Psychology' (1935) 47 Am. J. Psychol. 323; Edward Erwin, *The Concept of Meaninglessness* (1st edn, Johns Hopkins University Press 1970). Case law which adopted Wittgenstein's idea of meaning to interpret linguistic constructions include *The Branch Manager, MAGMA Leasing & Finance Ltd v Potluri Madhavilata* (Civil Appeal 6399/2009, September 18 2009) where the Supreme Court of India addressed the question of whether an arbitration agreement survives the termination of the main contract. In that case the Court placed emphasis on the House of Lords judgment in *Heyman v Darwins* (1942) 1 ALL ER 337 which held that where a difference arises between parties who had a contract then the difference should be regarded as having arisen 'in respect of', 'with regard to' or 'under' the contract. Therefore, the dispute resolution mechanism to which they have agreed, namely arbitration, should be utilised. See also *Buckeye Check Cashing Inc. v Cardegna* (546 US 460 (2005)

[175] Horwich (n 169), 1

[176] ibid, 79-80

[177] ibid, 131-142

the word appears so that it is its usage which makes it meaningful,[178] which of course adopts Wittgenstein's idea of meaning. In his discussion of the elements of meaning Platts writes that for words and phrases to have meaningful utility they must be uttered with certain intention by all interactants so that it has the specific meaning intended.[179]

Since it is unambiguous arbitration is "the aversion of business men to courts of law"[180] and an arbitration agreement is the construct of "a dispute resolution system",[181] it is indisputable that international commercial arbitration is the creation of the business community. Thus, many will indeed question the need to define international commercial arbitration when so much has been written about this celebrated institution. They would argue that this field is defined, and so what it means in theory is not important so long as in practice contracting parties could use it to adjudicate their disputes in a manner which suits them. Since it is the parties and practitioners, and maybe even academics, who bestow legitimacy to the institution and preserve its existence, it would be questionable whether a definitional exercise is really necessary.

To quote a conversation between Duchess of Monmouth and Lord Henry Wotton in Wilde's philosophical novel *The Picture of Dorian Gray* is appropriate here:

> "You are a sceptic".
> "Never! Scepticism is the beginning of faith".
> "What are you?"
> "To define is to limit".
> "Give me a clue".[182]

Chigara writes that "definitions tend to foreclose arguments" and that in "a theoretically and

[178] ibid, 1

[179] Mark Platts, *Ways of Meaning: An Introduction to a Philosophy of Language* (2nd edn, MIT Press 1997), 48, 87, 90-93, 256, 275 [hereinafter "Platts (n 179)"]. See also by Bernard E Rollin, *Natural and Conventional Meaning: An Examination of the Distinction (Approaches to Semiotics)* (Mouton de Gruyter 1976)

[180] Macassey (n 149), 518

[181] See n 41

[182] Oscar Wilde, *The Picture of Dorian Gray* (Alma Classics 2014), 178

socially dynamic and complex world" a definitional exercise "is fraught with difficulty".[183] For that reason, to define would, therefore, be to limit. As it is demonstrated here, however, a definitional exercise is indispensable with regard to international commercial arbitration. The aim is not for it to function like a final answer but more of a philosophical inquiry to evaluate the type of institution that it is by examining the institutional elements of this social institution. Furthermore, it is to discover what institutional entrepreneurship opportunity exist to change its nature, functionality and legitimacy.

A definitional exercise is justified for many reasons, not least because that "That someone who credibly endorses the legitimacy of arbitration in one environment may have no warrant to defend the process as it is practiced elsewhere – and that, by a parity of reasoning, a convincing critique of one type of arbitration may be irrelevant to another"?[184] Lew et al. write that "As arbitration is a dynamic dispute resolution mechanism varying according to law and international practice, national laws do not attempt a final definition".[185] To date, therefore, there is no one definition to communicate what international commercial arbitration means.

This presentation should be accepted as a crucial dialogue between the various actors engaged in semantic web about what is international commercial arbitration. Whilst the actors may well be talking about the same entity, what they communicate may not be understood in the same way by recipient of the message. A definition, by structure and nature, should be premised on concrete operational as having "common ground status"[186] to people of all cultures, particularly where the concept is of significance to people of all cultures.

A definition of international commercial arbitration does not appear in national legislation or international convention, including the landscape-changing protocols such as the Geneva Protocol; the Geneva Convention; the New York Convention; or the UNCITRAL Model Law.

[183] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Ashgate 2001), 118 [hereinafter "Chigara (n 183)"]. See also Diane Elam, *Feminism and Deconstruction* (Routledge 1994), 4

[184] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013), 3 [hereinafter "Paulsson (n 184)"]

[185] Lew et al. (n 112), 3

[186] Herbert P Grice, *Studies in the Way of Words* (Harvard University Press 1989), 65, 274 [hereinafter "Grice 1989 (n 186)"]. See also Stephen Schiffer, *Meaning* (Clarendon Press 1972), 30-31 on "mutual knowledge"; David Lewis, *Convention* (Harvard University Press 1969), 59 on "common knowledge".

The drafters of the New York Convention did not directly or indirectly include a definition in the 16 articles that make up the Convention.[187] Although a definition was proposed by the Secretariat, one is not found in the UNCITRAL Model Law because the Working Group deemed it "unnecessary".[188]

Mann writes that:

> "Numerous attempts have been made in recent years to define an 'international commercial arbitration'. They have failed to produce any clear formula, nor is it certain whether an effective formula, if it were to be found, would constitute a useful contribution rather than a sterile exercise".[189]

Mann's assessment leads to three observations that: (1) the existing definitions lack effectiveness; (2) any attempt to better such definitions would not be useful; and (3) in fact, there should be no definition of international commercial arbitration. To agree or disagree with Mann, it is indispensable to evaluate the effectiveness of the definitions that commentators currently tender and then decide on whether or not any improvement is necessary on them and if an improved definition would make any difference to the theory or practice of international commercial arbitration.

---

[187] United Nations Conference on Trade and Development, 'Dispute Settlement: Module 5.1 International Commercial Arbitration' (United Nations 2005), 4 <http://www.unctad.org/en/docs/edmmisc232add38_en.pdf> accessed 07 January 2012. See, for example, United States of America's Federal Arbitration Act 1925 (as amended) Pub. L. 68-401, 43 Stat. 883, 9 U.S.C. §§ 1-14 [hereinafter "FAA"] and Uniform Arbitration Act 1956 (as amended in 2000) [hereinafter "UAA"] 7 U.L.A. 100

[188] International Commercial Arbitration, 'Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN.9/207)' in *United Nations Commission on International Trade Law Yearbook* (1981) XII UNCITRAL Ybk 75, paras 29-30. Two reasons were given for not attributing a clear definition to arbitration, namely that it would have involved delineating the various types of arbitration, and also that neither national legislation nor international conventions contained a definition of arbitration. See also International Commercial Arbitration, 'Report of the Working Group on International Contract Practices on the work of its third session (New York, 16-26 February 1982) (A/CN.9/216)' in *United Nations Commission on International Trade Law Yearbook* (1982) XIII UNCITRAL Ybk 287. In its consideration of the features that should be included in the draft model law on international commercial arbitration, the Working Group asked the all-important question, "should the model law contain a definition of the term "arbitration"?", p.5, para 15. In response "The Group concluded that a definition of the term "arbitration" was unnecessary." 6, para 17. A definition had been proposed by the Secretariat. However, it appears that the truth of the matter is that it is not so much that the UNCITRAL Working Group believed that a definition of arbitration was unnecessary, rather they could not formulate a global definition

[189] Francis A Mann, 'Lex Facit Arbitrum' (1986) 2(3) Arb. Int'l 241, 245. See also Barbara A Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Asser Press Springer 2017), 20

Sturges writes that:

> "The identification of arbitration as it is constituted in legal lore is not very difficult. There is a near consensus of judicial utterances and statutory provisions posing it as a process for hearing and deciding controversies of economic consequence between parties. It begins with and depends upon an agreement between the parties to submit their claims to one or more persons chosen by them to serve as their arbitrator".[190]

Carbonneau writes that:

> "Arbitration embodies a trial process grounded in common sense, flexibility, and an ethic of problem-solving. Arbitral proceedings allow disputing parties and their representatives to assemble the facts, present witnesses, assert and contest positions, and argue about governing predicates. They culminate in a final ruling by the adjudicator on the matters under consideration. Only a true failure in procedural fairness may lead to a viable appeal. In other words, arbitration personifies due process and justice. It enables society to resolve disputes and to prosper by dedicating its resources to other activities".[191]

Domke[192] and Paulsson also label arbitration as a process.[193]

Each commentator's striking and glowing description appears to lack some elements which is found in the other. A definition does not jump off the page in any of them. Nevertheless, what is

[190] Wesley A Sturges, 'Arbitration – What Is It?' (1960) 35 N.Y.U.L. Rev. 1031, 1032 [hereinafter "Sturges (n 190)"]. See also Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemp. Asia Arb. J. 255 [hereinafter "Yu (n 190)"], citing Martin Domke, *Commercial Arbitration* (Prentice-Hall 1965), 31; and Tokusuke Kitagawa, 'Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective' in Pieter Sanders and Martin Domke (eds), *International Commercial Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff 1967), 133, 138; Kenneth S Carlston, 'Theory of the Arbitration Process' (1952) 17(4) Law & Contemp. Prob. 631 [hereinafter "Carlston (n 190)"]. He refers to the case of *Reily v Russell* 34 Mo. 524, 528 (1864) to emphasise the notion that arbitration derives from "the will and consent of the parties litigant" [636]

[191] Thomas E Carbonneau, 'Arguments in Favor of the Triumph of Arbitration' (2009) 10 Cardozo J. Conflict Resol. 395

[192] Martin Domke, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* vol I (Gabriel M Wilner ed, rev. ed., Supp. 1995)

[193] Paulsson (n 184), 2, 3; See also Jan Paulsson, 'Arbitration in Three Dimensions' (2010) LSE Legal Studies Working Paper 2/2010 <http://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf> accessed 31 July 2014

understood from them is that arbitration is a 'process' which derives from an agreement of the parties. Confusion intercedes, however, when definitions of descriptions by other commentators are considered.

Wetter, however, writes that "arbitration as a subject is procedure".[194] Coulson,[195] Böckstiegel,[196] and Mclean[197] write that arbitration is a 'system'. Rivkin goes further and writes that it is a system of and for "transnational justice".[198] Thus, there is a real question whether arbitration is a process or a system.

However, further uncertainty arises. Reference to 'mechanism' is in Yu's presentation of the theoretical overview of international commercial arbitration.[199] In exploring the blend of common and civil law procedures in arbitration, Strong[200] writes that this process is a 'means'[201] or as a 'mechanism'.[202] Moreover, de Vries writes that "it is a mode of resolving disputes".[203]

The key difference between these definitions is the use of five nouns, namely, 'process', 'system', 'mechanism', 'mode' and 'means'. The Oxford English Dictionary defines 'process' as "a series of actions or steps taken in order to achieve a particular end"[204] and system as "a set of things working together as part of a mechanism or an interconnecting network; a complex

---

[194] Jan G Wetter, *The International Arbitral Process: Public and Private* vol II (Oceana Publications 1979), 88. See also Sigvard Jarvin, 'The Sources and Limits of the Arbitrator's Powers' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987), 50; David D Caron, 'Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2008) 32 Suffolk Transnat'l L.J. 513, 516. He writes that "Arbitration generally, and international commercial arbitration in particular, is not in fact a system, but rather is a framework within which discrete and possibly unknown private actions are taken"; Andrew Foyle and Saira Singh, 'Arbitration: an introduction to the procedure' (2002) 152(7049) NLJ 1417

[195] Robert Coulson, 'Business Arbitration – What You Need to Know' (1980) American Arbitration Association' New York, N.Y. 6

[196] Karl-Heinz Böckstiegel, 'The Role of Arbitration within Today's Challenges to the World Community and to International Law' (2006) 22(2) Arb. Int'l 165, 165

[197] Mclean (n 61), 1089

[198] David W Rivkin, 'The Impact of International Arbitration on the Rule of Law - The 2012 Clayton Utz Sydney University International Arbitration Lecture' (2013) 29(3) Arb. Int'l. 327, 335

[199] See Yu (n 190)

[200] Stacie I Strong, 'Why is Harmonization of Common Law and Civil Law Procedures Possible in Arbitration but Not in Litigation?' [2013) Legal Studies Research Paper Series Research Paper No. 2013-12 <http://www.ssrn.com/abstract=2266672> accessed 31 July 2013

[201] ibid, 1, 5

[202] ibid, 2

[203] de Vries (n 148), 42

[204] John Simpson and Edmund Weiner (eds), *Oxford English Dictionary* (2nd edn, Oxford University Press 1989)

whole".[205]

The definition of 'mechanism' is:

i. "a system of parts working together in a machine; a piece of machinery;

ii. a natural or established process by which something takes place or is brought about".[206]

The noun 'mode' means "a way or manner in which something occurs or is experienced, expressed, or done".[207]

The definition of 'means' is "an action or system by which a result is brought about; a method".[208]

It may appear to some that the five nouns do not necessarily differ greatly and as such it may not oblige a definitional exercise, particularly as this is a practice, as opposed to theoretical, oriented institution. But they do and it does, because the definitions are dense and whilst they contain a number of elements sufficient enough to define the concept of international commercial arbitration, some important elements are missing. That would make it necessary for a novice ignorant about the institution to unpack its various definitions in order to find an elaborate description of it so as to discover a clear and effective formula that would convey its actual definition.

It would not suffice to refer to the general description that some commentators provide. These definitions are not standard, sound, exact, consistent, or compatible with what the institution is. Hacker writes that meaning is not a matter of scientific discovery but that "What a word means is

[205] ibid

[206] ibid

[207] ibid

[208] ibid

specified by the common, accepted explanation of its meaning".[209] It functions as a rule of the correct application of the term.

Despite the useful contributions made by the commentators cited, when one considers Mann's finding, it appears necessary to discover a useful of definition of international commercial arbitration by ascertaining the consensus that Sturges refers to; and this may come from scholarly works as well as judicial utterances and statutory provisions.

A definitional exercise of international commercial arbitration is mandatory, despite this institution being practice oriented. This would be in pursuit of cognitive processing of the historical, contemporary and future perspective of this institution. The reason is that definition in this sense does not refer to the dictionary structure but a definitional analysis pertaining to its nuclear meaning in practice. An assumption is made that there is a common meaning given to a lexeme. But "It is only when ambiguities arise or when we interact in unique environments requiring explicit definitional analyses that the fundamental shortcomings associated with the use of the words become apparent".[210]

A good definition contains different information about the specific term or phrase.[211] Usón and Benítez write that to understand conceptual structures necessitates an examination of the "linguistic representations of these concepts and their interrelationships".[212] It allows for what Weinrich calls "semantic mapping",[213] which means connecting a web of words and their related concepts.

To make any connection between the nouns referred to above with the related concepts of international commercial arbitration and to discover the missing insensible parts, it is essential at this juncture to look at the practical steps disputing parties take to implement their arbitration

[209] Peter MS Hacker, *Human Nature: the Categorial Framework* (Blackwell Publishing 2007), 46

[210] James G Cantrill, 'Definitional Issues in the Pursuit of Argumentative Understandings: A Critique of Contemporary Practice' (1988) 9 Contemporary Argumentation & Debate 45, 45

[211] Ricardo M Usón and Pamela F Benítez, 'Definitional Analysis in the Functional-Lexematic Lexicographic Model' (1997) 9 Alfinge 219, 219

[212] ibid, 219-220

[213] Uriel Weinrich, 'On the Semantic Structure of Language' in Joseph H Greenberg (ed), *Universals of Language* (2nd edn, MIT 1961) 114, 114

agreement and adjudicate their dispute. This is to understand its practical application.

1.9 Configuration of International Commercial Arbitration Proceedings

Understanding how arbitration proceedings come to being is crucial to determine if international commercial arbitration is a process/system/mechanism/means/mode. Arbitration is tenuous because the number of actions or steps to be taken to achieve a final and binding award is very few. The parties enter into a written arbitration agreement, which provides the guiding principle of how the parties' dispute should be adjudicated.

An agreement to arbitrate generally stipulates the following:[214]

1. Form of arbitration – *ad hoc* or institutional;

2. Procedural rules to be employed. For example, the parties may select the rules of an arbitration centre, such as the International Court of Arbitration of the International Chamber of Commerce (ICC) Rules of Arbitration[215] or the London Court of International Arbitration (LCIA) Arbitration Rules;[216] the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) (ICDR-AAA) International Arbitration Rules;[217] Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules;[218]

3. Law governing the contract;

4. Number of arbitrators to hear the dispute;

[214] de Vries (n 148) citing Pierre A Lalive, 'Problèmes relatifs à l'arbitrage international commercial' vol. I (1967) 120 Recueil des Cours 569 "The arbitration proceeding is governed by the totality of the terms of the agreement to arbitrate, the rules of the arbitration association, if any selected, and the arbitration law of the place of arbitration, the lex arbitri".

[215] Rules of Arbitration of the International Chamber of Commerce 2012 [hereinafter "ICC Rules (n 215)"]

[216] London International Court of Arbitration Rules 1998 [hereinafter "LCIA Rules (n 216)"]

[217] American Arbitration Association International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) 2014 [hereinafter "ICDR-AAA Rules (n 217)"]

[218] Hong Kong International Arbitration Centre Administered Arbitration Rules 2013 [hereinafter "HKIAC Rules (n 218)"]

5. Language of the arbitration; and

6. Place or seat of arbitration, meaning the law governing the arbitration.

A party initiates proceedings as prescribed in the agreement. This is the second step in the arbitration process.

A consideration of the rules of the centres, such as those named, is essential in understanding how *ad hoc* and administered arbitration is commenced for the purposes of determining which of the five nouns accurately describes the institution. A party shall file a written 'Request for Arbitration'[219] or a 'Notice of Arbitration'.[220] If the chosen arbitration centre agrees to administer the requested proceedings, which it is not obliged to do,[221] then the request will be sent to the respondent(s) named thereof.

A filing fee is paid by the party filing a claim, counterclaim, or additional claim. That party will become the claimant. He will await an 'Answer to Request';[222] a 'Response to Request';[223] a 'Statement of Defense';[224] or an 'Answer to the Notice of Arbitration',[225] including any counterclaim, to be filed by the respondent.

The next step is for the centre to appoint the arbitral tribunal, consisting either of one, two[226] or three arbitrators as ascertained from the arbitration agreement. A fundamental tenet of arbitration is that each party has a say in the appointment of the arbitrator who is to adjudicate the case.[227]

[219] art 4 ICC Rules (n 215); art 1 LCIA Rules (n 216)

[220] art 2 ICDR-AAA Rules (n 217); art 4 HKIAC Rules (n 218)

[221] n 19

[222] art 5 ICC Rules (n 215)

[223] art 2 LCIA Rules (n 216)

[224] art 3 ICDR-AAA Rules (n 217)

[225] art 5 HKIAC Rules (n 218)

[226] In some jurisdictions, notably in England and Hong Kong, it is permissible for the parties to appoint two arbitrators who would conduct the hearings. Where they fail to agree on a decision, they then appoint an umpire to whom the party-appointed arbitrators present, as advocates, the case of the appointing parties. The umpire then makes a decision. See Arbitration Act 1996, s. 21 [1996, c. 23] and Hong Kong Arbitration Ordinance 1997, s. 10 [1997, c. 341]

[227] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, Sweet & Maxwell 1999) 190. See also Lew et al. (n 112), 232 "the quality of arbitration proceeding depends to a large extent on the quality and skill of the arbitrators chosen"; Smit (n

The norm is that in a case requiring a single arbitrator either the parties mutually select one or the centre appoints one. Where the arbitration clause specifies three arbitrators, then each party appoints one and the two party-appointed arbitrators choose a chairman.[228] A tribunal is then formed.

When an arbitral tribunal is successfully constituted then the case file to be transferred to it. Either before[229] or after the file is transferred[230] the parties pay the applicable fees to the centre administering the proceedings. [231]

Transferring the file to a tribunal leads to the administrative body relinquishing their general management responsibilities to the tribunal and the parties correspond directly with it. Henceforth a case management conference[232] or a preparatory conference,[233] as a preliminary meeting, is fixed by the tribunal in order to establish a procedural timetable setting out the actions of the parties and the tribunal to the conclusion of the proceedings.

They agree the dates for the submission of the 'Statement of Claim', the 'Statement of Defence'; witness testimony; evidence; and expert evidence. This is in preparation for the substantive hearing. An agreement is also reached as to rules of evidence. There then follows the production of a 'Scheduling Order',[234] the 'Terms of Reference',[235] a 'provisional timetable'.[236]

An arbitral tribunal may adopt any means appropriate to establish the facts of the case provided that the parties are treated with equality and that each is given a fair opportunity to present its case.[237] It is a choice for the parties, or the arbitral tribunal in consultation with the parties,[238] if

---

12), 15

[228] For example, see art 11(3)(a) and (b) Model Law

[229] art 16 ICC Rules (n 215)

[230] art 24 LCIA Rules (n 216)

[231] See for example art 40.1 HKIAC Rules (n 218); art 3(iv) LCIA Rules (n 216); art 37(2) ICC Rules (n 215); art 36 ICDR-AAA Rules (n 217)

[232] art 24 ICC Rules (n 215). cf art 14.1 and 14.2 LCIA Rules (n 216) - the LCIA does not oblige an initial case management hearing

[233] art 16(2) ICDR-AAA Rules (n 217)

[234] art 20(2) ICDR-AAA Rules (n 217)

[235] art 23(1) ICC Rules (n 215)

[236] art 13.2 HKIAC Rules (n 218)

[237] art 22(4) ICC Rules (n 215); art 14.4(i) LCIA Rules (n 216); art 20(1) ICDR-AAA Rules (n 217); art 13.2 HKIAC Rules (n 218)

they wish to present testimony and evidence to the tribunal orally at a hearing where examination in chief and cross-examination of witnesses occurs or have the case adjudicated solely on documents.[239] At all times, the tribunal is mindful that the arbitration is the arbitrants' voluntary construction of their own informal and flexible dispute settlement process.[240] International commercial arbitration is premised on '*pacta sunt servanda*'.

Following collection of the parties' testimony, evidence and submissions, the tribunal close the proceedings. Following a reasonable period for consideration, the tribunal renders its final and binding and reasoned award in writing.[241] Rendering of an award brings the arbitration proceedings to an end.

Though it is always anticipated that the losing party will honour the award, frequently, however, the final stage of arbitration proceedings is the enforcement of the arbitration award. Whilst it is trite that an arbitral award is final and binding, one of the risks inherent in international commercial arbitration is non-enforceability of the award. Recognition and enforceability of an award often follows a petition to a national court, preferably one that is signatory to the New York Convention, where it is believed that the losing party has assets.

Such petition must satisfy the formal requirements of article IV of the Convention.[242] A petition is submitted to national courts because they are the actors in this institution with "greater formal authority, resources and discursive legitimacy", and this authority is "related to an institutional actor's legitimately recognized right to make decisions".[243] More importantly, an international

---

[238] art 1(4) ICDR-AAA Rules (n 217); art 19.1 LCIA Rules (n 216); art 22.4 HKIAC Rules (n 218)

[239] art 25 ICC Rules (n 215)

[240] See Pryles (n 41); de Vries (n 148) 42 "The arbitral process is a branch of the law of procedure. It is based on contract, rather than on legal norms established by states for the creation of judicial settlement of disputes".

[241] art 31(1) ICC Rules (n 215); art 26.2 LCIA Rules (n 216); art 30 ICDR-AAA Rules (n 217); art 30 HKIAC Rules (n 218)

[242] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999), 966ff; Albert J van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* Kluwer Law International (1981), 11ff [hereinafter "van den Berg (n 242)"]; Gino Lörcher, 'Enforceability of Agreed Awards in Foreign Jurisdictions' (2001) 17(3) Arb. Int'l 275. See also Susan Choi, 'Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions' (1995) 28 N.Y.U.J. Int'l L. & Pol. 175 [hereinafter "Choi (n 242)"]. Joseph T McLaughlin and Laurie Genevro, 'Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts' (1986) 3 Int'l Tax & Bus. Law 249

[243] Phillips et al. (n 50), 33, 219

organisation does not exist to carry out such task.

Despite the strength of the New York Convention, enforcement of arbitral awards is not free of difficulties. A losing party could appeal the decision of the tribunal to a national court by virtue of article V of the New York Convention. This provision avails a total of seven substantive defences that can be raised by both the parties (generally article V(1) (a); (b); (c); (d); and (e)); and the national court dealing with the petition to recognise and enforce the award (generally article V(2) (a) and (b)). The principle of these seven exhaustive defences is to eliminate misuse of the arbitration process by the parties. Still, contentions by defendants could be raised frequently as a method to postpone not only the rendering of award but also its enforceability.

The procedure for enforcement of an arbitral award or the challenge thereto relies on a system completely detached from arbitration – this being the judiciary of nation states. This demonstrates that "arbitration cannot be divorced completely from national courts"[244] and that "International commercial arbitration cannot function effectively without the assistance of national courts".[245] Arguably, this imperils the legal effectiveness of arbitration because it defeats the very purpose why parties choose to reject litigation to settle their dispute and instead opt for arbitration to avoid national courts. In effect, it raises doubt about the legitimacy of arbitration as a method of dispute resolution. Legitimacy requires the institution itself to exert "a pull towards compliance on those addressed normatively".[246] This does not appear present in arbitration.

1.10 Why Define International Commercial Arbitration?

Now that the steps that parties follow to have their dispute adjudicated are clearly outlined, it is important to tackle the question of why to define international commercial arbitration. Achieving a unique, unambiguous, unequivocal and ubiquitous, standard, sound, exact, and consistent formal definition that is compatible with what the institution stands for is necessary.

[244] Choi (n 242) 175

[245] Holtzmann (n 148), 253

[246] Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990), 16 [hereinafter "Franck (n 246)"]

Philosophers of logic and language disagree with mixed-up definitions, such as those of international commercial arbitration cited above, because they seem incomplete and achieve only a certain purpose of defining the institution, but not others. For example, none of them mention recognition and enforcement or appeal of arbitral awards.

Philosophers of language prescribe that every meaningful expression should fall under one of the numerous categories of definitions.[247] This is so as to explain the technical meaning of words or phrases and to distinguish the difference between the meaning of a term and its designation or what it denotes. A dictionary definition of 'international'; 'commercial'; and 'arbitration' would provide sufficient information to impart an understanding of the label, but not satisfy the philosophical quest.

Carnap prescribes two analytic categories of definitions.[248] According to its (i) 'intensional' definition, which specifies the essential characteristics, the term international commercial arbitration evokes the concept that it is a process used by businesses trading across national borders to adjudicate their disputes. In its (ii) 'extensional' definition, which identifies the term being defined as a concept in a class to which the term refers, it is one of the several processes for adjudication of disputes. Indeed, international commercial arbitration also has a 'stipulative' definition, which gives its 'lexical'; 'functional'; 'precising'; 'theoretical'; and 'persuasive' meaning.

A definition is an art and not a science.[249] A definition is either of 'real essence' or of 'nominal essence',[250] meaning that it is either a 'real definition' or a 'nominal definition'.[251] Nominal

[247] Stan Baronett, *Logic* (3rd edn, Oxford University Press 2015), 61-68

[248] Rudolf Carnap, *Meaning and Necessity* (University of Chicago Press 1947). See also Roy T Cook, *A Dictionary of Philosophical Logic* (Edinburgh University Press), 155

[249] Susan Thomas, 'The Importance of Being Earnest about Definitions' in Gottfried Vossen and others (eds), *Datenbanksysteme in Business, Technologie und Web* (Gesellschaft für Informatik 2005)

[250] John Locke, *An Essay Concerning Human Understanding* (Peter H Nidditch ed, Oxford University Press, 1975), see III, vi, 5; III.vi.6; III.iii.15; III, vi, 29; [hereinafter "Locke (n 250)"]. See also Antoine Arnauld and Pierre Nicole, *Logic, or the Art of Thinking* (Jill V Buroker ed and tr, 5th edn, Cambridge University Press 1996), ch 12, 60-63

[251] Richard Robinson, *Definition* (Oxford University Press 1950). See also William of Ockham, *Ockham's Theory of Propositions: Part I of the Summa Logicae* (Alfred J Freddoso and Henry Schuurman trs, 1st edn, St. Augustines Press 2011)

essence is the "abstract Idea to which the Name is annexed".[252] A definition is 'nominal' because it implicitly defines the word or term. This communicates the few obvious properties observed in the idea or name. The name is a generic description which does not suffice as a definition because it does not communicate the relevant characteristics of what it actually represents.

In the philosophy of language names are "tags"'[253] or "rigid designators".[254] Whilst names have a definite description they do not have meaning, but have a directly referential designation of an object without descriptive content but which gives meaning and existence to the name. Locke writes that "By this real Essence, I mean, the real constitution of any Thing".[255] A definition is 'real' because it explicitly defines the word or term. This conveys the unapparent components which are connected to the obvious ones, which means that nominal essence is dependent on real essence.

On the importance of linguistic construction and the potential consequences of any ambiguity thereto, the House of Lords in *Premium Nafta Products Ltd v Fili Shipping Company Ltd*[256] considers the wording of arbitration clauses, such as "arising under", "arising out of", "in relation to", or "in connection with", in a contract. Their Lordships conclude that "the distinctions which they make reflect no credit upon English commercial law" and "the time has come to draw a line under the authorities to date and make a fresh start".[257] A similar point is made by Adams that model contract language usually exhibits significant shortcomings. For example, "The couplet "controversy or claim" smacks of redundancy. Why not just say "disputes"?[258] Standard English achieves clarity, which is essential for contractual terms.

Gricean theory is that communication should not be redundant.[259] The crucial difference between

[252] Locke (n 250), III.vi.2

[253] Ruth B Marcus, 'Modalities and Intensional Languages' (1961) 13(4) Synthese 303, 309-310

[254] Saul Kripke, *Naming and Necessity* (Harvard University Press 1980), 48

[255] Locke (n 250), III.vi.6

[256] [2007] UKHL 40

[257] ibid, [12]

[258] Kenneth A Adams, *Manual of Style for Contract Drafting* (3rd edn, American Bar Association 2008), 16.11

[259] Herbert P Grice, 'Logic and Conversation' in Peter Cole and Jerry L Morgan (eds), *Syntax and Semantics* vol 3 (Academic Press 1975) 41, 54-58 [hereinafter "Grice 1975 (n 259)"]. See also Grice 1989 (n 186), 26

the five nouns mentioned above is that each means something different, though they may be synonymous. Synonym usage or definition by substitution, which is what the above outlined mix-up is, makes it extremely difficult for the actual meaning of international commercial arbitration to be ascertained from them. This results in regress because the specific context in which the term applies is not restricted to a defined or an agreed parameter.[260]

Furthermore, there is the danger that usage of the term lacks definition-specific application. For words and phrases to have meaningful utility they must be uttered with certain intention by all interactants so that it has the specific meaning intended.[261] Grice's conversational implicature study to distinguish between what is said and what is meant concludes that "it is not possible to find another way of saying the same thing, which simply lacks the implicature in question".[262] This is reinforcement of Locke's conception that human knowledge is hampered by words without fixed signification.

The similarity in all the above mentioned attempts to define this institution is that they all fail to make clear that arbitration is "a substitute for litigation in the courts",[263] which is its underlying intention. Sturges writes that judges expand on the basic definition of arbitration. He cites four reported cases in which judges express that arbitration is a substitute tribunal for the courts of the land.[264] Furthermore, from the abovementioned definitions it is not clear if the process/system/mechanism/means/mode is in fact adversarial or non-adversarial. This is a fundamental characteristic to communicate, for it would allow a potential user to know the setting – to prepare for trepidation or tranquillity. Arbitration proceedings often encompass a hearing at which examination in chief and cross-examination of witnesses occurs. It is, therefore, an adversarial process. Sturges emphasises that arbitration is not litigation because there is little resemblance in terms of the process that they each follow. Fundamentally "arbitration displaces

[260] Donald Davidson, 'Belief and the Basis of Meaning' (1974) 27(3/4) Synthese 309. See also Herbert P Grice, 'Utterer's Meaning and Intentions' (1969) 78(2) Philos. Rev. 147; David K. Lewis, *Convention* (Harvard University Press 1969); Horwich (n 169), 49

[261] See n 179

[262] Grice 1975 (n 259), 57. See also Chigara (n 183), 119-120; Allan C Hutchinson, 'From Cultural Construction to Historical Deconstruction' (1984) 94 Yale L. J. 209, 209-210

[263] Sturges (n 190), 1032. See also Carlston (n 190) "Arbitration is a means, a method, a procedure, rather than an agreement", 632

[264] Sturges (n 190), fns 4-7

all significant aspects of civil litigation except the right of hearing".[265]

What the listed definitions fail to achieve is carry "the Power to produce any Idea in our mind"[266] because most convey the 'nominal definition' as opposed 'real definition' or 'nominal essence' as opposed to 'real essence'. Therefore, the essential question must be why there is manifold definitions of arbitration? Perhaps there is a semantic problem with arbitration, or perhaps it is unnecessary usage of synonym. What is the purpose of referring to it as a process, a system, a mechanism or a means? The answer may be linked to the fact that there are four theories on arbitration. In examining the nature of arbitration Yu[267] proceeds from the view of national courts and analyses the four theories that classify arbitration.

She begins by "looking into the nature of international commercial arbitration to see how each theory defines the mechanism of international commercial arbitration".[268] She examines four theories of arbitration by considering four factors, including how national courts define international commercial arbitration. The very basis of her study is that "different interpretations have been given by national courts on various aspects of arbitration",[269] which stems from national courts espousing different theories of international commercial arbitration.

As academics and practitioners alike do not agree on whether arbitration is a 'system' or a 'process', or indeed whether it is a 'mode', a 'means' or a 'mechanism', it is essential to decide which it is. Referring to arbitration as a 'mechanism', 'mode' and 'means' cause difficulty so far as their meaning is concerned. Defining arbitration as a 'mechanism' leads to confusion as to whether it is a 'system' or a 'process'. This would necessitate further understanding to know which of these two nouns accurately describes it. A 'mode' is a way or manner in which something is done. This requires knowing it is a 'way' or 'manner' of doing what exactly. Yet, the word 'mode' lacks conviction for it requires prior knowledge of the function of arbitration so as to make the aforesaid logical connection. A 'means' is "an action" or a "system" or "a

[265] ibid, 1034

[266] Locke (n 250), II.viii.8

[267] Yu (n 190)

[268] ibid 257

[269] ibid, 256

method". It would appear logical for the word 'arbitration' conveys an action of a dispute being resolved; therefore, something is occurring, or something is being done about the dispute. But this is also ambiguous because whilst "an action" and a "method" imply a singular event, a "system" indicates a set of events.

It seems necessary to define international commercial arbitration if not for any other reason, for the sake of clarity. However, 'mechanism', 'mode' or 'means' must be eliminated from consideration for these nouns ultimately convey a sense of process or system. Thus, the sole question should be whether arbitration is a 'system' or a 'process'. These two nouns appear most frequently in literature describing arbitration.

The dictionary definition on its own, however, is not sufficient to determine whether to classify arbitration as a system or a process. An analytical perspective of the purpose, functionality, and legitimacy of international commercial arbitration gives rise to the need to delve, briefly, into the theory of system and theory of process. A system or a process possesses certain characteristics. In any system or process a structure must be present to demonstrate the direct or indirect relation between its various components. Also, both a system and a process are identified by particular behaviour. This refers to the method followed in order to produce the desired outcome. A system or a process has to show the relationship between these two characteristics, namely the particular behaviour and the desired outcome.

Bertalanffy defines a system as components that work together in relationships for the objective of the whole.[270] Deming provides an identical definition and writes that it is "a series of functions or activities within an organization that work together for the aim of the organization".[271] Senge writes that in a system there is a set of variables that influence one another.[272] Juran writes that a process is "a systematic series of actions directed to the

[270] Ludwig von Bertalanffy, *General System Theory: Foundations, Development, Applications* (George Braziller 1968), 36-38, 45, 55. See also Stephen G Haines, *The Complete Guide to Systems Thinking and Learning* (Human Resource Development Press 2000), 2; Daniel Katz and Robert L Kahn, *The Social Psychology of Organizations* (2nd edn, John Wiley & Sons 1966), 22

[271] William E Deming, *The New Economics for Industry, Government, Education* (2nd edn, MIT Press 1994), 50

[272] Peter M Senge, *The Fifth Discipline, The Art and Practice of the Learning Organization* (Crown Publishing Group 2006). See also Jay W Forrester, *Principles of Systems* (MIT Press 1968), 1-1

achievement of a goal".[273] Davenport writes that:

> "In definitional terms, a process is simply a structured, measured set of activities designed to produce a specified output for a particular customer or market.
>
> …
>
> A process is thus a specific ordering of work activities across time and place, with a beginning, an end, and clearly identified inputs and outputs: a structure for action".[274]
>
> …
>
> "Taking a process approach implies adopting the customer's point of view. Processes are the structure by which an organization does what is necessary to produce value for its customers".[275]

A system entails two key elements, (i) a series of functions or activities that (ii) influence one another. The former without the latter describes a process, meaning a set of activities to produce a specified output. Owing to party autonomy, configuration of arbitration proceedings varies. Thus, the set of activities for arbitration proceedings is not always as prescribed, but the desired outcome is still achieved by the rendering of an award. Labelling arbitration as a system or a process is, therefore, indispensable to defining the institution and for the purpose of discovering any institutional entrepreneurship opportunity that could enhance it.

From the definitions of international commercial arbitration and the description of the course that the proceedings follow, it does not fit into the definition of 'system' because there is no 'set of things' that 'work together' since recognition and enforcement of an arbitral award is carried is a

[273] Joseph M Juran, *Juran on Quality by Design: The New Steps for Planning Quality into Goods and Services* (Free Press 1992), 219

[274] Thomas H Davenport, *Process Innovation: Reengineering Work Through Information Technology* (Harvard Business School Press 1993), 5

[275] ibid, 7. See also Michael Hammer and James Champy, *Re-engineering the Corporation: A Manifesto for Business Revolution* (Harper Business 1993), 35; Henry J Johansson, *Business Process Reengineering: Breakpoint Strategies for Market Dominance* (John Wiley & Sons 1993), 209

step entirely detached from the arbitral tribunal and centre. But it appears to fit perfectly with the definition of 'process' because a 'series of actions or steps' must be taken by the parties and for the arbitral tribunal so as to produce an award. Carlston writes that "… it is erroneous to assume that the arbitration process remains the same and is uniform wherever the elements of its structure appear. It is erroneous to assume that arbitration is purely a structural concept …".[276]

Litigation in national courts also follows a series of actions or steps. However, a national legal system requires adherence to the rules for litigation that are pre-determined by the judicial structure of a sovereign state in which the court administering the proceedings is situated.[277] This is because a court of law is part of a defined system. In arbitration, such rules are defined by the parties either by adopting the rules of a particular arbitration centre or making up their own, or a mixture of both. For that reason, it is a process and not a system.

To flush through the sieve of warranted and undesirable definitions, a broad definition that is demonstrably unique, unambiguous, unequivocal and ubiquitous may surface. This may derive from a new construct or on existing architecture provided by various commentators. Moreover, any definition of international commercial arbitration must encompass the institutional elements of this social institution. Thus, before any definition could be formulated, it is essential to understand what the foundation of this institution is.

1.11 Upon which Elements of Institution is International Commercial Arbitration Founded?

Institutions are constituted of certain elements, which are "the vital ingredient of institutions".[278] Institutions as multifaceted, durable social structures, being relatively resistant to change and passed on across generations.[279] Institutions are composed of the 'cultural-cognitive',

[276] Carlston (n 190), 636

[277] Karyl Nairn, 'Arbitration: The Latest Fashion or a Classic Choice?' (2002) 11 JIBFL 431, 431

[278] Scott 2014 (n 8), 59

[279] Jepperson (n 10), 144-145. See also Lynne G Zucker, 'The Role of Institutionalization in Cultural Persistence' (1977) 42(5) Am. Sociol. Rev. 726; Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1984), 24 [hereinafter "Giddens (n 279)"]; John W Meyer, John Boli and George M Thomas, 'Ontology and Rationalization in the Western Cultural Account' in George M Thomas and others, *Institutional Structure: Constituting State, Society and the Individual* (SAGE 1987) 12, 13

'normative' and 'regulative' pillars.[280] They comprise of a community of organisations that partakes in a common meaning system. Scott's cultural-cognitive, normative and regulative perspectives provide the right approach to understanding institutions in many areas, including the adoption of quality practices in international business[281] and different attitudes in entrepreneurship.[282]

Institutional environments are expressly guided by distinctive beliefs and values to create common understanding in the institution. Many examples can be cited of institutions composed of the 'cultural-cognitive', 'normative' and 'regulative' pillars. The European Union is a good example. It is composed of many organisations including the European Parliament, the Council of the European Union, the European Commission, the Court of Justice and the European Court of Human Rights. The African Union is similarly structured – with the three pillars of an institution.

Examination of the three pillars is essential so as to identify which features of the three pillars are present in this social institution in order[283] to understand whether or not an opportunity for institutional entrepreneurship exists in this regard. If it does, what type of opportunity it is.

1.11.1 Cultural-Cognitive Pillar

Neoinstitutionalists or cognitive theorists, such as DiMaggio, Powell and Scott, and also anthropologists and sociologists, emphasise cognitivism aspects of institutions. The cultural-cognitive pillar[284] is concerned with how human beings using their own symbolic representations as well as objective conditions attribute meaning to external objects, action, events, and

[280] William R Scott, *Institutions and Organizations* (2nd edn, SAGE 2001), 48, 52 [hereinafter "Scott 2001 (n 280)"]. See also Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991), 8 [hereinafter "Powell and DiMaggio (n 280)"]; Andrew J Hoffman, 'Institutional Evolution and Change: Environmentalism and the U.S. Chemical Industry' (1999) 42(4) Acad. Manag. J. 351 [hereinafter "Hoffman 1999 (n 280)"]

[281] Tatiana Kostova and Kendall Roth, 'Adoption of an Organizational Practice by Subsidiaries of Multinational Corporations: Institutional and Relational Effects' (2002) 45(1) Acad. Manag. J. 215 [hereinafter "Kostova and Roth (n 281)"]

[282] Lowell W Busenitz, Carolina Gómez and Jennifer W Spencer, 'Country Institutional Profiles: Unlocking Entrepreneurial Phenomena' (2000) 43(5) Acad. Manag. J. 994

[283] Jonathan Turner, *The Institutional Order* (Longman 1997), 6; Giddens (n 279), 24; Rom Harre, *Social Being* (Blackwell 1979), 97-98

[284] Scott 2014 (n 124), 66-70. Hoffman 1999 (n 131)

behaviour. Scott writes that cultural-cognitive institutions derive from "the shared conceptions that constitute the nature of social reality and the frames through which meaning is made".[285] To attach meaning to social action, the recipient conducts an information-processing activity by taking into account aggregate conditions, both objectively and subjectively, and interprets them to make a proper evaluation, judgment, prediction, or draw inference[286] in order to distinguish a situation from what it is and what it should be because people carry different perceptions.[287]

Hoffman writes that "Cognitive institutions could be called taken-for-granted beliefs, myths, prejudices, or clichés" and it is a "product of "natural" development".[288] This makes such institutions informal. In terms of this pillar, compliance to the relevant rules occurs as a matter of routine because there is common programmed understanding how a particular action should be carried out and which actor within the collectivity of actors should carry out such action.[289] Any behaviour contrary to the prefabricated institutional model within the belief systems of the actors in the institution is inconceivable because the actors do not choose how to act.

This pillar is premised on actors aligning themselves with the cultural beliefs of the common framework of meaning dominant in the particular institution. On the one hand, this creates certitude and confidence and makes the actors feel competent and connected because they have learned the process of interaction within the common framework. On the other hand, this could create confusion or disorientation where the actors have not become familiar with the common model and do not, therefore, know what is expected of them.

Internal symbolic representations are influenced by both culture and a shared understanding of social action or interaction applying both the subjective and objective conditions. In essence,

---

[285] Scott 2001 (n 280), 57

[286] Hazel R Markus and Robert Zajonc, 'The Cognitive Perspective in Social Psychology' in Gardner Lindzey and Elliot Aronson (eds), *The Handbook of Social Psychology* (3rd edn, Random House 1985) 137

[287] Paul J DiMaggio, 'Culture and Cognition' (1997) 23(5) Am. Sociol. Rev. 263 [hereinafter "DiMaggio (n 287)"]; Mike GF Martin, 'Perception, Concepts, and Memory' (1992) 101(4) Phil. Review 745; John H McDowell, *Mind and World* (Harvard University Press 1994), 162; Ann Swidler, 'Culture in Action: Symbols and Strategies' (1986) 51(2) Am. Sociol. Rev. 273

[288] Andrew J Hoffman, *From Heresy to Dogma: An Institutional History of Corporate Environmentalism* (Stanford Business Books 2001), 36 [hereinafter "Hoffman 2001 (n 288)"]. See also Berger and Luckmann (n 44), 79

[289] Berger and Luckmann (n 44), 70-75

"Every human institution is, as it were, a sedimentation of meaning or, to vary the meanings, a crystallization of meanings in objective form".[290] Meaning that what a human being does is a function of his internal representation of his environment.[291] For this reason, social exchanges in cultural-cognitive institutions could be affected by risk and ambiguity.[292]

1.11.2 Normative Pillar

Institutions resting on the 'normative pillar'[293] rely on prescriptive, evaluative, and obligatory work norms (or rules or habits) and values. Norms specify both the goals and objectives to be achieved and the legitimate means to pursue these normative expectations.[294] Values specify the standards for assessing the behaviour of the actors in their pursuit of such goals. Such norms and values could apply either to all or only selected members of the social actors. Where they are directed at specific actors the concept of formally or informally constructed roles arises within such defined group.

Actors to whom defined roles are assigned carry out the specified responsibilities with access to the relevant material resources. Additionally, they are given rights specific to the roles. These rights and responsibilities include the rules on how an incumbent of a role is to behave towards an incumbent of another role.[295] A good illustration, as given by Hoffman,[296] is the presentation of an annual report to stakeholders of a corporation in conformity with, not a particular law or regulation, corporate values and policies and requirements of good governance. Weber writes that "From a sociological point of view an 'ethical' standard is one to which men attribute a certain type of value and which, by virtue of this belief, they treat as a valid norm governing their

[290] Peter L Berger and Hansfried Kellner, *Sociology Reinterpreted: An Essay on Method and Vocation* (Anchor Books 1981), 31. See also Berger and Luckmann (n 44) 85-89

[291] Roy G D'Andrade, 'Cultural Meaning Systems' in Richard A Shweder and Robert A LeVine (eds), *Culture Theory: Essays on Mind, Self and Emotion* (1st edn, Cambridge University Press 1985) 88, 88. See also Clifford J Geertz, *The Interpretation of Cultures* (Basic Books 1973), 10-13

[292] Scott A Shane, Shekhar T Venkataraman, Ian C MacMillan, 'Cultural Differences in Innovation Championing Strategies' (1995) 21(5) J. Manag. 931 [hereinafter "Shane et al. (n 292)"]

[293] Scott 2014 (n 124), 64-66. See also Hoffman 1999 (n 280); Everett C Hughes, *Men and Their Work* (Free Press 1958), 40, 57, 61 [hereinafter "Hughes (n 293)"]

[294] Scott 2001 (n 280), 55

[295] James G March and Johan P Olsen, *Rediscovering Institutions* (Free Press 1989), 21-23

[296] Hoffman 2001 (n 288), 38

action".[297]

The logic behind this pillar, which is premised on a conception embraced by sociologists and political scientists, is that normative prescriptions are delineated and the actors are expected to behave appropriately in response to them in accordance to their defined role and in disregard to their interests. It is a concept premised on social morals and obligations[298] where constraint as well as empowerment is imposed on the social behaviour through rights and privileges conferred upon the social actors.

Compliance with the norms derives from the social obligation and expectation in the form of external pressure that is internalised by the actors. Adherence to the rules evokes pride and honour and violation of the rules leads to shame; remorse; or disgrace. Such strong feelings are linked to self-respect and self-evaluation. Galtung writes that actors anticipate negative sanctions if they carry out actions which are discouraged.[299]

This explains why this conception is more prevalent in institutions where the relationship is based on common beliefs, expected values and social obligations for standard operation such as in families, religious organisms, social classes, and voluntary associations. Together, these elements induce or increase obedience to the prevailing rules because norms and values provide a stable social order and predictability. This explains Hoffman's perception that it is a "product of political dynamics" and "of direct human design".[300]

The role of social obligations in this informal structure places importance on 'collectivism' governed by uniformly applied rules rather than 'individualism' in personal relationships.[301]

---

[297] Max Weber, 'The Concept of Legitimate Order' in Talcott Parsons and others, *Theories of Society: Foundations of Modern Sociological Theory* vol I (The Free Press of Glencoe, Inc. 1961) 229, 237. See also Hughes (n 293), 78-87

[298] Arthur L Stinchcombe, 'On the Virtues of the Old Institutionalism' (1997) 23(1) Annu. Rev. Sociol. 1, 18. See also Hughes (n 293), 78-87

[299] Johan V Galtung, 'The Social Functions of a Prison' (1958) 6(2) Soc. Probl. 127, 127. See also Robert J Bursik Jr and Harold G Grasmick, 'The Use of Contextual Analysis in Models of Criminal Behavior' in John D Hawkins (ed), *Delinquency and Crime: Current Theories* (Cambridge University Press 1996) 236

[300] Hoffman 2001 (n 288), 36

[301] Philip Selznick, 'Foundations of the Theory of Organization' (1948) 13(1) Am. Sociol. Rev. 25; Harry C Triandis, *Individualism and Collectivism* (Westview Press 1995)

Collective responsibility and obligations increases cooperation and reduces transaction costs, but also there is tolerance for ambiguity related to willingness to take risk.[302]

1.11.3 Regulative Pillar

Institutions are under the 'regulative pillar'[303] when constraints and regularisation of behaviour happens through rule-setting, monitoring, and sanctioning of the relevant activities conducted under the auspices of the institution in question. Recognised and accepted processes, both formal and informal, exist not only to establish policies and work rules to regulate the institution's activities but also to ensure conformity to the rules and apply them to reward or punish the actors of the institution to influence their future behaviour.

This pillar is grounded on explicit regulatory processes in a formal or informal system backed by a hierarchical machinery of enforcement providing both "surveillance and sanctioning".[304] Scott writes that "Force, sanctions, and expedience responses are central ingredients of the regulatory pillar".[305] Organisations, for example, create rules and enforce sanctions to serve their interests and those of its members. The organisation and its individuals decide whether not to advance such interests by conforming, or not, to the rules. Actors in an organisation, with the relevant capacity and authority, could constrain the behaviour of the other actors in the organisation.[306]

It is another pillar that Hoffman calls a "product of political dynamics" and "of direct human design".[307] This pillar is more dynamic and complex because it is made up of a variety of actors, including the sovereign state as the central actor.[308] This pillar is favoured by scholars of rational

[302] Shane et al. (n 292)

[303] Scott 2014 (n 124), 59-64. See also Jennifer Palthe, 'Regulative, Normative, and Cognitive Elements of Organizations: Implications for Managing Change' (2014) 1(2) Manag. Organ. Stud. 59; Rick Delbridge and Tim Edwards, 'Inhabiting Institutions: Critical Realist Refinements to Understanding Institutional Complexity and Change' (2013) 34(7) Organ. Stud. 927

[304] Scott 2014 (n 124), 64

[305] ibid, 61

[306] Carol A Caronna, 'The Misalignment of Institutional "Pillars": Consequences for the US Health Field' [2004] J. Health Soc. Behav. (Suppl.) 45. See also Phillips et al. (n 50)

[307] Hoffman 2001 (n 288), 36

[308] Hélène Peton and Stéphan Pezé, 'The Unsuspected Dynamics of the Regulative Pillar: The Case of Faute Inexcusable in France' (2014) 17(3) M@n@gement 145, 145

choice and economists. Economists, for example, view regulative processes as fitting in a more explicit and formal environment. Regulative institutions consist of regulatory infrastructures. It is perceived as generally static and to akin to rules produced by states.

Scott summarises the components of these three pillars in a table,[309] which is important to reproduce for purposes of ascertaining which of these pillars international commercial arbitration is erected on.

		INSTITUTIONAL PILLARS		
		Regulative	**Normative**	**Cultural-cognitive**
PRINCIPLES OF EACH INSTITUTIONAL PILLAR	**Basis of compliance**	Expedience	Social obligation	Taken-for-grantedness Shared understanding
	Basis of order	Regulative rules	Binding expectations	Constitutive schema
	Mechanisms	Coercive	Normative	Mimetic
	Logic	Instrumentality	Appropriateness	Orthodoxy
	Indicators	Rules Laws Sanctions	Certification Accreditation	Common beliefs Shared logics of action Isomorphism
	Affect	Fear Guilt/ Innocence	Shame/Honor	Certainty/ Confusion
	Basis of legitimacy	Legally sanctioned	Morally governed	Comprehensible Recognizable Culturally supported

Of significance is that it is difficult to associate an institution with only one of the three pillars because the relationship between them is too complex. None is predominant over the others. This makes it extremely difficult to decouple the interaction or relationship that exists between the

[309] Scott 2014 (n 124), 60

pillars. For example, law and culture are different but related concepts with close interrelationship.[310]

Equally, a relationship can be identified in which the normative and regulative pillars strengthen each other when combined than when each is isolated. Although each pillar operates through distinctive mechanisms and processes, but all three may work in combination. This is why the regulative pillar is often perceived as a ratifier because it passively registers changes in the cognitive and normative.[311]

As per the delineated analysis of the three pillars of institutions, it appears that international commercial arbitration is grounded on the cultural-cognitive and normative pillars. Both are founded on informal rules. Basis of legitimacy for the cultural-cognitive pillar is conformity with a shared mindset, and for the normative pillar is conformity with moral duty and obligation. Basis of compliance in these two pillars is 'social obligation' in the former and 'shared understanding' in the latter. Upon agreeing to arbitrate, parties take for granted the shared understanding that they will arbitrate any dispute and adhere to award rendered thereto.

This is informal lawmaking; and such activity is associated with lack of accountability and transparency but also with being ineffective.[312] A party does not know whether the other will respond to a request for arbitration or commence proceedings in a national court to challenge the validity of the arbitration agreement or for some other reason to avoid the arbitration proceedings in which an award is likely to be rendered against him. Further uncertainty arises once an award

[310] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46(2) J. Econ. Lit. 285. See also Amir N Lichta, Chanan Goldschmidta and Shalom H Schwartz, 'Culture, Law, and Corporate Governance' (2005) 25(2) Int. Rev. Law Econ. 229

[311] William R Scott, 'Approaching Adulthood: The Maturing of Institutional Theory' (2008) 37(5) Theory Soc. 427. See also Hoffman 1999 (n 280); Steve Maguire and Cynthia Hardy, 'Discourse and Deinstitutionalization: the Decline of DDT' (2009) 52(1) Acad. Manag. J. 148 [hereinafter "Maguire and Hardy 2009 (n 311)"]

[312] Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012), 14, 22, 30, 424, 466, 518 See also Benedict W Kingsbury and Richard B Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations' in Katerina Papanikolaou and Martha Hiskaki (eds), *International Administrative Tribunals in a Changing World* (Esperia Publications 2008) 1, 1; Anne-Marie Slaughter, 'Agencies on the Loose? Holding Government Networks Accountable' in George A Bermann, Matthias Herdegen and Peter L Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press 2000) 521, 525

is rendered as the winning arbitrant would not know if the defeated arbitrant would indeed honour it. He would expect, however, that the defeated arbitrant would comply with the arbitration award, first as a contractual obligation, and second as a social obligation.

But neither shared mindset nor moral duty and obligation would be present once a final and binding arbitration award is rendered because of the condition that such award achieves its recognition and enforceability only by an application to a national court in the jurisdiction where the defeated arbitrant holds assets. A defeated arbitrant would not readily and willingly fulfil the award without opposing it in one way or another, if not for any valid reason, simply due to the 'mental programs' in the form of "behaviour: words and deeds" which drive thinking and social action in different cultures[313] – in this case the refusal to accept defeat, or perhaps just to acquire certainty by obtaining confirmation from a court.

Thus, the winning arbitrant would engage in a dispute resolution procedure conducted in a national court of the jurisdiction where the defeated arbitrant holds assets. The aim is for the court to confirm the validity and legitimacy of the award. Without a court granting an order to enforce the award, in effect rendering it into a judgment of the court as opposed to a contractual obligation, it cannot be enforced directly following its promulgation by the arbitral tribunal. This is demonstrated by the Court of Appeal in England in the case of *Mobile Telesystems Finance SA v Nomihold Securities Inc.*[314] A major risk of this is that the winning arbitrant would be embroiled in a judicial system which provides no less than two additional layers of appeal, using the jurisdiction of England and Wales as an example.

Once an award is rendered arbitrants employ the principles of the regulative pillar for its basis of compliance is 'expedience'; its basis of order is 'regulative rules'; its enforcement mechanism is 'coercive'; its logic is 'instrumentality'; its indicators are 'rules', 'laws' and 'sanctions'; its 'affect' is 'fear guilt/innocence'; and its basis of legitimacy is a 'legally sanctioned' outcome. These elements are not present in the two pillars of the international commercial arbitration

[313] Hofstede (n 167), 2

[314] [2011] EWCA Civ 1040. See *also Loeb v Record* (2008) 162 Cal. App. 4th 431; *National Ability SA v Tinna Oils & Chemicals Ltd* (The "Amazon Reefer") [2009] EWCA Civ 1330; *Pal Gazi Construction Company Limited v Federal Capital Development Authority* [2001] 10 NWLR (Pt. 722) 539 (Supreme Court of Nigeria)

institution without involvement of national laws and judiciary. Reliance on national courts to recognise and enforce arbitration awards is linked to the 'affect' of each pillar, meaning motive and reason that influence intention and action in institutions under each pillar.

For the cultural-cognitive pillar the 'affect' is 'certainty/confusion' and for the normative institutional pillar is 'shame/honor'. Since this institution is grounded on the cultural-cognitive and normative pillars, and therefore on informal rules, it is logic that arbitrants would engage in uncertainty avoidance provided by formal rules, in this case the law. Law has the necessary weight to provide certainty by counteracting the risk and uncertainty of non-payment of the award by the defeated arbitrant. In cultural-cognitive institutions risk of uncertainty is quite high and the law is helpful to offset it by reducing or avoiding of such risk because conformity to the law, rules and procedures is defined and expected; whereas in contractual settings it is the party's will that dictates behaviour.

1.12 Institutional Entrepreneurship Opportunity: Future Projects

Institutional entrepreneurship is a process. It is seldom the case that change in an institution would occur just because an institutional entrepreneur emerges. Institutional entrepreneurs must mobilise allies,[315] to seek the co-operation of those agents who are highly embedded in the institution. Institutional work is "the purposive action of individuals and organizations aimed at creating, maintaining and disrupting institutions".[316] Maguire et al. write that "Key to their success is the way in which institutional entrepreneurs connect their change projects to the activities and interests of other actors in a institution".[317]

There is no evidence of Smit or Holtzmann and Schwebel having made any effort, in whatever form, certainly not in further published writings, to gather the participation needed from key actors to conceptualise, articulate, and implement their innovations. This is unconditionally

[315] Thomas B Lawrence, Roy Suddaby and Bernard Leca (eds), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (Cambridge University Press 2009), 11

[316] Thomas B Lawrence and Roy Suddaby, 'Institutions and Institutional Work' in Stewart R Clegg and others (eds), *Handbook of Organization Studies* (2nd edn, SAGE 2006) 215, 215

[317] Maguire et al. (n 157), 658. See also Greenwood et al. (n 50), 59, 75

crucial because this institution operates in pockets of groups rather than a team. By definition the former is individuals who each perform a given job but their work completes a particular task,[318] whereas the latter is persons sharing a collective identity and purpose who work to jointly achieve a specific goal.[319]

For present purposes, it does not appear that Smit or Holtzmann and Schwebel devised a discursive strategy to generate discourse,[320] whether within a group or the international commercial arbitration community at large, to embed their changes. They did not actively seek to interpret their suggestions as attractive solutions, and thus to pull the actors towards what they present as a superior tool. This is the third explanation for why their ideas did not see the light of day.

A fourth reason can be advanced as to why a single institution and an appellate framework appeared too great a change to implement and to accept. In Holtzmann's words, "fundamental innovations do not appear to be needed".[321] As contradictory as this statement is because it is in the same breath that he suggests the creation of an appellate body,[322] which would undoubtedly be a 'fundamental innovation', it is the value of what these words have come to represent that is of significance here – how the international commercial arbitration community at large reacted to these proposals. Successful institutional change would occur through the interplay of interests and ideas within institutions, and actors are required to steer the desired change away from the traditional institutional arrangements.

While no actors directly opposed the ideas of Smit or Holtzmann and Schwebel, it is evident that more actors demonstrated their devotion to maintain the existing arrangements.[323] Change that

[318] Donelson R Forsyth, *Group Dynamics* (6th edn, Wadsworth Cengage Learning 2014), 4

[319] Jon R Katzenbach and Douglas K Smith, *The Wisdom of Teams: Creating the High-Performance Organization* (Harvard Business Press 1993), 45

[320] Colin Barker, Alan Johnson and Michael Lavalette (eds), *Leadership and Social Movements* (Manchester University Press 2001), 10. See also Greenwood and Suddaby (n 73); Lawrence (n 33)

[321] Holtzmann (n 13), 110

[322] Holtzmann (n 13), 112

[323] Paul J DiMaggio, 'Interest and Agency in Institutional Theory' in Lynne G Zucker (ed), *Institutional Patterns and Organizations: Culture and Environment* (HarperBusiness 1988) 3, 14 [hereinafter "DiMaggio (n 323)"]

derives from entrepreneurship raises concerns about deviation from the norm and therefore actors advantaged by existing arrangements would not readily embrace such change because institutions "constrain people's capacity to imagine alternatives to existing arrangements"[324] to secure stability. It seems, therefore, that it is not so much that Smit or Holtzmann and Schwebel, as institutional entrepreneurs, have been unable to impose institutional change, but that actors within the institution prefer to take for granted existing institutional arrangements as they are rather than holding them up to scrutiny.

It would seem that the right conditions to enable institutional entrepreneurship did not materialise since 1986 up to today. Thanks to the survey results, essential conditions may now be alive. As stated above, only a handful of international commercial arbitration centres and jurisdictions are preferred over and above the many that exist, despite there being little difference between the services they offer. This points to a competitive gap between the centres and national legal systems, a jolt which is enough to disturb the socially constructed institution-level.

Also, one of the most significant concerns associated with the use of international arbitration is the 'lack of appeal structure'.[325] Whether implementation of an appeal court is a fundamental innovation or a simple refinement of the procedural rules or institutional practice it matters not. The fact of the matter is that conditions to enable institutional entrepreneurship to bring about change are likely to arise in the near future because a varying viewpoint between the users of international commercial arbitration is clearly identifiable. On the premise that interactions of different actors lead to new institutions being designed or existing ones being redesigned and changed to shape their preferences and therefore to achieve their goals,[326] a colossal modification to this institution does not appear to be far away.

It is now 32 years since Smit made his suggestion of a single world-wide arbitration centre. It is

[324] DiMaggio (n 287), 268. See also Raghu Garud and Peter Karnøe, 'Path Creation as a Process of Mindful Deviation' in Raghu Garud and Peter Karnøe (eds), *Path Dependence and Creation* (Lawrence Earlbaum Associates 2001) 1, 10-11

[325] QMU-PwC 2006 Survey (n 75), 3, 7, 15, 22. See also QMU-W&C 2015 Survey (n 80), 8, 10

[326] Hokyu Hwang and Walter W Powell, 'Institutions and Entrepreneurship' in Sharon A Alvarez, Rajshree Agarwal and Olav Sorenson (eds), *Handbook of Entrepreneurship Research: Disciplinary Perspectives* (Kluwer Publishers 2005) 179, 182-195. See also Wijen and Ansari (n 74), 1089-1090

25 years since Holtzmann and Schwebel proposed the creation of an appellate body for international commercial arbitration. It is eight years since Paulsson submits that the arbitral tribunal should be appointed by a neutral body. Whether these proposed changes remain institutional entrepreneurship opportunities or whether new ones exist today, more commentaries must be considered to measure the future predictions about this institution.

In 2008 Böckstiegel writes that "National legislators will continue to be pushed … to adapt their respective legal frameworks to the demands of international business practice for efficient dispute settlement machineries".[327] In 2009 he writes that:

> "... international arbitration will become more international. … the growing number of lawyers and arbitrators involved in international arbitration, I would expect them to become less dependent on their specific national particularities and more open and flexible to the specific needs of disputes in the international context".[328]

Fundamental innovations must be permitted and initiated for both the national legal frameworks and the lawyers to become more international. Both will heed to the abovementioned survey results and bring about changes necessary to eliminate the disadvantages or enhance the advantages highlighted.

It is easily understood why such encouraged advocacy and fundamental innovations have not materialised. Such spirited commentary is quite incompatible with the narcissism associated with international commercial arbitration because of the impermeable sentiment towards party autonomy. The above presentations could be explained by Giddens' theory of structuration, which explicates that there is a relationship between human agency and social structure, and as such social life is based on repetition of acts by the relevant actors which results in a particular structure, and change is achieved in the same way.[329]

---

[327] Böckstiegel Karl-Heinz, 'Perspectives of Future Development in International Arbitration' in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (2nd edn, JurisNet 2008) ch 22, 821ff

[328] Karl-Heinz Böckstiegel, 'Past, Present, and Future Perspectives of Arbitration' (2009) 25(3) Arb. Int'l 293

[329] Giddens (n 279), ch 1, in particular 16-28. See also Anthony Giddens and Christopher Pierson, *Conversations with Anthony Giddens: Making Sense of Modernity* (Stanford University Press 1998), 77

What the abovementioned commentators communicate is that institutional change relies on the actors concerned within the institution to instigate the required change. Each of them plays a role to advocate for evolution in the international commercial arbitration process.

However, the aforesaid spirited commentary could overshadow party autonomy. Direct communication of a particular message, such as that quoted above, regarding the direction which some commentators would like the institution to take, could influence other practitioners, arbitrators and users to alter their preferences and as a consequence bring about the conditions necessary to enable institutional entrepreneurship. If a particular message is repeated it is likely to be implemented as a preference by altering the present one.[330] Repetition of the message has the potential to secure authority to lead to a particular line of thought and open the door for discussion amongst actors with similar views and this would increase the potential for a new concept to emerge because institutions mould and change aspirations.[331]

International commercial arbitration exists because of voluntary and direct agreement of commercial parties to contract out of national court structure. Since it is a particular section of the society that wants this process, it is them who could want it in a different form. Deinstitutionalisation is possible as existing institutions weaken or disappear over time.[332] In a polarised model, which this institution is, deinstitutionalisation paves the way for the emergence of specific governance mechanisms.

Why would practitioners, arbitrators and users want to alter the present preferences? One very important reason would be to properly reconcile "the values of efficacy and legitimacy".[333] Bermann writes that "The tension between efficacy and legitimacy surfaces at virtually every point in the arbitral cycle".[334] For example, a party is at liberty to unilaterally halt arbitration proceedings by presenting legal argument that it should not continue. He writes that this impairs

[330] Hodgson 2004 (n 55), 656

[331] ibid

[332] Scott 2001 (n 7), 110, 182

[333] Bermann (n 6), 2-3

[334] ibid, 4

the efficacy of the arbitration process dramatically.[335]

This should not be a surprise since at present sovereign states are the supreme powers of international commercial arbitration. They develop, control and influence international commercial arbitration because there is no regulatory body to do this. If they refuse to recognise and enforce an arbitration award, then this ADR mechanism is much less effective or even desirable. Though this is unlikely to happen for practical and economical reasons, it nevertheless places a heavy burden upon this private institution to rely so heavily on national courts.

Judging by the commentary discussed above, there appears to be a desire to change this institution. Since this social institution has recognised players who have established rules that structure their interactions, and give legitimacy to the institution, it is difficult to advance that it is legal systems that have a serious enough interest in properly reconciling the values of efficacy and legitimacy. At present supervision of arbitration proceedings is entrusted in national laws and their judicial authorities. As such, it would seem that legal systems have a serious enough interest in international commercial arbitration.

Indeed, national legal systems are an important player in international commercial arbitration, but just not as significant as the international commercial community and international commercial arbitration practitioners. But national legal systems would have very little interest to see the type change suggested by Holtzmann and Schwebel as it would take away that work away from them. Reviewing arbitral awards or deciding on their recognition and enforcement is a source of income for national courts and a means for national judges to participate in international work. It is not, therefore, in their interest to change the current set up.

In practice though, this task of reconciling the values of efficacy and legitimacy belongs to the institutional entrepreneurs of this institution for they form the institution and without whom there is no such institution. Institutional entrepreneurship is defined as "the activities of actors who have interest in particular institutional arrangements and who leverage resources to create new

[335] ibid, 14. See also Blackaby et al. 2004 (n 41), 8-9, paras 1-12

institutions or to transform existing ones".[336] DiMaggio writes that institutional entrepreneurs in possession of the appropriate resources create or contribute to the creation of new institutions if there is "an opportunity to realize interest that they value highly" and that institutional entrepreneurs shape institutions and they even "create a whole new system of meaning that ties the functioning of disparate sets of institutions together".[337] Institutional entrepreneurship is a theory of action, which derives from institutional theory that embraces the role of actors and their action in institutions.[338]

Institutional change is founded on the notion of institutional entrepreneurship, as introduced by Eisenstadt,[339] built on by DiMaggio[340] and developed further by Hardy and Maguire.[341] In a paper offering a theoretical framework on the patterns of change, Eisenstadt presents the analytical tools for inquiry into the process of change. He studies three ideal-typic patterns of change in traditional civilisations, namely, coalescent, partially coalescent, and noncoalescent. He pays particular attention to the variables which account for the patterns of change, such as cultural orientations, institutional structures, and the role of elites in institutional change. Similarly, Boettke and Coyne also explore the link between institutions and its entrepreneurs.

An institution is the formal and informal rules and the entrepreneurs act in accordance to these rules. They demonstrate this by examining entrepreneurship within different institutional settings, namely, private for-profit, private non-profit, and political. In the same vein, they

[336] Maguire et al. (n 157), 657. See also David Daokui Li, Junxin Feng and Hongping Jiang, 'Institutional Entrepreneurs' (2006) 96(2) Am. Econ. Rev. 358, 359-360 [hereinafter "Li, Feng and Jiang (n 336)"]

[337] DiMaggio (n 323), 14. See also Raghu Garud, Sanjay Jain and Arun Kumaraswamy, 'Institutional Entrepreneurship in the Sponsorship of Common Technological Standards: The Case of Sun Microsystems and Java' (2002) 45(1) Acad. Manag. J. 196, 196 [hereinafter "Garud, Jain and Kumaraswamy (n 337)"]; Petter Holm, 'The Dynamics of Institutionalization: Transformation Processes in Norwegian Fisheries' (1995) 40(3) Adm. Sci. Q. 398 [hereinafter "Holm (n 337)"]; Myeong-Gu Seo and WE Douglas Creed, 'Institutional Contradictions, Praxis and Institutional Change: A Dialectical Perspective' (2002) 27(2) Acad. Manag. Rev. 222 [hereinafter "Seo and Creed (n 337)"]

[338] Neil Fligstein, 'Social Skill and Institutional Theory' (1997) 40(4) Am. Behav. Sci. 397, 397; SM Christensen and others, 'Action and Institutions: Editors' Introduction' (1997) 40(4) Am. Behav. Sci. 392

[339] Shmuel N Eisenstadt, 'Cultural Orientations, Institutional Entrepreneurs, and Social Change: Comparative Analysis of Traditional Civilizations' (1980) 85(4) Am. J. Sociol. 840, 848

[340] DiMaggio (n 323)

[341] Cynthia Hardy and Steve Maguire, 'Institutional Entrepreneurship' in Royston Greenwood and others (eds), *The SAGE Handbook of Organizational Institutionalism* (SAGE 2008) 198

determine the impact of entrepreneurship on institutions and economic development.[342] It is the entrepreneurs within a particular institution who innovate and act to change the formal and informal rules, by challenging existing conditions or arrangements to spur meaningful and positive change in such institution.[343]

Institutional entrepreneurship takes many forms, where entrepreneurs create institutions;[344] where entrepreneurs change institutions, i.e. the destruction of one institution and the establishment of another;[345] where entrepreneurs maintain institutions;[346] and where entrepreneurs destroy institutions.[347] This is because institutional entrepreneurs are agents who act strategically in pursuing their interests.[348] However, for actors to become institutional entrepreneurs, presence of enabling field-level conditions must be identified.[349] This means that institutional change must be for a reason.

For actors to change an institution, they would need a reason to do so. To know which reason would be applicable to this most preferred and fastest growing process of transnational dispute adjudication, "ground-breaking and standard-setting"[350] survey results on corporate attitudes and practices towards arbitration would be helpful to understand the present inefficiency; the monopoly to constrain; the collective action to harmonise; and the professional conduct to

[342] Peter J Boettke and Christopher J Coyne, 'Context Matters: Institutions and Entrepreneurship' (2009) 5(3) Foundations and Trends® in Entrepreneurship 135, 137

[343] ibid

[344] Child, Lu and Tsai (n 74), 1024-1026; Clemens and Cook (n 51), 454-459. See also Fligstein (n 33); Garud, Hardy and Maguire (n 74); Garud, Jain and Kumaraswamy (n 337); Levy and Scully (n 74); Michael Lounsbury and Ellen Crumley, 'New Practice Creation: An Institutional Perspective on Innovation' (2007) 28(7) Organ. Stud. 993; Alistair Mutch, 'Reflexivity and the Institutional Entrepreneur: A Historical Exploration' (2007) 27(7) Organ. Stud. 1123; Markus Perkmann and André Spicer, 'Healing the Scars of History: Projects, Skills and Field Strategies in Institutional Entrepreneurship' (2007) 27(7) Organ. Stud. 1101; Wijen and Ansari (n 74); Tammar B Zilber, 'Stories and the Discursive Dynamics of Institutional Entrepreneurship: The Case of Israeli High-tech after the Bubble' (2007) 27(7) Organ. Stud. 1035 [hereinafter "Zilber 2007 (n 344)"]

[345] Charlene Zietsma and Thomas B Lawrence, 'Institutional Work in the Transformation of an Organizational Field' (2010) 55 Adm. Sci. Q. 189, 195-196

[346] Fligstein (n 33), 109; 111; Zilber 2007 (n 344), 1048-1051

[347] Maguire and Hardy 2009 (n 311), 183-184

[348] Beckert (n 33). See also Child, Lu and Tsai (n 74), 1016; Fligstein (n 33), 106; Garud, Hardy and Maguire (n 74), 966-969; Greenwood and Suddaby (n 73); Lawrence and Phillips (n 74); Levy and Scully (n 74); Misangyi, Weaver and Elms (n 74); Wijen and Ansari (n 74)

[349] Strang and Sine (n 34), 507. See also Greenwood et al. (n 50)

[350] QMU-PwC 2006 Survey (n 75), 1

implement. These empirical data obtained from counsel, arbitrators and corporate personnel in various sectors, would be valuable for the purpose of confirming or challenging perceptions of and on international commercial arbitration.

1.12.1 Opportunity for Institutional Entrepreneurship: To Implement the Regulative Pillar

It is now clear that international commercial arbitration is an institution that lacks an accurate and complete definition and is premised only on two of the three pillars of institutions. Although there appear two institutional entrepreneurship opportunities here: (i) to define international commercial arbitration; and (ii) to introduce the regulative pillar in this institution, it is the latter that seems to require immediate action for it would have practical significance on the institution.

International commercial arbitration is not elusive. A definition comes from selection and rejection/ostracisation[351] to aid clarity. Also, "properly speaking, nothing definable by a real definition has a nominal definition".[352] Thus, since …The objective to define is a useful attempt to elaborate on the past, present, and future look at international commercial arbitration. A definition would be profound and would settle an essential philosophical debate.

Whilst a comprehensive definition does not make significant contribution to the institution – its purpose or functionality – it does eliminate conjecture. Wittgenstein writes that "If I know an object then I also know all its possible occurrences in atomic facts. (Every such possibility must lie in the nature of the object). A new possibility cannot subsequently be found".[353] What the definition would achieve here is to know the institution and its possible occurrences, which for present purposes would be to discover the institutional entrepreneurship opportunity that exist.

An outline of the three pillars not only reveals the institutional entrepreneurship opportunity present in this institution, but also the enabling field-level conditions.

[351] Chigara (n 183), 258

[352] William of Ockham, *Quodlibetal Questions* vols 1 and 2 (Alfred J Freddoso and Henry Schuurman trs, Yale University Press 1998), for example 462-464; 551

[353] Wittgenstein 2016 (n 170), 26

International commercial arbitration is an alternative dispute adjudication process for international commerce, which has worked continue to work. It came about following a proper evaluation of all the negative elements associated with litigation such as bias and that the proceedings being public rather than private. This led to the judgment that a more private and neutral way to adjudicate international commercial disputes was needed. This resulted in an adjudication process founded on party autonomy with the deliberate intention to avoid the negative elements associated with national judicial systems, and litigation in general, such as bias and that the proceedings being public rather than private. Yet, arbitration does not and cannot guarantee complete evasion of national courts, as highlighted above, because they provide the regulative pillar for the institution. This is because the institution is not regulated by any organisation.

Reliance upon national courts to bestow both certainty and legitimacy upon an arbitration award is confirmation that the regulative pillar is absent in this institution. Therefore, this institution appears incomplete, which means that it is semi and not fully institutionalised.[354] This is due to the fact international commercial arbitration is a process and not a system. It involves sovereign states to empower it because states are the recognised authority not only to make law but also to implement it.

Using both the law and precedent created by past court decisions,[355] the state constrains the behaviour of the civilian society. In this case it is to constrain the behaviour of the defeated party by not allowing him to disrespect the award. This explains why Austin does not regard international law as positive law because it does not stem from the command of a sovereign. It stems from general opinion and thus it is 'law improperly so called', or put differently, it is not law 'properly so called', and it is enforced by moral sanctions.[356]

[354] Tolbert and Zucker (n 42); Strang and Sine (n 34)

[355] Hoffman 1999 (n 280)

[356] John L Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, Cambridge University Press 1995), 21-22, 165-166. See also Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2006); Steven R Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 Am. J. Int'l L. 291; Scott J Shapiro, *Legality* (Harvard University Press 2013), 26-30; Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press 2014), ch 1 [hereinafter "Schultz (n 356)"]

In relying upon national courts, the legitimacy of international commercial arbitration as an institution is both undermined and weakened. Suchman writes that "Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions".[357] Using this definition it seems that international commercial arbitration possesses legitimacy on the grounds that it is a socially constructed entity with norms, values, beliefs, and definitions which are desirable, proper, or appropriate for the actors within such an institution. Its historical development and present-day popularity confirm this. Yet, within this same meaning of legitimacy, international commercial arbitration does not have it because the actors within such an institution have to rely upon national courts to make decisions made therein desirable, proper, or appropriate.

This deduction is corroborated by Franck's definition of legitimacy, which is that it is:

(i) "a property of a rule or rulemaking institution which itself exerts a pull towards compliance on those addressed normatively";[358] and

(ii) "the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process".[359]

'Those addressed' in this context is multinational corporations; arbitration counsel; arbitrators; and arbitration centres which administer arbitration proceedings. In the context of international commercial arbitration there is neither rule nor rulemaking institution capable of exerting a pull towards compliance on these entities. Thus, if there is no compliance by arbitration counsel and arbitrators then the professional bodies to which they belong are likely to deal with them. Arbitration centres do not belong to a professional or any other organisation and so their non-compliance is largely unattended to. More importantly, if the arbitrants against whom an award

[357] Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) Acad. Manag. Rev. 571, 574

[358] Franck (n 246), 16. See also Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008)

[359] Franck (n 246), 19

is made do not comply with it, then there is no other rule making institution beside national courts that can coerce them to do so.

Franck provides a detailed analysis of legitimacy from the perceptions of three teleological approaches, namely, the Weberian perception; Habermasian discursive validation rationality; and neo-Marxist model to shed light on legitimacy in the international community. The first approach is based on a specific process within a superior framework in which rules are made in a defined way, the rulers are chosen in accordance with the agreed mechanism, and habitual obedience to the rules by the addressees is specified. A good example would be how legislation is passed and enforced in sovereign states.

The second is premised on procedural-substantive terms, which is concerned not only with the procedure followed to make the rule, but also how and why the rule is made and the ruler is chosen using objective and subjective data. Legitimacy is bestowed if there is agreement by the concerned parties rather than through "a contingent or forced consensus".[360] The third is focused on achieving outcomes characterised by equality, fairness, justice, and freedom, which validate the rule-making system and its rules.

None of these three teleologies are applicable to this institution because there is no super framework making rules to regulate it. It can be said, however, that by agreement of the concerned parties to arbitrate rather than litigate, mediate, negotiate or conciliate their dispute, legitimacy is bestowed on international commercial arbitration. Yet these concerned parties engage the third teleological approach, namely the law and national courts, to achieve an outcome characterised by equality, fairness, justice, and freedom, to validate both the arbitration proceedings and the resultant arbitration award.

By relying so heavily on national law and courts does not only point to international commercial arbitration being an incomplete process and lack legitimacy, but it appears to make international commercial arbitration a subsystem of national courts. This raises a question, which is not whether the institution has to change or wants to change, but whether it ought to change. Put

[360] Jürgen Habermas, *Communication and the Evolution of Society* (Thomas McCarthy tr, Beacon Press 1979), 188

differently, the question becomes whether it can be sustained in its current form or whether in the form of a regulated system, rather than a disjointed two-tier process, it would be enhanced? If the answer to this question is in the affirmative, then it must be ascertained how can such enhancement be achieved?

Based on the commentary presented here, it would seem that the institution ought to change. From the analytical exercise on the definition of this institution, it would seem that the change that would enhance its functionality and legitimacy is the creation of the regulative pillar as it is its missing pillar. Legitimacy of the regulative pillar is conformity with legal obligation. Introduction of the regulative pillar in international commercial arbitration could derive, to start with, from the adoption of the suggestion advanced by Holtzmann and Schwebel. This would remove the need to engage the municipal courts, under the New York Convention or otherwise. Thus, neither the winning arbitrant would have to apply to a national court to enforce his award nor would the losing arbitrant have to challenge it in a national court. This explains the support for Holtzmann's and Schwebel's proposal.[361]

In essence, Holtzmann and Schwebel suggest change to the historical foundation of international commercial arbitration. This would change this institution, not create a new one, and not destruct one to establish another. It can be advanced that such a change would maintain the institution by adding to the existing structure to create a hierarchy which encompasses a level where an arbitral award is recognised and enforced or reviewed by arbitrators and not national court judges. This would maintain all the advantages of international commercial arbitration such as flexibility, confidentiality, privacy and speed. Indeed, this would be a self-reinforcing mechanism for this process.

Response to change varies. It could be argued that such an addition would destroy this institution. Horvarth writes that:

> "… by creating what is, in essence, a supervisory division… there is always the risk that, by stealth or by design, this jurisdiction may be broadened. If this were the case, many of

[361] n 25; n 26 and n 27

> the advantages international arbitration has over transnational litigation, such as cost-effectiveness, speed, and efficiency, would certainly be permanently lost. The idea that awards are final, subject only to the limited grounds for refusing enforcement set forth in the New York Convention, would also become a thing of the past.
>
> …
>
> A formalizing and standardizing of procedures is then almost inevitable, which in turn would likely result in less flexibility and a more adversarial tone in international arbitration proceedings, making it more difficult for parties to preserve their business relationships".[362]

Horvarth's argument finds support. Paulsson writes that "The arbitration process would be transformed (and rejected) if it were kept under review by commissionars requiring it to meet whatever might be their notions of efficiency".[363]

These arguments could, however, be immediately dismissed since the award could be challenged under the New York Convention, which would make the award final only if it is accepted without contest by the defeated arbitrant. Thus, the availability of the possibility to challenge an arbitral award means that the award is not actually final until and unless it is adhered to in full. Holtzmann reasons that such a court would ensure uniform standards and predictability. Lynch writes that the type of court proposed would be useful in achieving consistency and predictability in decision-making pertaining to both petition for recognition and enforcement of arbitral awards and refusal thereto.[364]

Arguments against Holtzmann's and Schwebel's proposal should be based on theoretical

[362] Günther J Horvath, 'The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes?' in Stefan M Kröll and others (eds), *International Arbitration and International Commercial Law: Synergy Convergence and Evolution* (Liber Amicorum Eric Bergsten, Kluwer Law International 2011), 267. See also Born 2014 (n 28), 85

[363] Paulsson (n 184), 2

[364] Katherine L Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International 2003), 119

knowledge. Berger and Luckman write that "But theoretical knowledge is only a small and by no means the most important part of what passes for knowledge in a society. Theoretically sophisticated legitimations appear at particular moments of an institutional history".[365] Recognition and enforcement of arbitral awards relies on the effective operation of the New York Convention to enforce both the agreement to arbitrate and the resultant award. This Convention creates certainty in that national courts in member states to the Convention are obliged to enforce all valid arbitration awards. However, what is needed is practical knowledge with regard to the effectiveness of the Convention. Such knowledge would either corroborate or further diminish the viability of Holtzmann's and Schwebel's proposal.

The practical knowledge comes in the form of statistical data from aforementioned surveys. In the QMU-PwC 2008 Survey corporations surveyed report that they negotiated a settlement after an award had been rendered in order to save time and costs in seeking recognition and enforcement of the award (56%) and to preserve the business relationship (19%).[366] Moreover, corporations convey that only "49% of cases end in voluntary compliance" and that "11% of cases result in recognition and enforcement proceedings".[367] Moreover, "19% of the participating corporations were content to settle their claim for between 50% and 75% of the amount awarded by a tribunal".[368]

What this points to is that corporations are not confident that an award could be easily enforced, whether or not rendered in a state signatory to the New York Convention. The reason is that there exist inherent difficulties in the award creditor identifying the award debtor's assets and the award debtor not having sufficient or any assets to satisfy the award.

The empirical data from the QMU-PwC 2006 is helpful to make a determination on the ineffectiveness of the present mechanism used to review international arbitration awards. Moreover, the 2015 International Bar Association report on international arbitration finds that "While the New York Convention in theory imposes a broad geographical pro-arbitration

[365] Berger and Luckmann (n 44), 83

[366] QMU-PwC 2008 Survey (n 76), 3

[367] ibid, 3, 6

[368] ibid

structure for enforcement of awards, concerns were still raised about the robustness of national courts in enforcing arbitral awards".[369]

The present results are sufficient to conclude that at the stage of recognition and enforcement of an arbitration award the central actor is the sovereign state, particularly where the defeated party holds assets. A state's coercive power is crucial for the winning party to obtain the award and to ensure that the defeated party fulfills his obligations thereto.

This practical knowledge, which was not available in 1993 when Holtzmann and Schwebel made their suggestion, makes their proposal attractive at the juncture where international commercial arbitration currently stands. Moreover, the present knowledge supports that an appellate court to review international arbitration awards and to implement their enforcement is needed. Also, it is proof that the creation of a neutral, cost-effective, and expeditious forum to review and enforce arbitration awards is likely to be a desirable change for this institution.

In the IBA 2015 Subcommittee Report, one of the predictions for key trends in jurisprudence is that there should be a form of governance for peer review of arbitral awards to legitimise those awards because greater intervention by national courts to set aside awards is anticipated.[370] DiMaggio and Powell write that "external actors may induce an organization to conform to its peers by requiring it to perform a particular task and specifying the profession responsible for its performance".[371]

This recognition of the need to give legitimacy to arbitral awards means that there is potential for implementation of Holtzmann's and Schwebel's proposal. Furthermore, this is validation that there is an opportunity for institutional entrepreneurship to develop an international court that is not only needed but that should materialise in the not too distant future. If acknowledgement by the international commercial arbitration community that peer review of arbitral awards is essential to legitimise awards is not sufficient to convince the actors in this institution of the

[369] Welsh (n 92), 10

[370] ibid, 19

[371] Paul J DiMaggio and Walter W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48(2) Am. Sociol. Rev. 147, 150

immediate need to implement Holtzmann's and Schwebel's proposal, a look at some case law should act as an additional push factor.

Different types of challenges, grounds not in the Convention, to recognition and enforcement of arbitral awards appear to be emerging. Parties rely on statute of limitations to argue that an award should not be recognised. In *Yugraneft Corporation v Rexx Management Corporation*[372] the Supreme Court of Canada ruled that the Limitations Act 2000 of the Province of Alberta, s 3, which imposes a two-year limitation period, is applicable in a petition for recognition and enforcement of a foreign arbitral award in Alberta. The United States of America Court of Appeals for the Second Circuit confirmed in *Frontera Resources Azerbaijan Corporation v State Oil Company of the Azerbaijan Republic*[373] that a defendant must have minimum contacts[374] with the forum such that 'traditional notions of fair play and substantial justice' is not offended.

These arguments may be consistent with article III of the Convention, which provides that contracting states shall recognise and enforce arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon". They may, however, be inconsistent with article V of the Convention because it adds to or limits the grounds for non-recognition or enforcement.[375]

Furthermore, there is an overwhelming difference in the interpretation of the grounds under article V of the Convention. Whilst some national courts are 'pro-enforcement' and construe the grounds for refusal narrowly, others adopt a 'pro-refusal' stance. Chatterjee and Lefcovitch suggest that certain amendments to the provisions of article V should be made.[376] Violation of the requirements of international public policy is a good example. France, as illustrated by the

[372] [2010] SCC 19, [2010] 1 S.C.R. 649

[373] 2009 WL 3067888 (2d Cir. 2009)

[374] *Telcordia Tech Inc. v Telkom SA. Ltd* 458 F.3d 172, 178-79 (3d Cir. 2006); *Glencore Grain Rotterdam B.V. v Shivnath Rai Harnarain Co.* 284 F.3d 1114, 1121 (9th Cir. 2002); *Base Metal Trading v OJSC Novokuzmetsky Aluminum Factory*, 283 F.3d 208, 212 (4th Cir. 2002)

[375] William W Park and Alexander A Yanos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration' (2006) 58 Hastings L.J. 251, 255, 262. See also Martin King and Ian Meredith, 'Partial Enforcement of International Arbitration Awards' (2010) 26(3) Arb. Int'l. 381

[376] Charles Chatterjee and Anna Lefcovitch, 'Recognition and Enforcement of Arbitral Awards: How Effective is Article V of the New York Convention of 1958?' (2016) 9(36) International In-house Counsel Journal

case of *SNF v Cytec Industries BV*,[377] and England, as illustrated by *Westacre Investments v Jugoimport-SDPR Holding Co. Ltd*[378] would interfere on public policy grounds only where the violation is flagrant, effective and concrete. Countries such as Turkey, Malaysia, Indonesia, China, India, Vietnam, and Republic of Korea (South Korea), non-arbitration-friendly jurisdictions, readily accept the public policy defence.[379]

In 2013 *KSF-KDIC Investment Company v Korea Resolution & Collection Corporation* and *NDS Group Ltd v KT Skylife*[380] the Central District Court of Seoul and the Seoul Southern District Court, respectively, refused to enforce the arbitral awards. In respect of the former they reasoned that enforcement of the award would be contrary to public policy. This decision was upheld by the Seoul High Court but on the ground that there was no valid arbitration agreement between the companies; the respondent being a state-run insurance company. In respect of the latter the court's decision was based on the award not being sufficiently specific, though on appeal the Seoul High Court recognised validity of the award. This case remains subject of appeal to the Supreme Court.

Clearly there appears a gap appertaining to recognition and enforcement of awards. A peer review governance should close this gap as the review would be conducted by arbitrators of the highest calibre, entrusted with the authority to deliver consistent and predictable decisions which would facilitate the growth of international legal norms, as per Holtzmann's and Schwebel's vision. As opposed to judges in national courts possessing disparate knowledge, experience, cultural understanding and applying their own national law and producing decisions which vary considerably.

Recognition and enforcement of foreign arbitral awards is a subject that has been written about extensively. The most prolific of commentators on this matter is van den Berg and he provides

[377] Judgment no. 680 of 4 June 2008 of the French Cour de Cassation

[378] [1998] 2 Lloyd's Rep 111. See also *Lemenda Trading Co. Ltd v African Middle East Petroleum Co. Ltd* [1988] 1 QB 448; *Pencil Hill Ltd v US Citta Di Palermo SpA* (19 January 2016, Manchester District Registry)

[379] See for example Michael Hwang and Chuan Tat Yeo, 'Recognition and Enforcement of Arbitral Award' in Michael Hwang (eds), *Selected Essay on International Arbitration* (Academy Publishing 2013) 237, 272-290; Blackaby et al. 2009 (n 113), para 11-103; *Harris Adacom Corp v Perkom Sdn Bhd* [1994] 3 MLJ 504; *Oil and Natural Gas Corp Ltd v SAW Pipes* (2003) 5 SCC 705

[380] Case No. 2011 Gahap82815 27 September 2012; Case No. 2012 Na88930 16 August 2013; Case No. 2013 Da74868 29 October 2015

an extraordinarily thorough commentary. He writes that the judicial interpretation of the Convention creates an "an undesirable degree of uncertainty";[381] as a result of which, unmistakably deducible from the title of the book, he calls for uniform judicial interpretation of international commercial arbitration awards. When one considers the abovementioned cases, this call for uniformity should perhaps be implemented today.

To this end, an important question would be how could Holtzmann's and Schwebel's vision be brought to life? Kostova and Roth write that a useful framework for analysis of organisational principles and practice is to focus on the core institutional dimensions relevant to the study.[382] The present study identifies that an institutional entrepreneurship opportunity exists to implement the proposal by Holtzmann and Schwebel. Since they speak of an international court, the institutional dimensions to consider would be those of a structure similar to what is proposed. For example, the International Court of Justice (ICJ); the International Criminal Court (ICC); the European Court of Justice (ECJ); the European Court of Human Rights (ECHR); African Court on Human and Peoples' Rights (the Court); COMESA Court of Justice (CCJ); and Inter-American Court of Human Rights (IACHR), to name a few.

Formation of international judicial bodies, permanent or *ad hoc*, is by treaty between sovereign states or established by an international organisation. Romano writes that an international judicial body has five characteristics: a) permanence; b) established by an international instrument; c) decides cases on the basis of international law; d) decides cases according to pre-existing rules of procedures; and e) a process leading to a binding decision.[383] Caron suggests two types of international tribunals and introduces an expanded view of the function of international courts. He complements Romano's criteria by examining aspects such as creation, design and operation of international courts and tribunals, including their life span and closing it down.[384]

---

[381] See van den Berg (n 242). See also Herbert Kronke and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010); Emmanuel Gaillard (ed), *The Review of International Arbitral Awards* (Juris 2010); Emmanuel Gaillard, Domenico Di Pietro and Nanou Leleu-Knobil (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008)

[382] Kostova and Roth (n 281)

[383] Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 N.Y.U. J. Int'l L. & Pol. 709, 712

[384] Caron (n 149)

In recognising the increased involvement of national courts in transnational issues, Martinez studies whether an international judicial system is emerging and how national courts should respond to it. She identifies four categories of rules that are common to well-functioning judicial systems and suggests that international courts can craft their procedural rules by using the domestic context as a template.[385]

Martinez's approach is in conformity with that of institutionalists. Meyer and Rowan write that incorporation of "practices and procedures defined by prevailing rationalized concepts" increases survival prospects as legitimacy is enhanced and uncertainty is reduced.[386] Powell and DiMaggio advance this by explaining that to attain conformity with the three pillars of institution occurs through "templates for organizing", meaning that organisations in the same sphere adopt similar structures and practices to respond to institutional pressures.[387]

They call it convergent change, which occurs within the existing template, as oppose to radical change, which is when a move to another template occurs. Actors who, through "examining and comprehending organizations operating in other places and other times",[388] can bring about the change required to meet the demands in this institution. In essence, templates exist for the international commercial arbitration community to use to implement Holtzmann's and Schwebel's proposal.

Institutionalisation is an ongoing process.[389] Thus, the creation of the 'International Arbitration Awards Review Council' (IAARC), the most obvious name for the type of body that Holtzmann and Schwebel suggest, would simply be to supplement this institution and allow its institutionalisation process to continue and to complete. As per the definition of institutional

[385] Jenny S Martinez, 'Towards an International Judicial System' (2003) 56(2) Stan. L. Rev. 429. See also Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106(2) AJIL 225-270; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003); Schultz (n 356)

[386] Meyer and Rowan (46), 349. See also John W Meyer and William R Scott, *Organizational Environments: Ritual and Rationality* (SAGE 1983)

[387] Powell and DiMaggio (n 280), 27

[388] Scott 1995 (n 7), 151

[389] Tammar B Zilber, 'The Work of Meanings in Institutional Processes and Thinking' in Royston Greenwood and others (eds), *The SAGE Handbook of Organizational Institutionalism* (SAGE 2008) 150

entrepreneurship, the creation of the IAARC would require actors who have interest in having arbitral awards reviewed and sealed by an independent body to leverage resources to transform[390] the present institutional arrangement and convince the rest of the international commercial arbitration community that there is an opportunity to realise an interest that they value highly,[391] which is to keep national courts at bay.

For the IAARC to be established, following the route that the aforementioned courts and tribunals took to come into existence would be a good place to start. To maintain the friendly and flexible nature of arbitration, it would not be appropriate to call this organisation 'court' or 'tribunal' for they are dispute resolution forums. Since what is needed is a group of people formally constituted to review and enforce international commercial arbitration awards, a 'council' appointed for this specific advisory, deliberative, and administrative function would be more appropriate.

As to how to bring it about, a movement similar to that which saw the conception of the New York Convention could be followed. As a matter of fact, amendment to the New York Convention[392] would simplify and expedite the establishment of such a council because the Convention is a permanent international instrument under which cases are decided, though on the basis of national and not international law, according to pre-existing rules of procedures; and leading to a binding decision.

Since international courts and tribunals could be used as templates for the creation of the IAARC, inspiration with regard to composition of the IAARC can be derived from the selection and appointment of international judges. Terris, Romano and Swigart provide an introduction on this subject and write that "In general, one cannot apply to become an international judge. Most of the time one is called".[393] As an international institution, the IAARC could be a forum

[390] Li, Feng and Jiang (n 336)

[391] DiMaggio (n 323), 14. See also Garud, Jain and Kumaraswamy (n 337), 196; Holm (n 337); Seo and Creed (n 337)

[392] See Albert Jan van den Berg, 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' in Albert J van den Berg (ed), *50 Years of the New York Convention* (Kluwer Law International 2009) 649

[393] Daniel Terris, Cesare PR Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis 2007), 23. See also Ruth Mackenzie and others, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press 2010), 86; Ruth Mackenzie, 'The Selection of International Judges' in Cesare PR Romano, Karen J Alter and Yuval

composed of arbitrators of the highest calibre selected from each continent for purposes of impartiality and equality to render decisions that are not only consistent and predictable, but also neutral, cost-effective, and expeditious, in comparison to national courts.

As to why the regulative pillar is essential, Scott writes that "In this conception, regulatory processes involve the capacity to establish rules, inspect others' conformity to them, and, as necessary, manipulate sanctions—rewards or punishments—in an attempt to influence future behavior".[394]

1.13 Conclusion

International commercial arbitration, a social institution, is the dispute adjudication process of choice for the international business community. It is more advantageous in comparison to litigation, which is the traditional dispute resolution system. Commentators allude to the necessity to implement some change to this institution so as to improve its functionality and legitimacy. Data produced in the last decade or so appears to corroborate such necessity.

Some commentators suggest that the set up and functionality of this institution should be changed by: (i) the creation of a single world-wide arbitration centre; (ii) the introduction of an appeal procedure; and (iii) the selection and appointment of the tribunal to be the work of a neutral body and not the disputing parties. Others predict change is inevitable and that it is not too far away. Unquestionably, it is worth the endeavour to determine whether the future of international commercial arbitration lies with advancing the suggestions put forward by various commentators and discovering new ideas leading to a transformation of this institution.

As a starting point, a single comprehensive definition of international commercial arbitration is required, which does not currently exist. Instead there are many suggested by commentators. It seems that the definitions provided by the various commentators mentioned herein lack the

---

Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 737; Daniel Terris, Cesare PR Romano and Leigh Swigart, 'Toward a Community of International Judges' (2008) 30 Loy. L.A. Int'l & Comp. L. Rev. 419

[394] n 124

necessary epistemological goal. There is no precision, fairness, or clarity in some of them and for that reason they are not synthetic for they are neither conceptual nor explicative in meaning. In Lockean terms, "the constitution of the insensible parts"[395] are missing. Knowing such parts would serve, at least, the very useful purpose of understanding its constituent elements.

To define it encompasses philosophical delineation of the specific elements of the institution for purposes of interpretation of its identity and function. A definition thereof is necessary so as to make the requisite distinction between arbitration and other forms of dispute resolution because a definition serves a variety of functions: to communicate essence, concept, meaning, boundary, legal status, and substance.

Mann's judgement that an effective formula constituting a definition of international commercial arbitration may not be a useful contribution leads to the conclusion that in practice there is no need for a comprehensive definition. One of the main discoveries from studying the various definitions and the configuration of arbitral proceedings is that the institution is a process for it is composed of a series of actions or steps to be taken in order to achieve a particular end – an arbitral award. Another finding is that this process is incomplete because recognition and enforcement of an arbitral award, or challenge thereto, is subject to the judgment of national courts. That is because this institution is composed only of the 'cultural-cognitive' and 'normative' pillars. The 'regulative' pillar is missing in this institution.

Lack of a definition and regulative pillar provides ground for conclusion that the institution is semi institutionalised and lacks legitimacy. For both these reasons, it is demonstrated that the time has come for the suggestion by Holtzmann and Schwebel to be adopted and for a council to be created and integrated into the arbitral process to review and enforce international commercial arbitration awards. This is an opportunity to add a hierarchical structure to international commercial arbitration so as to move it away from being a process and turn it into a system – a dispute resolution procedure which is a complex whole.

This is likely to enhance the institution because it would become more efficient and more

[395] Locke (n 250), III.vi.2

legitimate through unification, standardisation and harmonisation of the way arbitral awards are reviewed for purposes of recognition and enforcement and challenge to their validity. Creation of such council may inspire the realisation of Smit's idea for a single world-wide international commercial arbitration centre. This could encourage delocalised international commercial arbitration – meaning detachment from national procedural and substantive law.

Whether or not creation of the council or making the institution a system would be useful and desirable, it is crucial to decipher the law applicable to international commercial arbitration in general, as well as the law applicable to procedure, to the merits, and to the resultant arbitral awards. Examination of the authority that underlies international commercial arbitration is the subject of the next chapter.

Chapter 2

Where Does the Legal Nature of the Arbitration Process and Award Stem From?

2.1 Introduction

Institutions are composed of the 'cultural-cognitive', 'normative' and 'regulative' pillars.[1] International commercial arbitration is a process-based institution grounded on the 'cultural-cognitive' and 'normative' institutional pillars. The 'regulative' institutional pillar is provided by national laws and courts. It means that the institution is semi institutionalised. An obvious enquiry would be, therefore, to determine what legal authority underlies international commercial arbitration so as to ascertain if the regulative pillar should be added to the institution and if to do so would enhance the institution. Expectedly it should for it would remove national laws and courts from the equation of the arbitration process.

Investigation about the legal authority that governs international commercial arbitration arises because at any given time up to five different legal systems may govern international commercial arbitration proceedings.[2] One law may govern the contract subject of the arbitration proceedings, whereas the law governing the capacity of the parties to enter into arbitration may be another. Likewise, the substance of the dispute may also be subject to another law, as may be the jurisdiction or the seat of the arbitration. Finally, the law governing the enforcement and recognition of the arbitration award is more often than not that of a different nation. An international commercial arbitrator must be able to understand and apply the fine points of law from several legal traditions of the world, such as common law, civil law and sharia law.

Gaillard writes that:

[1] William R Scott, *Institutions and Organizations* (2nd edn, SAGE 2001), 48, 52. See also Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991), 8

[2] Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014), 18 [hereinafter "Rogers (n 2)"]; Nigel Blackaby and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet and Maxwell 2004), 77-78

> "International arbitration law lends itself even more to a legal theory analysis than private international law. The fundamentally philosophical notions of autonomy and freedom are at the heart of this field of study. Similarly, essential are the questions of legitimacy raised by the freedom of the parties to favor a private form of dispute resolution over national courts, to choose their judges, to tailor the procedure as they deem appropriate, to determine the rules of law that will govern the dispute even where the chosen rules are not those of a given legal system. No less essential is the arbitrators' freedom to determine their own jurisdiction, to shape the conduct of the proceedings and, in the absence of an agreement among the parties, to choose the rules applicable to the merits of the dispute. More significantly still, the arbitrators' power to render a decision, which is private in nature, on the basis of an equally private agreement of the parties, begs a fundamental question. Where does the source of such power and the legal nature of the process and of the ensuing decision stem from? This question may be referred to as that of the 'juridicity' of international arbitration".[3]

Adjudicating an international commercial arbitration is a taxing task. An arbitration tribunal's main job is to balance the autonomy and freedom of the arbitrants as well as its own with that of the obligation to take into account the multiple substantive and procedural law. The outcome of this exercise confirms or denies legitimacy of the process. It is this that lends it to a legal theory analysis to determine what legal authority underlies international commercial arbitration.

Yet, the immutable fact is that "the ultimate purpose of an arbitration tribunal is to render an enforceable award".[4] The decision of the Swiss Federal Supreme Court in the "Serbian Case" emphasises this, in that "no party would be served by an unenforceable award; this would violate the principle that an (arbitral) tribunal should provide the parties with effective justice, namely a

[3] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010), 2 [hereinafter "Gaillard 2010 (n 3)"]. See also Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 4 [hereinafter "Lew et al. (n 3)"]

[4] Julian DM Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999) 114, 115. See also Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013), 30 [hereinafter "Paulsson 2013 (n 4)"]

solution to their dispute".[5]

This question of the doctrine applicable to the character of arbitration arises, most often, on the meaning of 'an enforceable award'. If "An arbitral tribunal's first objective is to produce an award that is valid and enforceable in the jurisdiction where it is rendered",[6] then there is no problem. If, however, as Poudret and Besson write, that arbitrators have a duty to also "take other legal values into account"[7] to avoid the setting aside of their award and its consequences, then the question of what authority underlies international commercial arbitration, or 'juridicity', is alive.

Different philosophical perspectives exist as to where the legal nature of the arbitration process and of the ensuing arbitral award stems from. Some commentators, both practitioners and academics, argue that the authority that underlies international commercial arbitration is 'contractual'; some say that it is 'national'; others advance that it is 'hybrid', meaning both contractual and national; and there are those who claim that it is 'autonomous'. Despite the multitude of learned commentary on the institution, the precise legal nature of an arbitration and its ensuing arbitral award is still divisive.

This controversy derives, mainly, from national courts in dealing with petitions for recognition and enforcement of arbitral awards. It is perhaps due to the fact that this private sphere of normativity is an "esoteric area of law".[8] This makes Gaillard's recurrent question about the juridicity, meaning its "aptitude to be within the realm of law",[9] or in other words the 'legality',[10]

---

[5] *Football Association of Serbia v M.*_____, 4A_654/2011 (23 May 2012) [3.1]

[6] Pierre A Karrer, 'Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?' in Gerald Aksen and Robert G Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishing 2005) 429, 429

[7] Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell 2007), 115 [hereinafter "Poudret and Besson (n 7)"]

[8] Gerry Lagerberg and Loukas A Mistelis, 'International Arbitration: Corporate Attitudes and Practices 2006' <http://www.arbitration.qmul.ac.uk/research/2006/123975.html> accessed 12 December 2013, i

[9] Gaillard 2010 (n 3), 8

[10] André-Jean Arnaud, 'Fact as Law' in Domenico Carzo and Bernard S Jackson (eds), *Semiotics, Law and Social Science* (Reggio and Rome Casa del libro editrice 1985), 129-144. Arnaud writes that the concept of juridicity employed in the philosophy and sociology of law means nothing more than 'legality'.

of this private dispute adjudication process, quite significant. To understand this, it is essential to determine what authority underlies international commercial arbitration.

These various commentaries about the nature of arbitration derive from how national courts identify the institution and recognise and enforce arbitral awards or deal with challenges thereof. In essence, this makes the legal foundation of this institution indeterminate and, in turn, accentuates the question of its legitimacy. An examination of the legal theory about the legal nature of the arbitration process and of the ensuing arbitral award is, with a view to resolving the uncertainty, necessary.

This chapter explores whether arbitration proceedings and the resultant awards are attached to any national legal system. This could be either the legal system of the country where the proceedings take place or where the award is enforced. It could also be both. Alternatively, arbitration proceedings and awards float and their only authority remains the control of the parties and thus making it a freestanding legal order detached from any country's legal system. In general, this looks at whether arbitration exists in the legal sense, and if it does, whether it does so in correlation with or without national legal order(s).

To arrive at a rational and convincing conclusion as to the authority that underlies this institution, a dynamic view of its theoretical foundation is ineluctable. Writings of venerable analysts must be relied upon for their customary elegance and felicity to provide a comprehensive response to the conceptual developments of this field. Philosophical and legal reflections and debates presented by various commentators offer sophisticated study and scrutiny of the theoretical and practical constructions about the institution.

The result of this ontology should pave way for a fundamental outcome as to whether international commercial arbitration is a definitely and unequivocally characterised concept. Additionally, these analyses and insights are essential in determining whether there is room for a somewhat more enhanced vision of international commercial arbitration, for systematisation through harmonisation, standardisation and unification of rules and procedures and for the creation of a single global institution for this supposed legal order. Expectation must not be set

too high, however, for the intellectual fad on this subject is the source of both conviction and confusion.

However, the starting point is that "Even the most ardent advocates of party autonomy appear to accept that arbitration must act within some system of law".[11] Lew et al. write that "In the main, national arbitration law seeks only to give effect to, supplement, and support the agreement of the parties for their disputes to be resolved by arbitration. Most laws are largely permissive and aim to support and enforce the agreement to arbitrate, rather than to intervene".[12] This explains why "different interpretations have been given by national courts on various aspects of arbitration. One explanation for this is the fact that different national courts adopt different theories in relation to international commercial arbitration".[13]

Consequently, herein lies the first major problem of the institution because "The great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself".[14] The second problem, Gaillard writes, is that:

> "The systematization of the various representations of international arbitration is all the more difficult in that, being mental representations, they are by definition rarely articulated as such and only appear implicitly, often in relation to technical issues, in the legal thinking of arbitration experts".[15]

Representations of international arbitration refer to the legal theories that potentially attach to international commercial arbitration. With regard to such representations Yu writes that "Generally speaking, the various commentaries about the nature of arbitration have been collected into four different theories: the jurisdictional theory, the contractual theory, the hybrid

[11] Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17(1) Arb. Int'l 19, 29-30 [hereinafter "Goode (n 11)"]. See also Charles Chatterjee, 'The Reality of the Party Autonomy Rule in International Arbitration' (2003) 20(6) J. Int'l Arb. 539

[12] Lew et al. (n 3), 4

[13] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemp. Asia Arb. J. 255, 257 [hereinafter "Yu (n 13)"]

[14] Jan Paulsson, 'Arbitration in Three Dimensions' (2010) LSE Legal Studies Working Paper 2/2010 <http://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf> accessed 31 July 2014, 2 [hereinafter "Paulsson 2010 (n 14)"]

[15] Gaillard 2010 (n 3), 13

theory (or the mixed theory) and the autonomous theory".[16] In his study of the legal theory of international arbitration, Gaillard writes that:

> "There are three structuring representations of international arbitration. The first relegates international arbitration to a component of a single national legal order. The second anchors international arbitration in a plurality of national legal orders. The third representation, which the author of this Course favors, is that which recognizes an autonomous character to international arbitration, viewed as having generated an authentic legal order: the arbitral legal order".[17]

In the exploration of the idea of arbitration, Paulsson writes that:

> "Our questions may be examined by reference to four more or less competing propositions. The first is that any arbitration is necessarily national; it lives or dies according to the law of the place of arbitration. This might be called the *territorial* thesis. The second is that arbitration may be given effect by more than one legal order, none of them inevitably essential. This is the *pluralistic* thesis. The third is that arbitration is the product of *an autonomous legal order accepted as such by arbitrators and judges*. The fourth is that arbitration may be effective under *arrangements that do not depend on the national law or judges at all*. Whether such arrangements qualify as legal orderings may be debated. The analysis proposed below gives an affirmative answer, with the result that this fourth proposition ultimately merges with and expands the second: it accounts for a feature of pluralism in the ascendancy".[18]

Where Yu and Paulsson proffer four theories, Gaillard determinedly presents three, as does Born,[19] to ground the core identity and determinacy of international arbitration. Understanding

[16] Yu (n 13), 257. See also Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press 2012), ch 4

[17] Gaillard 2010 (n 3), 15. He developed these representations in the course he gave on the legal theory of international arbitration at The Hague Academy in 2007

[18] Paulsson 2013 (n 4), 30. Italicised words appear in the original text. See also Paul S. Berman, 'Global Legal Pluralism' (2007) 80 S. Cal. L. Rev. 1155, 1166

[19] Gary B Born, *International Commercial Arbitration* vol II (Wolters Kluwer 2014), 214-18 [hereinafter "Born 2014 (n 19)"]

the authority that underlies transnational arbitral proceedings is not only to understand the structure of the institution, but also to identify the conflicting conceptions that describe this field. A study of these three or four theories is crucial, not to deciding which is more correct, but for the essential objective of actually answering the question whether this authority contractual; national; hybrid; or autonomous.

Each theory is examined with the purpose of determining if its ideological perspectives presents enabling field-level conditions for institutional entrepreneurship to enhance the functionality and legitimacy of international commercial arbitration. Ultimately, the question is which of the commentators could mobilise the right resources and employ other actors to advance their philosophical perspectives and pull the majority towards their thinking?

2.2 International Commercial Arbitration is Contractual

In presenting a theoretical overview of the institution, Yu writes that arbitration finds its origin in an agreement by the parties to arbitrate any dispute and its authority, or foundation, therefore, is contractual.[20] Lew et al. write that:

> "The principal characteristic of arbitration is that it is chosen by the parties. However fulsome or simple the arbitration agreement, the parties have ultimate control of *their* dispute resolution system. Party autonomy is the ultimate power determining the form, structure, system and other details of the arbitration".[21]

An arbitration tribunal is concerned with effecting the will of the parties according to their contractual relationship rather than determining a law to apply to the proceedings. From this perspective, an arbitration award is a decision of an independent private tribunal that the parties have given both the requisite jurisdiction and authority to adjudicate on their dispute. They are,

[20] Yu (n 13). See also Wesley A Sturges, 'Arbitration – What Is It?' (1960) 35 N.Y.U.L. Rev. 1031, 1032; Martin Domke, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* (Gabriel M Wilner ed., rev. ed., Supp. 1995)

[21] Lew et al. (n 3), 4. See also Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009), 1 [hereinafter "Blackaby et al. 2009 (n 21)"], 1. See also Born 2014 (n 19), 214

therefore, bound to adhere to the tribunal's decision.

In his study of the concept of delocalised arbitration, or arbitration not controlled by national law, Lew writes that:

> "In the first time period, the regulation of arbitration by national law was non-existent or minimal. The business community was left free to structure and use an arbitration system it considered suitable for its needs. The early forms of arbitration often existed without the blessings of, and perhaps oblivious to, the judicial mechanisms and national laws of the sovereign states in which they operated and which may have been relevant".[22]

In that period arbitration was an industry specific dispute adjudication process, such as the cotton industry, for example. To adjudicate on the rights and obligations of the arbitrants, established customs relevant to the industry in question were applied by the arbitral tribunal. Emulation of judicial procedures, such as legal rules or national laws were avoided. The courts of France and United States of America, for example, give credence to this theory over the others. Arbitral awards are enforced in these jurisdictions even if they are set aside by the courts of the place of arbitration. The courts in the United Kingdom, however, do not support such a view.

Definition of international commercial arbitration provides that it is a contractual process formed and controlled by *pacta sunt servanda*. The validity of the arbitration process under this theory is, whilst based on the supposition that a national legal regime bestows choice upon the parties to agree to arbitrate,[23] entirely dependent on the parties' agreement as to its existence and conduct. The parties voluntarily define arbitration and determine the procedural rules.

---

[22] Julian DM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arb. Int'l 179, 182 [hereinafter "Lew (n 22)"]. See also Mahmood Bagheri, *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration* (Kluwer Law International 2000), 115; Catherine Kessedjian, 'Determination and Application of Relevant National and International Law and Rules' in Loukas A Mistelis and Julian DM Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2008) 71, 81; Thilo Rensmann, 'Anational Arbitral Awards–Legal Phenomenon or Academic Phantom?' (1998) 15(2) J. Int'l Arb. 37; Hans Smit, 'A-National Arbitration' (1988-1989) 63 Tul. L. Rev. 629

[23] John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press 1999), 230 -231

Advancing that the authority that underlies international commercial arbitration is contractual finds support in article II(3) and article V(1)(d) of the New York Convention Recognition and Enforcement of Foreign Arbitral Awards 1958.[24] These provisions oblige courts of contracting states to refer disputing parties to arbitration when seized of a matter in which an arbitration agreement exists between the parties, and the latter makes it clear that so far as the procedure to be followed in arbitration proceedings is concerned, the intent of the parties is given precedence over national law, be it of the seat or enforcing jurisdiction.

In *Ross E. Cox, General Contractor, and Fidelity and Deposit Co. of Maryland v The Fremont County Public Building Authority*[25] the United States Court of Appeals Tenth Circuit had seized an appeal seeking the reversal of a judgment for award of damages in the sum of $31,500 against a contractor and his surety on his performance bond for breaching a contract for the construction of a courthouse in Fremont County. The appellants contended that the appellees' failure to arbitrate was in breach of articles 20 and 40 of their contract, which obliged the parties to submit 'disputes, claims or questions' to arbitration before taking any legal action, precluded them from recovering any damages resulting from such legal action. In agreement with the trial court's decision, this court held:

> "We conclude, however, that the circumstances involved here did not oblige appellees to invoke arbitration. For a dispute, claim or question to be present within the meaning of the contract, a difference between the parties was required. … There is no dispute requiring arbitration until a matter of fact or law is asserted by one side and denied by the other".[26]

The Court found that despite numerous complaints submitted to Cox by the Authority and the County, a dispute had never actually occurred because Cox agreed to do remedial work and furnished a five-year guarantee for the works. Additionally, there was no accord to release Cox of any rights that might have accrued in the County's benefit simply on the basis of him agreeing

[24] June 10, 1958, 330 U.N.T.S. 3; 21 U.S.T. 2517 [hereinafter "New York Convention"]

[25] 415 F.2d 882, 886 (10th Cir. 1969)

[26] ibid, [9]

to carry out remedial work and offer a guarantee as full satisfaction of his responsibilities. Since Cox had never denied "an assertion of fact or law by appellees and no dispute occurred requiring arbitration prior to suit"[27] there was no arbitrable dispute within the meaning of the contract. Thus, the appellees were justified in suing Cox for damages due to his failure to perform the construction and the remedial work adequately.

Another example of courts seizing a matter where an arbitration agreement exists is the case of *Société Européenne d'Etudes et d'Entreprises (SEEE) v World Bank, Yugoslavia and France*[28] in which by agreement dated 03 January 1932 SEEE had agreed to build a railroad and supply equipment for Yugoslavia for the contract to be paid in installments over 12 years. Payments were irregular following the commencement of World War II in 1941. An arbitral award against Yugoslavia was rendered in Switzerland on 02 July 1956. Due to its non-participation in the arbitration proceedings Yugoslavia sought to set aside the award in the Court of First Instance in the Canton of Vaud where the award was made. Neither SEEE's petition to enforce the award nor Yugoslavia's application to have it set aside succeeded on the ground that the arbitral tribunal was not constituted with an odd number of arbitrators as required by the then article 516 of the Code of Civil Procedure applicable in Vaud. The Swiss Supreme Court affirmed the decision on 18 September 1957.

The history of this case spans over four decades and this is because several attempts to have the award enforced in numerous countries failed. Two of the attempts happened in the Dutch Supreme Court in the Netherlands. On 07 November 1975 the court refused enforcement and held that the decision of the Swiss first instance court to remit the award was comparable to setting it aside as per article V(1)(e) of the New York Convention.[29] On 13 November 1984 the Rouen Court of Appeal in France opposed such reasoning and held that the award was simply not in accordance with the arbitration law of the Canton of Vaud. In accordance with the Convention, however, the court found that the award was binding on the parties.

[27] ibid, [11]

[28] (1986) XI(8) French Comm. Arb. Ybk 491; 26 I.L.M. 377 (1986)

[29] (1976) I(2D) Dutch Comm. Arb. Ybk 195

On 18 November 1986 the French Supreme Court of Appeal was seized of the case for the third time. This is because previous nullifying judgments held that the award was enforceable in France. On this occasion the court determined the recognition of the award and also the arbitrators' construction of the agreement to arbitrate. In regard to the latter, which concerned Yugoslavia's claim for immunity as a state, the Court held that the arbitrators had complete freedom to give the interpretation appropriate under the circumstances. Regarding the former the Court expressed that a declaration of enforceability (exequatur) cannot be granted to a judgment that involved the interpretation of an agreement involving question of public international law. The decision was the seal of approval in respect of the lower court's decision.

Since the agreement of the parties is the backbone of international commercial arbitration, the premise that this institution is contractual, as opposed to territorialist or pluralist, would appear to have more strength. It can be seen from article V of the New York Convention that such strength includes the parties agreeing to depart from the legal order of the seat with respect to both the composition of the arbitration tribunal and on the conduct of the proceedings. Paulsson writes that "The parties have the power to stipulate that the law giving binding effect to the proceedings is not the law of the place of arbitration".[30]

The parties pick arbitrators to form the tribunal, and to dictate the procedural rules to regulate the process and proceedings as well as the rules of law to govern the dispute. Similarly, the parties extend such autonomy to the arbitrators, who decide their own jurisdiction, shape the proceedings, where necessary determine the appropriate rules to apply to the merits of the case, and then render an award. Thus, the arbitration agreement is the source of power for this transnational private dispute adjudication process.

The case of *Götaverken Arendal AB v General National Maritime Transport Company*[31] also illustrates the strength of party autonomy. On 05 April 1978 under the aegis of the International Chamber of Commerce (ICC) arbitration in Paris three arbitral awards were rendered by a three-

[30] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 Int'l & Comp. L. Q. 358, 360 [hereinafter "Paulsson 1981 (n 30)"]. See also n 20

[31] International Chamber of Commerce case numbers 2977, 2978 and 3033, 13 August 1979, SO 1462, NJA 379

panel arbitral tribunal. These were decisions based on a majority vote delivered by the French and Norwegian arbitrators with the Libyan arbitrator dissenting. The tribunal held that the claimant's deviation from the contract with respect to the technical specifications and for using components made in Israel entitled the defendant to receive a reduction of only two percent of the contract price but not to refuse to accept delivery of the oil tankers constructed under three contracts dated 19 December 1973. The defendant was thus ordered to pay the balance price of the contracts to complete the $90 million down payment already made.

The defendant refused to comply with the arbitral award and initiated an appeal before French courts to have the award set aside. The defendant submitted that the Court of Appeal of Paris lacked jurisdiction because: (i) the award was not to be enforced in France; and (ii) an application to have the arbitral award upheld was pending in the Svea Court of Appeal. Whereas the Paris Court dismissed the application, the Svea Court upheld the enforcement petition. The defendant then appealed to the Swedish Supreme Court against Svea Court's judgment of 13 December 1978.

On 13 August 1979 the Supreme Court affirmed the judgment on the ground that the French courts did not have jurisdiction over the arbitration award because under the New York Convention and article 11 of the ICC Rules of Arbitration the award was not French as the law of the seat of arbitration would only control the arbitration proceedings where the parties have not specified particular rules in the arbitration agreement. Both Swedish courts based their decision "on the principle that parties to international arbitral proceedings are free to select the legal order to which they wish to attach the proceedings, and this freedom extends to the exclusion of any national system of law".[32] Götaverken was permitted to record its lien against the three ships by exercising its right of attachment and proceed with a judicial auction to recover its debt.

It would seem that there is merit in the presentation that international commercial arbitration is contractual and does or should not rely on any national legal order. In arbitration the aim for both arbitrants and arbitrator(s) is, as was the case in arbitration style church proceedings, to

[32] Paulsson 1981 (n 30), 366

"participate in a process designed to reassert harmony and consensus".[33] Jakubowski writes that:

> "Arbitration is a universal human institution. It is [the] product of a universal human need and desire for the equitable solution of differences inevitably arising from time to time between people by an impartial person having the confidence of and authority from the disputants themselves".[34]

So long as parties neither impose upon themselves the law of any jurisdiction to govern the arbitration proceedings nor rely on any interference by a national court, whether be it to force a particular action during or after the proceedings such as to enforce the award,[35] arbitration can function solely on contractual commitment. In essence, arbitration is not a process for the *resolution* of *disputes*, but a process for the *equitable solution of differences*. This explains that a party would resort to a national court only when a dispute arises regarding the other party's refusal to recognise and enforce an arbitration agreement or award.

Gaillard writes that "The fact that States have kept the monopoly on the enforcement of arbitral awards"[36] does not undermine the autonomy of the arbitration process. Therefore, full or limited binding effect of the agreement to arbitrate would depend entirely on the behaviour of the parties once a dispute arises and once an award is rendered. In respect of the former, it depends on the parties adhering to the agreement to arbitrate without challenging it. In respect of the latter, it depends on the arbitrants honouring the resultant award without challenging it unjustifiably.

2.3 International Commercial Arbitration is National

Götaverken led to a debate with respect to the possibility of contracting parties who have agreed to arbitrate but not to stipulate a governing law of any jurisdiction for both the arbitration

[33] Jerold S Auerbach, *Justice Without Law?: Resolving Disputes Without Lawyers* (Oxford University Press 1983), 24

[34] Jerzy Jakubowski, 'Reflection on the Philosophy of International Commercial Arbitration and Conciliation' in Pieter Sanders, *The Art of Arbitration: Essays on International Arbitration Liber Amicorum Pieter Sanders, 12 Sept. 1912-1982* (Jan C Schultsz and Albert J van den Berg eds, Springer Netherlands 1982) 175, 175-176. See also Thomas E Carbonneau, *The Law and Practice of Arbitration* (5th edn, Juris 2014), 593

[35] Paulsson 1981 (n 30), 368

[36] Gaillard 2010 (n 3), 59

proceedings and the resultant award. This is despite the inevitable fact that the proceedings and recognition and enforcement of the award would occur in a nation state. In essence, parties voluntarily subject themselves to a national law without any obliging on them to do so and that the binding force is in fact their contractual commitment.[37] This would be contrary, however, to Mann's thesis that international arbitration must always be "subject to a specific system of national law"[38] because no legal principle exists which expressly permits action outside municipal law.

Some commentators construct the authority that international commercial arbitration is attached to the law of the country where the proceedings take place. This is the 'jurisdictional theory', or 'the representation that relegates international arbitration to a component of the legal order of the seat', or 'the territorialist model'. Put simply, it means that the authority of international commercial arbitration is national. Yu writes that "The jurisdictional theory invokes the significance of the supervisory powers of states, especially those of the place of arbitration … it maintains that the validity of arbitration agreements and arbitration procedures needs to be regulated by national laws …".[39] Blackaby et al. disagree for, to them, arbitration operates without "the coercive power of any State" and "without reference to a court of law".[40]

Yu elaborates that, according to this theory, arbitrators are like judges because they are also required to apply the rules of law in settling a dispute. Under this theory, arbitrators are expected to apply the procedural rules of law chosen by the parties and those in force in the seat of arbitration. Although they are appointed according to the agreement of the parties, which makes them private judges, they are nevertheless granted judicial power by a particular legal system to conduct the arbitration proceedings.[41] The awards they render are regarded as resembling a

[37] Paulsson 1981 (n 30), 368

[38] Francis A Mann, 'Lex Facit Arbitrum' (1986) 2(3) Arb. Int'l 241, 242-243 [hereinafter "Mann (n 38)"]. See also Sundaresh Menon, 'Standards in Need of Bearers: Encouraging Reform from Within' (Chartered Institute of Arbitrators: Singapore Centenary Conference, Singapore, 3 September 2015) 23 <http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf> accessed 21 January 2016

[39] Yu (n 13), 258

[40] Blackaby et al. 2009 (n 21), 1

[41] Born 2014 (n 19), 215. See also *Dean Witter Reynolds Inc. v Byrd 470* U.S. 213 (1985) [219]; *First Option of Chicago v Kaplan* 514 U.S. 938 (1995) [945]; James Allsop, 'The Authority of the Arbitrator' (2014) 30(4) Arb. Int'l. 639; Joshua Karton, 'The Arbitral Role in Contractual

judgment. According to this theory, arbitration is analogous to litigation because the purpose of the proceedings is for a determination of the dispute in line with the applicable law. This is particularly more so as arbitration is a contentious process.

Yu's examination of the legal nature of the institution is from the view of national courts. Courts give different interpretations to various aspects of arbitration. They espouse different theories about the institution. Thus, she begins by "looking into the nature of international commercial arbitration to see how each theory defines the mechanism of international commercial arbitration".[42] She considers the status each theory affords to arbitral awards for the purpose of examining the challenges met by parties in enforcing awards in different jurisdictions. In consideration of the different approaches by national courts about the legal nature of the institution, it is not difficult to see why her analytical methodology is logical.

The legal system of England and Wales gives preference to the theory that international commercial arbitration is national, as demonstrated in the House of Lords case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*.[43] The High Court of London refused to grant an interim injunction on the application of Eurotunnel to restrain Trans-Manche Link (TML) from suspending work. TML made a counter-application that there was an arbitration pending in Belgium under the auspices of the ICC and thus such application should not be entertained. The Court of Appeal held that it had no jurisdiction to grant the injunction given the parties' choice to arbitrate. The House of Lords, however, was ready to grant the injunction for the English courts had jurisdiction, but did not do so. Lord Mustill said:

> "Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case, and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration".[44]

Interpretation' (2015) 6(1) J. Int. Disp. Settlement 4

[42] Yu (n 13), 257

[43] [1993] AC 334 (HL)

[44] ibid, [100]

Refusal to grant the order, however, was based on an ethical consideration, namely that it could have influenced the decision of the Dispute Resolution Board (DRB) or the arbitration. This is supportive of Yu's findings that the jurisdictional theory embraces the notion of states supervising the arbitration proceedings. The validity of the arbitration agreement should be examined in accordance with the laws of the place of arbitration. Equally, the validity of an award should conform to both the jurisdiction where enforcement is sought, as well as that of where the proceedings occur.

Such a mono-local approach is premised on international commercial arbitration being relegated to a component of a single national legal order where the arbitrator is akin to a national judge of the jurisdiction of the seat of arbitration. The seat of the arbitration is the forum where the adjudication of the dispute occurs. The award is recognised and enforced, or set aside where necessary, in accordance with the national law of this jurisdiction.[45] There is logic to Mann's erudite supposition that every activity occurring in a state should be subject to its jurisdiction. Arbitrators should be assimilated to judges of the country of the seat and subjected to the law of such jurisdiction.

Thus, an arbitral award should derive its legal status from the national legal order of that jurisdiction. Meaning that the juridicity of international commercial arbitration is the national legal regime of the seat of arbitration. This theory finds foundation in the history of international commercial arbitration. Article 2 of the Geneva Protocol on Arbitration Clauses 1923[46] provides that "[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place".

Mann writes that "Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law".[47] He reasons that every right or power

[45] Gaillard 2010 (n 3), 15. See also Mann (n 38), 162; Paulsson 2010 (n 14), 16

[46] (24 September 1923) 27 L.N.T.S. 157 (1924)

[47] Mann (n 38), 159

a private person enjoys is from municipal law. Perhaps a more palatable way to understand this would be to acknowledge that once the proceedings commence, the disputing parties' autonomy is curtailed to the extent that their wishes must be exercised in accordance with the law of the territory in which the tribunal is seated. Indeed, this appears logical for they would have specified such law in their arbitration agreement.

Rationality for this position is based on the doctrine of *lex loci arbitri*. In this respect, the law of the place where the arbitration proceedings take place governs the conduct of the arbitration proceedings – from determination of arbitrability to confirming the status and review of arbitral awards and everything in between. In essence, the jurisdictional theory projects state sovereignty above the agreement of the parties. For Poudret and Besson the will of the parties derives its validity from a legal system[48] - which allows them to contract and to agree to arbitrate. Mayer writes that the juridicity of an award being based on the seat of the arbitration is preferable in practice.[49]

Disapproval of this theory is premised on it not being in line with the freedom of contract that parties to arbitration exercise. Acknowledging the historical basis of this theory and that it is still present in contemporary thinking,[50] its philosophical postulates being based on state positivism and in the realisation of legal harmony[51] and predictability,[52] Gaillard writes that:

> "One has to admit that any reasoning which attempts to reconstruct the parties' intention regarding their choice of the seat of their arbitration, as if all situations were the same, is a highly speculative exercise, even when the parties themselves have directly decided on the matter. The only certainty is that the parties have decided to have their dispute resolved by way of arbitration and that therefore they have not, by definition, submitted

[48] Poudret and Besson (n 7), 83. See also William W Park, 'The *Lex Loci Arbitri* and International Commercial Arbitration' (1983) 32 Int'l & Comp. L. Q. 21, 23

[49] Pierre Mayer, 'The Trend Towards Delocalisation in the Last 100 Years' in Martin Hunter, Arthur L Marriott, VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Graham and Trotman/Martinus Nijhoff 1995) 37, 37

[50] Gaillard 2010 (n 3), 15. See also Paulsson 2013 (n 4), 33

[51] Gaillard 2010 (n 3), 22

[52] ibid, 24 citing Sylvain Bollée, *Les méthodes du droit international privé à l'épreuve des sentences arbitrales* (Paris, éd. Economica 2004), 367

such dispute to the national courts of any given country. The idea that they nonetheless implicitly accepted that the fate of their dispute be ultimately subjected to the conceptions of the seat's legal order on arbitration – or, in practice, what the courts of the seat will decide – seems questionable to say the least".[53]

Paulsson unequivocally opposes this thesis and deems the territorial thesis to be an "outdated conception"[54] because "a plurality of legal orders may give effect to arbitration".[55] He writes that the proponents of this theory "cannot anchor it in positive law"[56] and explicates that there is no assurance that the enforcement jurisdiction will agree with what happened at the seat of arbitration. Further, he propounds that the theory does not sit well with jurisdictions, such as Switzerland, that allow parties to opt out of judicial review of arbitral awards,[57] or indeed the New York Convention which mandates enforcement of arbitral awards without the need for the victorious party to seek approval of the award from the courts of the place of arbitration.

Paulsson's view would be partially correct and partially incorrect. Article V(1)(e) of the Convention provides that recognition and enforcement of the award may be refused if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". This could be read as meaning that the lack of any setting aside or suspension of the award equates to an approval of the same by the courts of the place of arbitration.

Other critics of this theory argue that the seat of the arbitration is often chosen by the parties for physical convenience and nothing more and for that reason "the law of that place was surely of little relevance".[58] Paulsson writes that the territorialist model fits the attitudes prevalent in the twentieth century, but that "It simply does not fit the realities of an international society no

[53] ibid, 20, 24-25

[54] Paulsson 2010 (n 14), 1, 4

[55] ibid, 1, 10

[56] Paulsson 2013 (n 4), 34

[57] ibid, 35, fn 8

[58] Gaillard 2010 (n 3), 95 citing Judge Lagergren in Clive Schmitthoff (ed), *The Sources of the Law of International Trade* (Stevens and Sons 1964) 271

longer constrained within national units – a world in which, moreover, national legal systems understand this new flux".[59] This fundamental argument is grounded on the facts that "The parties have rejected the normal jurisdiction offered by national courts. They have intentionally placed themselves and their dispute settlement mechanism in a neutral, non-national domain. For this reason, national laws have no interest in controlling the arbitration process".[60]

This recognises party autonomy because the arbitrants choose the seat of the arbitration and it is for this reason international commercial arbitration cannot be national. It cannot be denied, however, arbitrants expect that sovereign states will recognise the agreement to arbitrate and support the enforcement of arbitral awards, but if and only when they request such assistance from national courts.[61]

On this proposition, commentators advance that the institution is not only 'national' but actually anchored in a plurality of national legal orders. In other words, it is 'pluralistic'. Gaillard writes that the juridicity of an award derives, as well as from the jurisdiction of the seat of the arbitration tribunal, from "all legal orders that are willing, under certain conditions, to recognize the effectiveness of the award".[62] In a discourse enquiring into the legal ordering that gives effect to arbitration and its lawfulness, Paulsson also unhesitatingly writes that "arbitration derives its legitimacy and its effectiveness from an unknown number of potentially relevant legal orders".[63] This is the multi-localisation or the decentralised theory to the legal nature of the process and of the ensuing decision.

However, this does not necessarily remove the juridicity from the jurisdiction of the forum of the arbitration but widens it to all the "laws that are likely to have a connection with a given arbitration".[64] It relies upon all the national legal orders "that recognise the legitimacy of this

[59] Paulsson 2013 (n 4), 35

[60] Lew (n 22), 179

[61] ibid, 181

[62] Gaillard 2010 (n 3), 25

[63] Paulsson 2010 (n 14), 2. See also Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters?' (1983) 32 Int'l and Comp. L. Q. 53 [hereinafter "Paulsson 1983 (n 63)"]; Paulsson 1981 (n 30), 360

[64] Gaillard 2010 (n 3), 26

private means of dispute resolution and that determine the conditions of the effectiveness of the award as the end result of the arbitral process".[65]

Yu writes that "the validity of an arbitral award is decided by the laws of the seat and the country where the recognition or enforcement is sought".[66] She relies on Mann's hypothesis that sovereign states are entitled to exercise supervisory powers over the arbitration proceedings, or part thereof, carried out in their territory. In fact, this is enshrined in article V of the New York Convention.

Parties can seek the assistance of the courts of the country where the arbitration proceedings are conducted and the courts where a petition for recognition or enforcement is presented to validate the agreement to arbitrate, arbitrability of the dispute, and whether enforcement of the award would or not contravene the public policy of either or both states.[67] The focus of this theoretical representation is the resultant award that is binding on the parties because "It is the recognition of the award that retrospectively validates the entire process".[68]

Gaillard makes it clear that this representation of plurality is also, just like the jurisdictional theory, based on state positivism, but only "among States following a Westphalian model of sovereignty".[69] This is because, he writes, that the New York Convention minimises the role of the seat and, although the state of the seat is free to control the arbitration proceedings in its territory, it shifts the focus on the conditions of recognition and enforcement of awards to the state where enforcement is sought.[70] Essentially, the national court where recognition and enforcement of the award is sought can make a decision whether or not to recognise and enforce the award in complete disregard to the decision of other states.

Logic applies to this view in that from inception of the arbitral proceedings to the rendering of an

[65] ibid, 27

[66] Yu (n 13), 258

[67] Yu (n 13), 258-260

[68] Gaillard 2010 (n 3), 26

[69] ibid, 27

[70] ibid, 30

award it is the law of the seat that governs the proceedings. Once the petition for enforcement and recognition is issued at the national court in the territory where enforcement is sought, it is rational that the law of that jurisdiction should take over so far as the governance of the proceedings is concerned. A source of both sovereignty and legitimacy exists over arbitration proceedings and the applicable ruling authority very much depends on the stage that the proceedings have reached and in which state they are taking place. van den Berg writes:

> "First, it is a generally accepted rule that the setting aside of an arbitral award pertains to the exclusive jurisdiction of the courts in the country of origin (i.e., the country in which, or – rather theoretically - under the law of which, the award was made) and is to be adjudicated on the basis of the arbitration law of that country. This rule appears to underlie the ground for refusal of enforcement set forth in Article V(1)(e) of the Convention ("The award ... has been set aside ... by a competent authority of the country in which, or under the law of which, that award was made"). The courts in the other Contracting States may only decide under the Convention whether or not to grant enforcement of the award within their jurisdiction. The consequence is that setting aside of an award in the country of origin has extra-territorial effect as it precludes enforcement in the other Contracting States by virtue of ground (e) of Article V(1) of the Convention.
>
> …
>
> In contrast, a refusal of enforcement is limited to the jurisdiction within which a court refuses enforcement and courts in other Contracting States are in principle not bound by such refusal".[71]

Evidence suggests, not of the fact that "the New York Convention has clearly broken away from the ancient conception which considers the juridicity of international arbitration to be exclusively rooted in the legal order of the seat",[72] but that interoperability of different legal systems permits

[71] Albert Jan van den Berg, 'The New York Convention of 1958: An Overview' in *Yearbook Commercial Arbitration* (2003) XXVIII Comm. Arb'n Ybk v, 4

[72] Gaillard 2010 (n 3), 31. His reference to the "ancient conception" is to the Convention on the Execution of Foreign Arbitral Awards 1927, in

international commercial arbitration to function with consistency and efficiency.[73] These are achieved, so far as this representation is concerned, by the fact that a triumphant arbitrant could submit a petition for recognition and enforcement in any country where the defeated party has assets to satisfy the award. For multi-national corporations this is extremely advantageous to implement the award; until they face the difficulties of different interpretations in different jurisdictions, or even in the same jurisdiction.

The essence of this theory that international commercial arbitration is national is the case of *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*.[74] In a contract for the sale of white pepper by Putrabali, an Indonesian company, to Rena Holding, a French company, the parties stipulated for arbitration in accordance with the Rules of Arbitration and Appeal of the International General Produce Association (IGPA). The cargo containing the goods was lost in a shipwreck and Rena refused to pay for it. Putrabali initiated proceedings in London. The award of 10 April 2001 was in Rena's favour as the tribunal was convinced that Rena's refusal to pay was justified. Putrabali challenged the award and the High Court, which partially set aside the award on 19 May 2003 because Rena was in breach of contract for not paying. In a second arbitration the tribunal rendered an award on 21 August 2003 in Putrabali's favour. Rena was obliged to pay for the cargo.

In respect of the 2001 award, Rena filed a petition at the First Instance Court of Paris for recognition and enforcement and the Court granted an order allowing enforcement. Putrabali's challenge against the enforcement order on the ground of fraud on the part of Rena was dismissed by the Paris Court of Appeal on 31 March 2005 for the setting aside of an arbitral

---

particular article 1(d) which states "(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appel or pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending". Whilst it would be challenging to claim that Gaillard could be mistaken in any sense when he writes on his specialist subject, it would be erroneous not to point out that setting aside of an award would only occur where action amounting to the italicised words has been taken. The re-wording of the provision in the New York Convention does not make the concept ancient, but preserved. Therefore, the legal order of the seat, whilst not the only legal force pertaining to arbitration proceedings or the resultant award, cannot be removed from the equation at any stage of the proceedings.

[73] ibid, 31

[74] (2007) XXXII(2) French Comm. Arb'n Ybk 299; Cour de cassation, 1 ère civ., June 29, 2007, 05-18.053 (French Supreme Court, First Civil Section, June 29 2007, 05-18053 [hereinafter "Putrabali (n 74)"]. In some ways, *Putrabali* is also demonstrative of the delocalisation concept that Paulsson has for so long argued - see Paulsson 1981 (n 30), 360

award in a foreign country does not prevent enforcement in France, and that it would not be contrary to international public policy. On 29 June 2007 the Supreme Court affirmed the decision and held that an international arbitral award is a decision of international justice and its validity must be determined in accordance with the arbitration rules applicable in the country where its recognition and enforcement is sought.[75]

In this instance, the rule applicable in France, namely, Decree No. 2011-48 of 13 January 2011, does not contain a provision preventing the recognition and enforcement of an award on the ground that the award was set aside in the country of origin. Thus, in accordance with the arbitration agreement, the IGPA rules, and in line with article VII of the New York Convention, Rena had rightly sought enforcement in France. Such a permissive decision is unobjectionable since France has provides a fertile environment for arbitration. In fact, the 2011 Decree was intended to extend the attraction of France as a seat of arbitration proceedings by permitting maximum party autonomy and minimum court intervention.[76]

2.4 International Commercial Arbitration is Hybrid

A hybrid theory exists as a compromise for those who think that "neither the jurisdictional theory nor the contractual theory provides a satisfactory and logical explanation of the modern framework of international commercial arbitration".[77] This theory mixes the contractual and jurisdictional theories and was created by Surville and developed by Sauser-Hall. Sauser-Hall writes that "Although deriving its effectiveness from the agreement of the parties, as set out in the arbitral agreement, arbitration has a jurisdictional nature involving the application of the rules of procedure".[78] Such grounding can be traced to the case of *Marquis de Santa Cristina et al. v Princess del Drago et al* [79] in which the Paris Court of Appeal decision of 10 December 1901

[75] *Emphasis added*. See David W Rivkin, 'The Impact of International Arbitration on the Rule of Law - The 2012 Clayton Utz Sydney University International Arbitration Lecture' (2013) 29(3) Arb. Int'l. 327, 335

[76] Jean-Pierre Harb and Christoph Lobier, 'New Arbitration Law in France: The Decree of January 13, 2011' (2011) 26(3) Mealey's Int'l Arb. Rep. 1, 1

[77] Yu (n 13), 274

[78] Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, JurisNet 2014), 442 citing Georges Sauser-Hall 'L'arbitrage en droit international privé' (1952) 44 I. Ann. Ist. Dr. intl. 469 [hereinafter "Rubino-Sammartano (n 78)"]. See also Born 2014 (n 19), 215-216

[79] Court of Appeal, Paris, 10 December 1901, 29 Clunet 1902, 314

was that an arbitration award is partially contractual and partially jurisdictional in nature.

Yu cites Sanders and Ancel as supporters of this theory.[80] It is based on the premise that the contractual approach suffers some deficiencies, particularly with regard to the status of the arbitration tribunal and the enforceability of the arbitration award. How should these two aspects be interpreted - according to the contract or the particular legal system which granted power to the tribunal to conduct arbitration Proceedings? Another reason for the existence of the hybrid theory is that the contract theory is a relict, meaning that it has had its day in the history of the institution, but its place in the modern era is in combination with the jurisdictional theory; but certainly not alone. Thus, without application of national law to arbitration proceedings, the legitimacy of the process would be unjustifiably diminished.

Blackaby et al. sum it up accurately as follows:

> "International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties play a significant role. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most countries of the world will recognise and enforce. In short, this essentially private process has a public effect, implemented with the support of the public authorities of each State and expressed through that State's national law. This interrelationship between national law and international treaties and conventions is of vital importance to the effective operation of international arbitration".[81]

An arbitration originates in a contract but that national legal regimes determine the validity of the agreement to arbitrate and the enforceability of the resultant arbitral award. In *Paul Smith Ltd. v H & S International Holding Co. Inc.* Steyn J held that:

[80] Yu (n 13), 276 citing Pieter Sanders, 'Trends in the Field of International Commercial Arbitration' (1975) 145(2) Recueil des Cours 205, 233-34; and Jean-Pierre Ancel, 'French Judicial Attitudes towards International Arbitration' (1993) 9(2) Arb. Int'l 121, 121

[81] Blackaby et al. 2009 (n 21), 29

> "[The lex arbitri is] a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g. removing an arbitrator for misconduct)".[82]

This theory may well represent the reality of the institution in that arbitration proceedings are governed by whatever law and rules that the parties stipulate in their agreement to arbitrate. Once an award is rendered, however, it is the jurisdiction where enforcement of the award is sought, which could be 'the courts of most countries of the world', according to Blackaby et al. This statement carries a significant consequence because it makes an arbitral award multi-national or international. It is advanced as one of the theoretical foundations of international commercial arbitration.

2.5 International Commercial Arbitration is Autonomous

International commercial arbitration is a process created entirely by the international commercial community. It derives its authority, its functionality and legitimacy very much from the will of commercial parties. They contract for a particular transaction and agree to arbitrate, under agreed rules and procedures, any dispute arising from the transaction. For this reason, Lew writes that:

> "There can be no justification for national courts to intercede in the arbitration process or second-guess the determinations and analyses of an international arbitration tribunal. Courts which do so for parochial local law reasons … ignore the intention and expectation of the parties and the autonomy of international arbitration".[83]

[82] [1991] 2 Lloyd's L. Rep. 127 [130]

[83] Lew (n 22), 179

This being the case, an indispensable question must be "Can arbitration function without the support of the law of a particular state?"[84] A positive answer permits the theory that the institution is autonomous. In 2006, Lew writes that international arbitration is an autonomous dispute resolution process governed by international commercial rules and practices and not national rules because its principal basis is party autonomy.[85] In 2008, Yu writes that instead of fitting arbitration into a legal framework, it can be accepted as an autonomous institution not restrained by the law of the seat.[86] In 2010, Gaillard writes that:

> "The third representation of international arbitration is that which accepts the idea that the juridicity of arbitration is rooted in a distinct, transnational legal order, that could be labeled as the arbitral legal order, and not in a national legal system, be it that of the country of the seat or that of the place or places of enforcement".[87]

Gaillard's seminal and insightful look at the legal theory of international arbitration is dedicated to the philosophical aspects of international arbitration. He champions arbitration as an autonomous transnational legal order. Autonomous in the sense that it is independent of national law and that arbitrators are organs of the international community and not of any specific jurisdiction.[88] He expands that this representation is based on international arbitrators legitimately administering justice not on behalf of states but for and on the consensus of the international community. He advances this theory by reversing the arguments he presents on his previous two theories.

He reasons that to connect international arbitration with the seat "is too tenuous to constitute the exclusive foundation of international arbitration"[89] and that it is "increasingly anachronistic".[90] The reason is that states where enforcement of the award could take place "have just as

[84] Paulsson 2010 (n 14), 2

[85] Lew (n 22), 180

[86] Yu (n 13), 257

[87] Gaillard 2010 (n 3), 35

[88] ibid, 59

[89] ibid, 36

[90] ibid

legitimate a title – if not more so – to assert its or their views of what constitutes an arbitration worthy of legal protection".[91] The rules that govern both the arbitrators and the arbitrations do not derive from a single national legal system but from the "trends arising from the normative activity of the community of States",[92] meaning that they are transnational in nature.

Such a claim places a burden of proof on Gaillard as to how law can exist outside the state. He writes that "The existence of an arbitral legal order can readily be acknowledged if one accepts to reason from a natural law perspective",[93] which is justified by the notion of 'higher values' because natural law supports individual or collective values. In this context, natural law is characterised by arbitrators' decisions being based not on the arbitrants' legal or contractual rights but on their commercial interests.[94] These are rights which the arbitrants voluntarily produce by opting for a process of voluntary adjudication of any disputes that arise from their voluntary contracts.

Further, he elucidates that the arbitral legal order is not extraneous to national laws but "entirely based on the normative activity of States".[95] States recognise arbitration as a process of dispute adjudication because it satisfies the broad criteria upon which they have all agreed as such. Hence, they accept and sanction the enforcement of the arbitral awards, which is demonstrated by case law and national laws.[96] To present that international commercial arbitration is an autonomous legal order is not, however, without difficulties. Gaillard writes that:

> "The reality of the existence of an arbitral legal order is to be assessed in terms of its capacity to answer the fundamental questions of its sources and its relations with other legal orders, and not only by examining whether it is organized into a system of rules or whether it is able to provide answers to all disputes that the arbitrators are likely to encounter. However consistent and comprehensive a body of norms is, it can only be

[91] ibid

[92] ibid, 37

[93] ibid, 40

[94] ibid, 41

[95] ibid, 46

[96] ibid, 52

> characterized as a legal order if it is able to reflect on its sources and its relations with other legal orders".[97]

Since international commercial arbitration does not possess the regulative institutional pillar, it is not a system for the institution lacks this particular pillar. Therefore, it draws its formal sources from national legal orders and international law in general. The relationship between the informal sources of international commercial arbitration, being the agreement of the parties and the procedural rules that they agree upon, and the formal sources is that the latter lend support to the former. Their relationship is parallel. It is this relationship that legitimises international commercial arbitration.[98]

The notion of sovereign power is Hart's legal theory which suggests that the normative bindingness of positive law rests on the socially observable fact that people in fact recognise the rulemaking power of the sovereign.[99] More specifically in relation to arbitration, Reisman and Iravani write that:

> "The point of emphasis is that international commercial arbitration, no less than arbitration within nation-states, while conducted in the sphere of private law, is a public legal creation whose operation and effectiveness is inextricably linked to prescribed actions by national courts".[100]

Gaillard writes that it is in fact the will of and acceptance by states through case law and legislation that allows the existence of an arbitral legal order. Since states do not prevent its existence and continuation, such widespread acceptance legitimises its autonomous existence. National legal orders confer authority to arbitrators in their capacity as international judges to adjudicate international business disputes and, in turn, these orders unreservedly recognise the arbitral awards for they do not belong to a specific state. States simply ensure the enforcement of

---

[97] ibid, 58

[98] ibid, 59

[99] Herbert LA Hart, *The Concept of Law* (3rd edn, Clarendon Law 2012) [hereinafter "Hart (n 99)"]

[100] W Michael Reisman and Heide Iravani, 'The Changing Relation of National Courts and International Commercial Arbitration' (2010) 21 Am. Rev. Int'l Arb. 5, 5

awards because they permit the use of arbitration as a process for adjudicating international disputes,[101] both commercial and non-commercial.

It is why it could be submitted that an "award is not integrated into the national legal order of the seat of arbitration".[102] This is because the institution is a process and not a system. This makes it easy to conceive the notion of an arbitral legal order, despite the lack of the regulative pillar in this institution. The reason is that arbitration proceedings have a beginning and an end within the realm of the arbitrating parties' agreement and thus making it a process outside any characterised system. Once the proceedings come to an end, any subsequent proceedings become part of the relevant national legal system.

Gaillard corroborates his presentation of this theory by citing cases from various jurisdictions. Though mainly he relies on the French national courts' approach not to give relevance to the national laws of the seat of the arbitration. He cites *Société Hilmarton Ltd v Société Omnium de Traitement et de Valorisation (OTV).*[103] Hilmarton commenced arbitration proceedings against OTV under the auspices of the ICC to obtain its fees under a contract to provide advice and co-ordination relating to a bid for works in Algeria.

On 19 August 1988 the tribunal dismissed this claim. OTV sought enforcement of the award in France, which was granted. Hilmarton's challenge in the Paris Court of Appeal was unsuccessful in arguing that recognition and enforcement should have been refused by virtue of article V(1)(e) of the New York Convention and articles 1498 and 1502-5 of the French Code of Civil Procedure (nouveau code de procédure civile)[104] because the award had been set aside in Switzerland. The court upheld the enforcement order.

The French Supreme Court exhibited its pro-enforcement attitude by relying on article VII of the

[101] Gaillard 2010 (n 3), 59-60

[102] ibid, 61

[103] Cour de cassation, (23 March 1994) (1995) XX Comm. Arb'n Ybk 663

[104] Decree No 75-1123 of 5 December 1975 (le décret no 75-1123 du 5 décembre 1975, 12521) as amended by Law No 2007-1787 of 20 December 2007 (la loi no 2007-1787 du 20 décembre 2007, 20639); Livre IV: L'arbitrage, Titre Ier: L'arbitrage interne, Chapitre VI: Les voies de recours, Section 3: Dispositions communes à l'appel et au recours en annulation and Section 5: Autres voies de recours [hereinafter "NCPC"]

New York Convention and disregarded the Swiss Supreme Court's annulment of the arbitration award rendered in its jurisdiction. The Court reasoned that the arbitral award was an international award and was independent of Switzerland and thus capable of enforcement in France even if set aside in Switzerland. Additionally, its recognition in France would not contravene international public policy.

This was fortified recently by the Paris Court of Appeal in *La Direction Générale de l'Aviation Civile de l'Émirat de Dubaï v Société International Bechtel Co*.[105] On 21 October 2003 the Court of First Instance in Paris granted an order enforcing the award against the appellant. As the award was annulled by the United Arab Emirates' Court of Cassation on 15 May 2004 the appellant appealed against the order.

The appeal court rejected the two arguments advanced by the appellant, namely, that the award did not satisfy article 13(1)(c) of the Convention on Judicial Assistance, Recognition and Enforcement of Judgements in Civil and Commercial Matters[106] and that enforcement should be refused under article 1502-5 of the NCPC because it was contrary to international public policy. Of significance is the Court's disregard of the annulment of the award by the Court of Cassation of Dubai. The Court's justification was two-fold, that the NCPC aims to eliminate impediments to effecting international arbitral awards,[107] and that no consideration can be given by a foreign judge to judgments in annulment proceedings.

Indeed, it is the decision of the French Court of Cassation in *Putrabali*[108] that forcefully and explicitly endorses the existence of an arbitral legal order in which the validity of an international arbitral award is established only in the country of recognition and enforcement and not in any other jurisdiction because an award is the product of international justice.[109] The French stance is no different to that adopted by the United States of America as demonstrated by

[105] Chamber 1C, (29 September 2005). See also *Bargues Agro Industries v Young Pecan Company* (2006) Rev. Arb. 154; (2005) XXX Comm. Arb'n Ybk 499

[106] <http://www.un.int/wcm/webdav/site/uae/shared/bilateral%20treaties%20where%20UAE%20is%20a%20party.pdf> accessed 30 August 2014

[107] See in particular arts 1498 and 1502 of the NCPC

[108] Putrabali (n 74)

[109] ibid, 301

the decision in *Chromalloy Aeroservices Inc. v The Arab Republic of Egypt*[110] where the District Court for the District of Columbia granted enforcement of an award rendered in Egypt despite the subsequent annulment by the Egyptian courts.

In addition to citing crucial case law, Gaillard refers to numerous examples of arbitration statutes to maintain his claim that an arbitral legal order exists. For example, article 192 of the Swiss Private International Law Statute 1987 (PILS) provides that where none of the parties domicile, are habitually resident, or have a business establishment in Switzerland, they may either "waive fully their action for annulment or they may limit it to one or several of the grounds listed in Article 190(2)".[111]

Another example is article 1717 (4) of the Belgian Judicial Code which was introduced in 1985 and amended by article 1717(2) in 1998. This provides that the parties can exclude an application to set aside an arbitral award where none of them have "Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there".[112] In addition, he refers to article 78(6) of the Tunisian Arbitration Code of 1993; Article 51 of the Swedish Arbitration Act 1999; article 126 of Peru's General Law on Arbitration 1996; and article 36 of Panama's Decree Law No. 5 of 1999.[113]

Consistent with *Putrabali* that an international arbitral award is a decision of international justice is yet another decision of the Supreme Court of France. The case of *Société Elf Aquitaine and Total v M. X. and others*[114] concerns the application of article 1506(1) of the 2011 Decree. Read in conjunction with article 1456, this provision provides that the parties can obtain interim relief from the French courts before the arbitral tribunal physically constitutes as an arbitral tribunal because a tribunal is considered constituted upon all the arbitrators accepting their appointment.

In 1992 Elf Neftegaz, a French company, entered into a co-operation agreement with the Russian

[110] (1997) XXII Comm. Arb'n Ybk 1001

[111] Gaillard 2010 (n 3), 65

[112] ibid, 65

[113] ibid

[114] Cass. 1e civ., October 12, 2011 1 Rev. Crit. DIP 121 (2012) (French Supreme Court, First Civil Section, 12 October 2011, 11-11058)

company Interneft. As the agreement was for the exploitation of hydrocarbon fields in Russia, Russia's Minister of Fuel and Energy and the relevant official representatives of the Saratov and Volgograd regions countersigned the agreement. The agreement provided for *ad hoc* arbitration under the UNCITRAL Arbitration Rules administered by the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") with the seat of arbitration being Stockholm.

In 2009 the Russian parties commenced arbitration proceedings against Elf Neftegaz. Elf Neftegaz had been removed from the French Companies Registry several years prior due to dissolution and liquidation. On 28 July 2009 the Russian parties made an *ex parte* application to the Commercial Court of Nanterre, the city where Elf Neftegaz had been incorporated, to appoint an *ad hoc* legal representative to represent the company. A representative was appointed on 6 August 2009 who then appointed one of the three arbitrators as per the agreement. Following the arbitral tribunal's constitution on 04 September 2009 Elf Aquitaine and Total, as the former owners of Elf Neftegaz, commenced proceedings before French courts raising challenges to the jurisdiction of the arbitral tribunal and relying on article 809 of the NCPC[115] and sought provisional measures for imminent damage or manifestly illegal nuisance.

The arguments raised by the French parties were that: (i) the Saratov and Volgograd regions were not parties to the arbitration agreement; (ii) the order of the Nanterre Commercial Court appointing the legal representative of Elf Neftegaz was invalid due to inaccuracies in the application; (iii) the arbitrator appointed by the first *ad hoc* representative cannot stand since the order appointing the representative was invalid; (iv) the proceedings were initiated for the sole purpose of carrying out extortion against them and cited *fraus omnia corrumpit* (fraud corrupts everything); and (v) for these reasons the arbitral tribunal should be suspended pending a decision in the proceedings in Stockholm.

On 05 November 2010 the Paris Court of Appeal upheld the court of first instance's decision to reject the application in that French courts could not intervene for lack of jurisdiction over the Stockholm proceedings under the UNCITRAL rules. Elf Aquitaine and Total resorted to the

[115] NCPC

Supreme Court, which on 12 October 2011 held that the French judiciary could not intervene with the arbitral proceedings for the very same reasons given by the Court of Appeal, namely, that the French rules were not applicable to any aspect of the proceedings.

This was because the arbitration proceedings held in Stockholm were: (a) international in nature; (b) autonomous because the arbitral seat was Stockholm; (c) the arbitration rules in play were the UNCITRAL rules; (d) English was the language of proceedings; and (e) the appointing authority was SCC. There was no link to the French legal system whatsoever and for that reason "it does not fall within the powers of the French courts to intervene in arbitration proceedings to hinder their progress when the arbitral tribunal before which the proceedings are are held is seated in Stockholm according to the procedural rules defined by UNCITRAL".[116] In essence, the Court held that an arbitral tribunal is an independent international jurisdiction.

This judicious validation lends support to the fact that "National legal orders are thus gradually abandoning the idea that the source of validity of arbitral awards necessarily lies in the legal order of the seat, conceived as a forum, or even in any national legal order, and moving towards the conception that recognizes the existence of an arbitral legal order".[117] This strengthens Gaillard's presentation that an arbitral legal order indeed exists. This theory holds that "International arbitral proceedings are presented as if they occupy an impenetrable space".[118]

Akin to Gaillard, Paulsson also presents a stimulating theoretical examination of the legal foundation of arbitration. Paulsson's analytical and rigorous illumination takes a different approach to Gaillard's. Though in his introduction he appears to suggest that he presents the third

[116] French Supreme Court, First Civil Section, January 26 2011, 09-10.198. See X. Delpech, 'Confirmation de l'autonomie de l'ordre juridique arbitral international' Dalloz Actualités, October 25 2011. See also Rubino-Sammartano (n 78), 504

[117] Gaillard 2010 (n 3), 66

[118] Elie Kleiman and Claire Pauly, 'Supreme Court reiterates autonomy of the international arbitral legal order' <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=3c7249ce-66b6-4c50-8d32-d6fd2bd28653andutm_source=ILO+Newsletterandutm_medium=emailandutm_campaign=Arbitration+Newsletterandutm_content=Newsletter+2012-01-19> accessed 14 April 2015. See Lew (n 22), 180 "It exists in its own space – a non-national or transnational or, if you prefer, an international domain. It has its own space independent of all national jurisdictions. ... At the very least, the existence, structure, procedure and effect of international commercial arbitration are, or at least should be, above the direct controls of national laws and courts."

theory of arbitration as a "product of an autonomous legal order"[119] he does not in fact do so. Instead, he takes to challenge the idea of an autonomous arbitral legal order. His view of this theory is very clearly identified by the title he gives to the section in the book, which is 'A False Start'.[120]

He writes that "A vision has been taking form for half a century in the minds of a succession of French scholars. Its resonance, in France and elsewhere, has extended to judicial pronouncements, but not in legislation".[121] Paulsson's condemnation achieves two functions here, which are to highlight that Gaillard's presentation would not withstand scrutiny and that the French and American positions with respect to this theory is not in line with the British attitude.[122]

He writes that "The hollowness of the claims for this autonomous legal order was exposed by the English courts in the case of *Dallah v Pakistan*".[123] This is a case in which the Paris Court of Appeal[124] and the Supreme Court of the United Kingdom[125] reached contrary decisions whilst applying the same law to the same facts. In Paris the Court decided, in line with the arbitral tribunal's award, that the Government of Pakistan was an alter ego to the agreement entered into in September 1996 between Awami Hajj Trust and Dallah.

Pakistan had not only negotiated the terms of the agreement but also guaranteed the Trust's loan obligation and could be assigned the rights and obligations under the agreement without Dallah's consent since the Trust was created by the memorandum of understanding signed in July 1995 by

[119] Paulsson 2013 (n 4), 30. Italicised words appear in the original text.

[120] ibid, 39

[121] ibid

[122] This explains why Paulsson writes: "In raising some theoretical matters relating to arbitration, I hope that it is not too much to ask of an English audience that they for once sample this unfamiliar fare. One might name a dozen theoretical works written in French off the top of one's head. The English-speaking world, on the other hand, has the benefit of splendid writings that make sense of statutes and rules and cases dealing with arbitration, immensely valuable treatises on the craft of arbitration, but I can think of no book-length work on its theory". Paulsson 2010 (n 14), 2

[123] ibid, 42

[124] *Gouvernement du Pakistan – Ministère des Affaires Religieuses v Dallah Real Estate and Tourism Holding Company* (Case No. 09/28533) 17 February 2011

[125] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46

the Government of Pakistan and Dallah with the purpose of providing accommodation in Mecca for Pakistani pilgrims. In London, the High Court,[126] the Court of Appeal,[127] and the Supreme Court,[128] unanimously held that the Government of Pakistan was not a party to the arbitration agreement and thus Dallah could not enforce the arbitral award in England.

In his analysis of private legal systems, Schultz considers that "the concepts of prescriptive, adjudicative and enforcement jurisdictional powers as revealing factors of juridicity" and "a normative system that has no claims to comprehensiveness and supremacy, and that lives within and across other legal systems, can still be a legal system".[129] Thus, existence of an arbitral legal order is feasible.

Roberts,[130] however, categorically rejects the idea of law outside the state and implores that caution should be exercised in representing what he calls "negotiated orders" as law because law unconnected with government is difficult to define and to find. Even the oft-referenced *lex mercatoria* as "the most successful example of global law without a state",[131] unfortunately still relies on national courts for enforcement because its "legality is routinely secured from underneath, 'downwards' into the state, as it were".[132] In other words, the very existence of *lex mercatoria* is in the hands and will of national courts. This is no different to international commercial arbitration.

This explains why Gaillard's sustained attempt to introduce or support the existence of non-state governance in the form of an independent 'arbitral legal order' loses strength because, by his own admission, that:

> "In reality, the term 'arbitral legal order' is only justified where it can describe a system

[126] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm)

[127] *Dallah Real Estate and Tourism Holding Co v Pakistan* [2009] EWCA Civ 755; [2010] 2 W.L.R. 805 (CA Civ Div)

[128] See n 125

[129] Thomas Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2007) 10 Yale J. L. and Tech. 151, 156

[130] Simon Roberts, 'After Government? On Representing Law without the State' (2005) 68(1) Mod. L. Rev. 1, 18 [hereinafter "Roberts (n 130)"]

[131] Gunther Teubner, 'Global Bukowina': Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without A State* (Dartmouth Publishing 1997) 1, 1

[132] Roberts (n 130), 18

> that autonomously accounts for the source of the juridicity of international arbitration. Without the consistency offered by a system enjoying its own sources, there can be no legal order. Without autonomy vis-à-vis each national legal order, there can be no arbitral legal order".[133]

The will for international commercial arbitration to stand alone and not be attached to any jurisdiction has always been advocated. Lord Wilberforce aptly utters, during the legislative approval process of England's Arbitration Act 1996, this point:

> "Since I so heartily welcome this Bill and agree with its provisions, I do not propose to comment in any detail on it. I would like to dwell for a moment on one point to which I personally attach some importance. That is the relation between arbitration and the courts. I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law—yes, its substantive law. I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts".[134]

There is a major difficulty, however, in advancing that this institution is an independent legal order. Gaillard acknowledges that without an independent system to account for the source of the juridicity of international arbitration, there would not be a strong ground on which to build an autonomous arbitral legal order. This empowers the presentation of the current thesis that an independent system of international commercial arbitration should no longer be the dream that Smit had presented over a quarter of a century back for a single transnational commercial

[133] Gaillard 2010 (n 3), 39

[134] Lord Wilberforce, Arbitration Bill [HL], HL Deb 18 January 1996, vol 568 cols. 760-94, col. 778

arbitration institution,[135] but a reality that the field aspires. Keller writes that "In essence, international law continues to be a system of rules that rest on the consent of the very states to which they apply. To the extent that international law is founded on state consent, then, the latter legitimizes the former".[136]

Gaillard's acknowledgment is inescapably necessary because the noun 'autonomy' or adjective 'autonomous' convey the requirement of: (i) "having the freedom to govern itself or control its own affairs"; (ii) "having the freedom to act independently"; (iii) "the right or condition of self-government"; (iv) "freedom from external control or influence"; (v) "independence"; (vi) "self-rule"; and (vii) "self-determination". Due to the existence of difference theories that claim the legal nature of international commercial arbitration, this institution cannot assert 'autonomy'. Thus, to gain and enjoy considerable degree of autonomy, the institution must be free from state consent – meaning state laws and courts.

At this juncture, contemplation is compulsory as to why an independent arbitral legal order could be argued to or not to exist. A theoretical reasoning on the concept of a legal order must be provided and an obvious response would have to be two-fold. One, that can be implied from Gaillard's justification on the existence of an arbitral legal order, namely, that it is transnational in nature because its development stems from the community of states. Two, the latent "threat to the supremacy of State judicial system"[137] to counter the existence of such an order. It is not at all clear, however, whether it is for this reason that arbitration is regulated and controlled by states, or if it is due to fear and hesitation of the arbitration community to create a supreme structure capable of taking such authority away from states.

In this respect, probe of the different perceptions as to what authority underlies international commercial arbitration presents an opportunity for institutional entrepreneurship. Actors in this institution could design the roadmap for the future of this process towards transnational

[135] Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1986) 25(1) Colum. J. Transnat'l. L. 9

[136] Helen Keller, 'Codes of Conduct and their Implementation: the Question of Legitimacy' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 219, 257

[137] Carl Watner, 'Stateless, Not Lawless: Voluntaryism and Arbitration' Number 84 - Feb 1997 <http://voluntaryist.com/articles/084.html#.VG2Xe_mUdkD> accessed 19 November 2014

principles, including a definite authority that underlies the institution.

2.6 Opportunity for Institutional Entrepreneurship: To Bridge the Theoretical Traditions

Structures of argumentation about where the legal nature of the arbitration process and award stem from are presented herein. It is irrefutable that the theories point to conceptual incongruities, which calls into question the legitimacy of the process. This varied extensive commentary achieves nothing more than stretching the theory to an unnecessary extent. Borrowing Heidegger's words regarding national socialism, what today is systematically touted as the legal nature of the arbitration process and award, but which has nothing in the least to do with the inner truth and greatness of this institution, darts about with fish-like movements in the murky waters of these 'values' and 'totalities.[138]

It cannot be avoided that there is a need for cognitive and explicit engagement in a critical reflection to free this institution from some of the theoretical illusions. Existence of diverse perspectives about the theoretical underpinnings of the legal nature of this institution does not require a sophisticated analysis and description anymore.[139] It needs an attempt to reach a cooperative understanding on a single theory.

A philosophical framework that endorses a particular theory, and perhaps that introduces positive transformation, must be based on the presence of enabling field-level conditions.[140] Such conditions could empower institutional entrepreneurship for such a cooperative understanding on this matter of great common concern and to set about a fundamental overhaul of this aspect of

[138] Martin Heidegger, *An Introduction to Metaphyics* (Ralph Manheim tr, Yale University Press 1959), 199

[139] Alistair Mutch, 'Reflexivity and the Institutional Entrepreneur: A Historical Exploration' (2007) 27(7) Organ. Stud. 1123, 1123 [hereinafter "Mutch (n 139)"]

[140] David Strang and Wesley D Sine, 'Interorganizational institutions' in Joel AC Baum (ed), *Blackwell Companion to Organizations* (Blackwell Scientific Publications 2002) 495, 507. See also Royston Greenwood, Roy Suddaby and Christopher R Hinings, 'Theorizing Change: The Role of Professional Associations in the Transformation of Institutionalized Fields' (2002) 45(1) Acad. Manag. J. 58, 60. For discussion on other types of conditions that enable institutional entrepreneurship see Neil Fligstein and Iona Mara-Drita, 'How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union' (1996) 102(1) Am. J. Sociol. 1 (i.e. economic and political crisis); Nelson Phillips, Thomas B Lawrence and Cynthia Hardy, 'Inter-organizational Collaboration and the Dynamics of Institutional Fields' (2000) 37(1) J. Manage. Stud. 23; Kimberly A Wade-Benzoni and others, 'Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions' (2002) 27(1) Acad. Manag. Rev. 41 (complex and multi-faceted field-level problems)

the institution. Battilana writes that "it is necessary to explain under what conditions actors are enabled to act as institutional entrepreneurs".[141] This means discovering not only the conditions that prompt an opportunity or a will for institutional entrepreneurship but also those which make entrepreneurial behaviour successful.

Entrepreneurship is behaviour which occurs from time to time, which is why it is about practical actualisation. Enabling conditions on the level of the field include, but not necessarily limited to, precipitating jolts or crises; the presence of acute field-level problems; problems related to the scarcity of resources; the degree of heterogeneity of the field; and the degree of institutionalisation of the field. Enabling conditions also include the level of the actors' social position within the field, which is important because it determines their access to resources and influences their perception of the field.[142]

Diversity of ideas and norms with regard to the legal nature of the arbitration process and award gives rise to enabling conditions for institutional entrepreneurship. Primarily, this concerns the degree of institutionalisation of the field, and secondarily, it concerns the degree of heterogeneity of the field. Additionally, the institution's actors' position within the field may also give rise to enabling conditions in its own right, but also to support the field-level enabling conditions. For purposes of practicality, focus would be on the degree of institutionalisation because the theories presented appear not to be institutionalised. This confirms that this institution is semi-institutionalised.

In accordance with the definition of institutionalisation provided by Meyer and Rowan,[143] it

[141] Julie Battilana, 'Agency and Institutions: The Enabling Role of Individuals' Social Position' (2006) 13(5) Organization 653, 654. See also Julie Battilana, Bernard Leca and Eva Boxenbaum, 'Agency and Institutions: A Review on Institutional Entrepreneurship' Harvard Business School Working Paper (2008) Harvard Business School Working Paper 08-096/2008 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.461.6523&rep=rep1&type=pdf> accessed 30 May 2014, 6 [hereinafter "Battilana et al. (n 141)"]; Julie Battilana and Matthew Lee, 'Advancing Research on Hybrid Organizing' (2014) 8(1) Acad. Manag. Ann. 397 [hereinafter "Battilana and Lee (n 141)"]

[142] Battilana et al. (n 141), 9. See also Julie Battilana, Bernard Leca and Eva Boxenbaum, 'How Actors Change Institutions: Towards a Theory of Institutional Entrepreneurship' (2009) 3(1) Acad. Manag. Ann. 65; Battilana and Lee (n 141); Steve Maguire, Cynthia Hardy and Thomas B Lawrence, 'Institutional Entrepreneurship in Emerging Fields: HIV/Aids Treatment Advocacy in Canada' (2004) 47(5) Acad. Manag. J. 657, 657

[143] John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) Am. J. Sociol. 340, 341 [hereinafter "Meyer and Rowan (n 143)"]

seems that where the legal nature of the arbitration process and award stem from has not "come to take on rule like status in thought and action". Institutionalisation occurs when "alternatives may be literally unthinkable".[144] Institutionalised practices are widely followed, without debate, and exhibit permanence.[145] Institutionalised behaviour is powerful and binding "beyond the discretion of any individual participant or organization".[146]

Berger and Luckmann write that institutionalisation becomes crystalised upon acquiring exteriority and objectivity,[147] meaning that actors share a common understanding with regard to the expected behaviour and that such behaviour is repeated by different generations of actors without the common understanding being changed. When this occurs, the institution is fully institutionalised.[148]

Analsying the above debates reveals that the institutionalisation of the legal nature of the arbitration process and award is not crystalised. An institutional context is the common understanding which derives from "the rules, norms, and ideologies of the wider society".[149] This is about the actors within the relevant setting, for example institution or organisation, having shared meanings and institutional conformity in order to act rationally in accordance with the appropriate isomorphic prescriptions. This signals their legitimacy.

Agreeing a single theoretical underpinning is the institutional entrepreneurship opportunity present here. It is very likely to enhance the functionality and legitimacy of international

[144] Lynne G Zucker, 'Organizations as Institutions' in Samuel B Bacharach (ed), *Advances in Organizational Theory and Research* vol 2 (JAI Press 1983) 1, 5 [hereinafter "Zucker (n 144)"]

[145] Pamela S Tolbert and Lynne G Zucker, 'Institutional sources of change in the formal structure of organizations: The diffusion of civil service reform, 1880-1935' (1983) 28 Adm. Sci. Q. 22, 25 [hereinafter "Tolbert and Zucker 1983 (n 145)"]

[146] Meyer and Rowan (n 143), 344. See also Tolbert and Zucker 1983 (n 145), 22

[147] Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin 1991), 51-55, 59-61

[148] Pamela S Tolbert and Lynne G Zucker, 'The Institutionalization of Institutional Theory' in Stewart R Clegg, Cynthia Hardy and Walter R Nord (eds), *Handbook of Organization Studies* (SAGE 1996) 175 [hereinafter "Tolbert and Zucker 1996 (n 148)"]

[149] John W Meyer and Brian Rowan, 'The Structure of Educational Organizations' in John W Meyer and William R Scott (eds), *Organizational Environments: Ritual and Rationality* (SAGE 1983) 71, 84. See also Zucker (n 144), 105; William R Scott, 'The Organization of Environments: Network, Cultural and Historical Elements' in John W Meyer and Williams R Scott (eds), *Organizational Environments: Ritual and Rationality* (SAGE 1983) 155, 163

commercial arbitration institution for it would lead to predictability and consistency. Moreover, it is undeniable that the theoretical underpinning most appropriate to advance is that international commercial arbitration is an autonomous legal order because it is a process created by the business community and it functions for them and it is they who legitimise it.[150] It is the greater theory to advance because it corresponds to party autonomy.

Gaillard's core idea is arguably more practical in scope and it is the most relevant to confirm the conviction and reinforce the inner truth and greatness of international commercial arbitration and provide a basis for the structural transformation of the institution. It is certainly an attempt to introduce a comprehensive model that is both pragmatic and pluralistic because arbitration proceedings are *sui generis*. Born writes that "In all cases, it remains essential to categorize and treat arbitration as a distinctive and autonomous discipline, specially designed to achieve a particular set of objectives, which other branches of private international law fail to satisfactorily resolve".[151]

It would not be at all easy, however, to argue that the institution functions legitimately independent of national law; that arbitrators are organs of the international community and not of any specific jurisdiction; and that intercession by national courts in the arbitration process is unjustified. National courts do not, as Lew writes, "ignore the intention and expectation of the parties and the autonomy of international arbitration"[152] because it is always the parties who ask national courts to intercede. As discussed in chapter 1, the reason for this is simply that this institution is without a regulatory pillar.

Thus, in order to be an 'autonomous' legal order, the institution must create its own regulatory framework, and show that it can function without the support of state consent, and that arbitrators can legitimately administer the type of justice that the commercial community seeks. Thus, to gain and enjoy considerable degree of autonomy, the institution must become fully

[150] Emmanuel Gaillard, 'Sociology of International Arbitration' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 187, 187. See also George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 Yale J. Int'l L. 1, 2

[151] Born 2014 (n 19), 217. See also Rogers (n 2), 19, 28

[152] n 83

institutionalised by implementing the regulative pillar. Without it, this representation that international commercial arbitration is an autonomous transnational legal order is extremely difficult to accept and advance. This would not easily persuade the schools of thought pledged to the other theories.

The logic of the regulative pillar is instrumentality and its basis of legitimacy is legal sanction.[153] Due to the presence of various theories about the legal nature of this institution, however, how it accomplishes its functions, fulfills its obligations, and realises its objectives depends largely on the theory that a particular jurisdiction adopts. Its legal sanction is equally uncertain. This is contrary to the basis of institutions.

Schotter writes that "A social institution is a regularity in social behavior that is agreed to by all members of society, specifies behavior in specific recurrent situations, and is either self-policed or policed by some external authority".[154] Aoki also provides a similar definition and writes that "An institution is a self-sustaining, salient pattern of social interaction, as represented by meaningful rules that every agent knows, and incorporated as agents' shared beliefs about the ways the game is to be played".[155]

Institutions are equilibria of strategic games and actions which out-of-equilibrium are unstable.[156] Instability in this institution derives from the fact that there is no regularity in the behaviour of its actors because the rules appear not to be agreed to by all its actors. Moreover, it is policed by external authority, namely, laws of sovereign states and their courts. This means that the institution's rules are not known by every actor because the rules are not incorporated as the actors' shared beliefs about the ways the process functions. This means that its basis of order and indicators, namely, the regulative rules, are absent.

Advancing the interest for international commercial arbitration to be an autonomous legal order

[153] William R Scott, *Institutions and Organizations: Ideas, Interests, and Identities* (4th edn, SAGE 2014), 60

[154] Andrew Schotter, *The Economic Theory of Social Institutions* (Cambridge University Press 1981), 11

[155] Masahiko Aoki, 'Endogenizing Institutions and Institutional Change' (2007) 3 J. Inst. Econ. 1, 7

[156] See Hobart P Young, *Individual Strategy and Social Structure: An Evolutionary Theory of Institutions* (Princeton University Press 1998); Masahiko Aoki, *Toward a Comparative Institutional Analysis* (MIT Press 2001)

will have to seek to go beyond distinguishing it from other dispute adjudication processes. Although the foundation has been laid down by Gaillard, supported by Born and others, to influence the international commercial arbitration community about the potential for an autonomous legal order, there is an indispensable need to engage a reference group consisting of industry experts and researchers who rank highly to produce a powerful programme theory.[157] Institutional entrepreneurs are agents who act strategically in pursuing their genuine interests because of the presence of both individual and collective entrepreneurship.

In this respect Habermas distinguishes modes of action as "work", based on rational choice, instrumental and strategic action and "interaction", based on communication and coordination of behaviour through consensual norms.[158] Such a group would have to have strong will to advance and defend the most appropriate and distinct philosophical theory to realise practical actualisation of new possibilities. Institutional entrepreneurship is usually successful because entrepreneurs undertake rational problem solving.[159] The problem to solve and practical possibility to realise with regard to this matter is for a single theory to represent international commercial arbitration as a systematic framework premised on transnational principles without further academic debate about its legal nature.

Different institutional orders constitute different actors with different identities and interests with different ties among them and they possess different attitudes to entrepreneurship.[160] It is for this reason institutional change requires entrepreneurs to mobilise resources[161] and other actors[162] to

[157] Lance E Davis and Douglass C North, *Institutional Change and American Economic Growth* (Cambridge University Press 1971)

[158] Jürgen Habermas, *Toward a Rational Society* (Jeremy J Shapiro tr, Beacon 1970), 91-92. See also Jürgen Habermas, *Knowledge and Human Interests* (Jeremy J Shapiro tr, Beacon 1971), 168

[159] Farzad Khan, Kamal Munir and Hugh Willmott, 'A Dark Side of Institutional Entrepreneurship: Soccer Balls, Child Labour and Postcolonial Impoverishment' (2007) 27(7) Organ. Stud. 1055. See also Mutch (n 139)

[160] Elisabeth S Clemens and James M Cook, 'Politics and Institutionalism: Explaining Durability and Change' (1999) 25(1) Annu. Rev. Sociol. 441, 454. See also Lowell W Busenitz, Carolina Gómez and Jennifer W Spencer, 'Country Institutional Profiles: Unlocking Entrepreneurial Phenomena' (2000) 43(5) Acad. Manag. J. 994

[161] Tammar B Zilber, 'Stories and the Discursive Dynamics of Institutional Entrepreneurship: The Case of Israeli High-tech after the Bubble' (2007) 27(7) Organ. Stud. 1035 [hereinafter "Zilber (n 161)"]. See also Jens Beckert, 'Agency, Entrepreneurs, and Institutional Change: The Role of Strategic Choice and Institutionalized Practices in Organizations' (1999) 20(5) Organ. Stud. 777 [hereinafter "Beckert (n 161)"]; Mutch (n 139); David Levy and Maureen Scully, 'The Institutional Entrepreneur as Modern Prince: The Strategic Face of Power in Contested Fields' (2007) 27(7) Organ. Stud. 971 [hereinafter "Levy and Scully (n 161)"]

[162] Battilana et al. (n 141), 11. See also Beckert (n 161); Markus Perkmann and André Spicer, 'Healing the Scars of History: Projects, Skills and

purposely create, change, maintain or destroy practices considered legitimate.[163] Actors are collective but dispersed agents and it is the reason institutional entrepreneurs rely on other actors for their task cannot be the work of an individual entrepreneur.[164]

Such mobilisation of and cooperation by other actors, however, is attained by socially skilled actors who create meaning.[165] They are recognised not just as entrepreneurs, but as leaders;[166] visionaries[167] and reflexive agents[168] because they create the opportunity for institutional entrepreneurship by introducing a rational actor perspective; they provide motivation for the particular stance; and they control the same. They are prime movers because they influence institutions by their actions. They generate significantly positive development and reform.[169] It is for these reasons that entrepreneurship is the key driver of institutional change.

To mark the progress of ages and countries, a book authored by Gaillard, Born, and Rogers for

---

Field Strategies in Institutional Entrepreneurship' (2007) 27(7) Organ. Stud. 1101; [hereinafter "Perkmann and Spicer (n 162)"]; Levy and Scully (n 161)

[163] Thomas B Lawrence and Roy Suddaby, 'Institutions and Institutional Work' in Stewart Clegg and others (eds), *Handbook of Organization Studies* (2nd edn, SAGE 2006) 215, 217. See also Charlene Zietsma and Thomas Lawrence, 'Institutional Work in the Transformation of an Organizational Field' (2010) 55 Adm. Sci. Q. 189, 189

[164] Barbara Czarniawska, 'Emerging Institutions: Pyramids or Anthills?' (2009) 30(4) Organ. Stud. 423, 424. See also Silvia Dorado, 'Institutional Entrepreneurship, Partaking, and Convening' (2005) 26(3) Organ. Stud. 385; Michael Lounsbury and Ellen Crumley, 'New Practice Creation: An Institutional Perspective on Innovation' (2007) 28(7) Organ. Stud. 993; Steve Maguire and Cynthia Hardy, 'Discourse and Deinstitutionalization: The Decline of DDT' (2009) 52(1) Acad. Manag. J. 148, 173

[165] Neil Fligstein, 'Social Skill and the Theory of Fields' (2001) 19(2) Sociol. Theory 105, 106. See also Raghu Garud, Sanjay Jain and Arun Kumaraswamy, 'Institutional Entrepreneurship in the Sponsorship of Common Technological Standards: The Case of Sun Microsystems and Java' (2002) 45(1) Acad. Manag. J. 196; Vilmos Misangyi, Gary Weaver and Heather Elms, 'Ending Corruption: The Interplay among Institutional Logics, Resources, and Institutional Entrepreneurs' (2008) 33(3) Acad. Manag. Rev. 750; "Perkmann and Spicer (n 162)"]; Zilber (n 161); Roy Suddaby and Royston Greenwood, 'Rhetorical Strategies of Legitimacy' (2005) 50 Adm. Sci. Q. 35; [hereinafter "Suddaby and Greenwood (n 165)"]

[166] John Child, Yuan Lu and Terence Tsai, 'Institutional Entrepreneurship in Building an Environmental Protection System for the People's Republic of China' (2007) 27(7) Organ. Stud. 1013 [hereinafter "Child, Lu and Tsai (n 166)"]. See also Levy and Scully (n 161); Frank Wijen and Shahzad Ansari, 'Overcoming Inaction through Collective Institutional Entrepreneurship: Insights from Regime Theory' (2007) 27(7) Organ. Stud. 1079

[167] Beckert (n 161); Perkmann and Spicer (n 162); Zilber 2007 (n 157)

[168] Beckert (n 161); Suddaby and Greenwood (n 165); Mutch (n 139); Child, Lu and Tsai (n 166)

[169] Paul J DiMaggio, 'Interest and Agency in Institutional Theory' in Lynne G Zucker (ed), *Institutional Patterns and Organizations* (Ballinger Publishing Company 1988) 3 [hereinafter "DiMaggio (n 169)"]. See also Magnus Henrekson and Mikael Stenkula, *Understanding Entrepreneurship: Definition, Function and Policy* (Studentlitteratur 2016); William J Baumol, 'Entrepreneurship in Economic Theory' (1968) 58(2) Am. Econ. Rev. 64; Harvey Leibenstein, 'Entrepreneurship and Development' (1968) 58(2) Am. Econ. Rev. 72

example, entitled 'Autonomous Theory of International Arbitration' would be more productive to alter the rules of the game because institutions are self-enforcing and its behaviour is generated endogenously.[170] Downes writes that "technology changes exponentially, but social, economic, and legal systems change incrementally".[171] Gaillard's aforementioned seminal work would be the start of lobbying for an autonomous legal order for the institution. A book by the aforementioned commentators would form part of the objectification process of institutionalisation for this institution. It would allow the authors to champion the promotion and diffusion of the institution as an autonomous legal order.[172]

Tolbert and Zucker write that champions emerge when the potential for innovation exists. To do so, champions identify or define the generic institutional problem and justify their proposed solution either on logical or empirical grounds. Firstly, they must generate public recognition of dissatisfaction or failing of the institution. Secondly, they develop theories that provide solution or treatment. For the theories to be persuasive and effective, however, the champion must provide evidence of the potential success of the proposed innovation. Following objectification and diffusion, the innovation becomes semi-institutionalised and increases its rate of survival in comparison to pre-institutionalised structures.[173]

To establish a respectable, widely followed, permanent, and positively institutionalised theory without unthinkable alternatives, two forms of institutional entrepreneurship responses would have to be employed, namely, destructive and productive entrepreneurship.[174] Schumpeter calls this 'creative destruction', which describes the process of "incessantly destroying the old one, incessantly creating a new one".[175] Mobilized resources would engage, firstly, to destroy the difference in opinion about the number of theories pertaining to the legal nature of the arbitration process and resultant award. Even in their presentation of multiple theories, there is no

[170] Thráinn Eggertsson, *Imperfect Institutions: Possibilities and Limits of Reform* (University of Michigan 2005), 136 [hereinafter "Eggertsson (n 170)"]. See also Barry R Weingast, 'Political Institutions: Rational Choice Perspectives' in Robert Goodin and Hans-Dieter Klingemann (eds), *A New Handbook of Political Science* (Oxford University Press 1996) 167, 180

[171] Larry Downes, *The Laws of Disruption: Harnessing the New Forces that Govern Life and Business in the Digital Age* (Basic Books 2009), 2

[172] DiMaggio (n 169)

[173] Tolbert and Zucker 1996 (n 148), 183

[174] William J Baumol, 'Entrepreneurship: Productive, Unproductive, and Destructive' (1990) 98(5) J. Polit. Econ. 893

[175] Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Harper & Brothers 1942), 83

agreement with regard to how the different theories actually operate. It is for this reason that the difference in opinion about the theories and the theories with less support will have to be destroyed for any one particular theory to emerge and govern.

To realise institutional entrepreneurship, actors mobilise key constituents by framing the failing of the existing institutional arrangements. As well as diagnosing the failure, they also assign blame for the failure. Alternatively, actors promote their proposed institutional arrangement in an analytical frame as exciting, groundbreaking, and generally superior to the previous one by de-legitimating the existing arrangements and those endorsed by their opponents as futile.[176]

It would be practical and convenient to destroy the theory that international commercial arbitration is national or hybrid for two fundamental reasons, which are developed below. Actors would participate, secondly, to create strength in the presentation that the institution is in fact autonomous because it is contractual. This institutional entrepreneurship opportunity bears legitimacy.

To destroy the difference in opinion, the central argument is that Yu, Gaillard and Paulsson present that the institution is actually 'multi-national', not 'national'. For Yu, two national legal orders exercise supervisory powers over the validity of an arbitral award, namely, the seat of the proceedings and seat where recognition or enforcement of the arbitral award is sought because it is only sovereign states that are entitled to exercise supervisory powers over the arbitration proceedings.

For Gaillard there is no limitation as to the number of states that could exercise supervisory power over an arbitral award so long as they are all willing to recognise the award. This presentation does not attribute one nationality to arbitral awards but to a plurality of national legal orders. Gaillard considers article V of the New York Convention to separate the arbitration proceedings into two stages – (i) the actual trial of the merits; and (ii) the enforcement of the resultant award.

[176] Battilana et al. (n 141), 11

To him, the New York Convention minimises the supervisory powers of the courts at the seat of the arbitration proceedings and that exercise of such powers is entirely the prerogative of the courts where recognition and enforcement of an arbitral award is sought. Such a court has a stronger title to impose its views on the legal constituents of an arbitration because the state where enforcement is sought "authorizes the seizure and forced sale of assets on its territory".[177] Placing the juridicity of arbitration proceedings in both the state of the seat and the state in which the enforcement proceedings take place as "dual control" that "is archaic and inopportune".[178]

For Paulsson the plurality of legal orders applying to the arbitral process is that "arbitral agreements and awards will be given effect if given rules apply" whether these be of "national legal systems", "rudimentary orders" of an industry, "of a self-declared government of rebels", or "of a criminal organization".[179] His expansion of the plurality concept to include any category of rules to an arbitration process beyond those of a national legal system beggars belief by any stretch of imagination.

Paulsson's broadening does not accord with Hart's positivist normative theory that a legal system is based on primary rules, which prescribe the conduct with respect to obligations, and secondary rules, which are power-conferring as they facilitate the creation, modification, application and enforcement of the primary rules.[180] There is no legal validity in rules of an industry, of rebels, or of criminals since they are neither a legal system nor are their rules subordinate to a legal system.

A vital element of the pluralistic theory is that it is concerned with the award only and the jurisdictions in which its recognition and enforcement can be effected. In response to such a view Goode writes that:

> "But this argument never gets off the ground, for it presupposes that the arbitral process

[177] Gaillard 2010 (n 3), 32

[178] ibid

[179] Paulsson 2013 (n 4), 29. See also Paulsson 1983 (n 63). See also Paulsson 1981 (n 30), 360

[180] Hart (n 99)

> works in a complete legal vacuum unless and until application is made to enforce the award as a foreign award. If that were so, then at the time of its rendering the award would have no legal underpinnings at all. It would undoubtedly be the product of the parties' agreement, under which they assented to be bound, but as stated earlier that assent is no more than an agreement, lacking any legal force unless accepted as binding by the relevant national law; and the only possible law is the *lex loci arbitri*".[181]

This makes Yu's submission that both the law of the jurisdiction of the arbitration seat and that of the jurisdiction where recognition and enforcement is sought applies to the arbitration proceedings from beginning to end more accurate and rational. The law of the seat of the arbitration could delegitimise the enforcement proceedings on the ground of public policy, for example, and the territory in which the enforcement proceedings occur could hold that the conduct of the arbitral proceedings lack legitimacy because of the composition of the arbitral tribunal or its procedure, for instance. Yet, Gaillard's emphasis on the recognition and enforcement stage of the arbitration proceedings also bears strength. Once an award is rendered by a tribunal the arbitration comes to an end and whatever other proceedings take place are in fact judicial.

Since the arguments presented by both Yu and Gaillard would be acceptable to some extent, the effect of such divided presentations makes it difficult to accept that determinacy and legitimacy can be achieved in international commercial arbitration with respect to the legal nature of the arbitration proceedings and the resultant award. This makes international commercial arbitration neither consistent nor efficient.

It is time consuming to destroy an institution, but it is achievable. Two examples are sufficient to demonstrate this point. An attempt by the Shops Bill 1986 to repeal the Shops Act 1950 so as to permit trade on a Sunday in England and Wales failed. Another effort was made to achieve the same measure and that led to the enactment of the Sunday Trading Act 1994 legalising Sunday trading. Since 28 August 1994 shops of all kind have the legal right to trade on Sundays.[182]

[181] Goode (n 11), 29-30

[182] Tony Askham, *A Guide to the Sunday Trading Act 1994* (Butterworths 1994); Paul Freathy and Leigh Sparks, 'The Employment Structure of

South Africa's apartheid, an institutionalised system of racial segregation and discrimination which began in 1948 and codified by the Population Registration Act 1950 ended on 28 June 1991 when the remaining apartheid laws were repealed. Following the 1991 Convention for a Democratic South Africa (CODESA) to form a multiracial government to function under a constitution of an undivided South Africa, a new multicoloured flag was adopted in 1994 to mark the end of four decades of South Africans being classified by race. Several key individuals expressed contrition to such inhuman and degrading treatment of humans.[183]

To create strength in the argument that international commercial arbitration is in fact autonomous because it is contractual, and thus establish the institutional *status quo*, would have to involve taking a different route. Kay writes that if you want to go in one direction, the best route may involve going in another. He calls this "obliquity", which is "the process of achieving complex objectives indirectly".[184] He explains that goals are more likely to be achieved if pursued indirectly because oblique approaches are most effective in difficult terrain and where outcomes are dependent on engagement with other people. To go in the direction of claiming the autonomous legal nature of international commercial arbitration would have to involve taking a different route, such as destroying the other theories first as opposed to simply advancing it.

Many examples can be cited where institution altering, not destroying, efforts succeeded, but one or two would suffice to illustrate the point. Jing Shuping is the Chinese entrepreneur who advocated successfully for privately owned banks in China and this allowed him to open the first one, called Minsheng Bank, in 1996. Within a decade, 20 or more banks, privately or jointly owned with the authorities, were established.[185]

At the present time, it would be inconceivable to reference entrepreneurs without mentioning

---

the Sunday Labour Market in Retailing: A Comparative Analysis of DIY and Grocery Superstores in Scotland and in England and Wales' (1995) 27(3) Environ. Plann. A 471; Martyn Halsall, What's in store for Sunday trading? (1994) 20 The Guardian 34

[183] Leonard Thompson and Lynn Berat, *A History of South Africa* (4th edn, Yale University Press 2014); Nancy L Clark and William H Worger, *South Africa: The Rise and Fall of Apartheid (Seminar Studies in History)* (2nd edn, Routledge 2011); Josh Brooman and Martin Roberts, *Longman History Project South Africa 1948-1994: The Rise and Fall of Apartheid: Updated to Cover the ANC Governments of Mandela and Mbeki, 1994-2000* (2nd edn, Longman 2001)

[184] John A Kay, *Obliquity: Why Our Goals Are Best Achieved Indirectly* (Profile Books 2011), 1-13, 80-88

[185] David Daokui Li, Junxin Feng and Hongping Jiang, 'Institutional Entrepreneurs' (2006) 96(2) Am. Econ. Rev. 358, 360

Elon Reeve Musk, the founder of Space Exploration Technologies Corporation, commonly known as SpaceX. This company, founded in 2002, aims to reduce the cost of travelling to space from Earth. In 2003 Tesla Motors, now Tesla, Inc., was created to produce electric cars. Traditionally, aircrafts always had human pilots. Today, unmanned aerial vehicles are the norm for search and rescue missions and wars and even parcel delivery.

Only collective entrepreneurship would work here to divert attention from ideas advanced by other commentators that international commercial arbitration is not or cannot be autonomous. For example, Paulsson corroborates his stance by drawing on Romano's[186] theory on legal order to develop his thought on the legal foundations for arbitration, namely, institutionalism and pluralism.[187] His reasoning for such a conclusion is that the function of arbitration in social life is that:

> "The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.
>
> It is difficult for courts to achieve this kind of acceptance; public justice tends to be distant and impersonal. Arbitration is a private initiative… The ideal of arbitration is freedom reconciled with law.
>
> Acceptance of arbitration is a distinctive feature of free societies. It is rejected by totalitarian states".[188]

He writes that as humans have to live in community, the idea of *libre arbiter*, meaning complete freedom or free will, is never achieved because both law and freedom are necessary for humans and the community; and it is why humans willingly give up some freedom in return for the rule of law to, in this instance, make contracts binding. "We also want *our* law, and thus is born the

[186] Santi Romano, *The Legal Order* (Mariano Croce ed and tr, Routledge 2017)

[187] Paulsson 2013 (n 4), 46-48

[188] ibid, 1; See also Blackaby et al. 2009 (n 21), 1

idea of arbitration. It is about liberty, not only efficiency".[189]

Liberty is gained from the fact that "people are free to arrange their private affairs as they see fit, provided that they do not offend public policy or mandatory law".[190] This is in line with Austin's command theory that international law is not law because coercion is an indispensable element of law and order and that law derives from a sovereign.[191] A vector of legitimacy is, therefore, the law, particularly as the law plays a role in the development of an institutional field.[192]

Indeed, imperfect institutions have identifiable consequences.[193] In advancing the autonomous legal order theory, the main obstacle would be the reliance by this institution upon national courts. Gaillard acknowledges this and writes that "In order for a body of rules to be characterized as a system, the rules in question must operate in an interrelated manner following certain methods specifically belonging to the field of legal logic, first and foremost the general-specific and the principle-exception dialectics".[194] This is in line with the definition of 'system', namely, components that work together in relationships for the objective of the whole.[195]

As an autonomous legal order, the functions or activities within arbitration proceedings must work together for the aim of achieving an enforceable arbitral award. In this, the set of variables that influence one another must be within the realm of the arbitration institution and not subcontracted or assigned to national courts. The institution cannot be a process[196] where

[189] Paulsson 2013 (n 4), 2

[190] ibid

[191] John L Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed, Cambridge University Press 1995), 21-22, 165-166

[192] Shon R Hiatt, Wesley D Sine and Pamela S Tolbert, 'From Pabst to Pepsi: The Deinstitutionalization of Social Practices and the Creation of Entrepreneurial Opportunities' (2009) 54(4) Adm. Sci. Q. 635

[193] Eggertsson (n 170), 1

[194] Gaillard 2010 (n 3), 54

[195] Ludwig von Bertalanffy, *General System Theory: Foundations, Development, Applications* (George Braziller 1968), 36-38, 45, 55. See also Stephen G Haines, *The Complete Guide to Systems Thinking and Learning* (Human Resource Development Press 2000), 2; Daniel Katz and Robert L Kahn, *The Social Psychology of Organizations* (2nd edn, John Wiley & Sons 1966), 22; William E Deming, *The New Economics for Industry, Government, Education* (2nd edn, MIT Press 1994), 50; Peter M Senge, *The Fifth Discipline, The Art and Practice of the Learning Organization* (Crown Publishing Group 2006). Jay W Forrester, *Principles of Systems* (MIT Press 1968), 1-1

[196] Joseph M Juran, *Juran on Quality by Design: The New Steps for Planning Quality into Goods and Services* (Free Press 1992), 219. See also Thomas H Davenport, *Process Innovation: Reengineering work through Information Technology* (Harvard Business School Press 1993), 5; Michael Hammer and James Champy, *Re-engineering the Corporation* (Harper Business 1993), 35; Henry J Johansson, *Business Process*

recognition and enforcement, or challenge, of an arbitral award is achieved only through national courts. Institutions are not sequences of individual actions but rather sets of practices.

To inhibit the heterogeneity and create homogeneity in this institution requires not only strongly corroborated reasons for transformation of existing institutional arrangements, but also intense active effort to achieve it. Actors constitute institutions consciously from a practice perspective through interest-driven strategic agency.[197] Strategic conduct possesses three principles "the need to avoid impoverished descriptions of agents' knowledgeability; a sophisticated account of motivation; and an interpretation of the dialectic of control".[198]

Here, such interest-driven strategic conduct would have to be evasive entrepreneurship as a legitimate source of institutional change and innovation.[199] Such strategic action would have two aims. Firstly, it would be to demonstrate that the existing institutional framework is in contradiction with party autonomy, which is the foundation of international commercial arbitration. Secondly, it would be to circumvent the existing institutional framework by reducing the number of submissions of petitions to national courts for recognition and enforcement of and challenges to arbitration awards. Naturally, this should result in privileging the autonomous theory because of explicit and predictable law-like regulation with the correct controlling techniques to govern it.

2.7 Conclusion

To conclusively state that international commercial arbitration occupies an impenetrable space, or for it to do so, different theoretical groundings about its legal nature should not exist. Not only does this result in confusion but also creates difficulty in defining the institution. It is evident that the different philosophical perspectives regarding where the legal nature of the arbitration

---

Reengineering: Breakpoint Strategies for Market Dominance (John Wiley & Sons 1993), 209

[197] Thomas Lawrence, Roy Suddaby and Bernard Leca, 'Introduction: Theorizing and Studying Institutional Work' in Thomas Lawrence, Roy Suddaby and Bernard Leca (eds), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (Cambridge University Press 2009) 1, 7. See also Beckert (n 161); Child, Lu and Tsai (n 166)

[198] Anthony Giddens, *The Constitution of Society* (University of California Press 1984), 289

[199] Niklas Elert and Magnus Henrekson, 'Evasive Entrepreneurship' (2016) 47(1) Small Bus. Econ. 95

process and award stems from are likely to remain for the foreseeable future. Existence of this varied and wide-ranging commentary creates a key formative moment for ideas with significant influence to adopt a mature position and to settle the philosophy on this matter through important transitional works.

There is a necessity to bridge the traditions of thought of that the authority that underlies international commercial arbitration is ‘contractual’; ‘national’; ‘hybrid’, or ‘autonomous’. There is an opportunity for institutional entrepreneurship to provide intellectuals with the foundation to understand and accept, no longer involving inclusive critical discussion, the legal nature of international commercial arbitration. Legitimacy in the legal nature of the arbitration process and award depends on functional consistency and efficiency. Implementation of the regulative pillar would lead to this institution becoming fully institutionalised.

Once the regulative pillar is implemented and the institution is fully institutionalised, decisions such as *Putrabali* and *Hilmarton* are then likely to become the norm for they not only permit maximum party autonomy and minimum court intervention, but also provide the foundation for the creation and advancement of transnational principles. There is room for a somewhat more enhanced vision of international commercial arbitration, perhaps as an independent legal order.

An institution altering strategy would be to combine the contractual and autonomous theories because these two theories sit comfortably with party autonomy. To influence the emergence and evolution of this, the golden institutional entrepreneurship opportunity present must be seized by the right actors to destroy dispersed theories, change the view of the majority, and create certainty with respect to the legal nature of this institution by making it a definitely and unequivocally characterised concept. This should pave the way for a more dignified understanding of international commercial arbitration, for the systematisation of the field through harmonisation, standardisation and unification of rules and procedures, which would encourage the conception of this institution as a single global institution.

In turn, this may make it possible to create the single transnational commercial arbitration institution that Smit presented over a quarter of a century ago. After all, the international

commercial community intentionally places itself and their dispute adjudication process in a neutral, non-national domain. It is a matter of giving the community its own autonomous legal foundation – no longer a kind of annex, appendix or poor relation to national courts – but a freestanding arbitral legal order so as to grant the institution its own authority. Why this is even more necessary in today's world is explained by results of surveys conducted over last two decades wherein the current practices and attitudes of the international commercial arbitration community are ascertained, which show the challenges that the institution faces or could face in the future. This is the subject matter of the next chapter.

Chapter 3

Demystifying the 10 Ribs of International Commercial Arbitration

3.1 Introduction

Lack of clear characterisation of the authority that underlies international commercial arbitration appears not to have impeded its development. It has grown from a small part of the dispute resolution system to quite a large institution in its own right.[1] Today it is the most preferred dispute adjudication process in and for international commerce. In 1958 Dworkin writes that arbitration is "an obvious solution to a crowded docket".[2]

This implies that international commercial entities yearn for expeditious adjudication of their disputes. They aim to obtain this through arbitration. In 2010 Gaillard writes that arbitration is nothing to do with the need to relieve domestic courts but more about being a neutral dispute adjudication process in which arbitrants directly contribute to by appointing the arbitrators and shaping the proceedings.[3]

Such differing commentary about the institution makes it vitally significant to gain a philosophical and sociological perspective on why it is the *de facto* choice for the international commercial community. Such perspective is necessary so as to figure out its place in modern civilisation. This chapter examines the reasons why this institution provides a dependable forum. Is it due to components which are not found in national judiciary systems? Or, is the preference simply because it is an alternative? Such examination involves identifying both the functional and dysfunctional elements of this institution.

---

[1] Henry Gabriel and Anjanette Raymond, 'Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards' (2005) 5 Wyo. L. Rev. 453, 453. See also Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers/Brill Academic 2010), 2, 68 [hereinafter "Gaillard 2010 (n 1)"]; Jessica T Mathews, 'The Rise of Global Civil Society' (1997) 76(1) Foreign Affairs 50, 51

[2] Harry J Dworkin, 'Arbitration: An Obvious Solution to a Crowded Docket' (1958) 29 Clev. B. Ass'n J. 167, 167. A view shared by the judiciary as per Posner, J in *IDS Life Insurance Company et al. v Sunamerica Inc. et al.* 103 F.3d 524 (7th Cir. 1996), [528]

[3] Gaillard 2010 (n 1), 68. See also Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013), 1, 30 [hereinafter "Paulsson 2013 (n 3)"]; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009), 1 [hereinafter "Blackaby et al. 2009 (n 3)"]

International commercial disputants choose arbitration over litigation for 10 traditional central tenets. Herein these are referred to as the '10 ribs'.[4] In studying the culture of international arbitration, Kidane looks at the evolving justifications of international arbitration and he writes that "However, decades of experience with international arbitration have shown that most of these justifications are promotional or uncertain at best".[5]

Relevant to testing this assertion is empirical data from surveys conducted in 1996;[6] 2006;[7] 2008;[8] 2010;[9] 2012;[10] 2013;[11] 2014;[12] 2015;[13] and 2016.[14] The data are helpful to confirm or challenge perceptions of and on international arbitration to prove or disprove various suppositions about the 10 ribs. These data facilitate efforts to conceptualise and measure the operational arrangements of this institution.

---

[4] See Chapter 1, § 1.6.2, 26-35

[5] Won L Kidane, *The Culture of International Arbitration* (Oxford University Press 2017), ch 5

[6] Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (Kluwer Law International 1996), 30, 127-156 <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 18 December 2013 [hereinafter "AMIB 1996 Survey (n 6)"]

[7] Gerry Lagerberg and Loukas A Mistelis, 'International Arbitration: Corporate Attitudes and Practices 2006' <http://www.arbitration.qmul.ac.uk/research/2006/123975.html> accessed 12 December 2013 [hereinafter "QMU-PwC 2006 Survey (n 7)"]

[8] See also Gerry Lagerberg and Loukas A Mistelis, 'International Arbitration: Corporate Attitudes and Practices 2008' <http://www.pwc.co.uk/pdf/2008_international_arbitration_study.pdf> accessed 18 December 2013, 2, 5, 10 [hereinafter "QMU-PwC 2008 Survey (n 8)"]

[9] Paul Friedland and Loukas A Mistelis, '2010 International Arbitration Survey: Choices in International Arbitration' <http://events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf> accessed 18 November 2015 [hereinafter "QMU-W&C 2010 Survey (n 9)"]

[10] Paul Friedland and Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' <http://www.arbitration.qmul.ac.uk/docs/164483.pdf> accessed 23 May 2013 [hereinafter "QMU-W&C 2012 Survey (n 10)"]. See also Toby Landau and others, 'Seminar on Contemporary Challenges in International Arbitration' (Centre for Commercial Law Studies, Queen Mary University of London, 27 September 2012)

[11] Gerry Lagerberg and Loukas A Mistelis, '2013 Corporate Choices in International Arbitration: Industry Perspectives' <http://www.arbitration.qmul.ac.uk/docs/123282.pdf> accessed 11 September 2015, 5, 8 [hereinafter "QMU-PwC 2013 Survey (n 11)"]

[12] Nicholas Fletcher, 'International Arbitration Research based report on choice of venue for international arbitration' [2014] Berwin Leighton Paisner <http://www.blplaw.com/download/BLP_International_Arbitration_Survey_2014_FINAL.pdf> accessed 19 November 2015 [hereinafter "BLP 2012 Survey (n 12)"]

[13] Paul Friedland and Loukas A Mistelis '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 1 March 2016, 2, 5, 7, 10, 16, 24 [hereinafter "QMU-W&C 2015 Survey (n 13)"]. See also 'CIArb International Arbitration Conference' (Chartered Institute of Arbitrators Centenary Conference, London, 1-3 July 2015) <http://www.ciarb.org/about/centenary/centenary-papers> accessed 13 April 2016

[14] David McIlwaine and Loukas A Mistelis, '2016 International Dispute Resolution Survey: An insight into resolving Technology, Media and Telecoms Disputes' <http://www.arbitration.qmul.ac.uk/docs/189659.pdf> accessed 07 November 2017

It is established by the data that the most important advantages of arbitration are 'flexibility, 'enforceability' of awards, 'privacy' and 'selection of arbitrators'.[15] These translate into five ribs, which means the process is: (3) informal and flexible; (4) private; (2) neutral; (8) specialist; and (10) enforceable. The disadvantages are 'expense', 'time' 'national court intervention' and 'lack of appeal structure'.[16] Equally, the disadvantages also correspond to five ribs, which means the process is not: (1) autonomous; (5) confidential; (6) expeditious; (7) cost effective; and (9) final and binding.

Majority of the respondents insist on arbitration clauses in their contracts (62%).[17] Majority of the respondents indicate that they are satisfied with international commercial arbitration (86%). However, only a minority are very satisfied with it (18%).[18] Such high rate of satisfaction is in spite of the "increased costs of arbitration and delays to proceedings".[19] It would be difficult to comprehend this when the very foundation of every business is to make profit.[20] It seems that businesses are willing to lose both time and money in exchange for such aspects as informality and flexibility, privacy, neutrality and specialisation, and alleged guarantee of enforceability.

Such high percentage of corporations insisting on arbitration in their contracts could be understood as corporations acting in conformity with habit. Habit is "a propensity to behave in a particular way in a particular class of situations"[21] and derives from rational behaviour.[22] Habits

[15] QMU-PwC 2006 Survey (n 7), 10, 2, 6. See also QMU-PwC 2008 Survey (n 8), 2, 10; QMU-W&C 2010 Survey (n 9); QMU-W&C 2012 Survey (n 10); QMU-PwC 2013 Survey (n 11), 5, 8; QMU-W&C 2015 Survey (n 13), 2, 5, 7, 10, 16, 24; AMIB 1996 Survey (n 6) 30; BLP 2012 Survey (n 12), 03. See also See Blackaby et al. 2009 (n 3), 1-2; Gary B Born, *International Commercial Arbitration* vol I (Wolters Kluwer 2009), 64-68, 211-254, 1059-1060 [hereinafter "Born 2009 (n 15)"]; Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008), 1 [hereinafter "Moses (n 15)"]

[16] QMU-PwC 2006 Survey (n 7), 7. See also QMU-PwC 2008 Survey (n 8), 2; QMU-PwC 2013 Survey (n 11), 8; QMU-W&C 2015 Survey (n 13), 2, 5, 7, 10, 16, 24

[17] QMU-PwC 2006 Survey (n 7), 10

[18] QMU-PwC 2008 Survey (n 8), 5

[19] ibid

[20] Bob Pritchett, *Fire Someone Today: And Other Surprising Tactics for Making Your Business a Success* (Nelson Business 2006), 95

[21] Geoffrey M Hodgson, *The Evolution of Institutional Economics: Agency, Structure, and Darwinism in American Institutionalism* (Routledge 2004), 169. See also Charles Camic, 'The Matter of Habit' (1986) 91(5) Am. J. Sociol 1039, 1044-1047; Erkki Kilpinen, 'Human Beings as Creatures of Habit' in Alan Warde and Dale Southerton (eds), *The Habits of Consumption* (COLLeGIUM 2012) 45; Howard Margolis, *Paradigms and Barriers: How Habits of Mind Govern Scientific Beliefs* (University of Chicago Press 1994); James B Murphy, 'The Kinds of Order in Society' in Philip Mirowski (ed), *Natural Images in Economic Thought: Markets Read in Tooth and Claw* vol 12 (Cambridge University Press 1994)

help "economize on the cost of searching for information"[23] and thus "to rely on habit and other non-rational decision rules is fully rational".[24]

Despite the level of satisfaction with the institution and it being the forum of choice for adjudication of international commercial disputes, it cannot be ignored that these results communicate that the international commercial arbitration umbrella is held open by five ribs only since the advantages and disadvantages hold equal weight. Some kind of erosion or discontinuity has occurred that led to some of the advantages becoming disadvantages.

Oliver[25] identifies factors that determine the likelihood of dissipation, rejection or replacement over time of the institutional understanding and activity due to conditions present in the institution that derives from the behaviour of the actors within the institution. She writes that failure to accept "what was once a shared understanding of legitimate organisational conduct or by a discontinuity in the willingness or ability of organisations to take for granted and continually re-create an institutionalised organisational activity" can result in erosion or discontinuity and change in the organisation or institution. Such change is deinstitutionalisation of institutionalised elements.

Analysis of the survey results on the practice or the inside of international arbitration[26] is crucial to demystify the 10 ribs and understand their importance in and for the institution. This

---

[22] Gary S Becker, 'Habits, Addictions, and Traditions' (1992) 45(3) Kyklos 327 [hereinafter "Becker 1992 (n 22)"]; Garry S Becker and Kevin M Murphy, 'A Theory of Rational Addiction' (1988) 96(4) J. Political Econ. 675; Constantino Lluch, 'Expenditure, Savings and Habit Formation' (1974) 15(3) Int. Econ. Rev. 786; Louis Philips and Frans Spinnewyn, 'True Indexes and Rational Habit Formation' (1984) 24(2) Eur. Econ. Rev. 209

[23] Becker 1992 (n 22), 331

[24] Robert H Frank, 'Shrewdly Irrational' (1987) 2(1) Sociol. Forum 21, 23

[25] Christine Oliver, 'The Antecedents of Deinstitutionalization' (1992) 13(4) Organ. Stud. 563, 564. See also Royston Greenwood and Christopher R Hinings, 'Understanding Radical Organizational Change: Bringing Together the Old and the New Institutionalism' (1996) 21(4) Acad. Manag. Rev. 1022

[26] David D Caron, Stephan W Schill, Abby Cohen Smutny, Epaminontas E Triantafilou (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015); Jan Paulsson and others, 'Debating Jan Paulsson's Idea of Arbitration' (5th LSE Arbitration Debate, LSE Transnational Law Project, London, 13 February 2014); Jan Paulsson and Sundaresh Menon, 'Is Self-Regulation of International Arbitration an Illusion?' (4th LSE Arbitration Debate, LSE Transnational Law Project, London, 9 May 2013) <http://www.lse.ac.uk/website-archive/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1900> accessed 28 January 2017

institution appears to be founded upon two of the three institutional pillars,[27] namely, the 'cultural-cognitive' and 'normative' institutional pillars, and to be semi institutionalised.[28] Demystification is important, therefore, to discover whether deinstitutionalisation of the traditional habits and preferences results in enabling field-level conditions for an institutional entrepreneurship opportunity. Such opportunity being to add the 'regulative' institutional pillar to the institution and make it a 'fully' institutionalised.[29]

This exercise is carried out with a view to determining if the opportunity is executed would lead to the reinstatement of the traditional advantages and thus enhance the institution. At the same time, this necessitates consideration of the potential consequence should the traditional advantages not be restored – if it is likely to lead to an alternative process emerging to replace arbitration.

Contentment with this institution can, and must, only be measured by evaluating data pertaining to the observations and experiences of users and the activities of the international commercial arbitration centres. Empirical evidence from the surveys would confirm that this practice has gained wholehearted acceptance as illustrated by its continuing glorified expansion. This information is valuable for it presents an encompassing overview of the current practices and attitudes in and to the institution. To this end, accurate analysis of the qualitative and quantitative evidence pertaining to practices and attitudes provide an improved understanding of the institution's current environment and thus allow for a more apt response about its future.

3.2 The 10 Ribs: A Relevant or an Inutile Wish List?

To decipher the 10 ribs, it is necessary to interpret international commercial arbitration in a

[27] William R Scott, *Institutions and Organizations* (2nd edn, SAGE 2001), 48, 52 [hereinafter "Scott 2001 (n 27)"]. See also Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991), 8 [hereinafter "Powell and DiMaggio (n 27)"]

[28] Pamela S Tolbert and Lynne G Zucker, 'The Institutionalization of Institutional Theory' in Stewart R Clegg, Cynthia Hardy and Walter R Nord (eds), *Handbook of Organization Studies* (SAGE 1996) 175 [hereinafter "Tolbert and Zucker (n 28)"]; David Strang and Wesley D Sine, 'Interorganizational institutions' in Joel AC Baum (ed), *Blackwell Companion to Organizations* (Blackwell Scientific Publications 2002) 495 [hereinafter "Strang and Sine (n 28)"]

[29] Tolbert and Zucker (n 28)

narrower perspective. Advantages of the institution, compared to both judicial adjudication and other alternative dispute resolution (ADR) processes, are purportedly many,[30] be they hypothetical or tangible. To most commentators it would be difficult to argue against the perception that arbitration is neutral, informal, flexible, private, specialist, final and binding, and enforceable because this is advanced as the true nature of the process. Others would even say that it is also autonomous, confidential, cost-effective and expeditious; and this would in fact be deceptive on the basis of the survey results.

Such distinction is necessary because Blackaby et al. write that 'the main reasons' for choosing arbitration is it provides a neutral forum and a decision that is internationally enforceable.[31] The 'additional reasons'[32] for choosing arbitration is that it provides flexibility, confidentiality, additional powers of arbitrators and continuity of role.

Examination of the corporate practices and attitudes should reveal whether the international commercial community still choose arbitration because of the 10 ribs and would, therefore, battle for the survival of this wish list, or whether this list has become inutile. For this institution to remain particularly alluring, it is crucial to examine if contracting parties still need the process to provide each and every one of the 10 ribs. Perhaps the time has come to speak of a handful of advantages only, which are realistic and essential, when marketing arbitration as an ideal dispute adjudication process. Instrumental, therefore, to whether or not to adjust the existing structural set-up, the arbitration process itself, the procedural rules, and the historical legal and customary limitations, is to know what advantages and disadvantages are associated with it at present.

[30] Blackaby et al. 2009 (n 3), 30-33. See also Peter Sherwin, Ana Vermal and Elizabeth Figueira, 'The Decision to Arbitrate: I. Perceived Advantages and Disadvantages of International Arbitration' in *Proskauer on International Litigation and Arbitration: Managing, Resolving and Avoiding Cross-Border Business and Regulatory Disputes* <http://www.proskauerguide.com/arbitration/19/I> accessed 10 September 2015, ch 19

[31] Blackaby et al. 2009 (n 3), 31-32. See also QMU-W&C 2015 Survey (n 13), 2, 5-6; Angeline Welsh, 'Executive Summary' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 9 [hereinafter "Welsh (n 31)"]

[32] Blackaby et al. 2009 (n 3), 32-33

3.2.1 Advantages

Some commentators present that the advantages of arbitration over litigation are theoretical and others write that they are practically realised.[33] Analysis of the survey results should confirm which view is more accurate.

3.2.1.1 Selection of Arbitrators: Neutral Forum and Specialist Tribunal

Arbitration is a dispute adjudication process in which the parties hand-pick arbitrators with special and greater skill and experience in the relevant industry to form a tribunal to adjudicate their dispute. This tribunal is perceived as (1) neutral and (2) specialist, which encourages arbitrants to receive the arbitration award with confidence. They bestow upon the tribunal the authority to determine the dispute and direct the manner in which it should be done.[34]

This is likely the principal advantage of arbitration over litigation. It is not, however, without critique as arbitrators are seen as agents of the parties.[35] In litigation parties accept the judge to whom their case is assigned. One of the main differences between them is that arbitration is a process and litigation is a system. A process permits more freedom as demonstrated by the parties' right to choose the arbitrators.

Such empowerment for the disputants to form the arbitral tribunal is in fact enshrined in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, article V 1(d),[36] and also in the United Nations Commission on International Trade Law Model Law on

[33] Martin Domke and Gabriel M Wilner, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* (West Group 1984), 1:01 [hereinafter "Domke and Wilner (n 33)"]. See also Stephen B Goldberg, Frank EA Sander and Nancy H Rogers (eds), *Dispute Resolution: Negotiation, Mediation and Other Processes* (5th edn, Wolters Kluwer 2007), 214; Guy Robin, 'The Advantages and Disadvantages of International Commercial Arbitration' (2014) 2 I.B.L.J. 131 [hereinafter "Robin (n 33)"]

[34] Karyl Nairn, 'Arbitration: The Latest Fashion or a Classic Choice?' (2002) 11 JIBFL 431, 433

[35] Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010). See also Adam Samuel and Marie-Françoise Currat, *Jurisdictional problems in international commercial arbitration: A study of Belgian, Dutch, English, French, Swedish, Swiss, U.S., and West German law* (Schulthess Polygraphischer Verlag 1989); Jean JG Foelix and Charles Demangeat, *Traite du Droit International Privé: Ou Du Conflit des Lois de Differentes Nations en Matiere de Droit Privé* (2nd edn, Marescq et Dujardin 1847), 461; Phillipe-Antoine Merlin, *Recueil Alphabetique de Question de Droit* (4th edn, Tarlier 1829), 144

[36] June 10, 1958, 330 U.N.T.S. 3; 21 U.S.T. 2517 [hereinafter "New York Convention"]

International Commercial Arbitration 1985, article 34(2)(iv).[37] Such provision is similarly found in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, article 52(1)(a).[38] National legislation also express such a measure, such as the Belgian Judicial Code 1998, article 1704(2)(f);[39] the Brazil Arbitration Law 1996, article 32(II) and (IV);[40] and the Arbitration Law of the People's Republic of China 1994, article 58(3).[41]

3.2.1.1.1 Neutral Forum

Corporations are anxious to appear before a foreign court for three reasons: (i) lack of familiarity with foreign law; (ii) local language and culture; and (iii) potential bias.[42] Arbitration provides a neutral forum and this is one of two main reasons why it is a desirable alternative to litigation. Though major arbitration rules contain provisions addressing impartiality and independence of the arbitral tribunal,[43] the noun 'neutrality' does not appear in the rules or national arbitration

[37] 24 I.L.M. 1302 (1985) (as amended) (hereinafter "UNCITRAL Model Law")

[38] 17 U.S.T. 1270, TIAS 6090, 575 U.N.T.S. 159 (hereinafter "ICSID Convention")

[39] Code judiciaire Belge: sixième partie – L'arbitrage (arts 1676 à 1723), 1967101057, 01-11-1970, 11360

[40] Brazil - Law No. 9.307 of 23 September 1996

[41] Promulgated by Order No. 31 of the President of the People's Republic of China, Aug. 31, 1994, effective Sep. 1, 1995

[42] Gary B Born, *International Commercial Arbitration* vol II (Wolters Kluwer 2014), 74 [hereinafter "Born 2014 (n 42)"] Blackaby et al. 2009 (n 3), 31. See also Richard Garnett, 'International Arbitration Law: Progress Towards Harmonisation' (2002) 3 Melb. J. Int'l L. 400, 403; Gilles Cuniberti, 'Beyond Contract – The Case for Default Arbitration in International Commercial Disputes' (2008) 32(2) Fordham Int'l LJ 417, 424-425. cf Michael Hwang and Kevin Lim, 'Corruption in Arbitration - Law and Reality' (2012) 8 AIAJ 1 which focuses on highlighting the issue of corruption creeping in international commercial arbitration both at the arbitration tribunal level as well as post rendering of the award at the national court level. This is very likely to impact negatively on the future of international arbitration.

[43] See for example art 11 of the 2017 Rules of Arbitration of the of the International Chamber of Commerce International Court of Arbitration (hereinafter "ICC") <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 24 October 2017; [hereinafter "ICC Rules 2017 (n 43)"]; art 5 of 2014 Arbitration Rules of the London Court of International Arbitration (hereinafter "LCIA") 2014 <http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> accessed 24 October 2017 [hereinafter "LCIA Rules 2014 (n 43)"]; art 13 of the International Arbitration Rules of the International Dispute Resolution Procedures of the American Arbitration Association (hereinafter "AAA") 2014 <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased> accessed 24 October 2017 [hereinafter "AAA Rules 2014 (n 43)"]; art 28(3) of UNCITRAL Arbitration Rules 1976 as revised in 2010 (31 UN GAOR Supp No 17, UN Doc A/31/17 (1976)) and in 2013 (General Assembly resolution 68/109 adopted on 16 December 2013 (A/68/462)) <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> accessed 24 October 2017 [hereinafter "UNCITRAL Rules 2013 (n 43)"]; art 11 of the Hong Kong International Arbitration Centre (hereinafter "HKIAC") Administered Arbitration Rules 2013 <http://hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules> accessed 24 October 2017 [hereinafter "HKIAC Rules 2013 (n 43)"]; Rule 13.1 of the Arbitration Rules of the Singapore International Arbitration Centre (hereinafter "SIAC") 2016 <http://www.siac.org.sg/our-rules/rules/siac-rules-2016> accessed 24 October 2017 [hereinafter "SIAC Rules 2016 (n 43)"]; art 24 and 31 of the China International Economic and Trade Arbitration Commission (hereinafter "CIETAC") Arbitration Rules 2015

laws. By agreement, the jurisdiction as the seat of the arbitration is chosen by the parties, as well as the arbitration centre, and the method for selecting arbitrators to form the arbitral tribunal. These factors make arbitration neutral.[44] For 76% of the in-house counsel who responded to the QMU-PwC 2006 Survey, administered arbitration, over *ad hoc*, is the primary choice because parties trust those with relevant experience to provide administrative assistance.[45] This confidence strengthens the neutrality element of arbitration – in that arbitrants accept that the centre administering the arbitration proceedings is detached from the arbitrators.

Neutrality in this sense is related to: (i) the nationality of the arbitrator being different to the arbitrants; and (ii) the state of mind of the arbitrator and the distance he must establish vis-à-vis his background, be it religious, legal or political[46] with that of the arbitrants. Hence it is directly linked with the additional requirements of the tribunal being both impartial and independent. Nevertheless, parties may select a tribunal consisting of people with whom they share nationality, religion, legal or political inclination; though naturally they are unlikely to be considered completely neutral.[47] International arbitration developed to offer a neutral arbitration seat and applicable law that is not linked to the arbitrants.

<http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en> accessed 24 October 2017) [hereinafter "CIETAC Rules 2015 (n 43)"]; art 18(1) of the Arbitration Rules of the Institute of the Stockholm Chamber of Commerce 2017 <http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf> accessed 24 October 2017 [hereinafter "SCC Rules 2017 (n 43)"] Johannes Trappe, 'The Arbitration Proceedings: Fundamental Principles and Rights of the Parties' (1998) 15(3) J. Int'l Arb. 93

[44] See Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999), 600-602 for the debate about the rights and obligations of arbitrators and whether they arise from law or the contract entered into when they accept appointment [hereinafter "Fouchard Gaillard Goldman (n 44)"]. A view adopted by the English court in *Compagnie Européenne de Céréales S.A. v Tradax Export S.A.* [1986] 2 Lloyd's Rep. 301 [306] (Hobhouse J) observed that "It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract". See also *K/S Norjarl A/S v Hyundai Heavy Industries Co. Ltd* [1991] 1 Lloyd's Rep. 260 (Commercial Court) [266] (Phillips J); Murray L Smith, 'Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment' (1992) 8(1) Arb Int'l 17. cf Michael J Mustill and Stewart C Boyd, *Commercial Arbitration* (2nd edn, LexisNexis 1989), 220-223 [hereinafter "Mustill and Boyd (n 44)"]

[45] QMU-PwC 2006 Survey (n 7), 12

[46] Fouchard Gaillard Goldman (n 44), 587-588. See also M Scott Donahey, 'The Independence and Neutrality of Arbitrators' (1992) 9(4) J. Int'l. Arb. 31, 32; Douglas E McLaren, 'Party-Appointed vs List-Appointed Arbitrators: A Comparison' (2003) 20 J. Int'l Arb. 233; Giorgio Bernini, 'Report on Neutrality, Impartiality, and Independence' in International Chamber of Commerce International Court of Arbitration, *The Arbitral Process and the Independence of Arbitrators* (ICC Publishing 1991) 31, 31 "likelihood for the arbitrator to be, and remain, wholly equidistant in thought and action throughout the arbitral proceedings".; Born 2009 (n 15), 1474; Blackaby et al. 2009 (n 3), 268

[47] Laurence W Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000), para 12:04 [hereinafter "Craig et al. (n 47)"]

Blackaby et al. write that "whether the tribunal consists of one arbitrator or of three, it will be a strictly 'neutral' tribunal"[48] because parties select arbitrators due to their nationality or recognised neutrality. This material aspect arises from the exercise of the right that the parties confer to themselves, that is, for to each select an arbitrator of their choice to create a tribunal. Empirical statistics show that 76% of the respondents prefer to select one of the two co-arbitrators in a three-member tribunal.[49]

To select arbitrators is a fundamental right of the parties to empanel an arbitral tribunal. In *Siemens AG & BKMI Industrienlagen GmbH v Dutco Construction Co.*[50] the French Cour de Cassation annulled the arbitral award because Siemens and BKMI as the respondents appointed one arbitrator jointly instead of one each due to threats by the International Court of Arbitration the International Chamber of Commerce (ICC) to appoint one on their behalf should they not do so. The Court decided that this was unfair because the claimant had a greater influence on the composition of the tribunal and asserted that the fundamental right is a public policy matter.[51] A recent example of the importance of this right is the case of *Reliance Industries Ltd. v Union of India*[52] in which the Supreme Court of India appointed a New Zealander as third and presiding foreign national arbitrator in accordance with the parties' agreement.

This right to select an arbitrator promotes independence and impartiality. The judiciary and legal profession, particularly in less developed jurisdictions, could be susceptible to corruption and other form of irregularity. Thus, neutrality directs contracting and disputing parties to favour arbitration over litigation, particularly in cross-border transactions. Hence 73% of the

[48] Blackaby et al. 2009 (n 3), 31

[49] QMU-W&C 2012 Survey (n 10), 2, 5. See also QMU-PwC 2006 Survey (n 7), 6

[50] Cass. Civ. 7 Jan 1992; (1993) XVIII Comm. Arb'n Ybk 140. See also Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1986) 25(1) Colum. J. Transnat'l L. 9, 15 [hereinafter "Smit (n 50)"]. The only other international adjudication process which grants such the right to a party to appoint one of the number of judges to sit on contentious cases is art 31 the Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945); Doak Bishop and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14 Arb. Int'l 395, 395

[51] Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 381 [hereinafter "Lew et al. (n 51)"]

[52] Civ App No. 5675 of 2014, paras 78-80

respondents in the QMU-PwC 2006 Survey[53] prefer to use international arbitration. However, with only 47 of 103 respondents citing neutrality as an advantage, its position as the fourth most important benefit of international arbitration cannot be overlooked. This conflicts with the perception of Blackaby et al. that neutrality is one of only two main reasons why arbitration is a desirable process. Such conflict raises doubt, or at least confusion, about the real reason why contracting parties choose arbitration.

More specifically, neutrality is relevant in a three panel than in a one arbitrator arbitration tribunal as "a panel of arbitrators might be less susceptible to attitudinal blinders than an individual judge".[54] Chance of bias is less between three arbitrators. Blackaby et al.'s assertion that an arbitral tribunal is strictly 'neutral' permits a fair assumption that 'neutrality' is the result of the parties' right to appoint their arbitrators. The noun 'neutrality' is defined[55] as:

i. the state of not supporting or helping either side in a conflict, disagreement, etc.; impartiality; and

ii. absence of decided views, expression, or strong feeling.

Neutrality in this context would be achieved only where the party-selected arbitrator demonstrates impartiality, lack of bias, lack of prejudice, objectivity, open-mindedness, disinterestedness, detachment, even-handedness, fairness, and fair-mindedness. This means that in the name of fairness he or she must have the courage to displease and show no desire to be appointed again.[56] In reality, a defeated party is unlikely to accept an award rendered by the arbitrator selected by his opponent, even if together with the chairman of the tribunal, as an arbitrator appointed by a party is more likely to issue a dissenting opinion favouring their

[53] QMU-PwC 2006 Survey (n 7), 5

[54] Chris Guthrie, 'Misjudging' (2007) 7 Nev. L.J. 420, 453

[55] John Simpson and Edmund Weiner (eds), *Oxford English Dictionary* (2nd edn, Oxford University Press 1989)

[56] Pierre A Lalive, 'Conclusions, in: The Arbitral Process and the Independence of Arbitrators' (1991) 472 ICC Publication 119; Pierre A Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration' in Claude Reymond and Eugène Bucher (eds), *Swiss Essays on International Arbitration* (Schulthess 1984) 23, 24-28. See also *AT & T Corporation v Saudi Cable* [2000] 2 All ER (Comm) 625 CA; Jan Paulsson, 'Ethics, Elitism, Eligibility' (1997) 14(4) J. Int'l Arb. 13, 14; International Bar Association 'Guidelines on Conflicts of Interest in International Arbitration' (2014) <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 03 March 2015

appointer. A good illustration is the case of *Companhia Paranaense de Energia (COPEL) v UEG Araucária Ltda*.[57] A national court could, upon an application by a party, discharge an arbitrator due to his partiality as happened in *Sierra Fishing Company and other v Hasan Said Farran and others*.[58]

This conduct of arbitrators producing dissenting opinions in favour of the parties that appoint them causes concern against the very concept of parties appointing arbitrators. Paulsson[59] advocates that the arbitral tribunal should be appointed by a neutral body in order to remove the "moral hazard" created by this element. This is reinforced by van den Berg.[60] After all, this principle breaches the maxim *nemo judex in parte sua* (no one may judge his own case),[61] thus raising doubt about the impartiality of arbitrators. Owing to the fact that neutrality is a subjective component and that its value is relative to the attainment of its actual meaning, as illustrated by the *Union of India* and *Sierra Fishing* cases, the argument that the arbitral tribunal should be appointed by a neutral body would have merit if ardently advanced.

Brower and Rosenberg, however, defend this well-established "right of the parties to choose arbitrators" and the right of "arbitrator to express differing views in a dissenting opinion" because both are significant to the legitimacy of arbitration.[62] This divergence between the named commentators does not necessitate much afterthought for it is nothing more than the

[57] DJ 22 June 2004 11, TJPRJ (15 June 2004) [hereinafter "*COPEL* (n 57)"]

[58] [2015] EWHC 140 (Comm). See also *ASM Shipping Ltd v TTMI Ltd* [2006] 1 CLC 656, [2005] EWHC 2238 (Comm.) and *Locabail (UK) Ltd v Bayfield Properties* Ltd [2000] 1 QB 451 [hereinafter "Locabail (n 58)"]

[59] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25(2) ICSID Review 339. See also Jan Paulsson, 'Are Unilateral Appointments Defensible?' (Kluwer Arbitration Blog 2 April 2009) <http://kluwerarbitrationblog.com/2009/04/02/are-unilateral-appointments-defensible/> accessed 13 September 2015; Andreas F Lowenfeld, 'The Party-Appointed Arbitrator: Further Reflections' in Lawrence W Newman and Richard D Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, JurisNet 2014) ch 19; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015), 1-2 [hereinafter "Blackaby et al. 2015 (n 59)"]

[60] Albert J van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush Arsanjani and Jacob Cogan (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff Publishers 2010), 821-843

[61] Matthew Gearing, 'A Judge in His Own Cause?: Actual or Unconscious Bias of Arbitrators' (2000) 3(2) Int'l Arb. L. Rev. 46

[62] Charles N Brower and Charles B Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29 Arb. Int'l 7, 7. See also Demosthenes, Against Midias, Section 94, 361 BC "If any parties are in dispute concerning private contracts and wish to choose any arbitrators, it shall be lawful for them to choose whomsoever they wish. But when they have chosen by mutual agreement, they shall abide by his decisions and shall not transfer the same charges from him to another court, but the judgments of the arbitrators shall be final"; Kaja Harter-Uibopuu, 'Ancient Greek Approaches Toward Alternative Dispute Resolution' (2002) 10 Willamette J. Int'l L. & Disp. Resol. 47, 55

customary lack of uniformity in the literature about this institution. Lack of consensus between the scholars in this institution is perhaps the most apparent problem that it faces. Suffice to say that both arguments could be correct where the circumstances permit.

Arbitrators are not subordinate to their appointing party. England's Court of Appeal held that:

> "All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they will find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases, but because she shuts her eyes to all considerations extraneous to the particular case".[63]

This is confirmed by the Supreme Court of the United Kingdom in *Jivraj v Hashwani*.[64] This suggests that there is no moral hazard in party-appointed arbitrators. Arbitrators are obliged to closely adhere to the agreement to arbitrate and the applicable rules of arbitration so as to ensure efficacy in the process and legitimacy of the award rendered. Arbitrators have an interest to reconcile the values of party autonomy and procedural integrity;[65] and that is why they are a specialist tribunal.

3.2.1.1.2 Specialist Tribunal

Parties in international commerce contract for the right to appoint arbitrators with special and greater skill and experience in the subject matter of the dispute.[66] Such qualifications are in

[63] *Locabail* (n 58), [2]

[64] [2011] UKSC 40

[65] See for example 9.3 Europe in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 64

[66] Smit (n 50), 15. See also Douglas Shontz, Fred Kipperman and Vanessa Soma, 'Business-to-Business Arbitration in the United States-Perceptions of Corporate Counsel' [2011] Rand Institute for Civil Justice <https://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf> accessed 13 March 2012 [hereinafter "B-to-B 2011 Survey (n 66)"], 18, a study which found that majority of parties find arbitrators to be more likely to understand the subject of the arbitration than judges; Richard W Naimark and Stephanie E Keer, 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People' in Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical*

comparison to a judge of a court of first instance. In litigation judges are assigned to cases randomly and without regard to their qualifications vis-à-vis the subject matter of the dispute or personal characteristics because law is a rights-based system where judges are triers of fact and attempt to keep the peace.[67]

Arbitrators possess field-specific knowledge and experience.[68] As well as subject matter expertise, parties consider arbitrator's competence; personality; extent of experience; amount of arbitrations chaired; knowledge of a specific legal tradition, culture, and language; and the skill to conduct proceedings in an efficient and cost-effective manner.[69] Of the 10 ribs, this is perhaps the most justifiable advantage because it is a factually realisable advantage of arbitration over litigation.

Respondents to the QMU-PwC 2006 Survey express that the most desirable characteristics of arbitration are: reputation (90%); expertise and common sense (80%); and knowledge of applicable law (70%).[70] Expanding on the results of the aforementioned survey is the QMU-W&C 2010 Survey, which focuses on five factors that influence corporations' choices with regard to arbitrators and two perceptions regarding international arbitration. Of significance is the attributes that corporations seek in the 'appointment of arbitrators', which are open-mindedness and fairness (66%); prior experience of arbitration (58%); quality of awards (56%); availability (55%); reputation (52%); and knowledge of law applicable to the contract/arbitration

---

Research (Kluwer Law International 2005), 43-53 [hereinafter "Naimark and Keer (n 66)"]; Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa Law 2012), 165-167

[67] Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford University Press 1990), 67. See also Marc Galanter, 'The Emergence of the Judge as Mediator in Civil Cases' (1986) 69(5) Judicature 257

[68] Jerzy Jakubowski, 'Arbitration in International Trade' in Pieter Sanders, Jan C Schultsz and Albert J van den Berg (eds) *The Art of Arbitration: Essays on International Arbitration: Liber Amicorum Pieter Sanders, 12 Sept. 1912-1982* (Kluwer Law International 1982) 178, 181; Nigel Blackaby and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004), 197, para 4-47 "The task of presiding over the conduct of an international commercial arbitration is no less skilled than that of driving a car or flying an aircraft. It should not be entrusted to someone with no practical experience of it". [hereinafter "Blackaby et al. 2004 (n 68)"]; Catherine A Rogers, 'The Vocation of the International Arbitrator' (2005) 20(5) Am. U. Int'l L. Rev. 957

[69] Peter L Michaelson, 'Enhancing Arbitrator Selection: Using Personality Screening to Supplement Conventional Selection Criteria for Tripartite Arbitration Tribunals' (2010) 76 Int'l J. of Arb. Med. & Disp. Man. 98, 99. See also Terry A Bethel, 'Wrongful Discharge: Litigation or Arbitration' [1993] J. Disp. Resol. 289, 298; Edward Brunet, 'Replacing Folklore Arbitration with a Contract Model of Arbitration' (1999) 74 Tul. L. Rev. 39, 43; Lara M Pair, 'Cross-Cultural Arbitration: Do the Differences between Cultures Still Influence International Commercial Arbitration Despite Harmonization' (2002) 9 ILSA J. Int'l & Comp. L. 57; Welsh (n 31), 9

[70] QMU-PwC 2006 Survey (n 7), 16

(51%).[71]

Hence "the quality of arbitration proceeding depends to a large extent on the quality and skill of the arbitrators chosen".[72] Such high percentage of the 'fairness' requirement is commensurate to the findings of a study by Naimark and Keer in 2000 involving 131 participants, in which 81% of those surveyed ranked a fair and just result as the most important need for arbitrants.[73]

A direct result of the parties' right to appoint arbitrators is that the arbitrators' determinations pursue industry but not necessarily legalistic norms.[74] In *Xerox Canada Ltd v MPI Technologies Inc.*[75] the Superior Court of Ontario rejected a challenge by Xerox Canada to set aside the arbitral ward because one of the three-person arbitral panel had expert knowledge of the complex technical aspects of copyright infringement. The Court did not accept the submission that the tribunal exceeded its jurisdiction and its action was contrary to the UNCITRAL Model Law since the panel's decision derived partly from the knowledge of the expert arbitrator. The tribunal's awarded damages for breach of copyright and unpaid royalties were upheld.

New Zealand's High Court of Auckland in *Methanex Motunui Ltd & Methanex Waitara Valley Ltd v Joseph Spellman et al.*[76] reached a similar conclusion. In a review of an arbitral award for breach of the fundamental principles of natural justice, the Court held that "Even without express agreement on the subject, it is presumed that such arbitrators can draw on their knowledge and experience for general facts...".[77] An appeal to the Court of Appeal of Wellington failed because contribution by arbitrators on works of general application, legal precedents or articles used as part of their reasoning process is based on the fact that their career progress is dependent on

[71] QMU-W&C 2010 Survey (n 9), 3, 25-28

[72] Lew et al. (n 51), 232. See *BP v Libya* 53 ILR 300 (1979); *Texaco v Libya* 53 ILR 420 (1979); and *Liamco v Libya* 62 ILR 140 (1982). In these 'Libyan Oil Concession' awards, each tribunal reached a different conclusion despite the facts of the cases being similar.

[73] Naimark and Keer (n 66), 44-45

[74] Lawrence M Friedman, 'One World: Notes on the Emerging Legal Order' in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths LexisNexis 2002) 23, 31. See also Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) Am. Soc. Rev. 55, 61

[75] [2006] OJ No. 4895, [85]

[76] [2004] 1 NZLR 95

[77] ibid, [135]

itinerant success[78] because they are international judges.

3.2.1.2 Flexibility: Party Autonomy and Informality

Unquestionably 'flexibility' is "the most widely recognised advantage" of international commercial arbitration, as opined by 62 of the 103 respondents in the QMU-PwC 2006 Survey.[79] Contracting parties stipulate in the arbitration agreement whether their arbitration is *ad hoc* or administered; the laws to govern the process; the number of arbitrators and method for their selection; the seat of the arbitration; and the language of the proceedings. This level of active involvement "inspires confidence in the process".[80] Flexibility means that arbitration is less hostile and relatively informal than courts. Blackaby et al. write that "It is conducted in different countries and against different legal and cultural backgrounds, with a striking lack of formality. … It does not look like a legal proceeding at all".[81]

Flexibility in arbitration is two-fold. Primarily, arbitration is a creature of contract and it is a consensual process.[82] Contracting parties waive the right to go to court and agree to arbitrate any arbitrable dispute. This agreement, being the strongest evidence of party autonomy, is the primary source[83] of any arbitration proceedings. It is a process controlled almost entirely by the

[78] [2004] 3 NZLR 454 (CA), [480]. See also Everett C Hughes, *Men and Their Work* (Free Press 1958), 129

[79] QMU-PwC 2006 Survey (n 7), 6. This statement, however, necessitates a qualification because only 11 respondents said that flexibility was their first choice in comparison to 35 who said it was their second and 16 as their third choice. See also Stefano E Cirielli, 'Arbitration, Financial Markets and Banking Disputes' (2003) 14 Am. Rev. Int'l Arb. 243, 248 ("One of the major advantages of arbitration, in fact, is that the parties can agree to numerous substantive and procedural aspects, and are entitled to choose an informal and flexible process, which can be specially adapted to fit their dispute".); Arbitration Act 1996, s. 34 (1996, c. 23) [hereinafter "AA 1996"]; William W Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, Oxford University Press 2012), particularly ch 3 entitled 'Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure'

[80] QMU-PwC 2006 Survey (n 7), 6

[81] Blackaby et al. 2004 (n 68), 1. See also Edna Sussman and John Wilkinson, 'Benefits of Arbitration for Commercial Disputes', <http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf> accessed 18 January 2014

[82] Thomas E Carbonneau, 'The Exercise of Contract Freedom in Making of Arbitration Agreements' (2003) 36 V and. J. Transnat'l L. 1189, 1189 [hereinafter "Carbonneau (n 82)"]; Mahmood Bagheri, *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration* (Kluwer Law International 2000), 104

[83] Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009) 24 Am. U. Int'l L. Rev. 489, 491 [hereinafter "Lew 2009 (n 83)"]. See also Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011), 305, para 7.4; *The Bay Hotel and Resort Limited v Cavalier Construction Co. Ltd* [2001] UKPC 34, [38]; VV Veeder, 'Whose Arbitration is it Anyway: The Parties or the Arbitration Tribunal: An

disputing parties.[84] Secondarily, flexibility eases tension between the disputing parties and focus is on continuing business relations. For commercial entities, the ability to adjust the procedural formalities in order to meet the exigencies of the case presented is indispensable for it impacts on efficient adjudication of the dispute.

Parties choose a convenient location to hold hearings; prescribe the order in which witnesses should be called and often to the convenience of the parties' diary needs; continue a hearing outside of business hours; make use of video-conference and telephone facilities to conduct procedural hearings or to take testimony; allow expert evidence to be heard consecutively or concurrently; and submit written, in lieu of oral, testimony.[85] This is party autonomy, which allows for an informal and flexible process because the parties dictate every aspect of the arbitration proceedings; and it is the guiding principle in international commercial arbitration.[86]

Party autonomy is a basic principle in international commercial arbitration and it started to develop in the 19th century.[87] Today it appears in national legislation.[88] The appearance of party

---

Interesting Question?' in Lawrence W Newman and Richard D Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, Juris 2014) 87

[84] Anoosha Boralessa, 'The Limitations of Party Autonomy in ICSID Arbitration' (2004) 15 Am. Rev. Int'l Arb. 253, 266 [hereinafter "Boralessa (n 84)"]

[85] Blackaby et al. 2004 (n 68), 4. It would be utterly deceptive, however, not to mention that these listed amenities do not uniquely serve arbitration. They are available and incorporated into litigation in most developed legal systems. See Fredric Lederer, 'The Legality and Practicality of Remote Witness Testimony' [2009] The Practical Litigator 19, 22. For example, in UK see Civil Procedure Rules 1998 (SI 1998/3132) (hereinafter "CPR 1998"), pt 23 - General Rules about Applications for Court Orders, Practice Direction 23A – Applications, paragraphs 6 and 7 in respect of the use of telephone and video-conference facilities to conduct hearings; in United States of America see The Federal Rules of Civil Procedure 1938 (as amended) (28 U.S.C.; B5.1.3, R12.9.3), para 43(a). Victoria Evidence (Audio Visual and Audio Linking) Act 1997, s. 3 (Act No. 4/1997, Victoria, Australia) inserting into the Evidence Act 1958 s 42G

[86] Blackaby et al. 2004 (n 68), 315. See also Craig et al. (n 47), 135; Gary B Born, *International Commercial Arbitration Commentary and Materials* (2nd edn, Transnational Publishers 2001), 413

[87] Albert V Dicey, Lawrence Collins and John Humphrey Carlile Morris, *Dicey, Morris & Collins on The Conflict of Laws* vol 2 (14th edn, Sweet & Maxwell 2011), para 32-004

[88] Examples of statutory provisions that give rise to party autonomy include the AA 1996, s 1(b); art 1496 of France's New Code of Civil Procedure (Book IV, Decree 2011-48 of 13 January 2011 modifying French Decree of May 14, 1980, No. 80-354, originally published in J.O., May 18, 1980, 1238; Nouveau code de procédure civil, Decree No 75-1123 of 5 December 1975 (le décret no 75-1123 du 5 décembre 1975, 12521) as amended by Law No 2007-1787 of 20 December 2007 (la loi no 2007-1787 du 20 décembre 2007, 20639); Livre IV: L'arbitrage, Titre Ier: L'arbitrage interne, Chapitre VI: Les voies de recours, Section 3: Dispositions communes à l'appel et au recours en annulation and Section 5: Autres voies de recours [hereinafter "NCPC"]. See also Fouchard Gaillard Goldman (n 44), 785; art 187(1) of the Swiss Private International Law Act 1987 (ch 12 of the 1987 Federal Act on Private International Law (18 December 1987 as amended 01 July 2013) SR 291 (Loi fédérale du 18 décembre 1987 sur le droit international privé [hereinafter "PIL 1987"]); arts 19(1), 28(1) and 35(1) of the UNCITRAL Model Law 1985;

autonomy in the New York Convention is perhaps the most significant.[89] The Convention, article V(1)(d) of empowers the court in receipt of a petition for recognition and enforcement of an arbitration award to refuse to do so where "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".

In *China Nanhai Oil Joint Service Cpn v Gee Tai Holdings Company Ltd*[90] the Supreme Court of Hong Kong refused enforcement of an award made in China because the tribunal was not composed of arbitrators as per the parties' agreement. Thus, the arbitrators did not have jurisdiction. This is one of the many challenges to obtaining recognition and enforcement of an arbitration award. It appears extreme that an award valid in every other aspect would not be enforced simply because the arbitration agreement was not followed to the letter. Indeed, for an arbitrant arguing the contrary, it is understandably fair that the agreement be implemented without deviation.

Party autonomy is not, however, without limitation. An agreement to arbitrate is a separate agreement[91] and it must be valid according to the law which governs it; which is frequently the law governing the substantive contract. Arbitral procedure is invariably subject to the law of the seat of the arbitration.[92] In domestic law and rules of arbitration centres there is a mandatory requirement upon the arbitral tribunal, which applies to international commercial arbitration proceedings as well, to treat the parties with equality and fairness.

For example, a tribunal must give an opportunity to each arbitrant to present his case. In England and Wales this is mandated by the AA 1996, s 33; in Switzerland by the PIL 1987, article 182(3); in France by the NCPC, article 1502 (4) and (5) of; and in Belgium by the Belgian AA 2013,

---

UNCITRAL Rules 2013 (n 43)

[89] See n 36. See also Stacie I Strong, 'Research in International Commercial Arbitration: Special Skills, Special Sources' (2009) 20(2) Am. Rev. Int. Arb. 119, 156 [hereinafter "Strong 2009 (n 89)"], 134

[90] (1995) XX Comm. Arb'n Ybk 671, 672. See also *Encyclopaedia Universalis S.A. (Luxembourg) v Encyclopaedia Britannica Inc. (US)* (2005) XXX(520) U.S. Ybk 1136

[91] Fouchard Gaillard Goldman (n 44), 212

[92] ibid, 635

article 1699.[93] Rules of arbitration curtail the parties' autonomy in regard to the arbitral proceedings. Good examples include the ICC Rules 2017, articles 19 and 22[94] and the LCIA Rules 2014, articles 14.4 to 14.6 and 22.1 (v) to (vii).[95]

The significance of highlighting the limitations to the principle of party autonomy is that there is a hierarchy of the sources of law that govern the arbitration proceedings. Strong writes that the arbitration agreement is of great importance but that international conventions and treaties should be ranked first because failure to adhere to certain procedures could diminish the validity of an award,[96] as demonstrated by the *China Nanhai* case. With regard to arbitral procedure, "the most important national law to consider is the arbitration statute in effect in the arbitral forum"[97] and "it is critical to identify whether the parties have chosen to be bound by any arbitral rules, since those are one of the most important "private" sources of authority in this area of law".[98] Evidently, the parties' submission of their dispute to an arbitration centre and subsequently to an arbitral tribunal to administer their dispute reduces their autonomy.

Pryles presents a discourse about the limits to party autonomy in arbitration. He pays particular attention to the debate presented by Fouchard Gaillard Goldman[99] and Mustill and Boyd "as to whether the rights and obligations of arbitrators stem from their "status" as arbitrators and arise directly from law or whether they arise from a contract which is entered into when they accept their appointment".[100] Fouchard Gaillard Goldman take the view that the contract between the parties and the arbitrators confers rights and obligations for both, and if an arbitral centre is involved it also becomes a party to such contractual relationship. Mustill and Boyd argue that a businessman would not accept that he creates a contract when appointing an arbitrator because the rights and duties of an arbitrator ought to be considered in light of the public interest.[101]

[93] Belgian Judicial Code 10 October 1967 (Code judiciaire 10 octobre 1967) [hereinafter "Belgian AA 2013"]

[94] ICC Rules 2017 (n 43)

[95] LCIA Rules 2014 (n 43)

[96] Strong 2009 (n 89), 131

[97] ibid, 134

[98] ibid, 139

[99] Fouchard Gaillard Goldman (n 44), 600-602

[100] Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24(3) J. Int'l Arb. 327, 330. See also Mia Louise Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact' (2008) 5(5) J. Int'l Arb. 529, 532

[101] Mustill and Boyd (n 44), 223

Case law[102] demonstrates, however, that the relationship consists of both the contractual and status element because the arbitrators' acceptance of appointment for remuneration creates a contract. Once the tribunal is constituted, any step to be taken with respect to the conduct of the case requires the consent or action of that tribunal. In adjudicating a dispute, an arbitrator assumes quasi-judicial function and his status is taken into consideration.

Flexibility is a major advantage of arbitration, despite the fact that it is curtailed once the arbitrants instruct an arbitration centre and appoint an arbitral tribunal to administer the arbitral proceedings. However, by appointing a tribunal and engaging an arbitration centre, the arbitrants willingly agree to limit their party autonomy. There are certain elements of arbitration which do not generally form part of the parties' rights, although the parties could agree to forgo them, but are part and parcel of the institution. This includes privacy of the proceedings.

3.2.1.3 Private

Commercial entities do not want to air their proverbial dirty linen in public for any negative publicity is bound to have displeasing impact on their corporate and marketing identity. Arbitration allows them to protect these by limiting public scrutiny and adverse publicity. Arbitral hearings and awards are private,[103] unlike court hearings and judgments which are open to the public. Arbitration proceedings are not held in designated or identifiable locations, and as such that only those directly involved in the proceedings learn of their existence.[104]

The process is "largely free from external interference".[105] English courts accept this view and have done since the 19th century as seen in *Russell v Russell*.[106] On the basis that the parties' agreement to arbitrate rather than litigate their dispute, it is implicit that strangers are excluded from the arbitration proceedings as per Leggatt J in *Oxford Shipping Company v Nippon Yusen*

[102] See (n 49) *Compagnie Européenne*, [306]; *K/S Norjarl*, [266]; (n 69). See also *Cie Européene v Tradax* [1986] 2 Lloyd's Rep. 301

[103] Amy J Schmitz, 'Untangling the Privacy Paradox in Arbitration' (2006) 54 U. Kan. L. Rev. 1211, 1214 [hereinafter "Schmitz (n 103)"]

[104] Blackaby et al. 2004 (n 68), 1. See also Carlos de Vera, 'Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' (2004) 18(1) Colum. J. Asian L. 149, 186

[105] QMU-PwC 2008 Survey (n 8), 5. See also Andrea Marco Steingruber, *Consent in International Arbitration* (OUP 2012), paras 205 and 209

[106] (1880) LR 14 CH D 471. See also Trevor M Cook and Alejandro I Garcia, *International Intellectual Property Arbitration* (Kluwer Law International 2010), 240

Kaisha (The Eastern Saga).[107]

Privacy is the second most widely recognised advantage of arbitration according to the QMU-PwC 2006 Survey, in which 54 respondents choose it as their first (17); second (17); and third (20) reason for choosing arbitration.[108] Privacy for arbitration hearings is a right recognised and also given by arbitration centres.[109] In court, however, each party adopts a side of the room and this creates some kind of animosity. In arbitration, parties and their lawyers and the tribunal sit across the table from each other and this creates a cozy atmosphere.[110] This emphasises on the need to maintain privacy as the parties understand that the purpose of the proceedings is to resolve the issue and not to prove one party right and the other wrong.

The intention here is to facilitate flexible, friendly, efficient and relaxed dispute adjudication. A study by Naimark and Keer, however, finds that less than 10% of participants perceive privacy as one of the most important elements of arbitration.[111] These inconsistent results raise two crucial questions: (i) whether 'privacy' is indeed a valuable advantage of arbitration?; and (ii) how could concrete results about the role and nature of privacy in arbitration be ascertained? These are not answered here for it is not important for present purposes.

Nevertheless, privacy is not absolute and the extent that it is an advantage of arbitration is dependent on the circumstances. Judges have made this clear in many cases, and a good example is the case of *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company and International Industrial Bank.*[112] The English Court of Appeal considers whether a court's decision regarding the challenge of an arbitrator's decision, under the UNCITRAL Rules, must also be confidential as is the case with respect to the challenged arbitration proceedings and award because the Rules prescribe for private hearings[113] and that an award can be made public only with the consent of all parties, or where disclosure is required by

[107] [1984] 2 Lloyd's Rep. 373, 379

[108] QMU-PwC 2006 Survey (n 7), 2, 6

[109] See for example art 19.4 LCIA Rules 2014 (n 43); art 22(3) ICC Rules 2017 (n 43); art 23(6) AAA Rules 2014 (n 43)

[110] Soia Mentschikoff, 'Commercial Arbitration' (1961) 61 Colum. L. Rev. 846, 864

[111] Naimark and Keer (n 66), 46, 52. See also Born 2014 (n 42), 2782

[112] [2004] 2 Lloyd's Rep 179 (CA) (hereinafter "Bankers Trust (n 112)"]

[113] art 28(3) UNCITRAL Rules 2013 (n 43)

legal duty, or in relation to proceedings before a court.[114] The Court held that, though the AA 1996 did not contain any provisions regarding confidentiality, in this case the judgment should remain private because the dispute involved both sensitive and confidential issues, but that the fundamental rule is that court proceedings and judgments should be for public interest.[115]

This case provides explains why the QMU-PwC 2006 Survey and the study by Naimark and Keer are different. Mance, LJ observes that:

> "There are arbitrations about factual circumstances and issues which appear unlikely to involve any significant confidential information at all. The main motive to arbitrate may be different considerations, such as the expertise or informality of the arbitrators - many shipping and commodity arbitrations must fall into this category. In arbitration claims relating to such arbitrations, the starting point may easily give way to a public hearing".[116]

Undoubtedly, privacy is an important feature of arbitration, but perhaps not necessarily a fundamental characteristic of arbitration. Privacy presents a major shortcoming. Firstly, it is impossible to "measure the successes and failures of arbitral "coziness". We can only speculate about what happens in closed arbitration proceedings, and are left wondering whether less powerful parties are treated fairly behind these closed doors".[117] This apprehension could raise a very important question about the legitimacy of the process as it is conducted away from any type of scrutiny. Particularly so if it is accepted that arbitration is an independent system that is largely free from external interference.[118] In addition, generally arbitration awards are not

[114] art 34(5), ibid

[115] Bankers Trust (n 112), 194, [39]. See also *Scott v Scott* [1913] AC 417 which states that justice must be administered publicly, though with exceptions. In England, Part 39 of the CPR permits private hearings and non-publication of judgments for the protection of certain interests such as national security, confidential information, the interests of a child or patient or where the judge considers privacy to be necessary in the interests of justice. Equally, art 6 of the European Convention on Human Rights and Fundamental Freedoms 1950 (E.T.S. 5; 213 U.N.T.S. 221) permits deviation from the fundamental rule of the right to a fair and public hearing and for judgment to be pronounced publicly.

[116] Bankers Trust (n 112), Mance, LJ, 193, [38]

[117] Schmitz (n 103), 1216. To reach such stark conclusion, Schmitz relies on the findings of Wesley A Sturges, 'Arbitration – What Is It?' (1960) 35 N.Y.U.L. Rev. 1031, 1032-34, 1046 and Stephen J Ware, 'Default Rules from Mandatory Rules: Privatizing Law Through Arbitration' (1999) 83 Minn. L. Rev. 703, 707-708

[118] Emmanuel Gaillard, 'The Emerging System of International Arbitration: Defining "System"' (2012) 106 Proceedings of the Annual Meeting-

published or are published with redactions.

Privacy results in transparency of the process being affected. Privatisation of arbitration proceedings is seen as the single major hindrance to the development of international commercial arbitration and this is seen as a disadvantage.[119] Privacy makes it impossible to understand what is good and bad about it. It could be the reason why no two surveys communicate consistent findings.

3.2.1.4 Enforceable

It is implied into an agreement to arbitrate that arbitrants will comply with the arbitral award.[120] Often times, however, parties rely on the New York Convention. Its effective operation is critical to the existence of international arbitration. Transnational corporations rely on the Convention for the enforcement of both the agreement to arbitrate and the resultant award. In accordance with the Convention, articles 1 to 4, arbitration awards made in member states can be enforced in others.

It should be borne in mind, however, that recognition and enforcement of arbitration awards is not without practical and legal difficulties. Recognition and enforcement of arbitration awards is neither quick nor predictable because the New York Convention is applied differently by national courts,[121] as shown by the cases mentioned herein. Assets belonging to the award debtor must not only be identified, but also secured. State entities may rely on sovereign immunity. National courts are unlikely to enforce an award against certain assets such as state-owned

---

American Society of International Law 287, 287

[119] Schmitz (n 103), 1216. See also Orna Rabinovitch-Einy, 'Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age' (2002) 7 VA. J. L. & Tech. 4, 6, para 13; Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) EJIL 43, 60 [hereinafter "Gal-Or (n 119)"]; Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International 2005), 3

[120] Herbert Kronke and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010), 13. See also Blackaby et al. 2015 (n 59), 621

[121] Ihab AS Amro, *Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study of Common Law and Civil Law Countries* (Cambridge Scholars Publishing 2013); George A Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017); William W Park and Alexander A Yanos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration' (2006) 58 Hastings L.J. 251

properties. Potential bars to enforcement arising from national arbitration legislation must be avoided, which is very problematic since almost every state has its own.[122] Contracting parties are served better by states with pro-arbitration attitude, such as France as illustrated by many cases including *Société Hilmarton Ltd v Société Omnium de Traitement et de Valorisation (OTV),*[123] and *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*.[124]

In 2005 Quentin writes that more empirical data concerning the rate of enforcement of awards would be helpful to better assess the effectiveness of international arbitration.[125] A year later, findings of the QMU-PwC 2006 Survey came out and convey that the primary advantage of arbitration is in fact enforceability of arbitration awards. Of the 103 respondents, 24 select it as their first choice as the most important advantage of arbitration;[126] and not flexibility which is the most widely recognised advantage.

Statistical clarification, however, is necessary here. Enforceability was in fact the third most important advantage because, whilst 48 respondents in total ranked it as an important advantage, nine said it was their second choice and 15 said it was their third. Findings of the International Bar Association 2015 report are important to note, for they raise questions about the accuracy of the other survey results. In Africa[127] and Latin America,[128] for example, ease of enforceability of awards is not cited as an advantage. However, it is a primary advantage for the Asia-Pacific and

[122] See Martin King and Ian Meredith, 'Partial Enforcement of International Arbitration Awards' (2010) 26(3) Arb. Int'l. 381; Michael Hwang and Chuan Tat Yeo, 'Recognition and Enforcement of Arbitral Award' in Michael Hwang (eds), *Selected Essay on International Arbitration* (Academy Publishing 2013); Emmanuel Gaillard (ed), *The Review of International Arbitral Awards* (Juris 2010); Emmanuel Gaillard, Domenico Di Pietro and Nanou Leleu-Knobil (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008); n 121

[123] Cour de cassation, (23 March 1994) YB Comm Arb, Vol XX (1995) 663

[124] XXXII Y.B. Com. Arb. (2007) 299; Cour de cassation, 1 ère civ., June 29, 2007, 05-18.053 (French Supreme Court, First Civil Section, June 29 2007, 05-18053

[125] Quentin Tannock, 'Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards' (2005) 21(1) Arb. Int'l 71

[126] QMU-PwC 2006 Survey (n 7), 2, 5, 6

[127] 9.1 Africa, in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 40

[128] ibid, 75-76

Middle East and North Africa regions. It is somewhat an advantage in Europe, and North America and Latin America.

Inconsistent survey results are explicable when decisions by courts of enforcement across jurisdictions are considered. In *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* Singapore's High Court granted leave to enforce arbitral awards rendered by the Singapore International Arbitration Centre in favour of Astro. In October 2013, the Singapore Court of Appeal held that the awards were not enforceable in Singapore[129]. Likewise, on 05 December 2016, the Hong Kong Court of Appeal in *Astro Nusantara International v PT Ayunda Prima Mitra*[130] dismissed an appeal against an order by the Hong Kong Court of First Instance granting leave to First Media to enforce in Hong Kong the various arbitral awards.

Similarly, in *IMC Aviation Solutions Pte Ltd v Altain Khuder LLC,*[131] which was referred to in the aforementioned case, the Victoria Court of Appeal refused the enforcement of an arbitral award made against IMC made in Mongolia in September 2009. The Court held that the arbitral tribunal had no jurisdiction to make the award against IMC Mining Solutions Pty Ltd, a non-party to the arbitration agreement, and for failing to explain the basis on which it had determined that it had jurisdiction to order the latter to pay the awards amount on behalf of IMC, which the Mongolian courts verified. Altain obtained an order from the Trial Division of the Supreme Court of Victoria to enforce the award in Australia against both IMC and IMCS. IMCS applied to the Court to set aside the enforcement order for it was not a party to the arbitration agreement pursuant to the award. This was dismissed because, among other reasons, IMCS failed to prove that it was not bound by the agreement, particularly as it did not contest the issue neither during the arbitration proceedings nor during the verification proceedings in Mongolia. IMC then successfully appealed the enforcement order.

It is imperative to understand why respondents in the QMU-PwC 2006 Survey rank

[129] (2013) SGCA 57

[130] CACV 272/2015

[131] [2011] 282 ALR 717

enforceability as the third most important advantage of international commercial arbitration. They affirm that disputes are settled as follows: (i) before the first hearing (43%); (ii) prior to an award being rendered (25%); and (iii) voluntary compliance (49%). Only 11% of their cases resulted in recognition and enforcement proceedings.[132] Whilst satisfaction of and support for international arbitration is significant, these statistics are noteworthy because 11% is too low a number to substantiate that recognition and enforcement of arbitral awards is a major advantage, or an advantage at all, of this institution since a large number of cases are settled prior to the first hearing and an equally large number of awards are voluntarily complied with.

Recognition and enforcement of arbitral awards as an advantage of international commercial arbitration could, however, be explained by the high number of signatories to the New York Convention,[133] which compels adherence. Any signatory seen to resist compliance is likely to meet a counter-reaction in the form of political, economic and social measures.[134] In essence, this Convention creates certainty in that national courts are obliged to enforce all valid arbitration awards. Moreover, absence of a similar treaty for the international recognition and enforcement of court judgments makes an arbitral award more valuable.[135]

A further explanation why recognition and enforcement of arbitral awards is not a primary advantage is that the corporations negotiate settlement of an award to save time and costs in seeking its recognition and enforcement (56%) and to preserve business relationship (19%).[136] This explains why a shade over 10% of cases result in enforcement proceedings. To save time and costs relates, firstly, to the inherent difficulties that exist in the award creditor identifying the

[132] QMU-PwC 2008 Survey (n 8), 3, 6

[133] 156 signatories as at 11 May 2016 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 11 May 2016

[134] International Council for Commercial Arbitration, *ICCA'S Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, (International Council for Commercial Arbitration 2011), 30-31, citing *Saipem SpA v Bangladesh* ICSID case no. ARB/05/07 and *Salini Costruttori SpA v Jordan* ICSID case no. ARB/02/13. Fear of reputational sanctions provided the primary motivation for businessmen to voluntarily comply with their obligations, in this case the arbitral award. cf Clarence F Birdseye, *Arbitration and Business Ethics* (D. Appleton & Co., New York 1926), 91. Birdseye observed that commercial arbitrations "had no direct sanction of law, and were dependent only upon the mutual good faith of the parties for their operation and success".

[135] David W Rivkin, 'The Impact of International Arbitration on the Rule of Law - The 2012 Clayton Utz Sydney University International Arbitration Lecture' (2013) 29(3) Arb. Int'l 327, 336 [hereinafter "Rivkin (n 135)"]

[136] QMU-PwC 2008 Survey (n 8), 3

award debtor's assets; and secondly, the award debtor not having sufficient or any assets to satisfy the award. This is particularly so when "19% of the participating corporations were content to settle their claim for between 50% and 75% of the amount awarded by a tribunal".[137]

What this points to is that corporations are not confident that an award could be enforced with ease, whether or not rendered in a New York Convention signatory state. Hence the settlement deals. Aside the fact that an agreement to settle a rendered award introduces uncertainty in the form of increased risk of contractual hazard, in the event of non-adherence to the settlement agreement and therefore non-payment of the award,[138] often, such post award agreement is entered into due to the systematic differences in legal systems which affect business activities.[139]

It would be fair to conclude that recognition and enforceability of arbitral awards is not much of an advantage as commentators and practitioners of the process would have corporations believe. It is more of a feature to distinguish arbitration from national or international litigation because in the latter a similar international treaty does not exist to enforce foreign judgments. Varied legal procedures and practices in different countries makes enforcement of international commercial arbitration award difficult. A unified approach could prove more advantageous.

3.2.2 Disadvantages

International commercial arbitration is facing challenges, which make it disadvantageous; particularly for those inexperienced in the field.[140] Five key disadvantages are discussed here.

3.2.2.1 National Court Intervention

Success of international commercial arbitration can and must be measured by determining

[137] ibid

[138] Oliver E Williamson, 'Comparative Economic Organization: The Analysis of Discrete Structural Alternatives' (1991) 36(2) Adm. Sci. Q. 269

[139] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46(2) J. Econ. Lit. 285. See also Simeon Djankov and others, 'Courts' (2003) 118(2) Q. J. Econ. 453; Robert A Kagan, 'On Surveying the Whole Legal Forest' (2003) 28(3) Law Soc. Inq. 833

[140] Rivkin (n 135), 327; QMU-PwC 2006 Survey (n 7), 1; Robin (n 33)

whether it could function effectively without relying on the support of national courts. This is crucial since historically states demonstrated great hostility and reluctance to arbitration.[141] In United States of America (U.S.A.), for example, the Federal Arbitration Act 1925 was introduced "to eliminate judicial hostility towards arbitration and place arbitration agreements "upon the same footing" as other contracts".[142] Arbitration is a consensual process[143] since it arises from contracting parties agreeing to arbitrate and for the courts to "take a back seat".[144] That is the essence of party autonomy.

National courts assist parties to an agreement to arbitrate: (i) to compel arbitration when parties commence litigation proceedings in disregard of the agreement; (ii) to appoint arbitrator(s) where the disputing parties have not specified a method in the arbitration agreement; (iii) to revoke the appointment of or replace the arbitrator(s) because of impartiality or other conflict; (iv) to compel the attendance of witness(es); or (v) to compel the taking of evidence.[145] Though most major arbitral centres have begun to provide procedural steps to obtain provisional remedies, national courts still play a major role in such application.

A vital role of national courts relates to the application for recognition and enforcement of the arbitration award. It is only a national court that could deal with such an application. Equally, it is only national courts that could deal with an application to challenge the award, for example to annul it or review it on grounds of procedural or substantive errors in the process. In reality, it is only national courts that give effect to the arbitration agreement and the arbitral award where they are not voluntarily adhered to.

---

[141] Born 2014 (n 42), 40, 46-48, 61

[142] Pub. L. 68-401, 43 Stat. 883, 9 U.S.C. [hereinafter "FAA 1925"]. See Claudia T Salomon and Sandra Friedrich, 'Obtaining and Submitting Evidence in International Arbitration in the United States' (2013) 24(4) Am. Rev. Int'l Arb. 549, 555. Examples of states' hostility towards arbitration include the case of *Kill v Hollister* (1746) 1Wils. 129 and *Scott v Avery (1856)* 5 H.L. Cas. 811. The former is a decision of a U.S. court in action was allowed to proceed on the ground that "the agreement of the parties (to arbitrate) cannot oust the court". The latter is a decision of UK's House of Lords in which Lord Campbell explained that judges were indeed hostile towards arbitration because arbitration robbed them of their fees which were collected from litigants.

[143] See Carbonneau (n 82)

[144] Lew 2009 (n 83), 491. See also Giulia Carbone, 'The Interference of the Court of the Seat with International Arbitration' (2012) 1 J. Disp. Resol. 217, 217 "This choice relegates national courts to a secondary position".; George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 Yale J. Int'l L. 1, 2-3 [hereinafter "Bermann (n 144)"]

[145] Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982-1983) 57 Tul. L. Rev. 42, 47, fn 21

However, the functions that national courts carry out in arbitration may not be necessary if international arbitration is considered an autonomous process as advanced by Gaillard,[146] or becomes a system in its own right. It is a process that is said to be "governed primarily by non-national rules and accepted international commercial rules and practices", which means that "the relevance and influence of national arbitration laws and of national court supervision and revision is greatly reduced".[147] Yet, judicial supervision in this process is seen as a mechanism to maintain arbitration's effectiveness and safeguard its legitimacy because it is a way to correct any fundamental abuse in the process.[148]

Blackaby et al. write that "national courts could exist without arbitration, but arbitration could not exist without the courts".[149] This is echoed in case law such as *Coppée-Lavalin S.A./N.V. v Ken-Ren Chemicals and Fertilisers Limited (in liquidation in Kenya)* in which Lord Mustill said that only a court could rescue an arbitration.[150] This could be perceived as the feebleness of arbitration.

Intervention by national courts is a concern to 34 of the 103 respondents in the QMU-PwC 2006 Survey.[151] This is despite the irrefutable fact that intervention is always invited by the arbitrants or the arbitral tribunal to remove juridical obstacles from the proceedings. Such invited intervention in arbitration proceedings could come from a court at the seat of the arbitration or from a court in a different country without direct connection to the proceedings. It could come at any stage of the proceedings.

For example, parties employ tactics to impede proceedings by seeking judicial review. An application to a court seeking a judgment to deny jurisdiction to the arbitral tribunal, for

[146] Gaillard 2010 (n 1), 35

[147] Julian DM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arb. Int'l 179, 182 [hereinafter "Lew 2006 (n 147)"], 180. cf Boralessa (n 84), 266 - The arbitration process is not controlled entirely by the parties.

[148] Thomas E Carbonneau, 'At the Crossroads of Legitimacy and Arbitral Autonomy' (2005) 16 Am. Rev. Int'l Arb. 213, 215-16; Lew 2009 (n 83), 492-493

[149] Blackaby et al. 2009 (n 3), 439. See also John Lurie, 'Court Intervention in Arbitration: Support or Interference?' (2010) 76(3) Int'l J. of Arb. Med. & Disp. Man. 447 [hereinafter "Lurie (n 149)"]; Karen Gough, 'Judicial Supervision and Support for Arbitration and ADR' [2006] <http://www.39essex.com/docs/articles/KGO_Judicial_Supervision_Sept_2006.pdf> accessed 29 July 2015

[150] [1994] 2 Lloyd's Rep. 109 (HL), [116]

[151] QMU-PwC 2006 Survey (n 7), 7

example, is the most frequently made, and of course the most worrying, for it halts the arbitration proceedings. A good example is *Himpurna California Energy Ltd. v Republic of Indonesia*.[152] Thus, the opinion of 33% of the respondents would justify further investigation because such intervention impacts the parties. Court proceedings during arbitration proceedings increase the time and cost of the process to adjudicate the dispute. Court proceedings cause delay in bringing the arbitral proceedings to a speedy conclusion.

Lew studies whether national court involvement undermines the international arbitration process and as such investigates "when the courts should come forward"?[153] This question is proper when looking at the involvement during the arbitration proceedings and at the award enforcement phase. National courts' involvement in arbitration proceedings might be helpful assistance and essential to safeguard a minimum standard of due process and fairness.[154] Or it could be interference that hinders the arbitral process. Whether it is intervention or interference, however, will depend upon "the timing, manner and degree of such intervention".[155] Nevertheless, it must be clear that the basis of intervention or interference is supported by a wide range of legal doctrines.[156]

Bermann does not to disagree with judicial interference in international commercial arbitration

[152] (2000) XXV(11) Comm. Arb'n Ybk18. See also *Deco Automotive Inc. v G.P.A. Gesellschaft Fur Pressenautomation MbH* Case 383: MAL 1(2), 5, 8, 16 Deco initiated proceedings against GPA in Ontario, Canada, claiming that the agreement to arbitrate before the ICC involved fraud by GPA and as a result ICC had no jurisdiction. GPA's response that an arbitration was pending before the ICC was rejected and the court held that art 16 of the Model Law did not apply as the subject matter of Deco's claims were not subject of the arbitration clause in the contract. Thus, a stay of the court action was refused; *COPEL* (n 57) in which the court ruled that a company controlled by the Government could not arbitrate disputes without the Government's express authorisation; Blackaby et al. 2009 (n 3), 202 on parties boycotting arbitration proceedings; Stefan M Kröll, 'Recourse against Negative Decisions on Jurisdiction' (2004) 20 Arb. Int'l 55

[153] Lew 2009 (n 83), 491. See also Lew 2006 (n 147)

[154] Moses (n 15), 84-85. See also Lurie (n 149), 447. See also Martin Hunter, 'Judicial Assistance for the Arbitrator' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff 1987) 195, 196

[155] Lurie (n 149), 447

[156] William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' in Albert J van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 55, 90. See also William W Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 Tul. L. Rev. 647; William W Park, 'Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law' (2007) 8(1) Nev. L. J. 135; Saleem Marsoof, 'The Judiciary and the Arbitral Process' <http://www.academia.edu/5356161/The_Judiciary_and_the_Arbitral_Process> accessed 31 October 2015; *Law Debenture Trust Corp Plc v Elektrim Finance B V* [2005] EWHC (Ch) 1412, [341]

because national courts play an "important policing role" "to support the arbitral process".[157] He writes, however, that such interference should be limited to precede the constitution of the arbitral tribunal to address gateway issues. This is to ensure that court proceedings do not suspend the arbitral proceedings and, therefore, to allow arbitration to enjoy its autonomy. Interference by national court, he writes, "represents arbitral autonomy of a very different and more questionable stripe, and one that poses substantial legitimacy risks".[158]

The logic is that the courts should take the back seat for the parties agree to arbitrate and not litigate, and thus detach their dispute from national fora.[159] Some commentators, however, emphasise that "the courts have gradually eased their supervisory control over arbitration".[160] This is for two reasons: (i) party autonomy as illustrated by *Tjong Very Sumito v Antig Investments*;[161] and (ii) to ensure that the international business community obtains fast and conclusive resolution of their disputes.

Court intervention in the arbitral process is a disadvantage that diminishes the perception of corporate counsel that arbitration is an independent institution and free from external interference. Lack of total independence could be the major problem with arbitration because it means it is a semi and not a fully institutionalised institution. To this end, it would not be incorrect to argue that this makes an agreement to arbitrate incomplete because national court interference is voluntarily or involuntarily agreed to by the parties since arbitration proceedings are conducted under the auspices of national laws.

As a result, this completely negates the proposition that arbitration is autonomous and that it stands on its own feet.[162] International arbitration currently operates under qualified independence. For arbitration to stand on its own feet and to free arbitrants from intrusion by

[157] Bermann (n 144), 2

[158] ibid, 50

[159] ibid, 2

[160] Sundaresh Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' (International Arbitration: The Coming of a New Age?, 21st International Council for Commercial Arbitration Conference, Singapore, 11 June 2012) <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> accessed 22 January 2017, [2]

[161] [2009] 4 SLR(R) 732, [28-29]

[162] Blackaby et al. 2009 (n 3), 443

national courts, it needs absolute self-governance on all aspects of arbitration proceedings, particularly those that presently only national courts can deal with, such as recognition and enforcement of arbitral awards.

3.2.2.2 Cost of International Arbitration

Commentators have for long commended arbitration for being cost-effective in comparison to litigation.[163] Their view on this has now changed. The AA 1996, ss 1 and 33(1)(b) oblige an arbitral tribunal to avoid unnecessary delay or expense. Majority of arbitration rules express the same obligation – e.g. the ICC Rules 2017, article 22(1) and the LCIA Rules 2014, article 28.4. Yet, the most commonly cited disadvantage of international arbitration is cost ineffectiveness, as confirmed by the findings of the QMU-PwC 2006 Survey[164] and QMU-PwC 2015 Survey.[165]

Both the claimant and defendant in international arbitration proceedings pay administrative fees to the arbitration centre as well as fees and expenses to the arbitral tribunal. Whilst a filing fee is payable to a national court, which is significantly less than that paid to the arbitration centre, a separate sum is not paid for the bench that hears the case. In litigation, only the claimant bears the majority of the financial burden – naturally, because the defendant would not have agreed to the dispute resolution process, but also to being sued generally.

It is unarguable that international commercial arbitration is not cost effective since the respondents in the QMU-PwC 2008 Survey express that high costs force arbitrants to pre-award and post-award settlement (23% and 33% respectively).[166] Equally, high costs are also attributed to enforcement proceedings as the surveyed corporations report that they negotiated a settlement after an award had been rendered in order: (i) to save time and costs in seeking recognition and enforcement of the award (56%); and (ii) for prompt receipt of the award amount (16%).[167] It is of great significance to note these two reasons resulted in 43% of their cases being settled before

[163] Domke and Wilner (n 33), 1:01, 2

[164] QMU-PwC 2006 Survey (n 7), 2, 3, 6-7

[165] QMU-W&C 2015 Survey (n 13), 2, 5, 7, 10, 16

[166] ibid, 2, 3, 5, 7, 9, 11

[167] ibid, 3, 7

the first hearing and 31% before the hearing on the merits.[168]

Results of an extensive examination of the cost element in international arbitration are found in the CIArb 2011 Survey.[169] This survey produces data from the major arbitration centres such as ICC, LCIA, London Maritime Arbitrators Association (LMAA), American Arbitration Association (AAA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and others, the study of 254 arbitrations conducted between 1991 and 2010. It finds that the average cost of international arbitration for claimants is a shade under £1.6 million ($2.6 million/€2 million), and for respondents it is slightly less. Approximately 74% of the cost incurred in the arbitration process is on external legal services with the remaining 26% spread across other headings.[170] This is no different to Sachs' findings in his research comparing the cost in ICC cases, in which he concludes that the highest percentage of the costs in arbitration is paid to the lawyers and not to arbitrators or centres.[171]

Moreover, in comparing the cost of arbitration between the UK and Europe, the CIArb 2011 Survey finds that although the cost of barristers is higher in the UK, external legal fees are over 26% higher in Europe.[172] Arbitrations conducted in common law jurisdictions, however, are more expensive than in civil law countries because barrister fees, experts, and management costs are higher.[173] This begs the question, not to be determined here, why claimants spend a massive amount of money on external legal services to then settle the dispute prior to the first hearing or the hearing on the merits?

---

[168] ibid, 7

[169] Chartered Institute of Arbitrators (CIArb), 'CIArb Costs of International Arbitration Survey 2011' <http://www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf> accessed 5 February 2014 [hereinafter "CIArb 2011 Survey (n 169)"]

[170] CIArb 2011 Survey (n 169), 2, 10-11, 14. See also Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, JurisNet 2014), 1235 [hereinafter "Rubino-Sammartano 2014 (n 170)"]; Diana Rosert, 'The Stakes are High: A Review of the Financial Costs of Investment Treaty Arbitration' Research Report July 2014 International Institute for Sustainable Development <http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> accessed 13 August 2015, 8-14; ICC Commission Report, 'Decisions on Costs in International Arbitration' (2015) 2 ICC Dispute Resolution Bulletin 13 <http://store.iccwbo.org/icc-dispute-resolution-bulletin-issue-2> accessed 19 December 2016, 3, para 2

[171] Klaus Sachs, 'Time and Money: Cost Control and Effective Case Management' in Loukas A Mistelis and Julian DM Lew, *Pervasive Problems in International Arbitration* (Kluwer Law International 2006), 103-115

[172] CIArb 2011 Survey (n 169), 10

[173] ibid, 15

Cost of international commercial arbitration can be as much or as little as the parties, their legal representatives, the arbitral tribunals and even the courts desire, as they all directly manage the arbitral process,[174] as demonstrated by case law. In *ESCO Corporation (US) v Bradken Resources Pty Ltd. (Australia)*[175] an award rendered on 11 June 2010 in favour of ESCO included US$7.96 million in legal costs and fees of the arbitral process. Bradken's argument that to pay such high legal costs would be contrary to US public policy failed. On 24 May 2011 the Court ordered Bradken to pay the amount plus interest because "the parties had agreed to the ICC rules which provide that arbitrators may award legal costs".[176]

In comparison, the Supreme Court of India in *Sanjeev Kumar Jain v Raghubir Saram Charitable Trust & Ors*.[177] refused to enforce an arbitral award with high costs. It held that there is no provision in the law for award of actual costs and thus costs will have to be awarded within the limitation of the Civil Procedure Code 1908, s 35 and any other applicable rules and regulations.

Costliness of international commercial arbitration is not, however, a recent phenomenon. Since 1990s it has been a frequent complaint[178] and arbitrators now believe that "the costs of arbitration are getting out of hand".[179] Zamora explains that increasing sophistication, importation of litigation practices, and disregard of original arbitration customs, causes arbitration proceedings to cost more and last longer.[180] Menon expresses that costs in

[174] Rubino-Sammartano 2014 (n 170), 1236-1237. See also See also Joseph R Profaizer, 'International Arbitration: Now Getting Longer and More Costly' (28 July 2008) NLJ <https://www.paulhastings.com/docs/default-source/PDFs/9833309df6923346428811cff00004cbded.pdf> accessed 21 September 2013; Gary Grenley, 'Weight Cost of Arbitration as Carefully as the Cost of a Trial' (2008) Portland Bus. J. 28 <http://www.bizjournals.com/portland/stories/2008/09/29/focus7.html> accessed 21 December 2015; the AA 1996, s 65(1) provides for cap on recoverable costs of proceedings

[175] US District Court, District of Oregon, Portland Division January 31, 2011 Yearbook Commercial Arbitration 2011, 428; [2011] FCA 905; 282 ALR 282

[176] Rubino-Sammartano 2014 (n 170), 1236-1237

[177] (2012) 1 SCC 455

[178] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (2nd edn, Sweet & Maxwell 1991), 248. See also Michael E Schneider, 'Lean Arbitration: Cost Control and Efficiency Through Progressive Identification of Issues and Separate Pricing of Arbitration Services' (1994) 10(2) Arb. Int'l 119

[179] Gerald Aksen, 'Reflections of an International Arbitrator' (2007) 23(2) Arb. Int'l 255

[180] José María Abascal Zamora, 'Reducing Time and Costs in International Arbitration' (Modern Law for Global Commerce, Vienna, July 2007) <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V07/840/85/PDF/V0784085.pdf?OpenElement> accessed 16 March 2013, [a] [hereinafter "Zamora (n 180)"]

international arbitration are rising unsustainably.[181] Dezalay and Garth write that this form of dispute adjudication is big business.[182] Data from the surveys confirm these statements.

As a staggering sum is spent on legal fees in international commercial arbitration, pursuing a career in this field would be financially rewarding. The question to be determined in this regard is, however, how long will it be before this fruit-bearing corporate tree dries up? Bühler writes that "it becomes increasingly important for parties to assess the cost-benefit and risk involved in opting for arbitration.[183] It cannot, therefore, be ignored that 11% of respondents in the QMU-PwC 2006 Survey[184] say that they would rely on transnational litigation, and 41% of the respondents in the QMU-PwC 2008 Survey[185] say that they had relied on transnational litigation.

Whilst neither percentages represent the majority, it is demonstrative of the fact that arbitration is not the absolute dispute adjudication process for international commercial entities. Additionally, these percentages could be interpreted as an indication that international commercial entities are conducting the necessary cost-benefit and risk analysis about arbitration.

Findings of the IBA Subcommittee 2015 Report are quite interesting on the aspects of time and cost. In Europe and North America, with the exception of some countries, the costs and time involved in litigation and arbitration are comparable. Despite increased use of arbitration in Africa, practitioners and users point to costs as a significant disadvantage.[186] The same is true in

[181] Sundaresh Menon, 'Some Cautionary Notes for an Age of Opportunity' <http://www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf> accessed 21 December 2015

[182] Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (2nd edn, University of Chicago Press 1998), 144. See also John E Beerbower, 'International Arbitration: Can We Realise the Potential?' (2011) 27(1) Arb. Int'l 75, 75; Catherine Kessedjian, 'Is Arbitration a Service to Business or to the Legal Profession?' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation - The Fordham Papers 2009* (Martinus Nijhoff Publishers 2010), 311; Kate Durcan, 'International arbitration getting pricier but still growing' [2008] LS Gaz, 16 October 2008 <http://www.lawgazette.co.uk/analysis/international-arbitration-getting-pricier-but-still-growing/48011.fullarticle> accessed 21 December 2010

[183] Michael W Bühler, 'Costs of Arbitration: Some Further Considerations' in Gerald Aksen and Robert G Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005) 179. See also Micha Bühler, 'Awarding Costs in International Commercial Arbitration: an Overview' (2004) 22 ASA Bulletin 249

[184] QMU-PwC 2006 Survey (n 7), 5

[185] QMU-PwC 2008 Survey (n 8), 5

[186] Tunde Ogunseitan, 'Chapter 2: Africa' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015)

Asia-Pacific;[187] and Latin America.[188] Increase in costs and time may well be a direct result of the importation of processes not usually associated with arbitration, such as extensive disclosure and lengthy submissions. In countries where court fees are lower, increased cost of arbitration inhibits its growth.[189] High costs, therefore, could be the major impediment to the continued success of arbitration.

3.2.2.3 Lack of Appeal Structure: Final and Binding

Arbitration centres, and quite often the agreement to arbitrate also, prescribe that arbitral awards on the merits rendered by an arbitral tribunal shall be final and binding.[190] As such, the New York Convention, article III, obliges national courts to recognise and enforce arbitral awards. This qualifies the award for positive *res judicata*.[191] A rule of international law,[192] and on the basis of *pacta sunt servanda*, *res judicata* means that in appeal proceedings the same subject matter, relief sought by the arbitrants, or legal grounds, cannot be adjudicated upon. This results in the award attaining negative *res judicata* effect. The doctrine is well established in England,

---

<https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 20

[187] Swee Yen Koh, Sue Hyun Lim and James Morrison, 'Chapter 3: Asia-Pacific' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015)
<https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 23

[188] André de A Cavalcanti Abbud and Ignacio Minorini Lima, 'Chapter 5: Latin America' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015)
<https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 30

[189] Welsh (n 31), 9-10

[190] art 34(6) of ICC Rules 2017 (n 43); art 26.8 of LCIA Rules 2014 (n 43); art 34(2) of UNCITRAL Rules 2013 (n 43); art 35(1) of the UNCITRAL Model Law. But see art 30 AAA Rules 2014 (n 43) and art A-1 of the AAA/ICDR Optional Appellate Arbitration Rules effective 1 November 2013 [hereinafter "AAA Appellate Rules 2013 (n 192)"]. By stipulation or in their contract the parties can agree to provide for an appeal of an arbitration award.

[191] Peter Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press 2001), 11 [hereinafter "Barnett (n 191)"]. See also Fouchard Gaillard Goldman (n 44), para 1419; Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2nd edn, Kluwer 2001), 787-797; Bernard Hanotiau, 'The Res Judicata Effect of Arbitral Awards' in ICC International Court of Arbitration Bulletin, *Complex Arbitrations* (ICC Pub. No. 688E Special Supplement 2003) 43. The doctrine derives from the Latin maxims relating to 'public policy' "*Interest reipublicae ut sit finis litium"* meaning 'it is in the public interest that there should be an end of litigation'; and 'private justice' *"Nemo debet bis vexari pro una et eadem causa"* meaning 'no one should be proceeded against twice for the same cause'

[192] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003), 27-28, 164-173, 255-260, 245-255. See also Vaughan Lowe, 'Res judicata and the rule of law in international arbitration' (1996) 8 AJICL 38, 39; *Waste Management Inc. (Additional Facility) v United Mexican States (Mexico's Preliminary Objection Concerning the Previous Proceedings)*, ICSID Case No. ARB(AF)/00/3, (2002) 41 ILM 1315

Canada, India, Australia, France, Switzerland, U.S.A. and Egypt, for example,[193] and arbitral awards in these jurisdictions give rise to *res judicata*.

A conceptual framework of *res judicata* in arbitration from the perspective of comparative national law is indeed interesting, but a comprehensive outlook would not add much to the focus on the lack of appeal structure in this institution. Absence of substantive review of arbitration proceedings is the salient characteristic of the arbitration process.[194] Where does this fit in with it being "a means by which international business disputes can be *definitely* resolved"?[195] Where does this fit in with judicial declarations such as in *National Union Fire Insurance Company v Nationwide Insurance Company*[196] that there is no such thing as arbitration with a right to appeal? Where does this fit with arbitration being an alternative to legal proceedings when the two are "as distinct in their elementary structure as dirt is to water"?[197] These are important questions.

There is a change in the institution's landscape. Corporations who participated in the QMU-PwC 2006 Survey respond that 'lack of appeal structure' is the fourth disadvantage of international commercial arbitration.[198] Admittedly, though unfortunately, this finding is the view of only 29% of the respondents. The outright rejection of an appeal mechanism by 71% of the respondents makes it quite difficult for the minority voice to be heard. However, 23% of the respondents in

[193] See Barnett (n 191); Donald Lange, *The Doctrine of Res Judicata in Canada* (Butterworths 2000); *Hope Plantation Ltd v Taluk Land Board* (1999) 5 SCC 590; Keith Handley, 'Res Judicata: General Principles and Recent Developments' (1999) 18 Aust. Bar Rev. 214; Enid Campbell, 'Res Judicata and Decisions of Foreign Tribunals' (1994) 16 Syd. Law Rev. 311; Gary B Born, *International Commercial Arbitration in the United States* (2nd edn, Kluwer 2001), 914; In France, arts 480, 1476 and 1500 NCPC ("autorité de la chose jugée"); Fouchard Gaillard Goldman (n 44), paras 12, 24, 1419 and 1567; and Jean-Louis Delvolvé, Jean Rouche and Gerald H. Pointon, *French Arbitration Law and Practice* (Kluwer Law International 2004), 194-196; Heinrich Honsell and others, *International Arbitration in Switzerland* (1st edn, Kluwer Law International 2000), 572; art 190 of the Swiss PIL 1987; Egyptian Arbitration Act, A. 55 [No. 27/1994]. Recently, it has been confirmed by the British Columbia Court of Appeal in *Boxer Capital Corp. v JEL Investments Ltd* 2015 BCCA 24; 2015 Carswell BC 96, 379 D.L.R. (4th) 712 that *res judicata* applies to arbitration and thus set aside an award rendered in 2012 for not enforcing *res judicata* on the account of the 2009 arbitration and the 2011 decision of this court.

[194] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 N.Y.U. J. Int'l L. & Pol. 1109, 1110 [hereinafter "Ten Cate (n 194)"]. See also Peter B Rutledge, 'On the Importance of Institutions: Review of Arbitral Awards for Legal Errors' (2002) 19 J. Int'l Arb. 81, 81

[195] Born 2009 (n 15), 65

[196] 82 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1999)

[197] Gal-Or (n 119), 57. She writes that municipal law makes a clear distinction between litigation and arbitration.

[198] QMU-PwC 2006 Survey (n 7), 3, 7, 15, 22

the QMU-W&C 2015 Survey answer in the affirmative that there should be an appeal option in international arbitration.[199] An overwhelming majority reject the idea of an appeal mechanism in international arbitration[200] because those interviewed for the survey express that the advantages of the finality of an award outweigh the need for an appeal mechanism. This is understandable as finality provides closure for good.[201]

Another real reason why corporations prefer arbitration over litigation is not that they do not want an appeal mechanism, but that such additional layer of proceedings will cost them money and time – their two most precious profit-making elements. They could invest the money and time to make more money than spending it on lawyers to recover from, or to prove a point against, the other arbitrant. This is demonstrated by the fact that 56% of corporations surveyed would negotiate to settle an award in order to save time and cost in seeking its recognition and enforcement.[202]

In the 2006 survey 30 of 103 respondents and in the 2015 survey 175 of 763 respondents communicate that the lack of an appeal structure is a disadvantage. Whether these respondents indicate a need for "an appeal system within the arbitration framework rather than choosing to appeal through the courts; or that parties are increasingly prepared to challenge awards"[203] is irrelevant. Their feedback is not without significance because the 29% and 23% of the respondents, respectively, who perceive the lack of an appeal mechanism as a disadvantage are clearly saying that an option to appeal would enhance the status of international commercial arbitration as a primary process of dispute adjudication.

Smit writes that "The advantage of arbitration in providing a decision in a single instance can turn into significant injustice when the award is patently defective and not subject to judicial review on the merits".[204] Another way of interpreting this is that this institution could be a much

[199] QMU-W&C 2015 Survey (n 13), 2, 5, 7-8, 10

[200] QMU-PwC 2006 Survey (n 7); QMU-W&C 2015 Survey (n 13)

[201] Gal-Or (n 119), 65

[202] QMU-PwC 2008 Survey (n 8), 3

[203] QMU-PwC 2006 Survey (n 7), 7

[204] Smit (n 50), 27

larger industry than it currently is if it could persuade not only 11% of the respondents who use arbitration as a standalone process for resolving their disputes, but also the 43% who use it in combination with other processes, to use it as a standalone process to adjudicate their disputes.[205]

Findings of the QMU-PwC 2006 Survey are in line with two surveys conducted in U.S.A. – B-to-B 2011 Survey[206] and 'A Report on the Growing Use of ADR by U.S. Corporations'.[207] In the former it is ascertained that 37% of corporate counsel surveyed would not be discouraged to use arbitration if parties included a clause in the arbitration agreement preserving the right to appeal.[208] The latter reports that "almost 55 percent of the surveyed respondents cited the difficulty of appeal as a deterrent to using arbitration".[209] In the QMU-W&C 2010 Survey the respondents say that in selecting a seat of arbitration availability of appeal against awards is unimportant[210] and that one of their reasons for choosing arbitration include 'the absence of appeals'.[211]

The fact that it is the minority that would like an appeal mechanism does not make it less desirable because such a procedure in the arbitration process would be "… a natural evolution rather than an impossibility".[212] Gal-Or writes that an appeal level in this private dispute adjudication process "should be assessed as representing a developmental stage in a process fraught by trial and error, requiring fine-tuning and polishing"[213] because "the human quest for justice remains the same", particularly so since the beneficiaries strive for fairness.[214]

How could the contradiction that the respondents in the QMU-PwC 2006 Survey and in the

[205] QMU-PwC 2006 Survey (n 7), 5

[206] B-to-B 2011 Survey (n 66)

[207] David B Lipsky and Ronald L Seeber, 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations' [1998] Institute on Conflict Resolution, 26 [hereinafter "Lipsky and Seeber (n 207)"]

[208] B-to-B 2011 Survey (n 66), ix

[209] Lipsky and Seeber (n 207), 26, 28, 38

[210] QMU-W&C 2010 Survey (n 9), 18

[211] ibid, 30

[212] Howard M Holtzmann, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur L Marriott, VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Graham and Trotman/Martinus Nijhoff 1995) 109, 109, 112, 114

[213] Gal-Or (n 119), 59

[214] ibid, 60

QMU-W&C 2015 Survey express a desire for an appeal mechanism and the respondents in the QMU-W&C 2010 Survey express quite the contrary be explained? This question is crucial since "A common criticism of arbitration is that tribunals unnecessarily 'split the baby'."[215] Its answer lies in understanding the very purpose of an appeal against a decision. Ten Cate writes that there are two main arguments for an appeal mechanism in international commercial arbitration: (i) the often quite high monetary value of the disputes makes a substantive review of the arbitral awards crucial; and (ii) to allay fear in those who currently deem arbitration too risky,[216] which would be extremely difficult to achieve without the much-needed protective layer of an appeal process.

3.2.2.4 Time-consuming: Length of International Commercial Arbitration Proceedings

Almost all arbitration rules share common features, one of which is the expressly delineated timeframe within which disputants must receive a final and binding decision. Centres' rules of arbitration define the steps that arbitrants should take to present their respective case. Generally, when the case file is transferred to the tribunal the hand on the clock starts to go round. A timeline is then set for the respondent to file a defence or a response; for the arbitrants to form an arbitral tribunal; for the arbitrants to serve their submissions; and the tribunal to render an award. Save for under ICC rules, an arbitral award must be in writing under all other rules. The tribunal must give reasons for the decision and state the place and date at which it is made. In a three-panel arbitral tribunal the award should be made by the majority or solely by the presiding arbitrator where there is no majority.

Historically, contracting or disputing parties opted for arbitration to obtain an expedited adjudication of their dispute. Despite defined timelines, expeditious is no longer an adjective associated with this institution. In the present day, it is simply not feasible to complete the arbitration process within comfortable time limits, even if obligated by arbitration rules. This oft cited disadvantage is linked to different stages of the arbitration process. In the QMU-PwC 2006 Survey, the length of arbitration proceedings is the second most commonly cited disadvantage as proceedings take approximately 12 to 18 months from filing a request to the award being

[215] QMU-W&C 2012 Survey (n 10), 3

[216] Ten Cate (n 194), 1111

rendered. High value disputes stretch to over two years.[217] A further period of three to nine months for the publication of the award is added to the procedural timetable,[218] and then there is the period for recognition and enforcement proceedings.

Lengthy arbitration proceedings result in very troubling consequences. Corporations surveyed for the QMU-PwC 2008 Survey were asked whether international arbitration actually delivers upon its functional purpose in general. They report that they negotiated to settle the proceedings before the first hearing (43%); prior to an arbitral award being rendered (25%); or the arbitral award itself (40%); simply to avoid excessive delay (17%) in closing the dispute.[219] To save money is another factor influencing settlement, as stated above.

Arbitration rules vary greatly, some are prescriptive in that they set a time limit within which an arbitral tribunal is required to render its award, whereas others are silent on this point. The four most sophisticated and experienced centres provide the best example. At the ICC a final award must be rendered within six months from the date of the case management conference. At the SCC and CIETAC it is the same but with the time running from the date the case is referred to the arbitral tribunal.[220] SIAC and HKIAC do not dictate a time limit, but leave it to the tribunal to close the proceedings when the parties conclude their submissions.[221]

The AAA and LCIA give guidance as to when the tribunal should render an award, which is "promptly" in the former, and "as soon as reasonably possible" in the latter, after the last submission by the parties.[222] A time limit is likely to force the parties and tribunal to work towards the goal set. Difficulty would arise where the parties or tribunal seek to interpret 'promptly' or 'as soon as reasonably possible'. Zamora writes that the answer to achieving expeditious proceedings is fewer rules.[223]

[217] QMU-PwC 2006 Survey (n 7), 2, 7. See also BLP 2012 Survey (n 12), 11, 12-13

[218] BLP 2012 Survey (n 12), 4, 12, 14

[219] QMU-PwC 2008 Survey (n 8), 2, 3, 6

[220] art 4 (1) of ICC Rules 2017; art 43 of SCC Rules 2017 (n 43); art 48(1) of CIETAC Rules 2015 (n 43)

[221] Rule 28(1) of SIAC Rules 2016 (n 43); art 30.1 of HKIAC Rules 2013 (n 43)

[222] art 27(1) of AAA Arbitration Rules 2014; art 15.10 of LCIA Arbitration Rules

[223] Zamora (n 180), [c]

Currently arbitration is not different to litigation because the time expended to adjudicate a dispute is not short of one and half years. Delay in arbitration proceedings is attributed to a number of factors, most often with the complexity of the issues; the time a three-person tribunal takes to deliberate their findings and render an award; and members of tribunal having extremely busy schedules and so not being able to dedicate sufficient time to each case. "That said, there must come a point in any case where delay becomes problematic and undermines the reputation of arbitration".[224] Sentiments like these are not new.

In 2007 Zamora writes that exaggeration of the supposed belief of arbitration being less time consuming than litigation leads to arbitrants being disappointed and this is reflected on their subsequent perception and portrayal of arbitration.[225] This kind of message does not go unheeded, as demonstrated by the August 2007 and November 2012 ICC Commission on Arbitration reports[226] which provide guidance for efficient management of proceedings with regard to costs and time in international arbitration.

Four very significant messages that the international commercial arbitration community is likely to pay attention to derive from the BLP 2012 Survey. They are that: (i) 41% of respondents say that a single arbitrator delivers an award quicker than three arbitrators;[227] (ii) 32% of respondents feel that an incentive could be provided to the tribunal for a prompt award;[228] (iii) 41% of respondents feel that a financial penalty could be imposed upon the tribunal for not publishing an award promptly;[229] and (iv) 58% of the respondents say that delay is not beyond the authority of the arbitral centre to control.[230]

---

[224] BLP 2012 Survey (n 12), 3

[225] Zamora (n 180), [b]

[226] ICC Commission on Arbitration, 'Techniques for Controlling Time and Costs in Arbitration' (ICC Publication 843, 2007) <http://gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf> accessed 09 December 2011; ICC Commission on Arbitration and ADR, 'ICC Arbitration Commission Report: Report on Techniques for Controlling Time and Costs in Arbitration' (2nd edn, ICC Publication 861-1 ENG, 2015) <https://cdn.iccwbo.org/content/uploads/sites/3/2015/11/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration-2012.pdf> accessed 18 November 2016. See also David W Rivkin and Samantha J Rowe, 'The Role of the Tribunal in Controlling Arbitral Costs' (2015) 81(2) Int'l J. of Arb. Med. & Disp. Man. 116

[227] BLP 2012 Survey (n 12), 19. See also QMU-W&C 2012 Survey (n 10), 2

[228] BLP 2012 Survey (n 12), 20

[229] ibid

[230] ibid, 18

These aforementioned factors are completely in the hands of the parties and if adopted could radically change the institution's landscape and counter this delay dilemma, and perhaps even the other disadvantages discussed herein. Since the arbitrants' instruction to the arbitration centres and arbitrators is an agreement for service, they could dictate terms and conditions akin to this BLP 2012 Survey feedback to eliminate delay in any aspect of the proceedings; as opposed to the centres dictating rules to arbitrants and the tribunal.

Almost without exception, every commercial contract contains a financial penalty for delay in performance by a party to the contract; usually imposed on the party delivering products or performing a service. Thus, to prevent such considerable dissatisfaction by arbitrants it would be on a par with commercial custom if an agreement with arbitrators is drafted with such terms and conditions.

3.2.2.5 Confidentiality

Corporations strive to keep confidential intellectual property; trade secrets; and commercially sensitive information. Confidentiality is always an important measure and an inviolable advantage of arbitration,[231] because it bestows the required level of protection to contracting parties or arbitrants. Schmitz writes that confidentiality connotes secrecy because in arbitration it precludes disclosure of both written and oral exchange in the proceeding and such duty of confidentiality is imposed on the parties, witnesses, and any others involved in the process. Neither the public nor the media can access the hearings or the awards.[232] This is important for the success and profitability of the parties' business.

These are persuasive reasons to choose arbitration over litigation because confidentiality averts

[231] Blackaby et al. 2015 (n 59), 30. See also Steven Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 22(2) J. Int'l Arb. 127, 136 [hereinafter "Kouris (n 231)"]; Andrew Clarke, 'International Arbitration: Current Corporate Concerns' (2009) 20(2) ICC Bull 41 <http://library.iccwbo.org/content/dr/ARTICLES/ART_0481.htm?l1=Bulletins&l2=ICC+International+Court+of+Arbitration+Bulletin+Vol.20%2FNo.2+-+Eng&AUTH=7677fd17-4350-&Timeframe> accessed 28 October 2013, 6; Moses (n 15), 163 - asserts that application of confidentiality should apply to all matters involved, including the existence of a dispute, and by all involved.; Gu Weixa, 'Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?' (2004) 15 Am. Rev. Int'l. Arb. 607; Welsh (n 31), 9

[232] Schmitz (n 103), 1218

the potential risk of undisclosed business material belonging to national and international businesses becoming public and thus causing damage to reputation or position in the marketplace. Litigation, in comparison, is a public domain and documents referred to in open court usually lose any confidentiality attached to them. Similarly, evidence given by witnesses can be relied on in other proceedings. Arbitration proceedings, on the other hand, would not be admissible in court proceedings.[233] Furthermore, judgment given in litigation is public and published in law reports.

In a 1992 statistical survey U.S.A. and European users say that confidentiality is the most important benefit of international commercial arbitration.[234] Another empirical study conducted in the same period by Bühring-Uhle collected data from participants who resided in U.S.A., Europe, the Middle East and Australia express that confidentiality is "highly relevant" or "significant" for choosing arbitration.[235] They rank it as the third most important reason for choosing international commercial arbitration. In U.S.A, for example, neither the FAA 1925 nor any other law guarantees the secrecy of material pertaining to arbitration.[236] Thus, the high ranking is both understandable and desirable.

From the year 2000 the significance attached to this fundamental principle changed. The study by Naimark and Keer finds that less than 10 per cent of the subjects questioned specify confidentiality as an important feature of arbitration.[237] Confidentiality is identified neither as an advantage nor as a disadvantage in the QMU-PwC 2006 Survey.[238] This potential discrepancy could be explained by the findings of a survey which compares the advantages of arbitration as seen by practitioners in East Asia and the West. This survey finds that 76% of respondents in the

[233] ibid. See also Vijay Bhatia, Christopher N Candlin and Rajesh Sharma, 'Confidentiality and Integrity in International Commercial Arbitration Practice' (2009) 75(1) Arbitration 2, 2 [hereinafter "Bhatia, Candlin and Sharma (n 233)"]

[234] Hans Bagner, 'Confidentiality - A Fundamental Principle in International Commercial Arbitration?' (2001) 18 J. Int'l Arb. 243, 243 [hereinafter "Bagner (n 234)"]

[235] AMIB 1996 Survey (n 6), 127-156

[236] Kouris (n 231), 134. See also *United States v Panhandle Eastern Corp. et al*. 118 F.R.D. 346 (D. Del 1998) holding that confidential information in arbitration is only protected when special circumstances warrant a finding that the parties intended to keep specific information private [hereinafter "*Panhandle* (n 236)"]

[237] Naimark and Keer (n 66), 46, 52

[238] QMU-PwC 2006 Survey (n 7), 2, 7

East value confidentiality highly, compared to 56% of Western respondents.[239]

Respondents to the QMU-W&C 2010 Survey say that confidentiality is not the essential reason for choosing arbitration.[240] Only 33% of the corporations say that they make confidentiality a mandatory requirement in their contract.[241] For them it is not a serious concern.[242] However, 62% say that it is a very important feature of the process. This explains why 38% would still use arbitration if it would not offer confidentiality. Only 27% say that lack of agreement on the confidentiality clause would be a deal-breaker.[243]

It is clear that over time the view of the users has changed. As a matter of fact, it had been changing since the late 1980s,[244] for better or worse it matters not. The serious concern is the difference of opinion between users in different geographical locations and in different eras. This points to confidentiality no longer being a key aspect because of the impracticality, if not impossibility, of enforcing it.[245]

Users' mixed testimony is not different to the varying approach adopted by the civil law and common law jurisdictions. As an element of the arbitration process, confidentiality is absolute in most civil law jurisdictions or implied in many common law jurisdictions, and this may be dictated by the laws that govern the arbitration proceedings.[246] In *Bulgarian Foreign Trade Bank Ltd v A. I. Trade Finance*[247] the Swedish Supreme Court, a civil law jurisdiction, promulgated a

[239] Shahla F Ali, 'Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West' (2009) 28(4) Rev. Litig. 791

[240] QMU-W&C 2010 Survey (n 9), 3, 30

[241] ibid, 5-6

[242] ibid, 29

[243] ibid, 7

[244] Bagner (n 234), 243. See also Michael Pryles, 'Confidentiality' in Lawrence W Newman, Richard D Hill (eds), *The Leading Arbitrators Guide to International Arbitration* (Juris Publishing 2004) 415 [hereinafter "Pryles (n 244)"]

[245] Alexis C Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' [2001] Am. U. Int'l L. Rev. 969, 1017-1019 [hereinafter "Brown (n 245)"]

[246] Bhatia, Candlin and Sharma (n 233), 5. See also Quentin L Sze-On and Edwin LP Khoon, *Confidentiality in Arbitration: How Far Does it Extend?* (Academy Publishing 2007)

[247] [2000] T 1881-99. The position is the same in the United States of America as seen in *Panhandle* (n 236) in which the District Court of Delaware held that the US Government could have access to the documents relating to an earlier arbitration because the arbitration agreement and the arbitration rules were silent on the duty of confidentiality. See also *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] APP.L.R. 01/29 in which the parties signed a confidentiality agreement following arbitration

judgement on 27 October 2000 that an express agreement for confidential arbitration proceedings is essential and that every person involved in the proceedings must be a party to it because absolute confidentiality does not exist. In France, another civil law jurisdiction, a contrary position is adopted in favour of confidentiality as seen in *G. Aita v A. Ojjeh.*[248]

This difference between jurisdictions is the same as between the various arbitration centres, in that the rules of the centres vary with respect to confidentiality. Some make it mandatory and others simply recommend it. The AAA[249] obliges the parties and the tribunal to maintain confidentiality of proceedings, except in a judicial challenge, by court order or by law. The LCIA makes confidentiality applicable as a general principle.[250] The SCC places an obligation on the centre and the arbitration panel but not on the parties to keep matters confidential.[251] At ICC a party must make a request to the arbitral tribunal to make an order to protect trade secret and confidential information.[252] The HKIAC is strict in that the parties undertake to keep confidential all matters relating to the proceedings including the award.[253] The CIETAC prohibits anyone who was directly (and arguably indirectly) involved from disclosing any substantive and procedural issues regarding the case.[254] The UNCITRAL provides for confidentiality of the proceedings and the award, unless the parties consent to them being made public.[255]

---

proceedings. The question for the Privy Council was whether the issues determined in the first arbitration could be *res judicata* and thus relied upon by a party to those proceedings in a subsequent arbitration; and the answer was in the affirmative. Reliance upon the previous award did not breach the confidentiality agreement. In Australia an implied duty of confidentiality has been rejected as demonstrated by the case of *Esso Australia Resources Ltd et al v Plowman* (1995) 183 CLR 10. Under English law, the common view is that arbitrations are both private and confidential. Certainly, the parties are bound by a confidentiality undertaking as seen in *Ali Shipping Corp. v Shipyard Trogir* [1998] 2 All E.R. 136; 1 Lloyd's Rep. 643 and *Hassneh Insurance Co. of Israel v Mew* [1993] 2 Lloyd's Rep 243

[248] (1986) 4 Revue de l'Arbitrage 583 Cour d'Appel de Paris

[249] art 37 of AAA Rules 2014 (n 43) and art A-21 of AAA Appellate Rules 2013 (n 192), respectively

[250] art 30 of LCIA Rules 2014 (n 43). Ileana M Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) writes that English law "affords generous protection to virtually all the information presented in the arbitration", 77; See also Part 62.10(3)(b) CPR 1998 extends the duty of privacy and/or confidentiality in arbitration to court proceedings concerning arbitration. This is illustrated by *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184; Hewr R Dundas, 'Confidentiality in English arbitration: the final word? Emmott v Michael Wilson & Partners Ltd' (2008) 74(4) Arbitration 458

[251] art 46 of SCC Rules 2017 (n 43)

[252] art 22(3) of ICC Rules 2017 (n 43)

[253] art 42.1 of HKIAC Rules 2013 (n 43)

[254] art 38(2) of CIETAC Rules 2015 (n 43)

[255] art 32.5 of UNCITRAL Rules 2013 (n 43)

States and arbitration centres approach confidentiality differently. Arbitration proceedings are not necessarily and instinctively confidential. It is because of this "considerable variation"[256] that "the question of confidentiality in international arbitral proceedings is far from settled",[257] compared to the other facets of international commercial arbitration which are comfortably posited. The reason for this is that arbitration "is not confidential because information revealed during the process may become public".[258]

Safeguarded sensitive material could become public at the petition for recognition and enforcement stage when a national court is seized of the matter because proceedings in national courts are public. The value of confidentiality appears to depend on the jurisdiction, on the arbitration centre, and indeed on the context. As a result, arbitration could be transparent where necessary without undermining its value.[259] A good example is the case of *City of Newark et al. v Law Department of the City of New York et al. Deloitte & Touche LLP Intervenor-Respondent*[260] where Justice Friedman says that a confidentiality order issued by an arbitration panel cannot override the public's right of access to government records under the freedom of information law.

Confidentiality in international commercial arbitration should not and cannot be taken for granted,[261] particularly owing to the undesirably incoherent approach to confidentiality as presented here. This places arbitrants at risk of their dispute becoming public. Whilst loss of confidentiality as advantage impacts the users of the arbitration process, its existence as an advantage impacts researchers in the field as discursive data is inaccessible.[262] This detrimental

[256] Bhatia, Candlin and Sharma (n 233), 3

[257] Pryles (n 244), 415. See also Brown (n 245), 1017-1019

[258] Schmitz (n 103), 1211. See also Bernard Rix, 'Three Addresses in St Petersburg: International Arbitration, Yesterday, Today and Tomorrow' (2006) 72(3) Arbitration 224, 226; the cases of *Trogir* and *Hassneh* (n 249) are authorities that it is permissible to divulge the contents of the arbitral award when it is necessary to establish or defend the right of a third party, or to disclose the reasons in an arbitral award, 651 and 249-250, respectively.; Similarly by order or leave of the court where disclosure is in the interest of justice as in *London & Leeds Estates Ltd v Paribas Ltd* (No. 2) [1995] 1 EGLR 102

[259] Cindy G Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 Am. Rev. Int'l Arb. 121, 122. See also *Plaskett v Bechtel International* 243 F. Supp. 2d 334, 340-45 (D.V.I. 2003) in which the court decided that an arbitration containing a confidentiality clause is 'unconscionable'.

[260] 305 A.D.2d 28 (2003) 760 N.Y.S.2d 431, [30]

[261] Yves Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15(2) Arb. Int'l 131, 138

[262] Bhatia, Candlin and Sharma (n 233), 3

state of affairs results in limitation to understanding the arbitration practice because access to the institution is second hand, namely from lectures given or publications made by practitioners, and by survey reports. McIlwrath and Schroder write that users need a high degree of transparency in international arbitration to allow them to understand the arbitral process and, most importantly, compare how arbitration proceedings are conducted in different centres and by different arbitrators.[263]

Undoubtedly, the uncertain position described here is likely to remain due to the operational dynamics of the institution in different jurisdictions. It is, however, incumbent upon its community to protect, through a legitimately coherent and consistent mechanism, the confidentiality of the parties and their proceedings.

3.3 Opportunity for Institutional Entrepreneurship: To Reinstate the Lost Advantages

A unique opportunity has been had here to focus on and decipher empirical studies in order to understand the substance of perceptions and expectations of corporations and counsel. The opportunity is to realise the relative importance of the 10 ribs of the international commercial arbitration umbrella. Analysis of the data also permits an appreciation of the field-level conditions present[264] to enable institutional entrepreneurship.[265] At least five conditions are identified herein as creating such an opportunity; and they are the 'disadvantages' described above. These amount to precipitating jolts or crises; acute field-level problems; a degree of

[263] Michael McIlwrath and Roland Schroder, 'Users Need More Transparency in International Arbitration' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitral Awards* (Juris 2013) 87, 87

[264] Strang and Sine (n 28), 507. See also Royston Greenwood, Roy Suddaby and Christopher R Hinings, 'Theorizing Change: The Role of Professional Associations in the Transformation of Institutionalized Fields' (2002) 45(1) Acad. Manag. J. 58, 60. For discussion on other types of conditions that enable institutional entrepreneurship see Neil Fligstein and Iona Mara-Drita, 'How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union' (1996) 102(1) Am. J. Sociol. 1 (i.e. economic and political crisis); Nelson Phillips, Thomas B Lawrence and Cynthia Hardy, 'Inter-organizational Collaboration and the Dynamics of Institutional Fields' (2000) 37(1) J. Manage. Stud. 23; Kimberly A Wade-Benzoni and others, 'Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions' (2002) 27(1) Acad. Manag. Rev. 41 (complex and multi-faceted field-level problems)

[265] Julie Battilana, 'Agency and Institutions: The Enabling Role of Individuals' Social Position' (2006) 13(5) Organization 653, 654. See also Julie Battilana, Bernard Leca and Eva Boxenbaum, 'Agency and Institutions: A Review on Institutional Entrepreneurship' (2008) Harvard Business School Working Paper 08-096/2008 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.461.6523&rep=rep1&type=pdf> accessed 30 May 2014, 6 [hereinafter "Battilana et al. 2008 (n 265)"]; Julie Battilana and Matthew Lee, 'Advancing Research on Hybrid Organizing' (2014) 8(1) Acad. Manag. Ann. 397 [hereinafter "Battilana and Lee (n 265)"]

heterogeneity in the field; and lack of institutionalisation of the field.[266] From these data, a certain degree of heterogeneity can be ascertained in this institution; which would be foundation for institutional change.

It is trite that "institutions endure".[267] Disappointment of any kind, even from a minority, cannot be ignored, however, because fragmented and conflicting nature of the institution allows actors to promote change. It could be that the percentage of disappointed respondents is too low to be considered a crisis. Particularly so since 18% of the respondents in the QMU-PwC 2006 Survey are 'very satisfied' and 86% are 'satisfied' with the institution. Nevertheless, the disappointed minority present: (i) a precipitating jolt; (ii) an acute field-level problem; and (iii) a significant degree of heterogeneity in the field. These appear to affect the degree of institutionalisation of the field.

Dissatisfaction arising from increased costs, delayed proceedings, lack of appeal, lack of confidentiality, and difficulties with recognition and enforcement of arbitral awards could motivate the start of a rethinking and framing process not only to destabilise the existing institutional memory but also to establish a body of ideas to allow change to take place. These sources of institutional disruption could be interpreted as disintegration of the legitimacy of this institution because the rising of the disadvantages conflict with the traditional nature of this institution.

The purpose here is not to explain the potential for destabilisation of the institution. It is to understand the type of institutional entrepreneurship opportunity that could arise from these enabling field-level conditions. Since "there is a fear among many business managers that

[266] Battilana et al. 2008 (n 265), 9. See also Julie Battilana, Bernard Leca and Eva Boxenbaum, 'How Actors Change Institutions: Towards a Theory of Institutional Entrepreneurship' (2009) 3(1) Acad. Manag. Ann. 65 [hereinafter "Battilana et al. 2009 (n 266)"]; Battilana and Lee (n 265); Steve Maguire, Cynthia Hardy and Thomas B Lawrence, 'Institutional Entrepreneurship in Emerging Fields: HIV/Aids Treatment Advocacy in Canada' (2004) 47(5) Acad. Manag. J. 657, 657

[267] Elisabeth S Clemens and James M Cook, 'Politics and Institutionalism: Explaining Durability and Change' (1999) 25(1) Annu. Rev. Sociol. 441, 441 [hereinafter "Clemens and Cook (n 267)"]. See also Everett C Hughes, 'The Ecological Aspect of Institutions' (1936) 1(2) Am. Soc. Rev. 180; Everett C Hughes, 'Institutions' in Robert E Park and Edward B Reuter (eds), *An Outline of the Principles of Sociology* (Barnes & Noble 1939) 283; Lynne G Zucker, 'The Role of Institutionalization in Cultural Persistence' (1977) 42(5) Am. Soc. Rev. 726 [hereinafter "Zucker (n 267)"]

arbitrators tend to be undisciplined wild cards, rendering "split the difference" awards that lack principle, and do for commercial controversies what Solomon threatened to do in the proverbial child custody dispute",[268] Paulsson's recommendation that the arbitral tribunal should be appointed by a neutral body is a matter for entrepreneurship. As the respondents to the surveys discussed herein favour the right to choose arbitrators, this is not, therefore, an immediate opportunity. Particularly in light of recent survey results on the matter.[269] Equally, van den Berg's recommendation that a revised New York Convention, first presented at the last ICCA Congress in Dublin in 2009,[270] could lead to the disappearance of the current problems associated with national courts in their recognition and enforcement of arbitration awards. Also, this is not an immediate entrepreneurship opportunity.[271]

The more pertinent question is "When institutions are challenged, what factors determine their resistance or capacity to restore the status quo ante?"[272] Status quo ante is Latin for 'the way things were before'. Here, it would mean that the institution is restored to its previous state – the way it was and the way it is meant to be – its umbrella being held open by the 10 ribs enumerated above and without any single one being broken or bent. An obvious measure is to adopt the appropriate response to the institutional change that has occurred; to work on transformation; and to ensure durability of this unique and incommensurable institution.

Fligstein writes that "Markets in crisis are susceptible to transformation".[273] As arbitration proceedings are now more expensive and prolonged, for example, it is undeniable that this is a precipitating jolt because it is not in line with the traditional raison d'etre of this institution – to

[268] William W Park, 'Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection' (1998) 8 Transnat'l L. & Contemp. Probs. 19, 28-30

[269] George Burn, 'International Arbitration Survey: Party Appointed Arbitrators' [2017] <https://www.blplaw.com/media/pdfs/Reports/BLP_Arbitration_survey_2017.pdf> accessed 27 May 2018

[270] Albert J van den Berg, 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' in Albert J van den Berg (ed), *50 Years of the New York Convention* (Kluwer Law International 2009) 649. See also Charles Chatterjee And Anna Lefcovitch, 'Recognition and Enforcement of Arbitral Awards: How Effective is Article V of the New York Convention of 1958?' (2016) 9(36) International In-house Counsel Journal, who suggest that certain amendments to the provisions of art V should be made

[271] Emmanuel Gaillard, 'The Urgency of Not Revising the New York Convention' (2009) 14 ICCA Congress Series 689. See also VV Veeder, 'Is there a Need to Revise the New York Convention?' (2010) 1(2) J. Int'l Disp. Settlement 499

[272] Clemens and Cook (n 267), 460

[273] Neil Fligstein, 'Markets as Politics: A Political-Cultural Approach to Market Institutions' (1996) 61(4) Am. Soc. Rev. 656 [hereinafter "Fligstein (n 273)"], 664

be cost-effective and expeditious. On the premise that "no institution is created de novo",[274] the most obvious and greater institutional entrepreneurship opportunity is to restore tradition by reinstating the advantages that diminished over time; which have become the disadvantages of the institution. This is what the surveyed respondents seem to communicate.

An immediate result will be realised should this institution become cost-efficient, as it was once hailed, because there should be an increase in the 62% of corporations who insist on arbitration clauses in their contracts.[275] If it becomes both cost-effective and expeditious, the percentage of users who are 'very satisfied' with the institution should be well above 18%. This does not mean that the institution is a failure, rather that there is certainly room for improvement.

More importantly, as the world economy is now truly global, restoring the traditional advantages would enhance and reinforce the institution. To restore tradition in this instance means to regain "the trustworthiness of individuals who had otherwise strong centrifugal tendencies"[276] or "fixing or re-fixing relations of meaning and of membership".[277] The distinctive action required here is to rediscover and reinstate the core elements of this institution.

March and Olsen write about rediscovering institutions and the search for appropriate institutions. They write that "We are driven to the question of *efficacy*–whether an institution produces in an imperfect world what it promises in an imaginary one and whether the failures can be remedied without undue costs" and that such evaluation is about "judging and improving institutional utopias on the basis of their moral virtues in the real world".[278]

Fligstein cites, as example, how the Japanese keiretsu, families of firms in various industries with shared ownership, withstood a political assault when U.S.A. pressured Japan to open up its financial markets for corporate control to develop; a move which was seen as an attempt to force

[274] William H Riker, 'The Experience of Creating Institutions: The Framing of the United States Constitution' in Jack Knight and Itai Sened (eds), *Explaining Social Institutions* (University of Michigan Press 1995) 121, 121

[275] See n 17

[276] Eiko Ikegami, *The Taming of the Samurai: Honorific Individualism and the Making of Modern Japan* (Harvard University Press 1995), 5

[277] Stewart R Clegg, *Frameworks of Power* (SAGE 1989), 224

[278] James G March and Johan P Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (Free Press 1989), 129

open the keiretsu's procurement arrangements. Then there was the economic downturn of the early 1990s. Managers of the keiretsu fought off these attacks using their traditional conception of control based on interdependencies ranging from shared workforce to purchasing goods and services from inside the family and to helping each other to overcome economic troubles.[279]

The present institution allowed for its traditional conception of control, namely, where merchants appointed arbitrators to decide their dispute when a dispute arose rather than naming an arbitration centre which has fixed fees and timelines, to change. This led to the increase in cost and time to adjudicate international commercial disputes. Normally, institutions change when the functions they serve change.[280] Whilst change occurred in this institution, the functions it serves has not changed. The only reason for this change in the principles and practices of this institution could be explained by the lack of conception of control, namely, a regulative pillar in this institution; in other words, a collective stable order.

Moreover, it appears that this institution is not fully institutionalised. Scott's definition of institution is that they "are social structures that have attained a high degree of resilience" and "connote stability"[281] and are "multifaceted, durable social structures".[282] The loss of five of the 10 advantages associated with international commercial arbitration demonstrates that this institution has not attained a high degree of resilience, does not connote stability and is not durable. Indeed, in accordance with Scott's definition of institution, it is "subject to change processes, both incremental and discontinuous".[283] Thus, it could be that the institution changed in accordance with the needs of its actors. This is, however, a very unconvincing reason in light of the data from the surveys cited herein.

---

[279] Fligstein (n 273), 667-668

[280] Wolfgang Streeck and Kathleen A Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck and Kathleen A Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press 2005), 25-26; Richard Deeg and Gregory Jackson, 'Towards a More Dynamic Theory of Capitalist Variety' (2007) 5(1) Socio-Econ. Rev. 149, 156-157, 163; Bernhard Ebbinghaus, 'Can Path Dependence Explain Institutional Change? Two Approaches Applied to Welfare State Reform' (2005) 05/02 Discussion Paper, MPIfG 1, 23

[281] William R Scott, *Institutions and Organizations* (SAGE 1995), 33 [hereinafter "Scott 1995 (n 281)"]. See also Scott 2001 (n 27), 48

[282] William R Scott, *Institutions and Organizations: Ideas, Interests, and Identities* (4th edn, SAGE 2014), 57 [hereinafter "Scott 2014 (n 282)"]. See also Roger Friedland and Robert R Alford, 'Bringing Society Back In: Symbols, Practices and Institutional Contradictions' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991) 232, 243

[283] Scott 1995 (n 281), 33. See also Scott 2001 (n 27), 48

Institutions are structures based on taken for granted rules that support, yet control, social behaviour. Therefore, a more plausible explanation for the loss of half of the traditional advantages of this institution is that it has not fully institutionalised. An institutional entrepreneurship opportunity exists for institutionalisation of this institution. There is a need for instrumental and purposive action to straighten the ribs of the international commercial arbitration umbrella which are bent, namely the disadvantages discussed herein.

This is the role that the regulative institutional pillar would play if it is introduced in this institution. Scott summarises the components of the three institutional pillars, namely, the 'cultural-cognitive', 'normative' and 'regulative' pillars, in a table.[284] It is ascertainable from it that the basis of order of the regulative pillar is regulative rules. Its indicators, meaning its monitoring and evaluation framework to determine whether the institution is achieving its objectives and goal, is 'rules', 'laws' and 'sanctions'.

An 'institution' refers to shared rules held in place by custom or agreement and which enables actors to both cooperate and compete, but also to exchange.[285] Berger and Luckmann write that "The typifications of habitualized actions that constitute institutions are always shared ones. They are available to all the members of the particular social group in question, and the institution itself typifies individual actors as well as individual actions".[286] Dissipation of the traditional advantages indicates that typification of habitualised actions in this institution are not shared. It would appear that there are no shared rules in the institution or an agreement between its actors to cooperate or exchange.

Moreover, to straighten the bent ribs of the international commercial arbitration umbrella necessitates institutionalisation. Institutionalisation starts with habitualisation of a problem-solving patterned behaviour which leads to the creation of a new structure. Objectification follows this preinstitutionalisation stage whereat social consensus of the new behaviour is gained. It is completed by sedimentation, which ensures continuity of the new structure over

[284] Scott 2001 (n 27), 60

[285] Fligstein (n 273), 658

[286] Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise on the Sociology of Knowledge* (Penguin 1991), 72 [hereinafter "Berger and Luckmann (n 286)"]

time.[287] This structure then becomes taken for granted by the relevant actors as not only efficacious but as necessary. Institutionalisation is the action of establishing norm and it is an important part of process improvement. It results in commitment and consistency to the process because both the ideas and behaviours of the actors become institutionalised.

Habitualisation appears to have occurred in this institution as evinced by its success as the dispute adjudication process of choice for the international commercial community. The institution is the development of patterned problem-solving behaviours. It is the belief of this community that this institution offers 10 advantages over litigation. These 10 ribs prompt the majority of international commercial entities to automatically invoke arbitration where a dispute arises from a contract – this being the association of the behaviours with particular stimuli. Having completed this process of institutionalisation, the institution gained normative and cognitive legitimacy.

Objectification, however, appears not to have materialised. Whilst the 10 ribs developed as the general shared social meanings attached to the patterned problem-solving behaviour of international commercial entities, transplantation of the shared social meanings beyond their point of origination stagnated at some point in their development. This is evinced by the arising of the five disadvantages. Sedimentation, meaning complete spread and perpetuation of the 10 ribs over a lengthy period of time, appears not to have occurred. Thus, the institution did not become fully institutionalised for all three processes of institutionalisation did not finalise.

Tolbert and Zucker write that "In short, such patterned behaviors can vary in terms of the degree to which they are deeply embedded in a social system (more objective, more exterior), and thus vary in terms of their stability and their power to determine behavior".[288] The institution did not carry forward all of the 10 ribs. For example, it did not remain cost-effective, expeditious, independent from national courts, or procedurally adaptable due to lack of collective action in the interest of all. It would seem that some of the institution's actors changed the 10 ribs

[287] Tolbert and Zucker (n 28). See also John W Meyer, John Boli and George M Thomas, 'Ontology and Rationalization in the Western Cultural Account' in George M Thomas and others (eds), *Institutional Structure: Constituting State, Society and the Individual* (SAGE 1987) 12, 13

[288] Tolbert and Zucker (n 28), 181

associated with the institution. Such lack of shared meaning resulted in the historical assumptions, values, beliefs, and rules being lost.

Attention must now be turned to institutionalisation. An attempt to integrate different institutional perspectives so as to typify shared rules within the institution and between its actors is indispensable at this stage of the institution's life. Collective action causes institutional change.[289] Thus, actors in this institution could work together for two main objectives: first to ensure that the traditional advantages are restored; and second to put in place the right safeguards to prevent the loss of any of its principles and practices in the future. Collective action could be in the form of a supranational body to perform an overarching function of safeguarding the material practices, symbolic constructions, and organising principles, to shape this institution to the extent that it is regularised and predictable. This institutional entrepreneurship opportunity is likely to enhance this institution.

Fligstein writes that "As new industries emerge or old ones are transformed, new rules are made in the context of the old rules" because "New rules follow the contours of old ones".[290] In other words, institutions are transmitted by being embedded in institutional carriers such as those identified by Scott, as shown in this table together with the related institutional pillars.[291]

[289] Thomas B Lawrence and Roy Suddaby, 'Institutions and Institutional Work' in Stewart Clegg and others (eds), *Handbook of Organization Studies* (2nd edn, SAGE 2006) 215 [hereinafter "Lawrence and Suddaby (n 289)"]; Battilana et al. 2009 (n 266)

[290] Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton University Press 2001), 40; Fligstein (n 273), 661

[291] Scott 2014 (n 282), 96. See also Ronald L Jepperson, 'Institutions, Institutional Effects, and Institutionalization' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991) 143, 150 [hereinafter "Jepperson (n 291)"]; Berger and Luckmann (n 286), 72

		INSTITUTIONAL PILLARS		
		Regulative	**Normative**	**Cultural-cognitive**
INSTITUTIONAL CARRIERS	**Symbolic systems**	Rules Laws	Values Expectations Standards	Categories Typifications Schemas Frames
	Relational systems	Governance systems Power systems	Regimes Authority systems	Structural isomorphism Identities
	Activities	Monitoring Sanctioning Disrupting	Roles Jobs Routines Habits Repertoires of collective action	Predispositions Scripts
	Artifacts	Objects complying with mandated specifications	Objects meeting conventions, standards	Objects possessing symbolic value

In its journey to become the most preferred disputes adjudication process for international commerce, this prerequisite appears not have to be taken into account. Thus, the actors of international commercial arbitration did not transmit their habitualized behaviour and allowed it to be expensive; time consuming; subject to national courts; and more procedurally burdensome. From an institutional theory perspective, it is the non-existence of governance or power systems to monitor or sanction compliance of the mandated ribs that led to this rapid ascendance of the given structural arrangements.

Absence of the regulative pillar and its institutional carriers would appear to have prevented the 10 established traditional elements of the institution to go through the objectification and

sedimentation institutionalisation processes. Put differently, the 10 ribs have not been transmitted to new actors as social givens. They have not become exteriorised, in that they are not "experienced as possessing a reality of their own, a reality that confronts the individual as an external and coercive fact".[292] Thus, they have not attained regulative legitimacy.

How such central concepts of the institution diminished can be explained by acknowledging that the institutional carriers appertaining to the normative and cultural-cognitive pillars are more like particular kind of voluntary rules or standards. Brunsson and Jacobsson write that standards are "pieces of general advice offered to a large number of potential adopters".[293] Meaning that the advice was that arbitration should be, but not that it had to be, without national court intervention, confidential, cost-effective, expeditious and final and binding.

Furthermore, it can be explained by Giddens' "duality of social structure".[294] He writes that "Structures are not the patterned social practices that make up social systems, but the principles that pattern these practices".[295] It is the actors within the structure that shape it. However, it is the structure that determines how they do it. A given institution is encoded into the actors through the institutionalisation process.

Patterned behaviour is thus established, but it is constrained by the structure because the structure is "both the medium and the outcome of the practices which constitutes social systems".[296] When the actors behave according to the patterned behaviour, the institution is fully institutionalised. This objectifies it and then the institution becomes sedimented and taken-for-granted and thus the actors' behaviour is controlled by the institution. Acting in accordance with the institution becomes rational. Absence of the regulative institutional pillar in this institution, however, means that the actors' behaviour is not controlled by the institution for the necessary coercive mechanism of the pillar is not present.

[292] Berger and Luckmann (n 286), 76

[293] Nils Brunsson, Bengt Jacobsson and Associates, *A World of Standards* (Oxford University Press 2002), 2

[294] Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1984), 25

[295] ibid, 6

[296] ibid, 27

Actors use various methods to convince others to adopt their conception, including 'brainwashing' where 'free choice' is not the reason for individual purposes and choices.[297] To restore this institution's elemental characteristics, namely, cost-effective and expeditious, does not seem to be work that would be done by the main actors in this institution, namely, the lawyers and arbitrators. As illustrated by the CIArb 2011 Survey, these people charge large sums of money for their services. So, to expedite the adjudication of arbitral proceedings is not in their financial interest. This leads to the proceedings being protracted and expensive. There is no incentive for the lawyers and arbitrators to change the current favourable institutional arrangements because they did not heed to the frequent complaint about the costliness that has been made during the last three decades.

At times institutional persuasion requires powerful enough actors to force others "to go along with their conception of the market".[298] Since the institution, as a structure, could not prevent the decline of the five advantages, a supranational body representing the institution and carrying out collective action on its behalf is likely to ensure that those assumptions, values, beliefs, and rules that have been lost are restored but also that none of other tenets of this institution face the same fate. Restoration of the traditional advantages of arbitration is likely to force the creation of a market where arbitral proceedings are less expensive and less drawn out.

Using the translation model of institutional change, the original institution could be reformulated through a process of modification in order to reconfigure the components and therefore respond to the precipitating jolts. This involves rearrangement or recombination of the institution's traditional principles and practices to blend with new elements. The new institutional principles and practices should, to a significant degree, still resemble their predecessors.[299] This is very

[297] Gary S Becker, *Accounting for Tastes* (Harvard University Press 1996), 225. Even weak actors can influence others – Edward L Miles and others, *Environmental Regime Effectiveness: Confronting Theory with Evidence* (MIT Press 2002); Oran R Young, *International Governance Protecting the Environment in a Stateless Society* (Cornell University Press 1994)

[298] Fligstein (n 273), 663. See also Peter Hedström, 'Rational Imitation' in Peter Hedström and Richard Swedberg (eds), *Social Mechanisms: An Analytical Approach to Social Theory* (Cambridge University Press) 306, 314

[299] See John L Campbell, *Institutional Change and Globalization: Exploring Problems in the New Institutional Analysis* (Princeton University Press 2004) [hereinafter "Campbell (n 299)"]; Marie-Laure Djelic, *Exporting the American Model: The Postwar Transformation of European Business* (Oxford University Press 1998); Andrea Lippi, 'One Theory, Many Practices: Institutional Allomorphism in the Managerialist Reorganization of Italian Governments' (2000) 16 Scand. J. Manag. 455

likely to enhance the functionality, durability, and legitimacy of the institution.

Another advantage that has been lost is confidentiality. Opinion varies, however, on whether the loss of confidentiality should or not be restored as a principle of international commercial arbitration. To expressly allow its complete exclusion as a rib of the international commercial arbitration umbrella may enhance the institution. It is repeatedly argued that confidentiality is, as matter of fact, "detrimental to the future development of arbitration as a true alternative to litigation".[300]

The impact of confidentiality is that both existing and potential users would find it impossible to evaluate the quality of the practice of this institution; thus making the choice between litigation and arbitration a very difficult one indeed. Moreover, confidentiality restricts research in and of the field, making education and training of arbitration professionals unrealisable. Equally, countries intending to establish an arbitration centre and drafting its rules do not have the benefit of offering a better service because they can only second-guess the required measures of quality control.

This seems truly disadvantageous to the development of arbitration.[301] Bhatia, Candlin and Sharma write that transparency and accessibility of arbitral proceedings is absolutely necessary to allow "stakeholders to benefit from others' experiences".[302] Hence majority of in-house counsel wish to receive more training on "updates on arbitration law and practice, tools and tactics, venue choice, and the enforcement of awards".[303] They stress a very stark warning, that if arbitration does not become more transparent and accessible, the opportunity to create the right conditions for the future practice as an effective alternative to litigation would be truly missed.[304]

As well as deciding which of the lost advantages should be restored and devising the right mechanism to achieve the restoration, collective action could enhance the institution by carrying

[300] Bhatia, Candlin and Sharma (n 233), 3

[301] ibid, 9. See also Colin YC Ong, 'Confidentiality of Arbitral Awards' (2005) 1(2) AIAJ 169

[302] Bhatia, Candlin and Sharma (n 233), 8

[303] QMU-PwC 2006 Survey (n 7), 7

[304] Bhatia, Candlin and Sharma (n 233), 11. See also Smit (n 50), 32

out the desires of the respondents to the surveys analysed herein, if not for purposes of advancing it to meet the demands of its actors, certainly for purposes of protecting the status quo of this institution. For example, an appeal process appears to be a desirable addition in the institution.

Within the spectrum of the international dispute adjudication processes, only the World Trade Organisation has a recognised appeal mechanism known as the Appellate Body (WTO AB), which is an international adjudication authority. In ICSID Convention disputes, appeals are heard under the annulment procedure.[305] An established appeal facility within ICSID was given careful consideration in 2004.[306] Also, the discussion whether ICSID's annulment mechanism should be replaced with an appeal mechanism featured as a key theme in the 2015 International Bar Association International Arbitration Day. Such a mechanism has yet to materialise, for good or no reason it matters not.

An appeal level as described here is not the already available review of arbitration awards provided by the arbitration centres, such as the ICC.[307] Smit writes that this "should be encouraged" but "must be accompanied by proper safeguards".[308] The type of mechanism is that advocated for by practitioners and academics. In 1993 Holtzmann and Schwebel suggest an appellate framework in this institution.[309] The need for a mechanism to examine arbitral awards

[305] art 52 of the ICSID Convention and Rule 52 of the ICSID Convention Arbitration Rules 2006. ICSID second-stage arbitral panels reversed the decisions in *Klöckner v Cameroon* 1 ICSID Rev. 89 (1986); *AMCO Asia Corp. v Republic of Indonesia* 23 I.L.M. 351 (1984)

[306] Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008). See also ICSID Discussion Paper of 22 October 2004 on the 'Possible Improvements of the Framework for ICSID Arbitration' <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 28 June 2015; Christian J Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure* (Inst. für Wirtschaftsrecht 2006); Christopher Smith, 'The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure' (2013) 41(2) Ga. J. Int'l & Comp. L. 567; Lisa M Bohmer, 'Finality in ICSID Arbitration Revisited' (2016) 31(1) ICSID Rev. 236

[307] art 34 of ICC Rules 2017 (n 43)

[308] Smit (n 50), 27. Under the FAA 1925, s 10, for example, an award can be challenged even ICC Rules as demonstrated by *Lander Co. v Mine Investments Inc.* 107 F3d 476 and *Bay Networks Corp. v Willemen US Dist Lexis* 14827. See William W Park, 'Why Courts Review Arbitral Awards?' (2001) 16 Int'l Arb. Rep. 27, 27 "Judicial review of arbitral awards constitutes a form of risk management". In this regard see for example *Phillips v Manhattan & Bronx Surface Tr. Operating Auth.* 2015 NY Slip Op 06564 [132 AD3d 149] an arbitration award was reversed due to a provision in the contract being unenforceable because of public policy consideration pertaining to sexual harassment in the workplace.

[309] See n 212; Stephen M Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur L Marriott, VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Graham and Trotman/Martinus Nijhoff 1995) 115, 116. See also Charles N Brower, 'Charles N Brower Delivers Keynote Address at Premier Arbitration Conference' (2002) 13 World Arb. & Med. Rep. 270; Charles N Brower, 'A Crisis of Legitimacy' [2002] Nat'l L. J. B9; Ten Cate (n 194), 1110

or proceedings is likely to avail a much-needed source of security, guarantee and absolute finality.

An appeal mechanism is needed, if not for any other reason, at least to remove the intervention by national courts. This would totally eradicate the fundamental disadvantage discussed above. Gal-Or[310] echoes Smit and writes that an appeal mechanism would give an additional value to arbitral awards, which is to contribute to the development of stare decisis, consistency, integrity, and certainty.[311] In addition, an appeal option will reduce the significant risk of injustice which is present in any award as it could be defective in many ways, particularly as many arbitration decisions appear to 'split the difference'.

This single shot of adversarial contest that the institution currently provides, as it is a one-stop process, gives rise to a fundamental inquiry, and that is whether an arbitral decision is a resolution or dissolution of a dispute and if an arbitration decision results in the achievement of justice, fairness or compromise? The present structure seems to be a dispute dissolution process that provides a compromise on the dispute, and not a resolution of it. Such a view is particularly supported by the survey results which say that the majority of disputes adjudicated through arbitration are settled.

Thus, an appeal body is required to fulfill the function of reviewing both arbitral proceedings and the award to correct any errors by the initial decision-making body. Correction of erroneous decisions,[312] being one of the two purposes of an appeal mechanism, would protect arbitrants and safeguard the integrity of the arbitration process. It may encourage arbitrants not to settle but to see the adjudication of the dispute through to the end knowing that any error would be corrected.

Karrer writes that most challenges of arbitral awards are based on lack of procedural due

[310] Gal-Or (n 119)

[311] ibid, 46ff. See also Smit (n 50), 27. See also Georges R Delaume, 'Reflections on the Effectiveness of International Arbitral Awards' (1995) 12 J. Int'l Arb. 5; Paul-A Gélinas, 'Arbitration Clauses: Achieving Effectiveness' in Albert J van den Berg, *Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999) 47

[312] Christopher R Drahozal, 'Judicial Incentives and the Appeals Process' (1998) 51 SMU L. Rev. 469, 469-70 [hereinafter "Drahozal (n 312)"]. See also William H Knull III and Noah D Rubins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11(4) Am. Rev. Int'l Arb. 531; Paulsson 2013 (n 3), 98, 100, 109

process.[313] Indirectly, such a body would fulfill the second purpose of an appeal process, which is lawmaking.[314] Hart writes, that "A supreme tribunal has the last word in saying what the law is, and when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered".[315] A supreme tribunal appears necessary in the new environment of globalisation and multiculturalism, even if it would simply satisfy the minority who call for an appeal level in this institution.

As 52% of the respondents in the QMU-W&C 2015 Survey advocate, the mechanism should form part of a system of international commercial arbitration, and not through an external forum. It should be in the form of another arbitral tribunal and handled by the relevant arbitral centre. To satisfy all the respondents in all the surveys mentioned herein, an optional appeal mechanism, like that of the AAA,[316] to start with might be a way forward. Bermann writes that "Since parties commonly challenge awards that are unfavorable to them, managing the tension between the efficacy of the arbitral process and legitimacy of the arbitral outcome is a concern of paramount importance for every actor involved in international arbitration".[317]

However, it is anticipated that many will argue that there is not enough hunger to restore the status quo ante or to implement the desired changes expressed in the surveys because the international commercial community appears content with the present functionality of the institution as demonstrated by the ever-increasing cases referred to arbitration centres each year.[318] That being the case, the pertinent question posed above should be asked differently: if the status quo ante is not restored in this institution, and the desired changes expressed in the surveys are not made reality, what would be the resistance?

The response is quite simple, which is that this institution should endure in its current form without any improvement. However, institutions endure "so long as shifts in other opportunities

[313] Pierre A Karrer, 'The Civil and Common Law Divide: An International Arbitrator Tells it Like He Sees it' in American Arbitration Association, *AAA Handbook on International Arbitration and ADR* (2nd edn, Juris 2010), 431

[314] Drahozal (n 312), 469-70

[315] Herbert LA Hart, *The Concept of Law* (3rd edn, Clarendon Press Oxford 2012), 141

[316] AAA Appellate Rules 2013 (n 192)

[317] Bermann (n 144), 2-3

[318] See Chapter 4

do not lead individual actors and coalitions to defect from institutionalized arrangements".[319] Existence of such possibility is why some commentators disagree that institutions are enduring and imperturbable and present that institutions leave opportunities for change.[320] It is logical, since humans create, maintain, and disrupt institutions.[321]

Individuals and groups solve problems by capacity to imagine alternative possibilities,[322] which includes recombination as well as idiosyncratic interpretations of existing practices.[323] Institutions constitute different kinds of actors with different institutional positions shaped by different preferences and interests.[324] In identifying the nature of human power, Mann[325] rejects that society is monolithic and prefers the concept that it is intersecting. In a narrative history of power, he identifies four sources of power as being control over economic, ideological, military, and political resources. He explains the emergence of social stratification and writes that humans create "tunnels" around existing institutions to achieve their goals, whether by forming new networks, extending old ones, and emerging with rival configurations of the principal power networks.[326]

To defect from the present institutionalised arrangements in and of international commercial arbitration and to seek an alternative dispute adjudication process to litigation does not require

[319] Clemens and Cook (n 267), 445. See also William H Sewell Jr, 'A Theory of Structure: Duality, Agency, and Transformation' (1992) 98(1) Am. J. Sociol. 1, 3, 16; Neil Fligstein, *The Transformation of Corporate Control* (Harvard University Press 1990); Fligstein (n 273), 669; Calvin Morrill, 'Institutional Change Through Interstitial Emergence: The Growth of Alternative Dispute Resolution in U.S. Law, 1970-2000' (2017) 4(1) Revista de Estudos Empíricos em Direito 10, fn 6 [hereinafter "Morrill (n 319)"]

[320] Powell and DiMaggio (n 27); Scott 2001 (n 27), 48, 52

[321] See Jepperson (n 291)

[322] Paul J DiMaggio, 'Interest and Agency in Institutional Theory' in Lynne G Zucker (ed), *Institutional Patterns and Organizations* (HarperBusiness 1988 1988) 3 [hereinafter "DiMaggio (n 322)"]; Mustafa Emirbayer and Anne Mische, 'What is Agency? (1998) 103(4) Am. J. Sociol. 962

[323] Elizabeth S Clemens, 'Two Kinds of Stuff: The Current Encounter of social Movements and Organizations' in Gerald F Davis and others (eds), *Social Movements and Organization Theory* (Cambridge University Press 2005) 351

[324] John W Meyer and Ronald L Jepperson, 'The Actor and the Other: Cultural Rationalization and the Ongoing Evolution of Modern Agency' (Institutional Analysis Conference, Tucson, Arizona April 1996); John W Meyer and Ronald L Jepperson, 'The "Actors" of Modern Society: The Cultural Construction of Social Agency' (2000) 18(1) Sociol. Theory 100. See also Clemens and Cook (n 267), 454; Lowell W Busenitz, Carolina Gómez and Jennifer W Spencer, 'Country Institutional Profiles: Unlocking Entrepreneurial Phenomena' (2000) 43(5) Acad. Manag. J. 994

[325] Michael Mann, *The Sources of Social Power, Volume 1: A History of Power from the Beginning to A.D. 1760* (Cambridge University Press 1986), 16

[326] ibid

imagination of tunnelling alternative possibilities because many applied conflict settlement approaches for managing and resolving disputes and conflicts exist. The ADR family comprises of arbitration, mediation, negotiation, conciliation, early neutral evaluation, expert determination, judicial settlement, and mini-courts/mini-trials.[327] Much like arbitration, these processes are: (i) voluntary because they derive from an agreement by the parties; (ii) private; and (iii) confidential. Unlike arbitration, they do not attempt to discover and decide who is right or wrong, but to assist the parties to interpret the issue, improve communication and lower tension.[328]

Negotiation, mediation, and conciliation are processes that primarily dissolve disputes and secondarily prevent a disagreement becoming a dispute, which happens:

> "… only when the two parties are unable and/or unwilling to resolve their disagreement; that is, when one or both are not prepared to accept the status quo (should that any longer be a possibility) or to accede to the demand or denial of demand by the other. A dispute is precipitated by a crisis in the relationship".[329]

Much unlike arbitration, the other ADR processes are not binding because the intermediaries do not pronounce case outcomes, with the exception of mediation which could have such an effect. It is why the agreement reached by the disputants promotes harmonious and long-term relationships between the parties concerned for joint gains maximisation.[330] Unlike arbitration, the other ADR processes seek to positively transform the relationship between the disputing parties. This cannot be said about arbitration because, as Kallipetis writes, "Strictly speaking,

---

[327] Catherine R Albiston, Lauren B Edelman and Joy Milligan, 'The Dispute Tree and the Legal Forest' (2014) 10 Annu. Rev. Law Soc. Sci. 105; Laura Nader and Harry F Todd, 'Introduction' in Laura Nader and Harry F Todd (eds), *The Disputing Process - Law in Ten Societies* (Columbia University Press 1978) 1; Donald Black and Mary P Baumgartner, 'Toward a Theory of the Third Party' in Keith O Boyum and Lynn Mather (eds), *Empirical Theories About Courts* (Longman 1983) 84; Calvin Morrill, *The Executive Way: Conflict Management in Corporations* (University of Chicago Press 1995); Calvin Morrill and Danielle Rudes, 'Conflict Resolution in Organizations' (2010) 6 Annu. Rev. Law and Soc. Sci. 627

[328] Stephen B Goldberg, Eric D Green and Frank EA Sander, 'Saying You're Sorry' in John W Breslin and Jeffrey Z Rubin (eds), *Negotiation Theory and Practice* (Program on Negotiation Books 1991) 141

[329] Philip H Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press 1979), 75

[330] Robert D Luce and Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* (John Wiley & Sons 1957)

arbitration is not true ADR as it is basically a trial presided over by an arbitrator".[331]

Returning to the question that if the status quo ante is not restored in this institution, what would be the resistance? In 1986 Hoellering writes that "Although litigation is the primary method of dispute resolution in most western legal systems, alternatives to litigation are being sought to meet the burgeoning complexity and volume of modern international trade".[332] For a long time international commercial arbitration has been and still is the preferred alternative to litigation for the adjudication of cross-border business disputes.

In 2014 Strong writes that "the international corporate community has become somewhat disenchanted with that particular mechanism because of concerns about rising costs, delays, and procedural formality. As a result, parties are looking for other means of resolving international commercial disputes. One of the more popular alternatives is mediation".[333] At a point in time the international commercial community looked for an alternative to litigation. At this point in time they look for an alternative to the alternative; despite the presence and popularity of arbitration. Change is disruption of the established order, which maybe a product of exogenous shock. "Exogenous shocks or environmental changes may have effects by altering the salience of institutions or their relationship to domains of social life".[334]

Mediation is the most probable alternative to arbitration. Mediation is an organised and interactive process facilitated by a neutral, skilled, trained, certified and licensed professional intermediary who structures and timetables communication and negotiation between the disputants to allow them to reach a mutually beneficial resolution.[335] Focus is not on the

---

[331] Michel Kallipetis, 'Mediation in Civil and Commercial Disputes: Top 5 Things Everyone Should Know About Mediation' <http://www.ciarb.org/docs/default-source/ciarbdocuments/Policy/APPG/mediation-in-commercial-disputes.pdf?sfvrsn=2> accessed 28 September 2017, 1 [hereinafter "Kallipetis (n 331)"]. See also Eric A Schwartz, 'International Conciliation and the ICC' 10 ICSID Rev. Foreign Inv. L. J. 98, 113

[332] Michael F Hoellering, 'Alternative Dispute Resolution and International Trade' (1986) 14 N.Y.U. Rev. L. & Soc. Change 785, 785

[333] Stacie I Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' (2014) 45 Wash. U.J.L. & Pol'y 11, 11 [hereinafter "Strong 2014 (n 333)"]

[334] Clemens and Cook (n 267), 453. See also Stephen D Krasner, 'Approaches to the State: Alternative Conceptions and Historical Dynamics' (1984) 16(2) Comp. Polit. 223. See also Sven Steinmo, Kathleen A Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press 1992), 15

[335] Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) Harv. Negot. L.

disputing parties' rights solely, but also needs and interests. The mediator guides them to find their best solution. In helping the parties reach a settlement agreement, a mediator scrutinises the issues of the dispute but does not provide advice to the parties. At the core of this process is a therapeutic element between the parties in their discussion of the underlying issues and in arriving at a solution. This allows them to focus on creating a mutually agreed narrative that encourages them to explore mutually acceptable solutions without usually seeking evidence or calling witnesses, writing decision, or making an award.

Strong examines whether and to what extent mediation can be superior to arbitration as a dispute settlement process in international commerce. In providing a response if beyond international commercial arbitration is mediation, she explores if mediation would be quicker, less expensive and less procedurally formal. To answer these questions, she analyses whether mediation is the right forum for the unique characteristics of international commercial disputes. To evaluate the real prospects of mediation, she asks the most important question – what would motivate the use of mediation if it were not a time and cost saving process that is also less procedurally formal?

A two-fold response is necessary here. Firstly, events "disrupt the operative systems of ideas, beliefs, values, roles, and institutional practices of a given society".[336] Data from the QMU-PwC 2008 Survey would prove disruption of practices in this institution. More than 72 of the 129 corporations surveyed negotiated a settlement to save time and cost rather than seek recognition and enforcement of the award. Only 14.19 of cases that involved the 129 corporations resulted in enforcement proceedings. Less than 25 of the corporations were content to settle for up to half of the award. Less than 25 of the corporations chose arbitration to preserve business relationship. On this information, it seems that the international commercial community would appreciatively convert to a process that is an alternative to arbitration.

Secondly, long-term success for mediation can be ascertained from its history. Much like arbitration, mediation is an ancient dispute settlement concept. Prior to arbitration's flight to

---

Rev. 7

[336] Stephen Ellingson, 'Understanding the Dialectic of Discourse and Collective Action: Public Debate and Rioting in Antebellum Cincinnati' (1995) 101(1) Am. J. Sociol. 100, 103

becoming the preferred process for adjudicating international commercial disputes in the second half of the 20th century, mediation, together with conciliation, held this status in the first half of the 20th century.[337] During arbitration's plight, brought about by the loss of five of its traditional advantages, there may well be an opportunity for mediation to reclaim such standing and become the more popular process to settle transnational commercial disputes. Interest in mediation is of course based on the perception that it will be expeditious, less cumbersome procedurally, and more cost-effective than international commercial arbitration.

There is evidence that consensus-based dispute settlement processes are becoming increasingly utilised. Multinational corporations, such as General Electric and Siemens, use mediation as an early dispute settlement process.[338] Corporations see mediation as a means to regain control of their money, documents, reputation and time[339] and this is their reason for in-house corporate mediation programs. Donahey writes that "In the international setting, there is every reason to consider mediation as the first possible process for resolving a dispute. It is inexpensive, flexible, business oriented, and truly neutral. Wherever all parties are committed to the process and the mediator is a good one, a successful result is highly probable".[340] Fernandez and Spolter quote Coombe that mediation is "the sleeping giant of international dispute resolution mechanisms".[341]

---

[337] Kallipetis (n 331), 1; Strong 2014 (n 333), 12. See also Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position Under English, US, German and French Law* (Springer 2010), 15-17; Derek Roebuck, 'Sources for the History of Arbitration: A Bibliographical Introduction' (1998) 14(3) Arb. Int'l 237; Born 2009 (n 15)

[338] CPR Corporate Policy Statement on Litigation, Corporate Pledge, Int'l Inst. for Conflict Prevention & Resol. <http://www.cpradr.org/About/ADRPledges/CorporatePledgeSigners.aspx?page1839=14> accessed 21 February 2014; Michael A Wheeler and Gillian Morris, 'GE's Early Dispute Resolution Initiative (A)' Harvard Business School Case 801-395 (June 2001) <https://hbr.org/product/ges-early-dispute-resolution-initiative-a/801395-PDF-ENG> accessed 23 April 2016); Michael A Wheeler and Gillian Morris, 'GE's Early Dispute Resolution Initiative (B)' Harvard Business School Case Supp. 801-453 (June 2001) <https://hbr.org/product/ge-s-early-dispute-resolution-initiative-b/an/801453-PDF-ENG> accessed 23 April 2016); Walter G Gans and David Stryker, 'ADR: The Siemens' Experience' (Apr.–Sept. 1996) 51 Disp. Resol. J. 40; Emma Wilson and Emma Blackmore (eds), *Dispute or Dialogue?: Community Perspectives on Company-led Grievance Mechanisms* (International Institute for Environment and Development (UK) 2013)

[339] Drew L Mallick, 'Don't Think Twice, Mediation's All Right: United States Corporations Should Implement in-House Mediation Programs into their Business Plans to Resolve Disputes' <http://www.hnlr.org/2009/03/us-corporations-should-implement-in-house-mediation-programs-into-their-business-plans-to-resolve-disputes/> accessed 14 October 2017

[340] M Scott Donahey, 'International Mediation and Conciliation' (1997) 20 Fordham Int'l L. J. 275. See also Robert B Davidson, 'International Mediation Basics' in Daniel M Kolkey, Richard Chernick and Barbara R Neal (eds), *Practitioner's Handbook on International Arbitration and Mediation* (3rd edn, Juris 2012) 475

[341] Carmen C Fernandez and Jerry Spolter, 'International Intellectual Property Dispute Resolution: Is Mediation a Sleeping Giant' in American Arbitration Association, *AAA Handbook on International Arbitration and ADR* (2nd edn, Juris 2010), 287. See also Frank EA Sander, 'Varieties of Dispute Processing' (1976) 70 F.R.D. 111, 131-133 - advocating a flexible and diverse panoply of dispute resolution processes

In *Halsey v Milton Keynes General NHS Trust*[342] the Court of Appeal in England affirmed their support for mediation and in line with CPR 1998[343] strongly encourage legal professionals who conduct litigation should always advise their clients before and during litigation about ADR, particularly mediation. Commentators concede that mediation is suitable even for multiparty disputes.[344] Also, in Singapore the courts are holding parties to their agreement to negotiate and mediate as demonstrated by *HSBC Institutional Trust Services (Singapore) v Toshin Development Singapore*.[345] In 2015 Singapore launched the Singapore International Mediation Institute as well as the Singapore International Mediation Centre to administer international mediations.

In his discussion about the benefits of institutionalising new practices, Lande writes that continued institutionalisation of mediation will require true and qualified belief in mediation by key actors.[346] Indeed, repeated behaviour and interaction result in the institutionalisation of practices becoming taken for granted, factual and legitimate[347] as they are endorsed by those who hold authority within the institution.[348] To introduce and endorse positive transformation, institutional entrepreneurship also arises from actors framing the failing of the existing institutional arrangements and in turn promoting their proposed institutional arrangement as superior and legitimate.[349]

Institutional entrepreneurs act strategically and have strong will to pursue and advance their interests.[350] If their interest is rational problem solving, then quite often they succeed.[351]

[342] [2004] EWCA (Civ) 576. See also *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* (2014) EWHC 2104 (Comm). In

[343] Rule 1.4(e) Civil Procedure Rules 1998

[344] Rodney A Max, 'Multiparty Mediation' (1999) 23 Am. J. Trial Advoc. 269; Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edn, Wiley 2014), 555; Carrie Menkel-Meadow (ed), *Multi-Party Dispute Resolution, Democracy and Decision-Making* vol II (1st edn, Routledge 2012)

[345] (2012) 4 SLR 378 and (2012) SGCA 48

[346] John M Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation' (2000) 5 Harv. Negot. L. Rev. 137, 216-17. See also Cyril Chern, *International Commercial Mediation* (Informa Law 2008), 29

[347] Berger and Luckmann (n 286), 49-61. See also Powell and DiMaggio (n 27); Zucker (n 267), 726

[348] John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) Am. J. Sociol. 340. See also John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (University of Illinois Press 1982), 15

[349] Battilana et al. 2008 (n 265), 11

[350] DiMaggio (n 322), 14

[351] Farzad Khan, Kamal Munir and Hugh Willmott, 'A Dark Side of Institutional Entrepreneurship: Soccer Balls, Child Labour and Postcolonial

Although institutional entrepreneurship entails mobilisation of both resources[352] and other actors[353] to create, change, maintain or destroy practices,[354] here such mobilisation may not necessarily demand socially skilled actors who are leaders;[355] visionaries[356] or reflexive agents.[357] To destroy arbitration as the dispute adjudication process preferred by the international commercial community and replace it with mediation would simply require that the actors generate influence of positive development and reform[358] and provide motivation for the particular stance by their actions.

Action for change here is encouraged by the survey results analysed. They are catalyst for both the destruction of arbitration and creation of mediation[359] as the dispute settlement process of choice for the aforementioned community. Institutional entrepreneurs can create new sets of social arrangements where there is powerful organised interest because actors influence the direction of institutional change.[360] Hodgson writes that changes and constraints in an institution

---

Impoverishment' (2007) 27(7) Organ. Stud. 1055. See also Alistair Mutch, 'Reflexivity and the Institutional Entrepreneur: A Historical Exploration' (2007) 27(7) Organ. Stud. 1123, 1123 [hereinafter "Mutch (n 351)"]

[352] Tammar B Zilber, 'Stories and the Discursive Dynamics of Institutional Entrepreneurship: The Case of Israeli High-tech after the Bubble' (2007) 27(7) Organ. Stud. 1035 [hereinafter "Zilber (n 352)"]. See also Jens Beckert, 'Agency, Entrepreneurs, and Institutional Change: The Role of Strategic Choice and Institutionalized Practices in Organizations' (1999) 20(5) Organ. Stud. 777 [hereinafter "Beckert (n 352)"]; Mutch (n 351); David Levy and Maureen Scully, 'The Institutional Entrepreneur as Modern Prince: The Strategic Face of Power in Contested Fields' (2007) 27(7) Organ. Stud. 971 [hereinafter "Levy and Scully (n 352)"]

[353] Battilana et al. 2008 (n 265), 11. See also Beckert (n 352); Markus Perkmann and André Spicer, 'What are Business Models? Developing a Theory of Performative Representations' in Nelson Phillips, Graham Sewell and Dorothy Griffiths (eds), *Technology and Organization: Essays in Honour of Joan Woodward* (Research in the Sociology of Organizations) vol 29 (Emerald Group Publishing Limited 2010) 265 [hereinafter "Perkmann and Spicer 2010 (n 353)"]; Markus Perkmann and André Spicer, 'How Emerging Organizations Take Form: The Role of Imprinting and Values in Organizational Bricolage' (2014) 25(6) Organization Science 1785; Levy and Scully (n 352)

[354] Lawrence and Suddaby (n 289), 217. See also Charlene Zietsma and Thomas B Lawrence, 'Institutional Work in the Transformation of an Organizational Field' (2010) 55 Adm. Sci. Q. 189, 189

[355] John Child, Yuan Lu and Terence Tsai, 'Institutional Entrepreneurship in Building an Environmental Protection System for the People's Republic of China' (2007) 27(7) Organ. Stud. 1013 [hereinafter "Child, Lu and Tsai (n 355)"]. See also Levy and Scully (n 352); Frank Wijen and Shahzad Ansari, 'Overcoming Inaction through Collective Institutional Entrepreneurship: Insights from Regime Theory' (2007) 27(7) Organ. Stud. 1079

[356] Beckert (n 352); Perkmann and Spicer 2010 (n 353); Zilber (n 352)

[357] Beckert (n 352); Suddaby and Greenwood (n 161); Mutch (n 351); Child, Lu and Tsai (n 355)

[358] DiMaggio (n 322). See also Magnus Henrekson and Mikael Stenkula, *Understanding Entrepreneurship: Definition, Function and Policy* (Studentlitteratur 2016); William J Baumol, 'Entrepreneurship in Economic Theory' (1968) 58(2) Am. Econ. Rev. 64; Harvey Leibenstein, 'Entrepreneurship and Development' (1968) 58(2) Am. Econ. Rev. 72

[359] William J Baumol, 'Entrepreneurship: Productive, Unproductive, and Destructive' (1990) 98(5) J. Polit. Econ. 893

[360] Stephen R Barley and Pamela S Tolbert, 'Institutionalization and Structuration: Studying the Links Between Action and Institution' (1997) 18(1) Organ. Stud. 93; Mary Douglas, *How Institutions Think* (Syracuse University Press 1986); Petter Holm, 'The Dynamics of

result in change to habits and behaviour because the framing, shifting and constraining capacities give rise to a potential basis for new perceptions, preferences, intentions and beliefs.[361]

In reality, use of either arbitration or mediation could die out on the basis that corporations carefully consider their dispute settlement options, perhaps on the perceptions that these processes are perhaps refined state-provided dispute resolution processes. Even though they will remain useful and always needed because they have been in use for many centuries, "They are not truly innovative developments that are capable of providing a real response to the rapidly changing environment in which international commerce is conducted".[362]

Opinions would differ as to how quickly institutionalisation of international commercial mediation as an alternative to international commercial arbitration would occur. On the premise that an important element of institutionalisation is that "alternatives may be literally unthinkable",[363] and that indeed the international commercial community has started to think of alternatives, institutionalisation of mediation could become crystalised much faster than it happened with arbitration.

Morrill examines the institutional change that occurred in U.S.A. between 1970 and 2000 as a result of interstitial emergence of ADR.[364] Such alternative is to adjudication. He writes that in 1970 fewer than a dozen courts offered alternatives to adjudication but that by 2000 court-based ADR programs were implemented by legislation in 45 states. In fact, in some states, mediation is mandatory prior to adjudication of civil disputes.[365] ADR developed due to the high cost of litigation. Institutionalists submit that in any institution there is always opportunity for

---

Institutionalization: Transformation Processes in Norwegian Fisheries' (1995) 40(3) Adm. Sci. Q. 398; Lynne G Zucker, 'Where Do Institutional Patterns Come From? Organizations as Actors in Social Systems' in Lynne G Zucker (ed), *Institutional Patterns and Organizations: Culture and Environment* (HarperBusiness 1988) 23

[361] Geoffrey M Hodgson, 'Reclaiming Habit for Institutional Economics' (2004) 25 J. Econ. Psych. 651, 656. See also John Dewey, *Human Nature and Conduct* (H. Holt 1922), 40

[362] Martin Hunter, 'International Commercial Dispute Resolution - The Challenge of the Twenty-First Century' (2000) 16(4) Arb. Int'l 379

[363] Lynne G Zucker, 'Organizations as Institutions' in Samuel B Bacharach (ed), *Advances in Organizational Theory and Research* vol II (JAI Press 1983) 1, 5

[364] Morrill (n 319)

[365] ibid, 12

noninstitutionalised action and change.[366]

Morrill writes that interstitial emergence is a result of innovation of alternative practices in response to institutional failure and delegitimation. It occurs when actors experiment with alternative practices to solve problems that persist, such as internal contradictions that weaken the institution or open up opportunities for innovation. This entails any or all of the following four methods:[367]

1. Mobilisation of masses to support and develop the alternative practices; and/or

2. Construction of meaning for both supporters and opposition of the alternative practices to produce resonance between them; and/or

3. Mobilisation of resources to legitimise the alternative practices; and/or

4. Professionalisation of the alternative practices through professional organisations and create symbolic, cultural, and normative boundaries to modify established institutional narratives.

These data presented here would enable the actors in this institution to "locate, perceive, identify, and label" its problems and the practices that do not fit into its conventional element.[368] In turn, this permits the institution to identify and label the change needed to preserve and strengthen the institution. Once attention is drawn to the problematic issues and are rationalised, actors could act collectively to intentionally bring into existence a proto-institution, meaning a new

[366] Walter W Powell, 'Expanding the Scope of Institutional Analysis' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (2nd edn, University of Chicago Press 1991) 183; See also William R Scott, 'Unpacking Institutional Arguments' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991) 164; Walter W Powell, 'Neither Market nor Hierarchy: Network Forms of Organization' in Barry M Staw and Larry L Cummings (eds), *Research in Organizational Behavior* (JAI Press 1991) 295; Walter W Powell, 'Interorganizational Collaboration and the Locus of Innovation: Networks of Learning in Biotechnology' (1996) 41 Adm. Sci. Q. 116

[367] Morrill (n 319)

[368] Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (HarperGoffman 1974), 21; David A Snow and others, 'Frame Alignment Processes, Micromobilization, and Movement Participation' (1986) 51(4) Am. Sociol. Rev. 464

practice,[369] to resolve field-level problems and bring about institutional change. Collective action can cause extrainstitutional change.[370] This allows for alternative practices to materialise in the mainstream as new organisational form because institutions exist and actors simply shape the process of change to optimise their own interests and influence the direction of the change they seek.[371]

3.4 Conclusion

Data presented here communicate that international commercial arbitration is heterogeneous due to some degree of division in respect of opinion regarding the 10 traditional central tenets, herein referred to as the 10 ribs. Today, it is ascertainable from survey results that the international commercial arbitration community no longer views the tenets as advantages of the institution, as they once were. The reason is that the tenets translate into five advantages and five disadvantages.

The five disadvantages make the context for change optimal because they represent what the international commercial community dislikes about the institution. As a result, they could seek to change their preferred method of dispute adjudication to mediation as an alternative to arbitration. In order to conceptualise a different type of institutional durability so as to keep international arbitration viable, however, the highlighted disadvantages of this institution must be reinstated as advantages of this institution.

This requires reverse engineering of the change that occurred in the last half of the 20th century which led to high cost and stretched the length of time to complete arbitration cases. Such action would entail the three stages of institutionalisation so as to make the institution fully

[369] Thomas B Lawrence, Cynthia Hardy and Nelson Phillips, 'Institutional Effects of Interorganizational Collaboration: The Emergence of Proto-Institutions' (2002) 45(1) Acad. Manag. J. 281. See also Eva Boxenbaum, 'The Emergence of Proto-Institution' (2004) Working Paper 2004.5 <http://openarchive.cbs.dk/cbsweb/handle/10398/6726> accessed 30 May 2016

[370] Jepperson (n 291)

[371] John E Burns and Robert W Scapens, 'Conceptualizing Management Accounting Change: An Institutional Framework' (2000) 11(1) Manag. Account. Res. 3, 11. See also Peter Abell, 'The New Institutionalism and Rational Choice Theory' in William R Scott and Soren Christensen (eds), *The Institutional Construction of Organizations: International and Longitudinal Studies* (SAGE 1995) 3; Campbell (n 299); Morrill (n 319), 12

institutionalised. As a consequence of reinstating the traditional advantages, the institution is likely to become fully institutionalised because it would serve its intended purpose of being: (1) autonomous; (5) confidential; (6) expeditious; (7) cost effective; and (9) final and binding. This is what the international commercial community would like this institution to be.

This would mean less national court intervention; confidentiality of proceedings and award is maintained from the beginning to the end; proceedings are not as costly or as slow as litigation or any other dispute adjudication process; and an award is final and binding because a superior tribunal would review the arbitration proceedings and resultant award and confirm their validity and legitimacy. Arbitration would then readopt its original position as not only the efficacious but also as the necessary dispute adjudication process for international commercial disputes.

If the traditional advantages of the institution are not reinstated then mediation could overtake arbitration. To conclusively state that mediation would be an adequate substitute as the preferred process for settling international commercial disputes would, of course, require corroborative empirical data. It is, however, a choice for the international commercial arbitration community if or not to weather the storm and work towards the restoration of the traditional advantages of arbitration, or resign and permit the international commercial mediation community to wax lyrical that mediation would definitely be the process for settling international commercial disputes cost-effectively, expeditiously, and less procedurally burdensome.

This chapter is not concerned with how a new process for settling international commercial disputes could come into existence or how it could be diffused, but it is more about what could stop the international commercial arbitration community to search for an alternative to international commercial arbitration. That is why the institutional entrepreneurship opportunity presented here is not for the international commercial community to use the other forms of ADR, but it is to encourage the community to act fast to restore the lost advantages of the institution. It is the failure to do this that leaves the actors with the institutional entrepreneurship opportunity to promote other forms of ADR.

Collective action by actors in this institution could avert the possibility of international

commercial disputes being referred to mediation. They would be able to restore the traditional advantages of this institution that have been lost over the past three decades, which made this institution expensive as opposed to cost-effective, slow as opposed to expeditious, and procedurally formal as opposed to informal. Additionally, they could action the requirements communicated by the respondents to the surveys, such as to introduce an appeal mechanism.

The purpose of this would be not only to eliminate the persistent divergence confronting the institution but also to secure its durability and retain its legitimacy and bestow upon it the relative autonomy that it deserves. Simultaneously, this body would work to ensure the relevance of arbitration as the dispute adjudication process of choice for the international commercial community is not lost to mediation. Thus, the entrepreneurs seeking to transform this institution must convince or defeat others and be able to define and solve the problems and lead the institution by putting it through the three-stage process of institutionalisation and introduce the regulative institutional pillar.

For mediation to gain prominence, the test is to evince its worth as the alternative to international commercial arbitration. To determine both the popularity of arbitration and the challenge that mediation would face to overthrow arbitration, it is absolutely necessary to evaluate the statistical evidence appertaining to the activities of the international commercial arbitration centres and study the growth of arbitration from their view point; which is the focus of the next chapter.

Chapter 4

International Commercial Arbitration Centres: the Indispensable, the Useful and the Redundant

4.1 Introduction

Freedom of contract bestows upon contracting parties the choice to stipulate their preferred method of dispute resolution. It is instinctive for international commercial entities to agree to arbitrate as opposed to litigate or use other process of alternative dispute resolution (ADR). Arbitration offers many advantages in comparison to litigation.[1] It is for this reason that it dominates the global dispute adjudication market for international commerce.[2]

Historically, arbitration was an unwritten code of customs and practices habitually and uniformly observed by merchants as they travelled from one city and country to another. They applied them as their own law without the need for recognition or enforceability by any court.[3] Disputes were referred to consular courts composed of representatives who accompanied merchants from their own countries. These representatives implemented and applied the unwritten code and practices and supported the merchants in this regard. In more complex cases they would seek the

[1] Emmanuel Gaillard, 'France' in Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, Oxford University Press 2010) 423, 425, paras 6.08-6.09; Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution?' (1986) 25(1) Colum. J. Transnat'l L. 9, 9 [hereinafter "Smit (n 1)"]. See also Vijay K Bhatia, 'International commercial arbitration: A protected practice' in Christopher Williams and Girolamo Tessuto (eds), *Language in the Negotiation of Justice: Contexts, Issues and Applications* (Routledge 2016) 69, 70 [hereinafter "Bhatia (n 1)"]; Lawrence W Newman and David Azslowsky, 'International Litigation: Cultural Predictability in International Arbitration' (2004) 100 N. Y. L. J. 3; Gerry Lagerberg and Loukas A Mistelis, 'International Arbitration: Corporate Attitudes and Practices 2006' <http://www.arbitration.qmul.ac.uk/research/2006/123975.html> accessed 12 December 2013, 2, 5, 12 [hereinafter "QMU-PwC 2006 Survey (n 1)"]; Gerry Lagerberg and Loukas A Mistelis, '2013 Corporate Choices in International Arbitration: Industry Perspectives' <http://www.arbitration.qmul.ac.uk/docs/123282.pdf> accessed 11 September 2015, 4 [hereinafter "QMU-PwC 2013 Survey (n 1)"]

[2] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers/Brill Academic 2010), 2. See also Henry Gabriel and Anjanette Raymond, 'Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards' (2005) 5 Wyo. L. Rev. 453, 453; Emilia Onyema, 'Effective Utililisation of Arbitrators and Arbitration Institutions in Africa by Appointors' [2008] <http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf> accessed 21 July 2012 [hereinafter "Onyema (n 2)"]

[3] Lynden L Macassey, 'International Commercial Arbitration-Its Origin, Development and Importance' (1938) 24(7) ABA J. 518, 520 [hereinafter "Macassey (n 3)"]

assistance of permanently established consuls.[4] International commercial arbitration was *ad hoc*. Upon the occurrence of a dispute, an arbitration tribunal would be established to hear the arbitrants and make a decision on the dispute.

Today, the social institution that is international commercial arbitration is quite different to its historical roots.[5] Contracting parties can agree on either *ad hoc* arbitration or administered arbitration,[6] a choice that was not there in the institution's inception. Administered arbitration is commonly called institutional arbitration. Corporations prefer administered arbitration,[7] and this seems as intuitive as choosing arbitration over litigation or any other ADR process. Dissolution of international commercial disputes by arbitration is largely conducted under the auspices of any one of more than 207 private international arbitration centres in 102 countries around the world.[8] These arbitration centres administer proceedings for and on behalf of both national and international corporations. Administered arbitration avails a tried and tested framework and its advantages far outweigh those of *ad hoc* arbitration. It appears to be what made the institution grow to its present position.

Parties submit their dispute to the centre named in their agreement, which, for a fee, takes care of the administrative and bureaucratic procedures. This includes presenting a list of potential arbitrators to the parties to each select their preferred arbitrator to form the arbitral tribunal; finding suitable premises for the various procedural meetings and for the final hearing if necessary; and supervising the proceedings from the beginning to the end.[9] In *ad hoc* arbitration

[4] Macassey (n 3), 518

[5] Michael J Mustill, 'Arbitration: History and Background' (1989) 6(2) J. Int'l Arb. 43. See also Leon Trakman, "'Legal Traditions' and International Commercial Arbitration' [2007] UNSW Law Research Paper 29/2007 <https://ssrn.com/abstract=986507> accessed 02 April 2012; Earl S Wolaver, 'The Historical Background of Commercial Arbitration' [1934] U. Pa. L. Rev. 132

[6] Onyema (n 2), 3

[7] Gerry Lagerberg and Loukas A Mistelis, 'International arbitration: Corporate attitudes and Practices 2008' <http://www.pwc.co.uk/pdf/2008_international_arbitration_study.pdf> accessed 12 December 2013, 4, 15 [hereinafter "QMU-PwC 2008 Survey (n 7)"]

[8] Alec S Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) [hereinafter "Sweet and Grisel (n 8)"]. See also Laura F Brown, 'Arbitral Institutions Active in International Commercial Arbitration' in Laura F Brown (ed), *The International Arbitration Kit: A Compilation of Basic and Frequently Requested Documents* (4th edn, America Arbitration Association 1993) 387; Richard Happ, 'Happ's Arbitration Links' <http://www.arbitration-links.de/00000099670ba0802/index.html> accessed 12 July 2015 [hereinafter "Happ (n 8)"]

[9] Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Wolters Kluwer 2010), 45

each step of the arbitration proceedings is entirely in the hands of the parties.[10] They would use an arbitration centre's rules or the United Nations Commission on International Trade Law Arbitration Rules 1976 as revised. Often, they would modify the rules to meet their needs. At times, parties may construct their own rules. A good example of *ad hoc* arbitration is the case of *Insigma Technology Co. Ltd v Alstom Technology Ltd*.[11] To choose administered arbitration over *ad hoc* arbitration is, therefore, commonsensical.

Arbitration centres are not part of the structure of any state and are 'stateless'.[12] They are self-regulating and, therefore, principally autonomous. Despite this, they avail to corporations the convenience of an established structure.[13] Kronstein writes that arbitration is power which developed from organised private tribunals making binding decisions to serve private interests.[14] There is no association between them or with any other organisation or institution which cements them. There is no national or international regulatory organisation to plan; organise; command; coordinate; or control them.

In 1986 Smit proposes that a pragmatic solution to the ever-expanding number of arbitration centres would be for a single one. He reasons that "consideration should be given to whether existing institutional arrangements for conducting international arbitrations are adequate".[15] In 1989 Graving investigates how good a job these "institutions" are doing.[16] One way of knowing how good a job these centres are doing is to measure the views of the experts in the field.

On 24 October 1997 over 150 delegates from about 30 countries attended the Biennial

---

[hereinafter "Born 2010 (n 9)"], 45. See also Justin Michaelson, 'The A-Z of ADR - Pt II' (2003) 153(7064) NLJ 105

[10] Born 2010 (n 9), 45. A good example of the difficulties that could arise in *ad hoc* arbitration can be seen in the case of *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering & Construction Co Ltd* [2005] 2 SLR (R) 270; [2005] SGHC 33 and also *Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd* [2005] 3 SLR (R) 512; [2005] SGHC 114

[11] [2009] SGCA 24

[12] Smit (n 1), 9. See also Carl Watner, 'Stateless, Not Lawless: Voluntaryism and Arbitration' Number 84 - Feb 1997 <http://voluntaryist.com/articles/084.html#.VG2Xe_mUdkD> accessed 19 November 2014

[13] Born 2010 (n 9), 45; See also QMU-PwC 2006 Survey (n 1), 2, 5

[14] Heinrich Kronstein, 'Arbitration is Power' (1944) 38 N.Y.U. L. Rev. 661, 667

[15] Smit (n 1), 12

[16] Richard J Graving, 'The International Commercial Arbitration Institutions: How Good a Job are they Doing? (1989) 4(2) Am. U. Int'l L. Rev. 319 [hereinafter "Graving (n 16)"]

Conference of the International Federation of Commercial Arbitration Institutions (IFCAI)[17] to share their views on the conference topic of 'The Institutional Response to Changing Needs of Users'. The speakers address a variety of subjects including the revisions made by the major arbitration centres to their rules; the need for speed in arbitration proceedings; and the necessity to limit costs and judicial intervention. On 23 June 2014 White & Case LLP and the International Senior Lawyers Project organised a roundtable discussion involving leading international arbitration centres. They deliberate about arbitration trends in Africa; attainment and preservation of transparency and legitimacy by centres; challenges brought about by technological advancement; and institutional trend setting.[18]

On 11 June 2015 representatives from the London Court of International Arbitration (LCIA), the International Court of Arbitration of the International Chamber of Commerce (ICC), German Institution of Arbitration (DIS), Singapore International Arbitration Centre (SIAC) and Jerusalem Arbitration Centre (JAC) reflect on the roles and responsibilities of arbitral centres at the annual WilmerHale's Scholar-in-Residence seminar.[19] Their discussion includes a look at the issues facing the centres and also the international arbitration community. On 23 July 2015 a conference organised by SOAS University of London took place in Addis Ababa, Ethiopia, on arbitration centres in Africa.[20]

Conferences, roundtables and seminars pertaining to international arbitration centres are of great relevance to the field. Jarvin writes, however, that it must be examined that the numerous conferences do not simply serve a purpose of celebrating international arbitration in order to conceal its weaknesses. The international arbitration community does not like to put on display the institution's weaknesses because the community itself is involved in these weaknesses "and

[17] 'The Institutional Response to Changing Needs of Users' (Biennial Conference of the International Federation of Commercial Arbitration Institutions, Geneva, October 1997) <http://www.wipo.int/amc/en/events/conferences/1997/october/> accessed 24 February 2016

[18] Megha Joshi, 'Lagos Court of Arbitration Newsletter' (2014) 1(2) <http://www.lca.org.ng/newsletters/> accessed 24 February 2016

[19] Maxi Scherer and Gary B Born, 'International Arbitration Panel Discussion: Arbitral Institutions' Role and Responsibility' (Wilmer Cutler Pickering Hale and Dorr LLP's annual Scholar-in-Residence seminar, Wilmer Cutler Pickering Hale and Dorr LLP, London, 11 June 2015) <https://www.wilmerhale.com/pages/EventDetails.aspx?eventId=17179877222> accessed 16 June 2017

[20] Emilia Onyema, 'The Role of Arbitration Institutions in the Development of Arbitration in Africa' (Arbitration Institutions in Africa Conference, Addis Ababa, Ethiopia, 23 July 2015) <http://eprints.soas.ac.uk/20421/> accessed 08 October 2016

depend on for the continued success of international arbitration".[21] Participants at these meetings are very rarely the contracting and arbitrating parties, but always the professionals who represent "the international commercial arbitration circuit (or circus) sharing self-interest and, in some case, self-satisfaction".[22]

Naturally, existence of numerous centres creates competition. In a market economy it is necessary so that consumers can have a choice. To know how good a job these centres are doing, to discover if the practitioners conceal any weaknesses in the institution, and to know the type of competition that exists between them, it is necessary to understand the type of market economy in which the centres operate. Within a market economy four types of market structures exist, which are 'perfect competition'; 'monopoly'; 'oligopoly'; and 'monopolistic competition'.[23]

'Perfect competition' is where large number of providers of goods or services exist proportionate to the number of consumers and so there is an equilibrium in the market. 'Monopoly' is where a single seller dominates the market with respect to a particular product or service and can set higher prices and thus make supernormal profit. 'Oligopoly' is where the majority share of the market belongs to a relatively small number of providers of the goods or services. 'Monopolistic competition' describes imperfect competition where providers of goods or services are distinguished not by price but by their brand, quality or location only, because the goods or services are actually the same as those offered by the competitors. A broad presentation about the centres should reveal which market economy international commercial arbitration belongs to.

Commentators allude to the fact that countless arbitration centres exist all over the world.[24] In fact "not a month goes by without a new arbitral institution springing up".[25] Does this mean they

[21] Sigvard Jarvin, 'The Role of International Commercial Arbitration in the Modern World' (2009) 75(1) Int'l J. of Arb. Med. & Disp. Man. 65, 69

[22] ibid

[23] Peter Antonioni and Sean M Flynn, *Economics for Dummies* (2nd edn, For Dummies 2011)

[24] Latham & Watkins, 'Guide to International Arbitration' [2014] <https://m.lw.com/thoughtLeadership/guide-to-international-arbitration-2014> accessed 24 September 2015, 15, 21; Happ (n 8)

[25] Catherine A Rogers, 'Innovative New Criteria for Appointment of Arbitrators at Commercial Arbitration Centre of Lisbon' [2010] Arbitrator Intelligence <http://kluwerarbitrationblog.com/blog/2015/07/10/innovative-new-criteria-for-appointment-of-arbitrators-at-commercial-arbitration-centre-of-lisbon/> (Accessed 10 June 2015) [hereinafter "Rogers (n 25)"]. See also Nicholas Fletcher, 'International Arbitration Research based report on choice of venue for international arbitration' [2014] Berwin Leighton Paisner

operate with excess capacity? Whether they do or do not, however, does not appear to concern commentators. Even though they all seem to offer the same dispute dissolution services to international commercial entities, Born writes that "It is unwise to attempt to prescribe a single arbitral institution as the ideal choice for all transactions, disputes, or parties".[26]

Owing to the huge number of centres, in competition with one another, a more significant inquiry would be to merge Smit's proposal and Graving's question and examine what arrangements international arbitration centres need in place to do a good job of conducting international arbitration proceedings adequately. This obliges a close look at the setup, nature and function of these private organisations.

This examination seeks to uncover the development of these centres through empirical evidence with the intention to resolve whether this assortment of centres is useful from the perspective of the current type of market economy in which they operate. Or, whether the current format avails an institutional entrepreneurship opportunity for a different type of market economy that would enhance this institution by changing the setup, nature and function of the centres. The option to explore here is whether the institution would be enhanced if it is made up of a small number of centres, rather than over 200 centres, organised, controlled and managed by a supranational organisation within a defined infrastructure which facilitates for the centres to work together, rather than individually, to achieve common objectives in a more economically beneficial means.

4.2 International Commercial Arbitration Centres: What They are and What They are Not

To determine whether or not an institutional entrepreneurship opportunity exists for a different type of market economy in which a small number of arbitration centres are organised, controlled and managed within a defined infrastructure, it is crucial to know what international commercial arbitration centres are and what they are not. International commercial arbitration is a dispute adjudication process that offers free and open competition. International commercial arbitration

---

<http://www.blplaw.com/download/BLP_International_Arbitration_Survey_2014_FINAL.pdf> accessed 19 November 2015 [hereinafter "BLP 2014 Survey (n 25)"]

[26] Born 2010 (n 9), 57

centres play a significant role in this regard. So far as arbitration centres is concerned, there exists a nomenclature issue and it is necessary to resolve it.

Many commentators refer to them as 'institutions'. It seems fundamentally inaccurate to call arbitration centres 'institutions' because they are not. North writes that the study of institutions necessitates the conceptual separation between institutions and organisations, in that "Institutions are the rules of the game and organizations are the players".[27] In his exploration of the sociology of international arbitration Gaillard writes that the essential players in international arbitration are the parties and arbitrators but that numerous other actors bestow legitimacy to the field.[28] 'Other actors' means the arbitration centres as service and value providers, the organisations within the institution.[29]

Hoffman defines institutions as "rules, norms, and beliefs that describe reality for the organization, explaining what is and is not, what can be acted upon and what cannot".[30] Scott writes that organisations exist in institutions and that organisations must conform to the rules and requirements of the institution.[31] Institutions are in fact systems of a community of organisations.[32] It means the institutions can exert the necessary pressure on the organisations when necessary. Thus, arbitration centres make up an organisational field. DiMaggio and Powell define organizational field as "those organizations which, in the aggregate, constitute a recognized area of institutional life: key suppliers, resources and product consumers, regulatory

[27] Douglass C North, 'Five Propositions about Institutional Change' in Jack Knight and Itai Sened (eds), *Explaining Social Institutions* (University of Michigan Press 1995) 15, 16 [hereinafter "North (n 27)"]. See also Andrew J Hoffman, 'Institutional Evolution and Change: Environmentalism and the US Chemical Industry' (1999) 42(4) Acad. Manag. J. 351, 351 [hereinafter "Hoffman (n 27)"]; Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin 1991), 73, 82

[28] Emmanuel Gaillard, 'Sociology of International Arbitration' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 187, 187

[29] Rémy Gerbay, *The Functions of Arbitral Institutions* (Wolters Kluwer 2016) [hereinafter "Gerbay (n 29)"]. See also Robert Coulson, 'The Future of International Commercial Arbitration' (1991) 17(2) Can.-U.S. L. J. 515, to whom the centres are 'agencies'

[30] Hoffman (n 27), 351

[31] William R Scott, *Institutions and Organizations* (SAGE 1995), 132 [hereinafter "Scott 1995 (n 31)"]. See also Ronald L Jepperson, 'Institutions, Institutional Effects, and Institutionalization' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press 1991) 143, 145 [hereinafter "Jepperson (n 31)"]

[32] William R Scott, *Institutions and Organizations* (2nd edn, SAGE 2001), 48-49, 84, 92 [hereinafter "Scott 2001 (n 32)"]. See also Talcott Parsons, *The Social System* (Free Press 1951), 15 [hereinafter "Parsons 1951 (n 32)"]

agencies, and other organizations that produce similar services or products".[33]

These centres, as organisations, are formed by a group of people acting under a unified identity and set of rules to provide services to to the international commercial community. It would be accurate to assert that the centres are within the international commercial arbitration institution. They are an element of the institution. Thus, for the opposite of *ad hoc* arbitration is 'organisational' or 'administered' arbitration, but certainly not 'institutional' arbitration.

4.3 Tools for a Successful International Commercial Arbitration Centre

To know which international commercial arbitration centres are successful requires knowing what specific factors make it more or less likely that such centre would be chosen by contracting parties. Onyema offers five tools[34] that an arbitration centre must have in place to effectively administer arbitration proceedings. The tools are:

- Modern arbitration rules;
- Modern and efficient administrative and technological facilities;
- Security and safety of documents;
- Expertise within its staff; and
- Some serious degree of permanence.

These are employed here to measure the functional success of the centres. From an institutional theory perspective, which is a prevailing theory utilised to analyse organisations that exhibit social behaviour,[35] these tools are useful to establish if a particular centre is or not

[33] Paul J DiMaggio and Walter W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48(2) Am. Sociol. Rev. 147, 148 [hereinafter "DiMaggio and Powell (n 33)"]

[34] Onyema (n 2), 10

[35] Walter W Powell, 'Institutional theory' in Cary L Cooper and Chris Argyris (eds), *The Concise Blackwell Encyclopedia of Management*

institutionalised. An arbitration centre which can demonstrate presence of all five tools could be described as having gone through and completed the three-stage process of institutionalisation, namely, habitualisation; objectification; and sedimentation.[36] In essence, these processes are about diffusion, which in this instance would mean diffusion of the existence and services of a centre to the international commercial arbitration community.

Put differently, if using these tools it is ascertainable that a centre is institutionalised, then it can be said that the centre has gained legitimacy. Suchman writes that "Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions".[37] It is not sufficient for organisations to possess material resources and technical information, but "They also need social acceptability and credibility" if they are to have continued success in their social environments.[38]

A candid evaluation of a good number of centres by applying Onyema's five tools to assess if or not the centres are institutionalised is vital to understand the success or potential success of a given centre. This is particularly necessary "Given the significant increase in international arbitration in recent years, and the development of arbitration-related infrastructure across a much wider global platform".[39] A comprehensive database of international arbitration statistics is crucial to conduct a comparative assessment of the centres in order to understand whether the over 207 centres would satisfy the five tools and therefore demonstrate legitimacy. Vitally important to this exercise is to determine whether the existence of over 207 centres results in better accessibility and more choice for corporations.

(Blackwell 1998) 301

[36] Pamela S Tolbert and Lynne G Zucker, 'The Institutionalization of Institutional Theory' in Stewart R Clegg, Cynthia Hardy and Walter R Nord (eds), *Handbook of Organization Studies* (SAGE 1996) 175 [hereinafter "Tolbert and Zucker (n 36)"]; See also David Strang and Wesley D Sine, 'Interorganizational institutions' in Baum, Joel AC (ed), *Blackwell Companion to Organizations* (Blackwell Scientific Publications 2002) 497

[37] Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) Acad. Manag. Rev. 571, 574 [hereinafter "Suchman (n 37)"]. See also Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990), 19

[38] William R Scott and others, *Institutional Change and Healthcare Organizations: From Professional Dominance to Managed Care* (SAGE 2000), 237 [hereinafter "Scott et al. (n 38)"]

[39] BLP 2014 Survey (n 25), 01

To define the capacity and qualification of these centres and to distinguish between them, it would be sufficient to assess to what extent a centre establishes some serious degree of permanence evinced by its caseload over a period of 15 years. For present purposes, there is no need to ascertain or discuss: (a) how modern a centre's arbitration rules are; (b) how modern and efficient a centre's administrative and technological facilities are; (c) whether a centre can assure users of security and safety of documents; or (d) the level of expertise demonstrated by a centre's staff.

The reason is that arbitration proceedings do not look like legal proceedings at all because they are conducted in different countries, against different legal and cultural backgrounds, and with a striking lack of formality.[40] One would expect (a); (b); (c); and (d) to be different, but they are unlikely to be. For example, arbitration rules between centres are not different.[41] Nevertheless, these four elements would be best judged through qualitative and quantitative based analysis to measure why corporations choose particular centres over the others. Such analysis is not carried out here.

Considerably helpful qualitative and quantitative data are found in surveys conducted in 1996;[42] 2006;[43] 2008;[44] 2010;[45] 2012;[46] 2013;[47] 2014;[48] 2015;[49] and 2016.[50] These Data are very valuable

[40] Nigel Blackaby and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004), 1. See also Edna Sussman and John Wilkinson, 'Benefits of Arbitration for Commercial Disputes' <http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf> accessed 18 January 2014

[41] Donald Straus, 'The Growing Consensus on International Commercial Arbitration' (1974) 68 Am. J. Int'l L. 709, 711

[42] Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (Kluwer Law International 1996). See also Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (Kluwer Law International 2006)

[43] QMU-PwC 2006 Survey (n 1)

[44] See QMU-PwC 2008 Survey (n 7), 2, 5, 10

[45] Paul Friedland and Loukas A Mistelis, '2010 International Arbitration Survey: Choices in International Arbitration' <http://events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf> accessed 18 November 2015 [hereinafter "QMU-W&C 2010 Survey (n 45)"]

[46] Paul Friedland and Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' <http://www.arbitration.qmul.ac.uk/docs/164483.pdf> accessed 23 May 2013. See also Toby Landau and others, 'Seminar on Contemporary Challenges in International Arbitration' (Centre for Commercial Law Studies, Queen Mary University of London, 27 September 2012)

[47] QMU-PwC 2013 Survey (n 1), 5, 8

[48] BLP 2014 Survey (n 25)

[49] Paul Friedland and Loukas A Mistelis '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 01 March 2016, 2, 5, 7, 10, 16, 24. See also 'CIArb International Arbitration

for the purpose of confirming or challenging perceptions of and on international arbitration to allow for an unequivocal illustration about centres which are indispensable; which are useful; and which are redundant.

In turn, this enquiry should inform which type of 'market economy' or 'market structure' this dispute dissolution process operates under and whether that is of any benefit to its users. This critique should highlight some of the shortcomings in the present setup of this institution so far as the centres are concerned. Further, it should corroborate whether to abandon the notion of a huge number of centres in favour of a small number of centres working in harmony under a supranational regulatory body.

To measure which centres establish some serious degree of permanence, in Figure 1 the following information is presented: (i) years that the main centres in the six continents and the Middle East region have been in existence since their establishment; (ii) arbitration requests that they have administered between 2000 and 2015; and (iii) revisions to their arbitration rules. These should be adequate to determine the degree of permanence that the centre establishes. For present purposes, however, it is the centre's total number of arbitration requests, particularly the portion of which are international, over a period of 15 years that will be used to decide if the centre is indispensable, useful or redundant.

Conference' (Chartered Institute of Arbitrators Centenary Conference, London, 1-3 July 2015) <http://www.ciarb.org/about/centenary/centenary-papers> accessed 13 April 2016

[50] QMU-PwC 2006 Survey (n 1), 10

Figure 1: Arbitration Centres Caseload[51]

Key: Total (normal font)

International (italic font)

Name of Centre	**Year Created and Number of Years in Service as at 2016**	**Rules in Service Since inception to 2016**	**Number of International and Domestic Arbitration Requests Filed Annually (2000–2015)**															
			2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	20
EUROPE																		
ICC	1923 (93)	1922 1955 1975 1998	541	566	593	580	561	521	593	599	663	817	793	796	759	767	791	80
			458	*493*	*513*	*486*	*470*	*431*	*485*	*485*	*556*	*686*	*650*	*649*	*619*	*616*	*590*	*60*

[51] Obtained by this author from various sources, including the centres' websites; literature on the field; and email and telephone requests. Statistics appear to vary depending on the source – see for example Sweet and Grisel (n 8)

		2012 2014 2017																
LCIA	1892 (124)	1892 1926 1931 1935 1964 1970 1976 1978 1981 1985 1998 2014	81	71	88	104	87	118	133	137	213	232	237	224	265	290	296	32
SCC	1917 (99)	1976 1988 1999 2007 2010 2017	135 *73*	130 *74*	120 *55*	169 *82*	123 *50*	100 *56*	141 *74*	170 *87*	176 *85*	216 *90*	197 *91*	199 *96*	177 *92*	203 *86*	183 *94*	18 *10*
SCAI	2004	2006	No data as the centre was				105	54	47	59	68	104	89	87	92	68	105	10

	(12)	2012	established in 2004				*103*	*54*	*47*	*54*	*67*	*97*	*85*	*74*	*77*	*53*	*90*	*89*
VIAC	1975 (41)	1975 1983 1991 1997 1999 2001 2006 2013	*65*	*63*	*33*	*45*	*50*	*54*	*36*	*40*	*51*	*60*	*68*	*75*	*70*	*56*	*56*	*40*
RAAAC	2013 (3)	2014																
ICAC	1932 (84)	2017							120	141	158	250	299	252	241	274	314	31
NORTH AMERICA AND CANADA																		
AAA ICDR- AAA	1926 (90) 1996 (20)	1986 1991 2000 2003 2009 2014	*510*	*649*	*672*	*646*	*614*	*580*	*586*	*621*	*703*	*836*	*888*	*994*	*996*	*1,165*	*1,052*	*1,0*
BCICAC	1986	1986	90	89	76	81	84	83	82	85	87	78	83	76	99	108	81	10

	(30)	2000	*3*	*4*	*5*	*4*	*4*	*5*	*5*	*3*	*3*	*2*	*5*	*5*	*3*	*6*	*1*	*1*
SOUTH AMERICA																		
CAM	1997	2009																
	(20)																	
CAMARB	1998	1998	5	5	5	10	18	9	7	10	11	21	15	12	13	20	30	20
	(19)	2004	*1*	*0*	*0*	*0*	*1*	*0*	*0*	*2*	*1*	*0*	*0*	*0*	*0*	*2*	*3*	*0*
		2010																
		2017																
CICA	1999	2014																
	(18)																	
ASIA																		
CIETAC	1956	1956	633	731	684	709	850	979	981	1118	1230	1482	1352	1435	1060	1256	1610	19
	(60)	1989																
		1994																
		1995																
		2000	*543*	*562*	*468*	*422*	*462*	*427*	*442*	*429*	*548*	*559*	*418*	*470*	*331*	*375*	*387*	*43*
		2005																
		2012																
		2015																
HKIAC	1985	1986	298	307	320	287	260	281	394	448	602	429	291	275	293	260	252	27
	(31)	2005																

		2008 2013	*293*	*300*	*307*	*273*	*240*	*266*	*376*	*428*	*574*	*309*	*175*	*179*	*199*	*195*	*234*	*25*
SIAC	1991 (25)	1991 1997 2007 2010 2013 2016	58 *37*	64 *39*	64 *34*	64 *23*	78 *39*	74 *29*	90 *47*	86 *55*	99 *71*	160 *114*	198 *140*	188 *156*	235 *No publicly available statistics on the number o international commercial arbitration cases filed in 2012 to 2015*	259	222	27
ICA	1965 (51)	1990 1993 1998 2002 2003 2005 2009 2011 2012 2014 2016	61 *5*	67 *4*	521 *19*	84 *10*	52 *7*	44 *7*	61 *10*	43 *10*	75 *8*	50 *8*	53 *8*	49 *5*	52 *5*	56 *2*	63 *12*	74 *13*
KCAB	1966 (50)	1966 1973 2000	175 *40*	197 *65*	210 *47*	211 *38*	185 *46*	213 *53*	215 *47*	320 *59*	262 *47*	318 *78*	316 *52*	323 *77*	260 *85*	338 *77*	382 *87*	41 *74*

		2005 2007 2008 2011 2016																
JCAA	1953	1954	10	17	9	14	21	11	11	15	12	18	27	19	19	26	14	20
	(63)	1963 1971 1989 1991 1992 1997 2004 2006 2008 2014 2015	*10*	*16*	*9*	*14*	*19*	*9*	*11*	*14*	*12*	*18*	*22*	*17*	*18*	*24*	*12*	*20*
VIAC	1993	2012	23	17	19	16	32	27	36	30	58	48	63	83	64	99	124	14
[Vietnam]	(23)	2017	*20*	*17*	*16*	*14*	*23*	*25*	*27*	*21*	*33*	*22*	*36*	*51*	*29*	*48*	*51*	*54*
PDRC	1996	2005														17	17	
	(20)	2008										*0*						

		2012 2015																
KLRCA	1978 (38)	1982 2001 2003 2008 2010 2012 2013 2017	20	3	3	5	3	7	25	24	28	49	22 *2*	52 *3*	135 *17*	156 *28*	112 *32*	11 *18*
MIDDLE EAST																		
DIAC	1994 (22)	1994 2007	No figures available for 2000 to 2009							77	100	292	431	440	379	310	174	17
QICCA	2006 (11)	2012	No figures would be available for 2000 to 2005 as the centre was established in 2006															
BCDR-AAA	2010 (7)	2010 2017	No figures would be available for 2000 to 2009 as the centre was established in 2010															
SCCA	2014 (3)	2016	No figures would be available for 2000 to 2013 as the centre was established in 2014 but launched October 2016															
DIFC-LCIA	2008 (8)	2008 2016	No figures would be available for 2000 to 2008 as the centre was established in 2008									11 *8*	2 *2*	1 *1*	12 *10*	3 *3*	17 *11*	13 *9*

ADCCAC	1993 (23)	1993 2013	No figures available for 2000 to 2011											94	137	74	50
GCCCAC	1995 (21)	1994 1999	0 *0*	0 *0*	1	4	2	1	5	7	9	4	9	12 *4*	14	17	12	14
AFRICA																		
AFSA	1996 (20)																	
CRCICA	1979 (37)	1998 2000 2002 2007 2011										51	66 *16*	66 *19*	78			54
RCICAL	1989 (35)	1999 2008																
LCA	2012	2012	No figures would be available for 2000 to 2011 as the centre was established in 2012															
AUSTRALIASIA/OCEANIA																		
ACICA	1985 (31)	2005 2011 2016																

From Figure 1, it is clear that some arbitration centres receive more work than others. Using Onyema's criteria should lead to intelligible discovery why some centres administer more cases than the others. Whilst the simple answer may be that they have become fully institutionalised and have gained legitimacy, it would not complete the elemental quantitative based investigation as to what it is that keeps the centres with greater workload more relevant than those which administer a smaller caseload. It is the acid test of the competitive edge that the centres have over one another. Examination of the annual caseload of each centre seems the best mechanism to ascertain how well a particular centre competes.

For present purposes, analysis of the data in Figure 1 would require application of only one of Onyema's five tools, namely, whether the centres named herein have establish some serious degree of permanence. Figure 1 shows that the total number of cases, which includes domestic cases, over the 15 years period is 53,442 of which 39,060 are international cases. Knowing which centres demonstrate some serious degree of permanence would allow for the centres to be put into one of three categories – the indispensable, the useful and the redundant. Since it is clear that the centres with greater workload are more relevant than those with a smaller caseload, such categorisation is key to decide which of the centres, if ever an agreement is reached by the international commercial arbitration community, should be the sole one as proposed by Smit or should be part of a small collection of centres that would be part of a supranational organisation.

4.4 Some Serious Degree of Permanence

Some serious degree of permanence relates to the measure of reliability of the centres based on the idea that they may exist for a long time. This is a matter of fact and degree pertaining to human and technical resources to allow the centre to provide the relevant services. In temporal terms, the requisite degree of permanence is construed in terms of the centre not only being *in situ* but also to remain *in situ* for a significant period of time.[52] More accurately it signifies fixed establishment.

[52] For example, see *R (on the Application of Hall Hunter Partnership) v First Secretary of State* [2006] EWHC 3482 (Admin); *Skerritts of Nottingham Ltd v Secretary of State for Environment Transport and the Regions* [2000] JPL 1025, 1034. See also Frances AS Plimmer, *Rating Law and Valuation* (Routledge 1998), 20-22

Judicial interpretation of the meaning of 'fixed establishment' in the Sixth Council Directive 1977 on the harmonisation of the laws of the European Union Member States relating to turnover taxes,[53] article 9(1), offers assistance here. It can be taken that an arbitration centre must be a place of business with an adequate structure and human and technical resources to supply services on an independent basis.[54] The nature of institutions or organisations is that they persist over time and have permanence and stability.[55] In essence, this is what Onyema's five tools seek to ascertain in relation to arbitration centres.

Primary evidence of sufficient degree of permanence must be both the centre's caseload and also its age. Respondents to the QMU-PwC 2006 Survey rank three of their preferred centres from a list of ten. They were given the option to add to the list if their preferred centre(s) was/were not named. The 103 respondents respond as follows: ICC (42%); LCIA (20%); Regional which encompass SIAC, JCAA, CANACO, ACICA and CRCICA (15%); ICDR-AAA (13%); SCC (4 per cent); SCAI (3 per cent); CIETAC (two per cent); and HKIAC (1 per cent) rank the highest.[56]

Eight of these, namely, ICC; LCIA; SIAC; ICDR-AAA; SCC; SCAI; CIETAC; and HKIAC are the "major arbitration houses"[57] for they receive the highest number of requests for arbitration annually. These are the 'universal' arbitration centres because they "accept cases from all kinds of companies and industries".[58] Being the largest and busiest makes them the most dominant.[59]

---

[53] Sixth Council Directive (77/388/EEC) of 17 May 1977, OJ 1977 L 145, 1

[54] *ARO Lease BV v Inspecteur der Belastingdienst Grote Ondernemingen te Amsterdam* C-190/95 [1997] ECR-I-4383, [16]; *Lease Plan Luxembourg SA v Belgian State Case* C-390/96 [1998] ECR-I-2553, [24]; *Welmory sp. z o.o. v Dyrektor Izby Skarbowej w Gdańsku* Case C-605/12 [2014] EUECJ

[55] Norman T Uphoff, *Local Institutional Development: An Analytical Sourcebook* (Kumarian Press 1986), 9. See also Teddy Brett, 'Understanding Organizations and Institutions' in Dorcas Robinson, Tom Hewitt and John Harriss (eds), *Managing Development: Understanding Inter-organizational Relationships* (SAGE Publications in association with The Open University 2000) 17, 18

[56] QMU-PwC 2006 Survey (n 1), 2, 12; QMU-PwC 2008 Survey (n 7), 4, 15. See also Smit (n 1), 12-13

[57] QMU-PwC 2006 Survey (n 1), 2, 12; QMU-PwC 2008 Survey (n 7), 4, 15. See also Walter Mattli and Thomas Dietz (ed), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014), 2 [hereinafter "Mattli and Dietz (n 57)"]. See also Smit (n 1), 2; Sweet and Grisel (n 8), 45

[58] Mattli and Dietz (n 57), 170. Universal in that they are not the specialist or subject specific types of arbitration centres such as the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Centre, the Court of Arbitration of Sport (CAS) and the International Centre for Settlement of Investment Disputes (ICSID). As their name suggests these are not concerned (directly) with international commerce and so will not be discussed here. See also Christopher R Drahozal, 'Private Ordering and International Commercial Arbitration' (2009) 113(4) Penn. St. L. Rev. 1031

[59] Born 2010 (n 9), 46; Chartered Institute of Arbitrators (CIArb), 'CIArb Costs of International Arbitration Survey 2011'

Europe is home to 35 or more arbitration centres.[60] This explains why 69% of the respondents to the aforementioned survey rank European centres in their top three preferred centres. For present purposes, the two dominant centres are the ICC[61] and LCIA.[62] Although the LCIA is the oldest international commercial arbitration centre in the world, the ICC is always hailed as the pioneering arbitration centre in the world.[63] In 1919 the ICC was established by the international business community to promote international trade and provide the mechanism to resolve international commercial disputes through arbitration supervised by its arbitral body called the International Court of Arbitration of the ICC, which was created in 1923 in Paris, France. It has branches in more than 90 countries.

Born writes that the ICC "has less a national character than any other leading arbitral institution" and that "the ICC will continue to be the institution of preference for many sophisticated commercial users".[64] This is despite the fact that the "ICC's Rules have been criticized as expensive and cumbersome".[65] In the relevant period 81.85% of new arbitration requests filed at the ICC were international. Regarding the distinction between domestic and international cases, the centre's disobliging response is that beside the information on their website, they do not provide additional statistics on their cases.

In the same period, the LCIA received 7,839 less total number of cases than the ICC. Despite having the word 'international' in its name, the LCIA had to combat the perception that it is a

---

<http://www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf> accessed 05 February 2014

[60] Happ (n 8)

[61] Edward Poulton and Ekaterina Finkel, 'Comparison of the ICC, LCIA, SCC, CIETAC, SIAC, HKIAC and UNCITRAL Arbitration Rules' (31 March 2015) <http://globalarbitrationnews.com/comparison-of-the-icc-lcia-scc-cietac-siac-hkiac-and-uncitral-arbitration-rules-20150331/> accessed 13 June 2016; Yves Derains and Eric A Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005), 219, 247-248

[62] Hilary Heilbron, *A Practical Guide to International Arbitration in London* (Informa 2008); Peter Turner and Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford University Press 2009)

[63] Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 38 [hereinafter "Lew et al. (n 63)"]; Joaquim T Muniz and Ana T Basílio, *Arbitration Law of Brazil: Practice and Procedure* (Juris Publishing 2006), APP C-1; Jason A Fry and Victoria Shannon, 'The 2012 ICC Rules of Arbitration' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011* (Martinus Nijhoff Publishers 2012) 187, 187

[64] Gary B Born, *International Commercial Arbitration* vol II (Wolters Kluwer 2014), 174-199 [hereinafter "Born 2014 (n 64)"]. See also Onyema (n 2)

[65] Born 2010 (n 9), 48

principally English body.[66] In a determined effort, however, the LCIA has successfully changed this view through its appointment of successive non-English presidents[67] and vice-presidents since its first president in 1985.[68] To compare the caseload of the two centres prior to and post such change would prove that this made a significant difference, but such exercise is unnecessary due to the difficulty in obtaining such statistics. The LCIA's caseload for the period in question is 33.47% that of the ICC, which would explain its second place ranking as 20% of the respondents to the QMU-PwC 2006 Survey choose it as one of their top three preferred centres.

The SCC is nearly as old as the ICC, LCIA and ICDR-AAA at 99 years old. It gained considerable recognition in the 1970s when the United States of America (U.S.A.) and the Soviet Union chose it as a neutral centre under which trade disputes between the East and the West could be adjudicated.[69] China also started to use the centre in the same period.[70] Being the fourth oldest centre in the world, the sole arithmetical explanation why only 4 per cent of the respondents choose it as one of their top three preferred centres in the world is its international caseload, which is 52.60% of its total caseload. It is only 15.68% that of the ICC. Clearly it has not managed to use its standing in the 1970s and age to leverage the desired recognition from the international arbitration community.

According to the QMU-PwC 2006 Survey results SCAI is the fifth most preferred centre. In 2004, the Chamber of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich jointly established SCAI and adopted the Swiss Rules of International Arbitration 2004 to provide dispute adjudication services in a single structure.[71] In turn, SCAI created the Arbitration Court to administer the cases. Since its inauguration, SCAI's caseload is

[66] Born 2014 (n 64)

[67] Karl-Heinz Böckstiegel (1994 - 1998); Louis Y Fortier (1998 - 2001); Gerold Herrmann (2001 - 2004); Jan Paulsson (2004 - 2010); William W Park (2010 - 2015); Darius Khambata (2015 - 2017)

[68] Sabine Konrad and Robert Hunter, 'LCIA Rules' in Rolf A Schütze (ed), *Institutional Arbitration: A Commentary* (C. H. Beck, Hart and Nomos 2013) 413, 420; <http://www.lcia.org/News/changes-to-the-lcia-court-and-board-of-directors.aspx> accessed 13 June 2016

[69] Katherine T Ward, 'Arbitration with the Soviets: The Importance of Forum Selection in Dispute Resolution Clauses in Non-Maritime Joint Enterprise Agreements' (1990) 1(23) U. Chi. Legal F. 683; Per Runeland, 'Sweden Thrives as Neutral Arbitration Ground' [2004] Nat'l L. J. See also Marie Öhrström, 'SCC Rules' in Rolf A Schütze (ed), *Institutional Arbitration: A Commentary* (C. H. Beck, Hart and Nomos 2013)

[70] <http://www.sccinstitute.com/about-the-scc/news/2015/a-historical-perspective-on-the-china-sweden-arbitration-connection/> accessed 18 June 2016

[71] Born 2010 (n 9), 52

91.12% international.

North and South America have approximately 12 internationally recognised centres.[72] In North America and Canada the leading arbitration centres are the AAA[73] and BCICAC. In U.S.A. it is the AAA at 90 years old. Its head office is in New York with no less than 35 regional offices in U.S.A. Kellor writes that "Americans have the distinction of having organized the first national arbitration centre … They set arbitration upon a path of its own where it must depend upon itself for organization, administration and financing".[74]

In June 1996 the AAA established the ICDR exclusively to administer international cases, leading to the creation of the ICDR-AAA. Within a year of its establishment its caseload increases exponentially, and it has continued to do so ever since.[75] Notwithstanding that non-U.S.A. parties are unwilling to arbitrate under the AAA Rules "fearing parochial predisposition and unfamiliarity with international practice",[76] 13% of the respondents to the QMU-PwC 2006 Survey list the ICDR-AAA as a preferred centre.

Statistically the centre records 1,834 more total number of cases and 3,784 more international cases than the ICC for the period in question. Despite "The main emphasis of the AAA's activities continues to be intra-American arbitration",[77] it is the arbitration centre which has conducted the most number of arbitrations over the 15 years and that which conducts the highest number of cases annually. ICDR-AAA is, therefore, the overall heavy weight champion to which the gold medal of the busiest arbitration centre in the world would be awarded. Whilst BCICAC has a good domestic market, it is not well-known in the international arena, despite being in a

[72] Happ (n 8)

[73] Frances A Kellor, *American Arbitration: Its History, Functions and Achievements* (BeardBooks 2000) [hereinafter "Kellor (n 73)"]; William K Slate II, 'Recent American Arbitration Association International Activities' (Biennial Conference of the International Federation of Commercial Arbitration Institutions, Geneva, October 1997) 25 [hereinafter "Slate (n 73)"]. See also Loukas A Mistelis, 'International Arbitration – Corporate Attitudes and Practices 12 Perceptions Tested: Myths, Data and Analysis Research Report' (2004) 15 Am. Rev. Int'l Arb. 525 [hereinafter "Mistelis (n 73)"]

[74] Kellor (n 73), 29

[75] Slate (n 73), 25. See also Mistelis (n 73), 527-528 (ICC: 1994 – 384; 1996 – 433; 1998 – 466 and ICDR-AAA: 1994 – 187; 1996 – 226; 1998 – 387)

[76] Born 2010 (n 9), 50

[77] Roderich C Thümmel, 'IAR' in Rolf A Schütze (ed), *Institutional Arbitration: A Commentary* (C. H. Beck, Hart and Nomos 2013) 731, 733

developed country with sophisticated laws and impartial and independent judiciary.

In South America, commonly called Latin America, arbitral centres have become increasingly prevalent when the legal environment in the region changed in the 1990s. This is evinced by the establishment date of CAM; CAMARB and CICA, to name but a few of the centres, in that decade. A culture of arbitration-friendly emerges in that period and is supported by a reliable legal framework and is illustrated by the significant caseload in each of the arbitral centres. These are validated by the 2011 Inaugural Survey of Latin American Arbitral Institutions[78] which allows users to judge the efficacy of the centres in different jurisdictions in that continent.

This is the first-of-its-kind survey of arbitral centres there, which examines their histories, commonalities and practices. Though more than 165 arbitral centres exist in that subcontinent, the survey is a presentation of findings on 30 prominent centres. Mexico's CAM "registers between 10 and 20 cases per year"[79] and Costa Rica's CICA "registers more than 50 cases per year".[80] Brazil's CAMARB "registers 10 to 20 new cases annually"[81] and in 15 years it administered 211 cases, of which 10 are international. This reflects the fact that the majority of arbitral centres throughout Latin America serve local parties.[82]

Of the centres in Asia, CIETAC[83] is the oldest and the busiest. Having administered 82.75% that of the ICC's international caseload in the pertinent period, it is one of a handful of major centres

[78] Eduardo Zuleta and Jonathan C Hamilton, 'The Inaugural Survey of Latin American Arbitral Institutions' [2011] Institute for Transnational Arbitration <https://www.cailaw.org/media/files/ITA/Publications/arbitral-institutions-guide-dec.pdf> accessed 14 December 2016 [hereinafter "2011 Latin American Arbitral Institutions Survey (n 78)"]

[79] ibid, 26

[80] ibid, 24

[81] ibid, 18

[82] ibid, 12. See also Angeline Welsh, 'Executive Summary' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 7 [hereinafter "Welsh (n 82)"]

[83] Pietro Ortolani, 'The Role of Arbitration Institutions in China' (2013) 10(4) Transnat'l Disp. Manag. 1; Tang Houzhi, 'The Recent Revision of CIETAC Arbitration Rules' (Biennial Conference of the International Federation of Commercial Arbitration Institutions, Geneva, October 1997); Frederick Brown and Catherine A Rogers, 'The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China' (1997) 15(2) Berkeley J. Int'l Law 329; Qiao Liu, Wenhua Shan and Xiang Ren, *China and International Commercial Dispute Resolution* (Martinus Nijhoff 2015)

in the world. CIETAC was set up by the Chinese government in 1956[84] and it is focused on disputes related to Chinese parties. As a consequence, this raises particular skepticism in arbitrations between Chinese and non-Chinese parties. This is linked to the independence of CIETAC's management being questionable, which is now more evident following the notice dated 15 July 2015 of the Supreme People's Court of China addressing the jurisdictional issues arising from the breakaway from CIETAC by its two sub-commissions in Shanghai and Shenzhen.[85]

Born writes that "Except in the most routine types of commercial dealings, with limited amounts in dispute, foreign investors and other foreign parties doing business related to China will continue to insist for the foreseeable future on third-country arbitral institutions".[86] This sheds light on why only 2 per cent of the respondents chose it as one of their preferred centres.

Other centres in Asia ranked by the respondents to the QMU-PwC 2006 Survey as one of their preferred are SIAC, HKIAC and JCAA. Of the 53,442 cases, HKIAC's total caseload represents 9.86 per cent, SIAC is only 4.14 per cent, and JCAA is 0.49 per cent. With regard to international cases, HKIAC represents only 11.79 per cent, SIAC is 2 per cent, and JCAA is 0.63 per cent. SIAC affirms its gradually gained international recognition with strong caseload statistics, which appears to increase year-on-year. In 2012 it records a stellar year with 235 filings.[87] Although only 1 per cent of the respondents chose it as one of their preferred centres, HKIAC is one of the leading international arbitration centres in Asia according to its age and its caseload.

Altenkirch and Gremminger compile annual caseload statistics for 2012 to 2014 on some centres and write that "Almost 50% of the total arbitration cases are administered by CIETAC, HKIAC,

[84] Born 2010 (n 9), 54. See also Michael J Moser and Fu Yu (eds), *Doing Business in China* (Juris Publishing 1999), 2.04

[85] <http://www.cietac.org/index.php?m=Article&a=show&id=2517&l=en> accessed 23 September 2017

[86] Born 2010 (n 9), 55; Born 2014 (n 64), 174-199

[87] Simpson Thacher and Bartlett LLP, *Comparison of Asian International Arbitration Rules* (Juris 2003). See also Ang Yong Tong, 'SIAC: Arbitration in the New Millennium' <http://www.lawgazette.com.sg/2000-1/Jan00-23.htm> accessed 11 July 2015; <http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2010.pdf> accessed 09 June 2016; <http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf> accessed 09 June 2016

and SIAC".[88] However, KCAB is reasonably active,[89] as is KLRCA with its total caseload representing 1.42 per cent of 53,442. But it does not have a record of categorisation of cases before 2010 and so it is difficult to distinguish between national and international cases. Its international caseload for 2010 to 2015 is at 0.26 per cent of 39,060.

Klötzel writes that "The number of the international arbitration administered by KLRCA is significant".[90] Between 1986 and 2002, a period of 16 years, the centre processes only 63 international cases. In a period of nine years, from 1 January 2003 to 16 May 2012, it registers 59 international cases from a total of 278. The centre's caseload is indeed "relatively limited",[91] as it records only three international cases. Age wise it is not a young centre. Its caseload, however, does not seem to play a role to augment its reputation.

Of the seven arbitration centres in the Middle East region, the most cited are DIAC and ADCCAC perhaps because of their age, they are 24 and 23 years old, respectively.[92] However, these allegedly active and well-known centres do not have statistics. The former does not have figures for 2000 to 2009 and the latter can only provide statistics for four years. A serious competitor to them is the DIFC-LCIA with a total 59 cases of which 44 are international. Such recognition by the international commercial community in seven years signals that, on the balance of probabilities, it is highly likely to establish some serious degree of permanence. Its success could be attributed to its connection with the LCIA. This raise a similar expectation for Bahrain's BCDR-AAA which is linked to U.S.A.'s AAA. Without statistics, however, such prediction would be unfounded.

Respondents to the QMU-PwC 2006 Survey names one African centre, which is CRCICA, as

[88] Markus Altenkirch and Nicolas Gremminger, 'Parties' Preferences in International Arbitration: The Latest Statistics of the Leading Arbitral Institutions' <http://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/> accessed 13 June 2016

[89] Sae Youn-Kim and Harald Sippel, 'Korea's Arbitration Act is revised for a new world' The Lawyer (27 June 2016) 53. See also Welsh (n 82), 9, regarding the legislative reform in the country that has been a common factor in the growing use of arbitration

[90] Thomas R Klötzel, 'Rules of Arbitration of the Regional Centre for Arbitration Kuala Lumpur' in Rolf A Schütze (ed), *Institutional Arbitration: A Commentary* (C. H. Beck, Hart and Nomos 2013) 671, 675

[91] Born 2010 (n 9), 57

[92] Nathalie Najjar, *Arbitration and International Trade in the Arab Countries* (Brill Nijhoff 2017)

one of their preferred regional centres. Age wise, one would expect this centre to have established some serious degree of permanence. For the limited statistics available, it seems that it is a fairly busy centre. No statistics are available pertaining to the other African centres. This is also the case for Australia's ACICA, despite the respondents to the QMU-PwC 2006 Survey ranking it as one of their preferred regional centres. Statistics would be useful to determine the basis on which they express such a fondness.

For many years, a small number of centres have been preferred to administer international commercial arbitration proceedings, which are those that demonstrate some serious degree of permanence. Other centres do not demonstrate some serious degree of permanence. One of the main reasons, if not the only reason, is that many of the centres do not provide statistics regarding their caseload – owing either to lack of sufficiently attractive figures or none at all. Hence "No precise data on the number and activities of IACs exists".[93]

This makes obtaining data relevant for investigation about which centres satisfy this criterion extremely difficult because the centres are not constructed on some agreed model, like the star rating for hotels around the world, as each is left to independently manage itself. Tabulated results for some of the centres named above, such as DIAC, are from third party sources;[94] which raises the question about their accuracy. DIAC does not release caseload information,[95] unless approved by its Board of Trustees and Executive Committee, even then these are usually only presented at conferences.

Arguably having modern and efficient administrative and technological facilities; keeping documents secure and safe; and having staff with the right expertise would facilitate record keeping of statistics. It is certain, however, such an argument cannot be successfully advanced as justification for such administrative failure because it is basic record keeping. Publication of

[93] Sweet and Grisel (n 8), 45. See also Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International 2005), 341

[94] <http://eng.viac.vn/statistics/case-statistic-from-different-arbitration-centres-a273.html> accessed 09 November 2017; <http://www.fticonsulting.com/insights/fti-journal/trends-in-international-arbitration> accessed 09 November 2017

[95] <http://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2015/1036869/trends-in-international-arbitration-in-the-new-world-order> accessed 09 November 2017

accurate and reliable statistics by the centres should not be a matter of choice but obligation, for this is the only way to measure not only stability and durability, but it is a strong sign of the centre's intention to permanently occupy a place in the market. Nevertheless, lack of data, sufficient or accurate it matters not, corroborates the necessity to apply Onyema's other tools for assessing arbitration centres. Caseload statistics say which centres are popular, but it is still very important to find out why these centres demonstrate some serious degree of permanence.

4.5 How Centres Demonstrate Some Serious Degree of Permanence?

Knowing which centres demonstrate some serious degree of permanence is one thing. Knowing how they do it is equally as important, particularly for purposes of assessing the existence or not of institutional entrepreneurship opportunity with regard to the centres. A variety of factors influence contracting parties to choose a particular arbitration centre. A study on governing law and jurisdictional choices reports that enforceability, fairness and speed are the three primary reasons for choosing a particular arbitration centre.[96] In the IBA 2015 Subcommittee Report over 160 arbitration practitioners in more than 40 countries provide their ideas, concerns, proposals and perspectives on the evolution of international arbitration in their regions.

It can be deduced from the common factors identified as key to growth that centres can both establish and demonstrate some serious degree of permanence by having in place in their country appropriate arbitration laws and arbitration procedures; permitting greater party autonomy; having in place a developed and functioning enforcement regime; better control over time and cost inefficiencies associated with national courts; the right expertise in national courts; neutrality; and confidentiality.[97]

Respondents to the BLP 2014 Survey feel that a venue with which the parties to arbitration do not have a connection is quite important (73%).[98] Understandably this is significant since the

[96] DRA Academy of Law, 'Study on Governing Law & Jurisdictional Choices in Cross-Border Transactions' (2017) <http://www.draacademy.ae/wp-content/uploads/Study-on-Governing-Law-Jurisdictional-Choices-in-cross-border-transactions.pdf> accessed 21 February 2017

[97] Welsh (n 82), 9. See also James H Carter, *The International Arbitration Review* (7th edn, Law Business Research 2016)

[98] BLP 2014 Survey (n 25), 07

very essence of arbitration is neutrality. Only 52% feel that it is quite important for the arbitration seat to be in a jurisdiction that is signatory to the New York Convention. However, 31% say that this is not very important or of no importance at all. A minority, namely 17%, feel that it is very important.[99] This can be explained by the fact that the Convention has quite a large number of signatories. Access to a pool of good and experienced local lawyers (37%) and arbitrators (74%) are key factors.

Also, the survey finds that, on one hand, too much national court involvement is a major cause why commercial parties regret choosing a particular city as the arbitration seat (28%). It also finds that, on the other hand, less national court support is equally unappealing (20%). Logistical considerations, such as arbitration facilities, transport links and leisure amenities do not necessarily contribute to the value of a city as an arbitration venue. Respondents feel that arbitration facilities are either not very important or not important at all (80%). Only 16% of respondents consider ease of travel to be important, which is similar to response about leisure amenities.[100]

As to which countries provide an equilibrium of all the findings of the BLP 2014 Survey, the QMU-PwC 2006 Survey is helpful. Corporations express their main reasons for choosing administered arbitration. These are: (i) a strong reputation for managing arbitration proceedings; (ii) familiarity with proceedings; (iii) an understanding of costs and fees; and (iv) the convenience of using an established process.[101] A strong reputation in the marketplace is combination of internationalism, neutrality and widespread recognition.[102] This seems difficult to achieve since not all centres evince some serious degree of permanence.

In comparison to *ad hoc* arbitration, a strong advantage of administered arbitration[103] is that arbitral centres produce "more majestic, more dignified and more comforting"[104] arbitral awards

[99] ibid, 08. See also Sigvard Jarvin, 'Choosing the Place of Arbitration: Where Do We Stand?' (1988) 16 Int'l Bus. Law 417

[100] BLP 2014 Survey (n 25), 08

[101] QMU-PwC 2006 Survey (n 1), 1

[102] QMU-W&C 2010 Survey (n 45), 2, 21-24

[103] Lew et al. (n 63), 34

[104] Francis J Higgins, William G Brown and Patrick J Roach, 'Pitfalls in International Arbitration' (1980) 35 Bus. Law 1035, 1051

which an enforcing court can be confident that it is an outcome of proceedings from well-tested rules applied by skilled arbitrators.[105] It is attributable to 65% of the respondents to the BLP 2014 Survey expressing a preference for a particular seat of arbitration if the local law thereto does not contain a right of appeal against an award. Respondents rank England (57), Switzerland (36), France (35), and U.S.A. (30) as the most prevalent international arbitration venues. Although the other popular arbitration centres in the world are SCC; CIETAC; SIAC; and HKIAC,[106] it does not follow that the countries in which they are located are as desirable as arbitration seats. Though this is changing slowly for some of the countries, as discussed below.

The reasons for choosing these venues, in order, are: (i) legal considerations (56); (ii) convenience (62); (iii) neutrality (51); and (iv) proximity of evidence (39). Statistically England is the most preferred venue. Convenience is the top factor for a corporation's choice of venue.[107] It would be an easy assertion to make that there is a correlation here, namely that the international arbitration community's choice of legal system is common law and choice of language is English.

To ascertain what it is that makes a party select one venue over another, the BLP 2014 Survey questions 53 lawyers and corporate counsels from 34 jurisdictions on choice of venue for international arbitration.[108] This report emphasises the choices by the respondents in the QMU-PwC 2006 Survey. The leaders are: London (78%); Paris (55%); Geneva (34%); New York (26%); Stockholm (25%); Vienna (25%); Singapore (19%); Dubai (15%); Zurich (15%); Moscow (9%); and Miami (7%). Only two respondents have experience of Beijing. Only one respondent has experience of Tokyo and Johannesburg. No one has experience of Mumbai as a seat of arbitration. The VIAC is emerging as a popular centre,[109] which is unsurprising since its caseload for the past 15 years speaks volume about its experience in administering international arbitration proceedings. This allows Vienna to join the very small list of preferred venues for

[105] Paul D Friedland, *Arbitration Clauses for International Contracts* (2nd edn, Juris 2007), 40

[106] Born 2014 (n 64), 174-199

[107] QMU 2006 Survey (n 7), 14

[108] BLP 2014 Survey (n 25), 01

[109] ibid, 04. See also Franz T Schwarz and Christian W Konrad, 'The New Vienna Rules' (2007) 23(4) Arb. Int'l 601, 602 fn 3. In 1997 only a new fee schedule was incorporated into the Rules but there was no change to the substantive rules

arbitration.

If a variety of factors influence contracting parties to choose a particular arbitration centre, then there would be reasons as to why they stay away from the others. Russia's ICAC describes itself as "the leading arbitration institution in Russia and in East European countries which deals with resolving disputes of international nature".[110] Yet, to the misfortune of both ICAC and RAAAC, "neither Moscow nor St. Petersburg is currently recommended as a place for arbitration".[111] Lack of arbitration-friendly environment in the jurisdiction means significant business ends up in the established international arbitral centres such as the ICC, SCC and LCIA.

Lack of arbitration-friendly environment could mean many things. It is likely, however, that it includes underdeveloped international rules of procedure. For example, in the case of BCICAC only two versions of its arbitration rules have ever existed since the centre's establishment 31 years ago. It may well be a reason for its lack of international recognition as illustrated by its caseload. This would not be in comparison to the ICC which changed its rules seven times; the LCIA not less than 12 times, although Veeder writes that though the archives he consulted did not show the revisions made between 1892 and 1926, but he is certain that the rules must have been updated in those two decades;[112] and CIETAC eight times. The SCC is 99 years old and changed its rules only six times, as did the AAA and ICDR-AAA together, despite being 90 and 20 years old, respectively. It would, however, be in comparison to centres of similar age to BCICAC, such as VIAC which changed its rules eight times, SIAC six times and HKIAC four times.

Whilst Onyema's five tools correctly includes the requirement for modern arbitration rules, arbitral centre's rules "should be understood as the product of careful incremental changes in response to developing international norms and incorporating provisions that have been tested"

[110] <http://mkas.tpprf.ru/en/> accessed 19 October 2017

[111] Russian Public Opinion Research Centre (VCIOM) (July 2013) <http://www.rospravo.ru/en/info/articles/200148.html/> accessed 13 November 2015. See also BLP 2014 Survey (n 25), 04

[112] VV Veeder, 'The Draft New 1998 LCIA Rules' in (Biennial Conference of the International Federation of Commercial Arbitration Institutions, Geneva, October 1997), 31

in various jurisdictions.[113] Parties trust centres with relevant experience to provide the administrative assistance in international arbitration proceedings. They would not be willing to use centres without a proven track record.[114] This explains why 86% of arbitration awards rendered between 1998 and 2008 were under administered arbitration and only 14% under *ad hoc*.[115]

At this juncture it is important to mention, however, that whilst application of Onyema's five tools and examination of the annual caseload of the centres may provide a scientific basis for choosing between the centres, commentary about the centres is of great significance to this evaluation. Born writes that:

> "First, it is strongly advisable to avoid newly-formed institutions, and institutions without proven track records.
>
> Second, it is prudent in most cases to rely on one of the relatively few leading international arbitral institutions with significant caseloads and experience.
>
> Finally, choosing among these establishes institutions in particular cases requires considering the nature of the transaction, the identities of the parties, the likely nature of future disputes, and the parties' respective interests".[116]

Regardless of such commentary advising against centres without proven track record, centres now have the survey results to implement if they desire to achieve some serious degree of permanence. North writes that "The key point is that learning by individuals and organizations is the major influence on the evolution of institutions".[117] Yet, from the results of Figure 1 and the various survey results cited herein, it would seem highly improbable that all, or even the

[113] Martin F Gusy, James M Hosking and Franz T Schwarz, *A Guide to the ICDR International Arbitration Rules* (Oxford University Press 2011), 4, para 1.07

[114] QMU 2006 Survey (n 7), 12

[115] QMU-PwC 2008 Survey (n 7), 4

[116] Born 2010 (n 9), 58. See also Graving (n 16), 328-329

[117] North (n 27), 19

majority, of the centres would achieve some serious degree of permanence. The institutionalisation process is likely to be a very difficult one for centres which have such a desire. One factor that is likely prevent such realisation is the unfairness in the competition between the centres. Another factor is lack of a conception of control to legitimise them and create the right environment for perfect competition.

4.6 Opportunity for Institutional Entrepreneurship: A Conception of Control for Legitimate Centres and Perfect Competition

Gerbay's[118] nuanced overview of the functional reality of administered arbitration provides thoroughly researched answers to questions about the very essence of administered arbitration. His study of more than 40 international arbitration centres worldwide includes the extent to which the role of the centres varies from one to another, for example, depending on their arbitration rules. He also explains the many misconceptions about arbitration centres and administered arbitration in general. As a result of in-depth carefully designed survey, he provides a systematic theoretical and practical description about the nature of the arbitral process and the role of the centres.

He writes that arbitration centres are portrayed either as mere administrators with no decision-making power or as mere administrators with immaterial decision-making power because of their non-jurisdictional nature.[119] This is perhaps because they are perceived as facilitators of the arbitration proceedings. He writes that these depictions do not represent the reality of these administrative organisations because the extent of their involvement in the proceedings they administer depends on the individual centre, which allows for the conclusion that the centres are ancillary players in the arbitration process.

[118] Gerbay (n 29). See also Ludwik J Kos-Rabcewicz-Zubkowski and Paul Davidson, *Commercial Arbitration Institutions: An International Directory and Guide* (Oceana Publications 1986); Rolf A Schütze (ed), *Institutional Arbitration: A Commentary* (C. H. Beck, Hart and Nomos 2013); Barbara A Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Asser Press Springer 2017) [hereinafter "Warwas (n 118)"]

[119] Gerbay (n 29). See also Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012), 10; Warwas (n 118)"]

The arbitral centres being non-jurisdictional in nature presents an institutional entrepreneurship opportunity, which is two-fold: (1) to have only one international commercial arbitration centre in each continent as having multiple does not appear to be advantageous in any way; and (2) to grant the centres jurisdictional legitimacy in theory and practice. The simple reason is because "the legitimacy and functions of contemporary arbitral institutions have been subject to new challenges".[120] Ziadé writes that the two factors that will determine any future role for arbitration centres are efficiency and legitimacy; and legitimacy threats is the biggest challenge that arbitration centres will have to address.[121]

In *IDS Life Ins. Co. v SunAmerica Life Ins. Co.* Judge Posner concludes that arbitration awards "are more like jury verdicts than like the decisions of courts, and jury verdicts are not given any weight as precedents".[122] Drahozal writes "Moreover, because there is no single unifying decision maker, like a supreme court, conflicting awards may persist".[123]

Oneyma's criteria, in essence, are useful to test whether a particular centre is pre-, semi or fully institutionalised[124] so as to determine if it has attained sufficient institutional legitimacy. Legitimacy is grounded on elements including, but not limited to, age, size, structure, market niche, prestige, and resources.[125] These are the material components that would grant social acceptability and credibility on a centre.

Hearit[126] explains organisational credibility as an element of corporate social legitimacy, which is accomplished by an organisation that demonstrates 'competence' and benefits the

[120] Warwas (n 118), 19

[121] Nassib G Ziadé, 'Reflections on the Role of Institutional Arbitration Between the Present and the Future' (2009) 25(3) Arb. Int'l 427

[122] 136 F.3d 537 (1998), [16]

[123] Christopher R Drahozal, 'Is Arbitration Lawless?' (2006) 40 Loy. L. A. L. Rev. 187, 208. See also Herbert LA Hart, *The Concept of Law* (3rd edn, Clarendon Press Oxford 2012), 141

[124] Tolbert and Zucker (n 36)

[125] Joel AC Baum and Christine Oliver, 'Institutional Embeddedness and the Dynamics of Organizational Populations' (1992) 57(4) Am. Sociol. Rev. 540; Joel AC Baum and Walter W Powell, 'Cultivating an Institutional Ecology of Organizations: Comment on Hannan, Carroll, Dundon, and Torres' (1995) 60(4) Am. Sociol. Rev. 529

[126] Keith M Hearit, 'Mistakes Were Made: Organizations, Apologia, and Crises of Social Legitimacy' (1995) 46(1-2) J. Commun. Stud. 1, 3. See also Pieter HF Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Martinus Nijhoff 1994), 75

'community'. Competence refers to the organisation's ability to achieve its goals, in this case to administer international commercial arbitration proceedings in accordance with the expected standards of the community. Community in this instance means that an organisation operates and properly so as a member of the relevant community from the point of view of both character and goodwill. Parsons writes that acceptance leads to 'persistence' of the organisation.[127] These conditions, namely, 'acceptability'; 'credibility'; 'competence'; 'community' and 'persistence' are features which would bestow legitimacy on an organisation.

To gain legitimacy, organisations must evince competence in that their socially constructed system of norms, values, beliefs, and definitions accord with those wanted by the actors of those organisations. To establish credibility organisations need to be persistent in their activities so as to prove that they are desirable, proper, and appropriate. It is only then that legitimacy is acquired by the organisations.

Attainment of these qualities, however, demand strategic institutional approaches because, as Suchman explains, legitimacy is dependent upon the collective, as oppose to individual, organism. Meaning, whilst the organisation might conjure up legitimacy subjectively, it is only public approval that grants it ultimate legitimacy.[128] Put another way, DiMaggio and Powell write that "Organizations compete not just for resources and customers, but for political power and institutional legitimacy, for social as well as economic fitness".[129] Legitimacy is an asset displayed by the relationship between an organisation and its field through the flow of resources from the environment to the organisation.[130] Whilst an organisation attempts to obtain legitimacy, its competitors seek to deny it such asset[131] because their mission is to maintain and defend their own legitimacy.

Whilst this implies that legitimacy can be at different levels, what the statistics presented herein

[127] See Talcott Parsons, *Structure and Process in Modern Societies* (Free Press 1960) [hereinafter "Parsons 1960 (n 127)"]; Talcott Parsons, *The Structure of Social Action* (Free Press 1937) [hereinafter "Parsons 1937 (n 127)"]; Parsons 1951 (n 32)

[128] Suchman (n 37), 574

[129] DiMaggio and Powell (n 33), 150

[130] Michael T Hannan and John Freeman, *Organizational Ecology* (Harvard University Press 1989), 69

[131] John B Dowling and Jeffrey Pfeffer, 'Organizational Legitimacy: Social Values and Organizational Behavior' (1975) 18(1) Pac. Sociol. Rev. 122, 125 [hereinafter "Dowling and Pfeffer (n 131)"]

demonstrate is that the majority of the centres have not managed to attain some or all of these important standards. Thus, they do not compete at an institutional level. For this reason, one international commercial arbitration centre in each continent and one in the Middle East region with jurisdictional legitimacy seems necessary based on the majority of the centres being redundant. This would allow the centres to possess the characteristics of legitimacy and also compete in perfect competition at an institutional level. Also, it would result in the institutionalisation of the centres and provide meaning and stability therein.[132]

Böckstiegel writes that "states should accept the independence of the arbitral institutions in their jurisdiction".[133] For this to happen, a powerful external actor is needed to implement and enforce a new institutional design of the international commercial arbitration institution as a system.[134] A new institutional design could be a supranational regulatory body. This could supervise and support the centres, for example. It could provide them the resources; customers, social and economic fitness; political power; institutional legitimacy; and the jurisdictional authority that they need.

Meyer and Rowan write that:

> "Organizations are driven to incorporate the practices and procedures defined by prevailing rationalized concepts of organizational work and institutionalized in society. Organizations that do so increase their legitimacy and their survival prospects, independent of the immediate efficacy of the acquired practices and procedures".[135]

Adoption of formal structural arrangements leads to acquired social meanings due to the social evaluation of organisations. An organisation which exists in highly elaborated institutional

[132] Scott 2001 (n 32), 92

[133] Karl-Heinz Böckstiegel, 'Role of the State on Protecting the System of Arbitration' (Chartered Institute of Arbitrators: London Centenary Conference, London, 3 July 2015) <http://www.ciarb.org/docs/default-source/ciarbdocuments/london/b%C3%B6ckstiegel.pdf?sfvrsn=0> accessed 21 September 2017

[134] Jens Beckert, 'Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change' (2010) 28(2) Sociol. Theory 150, 153

[135] John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) Am. J. Sociol. 340, 340 [hereinafter "Meyer and Rowan (n 135)"]

environments gain both legitimacy and resources to allow it to not only survive but also thrive.[136]

Put differently, institutions are composed of the 'cultural-cognitive', 'normative' and 'regulative' pillars.[137] International commercial arbitration is a process-based institution grounded on the 'normative' and 'cultural-cognitive' institutional pillars only and the 'regulative' institutional pillar is provided by national laws and courts. In essence, the institution is free standing and independent only to a limited extent, as are the arbitration centres. That is due to the fact that "the international system is organized in a voluntarist fashion, supported by so little coercive authority".[138] That may be due to the fact that international systems vary widely in terms of features such as membership, scope, centralisation, control and flexibility.

This is very much true about international commercial arbitration centres. A formal structural arrangement would put in place the regulative institutional pillar for the centres. It would introduce coercive authority. Thus, it would lead to them having normative, cultural-cognitive and regulative legitimacy.

Many new international arbitral centres are created,[139] due to the colossal rise in commercial arbitration.[140] Centres are created with a strong ambition to strengthen their jurisdiction's reputation as an arbitration-friendly place for two reasons: (i) to limit the export of disputes arising in and from that jurisdiction to international arbitration centres in other jurisdictions; and (ii) to promote arbitration in the country. To confidently magnetise potential arbitrants in "a fiercely competitive "flattening" market for arbitral institution services", these centres "must establish their legitimacy" to administer disputes.[141] For that, centres customarily rely on: (a)

---

[136] ibid, 352

[137] Scott 2001 (n 32), 48, 52. See also Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991), 8

[138] Thomas M Franck, 'Legitimacy in the International System' (1988) 82(4) Am. J. Int'l L. 705, 705 [hereinafter "Franck (n 138)"]. See also Barbara Koremenos, Charles Lipson and Duncan Snidal (eds), *The Rational Design of International Institutions* (Cambridge University Press 2003)

[139] Rogers (n 25)

[140] Associated Press, 'Commercial Cases Increase 84% Since '83: Arbitration Up as Doubts on Litigation Grow' (New York, 29 December 1988) <http://articles.latimes.com/1988-12-29/business/fi-1400_1_commercial-arbitration-cases> accessed 19 February 2012, §4, [12] which reports that between 1983 and 1988 there was a rise of 84 percent; Michael Kerr, 'International Arbitration v. Litigation' [1980] J. Bus. L. 164

[141] Rogers (n 25). See also Catherine A Rogers, 'The Vocation of the International Arbitrator' (2005) 20(5) Am. U. Int'l L. Rev. 957; Catherine A

making available familiar and reliable international arbitrators; and (b) their codes of ethics for arbitrators to signal that they can be trusted to oversee international arbitration disputes. This establishes their legitimacy and unveils ambition to reach the international arbitration marketplace.

Slate writes that the ICDR-AAA carries out an "ongoing comprehensive review" of its list of arbitrators to ensure that only the highest quality candidates with "international expertise, prior arbitration experience and demonstrated acceptability"[142] are provided to the parties. The BLP 2014 Survey shows that these are the qualities that parties desire. DiMaggio and Powell write that "Organizational prestige and resources are key elements in attracting professionals. This process encourages homogenization as organizations seek to ensure that they can provide the same benefits and services as their competitors"[143] and that "Once a set of organizations emerges as a field, a paradox arises: rational actors make their organizations increasingly similar as they try to change them".[144]

This is very obvious from the fact that almost all of the organisations named in Figure 1 changed their rules in the same year or within a year of each other. By appearing to be rational,[145] organisations avoid social censure, minimise external accountability, secure necessary resources and gives them better chances of survival.[146] This is a pull factor in institutional change where institutional entrepreneurs recognise an attraction to imitate an existing institutional model because it presents solutions to the problems being faced by their own institution.[147]

Rogers, *Ethics in International Arbitration* (Oxford University Press 2014); Yves Derains and Laurent Levy (eds), *Is Arbitration Only as Good as the Arbitrator?: Status, Powers and Role of the Arbitrator* (Kluwer Law International 2015); David Hacking, 'Well, Did You Get the Right Arbitrator?' (2000) 15(6) Mealey's Int. Arb. Rep. 24; Nigel Blackaby and others (eds), *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009), para 4.14; Michael F Hoellering, 'The Role of International Arbitrators' (1996) 51(2) Disp. Resol. J. 100

[142] Slate (n 73), 25, 28

[143] DiMaggio and Powell (n 33), 154

[144] ibid, 147

[145] William R Scott, 'The Organization of Environments: Network, Cultural and Historical Elements' in John W Meyer and Williams R Scott (eds), *Organizational Environments: Ritual and Rationality* (SAGE 1983) 155, 160

[146] Royston Greenwood and others, 'Introduction' in Royston Greenwood and others (eds), *The SAGE Handbook of Organizational Institutionalism* (SAGE 2008) 1, 4

[147] Jens Beckert, 'Agency, Entrepreneurs and Institutional Change: The Role of Strategic Choice and Institutionalized Practices in Organizations' (1999) 20(5) Organ. Stud. 777 [hereinafter "Beckert (n 147)"]

Arbitration rules are becoming more homogenous as stated by practitioners surveyed. They perceive this as reflection of international best practice and a willingness to meet the demands of users and support the trend towards regionalisation.[148] Fligstein writes that "Having stable rules is often more important than the content of the rules".[149] This is logic because rules should be concrete but also evolve. Simple rules allow for the alignment of activities with corporate objectives, fostering coordination, and better decision making. Beer questions why arbitration rules cannot be similar through homegenisation, unless it can be shown that being different is so much better or that they are so special to the extent that the provide a unique approach.[150]

Rogers' criterion that the list of arbitrators is an extremely essential tool for a centre to validate its legitimacy should be added to Onyema's all-purpose criteria. After all, international commercial arbitration is a protected practice for it is colonised by a small number of legal experts and is denied to the wider legal community. It is closed to new interest, regardless of whether it derives from practitioners or academics.[151] To exhibit degree of permanence and expectation of continuity, therefore, a centre's list of arbitrators may act as brand endorsement like in the sport, music and film industries. The commendation of eminent names in the field would benefit both the centres and also serve the self-interest of practitioners.

Why is it important that there should be only seven centres with jurisdictional authority? Beer writes that "Choice is a wonderful thing, but it needs to be sustainable."[152] He highlights that the Middle East and North Africa (MENA) region, for example, houses 50 arbitration centres. Also, as per the 2011 Latin American Arbitral Institutions Survey there are approximately 165 centres in that part of the world.[153] In Europe there are over 35 centres. Beer enquires if: (a) they are all

[148] Welsh (n 82), 14

[149] Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton University Press 2001), 41 [hereinafter "Fligstein (n 149)"]; Neil Fligstein, 'Markets as Politics: A Political-Cultural Approach to Market Institutions' (1996) 61(4) Am. Sociol. Rev. 656, 662. See also Lawrence M Friedman, *The Legal System: A Social Science Perspective* (SAGE 1975), 292; Donald Sull and Kathleen M Eisenhardt, *Simple Rules: How to Thrive in a Complex World* (Mariner Books 2016)

[150] Mark Beer, 'The Future of International Dispute Resolution Centres: The Garfield 'Principle'' (Kluwer Law Conference for In-house Counsel, Dubai & Middle East: 5th Annual International Arbitration Summit, Dubai, February 2017) <https://www.youtube.com/watch?v=-MEGsXUZVCk> accessed 19 December 2017 [hereinafter "Beer (n 150)"]

[151] Bhatia (n 1), 69, 71

[152] Beer (n 150)

[153] 2011 Latin American Arbitral Institutions Survey (n 78), 3, 8

needed; and (b) if that choice is actually significant.

As demonstrated by the annual caseload and the factors that corporations make when selecting arbitration centres, a choice of around 207 centres is not actually significant as they are not all needed. International commercial arbitration could function the way CAS does in Switzerland. The CAS has its seat in Switzerland and arbitration proceedings thereof is based on Swiss law. Such a setup where centres have such jurisdictional authority would only be beneficial to the institution.

As per Figure 1, many of the centres appear dispensable. Smit writes that "It should be stressed at the outset that virtually all of the advantages to be gained from administered arbitration can be gained by making appropriate contractual provisions at the time of making the arbitration agreement".[154] Ancient arbitration was organised on an *ad hoc* basis and later substituted by a pre-organised, systematic administered arbitration. Setting in motion of arbitral proceedings is vested in contracting parties to exercise their choice of arbitration over litigation and of administered over *ad hoc* arbitration. Arbitration centres in general do not have to be used for the adjudication of international commercial disputes. Certainly, therefore, there is no need for a huge number of them.

As many advantages that could be cited to support administered arbitration, the same number could relate to *ad hoc* arbitration. Therefore, it is not difficult to dismantle the centres particularly as the international commercial arbitration institution neither supports their entry into or exit out of the market. It is not at all impossible to imagine emergence of *ad hoc* arbitration as the most popular form of this process. Parties could craft their own flexible rules and reduce the time and cost of the proceedings which result from the centres and their rules.

Beer writes that the number of arbitration centres in existence suggests trouble looms because for many centres the workload is declining. One reason is that some sectors, such as financial services, prefer commercial courts. Another reason is that, whilst arbitration is probably

[154] Smit (n 1), 14. See Pierre Lalive, 'avantages et inconvénients de l'arbitrage "ad hoc"' in Pierre Bellet (ed), *Etudes offertes à Pierre Bellet* (Litec 1991) 301

increasing overall, the increase is only for those centres that offer enforceability, fairness and speed, meaning those who demonstrate reputation, familiarity with proceedings, and an understanding of costs and fees. These being those which manifestly exhibit some serious degree of permanence.

Having less centres appears to be what the users actually want. The data in Figure 1 could lay the foundation for one centre in each of the six continents and one in the Middle East region for the data establish that copious centres do not offer choice and competition, but rather cause clog and chaos. It would be incomplete to advance that only seven arbitration centres should exist in the world without acknowledging that this argument is very likely to meet strong resistance. Popularity of international commercial arbitration is attributed to the centres to a very large extent for they have prompted the use of the process and brought about arbitration laws and arbitration procedures.[155] That is due to organisations being more than production systems, but more as social and cultural systems forces.[156]

The proposal of only seven centres is a matter of creating institutionalised ideas and behaviours in an organisational field. Scott writes that "The notion of field connotes the existence of a community of organizations that partakes of a common meaning system and whose participants interact more frequently and fatefully with one another than with actors outside the field".[157] A small number of centres organised, controlled and managed by a supranational organisation within a defined infrastructure in which the centres interact with each other frequently to achieve their common objectives is likely to enhance the institution.

To determine which centres should be one of the seven and be granted jurisdictional authority is quite a simple task. Mirowski writes that "The first rule of any selection model is that the selected entity must have a high degree of permanence (meaning that one can truly identify it as the *same* entity) and a low rate of endogenous change, relative to the degree of bias for or against

[155] Michael F Hoellering, 'The Role of Arbitration Institutions in Managing International Commercial Arbitration' (1994) 49(2) Disp. Resol. J. 12. See also Welsh (n 82), 8

[156] William R Scott, *Institutions and Organizations: Ideas, Interests, and Identities* (3rd edn, SAGE 2008), xx. See also Meyer and Rowan (n 135)

[157] William R Scott, 'Conceptualizing organizational fields: linking organizations and societal systems' in Hans-Ulrich Derlien, Uta Gerhardt and Fritz W Scharpf (eds), *Systemrationalitat und Partialinteresse* (Nomos Verlagsgesselschaf 1994) 203, 207-208

its favour in the environment".[158] Thus, the starting point to conducting such a selection process would be to divide the centres in each continent which demonstrate a high degree of permanence and then to choose those with the highest caseload until the best contender is identified.

In Europe the ICC is the top ranking centre and there is a marked difference between its caseload and that of the LCIA and SCC. Coincidentally, this is the same in Asia where CIETAC leads and HKIAC and SIAC follow. North America and Canada tell exactly the same story – with ICDR-AAA being the first choice for the international community and BCICAC, if necessary, could be an alternative. In South America CAMARB is the only centre with readily available statistics and therefore is able to demonstrate some serious degree of permanence. Mexico's CAM and Costa Rica's CICA can compete for second and third place. In Africa, if not based on the available statistics, then at least owing to its age, CRCICA is the best performing centre with the number two and three spots being up for grabs. Similarly, in the Middle East, the DIFC-LCIA would have to be named the number one centre followed by DIAC and ADCCAC. There is no competition in Australia and so there is no choice to be made as to which centre should survive; but that may well be that Australia is both a continent and a country.[159]

The proposed seven centres should come under the auspices of a supranational organisation. The words 'relative to the degree of bias for or against its favour in the environment' raise the significance of a regulatory body here - to confirm or deny the accuracy of the data presented by the centres and to eliminate the potential assumption that a centre could or would manipulate its data to exhibit itself in the most favourable light. Pfeffer and Salancik write that "When individuals and organizations consider what is being measured or produced, they are concerned with effectiveness rather than efficiency. Effectiveness is an external standard applied to the output or activities of an organization".[160] In this case, it is demonstration of some serious degree of permanence. A regulatory body is crucial also for auditing the efforts, statistics and rules of

[158] Philip Mirowski, *Against Mechanism: Protecting Economics from Science* (Rowman & Littlefield Publishers, Inc. 1988), 167 citing George C Williams, *Adaptation and Natural Selection* (Princeton University Press 1966), 23

[159] Gabriël A Moens and Philip Evans (eds), *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective* (Springer 2015)

[160] Jeffrey Pfeffer and Gerald R Salancik, *The External Control of Organizations: A Resource Dependence Perspective* (Harper and Row 1978), 34-35 [hereinafter "Pfeffer and Salancik (n 160)"]

each centre as a safeguard mechanism to avoid false enhancement of their status.

Furthermore, to prompt the imagination of the international commercial arbitration community that international commercial arbitration centres should belong to a regulatory body, it is necessary to refer to existing and functioning structures. The WIPO, an independent organisation specialising in intellectual property and technology disputes, is part of the United Nations family of organisations. The CAS, a sports-specific arbitration court, operates under the Court of Arbitration for Sport Statute of 1984 and under the supervision of the International Council of Arbitration for Sport (ICAS). The ICSID is part of the World Bank Group (WBG).

Perhaps the closest such body in international commercial arbitration so far as the arbitral centres are concerned would be IFCAI. This body was established in 1985. Its aims are to establish and maintain permanent relations between commercial arbitration centres and facilitate the exchange of information. IFCAI is not and cannot be said to be the type of body similar to the UN for WIPO, ICAS for CAS, or WBG for ICSID because since establishment in 1985 with the aim to establish and maintain permanent relations between commercial arbitration centres, only 52 member organisations have signed up. Why more than 148 of the 207 international arbitration centres have not joined the federation? It may well be that it is a membership-based organisation with no authority.

Moreover, another reason why international commercial arbitration centres should belong to a regulatory body, if the perfectly functioning example of CAS is not convincing, is that there is widespread support for regional arbitration centres as evinced by the cited survey results.

> "An important finding of the study was that a sizeable number of respondents were supportive of the development of stronger "regional" arbitration centres. Many corporations indicated an interest in institutions closer to the location of the dispute, which might also be less expensive than established institutions".[161]

[161] QMU-PwC 2006 Survey (n 1), 11. See also QMU-PwC 2008 Survey (n 7); Welsh (n 82), 7-8; Ben Rigby, 'Regional trends in arbitration' [2017] <https://www.cdr-news.com/categories/simmons-and-simmons/7083-regional-trends-in-arbitration> accessed 12 November 2017; Vijay K Bhatia, Christopher N Candlin and Maurizio Gotti (eds), *Discourse and Practice in International Commercial Arbitration: Issues, Challenges and Prospects* (Routledge 2016), 23

This suggests that delocalisation of international commercial arbitration does not only mean detachment from national procedural and substantive law, but detachment from sophisticated national legal systems that currently dominate both the governing law and arbitration centre choice in a contract.

Organisational change, whether by reason of erosion or rejection of institutionalised process, can occur because of "the failure of organizations to accept what was once a shared understanding of legitimate organizational conduct or by a discontinuity in the willingness or ability of organizations to take for granted and continually re-create an institutionalized organizational activity".[162] Dissipation of and dissatisfaction with existing structures, policies, and practices creates pressure for change[163] because institutionalised beliefs and practices may have become ineffectual.[164] Thus, coalitions with different interests and capacities for influence vie for control.[165]

In terms of capacity to change, centres less active are likely to change and adopt new practices due to the prevailing practices not being embedded in them. Centres which are less established would be more willing to apply new innovations and perceive it as more likely to enhance their relationship with their users. But more mature centres will not readily adapt to new inventions because these may inhibit their existing relationships and as a result demonstrate a resistance to change.

Support for regional arbitration centres can be explained by Maslow's 'hierarchy of human needs', which communicates that, one, people have different needs and are motivated by different incentives to achieve objectives and, two, people's needs change over time, and when

[162] Christine Oliver, 'The Antecedents of Deinstitutionalization' (1992) 13(4) Organ. Stud. 563, 564 [hereinafter "Oliver (n 162)"]. See also Royston Greenwood and Christopher R Hinings, 'Understanding Radical Organizational Change: Bringing Together the Old and the New Institutionalism' (1996) 21(4) Acad. Manag. Rev. 1022 [hereinafter "Greenwood and Hinings (n 162)"]; Danny O'Brien and Trevor Slack, 'An Analysis of Change in an Organizational Field: The Professionalization of English Rugby Union' (2003) 17(4) J. Sport Manag. 417; Sara Diogo, Teresa Carvalho and Alberto Amaral, 'Institutionalism and Organizational Change' in Jeroen Huisman and others, *Multi-Level Governance in Higher Education Research* (Palgrave 2015) 114

[163] Oliver (n 162); Greenwood and Hinings (n 162)

[164] Scott 1995 (n 31), 79. See also Jepperson (n 31), 152-153; William H Sewell, Jr, 'A theory of structure: Duality, Agency, and Transformation' (1992) 98(1) Am. J. Sociol. 1, 5 [hereinafter "Sewell (n 164)"]

[165] Greenwood and Hinings (n 162)

their needs are met new needs arise and that some needs take precedence over others.[166] Maslow writes that human motivation is based on fulfilment and change through self-actualisation and the motivation for it leads people in different directions.[167] Maslow's theory is applied in teaching and classroom management in schools and it is premised on students being valued and respected in a supportive environment. In the present scenario, some of the arbitration centres can be neither valued nor respected because they do not operate in a supportive environment but in an imbalanced competitive one.

It is absolutely intelligible, therefore, that the centres would try to achieve their needs by taking a different direction. Closure of LCIA India in June 2016 is a prime example of the fact that people's needs change over time. It became clear after seven years that the needs identified in 2009 when it began operation have changed. Tay and Diener test Maslow's theory through a survey conducted from 2005 to 2010 in which 60,865 people from 123 countries participated. It concludes that human needs exist regardless of cultural differences.[168] In the present instance, it appears that support for the development of stronger regional arbitration centres is to provide an alternative to the established centres and help them gain the required degree of permanence.

In the BLP 2014 Survey, 42% of respondents express an increased likelihood to select Singapore as a seat of arbitration than five years ago.[169] A number of factors explain such preference. In addition to the launch of the Court of Arbitration of SIAC in 2013, in January 2015 the Singapore International Commercial Court (SICC) was launched.[170] The establishment of SICC may be the reason why the respondents would consider Singapore as a seat of arbitration now. It may be linked to Singapore's plan to be the jurisdiction in Asia where international commercial disputes would be adjudicated by a panel of international civil and common law judges with

[166] Abraham H Maslow, 'A Theory of Human Motivation' (1943) 50(4) Psychol. Rev. 370; Abraham H Maslow, *Motivation and Personality* (Harper and Row 1954)

[167] Abraham H Maslow, *Toward a Psychology of Being* (Van Nostrand 1962); Edward Hoffman, *The Right to be Human: A Biography of Abraham Maslow* (McGraw-Hill 1988); Douglas T Kenrick and others, 'Goal-Driven Cognition and Functional Behavior: The Fundamental-Motives Framework' (2010) 19(1) Curr. Dir. Psychol. Sci. 63

[168] Louis Tay and Ed Diener, 'Needs and Subjective Well-Being Around the World' (2011) 101(2) J. Pers. Soc. Psychol. 354

[169] BLP 2014 Survey (n 25), 02, 04

[170] Loukas A Mistelis and Crina Baltag, 'Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations' (2008) 2(5) World Arb. & Med Rev. 83 – "National courts are a viable and reliable forum for dispute resolution, provided the judicial system is developed and judges well trained and perceived to be independent and fair".

parties represented by foreign lawyers and under rules and practice directions purposely created.

Also, it could be that the respondents have other reason for their answer. The Singapore Court of Appeal decision in *PT Prima International Development v Kempinski Hotels SA*[171] held that arbitral tribunals may now decide any issue expressly or impliedly raised in the parties' submissions. It explains why 60% of the respondents believe arbitration venues in South East Asia would become more popular.[172]

Jurisdictional legitimacy for the centres seems to be a desire of both the centres and their users. Organisations can gain legitimacy, whether pragmatic; moral; or cognitive,[173] by: (i) conforming to existing social norms; or (ii) altering social norms; or (iii) identifying with social values.[174] To gain legitimacy, it is not at all sufficient, however, for a centre to be desirable, proper or appropriate, but it must be a necessary and desirable asset, in that it is the neighbour of choice.[175] This corporate-wide principle refers to the assessment of a centre's reputation[176] and how it should be positioned in the institution.[177] Logically, as arbitration becomes localised, each centre would have to convince users that it is the neighbour of choice.

Burke writes that "The essential aim of becoming a neighbor of choice is to create and build a legacy of trust".[178] In order for legitimacy to be conferred upon an organisation, however, these constituent elements must be judged against accepted standards since "normative legitimacy is assessed in terms of scores based on accreditations and certifications received from meeting the standards set by professional governance structures".[179] Such mechanism does not currently exist for the centres in this institution.

---

[171] [2012] SGCA 35

[172] Shahla F Ali, *Resolving Disputes in the Asia-Pacific Region: International Arbitration and Mediation in East Asia and the West* (Routledge 2011)

[173] Suchman (n 37)

[174] Dowling and Pfeffer (n 131)

[175] Edmund M Burke, *Corporate Community Relations: The Principle of the Neighbor of Choice* (Praeger 1999), 24 [hereinafter "Burke (n 175)"]

[176] ibid. See also Charles J Fombrun, *Reputation: Realizing Value from the Corporate* (Harvard Business Review Press 1996)

[177] Burke (n 175), 47

[178] ibid, 24

[179] Scott et al. (n 38), 306

Stimulus for institutional change is presented here, which is for the creation of a source for organisational legitimation. Both structural, "what the system is",[180] and procedural, "what the system does",[181] change is needed in this institution. These two types of change would be a reorganisation of this institution in response to the opinion of its actors expressed through the survey results. It would lead to increase in organisational legitimacy through organisational isomorphism.[182]

Organisational legitimacy for the seven centres should be granted and controlled by a body outside the organisation which possesses legitimacy-determining power.[183] An external body would be better placed to devise a model that creates, manages, integrates and illustrates organisational legitimacy. As per Suchman's definition, legitimacy is attained when the actions of an entity are carried out within a system of norms, values, beliefs, and definitions; and it is this that the supranational organisation would avail.

A good example of centralised control in the form of a single entity is the Bank of England. Centralisation commenced with the Bank Charter Act 1844,[184] which waned the dominance of the network of country banks by, for example, granting the authority to issue new banknotes only to the Bank. As a result, merger and centralisation of provincial banks occurred, which led to the formation of larger banks.[185] Prior to this the provincial banks operated as private entities, much like the arbitration centres do today.

Recently, the Bank's supervision role was consolidated further. In March 2017, in order to centralise financial regulation, the Prudential Regulation Authority was replaced by the Prudential Regulation Committee and is now part of the Bank. This was achieved by the Bank of England and Financial Services Act 2016[186] so as to bring the subsidiary within the single legal

[180] Scott M Cutlip, Allen H Center and Glen M Broom, *Effective Public Relations* (8th edn, Prentice Hall 2000), 234 [hereinafter "Cutlip et al. (n 180)"]

[181] ibid, 234

[182] David L Deephouse, 'Does Isomorphism Legitimate?' (1996) 39(4) Acad. Manag. J. 1024

[183] Pfeffer and Salancik (n 160). See also Suchman (n 37), 571

[184] 1844, c. 32

[185] Timothy Johnson, *Ethics in Quantitative Finance: A Pragmatic Financial Market Theory* (Springer 2017), 178

[186] (2016 C. 14)

entity of the Bank rather than function as a limited company owned by the Bank. Majority of the arbitration centres are structured under a chamber of commerce or are private entities.[187] For example, the LCIA is a not-for-profit company limited by guarantee. Thus, their consolidation would facilitate the necessary control to be implemented.

Weber alludes to the importance of legitimate order as guiding social action.[188] Scott et al. write that environments are built around three components: (i) institutional logics; (ii) governance systems; and (iii) institutional actors. Institutional logics, as the organising principles which guide the relationship between an organisation and its environment, and governance systems, which regulate and control the organisations, guide institutional actors.[189] Institutional actors are the stakeholders in this institution, and so they would have vested interest in the activities or performance of these organisations[190] and they affect the success and survival of organisations.[191] Actors have the power to influence the organisation.

What can be clearly understood from the statistics mentioned herein is that the actors, as recognised sources of change,[192] express their preference in terms of the centres that they would select to administer their dispute adjudication proceedings. Through such survey they collectively communicate their interests to influence change to this institution. Now seems the right time, therefore, for the institution not to ignore the international commercial and arbitration community's expectations and to design a system in which organisations seeking legitimacy and support can be called upon to incorporate structures and procedures defined by a supranational organisation.

It is indeed arguable that the centres are in fact jurisdictional for they operate from a specific legal system governing a particular legal jurisdiction. In more than 75% of cases, half of

[187] Graving (n 16), 328. See also Warwas (n 118), 21

[188] Max Weber, *Economy and Society: An Interpretive Sociology* (Bedminister Press 1968). See also Parsons 1937 (n 127); Parsons 1951 (n 32); Parsons 1960 (n 127); Dowling and Pfeffer (n 131)

[189] Scott et al. (n 38), 20. See also Lynne G Zucker, 'Institutional Theories of Organization' (1987) 13 Annu. Rev. Sociol. 443, 443

[190] John Viljoen and Susan Dann, *Strategic Management* (4th edn, Prentice Hall 2003), 205

[191] Cutlip et al. (n 180), 409; Scott et al. (n 38), 258-264

[192] Cutlip et al. (n 180), 19

contracting parties select the seat of arbitration to match the law governing the contract[193] and 49% say that they were more likely to select a seat that is the home of the centre.[194] Parties who choose the ICC almost inevitably select Paris or Geneva or Zurich as the arbitration seat and those who choose the LCIA almost always select London as the arbitration seat. Correspondingly, a very important factor for 75% of respondents is a personal connection with the city in which the seat of arbitration is physically located.[195]

This would be explained by the familiarity principle of attraction, particularly where there is repeated exposure to that familiar element as this creates a common and pervasive pattern and results in increased attraction. Also known as the mere-exposure effect as developed by Zajonc, the familiarity principle relays that repeated exposure causes less fear and stimulates a fond reaction to the stimulus.[196] This leads to such reaction being "elicited with minimal stimulus input"[197] because the stimulus would be in better mood and feel more positive.[198] This explains why a large number of the most popular centres receive repeat business.

Transformation of this institution and the organisations therein is both necessary and inevitable. Organisations must constantly adjust and respond to environmental influences because legitimacy is required not only for viability[199] but also for stability[200] and survival.[201] Pfeffer and Salancik write that "Orgnizations are not so much concrete special entities as a process of organizing support sufficient to continue existence",[202] but that an organisation is a "source of meanings for the members of organizations".[203] Entrepreneurs as the creators of institutions, also

[193] BLP 2014 Survey (n 25), 04

[194] ibid

[195] ibid

[196] Robert B Zajonc, 'Attitudinal Effects of Mere Exposure' (1968) 9(2) J. Pers. Soc. Psychol. 1; Sheila T Murphy and Robert B Zajonc, 'Affect, Cognition, and Awareness: Affective Priming with Optimal and Suboptimal Stimulus Exposures' (1993) 64(5) J. Pers. Soc. Psychol. 723

[197] Robert B Zajonc, 'Feeling and Thinking: Preferences Need no Inferences' (1980) 35(2) Am. Psychol. 151

[198] Robert B Zajonc, 'Mere Exposure: A Gateway to the Subliminal' (2001) 10(6) Curr. Dir. Psychol. Sci. 224

[199] William P Barnett, 'The Dynamics of Competitive Industry' (1997) 42 Adm. Sci. Q. 128

[200] Suchman (n 37), 574

[201] Thomas A D'Aunno and Howard S Zuckerman, 'The Emergence of Hospital Federations: An Integration of Perspectives from Organizational Theory' (1987) 44(2) Med. Care Res. Rev. 323

[202] Pfeffer and Salancik (n 160), 24. See also Suchman (n 37), 571

[203] Scott 2001 (n 32), 42. See also Burke (n 175), 28

maintain and change them[204] all in pursuit of interests that they value highly.[205] It falls upon them, therefore, to create a whole new system to tie together the disparate sets of institutions.[206]

North writes that "the entrepreneurs of organizations induce institutional change as they perceive new or altered opportunities".[207] Thus, it is a matter of the players within each individual centre to develop and implement new norms in response to the "exogenous changes in the external environment".[208] Further, he writes that "the key to survival is improving the efficiency of the organization relative to that of rivals",[209] particularly since secure monopolies do not have to improve to survive, unless their rivals improve their efficiency. Improving the efficiency of the organisation includes, but not limited to, investment in skills and knowledge to make the organisation more efficient and productive, which is most likely to produce long-run economic growth.[210]

Such improvement is happening in Asia as 60% of the respondents to the BLP 2014 Survey express that Malaysia, Indonesia and South Korea are very likely to join the illustrious European

---

[204] John Child, Yuan Lu and Terence Tsai, 'Institutional Entrepreneurship in Building an Environmental Protection System for the People's Republic of China' (2007) 27(7) Organ. Stud. 1013; Elisabeth S Clemens and James M Cook, 'Politics and Institutionalism: Explaining Durability and Change' (1999) 25(1) Annu. Rev. Sociol. 441, 441 [hereinafter "Clemens and Cook (n 204)"]; Fligstein (n 149); Neil Fligstein, 'Social Skill and the Theory of Fields' (2001) 19(2) Sociol. Theory 105; Raghu Garud, Cynthia Hardy and Steve Maguire, 'Institutional Entrepreneurship as Embedded Agency: An Introduction to the Special Issue' (2007) 28(7) Organ. Stud. 957; Raghu Garud, Sanjay Jain and Arun Kumaraswamy, 'Institutional Entrepreneurship in the Sponsorship of Common Technological Standards: The Case of Sun Microsystems and Java' (2002) 45(1) Acad. Manag. J. 196 [hereinafter "Garud, Jain and Kumaraswamy (n 204)"]; David Levy and Maureen Scully, 'The Institutional Entrepreneur as Modern Prince: The Strategic Face of Power in Contested Fields' (2007) 27(7) Organ. Stud. 971; Michael Lounsbury and Ellen Crumley, 'New Practice Creation: An Institutional Perspective on Innovation' (2007) 28(7) Organ. Stud. 993; Tammar B Zilber, 'Stories and the Discursive Dynamics of Institutional Entrepreneurship: The Case of Israeli High-tech after the Bubble' (2007) 27(7) Organ. Stud. 1035

[205] ibid. See also Paul J DiMaggio, 'Interest and Agency in Institutional Theory' in Lynne G Zucker (ed), *Institutional Patterns and Organizations: Culture and Environment* (HarperBusiness 1988) 3, 14; Beckert (n 147); Roy Suddaby and Royston Greenwood, 'Rhetorical Strategies of Legitimacy' (2005) 50 Adm. Sci. Q. 35; Thomas B Lawrence and Nelson Phillips, 'From Moby Dick to Free Willy: Macro-Cultural Discourse and Institutional Entrepreneurship in Emerging Institutional Fields' (2004) 11(5) Organization 689; Vilmos Misangyi, Gary Weaver and Heather Elms, 'Ending Corruption: The Interplay among Institutional Logics, Resources, and Institutional Entrepreneurs' (2008) 33(3) Acad. Manag. Rev. 750; Frank Wijen and Shahzad Ansari, 'Overcoming Inaction through Collective Institutional Entrepreneurship: Insights from Regime Theory' (2007) 27(7) Organ. Stud. 1079

[206] Garud, Jain and Kumaraswamy (n 204)

[207] North (n 27), 16

[208] ibid

[209] ibid

[210] ibid, 19

cities as popular choice for international arbitration.[211] Though Beijing, Johannesburg, Moscow and Mumbai are unfavourable seats of arbitration with a rating of only one or two out of five.[212]

To respond to the needs of and developments in the ever-growing international commercial arbitration market "More than ever before, arbitration systems wishing to meet the changing needs of these heterogeneous array of existing and future players must enhance the universality, efficiency and flexibility of their rules and practices if they are to satisfactorily play the role expected from them".[213] Users do not need access to a variety of centres. Rather, they need competent centres that can satisfy their needs. The empirical evidence presented here allows for the conclusion that this institution operates in a free market economic system. Thus, it is an oligopoly because the majority share of the market belongs to a relatively small number of centres which hold the position as a pre-eminent location for international commercial arbitration.

Whilst there is no monopoly as such, there is also no perfect competition in this institution. Having only seven centres would be proportionate to the number of consumers and result in an equilibrium in the market and create a market economy based on perfect competition. This should abolish the current imperfect competition resulting from the oligopoly and semi-monopoly created by the majority share of the market belonging to a relatively small number of centres, which are distinguished certainly by their brand and location and maybe even quality.

A shift from the current market approach to an actual competitive market would represent a significant reform. It would refine choice and ensure effective, equitable, responsive and efficient delivery of arbitration proceedings and maximise organisational sustainability. This is particularly important if this process for adjudicating international commercial disputes is to continue to have a role in the modern world and meet the needs of tomorrow's international business. There is a need to build a model of organisational theory and practice within a system, which is proposed here in order to enhance both the centres' and users' experience.

[211] BLP 2014 Survey (n 25), 06

[212] ibid, 04

[213] Horacio A Grigera Naón, 'The Administration of Arbitral Cases under the 1998 Rules of Arbitration of the International Chamber of Commerce' (Biennial Conference of the International Federation of Commercial Arbitration Institutions, Geneva, October 1997) 11, 23

This is the institutional entrepreneurship present with regard to the arbitration centres – to create the environment for perfect competition and one that offers enforceability, fairness and speed. In the present conditions, it seems that perfect competition would be easily achieved by a supranational regulatory organisation under which arbitration centres would operate. Institutional change, or development, depends on the actors concerned to bring it about, either as a result of intended or unintended action. Intended action is often intervention whereas unintended action is based on passing of time. For the less known arbitration centres to realise a share of the market, in other words for their arbitration market to grow, institutional actors must enter into arbitration agreements nominating to arbitrate under the auspices of such centres and appoint less known arbitrators.[214]

After all, the most important advantage of international commercial arbitration is transnational adjudication by an impartial and neutral panel. This could be done under a single world-wide privately created and administered institution and not under many so-called 'institutions' located in different countries.[215] A small number of centres, as opposed to the current 207, which seems to be Smit's intention, would provide both the full measure of advantages of international commercial arbitration and the optimal means to eliminate present deficiencies and improving international arbitration.[216]

Non-existence of a regulatory body for the centres means that the centres' entry into the international commercial arbitration market is without having to satisfy criteria for such purpose, and so can liberally exit as well; or forced to. Each is totally independent and thus exercises a degree of power in and of itself without having to justify its actions to any authority. Each set and control the price it charges users of its services and there is no mechanism by which such prices can be qualified for fairness and legitimacy. Franck writes that "The legitimacy of a … rule-applying institution, is a function of the perception of those in the community concerned that … the institution, has come into being endowed with legitimacy: that is, in accordance with right process".[217]

[214] Onyema (n 2), 11

[215] ibid, 14

[216] ibid

[217] Franck (n 138), 711

International commercial arbitration centres are private business organisations. They would take any action that promises their continuing existence and profit making. Multiple institutional orders or alternatives present an opportunity for institutional entrepreneurship to change the existing arrangements.[218] Since contracting parties are not mandatorily required to submit to any particular international commercial arbitration centre, availability of such option would make deinstitutionalisation much easier. This is particularly true where the multiple centres do not share characteristics and become incompatible to the very purpose of the field.

The basis of international commercial arbitration is to avoid national courts of the contracting parties due to fear of potential bias. It does not seem logic to have in place international commercial arbitration centres in every country and city of the world. Particularly so when most do not get the chance to compete with their competitors. There are two reasons for this: (i) different institutional orders would be attractive to some actors but not others because of the difference in their preferences; and (ii) contradiction to the inherent characteristic of the institutional arrangement. A danger arises as a result of this contradiction. Actors who do not see the attraction for such contradiction make a conscious effort to eliminate the contradiction and implement institutional change to transform the existing arrangements.

How international commercial arbitration centres should develop in the future, Beer suggests that:

> "Dispute resolution centres must start to connect and collaborate, homogenise rules, share marketing resources, cluster the offering to present a unified message and enhance the efficiency of the marketing spend. Share facilities. International arbitration can involve people from all around the world. Technology can allow everyone to connect remotely. Work together to enhance interoperability and enforcement, as well as offering training and development. When these best practices are shared, the stronger centres bring up those in need of support. Success then can be shared. The needs are simple: enforceability, fairness and speed".[219]

[218] Sewell (n 164), 19. See also Clemens and Cook (n 204), 459

[219] Beer (n 150)

On 19 December 2017 SIAC releases a proposal for arbitral centres to adopt a protocol on cross-centre cooperation for the consolidation of international arbitral proceedings subject to arbitration rules of different centres. This should prove to be a successful initiative on the basis that "Networks may generate durable ties and practices through constitutive processes of social interaction or by shaping the opportunities and obstacles to exchange and cooperate".[220] This institution is very likely to benefit from such kind of inter-organisational dependence.[221] Only time will tell.

A supranational organisation would function to support not the individual operation of the seven centres but also their interdependence. A higher echelon with authority and responsibility between various levels of organised management would be in a better position to plan, direct and coordinate the operation of the arbitration centres. This type of authority is crucial to monitor the centres' actions and assignments and to set direct objectives and to ensure proper distribution of resources and provide direction for their progress and success.

4.7 Conclusion

This chapter seeks to determine which of the 207 international commercial arbitration centres that exist around the world would satisfy Onyema's five tools that an arbitration centre must have in place to effectively administer arbitration proceedings. A study of all the centres would be formidable. However, lack of sufficient data pertaining to them would make such exercise quite challenging. For this reason, an attempt to do so would, very possibly, be a pointless task. Instead, a more valuable investigation is to ascertain which of them satisfy the most important of the five tools, namely, which reveal 'some serious degree of permanence'. From an institutional theory point of view, this shows which is fully institutionalised.

---

[220] Clemens and Cook (n 204), 446. See also Walter W Powell, 'Expanding the Scope of Institutional Analysis' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (2nd edn, University of Chicago Press 1991) 183, 190; Lynne G Zucker 'Where Do Institutional Patterns Come From? Organizations as Actors in Social Systems' in Lynne G Zucker (ed), *Institutional Patterns and Organization: Culture and Environment* (HarperBusiness 1988) 23, 29

[221] Farok J Contractor and Peter Lorange, 'Why Should Firms Cooperate? The Strategy and Economics Basis for Cooperative Ventures' in Farok J Contractor and Peter Lorange (eds), *Cooperative Strategies in International Business* (Lexington 1988) 3. See also John Hagedoorn, 'Understanding the Rationale of Strategic Technology Partnering: Interorganizational Modes of Cooperation and Sectoral Differences' (1993) 14(5) Strat. Manag. J. 371

Using data from various surveys and also that collected for the specific purpose of conducting a comparative assessment of the centres, it appears that the majority would not satisfy the five tools. The present study shows a major imperfection in the existence of arbitration centres, particularly as autonomous private organisations. There are no objective criteria for corporations to employ in choosing between them. There is only subjective information for corporations to know which centres offer enforceability, fairness, speed, reputation, familiarity with proceedings, and an understanding of costs and fees. Knowing which possesses some serious degree of permanence, however, would allow corporations to objectively choose between them with some certainty about their proven track record.

The analytical exercise herein is intended to expose the arbitration centres by determining which demonstrate some serious degree of permanence so as corroborate the assertion that their existence is indispensable, useful or redundant. The noun 'permanence' communicates continued existence and condition of quality. Degree of permanence appears to be linked mainly to the number of arbitration requests that the centre receives, which can be seen from its annual caseload since its inception. A constant increase in caseload is perhaps the best indication of established degree of permanence.

Although not precisely determinant, but more likely than not, a centre's age indicates its caseload as those with the requisite degree of permanence are older. Thus, age and caseload would be the basic criteria for corporations to use in choosing between the centres. It is the use of such measures that make the ICC, LCIA, ICDR-AAA, CIETAC, SIAC, HKIAC, DIFC-LCIA and CRCICA the most prestigious centres with a proven record of serious degree of permanence. In fact, they dominate the international commercial arbitration market. Such dominance means that this market is an oligopoly and semi-monopoly.

Jurisdictions which do not provide arbitration-friendly environment affect the degree of permanence that centres thereto can develop. Potential business in such jurisdictions ends up with the oldest arbitration centres, meaning those with a proven record and serious degree of permanence. The result is that a handful of centres receive more work than others. This makes it clear, therefore, that existence of over 207 centres does not result in better accessibility or more

choice for corporations because the majority of the centres are morally or functionally thoroughly discredited by their age and caseload.

Analysis of the statistics presented here points to the potential for an isomorphic change because the majority of the centres are morally or functionally thoroughly discredited. The present structure of multiple arbitration centres lacks efficiency, transparency and most of all simplicity. It is essential to deal with the fundamental measure of incommensurability and improve and streamline the administration of international commercial dispute adjudication proceedings. To reflect best practice and standard, increase efficiency and respond to the developments in international commerce, the practice of international commercial arbitration in and of itself should adapt to recent developments communicated by survey results. What is needed to achieve this is not copious arbitration centres. It is institutionalisation of seven modern and multi-faceted arbitral centres to synchronise the dispute resolution needs of the international commercial community.

Objective facts obtained from survey results are valuable to design a road map for these seven centres. Onyema's five tools could be used to determine which centres are indispensable, useful and redundant. In other words, to decide which are pre-, semi and fully institutionalised. An institutional opportunity exists to eliminate the useful and redundant centres so that only the indispensable ones remain to compete in perfect competition and to offer corporations a real choice between a small number of centres.

Data presented allows for the indispensable centres in each continent to be chosen and to be granted jurisdictional legitimacy. Three arbitration centres are named herein for each continent and for the MENA region as the candidates for the role of the indispensable centre in the continent where it is located. It is envisaged that this exercise would result in the institutionalisation of the centres in the institution and provide meaning and stability therein. To achieve this, establishment of a supranational regulatory body appears necessary. Such a body would be obliged to implement these criteria and data and supervise their satisfaction by the centres. One essential function of this body would be to monitor the distribution of work between these centres to ensure equal degree of permanence by all. Absence of such a body makes

Onyema's tools and the data presented here nothing more than academic discourse.

Seven centres under the supervision of a regulatory body would enhance the jurisdictional authority, independence and prestige of international commercial arbitration centres. A centralised control model would enforce the centres to deliver their services in a harmonised, standardised and unified way. Moreover, it would introduce the notion of accountability. Due to their equal power and control, the centres would harness essential productivity, work integration and collective decision-making for the benefit of all. Such strength would allow the centres to discourage the emergence of *ad hoc* arbitration to take the place of administered arbitration. Moreover, such cohesion would allow the institution to resist competition from other dispute resolution processes such as litigation, mediation, conciliation, adjudication and negotiation.

How this institution could become harmonised, standardised and unified, and the benefits of such a structure, is discussed in the next chapter.

Chapter 5

International Commercial Arbitration: Harmonised, Standardised and Unified

5.1 Introduction

Aspiration as well as inspiration to change the present set up of international commercial arbitration are present. This is evident from both commentary and data from surveys on practices in and attitudes towards this social institution. This leads to the hypothesis that this institution is due for change and that change to the status quo would enhance it. To prove or disprove this, this dissertation investigates what institutional entrepreneurship opportunity exist to bring about change in this institution and determine if such opportunity is executed would enhance or enfeeble this institution.

To discover what institutional entrepreneurship opportunity exist to change this institution, an analysis of commentary from academics and practitioners is carried out and data from surveys are studied. The aim is to identify suggestions for change in and to this institution. It transpires that ample institutional entrepreneurship opportunity exist to effect positive change in this institution. The potential change identified include, but not limited to, the following: (i) settle on the definition of international commercial arbitration as a process; (ii) add an appeal layer to the process; (iii) bridge the gap between the four theories that are attributable to the legal nature of international commercial arbitration proceedings and the award that stems from it; (iv) reinstate the five lost advantages; and (v) reduce the number of arbitration centres from 207 to seven with jurisdictional authority.

Almost every recent commentary about this institution is based on a review of both its current state and an inquiry into its possible future.[1] Paulsson writes that "There is in sum, nothing

[1] Stavros Brekoulakis, Julian DM. Lew and Loukas A Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016); Beata Gessel-Kalinowska vel Kalisz (ed), *The Challenges and the Future of Commercial and Investment Arbitration: Liber Amicorum Professor Jerzy Rajski* (Court of Arbitration Lewiatan 2015); IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 7; Clyde Croft, 'The Future

eternal or inevitable about arbitration; it must find its meaning and its acceptance in the modern world it purports to serve. It cannot be static".[2] Owing largely to the demands of its users as evinced by results of surveys conducted in 1996;[3] 2006;[4] 2008;[5] 2010;[6] 2012;[7] 2013;[8] 2014;[9] 2015;[10] and 2016,[11] change in and to the institution seems urgent.

Further evidence to substantiate this urgency may emerge from the results of the '2018 International Arbitration Survey: The Evolution of International Arbitration'. It is launched by Queen Mary University of London (QMU) in collaboration with White & Case LLP (W&C). It aims to research the sentiment of the international arbitration community as a whole, meaning private practitioners, in-house counsel, arbitrators, academics and arbitral centre staff.

---

of International Investment Arbitration in Australia – a Victorian Supreme Court Perspective' (Law Institute of Victoria, 6 June 2011) <http://www.austlii.edu.au/au/journals/VicJSchol/2011/60.pdf> accessed 10 January 2018; Diego PF Arroyo, 'The Present and Future of International Commercial and Investment Arbitration: Is Arbitration in Crisis?' (Centre for Law & Business, National University of Singapore, Singapore 04 February 2016); Finland Chamber of Commerce, 'Challenges Facing International Commercial Arbitration - A Look Towards the Future' (The Arbitration Institute of the Finland Chamber of Commerce, Helsinki, 21 October 2011)

[2] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013), 13. See also Richard J Graving, 'The International Commercial Arbitration Institutions: How Good a Job are they Doing?' (1989) 4(2) Am. U. Int'l L. Rev. 319, 320 [hereinafter "Graving (n 2)"]

[3] Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (Kluwer Law International 1996), 30, 127-156 [hereinafter "AMIB 1996 Survey (n 3)"]

[4] Gerry Lagerberg and Loukas A Mistelis, 'International Arbitration: Corporate Attitudes and Practices 2006' <http://www.arbitration.qmul.ac.uk/research/2006/123975.html> accessed 12 December 2013, I [hereinafter "QMU-PwC 2006 Survey (n 4)"]

[5] Gerry Lagerberg and Loukas A Mistelis, 'International arbitration: Corporate Attitudes and Practices 2008' <http://www.pwc.co.uk/pdf/2008_international_arbitration_study.pdf> accessed 18 December 2013 [hereinafter "QMU-PwC 2008 Survey (n 5)"]

[6] Paul Friedland and Loukas A Mistelis, '2010 International Arbitration Survey: Choices in International Arbitration' <http://events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf> accessed 18 November 2015

[7] Paul Friedland and Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' <http://www.arbitration.qmul.ac.uk/docs/164483.pdf> accessed 23 May 2013 [hereinafter "QMU-W&C 2012 Survey (n 7)"]. See also Toby Landau and others, 'Seminar on Contemporary Challenges in International Arbitration' (Centre for Commercial Law Studies, Queen Mary University of London, 27 September 2012)

[8] Gerry Lagerberg and Loukas A Mistelis, '2013 Corporate Choices in International Arbitration: Industry Perspectives' <http://www.arbitration.qmul.ac.uk/docs/123282.pdf> accessed 11 September 2015 [hereinafter "QMU-PwC 2013 Survey (n 8)"]

[9] Nicholas Fletcher, 'International Arbitration Research based report on choice of venue for international arbitration' [2014] Berwin Leighton Paisner <http://www.blplaw.com/download/BLP_International_Arbitration_Survey_2014_FINAL.pdf> accessed 19 November 2015 [hereinafter "BLP 2012 Survey (n 9)"]

[10] Paul Friedland and Loukas A Mistelis '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 01 March 2016 [hereinafter "QMU-W&C 2015 Survey (n 10)"]. See also 'CIArb International Arbitration Conference' (Chartered Institute of Arbitrators Centenary Conference, London, 1-3 July 2015) <http://www.ciarb.org/about/centenary/centenary-papers> accessed 13 April 2016

[11] David McIlwaine and Loukas A Mistelis, '2016 International Dispute Resolution Survey: An insight into resolving Technology, Media and Telecoms Disputes' <http://www.arbitration.qmul.ac.uk/docs/189659.pdf> accessed 07 November 2017

Data from this survey is unlikely to be as helpful as it is expected. It is likely to be meaningful only to a very limited extent to configure the future of the institution. Such pessimism is explained by findings of the results of a survey by the IBA 2015 Subcommittee Report.[12] The data in this report is on regional perspectives about the current state and future of international arbitration. It finds that the future means something different to the arbitration communities around the world.

This conclusion is premised on the fact that arbitral seats and centres in Europe and North America continue to dominate. Arbitral seats and centres in Asia-Pacific are on the rise and are expected to continue to take market share away from those dominant. But the arbitral seats and centres in Africa and Latin America are in different stages of development and face different issues and challenges. Thus, the future of international commercial arbitration is divergent.[13]

Examination of the future of the institution starts in 1986 when Smit[14] presents that there should be a privately created and administered single world-wide arbitration institution, meaning centre. This would provide the impartial and neutral panel that arbitrating parties seek and eliminate deficiencies and improve the process. Graving's investigation of how good a job the arbitration centres are doing follows in 1989.[15] His conclusion is that they are doing very well indeed.

In 1991 Coulson writes that if arbitral procedures become uniform and arbitration proceedings occur within a common format, then commercial disputes will be decided in accordance with the expectations of the parties.[16] In 1993 Holtzmann[17] and Schwebel[18] propose that a council be

[12] Angeline Welsh, 'Executive Summary' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 7 [hereinafter "Welsh (n 12)"]

[13] ibid

[14] Hans Smit, 'The Future of International Commercial Arbitration: A Single Transnational Institution' (1986) 25(1) Colum. J. Transnat'l L. 9, 10 [hereinafter "Smit (n 14)"]

[15] Graving (n 2)

[16] Robert Coulson, 'The Future of International Commercial Arbitration' (1991) 17(2) Can.-U.S. L. J. 515, 518 [hereinafter "Coulson (n 16)"]

[17] Howard M Holtzmann, 'A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in Martin Hunter, Arthur L Marriott, VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Graham and Trotman/Martinus Nijhoff 1995) 109

created and integrated into the arbitral process to review and enforce international arbitration awards. In 1997 Arsić examines the potential and consequences of the place of arbitration no longer being a physical geographical location but the cyberspace whereat the proceedings are conducted over the internet, in effect being delocalised.[19]

In 2009 the J. B. Moore Society of International Law hosts a symposium to look at the future of international arbitration as its rapid expansion poses new challenges.[20] In 2010 Paulsson suggests that the well-established right of the parties to choose arbitrators should be dispensed with. Instead, the arbitral tribunal should be appointed by a neutral body in order to remove the moral hazard.[21] In agreement with him is van den Berg.[22]

All these endeavours can be summarised by the all-important question posed by Arden, namely, 'Is Commercial Arbitration the Future of Commercial Justice?'[23] Indeed, arbitration is more a dispute adjudication process than it is to do with justice. In this sense, 'justice' simply means the right process for adjudication of commercial disputes. It is, therefore, the all-important question in that regard. Moreover, it is the all-important question because Menon writes that:

> "But as we savour the moment, we should remain mindful that there is no place for complacency or reason to assume that this international system of dispute resolution which so many have invested so much in, will continue on its recent trajectory unaided.

---

[18] Stephen M Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in Martin Hunter, Arthur L Marriott, VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (Graham and Trotman/Martinus Nijhoff 1995) 115

[19] Jasna Arsić, 'International Commercial Arbitration on the Internet – Has the Future Come Too Early?' (1997) 14(3) J. Int'l Arb. 209

[20] J. B. Moore Society of International Law Symposium, 'International Arbitration: A Look to the Future' (J. B. Moore Society of International Law, University of Virginia School of Law, Charlottesville, 27 February 2009) <https://content.law.virginia.edu/news/2009_spr/jbmoore_conf.htm> accessed 16 December 2017

[21] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25(2) ICSID Review 339. See also Jan Paulsson, 'Are Unilateral Appointments Defensible?' (Kluwer Arbitration Blog 2 April 2009) <http://kluwerarbitrationblog.com/2009/04/02/are-unilateral-appointments-defensible/> accessed 13 September 2015

[22] Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush Arsanjani and Jacob Cogan (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2010) 821

[23] Mary Arden, 'Is Commercial Arbitration the Future of Commercial Justice?' (The London 2016 International and Commercial Law Conference, London, June 2016) <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/lj-arden-speech-arbitration.pdf> accessed 16 December 2017

> Murmurs of disaffection among users of arbitration have been mounting in recent years; and it is unlikely to be a coincidence that commercial courts around the world are gaining prominence at the same time".[24]

On the basis that murmurs of disaffection have been mounting in recent years, it is comprehensible why all eyes in the arbitration community are on its future. One of the reasons, it would appear, is that this institution is semi-institutionalised. Meaning that it has passed the pre-institutionalisation stage but is yet to become fully institutionalised. Tolbert and Zucker write that structures are either institutionalised or they are not and that an institution is the result of institutionalisation. This institution does not seem to have gone through the three-stage process of institutionalisation, which is: (1st) habitualisation (pre-institutionalised); (2nd) objectification (semi-institutionalised); and (3rd) sedimentation (fully institutionalised).[25]

This would explain why the change proposed by Smit in 1986 and Holtzmann and Schwebel in 1993 did not materialise. At the time the institution was going through the second stage of the institutionalisation process and was becoming pre-institutionalised. At the time the institution had just come out of its pre-institutionalisation phase (habitualisation) when arbitration rules were no longer being constructed by merchants as they traded across borders, but were formulated by arbitration centres. As arbitration centres were sprouting up all over the world, particularly in 1980s and 1990s, the institution was going through its semi-institutionalisation phase (objectification). The institution was in its maturation stage.[26] Now that both habitualisation and objectification appear to have taken their course, it follows that international commercial arbitration is ready to go through sedimentation and become fully institutionalised.

There is another reason for growing murmurs of disaffection and momentous attention on the

---

[24] Sundaresh Menon, 'Patron's Address' (Chartered Institute of Arbitrators London Centenary Conference, July 2015), para. 5 <https://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-(for-publication).pdf?sfvrsn=0> accessed 16 December 2017

[25] Pamela S Tolbert and Lynne G Zucker, 'The Institutionalization of Institutional Theory' in Stewart R Clegg, Cynthia Hardy and Walter R Nord (eds), *Handbook of Organization Studies* (SAGE 1996) 175 [hereinafter "Tolbert and Zucker (n 25)"]. See also David Strang and Wesley D Sine, 'Interorganizational institutions' in Joel AC Baum (ed), *Blackwell Companion to Organizations* (Blackwell Scientific Publications 2002) 495, 497 [hereinafter "Strang and Sine (n 25)"]

[26] Graving (n 2), 319

future of international commercial arbitration. Institutions are composed of the 'cultural-cognitive', 'normative' and 'regulative' pillars.[27] This one, however, seems to be grounded upon 'cultural-cognitive' and 'normative' pillars only. Its regulative legitimacy derives from legislation and national courts of sovereign states. Blackaby et al. write that:

> "In short, this essentially private process has a public effect, implemented with the support of the public authorities of each State and expressed through that State's national law. This interrelationship between national law and international treaties and conventions is of vital importance to the effective operation of international arbitration".[28]

Although the functional nature and purpose of international commercial arbitration is "the aversion of business men to courts of law",[29] the process does not currently guarantee complete evasion of national courts. National laws and courts provide the regulative pillar for the institution. This is because the institution is not regulated by any organisation.

At least four explanations are given in this dissertation to corroborate the conclusion that this institution is not fully institutionalised and that the regulative institutional pillar is absent. These stem from the concepts discussed in chapters 2 to 4, which are summarised herein.

A definition of international commercial arbitration does not exist. Mann[30] writes that the numerous attempts made to formulate a definition have failed. Academics and practitioners alike use five nouns, namely, 'process', 'system', 'mechanism', 'mode' and 'means' to define this institution. Moreover, Mann writes that even if one is formulated, it is uncertain it would constitute a useful contribution. A definition pertaining to its nuclear meaning in practice is

---

[27] William R Scott, *Institutions and Organizations* (2nd edn, SAGE 2001), 48, 52 [hereinafter "Scott (n 27)"]. See also Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organisational Analysis* (2nd edn, University of Chicago Press 1991), 8

[28] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009), 29 [hereinafter "Blackaby et al. 2009 (n 28)"]. See also Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 4

[29] Lynden L Macassey, 'International Commercial Arbitration-Its Origin, Development and Importance' (1938) 24(7) ABA J. 518, 518. See also Julian DM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arb. Int'l 179, 179 [hereinafter "Lew (n 29)"]

[30] Francis A Mann, 'Lex Facit Arbitrum' (1986) 2(3) Arb. Int'l 241, 245

mandatory. Thus, as the course of international commercial arbitration proceedings is delineated, a comprehensive definition transpires, though not suggested herein.

In accordance with the philosophy of language and purposes of interpretation of its identity, function, essence, concept, meaning, boundary, legal status and substance, it transpires that international commercial arbitration is a process and not a system. It is but a framework.[31] A definition is required to eliminate conjecture and to permit a more in-depth analysis of the institution so as to discover the potential institutional entrepreneurship opportunity; and this is what is gained from the definitional exercise conducted.

Moreover, it is a process for dispute dissolution and not resolution. The reason is that the regulative institutional pillar is provided by national laws and courts. In essence they give the process its legitimacy in that "national courts could exist without arbitration, but arbitration could not exist without the courts".[32] But it is such differences in the structures of international law and national systems that "do not justify closing the door to philosophical inquiry of the international legal system",[33] such as this institution. Particularly so when historically the regulation of arbitration by national law was non-existent or minimal as judicial mechanisms and national laws were irrelevant to the institution.[34]

A fundamental philosophical inquiry pertaining to this institution is investigating where the legal nature of the arbitration process and award stem from. It becomes clear that there are other three or four theoretical foundations upon which the institution could be based. It could be contractual;

[31] David D Caron, 'Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2008) 32 Suffolk Transnat'l L. J. 513, 516

[32] Blackaby et al. 2009 (n 28), 439. See also John Lurie, 'Court Intervention in Arbitration: Support or Interference?' (2010) 76(3) Int'l J. of Arb. Med. & Disp. Man. 447 [hereinafter "Lurie (n 32)"]; Karen Gough, 'Judicial Supervision and Support for Arbitration and ADR' [2006] <http://www.39essex.com/docs/articles/KGO_Judicial_Supervision_Sept_2006.pdf> accessed 29 July 2015; *Coppée-Lavalin S.A./N.V. v Ken-Ren Chemicals and Fertilisers Limited (in liquidation in Kenya)* [1994] 2 Lloyd's Rep. 109 [HL], [116] (Lord Mustill)

[33] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Ashgate 2001), 104

[34] Lew (n 29), 182. See also Mahmood Bagheri, *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration* (Kluwer Law International 2000), 115; Catherine Kessedjian, 'Determination and Application of Relevant National and International Law and Rules' in Loukas A Mistelis and Julian DM Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2008) 71, 81; Thilo Rensmann, 'Anational Arbitral Awards–Legal Phenomenon or Academic Phantom?' (1998) 15(2) J. Int'l Arb. 37; Hans Smit, 'A-National Arbitration' (1988-1989) 63 Tul. L. Rev. 629

national; hybrid; or autonomous. Each is plausible. This makes it an "esoteric area of law".[35] Gaillard advances the most recent phenomenon. He writes, however, that international arbitration "can be viewed as a body of norms sufficiently organized, complete, and effective to qualify as a system"[36] and that "international arbitration qualifies as a legal order in its own right".[37]

Since the regulative institutional pillar is provided by national laws and courts, it would not be easy to accept this institution as a system because it is not "a complex whole".[38] This substantiates the fact that it is in fact a process. Gaillard's argument is, therefore, easily discreditable. Thus, the institutional entrepreneurship opportunity is to bridge these three or four different theories and settle on one so as to enable the institution to become a system and make the legal nature of the arbitration process and award clear explicit and obvious.

The symbolic elements of this institution are that the process is: (1) autonomous, (2) neutral, (3) informal or flexible, (4) private, (5) confidential, (6) expeditious, (7) cost effective, (8) specialist (9) final and binding, and (10) enforceable. These 10 elements, herein referred to as the 10 ribs that hold open this umbrella institution, are the traditional advantages of this institution. They that make this institution a *de facto* choice for commercial disputants.[39] It is gathered from the cited surveys, however, that 'expense', 'time', 'national court intervention' and 'lack of appeal structure' are the disadvantages of this institution.[40] These disadvantages represent five ribs,

[35] QMU-PwC 2006 Survey (n 4), I

[36] Emmanuel Gaillard, 'The Emerging System of International Arbitration: Defining "System"' (2012) 106 Proceedings of the Annual Meeting-American Society of International Law 187, 287 [hereinafter "Gaillard 2012 (n 36)"]

[37] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers/Brill Academic 2010), 288 [hereinafter "Gaillard 2010 (n 37)"]. See also Teresa Cheng, 'Features of Arbitral Practice that Contribute to System Building' (2012) 106 Proceedings of the Annual Meeting-American Society of International Law 292

[38] ibid

[39] Stacie I Strong, 'Research in International Commercial Arbitration: Special Skills, Special Sources' (2009) 20(2) Am. Rev. Int. Arbitr. 119, 156; Justin Michaelson and Jamie Maples, 'Taking Clients to ADR' (2005) 155 NLJ 725, 725; Justin Michaelson, 'The A-Z of ADR - Pt II' (2003) 153(7064) NLJ 105; George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2012) 37 Yale J. Int'l L. 1, 2 [hereinafter "Bermann (n 39)"]; QMU-PwC 2006 Survey (n 4), 2

[40] QMU-PwC 2006 Survey (n 4), 7. See also QMU-PwC 2008 Survey (n 5), 2; QMU-PwC 2013 Survey (n 8)"], 8; QMU-W&C 2015 Survey (n 10), 2, 5, 7, 10, 16, 24; Chartered Institute of Arbitrators (CIArb), 'CIArb Costs of International Arbitration Survey 2011' <http://www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf> accessed 05 February 2014 [hereinafter "CIArb 2011 Survey (n 40)"]; Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, JurisNet 2014), 1235; Klaus Sachs, 'Time and Money: Cost Control and Effective Case Management' in Loukas A Mistelis and Julian DM Lew, *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 103-115

which make the institution less (1) autonomous; (5) confidential; (6) expeditious; (7) cost effective; and (9) final and binding. Thus, five of the 10 traditional advantages associated with the institution are lost for they have become its disadvantages.

As a result, international corporations are looking for alternatives to international commercial arbitration. Strong writes that "One of the more popular alternatives is mediation".[41] Such disruption to the established order appears to be a product of exogenous shock brought about by concerns about rising costs, delays, and procedural formality of this process. Such concerns give rise to institutional entrepreneurship opportunity, namely, to reinstate the five lost advantages.

Another persuasive argument that this institution is a process is that both *ad hoc* and administered international commercial arbitration proceedings could take place anywhere in the world.[42] This is party autonomy, which is the regal foundation of this institution.[43] Of interest is administered arbitration because the majority of international arbitration proceedings are conducted under the auspices of any one of more than 207 private international arbitration centres in 102 countries around the world.[44] Administered arbitration avails a tried and tested arrangement.

Onyema offers five tools, namely (i) Modern arbitration rules; (ii) Modern and efficient administrative and technological facilities; (iii) Security and safety of documents; (iv) Expertise within its staff; and (v) Some serious degree of permanence,[45] that an arbitration centre must have in place to effectively administer arbitration proceedings. These could be used to measure

[41] Stacie I Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' (2014) 45 Wash. U.J.L. & Pol'y 11, 11

[42] Nigel Blackaby and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet and Maxwell 2004), 1 [hereinafter "Blackaby et al. 2004 (n 42)"]

[43] Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24(3) J. Int'l Arb. 327, 328. See also Blackaby et al. 2004 (n 42), 8-9, 315; Gary B Born, 'Keynote Address: Arbitration and the Freedom to Associate' (2009) 38(7) Ga. J. Int'l & Comp. L. 7, 15

[44] Alec S Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) [hereinafter "Sweet and Grisel (n 44)"]. See also Laura F Brown, 'Arbitral Institutions Active in International Commercial Arbitration' in Laura F Brown (ed), *The International Arbitration Kit: A Compilation of Basic and Frequently Requested Documents* (4th edn, America Arbitration Association 1993) 387; Richard Happ, 'Happ's Arbitration Links' <http://www.arbitration-links.de/00000099670ba0802/index.html> accessed 12 July 2015

[45] Onyema (n 2), 10

which international commercial arbitration centres are successful and to find out which are more or less likely to be chosen by contracting parties. These tools are utilized to determine if the existence of a particular arbitration centre is indispensable, useful or redundant. In turn, it allows for a decision on whether more centres means better accessibility for corporations.

Statistics from 33 of the 207 international arbitration centres in the world, for the purpose of determining which of them establish some serious degree of permanence based on the number of arbitration requests they have administered between 2000 and 2015, reveal that only 10 centres, namely, ICC; LCIA; SIAC; JCAA; CRCICA; ICDR-AAA; SCC; SCAI; CIETAC; and HKIAC are the most preferred by international corporations. These are considered to be the "major arbitration houses"[46] for they receive the highest number of requests for arbitration annually. They appear to be an indispensable part of the institution.

Outside this group, there is a handful of centres which appear to establish some serious degree of permanence. Their presence within the institution could be considered useful. The majority, however, do not demonstrate some serious degree of permanence and they would in fact be deemed redundant. This makes it clear, therefore, that existence of over 207 centres does not result in better accessibility or more choice for corporations because the majority of the centres are morally or functionally discredited by their caseload. Thus, the institutional entrepreneurship opportunity here is to reduce the number of arbitration centres from 207 to seven and grant them jurisdictional authority by locating one in each continent and one in the Middle East region.

In sum, the hypothesis that this institution is due for change appears proven. Institutional entrepreneurship opportunity exist to bring about change in and to this institution that, if executed, would enhance it. There is opportunity to: (i) create a new component in this institution; (ii) change the disadvantages of this institution into advantages again; (iii) maintain it as the *de facto* process for dissolution of international commercial dispute; and (iv) destroy the

[46] QMU-PwC 2006 Survey (n 4), 2, 12; QMU-PwC 2008 Survey (n 5), 4, 15. See also Walter Mattli and Thomas Dietz (ed), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014), 2; Smit (n 14), 2; Sweet and Grisel (n 44), 45; Christopher R Drahozal, 'Private Ordering and International Commercial Arbitration' (2009) 113(4) Penn. St. L. Rev. 1031; Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Wolters Kluwer 2010), 46; CIArb 2011 Survey (n 40)

potential for any other ADR process to become the *de facto* process for dissolution of international commercial dispute. Implementing such institutional opportunity should eliminate deficiencies in the institution and enhance its operational functionality. This should increase its legitimacy as a result of the pursuit for efficiency and effectiveness.

There is cogent evidence that this institution is a process, is without a regulative institutional pillar and is semi-institutionalised. The institutional entrepreneurship opportunity presented here is, therefore, to make this institution a system so that it comprises of all three institutional pillars and become fully institutionalised. It is recommended that this would be better achieved by the creation of a supranational regulatory body for the institution. A good name for this body would be the International Centre for Arbitration of Commercial Disputes (ICACD). Its aim would be to make this institution a harmonised, standardised and unified single supranational system so as to secure its absolute legitimacy in the modern world.

5.2 How likely is it that the Institution's Actors Would Accept Supranational Regulation?

A supranational body to oversee international commercial arbitration is a concept that the international commercial arbitration community is likely to oppose unreservedly because this institution is practice-oriented. As a result, actors in this institution are likely to perceive this idea as controversial and based on unsustainable reasoning. Welsh writes that "There is little appetite for a truly international framework, with a near universal rejection of concepts such as an a-national award and a supranational body to oversee the arbitration process and arbitral awards".[47] Such a body would be deemed unnecessary mainly because it appears certain to the institution's community that arbitration will remain prevalent unless and until litigation satisfies commercial disputants.[48] Carbonneau writes that arbitration has become a legal and adjudicatory necessity and makes the conduct of global commerce possible.[49]

Respondents to the IBA 2015 Subcommittee Report provide regional perspective on the

[47] Welsh (n 12), 7-8

[48] Christopher Coakley, 'The Growing Role of Customized Consent in International Commercial Arbitration' (2000) 29 Ga. J. Int'l & Comp. L. 127, 130

[49] Thomas E Carbonneau, *The Law and Practice of Arbitration* (5th edn, Juris 2014), 593

possibility for a supranational body to oversee international arbitration. Africa's response is that efforts to create a supranational arbitral body in the region have not been successful. A key challenge is the ability of member states to enforce rules 'uniformly and fairly' across the continent's jurisdictions. Yet, respondents express that the establishment of a supranational arbitration centre could be driven by large corporations if there is a commercial need for it.[50] Commentary and data presented in this dissertation demonstrates that there is a need for such a body globally, not just for Africa.

Respondents in Asia-Pacific are unconvinced by the idea and see that: (i) the domestic laws on arbitration of different jurisdictions; (ii) the inequality of development in the jurisdictions; and (iii) the varying viewpoints in different jurisdictions about arbitration as a dispute adjudication process as obstacles to the creation of a supranational body.[51] Respondents in Hong Kong are keen on the proposal by the Association of Southeast Asian Nations (ASEAN) to form a body that would pre-approve arbitral awards to ensure enforcement within the ASEAN region as part of its integrated ASEAN Economic Community (AEC) plan.[52] In essence, in recognising that the difficulties with enforcing arbitral awards,[53] Hong Kong would like to create a body similar to that proposed by Holtzmann and Schwebel 25 years ago.

Europe's view on the matter is that a supranational body is not a real possibility in the near future due to lack of political will or consensus and that such a body would be impractical, unwieldy, bureaucratic and too formal. Some acknowledge that such a system would offer the following desirable advantages: (i) ensure uniformity on annulment proceedings; (ii) remove the influence of local courts; (iii) act as a quality controller; and (iv) oversee a binding arbitration code of

[50] '9.1 Africa' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 44, paras 12-13

[51] '9.2 Asia-Pacific' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 64

[52] Alex Larkin, 'Commercial Arbitration in the ASEAN Region Poised to Increase Confidence in Foreign Investment' (2017) 45(3) International Law News <https://www.dfdl.com/wp-content/uploads/2017/04/ILN_v45n3_Winter17_Larkin2.pdf.pdf> accessed 16 January 2018

[53] See for example Susan Choi, 'Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions' (1995) 28 N.Y.U.J. Int'l L. & Pol. 175; Joseph T McLaughlin and Laurie Genevro, 'Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts' (1986) 3 Int'l Tax & Bus. Law 249

ethics to govern arbitral proceedings.[54] Opinion is obviously split, but either the voice of the minority or that of the majority would prevail if a decision is to be made at on the matter.

For North America, the majority believe that there should not be a supranational body and that it is highly unlikely that one will emerge in the foreseeable future because: (i) its creation is not feasible; (ii) the most efficient and beneficial structure is the 'free market'; (iii) the institutions that currently exist, such as the IBA, are quite effective at promoting best practices and encouraging necessary harmonisation; (iv) too much homogeneity can be problematic and diversity is preferable to meet varying cultural expectations; (v) arbitral centres can enforce good practices with respect to predictability of the process, the award and the ethical regulation; (vi) the decentralised *ad hoc* nature of the process is its major advantage; and (vii) both states and stakeholders will be concerned about the propriety, independence and direction of such a body. Nevertheless, a few respondents express that a supranational organisation could be a positive development.[55] Again, opinion is split, but the minority or the majority stance will prevail.

This question does not appear to have been put to respondents in Latin America and the Middle East and North Africa (MENA) region as there is no feedback from them in the report.

As credibly definite that the report's blanket conclusion that there is a near universal rejection for a supranational body to oversee the arbitration process and arbitral awards appears, it does not proscribe the question whether a supranational body to oversee the arbitration process and arbitral awards would enhance the arbitration process? Therefore, it is asked herein for there are reasons that make its existence desirable.

An assessment of the regional perspectives makes it difficult to comprehend the report's blanket conclusion. It can be gathered from the report that the creation of such a body is not completely

[54] '9.3 Europe' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 75, paras 13.1-13.2 [hereinafter "9.3 Europe in IBA 2015 Subcommittee Report (n 54)"]

[55] '9.6 North America' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 102, paras 13.1-13.3

precluded, but that the community would need evidence to be convinced of it. It appears that what must be proven to change the opinion of the majority is that: (i) greater uniformity is desired or needed;[56] (ii) harmonisation cannot be a bottom-up process rather a top-down one;[57] (iii) political will and consensus could quite easily be stimulated;[58] (iv) the current trend towards regionalism and arbitration rules becoming more homogenous would not be affected;[59] and (v) rise in international arbitration interest and practice in all six regions would not be hindered.[60] Then the community is likely to accept the idea of a supranational regulatory body for the institution.

As a matter of act, the report lends support to the submission that the creation of a supranational regulatory body is likely to be realised sooner than later. Welsh writes that:

> "As the practice of international arbitration begins to develop globally, two broad trends may be observed. First, there is *a growing standardisation of international arbitration practice*. The biggest indicators of this are the *convergence of arbitral institutional rules* and a greater number of arbitral seats where parties can expect a modern and *pro-arbitration approach from the judiciary*. Secondly, as *international arbitration practice becomes more standardised*, the handling of international arbitration disputes *tends to stay within a particular region* as certainty and confidence in the arbitration process within that region grows".[61]

Furthermore, the report is clear that those in favour of a supranational body cite the potential advantages including, but not limited to: (i) the removal of unsupportive court intervention; (ii) uniformity over annulment proceedings; and (iii) regulation of ethical issues and quality.[62] There

[56] Swee Yen Koh, Sue Hyun Lim and James Morrison, 'Chapter 3: Asia-Pacific' in IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx> accessed 13 March 2016, 23

[57] 9.3 Europe in IBA 2015 Subcommittee Report (n 54), 75

[58] Welsh (n 12), 14

[59] ibid, 8

[60] ibid, 7

[61] ibid *(italicisation does not appear in the original text, but it is added for emphasis)*

[62] ibid, 14

are at least three reasons to support the creation of a supranational regulatory body. It seems that its existence would enhance this institution by harmonising, unifying and standardising some aspects of the institution. Thus, there is institutional entrepreneurship opportunity in this regard.

Of course, to convince the international commercial arbitration community that a supranational regulatory body would not be an easy task, yet not an impossible one either. However, to alter the prevalent stance, the starting point would be Albert Einstein's three rules of work, namely:

1. Out of clutter, find simplicity;

2. From discord make harmony; and

3. In the middle of difficulty lies opportunity.[63]

This dissertation undertakes to identify the challenges facing this institution and to suggest ways to find simplicity, to create harmony, and to eradicate the difficulties that cause the murmurs of disaffection. It leads to the finding that without the establishment of a supranational regulatory body, it appears that the challenges facing this institution would not be resolved. The aim of this body would to be to effect centralised control as opposed to the present distributed control. A harmonised, unified and standardised structure would produce centralisation of authority.

An inimitable institutional entrepreneurship opportunity exists – to create a supranational regulatory organisation for this institution. It could be achieved by the adoption of Fayol's principles of management;[64] together with Weber's bureaucratic structure;[65] and Schumacher's theory of large scale organisation.[66] These are presented in brief to demonstrate both the need for and the advantages of a supranational regulatory body and the elements that such a body would

[63] Mirjana R Gearhart, 'FORUM: John A Wheeler: From the Big Bang to the Big Crunch' (1979) 1(4) Cosmic Search <http://www.bigear.org/vol1no4/wheeler.htm> accessed 10 January 2018

[64] Henri Fayol, *General and Industrial Management* (Constance Storr tr, Martino 2013). See also Frederick W Taylor, *The Principles of Scientific Management* (Martino 2014); Jean-Louis Peaucelle and Cameron Guthrie, *Henri Fayol, the Manager* (Routledge 2016)

[65] Max Weber, *Weber's Rationalism and Modern Society: New Translations on Politics, Bureaucracy, and Social Stratification* (Tony Waters and Dagmar Waters eds and trs, Palgrave MacMillan 2015)

[66] Ernst F Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered* (Vintage Books 1993) [hereinafter "Schumacher (n 66)"]

comprise of so as to prove that it would be a positive development in and to the institution.

5.3 What Would Supranational Regulation Entail?

To understand what it would mean if this institution is subjected to supranational regulation, concepts developed by Fayol, Weber and Schumacher require consideration for such a system.

Fayol develops the general theory of business administration and management, which encompasses 14 principles of management. These are:

1. Division of work – assignment of tasks to groups and teams of personnel in the organisation to complete the whole job increases efficiency and productivity.

2. Authority and Responsibility – authority is the right of superiors to give orders to and obtain obedience from subordinates, and responsibility is to safeguard against abuse of authority.

3. Discipline – effective rules and procedures to govern the organisation are necessary for good discipline and obedience from personnel.

4. Unity of command – orders should derive from one superior only.

5. Unity of direction – achievement of organisational activities should be from following the plan directed by one manager.

6. Subordination of individual interest – interests of personnel should not take precedence over the interests of the organisation as a whole.

7. Remuneration of personnel – a fair wage must be paid to personnel for their services.

8. Centralisation and decentralisation – the degree to which subordinates are involved in decision making requires a balanced division between upper and lower management where the former establishes broad strategic plans and policies and the latter implements and interprets them.

9. Scalar chain – communication should follow a vertical line of authority from top management to the lowest level to ensure formal organisational control.

10. Order – there should be systematic arrangement of men, machine, material etc. to ensure that everything is in its right place at the right time.

11. Equity – the line of authority from top management should be kind and fair to the lowest level so as to secure devoted, committed, compliant and loyal personnel.

12. Stability of tenure of personnel – orderly planning regarding personnel should be in place to avoid high turnover and inefficiency.

13. Initiative – personnel who possess and carry out new ideas will exert high levels of effort.

14. Esprit de corps – harmony, morale and unity within the organisation is achieved through the promotion of team spirit.[67]

In addition, Fayol writes that there are five core functions at managerial level, which are:

(i) Planning – for the organisation to meet its objectives;

(ii) Organising – the relevant material and human resources to effect the objectives;

[67] Carl A Rodrigues, 'Fayol's 14 Principles of Management Then and Now: A Framework for Managing Today's Organizations Effectively' (2001) 39(10) Manag. Decis. 880

(iii) Commanding – giving direction for the performance of the necessary tasks;

(iv) Coordinating – making sure that the desired goals are achieved using the available resources and within the activities of the organisation; and

(v) Controlling – monitoring the planning, the organising, the commanding, and the coordinating to ensure that they are being carried out properly.

Fayol's principles, which in essence describe a systemised institution or organisation, and remain relevant today,[68] give rise to bureaucracy.

Weber's study of bureaucracy in 1922 leads to the definition of the characteristics of a bureaucratic structure. He writes that "Bureaucracy is the means of carrying 'community action' over into rationally ordered 'social action'".[69] As a power instrument of the first order, it is for societalising relations of power because it is the most rational means of carrying out imperative control over human beings. Once it is fully established it is a structure that is hard to destroy.

It controls the administrators, the input and the output, which allow for the community's needs and expectations to be attained with the highest degree of efficiency.[70] Weber's notion of bureaucracy is that it maintains a 'rational-legal authority' in society as it is a form of legitimate domination.[71] It is based on the science of administration and it is, therefore, suitable for both the public and private sectors.[72] Thus, it can be implemented in this institution as required.

Bureaucracy is the power of the office.[73] Hummel writes that:

[68] Jacqueline McLean, 'Fayol - Standing the Test of Time' (2011) 74 Br. J. Adm. Manag. 32. See also Michael J Fells, 'Fayol Stands the Test of Time' (2000) 6(8) J. Manag. Hist. 345; Jean-Louis Peaucelle and Cameron Guthrie, 'The Private Life of Henri Fayol and his Motivation to Build a Management Science' (2012) 18(4) J. Manag. Hist. 469

[69] Max Weber, *Bureaucracy* (Oxford Press 1946), 228 [hereinafter "Weber (n 69)"]. See also William R Scott and Gerald F Davis, *Organizations and Organizing: Rational, Natural and Open System Perspectives* (Routledge 2016), 48

[70] Weber (n 69), 337. See also Jay M Shafritz and Albert C Hyde, *Classics of Public Administration* (8th edn, Cengage Learning 2016)

[71] Weber (n 69), 324-328. See also Richard J Stillman, *Public Administration: Concepts and Cases* (7th edn, Houghton Mifflin 2000), 51 [hereinafter "Stillman (n 71)"]

[72] Weber (n 69), 221. See also Hal G Rainey, *Understanding and Managing Public Organizations* (5th edn, Jossey-Bass 2014)

[73] Ralph P Hummel, *The Bureaucratic Experience: The Post-modern Challenge* (5th edn, Routledge 2008), 7. See also Ralph P Hummel,

> "In conceiving the thought that an office could rule, the designers had made a discovery: people could orient their actions toward an idea instead of a human leader. This idea could become law for them. And this law would be legitimate, a product of their own making, by becoming embedded and available to all in published rules. To ensure compliance, there would be regulation and enforcement by the impersonal office. In this office, the present tenant is held accountable. But he or she will claim to be not personally responsible as long as he or she follows the rules, the law, and the impersonal idea".

Weber provides the definition of the characteristics of a bureaucratic structure, which are:

1. Hierarchical organisation – ranking of positions in descending order in which supervision and control of the lower level position depends on that which is above it;

2. Formal lines of authority (chain of command);

3. A fixed area of activity;

4. Rigid division of labour – work should be divided into specialised elements of the whole job so as to allow the personnel carrying out such work to become an expert in it in the course of time;

5. Regular and continuous execution of assigned tasks;

6. All decisions and powers specified and restricted by regulations;

7. Officials with expert training in their fields;

'Bureaucracy' in Jay M Shafritz (ed), *Defining Public Administration: Selections from the International Encyclopedia of Public Policy and Administration* (Westview Press 2000) 121

8. Career advancement dependent on technical qualifications; and

9. Qualifications evaluated by organisational rules, not individuals.

Bureaucracy carries many advantages including, but not limited to, the following:

1. Defined and strictly applied rules, regulations and procedures are followed by the personnel. This leads to consistency in behaviour.

2. Defined duties and responsibilities prevent overlapping or conflicting of the lines of authority and the division of labour. So, rationality prevails.

3. Selection and promotion of personnel is based on competence and skills and expertise to ensure optimum utilisation of human resources. Division of labour allows for the development of expertise within the selected and promoted personnel. Therefore, specialisation dominates.

4. Record keeping is mandatory for all activities, transactions and decisions, which allows retrieval for future use. Organisational consistency is attained.

5. Activities, transactions and decisions are governed by rational and objective considerations and not personal involvement, emotions or sentiments. This way predictability is achieved.

In his presentation of a theory of large scale organisation, formed of five principles, Schumacher writes that centralisation and decentralisation should not be considered as mutually exclusive because "centralisation is mainly an idea of order; decentralisation, one of freedom".[74] The distinction is better understood by the fact that "In any organisation, large or small, there must be a certain clarity and orderliness; if things fall into disorder, nothing can be accomplished" because "Order requires intelligence and is conducive to efficiency; while freedom calls for, and

[74] Schumacher (n 66), 204

opens the door to, intuition and leads to innovation".[75] Order is even more important if an organisation is large. Furthermore, he writes that:

> "Socialists should insist on using the nationalised industries not simply to out-capitalise the capitalists -- an attempt in which they may or may not succeed -- but to evolve a more democratic and dignified system of industrial administration, a more humane employment of machinery, and a more intelligent utilization of the fruits of human ingenuity and effort. If they can do this, they have the future in their hands. If they cannot, they have nothing to offer that is worthy of the sweat of free-born men".[76]

The five principles of Schumacher's theory of large scale organisation are also relevant to this discourse on structuring of international commercial arbitration. They are:

1. The Principle of Subsidiarity. The principle of subsidiary function is premised on the large organisation being made up of many semi-autonomous units possessing large amount of freedom and responsibility for creativity and entrepreneurship, but that the lower level is incapable of fulfilling a particular function satisfactorily and that the higher level can do better.

2. The Principle of Vindication. A central authority will have, as one of its most important duties, to defend, to prove to be true and valid; to justify; and to uphold the organisation in general but more importantly the units thereto so as to ensure satisfactory performance of the organisation's business.[77] To vindicate, the central body must be armed with a number of items to measure output, productivity, expenditure etc. so as to quantify the loss and profit or loss of the units specifically, but more generally for accountability with regard to observation of the rules and policies of the organisation. For this purpose, the central body must apply the concept of rents and subsidies to the units. A more profitable unit must

[75] ibid, 203

[76] ibid, 220

[77] ibid, 206

pay an appropriate rent and a disadvantaged one must be granted the necessary subsidy so as to sufficiently equalise the achievement of profit by the units.

He writes that "If such an equalisation is needed but not applied, the fortunate units will be featherbedded, while others may be lying on a bed of nails. This cannot be good for either morale or performance".[78]

3. The Principle of Identification. Each subsidiary unit must submit to the central body a profit and loss account and a balance sheet to measure its financial contribution, if any, to the organisation. An important task for the central body is to conduct a full efficiency audit to objectively assess the units' real and potential economic substance, which diminishes with loss and grows with profit. The significance of identifying the profit and loss of a unit is for the central body to decide to reinforce success, particularly where it has paid rent, or discriminate against failure, especially if it has received subsidy.[79]

4. The Principle of Motivation. The health of a large organisation is dependent on motivating the units to meet challenges and reward their success.[80]

5. The Principle of the Middle Axiom. A central body must strike a balance between establishing order and looking after the freedom and creative contribution of the units. Schumacher writes that "What is required is something in between a middle axiom, an order from above which is yet not quite an order".[81] A middle axiom is where the central body neither preaches nor issues instructions, but implements the necessary change, accepted as a self-evident truth which is assented to as soon as enunciated,[82] without impairing the freedom and responsibility of the units.

[78] ibid, 207

[79] ibid, 208

[80] ibid

[81] ibid, 211

[82] ibid

In consideration of these theoretical bases, it is time to discover bureaucracy for international commercial arbitration. Here is a summary of the whys and wherefores.

5.4 Opportunity for Institutional Entrepreneurship: To Harmonise, Standardise and Unify the Institution

Why a supranational regulation? Quite simply, to harmonise, standardise and unify the institution. In 1987 Jarvin writes "There is no uniform international arbitral procedure, and let's hope that there never will be one".[83] In 2009, however, he questions if the numerous conferences celebrating international arbitration in fact: (i) dissimulate its weaknesses; but still (ii) promote its continued success. The reason is that, characteristically, participants at these conferences are the professionals who represent "the international commercial arbitration circuit (or circus) sharing self-interest and, in some case, self-satisfaction" and not the contracting or arbitrating parties.[84] In 2010 Paulsson asks: "Can we, in this fluid universe, find an organising principle to guide our appraisal of the social institution we call arbitration?"[85]

The purpose of the institution is to avail to the international commercial community an alternative to litigation. It functions as a process of adjudication for their disputes. Jarvin writes that the weaknesses in the institution must be addressed openly and candidly by all who make use of it. Naturally, therefore, majority of participants at these conferences should be the contracting or arbitrating parties so that a comprehensive evaluation of the institution could be conducted. It is they who would accurately report on whether the institution is achieving its purpose and satisfying its function. Lack of attention to the observations of the parties is likely to contribute to the dissimulation of the institution's weaknesses. It could prove to be a major impediment to the future development of the institution, particularly judging by the discrepant survey results.

---

[83] Sigvard Jarvin, 'The Sources and Limits of the Arbitrator's Powers' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987) 50, 50

[84] Sigvard Jarvin, 'The Role of International Commercial Arbitration in the Modern World' (2009) 75(1) Int'l J. of Arb. Med. & Disp. Man. 65, 69. See also Won L Kidane, *The Culture of International Arbitration* (Oxford University Press 2017), ch 5 [hereinafter "Kidane (n 84)"]

[85] Jan Paulsson, 'Arbitration in Three Dimensions' (2010) LSE Legal Studies Working Paper 2/2010 <http://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf> accessed 31 July 2014, 33 [hereinafter "Paulsson 2010 (n 85)"]

These statements by Jarvin and Paulsson appear as headlines that some of the weaknesses in the institution may not be known. Moreover, they appear as suggestions to change the way that feedback about the institution is collected, indicating that there is room for improvement. Institutions are social structures. They are a set of rules and the rules structure social interactions in particular ways. Therefore, one of the objectives of the ICACD would be to address the weaknesses of the institution.

Jarvin's call for the characteristically controversial matters concerning the institution to be deliberated at conferences is heeded to at the 21st International Council for Commercial Arbitration Congress in 2012.[86] In addressing the dissatisfaction of the users of an unregulated industry, Menon presents the keynote address. He says that the actors of the institution have the responsibility for charting a new course. He calls upon the international arbitration community to self-regulate through the implementation of: (i) a unified code of conduct on the fixing of costs so as to do away with "runaway" costs of arbitration; and (ii) regulation of arbitrators by arbitral bodies in the way that bar associations do for lawyers. Naturally, this requires a regulatory body.

With respect to the speech, Paulsson expresses that it is about "How the golden age of arbitration might come to a thundering end" due to "a host of little time bombs that may one day wreak havoc with our patterns, our habits, our comforts". As to when Menon's advice should be acted on, Paulsson says that:

> "The time to reform and to innovate is when you are on top of the wave. The time to innovate and the time to reform is when you do so from a position of strength, not when you are heading to crashing on the sand and you are doing so out of desperation. Complacency leads to stagnation, it's a policy of suicide".[87]

[86] Sundaresh Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' (International Arbitration: The Coming of a New Age?, 21st International Council for Commercial Arbitration Conference, Singapore, 11 June 2012) <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> accessed 22 January 2017, para 2

[87] Jan Paulsson, 'Closing Message from ICCA President' (International Arbitration: The Coming of a New Age?, 21st International Council for Commercial Arbitration Conference, Singapore, 10 June 2012) <http://www.arbitration-icca.org/conferences-and-congresses/ICCA_SINGAPORE_2012-video-coverage/ICCA_SINGAPORE_2012-D2.html> accessed 22 January 2017

Brower, Pulos and Rosenberg submit that virtually anything in this world is capable of improvement. They promote and stimulate the right kind of inventiveness that would not tinker with the fundamental elements of international arbitration, and that can strengthen it as an institution.[88] Paulsson writes that "Arbitral self-regulation is plainly the best hope to avoid imposed dystopias".[89]

Following such proposal, Menon is awarded the Global Arbitration Review 'Best Lecture or Speech Award for 2012'.[90] This appears as an acknowledgment by the international commercial arbitration community that indeed there are issues in the institution that need to be addressed. With such praise in sight, in 2013 Paulsson and Menon debate the possibility of self-regulation for international arbitration.[91] They consider whether the international arbitration community is capable of establishing convincing mechanisms for self-regulation by looking at the roles and responsibilities of arbitral centres, arbitrators and counsel to keep the institution on track and in tune with the new challenges. It would not be erroneous to infer that they had in mind a body similar to the ICACD. It seems that there is a real prospect that this body would be created soon for debate about it is initiated. Self-regulation would inevitably necessitate the formation of a supranational regulatory body.

In the same year, Menon presents yet another keynote address at which he submits three issues which the community need to take cognisance of; and they are:

(i) New entrants from diverse legal traditions entering the global arbitration community. Absence of defined ethical standards to guide the diverse practitioners poses serious difficulties and could create an uneven battleground

[88] Charles N Brower, Michael Pulos and Charles B Rosenberg, 'So Is Anything Really Wrong with International Arbitration as We Know It?' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (Martinus Nijhoff Publishers 2013) 1

[89] Jan Paulsson, 'Universal Arbitration – What We Gain, What We Lose' in Julio César Betancourt and Jason A. Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (AuthorHouse 2014) 535, 555

[90] <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-31-29/archive-2013/305-gar-award-for-chief-justice-sundaresh-menon-sc-tops-off-year-of-resounding-success-for-singapore-arbitration> accessed 22 January 2017

[91] Jan Paulsson and Sundaresh Menon, 'Is Self-Regulation of International Arbitration an Illusion?' (4th LSE Arbitration Debate, LSE Transnational Law Project, London, 9 May 2013) <http://www.lse.ac.uk/website-archive/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1900> accessed 28 January 2017

that could affect fairness and integrity in international arbitration;

(ii) The growing incidence of third party funding and their participation in international arbitration is unregulated, and this makes it possible for such third-party funders to profit from frivolous and unmeritorious claims. A need arises for meaningful guidance as to the obligation on the arbitral tribunal to conduct the necessary due diligence to eliminate conflict of interest between counsels and arbitrators and parties involved in any given proceedings; and

(iii) The rising costs of international commercial arbitration which are at an unsustainable rate. He laments the unsatisfactory lack of response by the international arbitration community to address this issue. He writes that codes of conduct should be developed to combat these issues and for arbitration centres to regulate proceedings in several ways.[92]

At the 'Freshfields Arbitration Lecture 2015', Mance[93] writes that advocating an independent or transnational system of arbitration lacks coherence for arbitration is not, and should not become, a law unto itself. He says that arbitration cannot and should not be detached from the well-established rules of private or public international law and treaties. He reasons that arbitration faces problems to maintain coherence in its jurisprudence and also confidence in its efficacy as a dispute adjudication process.

A good illustration of inconsistency in judicial decisions pertaining to arbitration cases is the case of *Omnium de Traitement et de Valorisation S. A. v Hilmarton Ltd*[94] in England and *Société*

[92] Sundaresh Menon, 'Some Cautionary Notes for an Age of Opportunity' ('Arbitration: Tapping Asia's Growth', Chartered Institute of Arbitrators International Arbitration Conference, Penang, Malaysia, 22 August 2013) <https://singaporeinternationalarbitration.files.wordpress.com/2013/08/130822-some-cautionary-notes-for-an-age-of-opportunity-1.pdf> accessed 29 January 2017

[93] Jonathan Mance, 'Arbitration – a Law unto itself?' (2016) 32(2) Arb. Int'l 223. See also William W Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 Tul. L. Rev. 647, 650 - "The fashions for non-national justice and arbitral autonomy, if pushed too far, will ultimately backfire to compromise the integrity of international dispute resolution".

[94] [1999] 2 Lloyd's Rep. 222

Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)[95] in France. One national court may set aside an arbitral award and another may uphold it.

Hofstede writes that "uncertainty has no probability attached to it. It is a situation in which anything can happen and one has no idea what".[96] Thus, such inconsistency strengthens the argument for the adoption of the suggestion by Holtzmann and Schwebel for a council to be created and integrated into the arbitral process to review and enforce international arbitration awards. A good name for this body would be the 'International Arbitration Awards Review Council' (IAARC).

The IAARC would be in a better position than national courts to produce and maintain coherence in the jurisprudence of arbitration. Naturally, this body would come under the ICACD. Creation of this would body would make the institution complete, to the greatest extent possible, as it would add the 'regulative' pillar to the institution. This supplement would be part of the natural continuing process of institutionalisation,[97] which is a process not only for the creation but also for the perpetuation of enduring social groups.[98]

Even if this additional component does not lead to the institution becoming a system, a complex whole, it is very likely to enhance it because it would allow the international commercial arbitration community to realise an interest that they value highly,[99] which is to keep arbitral awards away from national courts. A unified, standardised and harmonised review and challenge of arbitral awards would result in consistency and predictability. Successful demonstration of

[95] Cour de cassation, (23 March 1994) YB Comm Arb, Vol XX (1995) 663

[96] Geert H Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations* (2nd edn, SAGE 2001), 148

[97] Tammar B Zilber, 'The Work of Meanings in Institutional Processes and Thinking' in Royston Greenwood and others (eds), *The SAGE Handbook of Organizational Institutionalism* (2008) 150

[98] Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise on the Sociology of Knowledge* (Penguin 1991)

[99] Paul J DiMaggio, 'Interest and Agency in Institutional Theory' in Lynne G Zucker (ed), *Institutional Patterns and Organizations: Culture and Environment* (HarperBusiness 1988) 3, 14 [hereinafter "DiMaggio (n 99)"]. See also Raghu Garud, Sanjay Jain and Arun Kumaraswamy, 'Institutional Entrepreneurship in the Sponsorship of Common Technological Standards: The Case of Sun Microsystems and Java' (2002) 45(1) Acad. Manag. J. 196, 196; Petter Holm, 'The Dynamics of Institutionalization: Transformation Processes in Norwegian Fisheries' (1995) 40(3) Adm. Sci. Q. 398 [hereinafter "Holm (n 99)"]; Myeong-Gu Seo and William ED Creed, 'Institutional Contradictions, Praxis and Institutional Change: A Dialectical Perspective' (2002) 27(2) Acad. Manag. Rev. 222

consistent and predictable arbitral awards reviewed and sealed by an independent body would convince the international commercial arbitration community and the legal community at large that there is an opportunity to realise yet another interest that they value highly, which is for the actors to leverage resources to transform[100] the institution into an autonomous legal order.

Paulsson's query at the ICCA Conference 2012 as to whom will confront the issues which international arbitration faces leads to one conclusion, that to realise the institutional entrepreneurship opportunity to create the ICACD necessitates the attitude of first-mover advantage, meaning a first entrant to initiate and capitalise on the advantages of the ICACD. First mover advantage is "the ability of pioneering firms to earn positive economic profits"[101] by being the first to enter into and serve a particular market.[102] This marketing strategy concept dictates that being the first to enter a new market leads to significant commercially competitive advantages over rivals such as holding a good standing in the relevant industry or sector and earning higher profits.

For present purpose, it is not necessary to discuss the three primary sources that give rise to first-mover advantage or its advantages and disadvantages. The point here is simply to alert the international commercial and/or commercial arbitration community of the existence of such an opportunity and what it would mean for the institution should any actor or a group of actors take the initiative to establish the ICACD.

Paulsson's recommendations regarding when to reform and to innovate leads to one conclusion, and that is now. Arbitration is undisputedly the most popular process for adjudication of international commercial disputes. This makes it on top of the wave and at a position of strength. It seems that if reform and innovation does not happen now, then complacency is likely to allow for meditation to become the alternative settlement resolution process of choice for the

[100] Steve Maguire, Cynthia Hardy and Thomas B Lawrence, 'Institutional Entrepreneurship in Emerging Fields: HIV/Aids Treatment Advocacy in Canada' (2004) 47(5) Acad. Manag. J. 657, 657 [hereinafter "Maguire, Hardy and Lawrence (n 100)"]. See also David Daokui Li, Junxin Feng and Hongping Jiang, 'Institutional Entrepreneurs' (2006) 96(2) Am. Econ. Rev. 358, 359-360

[101] Marvin B Lieberman and David B Montgomery, 'First-Mover Advantages' (1988) 9 Strateg. Manag. J. 41, 41 [hereinafter "Lieberman and Montgomery (n 101)"]. See also Andrew M Spence, 'The Learning Curve and Competition' (1981) 12(1) Bell J. Econ. 49

[102] Lieberman and Montgomery (n 101), 52

international commercial community.

Unarguably, arbitration is no longer expeditious or cost-effective. Moreover, it is a dispute dissolution, and not resolution, process due to the regulative institutional pillar being provided by national courts. Thus, even though mediation is not final and binding, absence of this element is unlikely to make a substantial difference to disputing parties, particularly as arbitrants settle the majority of their claims.[103] According to Strong, mediation may take over arbitration. If that happens, this institution would be heading to crashing on the sand and will then attempt to reform and innovate out of desperation.

International commercial arbitration as a process is incomplete, as evinced herein. Many aspects of arbitration proceedings rely on national courts. Recognition and enforcement of an arbitral award, or challenge thereto, being the most important aspect in the proceedings, is subject to the judgment of national courts[104] because decisions made by arbitrators are not 'legalistic'.[105] The law has weight which provides certainty by counteracting the risk and uncertainty of non-payment of the award by the defeated arbitrant.[106] Lord Woolf confirms in *AT&T Corp. Lucent Technologies, Inc. v Saudi Cable Co.* that arbitration rules of arbitration centres cannot restrict national courts.[107]

For example, the arbitral tribunal has the right and competence to rule on its own jurisdiction,[108]

[103] QMU-PwC 2008 Survey (n 5), 2-3, 5, 7, 9, 11

[104] Ihab AS Amro, *Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study of Common Law and Civil Law Countries* (Cambridge Scholars Publishing 2013). See also QMU-PwC 2006 Survey (n 4), 7; Anoosha Boralessa, 'The Limitations of Party Autonomy in ICSID Arbitration' (2004) 15 Am. Rev. Int'l Arb. 253, 266; Blackaby et al. 2009 (n 28), 439; Lurie (n 32). cf Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008), 84-85; William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 55, 90 [hereinafter "Park (n 104)"]

[105] Lawrence M Friedman, 'One World: Notes on the Emerging Legal Order' in Michael Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths LexisNexis 2002) 23, 31. See also Simon Roberts, 'After Government? On Representing Law without the State' (2005) 68(1) Mod. L. Rev. 1, 18; Pieter Sanders, *The Art of Arbitration: Essays on International Arbitration: Liber Amicorum Pieter Sanders, 12 Sept. 1912-1982* ((Jan C Schultsz and Albert J van den Berg eds, Kluwer Law International 1982), 154

[106] n 96

[107] [2000] 2 All ER (Comm) 625, [31-34]. See also *Corey v New York Stock Exch.*, 691 F.2d 1205 (6th Cir. 1982), 1209-12

[108] Lew (n 29), 193; Peter Gross, 'Competence of Competence' (1992) 8(2) Arb. Int'l 205; Park (n 104); Emmanuel Gaillard, 'The Negative Effect of Competence-Competence' (2002) 17(1) Mealey's Int. Arb. Rep. 27; Amokura Kawharu, 'Arbitral Jurisdiction' (2008) 23(2) N. Z. Univ. L. Rev. 238

by virtue of the principle of competence-competence. In English law this could be done under the Arbitration Act 1996, s 30.[109] This is subject to a party's statutory right to challenge such decision at national court under s 32[110] following the tribunal's ruling or under s 67[111] once an award is rendered. This is also the position of French law under article 1458 of the Nouveau code de procédure civil (NCCP).[112] In Sweden an arbitrant may request a court ruling on jurisdictional matters at any time during the arbitration proceedings by virtue of the Arbitration Act 1999, s 2.[113] Courts in the United States of America (U.S.A.) are allowed by the Federal Arbitration Act 1925[114] to intervene before the arbitral tribunal renders an award.

In the case of *Methanex Motunui Ltd v Spellman* Fisher J opines that:

> "If the parties say that they want arbitration, but in the same breath say that they do not want enforceable natural justice, their two statements are incompatible. Arbitration is a process by which a dispute is determined according to enforceable standards of natural justice. The scope of the particular natural justice to be applied in a given case may be modified by agreement. But enforceable natural justice cannot be excluded altogether if the process is to remain arbitration".[115]

Such incompleteness could be attributable to the theoretical authority that underlies this institution. Yu and Paulsson proffer that it could be contractual; national; hybrid; or autonomous. This eclecticism appears to be more of a hindrance than it is helpful. Gaillard, however, presents only three of them, as does Born,[116] to ground the core identity and determinacy of international

[109] 1996 c. 23 [hereinafter "AA 1996"]

[110] See *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Ll Rep 24; *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel* [2000] 2 Lloyd's Rep 1; *Fiona Trust & Holding Corp & ors v Privalov & ors* [2007] EWCA Civ 20

[111] See *UR Power v Kuok Oils* [2009] 2 Lloyd's Rep 495 in which the applicant failed to raise jurisdictional objection at the first-tier arbitral tribunal but did so at the second tier and this led to the loss of the right to appeal under AA 1996, s 67, (Gross J)

[112] Decree No 75-1123 of 5 December 1975 (le décret no 75-1123 du 5 décembre 1975, 12521) as amended by Law No 2007-1787 of 20 December 2007 (la loi no 2007-1787 du 20 décembre 2007, 20639); Livre IV: L'arbitrage, Titre Ier: L'arbitrage interne, Chapitre VI: Les voies de recours, Section 3: Dispositions communes à l'appel et au recours en annulation and Section 5: Autres voies de recours [hereinafter "NCPC"]. See *Société Eurodif v République Islamique d'Iran* (1989) Revue de l'Arbitrage 653

[113] SFS 1999:116

[114] Pub. L. 68–401, 43 Stat. 883, 9 U.S.C.

[115] [2004] NZLR 95 (HC), [50] and affirmed on appeal *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA)

[116] Gary B Born, *International Commercial Arbitration* vol II (Wolters Kluwer International 2014), 214-18

arbitration in national legal systems. Moreover, Gaillard advances that international commercial arbitration qualifies as a system[117] because it qualifies as a legal order.[118] There is some support for Gaillard's premonition. Michaels writes that "Autonomous arbitration may be nowhere, but it is also always 'yet to come'".[119]

Schultz, however, writes that "To be sure, when we are not pushing a business agenda, we may want to think again about whether we really think that it is desirable to call the arbitration regime a legal order, with all the political and ethical consequences that attach almost inevitably".[120] Furthermore, he writes that the process "does not meet the standards of regulative quality that one usually expects from a legal system".[121] This is what this dissertation discovers as a result of analysis of institutional pillars. Furthermore, arbitration is premised on *pacta sunt servanda* and so it exists if and only when contracting parties agree to it. Thus, it should not harbour a claim for autonomy as a legal order. To that end, calling it a legal system would be misleading.

In defining law in accordance with its political and ethical standards, Schultz writes that:

> "If we characterize a given regime as law, it signals that this regime is a superior mode or regulation, which is desirable, from which we should expect justice, which is normatively meaningful for external observers and for the regime's addressees, which relies on some form of organization, which opposes the intervention of other legal regimes, and which harbors a claim for autonomy.
>
> …
>
> Hence, in the ordinary discourse (that is, outside of jurisprudential discussions among legal theorists), the definition of law we use in order to characterize a certain normative

[117] See n 36

[118] See n 37

[119] Ralf Michaels, 'Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature' (2013) 1(1) London Rev. Int. L. 35, 50

[120] Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press 2014), 48

[121] ibid

> regime as law, or to deny it that label, should be adapted to the political and ethical signals that such a characterization would send. In other words, in ordinary, non-jurisprudential discourse about the nature of a given normative regime as either law or social order, our analytic stance on the concept of law should be adapted to the rhetorical effects of a pronouncement of legality".[122]

Furthermore, he writes that to demonstrate the existence of an arbitral legal order:

> "the arbitration community has to show that they do a good job, that they have created a desirable regime from which parties can expect true justice, and that arbitration forms a system that is sufficiently normatively meaningful to orient the bahavior of its addressees (and thus allows them to predict and plan their actions, in other words, to engage in reliable business activities). On this basis, the arbitration community can claim a certain degree of laissez-faire on the part of the state–it can claim autonomy through liberal arbitration laws".[123]

Growth of arbitration as the dispute adjudication process of choice for the international commercial community the arbitration community demonstrates that it does a good job. At present, however, the institution relies very heavily on the intervention of national legal systems because the institution is neither superior nor regulation, both of which appear desirable. In the words of Pythagoras, this institution is not free as it does not command itself.[124] It is a process[125] that secures support from external constituents. It appears to be a hybrid.

Davenport writes that:

> "Processes also need clearly defined owners to be responsible for design and execution and for ensuring that customer needs are met.

[122] ibid, 45

[123] ibid, 46-47

[124] Pythagoras of Samos in Florilegium, XVIII, 23 (Thomas Benfield Harbottle tr, *Dictionary of Quotations* (S. Sonnenschein & Company Limited 1906), 368

[125] Thomas H Davenport, *Process Innovation: Reengineering Work Through Information Technology* (Harvard Business School Press 1993), 5

> Process ownership must be seen as an additional or alternative dimension or the formal organizational structure that, during periods of radical process change, takes precedence over other dimensions of structure. Otherwise, process owners will not have the power or legitimacy needed to implement process designs that violate organizational charts and norms describing "the way we do things around here"".[126]

A process also, therefore, requires a superior regulatory. Establishment of the ICACD is needed to own this institution and to provide a source for organisational legitimation to it. Both structural and procedural change appears to be needed in this institution. The former type of change refers to "what the system is" and the latter relates to "what the system does".[127] Creation of the ICACD would be a reorganisation of this institution based on the opinion of its actors, which is to increase organisational legitimacy through organisational isomorphism.[128]

Elster writes that "Institutions keep society from falling apart, provided that there is something to keep institutions from falling apart".[129] What is shown in this dissertation is that the ICACD is needed to design and implement the desires of its users so as to:

(i) reinstate the lost advantages so that it becomes expeditious and cost-effective as intended;

(ii) eliminate the different interpretations on various aspects of arbitration which currently exist due to different national courts adopting different theories in relation to the institution;[130] and

(iii) eradicate the great paradox of arbitration seeking the cooperation of the very national courts from which it frees itself.[131]

---

[126] ibid, 7

[127] Scott M Cutlip, Allen H Center and Glen M Broom, *Effective Public Relations* (8th edn, Prentice Hall 2000), 234

[128] David L Deephouse, 'Does Isomorphism Legitimate?' (1996) 39(4) Acad. Manag. J. 1024

[129] Jon Elster, *Nuts and Bolts for the Social Sciences* (Cambridge University Press 1989), 147

[130] Hong-lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemp. Asia Arb. J. 255, 257

[131] Paulsson 2010 (n 85), 2

More importantly, the ICACD would be needed since it appears that international commercial arbitration has to resist the threat of being replaced by mediation. Such threat is existent due to the process being slow and expensive, but particularly in the absence of the regulative institutional pillar in this institution and it not being fully institutionalised.

Demystification of the 10 ribs through analysis of empirical data from the aforementioned surveys illustrates that the most important advantages of arbitration are 'flexibility, 'enforceability' of awards, 'privacy' and 'selection of arbitrators'.[132] These advantages represent five ribs, namely, (3) informal and flexible; (4) private; (2) neutral; (8) specialist; and (10) enforceable. Loss of five of the 10 traditionally held advantages of arbitration dilutes confidence in the institution. With regard to the 10 ribs, Kidane writes that "However, decades of experience with international arbitration have shown that most of these justifications are promotional or uncertain at best".[133]

Confidence in the institution is likely to diminish much faster than it may have done so far due to the loss of half of its advantages. National court intervention is a concern,[134] despite being an "important policing role" "to support the arbitral process".[135] Such interference poses substantial legitimacy risks to arbitral autonomy. Almost every survey results report on the extremely high cost of international arbitration. Long are gone the days when commentators commend arbitration for being more cost-effective than litigation. Cost ineffectiveness is the most commonly cited disadvantage of this process.[136]

The extent of dissatisfaction can be understood from the fact that arbitrants feel forced to pre-award and post-award settlement (23% and 33% respectively)[137] so as to save both time and cost,

[132] QMU-PwC 2006 Survey (n 4), 2, 6, 10. See also QMU-PwC 2008 Survey (n 5), 2, 10; QMU-W&C 2012 Survey (n 7); QMU-PwC 2013 Survey (n 8), 5, 8; QMU-W&C 2015 Survey (n 10), 2, 5, 7, 10, 16, 24; AMIB 1996 Survey (n 3), 30; BLP 2012 Survey (n 9), 3

[133] Kidane (n 84), ch 5

[134] QMU-PwC 2006 Survey (n 4), 7

[135] Bermann (n 39), 2. See also Howard M Holtzmann, 'Arbitration and the Courts: Partners in a System of International Jurisdiction' [1978] Revue d'arbitrage 253

[136] QMU-PwC 2006 Survey (n 4), 2-3, 6-7. See also QMU-W&C 2015 Survey (n 10), 2, 5, 7, 10, 16

[137] QMU-PwC 2008 Survey (n 5), 2-3, 5, 7, 9, 11

for example, in seeking recognition and enforcement of the award (56%).[138] According to the survey results, almost half of cases are settled before the first hearing (43%) and over a quarter are settled before the hearing on the merits (31%).[139] Arbitrants negotiate to settle an award because the circumstances of the defeated arbitrant change and also due to high asset specificity for the winning arbitrant.[140]

Lack of an appeal structure does not sit very well with present-day arbitrants, though their forefathers were quite happy to accept the final and binding award of an arbitral tribunal. A right to appeal is seen as an element of legal proceedings and not that of an alternative to it because their elementary structure is different.[141] Whilst finality provides closure for good,[142] and the majority (71%) of corporations surveyed reject the idea of an appeal mechanism,[143] it cannot be ignored that the minority (29%)[144] and (23%)[145] cite the lack of an appeal structure as a disadvantage of the institution.

An arbitral tribunal's raison d'etre is to produce a valid, final, binding and enforceable award.[146] Yet, challenge and appeal to arbitral awards is possible under national legislation. In England and Wales an arbitral award can be challenged under the AA 1996, ss 67, 68 and 69.[147] In France, the NCCP[148] permits for an arbitral award to be set aside under article 1518 read together

[138] ibid, 3, 7

[139] ibid, 7

[140] Jeffrey J Reuer and Africa Ariño, 'Contractual Renegotiations in Strategic Alliances' (2002) 28(1) J. Manag 47

[141] Noemi Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19(1) EJIL 43, 57 [hereinafter "Gal-Or (n 141)"]

[142] ibid, 65

[143] QMU-PwC 2006 Survey (n 4), 3, 7, 15, 22. See also QMU-W&C 2015 Survey (n 10), 2, 5, 7, 8

[144] QMU-PwC 2006 Survey (n 4), 3, 7, 15, 22

[145] QMU-W&C 2015 Survey (n 10), 8, 10

[146] Pierre A Karrer, 'Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?' in Gerald Aksen and Robert G Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (ICC Publishing 2005) 429, 429. See also art 35(6) of Rules of Arbitration of the of the International Chamber of Commerce International Court of Arbitration <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 24 October 2017; art 34(2) of UNCITRAL Arbitration Rules 1976 as revised in 2010 (31 UN GAOR Supp No 17, UN Doc A/31/17 (1976)) and in 2013 (General Assembly resolution 68/109 adopted on 16 December 2013 (A/68/462)) <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> accessed 24 October 2017

[147] See for example *The Secretary of State for the Home Department v Raytheon Systems Limited* [2014] EWHC 4375 (TCC); [2015] EWCH 311 (TCC); *Lorand Shipping Limited v Davof Trading (Africa) B.V. (Ocean Glory)* [2014] EWHC 3521 (Comm)

[148] n 112

with article 1520 and under article 1525 for an appeal against an order granting or denying recognition or enforcement of an arbitral award made abroad. Under the International Arbitration Act of Singapore 2002, s 24, [149] there are eight grounds under which an international arbitration award may be set aside.

Of significance is article V(1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[150] This provides grounds for refusal of enforcement of arbitral award. This, therefore, negates Born's argument that arbitration is "a means by which international business disputes can be *definitely* resolved".[151] There seems to exist such a thing as arbitration with a right to appeal. It should be clear and convincing to the international commercial arbitration community that challenges or appeals within the controlled and comfortable environment of the institution would be much more attractive, as actors of this institution seem to desire.

Ten Cate writes that there are two main arguments that makes a review of arbitral awards crucial in international commercial arbitration: the high monetary value of the disputes and to allay fear in those who currently deem arbitration too risky.[152] At the 2009 J. B. Moore Society of International Law Symposium Burnett expresses that while lack of appeal in international arbitration is alluring to some, it deters others from using the process for the same reason. His judgement is based on the findings of the Cornell University study that more than 50% of Fortune 1,000 corporations do not resolve disputes by international arbitration due to restricted rights of appeal. He expresses that "Arbitration tribunals don't always get it right" and that "In the past it's an attribute that's been looked at as a good thing, but now it's actually coming under some significant pressure".[153]

---

[149] Cap. 143A. See for example *AKN* and *another v ALC* and others and other appeals [2015] SGCA 18; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186; *BLB and another v BLC and others* [2013] SGHC 196; *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125

[150] June 10, 1958, 330 U.N.T.S. 3; 21 U.S.T. 2517

[151] Gary B Born, *International Commercial Arbitration* vol I (Wolters Kluwer 2009), 65

[152] Irene M Ten Cate, 'International Arbitration and the Ends of Appellate Review' (2012) 44 N.Y.U. J. Int'l L. & Pol. 1109, 1111

[153] Harry Burnett, Panel One, 'Growing Private Commercial Arbitration: The Effects on Companies and Consumers' at J. B. Moore Society of International Law Symposium, 'International Arbitration: A Look to the Future' (J. B. Moore Society of International Law, University of Virginia School of Law, Charlottesville, 27 February 2009) <https://content.law.virginia.edu/news/2009_spr/jbmoore_conf.htm> accessed 16 December 2017. See David B Lipsky and Ronald L Seeber, 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of

Gal-Or writes that a discussion must be had on "the development and design of procedural aspects of appeal".[154] As well as the survey results, there seem to exist many reasons to justify that an appeal layer should be introduced in this institution. Such procedure would be provided by the IAARC. This is necessary and it is more likely than not to enhance the institution than to damage it. So far as institutional entrepreneurship is concerned, the creation of the IAARC would require actors who have interest in having arbitral awards reviewed and sealed by an independent body to leverage resources to transform[155] the present institutional arrangement and advance, to the comfortable satisfaction of the international commercial arbitration community, that there is an opportunity to realise an interest that they value highly,[156] which is to keep national courts at bay.

If not for any other reason, creation of the ICACD is needed urgently to attend to complaints about the high cost and excessive length of international commercial arbitration proceedings. They are the most commonly cited disadvantages of this process. They have been a concern for not less than 20 years now.[157] There is an institutional entrepreneurship opportunity to remove this concern for it is in complete contradiction to the essence of arbitration. Actors could take steps to offer a cost-effective and an expeditious process. To achieve this, it is necessary to educate both the lawyers and business executives about the arbitral process, but also to make arbitral procedures more uniform.[158]

Uniformity in regard to procedures could be realised by the application of Fayol's principles, Weber's bureaucratic structure and Schumacher's large scale organisation for they provide mechanisms that rationalise authority and decision-making to be implemented in this institution. Elements of order, planning, predictability, central control, accountancy, instructions to the underlines, obedience and discipline are the result of a system. As a system the institution is likely to continue to survive and thrive because common policies and practices could be easily

---

ADR by U.S. Corporations' [1998] Institute on Conflict Resolution

[154] Gal-Or (n 141), 45

[155] See n 99

[156] See n 100

[157] See for example J Gillis Wetter, 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' (1990) 1 Am. Rev. Int'l. Arb. 91; Bernardo Cremades, 'Preventing Delay and Disruption of Arbitration' (1990) 5 ICCA Congress Series

[158] Coulson (n 16), 518

implemented and weaknesses thereto can be easily identified and rectified due to them receiving immediate and direct attention.

Homogeneity of procedures is likely to be half a solution to achieving expeditious and cost-effective proceedings. An important factor in achieving homogeneity in this regard is to lessen the number of international arbitration centres in the world. This appears necessary and is likely to have an impact on both the cost and length of proceedings. The reason is that statistics from 33 of the 207 international arbitration centres in the world show that they administered approximately 47,254 international arbitration proceedings between 2000 and 2015. However, only about 10 of the 33 centres could demonstrate some serious degree of permanence, meaning that they do a good job and that they are desirable to users, based on their caseload during the 15 years. Data is not readily available for the majority of the 207 centres, which makes it extremely difficult to evaluate them.

The largest portion of the 47,254 arbitration cases belongs to the major arbitration houses, of which there are no more than 10 around the world. Parties trust those with relevant experience to provide the administrative assistance in international arbitration proceedings. Correspondingly, results of a survey on choice of venue for international arbitration communicate that London; Paris; Geneva; New York; Stockholm; Vienna; Singapore; Dubai; Zurich; Moscow; and Miami are the most frequently chosen seats of arbitration.[159]

In effect, these survey results, together with the caseload statistics on which of the 33 centres establish some serious degree of permanence, reveal that there are arbitration centres which are indispensable for they administer the majority of proceedings, some which are only useful as they manage a reasonable number of cases per year, and others which are wholly redundant for their caseload is negligible.

These data confirm that there should be a very small number of arbitration centres in the world. A supranational regulatory body would be better placed to choose seven centres using Onyema's criteria and grant them jurisdictional authority. As to why seven and not one as suggested by

[159] BLP 2012 Survey (n 9)

Smit, the simple answer is that there are six continents in the world. The exception is the Middle East, which is quite a large region of the world which is connected to the Arabic speaking countries.

The number is also linked to the principles of first-mover advantage. Barney writes that "in order for there to be first-mover advantage, firms in an industry must be heterogeneous in terms of the resources they control".[160] First-mover advantage is gained by the significant occupation of a market segment and not the entire industry for this would be monopoly, which would not be desirable as perfect competition is the aim to be achieved for this institution. Moreover, it is to maintain the principle of party autonomy in this institution by allowing contracting parties to submit their dispute to a centre and jurisdiction of their choice.

Recommendation to grant 'jurisdictional authority' to arbitration centre means jurisdiction of a particular continent but not a particular country or its laws. By no means should jurisdictional authority be perceived as opposing delocalisation of international commercial arbitration. Creation of the ICACD and the IAARC would be with the intention to encourage delocalisation of the institution so as to make it a system of dispute resolution that is independent of national legal systems. However, it is beyond the scope of this dissertation to precisely articulate the concept of delocalised arbitration by stipulating how international commercial parties could detach their contracts and arbitrations from national procedural and substantive law. This is an exercise that commentators of this field attempt to achieve,[161] but have not yet fully committed to doing so due to ubiquitous hostility.[162] This dissertation prompts how delocalisation could be achieved.

---

[160] Jay Barney, 'Firm Resources and Sustained Competitive Advantage' (1991) 17(1) J. Manag. 99, 104

[161] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (2nd edn, Sweet & Maxwell 1991), 81-90; Mauro Rubino-Sammartano, *International Arbitration Law* (Kluwer Law and Taxation Publishers 1990), 24-25 [hereinafter "Rubino-Sammartano (n 161)"]; W Michael Reismann and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Foundation Press 1997), 1089; Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?' (2001) 17(1) Arb. Int'l 59

[162] Francis A Mann, 'England Rejects Delocalized Contracts and Arbitration' (1983) 33 Int'l & Comp. L.Q. 193; L Collins, 'The Law Governing the Agreement and Procedure in International Arbitration in England' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff 1987) 127; Rubino-Sammartano (n 161), 24

Party autonomy is what differentiates international commercial arbitration from national and international legal orders. Naturally, any change to this principle would be met with defensive reaction. In this respect, innovation to drive the institution in a new direction will certainly be ignored by some and approached with considerable resistance by others. Elimination of or limitation to party autonomy should not, however, prevent change in this institution. The reason is that "Institutions both constrain and enable behavior" and that a constraint "may enable choices and actions that otherwise would not exist. Regulation is not always the antithesis of freedom; it can be its ally".[163] Thus, this should dispel fear of the impact that existence of the ICACD would have on party autonomy.

Creation of a supranational organisation to organise, control, and manage these centres is likely to result in the centres being part of an industry of premised on perfect competition. What justifies the achievement of perfect competition is that having too many arbitration centres does not seem to bestow any benefit on the users of the process. Competition, of any kind, is currently only perceived but it is actually non-existent since only about 10 centres dominate the institution. Under the ICACD, contracting parties would have only seven centres to choose from and not 207 as the existence of such a large number does not appear advantageous.

Particularly so as there is no certain minimum standards against which the output of the centres can be measured for comparison to the others within the institution as a whole. Classification of hotels, for example, is by stars to classify hotels according to their quality. Although no international classification exists, in most countries a single rating standard is used according to defined criteria or as defined by law.[164] Classification of airlines, another example, was introduced by Skytrax in 1999. Skytrax's global airline quality rating programme is recognised as a global benchmark of airline standards.[165]

---

[163] Geoffrey M Hodgson, 'What Are Institutions?' (2006) 11(1) J. Econ. Issues 1, 2. See also Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990), 4 [hereinafter "North (n 163)"], 6

[164] For example, in Europe the European Hotelstars Union is an umbrella organisation that represents 39 associations from 24 European countries; in the United Kingdom hotels are rated by the Automobile Association, the national tourist boards: Visit England, Visit Wales, Scottish Tourist Board and Northern Ireland Tourist Board; in Germany hotels are rated by the German Hotel and Restaurant Association; in U.S.A. one of the bodies that carries out this functions is the American Automobile Association

[165] <https://skytraxratings.com/about-airline-rating> accessed 15 September 2018

Having certain minimum standards is necessary to bestow upon the arbitration centres normative legitimacy, which comes from professional governance structure.[166] This could be provided by the ICACD. With every arbitration centre being a private entity, lack of strong and efficient mechanism to monitor and control them results in weak and strong centres without identifiable conditions to support and encourage the weaker centres to succeed. It is why currently there are centres which are indispensable, useful and redundant. Without a governing body to implement a quality rating programme, this position is likely to remain for the foreseeable future.

A supranational organisation would function to support the operation of the seven centres through the application of Fayol's 14 principles of management, Weber's nine characteristics of a bureaucratic structure and Schumacher's five principles of structuring large scale organisation. In particular, Schumacher's 'principle of identification' seems to be a quality rating mechanism for monitoring and controlling the organisation or its subsidiaries. These appear mandatory for the centres to meet the demands of global business competitiveness and to provide consistency and continuity.[167] A higher echelon with authority and responsibility between various levels of organised management would be in a better position to plan, direct and coordinate the operation of the arbitration centres. This type of authority is crucial to monitor the centres' actions and assignments and to set direct objectives and to ensure proper distribution of resources and provide direction.

Existence of the ICACD would confer upon the seven centres the necessary organisational legitimacy. It would organise, control and manage them within a defined infrastructure in which the centres would work together, rather than individually, to achieve common objectives in a more economically beneficial means. Their status as a centre with jurisdictional authority would be controlled by an organisation with legitimacy-determining power.[168] A model that creates, manages, integrates and illustrates organisational legitimacy seems essential. As per Suchman's

[166] William R Scott and others, *Institutional Change and Healthcare Organizations: From Professional Dominance to Managed Care* (SAGE 2000), 306

[167] Gerald A Cole and Phil Kelly, *Management Theory and Practice* (8th edn, Cengage Learning 2015)

[168] Jeffrey Pfeffer and Gerald R Salancik, *The External Control of Organizations: A Resource Dependence Perspective* (Harper and Row 1978). See also Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) Acad. Manag. Rev. 571, 571 [hereinafter "Suchman (n 168)"]

definition, legitimacy is attained when the actions of an entity are carried out within a system of norms, values, beliefs, and definitions.[169] A supranational organisation would avail legitimacy for this institution in general but especially pertaining to the centres.

If the very purpose and function of arbitration is to offer an expeditious and cost-effective dispute adjudication process, having a smaller number of centres is very likely to achieve this because each centre would strive to meet its business objectives. As demonstrated by the survey results, only 10 centres are actually in competition with one another. Thus, a smaller number of centres controlled by a supranational regulatory body is likely to lead to expedited and more cost-effective arbitration proceedings because the body would regulate both the charges for and time of the proceedings as part of its management function. Such a body would be better placed to take into account the fact that individuals always seek the most cost-effective way to purchase goods and services, including the resolution of their disputes[170] and thus consciously ensure that arbitration does not lose business to other dispute resolution processes.

North writes that "Institutions reduce uncertainty by providing a structure to everyday life" because "institutions define and limit the set of choices of individuals.[171] It is difficult to justify, logically and practically speaking, how having 207 arbitration centres can reduce uncertainty. In fact, it is likely to produce quite the opposite effect because of the prerequisite to address efficiency and legitimacy challenges.[172] A defined infrastructure of the centres under the ICACD, therefore, is an institutional entrepreneurship opportunity that would eliminate such unfavourable multiplicity in this institution and enhance it by limiting the choice to seven arbitration centres.

Making this institution a system through the creation of the ICACD and implementing the changes discussed herein would result in institutional logic being transplanted into this institution. Friedland and Alford define institutional logic as:

---

[169] Suchman (n 168), 574

[170] Derek Parfit, 'Rationality and Reasons' in Dan Egonsson and others (eds), *Exploring Practical Philosophy: From Action to Values* (Ashgate 2001) 17

[171] North (n 163), 3-4

[172] Nassib G Ziadé, 'Reflections on the Role of Institutional Arbitration Between the Present and the Future' (2009) 25(3) Arb. Int'l 427

> "… supraorganizational patterns of activity by which individuals and organizations produce and reproduce their material subsistence and organize time and space. They are also symbolic systems, ways of ordering reality, thereby rendering experience of time and space meaningful".[173]

They define logic as "a set of material practices and symbolic constructions – which constitutes its organizing principles and which is available to organizations and individuals to elaborate".[174] Institutional logic means the underlying principles which shape behaviour of individuals and organisations within an institution to the extent that the way the particular institution works is regularised and predictable.[175] The definition provided by Thornton and Ocasio is elaborate. They write that institutional logic is "the socially constructed, historical patterns of material practices, assumptions, values, beliefs, and rules by which individuals produce and reproduce their material subsistence, organize time and space, and provide meaning to their social reality".[176] This demarcates an institution's material and cultural characteristics,[177] its normative and symbolic components,[178] its norms and values.[179]

As a process encompassed of actors and organisations operating in and from different parts of the world, it would appear that there is no institutional logic in this institution. Gaillard, for example, would disagree for he writes that the *modus operandi* for arbitral proceedings is the same in whichever jurisdiction they are conducted because it is international rules and guidelines and not domestic rules that guide proceedings, which results in a homogeneous approach and

---

[173] Roger Friedland and Robert R Alford, 'Bringing Society Back In: Symbols, Practices, and Institutional Contradictions' in Walter W Powell and Paul J DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press 1991) 232, 243 [hereinafter "Friedland and Alford (n 173)"]

[174] ibid, 248

[175] Robert Jackall, *Moral Mazes: The World of Corporate Managers* (Oxford University Press 1988), 112

[176] Patricia H Thornton and William Ocasio, 'Institutional Logics and the Historical Contingency of Power in Organizations: Executive Succession in the Higher Education Publishing Industry, 1958–1990' (1999) 105(3) Am. J. Sociol. 801, 804. See also Patricia H Thornton, William Ocasio and Michael Lounsbury, *The Institutional Logics Perspective: A New Approach to Culture, Structure and Process* (Oxford University Press 2012)

[177] Friedland and Alford (n 173), 250

[178] William Ocasio and Patricia H Thornton, 'Institutional Logics' in Royston Greenwood and others (eds), *The SAGE Handbook of Organizational Institutionalism* (SAGE 2008) 99, 105

[179] See n 141

makes the institution a system".[180]

There are no supraorganisational patterns of activity or symbolic systems. There is no supraorganisation body that performs an overarching function for the institution and its stakeholders to safeguard the set of material practices and organising principles. Thus, it would be difficult to advance that this institution is a system. Especially so as the historical patterns of material practices, assumptions, values, beliefs, and rules which provide meaning to this institution no longer exist.

For example, the belief and assumption that the institution is premised on being cost-effective and expeditious are difficult to accept any more. This means that the historical patterns are not reflected in the modern practice. Institutional logic clearly defined, implemented and enforced by the ICACD will ensure that the parties get what they expect from arbitration – such as an expeditious and a cost-effective process for resolution of disputes.

Cuniberti writes that arbitration should become the default process for adjudication of international commercial disputes and that extending its scope would actually improve the settlement of disputes.[181] There could be merit in such proposition. It seems irrational for there to be one International Court of Justice (ICJ) for the settlement of legal disputes between member states; one International Criminal Court (ICC) to prosecute individuals for international crimes; one International Centre for Settlement of Investment Disputes (ICSID) for investment arbitration cases; one Court of Arbitration for Sport (CAS) for the sports industry; one World Intellectual Property Organization (WIPO) Arbitration and Mediation Center to deal with intellectual property and technology disputes; one World Trade Organization (WTO) Dispute Settlement Body (DSB) to deal with disputes between members of the WTO; and one World Health Organization (WHO) for resolution of disputes through the Permanent Court of Arbitration (PCA), but for there to be over 200 international commercial arbitration centres!

[180] Gaillard 2012 (n 36), 289-290

[181] Gilles Cuniberti, 'Beyond Contract – The Case for Default Arbitration in International Commercial Disputes' (2008) 32(2) Fordham Int'l L. J. 417. See also David W Rivkin, 'The Impact of International Arbitration on the Rule of Law - The 2012 Clayton Utz Sydney University International Arbitration Lecture' (2013) 29(3) Arb. Int'l 327; Karyl Nairn, 'Arbitration: The Latest Fashion or a Classic Choice' (2002) 11 JIBFL 431

It seems necessary to emulate these bodies, not desirably but necessarily, so as to create an identical effective dispute resolution system for international commerce. Having ICSID as a foundation should inevitably contribute to the gradual acceptance of the emergence of a supranational body that is tasked with developing harmonised, standardised and unified arbitration rules and procedures, define the bounds of conduct for arbitrators, establish custom and general principles to govern the exercise of arbitrator power, to create a framework of established practices and norms, or indeed to institute a continuing process of law-creating authoritative decisions by creating an appeal mechanism to review both the conduct of arbitration proceedings and the arbitration awards to achieve consistency and predictability.

Making arbitration the default process and extending its scope would oblige a conception of control, meaning a collective identity that international commercial arbitration communities scattered around the world can attach to in order to produce a stable and successful market.[182] For this to happen, all states would have to adopt identical arbitration legislation and apply them uniformly.[183] This would be easily achieved since most of the arbitration laws are not too dissimilar as illustrated by the right to challenge an arbitral award and the jurisdiction of the arbitral tribunal. There is a chance to generate viable innovative alternatives to the currently dominant institutional arrangements. To successfully articulate, pass and implement any alternative would require an array of supportive constituencies,[184] most of which have been outlined herein.

Governance forms vary and the correct one should be adopted for this institution – perhaps one that is associated with levels of hierarchical control and inter-organisational dependence. Supranational regulation in international commercial arbitration should have the capacity to exert strong control over operational decisions, provide desired expertise to provide routine monitoring and assessment of performance, efficient and effective institutionalised processes and

[182] Neil Fligstein, 'Markets as Politics: A Political-Cultural Approach to Market Institutions' (1996) 61(4) Am. Sociol. Rev. 656, 664. See also Neil Fligstein, 'Competition, Stability, and Conceptions of Control' in Joel AC Baum and Frank Dobbin (eds), *Economics Meets Sociology in Strategic Management Advances in Strategic Management* vol 17 (Emerald Group Publishing Limited 2000) 115

[183] Gaillard 2010 (n 37), 24

[184] Elisabeth S Clemens and James M Cook, 'Politics and Institutionalism: Explaining Durability and Change' (1999) 25(1) Annu. Rev. Sociol. 441, 456

administrative procedures. Institutional structures have effect on transaction costs, which can be achieved through enforceable laws, rules and regulations to constrain opportunistic actions and with emphasis on effective cooperation between the actors within the institution.[185] Such alignment is usually and easily achieved in equity-based relationship as opposed to contractual or partnership relationship which have lower levels of control and certainty.[186]

Effective regulation should achieve a fit between the cultural-cognitive, normative and regulative institutional environment so as to: (i) achieve the full measure of advantages that the institution could and should offer; and (ii) eliminate the present deficiencies and improve the institution. Examination of the effects of legal, normative and cultural-cognitive institutions reveals that institutions that conform to rational rules support regulatory importance[187] because such a structure reduces uncertainty.[188]

The very essence of this proposal would allow international commercial disputants to achieve justice and the institution itself to become complete and attain absolute legitimacy. An entrenched institution, one that possesses institutional logic and conception of control would be a fully institutionalised institution. Institutionalisation ensures continuity of structure over time.[189] It would be difficult to deinstitutionalise because distribution of power resources ensures and supports its continuity.[190]

Marriott writes that "There are no permanent solutions to the problems of commercial dispute resolution and each generation must think again".[191] Paulsson, however, suggests that it is

[185] North (n 163), ch 6

[186] TK Das and Bing-Sheng Teng, 'Risk Types and Inter-Firm Alliance Structures' (1996) 33(6) J. Manag. Stud. 827; Ranjay Gulati and Harbir Singh, 'The Architecture of Cooperation: Managing Coordination Costs and Appropriation Concerns in Strategic Alliances' (1998) 43(4) Adm. Sci. Q. 781

[187] Scott (n 27)

[188] See n 152. See also Oliver E Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38(3) J. Econ. Lit. 595

[189] See Tolbert and Zucker (n 25). See also John W Meyer, John Boli and George M Thomas, 'Ontology and Rationalization in the Western Cultural Account' in George M Thomas and others (eds), *Institutional Structure: Constituting State, Society and the Individual* (SAGE 1987) 12, 13

[190] Jens Beckert, 'Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change' (2010) 28(2) Sociol. Theory 150, 154

[191] Arthur L Marriott, 'Pros and Cons of More Detailed Arbitration Laws and Rules' (1996) 7 ICCA Congress Series, 72

desirable to find an organising principle to appraise the institution.[192] In this instance, an organising principle would be a consistent central concept to direct the institution to simplify problems and direct solutions. A task that would be performed most effectively by a supranational regulatory body.

But whose responsibility is it to solve such problems? It seems that it should not be the professionals whose target is self-interest and self-satisfaction.[193] They emphasise on celebrating the institution and concealing its weaknesses. Rather, it should be, Coulson writes, that "the parties who draft arbitration clauses" for they "control the nature of the arbitral process" and so "It is up to them to modernize the system" if they are "willing to kick free from the vested interests of arbitrators and international lawyers".[194] To kick free from such vested interests, the norm for agreements to arbitrate could be to opt for a single arbitrator as opposed to three arbitrators, for example, so as to save both time and money.

Coulson's advice appears logical and practical. This institution is, Bhattia writes,[195] a protected practice due to the small number of legal experts that isolate it and make it closed to new interest. Undoubtedly, this would have impact on the development of the institution. As a consequence, such isolation may well undermine the integrity of the institution. Coulson writes that "The global business community would be foolish not to invest in strengthening such a system".[196] Mclean writes that "practitioners, arbitrators, and the parties" need to make the process efficient and effective.[197] In order to find a "more effective means to arbitrate cross-border disputes", they need to advocate for the evolution of the process.[198]

The entrepreneurs who should effect the desired change are "those actors whom the

[192] See n 85,

[193] See n 84

[194] Coulson (n 16), 518

[195] Vijay K Bhatia, 'International commercial arbitration: A protected practice' in Christopher Williams and Girolamo Tessuto (eds), *Language in the Negotiation of Justice: Contexts, Issues and Applications* (Routledge 2016) 69, 69-72

[196] Coulson (n 16), 518

[197] Mclean (n 69), 1087

[198] ibid

responsibility for new or changed institutions is attributed",[199] and whom could influence the direction of institutional change where there is powerful organised interest,[200] where a potential basis for new perceptions, preferences, intentions and beliefs.[201] Institutional entrepreneurs are agents who act strategically in pursuing their interests[202] where enabling field-level conditions are identified.[203] It means that actors act where there is a reason to do so. It appears that the parties, together with the practitioners and arbitrators, have a reason to respond to the challenges identified in this dissertation that the institution is currently facing.

It is the global community whose disputes are adjudicated. It is this community that pays the lawyers and arbitrators to adjudicate the disputes. It is this community that want the disputes to be dissolved expeditiously. Thus, it is this community, perhaps more than any of the other actors, that has interest in this institution that it values highly. And so, it is it that could effect change in and to this institution.

Nevertheless, irrespective of which of the institution's actors bring about change, how the ICACD could be created is crucial.

---

[199] Maguire, Hardy and Lawrence (n 100). See also Magnus Henrekson and Tino Sanandaji, 'The Interaction of Entrepreneurship and Institutions' (2011) 7(1) J. Int. Econ. 47

[200] Stephen R Barley and Pamela S Tolbert, 'Institutionalization and structuration: Studying the links between action and institution' (1997) 18(1) Organ. Stud. 93; Mary Douglas, *How Institutions Think* (Syracuse University Press 1986); Holm (n 99); Lynne G Zucker, 'Where Do Institutional Patterns Come From? Organizations as Actors in Social Systems' in Lynne G Zucker (ed), *Institutional Patterns and Organizations: Culture and Environment* (HarperBusiness 1988) 23

[201] Geoffrey M Hodgson, 'Reclaiming Habit for Institutional Economics' (2004) 25 J. Econ. Psych. 651, 656. See also John Dewey, *Human Nature and Conduct* (H. Holt 1922), 40

[202] Jens Beckert, 'Agency, Entrepreneurs, and Institutional Change: The Role of Strategic Choice and Institutionalized Practices in Organizations' (1999) 20(5) Organ. Stud. 777. See also Royston Greenwood and Roy Suddaby, 'Institutional Entrepreneurship in Mature Fields; The Big Five Accounting Firms' (2006) 49(1) Acad. Manag. J. 27; Thomas B Lawrence and Nelson Phillips, 'From 'Moby Dick to 'Free Willy': Macro-Cultural Discourse and Institutional Entrepreneurship in Emerging Institutional Fields' (2004) 11(5) Organization 689, 690, 706; Vilmos Misangyi, Gary Weaver and Heather Elms, 'Ending Corruption: The Interplay among Institutional Logics, Resources, and Institutional Entrepreneurs' (2008) 33(3) Acad. Manag. Rev. 750

[203] Strang and Sine (n 25), 507. See also Royston Greenwood, Roy Suddaby and Christopher R Hinings, 'Theorizing Change: The Role of Professional Associations in the Transformation of Institutionalized Fields' (2002) 45(1) Acad. Manag. J. 58, 60. For discussion on other types of conditions that enable institutional entrepreneurship see Neil Fligstein and Iona Mara-Drita, 'How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union' (1996) 102(1) Am. J. Sociol. 1 (i.e. economic and political crisis); Kimberly A Wade-Benzoni and others, 'Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions' (2002) 27(1) Acad. Manag. Rev. 41 (complex and multi-faceted field-level problems)

5.5 How to Bring About Supranational Regulation?

An institution is never complete as institutionalisation is an ongoing process.[204] Institutional change occurs through numerous models such as: (i) displacement; (ii) layering; (iii) drift; (iv) conversion; (v) exhaustion;[205] (vi) modifications; (vii) importations; and (viii) new formulations.[206] As this institution appears to be semi-institutionalised and founded upon normative and cultural-cognitive legitimacy, 'layering' and 'conversion' appear to be the most appropriate models to establish the ICACD. The former occurs when an institution adopts new functions to supplant the existing ones. The latter is where institutions take on new functions, goals or purposes.

Thelen writes that institutional change could occur as a result of layering and/or conversion, which can lead to transformation of the meaning and the role of an institutional order. Layering is "the grafting of new elements onto an otherwise stable institutional framework. Such amendments, as we will see, can alter the overall trajectory of an institution's development".[207] A new layer is added to the existing institution to change its functioning principles. An institutional change should occur if the added layer grows as expected.[208] It is premised on differential growth where new elements are introduced in the institution to gradually change both its status and structure. Conversion is the adoption of new goals or bringing in new actors that alter the institutional role or the core objectives of an institution.[209] It is a redirection or

[204] Thomas B Lawrence and Roy Suddaby, 'Institutions and Institutional Work' in Stewart Clegg and others (eds), *Handbook of Organization Studies* (2nd edn, SAGE 2006) 215 [hereinafter "Lawrence and Suddaby (n 204)"]. See also DiMaggio (n 99); Mary J Hatch and Tammar B Zilber, 'Conversation at the Border Between Organization Culture Theory and Institutional Theory' (2012) 21(1) J. Manag. Inq. 94, 95

[205] Wolfgang Streeck and Kathleen A Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press 2005) [hereinafter "Streeck and Thelen (n 205)"]. See also James Mahoney and Kathleen A Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency and Power* (Cambridge University Press 2010)

[206] Eva Boxenbaum, 'The Emergence of Proto-Institution' (2004) Working Paper 2004.5, 6-8 <http://openarchive.cbs.dk/cbsweb/handle/10398/6726> accessed 30 May 2016

[207] Kathleen A Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (Cambridge University Press 2004), 35. See also Tulia G Falleti and Julia F Lynch, 'Context and Causal Mechanisms in Political Analysis' (2009) 42(9) Comp. Political Stud. 1143; Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton University Press 2001)

[208] Streeck and Thelen (n 205), 22

[209] Kathleen A Thelen, 'How Institutionalism Evolves: Insights from Comparative Historical Analysis' in James Mahoney and James Rueschemeyer (eds), *Comparative Historical Analysis in the Social Sciences* (Cambridge University Press 2003) 208, 229. See also Margaret Weir, *Politics and Jobs: The Boundaries of Employment Policy in the United States* (Princeton University Press 1992)

reinterpretation of the functions and purposes of the institution.

Though the institution in question is at its pinnacle, it is nevertheless suffering disaffection from its users. Schumacher writes that "The stronger the current, the greater the need for skillful navigation".[210] Instrumental and purposive action from institutional entrepreneurs who seek to cause institutional change is necessary to lead to the creation of the ICACD so as secure the durability of this institution by making it a regulated and not a protected one.

Lawrence and Suddaby specify nine forms of institutional actions aimed at creating institutions, which are: (i) advocacy; (ii) defining; (iii) vesting; (iv) constructing identities; (v) changing normative associations; (vi) constructing normative networks; (vii) mimicry; (viii) theorising; and (ix) educating.[211] As the creation of the ICACD would involve persuading many actors to adopt different point of view by changing their vision of the institution, it will consist of overcoming many obstacles. Thus, adoption of all nine methods would be necessary to implement the institutional change advanced herein. A progressive refinement operation is necessary given the warranted complexities in balancing the different interests and the need to reconcile efficacy and legitimacy imperatives.

A change of this magnitude would involve new thinking and a lot of work to prove that order, planning, predictability, central control, accountancy, instructions to the underlines, obedience, discipline etc. are necessary for the sustainable development of this institution. At times bureaucracy becomes essential to respond to society's needs and it is why administrative structures are developed, specialised and divided so to achieve these needs.[212] Bureaucratic systems can handle more complex operations. It is this idea of office that international commercial arbitration as an institution could orient toward to become wholly legitimate under a supranational regulatory body.

Scott writes that "Institutional frameworks define the ends and shape the means by which

[210] Schumacher (n 66), 203

[211] Lawrence and Suddaby (n 204), 221

[212] Weber (n 69). See also Stillman (n 71)

interests are determined and pursued".[213] All the actors in the institution could embrace the institutional entrepreneurship opportunity identified herein to create such a body as a product of their own making in accordance with the type of regulation and enforcement that they desire. This would result in systematic and consistent management; planning; organising; commanding; coordinating; and controlling of the institution so as to: (i) eliminate the present challenges such as increased cost and time in proceedings; and (ii) meet the demands of global business competiveness; and (iii) provide consistency and continuity.

5.6 Conclusion

International commercial arbitration is an institution which the international commercial community depends on as a neutral dispute dissolution process. It is indifferent to linguistic, ethnic, cultural, legal, jurisdictional and technical differences. It does away with the negative aspects of litigation. However, there now exist negative aspects in this process. The most cited disadvantages of this institution are 'expense', 'time' 'national court intervention' and 'lack of appeal structure'. This could encourage its users to seek an alternative to it, which could be mediation.

To realise the positive features of this alternative to litigation and other processes, however, there appears a need for it to stand autonomously, without any dependence on or interference from national legal systems. There is a great need to change this institution from a process to a system. A system would make international commercial arbitration harmonised, unified and standardised. It would enhance the legitimacy of the institution.

The embodiment of international commercial arbitration is institutional entrepreneurship for the institution is born from the desire of businessmen to have a dispute resolution process that is: (1) autonomous; (2) neutral; (3) informal and flexible; (4) private; (5) confidential; (6) expeditious; (7) cost effective; (8) specialist; (9) final and binding; and (10) enforceable. Many centuries ago this need was satisfied.

[213] William R Scott, 'The Adolescence of Institutional Theory' (1987) 32(4) Adm. Sci. Q. 493, 508

As the institution advanced to its present stage, its golden age, murmurs of disaffection among users of arbitration have been mounting in recent years. Empirical data and commentary suggest that it has become less autonomous, less confidential and less final and binding. This would be attributable mainly to national legislation permitting numerous avenues for national courts to intervene in and with arbitration proceedings and arbitral awards.

Since this institution is premised on the normative and cultural-cognitive institutional pillars only, it relies heavily on national courts to provide the regulative institutional pillar, particularly with regard to recognition and enforcement of arbitral awards. Arbitral awards are not, therefore, final and binding unless a national court make them so. Also, any challenge to both the arbitration proceedings and the awards are raised in national courts. Enforcing and challenging arbitral awards carries various difficulties for the parties because the process varies between jurisdictions. Subjecting arbitration proceedings to national courts carries another disadvantage, which is that it leads to loss of confidentiality for court hearings are public.

Furthermore, the murmurs of disaffection in and to this institution are about the process being less cost-effective and less expeditious. This could be regarded as being caused by a small number of arbitrators and counsel who colonise the institution. Success of international commercial arbitration is, therefore, credited to the professionals who share self-interest and self-satisfaction and as a result mask its flaws. Also, it could be attributed to a small number of arbitration centres which monopolise the institution. These two factors together make the institution a protected practice. They close it to new interest.

Despite the potential threat of mediation to replace arbitration as the preferred dispute dissolution process of choice for the international commercial community, a new institution is not needed to replace the current one. What appears to be needed is for the existing one to be reassessed, renegotiated and redirected in response to changes in its environment. In order to remain valid and valuable, it should be regulated and controlled to prevent its disintegration for all the reasons outlined.

What is presented here is the means to eliminate the possibility of the institution coming to a

thundering end. Both commentary and empirical data provide the foundation for corroborated forecast about the future of this practice. They appear to make it necessary, realistic, practical, and convenient to form a single supranational international commercial arbitration institution with harmonised, standardised and unified substantive and procedural rules. This is the institutional entrepreneurship opportunity that exists here to enhance the institution.

Actors within the institution should seize the institutional entrepreneurship opportunity presented herein, which is to create the ICACD and as a result enhance the institution's operational functionality. The ICACD would be a supranational regulatory body that is based on Fayol's principles of management, Weber's structure of bureaucracy, and Schumacher's theory of large scale organisation. In essence, it is to introduce the regulative institutional pillar and to make this institution fully institutionalised.

This body would have authority to, firstly, construct the IAARC to review and seal arbitral awards and thus keep arbitration proceedings completely private, confidential and out of the realm of national courts. Secondly, the body would invite arbitration centres to demonstrate that they establish some serious degree of permanence and as such they should be selected as the arbitration centre to be granted jurisdictional authority for a particular continent or region. Thirdly, the ICACD would be empowered to conduct a complete review and revision of the process and devise strategies to make it more cost-effective and expeditious. This would result in the reinstatement of the advantages of the institution which have been lost. Accordingly, this would ensure that the institution becomes fully institutionalised and remain in a position of strength.

Creation of the ICACD would undoubtedly generate general discomfort in the institution. The potential positive value for the institution must, however, be the primary consideration for the actors. A global paradigm in the form of a supranational regulatory has the potential to enhance international commercial arbitration. For one, it would be much easier to maintain the established structural arrangements of a fully institutionalised institution. Ultimately, the ICACD would make this institution an autonomous single supranational system which would bring into existence components of interrelated systems to enable, sustain, and enhance a universal

approach to the provision of standardised, harmonised and unified dispute resolution services to the international commercial community. This would, it is envisaged, place international commercial arbitration on a platform that is truly international and more legitimate.

Unavoidably, this institution is due for change and that institutional entrepreneurship opportunity exist to bring about the desired change for such change would enhance it. The reason for such change is, to employ the founding principle of the London Chamber of Arbitration so as to remember the very purpose of this social institution, that international commercial arbitration should be expeditious where the law is slow; cheap where the law is costly; simple where the law is technical; and cooperative where the law is confrontational. This is what a supranational organisation is very likely to achieve.

Bibliography

Books

Abbud A, 'Fifty Years in Five? The Brazilian Approach to the New York Convention' in J Jemielniak and P Mikłaszewicz (eds), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer 2010)

Adams KA, *Manual of Style for Contract Drafting* (3rd edn, American Bar Association 2008)

Ali SF, *Resolving Disputes in the Asia-Pacific Region: International Arbitration and Mediation in East Asia and the West* (Routledge 2011)

Aksen G and RG Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005)

Alvarez SA, R Agarwal and O Sorenson (eds), *Handbook of Entrepreneurship Research: Disciplinary Perspectives* (Kluwer Publishers 2005)

American Arbitration Association, *AAA Handbook on International Arbitration and ADR* (2nd edn, Juris 2010)

Amro IAS, *Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study of Common Law and Civil Law Countries* (Cambridge Scholars Publishing 2013)

Anscombe GEM, *Intention* (2nd edn, Harvard University Press 2000)

Antonioni P and SM Flynn, *Economics for Dummies* (2nd edn, For Dummies 2011)

Aoki M, *Toward a Comparative Institutional Analysis* (MIT Press 2001)

Arnaud A-J, 'Fact as Law' in D Carzo and BS Jackson (eds), *Semiotics, Law and Social Science* (Reggio and Rome Casa del libro editrice 1985)

Arnauld A and P Nicole, *Logic, or the Art of Thinking* (JV Buroker ed and tr, 5th edn, Cambridge University Press 1996)

Askham T, *A Guide to the Sunday Trading Act 1994* (Butterworths 1994)

Auerbach JS, *Justice Without Law?: Resolving Disputes Without Lawyers* (Oxford University Press 1983)

Austin JL, *How to Do Things with Words* (JO Urmson and S Marina (eds), 2nd edn, Harvard University Press 1975)

Austin JL, *The Province of Jurisprudence Determined* (WE Rumble ed, Cambridge University Press 1995)

Bagheri M, *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration* (Kluwer Law International 2000)

Barker C, A Johnson and M Lavalette (eds), *Leadership and Social Movements* (Manchester University Press 2001)

Barnett P, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press 2001)

Baronett S, *Logic* (3rd edn, Oxford University Press 2015)

Barrett JT and JP Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement* (Jossey-Bass 2004)

Beale H (ed), *Chitty on Contracts: General Principles* (31st edn, Sweet & Maxwell 2012)

Becker G, *Accounting for Tastes* (Harvard University Press 1996)

Bekker PHF, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Martinus Nijhoff 1994)

Berger PL and H Kellner, *Sociology Reinterpreted: An Essay on Method and Vocation* (Anchor Books 1981)

Berger PL and T Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin 1991)

Berkeley A and J Mimms (eds), *International Commercial Arbitration: Practical Perspectives* (Construction Law Press 2001)

Bermann GA (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017)

Bermann GA, M Herdegen and PL Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press 2000)

Bernini G, 'Report on Neutrality, Impartiality, and Independence' in International Chamber of Commerce International Court of Arbitration, *The Arbitral Process and the Independence of Arbitrators* (ICC Publishing 1991)

Betancourt JC and JA Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (AuthorHouse 2014)

Bhatia VK, 'International commercial arbitration: A protected practice' in C Williams and G Tessuto (eds), *Language in the Negotiation of Justice: Contexts, Issues and Applications* (Routledge 2016)

Bhatia VK, CN Candlin and M Gotti (eds), *Discourse and Practice in International Commercial Arbitration: Issues, Challenges and Prospects* (Routledge 2016)

Birdseye CF, *Arbitration and Business Ethics* (D. Appleton & Co., New York 1926)

Blackaby N and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet and Maxwell 2004)

Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015)

Blackaby N and others, *Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press 2009)

Born GB, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Wolters Kluwer 2010)

Born GB, *International Commercial Arbitration* vol II (2nd edn, Wolters Kluwer 2014)

Born, GB, *International Commercial Arbitration* vol I (Wolters Kluwer 2009)

Born GB, *International Commercial Arbitration Commentary and Materials* (2nd edn, Transnational Publishers 2001)

Born GB, *International Commercial Arbitration in the United States* (2nd edn, Kluwer 2001)

Boyum KO and L Mather (eds), *Empirical Theories About Courts* (Longman 1983)

Brekoulakis S, JDM Lew and LA Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016)

Breslin JW and JZ Rubin (eds), *Negotiation Theory and Practice* (Program on Negotiation Books 1991)

Brett T, 'Understanding Organizations and Institutions' in D Robinson, T Hewitt and J Harriss (eds), *Managing Development: Understanding Inter-organizational Relationships* (SAGE Publications in association with The Open University 2000)

Bridgman PW, *The Logic of Modern Physics* (Macmillan 1927)

Brinton MC and V Nee, *The New Institutionalism in Economics and Sociology* (Stanford University Press 2002)

Brooman J and M Roberts, *Longman History Project South Africa 1948-1994: The Rise and Fall of Apartheid: Updated to Cover the ANC Governments of Mandela and Mbeki, 1994-2000* (2nd edn, Longman 2001)

Brower CN, M Pulos and CB Rosenberg, 'So Is Anything Really Wrong with International Arbitration as We Know It?' in AW Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* 2012 (Martinus Nijhoff Publishers 2013)

Brown LF, ‘Arbitral Institutions Active in International Commercial Arbitration’ in LF Brown (ed), *The International Arbitration Kit: A Compilation of Basic and Frequently Requested Documents* (4th edn, America Arbitration Association 1993)

Brunsson N, B Jacobsson and Associates, *A World of Standards* (Oxford University Press 2002)

Bühring-Uhle C, *Arbitration and Mediation in International Business* (Kluwer Law International 1996)

Bühring-Uhle C, L Kirchhoff and G Scherer, *Arbitration and Mediation in International Business* (Kluwer Law International 2006)

Burke EM, *Corporate Community Relations: The Principle of the Neighbor of Choice* (Praeger 1999)

Burrows A, *A Casebook on Contract* (4th edn, Hart Publishing 2013)

Bursik Jr RJ and HG Grasmick, ‘The Use of Contextual Analysis in Models of Criminal Behavior’ in JD Hawkins (ed) *Delinquency and Crime: Current Theories* (Cambridge University Press 1996)

Campbell JL, *Institutional Change and Globalization: Exploring Problems in the New Institutional Analysis* (Princeton University Press 2004)

Carbonneau TE, *The Law and Practice of Arbitration* (5th edn, Juris 2014)

Carnap R, *Meaning and Necessity* (University of Chicago Press 1947)

Caron DD and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015)

Carter JH, *The International Arbitration Review* (7th edn, Law Business Research 2016)

Chern C, *International Commercial Mediation* (Informa Law 2008)

Chigara B, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Ashgate 2001)

Clark NL and WH Worger, *South Africa: The Rise and Fall of Apartheid (Seminar Studies in History)* (2nd edn, Routledge 2011)

Clegg SR, *Frameworks of Power* (SAGE 1989)

Clegg SR, C Hardy and WR Nord (eds), *Handbook of Organization Studies* (SAGE 1996)

Clegg SR and others (eds), *Handbook of Organization Studies* (2nd edn, SAGE Publications 2006)

Cole GA and P Kelly, *Management Theory and Practice* (8th edn, Cengage Learning 2015)

Collier J and V Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press 1999)

Contractor FJ and P Lorange, 'Why Should Firms Cooperate? The Strategy and Economics Basis for Cooperative Ventures' in FJ Contractor and P Lorange (eds), *Cooperative Strategies in International Business* (Lexington 1988)

Cook RT, *A Dictionary of Philosophical Logic* (Edinburgh University Press)

Cook TM and AI Garcia, *International Intellectual Property Arbitration* (Kluwer Law International 2010)

Craig LW, WW Park and J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000)

Cutler C, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003)

Cutlip SM, AH Center and GM Broom, *Effective Public Relations* (8th edn, Prentice Hall 2000)

D'Andrade RG, 'Cultural Meaning Systems' in RA Shweder and RA LeVine (eds), *Culture Theory: Essays on Mind, Self and Emotion* (1st edn, Cambridge University Press 1985)

Davenport TH, *Process Innovation: Reengineering work through Information Technology* (Harvard Business School Press 1993)

Davidson D, *Inquiries into Truth and Interpretation* (2nd edn, Clarendon Press 2001)

Davis GF and others (eds), *Social Movements and Organization Theory* (Cambridge University Press 2005)

Davis LE and DC North, *Institutional Change and American Economic Growth* (Cambridge University Press 1971)

Delvolvé J-L, J Rouche and GH Pointon, *French Arbitration Law and Practice* (Kluwer Law International 2004)

Deming WE, *The New Economics for Industry, Government, Education* (2nd edn, MIT Press 1994)

Derains Y and L Levy (eds), *Is Arbitration Only as Good as the Arbitrator?: Status, Powers and Role of the Arbitrator* (Kluwer Law International 2015)

Derains Y and EA Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005)

Dewey J, *Human Nature and Conduct* (H. Holt 1922)

Dezalay Y and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (2nd edn, University of Chicago Press 1998)

Dicey AV, L Collins and JHC Morris, *Dicey, Morris & Collins on The Conflict of Laws* vol 2 (14th edn, Sweet & Maxwell 2011)

Diogo S, T Carvalho and A Amaral, 'Institutionalism and Organizational Change' in J Huisman and others, *Multi-Level Governance in Higher Education Research* (Palgrave 2015)

Djelic M-L, *Exporting the American Model: The Postwar Transformation of European Business* (Oxford University Press 1998)

Domke M and GM Wilner, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* (West Group 1984)

Domke M, *Commercial Arbitration* (Prentice-Hall 1965)

Domke M, *Domke on Commercial Arbitration: The Law and Practice of Commercial Arbitration* vol I (GM Wilner ed., rev. ed., Supp. 1995)

Douglas M, *How Institutions Think* (Syracuse University Press 1986)

Downes L, *The Laws of Disruption: Harnessing the New Forces that Govern Life and Business in the Digital Age* (Basic Books 2009)

Drahozal CR and RW Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International 2005)

Eggertsson T, *Imperfect Institutions: Possibilities and Limits of Reform* (University of Michigan 2005)

Elam D, *Feminism and Deconstruction* (Routledge 1994)

Elster J, *Nuts and Bolts for the Social Sciences* (Cambridge University Press 1989)

Erwin E, *The Concept of Meaninglessness* (1st edn, Johns Hopkins University Press 1970)

Fayol H, *General and Industrial Management* (Constance Storr tr, Martino 2013)

Fligstein N, 'Competition, Stability, and Conceptions of Control' in JAC Baum and F Dobbin (eds), *Economics Meets Sociology in Strategic Management Advances in Strategic Management* vol 17 (Emerald Group Publishing Limited 2000)

Fligstein N, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton University Press 2001)

Fligstein N, *The Transformation of Corporate Control* (Harvard University Press 1990)

Foelix JJG and C Demangeat, *Traite du Droit International Privé: Ou Du Conflit des Lois de Differentes Nations en Matiere de Droit Privé* (2nd edn, Marescq et Dujardin 1847)

Fombrun CJ, *Reputation: Realizing Value from the Corporate* (Harvard Business Review Press

1996)

Forrester JW, *Principles of Systems* (MIT Press 1968)

Forsyth DR, *Group Dynamics* (6th edn, Wadsworth Cengage Learning 2014)

Franck TM, *The Power of Legitimacy Among Nations* (Oxford University Press 1990)

Friedland PD, *Arbitration Clauses for International Contracts* (2nd edn, Juris 2007)

Friedman LM, *The Legal System: A Social Science Perspective* (SAGE 1975)

Frommel SN and BAK Rider, *Conflicting Legal Cultures in Commercial Arbitration Old Issues and New Trends* (Kluwer Law International 1999)

Gaillard E (ed), *The Review of International Arbitral Awards* (Juris 2010)

Gaillard E, D di Pietro and N Leleu-Knobil (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention Practice* (1st edn, Cameron May 2008)

Gaillard, E and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999)

Gaillard E, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010)

Garnett R and others, *A Practical Guide to International Commercial Arbitration* (Oceana Publication 2000)

Garud R and P Karnøe, 'Path Creation as a Process of Mindful Deviation' in G Raghu and P Karnøe (eds), *Path Dependence and Creation* (Lawrence Earlbaum Associates 2001)

Gauthier D, 'Hobbes's Social Contract' in GAJ Rogers and A Ryan (eds), *Perspectives on Thomas Hobbes* (Oxford University Press 1988)

Gauthier D, *Morals by Agreement* (Oxford University Press 1986)

Gaventa J, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley*

(University of Illinois Press 1982)

Geertz CJ, *The Interpretation of Cultures* (Basic Books 1973)

Gerbay R, *The Functions of Arbitral Institutions* (Wolters Kluwer 2016)

Giddens A and C Pierson, *Conversations with Anthony Giddens: Making Sense of Modernity* (Stanford University Press 1998)

Giddens A, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1984)

Goffman E, *Frame Analysis: An Essay on the Organization of Experience* (HarperGoffman 1974)

Goldberg SB, FE Sander and NH Rogers (eds), *Dispute Resolution: Negotiation, Mediation and Other Processes* (5th edn, Wolters Kluwer 2007)

Goldsmith JL and EA Posner, *The Limits of International Law* (Oxford University Press 2006)

Greenberg S, C Kee and JR Weeramantry, *International Commercial Arbitration - An Asia-Pacific Perspective* (Cambridge University Press 2011)

Greenwood R and others (eds), *The SAGE Handbook of Organizational Institutionalism* (SAGE 2008)

Grice HP, 'Logic and Conversation' in P Cole and JL Morgan (eds), *Syntax and Semantics* vol 3 (Academic Press 1975)

Grice HP, *Studies in the Way of Words* (Harvard University Press 1989)

Gulliver PH, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press 1979)

Guo K and others, *The Changing Organisation: Agency Theory in a Cross-Cultural Context* (Cambridge University Press 2016)

Gusy MF, JM Hosking and FT Schwarz, *A Guide to the ICDR International Arbitration Rules*

(Oxford University Press 2011)

Habermas J, *Communication and the Evolution of Society* (T McCarthy tr, Beacon Press 1979)

Habermas J, *Knowledge and Human Interests* (JJ Shapiro tr, Beacon 1971)

Habermas J, *Toward a Rational Society* (JJ Shapiro tr, Beacon 1970)

Hacker PMS, *Human Nature: the Categorial Framework* (Blackwell Publishing 2007)

Haines SG, *The Complete Guide to Systems Thinking and Learning* (Human Resource Development Press 2000)

Hammer M and J Champy, *Re-engineering the Corporation: A Manifesto for Business Revolution* (Harper Business 1993)

Hannan MT and J Freeman, *Organizational Ecology* (Harvard University Press 1989)

Harre R, *Social Being* (Blackwell 1979)

Hart HLA, *The Concept of Law* (3rd edn, Clarendon Law 2012)

Hart W, RD Blanchard and J Walter, *Litigation and Trial Practice* (6th edn, Delmar Cengage Learning 2006)

Hedström P and R Swedberg (eds), *Social Mechanisms: An Analytical Approach to Social Theory* (Cambridge University Press)

Heidegger M, *An Introduction to Metaphyics* (R Manheim tr, Yale University Press 1959)

Heilbron H, *A Practical Guide to International Arbitration in London* (Informa 2008)

Henrekson M and M Stenkula, *Understanding Entrepreneurship: Definition, Function and Policy* (Studentlitteratur 2016)

Hodgson GM, *Economics in the Shadows of Darwin and Marx: Essays on Institutional and Evolutionary Themes* (Edward Elgar 2006)

Hodgson GM, *The Evolution of Institutional Economics: Agency, Structure, and Darwinism in American Institutionalism* (Routledge 2004)

Hoffman AJ, *From Heresy to Dogma: An Institutional History of Corporate Environmentalism* (Stanford Business Books 2001)

Hoffman E, *The Right to be Human: A Biography of Abraham Maslow* (McGraw-Hill 1988)

Hofstede GH, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations* (2nd edn, SAGE 2001)

Honsell H and others, *International Arbitration in Switzerland* (1st edn, Kluwer Law International 2000)

Horwich P, *Meaning* (Oxford University Press 2004)

Hughes EC, 'Institutions' in RE Park and EB Reuter (eds), *An Outline of the Principles of Sociology* (Barnes & Noble 1939)

Hughes EC, *Men and Their Work* (Free Press 1958)

Hummel RP, 'Bureaucracy' in JM Shafritz (ed), *Defining Public Administration: Selections from the International Encyclopedia of Public Policy and Administration* (Westview Press 2000)

Hummel RP, *The Bureaucratic Experience: The Post-modern Challenge* (5th edn, Routledge 2008)

Hunter M, A Marriott and VV Veeder (eds), *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, London, (Graham and Trotman/Martinus Nijhoff 1995)

Hwang M (eds), *Selected Essay on International Arbitration* (Academy Publishing 2013)

Ikegami E, *The Taming of the Samurai: Honorific Individualism and the Making of Modern Japan* (Harvard University Press 1995)

International Commercial Arbitration, 'Report of the Secretary-General: possible features of a

model law on international commercial arbitration (A/CN.9/207)' in *United Nations Commission on International Trade Law Yearbook* (1981) XII UNCITRAL Ybk 75

International Commercial Arbitration, 'Report of the Working Group on International Contract Practices on the Work of its Third Session (New York, 16-26 February 1982) (A/CN.9/216)' in *United Nations Commission on International Trade Law Yearbook* (1982) XIII UNCITRAL Ybk 287

International Council for Commercial Arbitration, *ICCA'S Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration 2011)

Jackall R, *Moral Mazes: The World of Corporate Managers* (Oxford University Press 1988)

Johansson HJ, *Business Process Reengineering: Breakpoint Strategies for Market Dominance* (John Wiley & Sons 1993)

Johnson T, *Ethics in Quantitative Finance: A Pragmatic Financial Market Theory* (Springer 2017)

Juran JM, *Juran on Quality by Design: The New Steps for Planning Quality into Goods and Services* (Free Press 1992)

Katz D and RL Kahn, *The Social Psychology of Organizations* (2nd edn, John Wiley & Sons 1966)

Katzenbach JR and DK Smith, *The Wisdom of Teams: Creating the High-Performance Organization* (Harvard Business Press 1993)

Kay JA, *Obliquity: Why Our Goals Are Best Achieved Indirectly* (Profile Books 2011)

Kellor FA, *American Arbitration: Its History, Functions and Achievements* (BeardBooks 2000)

Kidane WL, *The Culture of International Arbitration* (Oxford University Press 2017)

Kilpinen E, 'Human Beings as Creatures of Habit' in A Warde and D Southerton (eds), *The*

Habits of Consumption (COLLeGIUM 2012)

Knight J and I Sened (eds), *Explaining Social Institutions* (University of Michigan Press 1995)

Knight J, *Institutions and Social Conflict* (Cambridge University Press 1992)

Kolkey DM, R Chernick and BR Neal (eds), *Practitioner's Handbook on International Arbitration and Mediation* (3rd edn, Juris 2012)

Koremenos B, C Lipson and D Snidal (eds), *The Rational Design of International Institutions* (Cambridge University Press 2003)

Kos-Rabcewicz-Zubkowski LJ and P Davidson, *Commercial Arbitration Institutions: An International Directory and Guide* (Oceana Publications 1986)

Kripke S, *Naming and Necessity* (Harvard University Press 1980)

Kröll SM and others (eds), *International Arbitration and International Commercial Law: Synergy Convergence and Evolution: Liber Amicorum Eric Bergsten* (Kluwer Law International 2011)

Kronke H and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010)

Lalive PA, 'On the Neutrality of the Arbitrator and of the Place of Arbitration' in C Reymond and E Bucher (eds), *Swiss Essays on International Arbitration* (Schulthess 1984)

Lalive PA, 'avantages et inconvénients de l'arbitrage "ad hoc"' in Pierre Bellet (ed), *Etudes offertes à Pierre Bellet* (Litec 1991)

Lange D, *The Doctrine of Res Judicata in Canada* (Butterworths 2000)

Lawrence TB, R Suddaby and B Leca (eds), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (Cambridge University Press 2009)

Lew JDM (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff Publishers 1987)

Lew JDM, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)

Lewis DK, *Convention* (Harvard University Press 1969)

Likosky M (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths LexisNexis 2002)

Liu Q, W Shan and X Ren, *China and International Commercial Dispute Resolution* (Martinus Nijhoff 2015)

Locke J, *An Essay Concerning Human Understanding* (Peter H Nidditch ed, Oxford University Press 1975)

Luce RD and H Raiffa, *Games and Decisions: Introduction and Critical Survey* (John Wiley & Sons 1957)

Lynch KL, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International 2003)

Mackenzie R, 'The Selection of International Judges' in CPR Romano, KJ Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014)

Mackenzie R and others, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press 2010)

Mahoney J and KA Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency and Power* (Cambridge University Press 2010)

Malatesta A and R Sali (eds), *The Rise of Transparency in International Arbitration: The Case for the Anonymous Publication of Arbitral Awards* (Juris 2013)

Malynes G and others, *The Ancient Law Merchant* (3rd edn, F. Redmayne 1685)

Mann M, *The Sources of Social Power, Volume 1: A History of Power from the Beginning to A.D. 1760* (Cambridge University Press 1986)

March JG and JP Olsen, *Rediscovering Institutions* (Free Press 1989)

Margolis H, *Paradigms and Barriers: How Habits of Mind Govern Scientific Beliefs* (University of Chicago Press 1994)

Markus HR and R Zajonc, 'The Cognitive Perspective in Social Psychology' in G Lindzey and E Aronson (eds), *The Handbook of Social Psychology* (3rd edn, Random House (1985)

Maslow AH, *Motivation and Personality* (Harper and Row 1954)

Maslow AH, *Toward a Psychology of Being* (Van Nostrand 1962)

Mattli W and T Dietz (ed), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014)

Mayr E, *Understanding Human Agency* (Oxford University Press 2011)

McDowell JH, *Mind and World* (Harvard University Press 1994)

Menkel-Meadow C (ed), *Multi-Party Dispute Resolution, Democracy and Decision-Making* vol II (1st edn, Routledge 2012)

Merlin P-A, *Recueil Alphabetique de Question de Droit* (4th edn, Tarlier 1829)

Meyer JW and WR Scott, *Organizational Environments: Ritual and Rationality* (SAGE 1983)

Miles EL and others, *Environmental Regime Effectiveness: Confronting Theory with Evidence* (MIT Press 2002)

Mirowski P, *Against Mechanism: Protecting Economics from Science* (Rowman & Littlefield Publishers, Inc. 1988)

Mistelis LA and JDM Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2008)

Moens GA and P Evans (eds), *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective* (Springer 2015)

Moore CW, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edn, Wiley 2014)

Moore JB, *History and Digest of the International Arbitrations to Which the United States has been a Party* vol I (Government Printing Office 1898)

Morrill C, *The Executive Way: Conflict Management in Corporations* (University of Chicago Press 1995)

Moser MJ and F Yu (eds), *Doing Business in China* (Juris Publishing 1999)

Moses ML, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008)

Moses M L, *The Principles and Practice of International Commercial Arbitration* (2nd Cambridge University Press 2012)

Muniz JT and AT Basílio, *Arbitration Law of Brazil: Practice and Procedure* (Juris Publishing 2006)

Murphy JB, 'The Kinds of Order in Society' in P Mirowski (ed), *Natural Images in Economic Thought: Markets Read in Tooth and Claw* vol 12 (Cambridge University Press 1994)

Mustill MJ and SC Boyd, *Commercial Arbitration* (2nd edn, LexisNexis 1989)

Nader L and HF Todd (eds), *The Disputing Process - Law in Ten Societies* (Columbia University Press 1978)

Nader L, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford University Press 1990)

Najjar N, *Arbitration and International Trade in the Arab Countries* (Brill Nijhoff 2017)

Nee VG, 'The New Institutionalism in Economics and Sociology' in NJ Smelser and R Swedberg, *The Handbook of Economic Sociology* (2nd edn, Princeton 2005)

Newman LW and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration*

(2nd edn, JurisNet 2008)

Newman LW and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, Juris 2014)

Newman LW and M Burrows, *Practice of International Litigation* (2nd edn, JurisNet 2013)

North DC, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990)

Noussia K, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position Under English, US, German and French Law* (Springer 2010)

O'Malley ND, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa Law 2012)

Onyema E, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010)

Papanikolaou K and M Hiskaki (eds), *International Administrative Tribunals in a Changing World* (Esperia Publications 2008)

Parfit D and others (eds), *Exploring Practical Philosophy: From Action to Values* (Ashgate 2001)

Park WW, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, Oxford University Press 2012)

Parsons T, *Structure and Process in Modern Societies* (Free Press 1960)

Parsons T, *The Social System* (Free Press 1951)

Parsons T, *The Structure of Social Action* (Free Press 1937)

Paulsson J, *Denial of Justice in International Law* (Cambridge University Press 2005)

Paulsson J, *The Idea of Arbitration* (Oxford University Press 2013)

Pauwelyn J, R Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012)

Peaucelle J-L and C Guthrie, *Henri Fayol, the Manager* (Routledge 2016)

Perkmann M and A Spicer, 'What are Business Models? Developing a Theory of Performative Representations' in N Phillips, G Sewell and D Griffiths (eds), *Technology and Organization: Essays in Honour of Joan Woodward* (Research in the Sociology of Organizations) vol 29 (Emerald Group Publishing Limited 2010)

Pfeffer J and GR Salancik, *The External Control of Organizations: A Resource Dependence Perspective* (Harper and Row 1978)

Phillips EM and DS Pugh, *How To Get A PhD: A Handbook for Students and their Supervisors* (4th edn, Open University Press 2005)

Pierson P and T Skocpol, 'Historical Institutionalism in Contemporary Political Science' in I Katznelson and HV Miller (eds), *Political Science: State of the Discipline* (Norton 2002)

Platts M, *Ways of Meaning: An Introduction to a Philosophy of Language* (2nd edn, MIT Press 1997)

Plimmer FAS, *Rating Law and Valuation* (Routledge 1998)

Poudret J-F and S Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell 2007)

Powell WW and PJ DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (2nd edn, University of Chicago Press 1991)

Powell WW, 'Institutional Theory' in CL Cooper and C Argyris (eds), *The Concise Blackwell Encyclopedia of Management* (Blackwell 1998)

Pritchett B, *Fire Someone Today: And Other Surprising Tactics for Making Your Business a Success* (Nelson Business 2006)

Pythagoras of Samos in Florilegium, XVIII, 23 (Harbottle, Thomas Benfield tr, *Dictionary of Quotations* (S. Sonnenschein & Company Limited 1906)

Rainey HG, *Understanding and Managing Public Organizations* (5th edn, Jossey-Bass 2014)

Ralston JH, *International Arbitration from Athens to Locarno* (The Lawbook Exchange 2004)

Rawls J, *A Theory of Justice* (Harvard University Press 1971)

Redfern A and M Hunter, *Law and Practice of International Commercial Arbitration* (2nd edn, Sweet & Maxwell 1991)

Redfern A and M Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn, Sweet & Maxwell 1999)

Reismann WM and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Foundation Press 1997)

Robinson R, *Definition* (Oxford University Press 1950)

Roebuck D, *Ancient Greek Arbitration* (Holo Books The Arbitration Press 2001)

Rogers CA, *Ethics in International Arbitration* (Oxford University Press 2014)

Rollin BE, *Natural and Conventional Meaning: An Examination of the Distinction (Approaches to Semiotics)* (Mouton de Gruyter 1976)

Romano S, *The Legal Order* (Mariano Croce ed and tr, Routledge 2017)

Rovine AW (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2011* (Martinus Nijhoff Publishers 2012)

Rovine AW (ed), *Contemporary Issues in International Arbitration and Mediation - The Fordham Papers 2009* (Martinus Nijhoff Publishers 2010)

Rubino-Sammartano M, *International Arbitration Law and Practice* (3rd edn, Juris Publishing 2014)

Rubino-Sammartano M, *International Arbitration Law and Practice* (2nd edn, Kluwer 2001)

Rubino-Sammartano M, *International Arbitration Law* (Kluwer Law and Taxation Publishers 1990)

Ryle G, *The Concept of Mind* (1st edn, University of Chicago Press 2000)

Salter M and J Mason, *Writing Law Dissertations, An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman 2007)

Samuel A and M-F Currat, *Jurisdictional problems in international commercial arbitration: A study of Belgian, Dutch, English, French, Swedish, Swiss, U.S., and West German law* (Schulthess Polygraphischer Verlag 1989)

Sanders P and M Domke (eds), *International Commercial Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff 1967)

Sanders P, *The Art of Arbitration: Essays on International Arbitration Liber Amicorum Pieter Sanders, 12 Sept. 1912-1982* (JC Schultsz and AJ van den Berg eds, Springer Netherlands 1982)

Sauvant, KP (ed), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008)

Schickler E, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton University Press 2001)

Schiffer S, *Meaning* (Clarendon Press 1972)

Schmitthoff C (ed), *The Sources of the Law of International Trade* (Stevens and Sons 1964)

Schotter A, *The Economic Theory of Social Institutions* (Cambridge University Press 1981)

Schultz T, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press 2014)

Schumacher EF, *Small is Beautiful: A Study of Economics as if People Mattered* (Vintage Books 1993)

Schumpeter JA, *Capitalism, Socialism and Democracy* (Harper & Brothers 1942)

Schutz A, *Collected Papers: the Problem of Social Reality* (Maurice Natanson ed, Martinus Nijhoff 1962)

Schutz A, *The Phenomenology of the Social World* (Northwestern Press 1967)

Schütze RA (ed), *Institutional Arbitration: A Commentary* (C. H. Beck, Hart and Nomos 2013)

Scott WR, *Institutions and Organizations: Ideas, Interests, and Identities* (4th edn, SAGE 2014)

Scott WR and S Christensen (eds), *The Institutional Construction of Organizations: International and Longitudinal Studies* (SAGE 1995)

Scott WR, 'Conceptualizing organizational fields: linking organizations and societal systems' in H-U Derlien, U Gerhardt and FW Scharpf (eds), *Systemrationalitat und Partialinteresse* (Nomos Verlagsgesselschaf 1994)

Scott WR and GF Davis, *Organizations and Organizing: Rational, Natural and Open System Perspectives* (Routledge 2016)

Scott WR, *Institutions and Organizations* (2nd edn, SAGE 2001)

Scott WR, *Institutions and Organizations* (SAGE 1995)

Scott WR and others, *Institutional Change and Healthcare Organizations: From Professional Dominance to Managed Care* (SAGE 2000)

Senge PM, *The Fifth Discipline, The Art and Practice of the Learning Organization* (Crown Publishing Group 2006)

Shafritz JM and AC Hyde, *Classics of Public Administration* (8th edn, Cengage Learning 2016)

Shany Y, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003)

Shapiro SJ, *Legality* (Harvard University Press 2013)

Sime S, *A Practical Approach to Civil Procedure* (19th edn, Oxford University Press 2016)

Simpson J and E Weiner (eds), *Oxford English Dictionary* (2nd edn, Oxford University Press 1989)

Smeureanu IM, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011)

Staw BM and LL Cummings (eds), *Research in Organizational Behavior* (JAI Press 1991)

Steingruber AM, *Consent in International Arbitration* (Oxford University Press 2012)

Steinmo S, KA Thelen and F Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press 1992)

Stillman RJ, *Public Administration: Concepts and Cases* (7th edn, Houghton Mifflin 2000)

Strang D and WD Sine, 'Interorganizational institutions' in JAC Baum (ed), *Blackwell Companion to Organizations* (Blackwell Scientific Publications 2002)

Streeck W and KA Thelen, *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press 2005)

Strong SI, *Research in International Commercial Arbitration: Sources and Strategies* (Oxford University Press 2009)

Sull D and KM Eisenhardt, *Simple Rules: How to Thrive in a Complex World* (Mariner Books 2016)

Sweet AS and F Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017)

Sze-On QL and ELP Khoon, *Confidentiality in Arbitration: How Far Does it Extend?* (Academy Publishing 2007)

Tams CJ, *An Appealing Option? The Debate about an ICSID Appellate Structure* (Inst. für Wirtschaftsrecht 2006)

Taylor FW, *The Principles of Scientific Management Paperback* (Martino 2014)

Terris D, CPR Romano and L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis 2007)

Teubner, G (ed), *Global Law Without A State* (Dartmouth Publishing 1997)

Thacher S and Bartlett LLP, *Comparison of Asian International Arbitration Rules* (Juris 2003)

Thelen KA, 'How Institutionalism Evolves: Insights from Comparative Historical Analysis' in J Mahoney and J Rueschemeyer (eds), *Comparative Historical Analysis in the Social Sciences* (Cambridge University Press 2003)

Thelen KA, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (Cambridge University Press 2004)

Thomas GM and others (eds), *Institutional Structure: Constituting State, Society and the Individual* (SAGE 1987)

Thomas S, 'The Importance of Being Earnest about Definitions' in G Vossenand others (eds), *Datenbanksysteme in Business, Technologie und Web* (Gesellschaft für Informatik 2005)

Thompson L and L Berat, *A History of South Africa* (4th edn, Yale University Press 2014)

Thornton PH, W Ocasio and M Lounsbury, *The Institutional Logics Perspective: A New Approach to Culture, Structure and Process* (Oxford University Press 2012)

Triandis HC, *Individualism and Collectivism* (Westview Press 1995)

Turner J, *The Institutional Order* (Longman 1997)

Turner P and R Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford University Press 2009)

Udehn L, *Methodological Individualism: Background, History and Meaning* (Routledge 2014)

Uphoff NT, *Local Institutional Development: An Analytical Sourcebook* (Kumarian Press 1986)

van den Berg AJ (ed), '*50 Years of the New York Convention*' (2009) 14 ICCA Congress Series

van den Berg AJ(ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999)

van den Berg AJ (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007)

van den Berg AJ, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in M Arsanjani and J Cogan (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2010)

van den Berg AJ, 'The New York Convention of 1958: An Overview' in *Yearbook Commercial Arbitration* (2003) XXVIII Comm. Arb'n Ybk

van den Berg AJ, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International (1981)

vel Kalisz BG-K (ed), *The Challenges and the Future of Commercial and Investment Arbitration: Liber Amicorum Professor Jerzy Rajski* (Court of Arbitration Lewiatan 2015)

Velleman JD, *The Possibility of Practical Reason* (University of Michigan Library 2014)

Viljoen J and S Dann, *Strategic Management* (4th edn, Prentice Hall 2003)

von Bertalanffy L, *General System Theory: Foundations, Development, Applications* (George Braziller 1968)

Warwas BA, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Asser Press Springer 2017)

Weber M, 'The Concept of Legitimate Order' in Talcott Parsons and others, *Theories of Society: Foundations of Modern Sociological Theory* vol I (The Free Press of Glencoe, Inc. 1961)

Weber M, *Bureaucracy* (Oxford Press 1946)

Weber M, *Economy and Society: An Interpretive Sociology* (Bedminister Press 1968)

Weber M, *Weber's Rationalism and Modern Society: New Translations on Politics, Bureaucracy, and Social Stratification* (T Waters and D Waters eds and trs, Palgrave MacMillan 2015)

Weigand F-B (ed), *Practitioner's Handbook on International Commercial Arbitration* (2nd edn, Oxford University Press 2010)

Weingast BR, 'Political Institutions: Rational Choice Perspectives' in R Goodin and H-D Klingemann (eds), *A New Handbook of Political Science* (Oxford University Press 1996)

Weinrich U, 'On the Semantic Structure of Language' in JH Greenberg (ed), *Universals of Language* (2nd edn, MIT 1961)

Weir M, *Politics and Jobs: The Boundaries of Employment Policy in the United States* (Princeton University Press 1992)

Wells A, *Social Institutions* (Heinemann 1970)

Wetter JG, *The International Arbitral Process: Public and Private* vol II (Oceana Publications 1979)

Wilde O, *The Picture of Dorian Gray* (Alma Classics 2014)

William of Ockham, *Ockham's Theory of Propositions: Part I of the Summa Logicae* (AJ Freddoso and H Schuurman trs, 1st edn, St. Augustines Press 2011)

William of Ockham, *Quodlibetal Questions* vols 1 and 2 (AJ Freddoso and H Schuurman trs, Yale University Press 1998)

Wilson E and E Blackmore (eds), *Dispute or Dialogue?: Community Perspectives on Company-led Grievance Mechanisms* (International Institute for Environment and Development (UK) 2013)

Wittgenstein L, *Philosophical Investigations* (GEM Anscombe tr, Wiley-Blackwell 1973)

Wittgenstein L, *Tractatus Logico Philosophicus* (CK Ogden tr, Chiron Academic Press 2016)

Wolfrum R and V Röben (eds), *Legitimacy in International Law* (Springer 2008)

Young HP, *Individual Strategy and Social Structure: An Evolutionary Theory of Institutions* (Princeton University Press 1998)

Young OR, *International Governance Protecting the Environment in a Stateless Society* (Cornell University Press 1994)

Zucker LG (ed), *Institutional Patterns and Organizations: Culture and Environment* (HarperBusiness 1988)

Zucker LG, 'Organizations as Institutions' in SB Bacharach (ed), *Advances in Organizational Theory and Research* vol II (JAI Press 1983)

Journals

'History of the Arbitration - The United States Has Every Reason to be Satisfied with the Decision of the Tribunal' *The New York Times* (New York, 16 August 1893)

Adams KA, 'The AAA Standard Arbitration Clause: Room for Improvement' (2010) 243(44) NYLJ

Aksen G, 'Reflections of an International Arbitrator' (2007) 23(2) Arb. Int'l 255

Albiston CR, LB Edelman and J Milligan, 'The Dispute Tree and the Legal Forest' (2014) 10 Annu. Rev. Law Soc. Sci. 105

Ali SF, 'Approaching the Global Arbitration Table: Comparing the Advantages of Arbitration as Seen by Practitioners in East Asia and the West' (2009) 28(4) Rev. Litig. 791

Allsop J, 'The Authority of the Arbitrator' (2014) 30(4) Arb. Int'l. 639

Ancel J-P, 'French Judicial Attitudes towards International Arbitration' (1993) 9(2) Arb. Int'l 121

Aoki M, 'Endogenizing Institutions and Institutional Change' (2007) 3 J. Inst. Econ. 1

Arsić J, ‘International Commercial Arbitration on the Internet – Has the Future Come Too Early?’ (1997) 14(3) J. Int’l Arb. 209

Bagner H, ‘Confidentiality - A Fundamental Principle in International Commercial Arbitration?’ (2001) 18 J. Int’l Arb. 243

Barley SR and PS Tolbert, ‘Institutionalization and Structuration: Studying the Links Between Action and Institution’ (1997) 18(1) Organ. Stud. 93

Barnett WP, ‘The Dynamics of Competitive Industry’ (1997) 42 Adm. Sci. Q. 128

Barney J, ‘Firm Resources and Sustained Competitive Advantage’ (1991) 17(1) J. Manag. 99

Battilana J and M Lee, ‘Advancing Research on Hybrid Organizing’ (2014) 8(1) Acad. Manag. Ann. 397

Battilana J, ‘Agency and Institutions: The Enabling Role of Individuals’ Social Position’ (2006) 13(5) Organization 653

Battilana J, B Leca and E Boxenbaum, ‘How Actors Change Institutions: Towards a Theory of Institutional Entrepreneurship’ (2009) 3(1) Acad. Manag. Ann. 65

Baum JAC and C Oliver, ‘Institutional Embeddedness and the Dynamics of Organizational Populations’ (1992) 57(4) Am. Sociol. Rev. 540

Baum JAC, and WW Powell, ‘Cultivating an Institutional Ecology of Organizations: Comment on Hannan, Carroll, Dundon, and Torres’ (1995) 60(4) Am. Sociol. Rev. 529

Baumol WJ, ‘Entrepreneurship in Economic Theory’ (1968) 58(2) Am. Econ. Rev. 64

Baumol WJ, ‘Entrepreneurship: Productive, Unproductive, and Destructive’ (1990) 98(5) J. Polit. Econ. 893

Becker GS and KM Murphy, ‘A Theory of Rational Addiction’ (1988) 96(4) J. Political Econ. 675

Becker GS, ‘Habits, Addictions and Traditions’ (1992) 45(3) Kyklos 327

Beckert J, ‘Agency, Entrepreneurs, and Institutional Change. The Role of Strategic Choice and Institutionalized Practices in Organizations’ (1999) 20(5) Organ. Stud. 777

Beckert J, ‘Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change’ (2010) 28(2) Sociol. Theory 150

Beerbower JE, ‘International Arbitration: Can We Realise the Potential?’ (2011) 27(1) Arb. Int’l 75

Bergsten EE, ‘Teaching about International Commercial Law and Arbitration: the Eighth Annual Willem C. Vis International Commercial Arbitration Moot’ (2001) 18(4) J. Int’l Arb. 481

Berman PS, ‘Global Legal Pluralism’ (2007) 80 S. Cal. L. Rev. 1155

Bermann GA, ‘The “Gateway” Problem in International Commercial Arbitration’ (2012) 37 Yale J. Int’l L. 1

Bethel TA, ‘Wrongful Discharge: Litigation or Arbitration’ [1993] J. Disp. Resol. 289

Bhatia V, CN Candlin and R Sharma, ‘Confidentiality and Integrity in International Commercial Arbitration Practice’ (2009) 75(1) Arbitration 2

Bishop D and L Reed, ‘Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration’ (1998) 14 Arb. Int’l 395

Böckstiegel K-H, ‘Past, ‘Present, and Future Perspectives of Arbitration’ (2009) 25(3) Arb. Int’l 293

Böckstiegel K-H, ‘The Role of Arbitration within Today’s Challenges to the World Community and to International Law’ (2006) 22(1) Arb. Int’l 165

Boettke PJ and CJ Coyne, ‘Context Matters: Institutions and Entrepreneurship’ (2009) 5(3) Foundations and Trends® in Entrepreneurship 135

Bohmer LM, ‘Finality in ICSID Arbitration Revisited’ (2016) 31(1) ICSID Rev. 236

Boralessa A, ‘The Limitations of Party Autonomy in ICSID Arbitration’ (2004) 15 Am. Rev.

Int'l Arb. 253

Born GB, 'Keynote Address: Arbitration and the Freedom to Associate' (2009) 38(7) Ga. J. Int'l & Comp. L. 7

Botsford P, 'International Arbitration: Beyond Borders' [2008] LS Gaz, 14 Feb, 20

Boxenbaum E and J Battilana, 'Importation as Innovation: Transposing Managerial Practices Across Fields' (2005) 3(4) Strat. Org. 355

Brower CN and CB Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29 Arb. Int'l 7

Brower CN and SW Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law' (2009) 9(2) Chi. J. Int'l L. 471

Brower CN, 'A Crisis of Legitimacy' [2002] Nat'l L. J. B9

Brower CN, 'Charles N. Brower Delivers Keynote Address at Premier Arbitration Conference' (2002) 13 World Arb. & Med. Rep. 270

Brown AC, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' [2001] Am. U. Int'l L. Rev. 969

Brown F and CA Rogers, 'The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China' (1997) 15(2) Berkeley J. Int'l Law 329

Brunet E, 'Replacing Folklore Arbitration with a Contract Model of Arbitration' (1999) 74 Tul. L. Rev. 39

Bühler M, 'Awarding Costs in International Commercial Arbitration: an Overview' (2004) 22 ASA Bulletin 249

Burns JE and RW Scapens, 'Conceptualizing Management Accounting Change: An Institutional Framework' (2000) 11(1) Manag. Account. Res. 3

Busenitz LW, C Gómez and JW Spencer, 'Country Institutional Profiles: Unlocking Entrepreneurial Phenomena' (2000) 43(5) Acad. Manag. J. 994

Buys CG, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 Am. Rev. Int'l Arb. 121

Camic C, 'The Matter of Habit' (1986) 91(5) Am. J. Sociol 1039

Campbell E, 'Res Judicata and Decisions of Foreign Tribunals' (1994) 16 Syd. Law Rev. 311

Cantrill JG, 'Definitional Issues in the Pursuit of Argumentative Understandings: A Critique of Contemporary Practice' (1988) 9 Contemporary Argumentation & Debate 45

Carbone G, 'The Interference of the Court of the Seat with International Arbitration' (2012) 1 J. Disp. Resol. 217

Carbonneau TE, 'Arguments in Favor of the Triumph of Arbitration' (2009) 10 Cardozo J. Conflict Resol. 395

Carbonneau TE, 'At the Crossroads of Legitimacy and Arbitral Autonomy' (2005) 16 Am. Rev. Int'l Arb. 213

Carbonneau TE, 'The Exercise of Contract Freedom in Making of Arbitration Agreements' (2003) 36 V and. J. Transnat'l L. 1189

Carlston KS, 'Theory of the Arbitration Process' (1952) 17(4) Law & Contemp. Prob. 631

Caron DD, 'Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2008) 32 Suffolk Transnat'l L. J. 513

Caron DD, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 Berkeley J. Int'l Law 401

Caronna CA, 'The Misalignment of Institutional "Pillars": Consequences for the US Health Field' [2004] J. Health Soc. Behav. (Suppl.) 45

Carr IM, 'Fighting Corruption through Regional and International Conventions: A Satisfactory

Solution?' (2007) 15 Eur. J. Crime Crim. L. & Crim. Just. 121

Cate IMT, 'International Arbitration and the Ends of Appellate Review' (2012) 44 N.Y.U. J. Int'l L. & Pol. 1109

Chatterjee C, 'The Reality of the Party Autonomy Rule in International Arbitration' (2003) 20(6) J. Int'l Arb. 539

Chatterjee C and A Lefcovitch, 'Recognition and Enforcement of Arbitral Awards: How Effective is Article V of the New York Convention of 1958?' (2016) 9(36) International In-house Counsel Journal

Cheng T, 'Features of Arbitral Practice that Contribute to System Building' (2012) 106 Proceedings of the Annual Meeting-American Society of International Law 292

Child J, Y Lu and T Tsai, 'Institutional Entrepreneurship in Building an Environmental Protection System for the People's Republic of China' (2007) 27(7) Organ. Stud. 1013

Choi S, 'Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions' (1995-1996) 28 N.Y.U.J. Int'l L. & Pol. 175

Christensen S and others, 'Action and Institutions Editors' Introduction' (1997) 40(4) Am. Behav. Sci. 392

Cirielli SE, 'Arbitration, Financial Markets and Banking Disputes' (2003) 14 Am. Rev. Int'l Arb. 243

Clemens ES and JM Cook, 'Politics and Institutionalism: Explaining Durability and Change' (1999) 25(1) Annu. Rev. Sociol. 441

Coakley C, 'The Growing Role of Customized Consent in International Commercial Arbitration' (2000) 29 Ga. J. Int'l & Comp. L. 127

Coulson R, 'Business Arbitration – What You Need to Know' (1980) American Arbitration Association' N.Y. 6

Coulson R, ‘The Future of International Commercial Arbitration’ (1991) 17(2) Can.-U.S. L. J. 515

Cremades B, ‘Preventing Delay and Disruption of Arbitration’ (1990) 5 ICCA Congress Series

Cuniberti G, ‘Beyond Contract – The Case for Default Arbitration in International Commercial Disputes’ (2008) 32(2) Fordham Int’l L. J. 417

Czarniawska B, ‘Emerging Institutions: Pyramids or Anthills?’ (2009) 30(4) Organ. Stud. 423

D’Aunno TA and HS Zuckerman, ‘The Emergence of Hospital Federations: An Integration of Perspectives from Organizational Theory’ (1987) 44(2) Med. Care Res. Rev. 323

Das TK and B-S Teng, ‘Risk Types and Inter-Firm Alliance Structures’ (1996) 33(6) J. Manag. Stud. 827

Davidson D, ‘Belief and the Basis of Meaning’ (1974) 27(3/4) Synthese 309

De Palo G and L Costabile, ‘Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries’ (2006) 7 Cardozo J. Conflict Resol. 303

de Vera C, ‘Arbitrating Harmony: ‘Med-Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China’ (2004) 18(1) Colum. J. Asian L. 149

de Vries HP, ‘International Commercial Arbitration: A Contractual Substitute for National Courts’ (1982) 57 Tul. L. Rev. 42

Deeg R and G Jackson, ‘Towards a More Dynamic Theory of Capitalist Variety’ (2007) 5(1) Socio-Econ. Rev. 149

Deephouse DL, ‘Does Isomorphism Legitimate?’ (1996) 39(4) Acad. Manag. J. 1024

Delaume GR, ‘Reflections on the Effectiveness of International Arbitral Awards’ (1995) 12 J. Int’l Arb. 5

Delbridge R and T Edwards, ‘Inhabiting Institutions: Critical Realist Refinements to Understanding Institutional Complexity and Change’ (2013) 34(7) Organ. Stud. 927

DiMaggio PJ and WW Powell, ‘The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields’ (1983) 48(2) Am. Sociol. Rev. 147

DiMaggio PJ, ‘Culture and Cognition’ (1997) 23(5) Am. Sociol. Rev. 263

Djankov S and others, ‘Courts’ (2003) 118(2) Q. J. Econ. 453

Donahey MS, ‘International Mediation and Conciliation’ (1997) 20 Fordham Int’l L. J. 275

Donahey MS, ‘The Independence and Neutrality of Arbitrators’ (1992) 9(4) J. Int’l. Arb. 31

Dorado S, ‘Institutional Entrepreneurship, Partaking, and Convening’ (2005) 26(3) Organ. Stud. 385

Dowling JB and J Pfeffer, ‘Organizational Legitimacy: Social Values and Organizational Behavior’ (1975) 18(1) Pac. Sociol. Rev. 122

Drahozal CR, ‘Is Arbitration Lawless?’ (2006) 40(1) Loy. L. A. L. Rev. 187

Drahozal CR, ‘Judicial Incentives and the Appeals Process’ (1998) 51 SMU L. Rev. 469

Drahozal CR, ‘Private Ordering and International Commercial Arbitration’ (2009) 113(4) Penn St. L. Rev 1031

Dundas HR, ‘Confidentiality in English arbitration: the final word? Emmott v Michael Wilson & Partners Ltd’ (2008) 74(4) Arbitration 458

Dworkin HJ, ‘Arbitration: An Obvious Solution to a Crowded Docket’ (1958) 29 Clev. B. Ass’n J. 167

Ebbinghaus B, ‘Can Path Dependence Explain Institutional Change? Two Approaches Applied to Welfare State Reform’ (2005) 05/02 Discussion Paper, MPIfG 1

Eisenstadt SN, ‘Cultural Orientations, Institutional Entrepreneurs, and Social Change:

Comparative Analysis of Traditional Civilizations' (1980) 85(4) Am. J. Sociol. 840

Elert N and M Henrekson, 'Evasive Entrepreneurship' (2016) 47(1) Small Bus. Econ. 95

Ellingson S, 'Understanding the Dialectic of Discourse and Collective Action: Public Debate and Rioting in Antebellum Cincinnati' (1995) 101(1) Am. J. Sociol. 100

Emirbayer M and A Mische, 'What is Agency?' (1998) 103(4) Am. J. Sociol. 962

Estreicher S and SC Bennett, 'Untimely Arbitration Awards' (2006) 235(59) NYLJ

Falleti TG and JF Lynch, 'Context and Causal Mechanisms in Political Analysis' (2009) 42(9) Comp. Political Stud. 1143

Fells MJ, 'Fayol Stands the Test of Time' (2000) 6(8) J. Manag. Hist. 345

Fligstein N and I Mara-Drita, 'How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union' (1996) 102(1) Am. J. Sociol. 1

Fligstein N, 'Markets as Politics: A Political-Cultural Approach to Market Institutions' (1996) 61(4) Am. Soc. Rev. 656

Fligstein N, 'Fields, Power, and Social Skill: A Critical Analysis of the New Institutionalisms' (2001) 2(4) J. Econ. Sociol. 28

Fligstein N, 'Social Skill and Institutional Theory' (1997) 40(4) Am. Behav. Sci. 397

Fligstein N, 'Social Skill and the Theory of Fields' (2001) 19(2) Sociol. Theory 105

Fortier Y, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15(2) Arb. Int'l 131

Foyle A and S Singh, 'Arbitration: an introduction to the procedure' (2002) 152(7049) NLJ 1417

Franck TM, 'Legitimacy in the International System' (1988) 82(4) Am. J. Int'l L. 705

Frank RH, 'Shrewdly Irrational' (1987) 2(1) Sociol. Forum 21

Freathy P and L Sparks, ‘The Employment Structure of the Sunday Labour Market in Retailing: A Comparative Analysis of DIY and Grocery Superstores in Scotland and in England and Wales’ (1995) 27(3) Environ. Plann. A 471

Gabriel H and A Raymond, ‘Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards’ (2005) 5 Wyo. L. Rev. 453

Gaillard E, ‘The Emerging System of International Arbitration: Defining “System”’ (2012) 106 Proceedings of the Annual Meeting-American Society of International Law 287

Gaillard E, ‘The Negative Effect of Competence-Competence’ (2002) 17(1) Mealey’s Int. Arb. Rep. 27

Gaillard E, ‘The Urgency of Not Revising the New York Convention’ (2009) 14 ICCA Congress Series 689

Gaillard E, ‘Transnational Law: A Legal System or a Method of Decision Making?’ (2001) 17(1) Arb. Int’l 59

Galanter M, ‘The Emergence of the Judge as Mediator in Civil Cases’ (1986) 69(5) Judicature 257

Gal-Or N, ‘The Concept of Appeal in International Dispute Settlement’ (2008) 19(1) EJIL 43

Galtung JV, ‘The Social Functions of a Prison’ (1958) 6(2) Soc. Probl. 127

Gans WG and D Stryker, ‘ADR: The Siemens’ Experience’ (Apr.–Sept. 1996) 51 Disp. Resol. J. 40

Garnett R, ‘International Arbitration Law: Progress Towards Harmonisation’ (2002) 3 Melb. J. Int’l L. 400

Garud R, C Hardy and S Maguire, ‘Institutional Entrepreneurship as Embedded Agency: An Introduction to the Special Issue’ (2007) 27(7) Organ. Stud. 957

Garud R, S Jain and A Kumaraswamy, ‘Institutional Entrepreneurship in the Sponsorship of

Common Technological Standards: The Case of Sun Microsystems and Java' (2002) 45(1) Acad. Manag. J. 196

Gearing M, 'A Judge in His Own Cause?: Actual or Unconscious Bias of Arbitrators' (2000) 3(2) Int'l Arb. L. Rev. 46

Gelinas F, 'The Independence of International Arbitrators and Judges: Tampered with or Well-Tempered?' (2011) 24(1) N. Y. Int'l L. R.

Ginsburg T, 'The Culture of Arbitration' (2003) 36 Vand. J. Transnat'l L. 1335

Goode R, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17(1) Arb. Int'l 19

Graving RJ, 'The International Commercial Arbitration Institutions: How Good a Job are they Doing?' (1989) 4(2) Am. U. Int'l L. Rev. 319

Greenwood R and CR Hinings, 'Understanding Radical Organizational Change: Bringing Together the Old and the New Institutionalism' (1996) 21(4) Acad. Manag. Rev. 1022

Greenwood R and R Suddaby, 'Institutional Entrepreneurship in Mature Fields; The Big Five Accounting Firms' (2006) 49(1) Acad. Manag. J. 27

Greenwood R, R Suddaby and CR Hinings, 'Theorizing Change: The Role of Professional Associations in the Transformation of Institutionalized Fields' (2002) 45(1) Acad. Manag. J. 58

Grice HP, 'Utterer's Meaning and Intentions' (1969) 78(2) Philos. Rev. 147

Gross P, 'Competence of Competence' (1992) 8(2) Arb. Int'l 205

Gulati R and H Singh, 'The Architecture of Cooperation: Managing Coordination Costs and Appropriation Concerns in Strategic Alliances' (1998) 43(4) Adm. Sci. Q. 781

Guthrie C, 'Misjudging' (2007) 7 Nev. L.J. 420

Hacking D, 'Well, Did You Get the Right Arbitrator?' (2000) 15(6) Mealey's Int. Arb. Rep. 24

Hagedoorn J, ‘Understanding the Rationale of Strategic Technology Partnering: Interorganizational Modes of Cooperation and Sectoral Differences’ (1993) 14(5) Strat. Manag. J. 371

Halsall M, What’s in store for Sunday trading? *The Guardian* (London, 1994) 34

Handley K, ‘Res Judicata: General Principles and Recent Developments’ (1999) 18 Aust. Bar Rev. 214

Hanotiau B, ‘The Res Judicata Effect of Arbitral Awards’ in ICC International Court of Arbitration Bulletin: Complex Arbitrations (ICC Pub. No. 688E Special Supplement 2003) 43

Harb J-P and C Lobier, ‘New Arbitration Law in France: The Decree of January 13, 2011’ (2011) 26(3) Mealey’s Int’l Arb. Rep. 1

Harter-Uibopuu K, ‘Ancient Greek Approaches Toward Alternative Dispute Resolution’ (2002) 10 Willamette J. Int’l L. & Disp. Resol. 47

Hatch MJ and TB Zilber, ‘Conversation at the Border Between Organization Culture Theory and Institutional Theory’ (2012) 21(1) J. Manag. Inq. 94

Hearit KM, ‘Mistakes Were Made: Organizations, Apologia, and Crises of Social Legitimacy’ (1995) 46(1-2) J. Commun. Stud. 1

Henrekson M and T Sanandaji, ‘The Interaction of Entrepreneurship and Institutions’ (2011) 7(1) J. Int. Econ. 47

Hiatt SR, WD Sine and PS Tolbert, ‘From Pabst to Pepsi: The Deinstitutionalization of Social Practices and the Creation of Entrepreneurial Opportunities’ (2009) 54(4) Admin. Sci. Q. 635

Higgins FJ, WG Brown and PJ Roach, ‘Pitfalls in International Arbitration’ (1980) 35 Bus. Law 1035

Hill Jr MF and AV Sinicropi, ‘Improving the Arbitration Process: A Primer for Advocates’ (1991) 27 Willamette L. Rev. 463

Hodgson GM, ‘Reclaiming Habit for Institutional Economics’ (2004) 25 J. Econ. Psych. 651

Hodgson GM, ‘What Are Institutions?’ (2006) 11(1) J. Econ. Issues 1

Hoellering MF, ‘Alternative Dispute Resolution and International Trade’ (1986) 14 N.Y.U. Rev. L. & Soc. Change 785

Hoellering MF, ‘The Role of Arbitration Institutions in Managing International Commercial Arbitration’ (1994) 49(2) Disp. Resol. J. 12

Hoellering MF, ‘The Role of International Arbitrators’ (1996) 51(2) Disp. Resol. J. 100

Hoffman AJ, ‘Institutional Evolution and Change: Environmentalism and the US Chemical Industry’ (1999) 42(4) Acad. Manag. J. 351

Holm P, ‘The Dynamics of Institutionalization: Transformation Processes in Norwegian Fisheries’ (1995) 40(3) Admin. Sci. Q. 398

Hopkins R, ‘Cutting out the complications’ (2008) 158(7329) NLJ 991

Hopkins R, ‘In Practice: Practice points: arbitration guidelines’ (2008) LS Gaz, 23 Oct, 22

Hughes EC, ‘The Ecological Aspect of Institutions’ (1936) 1(2) Am. Soc. Rev. 180

Hunter M, ‘International Commercial Dispute Resolution - The Challenge of the Twenty-First Century (2000) 16(4) Arb. Int’l 379

Hutchinson AC, ‘From Cultural Construction to Historical Deconstruction’ (1984) 94 Yale L. J. 209

Hwang M and K Lim, ‘Corruption in Arbitration - Law and Reality’ (2012) 8(1) AIAJ 1

Jarvin S, ‘Choosing the Place of Arbitration: Where Do We Stand?’ (1988) 16 Int’l Bus. Law 417

Jarvin S, ‘The Role of International Commercial Arbitration in the Modern World’ (2009) 75(1) Int’l J. of Arb. Med. & Disp. Man. 65

Kagan RA, ‘On Surveying the Whole Legal Forest’ (2003) 28(3) Law Soc. Inq. 833

Karton J, ‘The Arbitral Role in Contractual Interpretation’ (2015) 6(1) J. Int. Disp. Settlement 4

Kaster LA and JA Archer, ‘The Boundaries of Arbitral Power - A Doctrine Revisited’ (2011) 4(1) NYSBA New York Dispute Resolution Lawyer 25

Kawharu A, ‘Arbitral Jurisdiction’ (2008) 23(2) N. Z. Univ. L. Rev. 238

Kenrick DT and others, ‘Goal-Driven Cognition and Functional Behavior: The Fundamental-Motives Framework’ (2010) 19(1) Curr. Dir. Psychol. Sci. 63

Kerr M, ‘International Arbitration v. Litigation’ [1980] J. Bus. L. 164

Khan F, K Munir and H Willmott, ‘A Dark Side of Institutional Entrepreneurship: Soccer Balls, Child Labour and Postcolonial Impoverishment’ (2007) 27(7) Organ. Stud. 1055

King Jr HT and MA Le Forestier, ‘Arbitration in Ancient Greece’ (1994) Disp. Resol. J. 38

King M and I Meredith, ‘Partial Enforcement of International Arbitration Awards’ (2010) 26(3) Arb. Int’l. 381

Knull III WH and ND Rubins, ‘Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?’ (2000) 11(4) Am. Rev. Int’l Arb. 531

Kostova T and K Roth, ‘Adoption of an Organizational Practice by Subsidiaries of Multinational Corporations: Institutional and Relational Effects’ (2002) 45(1) Acad. Manag. J. 215

Kouris S, ‘Confidentiality: Is International Arbitration Losing One of Its Major Benefits?’ (2005) 22(2) J. Int’l Arb. 127

Krasner SD, ‘Approaches to the State: Alternative Conceptions and Historical Dynamics’ (1984) 16(2) Comp. Polit. 223

Kröll SM, ‘Recourse against Negative Decisions on Jurisdiction’ (2004) 20 Arb. Int’l 55

Kronstein H, ‘Arbitration is Power’ (1944) 38 N.Y.U. L. Rev. 661

La Porta R, F Lopez-de-Silanes and A Shleifer, ‘The Economic Consequences of Legal Origins’ (2008) 46(2) J. Econ. Lit. 285

Lalive PA, ‘Problèmes relatifs à l'arbitrage international commercial’ vol I (1967) 120 Recueil des Cours 569

Lalive PA, ‘Conclusions, in: The Arbitral Process and the Independence of Arbitrators’ (1991) 472 ICC Publication 119

Lande JM, ‘Getting the Faith: Why Business Lawyers and Executives Believe in Mediation’ (2000) 5 Harv. Negot. L. Rev. 137

Lawrence TB, ‘Institutional Strategy’ (1999) 25(2) J. Manag. 161

Lawrence TB and N Phillips, ‘From ‘Moby Dick’ to ‘Free Willy’: Macro-Cultural Discourse and Institutional Entrepreneurship in Emerging Institutional Fields’ (2004) 11(5) Organization 689

Lawrence TB, C Hardy and N Phillips, ‘Institutional Effects of Interorganizational Collaboration: The Emergence of Proto-Institutions’ (2002) 45(1) Acad. Manag. J. 281

Lederer F, ‘The Legality and Practicality of Remote Witness Testimony’ [2009] The Practical Litigator 19

Leibenstein H, ‘Entrepreneurship and Development’ (1968) 58(2) Am. Econ. Rev. 72

Lenehan E, ‘Arbitration Rules - International Chamber of Commerce versus UNCITRAL’ (2006) 17(8) Cons. Law 13

Levy D and M Scully, ‘The Institutional Entrepreneur as Modern Prince: The Strategic Face of Power in Contested Fields’ (2007) 27(7) Organ. Stud. 971

Lew JDM, ‘Achieving the Dream: Autonomous Arbitration’ (2006) 22(2) Arb. Int’l 179

Lew JDM, ‘Does National Court Involvement Undermine the International Arbitration Process?’ (2009) 24 Am. U. Int’l L. Rev. 489

Li DD, J Feng and H Jiang, ‘Institutional Entrepreneurs’ (2006) 96(2) Am. Econ. Rev. 358

Lichta AN, C Goldschmidta and SH Schwartz, ‘Culture, Law, and Corporate Governance’ (2005) 25(2) Int. Rev. Law Econ. 229

Lieberman MB and DB Montgomery, ‘First-Mover Advantages’ (1988) 9 Strateg. Manag. J. 41

Lippi A, ‘One Theory, Many Practices: Institutional Allomorphism in the Managerialist Reorganization of Italian Governments’ (2000) 16 Scand. J. Manag. 455

Lipsky DB and RL Seeber, ‘The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations’ [1998] Institute on Conflict Resolution

Livingstone ML, ‘Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact’ (2008) 5(5) J. Int’l Arb. 529

Lluch C, ‘Expenditure, Savings and Habit Formation’ (1974) 15(3) Int. Econ. Rev. 786

Lörcher G, ‘Enforceability of Agreed Awards in Foreign Jurisdictions’ (2001) 17(3) Arb. Int’l 275

Lounsbury M and E Crumley, ‘New Practice Creation: An Institutional Perspective on Innovation’ (2007) 28(7) Organ. Stud. 993

Lowe V, ‘Res judicata and the rule of law in international arbitration’ (1996) 8 AJICL 38

Lurie J, ‘Court Intervention in Arbitration: Support or Interference?’ (2010) 76(3) Int’l J. of Arb. Med. & Disp. Man. 447

Macassey LL, ‘International Commercial Arbitration-Its Origin, Development and Importance’ (1938) 24(7) ABA J. 518

Macaulay S, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28(1) Am. Soc. Rev. 55

Maguire S and C Hardy, ‘Discourse and Deinstitutionalization: the Decline of DDT’ (2009) 52(1) Acad. Manag. J. 148

Maguire S, C Hardy and TB Lawrence, ‘Institutional Entrepreneurship in Emerging Fields:

HIV/Aids Treatment Advocacy in Canada' (2004) 47(5) Acad. Manag. J. 657

Mance J, 'Arbitration – a Law unto itself?' (2016) 32(2) Arb. Int'l 223

Mann FA, 'Lex Facit Arbitrum' (1983) 2(3) Arb. Int'l 245

Mann FA, 'England Rejects Delocalized Contracts and Arbitration' (1983) 33 Int'l & Comp. L.Q. 193

Marcus RB, 'Modalities and Intensional Languages' (1961) 13(4) Synthese 303

Marriot AL, 'Pros and Cons of More Detailed Arbitration Laws and Rules' (1996) 7 ICCA Congress Series

Martin MGF, 'Perception, Concepts, and Memory' (1992) 101(4) Phil. Review 745

Martinez JS, 'Towards an International Judicial System' (2003) 56(2) Stan. L. Rev. 429

Maslow AH, 'A Theory of Human Motivation' (1943) 50(4) Psychol. Rev. 370

Mathews JT, 'The Rise of Global Civil Society' (1997) 76(1) Foreign Affairs 50

Max RA, 'Multiparty Mediation' (1999) 23 Am. J. Trial Advoc. 269

McLaren DE, 'Party-Appointed vs List-Appointed Arbitrators: A Comparison' (2003) 20 J. Int'l Arb. 233

McLaughlin JT and L Genevro, 'Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts' (1986) 3 Int'l Tax & Bus. Law 249

Mclean DJ, 'Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration' (2009) (30)4 U. Pa. J. Int'l L. 1087

McLean J, 'Fayol - Standing the Test of Time' (2011) 74 Br. J. Adm. Manag. 32

Mentschikoff S, 'Commercial Arbitration' (1961) 61 Colum. L. Rev. 846

Meyer JW and RL Jepperson, 'The "Actors" of Modern Society: The Cultural Construction of

Social Agency' (2000) 18(1) Sociol. Theory 100

Meyer JW and B Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) Am. J. Sociol. 340

Michaels R, 'Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature' (2013) 1(1) London Rev. Int. L. 35

Michaelson J and J Maples, 'Taking Clients to ADR' (2005) 155 NLJ 725

Michaelson J, 'A–Z of ADR: the sequel' (2013) 163(7587) NLJ 30

Michaelson J, 'The A-Z of ADR - Pt I' (2003) 153(7064) NLJ 181

Michaelson J, 'The A-Z of ADR - Pt II' (2003) 153(7064) NLJ 105

Michaelson PL, 'Enhancing Arbitrator Selection: Using Personality Screening to Supplement Conventional Selection Criteria for Tripartite Arbitration Tribunals' (2010) 76 Int'l J. of Arb. Med. & Disp. Man. 98

Misangyi V, G Weaver and H Elms, 'Ending Corruption: The Interplay among Institutional Logics, Resources, and Institutional Entrepreneurs' (2008) 33(3) Acad. Manag. Rev 750

Mistelis LA and C Baltag, 'Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations' (2008) 2(5) World Arb. & Med. Rev. 83

Mistelis LA, 'International Arbitration – Corporate Attitudes and Practices 12 Perceptions Tested: Myths, Data and Analysis Research Report' (2004) 15 Am. Rev. Int'l Arb. 525

Morrill C and D Rudes, 'Conflict Resolution in Organizations' (2010) 6 Annu. Rev. Law and Soc. Sci. 627

Morrill C, 'Institutional Change Through Interstitial Emergence: The Growth of Alternative Dispute Resolution in U.S. Law, 1970-2000' (2017) 4(1) Revista de Estudos Empíricos em Direito 10

Movsesian ML, 'International Commercial Arbitration and International Courts' (2008) 18 Duke

J. Comp. & Int'l L. 423

Murphy ST and RB Zajonc, 'Affect, Cognition, and Awareness: Affective Priming with Optimal and Suboptimal Stimulus Exposures' (1993) 64(5) J. Pers. Soc. Psychol. 723

Mustill, MJ, 'Arbitration: History and Background' (1989) 6(2) J. Int'l Arb. 43

Mutch A, 'Reflexivity and the Institutional Entrepreneur: A Historical Exploration' (2007) 27(7) Organ. Stud. 1123

Naimark RW and SE Keer, 'International Private Commercial Arbitration Expectations and Perceptions of Attorneys and Business People - A Forced-Rank Analysis' (2002) 30 Int'l Bus. Law. 203

Nairn K, 'Arbitration: The Latest Fashion or a Classic Choice?' (2002) 11 JIBFL 431

Newman LW and D Azslowsky, 'International Litigation: Cultural Predictability in International Arbitration' (2004) 100 N. Y. L. J. 3

Newman P, 'A Fillip for Arbitration' (2008) 19(1) Cons. Law 26

O'Brien D and T Slack, 'An Analysis of Change in an Organizational Field: The Professionalization of English Rugby Union' (2003) 17(4) J. Sport Manag. 417

Oliver C, 'The Antecedents of Deinstitutionalization' (1992) 13(4) Organ. Stud. 563

Ong CYC, 'Confidentiality of Arbitral Awards' (2005) 1(2) AIAJ 169

Onyema E, 'Selection of Arbitrators in International Commercial Arbitration' (2005) 8(2) Int'l Arb. L. Rev. 45

Ortolani P, 'The Role of Arbitration Institutions in China' (2013) 10(4) Transnat'l Disp. Manag. 1

Pair LM, 'Cross-Cultural Arbitration: Do the Differences between Cultures Still Influence International Commercial Arbitration Despite Harmonization' (2002) 9 ILSA J. Int'l & Comp. L. 57

Palthe J, ‘Regulative, Normative, and Cognitive Elements of Organizations: Implications for Managing Change’ (2014) 1(2) Manag. Organ. Stud. 59

Park WW and AA Yanos, ‘Treaty Obligations and National Law: Emerging Conflicts in International Arbitration’ (2006) 58 Hastings L.J. 251

Park WW, ‘Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection’ (1998) 8 Transnat’l L. & Contemp. Probs. 19

Park WW, ‘Determining an Arbitrator’s Jurisdiction: Timing and Finality in American Law’ (2007) 8(1) Nev. L. J. 135

Park WW, ‘National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration’ (1989) 63 Tul. L. Rev. 647

Park WW, ‘The *Lex Loci Arbitri* and International Commercial Arbitration’ (1983) 32 Int’l & Comp. L. Q. 21

Park WW, ‘Why Courts Review Arbitral Awards?’ (2001) 16 Int’l Arb. Rep. 27

Paulsson J, ‘Arbitration Unbound: Award Detached from the Law of its Country of Origin’ (1981) 30 Int’l & Comp. L. Q. 358

Paulsson J, ‘Delocalisation of International Commercial Arbitration: When and Why it Matters?’ (1983) 32 Int’l and Comp. L.Q. 53

Paulsson J, ‘Ethics, Elitism, Eligibility’ (1997) 14(4) J. Int’l Arb. 13

Paulsson J, ‘Moral Hazard in International Dispute Resolution’ (2010) 25(2) ICSID Review 339

Peaucelle J-L and C Guthrie, ‘The Private Life of Henri Fayol and his Motivation to Build a Management Science’ (2012) 18(4) J. Manag. Hist. 469

Perkmann M and A Spicer, ‘Healing the Scars of History: Projects, Skills and Field Strategies in Institutional Entrepreneurship’ (2007) 27(7) Organ. Stud. 1101

Perkmann M and A Spicer, ‘How Emerging Organizations Take Form: The Role of Imprinting

and Values in Organizational Bricolage' (2014) 25(6) Organ. Sci. 1785

Peton H and S Pezé, 'The Unsuspected Dynamics of the Regulative Pillar: The Case of Faute Inexcusable in France' (2014) 17(3) M@n@gement 145

Philips L and F Spinnewyn, 'True Indexes and Rational Habit Formation' (1984) 24(2) Eur. Econ. Rev. 209

Phillips N, TB Lawrence and C Hardy, 'Inter-organizational Collaboration and the Dynamics of Institutional Fields' (2000) 37(1) J. Manag. Stud. 23

Ping-Fat S, 'Obligatio Naturalis: A Concept or a Fallacy?' (2007) 28(7) Bus. L. Rev. 209

Ping-Fat S, 'Voluntary Arbitration and Fair Trial' (2007) 36(171) C. L. & J. 638

Powell WW, 'Interorganizational Collaboration and the Locus of Innovation: Networks of Learning in Biotechnology' (1996) 41 Admin. Sci. Q. 116

Pryles M, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24(3) J. Int'l Arb. 327

Qureshi K, 'Practice Points: The international View of Arbitration' (2006) LS Gaz, 17 Aug, 26

Rabinovitch-Einy O, 'Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age' (2002) 7 VA. J. L. & Tech. 4

Rao H, C Morrill and MN Zald, 'Power Plays: How Social Movements and Collective Action Create New Organizational Forms' (2000) 22 Res. Organ. Behav. 237

Ratner SR and A-M Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 Am. J. Int'l L. 291

Reid G, 'Security for Costs in International Arbitrations - Forget it?' (2002) 152(7049) NLJ 1426

Reisman WM and H Iravani, 'The Changing Relation of National Courts and International Commercial Arbitration' (2010) 21 Am. Rev. Int'l Arb. 5

Rensmann T, 'Anational Arbitral Awards–Legal Phenomenon or Academic Phantom?' (1998)

15(2) J. Int'l Arb. 37

Reuer JJ and A Ariño, 'Contractual Renegotiations in Strategic Alliances' (2002) 28(1) J. Manag 47

Riskin LL, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) Harv. Negot. L. Rev. 7

Rivkin DW and SJ Rowe, 'The Role of the Tribunal in Controlling Arbitral Costs' (2015) 81(2) Int'l J. of Arb. Med. & Disp. Man. 116

Rivkin DW, 'The Impact of International Arbitration on the Rule of Law - The 2012 Clayton Utz Sydney University International Arbitration Lecture' (2013) 29(3) Arb. Int'l. 327

Rix B, 'Three Addresses in St Petersburg: International Arbitration, Yesterday, Today and Tomorrow' (2006) 72(3) Arbitration 224

Roberts S, 'After Government? On Representing Law without the State' (2005) 68(1) Mod. L. Rev. 1

Robin G, 'The Advantages and Disadvantages of International Commercial Arbitration' (2014) 2 I.B.L.J. 131

Rodrigues CA, 'Fayol's 14 Principles of Management Then and Now: A Framework for Managing Today's Organizations Effectively' (2001) 39(10) Manag. Decis. 880

Roebuck D, 'Sources for the History of Arbitration: A Bibliographical Introduction' (1998) 14(3) Arb. Int'l 237

Rogers CA, 'The Vocation of the International Arbitrator' (2005) 20(5) Am. U. Int'l L. Rev. 957

Roland G, 'Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions' (2004) 38(4) Stud. Comp. Int'l Dev. 109

Romano CPR, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 N.Y.U. J. Int'l L. & Pol. 709

Runeland P, ‘Sweden Thrives as Neutral Arbitration Ground’ [2004] Nat’l L. J.

Rutledge PB, ‘On the Importance of Institutions: Review of Arbitral Awards for Legal Errors’ (2002) 19 J. Int’l Arb. 81

Salomon CT and S Friedrich, ‘Obtaining and Submitting Evidence in International Arbitration in the United States’ (2013) 24(4) Am. Rev. Int’l Arb. 549

Samuels WJ, ‘The Scope of Economics Historically Considered’ (1972) 48(3) Land Economics 248

Sander FEA, ‘Varieties of Dispute Processing’ (1976) 70 F.R.D. 111

Sanders P, ‘Trends in the Field of International Commercial Arbitration’ (1975) 145(2) Recueil des Cours 205

Schmitz AJ, ‘Ending a Mud Bowl-Defining Arbitration’s Finality Through Functional Analysis’ (2002) 37 Ga. L. Rev. 123

Schmitz AJ, ‘Untangling the Privacy Paradox in Arbitration’ (2006) 54 U. Kan. L. Rev. 1211

Schneider ME, ‘Lean Arbitration: Cost Control and Efficiency Through Progressive Identification of Issues and Separate Pricing of Arbitration Services’ (1994) 10(2) Arb. Int’l 119

Schultz T, ‘Private Legal Systems: What Cyberspace Might Teach Legal Theorists’ (2007) 10 Yale J. L. and Tech. 151

Schwartz EA, ‘International Conciliation and the ICC’ (1995) 10 ICSID Rev. Foreign Inv. L. J. 98

Schwarz FT and CW Konrad, ‘The New Vienna Rules’ (2007) 23(4) Arb. Int’l 601

Scott WR, ‘Approaching Adulthood: The Maturing of Institutional Theory’ (2008) 37(5) Theory Soc. 427

Scott WR, ‘The Adolescence of Institutional Theory’ (1987) 32(4) Adm. Sci. Q. 493

Selznick P, ‘Foundations of the Theory of Organization’ (1948) 13(1) Am. Sociol. Rev. 25

Seo M-G and WED Creed, ‘Institutional Contradictions, Praxis and Institutional Change: A Dialectical Perspective’ (2002) 27(2) Acad. Manag. Rev. 222

Sewell Jr WH, ‘A Theory of Structure: Duality, Agency, and Transformation’ (1992) 98(1) Am. J. Sociol. 1

Shackelford E, ‘Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration’ (2006) 67(4) U. Pitt. L. Rev. 897

Shane SA, ST Venkataraman and IC MacMillan, ‘Cultural Differences in Innovation Championing Strategies’ (1995) 21(5) J. Manag. 931

Shany Y, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’ (2012) 106(2) AJIL 225-270

Slate WK, ‘International Arbitration: Do Institutions Make a Difference?’ (1996) 31 Wake Forest L. Rev. 41

Smit H, ‘A-National Arbitration’ (1988-1989) 63 Tul. L. Rev. 629

Smit H, ‘Substance and Procedure in International Arbitration: The Development of a New Legal Order’ (1991) 65 Tul. L. Rev 1309

Smit H, ‘The Future of International Commercial Arbitration: A Single Transnational Institution’ (1986) 25(1) Colum. J. Transnat’l L. 9

Smith C, ‘The Appeal of ICSID Awards: How The AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure’ (2013) 41(2) Ga. J. Int’l & Comp. L. 567

Smith ML, ‘Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment’ (1992) 8(1) Arb Int’l 17

Snow, DA and others, ‘Frame Alignment Processes, Micromobilization, and Movement Participation’ (1986) 51(4) Am. Sociol. Rev. 464

Spence AM, ‘The Learning Curve and Competition’ (1981) 12(1) Bell J. Econ. 49

Spiermann O, ‘Twentieth Century Internationalism in Law’ (2007) 18(5) Eur. J. Int. Law 785

Stevens SS, ‘The Operational Definition of Psychological Concepts’ (1935) 42(6) Psychol. Rev. 517

Stipanowich TJ, ‘Arbitration: The “New Litigation”’ (2010) 1 U. Ill. L. Rev. 53

Stinchcombe AL, ‘On the Virtues of the Old Institutionalism’ (1997) 23(1) Annu. Rev. Sociol. 1

Strong SI, ‘Beyond International Commercial Arbitration? The Promise of International Commercial Mediation’ (2014) 45 Wash. U. J. L. & Pol’y 11

Strong SI, ‘Research in International Commercial Arbitration: Special Skills, Special Sources’ (2009) 20 Am. Rev. Int’l Arb. 119

Sturges WA, ‘Arbitration – What Is It?’ (1960) 35 N.Y.U.L. Rev. 1031

Suchman MC, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) Acad. Manag. Rev. 571

Suddaby R and R Greenwood, ‘Rhetorical Strategies of Legitimacy’ (2005) 50 Admin. Sci. Q. 35

Swidler A, ‘Culture in Action: Symbols and Strategies’ (1986) 51(2) Am. Sociol. Rev. 273

Tannock Q, ‘Judging the Effectiveness of Arbitration Through the Assessment of Compliance with and Enforcement of International Arbitration Awards’ (2005) 21 Arb. Int’l 71

Tay L and E Diener, ‘Needs and Subjective Well-Being Around the World’ (2011) 101(2) J. Pers. Soc. Psychol. 354

Terris D, CPR Romano and L Swigart, ‘Toward a Community of International Judges’ (2008) 30 Loy. L.A. Int’l & Comp. L. Rev. 419

Thornton PH and W Ocasio, ‘Institutional Logics and the Historical Contingency of Power in

Organizations: Executive Succession in the Higher Education Publishing Industry, 1958–1990' (1999) 105(3) Am. J. Sociol. 801

Timmis C, 'International Arbitration: Firm Grip on Disputes' (2006) LS Gaz, 16 Mar, 18

Tolbert PS and LG Zucker, 'Institutional sources of change in the formal structure of organizations: The diffusion of civil service reform, 1880-1935' (1983) 28 Adm. Sci. Q. 22

Trappe J, 'The Arbitration Proceedings: Fundamental Principles and Rights of the Parties' (1998) 15(3) J. Int'l Arb. 93

Usón RM and PF Benítez, 'Definitional Analysis in the Functional-Lexematic Lexicographic Model' (1997) 9 Alfinge 219

Veeder VV, 'Is there a Need to Revise the New York Convention?' (2010) 1(2) J. Int'l Disp. Settlement 499

Verbeke LC, 'Sources of International Commercial Arbitration' (1995) 23 Int'l. J. Legal Info. 293

Wade-Benzoni KA and others, 'Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions' (2002) 27(1) Acad. Manag. Rev. 41

Ward KT, 'Arbitration with the Soviets: The Importance of Forum Selection in Dispute Resolution Clauses in Non-Maritime Joint Enterprise Agreements' (1990) 1(23) U. Chi. Legal F. 683

Ware SJ, 'Default Rules from Mandatory Rules: Privatizing Law Through Arbitration' (1999) 83 Minn. L. Rev. 703

Webster TH, 'Selection of Arbitrators in a Nutshell' (2002) 19(3) J. Int'l Arb. 261

Weixa G, 'Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?' (2004) 15 Am. Rev. Int'l. Arb. 607

Wetter JG, 'The Present Status of the International Court of Arbitration of the ICC: An

Appraisal' (1990) 1 Am. Rev. Int'l. Arb. 91

Wijen F and S Ansari, 'Overcoming Inaction through Collective Institutional Entrepreneurship: Insights from Regime Theory' (2007) 27(7) Organ. Stud. 1079

Williamson OE, 'Comparative Economic Organization: The Analysis of Discrete Structural Alternatives' (1991) 36(2) Admin. Sci. Q. 269

Williamson OE, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38(3) J. Econ. Lit. 595

Wolaver ES, 'The Historical Background of Commercial Arbitration' (1934) 83 U. Pa. L. Rev. 132

Youn-Kim S and H Sippel, 'Korea's Arbitration Act is revised for a new world' The Lawyer (27 June 2016) 53

Yu H-l, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) Contemp. Asia Arb. J. 255

Zajonc RB, 'Attitudinal Effects of Mere Exposure' (1968) 9(2) J. Pers. Soc. Psychol. 1

Zajonc RB, 'Feeling and Thinking: Preferences Need no Inferences' (1980) 35(2) Am. Psychol. 151

Zajonc RB, 'Mere Exposure: A Gateway to the Subliminal' (2001) 10(6) Curr. Dir. Psychol. Sci. 224

Ziadé NG, 'Reflections on the Role of Institutional Arbitration Between the Present and the Future' (2009) 25(3) Arb. Int'l 427

Zietsma C and TB Lawrence, 'Institutional Work in the Transformation of an Organizational Field' (2010) 55 Admin. Sci. Q. 189

Zilber TB, 'Stories and the Discursive Dynamics of Institutional Entrepreneurship: The Case of Israeli High-tech after the Bubble' (2007) 27(7) Organ. Stud. 1035

Zucker LG, ‘Institutional Theories of Organization’ (1987) 13 Annu. Rev. Sociol. 443

Zucker LG, ‘The Role of Institutionalization in Cultural Persistence’ (1977) 42(5) Am. Sociol. Rev. 726

Conference, Congress, Seminar, Lecture

‘The Institutional Response to Changing Needs of Users’ (Biennial Conference of the International Federation of Commercial Arbitration Institutions (IFCAI), Geneva, October 1997) <http://www.wipo.int/amc/en/events/conferences/1997/october/> accessed 24 February 2016

Arroyo DPF, ‘The Present and Future of International Commercial and Investment Arbitration: Is Arbitration in Crisis?’ (Centre for Law & Business, National University of Singapore, Singapore, 04 February 2016)

Bayer K and T McCormack, ‘Arbitration: The New Litigation?’ (Civil Litigation Conference, Texas, October 2010) <http://www.karlbayer.com/pdf/publications/2010-10-28_KarlBayer_Arbitration-The-New-Litigation.pdf> accessed 12 March 2014

Croft C, ‘The Future of International Investment Arbitration in Australia – a Victorian Supreme Court Perspective’ (Law Institute of Victoria, 6 June 2011) <http://www.austlii.edu.au/au/journals/VicJSchol/2011/60.pdf> accessed 10 January 2018

Finland Chamber of Commerce, ‘Challenges Facing International Commercial Arbitration - A Look Towards the Future’ (The Arbitration Institute of the Finland Chamber of Commerce, Helsinki, 21 October 2011)

Holtzmann HM, ‘Arbitration and the Courts: Partners in a System of International Jurisdiction’ (VIth International Arbitration Congress, Mexico City, March 1978)

J. B. Moore Society of International Law Symposium, ‘International Arbitration: A Look to the Future’ (J. B. Moore Society of International Law, University of Virginia School of Law, Charlottesville, 27 February 2009)

<https://content.law.virginia.edu/news/2009_spr/jbmoore_conf.htm> accessed 16 December 2017

Landau T and others, 'Seminar on Contemporary Challenges in International Arbitration' (Centre for Commercial Law Studies, Queen Mary University of London, 27 September 2012)

Menon S, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' (International Arbitration: The Coming of a New Age?, 21st International Council for Commercial Arbitration Conference, Singapore, 11 June 2012) <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> accessed 22 January 2017

Menon S, 'Patron's Address' (Chartered Institute of Arbitrators: London Centenary Conference, London, 2 July 2015) <https://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-(for-publication).pdf?sfvrsn=0> accessed 16 December 2017

Menon S, 'Some Cautionary Notes for an Age of Opportunity' <http://www.singaporelaw.sg/sglaw/images/media/130822%20Some%20cautionary%20notes%20for%20an%20age%20of%20opportunity.pdf> accessed 21 December 2015

Menon S, 'Standards in Need of Bearers: Encouraging Reform from Within' (Chartered Institute of Arbitrators: Singapore Centenary Conference, Singapore, 3 September 2015) 23 <http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf> accessed 21 January 2016

Meyer J and RL Jepperson, 'The Actor and the Other: Cultural Rationalization and the Ongoing Evolution of Modern Agency' (Institutional Analysis Conference, Tucson, Arizona April 1996)

Onyema E, 'The Role of Arbitration Institutions in the Development of Arbitration in Africa' (Arbitration Institutions in Africa Conference, Addis Ababa, Ethiopia, 23 July 2015) <http://eprints.soas.ac.uk/20421/> accessed 08 October 2016

Paulsson J and S Menon, 'Is Self-Regulation of International Arbitration an Illusion?' (4th LSE Arbitration Debate, LSE Transnational Law Project, London, 9 May 2013)

Paulsson J, ‘Closing Message from ICCA President’ (International Arbitration: The Coming of a New Age?, 21st International Council for Commercial Arbitration Conference, Singapore, 10 June 2012) <http://www.arbitration-icca.org/conferences-and-congresses/ICCA_SINGAPORE_2012-video-coverage/ICCA_SINGAPORE_2012-D2.html> accessed 22 January 2017

Paulsson J and others, ‘Debating Jan Paulsson’s Idea of Arbitration’ (5th LSE Arbitration Debate, LSE Transnational Law Project, London, 13 February 2014)

Scherer M and GB Born, ‘International Arbitration Panel Discussion: Arbitral Institutions’ Role and Responsibility’ (Wilmer Cutler Pickering Hale and Dorr LLP’s annual Scholar-in-Residence seminar, Wilmer Cutler Pickering Hale and Dorr LLP, London, 11 June 2015) <https://www.wilmerhale.com/pages/EventDetails.aspx?eventId=17179877222> accessed 16 June 2017

Zamora JMA, ‘Reducing Time and Costs in International Arbitration’ (Modern Law for Global Commerce, Vienna, July 2007) <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V07/840/85/PDF/V0784085.pdf?OpenElement> accessed 16 March 2013

Website Material

‘CIArb International Arbitration Conference’ (Chartered Institute of Arbitrators Centenary Conference, London, 01-03 July 2015) <http://www.ciarb.org/about/centenary/centenary-papers> accessed 13 April 2016

‘Commercial Arbitration: Chambers of Commerce Proposals – Board of Trade Enquiries’ *Evening Post* (London, LXXIX(132) 7 June 1910) 7 <https://paperspast.natlib.govt.nz/newspapers/EP19100607.2.90?query=Commercial%20Arbitration> accessed 23 February 2012

‘International Commercial Conference: Departure of the Agents General – A Comprehensive Programme’ *Evening Post* LVIII(104) (London, 30 October 1899) 7

<https://paperspast.natlib.govt.nz/newspapers/EP18991030.2.69> accessed 23 February 2012

Alford DE, 'A Guide on the Harmonization of International Commercial Law' (2005) <http://www.nyulawglobal.org/Globalex/Unification_Harmonization.htm> accessed 18 November 2011

Alford DE, 'Update: A Guide on the Harmonization of International Commercial Law' (2009) <https://web.archive.org/web/20101222100754/http:/nyulawglobal.org/globalex/Unification_Harmonization1.htm> accessed 18 November 2011

Alford DE, 'Update: A Guide on the Harmonization of International Commercial Law' (2009) <https://web.archive.org/web/20131220150026/http:/www.nyulawglobal.org/Globalex/Unification_Harmonization1.htm> accessed 11 January 2013

Alford DE, 'Update: A Guide on the Harmonization of International Commercial Law' (2009) <http://www.nyulawglobal.org/globalex/Unification_Harmonization1.html> accessed 28 August 2017

Altenkirch M and N Gremminger, 'Parties' Preferences in International Arbitration: The Latest Statistics of the Leading Arbitral Institutions' <http://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/> accessed 13 June 2016

Associated Press, 'Commercial Cases Increase 84% Since '83: Arbitration Up as Doubts on Litigation Grow' (New York, 29 December 1988) <http://articles.latimes.com/1988-12-<29/business/fi-1400_1_commercial-arbitration-cases> accessed 19 February 2012

Battilana J, B Leca and E Boxenbaum, 'Agency and Institutions: A Review on Institutional Entrepreneurship' (2008) Harvard Business School Working Paper 08-096/2008 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.461.6523&rep=rep1&type=pdf> accessed 30 May 2014

Beer M, 'The Future of International Dispute Resolution Centres: The Garfield 'Principle'' (Kluwer Law Conference for In-house Counsel, Dubai & Middle East: 5th Annual International Arbitration Summit, Dubai, February 2017) <https://www.youtube.com/watch?v=-

MEGsXUZVCk> accessed 19 December 2017

Böckstiegel K-H, 'Role of the State on Protecting the System of Arbitration' (Chartered Institute of Arbitrators: London Centenary Conference, London, 3 July 2015) <http://www.ciarb.org/docs/default-source/ciarbdocuments/london/b%C3%B6ckstiegel.pdf?sfvrsn=0> accessed 21 September 2017

Boxenbaum E, 'The Emergence of Proto-Institution' (2004) Working Paper 2004.5 <http://openarchive.cbs.dk/cbsweb/handle/10398/6726> accessed 30 May 2016

Burn G, 'International Arbitration Survey: Party Appointed Arbitrators' [2017] <https://www.blplaw.com/media/pdfs/Reports/BLP_Arbitration_survey_2017.pdf> accessed 27 May 2018

Bynum CL, 'International Commercial Arbitration Guide: Home' <http://guides.library.cornell.edu/c.php?g=32254> accessed 11 October 2011

Chartered Institute of Arbitrators (CIArb), 'CIArb Costs of International Arbitration Survey 2011' <http://www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf> accessed 5 February 2014

Clarke A, 'International Arbitration: Current Corporate Concerns' (2009) 20(2) ICC Bull 41 <http://library.iccwbo.org/content/dr/ARTICLES/ART_0481.htm?l1=Bulletins&l2=ICC+International+Court+of+Arbitration+Bulletin+Vol.20%2FNo.2+-+Eng&AUTH=7677fd17-4350-&Timeframe> accessed 28 October 2013

CPR Corporate Policy Statement on Litigation, Corporate Pledge, Int'l Inst. for Conflict Prevention & Resol., <http://www.cpradr.org/About/ADRPledges/CorporatePledgeSigners.aspx?page1839=14> accessed 21 February 2014

DRA Academy of Law, 'Study on Governing Law & Jurisdictional Choices in Cross-Border Transactions' (2017) <http://www.draacademy.ae/wp-content/uploads/Study-on-Governing-Law-Jurisdictional-Choices-in-cross-border-transactions.pdf> accessed 21 February 2017

Durcan K, ‘International arbitration getting pricier but still growing’ [2008] LS Gaz, 16 October 2008 <http://www.lawgazette.co.uk/analysis/international-arbitration-getting-pricier-but-still-growing/48011.fullarticle> accessed 21 December 2010

Fletcher N, ‘International Arbitration Research based report on choice of venue for international arbitration’ [2014] Berwin Leighton Paisner <http://www.blplaw.com/download/BLP_International_Arbitration_Survey_2014_FINAL.pdf> accessed 19 November 2015

Friedland P and S Brekoulakis, ‘2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process’ <http://www.arbitration.qmul.ac.uk/docs/164483.pdf> accessed 23 May 2013

Friedland P and LA Mistelis, ‘2010 International Arbitration Survey: Choices in International Arbitration’ <http://events.whitecase.com/law/services/2010-International-Arbitration-Survey-Choices.pdf> accessed 18 November 2015

Friedland P and LA Mistelis, ‘2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’ <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 01 March 2016

Gearhart MR, ‘FORUM: John A. Wheeler: From the Big Bang to the Big Crunch’ (1979) 1(4) Cosmic Search <http://www.bigear.org/vol1no4/wheeler.htm> accessed 10 January 2018

Grenley G, ‘Weight Cost of Arbitration as Carefully as the Cost of a Trial’ (2008) Portland Bus. J. 28 <http://www.bizjournals.com/portland/stories/2008/09/29/focus7.html> accessed 21 December 2015

Happ R, ‘Happ’s Arbitration Links’ <http://www.arbitration-links.de/00000099670ba0802/index.html> accessed 12 July 2015

<http://cil.nus.edu.sg/1965/1965-convention-on-the-settlement-of-investment-disputes-between-states-and-nationals-of-other-states-2/> accessed 23 October 2011

<http://eng.viac.vn/statistics/case-statistic-from-different-arbitration-centres-a273.html>

accessed 09 November 2017

<http://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2015/1036869/trends-in-international-arbitration-in-the-new-world-order> accessed 09 November 2017

<http://gull.georgetown.edu/search/a?searchtype=X&searcharg=International+Commercial+Arbitration&SORT=D&extended=0> accessed 10 October 2011

<http://library.law.columbia.edu/guides/International_Commercial_Arbitration> accessed 20 October 2011

<http://mkas.tpprf.ru/en/> accessed 19 October 2017

<http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2010.pdf> accessed 09 June 2016

<http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 18 December 2013

<http://www.cietac.org/index.php?m=Article&a=show&id=2517&l=en> accessed 23 September 2017

<http://www.crt-ii.org/_crt-i/frame.html> accessed 05 January 2012

<http://www.fticonsulting.com/insights/fti-journal/trends-in-international-arbitration> accessed 09 November 2017

<http://www.icheic.org> accessed 15 January 2012

<http://www.lcia.org/News/changes-to-the-lcia-court-and-board-of-directors.aspx> accessed 13 June 2016

<http://www.sccinstitute.com/about-the-scc/news/2015/a-historical-perspective-on-the-china-sweden-arbitration-connection/> accessed 18 June 2016

<http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-31-29/archive-2013/305-gar-

award-for-chief-justice-sundaresh-menon-sc-tops-off-year-of-resounding-success-for-singapore-arbitration> accessed 22 January 2017

<http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf> accessed 09 June 2016

<http://www.un.int/wcm/webdav/site/uae/shared/bilateral%20treaties%20where%20UAE%20is%20a%20party.pdf> accessed 30 August 2014

<http://www.uncitral.org/uncitral/en/about/origin.html> accessed 23 December 2011

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 04 December 2016

<https://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp> accessed 23 October 2011

IBA Arb 40 Subcommittee, 'The Current State and Future of International Arbitration: Regional Perspectives' (International Bar Association September 2015) <https://www.ibanet.org/LPD/Dispute_Resolution.../Arbitration/Publications.aspx> accessed 13 March 2016

ICC Commission on Arbitration and ADR, 'ICC Arbitration Commission Report: Techniques for Controlling Time and Costs in Arbitration' (2nd edn, ICC Publication 861-1 ENG, 2015) <https://cdn.iccwbo.org/content/uploads/sites/3/2015/11/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration-2012.pdf> accessed 18 November 2016

ICC Commission on Arbitration, 'Techniques for Controlling Time and Costs in Arbitration' (ICC Publication 843, 2007) <http://gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf> accessed 09 December 2011

ICC Commission Report, 'Decisions on Costs in International Arbitration' (2015) 2 ICC Dispute Resolution Bulletin 13 <http://store.iccwbo.org/icc-dispute-resolution-bulletin-issue-2> accessed 19 December 2016

ICSID Discussion Paper of 22 October 2004 on the 'Possible Improvements of the Framework for ICSID Arbitration'
<https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> accessed 28 June 2015

International Bar Association 'Guidelines on Conflicts of Interest in International Arbitration' (2014)
<https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 03 March 2015

Joshi M, 'Lagos Court of Arbitration Newsletter' (2014) 1(2)
<http://www.lca.org.ng/newsletters/> accessed 24 February 2016

Kallipetis M, 'Mediation in Civil and Commercial Disputes: Top 5 Things Everyone Should Know About Mediation' <http://www.ciarb.org/docs/default-source/ciarbdocuments/Policy/APPG/mediation-in-commercial-disputes.pdf?sfvrsn=2> accessed 28 September 2017

Kleiman E and C Pauly, 'Supreme Court reiterates autonomy of the international arbitral legal order' <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=3c7249ce-66b6-4c50-8d32-d6fd2bd28653andutm_source=ILO+Newsletterandutm_medium=emailandutm_campaign=Arbitration+Newsletterandutm_content=Newsletter+2012-01-19> accessed 14 April 2015

Lagerberg G and LA Mistelis, 'International Arbitration: Corporate Attitudes and Practices 2008' <http://www.pwc.co.uk/pdf/2008_international_arbitration_study.pdf> accessed 18 December 2013

Lagerberg G and LA Mistelis, '2013 Corporate Choices in International Arbitration: Industry Perspectives' <http://www.arbitration.qmul.ac.uk/docs/123282.pdf> accessed 11 September 2015

Lagerberg G and LA Mistelis, 'International Arbitration: Corporate Attitudes and Practices 2006' <http://www.arbitration.qmul.ac.uk/research/2006/123975.html> accessed 12 December

2013

Larkin A, ‘Commercial Arbitration in the ASEAN Region Poised to Increase Confidence in Foreign Investment’ (2017) 45(3) International Law News <https://www.dfdl.com/wp-content/uploads/2017/04/ILN_v45n3_Winter17_Larkin2.pdf.pdf> accessed 16 January 2018

Latham & Watkins, ‘Guide to International Arbitration’ [2014] <https://m.lw.com/thoughtLeadership/guide-to-international-arbitration-2014> accessed 24 September 2015

Mallick DL, ‘Don’t Think Twice, Mediation’s All Right: United States Corporations Should Implement in-House Mediation Programs into their Business Plans to Resolve Disputes’ <http://www.hnlr.org/2009/03/us-corporations-should-implement-in-house-mediation-programs-into-their-business-plans-to-resolve-disputes/> accessed 14 October 2017

Marsoof S, ‘The Judiciary and the Arbitral Process’ <http://www.academia.edu/5356161/The_Judiciary_and_the_Arbitral_Process> accessed 31 October 2015

McIlwaine D and LA Mistelis, ‘2016 International Dispute Resolution Survey: An insight into resolving Technology, Media and Telecoms Disputes’ <http://www.arbitration.qmul.ac.uk/docs/189659.pdf> accessed 07 November 2017

Miccoili G, ‘International Commercial Arbitration’ <https://www.asil.org/sites/default/files/ERG_ARB.pdf> accessed 10 October 2011

Onyema E, ‘Effective Utililisation of Arbitrators and Arbitration Institutions in Africa by Appointors’ [2008] <http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf> accessed 21 July 2012

Paulsson J, ‘Are Unilateral Appointments Defensible?’ (Kluwer Arbitration Blog 2 April 2009) <http://kluwerarbitrationblog.com/2009/04/02/are-unilateral-appointments-defensible/> accessed 13 September 2015

Paulsson J, ‘Arbitration in Three Dimensions’ (2010) LSE Legal Studies Working Paper 2/2010 <http://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf> accessed 31 July 2014

Poulton E and E Finkel, ‘Comparison of the ICC, LCIA, SCC, CIETAC, SIAC, HKIAC, and UNCITRAL Arbitration Rules’ (31 March 2015) <http://globalarbitrationnews.com/comparison-of-the-icc-lcia-scc-cietac-siac-hkiac-and-uncitral-arbitration-rules-20150331/> accessed 13 June 2016

Profaizer JR, ‘International Arbitration: Now Getting Longer and More Costly’ (28 July 2008) NLJ <https://www.paulhastings.com/docs/default-source/PDFs/9833309df6923346428811cff00004cbded.pdf> accessed 21 September 2013

Rigby B, ‘Regional trends in arbitration’ [2017] <https://www.cdr-news.com/categories/simmons-and-simmons/7083-regional-trends-in-arbitration> accessed 12 November 2017

Rogers CA, ‘Innovative New Criteria for Appointment of Arbitrators at Commercial Arbitration Centre of Lisbon’ [2010] Arbitrator Intelligence <http://kluwerarbitrationblog.com/blog/2015/07/10/innovative-new-criteria-for-appointment-of-arbitrators-at-commercial-arbitration-centre-of-lisbon/> accessed 10 June 2015

Rosert D, ‘The Stakes Are High: A review of the financial costs of investment treaty arbitration’ <http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> accessed 13 August 2015

Russian Public Opinion Research Centre (VCIOM) (July 2013) <http://www.rospravo.ru/en/info/articles/200148.html/> accessed 13 November 2015

Sekolec J, ‘International Commercial Arbitration’ <http://legal.un.org/avl/ls/Sekolec_IEL.html> accessed 23 December 2011

Sekolec J, ‘The Role of UNCITRAL in the Harmonization and the Modernization of the Law of International Trade’ <http://legal.un.org/avl/ls/Sekolec_IEL.html> accessed 23 December 2011

Sherwin P, A Vermal and E Figueira, ‘The Decision to Arbitrate: I. Perceived Advantages and

Disadvantages of International Arbitration' in *Proskauer on International Litigation and Arbitration: Managing, Resolving and Avoiding Cross-Border Business and Regulatory Disputes* Chapter 19 <http://www.proskauerguide.com/arbitration/19/I> accessed 10 September 2015

Shontz D, F Kipperman and V Soma, 'Business-to-Business Arbitration in the United States-Perceptions of Corporate Counsel' [2011] Rand Institute for Civil Justice <https://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf> accessed 13 March 2012

Strong SI, 'Why is Harmonization of Common Law and Civil Law Procedures Possible in Arbitration but Not in Litigation?' (2013) <http://ssrn.com/abstract=2266672> accessed 31 July 2013

Subhan J, 'Arbitration Conciliation and Mediation- Conflict between Formal and Informal Setups' (2010) <http://ssrn.com/abstract=2145187> accessed 06 October 2012

Sussman E and J Wilkinson, 'Benefits of Arbitration for Commercial Disputes' <http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf> accessed 18 January 2014

Tong AY, 'SIAC: Arbitration in the New Millennium' <http://www.lawgazette.com.sg/2000-1/Jan00-23.htm> accessed 11 July 2015

Trakman L, ''Legal Traditions' and International Commercial Arbitration' [2007] UNSW Law Research Paper 29/2007 <https://ssrn.com/abstract=986507> accessed 02 April 2012

United Nations Conference on Trade and Development, 'Dispute Settlement: Module 5.1 International Commercial Arbitration' (United Nations 2005) <http://unctad.org/en/docs/edmmisc232add38_en.pdf> accessed 07 January 2012

Waters A, 'Arbitration: What in-house Lawyers Need to Know the Costs of Arbitration August 2015' <http://www.wfw.com/wp-content/uploads/2015/08/WFW-ArbitrationNewsletter1-Costs.pdf> accessed 11 Mar 2016

Watner C, 'Stateless, Not Lawless: Voluntaryism and Arbitration' (1997) 84

<http://voluntaryist.com/articles/084.html#.VG2Xe_mUdkD> accessed 19 November 2014

Welser I, 'Efficiency – Today's Challenge in Arbitration Proceedings' <http://www.chsh.com/fileadmin/docs/publications/Welser/Welser_AYIA_2014.pdf> accessed 06 October 2015

Wheeler MA and G Morris, 'GE's Early Dispute Resolution Initiative (A)' Harvard Business School Case 801-395 (June 2001) <https://hbr.org/product/ges-early-dispute-resolution-initiative-a/801395-PDF-ENG> accessed 23 April 2016

Wheeler MA and G Morris, 'GE's Early Dispute Resolution Initiative (B)' Harvard Business School Case Supp. 801-453 (June 2001) <https://hbr.org/product/ge-s-early-dispute-resolution-initiative-b/an/801453-PDF-ENG> accessed 23 April 2016

Zuleta E and JC Hamilton, 'The Inaugural Survey of Latin American Arbitral Institutions' [2011] Institute for Transnational Arbitration <https://www.cailaw.org/media/files/ITA/Publications/arbitral-institutions-guide-dec.pdf> accessed 14 December 2016