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NAVIGATING THE BOUNDARIES: BALANCING PARTY AUTONOMY AND INSTITUTIONAL CONTROL IN INSTITUTIONAL ARBITRATION

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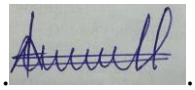
DECLARATION

I, **ALBERT NGIGI MACHARIA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. All external sources referenced in this work have been duly acknowledged and cited.

Signed: .....  .....

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LIST OF LEGAL INSTRUMENTS

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6. *Insigma Technology Co Ltd v Alstom Technology Ltd* (2009), Singapore High Court.
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8. *Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v Algerian Energy Company SPA* (2023), Paris Court of Appeal.
9. *NCC International AB v Land Transport Authority Singapore* (2008), Singapore High Court.
10. *NCC Land Arbitration Case v Alliance Concrete Singapore* (2008), Singapore High Court.
11. *Nedermar Technology BV Limited v Kenya Anti-Corruption Commission & Attorney General* (2008) eKLR.
12. *Nobles Resources Pte. Ltd. v. Good Credit International Trade Co. Ltd.* (2016), Shanghai No.1 Intermediate People's Court.

LIST OF ABBREVIATIONS

1. **AAA** - American Arbitration Association.
2. **CIETAC** - China International Economic and Trade Arbitration Commission.
3. **DIS** - German Arbitration Institute.
4. **ICC** - International Chamber of Commerce.
5. **ICDR-AAA** - International Centre for Dispute Resolution – American Arbitration Association.
6. **HKIAC** - Hong Kong International Arbitration Centre.
7. **LCIA** - London Court of International Arbitration.
8. **SGHC** - Singapore High Court.
9. **SCC** - Stockholm Chamber of Commerce.
10. **SIAC** - Singapore International Arbitration Centre.
11. **VIAC** - Vienna International Arbitration Centre.
12. **UNCITRAL** - United Nations Commission on International Trade Law.

ABSTRACT

Arbitration, a dispute resolution mechanism based on a contractual agreement between parties, has gained widespread popularity as an alternative to litigation. A key reason for its appeal is the flexibility it offers, allowing parties to customise the arbitral procedure to suit their needs. This concept, known as party autonomy, lies at the core of every arbitration agreement. Despite its advantages, party autonomy in institutional arbitration is not absolute, where an arbitral institution administers proceedings under its established procedural rules. It operates within the confines of established institutional rules, often characterized as non-derogable, which can restrict the extent to which parties can exercise their autonomy to customize procedural frameworks to suit their preferences. This study delves into the intricate relationship between these factors, examining how established mandatory institutional rules impact the exercise of party autonomy in institutional arbitration. The study seeks to establish a balanced framework that upholds party autonomy while ensuring compliance with institutional rules. This study employs desktop research methodology, synthesizing insights from legal literature, case law, and institutional practices to comprehensively understand the challenges and opportunities in the exercise of party autonomy inherent in institutional arbitration. The study's significance lies in its contribution to the ongoing discourse on arbitration, shedding light on the balance between regulatory guidance of arbitral institutions through institutional rules and party autonomy in shaping arbitration procedures.

***Key Words**: Party Autonomy, Arbitration, Institutional Rules, Procedural Framework, Mandatory Rules.*

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CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

Arbitration has achieved global prominence, providing an alternative avenue to traditional litigation.[1] Specifically, institutional arbitration denotes a form of dispute resolution wherein parties submit their disputes before an arbitral institution with pre-formulated procedural rules governing the conduct of the arbitral proceedings.[2] The arbitral institution assumes a central role by administering and supervising arbitration proceedings by the applicable institutional rules.[3] Subsequently, parties are automatically subject to these rules when they commence arbitration under the institution's framework.[4] These institutional rules meticulously dictate the procedural aspects of the arbitral process, and parties seldom deviate from their stipulations.[5]

At the core of this arbitration framework lies the principle of party autonomy. It denotes the power of the parties to tailor the arbitral procedure to their wants.[6] Arbitral procedures include a dictation of the arbitral process to be followed by the arbitral tribunal.[7] However, predetermined institutional rules set by arbitral institutions introduce limitations to the exercise of party autonomy.[8] The concept of non-derogable mandatory rules within institutional regulations presents a notable challenge. [9] These rules are deemed by arbitral institutions to triumph any parties' agreement to the contrary.[10] This study explores the implications of non-derogable institutional rules on party autonomy, particularly when parties attempt to deviate from or modify institutional rules. The primary focus is the exercise of party autonomy after the dispute has been submitted to institutional

[1] Gary Born, "International commercial arbitration", *Kluwer International,* 2021, 177.
[2] Redfern A and Hunter M, Redfern & Hunter on International Arbitration, 570.
[3] W Park "Challenging Arbitral Jurisdiction: The Role of Institutional Rules", *Boston University School of Law*, Public Law Research Paper, 34, 2015.
[4] *See,* Article 6(2), *International Chamber of Commerce Rules (2021).*
[5] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox",7 2018.
[6] Gordon Battle. "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law." Virginia Law Review 16, no. 3 (1930): 255–60.
[7] Gordon Battle. "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law." Virginia Law Review 16, no. 3 (1930): 255–60.
[8] Gordon Battle. "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law." Virginia Law Review 16, no. 3 (1930): 255–60.
[9] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox",9, 2018.
[10] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox",9, 2018.

arbitration. It examines whether this approach is justifiable and its broader impact on party autonomy.

This paper examines the interaction between institutional rules and party autonomy in arbitration, aiming to determine whether these rules limit party autonomy and, if so, how such conflicts can be resolved. To facilitate this analysis, the paper conceptualises two levels of party autonomy. The first is *primary party autonomy*, referring to the parties' decision to submit their dispute to institutional arbitration rather than other forms of dispute resolution. The second is *secondary party autonomy*, which involves the parties' ability to tailor the arbitral procedure, including the potential to deviate from institutional rules after choosing institutional arbitration.

Limitations on party autonomy include considerations such as mandatory rules, public policy, institutional discretion that allows arbitrators to accept or reject procedural agreements made by the parties, and the need to ensure procedural fairness and equality in arbitral proceedings.[11] In light of these constraints on party autonomy, this study delves deeply into the complex relationship between party autonomy and the regulatory constraints imposed by institutional rules within the realm of institutional arbitration. The study aims to propose a harmonious balance between party autonomy and the mandatory nature of institutional rules.

1.2 PROBLEM STATEMENT

In ideal institutional arbitration, party autonomy and institutional rules coexist seamlessly, allowing parties to shape the arbitral process according to their preferences, including deviations from institutional rules by mutual agreement. However, non-derogable provisions within institutional rules often override such agreements, disrupting this balance and restricting procedural flexibility. This undermines the ideal scenario where parties can tailor proceedings to their specific needs for more effective dispute resolution. This study examines the tension between secondary-level party autonomy, exercised after the dispute is submitted to institutional arbitration and mandatory institutional rules. It proposes a balanced approach that empowers parties to customise their arbitration process while safeguarding institutional integrity.

[11] Gordon Battle. "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law." Virginia Law Review 16, no. 3 (1930): 255–60.

1.3 JUSTIFICATION OF THE STUDY

The study of the dynamics of party autonomy and institutional control in international arbitration is of paramount importance in the field of dispute resolution. Arbitration has emerged as a preferred method for resolving international disputes due to its flexibility and efficiency.[12] However, the balance between party autonomy and institutional rules is delicate and requires a thorough examination to ensure the continued success and attractiveness of arbitration as a dispute resolution mechanism.[13] This study fills a critical gap in the existing literature by delving into the complex interplay between party autonomy and institutional control.[14] While previous research has acknowledged the significance of party autonomy, there is a notable lack of comprehensive analysis of how institutional rules impact this autonomy.[15] Specifically, it introduces the concept of secondary party autonomy as a conceptual lens in studying the interaction between institutional rules and party autonomy in institutional arbitration. By exploring this dynamic, the study aims to provide a nuanced understanding of the challenges and opportunities inherent in international arbitration.

In conclusion, this study represents a significant contribution to international arbitration. By shedding light on the complex relationship between party autonomy and institutional control, the study aims to advance our understanding of arbitration practices and contribute to developing more effective dispute-resolution mechanisms.

1.4 RESEARCH OBJECTIVES

This study seeks to deepen our understanding of how party autonomy interacts with mandatory provisions in arbitration. It aims to find a harmonious balance between these elements. The study's objectives include:

[12] Gordon Battle. "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law." Virginia Law Review 16, no. 3 (1930): 255–60.

[13] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox",2, 2018.

[14] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox",2, 2018.

[15] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox",2, 2018.

1. Examine the extent of party autonomy in shaping arbitral procedures in institutional arbitration and assess how mandatory institutional rules influence the exercise of this autonomy.
2. Examine the extent of autonomy granted to arbitral institutions in administering arbitral procedures and its impact on the exercise of party autonomy in institutional arbitration.
3. Examine the justifications for mandatory institutional rules in institutional arbitration and how these rules create tension with party autonomy in structuring arbitral processes and ensuring enforceable awards in institutional arbitration.
4. Propose, and examine strategies and recommendations to achieve a harmonious balance between respecting parties' will and safeguarding the autonomy of arbitral institutions in the context of institutional arbitration.

1.5 RESEARCH QUESTIONS

To achieve the above objectives, this research is guided by the following questions.

1. What extent of party autonomy can be exercised by parties in shaping arbitral procedures within the framework of institutional arbitration?
2. What is the extent of autonomy conferred upon arbitral institutions in controlling arbitral procedures, and how does this influence the exercise of party autonomy in institutional arbitration?
3. What are the justifications for imposing mandatory institutional rules in institutional arbitration, and how do they conflict with party autonomy in shaping the arbitral process and ensuring the enforceability of arbitral awards?
4. What strategies and recommendations can be proposed to balance party autonomy and the application of mandatory institutional rules in international arbitration?

1.6 HYPOTHESIS

While designed to ensure procedural efficiency, mandatory rules in institutional arbitration often restrict party autonomy in shaping arbitral procedures. This tension can only be resolved through a balanced approach that upholds institutional control to administer arbitrations while accommodating parties' preferences for customisation of the arbitral procedure.

1.7 LITERATURE REVIEW

Party autonomy is the cornerstone in determining the procedure for international commercial arbitration. This literature review focuses on the exercise of party autonomy after a dispute has been referred to as institutional arbitration, conceptualised as secondary party autonomy. In contrast, as discussed in the second chapter, the exercise of party autonomy at the primary level includes the parties' freedom to decide to submit their dispute to institutional arbitration as opposed to any other means of dispute resolution.[16] At this secondary level, the evolution of institutional arbitration has revealed ongoing tension between the parties' freedom to shape their dispute resolution process and the constraints imposed by mandatory provisions within institutional frameworks.[17] The prominent work on this intricate relationship has been advanced by Klaus Berger, a distinguished member of the International Chamber of the Commerce(ICC) Commission and a prominent scholar in institutional arbitration.[18]

Klaus Berger has extensively investigated the intricate relationship between institutional rules and party autonomy. In his publication, "Institutional Arbitration and Party Autonomy Paradox," Berger argues that, in general, Institutional Arbitration permits party autonomy, except for features within institutional rules that are considered mandatory.[19] He propounds that to accommodate party autonomy, most institutional arbitration rules provide for a general framework to leave ample freedom for the parties to agree on specific procedures deviating from the institutional rules in question.[20] However, there is a twofold limitation. The first instance is where Parties' are bound by mandatory provisions of the institutional rules in question.[21] The word '**mandatory provision'** has been understood to mean an essential feature or rule of the institutional rule that, if deviated from, would render a violation of the "spirit" of the institutional rules and the reputation of the

[16] See, chapter 2.

[17] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", *Fundación Universitaria San Pablo CEU*, 7-10, 2018.

[18] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", *Fundación Universitaria San Pablo CEU*, 7-10, 2018.

[19] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", *Fundación Universitaria San Pablo CEU*, 7, 2018.

[20] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", *Fundación Universitaria San Pablo CEU*, 10, 2018.

[21] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", *Fundación Universitaria San Pablo CEU*, 20,2018.

administrative services it offers.[22] Other scholars such as Redfern Hunter have described it as those rules that 'cannot be derogated from by way of Contract' of the parties.[23] Klaus argues that such provisions limit Party autonomy, for Parties cannot deviate from such provisions.[24] This viewpoint is supported by multiple authors, including Simon Greenberg, a contributor to the ICC institutional rules.[25] Greenberg, in the secretariat guide, addresses Article 19 of the ICC rules, affirming that ICC rules take precedence over parties' agreements, with the latter only considered in the absence of specific provisions in the rules.[26]

Secondly is the idea of Institutional discretion, which posits that institutional bodies are better placed to exercise discretion in the administration of arbitral proceedings.[27] This is based on the premise that by selection of institutional arbitration in the first place, the parties granted the institution the authority to exercise institutional authority entrusted to them by the parties' choice of the particular institution and its rules, to exercise discretionary decision-- -making concerning the administration of proceedings.[28] Klaus's significant contribution sheds light on the interplay of party autonomy and institutional rules in institutional arbitration.

However, Klaus's propositions are subject to limitations. For instance, *the NCC Land arbitration case* in Singapore highlights this tension.[29] In his obiter, Justice Tay emphasized that, in conflicts between parties' agreements and institutional rules, the preferable stance is that parties cannot be compelled to adhere to rules they did not explicitly agree upon, asserting the limitations on arbitral institutions in imposing their rules on the parties.[30]

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[22] *See,* for example J Fry, S Greenberg and F Mazza, The Secretariat's Guide to ICC Arbitration (ICC 2012), No 3-1183 who mentions a case in which the ICC refused to administer an arbitration because the parties had opted out of the aforementioned scrutiny process

[23] Redfern, Hunter, Blackaby Constantine Partasides QC , " Redfern and Hunter on International Arbitration", *Oxford University Press,* Sixth edition, 195, 2009.

[24] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", *Fundación Universitaria San Pablo CEU*, 22, 2018.

[25] J Fry, S Greenberg, F Mazza, "The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration" Article 19, 2012.

[26] International Chamber of Commerce (ICC), *Rules of arbitration and Mediation,* Art.19,2017.

[27] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", *Fundación Universitaria San Pablo CEU*, 28, 2018.

[28] Gerbay (n 4), § 4.03 [B]; *see,* H Grigera-Naon, in Arbitration in the Next Decade – ICC Bulletin Special Supplement, 1999, 56: "*the ICC arbitration system […] should probably be considered as the one vesting the arbitral institution with more controlling powers in the arbitral process and its outcome than any other and, from that standpoint, as the one providing the institution with the most far-reaching decisional powers binding on the parties and the arbitral panel regarding the conduct and outcome of the arbitration proceedings governed by its rules*"

[29] *NCC Land arbitration case v. Alliance Concrete Singapore*, (2008).

[30] *NCC Land arbitration case v Alliance Concrete Singapore*, (2008).

The second limitation arises from the notion that parties are incapable of exercising absolute autonomy over mandatory rules.[31] To counter the prospect of absolute autonomy over institutional rules, parties may resort to 'wildcat' arbitration.[32] Wild cat arbitration" is where parties stipulate that arbitration should be governed by specific institutional rules but administered by a different institution rather than the arbitration that authored the rules in the first place.[33] A classic example is the *Insignma case,* where the Parties had agreed to arbitration under the ICC arbitrations, to be administered by the Singapore International Arbitration Centre (SIAC).[34] This is an indication that where arbitral institutions authoring rules decline to administer rules, claiming a violation of their essential features of the rules, the Parties can always opt for wild cat arbitration under the same rules.[35]

Notably, other prominent scholars have advanced similar views on the subject. They have acknowledged the primacy of party autonomy in institutional arbitrations.[36] There's a consensus that a balance must be struck between the wishes of the parties as to the procedure to be followed by the arbitral tribunal and any overriding requirements of the applicable law governing the arbitration.[37] For example, According to Redfern and Hunter, party autonomy in institutional arbitration is not absolute, and it is subject to the mandatory rules of the governing law.[38]He argues that mandatory provisions set in institutional arbitration rules as a limitation to Party autonomy.[39] He argues that arbitration rules often introduce limitations to party autonomy by operating the

[31] J Fry, S Greenberg, F Mazza, "The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration" Article 19, 2012.
[32] J Kirby, 'Insigma Technology Co. Ltd v Alstom Technology Ltd: SIAC Can Administer Cases under the ICC Rules?', 2009, 319.
[33] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", 7,2018.
[34] *Insigma Technology Co. Ltd v Alstom Technologies Ltd*, SGHC(2008) 134.
[35] J Fry, S Greenberg, F Mazza, "The Secretariat's Guide to ICC Arbitration" Article 19, 2012.
[36] Redfern, Hunter, Blackaby Constantine Partasides QC, " Redfern and Hunter on International Arbitration", *Oxford University Press,* Sixth edition, 355, 2009.; P Fouchard, E Gaillard and B Goldman, On International Commercial Arbitration, (Kluwer International, 1999).; GarryBorn; G Bell, "The UNCITRAL Model Laws and Asia Arbitration Laws, 256, 2018.
[37] Redfern, Hunter, Blackaby Constantine Partasides QC , " Redfern and Hunter on International Arbitration", *Oxford University Press,* Sixth edition, 354, 2009.
[38] Redfern, Hunter, Blackaby Constantine Partasides QC , " Redfern and Hunter on International Arbitration", *Oxford University Press,* Sixth edition, 354, 2009.
[39] Redfern, Hunter, Blackaby Constantine Partasides QC , " Redfern and Hunter on International Arbitration", *Oxford University Press,* Sixth edition, 354, 2009.

arbitration rules chosen by the Parties. Such rules may contain mandatory provisions relating to the conduct of the proceedings. [40]

Similarly, Scholars such as Guiditta Cordero-Moss have advanced similar views. Moss describes Overriding Mandatory rules are rules that the judge or, under certain circumstances, the arbitral tribunal is entitled to apply irrespective of the choice of law made by the parties.[41] However, Moss argues that the primacy of the parties' agreement needs to be coordinated with the applicable rules in question to ensure the enforceability of an arbitral award.[42] This implies that Party autonomy may be limited if it is likely to affect the enforceability of an arbitral award. This is mainly confirmed by provisions in various institutional rules that render a duty to the arbitral tribunal to render enforceable awards.[43] Moss argues that the tribunal may disregard parties' wishes if they risk rendering the award invalid and enforceable.[44]

Other commentaries on institutional rules, such as the ICC Secretariat guide, written by Arbitration scholars such as Greenberg, recognise Party autonomy as one of the founding principles of the ICC Rules that should guide the court in its interpretation.[45] However, they recognise that this is not absolute and that where there is a question of the hierarchy of applicable rules or procedure, ICC Rules will take precedence over the Parties' agreement.[46] There is a consensus amongst scholars that the rules will take precedence in ICC arbitration.[47] For example, Michael Pryles has captured this to mean that these Rules shall govern an ICC Arbitral Tribunal and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration." He argues that Article 19 of the ICC Rules establishes a hierarchy for

[40] Redfern, Hunter, Blackaby Constantine Partasides QC , " Redfern and Hunter on International Arbitration", *Oxford University Press,* Sixth edition, 357, 2009.

[41] Giuditta Cordero-Moss, ' International Arbitration is Not only International', 37, 2021.

[42] *See,* for a more extensive reasoning, Giuditta Cordero-Moss, 'Arbitration and Private International Law', International Arbitration Law Review, 11(2008), 153. For a similar reasoning see Redfern et al., Redfern and Hunter on International Arbitration, para. 3.102, adding also, as the only additional basis to restrict the parties' choice, that the parties' choice must have been made bona fide. See also the International Commercial Arbitration Committee, 'International Law Association Report Ascertaining the Contents of the Applicable Law in International Commercial Arbitration', p. 21, affirming that the only restriction to parties' choice is the public policy exception.

[43] *See,* Article 34, International Chamber of Commerce Rules, 2021.

[44] Guiduitta Cordero Moss, ' International Arbitration is Not Only International ', page 35.

[45] J Fry, S Greenberg, F Mazza, "The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration" Article 19, 2012.

[46] Article 19, I*nternational Chamber of Commerce Rules* (2021).

[47] J Fry, S Greenberg, F Mazza, "The Secretariat's Guide to ICC Arbitration", Article 19, 2012.

governing arbitral proceedings, prioritizing the ICC Rules, followed by the parties' agreement, and finally, the arbitral tribunal's determination.[48] It is evident in this scenario that the Parties' agreement on the procedure will only be considered relevant if the rules are silent on the matter.

In conclusion, the literature review underscores the complexity inherent in balancing party autonomy and institutional rules in international commercial arbitration. The interplay between these two elements involves navigating the constraints of mandatory provisions, institutional discretion, and the delicate tension between parties' preferences and overarching legal requirements. As scholars like Klaus Berger and others have explored these dynamics, the research aims to delve deeper into specific scenarios, conflicts, and strategic responses within this intricate relationship. By addressing the nuanced challenges presented in the literature, the research seeks to contribute valuable insights to the evolving discourse on party autonomy and institutional control in institutional arbitration.

1.8 LIMITATIONS OF THE STUDY

This study focuses exclusively on institutional arbitration, offering an in-depth analysis of how party autonomy interacts with institutional rules in international commercial arbitration. It does not extend to Ad Hoc arbitration. The reliance on existing literature may introduce limitations due to the availability of relevant materials, while the diversity of institutional practices and procedural variations across jurisdictions could affect the generalizability of the findings. Furthermore, evolving arbitration laws and regulations may impact the long-term relevance of the study's conclusions. Notably, this paper is specifically confined to examining secondary-level party autonomy, focusing on its exercise after a dispute has been submitted to institutional arbitration.

1.9 SIGNIFICANCE OF THE STUDY

Despite these limitations, the study offers valuable insights into international commercial arbitration by examining the intricate relationship between party autonomy and institutional rules. It provides a nuanced understanding of parties' challenges and opportunities when exercising secondary party autonomy within institutional arbitration. The findings are expected to serve as a practical guide for resolving conflicts between institutional rules and party autonomy, benefiting

[48] J Fry, S Greenberg, F Mazza, "The Secretariat's Guide to ICC Arbitration", Article 19, 2012.

legal practitioners, arbitrators, policymakers, and scholars. By offering actionable insights to inform decision-making, refine arbitration strategies, and shape institutional frameworks, the study advances the ongoing discourse on balancing party autonomy with effective arbitration administration, fostering a more informed, adaptable, and efficient approach to international dispute resolution.

1.10 THEORETICAL FRAMEWORK

A comprehensive grasp of the theoretical framework that underlies arbitration is essential for assessing the degree of party autonomy in institutional arbitration. At the core of this framework lies the principle of party autonomy, which embodies the parties' capacity to tailor the arbitration procedure to their particular requirements.[49] This theoretical framework explores the fundamental clash between parties concerning mandatory institutional rules and any agreements that deviate from these provisions. Two pivotal theories come into play: the contractual and efficiency theories. The contractual theory highlights the parties' right to tailor their proceedings based on their preferences.[50] Conversely, efficiency theory elucidates the justification for party autonomy in arbitration, providing a framework for assessing which rule should prevail in cases of conflict.[51]

1.10.1 Contractual Theory

The contractual theory asserts that arbitration fundamentally arises from the parties' agreement.[52] It posits that arbitration's essence lies in the parties' ability to tailor the process to their needs and preferences. [53] This theory is rooted in the doctrine of freedom of contract, which holds that parties are free to determine the terms of their contract, and thus, no unwarranted impositions may be forced upon them.[54] The contractual theory underscores parties' autonomy in arbitration to decide on the relevant procedures without unjustified limitations.

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[49] Redfern, Hunter, Blackaby Constantine Partasides QC , " Redfern and Hunter on International Arbitration", *Oxford University Press,* Sixth edition, 354, 2009.

[50] Maniruzzaman A, 'State Contracts and Arbitral Choice of Law, Process, and Techniques' 15(3) Journal of International Arbitration,1998,69.

[51] Semakula S, 'Party Autonomy Doctrine is the Cornerstone of Arbitral Provisional Measures' 1(1) International Academic Journal of Law and Society,2016, 30.

[52] Yu H, 'A theoretical Overview of the Foundations of International Commercial Arbitration' 274.

[53] Redfern A and Hunter M, Redfern & Hunter on International Arbitration, 416.

[54] Maniruzzaman A, 'State Contracts and Arbitral Choice of Law, Process, and Techniques' 15(3) Journal of International Arbitration,1998,69.

It emphasizes parties' autonomy in designing the arbitration process, viewing arbitration as a mechanism for enforcing their contractual rights and obligations.[55] The theory considers arbitration a creature of contract, where party autonomy governs the conduct of arbitral proceedings.[56] Party autonomy, within this theory, refers to parties' right to conclude a contract or agreement on the arbitral procedure or conduct of their proceedings, allowing them to modify the structure of the arbitral procedure without limitations imposed by institutional rules.[57]

In balancing party autonomy and institutional control, the contractual theory advocates for a harmonious interplay between the two.[58] While institutions provide a framework for arbitration, they should not impose rules that contradict parties' agreements unless compelling reasons exist. Critics of the contract theory in arbitration argue that referencing institutional rules is an exercise of party autonomy.[59]However, when parties explicitly agree otherwise, it creates a conflict of autonomy that requires a balance between party autonomy and institutional control. [60]This balance involves considering the limitations imposed by institutional rules on party autonomy and proposing strategies to reconcile these conflicting interests.

The contractual theory offers a theoretical framework for understanding party autonomy and institutional control dynamics in international arbitration. This framework aims to reconcile conflicting interests and promote a more effective and efficient arbitral process by recognizing the foundational role of parties' agreements and the limitations on party autonomy. However, while party autonomy is a fundamental principle, it is not absolute.[61] The contractual theory acknowledges limitations to party autonomy imposed by applicable law, public policy considerations, and institutional rules, which are necessary to ensure fairness, efficiency, and the integrity of the arbitral process.

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[55] Gordon Battle. "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law." Virginia Law Review 16, 1930,255 –60.

[56] Gordon Battle. "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law." Virginia Law Review 16, 1930, 255–60.

[57]Maniruzzaman A, 'State Contracts and Arbitral Choice of Law, Process, and Techniques' 15(3) Journal of International Arbitration,1998,69.

[58] Daniel Ling Tien Chong, 'Institutional Leadership or Institutional Overreach?', in Stavros Brekoulakis (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 2020, 270 - 292.

[59] Daniel Ling Tien Chong, 'Institutional Leadership or Institutional Overreach?', 2020, 270 - 292.

[60] Yu H, 'A theoretical Overview of the Foundations of International Commercial Arbitration' 274

[61] Allan Schwartz, Robert E.Scott, " Contract Theory and the Limits of Contract Law", *The Yale Law Journal,* Volume 113, 2003, 544.

1.10.2 Efficiency Theory

The efficiency theory in international arbitration advocates for an approach aimed at enhancing the effectiveness and efficiency of dispute resolution processes.[62] This theory is grounded in the belief that arbitration, like any other contract, should be tailored to maximize gains between the parties while minimizing delays.[63]The theory's affirmative claim is that arbitration should be tailored to maximise gains between the parties.[64] Its adverse claim is that this should be the sole aim of arbitration.[65]

Efficiency in arbitration is measured by minimizing costs, reducing delays, and simplifying procedures to achieve timely and cost-effective outcomes.[66] The flexibility inherent in arbitral procedures is considered crucial for efficiency, as it allows parties to customize the process to their specific needs.[67] Proponents of the efficiency theory argue that parties should have the authority to override mandatory provisions of institutional arbitration and customize the procedure according to their preferences.[68] They contend that imposing mandatory rules that supersede contractual terms would be counterproductive, as it would undermine parties' true intentions and hinder the efficiency of the arbitration process.[69]

However, the efficiency theory has faced criticism for potentially compromising procedural fairness and due process in pursuing efficiency. Critics argue that overly expedited procedures and strict timelines could limit parties' ability to fully present their case and could lead to rushed or inadequately considered decisions.[70] Additionally, the focus on cost-effectiveness could result in arbitrators favoring the interests of repeat players or economically powerful parties over those of

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[62] Allan Schwartz, Robert E.Scott, " Contract Theory and the Limits of Contract Law", *The Yale Law Journal,* Volume 113, 2003, 544.

[63] Allan Schwartz, Robert E.Scott, " Contract Theory and the Limits of Contract Law", *The Yale Law Journal,* Volume 113, 2003, 544.

[64] Allan Schwartz, Robert E.Scott, " Contract Theory and the Limits of Contract Law", *The Yale Law Journal,* Volume 113, 2003, 544.

[65] Allan Schwartz, Robert E.Scott, " Contract Theory and the Limits of Contract Law", *The Yale Law Journal,* Volume 113, 2003, 544.

[66] Abien Gélinas, Clément Camion, "Efficiency and Values in the Constitution of Civil Procedure", 4 *International Journal of Procedural Law,* 2014, 202.

[67] William Park, "Arbitration and Fine Dining: Two Faces of Efficiency",*Scholarly Commons at Boston University School of Law",* Boston University School of law, 2017, 6.

[68] William Park, "Arbitration and Fine Dining: Two Faces of Efficiency",*Scholarly Commons at Boston University School of Law",* Boston University School of law, 2017, 6.

[69] Allan Schwartz, Robert E.Scott, " Contract Theory and the Limits of Contract Law", *The Yale Law Journal,* Volume 113, 2003, 544.

[70] Abien Gélinas, Clément Camion, "Efficiency and Values in the Constitution of Civil Procedure", 4 *International Journal of Procedural Law,* 2014, 202.

smaller or less-resourced parties, potentially undermining the principle of equality of arms and eroding confidence in the arbitral process.[71]

In conclusion, while the efficiency theory offers valuable insights into improving arbitration to better serve parties' needs, it is essential to balance efficiency and fairness. Efforts to enhance efficiency should not come at the expense of procedural fairness or the parties' rights. Arbitral institutions and practitioners should consider these considerations when implementing efficiency measures in arbitration proceedings.

1.11 RESEARCH METHODOLOGY

The research methodology employed in this study is a qualitative analysis of primary and secondary legal sources conducted through desktop research. Primary sources include statutes, treaties, conventions, and case law from various jurisdictions. These sources are pivotal in understanding arbitration's legal framework, particularly the interplay between party autonomy and institutional rules. Key primary sources include institutional rules such as the ICC, SIAC, HKIAC, the UNCITRAL Model Law, and the New York Convention.

The primary sources provide the foundation for understanding the legal principles governing arbitration and the specific provisions that may override parties' agreements. Case law, in particular, helps illustrate how these principles are applied in practice and the outcomes of disputes involving party autonomy and institutional rules.

Secondary sources, including commentaries on primary sources and academic work, are crucial in providing a deeper understanding and analysis of the legal principles and concepts. These sources help contextualize the primary sources and provide insights into the study's theoretical framework.

The selection of case law is based on the type of institutional rules involved, focusing on cases from leading arbitral institutions such as the ICC, LCIA, SIAC, SCIA, and HKIAC. Comparative analysis examines the position of party autonomy about overriding provisions of institutional rules, aiming to identify trends and standard practices across different jurisdictions and institutions.

[71]Abien Gélinas, Clément Camion, "Efficiency and Values in the Constitution of Civil Procedure", 4 *International Journal of Procedural Law*, 2014, 202.

This research methodology allows for a comprehensive analysis of the theoretical framework and practical implications of party autonomy in institutional arbitration, drawing on various legal sources and expert opinions.

1.12 CHAPTER BREAKDOWN

1.12.1 Chapter One: Introduction to the Study

Chapter One introduces the study, highlighting arbitration's rise as an alternative to litigation, with institutional arbitration emphasizing the role of arbitral institutions in administering proceedings. It explores the tension between party autonomy and institutional rules, outlining objectives to examine their interplay, identify conflict factors, and propose balanced solutions. The chapter concludes with a literature review, analysing scholarly perspectives on the complex relationship between party autonomy and institutional control.

1.12.1 Chapter Two: Institutional Arbitration and Party Autonomy

Chapter 2 examines the concept of institutional arbitration and the principle of party autonomy, analysing their interaction and interdependence. It explores party autonomy at two levels: the primary level, where parties choose institutional arbitration over other dispute resolution methods, and the secondary level, where parties seek to customize the arbitration process by deviating from pre-formulated rules. The chapter evaluates how party autonomy is exercised within institutional arbitration, with a particular focus on its interaction with non-derogable institutional rules. It highlights the challenges and opportunities that arise in this context and assesses the extent to which parties can tailor their arbitration process while adhering to institutional frameworks, thereby establishing the critical link between institutional regulations and party autonomy in international arbitration.

1.12.3 Chapter Three: Mandatory Institutional Rules and Party Autonomy

This chapter explores the tension between institutional mandatory rules and party autonomy, examining the theoretical justifications for enforcing such rules, even when they override parties' preferences. Building on earlier discussions, it delves deeper into the debate surrounding the justification for mandatory rules within institutional arbitration, analyzing the foundational

arguments supporting their necessity and role in shaping the arbitration process. The objective is to clarify how these rules affect party autonomy and identify how institutional control may restrict parties' freedom in structuring their arbitration.

1.12.4 Chapter Four: Harmonising Party Autonomy and Mandatory Institutional Rules

This chapter critically examines strategies for reconciling arbitral institution's discretion in enforcing mandatory rules and secondary party autonomy in institutional arbitration. Building on earlier discussions, it synthesizes insights from practice, jurisprudence, and scholarship to develop frameworks that harmonize these competing priorities while ensuring mandatory institutional rules do not unduly restrict parties' ability to shape their arbitration process.

1.12.5 Chapter Five: Conclusion

Chapter 5 provides a conclusion to the study, summarising key findings and contributions of the study. The chapter offers concluding thoughts on the importance of institutional flexibility and proposes recommendations to address identified gaps, including harmonizing international standards and adopting a context-specific approach to derogability. It further suggests areas for future research and the development of more adaptive institutional frameworks, emphasizing the importance of a balanced approach in institutional arbitration for ensuring fairness and efficiency in dispute resolution.

CHAPTER TWO: INSTITUTIONAL ARBITRATION AND PARTY AUTONOMY

2.0 INTRODUCTION

This chapter explores the intricate relationship between institutional arbitration and the principle of party autonomy, examining these concepts' interplay and mutual influence. It delves into the functioning of institutional arbitration within the framework of arbitral institutions, which play a pivotal role in administering and supervising arbitration proceedings according to their predetermined rules. This chapter will examine how party autonomy is exercised within this context, discussing the challenges and opportunities that arise as parties navigate the balance between customizing their arbitration process and adhering to institutional arbitration rules. By doing so, it aims to establish a clear understanding of how institutional arbitration shapes and sometimes limits parties' autonomy in the international arbitration landscape.

2.1 MODES OF ARBITRATION: AD HOC AND INSTITUTIONAL ARBITRATION

Arbitration, a cornerstone of alternative dispute resolution, is commonly categorized into two fundamental forms: ad hoc and institutional arbitration. Ad hoc arbitration is governed by rules that are formulated by the parties to the arbitration, with no administering institution,[72] whilst institutional arbitration is governed by pre-formulated institutional rules published and administered by an arbitral institution.[73] This distinction, while widely accepted in both theoretical and practical contexts, often lacks a precise definition despite the broad consensus surrounding it.[74] The principle of party autonomy, which underpins arbitration, allows for diverse approaches to dispute resolution that do not always fit neatly into these two categories. Although terms like "forms," "kinds," "types," or "categories" are frequently used interchangeably to describe ad hoc and institutional arbitration, the precise characteristics that distinguish these modes of arbitration

[72] Moses M, *The Principles and Practice of International Commercial Arbitration*, 2 ed, Cambridge University Press, New York, 2012, 10.

[73] 'Institutional arbitration- an introduction to the key features of institutional arbitration' LexisNexis, accessed on 20 August 2024, <https://www.lexisnexis.co.uk/legal/guidance/institutional-arbitration-an-introduction-to-the-key-features-of-institutionalarbitration#:~:text=What%20is%20Institutional%20arbitration%3F,referred%20to%20as%20administered%20Arbitration>.

[74] Schroeter U, 'Ad Hoc or Institutional Arbitration - A Clear-Cut Distinction? A Closer Look at Borderline Cases' Contemporary Asia Arbitration Journal, vol 10, 2017, 141-144, <https://doi.org/10.2139/ssrn.3086537>.

have not been thoroughly examined.[75] Even the 1961 European Convention on International Commercial Arbitration, one of the few international instruments that directly addresses this distinction, refers to them as "modes of arbitration."[76]

Relevant to this study is the exercise of party autonomy in the context of institutional arbitration. Institutional arbitration is characterized by the codification of binding institutional rules, often drawing parallels to a system of litigation before domestic courts.[77] The binding nature of these institutional rules and potential limits to party autonomy may potentially cause a metamorphosis of Institutional arbitration into a rigid system.[78] However, it must be noted that such rigidity is subject to the will of the parties, as evidenced in the arbitration agreement where the parties agree to submit their dispute to an arbitral institution.

This section seeks to understand the nature of institutional arbitration and the exercise of party autonomy in the context of institutional arbitration.

2.1.1 Defining features of Institutional Arbitration

Institutional arbitration refers to an arbitral procedure administered by an arbitral institution or organisation, with a predetermined set of procedural rules, agreed upon by the parties, and conducted per the institution's arbitration rules.[79] It has also been described to be an arbitration conducted according to specialist arbitral institutional rules, overseen by an administrative authority with responsibility for various aspects relating to the constitution of the arbitral tribunal and other procedural matters.[80]

In recent times, there has been a significant increase in arbitral institutions at both domestic and international levels.[81] This trend has brought heightened attention to the concept of party autonomy in institutional arbitrations, mainly because of the need for these arbitral institutions to safeguard "essential" features of their identity.[82] Understanding these defining characteristics is crucial,

[75] Schroeter, 'Ad Hoc or Institutional Arbitration' 144.
[76] Article IV(6), European Convention on International Commercial Arbitration, 1961.
[77] Berger, "Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'," 476.
[78] Berger, "Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'," 476.
[79] 'Institutional arbitration: An introduction to the key features of institutional arbitration," accessed 20 August 2024.
[80] Schroeter, 'Ad Hoc or Institutional Arbitration' 144.
[81] R Gerbay, The Functions of Arbitral Institutions (Kluwer 2016) s 2.01 [A].
[82] Berger, "Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'," 474.

particularly in the context of mandatory rules, which are non-derogable and are deemed to protect the essential attributes of arbitral institutions.[83] This understanding is central to addressing the limitations of party autonomy within institutional arbitration.

The following features are considered the defining features of institutional arbitration. First, the existence of pre-formulated rules, in this case, institutional rules under which the arbitral proceedings are conducted.[84] Second is the existence of a body that administers these rules, the arbitral institution, which is a permanent body that helps administer the rules. Third, the administration of the arbitral proceedings is a creature of contract arising out of the parties' consensual nature to agree to submit the dispute to institutional arbitration.[85] These criteria must be present for arbitration to be deemed as an institutional arbitration.[86]

Whilst understanding these defining features of institutional arbitration, Institutional bodies have taken approaches to maintain their defining features. Despite the 3 features discussed above some institutions have developed their mandatory features often prescribed in the rules that are binding to the parties, and where the parties cannot deviate from such rules.[87] Such approaches may be viewed as a limit to party autonomy, which is the subject of investigation of this section.

2.2 PARTY AUTONOMY IN INSTITUTIONAL ARBITRATION

Party autonomy is the freedom accorded to parties in an arbitration to construct their contractual relationship in the way they deem or determine to be the most efficient way to construct their arbitration procedure.[88] This freedom extends not only to procedural issues but also to substantive merits of an arbitration such as the choice of law that governs the contract in question.[89] However, the question of the extent of party autonomy as a principle in international commercial arbitration

[83] Schroeter, 'Ad Hoc or Institutional Arbitration' 170-171.
[84] Berger, "Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'," 476.
[85] Fouchard, Gaillard and Goldman, 'On International Commercial Arbitration', 403.
[86] Berger, "Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'," 474.
[87] Battle, "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law," 255.
[88] Abdulhay S, ' Corruption in International Trade and Commercial Arbitration' *Kluwer Law International,* 2004,159.
[89] Fouchard, Gaillard and Goldman, 'On International Commercial Arbitration', 32.

remains largely debatable and unsettled, especially, as to the absolute or limited nature of the party autonomy in question.[90]

In the present study, party autonomy is examined on two distinct levels, reflecting the extent and role it plays at various stages of the arbitration process. This analysis includes a study of party autonomy at both the primary and secondary levels, with the latter being particularly significant for this paper. This dichotomy is crucial for categorizing party autonomy and clearly defining the scope of the study. The primary level involves the exercise of party autonomy in deciding to submit the dispute to institutional arbitration. The secondary level, which is the focus of this paper, explores the extent and limits of party autonomy in modifying or deviating from institutional rules after the dispute has been submitted to institutional arbitration.

2.2.1 Party Autonomy at the Primary level

The foundational basis of arbitration lies in the parties' agreement to submit their current or future dispute to arbitration as their chosen method of dispute resolution.[91] The agreement to arbitrate, which is essential for a valid arbitration process, is recognized in both national laws and international treaties.[92] In the context of institutional arbitration, the consent to submit a dispute to an arbitral institution is typically formalized in the arbitration agreement, which specifies the submission of the dispute to a particular arbitral institution.[93] This represents the first level of autonomy—the decision to submit a dispute to institutional arbitration as opposed to an Ad hoc arbitration as well as other dispute resolution means. This agreement serves as clear evidence of the parties' consent to the arbitration process, reflecting the inherently consensual nature of arbitration.[94] The author identifies this as the primary level of party autonomy: the parties' consensual decision to use institutional arbitration as their primary mode of dispute resolution.

The arbitration agreement embodies the primary level of party autonomy. Article 7(1) of the UNCITRAL Model Law defines arbitration as an agreement by the parties to submit all or certain

[90] Sunday A. Fagbemi, " The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality' *Afe Babalola University Journal of Sustainable Development of Law and Policy, Volume 6, 2015, 225.*
[91] Moses M, '*The Principles and Practice of International Commercial Arbitration*,',10.
[92] Redfern et al., *'Redfern and Hunter on International Arbitration'*, 32.
[93] Redfern et al., '*Redfern and Hunter on International* Arbitration', 46.
[94] Moses M, '*The Principles and Practice of International Commercial Arbitration*,',10.

disputes arising from a defined legal relationship, whether contractual or not, to arbitration. [95] The Model Law, widely adopted by many nations, illustrates the connection between party autonomy and institutional arbitration. Article 2(d) of the Model Law states that when the law allows parties the freedom to determine an issue, this autonomy includes the right to authorize a third party, including an institution, to make that determination.

The arbitration agreement is central, as it shapes the basis for selecting institutional arbitration, representing the primary exercise of party autonomy. In some cases, the agreement may also cover detailed procedural aspects, such as the constitution of the arbitral tribunal and the choice of governing law. [96] However, this paper focuses on the secondary level of party autonomy, which concerns whether parties, after choosing institutional arbitration, are fully bound by institutional rules or can deviate from them.

2.2.2 Party Autonomy at the Secondary Level

Party autonomy at the secondary level refers to the parties' ability to modify or deviate from the institutional rules that govern the arbitration process after the dispute has already been submitted to institutional arbitration. This involves the extent to which the parties can exercise their autonomy to adjust procedural aspects, select different rules, or even override specific provisions of the institutional framework despite having initially agreed to those rules when choosing institutional arbitration.[97] The focus is on understanding the boundaries and flexibility of party autonomy within the constraints of the chosen institutional rules.

The exercise of party autonomy in institutional arbitration is limited by rules considered mandatory or non-derogable by the institution in question.[98] "*Mandatory (institutional arbitration) rules*" refer to provisions within institutional rules that parties are generally not permitted to deviate from.[99] Institutional bodies consider it impermissible for parties to alter these rules in a manner deemed "unworkable" or unacceptable by the administering institution, leading to the concept of

[95] Article V, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 10 June 1958 ; Article 36(1)(a)(i), UNCITRAL Model Law on International Commercial Arbitration, 1985.
[96] Redfern et al., *'Redfern and Hunter on International Arbitration'*, 32.
[97] Berger, "Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'," 474.
[98] Battle, "The Two Fundamental Concepts of Arbitration and Their Relation to Rules of Law," 255.
[99] Schroeter, 'Ad Hoc or Institutional Arbitration',171.

mandatory institutional rules.[100] For example, Article 7(6) of Vienna Rules explicitly provides that the Vienna International Arbitral Centre (VIAC) can decline to the administration of proceedings if the arbitration agreement, or parties agreement, "deviates *fundamentally from and is incompatible with "* the Vienna Rules.[101]

Similarly, leading arbitral institutions such as the ICC also exemplify the adoption of mandatory institutional arbitration rules. For instance, Article 27 of the ICC Rules grants the ICC Court the authority to scrutinize arbitral awards.[102] This provision is widely regarded as a mandatory feature of the ICC Rules, with the ICC potentially refusing to administer an arbitration if parties attempt to deviate from these rules.[103] Scholars like Michael Pryles describe such mandatory features as "*unacceptable*" amendments to institutional rules.[104] This view presupposes that the selection of institutional arbitration may be a limit to party autonomy when parties try to alter the rules of the administering body in an "unworkable*'* manner or in a way not accepted by the administering body.*[105]*

However, it must be noted that an arbitration agreement that provides from deviation from institutional rules is not necessarily invalid or null and void.[106] Institutional arbitration rules are a product of the parties' choice, not mandated by the law of the seat, and therefore, their provisions are not inherently mandatory.[107] Parties may agree to deviate from these rules, but this could grant the administering body the right to refuse to administer the arbitration if the deviations conflict with the institution's defining features.[108]

Scholars have argued that a conflict arises between the parties' initial will to be bound by institutional rules through the arbitration agreement and their later desire to deviate from those

[100] Schroeter, 'Ad Hoc or Institutional Arbitration',171.
[101] Vienna International Arbitration Centre (VIAC), *Rules of Arbitration and Mediation*, Art. 7(6), 2013.
[102] International Chamber of Commerce (ICC), *Rules of Arbitration and Mediation,* Art.27, 2017.
[103] *See,* for example J Fry, S Greenberg and F Mazza, The Secretariat's Guide to ICC Arbitration (ICC 2012), No 3-1183 who mentions a case in which the ICC refused to administer an arbitration because the parties had opted out of the aforementioned scrutiny process
[104] Pryles M, *'Limitations to Party Autonomy',* 4.
[105] Pryles M, *'Limitations to Party Autonomy',* 4.
[106] Besson S, 'Introduction to the Swiss Rules' in Zuberbühler T et al. (eds), 'Swiss Rules of International Arbitration: Commentary', 30, 2005.
[107] Schroeter, 'Ad Hoc or Institutional Arbitration',171.
[108] *See,* for example J Fry, S Greenberg and F Mazza, The Secretariat's Guide to ICC Arbitration (ICC 2012), No 3-1183 who mentions a case in which the ICC refused to administer an arbitration because the parties had opted out of the aforementioned scrutiny process.

rules. [109] However, this perspective oversimplifies the situation, framing it as a paradox of party autonomy.[110] The core of party autonomy is the ability of parties to tailor procedures, including the right to amend an already agreed-upon process.[111] It is not necessarily paradoxical for parties to override a previously agreed procedural order. If parties were restricted from amending such orders, institutional arbitration would risk becoming a rigid system, contradicting the fundamental principle of party autonomy. Allowing parties the flexibility to adjust procedural agreements ensures that arbitration remains a dynamic and adaptable method of dispute resolution, true to its core purpose of reflecting the will of the parties involved.

In light of this, exploring the interaction between party autonomy and institutional arbitration is crucial to determine how extensively such autonomy can be exercised within the framework of institutional rules. The following analysis of various institutions and markets aims to illustrate this interaction and examine the exercise and approaches to party autonomy at the secondary level.

2.3 CASE STUDIES ON SECONDARY-LEVEL PARTY AUTONOMY

This section aims to illustrate the interplay of party autonomy within secondary institutions across various global markets and arbitral institutions. It highlights that there is no universally agreed-upon consensus that mandatory rules should always override party autonomy at the secondary level. The section demonstrates that the limitation of secondary party autonomy often lies at the discretion of specific arbitral institutions, making it subjective rather than a matter of public policy or the law of the seat.

2.3.1 Arbitration under the ICC Rules

The International Chamber of Commerce (ICC) Rules designate specific provisions as mandatory, often asserting that they should prevail over any contrary party agreements. A notable example is Article 10, which governs the consolidation of arbitral proceedings and explicitly stipulates that the ICC Court "shall" decide on consolidation, regardless of the parties' agreement to the

[109] Berger, "Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'," 474 -476; Schroeter, 'Ad Hoc or Institutional Arbitration',171-176.
[110] Schroeter, 'Ad Hoc or Institutional Arbitration',171-176; Pryles M, *'Limitations to Party Autonomy',* 4-6; Berger, "Institutional Arbitration: Harmony, Disharmony and the 'Party Autonomy Paradox'," 474 -476
[111] Redfern et al., *'Redfern and Hunter on International Arbitration'*, 46.

contrary.[112] This provision has been a focal point in litigation where parties have attempted to override it through their own agreements. The significance of Article 10 lies in its clear exclusion of party autonomy in consolidation matters, demonstrating the tension between mandatory rules and party agreements.[113] However, this issue remains contentious, as courts have not universally upheld the primacy of mandatory rules over the parties' contrary agreements, underscoring the ongoing debate surrounding the enforceability of such provisions.

Central to this issue is the case of *Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SPA*, the Paris Court of Appeal examined the critical issue of consolidation of disputes arising from multiple contracts related to a seawater desalination project in Algeria.[114] In this case, the parties had included a provision allowing the **arbitral tribunal** to consolidate disputes despite Article 10 of the ICC Rules, which explicitly states that the **ICC Court** is responsible for administering the consolidation of disputes under its rules.[115] The plaintiffs challenged the tribunal's authority to consolidate the disputes, arguing that the contracts in question were distinct and that the tribunal did not have jurisdiction to hear claims involving non-signatory parties. The plaintiffs contested the arbitral tribunal's authority to consolidate these disputes, arguing that the contracts in question were distinct and that the tribunal lacked jurisdiction to hear claims against non-signatory parties and thus, could not consolidate the proceedings.[116]

The arbitration agreements in this case included both the Framework Agreement and the Association Agreement, each containing specific provisions regarding arbitration and the potential for consolidation. Notably, Article 23 of the Association Agreement included a consolidation clause that allowed for disputes arising from the agreement to be consolidated with disputes from related contracts, provided that such consolidation was justified.[117] Similarly, the Framework Agreement referenced the Protocol relating to the Resolution of Disputes, which allowed for

[112] International Chamber of Commerce (ICC), *Rules of Arbitration and Mediation,* Art.10, 2021.
[113] The exclusion in Article 10 designates the ICC Court as the exclusive authority for consolidating arbitral proceedings, subject to the conditions specified within the provision.
[114] Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SPA, Paris Court of Appeal, 13 June 2023.
[115] International Chamber of Commerce (ICC), *Rules of Arbitration and Mediation,* Art.10,2017.
[116] Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SPA, 13 June 2023.
[117] Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SPA, 13 June 2023.

consolidating disputes under certain conditions. This framework indicated a clear intention by the parties to consolidate the claims. In this case, the parties' agreement was a quest to deviate from Article 10 of the ICC Rules.

The court emphasized the principle of party autonomy, which is a cornerstone of arbitration law.[118] It recognized that parties have the freedom to determine the terms of their arbitration agreements, including the scope of disputes to be arbitrated and the conditions under which consolidation may occur.[119] The court found that the arbitration clauses in the agreements were compatible, as they referred to the same arbitration rules, seat, number of arbitrators, and applicable law.[120] This compatibility underscored the mutual intent of the parties to allow for consolidation, as the minor differences in the clauses did not detract from their overall purpose. Ultimately, the Paris Court of Appeal took a pro-autonomy approach and affirmed the arbitral tribunal's authority to consolidate the disputes, underscoring the significance of the parties' autonomy.

The decision, in this case, addresses the critical question of whether parties can deviate from institutional rules, which has been conceptualised by this paper to refer to Secondary party autonomy. Despite the explicit provision of Article 10 of the ICC Rules, which states that "The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration....", the parties agreed to a deviation from Article 10 in their arbitration agreement.[121] This is explicit evidence of the exercise of party autonomy at the secondary level, which is the subject of investigation in the present paper.

The Paris Court of Appeal decision is particularly significant for analysing the secondary level of party autonomy. To fully grasp its implications, this analysis must be considered in the context of the hierarchy of rules established by the ICC Arbitration framework. Article 19 of the ICC Rules outlines this hierarchy, placing institutional rules above party autonomy and specifying that if the rules are silent on a matter, the tribunal may then apply procedural rules of national law.[122] By

[118] Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SPA, 13 June 2023.
[119] Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SPA, 13 June 2023.
[120] Malakoff Corporation Berhad and Tlemcen Desalination Investment Company v. Algerian Energy Company SPA, 13 June 2023.
[121] International Chamber of Commerce (ICC), *Rules of Arbitration and Mediation,* Art.10,2017.
[122] International Chamber of Commerce (ICC), *Rules of Arbitration and Mediation,* Art.19,2017.

Article 19, the ICC institutional rules are intended to take precedence over any contrary party agreements.[123] However, in this case, the court's decision demonstrated the opposite, affirming that parties can indeed exercise their autonomy by deviating from previously agreed institutional rules.

However, it is essential to recognize that the above analysis is specific to Article 10 of the ICC Rules. The ICC has designated other mandatory provisions not specifically litigated before the Paris Court of Appeal. For instance, Article 23 on Terms of Reference and Article 27 on the scrutiny of awards by the ICC Court are considered binding and non-negotiable.[124] This brings the broader question of the extent and limitations of secondary party autonomy within institutional arbitration, which will be further explored in the next chapter.

2.3.1 Overview of Other Arbitral Institutions

An examination of arbitral practices across various institutions reveals the complex interplay between institutional arbitration and the secondary level of party autonomy. Institutional bodies often exercise administrative discretion under the rules to deny the administration of proceedings or enforce specific procedural frameworks. [125] A notable example is the application of expedited procedure rules, which are frequently considered mandatory across many arbitral institutions.[126] These rules, which typically prescribe a single arbitrator instead of a three-member tribunal, often precede any contrary agreements the parties make. This approach underscores the subjective nature of a "mandatory" rule, as different institutions may interpret these requirements differently. The varying treatment of expedited procedures highlights the need for institutional rules to allow flexibility rather than rigidly restricting party autonomy at the secondary level.

Article 5.2(b) of the SIAC Rules (2013) is the governing provision on expedited procedure. It grants the president of the SIAC the institutional discretion to appoint a sole arbitrator for expedited procedures, even if the arbitration agreement specifies a three-member tribunal.[127]

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[123] J Fry, S Greenberg, F Mazza, "The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration" Article 19, 2012.
[124] J Fry, S Greenberg, F Mazza, "The Secretariat's Guide to ICC Arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration" Article 23-24, 2012.
[125] *See*, Berger K, 'The Need for Speed in International Arbitration – Supplementary Rules for Expedited Procedures of the German Institution of Arbitration (DIS)' *Journal of International Arbitration,* 2008,295.
[126] ICC, *Rules of Arbitration and Mediation,* Art.31,2017; SIAC, *Rules of Arbitration and Mediation,* Art.5.2(b),2013.
[127] SIAC, *Rules of Arbitration and Mediation,* Art.5.2(b),2013.

Courts have interpreted this provision as a "mandatory" institutional rule, viewing it as a legitimate limitation on secondary-level party autonomy. In the case of *AQZ v ARA,* [128] the court considered an arbitration agreement in which the parties had specified that disputes would be resolved by a three-member tribunal under SIAC rules. The claimant requested expedited proceedings, which the SIAC president approved. Under Article 5.2(b) of the 2010 SIAC Rules, the president appointed a sole arbitrator, contrary to the parties' agreement for a three-member tribunal. The respondent challenged the enforceability of the award, arguing that the appointment of a sole arbitrator was inconsistent with the parties' agreement.

The Singapore High Court adopted a pro-institutional autonomy stance, concluding that when parties select a version of the SIAC Rules that includes expedited procedure provisions, such as Article 5.2(b), it is consistent with the principle of party autonomy for these provisions to override contrary terms in the arbitration agreement. [129] This approach aligns with practices in other arbitration institutions; for example, Article 30(1) of the ICC Rules states that "by agreeing to arbitration under the Rules... the rules shall take precedence over any contrary terms of the arbitration agreement."[130]

In contrast, On 11 August 2017, the Shanghai No.1 Intermediate People's Court (Shanghai Court) interpreted a similar provision and arrived at a substantially different conclusion.[131] The Shanghai court argued that Article 5.2(b) of the SIAC Rules should not be interpreted as granting the SIAC President absolute discretion in determining the tribunal's composition. It emphasized that the President must fully consider the parties' agreement for a three-member tribunal, thereby upholding party autonomy. The court contended that the principle of party autonomy in deciding the number of arbitrators should precede the discretionary powers granted under Article 5.2(b). Consequently, the court ruled that the SIAC President should have adhered to the parties' agreement and appointed a three-member tribunal for the expedited arbitration. Despite the sole arbitrator's appointment being consistent with Article 5.2(b), the court deemed it a violation of the

[128] AQZ v ARA [2015] SGHC 49; see for a commentary on the decision G Born and J Lim, 'AQZ v ARA: Singapore High Court Upholds Award Made under SIAC Expedited Procedure', *Kluwer Arbitration Blog*, 2015.
[129] AQZ v ARA, para 131 referring to para 19 of the Award.
[130] ICC, *Rules of Arbitration and Mediation,* Art.30(1), 2021.
[131] Herbet Smith Freewill, ' PRC Court Refuses to enforce an SIAC Award made under Expedited Procedure', <https://www.herbertsmithfreehills.com/notes/arbitration/2017-08/prc-court-refuses-to-enforce-an-siac-award-made-under-expedited-procedure> Accessed on 17 Oct. 24.

parties' arbitration agreement. As a result, the Shanghai Court refused to recognize and enforce the award, citing Article V(1)(d) of the New York Convention.[132]

In comparison to other arbitral institutions, Article 41.2 of the Hong Kong International Arbitration Centre (HKIAC) Rules stipulates that expedited procedures should generally involve a sole arbitrator.[133] However, if the arbitration agreement specifies a three-member tribunal, the HKIAC will invite the parties to agree to a sole arbitrator. If the parties do not agree, the case will proceed with three arbitrators. A similar hybrid approach has also been adopted in Article 42(2) of the Swiss Rules (2012), which is comparable to Article 41.2 of the HKIAC Rules, reflecting a balance between respecting party autonomy and allowing institutional discretion.[134]

In conclusion, the differing approaches to the interaction between institutional rules and party autonomy highlight the complexity of this relationship and underscore the need for further study. This section has illustrated that the extent of secondary party autonomy in institutional arbitration varies significantly across jurisdictions, particularly regarding modifying institutional rules. The questions surrounding this interaction are complex and nuanced. This paper will explore whether limitations exist on party autonomy in institutional arbitration, assess the justifiability of such limitations, and examine potential solutions if these limitations are necessary.

2.4 CONCLUSION

In this chapter, the interplay between institutional arbitration and party autonomy is examined, focusing on how institutional frameworks influence and sometimes limit parties' autonomy in arbitration. Institutional arbitration is defined by its reliance on pre-formulated rules administered by arbitral institutions, which contrasts with ad hoc arbitration, where parties create their own rules. This system's defining features include established procedural rules and administrative oversight by a permanent institution. While institutional rules provide structure, they can potentially restrict party autonomy, particularly when rules are deemed mandatory and non-negotiable. The chapter explores how parties exercise their autonomy both at the primary level by

[132] New York Convention, Art V (1)(d).
[133] HKIAC, *Rules of Arbitration and Mediation,* Art.41.2, 2018.
[134] *Swiss Rules International Arbitration*, Art. 42(2),2021.

choosing institutional arbitration and at the secondary level by attempting to modify or deviate from institutional rules once arbitration has commenced.

The analysis includes case studies from various arbitral institutions, highlighting different approaches to party autonomy within institutional arbitration. In Paris, the Court of Appeal affirmed party autonomy by allowing deviations from institutional rules, while the ICC's mandatory rules remained a point of contention. Other jurisdictions like Singapore and China favor balancing institutional discretion with party autonomy. Singaporean courts have supported the primacy of institutional rules in expedited procedures, while Chinese courts have prioritized party agreements over institutional discretion. These case studies illustrate the ongoing debate over the extent of party autonomy within institutional arbitration, showing that while institutions have specific mandatory rules, the degree to which these rules can restrict autonomy varies by market and institution.

CHAPTER THREE: MANDATORY INSTITUTION RULES AND PARTY AUTONOMY

3.0 INTRODUCTION

The cornerstone of arbitration is undoubtedly the extensive freedom granted to parties to determine the applicable arbitral procedure. Institutional arbitration rules, while comprehensive, cannot anticipate every procedural scenario, necessitating the supplementation of these rules through tailored procedures to address specific procedural challenges.[135] However, the exercise of party autonomy in crafting such procedures is often constrained by the imposition of mandatory institutional rules. Imposition of these rules may not only limit parties' freedom to customise the arbitral process but may also risk the enforceability of the award where such institutions impose arbitral procedures contrary to the parties' agreement.[136] This section explores the tension between institutional mandatory rules and party autonomy, investigating the theoretical justifications for enforcing mandatory institutional rules that may override parties' preferences.

Building on earlier discussions, this chapter delves deeper into the debate surrounding mandatory rules within the context of institutional arbitration. It examines foundational arguments and rationales that underscore the necessity of these rules and their role in shaping the arbitration process. The goal is to clarify how these interactions impact the autonomy of parties and to analyze the points at which institutional control may curtail the freedom of parties in structuring their arbitration.

The chapter begins with a concise analysis of the concept of mandatory rules, followed by a detailed examination of arbitral institutions and the specific mandatory rules they enforce. This leads to a theoretical exploration of the interplay between these rules and party autonomy, providing insights into the boundaries and justifications for institutional control within international arbitration.

[135] Diego Fernandez Arroyo, 'Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy?', 201.
[136] *See*, Article V (1) (d), *New York Convention*, 1958; Recognition and Enforcement of award will be set aside when the arbitral procedure was not in accordance with the Parties agreement.

3.1 MANDATORY RULES IN INSTITUTIONAL ARBITRATION

Mandatory rules are legal provisions or institutional requirements that apply irrespective of the parties' agreements in structuring their arbitral proceedings.[137] These rules are fundamental to the framework of international commercial arbitration, serving as a safeguard for broader legal, institutional, and public interests, even at the expense of party autonomy.[138] They can be broadly classified into two categories: Public mandatory rules and private mandatory rules. This distinction forms a critical basis for understanding the limitation of party autonomy in the present study.

3.1.1 Public Mandatory Rules

Public Mandatory Rules are legal provisions established by the state that take precedence over contractual terms or procedural agreements chosen by parties. [139] Rooted in domestic or international public policy, these rules aim to protect a state's vital economic, social, or political interests and are typically reflected in the public policy of the applicable law, often that of the arbitral seat.[140] They serve to delineate the scope of party autonomy, permitting parties to structure arbitral procedures as long as such agreements do not breach mandatory public policy standards.[141]

Although Public Mandatory Rules are a product of the public policy of the applicable law governing the seat, they are also a reflection of the existing transnational procedural public policy, which operates to limit party autonomy.[142] Such transnational procedural principles have been widely accepted and it's a conceptualization of global trends, they would include the right to equal treatment, and the right to adequately present one's case.[143] These rules have been codified in various instruments. For example, the UNCITRAL Model Law, which is a codification of accepted arbitration trends at a global level, allows for party autonomy up to the extent that it does not

[137] Andrew Barraclough, Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration', *Melbourne Journal of International law*, Volume 6, 2005,14.
[138] Andrew Barraclough, Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration', *Melbourne Journal of International law*, Volume 6, 2005,14.
[139] Perre Mayor, 'Mandatory Rules of Law in International Arbitration', *Arbitration International Journal* 1986, 274-275.
[140] Moses M, 'The Principles and Practice of International Commercial Arbitration', Press, New York, 2012, 84.
[141] Redfern A and Hunter M, Redfern & Hunter on International Arbitration, 189.
[142] Andrew Barraclough, Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration', *Melbourne Journal of International law*, Volume 6, 2005,14.
[143] Mantilla Serrano, 'Towards a transnational procedural public policy in Arbitration', 2004, 333, 341.

violate equal treatment, and equal opportunity to present one case envisioned in Article18 of the UNCITRAL Model Law.[144]

3.1.2 Private Mandatory Rules

In contrast to Public Mandatory Rules, Private Mandatory Rules are binding provisions set by arbitral institutions within their procedural framework, regarded as non-derogable by those institutions.[145] Private Mandatory Rules, although established by arbitral institutions and not deriving from statutory law, impose significant limitations on party autonomy in institutional arbitration. [146] By agreeing to arbitrate under the auspices of a particular institution, parties implicitly adopt its rules as part of their procedural framework. While parties may often modify or exclude specific provisions, there are exceptions where such deviations are impermissible. These exceptions arise when an institution designates certain rules as essential to its arbitration process, ensuring the integrity and consistency of its administrative role.[147] In such cases, institutions may refuse to administer proceedings that deviate from these core provisions, thereby imposing private mandatory rules that effectively curtail party autonomy.

In the context of private mandatory rules, expedited procedure rules exemplify their mandatory nature by overriding party agreements to the contrary.[148] In summary, these rules facilitate a streamlined, faster, and more efficient arbitration process, with a key notable feature being the fixation of the number of arbitrators by the arbitral institution at the expense of the parties' autonomy.[149] For instance, the ICC expedited procedure rules provide that expedited proceedings are subject to the nomination of a sole arbitrator irrespective of any parties' preference for the

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[144] Article 18, *UNCITRAL Model Law*, 2006; '…The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

[145] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox",7 2018, 21.

[146] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", 2018, 21.

[147] Andrew Barraclough, Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration', Melbourne Journal of International law, Volume 6, 2005,14.

[148] Joshi Sacchit, and Brijesh Chhatrola, 'Expedited Procedure Vis-à-Vis Party Autonomy, Enforceable?', 2018, available at https://arbitrationblog.kluwerarbitration.com/2018/05/12/expedited-procedure-vis-vis-party-autonomy-enforceable/#:~:text=The%20Swiss%20Rules%20and%20the,preferred%20while%20effecting%20expedited%20procedure, accessed on 7 January 2024.

[149] Joshi Sacchit, and Brijesh Chhatrola, 'Expedited Procedure Vis-à-Vis Party Autonomy, Enforceable?', *Kluwer Arbitration Blog*, 2018; *See Also*, Article 30, *International Chamber of Commerce Arbitration Rules*, 2021; Article 42(2)(b), *Swiss Rules of International Arbitration*, 2012; Rule 5.2, *SIAC Arbitration Rules*, 2016; Article 41.2(b), *HKIAC Arbitration Rules*, 2024; Article 17, *SCC Arbitration Rules*, 2017.

composition of the arbitral tribunal.[150] These rules form the bulk of the present study, with keen focus on their implications on secondary party autonomy and their widespread application across various arbitral institutions.

3.2 INSTITUTIONAL OVERREACH IN INSTITUTIONAL ARBITRATION

Mandatory institutional rules are justified by the theory of implied consent, which posits that by agreeing to institutional arbitration, parties inherently accept these rules.[151] This theory will be scrutinized in the analysis section of this chapter. While various institutional rules may fall within the scope of this examination, expedited procedure rules present a particularly compelling case for analysis of their impact on secondary party autonomy for two key reasons. First, they directly affect a core element of party autonomy—the choice of the number of arbitrators. Second, their application is widespread across arbitral institutions, albeit with variations in their mandatory nature. The uniform presence of expedited procedure rules in institutional frameworks makes them an ideal subject for evaluating the interaction between party autonomy and these mandatory provisions. The scope of expedited procedure is explored in the next two sections, which are discussed in detail in the analysis section. First, expedited rules are absolute in nature, allowing no derogation, a concept often referred to as the pro-institutional control approach.[152] Second, there are expedited procedure rules that permit parties to deviate from the prescribed number of arbitrators in the composition of the arbitral tribunal, a stance known as the pro-party autonomy approach.[153] However, a brief introduction to expedited procedure rules is warranted in this section.

[150] International Chamber of Commerce, 'Expedited Procedure Provisions', available at https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/expedited-procedure/, accessed on 6 January 2024.
[151] Fabian Bonke (Hogan Lovells), "Overriding an Explicit Agreement on the Number of Arbitrators – One Step Too Far under the New ICC Expedited Procedure Rules?" Kluwer Arbitration Blog, 22 May 2017, https://arbitrationblog.kluwerarbitration.com/2017/05/22/overriding-an-explicit-agreement-on-the-number-of-arbitrators-one-step-too-far-under-the-new-icc-expedited-procedure-rules/ accessed on 7 January 2024.
[152] Daniel LING Tien Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", *American Journal of Trade and Policy*, Volume 7(1), 2020, 25.
[153] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 26.

Expedited Procedure Rules are set of arbitration guidelines designed to accelerate proceedings and reduce costs by simplifying and streamlining the arbitration process. [154] Many leading institutional arbitrations, including the ICC and SIAC, have adopted these rules to address concerns over lengthy and expensive arbitration.[155] Central to this procedural speed is the preference for a sole arbitrator, which is seen as more cost-effective and efficient.[156] However, these rules, which allow institutions to override the parties' agreement on the number of arbitrators, challenge party autonomy by prioritizing institutional control. This shift raises concerns that it may misinterpret the parties' intentions and undermine the core principle of party autonomy in arbitration, potentially leading to conflicts between secondary party autonomy and mandatory institutional rules.

This practice raises fundamental questions about whether the pursuit of expedited dispute resolution justifies allowing institutions to override parties' autonomy. This has sparked significant debate over the extent to which party autonomy can be curtailed in institutional arbitration.[157] Notably, the emergence of expedited procedure rules has served as a precursor to the ongoing debate regarding the balance between party autonomy and institutional control in arbitration.[158] These rules, while designed to enhance efficiency and reduce costs, raise critical questions about the extent to which institutional frameworks can limit parties' freedom to structure their arbitration proceedings.

In such circumstances, where arbitral institutions, through the application of their institutional rules, override the parties' agreement, this has been conceptualised as "institutional override."[159] While mandatory institutional rules, such as Expedited Procedure Rules, serve practical purposes, it remains contentious whether the pursuit of efficiency should override secondary party

[154] Fabian Bonke (Hogan Lovells), "Overriding an Explicit Agreement on the Number of Arbitrators – One Step Too Far under the New ICC Expedited Procedure Rules?", *Kluwer Arbitration Blog,* 2017.
[155] International Chamber of Commerce, 'Expedited Procedure Provisions' 2024.
[156] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 28.
[157] KP Berger, 'The Need for Speed in International Arbitration Supplementary Rules for Expedited Procedures of the German Institution of Arbitration (DIS)', *Journal of International Arbitration,* 2008, 595.
[158] KP Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox",2018.
[159] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 25.

autonomy.[160] The core of this debate lies in the impact of these rules, particularly on the selection of arbitrators, which raises significant questions about the balance of institutional control over arbitration proceedings. To deepen this analysis, the study will be conducted in two phases, offering a thorough comparison of how major arbitral institutions worldwide approach and implement these rules, shedding light on their broader implications.

The first phase of the study will examine institutions that have adopted an absolutist approach to Expedited Procedure Rules, where no derogations are allowed. The second phase will focus on arbitral institutions that have introduced the rules with greater flexibility, allowing for party autonomy in determining the composition of the arbitral tribunal in expedited proceedings. This analysis will delve into an analysis of specific rules and procedural nuances of prominent arbitral institutions in matters of expedited procedure including the International Chamber of Commerce (ICC),[161] London Court of International Arbitration (LCIA),[162] Singapore International Arbitration Centre (SIAC),[163] Hong Kong International Arbitration Centre (HKIAC),[164] Stockholm Chamber of Commerce (SCC),[165] China International Economic and Trade Arbitration Commission (CIETAC),[166] International Centre for Dispute Resolution – American Arbitration Association (ICDR-AAA),[167] German Arbitration Institute (DIS),[168] Vienna International Arbitration Centre (VIAC),[169] and Swiss Chambers' Arbitration Institution.[170]

3.2.1 Pro-Institutional Control Perspective on Arbitral Institutions

In the context of expedited procedures, some leading arbitral institutions prioritise institutional autonomy, asserting procedural matters such as fixation on the number of arbitrators are best

[160] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 28.
[161] Article 30, *International Chamber of Commerce Arbitration Rules*, 2021.
[162] Article 42(2)(b), *Swiss Rules of International Arbitration*, 2012.
[163] Rule 5.2(b), *SIAC Arbitration Rules*, 2016.
[164] Article 41.2(b), *HKIAC Arbitration Rules*, 2024
[165] Article 17, *SCC Arbitration Rules*, 2017.
[166] Article 58, *CIETAC Arbitration Rules*, 2024.
[167] Section 2, *American Arbitration Association Commercial Arbitration Rules and Mediation Procedures*, 2013.
[168] Section3, *DIS Supplementary Rules for Expedited Proceedings*, 2008.
[169] Article 45(5), *Vienna Rules of Arbitration and Mediation*, Vienna International Arbitration Centre, 2018.
[170] Art.42(2)b, *Swiss Rules of International Arbitration*, Swiss Chambers Arbitration Institution, 2012.

determined by the institution, regardless of contrary party agreements. For instance, ICC Rules exemplify this stance on the primacy of expedited procedure rules. Article 30(1) of the ICC Rules provides that, *"By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the 'Expedited Procedure Provisions') shall take precedence over any contrary terms of the arbitration agreement."*[171] This principle is further reinforced within the ICC Rules themselves. For example, Article II of Appendix VI in the 2021 ICC Rules states that the ICC Court may, *"notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator."* [172] This stance is also clarified in the ICC's Note to Parties, which emphasises that *"the Court may appoint a sole arbitrator notwithstanding any contrary provision of the arbitration agreement."*[173] The ICC Court has consistently affirmed this position, stating that under the expedited procedure rules, a sole arbitrator will be appointed irrespective of any agreement to the contrary by the parties. [174]

In comparison to other arbitral institutions, the ICC is not unique in prescribing mandatory expedited procedure rules. The SIAC Rules, under Rule 5.2(b), provide that in expedited procedures, a sole arbitrator is to be appointed unless the President determines otherwise for a different tribunal composition. [175] Rule 5.3 further reinforces this position, stating that the appointment of a sole arbitrator prevails notwithstanding any contrary provision in the parties' agreement. [176] This framework grants the President of SIAC discretionary authority to determine whether institutional rules can override party autonomy in specific cases.

Similarly, the American Arbitration Association (AAA), in its 2016 Commercial Arbitration Rules and Mediation Procedures, unequivocally mandates the appointment of a sole arbitrator for expedited procedures, overriding any agreement to the contrary by the parties. [177] Likewise, the

[171] Article 30, *International Chamber of Commerce Arbitration Rules*, 2021.
[172] Appendix VI.II, *International Chamber of Commerce Arbitration Rules*, 2021.
[173] ICC, '*Note to Parties and Arbitral tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration',* 2019, 109.
[174] ICC, '*Note to Parties and Arbitral tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration',* 2019, 109.
[175] Rule 5.2(b), *SIAC Arbitration Rules*, 2016; "… The arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply…. The case shall be referred to a sole arbitrator unless the president determines otherwise".
[176] Rule 5.3, *SIAC Arbitration Rules*, 2016; By agreeing to arbitration under these Rules, the parties agree that where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply *Even in cases where the arbitration agreement contains contrary terms'*
[177] Section 2, *American Arbitration Association Commercial Arbitration Rules and Mediation Procedures*, 2013.

Stockholm Chamber of Commerce (SCC), under Article 17 of its 2017 Rules for Expedited Procedures, prescribes that arbitration must be conducted by a sole arbitrator. [178] However, the SCC's position is less rigid, leaving room for debate on whether party agreements can prevail over its rules. Notably, in SCC Expedited Arbitration 053 of 2005, the tribunal deemed it reasonable to permit the parties to deviate from Article 17's requirement for a sole arbitrator, highlighting a nuanced approach that balances institutional rules with party autonomy. [179]

3.2.2 Pro-Party Autonomy Perspective on Arbitral Institutions

In contrast, several arbitral institutions have embraced a pro-party autonomy approach to expedited procedures, establishing rules while allowing parties the discretion to deviate from them. These institutions refrain from framing expedited procedure rules as mandatory, thereby affording parties greater autonomy in shaping the process. One such institution is the Hong Kong International Arbitration Centre (HKIAC), which, under Article 41.2(b), grants parties the flexibility to opt for a sole arbitrator or, in the absence of mutual agreement, refer the dispute to a three-member tribunal.[180] Similarly, the China International Economic and Trade Arbitration Commission (CIETAC) adopts a comparable stance in Article 59 of its rules, stipulating that "*Unless agreed otherwise by the parties,* a sole arbitrator tribunal shall be formed in accordance with Article 28 of these Rules to hear a case under the Summary Procedure." [181]

The London Court of International Arbitration (LCIA) also adheres to a pro-party autonomy perspective, as evidenced by Rule 5.8 which provides that, "*A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three).*" [182] This nuanced approach reflects a broader commitment to balancing institutional rules, arguably of a mandatory character, with secondary party autonomy. Comparably, the Swiss Chambers'

[178] Article 17, *SCC Arbitration Rules,* 2017.
[179] Carita C. H. Wallgren-Lindholm, Helle Lindegaard, Per Franke and Eric M. Runesson, "Final Award rendered in SCC Expedited Arbitration O53/2005", *Stockholm International Arbitration Review*, 2007.
[180] Article 41.2(b), *HKIAC Arbitration Rules*, 2024; 'If the arbitration agreement provides for three arbitrators, HKIAC Shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree the case shall be referred to three arbitrators.
[181] Expedited Procedure is also known as Summary Procedure under the CIETAC Rules; *See*, Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 27.
[182] Rule 5.8, *LCIA Arbitration Rules,* 2020.

Arbitration Institution (SCAI) adopts a pro-party autonomy stance. Article 42(2)(b) of the Swiss Rules provides that in cases of expedited procedure, '*the case shall be referred to a sole arbitrator unless the arbitration agreement provides for more than one arbitrator'.*[183]

The German Arbitration Institute (DIS) also adopts a similar position. Section 3 of the DIS supplementary Rules on an expedited procedure,[184] provides for the composition of the tribunal by a sole arbitrator unless the parties had agreed before the filing of the statement of claim that the dispute is to be decided by three arbitrators.[185] Lastly, for purposes of the present study, Article 45(5) of the Vienna International Centre(VIAC) Rules of Arbitration and Mediation, provides that expediated proceedings shall be conducted by a sole Arbitrator '…*unless the parties have agreed on a panel of arbitrators'.*[186]

Two key observations arise from the comparison. First, there is no universal agreement that expedited procedures are mandatory institutional rules. While cross-institutional trends exist, the discretionary mechanisms by which institutions designate certain rules as mandatory warrant further exploration, though this is beyond the scope of the paper. Second, the subjective nature of defining expedited procedures as mandatory calls into question the balance between party autonomy and the efficiency goals of such rules. In practice, as shown, most arbitral institutions tend to prioritise party autonomy.

The following sections will analyse the rationale behind these rules.

3.3 ANALYSIS

The above analysis reveals a lack of universal consensus on whether arbitral institutions' rules on expedited procedures should override parties' agreements to the contrary. Most leading arbitral institutions provide flexibility, allowing parties to determine the composition of the tribunal in expedited proceedings. However, at least three institutions, including the ICC, the world's leading arbitral institution by caseload, have adopted a pro-institutional stance. This raises a pertinent

[183] Article 42(2)(b), *Swiss Rules of International Arbitration*, 2012.
[184] Section 3, *DIS Supplementary Rules for Expedited Proceedings*, 2008.
[185] Section 3, *DIS Arbitration Rules*, 2018; 'The dispute shall be decided by a sole arbitrator, unless the parties have agreed prior to the filing of the statement of claim that the dispute shall be decided by three arbitrators.
[186] Article 45(5), *Vienna Rules of Arbitration and Mediation*, Vienna International Arbitration Centre, 2018.

question about whether the imposition of mandatory expedited procedure rules infringes upon the secondary level of party autonomy.

The forthcoming analysis will include an examination of relevant jurisprudence on the issue and a theoretical exploration of potential justifications for a pro-institutional approach in arbitration.

3.3.1 Jurisprudence on the interaction between Party autonomy and Expedited Procedure Rules

The question of whether mandatory expedited procedure rules infringe upon party autonomy has been examined by various courts, most notably in the 2015 case of *AQZ v ARA*.[187] The central issue was the interpretation of SIAC Rule 5.2(b), which mandates the appointment of a sole arbitrator regardless of any agreement by the parties to the contrary.[188] In this case, the losing party sought to set aside the arbitral award, arguing that it contravened the express terms of their arbitration agreement, which explicitly required the appointment of three arbitrators. Despite this, the court adopted a pro-institutional stance, reasoning that when parties agree to institutional arbitration, their arbitration agreement must be interpreted purposively to reflect consent to all limitations on their autonomy imposed by the institution's rules. In this case, the arbitration agreement, by incorporating the SIAC Rules, was deemed to include the limitation imposed by Rule 5.2(b).

Key to this conclusion was the court's consideration in its earlier decision in the case of *NCC International AB v. Land Transport Authority Singapore*.[189] In this case, the court had held that where parties to institutional arbitration, bound by the rules, agree to an express number of arbitrators, the better interpretation ought to be that the parties in question adopted the institutional rules subject to any agreement of the parties to the contrary as to the number of arbitrators.[190] The court categorically stated that the incorporation of the institutional rules into the parties' agreement cannot triumph over the parties' agreement contained in the arbitration clause. However, the Court

[187] *AQZ V ARA*, (2015) Singapore High Court.
[188] Rule 5.2(b), *SIAC Arbitration Rules*, 2016;'…the case shall be referred to a sole arbitrator, unless the President determines otherwise.'
[189] *NCC international AB v. Land Transport Authority Singapore (2008),* Singapore High Court, 186.
[190] *NCC International AB v. Land Transport Authority of Singapore* (2008), Singapore High Court.

in *AQZ v. ARA* departed from this view and held that it would be consistent with party autonomy to override the parties's express agreement.

Notably, a year after the decision of *AQZ v. ARA*, the case of *Nobles Resources Pte. Ltd. v. Good Credit International Trade Co. Ltd*,[191] while interpreting Article 5.2 of the SIAC Rules, refused recognition and enforcement of an award. The court reasoned that SIAC's appointment of a sole arbitrator had contravened the parties' agreement and was therefore unenforceable under Article V(1)(d) of the New York Convention. This establishes a lack of consensus in jurisprudence on whether such institutional rules can indeed triumph over parties' agreement to the contrary.

These decisions have sparked debates on the justification for limiting or upholding party autonomy. One such argument is grounded in the principle of generalia specialibus non-derogant (the general does not detract from the specific).[192] This principle suggests that when two provisions conflict, preference should be given to the more specific provision.[193] In the context of a conflict between institutional rules and an arbitration agreement, it is argued that the parties adopt institutional rules subject to the specific terms of their arbitration agreement.[194] This principle is a direct challenge to the theory of implied consent, which suggests that parties consent to all institutional rules by submitting their dispute to an arbitral tribunal.[195] Instead, it allows for an interpretation of the parties' intention, as expressed in the arbitration agreement, as a more specific provision that can take precedence over the mandatory institutional rule in question.

The preference for arbitration agreements over mandatory institutional rules is further reinforced by the principle of lex deliberato, which asserts that negotiated terms generally take precedence over incorporated terms. [196] This principle was embraced by the Singapore High Court in *BNP v. BNR*, where the court resolved the tension between party autonomy and mandatory institutional

[191] *Nobles Resources Pte. Ltd. v. Good Credit International Trade Co. Ltd.* (2016) Shanghai No.1 Intermediate People's Court.
[192] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 28.
[193] https://www.lsd.law/define/generalia-specialibus-non-derogant on 25 November 2024.
[194] Joshi Sacchit, and Brijesh Chhatrola, 'Expedited Procedure Vis-à-Vis Party Autonomy, Enforceable?', *Kluwer Arbitration Blog,* 2018.
[195] Joshi Sacchit, and Brijesh Chhatrola, 'Expedited Procedure Vis-à-Vis Party Autonomy, Enforceable?', *Kluwer Arbitration Blog,* 2018
[196] Chitty on Contracts (2012) 31 Sweet & Maxwell 1 at [13-082].

rules by prioritizing the arbitration agreement over the institutional rules. [197] Additionally, when clauses are incorporated by reference into a contract but conflict with the written terms, the latter should typically prevail. [198] Commercial parties can be assumed to expect their express agreement in the arbitration clause to take precedence over institutional rules, which are often not closely scrutinized by the parties. [199] Consequently, it is difficult to interpret the arbitration agreement as waiving the agreed-upon three-arbitrator provision in favor of the single arbitrator mandated by the institutional rules.

Central to this debate is the concept of Party autonomy, which in the present context has led to the emergence of two divergent theories to argue for and against institutional override. First, it is argued that party autonomy is so fundamental to the arbitral process that it cannot be derogated. On the other hand, it is argued that only one of the considerations is to be taken into account in the arbitral process, and hence not absolute.[200]

The debate revolves around whether overriding provisions in institutional rules should take precedence over the parties' express agreement, particularly in arbitration agreements. Proponents of institutional autonomy argue that such provisions, including expedited procedures, align with party autonomy by facilitating efficient resolution. They contend that consent to institutional arbitration inherently includes acceptance of any limitations to party autonomy imposed by the administration of the rules.[201] However, critics maintain that the composition of the arbitral tribunal is a core aspect of party autonomy, and any modification of this by institutional rules undermines the parties' agreement.[202] This perspective raises concerns that allowing institutional rules to override explicit party agreements could jeopardize the recognition and enforcement of arbitral awards under Article V(1)(d) of the New York Convention, especially where the

[197] *BNP V BNR* (2017), Singapore High Court.
[198] Chitty on Contracts (2012) 31 Sweet & Maxwell 1 at [13-082].
[199] Kah Cheong Lye, "Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement" Kluwer Arbitration Blog,2013, < https://arbitrationblog.kluwerarbitration.com/2013/01/17/institutional-overreach-institutional-arbitral-rules-versus-parties-express-agreement/> accessed on 23 November 2024).
[200] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 30.
[201] *See*, Mohamed S. Abdel Wahab, "Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation: Procedural Efficiency and Enforcement Challenges" in "L. Lévy and M. Polkinghorne, "Expedited Procedure in International Arbitration", ICC Publication No. 793E, 2017, 9.
[202] *See*, Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020.

arbitration process contradicts the parties' intentions.[203] Despite this, national courts exhibit varied approaches, with some refusing to recognize awards when expedited procedures override party agreements, while others accept such awards, citing the permissive language of Article V(1)(d).

3.3.2 Theoretical considerations of mandatory institutional rules

Arbitral institutions may rationalise the imposition of fixed rules, such as the number of arbitrators in expedited procedures, or any other mandatory provisions. A key justification is that by agreeing to institutional arbitration, the parties implicitly consent to a set of institutional rules, thereby prioritizing these rules over any conflicting agreements made by the parties.[204] This is understood to mean that the parties consent to elevating certain procedural rules to the status of mandatory contractual terms that cannot be modified by mutual agreement.[205]

However, the conceptual foundation for elevating these rules is questionable. Firstly, the rationale for appointing a sole arbitrator, primarily to promote efficiency in expedited arbitral procedures, raises fundamental questions. Whether such efficiency should supersede party autonomy, a cornerstone of international commercial arbitration, remains contentious.[206] Efficiency, while important, does not constitute a fundamental principle that should override the more essential tenet of party autonomy.[207] Secondly, although efficiency is central to expedited procedures, using it as a justification for overriding institutional rules is problematic. The larger the financial stake, the stronger the argument for appointing three arbitrators rather than one, thereby complicating the application of a purely efficiency-driven approach.

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[203] Article V(1)(d), '…recognition and enforcement of the award may be refused"; Gary B. Born, "International Commercial Arbitration" (2014) 2 Kluwer Law International at 16.01[A]

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

[205] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 30; *also see*, Mohamed S. Abdel Wahab, "Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation: Procedural Efficiency and Enforcement Challenges" in "L. Lévy and M. Polkinghorne, "Expedited Procedure in International Arbitration" 2017.

[206] Michelle Grando, "Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop" *Kluwer Arbitration Blog,* 2017, < https://arbitrationblog.kluwerarbitration.com/author/michelle-grando/ > Accessed on 24 November 2024.

[207] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 31.

Second, efficiency in itself as a justification for any overriding provision on institutional arbitration has its pitfalls. While efficiency is a key factor in expedited procedures, it is logical that as the value of a claim increases, the justification for opting for a three-member tribunal rather than a sole arbitrator also grows. From a rational choice perspective, parties in higher-value disputes are more likely to prefer a three-member panel to reduce the risk of an erroneous decision. [208] In such cases, parties are often more willing to accept or even create complex and costly procedures. Efficiency therefore evolves, not just as a matter of faster selection of a sole arbitrator, but also a matter of an accurate outcome.

Further, the argument for mandatory institutional rules is often based on the need for uniformity in their application.[209] However, the necessity for institutions to preserve such "uniform characteristics" can be questioned for two key reasons. First, mandatory rules, such as expedited procedures, are inherently subjective and context-dependent, with the sum in dispute influencing the number of arbitrators. Additionally, as noted earlier, some arbitral institutions have embraced a pro-autonomy approach, allowing for more flexibility in these matters. Second, the emphasis on "defining characteristics" unique to each arbitral institution appears to conflict with the international community's broader efforts to harmonize international commercial arbitration practices. These efforts are evident in the adoption of globally recognized frameworks like the UNCITRAL Model Law, the IBA Rules on the Taking of Evidence[210], and the New York Convention, which collectively seek to standardize arbitration practices and reduce jurisdictional inconsistencies. Additionally, it is unclear why institutions feel the need to elevate these "defining characteristics" to a mandatory status.[211]

Lastly, rigidity has also been a focal point in the debate surrounding the dichotomy between ad hoc and institutional arbitration. It has been argued that the mandatory nature of institutional rules serves as a distinguishing factor, preventing unilateral variations by parties. While there is some

[208] John Choong, Mark Mangan & Nicholas Lingard, 'A Guide to the SIAC Arbitration Rules', *Oxford University Press,* 2018, at 6.01

[209] Mohamed S. Abdel Wahab, "Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation: Procedural Efficiency and Enforcement Challenges" in "L. Lévy and M. Polkinghorne, "Expedited Procedure in International Arbitration", *ICC Publication No,793E*, 2017, 9.

[210] *International Bar Association, Rules on the Taking of Evidence in International Arbitration* (2010).

[211] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 33.

validity to this claim, it is important to note that deviations from institutional mandatory rules are not the result of unilateral action by a single party but rather mutual agreement among all parties involved in the arbitration. Moreover, adjustments such as deviations from expedited procedures such as the changes in the number of arbitrators do not necessarily transform the nature of the proceedings from institutional arbitration to ad hoc arbitration. This can be evidenced by the varying application of expedited procedure rules among various arbitral institutions. Therefore, it cannot be conclusively argued that any form of deviation undermines the fundamental character of institutional arbitration, nor does it render it equivalent to ad hoc arbitration.

3.4 CONCLUSION

In conclusion, party autonomy is not merely a theoretical construct; it is a practical necessity that underpins the legitimacy and effectiveness of arbitration as a preferred method of dispute resolution. However, the increasing prevalence of mandatory institutional rules presents a significant challenge to the exercise of secondary party autonomy. While these rules aim to enhance efficiency, reduce costs, and expedite dispute resolution, they often do so at the expense of overriding the parties' explicit agreements. The relationship between these rules and party autonomy is complex, as evidenced by diverse jurisprudential interpretations and varied applications of mandatory rules by arbitral institutions. Such inconsistencies across jurisdictions and institutions add complexity to the arbitration framework, creating uncertainty for parties seeking to adopt institutional arbitration. As arbitration continues to evolve, it is imperative to develop a framework that respects party autonomy while accommodating the practical functioning of institutional rules.

CHAPTER FOUR: HARMONISING PARTY AUTONOMY WITH MANDATORY INSTITUTIONAL RULES

4.0 INTRODUCTION

International arbitration is rooted in party autonomy, allowing parties to tailor the procedural framework to their needs.[212] This flexibility, though a key advantage of arbitration, can clash with the mandatory rules of arbitral institutions.[213] The previous chapter highlighted these tensions, demonstrating that while institutional rules promote procedural integrity and efficiency, they can sometimes restrict party autonomy. This chapter explores solutions to strike a balance between institutional discretion in enforcing mandatory rules and party autonomy in institutional arbitration. It presents frameworks designed to harmonise these competing priorities, ensuring institutional oversight does not unduly restrict parties' freedom to shape their arbitration process.

Building on the interaction between party autonomy and mandatory institutional rules discussed in Chapter 3, this section draws insights from these dynamics to balance party autonomy with institutional authority in administering mandatory rules. To address potential conflicts, it outlines a series of strategies aimed at achieving this balance. A key approach is institutional flexibility, conceptualized as the ability of arbitral institutions to allow deviations from their rules based on party agreements to the greatest extent possible.[214] This flexibility promotes a harmonious interpretation of arbitration agreements, ensuring institutional rules align with party agreements and minimising conflicts between them. Additionally, this section explores other mechanisms to accommodate party autonomy, including "wildcat arbitration," where parties select an arbitral institution to administer the rules of a different institution, thereby promoting greater procedural adaptability.[215] Another consideration is the requalification of institutional arbitration into ad hoc arbitration, allowing parties to transition from institutional to ad hoc proceedings when institutional rigidity limits their autonomy. The section also examines key factors in determining

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[212] Redfern, Hunter, Blackaby Constantine Partasides QC, " Redfern and Hunter on International Arbitration", 2009, 195.

[213] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", 2018, 20.

[214] Kah Cheong Lye and Chuan Tat Yeo, 'Institutional Overreach? Institutional Arbitral Rules versus Parties' Express Agreement' [2013]< https://arbitrationblog.kluwerarbitration.com/2013/01/17/institutional-overreach-institutional-arbitral-rules-versus-parties-express-agreement/> accessed 14 January 2025.

[215] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", 2018, 20.

whether party agreements or institutional rules should take precedence, drawing insights from judicial decisions that have addressed such disputes.

The discussion begins with an analysis of policy considerations behind mandatory institutional rules, particularly the rationale for their imposition by arbitral institutions. As will be demonstrated, these rules often respond to market demands, with institutions shaping arbitration practices to enhance efficiency and procedural integrity.[216] However, the latter sections seek to balance these institutional objectives with the need to protect party autonomy in institutional arbitration. Ultimately, this section aims to preserve the integrity of arbitration while safeguarding its foundational principle of party autonomy, fostering a more effective and equitable institutional arbitration framework.

4.1 INSTITUTIONAL FLEXIBILITY IN PROCEDURAL ARRANGEMENTS

Arbitral institutions have long maintained that the parties' agreement provides the foundational basis for the arbitral institution or tribunal to override any conflicting party agreement by submitting the dispute to institutional arbitration.[217] However, as shown in Chapter 3, this argument is at best an assumption, and it is debatable whether such mandatory rules should carry more weight than party autonomy when parties seek to deviate from them, a question that this paper attempts to answer.[218] The application of mandatory institutional rules should be permitted only insofar as it does not deprive the parties of their authority to determine the procedural framework for their arbitration.[219] However, it is essential to understand the rationale behind the elevation of certain institutional rules to mandatory status. This perspective positions these rules

[216] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 33.
[217] Lucja Nowak and Nata Ghibradze, 'The ICC Expedited Procedure Rules – Strengthening the Court's Powers' *Kluwer Arbitration Blog*, 13 December 2016 <http://arbitrationblog.kluwerarbitration.com/2016/12/13/reserved-for-13-december-the-icc-expedited-procedure-rules-strengthening-the-courts-powers/> on 7 January 2025.
[218] *See*, Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 29-32.
[219] Kishan Gupta, 'The Perceived Tension Between Party Autonomy and Expedited Procedure Under SIAC Arbitration Rules 2016' *American Review of International Arbitration*, 16 April 2019 <https://aria.law.columbia.edu/the-perceived-tension-between-party-autonomy-and-expedited-procedure-under-siac-arbitration-rules-2016/> on 7 January 2025.

as being driven by policy considerations, which must be thoroughly examined before suggesting any solutions aimed at balancing mandatory rules with party autonomy.

4.1.1 Policy Considerations in Institutional Arbitration

In seeking to find a balance between institutional regulation and party autonomy, it's important to recognise that arbitral institutions are in a unique position to drive reforms within the arbitration system due to their ability to prescribe procedural regulations that enhance efficiency swiftly.[220] By regularly amending rules, updating practice guidelines, and revising procedural norms, these institutions can respond quickly to evolving demands in arbitration practice.[221] However, such regulations may cause friction with the exercise of party autonomy. Propelled by the need for reforms in arbitration practice, arbitral institutions introduce mandatory regulations primarily driven by the need for efficiency.[222] For instance, the ICC has provided justifications for introducing expedited procedure rules, which are non-derogable by nature. The ICC argues that, in the modern era, arbitration has increasingly taken on characteristics of judicial proceedings, becoming time-consuming, costly, and procedurally complex due to existing rules.[223] To address these concerns, expedited procedures have become a standard feature across leading arbitral institutions, designed to restore arbitration's reputation for efficiency in both time and cost.[224] However, while these measures serve a legitimate purpose, they also challenge party autonomy, creating friction between institutional regulation and the parties' right to shape their proceedings.[225] Although this tension is valid, constraints on party autonomy must be carefully balanced to ensure that efficiency gains do not come at the expense of fairness and procedural integrity.

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[220] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 35.

[221] Abdel Wahab MS, 'Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation' in Lévy L and Polkinghorne M (eds), *Expedited Procedures in International Arbitration*, Dossier XVI of the ICC Institute of World Business Law, ICC Publication No. 793, 2017, 133.

[222] Gary B. Born and Jonathan Lim, 'AQZ v ARA: Singapore High Court Upholds Award Made under SIAC Expedited Procedure' *Kluwer Arbitration Blog*, 9 March 2015 – https://arbitrationblog.kluwerarbitration.com/2015/03/09/aqz-v-ara-singapore-high-court-upholds-award-made-under-siac-expedited-procedure/ on 7 January 2025.

[223] Abdel Wahab, 'Expedited Institutional Arbitral Proceedings', 133.

[224] Abdel Wahab, 'Expedited Institutional Arbitral Proceedings', 133.

[225] Gary Born and Jonathan Lim, 'AQZ v ARA: Singapore High Court Upholds Award Made under SIAC Expedited Procedure' *Kluwer Arbitration Blog*, 9 March 2015 – https://arbitrationblog.kluwerarbitration.com/2015/03/09/aqz-v-ara-singapore-high-court-upholds-award-made-under-siac-expedited-procedure/ on 7 January 2025.

In addition to addressing market needs, arbitral institutions view themselves as leaders in shaping the future of arbitration. Institutions like the ICC and SIAC are dedicated to fostering innovation and advancing arbitration practices on a global scale.[226] They take on the role of fiduciaries not only for the disputing parties but for the broader arbitration community as well, ensuring that reforms align with both immediate interests and public concerns.[227]Arbitral institutions must ensure that the arbitration system remains both relevant and efficient while upholding party autonomy. Achieving this requires a careful balance between institutional reforms and the foundational principle of party autonomy. Two key considerations must be noted. First, arbitral institutions do not have unrestricted authority to override party agreements. Their ability to respond to market demands is constrained by the New York Convention, and any violation of these limits risks the annulment of an arbitral award if it infringes upon party autonomy.[228] Second, institutional reforms can be implemented in a manner that safeguards party autonomy, ensuring compliance with the New York Convention while enhancing the arbitration framework. These considerations can only be achieved through institutional flexibility, meaning the reasonable accommodation of party agreements within institutional arbitration, as justified in the following section.

4.1.2 Institutional Flexibility and Party Autonomy

Institutional flexibility is conceptualised to mean, the ability of arbitral institutions to allow deviations from rules via party's agreement to the greatest degree possible to allow for accommodation of party autonomy in institutional arbitration.[229] By its nature, this calls for a balancing act between the essence and importance of the rule considered to be mandatory, and the parties' agreement in question, if no tangible explanation or reason can be arrived at as to the limitation of the party's agreement then parties agreement should prevail under such circumstances.

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[226] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 33.

[227] *See*, Nash K, 'Arbitration Kitchen with Kevin Nash (SIAC)' *Arbitration Journal*, 4 August 2020, <https://journal.arbitration.ru/interview/arbitraation-kitchen-with-kevin-nash-siac/>, on 17 January 2025.

[228] Daniel Chong, "Institutional Leadership or Institutional Overreach? Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings", 2020, 36.

[229] *See*, Kah Cheong Lye and Chuan Tat Yeo, 'Institutional Overreach? Institutional Arbitral Rules', 2013.

A case in point is *Jivraj v. Hashwani*, where the Supreme Court of the United Kingdom examined the exercise of party autonomy in the face of conflicting provisions.[230] The parties had stipulated that arbitrators be members of the Ismaili community, a requirement that conflicted with the Employment Equality (Religion or Belief) Regulations 2003.[231] Lord Clarke emphasized the distinctive nature of arbitration, stating, that "One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute."[232] The Court concluded that, in the absence of compelling legal reasons to override the parties' agreement, the arbitration clause should be upheld. This case illustrates the principle that party agreements in arbitration are paramount, and any limitations on such autonomy must be substantiated by compelling reasons, as determined by the tribunal or the courts.

However, the assessment of compelling reasons must be context-specific. Factors such as the significance of the clause, the parties' awareness of its existence when drafting the arbitration agreement or opting out of the rule, the nature of the institutional rule in question, and other relevant considerations must be evaluated to determine the weight accorded to the mandatory rule in relation to the parties' agreement to the contrary.[233] This analysis challenges the blanket application of the principle that institutional rules will always take precedence and override any contrary party agreement. A case in point is, *Nedermar Technology BV Limited v. Kenya Anti-Corruption Commission & Attorney General*, the Court of Appeal of Kenya examined the extent of party autonomy in arbitration agreements vis a vee public policy laws.[234] The court affirmed that parties are free to choose the applicable law in their contractual relations, including the right to exclude certain branches of law, such as public law. The court held that, as long as the parties' agreement is bona fide, legal, and not contrary to public policy, it should be upheld.[235] This decision underscores the principle that limitations to party autonomy are primarily confined to considerations of public policy as enshrined in the law of the seat of arbitration. While in a different

[230] *Jivraj v Hashwani* (2011), United Kingdom Supreme Court.
[231] *Jivraj v Hashwani* (2011), United Kingdom Supreme Court.
[232] Justin Williams and Natasha G. Kohne, 'English Supreme Court Upholds Party Autonomy in International Arbitration',2011,<https://www.akingump.com/en/insights/alerts/english-supreme-court-upholds-party-autonomy-in-international-arbitration>, accessed 31 January 2025.
[233] *See,* Kah Cheong Lye and Chuan Tat Yeo, 'Institutional Overreach? Institutional Arbitral Rules', 2013.
[234] *Nedermar Technology BV Limited v Kenya Anti-Corruption Commission & Attorney General*, (2008) eKLR.
[235] *Nedermar Technology BV Limited v Kenya Anti-Corruption Commission & Attorney General,* (2008) eKLR.

context, this approach illustrates the broad latitude granted to party autonomy, with restrictions only imposed by matters of public policy.

Similarly, in *AQZ v. ARA*, Justice Tay of the Singapore High Court addressed a conflict between an arbitration agreement and institutional rules.[236] The arbitration agreement provided for a three-member tribunal, but the SIAC appointed a sole arbitrator under its expedited procedure rules. In response to this issue, Justice Tay held that, in cases of conflict between the arbitration agreement, a product of party autonomy, and institutional rules, the better interpretation ought to be that the parties, by knowingly opting into institutional arbitration, intended for the arbitration agreement to prevail over institutional rules.[237] This perspective underscores the primacy of party autonomy in arbitration, permitting deviations only when compelling reasons justify such an approach. As discussed in previous chapters, some tribunals and courts have taken differing positions when faced with similar questions, reflecting the nuanced and context-specific balance between party autonomy and institutional rules.

In addition to the above considerations, this paper introduces another important factor in assessing the weight of institutional rules versus party agreements. This factor involves comparing the mandatory nature of rules across different arbitral institutions. When a rule that one institution deems mandatory is not considered mandatory by others, party autonomy should take precedence. A clear example of this is the differing application of expedited procedure rules, which primarily govern procedural aspects like the selection of arbitrators in emergency proceedings. Arbitral institutions vary in their stance on whether these rules are compulsory. Some prioritise party autonomy,[238] while some contend that such rules governing expedited procedures are mandatory, leaving no room for exceptions or derogations.[239]Given this variation in application, such rules cannot be regarded as strictly mandatory. In these cases, the approach that Favors party autonomy should be followed. To facilitate this, institutional flexibility is encouraged, allowing arbitral institutions to permit deviations from rules that are not strictly mandatory.

[236] *AQZ v ARA* (2015), Singapore High Court (SGHC), 49.
[237] *AQZ V. ARA* (2015), SGHC, 49.
[238] *See*, Article 42(2)(a), HKIAC Arbitration Rules, 2024.
[239] *See*, Article 30, *International Chamber of Commerce Arbitration Rules*, 2021;Article 17, *SCC Arbitration Rules*, 2017; Article 45(5), *Vienna Rules of Arbitration and Mediation*, Vienna International Arbitration Centre, 2018.

A relevant example of this balanced approach can be seen in the practice of expedited procedure under HKIAC Rules.[240] While its expedited procedure rules generally favour a single arbitrator, the rules also allow parties to agree on a different number of arbitrators.[241] If the arbitration agreement specifies three arbitrators, HKIAC invites the parties to consider referring the case to a sole arbitrator. If the parties do not reach an agreement, the case proceeds with three arbitrators as stipulated in the arbitration agreement.[242]Such approaches uphold party autonomy while maintaining procedural integrity, ensuring arbitration remains both adaptable and legitimate.

However, challenges may arise from differing interpretations of what constitutes a mandatory institutional rule, as these can be subjective and influenced by the preferences of arbitral institutions. Some rules are considered defining features of these institutions, granting significant discretion in determining which rules are mandatory, potentially overriding party agreements.[243] A case in point is the supervision of arbitral awards by the ICC Court, where it is recognized that the ICC will decline to administer an arbitration if parties seek to deviate from such a rule.[244] These provisions can pose problems. While subjective concerns are valid and institutional flexibility may not always lead to a blanket application of rules, this approach aligns with party autonomy. It acknowledges that parties' intentions and agreements are subjective, differing from one context to another, and thus cannot be uniformly applied.

Doctrinally, institutional flexibility is consistent with principles of contractual interpretation, which aim to reconcile differences in light of the parties' intentions and the specific facts of the case.[245] Similarly, when dealing with rules considered integral to the arbitral institution, prior consultation between the parties and the institution can be crucial in preventing future disputes

[240]Art.42(2)(a), '...The arbitral proceedings shall be conducted in accordance with an Expedited Procedure based upon the foregoing provisions of these Rules, subject to the following changes: (a) the case shall be referred to a sole arbitrator, unless the arbitration agreement provides for three arbitrators', HKIAC Arbitration Rules, 2024.

[241] Hong Kong International Arbitration Centre, 'Expedited HKIAC Arbitration' HKIAC, 2025, <https://www.hkiac.org/arbitration/process/expedited-hkiac-arbitration> on 1 February 2025.

[242] Hong Kong International Arbitration Centre, 'Expedited HKIAC Arbitration' HKIAC, 2025, <https://www.hkiac.org/arbitration/process/expedited-hkiac-arbitration>, on 1 February 2025.

[243] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", 2018, 32.

[244] Pryles M, 'Limits to Party Autonomy in Arbitral Procedure' International Council for Commercial Arbitration, 2005, <https://cdn.arbitrationicca.org/s3fspublic/document/media_document/media012223895489410limits_to_party_autonomy_in_international_commercial_arbitration.pdf> on 2 February 2025.

[245] Kah Cheong Lye and Chuan Tat Yeo, 'Institutional Overreach? Institutional Arbitral Rules', 2013.

regarding the primacy of institutional rules over party autonomy. Any potential violation of party autonomy should be justified by compelling reasons, followed by a careful analysis to avoid arbitrary decisions by arbitral institutions that could override the parties' agreement.

4.2 OTHER CONSIDERATIONS

In addition to institutional flexibility, alternative approaches can help reconcile the tension between party autonomy and mandatory institutional rules. These solutions primarily emerge from arbitration practice and judicial decisions addressing such conflicts. One rare but notable approach is the concept of "wildcat arbitration," where parties adopt the institutional rules of one arbitral institution while designating a different institution to administer the arbitration.[246]

Courts have upheld such arrangements in several cases. In *Insigma Technology Co Ltd v. Alstom Technology Ltd*, the Singapore Court of Appeal enforced an arbitration agreement applying ICC Rules but administered by SIAC.[247] Similarly, in *HKL Group Co Ltd v. Rizq International Holdings Pte Ltd*, the Singapore High Court validated an agreement that referenced a non-existent institution while incorporating ICC Rules.[248] The Svea Court of Appeal in *Case T 9128-14* took a similar stance, recognizing an arbitration agreement that applied ICC Rules but was administered by the Arbitration Institute of the Stockholm Chamber of Commerce. When an arbitral institution rigidly enforces its rules and refuses to allow deviations, wildcat arbitration can serve as a means to uphold party autonomy. However, its viability depends on judicial interpretation and the willingness of institutions to recognize such arrangements. The broader debate remains whether this approach strengthens arbitration by prioritizing party choice or risks undermining institutional safeguards and procedural coherence.

Similarly, albeit, uncommon, parties may choose to transition from institutional arbitration to ad hoc arbitration to better preserve their autonomy. This shift involves the parties agreeing to have their dispute administered by an ad hoc tribunal rather than an arbitral institution. The distinction between ad hoc and institutional arbitration is significant, where as ad hoc arbitration would grant parties' the freedom to tailor procedures to their specific needs without the framework of binding

[246] Berger K Berger, "Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox", 2018, 12.
[247] *Insigma Technology Co Ltd v. Alstom Technology Ltd* (2009), SGHC 936.
[248] *HKL Group Co Ltd v. Rizq International Holdings Pte Ltd* (2013), SGHC 72.

institutional rules, institution arbitration may limit party autonomy within the confines of its rules.[249] While the requalification from institutional to ad hoc arbitration is uncommon, it remains a viable option for parties seeking greater control over the arbitration process. This approach allows parties to design procedures that align closely with their mutual interests, thereby enhancing the efficiency and effectiveness of dispute resolution.

4.3 CONCLUSION

The tension between mandatory institutional rules and their impact on party autonomy, while challenging, is not insurmountable. Reconciling these differences requires a context-specific approach that considers a range of factors, including the significance of the clause to the parties, their intent, whether they were aware of and intended to override the rules in question, and the weight of the institutional rule itself by examining whether other arbitral institutions classify such a rule as mandatory. By fostering procedural flexibility and adopting interpretations that harmonize party agreements with institutional rules, arbitral institutions can preserve the legitimacy of arbitration while enhancing its appeal. Where institutional rules remain irreconcilable with party agreements, requalification into ad hoc arbitration offers a viable alternative. Ultimately, maintaining a delicate balance between oversight and autonomy ensures that arbitration remains a robust, effective, and party-driven mechanism for dispute resolution.

[249] Christopher Wenn, Gregor Hayworth, and Zhuan Faraj, 'Burges Salmon Arbitration Basics: ad hoc vs institutional arbitration' 2022, <https://www.burges-salmon.com/news-and-insight/legal-updates/disputes/burges-salmon-arbitration-basics-ad-hoc-vs-institutional-arbitration>, accessed 3 February 2025.

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION

In summary, the foundational basis of the present study was to examine the exercise of secondary party autonomy in institutional arbitration, with a focus on how mandatory institutional rules shape and, at times, restrict parties' ability to customize their arbitral proceedings. Through a comprehensive analysis, it became evident that while institutional arbitration prides itself on the enhancement of efficiency through the imposition of mandatory institutional rules, it often does so at the expense of secondary party autonomy—the ability of parties to tailor procedures after submitting their dispute to institutional arbitration, most often through modification or deviation of established institutional rules. This study not only identified the scope of this tension but also proposed a path toward achieving a balanced framework that respects both institutional control and party preferences.

5.2 SUMMARY OF FINDINGS

Chapter One laid the groundwork by introducing arbitration's rising popularity as an alternative to litigation, with institutional arbitration standing out for its structured framework administered by arbitral institutions. Central to the Chapter was the principle of party autonomy, the cornerstone of arbitration, that empowers parties to shape their dispute resolution process. The Chapter explored the core research issue regarding the extent to which parties can exercise autonomy within institutional arbitration. The analysis revealed a clear conflict between mandatory institutional rules, commonly regarded as non-derogable, and the exercise of party autonomy. This tension becomes particularly evident when parties, through mutual agreement, attempt to modify the arbitral process beyond the institutional framework they originally agreed to follow in their arbitration agreement. This tension formed the crux of the study, not merely to expose the conflict but to propose practical avenues for reconciling party autonomy with institutional control.

The Chapter also conducted a comprehensive literature review, revealing a significant gap in scholarship addressing this specific conflict. This gap underscores the value of the present work, contributing meaningfully to the ongoing discourse by not only identifying the friction between party autonomy and institutional rules but also advancing sustainable solutions. Thus, the Chapter

established a clear foundation for the subsequent Chapters, guiding the inquiry into the limitations, opportunities, and strategies for harmonizing party autonomy with institutional arbitration.

Chapter Two provided the analytical framework for the present study by offering a deeper understanding of party autonomy in institutional arbitration. It revealed that party autonomy operates at two distinct levels. The first is the primary level, where parties exercise autonomy by choosing institutional arbitration over other forms of dispute resolution. This choice is most commonly reflected in the arbitration agreement, which signifies the parties' intent to resolve their disputes within the framework of an arbitral institution rather than through litigation or ad hoc arbitration. The second, more nuanced level and the core focus of this study is secondary party autonomy. This pertains to the parties' ability to modify pre-formulated institutional rules after arbitration has commenced, allowing them to tailor the procedural framework to suit their specific needs and preferences. The study found, first, that it is indeed possible for parties to deviate from institutional rules, and second, that the primary threat to secondary party autonomy arises from provisions deemed mandatory by arbitral institutions. However, an analysis of case studies demonstrated that, despite the existence of such rules, parties can exercise autonomy, including the right to deviate from institutional procedures when acting by mutual agreement.

The study further revealed significant jurisdictional variance in how secondary party autonomy is recognized and enforced. Some jurisdictions uphold party agreements even when they conflict with institutional rules, while others prioritize institutional control. This inconsistency underscores the necessity of the present study, not only to examine the extent of party autonomy in institutional arbitration but also to advocate for a more harmonized approach that ensures party autonomy remains a cornerstone of the arbitral process.

Building on this disparity, Chapter Three delved deeper into the tension between non-derogable institutional rules and secondary party autonomy. It critically examined the justifications advanced by arbitral institutions for imposing mandatory rules, often framed as essential for procedural integrity and efficiency. The Chapter challenged the prevailing argument that parties, by consenting to institutional arbitration, implicitly accept all institutional rules. It established that this justification is flawed, as implied consent cannot override express party agreements, particularly when both parties mutually seek to deviate from institutional provisions. Jurisprudence

from various jurisdictions further confirmed the absence of consensus on whether institutional rules can unilaterally override party autonomy, reinforcing the need for a more flexible approach.

The Chapter further distinguished between public mandatory rules, established by law, and private mandatory rules, imposed by arbitral institutions. While public mandatory rules are typically non-negotiable, private institutional rules should not uniformly restrict party autonomy, especially when procedural efficiency can be preserved without undermining party preferences. The study focused on expedited procedure rules as a prime example of mandatory institutional rules, revealing how they, despite being designed to enhance efficiency and reduce costs, often exemplify the tension between institutional control and party autonomy. A notable instance is the mandatory appointment of a sole arbitrator under expedited procedures, which frequently overrides the parties' preference for a three-member tribunal. This demonstrates how rigid institutional frameworks can undermine party choice, underscoring the urgent need for institutional flexibility that preserves efficiency while safeguarding party autonomy.

The study culminates to resolve the tension between mandatory institutional rules and party autonomy, with Chapter Four advocating for institutional flexibility as the cornerstone of this balance. Institutional flexibility is defined as the ability of arbitral institutions to permit deviations from institutional rules based on party agreements to the greatest extent possible. To achieve this balance, the Chapter proposes a context-specific approach, emphasizing the need to consider several factors, including the significance of the clause in question to the parties, the parties' intentions, the weight of institutional rules, and the presence of compelling justifications for overriding party autonomy. This approach underscores that no general rule can categorically prohibit deviations from institutional rules deemed mandatory. Instead, the guiding principle lies in these context-specific considerations.

The Chapter further highlights that inconsistencies in how different arbitral institutions interpret mandatory rules, with some treating specific provisions as non-negotiable while others adopting a more flexible stance, reinforce the argument for prioritizing party autonomy. Such divergence underscores the importance of allowing parties to tailor their arbitration process rather than conforming to a rigid one-size-fits-all framework.

Beyond institutional flexibility, the Chapter also explores existing solutions in practice, such as "wildcat arbitration," where parties adopt one institution's rules while designating another to

administer the proceedings. This approach enhances procedural adaptability while preserving institutional oversight. Another proposed solution is the potential requalification of institutional arbitration as ad hoc arbitration, thereby maximizing party autonomy without undermining procedural integrity.

Ultimately, the Chapter concludes that fostering institutional flexibility is essential for preserving the integrity, accessibility, and effectiveness of international arbitration. By prioritizing party autonomy while maintaining procedural safeguards, arbitration can remain a robust, equitable, and adaptable mechanism for dispute resolution.

5.3 CONCLUDING REMARKS AND RECOMMENDATIONS

Ultimately, the study concludes that while institutional rules play a vital role in safeguarding the integrity of arbitration, they should not unduly restrict party autonomy, particularly at the secondary level. The future of institutional arbitration lies in fostering a dynamic equilibrium that upholds institutional standards while preserving the flexibility that defines arbitration's appeal. Achieving this balance requires continuous dialogue among arbitral institutions, parties, and the broader arbitration community, alongside the adoption of institutional frameworks that prioritize contextual flexibility over rigid adherence to institutional rules.

In sum, this study reaffirms that party autonomy remains the cornerstone of arbitration's legitimacy. Mandatory institutional rules, while essential for procedural consistency, must evolve to accommodate the parties' right to shape their dispute resolution journey. Only through such a balanced approach can institutional arbitration maintain its legitimacy, efficiency, and appeal as a preferred mode of dispute resolution.

Informed by the present study, several recommendations are proposed. First, there is a pressing need for the harmonization of international standards through bodies like UNCITRAL to establish clear guidelines for balancing secondary party autonomy and institutional rules. Such standards would enhance certainty and consistency in cases where tribunals must determine whether party autonomy or institutional rules should prevail. This approach would ensure that arbitral practice aligns with the foundational principle of party autonomy while maintaining procedural integrity across jurisdictions.

Second, arbitral institutions should adopt a context-specific approach when assessing the derogability of institutional rules. This requires evaluating the significance of procedural rules in relation to secondary party autonomy, ensuring that rules are classified as non-derogable only when absolutely necessary. Any such classification should be a last resort, applied only when deviation would compromise procedural fairness or the enforceability of the award. Promoting a party-centric approach, where institutions facilitate procedural choice while upholding essential safeguards, would further strengthen the balance between institutional control and party autonomy.

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