THE REGULATION OF INTERNATIONAL COMMERCIAL ARBITRATORS

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Abstract

International commercial arbitration has established itself as the main dispute resolution mechanism for international commercial disputes. This increased visibility has drawn attention to arbitrators' public role, leading to a well-established general perception that arbitrators are bound to special obligations, such as the duty to be independent and impartial or the obligation to assure that arbitral proceedings are not abused to achieve nefarious goals. Despite this general acknowledgement, little attention has been paid to the mechanisms that ensure that arbitrators adhere to these obligations. In particular, there has been limited analysis of the underlying mechanisms that incentivise the production and enforcement of professional norms in this field.

This thesis argues that the particulars of the arbitration market largely explains why the evolution of the regulation of international arbitrators has not matched those of other professions. At the same time, it will argue that those same particularities create incentives for several actors, most notably the arbitral community itself, to step in and occupy this regulatory vacuum. In particular, it explores the notion that the market strategies employed by arbitrators, arbitral institutions and other members of the arbitral community have the production of professional norms as a by-product. It further explores how the arbitral market tends to create an environment where compliance with professional norms is rewarded, leading, at the same time, the arbitral community to work as a network that promotes adherence to professional norms through mostly informal sanctions.

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List of abbreviations

AAA …… American Arbitral Association

ABA …… American Bar Association

CAM …… Milan Chamber of Arbitration

CBAr …… Comitê Brasileiro de Arbitragem

CEA …… Club Español del Arbitraje

CFA …… Comité Français de l'Arbitrage

CIArb …… Chartered Institute of Arbitrators

CIETAC …… China International Economic and Trade Arbitration Commission

DIFC …… Dubai International Financial Centre

FAA …… Federal Arbitration Act

GAR …… Global Arbitration Review

IBA …… International Bar Association

ICC …… International Chamber of Commerce

ICCA …… International Council for Commercial Arbitration

ICDR …… International Centre for Dispute Resolution

ICSID …… International Centre for Settlement of Investment Disputes

HKIAC …… Hong Kong International Arbitration Centre

LCIA …… The London Court of International Arbitration

NGO …… Non-governmental Organisation

QMUL …… Queen Mary University of London

SCC …… Stockholm Chamber of Commerce

SIAC …… Singapore International Arbitration Centre

SICC …… Singapore International Commercial Court

CHAPTER I

SETTING THE SCENE: ARE INTERNATIONAL COMMERCIAL ARBITRATORS REGULATED?

1.1 Introducing the debate about the 'regulation' of international commercial arbitrators

When entering a hospital, the average patient rarely questions the commitment of its doctors to its wellbeing.[1] Likewise, when visiting a lawyer, most have confidence that the professional they visit has their best interests at heart. Professionals perform their roles due to the existence of a complex web of incentives and deterrents not always easy to identify. Doctors care for the life and health of their patient and lawyers for the fate of their client due to a wide range of factors, from simple monetary and professional incentives such as the desire to gain more customers[2] or avoid disciplinary action, to complex and deeply ingrained cultural values and moral judgements.

Society expects many professions to act ethically and fulfil a role that goes beyond simply complying with strictly defined contractual obligations. Communities trust many

1 It should be noted that trust in physicians is however quite distinct in different countries. For an overview, see Robert J Blendon, John M Benson and Joachim O Hero, 'Public Trust in Physicians — U.S. Medicine in International Perspective' (2014) 371 New England Journal of Medicine 1570.

2 '[M]*ost contracts, both formal and informal, are "enforced" simply by the latent threat of withdrawing future business from the violator*' William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 The Journal of Legal Studies 1, 1.

professionals to perform key tasks with deep public interest implications, from providing life-saving procedures to guaranteeing legal rights. A society, however, rarely trusts solely in market incentives, social pressures, and moral judgements to lead professionals to behave in accordance with their professional and ethical obligations. To ensure that professionals uphold public interest goals, many jurisdictions establish complex institutional and legal arrangements. Such arrangements range from establishing or endorsing the power of professional associations to dictate and enforce behavioural norms, to the state directly establishing detailed limits on who can perform such professional services and how they must be delivered.

However, one significant exception relates to international commercial arbitration. International commercial arbitrators, deciding cases often valued at millions of dollars and with profound implications for the fate of companies, workers and communities, certainly qualify as agents of central importance in many legal jurisdictions.[3] Despite their key importance, arbitrators and arbitral institutions can, in theory, enter the market in international arbitration services without being previously licenced and, in practice, are subject to little or no disciplinary oversight from state-backed institutions.[4] This makes

3 See Susan D Franck, 'The Role of International Arbitrators' (2005) 12 ILSA J. Int'l & Comp. L. 499.

4 See Gary Born, *International Commercial Arbitration* (2 edition, Wolters Kluwer Law & Business 2014) 2047.For an overview of the lack of certification and licensure practice in the United States in regard to arbitrators see Stephen K Huber, 'State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts' (2009) 10 Cardozo Journal of Dispute Resolution 509, 544.

international commercial arbitrators a particularly unique 'profession' from a legal, sociological and economic perspective.[5]

It should be noted that, despite lacking institutional and legal arrangements that regulate behaviour in many other markets in professional services, international commercial arbitration is today seen by many as able to guarantee an efficient and trusted system of solving international disputes.[6] It works as the main dispute resolution system for international commercial disputes and is increasingly supported by courts and legislators in most jurisdictions.[7] Reflecting this success, arbitral institutions report an increasilng number of new cases,[8] surveys of users of the system indicate general

5 The definition of what constitutes a 'profession' is contentious, with its precise definition being context-dependent. For an overview of the different approaches to the concept, see Mike Saks, 'Defining a Profession: The Role of Knowledge and Expertise' (2012) 2 Professions and Professionalism. Within arbitration circles, the majority view tends to qualify arbitrators as not being a profession. See, for example, Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 65. Despite this, and while arbitrators do not indeed fit neatly into most definitions of what constitutes a 'profession', the term will be sometimes used as a short-hand throughout this thesis.

6 In the words of Lord Neuberger, referring in particular to the 1996 Arbitration act, "*[a]s unlike in the banking sector, such modern light touch regulation is not merely what the market wanted, but nearly twenty years on, it is generally seen to be working well.*" See Lord Neuberger, Key Note Speech, Chartered Institute of Arbitrators Centenary Conference, 2 July 2015, available at https://www.ciarb.org/docs/default-source/centenarydocs/london/lord-neuberger.pdf?sfvrsn=0.

7 In the words of Lew: "*International arbitration, before neutral arbitrators, in a third country, with non-national or international procedures being followed, has become the essential mechanism for the settlement of all kinds of international business disputes*." Julian DM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 Arbitration International 179, 185. See also, Thomas E Carbonneau, Law and Practice of Arbitration (5th edn, Juris Publishing, Inc 2014) xiii; Karl-Heinz Böckstiegel, 'Past, Present, and Future Perspectives of Arbitration' (2009) 25 Arbitration International, 295.

8 Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 16.

satisfaction with international arbitration,[9] and several pieces of national legislation have been amended to further support the use of arbitration.[10]

1.2 Why study how international commercial arbitrators are 'regulated'?

International commerce is witnessing a 'golden age' of international commercial arbitration. Still, little is known about the underlying forces that create and enforce the 'norms' that regulate international commercial arbitrators. For example, while there is general agreement that arbitrators are bound to act independently and impartially or not to render awards which would be against transnational public policy,[11] less has been explored regarding: i) which incentives lead different stakeholders to participate in the process of creating and developing these norms; and ii) how these norms are enforced within the arbitral community.

Providing an answer to these questions is increasingly pressing in the face of the criticism over some aspects of arbitration from both within and outside arbitral circles. Despite its increasing popularity, arbitration is suffering some backlash, affecting its two

9 QMUL's 2015 International Arbitration Survey, for example, indicates that "*90% of respondents indicate that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%).*" '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' 2 <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 16 October 2015.

10 Amongst many others, Russia (2016), Brazil (2015), Slovakia (2015), Colombia (2012), France (2011) have recently amended their legislation to further support arbitration.

11 For an introduction to the concept of transnational public policy, see, amongst others: Hossein Fazilatfar, 'Transnational Public Policy: Does It Function from Arbitrability to Enforcement' (2011) 3 City University of Hong Kong Law Review 289; Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law and Taxation Publishers 1987); Mark A Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26 American Business Law Journal 511.

most well-known branches: international commercial arbitration and international investment arbitration. Most ill will has been directed to investment arbitration which has been derided in some quarters as an opaque and untrustworthy system of protecting multi-national companies.[12] These criticisms, however, have spilt over to affect the perception of the traditionally less controversial commercial arbitration, with some of the attacks simply casting negative aspersions over arbitration in general, pointing to its opacity and lack of diversity.[13]

Perhaps more surprisingly, some elite members of the commercial arbitration community have increasingly albeit quietly expressed concerns about the level of transparency, cost, and fairness of commercial arbitration. [14] A few have expressed apprehension regarding the increased number of arbitrators. [15] Others have proposed changes: i) to the process through which arbitrators are selected;[16] and ii) to institutions'

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12 For an extensive analysis see Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

13 Stavros L Brekoulakis, 'Introduction: The Evolution and Future of International Arbitration' in Stavros L Brekoulakis, Julian DM Lew and Loukas A Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016) 12.

14 David W. Rivkin, for example, in a well known speech in the 2015 ADR Asia Conference chastised arbitrators for often not meeting parties' expectations. David W Rivkin, 'Keynote Address: A New Contract Between Arbitrators and Parties' (2016) 18 Asian Dispute Review 4. See also Park who notes that "*recent literature laments that a golden age of cheap and cheerful arbitration has yielded to backlash against a system marked by too many rules, excessive rules and undue delay.*" William Park, 'Procedural Tension in International Arbitration: Arbitration in Autumn' in John Norton Moore (ed), *International Arbitration: Contemporary Issues and Innovations* (Martinus Nijhoff Publishers 2013) 3.

15 See, Sundaresh Menon, 'Some Cautionary Notes for an Age of Opportunity' (Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013) <http:// www.singaporelaw.sg/sglaw/images/media/13082 Some cautionary notes for an age of opportunity.pdf>.

16 Paulsson's – a worldwide leading arbitral practitioner – criticism of the system of party appointed arbitrators has been specially noted. Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID review 339. Also criticising the system of party appointed arbitrators, see Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush H Arsanjani and W Michael Reisman (eds), *Looking to the future: essays on international law in honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011).

behaviour with the aim of augmenting the level of transparency, reducing costs, and increasing the speed of arbitral proceedings.[17] However, these are in the larger picture, minor quibbles in what is usually the self-congratulatory tone of most self-analysis that the arbitration community provides. [18]

In summary arbitrators: i) have risen to be one of the main adjudicators of transnational commercial disputes; [19] and ii) lack an organised professional structure similar to those offering professional services. Despite its unique regulatory system, the general perception seems to be that serious deviations from professional norms by international commercial arbitrators are rare. The question that emerges is what underlying forces have led to these unique regulatory arrangements and what is leading members to comply with applicable professional standards and norms within the current environment. In this regard, it is important to determine how the peculiar way arbitrators are chosen and remunerated may influence participation in the creation and compliance with accepted norms.

Presenting an answer to these questions is the key objective of this thesis. More specifically, this thesis explores the idea that a set of underlying incentives specific to the

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17 For an overview of the debate see Albert Jan van den Berg (ed), 'Survey: Arbitral Institutions Can Do More to Foster Legitimacy. True or False?', *Legitimacy: Myths, Realities, Challenges* (Wolters Kluwer Law & Business 2015).

18 In the words of Born: "*There have been periods of lesser, and periods of greater, judicial and legislative support for the arbitral process. […] Judicial skepticism or hostility has typically been cyclical, not infrequently coinciding with outbreaks of extreme nationalism or totalitarianism, while in most instances the enduring needs of the business community, the respect of enlightened governments for the parties' freedom to order their commercial affairs and the relative advantages of the arbitral process have eventually overcome limitations or prohibitions on the arbitral process.*" Born, *International Commercial Arbitration* (n 4) 69.

19 Eva Lein and others, 'Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts' (2015) Ministry of Justice Analytical Series, p. 12.

arbitration market have significantly shaped the regulatory structure in place. Understanding the set of incentives and motivations that lead the different agents working within commercial arbitration to 'regulate' their behaviour is an essential step to: i) understand if the commercial arbitration community can be 'trusted' to create and enforce their own rules of behaviour;[20] and ii) in the case of a negative answer, if reform is possible and what steps should be undertaken to develop different regulatory approaches in this field.[21]

1.3 How does this thesis fit within existing literature?

It should be noted that for a long time, little academic literature could be found regarding the regulation of arbitrators or, more broadly, the socio-economic position of arbitrators.[22] It is true that the current 'golden age' of international arbitration has brought with it a large body of legal analysis, providing a thorough and increasingly intricate discussion of the many legal issues surrounding international arbitration.[23] Analysis of international

20 In the words of Paulsson, "*[c]onfidence in the ethical standards of arbitrators and arbitral institutions is the Alpha and Omega of the legitimacy of the process*." Jan Paulsson, *The Idea of Arbitration* (OUP Oxford 2013) 147.

21 In an interview Born summarized, what seems to be the view dominant amongst the community: "*arbitration is more efficient, more expeditious, more expert, more even-handed and more enforceable*". Modern *Arbitration*: Live – An *Interview* With Gary Born. (March 19, 2019). Available at: www.wilmerhale.com (last accessed 25 February 2020).

22 Key exceptions include the following monographies: Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press 2014); Joshua DH Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press 2013); Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

23 Some of the most well-known works in the legal analysis of international arbitration, include: Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012); Philippe Fouchard and others, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999); Julian DM Lew, Loukas A Mistelis and Stefan Kröll,

commercial arbitration as a socio-legal and economic phenomenon – i.e. a legal institution with social and economic consequences for service providers, disputing parties and the community at large – was, however, for a long time comparatively much scarcer.[24]

Several factors contributed to the limited study of international commercial arbitration from a socio-legal perspective. First, during a long-time international arbitration was a reasonably marginal legal phenomenon which attracted little attention outside arbitration circles and the limited number of experts in the field. Second, the reasonably closed nature of international arbitration,[25] lack of readily available public information

Comparative International Commercial Arbitration (Kluwer Law International 2003); Alan Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004); Mauro Rubino-Sammartano, *International Arbitration Law* (Kluwer Law International 2001). Many other authors – who often are also leading practitioners – working in this academic side of international commercial arbitration, have also provided detailed legal doctrine regarding international arbitration treaties, national arbitration statuses and arbitration in particular regional settings or jurisdictions.: Jean-Louis Delvolvé, Jean Rouche and Gerald H Pointon, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (Kluwer Law International 2009); Jalal El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011); Gabrielle Kaufmann-Kohler and Blaise Stucki, *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer Law International 2004); Michael J Moser, *Arbitration in Asia - 2nd Edition* (Juris Publishing, Inc 2008); Essam Al Tamimi, *Practitioner's Guide to Arbitration in the Middle East and North Africa* (Juris Publishing, Inc 2009); Jingzhou Tao, *Arbitration Law and Practice in China* (Kluwer Law International 2008).

24 E. Gaillard, 'Sociology of International Arbitration' (2015) 31 Arbitration International 1, 2. Despite the shortage of socio-legal analysis when compared to more traditional doctrinally oriented legal literature, a significant number of studies have shed light on the nature, functioning and evolution of arbitration as a social and economic institution. For example, they have provided guidance on the role played by competing generations of arbitrators in creating a transnational dispute system, arguing that economic incentives have helped to create "a culture of arbitration" and evaluated the market for international arbitrator services, in light of obligations and expectations attendant with their role as custodians of the international arbitration system. See, Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996); Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 The Vanderbilt Journal of Transnational Law, 1335–1345. Catherine A Rogers, 'The Vocation of the International Arbitrator' (2004) 20 Am. U. Int'l L. Rev. 957.

25 Jean-Babtiste Racine, 'Éléments D'une Sociologie de L'arbitrage: Actes de La Journée D'étude Du Groupe Sociologie de L'arbitrage Du Comité Français de L'arbitrage' (2012) 2012 Revue de l'Arbitrage 709.

regarding how arbitral tribunals truly deliberate[26] and the complex legal arrangements underlying this field may have discouraged general discussions of the grid of incentives that international arbitrators face in relation to compliance with professional standards.

There is, however, a growing influence of inter-disciplinary studies in the international commercial arbitration literature. Importantly for this thesis, there is a growing perception in the literature that arbitrators operate at least partially as economic agents competing in a market and that they deploy complex economic strategies.[27] Also, recent research shows that a broad range of psychological, social, cognitive, and emotional factors influences how arbitrators act. [28] At the same time, increased attention has been paid to the networks formed by arbitrators.[29] Finally, it has also been proposed that an exclusive 'culture' amongst the arbitral community has developed, focusing on how values such as party autonomy, the service of business, neutrality, and internationalism dominate arbitration.[30]

This thesis will build upon many of these existing insights from the available academic literature to provide a discussion of how 'regulation' and 'self-regulation' of international commercial arbitrators take place. It will more specifically argue that there is a link between the particularities of the arbitration market and the regulatory framework applicable to international arbitrators. It will in this sense put forward the idea that there

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26 Christopher R Drahozal, 'Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration' (2006) 22 Arbitration International 291, 293.

27 Thomas Clay, 'El Mercado Del Arbitraje' (2014) 7 Arbitraje: revista de arbitraje comercial y de inversiones 15.

28 Susan D Franck and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory Law Journal 1115.

29 S Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387.

30 Karton (n 22).

are specific underlying economic and social arrangements that lead arbitrators to behave in a way significantly different from other professions and that those same forces explain to a large extent: i) how norms are created; ii) the content of those norms; and iii) how those norms are enforced in this area.

While this thesis spends considerable time discussing the rather unique market behaviour and social composition found within commercial arbitration, many of the conducts described in this thesis have already been noted by others.[31] In this sense, they will be easily recognised by those familiar with the field. The contribution of this thesis focuses instead on how this set of behaviours has shaped the regulatory apparatus of international arbitrators, a topic considerably less explored. Before advancing a discussion of these ideas, it will, however, be important to clarify some of the key concepts that will be used throughout this thesis.

1.4 Exploring key concepts: regulation, arbitration, arbitrators and professional norms

To further delimit the core themes of this thesis, it will be necessary to refine the four key concepts underlying it: "regulation", "arbitration", "arbitrators" and "professional norms". This is important as these concepts lend themselves to different usages and are heavily dependent on context. The goal of this section is twofold: i) to clarify how these concepts are used within this thesis; and ii) to discuss and justify why this thesis focuses particularly

[31] See, for example, Dolores Bentolila, *Arbitrators as Lawmakers* (Wolters Kluwer 2017) 145; Karton (n 22) 56.

on international commercial arbitration and on the professional obligations of international commercial arbitrators. With these aims, a brief discussion of these concepts will be undertaken in turn.

1.4.1 'Regulation': an enlarged notion to include all forms of social or economic influence

The word 'regulation' is often used to refer to a reasonably straightforward concept: i.e. the actions undertaken by a public authority to oversee activities that are valued by a community.[32] In this narrow definition, 'regulation' is used to refer to an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with rules.[33] In practical terms, and in the context of professional regulation, that often involves determining legal rules that shape who can offer services and legal constraints on how these services can be provided. Further, it usually also involves a system of applying legal sanctions for those who infringe these norms.

'Regulation' is, however, sometimes used to refer to a much broader idea: i.e. to refer to all forms of social or economic incentive that come to influence an agent.[34] In this sense, regulation is used to refer to incentives beyond state-based interventions. It also encompasses the effects of the interventions of a host of other bodies, including

32 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2 edition, Oxford University Press 2012) 2–3.

33 Robert Baldwin, Colin D Scott and Christopher Hood, *A Reader on Regulation* (Oxford University Press 1998) 3.

34 For a discussion see ibid.

corporations, self-regulators, trade bodies, and voluntary organisations, and even social or economic forces (such as markets, cultural understandings, or even language).[35] In this sense, regulation includes not only intentional interventions but also the effects of all other factors that influence behaviour.

When discussing the 'regulation' of international commercial arbitrators, I will be referring to regulation in this broader sense – i.e. I will openly accept that 'regulators' can be either state institutions, non-state actors, or social and economic forces. This conceptual preference derives mainly from the fact that, in the context of international arbitration, it is often very difficult to separate the effects of 'intentional' regulation from broader forces shaping behaviour. For example, as will be explored in Chapter VII and VIII, the decision for an arbitrator to comply or not with standards of independence is contingent on economic strategies, cultural preferences and legal considerations that are often not possible to analyse independently of each other.

1.4.2 Why analyse commercial arbitration separately from investment arbitration

The second important conceptual caveat to the scope of this thesis is that it will mostly deal with international commercial arbitration and international commercial arbitrators. As is well known this is only a subset of a larger legal institution – known collectively as 'arbitration' or, when talking in a transnational context, as 'international arbitration'. While

[35] See also Rogers, *Ethics in International Arbitration* (n 22) 222.

the rising popularity of arbitration has meant that these distinctions are widely known even for those outside the world of arbitration, it is still useful to clarify the meaning of these different concepts. This will allow understanding of: i) the scope of this thesis; and ii) the choice to deal separately with commercial arbitration.

While definitions vary, in general terms arbitration is: a consensual means to resolve disputes via a non-governmental decision-maker, selected by or for the parties involved, which produces a binding decision through the use of impartial adjudicative procedures which afford each party the opportunity to present their case.[36] It is then possible to subdivide arbitration between international arbitration and domestic arbitration, where the first refers to arbitrations with a transnational element and the second to arbitrations which deal uniquely with matters internal to a specific national jurisdiction.[37]

Taken in its broader sense, international arbitration itself encompasses different subsets of arbitration, most notably: international commercial arbitration, which in general refers to arbitration proceedings resulting from contractual disputes; investor-state arbitration, which refers to arbitration between private investors and states regarding possible violations of investment protection agreements; and state-to-state arbitrations, which refers to arbitration proceedings between two or more states regarding international law disputes.[38]

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36 Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 3.

37 See UNCITRAL Model Law Article 1(3).

38 Besides these types of consensual arbitration, some jurisdictions also establish some forms of mandatory arbitration. Whether this kind of arbitration should be considered 'truly' a form of arbitration is subject to controversy. For a discussion, see Charles Jarrosson, 'Les Frontières de l'arbitrage' (2001) 2001 Revue de l'arbitrage 5, 5–42.These kinds of arbitration, despite also serving as a basis for markets, have often structures, supply and demand formation mechanisms considerably different from commercial arbitration.

In the context of a socio-legal or economic analysis of this field, the option of many authors has often been to offer an analysis of international arbitration and international arbitrators as a whole.[39] As it is well known, there are many remarkable similarities between the legal rules and main values that provide a framework for these different kinds of arbitration. Furthermore, many of the people and institutions who operate in these different fields are often the same.[40] Therefore, there exists a degree of overlap between the professional communities linked to each of these types of arbitration.[41] For these reasons, many of the regulatory mechanisms leading a commercial arbitrator to comply with their professional and ethical obligations are similar to the mechanisms that lead an investment arbitrator to comply with their professional and ethical obligations.

An analysis of the regulation of international arbitration and international arbitrators as a whole could have been the option of this thesis. It should be noted, however, that commercial arbitration and these other types of arbitration also differ in considerable ways. They possess distinct legal frameworks and institutional arrangements, and rely on different narratives and sources of legitimacy.[42] Further, these different markets, despite

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39 This was for example the option of Gaillard in Emmanuel Gaillard, 'Sociology of International Arbitration' (2015) 31 Arbitration International 1 and Rogers in Rogers, *Ethics in International Arbitration* (n 22).

40 For example, many of the most well-known arbitrators of international commercial arbitration cases also act as arbitrators in international investment cases. Also law firms and counsel often work in both fields.

41 See Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 72.This proximity has practical implications. For example, an arbitrator who can build a career within the field of international investment arbitration may be able to leverage their reputation to obtain more nominations within the international commercial arbitration market and vice-versa. Therefore, there are reputational effects across these markets.

42 Investment arbitration in particular has been subject to heavy criticism. For an analysis: Waibel and others (n 12).

appearing somewhat similar from a distance, upon closer inspection have considerable differences regarding the demand and supply structures, potentially favouring different attitudes and leading market actors to adapt differently.

For example, in investment arbitration, an arbitrator will have to take into consideration that the parties have unique contrasting characteristics (investment arbitration typically pits an 'investor' who acts as a claimant against a 'state' who acts as a respondent). In contrast, in commercial arbitration, claimants and respondents often are both commercial enterprises. Further, in investment arbitration, a single institution, the International Centre for Settlement of Investment Disputes (ICSID), has a key position in the market. In the commercial arbitration market, the arbitrator will take into consideration the existence of a multitude of arbitral institutions operating in the market. Importantly, while in investment arbitration most awards are public, whereas in commercial arbitration awards are most often confidential. [43] Finally, investment arbitration often raises fundamental issues of public interest which are usually absent from international commercial arbitration.[44]

Arbitrators' optimal market strategies – i.e. the way that they operate within certain institutional constraints to achieve their market goals – will hence not fully coincide. Consequently, while several of the underlying methods that regulate behaviour are present across these markets, considerable differences in the characteristics of the disputing parties

43 For an overview, see Bernardo M Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' - Journal of Arbitration Studies.

44 See Nigel Blackaby, 'Public Interest and Investment Treaty Arbitration' in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (Kluwer Law International 2003).

that use the system, the levels of information available, the size of the community, and governing institutions means that players are likely to adapt and behave differently within these markets. Hence the regulatory superstructure and incentives overviewing behaviour are distinct.

Overall, an in-depth analysis of the regulatory mechanisms taking place within the arbitral market is, therefore, better conducted through a separate analysis of the different types of arbitration. And in this sense, due to its importance, international commercial arbitrators will be the focus of analysis of this thesis.[45] Commercial arbitration is certainly, when considering the absolute number of cases and their aggregated value, the most relevant subset of international arbitration, especially in its international strand, with an increasing number of practitioners in a variety of jurisdictions dedicating themselves full-time or close to full-time to this area.[46]

Accordingly, and for the purpose of this thesis, 'international commercial arbitration' will be used throughout to refer to a method of settling disputes, usually of a private-law nature, based on an agreement between two parties, usually based in different jurisdictions, in front of an arbitral tribunal constituted in accordance with the parties' agreement and the applicable law. 'International arbitration' will be used in a broader sense to mean both international commercial arbitration and investor-state arbitration.

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45 While there are great similarities in proceedings, institutional arrangements and social practices between both international and domestic commercial arbitrations, the communities of practitioners, and applicable legal rules do not fully overlap. Still, and while the text will mostly focus on the international commercial arbitration market, most of the conclusions in this text will be applicable *vis-à-vis* domestic commercial arbitration.

46 However, perhaps due to the larger amount of publicly available information, most empirical research on arbitration has dealt with investor-state arbitration.

'Arbitration' will be used even more broadly to incorporate not only cross-border disputes, but also domestic disputes referred to arbitration.

1.4.3 Why focus on the regulation of arbitrators instead of arbitration?

As mentioned in the sections above, the analysis of this thesis focuses on 'arbitrators' – i.e. those who offer their services of dispute resolution specifically to 'commercial' disputes. Instead of focusing on the ethical quandaries and regulatory problems and solutions of arbitration as a whole, which has been the most common approach when discussing international arbitration, this thesis focuses on the actions undertaken by the different market participants within arbitration. Much of the discussion revolves around the market strategies deployed by arbitrators and their effect on the creation and enforcement of ethical and professional norms in this field. Often this discussion is complemented with reference to other types of incentives, such as peer interaction and moral considerations, that shape arbitrators and other market agents' behaviour.

The option to focus on commercial arbitrators instead of arbitration as a whole allows the provision of a coherent narrative on how the regulation of the field emerged and how it operates. As it will be argued, there are peculiarities in arbitration as a service that can be explained by analysing the behaviour and long-term interests of arbitrators as a group. Further, this approach provides insights into the underlying mechanisms that explain perceived successes and drawbacks – such as the perception that costs of arbitrating are rising, and the proceedings are often not efficient – of modern international arbitration. As will be discussed in Chapter VI, different levels of compliance with different kinds of

obligations may be a result of how strong the incentives are for an arbitrator to comply or deviate from a particular obligation.

Further, focusing on international commercial arbitrators allows uncovering interesting questions that are often overlooked when arbitration is discussed as a whole. In particular, it allows to explore the regulation of 'arbitrators' as a professional group – a topic rarely touched upon in the literature. Arbitrators are an interesting sociological category as they do not fit squarely into the definition of a 'profession' from a sociological perspective. A 'profession' is a concept, at least in the Anglo-American context, usually defined as a paid occupation associated with advanced knowledge[47], usually acquired in institutions of advanced learning. Professional status is linked to special power and prestige, and most often organised around professional associations and shaped by a specific culture and professional ethical norms.[48]

By focusing on studying international commercial arbitrators, this thesis will also provide details about how unique this community is as a professional group by referencing the academic literature on the sociology of professions. As will be explored in Chapters III and IV, arbitrators often do not engage in this occupation in a full-time fashion, do not have to pursue mandatory licensing, and are not organised around mandatory arbitral associations or undertake compulsory training. In this sense, being an arbitrator is not a 'profession' by the traditional definition. Exploring the reasons why arbitrators evolved in

47 See Keith M Macdonald, *The Sociology of the Professions* (SAGE Publications 2013) 2.

48 See, for all, Harold L Wilensky, 'The Professionalization of Everyone?' (1964) 70 American journal of sociology 137.The exact definition of what constitutes a profession in sociological terms, however, continues to be debated. For an overview, Saks (n 5).

this way and how this evolution interrelates with the regulation of international arbitrators is also one of the key objectives of this thesis.

The question of how arbitrators are regulated is in itself an interesting question that allows uncovering how an elite 'profession' is regulated outside the more typical methods of a national based legal-centric regulation system. As this thesis will argue, traditional legal regulatory mechanisms of professional oversight take a backseat to reputation amongst peers and market mechanisms in the case of arbitrators. Further, analysing the arbitration market reveals how the mechanics of selecting service providers and price formation deeply affect the regulatory structure providing an interesting contrasting case to other professions, such as auditors and lawyers.

1.4.4 'Professional norms': the numerous obligations that arbitrators must adhere to

This thesis often refers to 'professional norms.' By professional norms, I refer to the regularities of behaviour expected from the members of a profession in the exercise of professional work, or in connection with being a member of the profession. In the context of professional regulation, such norms are at the same time constructed as a way of limiting the exploitation of clients, serving wider public interests, and/or as a way of protecting the integrity and interests of a certain professional community.[49] The professional norms established by the members and the institutions of the profession or by external forces,

[49] See James Fisher, Sally P Gunz and John McCutcheon, 'Private/Public Interest and the Enforcement of a Code of Professional Conduct' (2001) 31 Journal of Business Ethics 191.

such as government bodies or independent regulatory agencies, often assume an ethical dimension by serving as normative reference points for defining acceptable and non-acceptable behaviour.[50]

In the context of this thesis the expression 'professional norms' is often used as a stand-in for the numerous obligations that arbitrators have to comply with. Those initiated in international commercial arbitration are certainly familiar with the outline of such obligations. These include, among others, obligations of impartiality, independence, disclosure of potential conflicts of interest, efficiency, and guaranteeing parties' procedural rights. The content of these norms is discussed in Chapter VI of this thesis. Much of the discussion undertaken in this thesis will relate to how these norms have been developed by different actors and how they are enforced. This thesis refers to this conjunction of norms as 'professional norms' when it intends to refer to them collectively and will refer to the specific principles and norms when appropriate.

1.5 Conceptual framework and methodology

In analysing the regulation of international commercial arbitrators, this thesis starts by focusing on the strategies individually undertaken by arbitrators and other market agents, such as arbitral institutions and counsel, to succeed in the arbitration field. From there, it analyses how the aggregation of the strategies of the different actors in the field – most importantly arbitrators and arbitral institutions but also state legislators, court and

[50] See, Mark S Frankel, 'Professional Codes: Why, How, and with What Impact?' (1989) 8 Journal of Business Ethics 109.

academics which interact with arbitration – shapes the creation and enforcement of norms that regulate the conduct of both individual arbitrators and arbitration proceedings more widely. Accordingly, the regulatory framework is presented as the legal, economic and social forces that together both shape the behaviour of international commercial arbitrators and are the result of the interactions of the different agents within international commercial arbitration.[51]

In this sense, this thesis differs from other works that spotlight the socio-legal aspects of international arbitration. Indeed, the most prominent socio-legal enquiries into arbitration often present the field from a group conflict perspective – often focusing on how competition by different groups inside arbitration has shaped the field.[52] This understanding can be largely attributed to the enquiries undertaken by Dezalay and Garth in the 1990s. Using a Bordesian approach, they presented the evolution of arbitration as a 'struggle' between two generational groups vying for supremacy. It has been a framework that, due to its high originality, compelling argumentation and lack of competing narratives at the time, has been highly influential to this day, shaping many other texts about arbitration.[53]

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51 Noting that the usage of an enlarged notion of regulation has the advantage of showing the importance of the activities of businesses and their professional advisers in shaping regulatory fields, both in terms of policy-making and implementation, see Baldwin, Scott and Hood (n 33) 4.

52 Most notably Dezalay and Garth in Dezalay and Garth (n 19) but also Rogers in her work 'Ethics in International Arbitration' that, in an account considerably echoing Dezalay and Garth's, focus on the transformation from a close-knit community, where it was considered unthinkable to stray from the 'noble duties' of the arbitrator, to a 'ethical no man's land'. Rogers attributes much of these transformation to the entrance of the 'US law firm' into the arbitration arena. Rogers, *Ethics in International Arbitration* (n 22). Also following very closely Dezalay and Garth, see Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators?' (2012) 28 Arbitration International 161.

53 For a critique of Dezalay and Garth's work see Florian Grisel, 'Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession: Grisel' (2017)

This thesis develops a different approach. Instead of concerning itself with how different groups position themselves within international arbitration, it focuses on how incentives lead individual agents to shape the regulatory environment. Although the unit of analysis is still arbitrators as a socio-professional group, the emphasis is on the dialogue between the individual and the structure. This is not necessarily a rebuke of prior work. At times, such as when discussing the evolution of arbitrators into a market, these other narratives are relied upon.[54] However, the focus on individual action found in the remainder of the thesis reflects the different goals of this work. Instead of a description of the field, this thesis is concerned with the underlying grid of incentives that explain observable behaviour, which in my view is better accomplished by looking into the motivations of each agent inside the arbitration market.

To identify which strategies each actor undertakes and how they affect the regulatory environment, this thesis relies heavily on primary and secondary sources, such as statistical data divulged by arbitral institutions and the descriptions made about the field in the literature. It is also informed by my observations of the field during the 5 years I practised as a lawyer and my discussions with arbitrators and other practitioners during the research for this thesis. After establishing that arbitrators operate it a competitive market and showing how each actor tries to succeed in this field, it links this with the regulatory efforts undertaken in the field showing them to be the result of rational adaptions to the particular market structure. The focus will therefore be on piecing together the observations

51 Law & Society Review 790. Also, Ginsburg's alternative account of arbitration as a 'network' should be noted. See Tom Ginsburg, 'The Culture of Arbitration' (2003) 36 The Vanderbilt Journal of Transnational Law 1335.

54 See Chapter II, Section 2.2.

about how the different agents' actions pursue their own goals and how norms are developed and enforced within this field.

In practical terms, it means that this thesis will, for example, when discussing the market strategies undertaken by arbitrators in Chapter III, argue that arbitrators and would-be arbitrators have a strong incentive to participate in many of the communities' initiatives. That idea will then be picked up again in Chapter V when discussing the creation of norms, to argue that there are stronger incentives for participation in self-regulatory spontaneous 'grass-roots' regulatory projects than in other professions and again in Chapter VII when discussing how information regarding compliant and non-compliant members travels within the community. This will establish the groundwork to then discuss in the respective chapters the nature of the mechanisms underpinning norm creation and compliance in this field.

How much the reader will find the argument persuasive will be dependent upon: i) accepting the premise that individual behaviour within the arbitral community is mostly motivated by incentives, be they economic, social or ethical considerations;[55] and ii) finding that the overall narrative presents a coherent account of why arbitrators are organised and regulated in this particular way. In this sense, the account presented gains strength as the reader acknowledges that many of the behaviours and particularities of the

[55] This however does not negate the 'irrationality' of human behaviour that has been noted in extensive literature. See, for all, Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (HarperCollins 2008) and in the context of arbitration Franck and others (n 28). Still, in the context of arbitration, which is a field dominated by elite actors playing high-stakes competitive games, a broad tendency for a preference for self-interest seems reasonable to expect. This will be a topic that will be picked up again at Chapter VII, Section 7.4.

field are not 'accidents', but rather can be explained by referring back to the way in which this market is organised – in particular the way arbitrators are selected and fees defined.

Two further notes are important. First, while this thesis often refers to open-textured concepts such as 'markets', 'efficiency' and 'competition' often found in economic literature, it does not follow a traditional law and economics approach, nor does it adhere to a strict neo-classical construction of markets and market behaviour.[56] Throughout the thesis, the reader will instead be confronted with an understanding of markets and market behaviour as embedded and enmeshed in a complex social world, composed by social relations and institutions.[57] As it will be seen, understanding the behaviour of market agents within arbitration cannot be completely decoupled from normative understandings of what the community defines as acceptable behaviour, tradition and other non-economic institutions.

At the same time, this thesis is also not a sociological enquiry in the traditional sense, nor does it utilise the methods typically associated with empirical sociologic work. It, nevertheless, invites the reader to consider a 'legal pluralist' approach to the question of how arbitrators are regulated.[58] As it will be seen throughout this thesis, legal regulation in this field – and in reality also in many others fields – is only one of the many ways

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56 For a classical law and economics approach to arbitration, see, amongst others, Robert D Cooter, 'The Objectives of Private and Public Judges' (1983) 41 Public Choice 107; William M Landes and Richard A Posner, 'Adjudication as a Private Good' (1979) 8 The Journal of Legal Studies 235.

57 The concept of 'embeddedness' was popularized by Polyani in his classical work The Great Transformation, having since become a key concept in economic sociology. For a discussion, see Gareth Dale, 'Lineages of Embeddedness: On the Antecedents and Successors of a Polanyian Concept' (2011) 70 American Journal of Economics and Sociology 306.

58 Discussing the concept of 'legal pluralism' and with particular relevance for this thesis, the existence of an economic/capitalistic order, see Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2007) 30 Sydney Law Review 375.

behaviour is regulated. A fuller picture emerges when one considers other normative orders. In the particular case of arbitration, informal norms that govern the continuing relationships between members of the community, shared beliefs about acceptable and non-acceptable behaviour and, perhaps most importantly, economic incentives are key to understand the field.

1.6 Structure of the thesis

This thesis is composed of nine chapters. After this first introductory chapter, Chapter II will introduce the reader to how in the 20th century modern international commercial arbitration was formed and how it acquired its main features, such as its autonomy from courts and the finality of its awards. Particular attention will be paid to the idea that a consensus developed around the notion that private arbitrators can be trusted to uphold the integrity and fairness of the arbitration process[59] and therefore minimal court oversight is necessary. From there, I will argue that this legal framework created a potentially profitable 'market' where significant proceeds could be obtained by both arbitrators and law firms. It will be shown that this was an opportunity that was quickly taken advantage of by these actors. This is important as it explains the importance given to economic incentives in the subsequent chapters of this thesis.

Chapter III will detail the main features of the market in international commercial arbitration services. More specifically, this chapter will detail how arbitrators and arbitral

[59] For a more detailed analysis, see Dario Alessi, 'Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability' (2014) 31 Journal of International Arbitration 735.

institutions are selected, how prices are formed, and which strategies are undertaken by these actors to prosper in the market. This chapter will make clear how the specificities of this market have led to an environment where arbitrators and arbitral institutions mostly compete by trying to increase their reputation and visibility. Based on an analysis of the market structure, how arbitrators are selected, and how fees are determined, it will be shown that price is often not a relevant driver of competition in this context. Instead, the dominant strategy for arbitrators involves networking and improving one's standing and reputation within the arbitral community.

Chapter IV will then start linking the particularities of the market described in the previous chapter to the regulation of arbitrators. After briefly contextualising the regulation of arbitrators against the background of the literature about the sociology of professions – especially the extensive literature dedicated to the transformation of 'occupations' into 'professions', this chapter will pay particular attention to how the characteristics of arbitration and the arbitral market have led the regulation of arbitrators to be distinct from that of other professions, such as doctors or lawyers. The key focus will be on why states and/or state-backed institutions have a less detailed regulation of arbitrators compared to these other professions. This will help to explain why in the context of the regulation of arbitrators, understanding markets, the community and other forces outside traditional legal interventions are particularly relevant.

Chapter V will build on the considerations advanced in the previous chapter to discuss how regulatory norms are created in this field. After having established in Chapter IV that states are not able to – or at least have largely decided not to – create detailed rules to oversee arbitrators' behaviour, this chapter will argue that a unique system of norm

creation takes place in regard to international arbitrators. The hypothesis developed and explored in this chapter is that the members of the community individually have a self-interest in helping develop rules of behaviour, leading the community to have *de facto* mechanisms of producing normative content. Sometimes the way the community creates 'norms' is easy to identify, such as when arbitral institutions and association of lawyers produce ethical codes. Other times such role in the creation of norms is subtler, such as the role of the community in developing over time a 'culture of arbitration' – i.e. the shared social norms and expectations shared between those who participate in the arbitration community.[60]

Chapter VI proceeds from the previous chapter to discuss the content of the norms produced. More than a descriptive account of these norms, this chapter will contextualise what kind of issues the arbitral community addresses and how. If in Chapter V it was shown that there are strong incentives for the community to produce 'regulation', the open question is whether such 'regulation' is just a pointless set of initiatives only intended to gather members of the community or instead effectively addresses the most concerning issues within the arbitral community. This chapter will show that compliance with some professional obligations is intrinsically more problematic than with others as incentives for deviation are higher. This chapter will put forward the idea that there seems to be a higher level of self-regulatory interest precisely in these more problematic areas such as conflicts of interests and disclosure duties.

[60] See Ginsburg (n 53) 1337.

Chapter VII will, in turn, dedicate itself to the question of why arbitrators comply with their professional obligations. In doing so this chapter will explore a number of related topics. First, and on the basis of Chapter III, it will show that following these rules is the dominant market strategy adopted by arbitrators, despite the inexistence of clearly defined formal sanctions. It will further explore how the arbitration market and arbitral community pre-selects those who enter the arbitration market and how the characteristics of those selected may contribute to compliance. A key idea here will be that despite arbitration lacking formal licensing or educational requirements, over time it still filters out those not committed to the field. Finally, it will also analyse how the long process of entering into the arbitration community helps members learn and internalise these rules, arguably also contributing to compliance.

Chapter VIII, in turn, will complete the analysis presented in Chapter VII by analysing how certain institutions, namely arbitral institutions, professional associations, national courts, and criminal investigation authorities contribute to the enforcement of these obligations. Again, more than a description of these mechanisms, the goal is to provide an analysis of how these institutions provide incentives for arbitrators to comply and how these interrelate with market and community forces. Significant attention will be paid to how some of these mechanisms, namely civil liability suits and criminal investigations, have more limited usage in the arbitral context. This discussion will show, however, how the actions undertaken by these institutions provide a system of checks that allows recourse when the underlying grid of incentives is insufficient to lead arbitrators to comply with their obligations.

Chapter IX will conclude the thesis by tying in the analysis provided in the previous chapters with the discussions currently being undertaken within the arbitral community. First, it will analyse whether the current transformations in the market – such as the increase in the number and diversity of practitioners – will disrupt the self-regulatory framework in place. From there it will analyse whether 'professionalism' of international arbitrators is to be encouraged. With this aim, it will first analyse which actors could bring such transformations into fruition, analysing the role that could be played in this regard by states, changing parties' preferences, arbitral institutions and the arbitral community itself. From there it will consider not only the arguments for and against such transformations but how such changes would affect the incentives currently leading to the productions and enforcement of professional norms.

CHAPTER II

THE EMERGENCE OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE MODERN ARBITRATOR

This chapter focuses on two significant, and largely still recent, modifications to international commercial arbitration. First, it explores how international arbitration developed into an increasingly technocratic and quasi-judicial system of solving disputes, with arbitrators acting in ways increasingly akin to national judges. Second, it notes how, at the same time, it evolved into a fully-fledged for-profit industry, with different actors developing increasingly complex commercial strategies. This is important as it helps to establish how arbitrators have come to conduct themselves in international commercial arbitration with market goals in mind, and are still expected to play a 'public role'[61] and ensure that the proceedings they preside over respect basic principles of procedural fairness.[62] Both are key premises on which the following chapters will be built upon.

This chapter will start by reviewing the development of international commercial arbitration. It will focus on how an initially reasonably small community of practitioners, spearheaded by the International Chamber of Commerce (ICC), transformed arbitration

61 See Catherine A Rogers, 'The Vocation of the International Arbitrator' (2004) 20 Am. U. Int'l L. Rev. 957, 1016.

62 See Franck, 'The Role of International Arbitrators' (n 3) 505.

into a well-functioning system, capable of producing enforceable awards across borders. It will further explore how this led not only to a dramatic increase in the number of proceedings, but also to the financial gains that could be obtained from providing services in this area. The chapter will then review the transformations that took place in the arbitral 'profession' by establishing how the profile of arbitrators adapted to the changes in arbitration. It will finally provide a short introduction to the main features of the current international commercial arbitration system for those less familiar with the field.

2.1 The development of international commercial arbitration and its transformation into a distinct market

A first step to understand international commercial arbitration, its market and the 'regulation' of arbitrators demands contextualising its deep transformation over the past century. An abridged introduction to the modern history of international arbitration depends on selecting a key number of facts and actors that illustrate the main events leading to the current *status quo*. While any such selection is necessarily incomplete, there are a few actions and trends since the First World War that are paramount to the construction of the system of international commercial arbitration.[63] These include the arbitration reform

[63] While noting that a full historical account of arbitration largely remains unwritten, for a more thorough introduction to the history of arbitration, see Born, *International Commercial Arbitration* (n 4) 7. Also, Roebuck's prolific work should be noted. See, for example, Derek Roebuck and Bruno De Fumichon, *Roman Arbitration* (1st edition, The Arbitration Press 2004); Derek Roebuck, *Early English Arbitration* (The Arbitration Press 2008); Derek Roebuck, *Mediation and Arbitration in the Middle Ages: England 1154 to 1558* (Holo Books The Arbitration Press 2013); Derek Roebuck, *The Golden Age of Arbitration: Dispute Resolution Under Elizabeth I* (First Edition, Holo Books The Arbitration Press 2015); Derek Roebuck, *Arbitration and Mediation in Seventeenth-Century England* (Holo Books The Arbitration Press 2017); Derek Roebuck, Francis Calvert Boorman and

movement in the 1920s, the signing of the New York Convention in 1950s, the approval of pro-arbitration statutes throughout the 1970s and 1980s, and the rapid expansion in the number of cases and service providers since the 1990s. These developments will be presented next.

2.1.1 Arbitration prior to the 20th century: a markedly distinct institution

It is commonplace in texts of international commercial arbitration to note the centuries-old origins of international commercial arbitration.[64] Often it is noted that arbitration predates court litigation, with historical examples dating back to the ancient great civilisations.[65] It is important to note that arbitration in this historical context worked in a markedly different way from what today we think of as arbitration. Importantly, it lacked the 'enforceability' that nowadays is usually associated with international commercial arbitration. Rather, it strived to achieve solutions that could be voluntarily complied with by both parties.[66] It further relied on reputation and the threat of ostracism to persuade parties into compliance with the arbitrator's decision.[67]

Rhiannon Markless, *English Arbitration and Mediation in the Long Eighteenth Century* (Holo Books The Arbitration Press 2019).

64 See, amongst others, Born, *International Commercial Arbitration* (n 4) 6; Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, Juris Publishing, Inc 2014) 51.

65 See J Martin and H Hunter, 'Arbitration Procedure in England: Past, Present and Future' (1985) 1 Arbitration International 82; Andrea M Steingruber, *Consent in International Arbitration* (OUP Oxford 2012) 11; Born, *International Commercial Arbitration* (n 4) 7; Frances Kellor, *American Arbitration: Its History, Functions and Achievements* (Beard Books 1948) 3.

66 Stone Sweet and Grisel (n 41) 39.

67 ibid.

While arbitration was in this sense successful in solving disputes between established traders that due to the nature of their transactions were heavily dependent on their reputation, it was poorly equipped to deal with disputes outside well-connected, closely-knit trading communities. While never extinguished, arbitration was to an extent superseded by court litigation. By the 16th century, national courts had become the typical way of solving disputes, relegating arbitration to a secondary role in most western jurisdictions.[68] For example, in England, by the 19th century national judges, likely motivated by a self-interested desire in increasing their number of commercial cases and consequently the fees received, had determined to have jurisdiction even in the cases for which the parties had determined an arbitration clause.[69]

2.1.2 From the foundation of the ICC to the signing of the Geneva Conventions

The rise of national courts as the dominant system of solving commercial disputes also brought several difficulties that would ultimately allow a re-birth of arbitration. Indeed, national courts proved over time to be inadequate fora for international commercial disputes. Although international private law could, in theory, provide the tools to allow national courts to address international disputes, it often proved incapable of providing

68 ibid; Thomas Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (Cambridge University Press 2015) 27. See also Born, *International Commercial Arbitration* (n 4) 12.

69 Martin and Hunter (n 65) 84. See also Bruce L Benson, 'An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States' (1995) 11 Journal of Law, Economics, & Organization 479, 483.

truly effective dispute resolution.[70] In particular, there were: i) problems with consistently selecting and applying national laws in regard to transnational contracts; ii) inexperience with the problems arising with complex transnational transactions; iii) difficulties with enforcing foreign court judgments; and iv) apprehensions regarding the neutrality of national courts when one of the disputants was a foreign party. These all limited the ability of national courts to address this kind of disputes.[71]

2.1.2.1 The ICC and the transformations undertook at the international level

Against this background, international arbitration began its revival in the aftermath of the First World War.[72] This was a period marked by an internationalist movement looking increasingly into arbitration as a key to solving international disputes.[73] It was also an age of progressively open global commerce, needing newer approaches to dispute resolution. It was also in this context that the International Chamber of Commerce (ICC) emerged. It would prove to be one of the key players in the development of the modern international commercial arbitration system. Founded in 1919 by prominent members of the business communities of Belgium, France, Italy, the United Kingdom, and the United States,[74] the ICC had the goal of facilitating business transactions and strived to be a 'world parliament of business.'[75]

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70 See Stone Sweet and Grisel (n 41) 40.

71 See ibid.

72 See Kellor (n 65) 9; Imre S Szalai, 'Modern Arbitration Values and the First World War' [2007] The American Journal of Legal History 355, 363.

73 See Szalai (n 72) 363.

74 Eric A Schwartz and Yves Derains, *Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law International 2005).

75 Lyman Cromwell White, *International Non-Governmental Organizations: Their Purposes, Methods, and Accomplishments* (Rutgers University Press 1951) 250.

This revival of international arbitration is to an extent indissociable from the role played by the ICC. Soon after its creation, the ICC identified the need to provide a reliable dispute resolution mechanism for international commercial disputes as key to the development of international commerce.[76] With this aim, it established, in 1923, its International Court of Arbitration. This Court, against a fee, organised arbitral proceedings and indicated, when necessary, arbitrators to solve a dispute. While not the first arbitral institution,[77] it rose at one point to be the absolute dominant arbitral institution for international disputes,[78] helping to lead the preference overtime for 'institutionalised' arbitration – i.e. arbitral proceedings organised within an arbitral institution.

Finally, to guarantee that arbitration clauses and arbitral awards would be complied with, the ICC further worked with the League of Nations in the elaboration of the Geneva Protocol of Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[79] By the first Protocol, contracting States agreed to recognise the validity of foreign arbitration agreements and that their tribunals, when facing a dispute covered by the scope of an arbitration clause, would refer the parties to arbitration. By the 1927 Convention, contracting States agreed that arbitral awards should be

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76 See Florian Grisel, 'Treaty-Making between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2017) 28 European Journal of International Law 73, 76; Katherine L Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International 2003) 114.

77 For example, the London Court of Arbitration (LCIA), initially named The City of London Chamber of Arbitration, had its origin in 1892.

78 Richard J Graving, 'The International Commercial Arbitration Institutions: How Good A Job Are They Doing?' (1989) 4 American University International Law Review 319, 330.

79 See Lynch (n 76) 128; Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011) 7.

recognised as binding and be enforced if the award was not contrary to the public policy or to the principles of the law of the country in which it was sought to be relied upon.

2.1.2.2 The transformations at the national level and the changing perception of international arbitration

The transformations of the legal framework did not take place only at the international level. Contemporaneous to the international transformations described above were transformations in domestic arbitration acts that would foster arbitration. The most iconic of these transformations is the passage of the Federal Arbitration Act (FAA), signed into the law by President Coolidge in 1925 and still in force today. In the case of the FAA, the role of the American Bar Association (ABA) and its Committee on Commerce, Trade and Commercial Law should be particularly highlighted, since it prepared the original draft of the bill that Congress enacted into law with only minor amendments.[80]

Also is important to note that the passage of the FAA was fuelled by the strong and well-organised lobbying efforts of the US business community.[81] In this sense, it is possible to identify that this period of development of domestic arbitration in the United States mirrors that of arbitration at the international level. If the international business community, through the ICC, had spearheaded the international legal framework that would support arbitration, American corporate power expressed its support for a new domestic arbitration law through the lobbying efforts of the New York Chamber of

80 Christopher R Drahozal, 'In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act' (2002) 78 Notre Dame Law Review 101, 125.

81 Szalai (n 72) 380; Jérôme Sgard, 'A Tale of Three Cities: The Construction of International Commercial Arbitration' in Gregoire Mallard and Jerome Sgard (eds), *Contractual Knowledge* (Cambridge University Press 2016) 167.

Commerce and the Arbitration Society Association, beyond the aforementioned ABA. Underlying both movements, one could see identification with broader ideals of free enterprise and business 'self-regulation'.[82]

Also, in regard to content, the FAA covered the main issues addressed by the Geneva Protocol of 1923 and the Geneva Convention of 1927. The FAA, following previous legal acts at the state level,[83] established arbitration agreements to be enforceable and irrevocable, [84] where before arbitration agreements were generally considered revocable at will and, therefore, unenforceable in a court of law.[85] It further established arbitral awards to be enforceable, determining only a limited amount of circumstances where parties could seek to have the arbitral award annulled by a judicial court.[86] This was important, as American courts, following English courts' views, traditionally regarded arbitration with hostility.[87] This was an attitude that the passage of the FAA and pro-arbitration statutes at the state level would help change.[88]

Changes could also be observed in other jurisdictions. In England, a movement to modernise commercial dispute resolution had already started in the late 19th century,

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82 Eric George, 'A Historical Reflection on Arbitration and the Corporation as an Object of Economic Governance' 39 Western New England 557, 563.

83 Most notably the 1920 New York Arbitration Act, itself the result of the efforts of a joint committee of the New York State Bar Association and the Chamber of Commerce of the State of New York.

84 See Federal Arbitration Act 1925, §2-4.

85 See Szalai (n 72) 356.

86 See Federal Arbitration Act 1925, §2-4.

87 See Jennifer Schulz, 'Arbitrating Arbitrability: How the U.S. Supreme Court Empowered the Arbitrator at the Expense of the Judge and the Average Joe Comment' (2010) 44 Loyola of Los Angeles Law Review 1269, 1270.

88 Noting, however, that arbitration was well established and growing rapidly, long before these statutes were passed and the respective change in judicial attitudes towards arbitration, see Benson (n 69).

expressed through the approval of the Arbitration Act (1889), the foundation of the London Court of International Arbitration (1892) and the establishment of the Supreme Court's Commercial Court (1895).[89] In the 1920s and 1930s, further changes were established, namely through the Arbitration Clauses (Protocol) Act 1924, which gave effect within England to the Geneva Protocol of 1923 and by the Arbitration (Foreign Awards) Act 1930, which gave effect to the Geneva Convention of 1927. This new background was complemented by a change in attitude by English judges who were increasingly prepared to construe generously the powers and autonomy given to arbitrators.[90]

Also, in France, a similar movement of increased support for arbitration can be observed. Prior to the 20th century, the restrictions imposed by the Napoleonic Code of Civil Procedure of 1806 and by the dominant case-law determined that French nationals who were parties to a domestic contract could not agree to arbitrate future disputes, seriously limited the availability of arbitration for internal disputes.[91] This state of affairs started to change with a legislative act in 1925 which legalised compromissory clauses in certain specified commercial cases, yet again mirroring the transformations that had been brought by the Geneva Protocol of 1923.[92]

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89 See V Veeder and B Dye, 'Lord Bramwell's Arbitration Code 1884-1889' (1992) 8 Arbitration International 329.

90 See G Ellenbogen, 'English Arbitration Practice' (1952) 17 Law and Contemporary Problems 656, 658.

91 Born, *International Commercial Arbitration* (n 4) 39. It should be noted that in regards to international arbitration, French courts' approach had always been more amicable. See on this point Thomas E Carbonneau, 'The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity' 55 Tulante Review 1.

92 See Carbonneau (n 91) footnote 6; Lynden Macassey, 'International Commercial Arbitration - Its Origin, Development and Importance' (1938) 24 American Bar Association Journal 518. See also Born, *International Commercial Arbitration* (n 4) 68.

It is important to note, however, that the changes in commercial arbitration did not affect only the legal or the institutional framework. The interwar period also signalled a profound transformation of the way arbitration as a legal institution was to be perceived. As an American lawyer writing in 1934 explained:

> *"We cannot ignore the fact, for example, that the nature of arbitration has changed in recent years. To the Middle Age merchant, and in fact up to the time of our modern arbitration acts, the process was more or less a friendly method of settlement of disputes. Awards were compromises and arbitrators were agents whose authority in effect was limited to securing a settlement which both sides would willingly accept. To compel "arbitration"' as used in that sense borders on the grotesque. But arbitration as visualized by modern proponents of the movement, arbitration such as results when an entire industry agrees that disputes should be thus settled, arbitration by which one pre-empts his right to secure court disposition of any possible dispute which may thereafter arise between the parties, is no longer a simple agency-compromise, it is a substitute for the courts, termed quasi-judicial by its proponents; which probably means judicial in result, judicial in its nature, non-judicial in its judges."*[93]

By the interwar period, the notion that national courts were poorly equipped to deal with commercial disputes, in particular those of a transnational nature, had gained traction.[94] This led to a revival of a profoundly different arbitration. Arbitration had by the interwar period stopped being an amicable method of dispute resolution between traders akin to conciliation. Instead, it started working as a true alternative to the national court systems, providing awards of true adjudicatory nature. Based on a specific international legal framework, arbitration, albeit dependent on national courts' supervision and sometimes enforcement, was beginning to be shaped as an alternative self-enforcing system, semi-independent of national jurisdictions and national judicial forums.

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93 Philip G Phillips, 'A Lawyer's Approach to Commercial Arbitration' (1934) 44 The Yale Law Journal 31, 35.

94 See George (n 82) 564.

2.1.3. From the New York Convention to the UNCITRAL Model Law and a wave of arbitral reform

Although the interwar period saw an increase in its popularity, the nascent modern international commercial arbitration was still mostly *ad hoc* in nature and used in a small number of enclaves, such as disputes related to international trade of commodities.[95] In these markets, the close-knit nature of the community of traders, which would repeatedly trade amongst themselves, and the strong power of trade associations to blacklist non-complying traders, led parties to voluntarily comply with arbitral decisions.[96] Outside these situations, international commercial arbitration was not so successful. Indeed, the number of cases at the ICC at the time, while noteworthy, were incomparably lower than they would become.[97]

2.1.3.1. The New York Convention as the catalyst for a new era of international arbitration

Part of the difficulties of arbitration at the time related to the obstacles of enforcing foreign arbitral awards in a court of law even in the aftermath of the Geneva Conventions. This derived from the 1927 Geneva Convention, in its article 4(2), determining that a party in

95 Detailing, that, in the pre-war period, the London Corn Trade Association was reported to have handled about 20,000 cases annually, the Incorporated Oil Seed Corporation about 7,000 and the London Jute Association about a 1000, see Morris S Rosenthal, 'Arbitration in the Settlement of International Trade Disputes' (1946) 11 Law and Contemporary Problems 808, 825.

96 Sgard (n 81) 159.

97 From 1923 to 1939 the ICC had reportedly arbitrated a total of slightly over 700 cases. See Rosenthal (n 95) 829.

order to enforce an award abroad, had to supply, inter alia, documentary evidence to prove that the award has become final in the country where it was made.[98] This gave rise to the so-called "double-exequatur" system, as according to the dominant interpretation, it demanded a party to first initiate proceedings at the seat of the arbitration (to obtain a declaration that the award was indeed final) and after at the place of enforcement (to enforce the award and seize assets located in that country). This significantly lengthened the process of enforcing an award.[99]

Reforming this cumbersome system was therefore a priority for the international arbitration advocates. The ICC would play again a paramount role in the next step of advancing the international commercial arbitration agenda: the signing of the New York Convention in 1958 – which would substitute the Geneva Protocol and the Geneva Conventions. Indeed, it was the ICC, under the initiative of its Chairman, who first offered a draft of a new Convention.[100] This draft was then presented to the United Nations Economic and Social Council which in turn presented a modified version to an international conference which was held at the United Nations headquarters.[101]

In summary, the New York Convention covered two main issues. It first placed an obligation upon the courts of contracting states to respect arbitral agreements by determining that a court, when seized of a matter in respect of which the parties have made

98 See Herbert Kronke, 'The Role of Private International Law: UNIDROIT and the Geneva Conventions on Arbitration' in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law* (Nomos Verlagsgesellschaft mbH & Co KG 2019) 191.

99 Grisel (n 76) 77.

100 See Julian DM Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 21.

101 Pieter Sanders, 'The Making of the Convention', *Enforcing arbitration awards under the New York Convention: experience and prospects* (UN 1999) 3.

an arbitration agreement, must, at the request of one of the parties, refer them to arbitration.[102] Second, it determined that contracting states are obligated to recognise arbitral awards as binding and to enforce them, with the parties seeking enforcement of a foreign award needing to supply 'only' the arbitral award and the arbitration agreement.[103] Courts within the contracting states would then only be able to refuse enforcement if one of the limited grounds recognised within the Convention applies.[104]

Unlike the Geneva Conventions, the New York Convention was a resounding success, leading some within the community to simply summarise that '*it works*'.[105] Its success may be attributed to a range of factors. First, as mentioned previously, the elimination of the double exequatur system was a major step towards a pro-enforcement system.[106] Second, the New York Convention was more widely adopted than the Geneva Convention of 1927, having been ratified within its first 30 years of existence by 79 parties.[107] Finally, and equally important, has been the tendency of national courts, across jurisdictions, to interpret the New York Convention relatively uniformly and in a pro-enforcement fashion, leading to arbitration working as a predictable system of solving disputes.[108]

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102 See New York Convention, Article II, para. 3.

103 See New York Convention, Article IV.

104 See New York Convention, Article V.

105 Linda Silberman, 'The New York Convention After Fifty Years: Some Reflections on the Role of National Law' 38 Georgia Journal of International & Comparative Law 25, 26.

106 Emmanuel Gaillard, 'International Arbitration as a Transnational System of Justice' in Albert Jan Van Den Berg (ed), *Arbitration - The Next Fifty Years* (Kluwer Law International 2012) 72.

107 Including the United States and the Soviet Union which had not ratified the Geneva Convention of 1927.

108 See Silberman (n 105) 26.

2.1.3.2. Competition between new national legislations and the birth of the modern arbitral market

While the New York Convention was a key step in allowing the flourishing of arbitration as a dispute resolution mechanism, it only covered a small part of the entire canvas of international arbitration. It was still upon states to define many key issues, including the scope of arbitrability, i.e. the kind of disputes that may be referred arbitration; the extent of court support to arbitration in regards, for example, to taking evidence; and the powers of the arbitral tribunal, in regards for example, to decree provisional measures. The next transformation of the system of international arbitration would therefore take place at the national legislation level, addressing many of these issues in a pro-arbitration fashion.

Two movements should be noted. First, at the international level, the creation of the UNCITRAL Model Law. This initiative by UNCITRAL, a part of the United Nations family, was designed to assist States in reforming and modernising their laws of arbitration. This was at a time where many jurisdictions still held what was considered outdated and fragmentary legislation as relevant issues were not addressed.[109] The Model Law was intended to help solve these issues, presenting itself as a 'modern' pro-arbitration legislation template to be adopted with or without modifications by members states. In doing so, the goal was to harmonise practices between different jurisdictions, as significant differences between local legislations were perceived to hinder a predictable system of arbitral international.[110]

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109 See Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration, para. 6. See, also, Gerold Herrmann, 'UNCITRAL's Work Towards a Model Law on International Commercial Arbitration' (1984) 4 Pace Law Review 537, 543.

110 See ibid.

The second movement to be noted was a string of arbitration laws supporting generally pro-arbitration solutions.[111] The late 1970s and the 1980s would witness, amongst others, new acts in England and Wales (1979); France (1981); Italy (1983); the Netherlands (1986); the Federal Republic of Germany (1986); and Switzerland (1988). This drive, whose start predated the Model Law, illustrated an increased tendency of states to present themselves as arbitration 'friendly' jurisdictions in a bid to attract arbitral proceedings.[112] These inaugurated a legislative movement that has continued to this day, by which numerous jurisdictions would cyclically approve revised arbitral statutes, many of which inspired in the Model Law, that would incorporate increasingly 'modern' and 'pro-arbitration' features.[113]

But again, transformations were not only again legal or institutional. Attitudes towards this legal institution also changed. The 1980s saw international arbitration develop into a fully-fledged service industry with the opportunity to obtain large sums of money now available to all service providers in this market. Michael Mustill, a well-known English judge and arbitrator at the time, encapsulated the new perspective on arbitration, writing in 1989:

> "*[A]rbitration is now a service industry, and a very profitable one at that. The arbitral institution, the arbitrators, the lawyers, the expert witnesses and the providers of ancillary services all charge fees on a scale which would quite literally have been inconceivable thirty years ago. Hotel bills alone may now surpass what would then have been the entire cost of an arbitration. Of course, in one sense there is nothing wrong with charging*

111 See Alessandra Casella, 'On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration' (1996) 40 European Economic Review 155, 160.

112 See Steven J Stein and Daniel R Wotman, 'International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules' (1983) 38 The Business Lawyer 1685, 1686.

113 See Christopher R Drahozal, 'Regulatory Competition and the Location of International Arbitration Proceedings' (2004) 24 International Review of Law and Economics 371.

> *what the market will stand. But in another, the recognition that this is what those concerned are doing demonstrates how far commercial arbitration has come from its former roots*."[114]

By the 1980s, arbitration was indeed notably a distinct institution. With an international and national legal framework that heavily facilitated the usage and enforcement of arbitral proceedings, all pieces were in place for a burst in the number of arbitral proceedings. The explosion in the number of cases[115] made arbitration at the same time more judicial-like and business-like, leading to changes in the approach of the different players in the field. The big Anglo-American law firms entered the field, partly leading to the importation of the adversarial stance dominant in common law litigation.[116] Arbitrators relied increasingly on a technocratic and legalistic approach in their decision-making [117] and arbitral institutions, in a landscape still dominated by the ICC, professionalised and expanded their activities.[118]

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114 Michael John Mustill, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration 43.

115 The caseload from ICC offers a good benchmark of the spectacular rise in the number of cases. From 1922 to 1976 the ICC had roughly 3.000 cases filled. From 1977 to 1988 another 3000 cases were filled. Jacques Werner, 'International Commercial Arbitrators: From Merchant to Academic to Skilled Professional Focus on International ADR' (1997) 4 Dispute Resolution Magazine 22.

116 See Dezalay and Garth (n 22) 48; Elena V Helmer, 'International Commercial Arbitration: Americanized, Civilized, or Harmonized' (2003) 19 Ohio State Journal on Dispute Resolution 35.

117 See Dezalay and Garth (n 22) 34.

118 This was notably the case of the London Court of Arbitration, which after some earlier success, had by the 1950s became "*essentially a prostrated institution with an almost empty docket*". Sgard (n 81) 166. It remerged, fully reformed, in the 1980s with a new name (London Court of International Arbitration), eventually rising to be a key player in the international arbitration market.

2.1.4. Arbitration from the onwards 1990s: the explosion of cases and the moves east and south

If the 1980s had seen all the institutional finally in place, the 1990s and the first decade of the 21st Century would witness an explosion in the number of arbitrations taking place around the world. By this time international commercial arbitration had transformed into an undisputed major legal market, representing a relevant source of income for law firms, senior lawyers, and arbitrators, representing a key opportunity for these service providers to 'internationalise' their services. Starting in the 1990s, further changes would accelerate this movement, as arbitration would gain prominence and globalise to previously unexplored markets and become the dominant method of solving international (and many domestic) disputes.

The first change to be noted was the spectacular rise of international investment arbitration in the 1990s. If until the early 1990s investment arbitration was a discreet and somewhat exotic sub-branch of international public law, mostly relegated to academic discussions, it would rapidly thrive in that decade and the first decade of the 21st Century. Following the growing international investment and the increasing number of bilateral investment treaties providing for arbitration, a wave of international disputes between investors and most often developing states would develop.[119] This would give rise to another profitable legal market. This space was quickly occupied by many of the same key law firms, senior lawyers and the arbitrators that populated commercial arbitration, giving

[119] From the 1950s to 1989 there was a single investor-state dispute settlement arbitration case. From 1990 to 2007 there were 291. See UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance', p. 121.

firms and arbitrators a new source of work that would allow the sizeable practices typical today.[120]

Equally important in the globalisation of arbitration was the contemporary movement of arbitration expansion outside its traditional venues. If by the 1980s arbitration was still much 'western' dominated, in the 1990s and subsequent decades, arbitration would expand from its traditional capitals of Paris, Genève, and London to new hubs worldwide, namely in Asia.[121] Hong Kong and Singapore, in particular, emerged as key arbitral seats. Helped by local governments interested in fostering a dispute resolution 'industry' in those jurisdictions, local institutions such as the Hong Kong International Arbitration Court ('HKIAC') and the Singapore International Arbitration Court ('SIAC') would become leading institutions.[122] Around these institutions, law practices, often branches of British and American international law firms, flourished.

At the same time, emergent new markets also provided increased demand and developed their own approaches to arbitration.[123] China, for example, took its first steps to enter the global international arbitration community by joining the New York Convention in 1986 and passing a domestic arbitral law in 1994. While maintaining many peculiarities

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120 See Charles N Brower, 'W(h)Ither International Commercial Arbitration?: The Goff Lecture 2007' (2008) 24 Arbitration International 181, 191.

121 Neil Kaplan, writing in 1996, describes how "*a mere 15 years ago, Hong Kong would never have been thought of, let alone mentioned, in the context of international arbitration*." The author further indicates that the members of the Hong Kong Branch of The Chartered Institute of Arbitrators numbered less than 50; by the mid 1990's they numbered in the region of 1,100. Neil Kaplan, 'The History and Development of Arbitration in Hong Kong Symposium: Financial Law in Hong Kong and South-East Asia' (1996) 1 Yearbook of International Financial and Economic Law 203.

122 In 1990 HKIAC had been established for five years and its docket consisted of 54 cases. See Brower (n 120) 181. In 2018, a total of 521 cases were submitted to HKIAC

123 See Fernando Dias Simões, 'A Dispute Resolution Center for the Brics?' in Rostam J Neuwirth, Alexandr Svetlicinii and Denis De Castro Halis (eds), *The BRICS-Lawyers' Guide to Global Cooperation* (Cambridge University Press 2017).

when compared to what was international practice,[124] Chinese parties would increasingly use arbitration, becoming a key source of work for the new arbitration centres in Hong Kong and Singapore. Brazil, where until the late 1990s arbitration was virtually inexistent, would, following an arbitration law in 1996 and a 2001 Supreme Federal Court decision upholding the constitutionality of arbitration, saw arbitration thrive against the background of an often inadequate judicial system.[125] India would also inaugurate in 1996, through the passage of its new arbitration law, a slow process for arbitral reform and development.[126]

Arbitration would therefore become globalised in the 2000s. From North America to sub-Saharan Africa, arbitration started being used as the dispute mechanism for most major international transactions and many domestic disputes. This was also, however, a time of backlash. The increasing 'judicialisation' of arbitration – i.e. an increasingly formalistic and legalistic approach taken by arbitral tribunals instead of a more 'amicable' approach once-dominant – had some concerned.[127] Complaints about the rising costs and slowness of arbitral proceedings, potentially underlying discriminatory attitudes in regards

124 Most notably there are severe limitations on Chinese parties to have recourse to international forums in domestic disputes. For an overview see Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Hart Publishing 2013) 26.

125 For an overview of the evolution of arbitration in Brazil, see Joaquim T de Paiva Muniz and Ana Tereza Palhares Basílio, *Arbitration Law of Brazil: Practice and Procedure* (Juris Publishing, Inc 2006) 3.

126 See Sumeet Kachwaha, 'The Arbitration Law of India: A Critical Analysis' (2005) 1 Asian Int'l Arb. J. 105.

127 See, for example, Lucy Greenwood, 'The Rise, Fall and Rise of International Arbitration: A View from 2030' (2011) 77 Arbitration 435.

to arbitral nominations and the inadequacy of arbitration to solve issues outside strictly commercial matters, were increasingly being noted.[128]

Still, by the 2010s arbitration was beating all-time highs with many predicting arbitration to continue dominating international dispute resolution.[129] It had become a fully mature market, filled with a thriving community of practitioners and academics. It also became a new environment where arbitral institutions would more aggressively pursue marketing strategies and enter new territories, law firms' arbitral teams would increase in size, and states would ever quickly reform arbitral laws. Arbitrators would also evolve and become significantly distinct from the arbitrators of 100 years before. How the transformation from the traditional figure of the arbitrator into the modern practitioner will be analysed next.

2.2 The evolution of the arbitral profession from a socio-legal perspective

Parallel to the evolution of international arbitration described above, there were profound transformations of the role and characteristics of the arbitrator. As arbitration evolved from an amicable system into an increasingly major legal market where players act increasingly as entrepreneurs, arbitrators also adapted. Indeed, arbitrators evolved from merchants to legal experts to legal entrepreneurs, adapting their approach to the changing expectations

128 See Michael McIlwrath and Roland Schroeder, 'Transparency In International Arbitration: What Are Arbitrators And Institutions Afraid Of?' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010)* (Brill | Nijhoff 2011) 334.

129 See Jean E Kalicki and Mohamed Abdel Raouf (eds), 'Personal Reflections from Leading Arbitrators: Transcript of Luncheon Panelists' Remarks', *Evolution and Adaptation: The Future of International Arbitration* (Kluwer Law International 2019) 163.

of parties. All these happened without, in most circumstances, fully professionalising into a full-time occupation. At the same time, the 'profession' grew and became more open and competitive. These transformations will be explored next.

2.2.1 The traditional vision of the 'arbitrator': an 'honorary appointment' of a 'merchant'

Up until the transformations undertaken in the 1950s arbitrators were deeply distinct from arbitrators today. Indeed, by the turn of the 19th to 20th-century arbitrators were most often still 'merchants' themselves, in the sense that arbitrators were recruited amongst those within the industries where the dispute took place. In London's commodities associations, where arbitration was widely used to solve international commercial disputes, 'arbitrators' were most often participants in the same trade association as the disputing parties.[130] In continental Europe, during the first couple of decades of the ICC, engineers, businessmen, corporate executives and members of trade federations were a considerable percentage of the arbitral appointments within this institution – a profile that would quickly transform.[131]

In the arbitration environment dominant at the time, arbitrators were expected to solve disputes in a way that was acceptable to both parties – i.e. there was a preference for a 'consensual' approach to arbitration. In this sense, persuasion, industry knowledge and status in relation to the disputing parties were key attributes for the arbitrators. 'Trust' was

130 For an overview of arbitration at the English trade associations see Sgard (n 81) 157.

131 For a detailed description of these changes, see Eduardo Silva Romero, Emmanuel Jolivet and Florian Grisel, 'Aux origines de l'arbitrage commercial contemporain : l'émergence de l'arbitrage CCI (1920-1958)' (2016) 2016 Revue de l'arbitrage 403.

a key factor in the selection of arbitrators. Conversely, a technically advanced approach to the law was at the time perceived as unnecessary[132] even counterproductive. This was a time when arbitrators often decided disputes in accordance with the trade usages, i.e. the practices and expectations within a certain industry, and equity.[133] Arbitrators were expected to decide cases as 'businessmen', not bound by state legal norms.

This was also a time where an arbitrator's appointment was often not paid. As indicated in the 1922 ICC Arbitration rules, while the arbitrators were "*entitled to reimbursement of all expenses*", they should "*render their services gratuitously*" except for those industries and countries where customarily provided for arbitrators, in which the ICC Court could determine at its discretion to allow arbitrators' fees to be included in the costs of arbitration.[134] This trend of gratuity in arbitrators' performance derived from the belief that the 'honorific' nature of an appointment was sufficiently rewarding.[135] This approach to arbitrators' pay would however also quickly change, with the 1934 rules already establishing the power of the ICC Court to fix arbitrators' fees.[136]

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132 In the context of US domestic commercial arbitration, in the early 1950s, a survey by the AAA showed that only 21% of commercial arbitrators were lawyers. Sylvain Gotshal, 'Aribitration and the Lawyer's Place in the Business Community' (1956) 11 The Business Lawyer 52, 57.

133 See Stone Sweet and Grisel (n 41) 56. See also Romero, Jolivet and Grisel (n 131) 412.

134 See Rules of Procedure for Arbitration of the International Chamber of Commerce of 1922, Article XIX, e).

135 See Stone Sweet and Grisel (n 41) 91.

136 See ibid.

2.2.2 International Commercial Arbitrators from the 1950s to the 1970s: the 'grand old men'

From the 1950s to the 1970s, as the New York Convention inaugurated a new era of international commercial arbitration, the characteristics of international commercial arbitrators were already clearly distinct. It should be noted that the particular sociological makeup of the arbitral community at this time has become well-known due to Dezalay and Garth's seminal work *Dealing in Virtue*.[137] The authors provided an account of how an earlier generation of 'Grand Old Men' was partially displaced in the 1980s and 1990s by a new generation of arbitration 'technocrats.' According to this narrative, such transformations in the social make-up of arbitrators was due to the transformations taking place in the arbitration field itself, namely its increasingly technical complexity.

This account described how arbitration from the 1950s to 1970s was dominated by 'Grand Old Men' – i.e. a group of mostly Western men who had risen to the top of their national legal professions, but who had not specialised in the field of arbitration. These men (there were virtually no women) relied on their accomplishments outside arbitration as a platform to enter the restricted group of people considered for the role of arbitrators. They were, primarily, a small number of great professors or more rarely high judges of Continental Europe and, more rarely, senior barristers, Queen's Counsels (QCs), and partners at law firms from the Anglo-American system.[138] It has been noted, however, that

137 Dezalay and Garth (n 22). See also, Yves Dezalay and Bryant G Garth, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes' (1995) 29 Law & Society Review 27.

138 Dezalay and Garth (n 22) 35.

arbitral appointments in ICC, in reality, often favoured those with strong transnational profiles though they were not necessarily leading figures within their jurisdictions.[139]

Independently of the best description of the background of arbitrators at the time, it is clear that by this time knowledge and a career in law were almost indispensable to accede the small circle of arbitrators surrounding the ICC.[140] Albeit not necessarily lawyers or law professors, almost all key arbitrators had a degree and knowledge in law.[141] Still, a technocratic legal approach was not often undertaken. Many disputes were solved without delving into the particularities of national laws, often resorting to reasoning following, sometimes loosely defined, transnational legal rules and principles, encompassed under the term *lex mercatoria*.[142] The informal setting, small number of arbitrators, and close relationships inspired an environment where many decisions were compromise-oriented exercises between the panels.[143]

It should be noted that by this time arbitral appointments were already paid. In ICC arbitrations, by 1950 arbitrators were expected to receive around 1% of the amount in dispute.[144] From 1955, ICC would start publishing schedules of fees that would indicate percentages bands of how much arbitrators' fees would amount to, a practice that many of

139 For a detailed analysis of ICC arbitral appointments at the time, see Grisel (n 53).

140 This was, however, not necessarily the case in more specialized sub-sets of domestic arbitration. Flood and Caiger present an interesting socio-legal account of the competition between lawyers and non-lawyers in the field of construction arbitration occurring in the early 1990s. See John Flood and Andrew Caiger, 'Lawyers and Arbitration: The Juridification of Construction Disputes' (1993) 56 The Modern Law Review 412.

141 See Grisel (n 53) 799.

142 Catherine A Rogers, 'Transparency in International Commercial Arbitration' (2006) 54 Kansas Law Review 1301; Dezalay and Garth (n 22) 89.

143 Rogers, 'Transparency in International Commercial Arbitration' (n 142).

144 See Stone Sweet and Grisel (n 41) 91.

the other major arbitral institutions would emulate. These men often treated being an arbitrator not as an entrepreneurial venture but more as a part-time duty derived from their accomplishments in the legal career.[145] Entrance into the arbitral club was, however, still mostly in the hands of a small number of men that frequented closed circles around the ICC and the main European arbitral capitals.

2.2.3 International Commercial Arbitrators from the 1980s to the late 1990s: the 'technocrats'

By the 1980s and 1990s, the make-up of international commercial arbitrators had already changed again. By this time, a younger generation which had become specialised in the field of international arbitration, often through experiences at international law firms or within arbitral institutions, took over the elite position within arbitration.[146] This younger generation relied on its technical expertise regarding an increasingly complex body of rules applicable to international arbitration to climb to the top of the arbitral world. The more 'judicial-like' approach to decision-making resulted in more meticulously reasoned awards

145 As Glossner stated in 1982, channelling the dominant view at the time: "*To be an arbitrator is to exercise an honourable function. It is no profession […]. To be an arbitrator is a noble task which challenges the whole personality*." Ottarndt Glossner, 'Sociological Aspects of International Commercial Arbitration' (1982) 10 International Business Lawyer 311, 311.

146 Dezalay and Garth (n 22) 37.

expressly based on the law selected by the parties,[147] a requirement of increasingly sophisticated and highly advised commercial entities.[148]

The preference for arbitrators with more specialised knowledge in international arbitration should also be understood in the context of a more adversarial attitude in international arbitration. As the large Anglo-American law firms started entering the market, it was increasingly common to see parties willing to challenge arbitrators and awards.[149] At the same time they also imported antagonistic approaches previously reserved to court ligation.[150] As the number of cases increased and parties were increasingly willing to resist enforcement (albeit most often unsuccessfully) through recourse to national courts, it became more and more important for arbitrators to be aware of and engage with arbitral practice and technicalities so as to produce enforceable awards.

At the same time, it should be noted that potential gains from acting as an arbitrator were also on the rise. As the 1980s and 1990s progressed, very large arbitral cases became more common. As the amount in dispute is strongly correlated with arbitrators' fees, an appointment for these cases could amount to very significant gains for those selected.[151] In

147 Still, it should be noted that in arbitration circles it is often emphasised the idea that arbitrators are often better prepared to take in consideration the particularities of the dispute and the disputing parties and the practical consequences of a solution vis-à-vis national judges. See, Paulsson, *The Idea of Arbitration* (n 20) 8.

148 Rogers, 'Transparency in International Commercial Arbitration' (n 142).

149 See Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'real Danger' Test* (Kluwer Law International 2009) 252.

150 See Helmer (n 116) 46.

151 Showing the sharp contrast, Austrian arbitrator Werner Melis reminisces how in the early 1960s, in the beginning of his career as an arbitrator, the fees received from his first ICC case as an arbitrator were only enough to "*invite a friend to a good fish restaurant in Paris for dinner*". See Werner Melis, 'The Role of Individuals in International Arbitration' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Wolters Kluwer 2017) 226.

this context, it was clear both an increase in the level of specialisation of international arbitrators and a more aggressive pursuit of appointments.[152] Also, the increased number of cases gave rise to an increased pool of arbitrators and would-be arbitrators.[153] Still, the dominance of Western, old, white, male arbitrators was an oft-noted characteristic, contributing for a still 'homogeneous' group of elite members.[154]

2.2.4 International Commercial Arbitrators from the 2000s onwards: the 'corporatisation' of arbitrators

In the 2000s, the ever-increasing usage of international commercial arbitration accelerated transformations in the characteristics of international arbitrators. As the number of arbitral centres increased, the arbitral community metastasised into different regional communities, not only around the traditional European 'arbitral capitals', but also in the burgeoning Asian arbitral capitals, namely Hong Kong and Singapore. Different regional communities emerged establishing their own networks, where members interacted mostly with members of the same community. Arbitrators started to specialise not only in arbitration generally but to focus their practice along national and regional lines or in subsets of arbitral disputes.

This is, therefore, a growing market with an increased number of participants. Albeit still often described as a 'close shop,'[155] the number of arbitrators and arbitration

152 See Catherine A Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2005) 41 Stanford Journal of International Law 53, 64.

153 See ibid 62; Franck, 'The Role of International Arbitrators' (n 3) 519.

154 See Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 North Caroline Law Review 75.

155 See, for example, Rogers, 'The Vocation of the International Arbitrator' (n 61) 967.

practitioners had in many jurisdictions, and certainly at many of the arbitration 'capitals,' grown beyond the point where members of this community personally knew each other. An interesting development around this time was the appearance of new ways of establishing and communicating hierarchies. With the expansion of the market, service providers who rate, advertise and inform about arbitrators, often compiling lists indicating the most preeminent and in-demand arbitrators and arbitral practices, appeared and increased in visibility,[156] allowing insiders and outsiders a handy summary of those most distinguished within each particular jurisdiction.

At the same time, a select few arbitrators became true international providers, with some of the most accomplished arbitrators becoming true 'brands', providing services across multiple jurisdictions and in different types of arbitrations. Also around this time, discussions about arbitrators practice of delegating tasks to staff, including the preparation of hearings, issuing procedural orders, and even writing awards, became more prominent.[157] The acceptability of such practices became hotly debated,[158] as it became clear that at least some arbitrators played an increasingly 'managerial' role, delegating many tasks in increasingly larger support teams.[159]

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156 Examples of such publications include Chambers and Partners, Who's Who Legal (WWL) and Legal 500 that produce international rankings for the legal industry and have had started organizing specialized rankings for arbitration. Also, the GAR 100, started in 2008, and specializing in ranking law firms arbitration capabilities is worth noting.

157 Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (Oxford University Press 2015) 404–405.

158 A particular point of contention is the role to be played by arbitral secretaries (usually junior lawyers which assist the arbitral tribunal in the performance of their arbitral mandates) For a discussion, see Constantine Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 Arbitration International 147.

159 As Schultz and Kovacs concluded from a survey of lawyers and arbitrators engaged in international arbitration: "*Sixty-five per cent of participants responded that they did not mind if an arbitrator*

As some have argued, international commercial arbitration could be witnessing the rise of a third generation of arbitrators,[160] where arbitrators act increasingly as heads of structures that heavily support their work and career development. Indeed, such structures not only help arbitrators provide services but also accomplish tasks that allow them to obtain visibility in the market, namely through writing and participation in community gatherings. While any definitive trends are still not fully clear, it may be possible to anticipate that arbitration services are moving to develop some primitive corporate features, where services, while still very linked to a specific person, are in reality supplied by increasingly complex structures.

A parallel, more recent phenomenon is a tendency from some leading arbitrators to establish small or medium-sized arbitration boutiques upon leaving or retiring from larger law firms.[161] While several different factors may contribute to this tendency, increasingly strict rules[162] regarding conflicts of interests, which leads to many of the partners of large law firms being barred from accepting arbitral appointments, is likely to be one of the most relevant factors.[163] Still, even these arbitrators rarely fully professionalised into full-time

delegated the arbitrator's preparation for hearings, issuing procedural orders and even writing the award. Brutally simplified, this seems to be an indication that arbitrators are seen as managers today, only responsible for the product, with no mandate to do the work themselves." Schultz and Kovacs (n 52) 171.

160 Schultz and Kovacs (n 52).

161 For example, out of 25 'elite' arbitrators identified in the Who's Who 2016 survey, a professional directorate listing most in demand arbitrators, 14 operated as either independent arbitrators or within small to medium-sized law offices.

162 See, for example, IBA's 2014 Guidelines on Conflicts of Interest in International Arbitration.

163 Also, the per hour potential earnings as counsel in a leading international law firm often outstrips the per hour earnings as an international arbitrator. This leads these firms to often their partners to focus in working as counsel as this proves to be more profitable for the firm. Gerald Aksen, 'Taming the Twin Dragons of International Arbitration: Cost and Delay' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Wolters Kluwer 2017) 3.

arbitrators, as most of these boutique firms serve as platforms for their partners to act not only as arbitrators but also counsel specialising in arbitration. Arbitrators therefore still retained their hybrid nature of arbitral providers – often operating at the same time as lawyers, academics and arbitrators.[164]

Still, even as arbitration became more market-driven, arbitrators did not see themselves as profit-seeking entrepreneurs who provide a service against payment of a sum. Instead, arbitrators increasingly perceive themselves as quasi-judicial neutral adjudicators with special obligations to uphold a public role and an important public function. The fulfilment of this role is an essential assumption of the legitimacy of international arbitration as a whole and of each arbitrator taken individually.[165] The tension between the notion that arbitrators are private market actors and that at the same time they have public obligations and how this is resolved without typical regulation will be a key theme of this thesis. Before advancing to this topic it will be important to introduce the reader to the key features of modern international arbitration.

2.3. The main features of international commercial arbitration today

A full description of the legal workings of international commercial arbitration is a herculean task, having led to several major extensive works.[166] Indeed, international

164 See Grisel (n 53) 813.

165 See, Franck, 'The Role of International Arbitrators' (n 3) 504.

166 See, e.g., Philippe Fouchard and others, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999); Born, *International Commercial Arbitration* (n 4); Lew, Mistelis and Kröll (n 100).

arbitration is today subject to a complex and intertwined set of international and domestic legal norms and contractual arrangements. A full review of the intricate set of possible applicable national laws, international conventions, and arbitral institutions' regulations for the different phases of the arbitration proceeding, or a detailed account of the competing interpretations of many of the legal provisions applicable, is well outside the scope of this thesis. Still, a perfunctory grasp of the applicable legal framework is necessary to fully understand some of the particularities of the 'regulation' of arbitrators. With this goal in mind, a short summary of the key main features of international commercial arbitration, intended for the 'uninitiated', is presented below.

2.3.1 A 'voluntary' dispute resolution system that is 'the only game in town'

In the context of commercial arbitration, for an arbitral tribunal to have powers to decide a certain dispute, parties must have agreed on arbitration as the dispute settlement mechanism for their disputes.[167] The legitimacy of the arbitral tribunal arises from a contractual link established between two or more parties to submit future or present disputes to an arbitral tribunal – i.e. an arbitration agreement. While in other fields of arbitration, such as sports arbitration and consumer arbitration, the jurisdiction of an arbitral tribunal has been increasingly been mandatorily imposed,[168] within 'commercial'

167 See Lew, Mistelis and Kröll (n 100) 141.

168 And also, especially in the US, increasingly controversial. See Jean R Sternlight, 'Creeping Mandatory Arbitration: Is It Just' (2004) 57 Stanford Law Review 1631.

arbitration parties voluntarily submitting their disputes to arbitral tribunals is still, typically, the only source of attributing jurisdiction to arbitral tribunals.[169]

Through this contractual link, as understood today, parties establish a positive non-revocable obligation to participate in good faith in an adjudicatory procedure that will finally resolve their disputes and a mirror image comparable negative obligation forbidding litigation of such matters in the national courts' systems.[170] Further, the parties assume the responsibility to remunerate the arbitrators and, if applicable, the arbitral institution. The larger the number of contracts with arbitration clauses, the more potential work arbitrators and lawyers specialising in arbitration may receive in the future. As expected, arbitral institutions, specialised lawyers and arbitrators themselves spend considerable time looking to expand the popularity of arbitration, often publicising its advantages.

Commercial arbitration is therefore foremost in 'competition' with the different national court systems.[171] To subsist as a successful system, international arbitration needs to offer – or at least to be perceived as offering – advantages over recourse to a national court for at least a cross-section of disputes. Several advantages are usually advanced by

169 Although commercial arbitration typically rests in the idea of a consent expressed by an express agreement, arbitral proceedings can be extended to non-signatories, either by relying on the concept of 'implied consent' or 'disregard of corporate personality'. For an overview, see William W Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' (2011) 2 Kölner Schrift zum Wirtschaftsrecht 198.

170 Born, *International Arbitration* (n 36) 58–67.

171 As some have argued, the competitive position of international commercial arbitration as an alternative to litigation in state courts is considerably privileged when compared to litigating international disputes in national courts. Indeed, in an international setting, court judgements lack a global system of enforcement akin to the New York Convention. In this context, international commercial arbitration has, in Paulsson's words, often a 'captive market.' Paulsson, *The Idea of Arbitration* (n 20) 176. The recent Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters should, however, be noted. As of the writing of this thesis this convention was, however, not in force, being unclear to what extent it would make national courts a competitive alternative to international arbitration.

arbitration proponents including the easier enforcement of arbitral awards across borders, arbitrators' expertise, the confidentiality of proceedings, lower costs, speediness, and flexibility.[172] The easier enforcement of arbitral awards in comparison with judicial decisions across borders, due to the effect of the New York Convention, is a particular in-built advantage in the context of international dispute resolution. In turn, the advantages in speed, cost and, to an extent, neutrality, seem to be more contextual, being dependent on the specific characteristics of the dispute, the concerned arbitral tribunal and arbitral institutions and the judicial system the comparison is being established to.[173]

It is important to note that the competition between arbitration and court litigation is not a two-way rivalry between two separate systems which vie for supremacy.[174] National court systems largely do not operate in accordance with market logics and are not necessarily interested in expanding the number of cases they administer.[175] Therefore, in most circumstances, they will not perceive arbitral tribunals as competitors.[176] Indeed, a well-functioning arbitral system is dependent on the cooperation of national courts in many areas, ranging from the obligation to refuse to establish their jurisdiction over disputes

172 See Franck, 'The Role of International Arbitrators' (n 3) 500.

173 See Casella (n 111) 162.

174 Noting, however, instances of states and states courts competing with arbitration to at least prevent a mass exodus of cases from the state court dockets, see Erin O'Hara O'Connor and Peter B Rutledge, 'Arbitration, the Law Market, and the Law of Lawyering' (2014) 38 Unlocking the Law: Building on the Work of Professor Larry E. Ribstein 87, 90.

175 On the contrary, support of national courts of arbitration may be attributed partially to the practical consideration of courts having heavily loaded calendars themselves. See Pieter Sanders, *Quo Vadis Arbitration?:Sixty Years of Arbitration Practice* (Kluwer Law International BV 1999) 18.

176 Martin and Hunter commented in 1987 that albeit in a distant past judges and arbitrators could be seen as competitors: "*realism now prevails and arbitrators and judges no longer compete for business*." J Martin and H Hunter, 'Judicial Assistance for the Arbitrator' in Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Springer Netherlands 1987) 195.

covered by arbitral agreements to providing assistance in the enforcement of arbitral decisions.[177]

It is important to note that commercial arbitration is mostly geared to deal with sizeable disputes.[178] Commercial arbitration has been largely uninterested in expanding to everyday dispute resolution, where in its current form it has difficulties in out-competing national courts. This is especially true regarding small domestic commercial disputes.[179] The public financing of state courts, the transaction costs associated with pre-establishing arbitration clauses, and the costs of arbitral tribunals and lawyers prepared to deal with arbitration make voluntary commercial arbitration generally a poor option for small-value disputes, except where there is a significant concern with cross-border enforceability. Well-aware of these limitations, major arbitration institutions and practitioners usually do not present commercial arbitration as the 'default' mechanism of dispute resolution outside international transactions and large/complex domestic disputes.[180]

177 For an overview see Martin and Hunter (n 176).

178 See Casella (n 111) 158.

179 In this sense, the usage of domestic arbitration is very much correlated to the specific conditions of the national judicial courts in that particular jurisdiction. Higher congestion, costs and length of proceedings in the national courts are naturally more likely to make domestic arbitration a more appealing option. See ibid 162.

180 As an example, ICC Statistical Report for 2015 indicates the average value of the disputes referred to the ICC to be USD 84 million.

2.3.2 Parties have a large degree of control regarding how their dispute will be solved

Another particularity of arbitration, often presented as one of its advantages, is the level of control the parties have regarding the way their proceedings will be conducted and their power to decide the legislative framework that will govern their proceedings. On a more straightforward level, parties can define the procedural rules that will apply to their proceedings either by agreeing to a set of customised rules or, much more commonly, by referring to a pre-established set of rules. Further, parties can decide broader aspects including: i) the seat of the arbitration – i.e. the jurisdiction whose national law governs the arbitral proceeding; ii) the institutional arbitration (if any) organising their proceedings; and iii) particularly important for this thesis, select their arbitrators.

The parties' freedom, under most jurisdictions, to select the seat of arbitration they wish, including one with no connection to the dispute at hand, is a key aspect of the framework applicable to arbitration.[181] Under the New York Convention, and national arbitration legislation acts, the arbitral seat: i) provides the national arbitration legislation applicable to the arbitration, which governs a wide range of "internal" and "external" procedural issues in the arbitration; ii) determines where the arbitral award is "made" for purposes of the New York Convention; and iii) determines the courts with powers to assist the arbitral proceedings and decide on any annulment suits brought by any of the parties.[182] When selecting the seat of the arbitration, parties will consider several issues, including the

[181] See Luca Radicati di Brazolo, 'International Arbitration and Domestic Law' in Giuditta Cordero-Moss (ed), *International Commercial Arbitration: Different Forms and Their Features* (Cambridge University Press 2013) 50.

[182] See Born, *International Arbitration* (n 36) 105–120.

familiarity of the parties with that forum, the applicable legislation, and the ability of the relevant courts to support the arbitral proceedings.

The possibility for parties to select the seat where the arbitration takes place opens, therefore, an avenue to competition between different jurisdictions.[183] As will be discussed in further detail in Chapters IV and V, many countries tweak their legislations in order to be selected by parties as an arbitration seat.[184] This allows parties to select, to an extent, the level of oversight they want their arbitral proceedings to be subject to. Since it is, as it will be seen below, primarily upon the courts of the seat of the arbitration to review the award and it is upon the parties to decide where the seat of arbitration is, parties can in effect define whether they want to opt for a jurisdiction where awards and arbitrators' behaviour is more thoroughly scrutinised or not.

The possibility of selecting an arbitral institution – if any – is also especially pertinent, opening itself another competition avenue. It is important to note that parties have at their disposal two sets of possible arrangements to undertake commercial arbitration. First, they may refer a dispute to an ad hoc arbitral tribunal to be composed in accordance with the parties' agreement and the applicable national statutes. Alternatively, parties may refer a dispute to an arbitral institution. In this instance, an arbitral tribunal will be constituted pursuant to the arbitral institution rules. In institutional arbitrations, the arbitral institution will play a multitude of roles, including playing a role in constituting the arbitral tribunal, fixing the arbitrators' compensation, and providing help with the

183 See Lynch (n 76) 274.

184 See Drahozal, 'Regulatory Competition and the Location of International Arbitration Proceedings' (n 113).

logistics of the hearing.[185] A key characteristic of the current arbitration environment is arbitral institutions increasingly competing amongst themselves to attract disputes.[186]

Finally, it should be noted that in arbitration that parties also have a level of control over the arbitrators they choose.[187] Applicable laws and arbitral institutional rules typically allow parties to agree on the arbitrator(s) deciding the dispute. Further, in case, of a three-member panel, these rules usually allow each party to appoint an arbitrator to the panel. The ability to select arbitrators is often presented as a selling point of arbitration, allowing, at least in theory, parties to select those with the needed skills and expertise in their market.[188] In practice, this has given rise to increasingly more strategic approaches by parties to select arbitrators that will maximise the likelihood of the arbitral tribunal deciding in their favour and a marketplace where arbitrators compete to be selected.[189] This topic will be picked up again in Chapter III.

185 Born, *International Arbitration* (n 36) 26.

186 See Barbara Alicja Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (TMC Asser Press 2017) 43.

187 The idea of the 'party appointed-arbitrator' has accompanied arbitration throughout history being presented by some as its cornerstone. See Douglas Pilawa, 'Sifting through the Arbitrators for the Woman, the Minority, the Newcomer Notes' (2019) 51 Case Western Reserve Journal of International Law 395, 404.

188 See Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (Kluwer Law International BV 2006) 64.

189 See Luttrell (n 149) 138. See also Pilawa (n 187) 405.

2.3.3 The design of arbitral proceedings in international commercial arbitrations

The arbitral proceedings themselves may follow significantly distinct procedural rules and often, depending on the complexity and value of the case, may lead to more or less intricate proceedings. Subject to basic due process principles being followed, parties and arbitrators have under most applicable laws freedom to design their proceedings. This flexibility is often also presented as a selling point of arbitration, allowing, at least in theory, proceedings to be tailored in the most cost-effective way for that particular dispute.[190] Despite this potential diversity, most proceedings follow, in spite of natural variations in the details, the same basic structure.

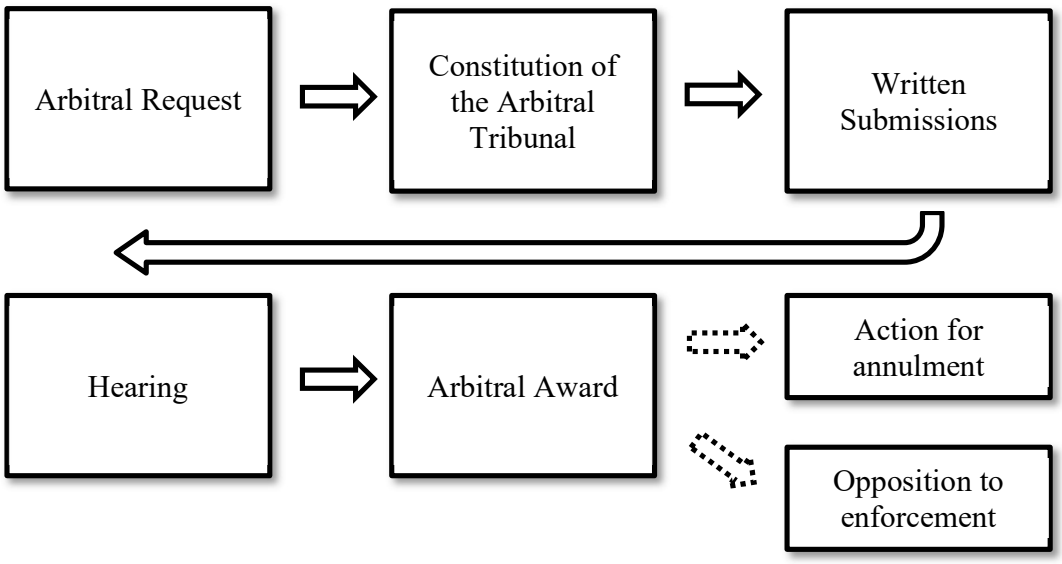

Fig. 1: Simplified example of the phases of an arbitral proceeding

190 See Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2012) 1.

International arbitral proceedings typically start by a claimant delivering the appropriate form of notice or request for arbitration. Following the constitution of the arbitral tribunal, parties usually present one or more written submissions (which often include written testimonials, expert reports, and documents). Arbitral proceedings also usually incorporate a hearing phase where parties present their cases through their counsel and hear witnesses' testimonials. In case the parties do not reach an amicable agreement before the end of the proceedings, the arbitral proceedings are terminated by an arbitral award that is binding to the parties and typically enforceable in a court of law.

It is important to note that despite following this basic structure, most international arbitral proceedings, especially the ones where significant amounts are at stake, often devolve into complex affairs. Parallel to the reasonably straightforward proceedings' sketch discussed above, international arbitration has also developed their own set of distinctive procedural techniques[191] and, in the last decades, an increasingly 'adversarial' culture where parties and their counsel often try to use tactics to delay and derail proceedings.[192] Part of the complexity of modern arbitral proceedings results, amongst other issues, from the usage of lengthy submissions and evidence production, extensive document discovery, the heavy reliance on expert reports and recourse to national courts

191 One of the most well-known examples of a procedural instrument specific to international arbitration is the usage of the so called 'Redfern Schedule', a form, named after well-known arbitrator Alan Redfern, used to streamline document requests in arbitration. For an example of the format, see Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Taylor & Francis 2013) 52..

192 See Rogers, *Ethics in International Arbitration* (n 22) 26.

to, for example, challenge and remove arbitrators or attack an arbitral tribunal's jurisdiction.[193]

2.3.4 Parties have limited ways to react to a decision from an arbitral tribunal

While, in practice, international arbitral proceedings often give rise to complex and lengthy adversarial disputes, after an arbitral award is made by an arbitral tribunal it is typically final in the sense that it is binding to the parties and, under most jurisdictions, not subject to be fully reviewed or appealed at a national court. The idea that arbitral awards are final is one of the cornerstones of the success of modern international arbitration. While some jurisdictions, most notably England,[194] still maintain as a default mechanism the possibility of to a small extent re-evaluating the arbitral award, the clear trend is for a preference for a non-interventionist approach by national courts, in particular regarding the idea that no merit review should be undertaken.[195]

While arbitral awards are usually not appealable, there are two universally accepted mechanisms parties may react, albeit in limited terms, to the arbitral tribunal's decision. First, a party may seek to annul the arbitral award at the competent courts of the jurisdiction where the arbitration is seated. Most national legislatures present very strictly defined

193 In this context discussions around the concept of 'guerrilla tactics', i.e. strategies used by counsel and parties to delay and disrupt arbitral proceedings, have emerged. For an in-depth discussion see Günther J Horvath and Stephan Wilske, *Guerrilla Tactics in International Arbitration* (Kluwer Law International 2013).

194 See English Arbitration Act 1996, Section 69.

195 See Emmanuel Gaillard, *The Review of International Arbitral Awards* (Juris Publishing, Inc 2010) 2.

grounds for annulment of an arbitral award.[196] These include: i) the arbitral agreement not being valid; ii) a party showing it was unable to present their case; iii) the composition of the arbitral tribunal or the arbitral procedure was not made in accordance with the agreement of the parties; or iv) the award being in conflict with the public policy of the state.[197]

Second, the losing party may also oppose the enforcement of the arbitral award in the jurisdiction where enforcement is sought. If the losing party refuses to voluntarily comply with an award, the other party may initiate enforcement proceedings at the relevant jurisdiction – i.e. the jurisdiction(s) where the debtor's assets are located – to forcibly enforce the award. The losing party may, however, oppose this. Again, the grounds for refusing enforcement are usually strictly defined, often coinciding with those that allow the annulment of the award.[198] In this area, the New York Convention – today ratified by 157 countries – is the central piece of legislation, establishing a very limited set of grounds that ratifying states' courts may use as a basis to refuse the enforcement of an award.[199]

It is important to note that, in theory, the language of the provisions regarding setting aside and non-enforcement of awards could still allow national courts a large degree of discretion to decide which arbitral awards to upheld, set-aside or not enforce. The arbitral community has been, not surprisingly, very often a strong advocate of a strict construction

196 For an overview see Gaillard, *The Review of International Arbitral Awards* (n 195).

197 See, for all, UNCITRAL Model Law, Article 34.

198 See, for all, UNCITRAL Model Law, Article 36.

199 For an in-depth analysis of the New York Convention, see e.g., Reinmar Wolff, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: A Commentary* (CH Beck 2019); Herbert Kronke, Patricia Nacimiento and Dirk Otto, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International BV 2010).

of these grounds. This understanding has permeated many court decisions that tend increasingly to respect the autonomy and finality of arbitral awards. This respect of legislators and courts of the independence of arbitral tribunals and arbitration has been one of the great conquests of international arbitration, being a key factor of arbitration becoming a competitive dispute resolution mechanism.

In conclusion, the current system of international commercial arbitration pays, therefore, a great deal of deference to parties and arbitral tribunals' autonomy. This allows: i) arbitration to be a competitive system of dispute resolution for a particular set of disputes; ii) parties to strategically select the jurisdiction where the arbitral proceedings will take place; and iii) to an extent define the method by which the members of the arbitral tribunal will be selected. As will be explored further in the next chapters, the cumulative effect of these selections significantly shapes how the arbitral market operates and how the behaviour of arbitrators is steered. The precise details of how this market functions will be discussed in the next chapter.

CHAPTER III

INTERNATIONAL COMMERCIAL ARBITRATION AS A MARKET

In the previous chapter, I explored how the significant success of international commercial arbitration coupled with the hefty fees charged by arbitrators, lawyers, arbitral institutions, and other service providers, has led to an increased awareness of the market-like features of international commercial arbitration.[200] While the idea that arbitration should not be too profit-driven perhaps held sway amongst most traditional sections of the arbitral community,[201] it has become clear that many arbitral institutions, and at least part of the arbitral community, often pursue strategies to increase demand for their services, raise their market share, and increase their income.[202] As I will highlight in this chapter, this is, however, a rather unique market.

200 See, Joanna Jemielniak, *Legal Interpretation in International Commercial Arbitration* (Ashgate Publishing, Ltd 2014) 100; Lynch (n 76) 112; Clay (n 27).

201 Paulsson explains that: "*Although arbitrators can expect to receive fees for their work, the prospect of financial rewards is doubtless a less motivating factor than non-specialists might imagine. For occasional arbitrators, the income is unsteady. Arbitrators who are much in demand are likely to have the ability and the opportunity to earn at least equal rewards in other endeavours. The important attractions of the job are, therefore, perhaps less tangible. Lawyers like to judge, and believe they do it well. Undeniably, appointment as arbitrator satisfies the ego in more or less admirable ways.*" Jan Paulsson, 'Ethics, Elitism, Eligibility' (1997) 14 Journal of International Arbitration 13, 14.

202 As a commentator observed: "*[b]eing today recognized for what it is, namely a service industry, international arbitration has become a field of intense competition: competition between the arbitration sites, between the arbitral institutions, between counsel, between arbitrators, and even between the periodicals on international arbitration.*" Jacques Werner, 'Competition within the Arbitration Industry' (1985) 2 Journal of International Arbitration 5, 6.

As detailed in the previous chapter, underlying the arbitral system there is a *sui generis* service contract[203] through which arbitrators perform an adjudicatory function against payment of – often very substantial – monetary compensation. Against this background, market mechanisms are very much in play when determining supply and demand of international arbitration related services and in determining agents' behaviour. Still, the specific method by which arbitrators and arbitral institutions are selected and prices are formed separates commercial arbitration from other services' markets. As I will argue in the following chapters, this is important as many of the 'regulatory' specificities of the arbitral profession are a result of the market adaptations undertaken by arbitrators, would-be arbitrators and arbitral institutions.

To understand how these agents behave in the market, this chapter will first provide an overview of the current structure of the market at both the arbitral institution level and the arbitrator level. From there it will summarise the mechanics of selecting these service providers, and for the establishment of their remuneration. Next, the determinants underlying the selection of both arbitrators and would-be arbitrators will be detailed. Finally, I will explore the strategies adopted by both arbitral institutions and arbitrators to maintain and expand their market share. As will be seen, many of the characteristics of the

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203 The nature of this service contract was discussed in great detail in the well-known case of *Jivraj v Hashwani* [2011] UKSC 40. In this case, The Supreme Court ruled that arbitrators are not "employees" under UK employment discrimination law. Lord Clarke held that "*though an arbitrator may be providing services for the purposes of VAT and he of course receives fees for his work, and although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties […] He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties […]* Agreeing on this point, Lord Mance quoted from the German Reichsgericht: "*It does not seem permissible to treat the arbitrator as equivalent to a representative or an employee or an entrepreneur. His office has … an entirely special character, which distinguishes him from other persons handling the affairs of third parties.*"

arbitral community that will be relevant to understand the regulation of arbitrators, such as the strong interconnection and continuing efforts of its members to increase their reputation and visibility, are adaptions to these market characteristics.

3.1 The current structure of international commercial arbitration markets

As mentioned in Chapter II, international commercial arbitration has a dual nature in the sense that it admits both the existence of institutional and ad hoc arbitrations. This advises to analyse two markets separately: a market for arbitral institutions' services and a market for arbitrators' services. Some of the key notions necessary to understand how the international commercial arbitration market works include the following ideas: i) in practice arbitral institutions operate in an oligopolistic market; ii) these institutions are not fully entrepreneurial and many of the key positions inside it are occupied by senior members of the arbitral community; and iii) arbitrators are elite legal professionals who often are connected to large law firms and academia. I will explore these ideas below.

3.1.1 The market structure at the institutional arbitral level

A first key decision for all would-be users of international commercial arbitration is to decide whether to undertake arbitration through an arbitral institution or instead in an ad hoc setting. While the advantages and disadvantages of institutional arbitration vis-à-vis

ad hoc arbitration are a topic frequently discussed in the literature,[204] there are no reliable ways of definitively determining the relative usage of these two methods.[205] Still, some data and anecdotal evidence seem to corroborate the idea that, over time, institutional arbitration has become the preferred method of arbitrating a commercial dispute.[206]

Parties wishing to undertake institutional arbitral proceedings may, in theory, choose amongst an ever-growing list of arbitral institutions.[207] At a glance, these arbitral institutions may seem similar. They proclaim similar goals, typically promoting efficient and agile dispute resolution systems for business enterprises, and display similar arbitral rules, often giving the arbitral institution similar powers in the organisation of arbitral proceedings. However, the level of sophistication, experience, and the geographical reach of these different institutions varies widely. The current market structure at the institutional

204 Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International 2001) 12; Anne Véronique Schlaepfer and Christian Girod, 'Institutional vs. Ad Hoc Arbitration' in Gabrielle Kaufmann-Kohler and Blaise Stucki (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer Law International 2004); Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004).

205 To this effect Naimark reported: "*I have been doing an informal word-of-mouth survey of lawyers who specialize in international commercial arbitration. The question I ask them is very simple, "compared to the institutionally conducted arbitrations, how many ad hoc cases are taking place every year?" A number of attorneys have said that there were just a few of these cases, with most of the cases going through institutions; others have said that there were a significant number of ad hoc cases and estimated that the number might approximate the number of institutional cases; and two attorneys told me that they thought there were far more ad hoc cases taking place around the world each year than all the arbitral institutions put together*." Richard W Naimark, 'Building a Fact-Based Global Database-The Countdown' (2003) 20 Journal of International Arbitration 105, 106. See also Jemielniak (n 200) 89.

206 To this effect, the 2008 QMUL / PwC's survey reported that "86% of awards were rendered by arbitration institutions rather than through ad hoc arbitrations."'2008 International Arbitration Study - Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards' 4 <http://www.arbitration.qmul.ac.uk/docs/123294.pdf> accessed 8 March 2016. See also Loukas Mistelis, 'International Arbitration - Corporate Atitudes and Practices- 12 Perceptions Tested: Myths, Data and Analysis' (2004) 15 American Review of International Arbitration 525, 559.

207 Warwas (n 186) 45.

level is therefore stratified, with different arbitral institutions catering to different subsets of the arbitration market.

To understand the market of institutional arbitrations services, a convenient rough distinction between national and international arbitral institutions may be drawn.[208] International arbitral institutions, while often displaying strong national connections, tend to feature: i) members coming from different countries; ii) the arbitrators chosen and the administrative staff are of different nationalities; and iii) the disputes solved often display strong transnational components. On the other hand, national institutions are those which tend to: i) be located in a single country; ii) with administrative staff and arbitrators drawn primarily from that country; and iii) with most of the cases handled relating to contracts performed or otherwise substantially linked to that country.

While in practice a significant number of institutions will fit between the two concepts, in the current market only a handful of arbitral institutions are prepared both logistically and in terms of experience to deal with large numbers of truly international disputes. Most arbitral institutions, while often proclaiming ambitious goals, deal mostly with domestic arbitrations and are generally avoided by parties in large international transactions.[209] It is thus possible to identify a small number of leading institutions that dominate the market in what concerns large-sized international disputes. This list includes the International Chamber of Commerce (ICC), the London Court of International

208 On the distinction between national and international arbitral institutions, see Fouchard and others (n 166) 159.

209 See Karl-Heinz Böckstiegel, 'Do Institutions Really Add Value to the Arbitral Process?' in Bernard Hanotiau and Alexis Mourre (eds), *Dossier IX Players' Interaction in International Arbitration* (ICC Publishing SA 2012).

Arbitration (LCIA), The Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC).[210]

A review of these institutions allows identifying several shared features. Arbitral institutions are usually not-for-profit entities,[211] being instead often organised as independent bodies of a chamber of commerce or incorporated as 'non-profit companies' that frequently offer institutional arbitration services with the stated goal of encouraging and facilitating international commerce.[212] Structure wise, while the details of their internal organisation may vary significantly, their senior management and internal consulting bodies are often filled by well-known arbitrators and highly accomplished practitioners in this field.[213] Further, these institutions display internal teams – often composed of full-time internal lawyers – which deal with the day-to-day aspects of case management. Commonly,

210 Naturally, even these institutions do not show a uniform global presence, often being more popular in specific world regions or in relation to certain types of disputes. To this effect, for example, the HKIAC highlights in its website its role as "*experts in China-Related Disputes*".

211 See, Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015) 26; Christopher R Drahozal, 'Commercial Norms, Commercial Codes, and International Commercial Arbitration' (2000) 33 Vand. J. Transnat'l L. 79, 123. An exception to the non-profit model is Judicial Arbitration and Mediation Services (JAMS) a for-profit arbitral institutions with a sui-generis structure. It is owned by its (full-time) neutrals and management.

212 See, for example, foreword to ICC's 2014 "Arbitration Rules / Mediation Rules" available at <www.iccwbo.org/> accessed 14 March 2016, p. 1.

213 In the case of ICC, a strong structural dichotomy between bodies composed by experienced members of arbitral community and internal staff is readily identifiable. ICC is composed primarily by the Court, which in turn consists of a President, 17 Vice-Presidents, and members and alternate members largely drawn from the top of the legal arbitral profession and academia. The Court functions include: i) confirming, appointing, and replacing arbitrators; ii) deciding on any challenges filed against arbitrators; and iii) scrutinizing and approving arbitral awards. In its work the Court is assisted by the Secretariat, which is composed by full-time lawyers and support staff.

Similarly, the LCIA is also composed by the LCIA Court and by the Secretariat. The LCIA Court is made of up to thirty-five members, plus representatives of associated institutions, and former Presidents. Similarly to the ICC Court, the LCIA Court is composed by leading practitioners in commercial arbitration. The LCIA Court is the final authority for the proper application of the LCIA rules. Its principal functions are appointing tribunals, determining challenges to arbitrators, and controlling costs. Similarly to the ICC secretariat, the LCIA secretariat is responsible for the day-to-day administration of disputes referred to the LCIA.

those working within these case management positions often transit to and from positions as arbitration counsel in law firms.

A few further notes are warranted. Despite usually possessing a non-profit nature, there is ample available information to support the idea that these arbitral institutions compete to attract new business and expand their market quota.[214] It is therefore possible, at times, to at least partially equate the behaviour of arbitral institutions to those of commercial entities.[215] Still, arbitral institutions do not possess the corporate governance structure which usually secures that their behaviour aligns with the profit motive of its shareholders. Therefore, a more apt comparison would be perhaps with non-profit enterprises, such as the ones common in the field of education, research and the arts, which have been noted to have a broad spectrum of entrepreneurial motivations, including personal/professional development of the members of the organisation, belief in a cause, or a desire to gain power and prestige.[216]

214 See Warwas (n 186) 38. Arbitral institutions, however, also sometimes cooperate namely developing common initiatives and sharing resources. Mohamed Abdel Raouf, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Stavros L Brekoulakis, Julian DM Lew and Loukas A Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016) 327.

215 Gerhard Wagner, 'Dispute Resolution as a Product: Competition between Civil Justice Systems' in Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Bloomsbury Publishing 2013) 390; Drahozal, 'Commercial Norms, Commercial Codes, and International Commercial Arbitration' (n 211) 123.

216 Cristoph Badelt, 'Entrepeunership in Nonprofit Organizations: Its Role in Theory and in the Real World Nonprofit Sector' in Helmut K Anheier and Avner Ben-Ner (eds), *The Study of Nonprofit Enterprise: Theories and Approaches* (Springer Science & Business Media 2003) 143.An interesting observation that can be taken away from the literature on non-profit firms and that may be applicable to arbitral institutions relates to the mechanisms incentivising their commitment to their core goals. Despite a theoretical tendency of non-profit organizations to be less pressured to be efficient due governance issues, the need for non-profits to compete in product markets and in the market for donations keeps organizations in line. See Edward L Glaeser (ed), *The Governance of Not-for-Profit Organizations* (Univ of Chicago Press 2006) 40.

It should also be noted that while there are no significant regulatory barriers to entry[217] or expansion in this sub-section of the international commercial arbitration market, it is possible to identify a trend of stability. Indeed, the same institutions have largely maintained their place at the top of the international commercial arbitration market in the last couple of decades:

	2000	*2002*	*2004*	*2006*	*2008*	*2010*	*2012*	*2014*	*2016*	*2018*
CIETAC	543	468	461	442	548	418	331	387	483	522
HKIAC	298	320	280	394	602	624	456	477	460	521
ICC	541	593	561	593	663	793	759	791	966	842
ICDR	510	672	614	586	703	888	996	1052	1050	993
LCIA	87	88	87	133	213	237	265	277	303	317
SIAC	37	34	39	47	71	140	235	222	343	402
SCC	66	50	45	64	74	91	92	94	103	76
Total	2082	2225	2087	2259	2874	3191	3134	3300	3708	3673

Fig. 2: Breakdown of arbitral institutions' international arbitral cases[218]

An analysis of these statistics shows the ICDR and the ICC displaying the highest number of international commercial arbitrations in recent years. While trailing behind the ICDR in the number of cases,[219] the ICC is still perceived as the market leader, often being

217 Warwas (n 186) 44.

218 Where possible, the numbers presented indicate only international arbitral cases and exclude domestic arbitrations. This is a particularly relevant feature in CIETAC which would otherwise be the most widely used arbitral institution worldwide. It is relevant to note that the ICDR defines 'international' cases in an ample manner to include cases which involve US-based subsidiaries of non-US companies who prefer arbitration to the US court system, as well as cases in which one, or both, parties are from overseas. This explains in part the large numbers presented by the ICDR. Also the numbers presented for HKIAC include all cases submitted to the institution including domestic disputes and domain name disputes. Sources: International Arbitration institutions websites, Markus Altenkirch and Nicolas Gremminger, 'Parties' International Arbitration Statistics 2018 – Another busy year for Arbitral Institutions' (Global Arbitration News, 5 August 2015) <http://globalarbitrationnews.com/> accessed 30 May 2020;; James Nicholson and Howard Rosen, 'Trends in International Arbitration' <http://www.fticonsulting.com/ insights/fti-journal/ trends-in-international-arbitration> accessed 15 March 2016.

219 It is relevant to note that the ICDR defines 'international' cases in an ample manner to include cases which involve US-based subsidiaries of non-US companies who prefer arbitration to the US court

referred to as the most respected and universal of the arbitral institutions.[220] However, the ICC has long lost what was at one point its quasi-monopolistic position in the market.[221] Indeed, the last few decades have seen a consistent rise of other competitors not only in the Western world but also in Asia, where the HKIAC and the SIAC have risen in prominence.

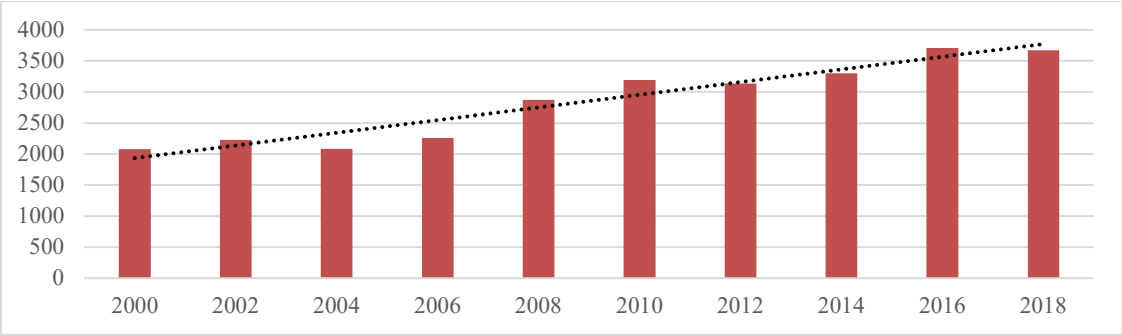

Fig. 3: Total number of international arbitral cases in the major arbitral institutions

On a macro level, analysis of the statistics available shows a sharp increase in the total number of cases taking place at the above-mentioned institutions over the last 15 years. This is not a recent trend. An analysis of the number of cases in the major institutions between 1992 and 2012 shows an increase of circa 400% in several cases.[222] This is not, however, representative of the fate of all international arbitral institutions. Other arbitral institutions do not show major increases in caseload or have been unsuccessful in getting off the ground in a meaningful way.[223] This has consequences for the regulation of

system, as well as cases in which one, or both, parties are from overseas. This explains in part the large numbers presented by the ICDR.

220 Giuditta Cordero-Moss, *International Commercial Arbitration: Different Forms and Their Features* (Cambridge University Press 2013) 205; Lew, Mistelis and Kröll (n 100) 38; Hale (n 68) 20; Luttrell (n 149) 88.

221 Dezalay and Garth (n 22) 45.

222 Born, *International Arbitration* (n 36) 16.

223 Leading practitioners Paulsson, Rawding and Reed summarize the issue as a 'vicious circle'. "[P]*arties do not insert clauses providing for arbitration under a new institution's rules due to the*

arbitrators, as the well-established nature of some of these arbitral institutions gives them a pivotal role in the creation and enforcement of professional norms.[224]

3.1.2. The market structure at the arbitrator level

At the arbitrator level, the market presents itself more atomized in the sense that there is a much larger pool of potential service providers. While the exact number of people who have acted as arbitrators is not possible to determine, there are today a considerable number of practitioners and academics who have acted as arbitrators in international commercial disputes and an even larger number of those interested in being appointed to this function. Still, identifying common social-professional traits amongst the people selected to this role allows establishing a clearer picture of possible behavioural incentives, social interconnections, and underlying shared values. As will be seen, there are some characteristics typical between arbitrators, such as their high elite status, average age, and previous experiences, which may yield relevant consequences in terms of norm compliance.[225]

It should be noted that the high number of arbitrators, different geographic origins, and different commitment to the role of arbitrator makes any generalisations regarding the profession unreliable. Still, arbitrators are generally portrayed as a small group of talented,

absence of practical experience or fear of lack of permanence; consequently the institution is unable to acquire the practical experience and a viable caseload necessary to ensure its permanence". Jan Paulsson, Nigel Rawding and Lucy Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts* (Kluwer Law International BV 2011) 62.

224 See, in particular, Chapter V, Section 5.3 and Chapter VIII, Section 8.1.

225 See, in particular, Section Chapter VII, Section 7.2.2.

multilingual individuals, drafted from the higher echelons of the legal profession.[226] Typically, arbitrators are, previously to being appointed, already successful in their legal career, mostly as practitioners and also, more rarely, as academics or in the judiciary. It is also clear that they are usually educated at some of the world's most prestigious universities and display high levels of academic achievement.[227] On the other hand the arbitral profession, at least at its higher levels, has been criticised as lacking diversity, being dominated by an elite group of mainly old, male, and white, arbitrators.[228]

While some – likely most – arbitrators, especially the most prominent, are specialists in arbitration law and have built their careers around international arbitration, others may act as arbitrator only once or twice and will have no long-lasting relevant connections to the field.[229] It is also important to note that while a small number of practitioners seem to engage in the market primarily as arbitrators, the vast majority of most potential arbitrators combine this activity with other professional endeavours, most commonly working as counsel for parties in arbitration.[230] Indeed, many of the most well-known names in the field of international arbitration interact with each other playing interchanging roles. In one dispute, 'A' may play the role of arbitrator and interact with 'B' while he is playing the role of counsel; in the next dispute, roles may be reversed, with 'A' playing the role of counsel and 'B' playing the role of arbitrator.

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226 Rogers, 'The Vocation of the International Arbitrator' (n 61) 958; Karton (n 22) 23.

227 Rogers, 'The Vocation of the International Arbitrator' (n 61) 958; Karton (n 22) 23.

228 See, among others, V Veeder, 'Who Are the Arbitrators?' in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18* (Kluwer Law International, 2015).

229 Karton (n 22) 23.

230 See Thomas Clay, 'Qui Sont Les Arbitres Internationaux? : Approche Sociologique' in Rosell (ed), *Les arbitres internationaux* (Société de législation comparée, 2005) 31.

Lack of published awards and difficulties in assessing the reliability of the wide number of profiles of arbitrators publicly available does not allow a full description of the makings of the community. Nevertheless, an analysis of arbitrators' professional careers, as described in professional directorates such as GAR's Who's Who 2016, confirms that arbitrators have mostly four professional origins: i) partners, or former partners, of often large and international law firms; ii) academics, often specialising in arbitration or in related areas such as international private law, who usually combine their academic career with work as practitioners; iii) highly regarded barristers with a special interest in arbitration or commercial law; and iv) legal practitioners who have developed a career within arbitration institutions, often holding relevant positions within the same.[231]

It should be noted, however, that the background of most arbitrators, instead of neatly fitting into any of the above categories, displays composite features of the different backgrounds. Indeed, many of the arbitrators who have developed their careers within law firms display strong academic links and often undertake teaching and assume active participation in publishing and editorial boards of arbitration-related journals. Conversely, many of the academics who act as arbitrators have past or present relevant associations with law firms. Also, a few of today's 'elite' arbitrators have started their careers or spent relevant time amongst the internal teams of arbitral institutions. Many have held relevant executive or advisory roles within (sometimes several of) the world's leading arbitral institutions.

[231] See also Karton (n 22) 23.

An interesting recent phenomenon is a tendency from some leading arbitrators to form small or medium-sized arbitration boutiques upon leaving or retiring from larger law firms. Out of 25 'elite' arbitrators identified in the Who's Who 2016 survey, 14 operated as either independent arbitrators or within small to medium-sized law offices. While several factors may contribute to this tendency, increasingly stricter rules[232] regarding conflicts of interests is likely one of the most relevant factors. These rules lead to partners of large law firms being often barred from accepting appointments. Most of these boutique firms do, however, serve as platforms for their partners to act both as arbitrators and counsel specialising in arbitration.

Finally, the dominance of 'Western' arbitrators at the top of their arbitral profession should also be noted. Both an analysis of the nationalities of the 25 leading arbitrators of the Who's Who Survey 2016 and the nationalities of arbitrators most common in ICC arbitrations confirm this. Further, the dominance of male arbitrators is also confirmed, with 92% of the 25 leading arbitrators identified in the survey as being male. This is a well-identified trend among empirical studies of international arbitration[233] and available data from arbitral institutions.[234]

232 See, for example, IBA's 2014 Guidelines on Conflicts of Interest in International Arbitration.

233 Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (n 154); Susan D Franck and others, 'Diversity Challenge: Exploring the Invisible College of International Arbitration, The' (2014) 53 Colum. J. Transnat'l L. 429.

234 To this effect LCIA's Registrar's report 2015 indicates that 16% of arbitrators appointed were female.

Nationality	*N.º*	*%*
British	6	24
French	5	20
Canadian	4	16
US	3	12
New Zealander	2	8
Swiss	2	8

Fig. 4: Leading nationalities amongst the 25 most voted arbitrators in Who's Who 2016 Survey

Nationality	*N.º*	*%*
British	216	16
US	131	10
Swiss	119	9
French	117	9
German	90	7
Austrian	56	4

Fig. 5: Leading nationalities in number of confirmations in ICC arbitrations in 2014

The apparent lack of diversity of the current roster of international arbitrators denotes gaps which are often still present across the higher echelons of the legal profession.[235] Since reaching the position of arbitrator is often linked with reaching the top of the legal profession, there are good reasons to expect the arbitral profession to reflect, perhaps with some delay, the socio-demographic features of the top of the legal profession. In any case, the lack of diversity of the arbitral profession has been a concern of many within the field, with arbitral institutions, in particular, driving an effort for a more diverse background of arbitrators.

The relatively similar background between arbitrators also shows a reasonably homogeneous community, which gives preference to already well-established members of the legal profession. This results from a framework which leads agents to take a conservative approach regarding the selection of service providers in this market. In this sense, it is often noted the difficulties faced by those wanting to enter the market as arbitrators. Indeed, there seems to be an overwhelming preference for both well-established arbitral institutions and arbitrators. The reasons leading to this will become clearer through

235 SC Bolton and D Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession' (2007) 41 Sociology 47; Leah V Durant, 'Gender Bias and Legal Profession: A Discussion of Why There Are Still So Few Women on the Bench' (2004) 4 U. Md. LJ Race, Religion, Gender & Class 181.

exploring the mechanics of selecting arbitral institutions and arbitrators as well as the factors underlying these choices. I will undertake an analysis of these next.

3.2 How service providers are selected in international commercial arbitration

3.2.1. The methods of selecting an arbitral institution

Selecting an arbitral institution does not pose legal difficulties. In most jurisdictions, parties are free to choose an arbitral institution to supervise and organise their proceedings if all disputing parties have agreed to it. Parties can both determine an arbitral institution to oversee their proceedings after a dispute has arisen or pre-establish the chosen institution by incorporating an arbitration clause into a contract where they pre-define the arbitral institution. While the exact wording of these clauses may vary, parties are generally recommended to establish the specified institution by using a template clause.[236] Due to understandable difficulties in establishing agreements after a dispute has arisen, the selection of the arbitral institution takes usually place while a contract is negotiated between the parties.[237]

236 Most arbitral institutions provide recommended ready-made arbitration clauses with the purpose of avoiding problematic drafting and as a marketing tool to facilitate adherence to the arbitral institution.

237 See, Francisco Cabrillo and Sean Fitzpatrick, *The Economics of Courts and Litigation* (Edward Elgar Publishing 2008) 212.

3.2.2 The methods of selecting arbitrators

The legal issues arising from the nomination of arbitrators are, on the other hand, more complex than those arising from the selection of arbitral institutions. Arbitration acts, institutions' rules, and soft law provisions all provide a mixture of mandatory and subsidiary rules regarding the appointment of arbitrators. While these norms are not entirely consistent, there are still trends across legal systems and institution rules that allow a description of a general legal framework for selecting arbitrators. As will be described below, this analysis also allows an identification of the main players driving the selection of arbitrators.

3.2.2.1 An overview of institutional arbitral rules and national statutes

Across legal systems, the constitution of an arbitral tribunal is subject to the principle of parties' autonomy – i.e. parties are largely free to agree how their disputes are to be resolved, subject only to such safeguards as are necessary for safeguarding basic notions of procedural fairness and the public interest.[238] The vast majority of national statuses allow parties to establish the number of arbitrators that will constitute the arbitral tribunal (almost without exception parties choose a panel of three arbitrators or a single arbitrator), and the identity or the method to be utilised for selecting the specific arbitrators that will solve the dispute.[239]

238 English Arbitration Act 1996, section 1(b).

239 See for all, Born, *International Commercial Arbitration* (n 4) 1653.. For practical reasons parties rarely identify a specific arbitrator within their arbitration clause. Emilia Onyema, 'Drafting an Effective Arbitration Agreement in International Commercial Contracts' (2003) 7 Vindobona Journal of International Commercial Law & Arbitration 277, 283. Since it is not possible to determine when a dispute will take place, selecting a specific arbitrator in advance is often not feasible as he/she may not be available at the necessary time.

In practice, parties often establish a specific method of appointment by reference to institutional arbitral rules which, in turn, detail procedural rules regarding arbitrators' appointments. One of the most often cited advantages of institutional arbitration is precisely providing secure and predictable methods of arbitrators' appointments,[240] with the ability to select, when needed, a capable arbitrator being one of the most important roles of an arbitral institution. While specific arbitral institutional rules vary, a review of the major arbitral institutions' rules allows determining some trends regarding the most common methods of arbitrators' nomination in an arbitral setting. Most arbitral rules establish that:

i) Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party nominates one arbitrator. If a party fails to nominate an arbitrator, the appointment will be made by the arbitral institution. The third arbitrator, depending on the institution, is either chosen by the two arbitrators already selected or, alternatively, selected directly by the institution;[241]

ii) Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator. If the parties

240 See Born, *International Commercial Arbitration* (n 4) 170; Gabrielle Kaufmann-Kohler and Blaise Stucki, *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer Law International 2004) 12.

241 See Article 12(4) and 12(5) ICC 2012 Arbitration Rules, Article 13(3) 2010 SCC Rules, Article 8 2013 HKIAC Administered Arbitration Rules and Article 8 2013 SIAC Rules. ICC 2012 Rules, SCC 2010 Rules and 2013 SIAC Rules determine that, absent agreement of the parties to the contrary, is upon the institution to nominate the third arbitrator of the panel. The HKIAC's 2013 rules provide that the two arbitrators appointed by the parties shall designate a third arbitrator

fail to nominate the arbitrator, the sole arbitrator is appointed by the institution.[242]

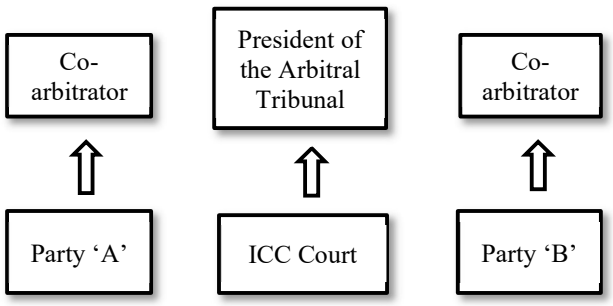

Fig. 6: Procedure for composition of 3 arbitrators tribunals under the ICC Rules

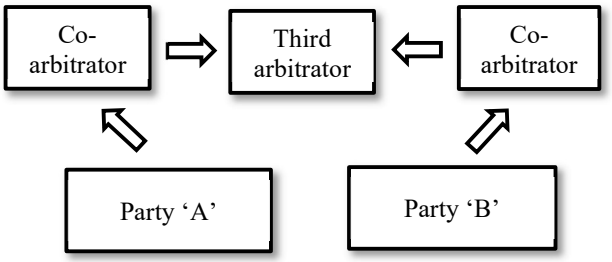

Fig. 7: Procedure for composition of 3-arbitrator tribunals under the UNCITRAL Model Law

In *ad hoc* arbitrations, national arbitration statutes also provide default rules for the selection of arbitrators when parties fail to agree on a specific method for their appointment or the parties fail to appoint the arbitrators in accordance with the applicable norms.[243] According to most rules: with a sole arbitrator, if the parties are unable to agree on the arbitrator, they shall be appointed by the competent national court;[244] in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint its arbitrator or if the

242 See Article 12(3) ICC 2012 Arbitration Rules, Article 13(2) 2010 SCC Rules, Article 7 2013 HKIAC Administered Arbitration Rules, Article 7 2013 SIAC Rules.

243 For an detailed analysis of the different possible scenarios, see Onyema (n 5) 84.

244 See, among others, UNCITRAL Model Law Article 11(3), English Arbitration Act 1996, section 16(3), French Code of Civil Procedure Article 1452(1).

two arbitrators fail to agree on the third arbitrator the appointment shall be made, upon request of a party, by the competent court.[245]

3.2.2.2 The relative weight of the different actors in the selection of arbitrators

From the description above it results that several actors may, in different circumstances, appoint arbitrators. Namely, i) parties to arbitral proceedings; ii) co-arbitrators; iii) arbitral institutions; and iv) courts all may play a role in selecting arbitrators. While it is not possible to fully deconstruct the relative weight of these different actors throughout the whole system, ICC statistics provide some insight that may be representative of larger trends:

	Nominations by parties (confirmed by the ICC)	Nominations by co-arbitrators (confirmed by the ICC)	Appointments by the ICC (upon proposal of a national committee or directly by the ICC Court)	Appointment by another entity than the ICC Court	Total
Sole arbitrator	62	-	156	2	220
Co-arbitrators in three-members' tribunals	704	-	43	3	750
Presidents in three-members' tribunals	17	218	120	2	357
	783	218	319	7	1327

Fig. 8: Breakdown of the appointments made in 2014 by type of arbitrator and method of designation in ICC Arbitrations[246]

245 See, among others, UNCITRAL Model Law Article 11(3), English Arbitration Act 1996, section 16(5), French Code of Civil Procedure Article 1452(2).

246 ICC, '2014 ICC Dispute Resolution Statistics' (2015).

While only partial, these figures indicate that parties are responsible, in ICC administered arbitrations, for just over 50% of the nominations. To the same effect, LCIA's 2015 statistics indicate that parties accounted for slightly less than 50% of the nominations.[247] Even in the context of ad hoc arbitrations, while no available aggregated data exists, it is to be expected that the selection of at least one or more members of a tribunal often will not be undertaken by the parties but instead by a third nominating authority – typically by the other members of the arbitral tribunal regarding the third arbitrator or the national courts where parties fail to nominate an arbitrator.

The fact that arbitrators are often selected by actors beyond the disputing parties has significant implications towards the market of international commercial arbitration. It means that arbitrators wishing to obtain a higher number of nominations must take into consideration not only how they will be perceived by disputing parties but also by other agents such as arbitral institutions, other arbitrators, and national courts. This allows the arbitral community an important say on who becomes a successful arbitrator. The relevance of the community as a driver of appointments will be picked up again at the end of this chapter,[248] when discussing the strategies undertaken by arbitrators to improve their position in the market and again, in more detail, in Chapter VII.

247 LCIA, 'Registrar's Report 2015' (2015) 4 <http://www.lcia.org/LCIA/reports.aspx>.

248 See Chapter III, Section 3.5.2.

3.3 The mechanics of establishing remuneration of arbitral institutions and arbitrators

Another particularity of the international commercial arbitration market derives from its price formation mechanisms. Indeed, remuneration of arbitrators, and to a lesser extent arbitral institutions, does not follow the same procedures as in regard to the purchase of most other services. Again, it should be noted that there are also considerable differences between institutional arbitrations and ad hoc arbitrations regarding the remuneration of services. Therefore, these two situations will be analysed in turn.

In institutional arbitrations, parties will have to remunerate both the arbitral institution and the arbitrators themselves. For this reason, each arbitral institution establishes its own rules regarding the payment of its services and the services of the arbitrators.[249] In practical terms, parties adhere to these rules by selecting the relevant institution when negotiating the underlying contract to the dispute, with little to no availability from institutions to accept negotiated alterations to their established provisions and prices.[250]

While rules vary from institution to institution, general trends can be identified. Most arbitral institutions remunerate their services and the services of arbitrators according to a pre-defined scale of costs based on the monetary value of the claims. These institutions usually attribute a small percentage of the value at stake in the arbitral proceedings to both

249 Lew, Mistelis and Kröll (n 100) 285; Rubino-Sammartano (n 64) 518.

250 ICC, for example, establishes in Appendix III, Article 2(4) of its 2017 Rules that: "*The arbitrator's fees and expenses shall be fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are contrary to the Rules*."

the arbitrators and the arbitral institution. Such percentage which will typically decrease as the values claimed increase.[251] Other institutions remunerate services on the basis of time spent by the arbitrators and the arbitral institution's personnel on the case.[252] Independently of the method by which arbitrators' remuneration is defined, many arbitral institutions reserve some discretion regarding the exact values they charge.

In regard to ad hoc arbitrations, parties will have to negotiate with arbitrators the basis upon which remuneration is to be calculated.[253] If no agreement is reached but the arbitrators still perform their mandate, it is usually upon the arbitrators themselves to determine their fees.[254] Arbitrators and parties often, as in institutional arbitrations, agree to calculate arbitrators' remuneration as a percentage of the amount in dispute or on the basis of time spent. In practice, it is not uncommon that arbitrators and parties look into the fees of a relevant arbitral institution as a guide to the establishment of the relevant remuneration.[255] It is, however, possible in most jurisdictions to request a review of the fees established by an arbitral tribunal to the competent court or other competent authority.[256]

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251 This is the case of, among others, of the ICC, SIAC and the SCC.

252 This is the case of, among others, of the LCIA and, when parties do not agree on other method, the HKIAC. The ICDR establishes a hybrid system where arbitrators are to be paid on the basis of an daily or hourly rate and the institution's fees on the basis of a fixed value calculated from the amount at stake.

253 Lew, Mistelis and Kröll (n 100) 285; Onyema (n 5) 133.

254 Lew, Mistelis and Kröll (n 100) 285; Rubino-Sammartano (n 64) 518.

255 Onyema (n 5) 133.

256 See to this effect, for example, English Arbitration Act 1996 28(2).

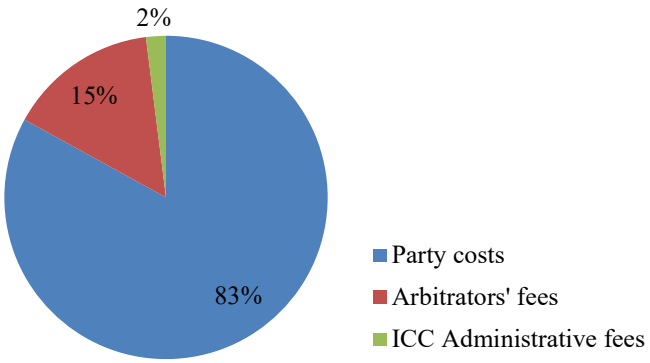

Fig. 9: Proportion of costs between party costs, arbitrators' fees, and administrative costs in ICC arbitrations in 2012

It should be noted, however, that usually the costs related to arbitrators' fees and especially administrative fees represent only a fraction of litigating an arbitral dispute. As an illustration, ICC administrative fees and arbitrators' fees on average represent respectively 2% and 15% of the total arbitration costs borne by the parties, with the remaining being party costs, most notably lawyer and expert witness fees and expenses.[257] Finally, it should be further noted that while not all arbitral institutions and arbitration acts establish exactly the same rules, it is common practice for tribunals to allow the successful party to recover its reasonable costs – i.e. arbitration often works based on a 'loser pays' system.[258]

The particularities of how prices are established in international commercial arbitration have important implications for the 'regulation' of international commercial arbitrators. Both in institutional arbitrations and ad hoc arbitrations, arbitrators have very little benefit from competing on prices. As it will be picked up again at the end of this

257 ICC, 'Decisions on Costs in International Arbitration' (2015) 3.

258 ibid.

chapter,[259] this leads arbitrators to mostly compete through 'quality' displays and networking. Before analysing these implications, it will be, however, necessary to provide an overview of the reasons underlying the choice of a service provider over another in this market. This will be undertaken next.

3.4 The determinants of service providers' selection in international commercial arbitration

3.4.1. Factors determining the choice of an arbitral institution

While the mechanics of choosing an arbitral institution are relatively straightforward, the reasons underlying any such choice are more difficult to pinpoint. Deciding on an arbitral institution requires the negotiated consent of two different parties. Further, the internal process of decision-making in each of the parties may follow different paths and determine the intervention of different internal and external counsel. Therefore, determining the reasons underlying the choice of an arbitral institution through an inquiry of former or prospective users faces limitations.

Still, some surveys have been carried out and allow some light to be shed on the determinants of choosing an arbitral institution. Perhaps the most well-known of these surveys is the yearly survey conducted by QMUL.[260] In their 2015 survey of 763 senior in-house counsel, senior representatives of arbitral institutions, academics, and arbitrators, it

259 See Chapter III, Section 3.5.2.

260 QMUL, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> accessed 17 October 2015.

asked respondents '*Why are certain institutions selected the most?*'. Presented with a set of different options, the top two considerations were "*reputation and recognition*" and "*previous experience of the institution*", which were chosen by 62% and 52% of respondents respectively. The same study questioned '*What are the four most important reasons for preference for certain institutions?*' Respondents' top three answers were: 1) high level of administration (including pro-activeness, facilities, quality of staff); 2) neutrality/'internationalism'; and 3) global presence/ability to administrate arbitrations worldwide/high level of administration.

Several aspects may be hypothesised to justify the centrality of reputation and experience in the arbitral institution market. First, as in other professional service markets, reputation provides buyers with a surrogate for quality,[261] providing an ex-ante indicator of the level of service to be expected. In the particular case of international arbitration, since the decision to enlist the services of an arbitral requires the common consent of at least two different parties, the well-established status may be an important tool to allow both parties to agree to the same service provider. Conceivably, larger and more well-established institutions will be less likely to be 'captured' by one of the disputants as typically any single user does not represent a significant source of business for the institution.[262]

261 See, Richard L Abel, *American Lawyers* (Oxford University Press, USA 1989) 183; Harris H Kim, 'Market Uncertainty and Socially Embedded Reputation' (2009) 68 American Journal of economics and sociology 679.

262 See Stephen J Choi, 'The Problem with Arbitration Agreements' (2003) 36 Vanderbilt Journal of Transnational Law 1233, 1237.

Second, parties and their counsel may display a tendency for risk-averse behaviour in choosing a dispute resolution mechanism. In-house and external counsel likely have an incentive to recommend conservative approaches to dispute resolution clauses, since an unenforceable contract or an inoperative dispute resolution clause may damage the company and harm counsel's position within the structure.[263] Further, since disputes may arise considerably after the arbitration agreement was agreed by the parties, a well-established institution might give greater assurances that it will be able to provide the service when needed.[264]

Finally, counsel will likely display a preference, even if subconsciously, for arbitration rules and arbitral institutions they are familiar with. For practical purposes, counsel may feel uncomfortable litigating under rules it might not be familiar with or dealing with arbitral institutions whose staff or modus operandi are unknown to them.[265] Other practical considerations, like the ability to provide services in a language familiar to the parties or to arrange facilities for hearings in a location convenient to the parties, will also play a role in the selection.

263 Noting that in-house and external counsel are often perceived in the business world as excessively loss-averse, see Steven L Lovett, 'The Employee-Lawyer: A Candid Reflection on the True Roles and Responsibilities of in-House Counsel' (2015) 34 Journal of Law and Commerce 113, 146.

264 See, Paulsson, Rawding and Reed (n 223) 62.

265 Noting that here is a "comfort" element in arbitrating within a well-established institution, see Mistelis (n 206) 563.

3.4.2 Factors determining the choice of an international arbitrator

A detailed account of the reasons underlying the choice of a specific arbitrator in international arbitration is challenging. As highlighted above, distinct actors choose arbitrators in various contexts and are motivated by different goals. Further, even the same type of players lack the homogeneity in their decision-making processes as they may face different grids of incentives and may show different social and cultural attachments. Still, a primary understanding of the forces determining preference for some arbitrators above others is essential to determine which behaviour by arbitrators is rewarded and which behaviour is 'punished' in the market. With this goal in mind, I will next analyse the motivations influencing the selection of arbitrators from the perspective of each type of player with powers to undertake nominations.

3.4.2.1 Parties' selection of arbitrators

Assuming that parties will try to maximise their gains from participating in arbitral proceedings, it is fair to assume that they will strive to nominate the arbitrator which will likely yield the most positive outcome of the arbitral proceedings to that party.[266] The strategy to achieve this goal is, however, far from straightforward and is dependent on a complex set of considerations, including: the number of arbitrators in the panel, the likely interactions amongst arbitrators, and the specific facts and legal questions to arise from the

[266] See Juan Fernandez-Armesto, 'Salient Issues of International Arbitration' (2012) 27 American University International Law Review 724.

case. Further practical considerations, such as prospective arbitrators' language skills and availability, will also play a role in the selection of arbitrators.[267]

Facing the impossibility of predicting all the influencing factors of arbitrators' decision-making, parties can do no better than, with the aid of internal and external counsel and through a mixture of instinct and experience, attempt to determine the most advantageous arbitrator. Parties might, therefore, look for arbitrators which hold doctrinal views most favourable to their case. At the same time, in a three-panel arbitrator setting, parties might look to nominate a highly regarded arbitrator[268] amongst their peers, calculating that through their senior position they may yield some clout over the remaining members of the panel.[269]

A few further points are important to note. First, if unbounded by ethical and/or legal constraints, parties could in theory try to develop a pure agency relationship with their chosen arbitrator. A party could, therefore, nominate the arbitrator that would be prepared to most openly favour their position.[270] Any such strategy could, however, prove

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267 C Leaua, 'Factors Taken into Consideration by the Parties When Appointing an Arbitrator' (2012) 33 Procedia - Social and Behavioral Sciences 925, 926.

268 Mistelis empirically notes how corporations typically look for arbitrators with a solid reputation in the arbitration community and, in addition, display common sense and relevant industry/geographic expertise. See. Mistelis (n 206) 576.

269 Arbitrator Carlos Lopéz describes that "[a] *factor to take into account is the standing and influence of the arbitrator […] The arbitrator must generate respect amongst the other members of the tribunal, to be persuasive during their private deliberations. Such influence may arise from their reputation and status in the legal community, and partly depends on the appearance of absolute independence and impartiality of judgment*." Carlos A Matheus López, 'Practical Criteria for Selecting International Arbitrators' (2014) 31 Journal of International Arbitration 795, 799.

270 This is not to say that open advocacy of a co-arbitrator does not happen in practice. Recalling one such incident but indicating that in his view this "*was someone, in short, who should never have been acting as arbitrator*". Ugo Draetta, 'The Dynamics of Deliberation Meetings in Arbitration: Some Personal Considerations' (2011) 2011 International Business Law Journal 219, 225.

detrimental. Arbitrators perceived as biased, dishonest, or insincere by the rest of the panel might be less likely to influence the final decision. As Professor Martin Hunter explains:

> "*When I am representing a client in arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias*"[271]

Therefore, the dominant strategy may be to nominate the arbitrator who will be most prone towards the position[272] of the party and that through his argumentation, *gravitas* and perceived independence may nudge the panel's position towards the position of the appointing party. It should, however, be noted that while the dominant attitude is that all members of the arbitral panel, including party-appointed arbitrators, should be impartial,[273] how much advocacy from a party-appointed arbitrator is accepted still varies across jurisdictions.[274]

Finally, the possible relevance of principal-agent problems between parties and counsel in the context of selecting arbitrators should also be taken into consideration.[275]

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271 Martin Hunter, 'Ethics of the International Arbitrator' (1987) 53 Arbitration 219, 223.

272 See Greenberg, Kee and Weeramantry (n 79) 263; Doak Bishop and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14 Arbitration International 395, 396.

273 Greenberg, Kee and Weeramantry (n 79) 283.

274 Indeed, in the US, the traditional default understanding, at least in domestic arbitrations, was that party-appointed arbitrators did not need to be neutral. This understanding seems, however, to have changed in the last decades n the US. A survey undertaken in the early 2000's found that a majority of US in house lawyers favoured the notion that party-appointed arbitrators should not agree to be anything but neutral when serving on a panel. See, Douglas Earl Mclaren, 'Party-Appointed vs List-Appointed Arbitrators: A Comparison' (2003) 20 Journal of International Arbitration 233. See also, Christopher R Drahozal, 'Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration' (2006) 22 Arbitration International 291, 303.

275 Indicating that the knowledge-intensiveness of conflict resolution generates power in favour of law professionals, who may, therefore, over-power their clients and take control of the agency relationship, see Adrian Borbély, 'Agency in Conflict Resolution as a Manager–Lawyer Issue: Theory and Implications for Research' (2011) 4 Negotiation and Conflict Management Research

Frequently parties will lack the necessary information to evaluate the best arbitrator for their case and will therefore rely on the advice of external counsel to appoint their arbitrator. This situation may create an opportunity for counsel to choose, consciously or unconsciously, an arbitrator in accordance with its own goals and/or values. Counsel may, for example, use this opportunity to push for arbitrators which conform to their own normative understanding of behaviour in arbitral proceedings.

On the other hand, counsel, especially in the context where they also act in the market as a potential arbitrator, may use their influence on the arbitral nomination process in a certain proceeding to advance their career as an arbitrator. Counsel may appoint a certain arbitrator hoping – or even agreeing – to be appointed in a future arbitral proceeding by that same person.[276] Still, competition amongst law firms and legal and ethical bounds will limit, at least partially, the opportunities for counsel to deviate significantly from their clients' interests.

3.4.2.2 Co-arbitrators' selection of arbitrators

In practical terms, selection of a third arbitrator by co-arbitrators is a negotiated procedure where the co-arbitrators often consider several names to ultimately agree on a third-panel member that is acceptable to both.[277] During this process of selection, it is considered acceptable, at least in some circles, that party-nominated arbitrators consult with their

129, 131. Principal-agent problems while arguably a relevant consideration to understand choices in the context of international arbitration have been, however, largely overlooked in the literature. See, Wagner (n 215) 407.

276 Less directly, counsel may use their influence on the process to curry favour with the most relevant members of the arbitral community and raising their profile within the community.

277 Noting, however, this process to be in his experience, in most cases, rather fast, see Ugo Draetta, 'Cooperation among Arbitrators in International Arbitration' (2016) 5 Indian Journal of Arbitration Law 107, 114.

nominating parties regarding the identity of the third arbitrator.[278] Further, in the context of institutional arbitrations, it is also possible that even when the co-arbitrators appoint the chairman, the institute offers input by, for example, providing the co-arbitrators with a list of potential chairmen.[279]

In these circumstances, it seems reasonable to assume that the co-arbitrators' decision regarding who to appoint will be subject to the same incentives that underlie their remaining decisions. It is, therefore, to be expected that arbitrators when selecting the presiding arbitrator will make a decision that will best allow them to accomplish their goals and conform to what they consider appropriate behaviour. To this effect, arbitrators will certainly consider how the choice of the third arbitrator will reflect on the quality of the work produced by the arbitral tribunal and how it will bear on the perceived quality of the arbitrators themselves. Due to the collegial nature of the work to be undertaken, it is natural that selections will fall over members the co-arbitrators 'trust' and 'respect'.[280]

It seems also reasonable to assume that the possibility of appointing a person amongst their peers may allow arbitrators the opportunity to 'politick' their own position inside the community. Arbitrators form reasonably closed communities[281] where prestige and networking are central tools to reach the higher echelons of the profession. In this context, systems of informal trading of nominations may arise, where selections are made

278 See, James H Carter and John Fellas, *International Commercial Arbitration in New York* (Oxford University Press 2010) 128.

279 ibid 129.

280 See Draetta, 'Cooperation among Arbitrators in International Arbitration' (n 277) 114.

281 It is important to note that, while there is no census on the size of the arbitral community, it is clear that the number of participants has been growing exponentially. Diego P Fernández Arroyo, 'Soft Law and Arbitral Procedure: A Conditioned But Inescapable Couple' (2018) 7 European International Arbitration Review 71.

in the hope or even under tacit agreements to further the nominating arbitrators' career and future opportunities.

3.4.2.3 Arbitral institutions' selection of arbitrators

Assuming arbitral institutions endeavour to improve their position in the market and, and that arbitral institutions grow their position in the market by increasing their reputation and by having a track record of successfully managed arbitrations, arbitral institutions will nominate arbitrators that will guarantee an efficacious proceeding and an enforceable award. Further, to reinforce their legitimacy – and subsequently their reputation amongst the community of businesses and lawyers that ultimately are responsible for selecting arbitral institutions – these institutions will likely aim to strive to appoint independent and impartial arbitrators.[282]

It is important to note that arbitral institutions' selection of arbitrators may give rise to possible agency problems. There is, at least in theory, the possibility of members of institutions appropriating the decision to advance their own interests, especially taking into consideration that this decision is often made by the chairman of the institution or special boards, positions often occupied by relevant members of the community themselves. Again, the possibility of informal trading of nominations may arise. It should also be considered that arbitral institutions, not being truly commercial corporations, may not

[282] Stephen Bond, former Secretary General of the ICC, explains that "*The arbitral institutions are […] not only conscious of their responsibility to satisfy as best they can the legitimate expectations of the parties, but that failure to do so places in jeopardy their own reputation and perhaps that of international arbitration as a means of dispute resolution.*" Stephen R Bond, 'The International Arbitrator: From the Perspective of the ICC International Court of Arbitration' (1991) 12 Northwestern Journal of International Law & Business 1.

possess the strong governance mechanisms that usually control managerial decisions in for-profit organizations.

Still, in the context of albeit imperfect competition between arbitral institutions, its decision-makers may not be able to significantly deviate from the interests of the arbitral institution without damaging the market position and reputation of the institution they are linked to. Further, in a context where high-profile positions within institutions attract attention to the position holders, inappropriate decision making may subject that member to criticism or censure, leading to a decrease of their value in the eyes of the community and consequentially lower long-term returns from their participation in the arbitral market.

3.4.2.4 National courts' selection of arbitrators

Finally, national courts' underlying motivations in selecting arbitrators should be mentioned. Typically, their involvement in the process of appointing arbitrators is residual – i.e. they typically only intervene in appointing an arbitrator when the main appointment method has failed to work properly, such as the situations where parties failed to reach an agreement on a sole arbitrator, fail to make an appointment or the primary appointing authority (typically arbitral institution) failed to appoint.[283] As judicial authorities have less experience and are usually less knowledgeable about the arbitration market, their decisions might be less informed than those taken by parties, co-arbitrators and arbitral institutions. In this sense, they have been noted to – depending on the jurisdiction and the circumstances – range between undertaking 'parochial' choices of local arbitrators when such choices

[283] See UNCITRAL Model Law Article 11(3) and (4).

were likely not advisable and making measured selections of distinguished members of the arbitral community.[284]

3.5 Markets participants' strategies for expanding their presence and influence in the market

Due to the supra described market structure and the specific method through which arbitral institutions and arbitrators are selected, many of the market strategies diverge from other elite service markets. In a market where many of the selections are undertaken by members of the community – for example, counsel advising on the selection of a specific arbitral institution or arbitral institutions selecting an arbitrator – many of the strategies adopted by the different actors are directed to improve the agent's position inside the community. A general picture of how these agents look to improve their position in this market will allow to further understand how the behaviour within the community helps shape the regulation of the field. With this goal in mind, the strategies taken by arbitral institutions and arbitrators to improve their position will be analysed in turn.

[284] See Born, *International Commercial Arbitration* (n 4) 1713 and 1727.

3.5.1. Strategies developed by arbitral institutions to enter and improve their position in the market

The environment where arbitral institutions compete is rather unique for a few reasons. First, arbitral institutions as discussed above are not usually for-profit enterprises and, therefore, are not necessarily profit-maximising. Second, arbitral institutions are, with few exceptions, often linked with a particular jurisdiction where they might dominate the market. At the international level, there is in practice an oligopoly of sorts, with a small number of institutions dominating the market. Third, the decisions taken by parties when selecting arbitral institutions do not seem to be very price-sensitive but rather driven by the prestige, familiarity and proximity with the arbitral institution. Some of the ways that arbitral institutions 'compete' in this environment will be discussed next.

3.5.1.1 Well-established arbitral institutions undertake limited price-competition

A value often emphasised by arbitral institutions is their 'cost-effectiveness,' with the institutions sometimes presenting data where they look to illustrate the advantages of the institution over their rivals.[285] It is important to note that this has not equated to aggressive price competition by arbitral institutions nor do they seem to engage in other forms of more aggressive commercial practices such as discounting or direct price agreements with parties. While major arbitral institutions do seem to an extent to consider the price positioning of their more direct competitors, they have not seemed to actively look to

[285] See as examples ICDR, *International Centre for Dispute Resolution (ICDR) Arbitration Report*: *Time and Cost* available at <https://www.icdr.org/sites/default/files/document_repository/AAA241_ICDR_Time_and_Cost_Study.pdf> last accessed on 11 March 2020; LCIA, *Facts and Figures: Cost and Duration 2013-2016*, available at <https://www.lcia.org//media/download.aspx?MediaId=596> last accessed on 11 March 2020.

undercut each other in terms of pricing.[286] While some newer institutions position their prices purposely below more established competitors, such strategies by themselves seem to have limited success in guaranteeing a relevant number of cases to an institution.

It is important to note that arbitral institutions in reality show a strong variance in prices due to widely different schedules and methods of calculating fees.[287] The way their fees' schedules are designed means that a certain arbitral institution may be very competitive for a dispute of a certain size but not competitive at all at disputes of other sizes. Also, when selecting an arbitral institution in a contract for future disputes, the actual size of a future fee is not always easy to establish. All this further complicates 'shopping around' for an arbitral institution on a price basis.[288] Altogether, the oligopolistic and sui generis nature of this market helps to explain why arbitral institutions have not engaged in aggressive price competition, focusing instead on forms of 'quality' competition. Still, the trend for arbitral institutions to more directly compare their fees to their competitors should be noted, perhaps signifying parties to have become over time more cost-conscious.

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286 To this effect, Alexis Mourre, President of the ICC International Court of Arbitration, has indicated in interviews that he does "*not think that the costs of the institution are a major driver in the choice of an arbitral institution*" HSF, Inside Arbitration: An interview with Alexis Mourre, President ICC International Court of Arbitration, 7 February 2019 available <https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-an-interview-with-alexis-mourre-president-icc-international-court> accessed on 11 March 2020.

287 See Warwas (n 186) 50.

288 Noting that "*there is no clear-cut formula for identifying the most attractive institutional regime regarding the costs of institutional arbitration from the perspective of its users*", see ibid 53.

3.5.1.2 Arbitral institutions emphasise their experience and neutrality as ways of attracting parties

In this context, further to their cost-effectiveness, arbitral institutions emphasise other values as distinguishing features. As detailed above, reputation as an independent and impartial institution and a track record of successfully organising arbitrations appear to be the leading reason underlying the choice of an arbitral institution. Assuming that arbitral institutions intend to expand their position, they foremost will look to behave in a way that will lead them to be perceived as independent and impartial and able to support the arbitral tribunals in performing satisfactorily their functions. This is also important for parties because reputed institutions may see their awards have a greater likelihood of being enforced in national courts.[289]

In this environment, it is therefore natural to expect arbitral institutions to focus on establishing a strong reputation, experience, and proven track record in the market for services of international arbitration institutions. Anecdotal evidence seems to corroborate the idea that international arbitral institutions perceive the importance of reputation and experience as core values to communicate externally. On their webpage the ICC, under the heading '*ten good reasons to choose ICC arbitration'*,[290] it indicates reputation as the first reason to choose its arbitral proceedings; AAA-ICDR highlights its '*long history and*

289 See Thomas E Carbonneau, 'The Exercise of Contract Freedom in the Making of Arbitration Agreements' (2003) 36 Vanderbilt Journal of Transnational Law 1189, 1207.

290 <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Ten-good-reasons-to-choose-ICC-arbitration/> last accessed 16 October 2015.

experience in the field of alternative dispute resolution'[291] and SCC stresses its emergence '*as one of the most important and frequently used arbitration institutions worldwide.*'[292]

Further, arbitral institutions can undertake 'quality' competition by providing different levels of 'service'. Not all arbitral institutions provide the same functions with some arbitral institutions having a more hands-on approach in guaranteeing that arbitral awards are produced efficiently and fairly and are enforceable in a court of law. Perhaps one of the most well-known examples of the distinction in the level of service provided is ICC's practice of 'scrutinising' awards – a multiple-step process through which different people within the institution and finally ICC's Court review the awards' 'quality'.[293] This review, aimed at ensuring a higher likelihood that the award will be enforceable in a court of law, as it is not really undertaken by other institutions, allows ICC, an institution usually perceived to be on the pricier side, to separate itself from its competitors.[294]

3.5.1.3 Arbitral institutions focus on expanding links and connections to the wider arbitral community

The efforts of an arbitral institution to increase its profile and compete are not limited to fulfil its activities in an independent and impartial fashion. In the context of a still reasonably small community of arbitrators and practitioners, the reputation of these arbitral institutions is very much derived from the opinions of the arbitration 'insiders' upon the 'quality' of the different arbitral institutions. Not only practitioners and those within the

291 <*https://www.adr.org/aaa/faces/s/about/*> last accessed 16 October 2015.

292 <*https://www.*sccinstitute.com/about-the-scc/> last accessed 16 October 2015.

293 See Article 33 ICC 2017 Arbitration Rules. See also Thomas H Webster and Dr Michael Buhler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet & Maxwell 2014) 497.

294 Schwartz and Derains (n 74) 312.

community influence the general perception regarding that institution they can also direct parties to the institution by advising it as a good choice to clients and contacts. It is therefore to be expected that much of the efforts undertaken by arbitral institutions are directed precisely towards this community.

Arbitral institutions can establish these bridges and connections with the arbitral community in different ways. For example, arbitral institutions often incorporate members of the community in executive and advisory boards. Some institutions also organise lists of arbitrators from which they then draw appointments. While these selections are made to improve the performance of the arbitral institution, approach and engaging with the arbitral community in this fashion conceivably has the effect of linking arbitrators and arbitral institutions. On the one hand, it allows the arbitral institution to develop a closer relationship with selected members of the community. Further, it conceivably allows the arbitral institution to rely on the arbitrators' reputation to increase its own reputation.

Arbitral institutions also relate with members of the arbitral community in other relevant ways. Major and minor arbitral institutions undertake efforts to organise frequent events of varying sizes, such as conferences, courses, and symposia dedicated to arbitration.[295] Some of these events, such as the 'Joint Colloquium on International Arbitration' co-organised by ICSID, AAA, and ICC every year, may gather hundreds of participants from all over the world, including much of the arbitral elite, and provide a forum for discussing complex arbitral topics and opportunities to network for members of

[295] See Warwas (n 186) 48.

the community.[296] Other events may only be attended by a few dozens of participants and have a more introductory approach to arbitration.

It is important to note that this connection between arbitral institutions and the arbitral community is very much a two-way street. Arbitral institutions and those connected to it often look to the arbitration practitioners as a key audience that will help divulge and increase the usage of that arbitral institution. As will be discussed below, for practitioners, especially those also participating or intending to participate in the market as arbitrators, having a working relationship with an arbitral institution can be relevant as they are important sources of appointments and visibility within the community. In this environment, it is possible to observe a sort of 'revolving door' between positions in arbitral institutions and private practice with many key members rotating or cumulating positions in arbitral institutions and private firms.

3.5.1.4 Arbitral institutions' engagement with the business community and governments

The efforts of arbitral institutions to improve their position in the market do not only involve establishing links with the community of established arbitrators and practitioners. Arbitral institutions are often connected with chambers of commerce and are primarily designed to serve the interests of a business community. It is therefore unsurprising that arbitral institutions often engage with the business community in order to promote arbitration in general and the arbitral institution in particular. In this effort, arbitral institutions make a special effort to divulge ready-made standardised arbitration clauses that parties can easily incorporate into their contracts.

296 See Gaillard, 'Sociology of International Arbitration' (n 39) 13.

To better serve parties and the business community at large, arbitral institutions often update their rules and produce related documents such as guidelines and reference works. These changes are often primarily directed to better adapt to the dispute resolution needs of business parties and rationalising and improving the quality of proceedings. Further, these changes and assorted documents also help to promote the arbitral institution offering a way of 'advertising' the arbitral institutions' commitment to 'modernise' and to the core values of arbitration. As it will be discussed in Chapter V, such works often are the object of review within specialised literature and divulged in websites, newsletters, and other mediums dedicated to arbitration, helping further publicise the arbitral institution.

Finally, the relationship between arbitral institutions and governments merits a reference. Governments can be important supporters of arbitral institutions, offering funding or cooperating in strategies to develop a certain jurisdiction as an arbitration hub.[297] Government support can be especially important for nascent arbitral institutions as, through funding and institutional support, supported institutions have a better chance of overcoming the high difficulties of entering the international arbitration market.[298] However, typically governments do not meddle in the day-to-day internal affairs of the arbitral institutions who intend to be selected for international disputes. This is to be expected. The perception that an arbitral institution might be influenced in their operations

297 One of the most iconic of examples of government support for the development of arbitration has been the extensive efforts of the Dubai government in the establishment of arbitration as part of the Dubai International Financial Centre (DIFC) project. For an overview R Mohtashami and S Tannous, 'Arbitration at the Dubai International Financial Centre: A Common Law Jurisdiction in the Middle East' (2009) 25 Arbitration International 173.

298 Denoting the importance of the local government in supporting the development of HKIAC, see Kaplan (n 121) 222.

by external forces would undermine its ability to attract parties to voluntarily select that arbitral institution.

3.5.2 Strategies developed by arbitrators to enter and improve their position in the market

Turning now to the strategies undertaken by international arbitrators to enter and improve their position in the market, it is important to note that, for the reasons explained above, this market is also quite unique itself. The strategies undertaken by arbitrators are therefore distinct from those undertaken in other professional services markets. Three key ideas will be explored. First, the particularities of the market lead international commercial arbitrators to engage in little to no price competition. Second, arbitrators compete by projecting images of technical expertise and independence, especially amongst their peers. And third, they invest heavily in activities that allow them to network and obtain exposure within the community. These ideas will be explored in turn.

3.5.2.1 There is limited price competition between international commercial arbitrators

One of the key elements of international commercial arbitration is that under the prevalent market conditions in both institutional and ad hoc arbitrations alike, virtually only competition based on quality is available to arbitrators. In institutional arbitrations, as described above, arbitrators are largely subject to the fee schemes established by the rules of the institution responsible for organising the proceedings.[299] An arbitrator willing to

[299] See Chapter III, Section 3.3.

provide services at a lower cost than established by the institution would not be able to attract a higher number of institutional arbitration nominations, from either the parties or the institution. Since the prices are in most cases already (at least to some extent) pre-fixed, arbitrators face little pressure to procure work by offering lower prices to either arbitral institutions or the parties.

In ad hoc proceedings, arbitrators and parties will often negotiate fees only after the arbitrators have been selected. However, at this point parties have low bargaining power. To bargain efficiently, disputing parties would in many situations need to cooperate, an often-unrealistic option. Further, after the arbitral tribunal has been selected, a party will in some situations be understandably wary of offending or displeasing the members of the tribunal. This may also contribute to an environment where parties will not aggressively negotiate fees with arbitrators, leading to the common practice of parties and arbitrators agreeing to apply the fees schedule of an arbitral institution to their dispute.

In theory, arbitrators could still compete on prices to create a reputation of providing their service at lower prices than their peers. However, developing a reputation for establishing lower fees is unlikely to be a dominant strategy for arbitrators. Given that arbitrators often work in panels composed of three arbitrators, any strategy to individually develop a reputation as a low-price provider would be difficult to maintain.[300] Beyond this, the confidential nature of most arbitral proceedings means that the fees charged by an

[300] That does not mean, however, that arbitrators can charge prices at will in the context of ad hoc arbitrations. Indeed, beyond the possibilities of review of fees charged established in many jurisdictions by courts, it is conceivable that an arbitrator unilaterally establishing fees out of the ordinary could expose him to criticism and, therefore, lead to a decrease of his value within the community.

arbitrator are information difficult to obtain and, given the specificities of every case, difficult to compare.

It should also be noted that even if an arbitrator could develop and maintain a reputation as a 'low-cost' service provider, they would likely not be guaranteed any significant increase in business.[301] Especially in three-member panels, parties' choice of their party-appointed arbitrator is rarely influenced by the 'low-cost' reputation of an arbitrator. As detailed in the previous chapter, parties will preferably choose the arbitrator who will increase the likelihood of a positive outcome for that party, irrespective of the cost.[302] This is compounded by the that arbitration often works under a mitigated 'loser pays' system, meaning that parties will be often under the belief that they will be able to shift their cost to the counterparty.

It should finally be borne in mind that arbitrators have limited time and therefore a limit to the number of the cases they can realistically manage. In this context, successful arbitrators, i.e. arbitrators who are in more demand than the cases they can accept, will show a preference to maximise the price per hour worked. Even arbitrators in limited demand will have to weigh the price they are willing to accept against applying their time to the pursuit of other profitable opportunities. These characteristics naturally also limits the interest of arbitrators – especially the ones that have strong reputations in the market

301 Willingness to work at lower fees, on the other hand, can allow an arbitrator to acquire more cases. As smaller disputes usually are paid comparably much less attractive values, availability to accept those cases can lead to more appointments.

302 Also when the arbitrator is to be chosen by a national court, judges will not likely prioritize 'low-cost' reputation, since they will most often not possess such a detailed knowledge of the market, and, naturally, do not bear the cost of the arbitration.

and therefore are strongly preferred – in developing 'low-cost' reputations. Therefore, arbitrators focus mostly on other strategies to expand their position in the market.

3.5.2.2 'Quality competition': projecting images of 'expertise' and 'independence'

Without the ability to compete on price, arbitrators compete through 'quality' displays. Arbitrators looking to enter or expand their position in the market will naturally take into consideration how the decisions to select arbitrators are taken. Assuming, as seen above, that the dominant strategy by parties is to select an arbitrator perceived as experienced, knowledgeable, and impartial, and that arbitral institutions will strive to appoint arbitrators perceived as competent and impartial, potential arbitrators will therefore assume strategies that will lead them to be perceived as displaying these characteristics.

The most straightforward way of an arbitrator being perceived as possessing such qualities will naturally be to demonstrate them in arbitral proceedings and over time accrue the reputation as a competent professional. Despite the often-confidential nature of proceedings, due to the well-connected nature of the international arbitration community information travels between the members of the community, allowing 'good' arbitrators to be known within the field. Further, arbitrators and those looking to act as arbitrators may pursue different activities to signal their technical proficiency and ability to be appointed as arbitrators. Members of the community – and those who wish to enter – often undertake speaking engagements, assume academic positions, and produce academic writings related to arbitration where they display their knowledge and commitment to the field.[303]

303 See Peter B Rutledge, 'Toward a Contractual Approach for Arbitral Immunity' (2004) 39 Georgia Law Review 151, 164; Mistelis (n 206) 574.

Finally, arbitrators and prospective arbitrators can use their parallel careers to manifest the qualities needed to be appointed as an arbitrator. As discussed above, an analysis of the profile of arbitrators shows that most arbitrators combine working in this function with other professional endeavours, most commonly working as counsel. Therefore, one way a prospective arbitrator has to prosper in the arbitration market is to show expertise in arbitration in his or her primary occupation. Members who are perceived to be successful in their primary occupation may find a higher likelihood of being nominated. Not only may their perceived success serve as a proxy to their professional ability, but it may also lead them to be considered valuable members of the community, offering them the visibility in the field necessary to advance in their career.

3.5.2.3 Arbitrators invest significant time in networking and exposure within the arbitral community

In a context where many of the nominations are taken or at least influenced by the community of practitioners, other arbitrators, and arbitral institutions, it is not surprising that arbitrators invest heavily in creating connections with other members of the community. This helps to explain why arbitrators and prospective arbitrators so often attend conferences and arbitration events where, beyond opportunities for members to signal their knowledge, they have occasion to connect and network. [304] Further, they often participate in professional arbitral associations and assume positions within this. [305] These

304 Noting the number of players attending these events as being 'larger and larger', see Gaillard, 'Sociology of International Arbitration' (n 39) 13.

305 Well-known arbitrator Sussman indicates that becoming involved with groups such as local bar associations, the ABA, and International Bar Association committees were "*the way I got to develop my practice and meet so many people.*" Adam R Martin, Edna Sussman and Maxi Scherer, 'Success in International Arbitration: No Shortcuts' (2014) 21 Dispute Resolution Magazine 27, 28.

may prove to be successful strategies for those wishing to enter or raise their profile within the community.[306]

This need to obtain exposure and links is particularly important for those looking to enter the market. It is important to note the position of arbitrator is notoriously difficult, even for well-accomplished individuals, with a first appointment often being described as 'elusive.' Without a clear career path to guarantee entry into the world of the select few who routinely act as arbitrators,[307] reaching such status involves often first achieving a high level of accomplishment within the legal profession or the academic world, with a strong preference for those achieving such feats within the arbitration field.[308] Obtaining such positions may allow practitioners the visibility and the connections that can facilitate their recruiting into the arbitral elite.

In summary, a successful arbitrator will often need to attain a successful career prior to achieving nominations and establish a web of personal and professional connections amongst the arbitral community. Establishing a reputation as a reliable, charismatic, and technically proficient member of the community, and cultivating connections over time with arbitral institutions and other key members of the community in the many forums reserved to such social engagements, appears to be the dominant strategy amongst elite arbitrators and those wishing to achieve such status.

306 See Marc J Goldstein, 'A Career in International Commercial Arbitration' in Salli Swartz (ed), *Careers in International Law* (American Bar Association 2008) 105.

307 See Rémy Gerbay, '"How Does a New Arbitrator Get Their First Appointment?", A Q&A Session with Remy Gerbay (Interview Given to Lexis PSL Arbitration)' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2519505.

308 See Schultz and Kovacs (n 52) 170.

The cumulative effect of a high number of arbitrators assuming the tactics supra described has relevant consequences for their 'regulation'. As already noted, the practical impossibility of arbitrators competing on price leads to an exacerbated need from arbitrators to distinguish themselves by adopting the above-described strategies. How, in turn, these lead to an environment which steers the members of the arbitral community to create norms that regulate their behaviour and fulfil their socially relevant role will be discussed, respectively, in Chapter V and VII. How the particularities of the market have helped shape the different evolution of the regulation of international arbitrators, vis-a-vis other professions, will be discussed in the next chapter.

CHAPTER IV

THE UNIQUE 'REGULATION' OF INTERNATIONAL COMMERCIAL ARBITRATORS

In the previous two chapters, I have argued that international commercial arbitration has transformed itself into a complex marketplace, where a multitude of actors offer services in an increasingly competitive market. However, as it was described, the market for international commercial arbitrators has many peculiarities. The way arbitrators are chosen, the way prices are established, and the mechanisms through which competition takes place, separate arbitrators from most other high-level professions. This leads arbitrators and would-be arbitrators to adapt to this market by investing in strong displays of technical proficiency, such as the production of academic work, and networking. This, it will be argued, also has profound consequences for the regulatory preferences of the arbitral community, namely, leading to a preference for a 'non-interventionist' approach.

A good starting point for analysing how the regulation of arbitrators differs from other professions is reviewing how the literature on the sociology of professions has addressed the evolution of professions and their associated regulation.[309] While a full

309 For a review of literature on the sociology of professions, see Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press 2014) 3; Eliot Freidson, 'The Theory of Professions: State of the Art' in Robert Dingwall and Philip Lewis (eds), *The Sociology of the Professions: Lawyers, Doctors and Others* (Quid Pro, LLC, 2014).

review of the vast literature in this field is outside the scope of this work, I will rely on this strand to identify some patterns in the evolution of the regulation of many professions.[310] Professional groups tend to organise themselves according to predictable patterns and develop a legal framework intended to protect members of the profession and/or consumers and third parties.[311] As will be seen, however, one of the particularities of arbitrators as a 'socio-professional' category is not having undertaken a process of 'professionalisation' similar to that of other professions.[312]

With this in mind, this chapter will start by evaluating how the evolution of certain occupations into 'professions' has typically meant a transformation in their regulatory framework. From there, I will explore the reasons that have led to the regulation of international commercial arbitrators to evolve in a way significantly different from other professions. Three main reasons will be explored as possible justifications for this difference: i) under the current legal framework, a level of regulatory competition between states makes regulation of arbitrators along national lines more difficult to achieve; ii) the characteristics of the arbitration market lead arbitrators to be less interested in procuring the same sort of protection from competition found in other professions; and iii) the particularities of the users of arbitration and arbitration in general has led to a lack of external public pressure to further regulate arbitrators.

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310 See Andrew Abbott, 'The Order of Professionalization: An Empirical Analysis' (1991) 18 Work and Occupations 355, 356.

311 The discussion whether 'professionalization' as a phenomenon and the legal framework usually associated with the profession have as a primary effect protecting the clients and the public or, instead, directed to exclude the profession from outsiders is one of key contentious points in the sociology of professions' literature. See ibid; Rosemary Crompton, 'Professions in the Current Context' (1990) 4 Work, Employment and Society 147.

312 Noting that arbitrators have however developed some of the markers of professionalism, see Rogers, 'The Vocation of the International Arbitrator' (n 61) 977.

4.1 The regulation of professions: different paths leading to different models of regulation

Sociological literature has provided an in-depth historical analysis of the development of many occupations into well-established (and not-so well-established) professions.[313] From this analysis, broader sociological theories on how professions carve out legally protected monopolies over certain activities have been proposed. It is true that the paths that have led certain occupations to rise to the level of fully regulated professions have not been identical.[314] Different professions in different countries see a lot of variance on how they have evolved and what regulatory arrangements they are subjected to. Still, it is possible to identify a pattern of evolution through which occupations evolve to fully independent professions.[315]

313 See, amongst many others, Eliot Freidson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* (University of Chicago Press 1988); Richard L Abel, *The Making of the English Legal Profession* (Beard Books 1998); Wai-Fong Chua and Stewart Clegg, 'Professional Closure: The Case of British Nursing' (1990) 19 Theory and Society 135; Norman K Denzin and Curtis J Mettlin, 'Incomplete Professionalization: The Case of Pharmacy' (1968) 46 Social Forces 375; William J Goode, 'The Librarian: From Occupation to Profession?' (1961) 31 The Library Quarterly: Information, Community, Policy 306.

314 A full review of the numerous different theories from the fields of economics, sociology and political science that look to provide explanations for these tendencies is well outside of the scope of this text. On broad simplistic terms, two main accounts have been advanced to explain the support of organized professions for increased state regulation, and, in particular, state-backed self-regulation, of their profession. Some highlight these efforts are mostly the result of practitioners looking to earn supra-competitive profits, stifle competition, and protect incumbency. See George Stigler, 'The Theory of Economic Regulation' (1971) 2 Bell Journal of Economics 3; Richard A Posner, 'Theories of Economic Regulation' (1974) 5 Bell Journal of Economics and Management Science 335. Others prefer to emphasise that these mechanisms of regulation are efficient ways of reducing information asymmetry, reducing the costs of enforcement, and avoiding negative externalities resulting from malpractice. See Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 Oxford Journal of Legal Studies 97, 97.

315 See, Mark Neal and John Morgan, 'The Professionalization of Everyone?: A Comparative Study of the Development of the Professions in the United Kingdom and Germany' (2000) 16 European Sociological Review 9.

Before addressing the particularities that have led to the unique international commercial arbitrators' regulatory regime, I will briefly explore: i) the process through which certain occupations evolve to distinct professions with well-established legal and regulatory frameworks; and ii) what characteristics the regulation of these professions usually acquires over time. This will establish the groundwork to discuss the particularities of commercial arbitrators as a professional group and the reasons underlying the different evolution of their regulatory framework in the second part of this chapter.

4.1.1 The evolution from 'occupation' to 'profession': patterns leading to separate professional regulation

In modern societies, many service activities have evolved over the time from mere occupations to professions – i.e. areas of labour which, due to the perception of needing special expertise and dealing with sensitive public interests, are held to not be simply business ventures or trades. In this sense, professions are those occupations which over time have developed a body of specific knowledge transmitted through means of formal education (often demanding graduate studies), supported by a body of professional literature and with the professionals often viewing themselves as working for some aspect of the good of society.[316] The process which started for some professions as early as the

316 See Thomas Donaldson, 'Are Business Managers "Professionals"?' (2000) 10 Business Ethics Quarterly 83, 84; Howard S Becker, *Sociological Work: Method and Substance* (1 edition, Routledge 1976) 88. For a discussion on the highly contentious concepts of 'profession' and 'professionalism' see, amongst many others, Freidson, 'The Theory of Professions: State of the Art' (n 309); Abbott (n 309) 9.

Middle Ages has today extended to many fields as diverse as doctors, building engineers, and patent lawyers.[317]

In perhaps still the most well-known study of the evolution of professions, Wilensky proposed in 1964 a typical sequence through which professions established themselves in the USA.[318] In broad terms, Wilensky proposed that in order for a profession to establish itself: i) an occupation starts to be undertaken full time by at least a subset of practitioners; ii) specialised training schools start to develop either inside or outside of universities; iii) a professional association is formed; iv) persistent political agitation requesting protection for those participating in the profession takes places; and v) rules to eliminate the unqualified and unscrupulous, reduce internal competition, protect clients and emphasise the service ideal are organised into a formal code of ethics.

While Wilensky developed his hypothesis based on a study of the history of eighteen occupations in the USA, studies focusing on other countries also describe somewhat similar processes. In the UK context, for example, a typical route to professionalisation included: i) the occupation becoming 'full-time'; ii) the establishment of an articles system; iii) formation of a professional association; iv) introduction of qualifying examinations; v) political agitation for legal protection of specific work areas and/or Royal Charter is undertaken; vi) academic routes to qualification in co-operation

317 See Neal and Morgan (n 315). See also Beth Redbird, 'The New Closed Shop? The Economic and Structural Effects of Occupational Licensure' (2017) 82 American Sociological Review 600, 600.

318 Wilensky (n 48). Prior to Wilensky, Caplow's work in this field is worth noting, Theodore Caplow, *The Sociology of Work* (University of Minnesota Press 1954).

with higher education authorities are established; and vii) rules are introduced to ensure continuous professional development.[319]

It is important to note that the models described above may be oversimplifications of more complex processes,[320] and may not necessarily fit well with all jurisdictions and professions.[321] Countries in continental Europe and the 'non-Western' world have their unique patterns, often involving a stronger impulse of the state in the creation and regulation of the many professions.[322] As an example, in Germany, which has also been the focus of different studies about the evolution of its professions, local licensing, and the introduction of academic degrees as requirements, was more the outcome of local and governmental intervention than the result of professional self-regulation.[323] Still, overall, the main idea that stands out is that over time some occupations, under the impulse of their own members, the state, or both, establish separate regulatory frameworks and become a regulated profession. These will be discussed next.

319 See Neal and Morgan (n 315).

320 Wilensky's work has not been without critics. Noting the model proposed by Wilensky to be "*seriously flawed*" and presenting professionalization as a more "*complex, contagious, multilevel process*", see Abbott (n 310) 380.

321 The concept of 'profession' itself is sometimes problematic outside the Anglo-Saxon world, often without an exact correspondence in other languages. See David Sciulli, 'Continental Sociology of Professions Today: Conceptual Contributions' (2005) 53 Current Sociology 915.

322 See Carlos Wing-Hung Lo and Ed Snape, 'Lawyers in the People's Republic of China: A Study of Commitment and Professionalization' (2005) 53 The American Journal of Comparative Law 433, 437. See, also Sciulli (n 321); Anna Buchner-Jeziorska and Julia Evetts, 'Regulating Professionals: The Polish Example' (2016) 12 International Sociology 61.

323 See Neal and Morgan (n 315) 19; James R Faulconbridge and Daniel Muzio, 'Professions in a Globalizing World: Towards a Transnational Sociology of the Professions' (2012) 27 International Sociology 136, 140.

4.1.2 Characteristics of the 'regulated profession': different models in different jurisdictions

As it is possible to detect patterns of evolution to an occupation becoming a profession in different jurisdictions, it is also possible to identify some patterns regarding how professions are regulated. To this effect, in the Anglo-Saxon world professions were traditionally largely self-regulated. Professional standards were (and to a large extent still are) developed by professional associations that retain considerable levels of self-determination. Further, professional associations retain some level of responsibility for professional education. In continental Europe, as seen above, with sometimes the exception of the more high-status professions, states took usually a more hands-on approach to regulation, with state bureaucracies playing the role usually reserved to professional associations in the Anglo-Saxon world.[324]

Over time the traditional distinction between continental and Anglo-Saxon approaches to regulation has largely subsided. Many occupations find themselves regulated by a mixture of government statutory regulation and self-regulation.[325] Some literature strands, in particular, highlight how professions are regulated by a mixture of: i) self-regulation, usually induced by a professional association to which all members have to belong to; ii) 'rational-legal' regulation, induced more directly by states through the use of

[324] See Buchner-Jeziorska and Evetts (n 322); James R Faulconbridge and Daniel Muzio, 'Legal Education, Globalization, and Cultures of Professional Practice Symposium: Empirical Research on the Legal Profession: Insights from Theory and Practice' (2009) 22 Georgetown Journal of Legal Ethics 1335, 1342.

[325] Many jurisdictions also establish so called 'co-regulation' mechanisms through which states incorporate professional associations or other self-regulating organisations in establishing the regulatory framework to assist with both the detailed rule-making and/or the administration of the regime.

mandatory legal norms; and iii) market pressures, induced by consumer clients and employers' preferences.[326] The emergence of supranational entities, such as the European Union, also created both a new level of regulation affecting these professions and a tendency to render uniform regulation in their respective spheres of influence.[327]

Still, in broad terms, similarities can be found regarding the regulation of professions across jurisdictions and professions. First, the regulation of professions often involves carving out a legal monopoly over a professional activity.[328] This means, in practice, that legal rules determine that only members of a certain profession may provide a certain category of services. Closely relating to this idea, regulation of the profession also often includes licensing and/or certification requirements – i.e. members of the profession, to legally engage in the market, are obligated to first obtain an authorisation from the relevant authority.[329] Often it also includes some form of mandatory education, often at the university level, and/or mandatory apprenticeship programmes.[330]

Second, rules regarding how services must be provided are also commonly established. Often these are encapsulated in ethical codes, some with the nature of mandatory law, others appearing as 'soft law.'[331] These rules may establish protection for

326 Eliot Freidson, 'The Changing Nature of Professional Control' (1984) 10 Annual review of sociology 1. See also Buchner-Jeziorska and Evetts (n 322).

327 Faulconbridge and Muzio (n 323) 141.

328 See Frank Parkin, *Marxism and Class Theory: A Bourgeois Critique* (Columbia University Press 1983) 57.

329 It should be noted that occupational closure has extended much beyond the historically privileged occupations usually labelled as professions. See Redbird (n 317) 600.

330 See Richard L Abel, 'Comparative Sociology of Legal Professions: An Exploratory Essay' (1985) 10 American Bar Foundation Research Journal 5, 10.

331 On the different types of professional ethical codes, Frankel (n 50) 110.

the consumers, third parties, the public in general or the professionals themselves. On a more sceptic view, some argue these rules also have the effect (and sometimes the primary intent) of curbing competition.[332] In achieving these goals, rules are introduced to cover several topics including how the service provider must act and which goals it must adhere to, how advertisement can be made, how clients can be acquired and, more rarely, how prices should be defined.[333]

Finally, typically some specialised organisation is established to oversee and regulate a profession. Most typically, especially the most high-level professions, are organised around local, regional and/or national professional associations with mandatory membership. They express typically a form of self-regulation in the sense that the members of the profession often play a role in selecting amongst their own who will take the leadership of such organisations. Such organisations take often a key role in creating and/or implementing the entrance requirement and the rules discussed above. Sometimes, public entities take a primary or an at least complementary role in playing these functions, also playing a role in organising and regulating the roles of professionals.[334]

332 See for example the highly influential Magali S Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press 1977).

333 Those advocating that the regulation of professions is driven primarily as a process to monopolize a certain service market have been quick to argue that many of these limitations are in reality thinly disguised attempts to stop competition. For example, noting that limitations on advertising are often driven by a fear of price competition, see Abel, 'Comparative Sociology of Legal Professions' (n 330) 32.

334 Noting different types of relationship between states and regimes of self-regulation, see Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 The Modern Law Review 24, 27.

4.2 The lack of command and control state-backed regulation of the arbitral community

One of the most interesting aspects of the evolution of international commercial arbitration is that arbitrators have not evolved into a profession in the same way as other apparently 'elite' service providers. 'Arbitrator' has never truly become a full-time occupation, with most engaging in the market on a part-time basis cumulating their appointments with another more primary occupation most often as a lawyer. Several reasons may help explain why most arbitrators do not engage in this function full time. First, holding other occupations, especially high-level positions in the legal industry or academia, facilitates entering and acquiring nominations.[335] Further, the irregular nature of appointments, and consequently of the income produced, might discourage full-time engagement as an arbitrator.

In this sense, one could even question if arbitrators can be classified as professionals' in the stricter sense of the word. Arbitrators have not exhibited as a socio-professional group all the identifying markers most professions display.[336] First, while many, if not all, arbitrators have undertaken tertiary education, often to very advanced levels, there are usually no legally mandated educational, apprenticeship, or even licensing requirements.[337] Indeed, one of the most notable aspects of the arbitration market is that despite being often described as a closed circle, there are usually actual no legal limitations

335 See Chapter III, Section 3.5.2.

336 See, however, Rogers, 'The Vocation of the International Arbitrator' (n 61) 977.

337 See ibid.

to the entrance in this market.[338] Also, while some institutions provide arbitration training,[339] many arbitrators have not undertaken formalised training on arbitration.

Finally, closely related to the ideas above is the distinct nature of the regulatory framework governing arbitrators. While many arbitral associations exist, these are not professional associations at least in the traditional sense. They usually include many members who are not arbitrators but practitioners, and their activities are not directed to oversee the profession as much as they are to advance arbitration. Relevant to this, neither arbitral institutions nor the state fully regulates arbitrators in a way akin to other professions. As will be seen in more detail in Chapters V and VII, while arbitrators are indeed regulated, this often takes place outside legal frameworks. The reasons underlying this peculiar regulatory framework will be analysed next.

4.3 The reasons underlying the different kind of 'regulation' arbitrators are subjected to

Three main reasons may be identified as to why regulatory oversight, akin to what exists in many other professional services, has not taken hold in international commercial arbitration. First, under the current system a regulatory intervention that would limit the provision of arbitral services, at least regarding the international dimension of arbitration, would be efficient only if it is taken in a coordinated fashion by different jurisdictions.

338 See Born, *International Commercial Arbitration* (n 4) 2047.

339 Most notably CIArb, that provides training, allowing candidates access to different levels of membership within the Institute. See Júlio César Bettencourt and Tony Marks, 'The Chartered Institute of Arbitrators' in JDM Lew and others (eds), *Arbitration in England: With Chapters on Scotland and Ireland* (Kluwer Law International 2013) 80.

Such coordination, however, is largely unfeasible. Second, many arbitrators would not benefit straightforwardly from the existence of increased regulation. Therefore, there is little lobbying pressure from arbitrators themselves for heightened regulation. Lastly, the particularities of the users of international arbitration and its non-mandatory nature lead to less external pressures for more intervention. These ideas will be explored in turn.[340]

4.3.1 The difficulties of transnational regulation and regulatory competition in international arbitration

As noted above, states have usually taken little to no steps to establish the same kind of regulations that oversee other professions. As will be seen, under the current system of international arbitration, due to the framework provided by the New York Convention it is not easy for states to individually regulate international commercial arbitrators. Two key ideas are important to note: i) regulation of international commercial arbitrators cannot truly be undertaken unilaterally by a single state; and ii) in practice some states compete to attract arbitrations to their jurisdiction and therefore show little interest in advancing stringent regulation of arbitrators. These ideas will be seen in more detail next.

4.3.1.1 The limits to the ability of states to regulate within the system established by the New York Convention

International commercial arbitration's intrinsically transnational nature, combined with the ability of parties to delocalise the arbitration seat, leads to the fact that heightened

340 These arguments are applicable vis-à-vis the lack of pressure by arbitral institutions to further regulate their market.

regulation within a single jurisdiction would have limited effect on the actual regulation of international commercial arbitrators. As discussed in Chapter II, parties can very easily choose under what set rules they want to operate and what regulatory regime will apply.[341] If a jurisdiction is not chosen by parties this leads to its arbitration law to rarely be applied in arbitral proceedings. This combined with the highly mobile nature of arbitrators and proceedings opens an avenue for regulatory competition, where cases will tend to flow to the jurisdictions most in line with the preferences of parties and their counsel.

To understand how this competition works, it is important to note that parties can determine that their arbitration will take place under a certain jurisdiction by simply establishing in their contract that the arbitral seat will be in place '*x*'. While this selection has important legal consequences, namely by determining which courts will have powers to oversee the proceedings, this is at the same time largely a formal choice as it does not mandate that the arbitral hearings take place in said jurisdiction.[342] Therefore, parties can select jurisdiction '*x*', even if none of the parties or arbitrators have any link with that jurisdiction or even if no part of the arbitral proceedings actually takes place in that jurisdiction. Within the system instituted by the New York Convention, states are then bound to enforce these arbitral awards unless the strict exceptions provided for by the Convention apply.

In practical terms, this means that if a state were to decide, for example, to unilaterally to impose a rule that only those arbitrators who first obtain a certain

341 See Chapter II, Section 2.3.2. See also Eidenmüller, 'The Transnational Law Market, Regulatory Competition, and Transnational Corporations' (2011) 18 Indiana Journal of Global Legal Studies 707, 723.

342 See UNCITRAL Model Law, Article 20(2).

qualification can provide arbitral services, parties could easily avoid this jurisdiction by establishing a different arbitral seat, if they found such requirement detrimental.[343] If country '*x*' decided to establish that only those with an academic background in law[344] could act as arbitrators or that arbitrators would only be entitled to an amount of '*y*', parties could easily avoid that jurisdiction if unhappy with such requirements.[345] They would then still be able to enforce their arbitral award within that jurisdiction as per the framework provided by the New York Convention.

States that would wish to impose stricter regulatory requirements to international arbitral awards would have to stay outside the New York Convention framework or limit the ability of their own national companies to adhere to international arbitration agreements, arguably putting them at a disadvantage and discouraging investment and trade with foreign companies. While some legal alternatives may be found to secure the interests of contracting parties and investors, companies from states that have not ratified the New York Convention may be held to be less reliable, since any awards against such company might be more difficult to enforce. Also, states not prepared to enforce foreign

343 It is widely recognized that as a general principle parties are free to agree on the place of arbitration. See, for all, UNCITRAL Model Law, article 20(1).

344 Spanish Arbitration Law establishes a 'weak' version of this requirement, determining that arbitrators, unless otherwise established by the parties must be jurists in a case of sole-arbitrator or at least one of the members of the panel must be a jurist. In the case of a three-member panel, the law determines that at least on the of the arbitrators must be a jurist. See, Spanish Arbitration Act 2003 (2011 Reform), Article 15(1). This determination, while unusual, does not seem to have precluded the choice of a Spain as an arbitral seat.

345 See, for example, the case of Singapore where in the late 1980s restrictions were imposed that limited the ability to select (not the arbitrators) but their counsel. Such restrictions were seen as hampering the ability of Singapore to market itself as a destination for international arbitration and were quickly revoked. Peter B Rutledge, 'Convergence and Divergence in International Dispute Resolution' (2012) 2012 Journal of Dispute Resolution 49, 52.

arbitral awards may be perceived as investment destinations where the business is more difficult to undertake.[346]

This all means that if a state were to individually try to create regulatory burdens to the development of international commercial arbitration, it would be largely ineffective. Any regulatory measure taken by a state in an uncoordinated fashion, if unaccepted by parties and legal counsel, would result in said jurisdiction being shunned. Any attempts to further regulate how arbitral services can be provided would need coordinated action by states, most likely through amending the New York Convention, or would need to create a new widely accepted international treaty. Any such multilateral international regulatory action is particularly difficult as it would demand a very large number of countries agreeing in the detailed regulation of a market. However, as it will be seen next, many states instead compete to fine-tune their legislation to attract arbitrations to their jurisdiction.

4.3.1.2 States compete to bring arbitrations to their jurisdictions by adapting their legislations

Another important point to note is that in the current regime of easy mobility of arbitrations between states, competition between states has arisen.[347] Under the current system, domestic legislatures are pressured through a system of regulatory competition, often driven by the arbitral community itself, not to over-regulate behaviour in international

346 See Koffi Annan, 'Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration', in *Enforcing Arbitration Awards under the New York Convention Experience and Prospects* (United Nations Publications 1999) 2.

347 See Drahozal, 'Regulatory Competition and the Location of International Arbitration Proceedings' (n 113). Interestingly, this competition might not exist to the same extent in intra-domestic legislative efforts. Noting that US states have not engaged in significative efforts to attract domestic interstate arbitration business. O'Connor and Rutledge (n 174) 104.

commercial arbitration.[348] Indeed, a string of increasingly pro-arbitration statutes, such as those that increase the realm of arbitrable disputes or limit the possibility for national courts to disrupt arbitral proceedings, have been approved in the last few decades in several jurisdictions.[349] These alterations appear to signal a convergence of attitudes regarding international commercial arbitration for less stringent state intervention on arbitral proceedings.

It should be noted, however, that despite states engaging in some level of regulatory competition, that does not mean that a regulatory 'race to the bottom' has been observed. On the contrary, parties and their lawyers seem to prefer to conduct their arbitrations in places where there is a well-established legal framework and trusted national courts that the parties can rely on as a safety mechanism in case arbitral proceedings do not develop in accordance with acceptable principles of procedural fairness.[350] Conversely, jurisdictions providing no national court oversight and/or an insufficiently developed framework may be shunned.

To illustrate this point, the modifications trialled in Belgium in 1985 show how states who pursue an extreme 'non-interventionist' policy may end up attracting less international arbitrations.[351] At the time, Belgium took the largely unprecedented step of determining that if both parties were neither nationals nor resided in Belgium, they would

348 See Filip De Ly, 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) 12 North western Journal of International Law & Business 48.

349 See Drahozal, 'Regulatory Competition and the Location of International Arbitration Proceedings' (n 113) 373.

350 See Karton (n 22) 70.

351 Redfern and Hunter (n 204) 329.

not be able to apply to set aside an arbitral award made in Belgium in Belgium courts. The move, which planned to attract more international arbitrations to Belgium, operated instead as a deterrent, as parties were presumably uncomfortable in having no means of reacting to a decision in the jurisdiction where the arbitration took place.[352]

In any case, the fact that different jurisdictions seem interested in competing to attract international arbitrations is itself a revealing phenomenon.[353] While the direct economic advantages for a country in hosting international commercial arbitration may be negligible in absolute terms,[354] special interest groups – mainly local arbitration lawyers, local arbitrators, and local arbitral institutions – have a strong interest in developing pro-arbitration statutes aimed at attracting arbitrations.[355] It is plausible that this indicates the arbitral community, through their specific technical expertise, holds significant sway over legislative changes in this field.[356] This, coupled with the lack of interest of the arbitral

352 See Bernard Hanotiau and Guy Block, 'The Law of 19 May 1998 Amending Belgian Arbitration Legislation' (1999) 15 Arbitration International 97, 97.

353 Some states, in supporting arbitration, go much beyond providing arbitration friendly legislations. Noting that in the case of Singapore, a host of measures, including tax-break and heavy support for the local institution, were implemented see Elizabeth MacArthur, 'Regulatory Competition and the Growth of International Arbitration in Singapore' (2018) 23 Appeal: Review of Current Law and Law Reform 165, 172.

354 Drahozal, 'Regulatory Competition and the Location of International Arbitration Proceedings' (n 113) 373. Drahozal ultimately concludes that while "*a country which enacts a new or revised arbitration statute experiences a statistically significant increase in the number of ICC arbitration proceedings […] [i]n absolute numbers, the estimated increase is small*".

355 See Christopher R Drahozal, 'Arbitrator Selection and Regulatory Competition in International Arbitration Law' in Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International 2004) 167; Ly (n 348) 49.

356 In this sense, the arbitral community works has been described as an 'epistemic community' yielding great influence on the policy developments in the field. See Lynch (n 76) 94; Ralf Michaels, 'Roles and Roles Perceptions of International Arbitrators' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014) 52.

community itself in state regulation of arbitrators, may help explain the lack of interest of states in regulating arbitrators.

4.3.2 The lack of professional pressures to increase regulation of international commercial arbitrators

As discussed above, a tendency for 'protectionism' is often exhibited by many professions in that professionals often directly develop or support regulation that insulates them to an extent from competition from those outside the profession. International commercial arbitrators seem, so far, to not have developed an agenda for mandatory professional organisations, licensing, or a legal monopoly over the creation and enforcement of professional ethical rules.[357] Indeed, arbitrators do not seem to organise to lobby the state in order to acquire legal protection in the market.[358] On the contrary, examples can be found of arbitrators and arbitral organisations actively opposing regulatory interventions by the state that would make their regulation more akin to that of other professions. [359]

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357 Interestingly this may not fully apply to the market of arbitral institutions. Notably Alexis Mourre, ICC president, recently argued that an institutional self-regulation through a common framework' to consider 'best practices and international standards' would be preferable to "free competition" to weed out institutions that do not deserve the trust of users. See GAR, «Mourre calls for institutions to join forces», 9 March 2018, available at <https://globalarbitrationreview.com/article/1166513/mourre-calls-for-institutions-to-join-forces> accessed on 11 March 2020.

358 Other professions regulatory interests sometimes influence the arbitral regulatory framework. Spain established in its 1988 Arbitration Law that when the dispute is to be settled by de jure arbitration, the arbitrators had to be practicing attorneys. This uncommon requirement was maintained, although only in relation to internal arbitrations, in the 2003 reform. Some saw it as the result of corporatist pressure by the attorney profession. See, Marta Gonzalo Quiroga, 'Reflexiones y Propuestas Prácticas a La Luz Del Arbitraje Internacional En La Ley 60/2003' (2006) 3 Revista Brasileira de Arbitragem 71, 80.

359 This is the case of CBar (Brazilian Arbitration Committee), the most well-known Brazilian arbitral professional association. which has developed a commission dedicated to legislative developments.

Three likely explanations can help this rather unique state of affairs. First, the method by which arbitrators are selected and the kind of characteristics that the market demands of arbitrators act as a barrier to entry in the market. Second, a lack of price competition between arbitrators leads the community to feel less pressure to avoid increased competition. Third, many – or at least the most elite members of the profession – would be worse off if states were to establish disjointed requirements to exercise the profession since that would restrict the potential to offer services across jurisdictions. These ideas will be discussed in more detail next.

4.3.2.1 Preferences in the selection of arbitrators lead to a lack of incentives for arbitrators to push for regulation

In relation to the first idea, it should be noted that incumbent arbitrators face less competitive pressure from would-be market entrants. As detailed in Chapter III, arbitrators' prior experience and existing reputation within the arbitral community are key factors in their selection by parties and arbitral institutions.[360] Arbitrators already installed in the market, through their acquired technical expertise and prior established relationships in the community, have a strong advantage over new entrants. As many practitioners note, in

This commission offers CBar's views on the legislative projects that might affect arbitration practice. Notably, it strongly opposed an attempt to heavily regulate the arbitral profession in Brazil (Draft-Law 4.891/05). This project was noteworthy for determining a fully-regulated arbitral profession, with the establishment of a self-regulatory professional association that would oversee arbitrators (see articles 12-15 of the Draft Law) and, further determining, that only those enrolled in the association and fulfilling educational requirements would be allowed to be arbitrators (articles 3-7). In its opposition, CBar argued that "*being an arbitrator is not a profession*", "*one of most important characteristics of arbitration is the ability of parties freely selecting their arbitrators*" and "*that companies will be able to select foreign arbitral institutions to avoid these kind of controls*". See CBar. "*Profissão de árbitro: Projeto de Lei n. 4.891/05*", available at <http://cbar.org.br/site/wp-content/uploads/2018/04/Projeto-de-Lei-n.-4.891-2005-Silvia.pdf> last access 18 March 2020.

360 See, also, Fernando Dias Simões, *Commercial Arbitration Between China and the Portuguese-Speaking World* (Wolters Kluwer Law & Business 2014) 74.

practice, the market almost always heavily prefers those that already have arbitration or otherwise leading legal or technical experts with many years of experience.[361]

The strong incumbency advantages and elite status of international commercial (and domestic) arbitrators may partially explain arbitrators' lack of interest in advancing an agenda for, for example, licensing or educational mandatory requirements. Their incumbent position is often already protected by the market in a way that makes such requirements unnecessary. While mandatory licensing or educational requirements almost do not exist, the market's strong preference for highly qualified individuals plays the same role, making such regulatory interventions to maintain their position largely unnecessary.

4.3.2.2 Limited price competition leads to a lack of incentives for arbitrators to push for regulation

Closely relating to this idea, it should be noted that price competition is not a key driver of competition amongst arbitrators. As discussed in more detail in Chapter III,[362] both in the context of institutional arbitrations and ad hoc arbitrations, arbitrators are not heavily pressured to compete on price. In institutional arbitrations, prices are most often defined by arbitral institutions and an arbitrator being willing to work at a lower price than that established by the institution does not lead to an increased number of appointments. The way fees are established in ad hoc arbitrations, typically through negotiation with the two disputing parties usually only after the arbitrators are selected with the arbitral tribunal

361 See also Rogers, 'The Vocation of the International Arbitrator' (n 61) 967.

362 See Chapter III, Section 3.5.2.1.

often retaining the power to establish their own fees, also does not incentivise strong price competition.

This separates them from most other professions. In most circumstances, an increase in the number of suppliers leads to a decrease in the price. While sometimes elite members of a profession – such as specialised highly-regarded doctors or senior lawyers – may be more insulated from competition pressures, many often have an interest in restricting entrance to keep prices high. However, arbitrators are not in a fully equivalent position, since incumbent arbitrators mostly do not have to charge lesser fees if more arbitrators are willing to enter the market due to the way fees are set and the strong preference for previous experience. Therefore, they are also conceivably less incentivised to procure regulatory barriers to protect their position and keep their fees at a higher level.

4.3.2.3. Disjointed regulatory systems would lead arbitrators to be in a worse position

Finally, the fact that many arbitrators provide their services across jurisdictional lines should also be noted. This is another aspect that differentiates arbitrators from most other professionals. Indeed, most professions are traditionally regulated along national lines with most professionals offering their services in a single locality and subject to the norms of a single jurisdiction.[363] Arbitrators, on the other hand, often work on arbitrations seated in different jurisdictions, working across localities. Elite arbitrators in particular often act in multiple jurisdictions at the same time, with multiple concurrent cases taking place in many

363 It should be noted, however, that in regards to many professions globalization processes have led to a recalibrated role exercised of the nation-state and of local professional associations regarding professional closure regimes, with supra-national governance playing an increased role. See Faulconbridge and Muzio (n 324) 1344.

of the most important arbitral cities. Arbitrators are therefore potentially subject to different regulatory jurisdictions.

If different jurisdictions developed their own unique regulatory rules, for example by creating unique licensing systems, this would make offering arbitral services across borders more challenging. The need to comply with these multiple regulatory frameworks could represent a significant cost of money and time to arbitrators. This likely discourages arbitrators, especially the most elite ones, from pressuring for such developments. Even arbitrators offering their services in a single jurisdiction could be harmed by such regulatory developments, as an idiosyncratic regime could conceivably be less attractive and lead parties to delocalise their proceedings.

4.3.3 The lack of external pressure to increase regulation of international commercial arbitrators

Finally, it should be noted that due to its particular characteristics, international commercial arbitration has been subjected to little external pressure to heighten state regulation. Indeed, no other stakeholders have pressured for significant changes in the regulation of international commercial arbitrators so far. In this regard, three key ideas should be highlighted. First, the particularities of the users of international commercial arbitration lead them to be less exposed to the kind of asymmetric information that justifies regulatory intervention. Second, commercial arbitration has been able to present itself as an elective alternative to the use of national courts. Finally, international commercial arbitration seems

not to have been marred by important scandals that force a re-evaluation of the system. These ideas will be explored in turn.

4.3.3.1 The particular characteristics of the users of international commercial arbitration

A first idea that also helps the lack of regulation of international arbitrators relates to the fact that the users of international commercial arbitration are likely perceived as being in less need of protection. International commercial arbitration has been mostly used by parties with a reasonable level of economic power and sophistication and, most often, in a context where they are supported by either in-house or outside counsel. Indeed, commercial arbitration is mostly designed to deal with high-level disputes. Further, the high costs of arbitration and the practical need of including a written arbitration clause prior to the emergence of an actual dispute has also helped leading arbitration not to become a mass-market method of dispute resolution.

In this sense, commercial arbitrators are yet again in a distinctly different position from other professions. Many professionals provide services to users that are often perceived as unable to determine the quality of the service provider. This leads often to the development of 'floor regulation' – i.e. regulation to ensure that all service providers guarantee minimum quality standards. Since the users of arbitration are usually sophisticated companies operating in a transnational setting, they are arguably in a better position to identify the underlying quality of the services of arbitrators and arbitral institutions. This in turn may lead to a perceived need of less intervention in this market, as the consumers of the services are understood to be in a position to make these selections and to have the means to identify and react against deviations.

Closely relating to this idea, it should also be taken in consideration that international commercial arbitration, while an important legal phenomenon, stays mostly outside the spotlight partially due to the lack of mass adoption. While an increase can be observed, in absolute terms the number of commercial arbitration cases is reasonably low, with most ordinary people having little to no contact with commercial arbitration and international commercial arbitration in particular. Equally, the confidential nature of most arbitration proceedings might lead arbitration to have less public exposure than court litigation. This arguably leads to less public pressure and media interest in the area and therefore less pressure to intervene in this market.

4.3.3.2 International commercial arbitration as an 'alternative' dispute resolution mechanism

Regarding the second idea, it is important to note that international commercial arbitration is as an option that parties might use as an alternative to what is the default system of dispute resolution: litigation at a national court. In reality, due to the difficulties of enforcing foreign court decisions in some contexts, arbitral proceedings are on occasion such an advantageous method of solving international disputes that parties systemically introduce arbitration clauses in contracts of a transnational nature.[364] Still, parties are perceived as having the possibility of recourse to national courts instead of arbitration if they so choose in their contractual dealings.

364 Indicating the usage of arbitration clauses in 88% of international joint-venture agreements, see Christopher R Drahozal and Richard W Naimark, *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International BV 2005) 59.

In this sense, commercial arbitration is usually perceived as an 'alternative' dispute resolution mechanism – i.e. a system that parties expressly opt-in and where party autonomy is understood to be a key principle.[365] This might arguably lead legislators and public opinion to be less interested in the regulation of the inner workings of commercial arbitration. To this also contributes a perception that courts are part of a public sphere and arbitral tribunals are private, that is a concern primarily of the disputing parties and their respective arbitrators and arbitral institutions. In this sense, arbitration is often presented as more of an extension of a right to freely contract between two parties than a service that parties acquire from a service provider.

4.3.3.3 The general perception that international commercial arbitration works

Finally, it should be noted that a key reason why international commercial arbitration market has not been more thoroughly regulated relates to a general perception that international commercial arbitration has been accomplishing its main goals: providing an efficient and trustworthy dispute resolution for highly-complex contractual arrangements, in particular those with a transnational element.[366] While other fields of arbitration, such as investor-state arbitration and labour arbitration, have faced repeated calls for reform from those outside the field, commercial arbitration specifically has been less controversial.[367]

365 See Lew, Mistelis and Kröll (n 100) 4.

366 As noted by Caselle: "*it is clear that the enforcement power is lent by the national courts, and the latitude allowed to arbitration depends on explicit provisions made by the law-makers or the courts. Presumably the currently liberal legislation would be revoked if there were perceptions of abuse*." Casella (n 111) 161.

367 See for example Van Harten, that in its strong criticism of investment arbitration, notes his criticisms "*not to be directed at the usage of arbitration in other contexts, especially the commercial context,*

Several explanations may help explain this perception. First, in relation to commercial arbitration, there is a lack of an organised effort by countervailing forces. Judges, who one could perhaps imagine would be natural competitors to arbitrators, often instead welcome commercial arbitration. Indeed, commercial arbitration in many jurisdictions helps move judges' dockets by freeing them from highly complex litigation cases.[368] In some jurisdictions, it further offers a career for judges post-retirement.[369] Second, despite a few cases that will be discussed at the end of Chapter VIII,[370] arbitration has not been marred by high-profile scandals or cases that have put into question its legitimacy as a dispute resolution system nor has been seen to jeopardise the public at large. In this sense, it has not attracted the attention of political groups intending to change the system.

This last point is particularly salient. Commercial arbitration has not seen situations that have led users, legislators or the general public to distrust the system.[371] In this sense, with every year that goes by without commercial arbitration being challenged by news reports that undermine trust in its ability to fairly solve disputes, it further entrenches itself in legal life. By extension arbitrators' legal status tends to be maintained. The interesting

where it does not generally raise the same concerns". Gus van Harten, 'Perceived Bias in Investment Arbitration' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

368 See Chapter II, Section 2.3.1.

369 See Robert Coulson, 'Will the Growth of Alternative Dispute Resolution (ADR) in American Be Replicated in Europe' (1992) 9 Journal of International Arbitration 39, 40.

370 See Chapter VIII, Section 8.5.2.

371 Roger summarizes: "*International commercial arbitration has not itself been entirely free from issues regarding arbitrator bias and conduct.20 6 The number of challenges to arbitrators has risen sharply in recent years, and there is lively debate about standards for disclosure and challenge. These issues, however, have largely percolated within the system without creating an externally perceptible crisis of legitimacy*." Catherine A Rogers, 'The Arrival of the "Have-Nots" in International Arbitration' (2007) 8 Nevada Law Journal 376.

point here is that the tendency of arbitration and arbitrators to fulfil their goals does not seem to be merely accidental. Indeed, despite the lack of similar regulatory arrangements that govern other professions, the particular characteristics of international arbitration have led to the emergence of unique regulatory arrangements steering arbitrators to compliance with a pre-defined set of professional norms. These arrangements will be analysed in the next chapters.

CHAPTER V

THE CREATION OF PROFESSIONAL NORMS APPLICABLE TO ARBITRATORS

This chapter focuses on analysing how different 'actors' interact to create the professional norms that regulate commercial arbitrators. In this analysis, the role of states, courts, arbitral institutions, professional associations, and members of the international arbitration community themselves will be examined.[372] Beyond a discussion of how these different forces contribute to the regulation of arbitrators, this chapter intends to shed light on the incentives that lead each actor to participate in these processes. This analysis will provide the backdrop for more general ideas regarding the formation of arbitrators' professional norms. In the last section of this chapter I will argue that: i) boundaries between legal norms, soft law applicable to arbitrators are blurred; ii) a mixed process of state intervention and self-regulation can be observed; and iii) the particularities of the market incentivise strong community participation in normative creation processes.

372 It has been noted that the area of ethical standards is one of "*the most fractured area of international arbitration*." James Ng, 'When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics through the IBA Guidelines on Conflict of Interest and Published Challenges' (2015) 2 McGill J. Disp. Resol. 23, 24. See also Katia Fach Goméz, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (1st edition, Springer Berlin Heidelberg 2018) 12.

5.1 The role of state legislators in establishing professional and ethical norms for commercial arbitrators

In Chapter IV, I examined why states do not intervene in the regulation of international commercial arbitrators in the same way that they intervene in most other professions.[373] They do however still play a key role in international commercial arbitration, including a particularly important role in sketching out the key obligations arbitrators must comply with. It is important to note that arbitration, as we understand it today, can only exist with the support of states.[374] Without the support of states' legal institutions and coercive instruments, arbitration could not operate as a quasi-judicial resolution system of easily enforceable awards. The obligations defined by states' authorities are therefore particularly relevant as they may be understood as a manifestation of the key goals that commercial arbitration must achieve to continue to enjoy wide state support.

To further explore how states influence the creation and development of normative standards within the international arbitration community, I will focus on three key ideas. First, I will focus on the idea that states do contribute to defining and strengthening the basic principles that arbitrators must follow through international treaties and national legislation. Second, I will highlight how state interventions in the regulation of arbitrators take place almost exclusively through the use of open-ended legal principles, such as impartiality and independence, separating the regulation of international commercial arbitrators from that of other professions. Finally, I will review how the international

373 See Chapter IV, Section 4.3.1.

374 Identifying eleven roles that the state takes in relation to arbitration, see Neil Kaplan, 'The Role of the State in Protecting the System of Arbitration' (2015) 81 Arbitration 452.

commercial arbitration community plays a decisive role in shaping states' efforts in creating norms for international commercial arbitrators.

5.1.1 International treaties and national arbitration legislation as a source of arbitrators' professional and ethical and legal obligations

States regulate international commercial arbitration through two main kinds of legal norms. First, states establish international arbitration treaties where they establish common rules regarding arbitration. The focus of these treaties has been on two very specific areas: the mutual recognition of arbitration agreements, and the enforcement of international arbitral awards. Second, they establish domestic legal acts regarding, amongst other issues, the validity of arbitration agreements, the conduct of arbitral proceedings, and the recognition and enforcement of arbitral awards. While these legal instruments are not primarily designed to regulate arbitrators' behaviour, they end up establishing directly and indirectly obligations on how they should behave.

The New York Convention provides the most important example by far of the kind of international conventions that states establish to regulate international commercial arbitration.[375] It is important to note that the Convention does not establish directly any obligations for arbitrators. Rather, it establishes only the conditions under which contracting states must recognise and enforce arbitration agreements and arbitral awards.

375 Other major arbitral treaties include the 1975 Inter-American Convention on International Commercial Arbitration (usually known as the "Panama Convention") and the European Convention on International Commercial Arbitration of 1961. The practical relevance of these conventions is quite reduced when compared to the New York Convention.

Still, in doing so, the Convention imposes indirectly obligations on international arbitrators. For example, the Convention determines that the recognition and enforcement of an award may be refused if a party is "*unable to present his case.*"[376] By establishing this standard, the Convention contributes to the idea that an arbitrator must uphold procedural fairness within arbitral proceedings.

At the domestic level, states establish further details regarding arbitrators' professional and ethical obligations. Sometimes national arbitration acts use language that directly establishes generic obligations upon the arbitral tribunal. For example, the English Arbitration Act 1996 determines that the arbitral tribunal must "*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case*"[377] and avoid "*unnecessary delay or expense.*"[378] Also, the French arbitration law establishes that: "*irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process*." [379]

At other times arbitration legislation establishes obligations, not to the arbitral tribunal as a whole but instead directly to the arbitrators themselves. For example, many Model Law inspired legislations establish that "*arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence*." [380] Also, some arbitration acts have defined more general principles

376 New York Convention, Article V 1(b).

377 English Arbitration Act 1996, Section 33, 1(a).

378 English Arbitration Act 1996, Section 33, 1(b).

379 French Code of Civil Procedure, Article 1510.

380 UNCITRAL Model Law, Article 12(1). See also, among others, French Code of Civil Procedure, Article 1456 and Spanish Arbitration Act 2003, Article 17(2).

directed to arbitrators. To this effect, for example, the Spanish Arbitration Act 2003 establishes in general terms that arbitrators must *"be and remain independent and impartial throughout the arbitration.*"[381] In the same vein, the Swedish Arbitration Act 1999 establishes that "*an arbitrator shall be impartial.*"[382]

Like the New York Convention, national arbitration acts also make clear the applicability of these generally held norms even when not establishing obligations directly upon arbitrators. Most states will establish, for example, that an arbitrator may be challenged "*if circumstances exist that give rise to justifiable doubts as to his impartiality or independence*"[383] or that an arbitral award may be set aside if "*the award is in conflict with the public policy*" [384] of the state. These rules, while not directly establishing obligations to arbitrators, reflexively contribute to reinforcing the key values and norms, that are applicable in this field.

The important point to note is that all major jurisdictions contain provisions within their national legislation that make clear the importance of certain key principles that dominate international commercial arbitration. In particular, legal principles such as the obligation of the arbitral tribunal/arbitrators to be impartial and that the arbitral tribunal/arbitrators should respect basic principles of due process are universally present across arbitral legislation.[385] Even if such obligations are often not neatly expressed by arbitral legislation in a systematic fashion, they are referred to directly and indirectly

381 Spanish Arbitration Act 2003, Article 17(1).

382 Swedish Arbitration Act 1999, Section 8.

383 See, for example. UNCITRAL Model Law, Article 12(2).

384 See, for example. UNCITRAL Model Law, Article 34(2) b) (i).

385 See Born, *International Commercial Arbitration* (n 4) 1810.

consistently throughout the acts either as general principles to be applied or by determining ways for the parties to react if such principles are violated.

5.1.2 Light-touch regulation and using open-ended concepts as the dominant approach to state regulation of arbitration

The combination of the New York Convention with national legislations is the bedrock of the legal framework that arbitrators must adhere to. It should, however, be noted that the commands established by the New York Convention and national legislations do not establish detailed rules and usually refer only to open-ended concepts. In this sense, references to ideas of independence, impartiality, or due process as guiding principles for arbitrators are common. However, arbitration acts usually offer no substance to the meaning of these concepts.[386] Equally, most arbitration acts establish no requirements concerning mandatory legal qualifications or training, nor demand a minimum of arbitral experience.[387] This is especially the case with regard to international arbitrations.

386 A few jurisdictions do offer guidance on the meaning of these concepts. For example, Brazil determines that arbitrators are precluded to act in the same situations that judges would be in accordance with the Civil Procedure Code. See Brazilian Arbitration Law 1996, Article 14.

387 A few exceptions outside the most used seats of arbitration should, however, be noted. The most relevant of these exceptions can be found in the Chinese Arbitration Law, which determines requirements of professional experience and/or education namely, amongst other routes, that an arbitrator must o have been engaged in arbitration work for at least eight years or have worked as a lawyer or a judge for eight years. These requirements are applicable only to domestic arbitrations. See, Chinese Arbitration Law 1994, Article 11. See, also, Jingzhou Tao, 'Arbitration Law of the PRC', *Concise International Arbitration* (Second Edition, Kluwer Law International 2015). Other exceptions include Indonesia, see Indonesian Arbitration Law 1999, Article 12(1), Vietnam, see Vietnamese Law on Commercial Arbitration, Article 20(1) and Colombia, see Colombian Arbitration Law 2012, Article 7. Also, notably, Latvia heavily regulates arbitrators, see Latvian Arbitration Law 2015.

This contrasts deeply with other professions. Take auditors, for example, who usually are expected to maintain a level of independence from the companies they audit. In most jurisdictions they face not only general legal demands of independence but also detailed binding legal rules prohibiting auditors and audit firms from establishing certain kinds of arrangements with the firms they audit.[388] While the exact details of regulations will vary from jurisdiction to jurisdiction, auditors will also have mandatory requirements in relation to training and education, often having to sit licensing exams and to accumulate a certain number of hours working within the profession.[389]

The striking differences between the regulation of auditors and arbitrators in the US may help to exemplify how much the state regulation of arbitrators may be considered 'light touch.' In regard to arbitrators, little to no direct regulation of the profession can be found. The Federal Arbitration Act 1925 does not even expressly require arbitrators to be independent or impartial (albeit there is general agreement that an arbitral tribunal has to be impartial). It instead establishes simply the competent court may make an order vacating the award "*where there was evident partiality or corruption in the arbitrators.*"[390] In the

388 See, Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, Article 22 in particular, and also Sarbanes–Oxley Act of 2002, Sec. 201-209 in particular. See, also Niels Philipsen, 'Recent Developments in the Regulation of Auditors: An Economic Perspective' in Niels Philipsen and Guangdong Xu (eds), *The Role of Law and Regulation in Sustaining Financial Markets* (1 edition, Routledge 2014).

389 See, for all, Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 Articles 6 and 7.

390 US Federal Arbitration Act 1925, Section 10(a)(2).

text of the law itself, no details are given regarding what is meant by 'evident partiality' or what conflict of interests could give rise to a vacatur of the award.[391]

By comparison, in the US, auditors and audit firms are also expected to be independent in the performance of professional services. But, beyond establishing these more general principles expressly as a matter of law, several legally binding instruments provide very detailed rules to assure that such independence is preserved. Most notably, the Sarbanes-Oxley Act of 2002 prohibits auditors from providing a number of other services contemporaneous to the audit, including bookkeeping, management functions, investment advice, investment banking services, and legal services.[392]

The unique status of arbitrators is not only noticeable when they are compared to auditors. Most professions with a strong public interest element are regulated by state legislations or other legally binding instruments that provide detailed rules regarding licencing, ethical issues, and conflict of interests. Amongst many other professions, lawyers, doctors, or engineers will find detailed binding rules regarding these issues. In turn, when looking to national legislation, arbitrators are usually only bound to the kind of open-ended rules described above.

This is not to mean that arbitrators are not bound to (sometimes very detailed) norms regarding similar issues, namely regarding conflicts of interest and standards of independence and impartiality. These are, however, found by putting together other sources

391 For a brief description of how courts in New York approach this provision, see John VH Pierce, Janet R Carter and David N Cinotti, 'Challenging and Enforcing International Arbitral Awards in New York' in James H Carter and John Fellas (eds), *International Commercial Arbitration in New York* (Second Edition, Oxford University Press 2016) 490.

392 Sarbanes–Oxley Act of 2002, Sec. 201.

of regulatory norms such as court decisions, arbitral institutions' rules, soft law, and academic and non-academic writing. However, before advancing on a discussion of these, it will be important to note how the arbitral community heavily influences the development of arbitral legislation.

5.1.3 The influence of the arbitral community on the development of arbitral legislation

In international commercial arbitration, while state legislators formally hold the power to legislate, in practice many of these legislators do not truly drive innovative regulatory effort in this area. Two main considerations are important in this regard. First, many states simply import wholly or partially the UNCITRAL Model Law on International Commercial Arbitration, instead of developing their own regulatory framework. Second, even when the states develop their own arbitral legislative framework, they often do it under the influence of a local arbitral community. These ideas will be further illustrated in the sections below.

5.1.3.1 The UNCITRAL Model Law and the influence of the arbitral community on its development

With regard to the first point raised, it bears explaining that the UNCITRAL Model Law works as a highly influential effort towards harmonisation of national legislatures in the field of international arbitration. Developed by the United Nations Commission on International Trade Law ("UNCITRAL"), it was first adopted in 1985 by a resolution of U.N. General Assembly and amended in 2006. The Model Law, while not mandatory, is

designed to be adopted by national legislatures. It has since been adopted, albeit in some cases with considerable changes, by around 70 states and 100 jurisdictions.[393]

Adoption of the Model Law has been touted to have several advantages by its proponents.[394] First, it allows states to implement a well-drafted and internally coherent arbitration legislative text. Second, its wide usage provides a level of familiarity to the users of international arbitration even if they would otherwise not be familiar with that particular jurisdiction. Therefore, states often incorporate the Model Law into their national legislation as a way of attracting international arbitral proceedings and of promoting the usage of arbitration as a means of solving disputes within that jurisdiction.[395] Equally, local practitioners and arbitrators often refer to the Model Law as an example of the best legislative practices to be followed and as a way to further develop arbitration in that jurisdiction.[396]

The development of the Model Law text itself is an interesting example of how the community of arbitrators and practitioners is involved in the development of state arbitral legislation. While the Model Law was developed by the United Nations Commission on International Trade Law, the decision to commence work on the Model Law followed a consultative meeting in Paris in September 1978 which included representatives of the ICC,

393 J Ole Jensen, 'Setting Aside Arbitral Awards in Model Law Jurisdictions: The Singapore Approach from a German Perspective' (2015) 4 European International Arbitration Review 55.

394 See David Cairns, 'The Spanish Application of the UNCITRAL Model Law on International Commercial Arbitration' (2006) 22 Arbitration International 573, 573.

395 See, amongst others, Pedro Galindo Gil, 'Ley de Arbitraje, Artículo 1 [Ámbito de Aplicación]' in Carlos González-Bueno (ed), *Comentarios a la Ley de Arbitraje* (Consejo General del Notariado 2014) 15.

396 See, amongst others, Christopher R Seppälä, 'Why Finland Should Adopt the UNCITRAL Model Law on International Commercial Arbitration' (2017) 34 Journal of International Arbitration 585.

the leading arbitral institution, and the International Council for Commercial Arbitration ('ICCA'), an NGO composed mostly by arbitration specialists.[397] The discussion of the Model Law text was then undertaken by representatives of different states, some of who were well-known figures within the arbitral community.[398] Further, several arbitral organisations participated as observers in the discussions.[399]

5.1.3.2 The influence of the arbitral community in the development of national arbitration acts

The influence of the arbitral profession on legislation is perhaps even more notable when looking to the way arbitrators and arbitral practitioners provide impulses to the creation and development of arbitral legislation in many jurisdictions. This was, for example, the case of the passage of the England and Wales Arbitration Act 1996, where a ministerially appointed Departmental Advisory Committee on Arbitration Law ('DAC') largely drove the legislative effort.[400] Comprising a veritable 'who's who' of English arbitration at the time, the DAC presented a proposal for a modern, arbitration-friendly legislative framework. The UK Parliament quickly adopted the proposal, with the new legislation significantly contributing to cementing London as a key seat in international arbitration.

397 Eric A Schwartz, 'The ICC Arbitration Rules and the UNCITRAL Model Law' (1993) 9 Arbitration International 231.

398 This was for example the case for Sir Michael Mustill (United Kingdom) and Prof. Dr Heinz Strohbach (German Federal Republic) both leading arbitration figures in their respective jurisdictions.

399 This was the case for the Chartered Institute of Arbitrators and the ICC.

400 See, amongst others, V Veeder, 'La Nouvelle Loi Anglaise Sur l'arbitrage de 1996: La Naissance d'un Magnifique Éléphant'' [1997] Revue de l'Arbitrage 3; Claude Reymond, 'L'Arbitration Act, 1996 - Convergence et Originalité' (1997) 1997 Revue de l'Arbitrage 45; Julian DM Lew and Melissa Holm, 'Development of the Arbitral System in England' in Julian DM Lew and others (eds), *Arbitration in England: With Chapters on Scotland and Ireland* (Kluwer Law International 2013).

The influence of members of the arbitral community in the development of arbitration is by no means a phenomenon restricted to England. In many other jurisdictions including France,[401] Germany,[402] and Sweden,[403] similar interventions by the arbitral community can be identified. Indeed, every well-established national arbitral community continuously evaluates their arbitral legislation as well as the proposal of legislative changes and compares it with other arbitral acts. In these efforts, members of the arbitral community push for so-called pro-arbitration legislation – i.e. arbitration acts that comply with tenets of international arbitration, such as allowing a great degree of party autonomy or establishing easily enforceable arbitral awards.

The fact that members of the arbitral community spend so much effort on helping to develop legislative standards and/or publicly analysing those legislative acts is itself a telling reflection of the strategies undertaken by the members of the community to progress within the profession. Arbitrators benefit from legislation that increases the usage of arbitration.[404] But most uniquely to the arbitral profession, the participation of arbitrators in these processes allows them to raise their profile and to network with similarly minded members of the community. The link between the need to raise a profile within the

401 See Guido Carducci, 'The Arbitration Reform in France: Domestic and International Arbitration Law' (2012) 28 Arbitration International 125.

402 Böckstiegel, a key figure on the German arbitration circles, reports his own role and efforts in the development of the 1998 Arbitration Law reform. See, Karl-Heinz Böckstiegel, 'An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law' (1998) 14 Arbitration International 19.

403 See 'The Draft New Swedish Arbitration Act: The "Presentation" of June 1994 Preface' (1994) 10 Arbitration International 407; Kaj Hobér, 'Arbitration Reform in Sweden' (2001) 17 Arbitration International 351.

404 For empirical support of the idea that local arbitrators see an increased number of nominations following the enactment of a new or a revised arbitration law, see Drahozal, 'Arbitrator Selection and Regulatory Competition in International Arbitration Law' (n 355) 167.

community and success in the profession might explain the level of involvement of members of the arbitral community in this process. This is an idea that will be discussed again at the end of this chapter.[405] First, however, it will be important to review the role played by other institutional actors. The role of national courts will be analysed next.

5.2 National courts as a source of regulatory norms for international commercial arbitrators

In a context where most states' legislatures do not provide detailed guidance on the specific requirement for becoming an arbitrator or the content of arbitrators' obligations, national courts have played an important role in developing the norms that are usually considered binding on arbitrators. In exploring how this process takes place, I will focus on two key ideas. Firstly, I will discuss how through ad hoc approaches courts have helped to clarify, crystallise, and sometimes create normative understandings in this field. Secondly I will discuss how this process is not necessarily straightforward, and how a feedback loop process with the arbitral community determines that only certain court decisions effectively enter the normative understandings of the arbitral community.

405 See Chapter V, section 5.6.3.

5.2.1 Courts' role in developing and crystallising the content of arbitrators' professionals and ethical norms

The idea that judges in practice 'create' legal rules is by no means a particularity of the regulation of arbitrators. Despite being bound by institutional and legal constraints, judges make new 'law' by applying or extending established rules to novel circumstances and by altering the content of legal rules in accordance with changed economic and social circumstances.[406] Naturally, the level of influence that jurisprudence has in developing a particular legal framework will depend on a large number of factors including the historical particularities of that specific jurisdiction, the level of detail that applicable legislative rules have, how many novel questions courts face, and how judges perceive their own role as law-makers.

In the context of arbitration and in particular the regulation of arbitrators, where legislation often offers mostly open-ended concepts and rules, the role of national courts is particularly important. National courts have numerous opportunities to engage with arbitral proceedings. Amongst other functions, national courts might be called upon to decide challenges raised against arbitrators, set aside arbitral awards, or recognise and enforce awards. These operations involve often evaluating the conduct of arbitrators during the arbitral proceedings. Through the application of general legal standards to these situations, courts: i) reinforce and slowly develop interpretations that are over time incorporated into

406 Ronald Sackville, 'Why Do Judges Make Law: Some Aspects of Judicial Law Making' (2001) 5 University of Western Sydney Law Review 59, 59.

the canon of norms applicable to arbitrators; and ii) present novel understandings that shift perceptions and understandings.

Looking at the influence of classic decisions such as *Veritas Shipping Ltd v. Anglo-Canadian Cement, Ltd* or *Commonwealth Coatings Corp. v. Continental Cas*. Co. illustrates how the process takes place. By analysing a request for an arbitrator to be removed, as in Veritas, or a request for an award to be vacated, as in Commonwealth Coatings,[407] the English High Court and US Supreme Court had opportunities to review what the obligation of impartiality entails. In doing so these courts reinforced, both inside their respective jurisdictions and outside their borders, the idea that arbitrators are bound to obligations of impartiality and independence and have an obligation to disclose any dealings which might create an impression of possible bias.[408]

It should be noted that in most circumstances, court decisions do not represent radical departures from the understandings dominant within the arbitral community. On the contrary, national courts often rely on the soft law[409] and academic works of the arbitral community when reasoning about arbitrators' professional and ethical obligations.[410] Exceptionally, court decisions have produced important transformations of the practices

407 In this case from 1968, the Supreme Court held that since previous engineering consultant services provided by the arbitrator to one of the parties were not disclosed, the award could be vacated under §10 of the FAA.

408 See Born, *International Commercial Arbitration* (n 4) 716.

409 A particular work to be noted in this respect is the ICCA's Guide to the Interpretation of the 1958 New York Convention prepared with assistance of the Permanent Court of Arbitration and intended as a handbook "*to give guidance to judges determining applications under the Convention as to its scope, interpretation and application*."

410 Noting that courts defer increasingly to the IBA Guidelines on Conflicts of Interest, see Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity' (2010) 1 Journal of International Dispute Settlement 1, 14; Felix Lüth and Philipp K Wagner, 'Soft Law in International Arbitration – Some Thoughts on Legitimacy' (2012) 2012 StudZR 14, 418.

within the community. The well-known Dutco decision of the French Cour de Cassation provides an example of a court decision serving as a catalyst of significant changes on how arbitral institutions and parties dealt with appointments of arbitrators in multi-party arbitrations, determining that in these types of arbitrations all parties must be afforded equal rights in the appointment process.[411]

5.2.2 The relative importance of different national courts and the feedback loop between the arbitrators' community and courts

If it is true, as seen above, that courts influence how arbitrators' obligations are construed, it should be said that not all national courts have the same impact on the development of these normative standards. Some courts see their decisions widely quoted by commentators in arbitration-related books, articles, and conferences.[412] In turn, decisions from other jurisdictions may be more or less ignored outside that particular jurisdiction. While all national courts help generate the norms that frame arbitration, courts from key arbitral seats – such as England, France, the United States, and Switzerland – likely display a much more important role in this process than others, at least in the international arena.

411 For an analysis of the Dutco case Jean-Louis Delvolvé, 'Multipartism: The Dutco Decision of the French Cour de Cassation' (1993) 9 Arbitration International 197. For an overview of the transformations in arbitration practice following the case, see Thomas Bevilacqua and Ricardo Ugarte, 'Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions' (2010) 27 Journal of International Arbitration 9.

412 See as an example the appendix of cases to Born, *International Commercial Arbitration* (n 4).

The level of importance given to certain jurisdictions over others will be linked to a number of factors such as: i) the importance perceived of a certain jurisdiction due to the number of international cases it handles; ii) the reputation of the court and their judges; iii) how easily available those court decisions are; and iv) how widely read the language used by the court is. Naturally, even within the same jurisdiction, not all decisions will hold the same level of influence over the 'canon' of professional and ethical norms that govern international arbitrators. In this sense, the most relevant and original decisions will usually be more publicised and therefore more influential in the understandings of the arbitral community.

It should be said, however, that not all court judgements are accepted by the arbitral community. In particular, court decisions perceived as inconsistent with international practice are often criticised by the community in online fora, blogs, or academic publications.[413] In such circumstances, judges are sometimes criticised for their 'lack of understanding' of arbitration. Conversely, court decisions that upheld a 'pro-arbitration' stance, namely by respecting arbitrators' autonomy, are usually praised as 'modern' and 'moving in the right direction.'[414] In this sense, members of the arbitration community filter and mediate the understandings produced by courts, favouring those that better coincide with the interests of the community.[415]

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413 Examples of such publications and forums include the Global Arbitration Review (GAR), the Kluwer Arbitration Blog and the OGEMID mailing list, amongst many others.

414 See, for example, Chiann Bao lauding Hong Kong courts for undertaking "*persistent and proactive crafting of pro-arbitration policy that has enabled Hong Kong to remain a top reliable seat for arbitration*." Chiann Bao, 'Hong Kong Courts: International Arbitration Law in the Making'' (2019) 2019 b-Arbitra | Belgian Review of Arbitration 615, 628.

415 See also Chapter V, Section 5.5.

5.3 Arbitral institutions as a source of professional and ethical obligations

In addition to state legislators and national courts, arbitral institutions are also key players in the development and practice of international commercial arbitration. In practice, their role extends far beyond organising the arbitral proceedings. They play a key role in regulating the behaviour of parties and arbitrators. While their importance as a regulatory agent is perhaps more automatically evident as an enforcer of regulatory norms,[416] arbitral institutions are also an important source of professional and ethical norms applicable to arbitrators. Their contribution to the development of the normative environment takes place mostly through: i) the enactment of arbitral institutional rules; and ii) the development of guidelines and other soft law texts.

5.3.1 Arbitral institutional rules as a source of professional and ethical obligations

Arbitral institutional rules, while only directly applicable in institutional arbitrations, are a key part of the normative groundwork applicable to commercial arbitrations. Primarily, they define mandatory pre-established rules and procedures which frame the arbitral proceedings organised within a certain arbitral institution. Arbitral rules determine such issues as: i) how to initiate arbitral proceedings; ii) how to constitute the arbitral tribunal; or iii) how the arbitral tribunal shall make the award. Institutional arbitral rules, however, also contribute to the normative framework that arbitrators operate in. They do so by: i)

[416] See Chapter VIII, Section 8.1.

emphasising principles applicable to arbitrators, such as impartiality and efficiency; and ii) creating obligations that arbitrators must follow within institutional arbitral proceedings.

To this effect, institutional arbitration rules contribute to reinforcing generally held principles arbitrators are expecting to accomplish by declaring for example that "*every arbitrator must be and remain impartial and independent of the parties involved in the arbitration*"[417] or that "*the arbitral tribunal […] shall make every effort to conduct the arbitration in an expeditious and cost-effective manner.*"[418] In this respect, arbitral rules do not typically contain provisions that establish different principles from those already often found in national legislations. In fact, the formulations used in national legislations and arbitral rules in this regard are often of a similar nature. Still, by incorporating such principles, arbitral institutions arguably signal their commitment to these values.

Further, to incorporate principles, institutional arbitral rules also create more tangible obligations to arbitrators. They might determine that arbitrators must: (i) "*disclose in writing […] any facts or circumstances to call into question the arbitrator's independence in the eyes of the parties, as well as […] the arbitrator's impartiality*";[419] (ii) "*render its final award i[n] [X] months*";[420] or (iii) "*state the reasons upon which [the award] is based*."[421] In these sense arbitral institutions sometimes provide specific and

417 Article 11(1) ICC 2017 Arbitration Rules. See also Article 5(3) LCIA 2014 Arbitration Rules and Article 11(1) 2013 HKIAC Administered Arbitration Rules.

418 Article 22(1) ICC 2017 Arbitration Rules. See also Article 13(5) 2013 HKIAC Administered Arbitration Rules.

419 Article 11(2) ICC 2017 Arbitration Rules. See also Article 5(4) LCIA 2014 Arbitration Rules and 11(4) 2013 HKIAC Administered Arbitration Rules.

420 For example, 6 months in ICC, see Article 31(1) ICC 2017 Arbitration Rules.

421 Article 32(2) ICC 2017 Arbitration Rules. See also Article 26(2) LCIA 2014 Arbitration Rules and Article 34(4) 2013 HKIAC Administered Arbitration Rules.

more detailed ways on how obligations must be operationalised. This is the case, for example, of when arbitral institution rules establish the way through which arbitrators must communicate a possible conflict of interest and how these are decided. At other times, arbitral institutions merely restate well-established principles of behaviour as when they establish a general obligation of the arbitrators to be impartial.[422]

It should be noted that development, update, and discussion of their arbitral rules is one of the most relevant tasks undertaken by arbitral institutions. As explored in Chapter III, having arbitral rules perceived as appropriate, modern, and generally conducive to cost-efficient, well-run proceedings and enforceable awards, is an important element of an arbitral institution's success.[423] Further, arbitral institutions may benefit from the 'free' publicity that is generated by the discussion around the changes to their rules. It is therefore unsurprising that all major arbitral institutions frequently update their rules. In this sense, the increased rhythm of changes to arbitration rules may perhaps be a reflection of the increased competitiveness between arbitral institutions.[424]

422 Indeed, arbitral institutions tend not to particularize the meaning of the meaning of concepts such as "independence" and "impartiality". See Franck, 'The Role of International Arbitrators' (n 3) 514.

423 See Chapter III, Section 3.5.1.

424 The ICC for example first established its first arbitration rules in 1922, subsequently amending them in 1927, 1928, 1932, 1934,1939, 1947, 1955, 1975,1998, 2012 and 2017. The LCIA, in turn, adopted revised rules in 1981 and again in 1985, 1998 and 2014. HKIAC passed its first administered rules in 2008 and revised them in 2013. SIAC first rules were developed in 1991 and revised in 1997, 2007, 2010, 2013 and 2016. In the same fashion, almost all other major arbitral centres have reviewed their arbitral rules over the last few years.

5.3.2 Arbitral institutions as a source of soft law applicable to international commercial arbitrators

Arbitral institutions do not contribute only to the regulatory environment applicable to arbitrators through their arbitration rules. In addition, arbitral institutions create other texts that sometimes offer more detail in regards to what arbitrators are expected to accomplish and how they are expected to act. Such texts come under different names, such as ethical codes or practice notes, but share a common goal: providing information regarding how arbitrators, parties, and counsel should act in proceedings, how arbitral rules should be interpreted, and how arbitral institutions will carry out their functions. These texts, however, are not intended to be binding for the parties or arbitrators, but instead simply provide guidance.

The growing number of these soft law texts must be understood in the context of arbitral institutions' strategy to enhance the transparency and predictability of the arbitration process in the eyes of their users.[425] Several transformations in the arbitral market may help explain the increased usage of these texts by arbitral institutions: i) the growing heterogeneity and number of arbitrators and arbitrations linked to each arbitral institution makes the need for uniform proceedings and understandings more evident;[426] and ii) the growing competition between arbitral institutions pressures these institutions to tackle issues that may be seen as problematic, such as conflicts of interests or rising costs

425 Denoting that '*while efficient case administration remains the core activity of arbitral institutions, institutions increasingly assume related roles […] including participate in developing arbitration laws and best practices through issuing guidelines and practice notes*', see Raouf (n 214) 325.

426 See William Park, 'The Procedural Soft Law of International Arbitration: Non-Governmental Instruments' in Loukas A Mistelis (ed), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 150.

in international arbitration. The development of these 'soft law' texts is an attractive way of showing users the commitment of the institution to tackle these issues and, at the same time, 'advertise' the work undertaken by the institution.[427]

5.4 Professional organisations' 'soft law' as a source of arbitrators' professional and ethical norms

Another particular aspect of international commercial arbitration is the multitude of professional organisations dedicated to the profession. Some of these, such as the Chartered Institute of Arbitrators (CIArb) or the ICCA International Council for Commercial Arbitration (ICCA), have a global reach with thousands of members across multiple jurisdictions.[428] Others have national ambitions, aggregating arbitrators and arbitral practitioners from a particular jurisdiction. Others yet look to gather arbitrators working within particular areas of law or arbitrators or practitioners typically perceived as having backgrounds, often regarding gender[429] and/or age,[430] that put them at a disadvantage when entering the market. Importantly, some professional organisations not directed solely to

427 See Warwas (n 186) 46.

428 CIArb, while initially an UK based association, has today membership that expands across more than 100 countries and has more than 12,000 professionally qualified members around the world. See Bettencourt and Marks (n 339) 75. For an overview on ICCA see V Veeder, 'Gala Dinner Address: Memories from ICCA's First Fifty Years' in AJ van den Berg (ed), *Arbitration: The Next Fifty Years* (Kluwer Law International 2012).

429 These include associations such as ArbitralWomen and initiatives such as Equal Representation in Arbitration ('the Pledge').

430 These include different branches directed to 'young' practitioners either sponsored by arbitral institutions, such as the ICC's Young Arbitrators Forum (YAF) or LCIA's Young International Arbitration Group (YIAG), or arbitral organisations such as CIArb's Young Members Group (YMG).

arbitration practitioners pay particular attention to the arbitration and count significant numbers of arbitration practitioners amongst their ranks.

The popularity of membership within these professional organisations has to be understood in a context where arbitrators often look to expand their networks. While the levels of activity within these organisations vary greatly, most frequently organise events and social gatherings, and provide promotional opportunities. Some provide training and education to their members. Further, and importantly for the purpose of understanding the normative environment where arbitrators operate, some of these professional organisations also develop professional and ethical codes as well as practical notes to guide on how arbitrators should operate in a number of situations.[431]

These texts work as 'codification' of existing practice but in some circumstances also display truly original normative solutions.[432] They therefore represent one of the clearest examples of the 'soft normativity' that dominates international arbitration.[433] Often, involving elite members of the arbitral community in their creation, the popularity of some of these texts over others may result from two factors: i) the 'borrowed authority' of the institutions they emanate and/or the members who develop these texts; and ii) the need for the normative solutions that the particular text addresses.

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431 See, for example, the ethical codes provided by CIArb (Code of Professional and Ethical Conduct - 2009). the American Bar Association (Code of Ethics for Arbitrators in Commercial Disputes 1977, revised in 2003), Club Espanõl del Arbitraje (Code of Good Arbitral Practices 2005, which has the particularity of being primarily designed as a code of practices for arbitral institutions). See also the guidelines provided by CIArb (notably its 2016 Arbitration Practice Guidelines, covering best practices regarding issues such as terms of reference including remuneration and drafting awards).

432 This is for example the case of the IBA Guidelines on Conflicts of Interest which in their specification of situations that constitute conflicts of interests and/or create a duty of disclosure involves a creative element. See Kaufmann-Kohler (n 410) 9.

433 See Kaufmann-Kohler (n 410).

Indeed, the importance of these texts and extent to which they are relied upon varies widely. While some of these texts seem to be rarely looked upon, others have undoubtedly reached a central stage within the international arbitration community. Texts like the IBA Guidelines on Conflicts of Interest in International Arbitration, or the IBA Rules on the Taking of Evidence in International Arbitration, have become key normative sources within the community. These are not only widely relied upon but are also the focus of debate, review, and sometimes dissent. While not all of these texts deal primarily with the professional and ethical norms, these texts reinforce dominating principles and detail obligations that arbitrators must follow.

Again, the participation in the committees that develop these documents must be understood in the context of the professional development strategies undertaken by members of the community. More directly, participating in the development of these documents is an opportunity to increase that particular member's visibility within the community and also network with other relevant members. More indirectly, by addressing perceived problems that may affect the legitimacy of international commercial arbitration, members of the community help secure its usage.[434]

[434] As Goméz states: "*It is clear that if arbitrators comply with their duties, regardless of how and where they are set out in writing, this benefits not only the arbitrators' careers, but also the entire arbitration collective, the institution managing the arbitration, and ultimately all participant stakeholders.*" Fach Goméz (n 372) 14.

5.5 Academic and non-academic writing as sources of arbitrators' professional and ethical obligations

Another particularity of international commercial arbitration is the importance of academic and non-academic writing in the development of arbitration and its legal framework. While much could be said about the functions of academic writing in relation to the development of arbitrators' professional and ethical obligations, I will focus on two key ideas: i) academic and non-academic writing plays a key role in organising and disseminating professional and ethical norms; and ii) academic and non-academic writing in international arbitration is largely dominated by those practising in the field, which arguably influences how these shape the content of these norms. These ideas will be analysed in turn.

5.5.1 The importance of academic writing and non-academic writing in systematising and communicating professional and ethical norms

Starting with the first idea, it should be said that the *de facto* importance of the academic community as an influence on the development and interpretation of the law is by no means exclusive to international commercial arbitration.[435] However, the transnational nature of international commercial arbitration and the numerous competing sources of norms exacerbate the role played by the academic community in this field.[436] In international

435 For a discussion on the 'influence' of legal scholarship, see, amongst others, William Twining and others, 'The Role of Academics in the Legal System' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (OUP, 2005).

436 See Paola Catenaccio, 'Cultural Variation in Arbitration Journals: The International Court of Arbitration Bulletin and the Arbitration Journal Compared' in Vijay Kumar Bhatia, Christopher

commercial arbitration, members of a somewhat diverse community, coming from different jurisdictions and working across boundaries, need a common basis of understandings and a set of rules and principles they can rely upon.[437]

Widely read and relied upon academic works about arbitration play this role. Major works, such as Gary Born's 'International Commercial Arbitration', Fouchard, Gaillard, Goldman on International Commercial Arbitration, or Redfern and Hunter on International Arbitration, among many others summarise, 'codify', and describe the complex legal framework in ways which are intelligible across borders, providing common ground for the different members of the community.[438] Familiarity with key arbitration authors and their works is a necessary part of participating in international commercial arbitration at any relevant level, making these texts known and accepted by virtually all members of the arbitral community.

It should be noted that in the complex normative environment of international arbitration where there is no centralised legislative power, this process of codification through academic work is especially relevant. In a context where many legislative acts, national court decisions, and soft law texts potentially project obligations on international arbitrators, the numerous books, articles, and texts produced by the members of the arbitral community play a role in selecting which of these sources is to be relied upon and how are they to be interpreted. This process often involves critically evaluating the quality of these

Candlin and Maurizio Gotti (eds), *Discourse and Practice in International Commercial Arbitration: Issues, Challenges and Prospects* (Ashgate Publishing, Ltd 2012) 164.

437 See Park, 'The Procedural Soft Law of International Arbitration: Non-Governmental Instruments' (n 426) 150.

438 In the words of Ginsburg: "*Like the grand civil-law tradition, it is scholarly commentary that produces the law and technique of arbitration.*" Ginsburg (n 53) 1340.

texts in order to determine if they are useful as reference points. Arguably, legislative acts, national court decisions, and soft law texts quoted frequently and presented in a positive light within the texts of the community might see their relevance increased.

Further to these roles of selecting and codifying the norms, the vast number of academic works (and, increasingly, blogs and other online fora) dedicated to arbitration play an important role in communicating developments in the field throughout the community. Information regarding new arbitral acts and legislative alterations in relevant jurisdictions, changes to the rules and developments on the lives of arbitral institutions, as well as important court decisions, are therefore quickly disseminated through the community.[439] Furthermore, a small but increasingly visible specialised international press on international arbitration focuses on these issues.[440] This media focus allows that any relevant changes to arbitrators' obligations are quickly informed and discussed across the community.[441]

As discussed throughout this chapter, the community undertakes a constant critical evaluation of the norms that are part of the arbitral regulatory framework. In this process, these innovations are often analysed through the prism of whether said development is positive or negative to the development of arbitration. Legislative alterations that are perceived as promoting the use of arbitration and attracting international arbitrations to that

439 In divulging the developments within the arbitral community, the role of blogs such as Kluwer Arbitration blog, a publication of publisher Kluwer International, and Herbert Smith Arbitration Notes, a news blog organized by law firm Herbert Smith Freehills have been particularly relevant.

440 Launched in 2006, Global Arbitration Review ('GAR') is perhaps the most well-known of these publications.

441 See Paula Hodges, 'The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2015* (Manz'sche Verlags, 2015) 206..

jurisdiction are usually praised. Reforms which do not achieve this goal usually are considered 'missed opportunities.' In the same vein as discussed above, national court decisions that are perceived as upholding the 'values' of arbitration and as helping to maintain arbitration as a functional method of solving disputes are lauded. Court decisions that are perceived as doing the opposite usually are received with concern.[442]

5.5.2 The particularities of the arbitral academic/ practitioner community and its influence on the content of the norms

To understand the process through which academic and non-academic writing influences the creation of regulatory norms in this field, it should be noted that this process has important particularities. First, arbitration exhibits arguably less of a 'division of labour' between practitioners and academics than other fields of law.[443] As explored in Chapter III, academic writing and teaching in arbitration possibly: i) offer academics a platform that facilitates entry into the market; and ii) offer practitioners visibility and provide an opportunity to show prowess and understanding of the technical aspects of international commercial arbitration. Therefore it is very common for there to be an overlap between the people participating in both activities.[444]

442 See, amongst many others, Edward Torgbor, 'Overview of the Disposition of Courts Towards Arbitration in Africa' in Emilia Onyema (ed), *Rethinking the role of African national courts in arbitration* (Kluwer Law International 2018) 50; Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35 Journal of International Arbitration 157.

443 See Catenaccio (n 436) 164.

444 See Hodges, 'The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?' (n 441) 206; Ginsburg (n 53) 1340.

This also means that in international commercial arbitration policy analysis is largely undertaken by people who participate in the industry as service providers. In theory, this could lead to a systemic predilection for sub-optimal regulatory decisions – i.e. scholarship in this area may display a tendency to favour policy solutions that benefit service providers.[445] This might help explain the common tendency of seeing pro-arbitration solutions being lauded within arbitral academic writing. At the same time, as is apparent in many texts, there is a concern with the long-term legitimacy and improvement of international arbitration.[446] Ultimately, increased legitimacy and usage of international arbitration will benefit those who offer services in this area, arguably producing an incentive for those operating in the area to defend regulatory solutions that maintain the legitimacy of international arbitration.

Closely relating to the idea above is the notion that within the field of international arbitration there are strong incentives for participation in academic production. Practitioners and academics are aware that participation in this process is a key step in evolving their career. As one commentator quipped:

> '*much scholarship on international commercial arbitration is difficult to distinguish from advertising.*'[447]

At the same time, it is clear that authors are conscious of how the opinions they express

445 See Huber (n 4) 512.

446 See for example Neil Andrew's address 'Improving Arbitration: Responsibilities and Rights - Roebuck Lecture 2017' available at: www.ciarb.org/docs/default-source/ciarbdocuments /events/flagship/events/roebuck-lecture/roebuck-lecture-2017.pdf?sfvrsn=4 (last accessed on 4 October 2018)

447 Ralf Michaels, 'Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature' (2013) 1 London Review of International Law 35, 37.

about the field will reflect in turn on how the community will perceive them.[448] This state of affairs leads to one notable particularity of international commercial arbitration. Academic and non-academic writings and speeches in international commercial arbitration, while often displaying high levels of expertise, rarely deviate significantly from the ideological foundations of arbitration. Ideas such as arbitration is a worthy enterprise that should be pursued as an efficient alternative to state-based adjudication, and its autonomy should be protected, are almost always explicitly or implicitly present in the texts produced.[449]

This, in turn, might influence how arbitrators' professional obligations are interpreted and developed through academic scholarship. Speculatively, there is perhaps a tendency of the community to start from 'optimistic' assumptions regarding arbitrators' behaviour. These are usually assumed as trustworthy, well-intentioned and able to effectively deal with complex legal questions. This, therefore, might help explain the implied '*laissez-faire'* perspective – i.e. a preference for limited state intervention in the arbitration market – that underlies most of the writings in international arbitration.

448 In this regard, an article by Stephen Huber indicates how an author is often conscious that opinions outside the mainstream might put him at odds with the community: '*[…] expanding state court review of arbitration awards offers a promising route for those who believe that arbitration needs to be checked—both in the sense of limiting arbitration and in quality control of arbitral awards. For this heresy, I expect to become a pariah among persons associated with the organized arbitration community, which consistently opposes any suggestion that courts do anything with respect to arbitration awards other than confirm them*'. Huber (n 4) 512.

449 This is not to say that members community do not sometimes present criticisms to the status quo and/or calls for reform. But even when they do, attachment to the dominant goals of the community can still be found. For example, Paulsson's well publicized criticism of the party-appointed arbitrator system is ultimately rooted in the need to defend arbitral values such as independence and impartiality of the adjudicators. Paulsson, 'Moral Hazard in International Dispute Resolution' (n 16).

5.6 The creation of regulatory norms for international commercial arbitrators as a distinct process

By way of conclusion, there are three main takeaways regarding the production of professional and the professional and ethical norms of international commercial arbitrators. First, the creation of the regulatory norms applicable to international commercial arbitrators is the result of a composite of general legal principles, concrete judicial decisions, and the internal discussions that are permanently ongoing within the community. Second, the development of these norms is the result of a unique mixed system where states establish the key principles which arbitrators must adhere to and where the arbitral community develops and details them. Third, the particularities of the arbitration market explain the high-level of participation in the process of creating and developing norms by the members of the community. These ideas will be addressed in turn.

5.6.1 A diffuse process of norm creation where boundaries between legal norms, soft law and merely expected behaviour are blurred

In international commercial arbitration, it is possible to find arbitrators as both operating in an ethical no-man's land or suffering from a wave of 'legislitis.'[450] On the one side, state-backed 'hard law' offers often little more than open-ended demands in relation to how

[450] See on the one side, Catherine A Rogers, 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' (2001) 23 Mich. J. Int'l L. 341, 342. On the other hand, warning against the risks of over-regulation see Ugo Draetta, 'The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization' (2015) 33 ASA Bulletin 327. See also Toby Landau and Romesh Weeramantry, 'A Pause for Thought' in AJ van den Berg (ed), *International arbitration: the coming of a new age?* (2013).

an arbitrator should act.[451] As seen above, states' legislatures often do not indicate much more than an arbitrator must be 'independent' and 'impartial' or that, for example, the fees charged must be 'reasonable.'[452] On the other side, arbitrators operate in an environment where, in practice, they are expected to observe many written and unwritten norms arising from a wide number of sources, from detailed ethical codes with varying degrees of enforceability to unprinted cultural expectations about how an arbitrator should act, talk, and behave.[453]

For the reasons set out in Chapter IV, the regulation of international arbitrators has not evolved in the same way as other professions. International commercial arbitration has not evolved centralised, organised institutions with the power to establish legally binding professional standards and generally applicable ethical rules.[454] That does not mean, however, that international commercial arbitrators are not bound by well-established rules of behaviour. As in other professions, there are mechanisms of creating these norms which often evolve into rather detailed commands which determine issues such as: i) what kind

451 In this sense, as one commentator has summarized: "*…barbers and taxidermists are subject to far greater regulation than [arbitrators]*." See, Richard C Reuben, 'Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice' (1999) 47 Ucla L. Rev. 949, 1013.

452 Regarding independence and impartiality of arbitrators, see amongst others English Arbitration Act 1996, Section 1(a) or Spanish Arbitration Act 2003, Article 17(1). Regarding the 'reasonableness' of fees see, amongst others, English Arbitration Act 1996, Section 64(1). These concepts will be further explored in Chapter VI.

453 Michael Kerr, who served as a Lord Justice of Appeal and acted as an arbitrator, for example noted in his autobiography, that a "*successful arbitrator*" should beyond "*total integrity and impartiality as both go without saying*" also display an "*absence of any eccentricity or arrogance.*" Michael Kerr, *As Far as I Remember* (Hart Publishing 2002) 326.a

454 In the context of enlargement of the number of service providers and the geographical spaces where arbitration takes place, few actors have the legitimacy to generate norms that will be accepted by all relevant players. On this point see Gaillard, 'Sociology of International Arbitration' (n 39) 16.

of disclosures arbitrators are supposed to do in relation to an appointment; or ii) when arbitrators are supposed to refuse an appointment.

Due to the lack of centralised governing bodies with mandatory authority over these issues, determining the exact answer to many practical questions demands to puzzle together different legal statutes, jurisprudence, soft norms, academic texts, and accepted practices within this community. Within this environment, it is often difficult to determine exactly where binding legal rules and social practices start and end. Many of the tenets that regulate international arbitrators do not have a single well-defined source but instead result from a process where certain principles and rules rise (and sometimes fall) in prominence over time.

In this regard, arbitrators are different from judges, practising lawyers, or other organised professions. Often arbitrators will not find a well-defined set of institutions that will state their function and determine their exact role within a given jurisdiction. Instead, regulatory norms are developed in community-dominated phenomena that operate across borders. While this does not mean that there is a universally accepted set of detailed legal obligations and ethical standards that arbitrators must comply with uniformly across the world,[455] this normative environment has been capable of producing universally accepted principles arbitrators are obligated to follow.

Within the international commercial arbitration community, it therefore seems to be more apt to think of their regulation as being governed by several key principles to

[455] While there has been a strong tendency for standards and practice to be growingly uniform in the field of arbitration, some geographical and sector communities maintain sometimes specificities. The most traditional example of this distinction has been the acceptance in the Unites States of 'partisans' co-arbitrators in the domestic arbitration context.

which many different sources contribute.[456] As will be discussed in the next chapter, some of these have developed into detailed rules, whilst others have remained vague. What is important to note is that arbitrators are more often regulated through a universally accepted and oft-repeated concepts and formulas such as an 'arbitrator must be impartial and independent' or 'an arbitrator must conduct proceedings diligently' than steadfast precise rules. While detailed rules increasingly appear within international arbitration, they are almost always the result of the work of the arbitral community and are often not legally binding.

5.6.2 A mixed process of creating professional norms: state intervention and 'self-regulation'

Further to the idea above, it should be noted that the regulation of international commercial arbitrators does not work: i) as a system of top-down imposition, where regulatory norms are imposed by an external regulatory force to a professional community; or ii) as a system of mandatory self-regulation where the members of the profession establish mandatory professional standards for all the members of the community.[457] Instead, there is a *sui*

456 See Fach Goméz (n 372) 11.See also William Park, 'Rectitude in International Arbitration' (2011) 27 Arbitration International 473, 512.

457 See the qualification of 'self-regulation' in four types proposed by Black: "*mandated self-regulation, in which a collective group, an industry or profession for example, is required or designated by the government to formulate and enforce norms within a framework defined by the government, usually in broad terms; sanctioned self-regulation, in which the collective group itself formulates the regulation, which is then subjected to government approval; coerced self- regulation, in which the industry itself formulates and imposes regulation but in response to threats by the government that if it does not the government will impose statutory regulation; and voluntary self-regulation, where there is no active state involvement, direct or indirect, in promoting or mandating self- regulation*". Black (n 334) 27.

generis creation of professional norms derived from the transnational nature of commercial arbitration where community consensus-building is central. There is in this sense a division of regulatory power between the state and the arbitral community.

In broad terms, states establish the blueprint for international arbitration and arbitrators' obligation, often through a consensus approach expressed in international conventions such as the New York Convention and through national legislation which most often establishes a great level of autonomy to arbitration. States then leave to the arbitral community the responsibility to develop the few key principles established in their legislation into actual, meaningful commands.[458] This is made increasingly through the usage of soft law rules that, while not legally binding, are often highly influential in practice. These processes are aided through a mix of academic and non-academic writing from members of the community which offers guidance on the applicable principles and rules, and offers prescriptive criticism on current practices.

As noted in this chapter, the arbitral community plays a dominant role in setting these regulatory frameworks.[459] However, the grasp that the arbitral community has held over the normative environment that regulates international commercial arbitration takes place through different mechanisms than those usually associated with regulatory 'capturing.' Instead of traditional lobbying activities, the influence of the arbitral

458 In this process, despite typically not being the drivers of these initiatives, sometimes the users of arbitration have some input in the content of these soft-law texts, with the views of general counsel in large corporations being considered by members of the community. See, for example, Otto de Witt Wijnen, Nathalie Voser and Neomi Rao, 'Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration' (2004) 5 Business Law International 433, 436.

459 Kaufmann-Kohler (n 410) 13.It is important to note that this is by no means a particularity of the arbitral community. In reality, "[l]*iittle legislation relating to any profession is passed without being largely shaped by that profession.*" William J Goode, 'Community Within a Community: The Professions' (1957) 22 American Sociological Review 194, 195.

community takes place through: i) a quasi-monopoly on the production of the dominant understandings of what arbitration is and ought to be – in this sense operating a sort of 'cognitive' capture of the regulatory process; ii) a strong commitment by the members of the community in participating directly and indirectly in the process of creating these norms; and iii) collectively rejecting as much as possible (when necessary) certain jurisdictions, courts, or institutions, forcing them to make changes if they intend to obtain any relevant role in the international commercial world.

5.6.3 The 'collective-action problem' of creating regulating norms and the arbitral market

A final idea regarding the incentives for regulatory norm creation should be noted. The strong commitment of the members of the arbitral community to participating in this regulatory process is not an accident. Underlying the strong participation in the production of these normative standards by the community one can find very strong individual market incentives. For arbitrators and practitioners, participating in the process allows visibility, networking opportunities, and showing proficiency within the community that ultimately yields great influence on who succeeds in the profession.[460] For arbitral institutions, involvement in the process of creating and influencing the creation of norms of behaviour

[460] In a typical example of how participation in community initiatives may benefit participants, well known Austrian arbitrator Werner Melis describes how the negotiations for the UNCITRAL Arbitral Rules 1976: "*gave the opportunity to become acquainted with persons working in this field and to establish personal relationships and even friendships which were very helpful for the work in the professional field*." Melis (n 151) 226.

is a form of projecting commitment to the dominant values and increasing its visibility and reputation.

It should be noted that the creation of general welfare-oriented regulatory norms has, in a way, the nature of a 'public good' – i.e. 'goods' for which consumption is both non-excludable and non-rivalrous and therefore may be 'underprovided' by the 'market.' In the case of professional regulation specifically, the activity of creating professional and ethical norms cannot be 'charged' to those who benefit from the activity as it is not feasible to negotiate a price with those who extract utility from this activity. In most cases, regulation therefore has to be undertaken by public entities or, alternatively, by private entities which are financed: i) by mandatory contributions of those regulated or others; or ii) by voluntary donations of time and/or money from those who are regulated or other parties.

In the context of the regulation of international commercial arbitrators, the bulk of regulatory 'work' has been undertaken by arbitrators, practitioners, and arbitral institutions on a 'voluntary' basis. As seen above, members of the arbitral community and arbitral institutions 'donate' their time to, among other activities: i) propose, shape, and review legislation passed in different jurisdictions; and ii) participate in associations, committees, and other groups that develop 'soft law.' The high level of participation is, however, not only derived from a commitment to the values of the profession but also from the fact that this participation is sometimes part of a strategy of 'business development'.

This feature of the international commercial arbitration market allows defeating the 'collective action problem' that otherwise would make such widespread creation of norms

unattainable.[461] Without the existence of direct and indirect advantages for the ones who participate in the process, it would be difficult to understand the high number of 'normative' creation initiatives and the high level of participation across the community in these projects. The participation across jurisdictions of elite members of the professions seems to indicate that members of the community perceive their costs of participating in this process (most importantly their time invested in it) as lower than the benefits they ultimately obtain from these interactions.

461 On the concept of the 'collective action problem' see Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard Univ Press 1971) 11–16.

CHAPTER VI

THE REGULATORY NORMS APPLICABLE TO INTERNATIONAL COMMERCIAL ARBITRATORS

Chapter V explored the different sources contributing to the development of arbitrators' professional obligations. As discussed, states rarely provide detail about the content of the professional norms applicable to arbitrators. Despite this, there is general agreement regarding the key duties that are imposed upon arbitrators.[462] Arbitrators are far from being expected to be simple 'hired guns' which should comply with the request of producing an award.[463] Indeed, arbitrators are bound to special professional and ethical obligations, most importantly guaranteeing a fair adjudicative dispute resolution process.[464] While the application of these principles to actual real-life situations is often not evident, nor are those principles universally understood in the same way, the arbitral community has gone to great

462 See Paula Hodges and Joanne Greenaway, 'Duties of Arbitrators' in JDM Lew and others (eds), *Arbitration in England: With Chapters on Scotland and Ireland* (Kluwer Law International 2013) 317.

463 See A Mourre, 'Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator' (2006) 22 Arbitration International 95, in particular 114.

464 Franck, 'The Role of International Arbitrators' (n 3) 502. See also QMUL's 2015 International Arbitration Survey which indicates that participants mention speed and cost within the three most valuable characteristics of international arbitration in only 10% and 2% of the responses respectively. Neutrality is, in turn, mentioned by 25% of respondents. QMUL, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (n 260).

lengths to develop guidance regarding many of the practical issues that mostly common arise.[465]

In this chapter, I will focus on four of the arbitrators' key professional obligations that provide a good illustration of how different issues have been addressed by the arbitral community: i) to be independent and impartial and disclose conflicts of interests; ii) to guarantee parties' due process rights; iii) to efficiently solve the dispute; and iii) to guarantee that substantive public policy considerations are not violated.[466] More than providing a thorough description of the content of these duties, this analysis intends to illustrate how in regards to certain obligations there are underlying incentives that make deviation more or less likely, and how the international arbitration community has addressed these issues. This allows some insight into the heterogeneous set of regulatory responses given to different professional issues and how the level of regulatory detail may be related to how problematic the underlying issue is.

6.1 Arbitrators' obligation to be independent and impartial and to disclose conflicts of interests

Arbitrators' obligation to be independent and impartial and disclose conflicts of interest is a good example of how the arbitral community developed detailed guidelines to guide

465 See Lynch (n 76) 94.

466 This is not an exhaustive list of arbitrators' obligations. Other obligations such as for example maintain the confidentiality of proceedings and complete the arbitrator's mandate exist. For a blackletter analysis of arbitrators´ obligations, see Born, *International Commercial Arbitration* (n 4) 1986; Hodges and Greenaway (n 462) 317.

behaviour. National legislators,[467] courts,[468] arbitral institutions,[469] and leading commentators[470] all express direct and indirectly that the arbitrators – or at least the arbitral tribunal as a whole – must be always independent and impartial of the parties and in consequence disclose any conflicts of interests they might have. The idea of the arbitral tribunal as a neutral decider has not only become one of the key selling points of international commercial arbitration[471] but also, perhaps, the bedrock of the argument for the legitimacy of international arbitration.[472]

Still, to a great extent the exact meaning of these concepts and how they should be interpreted has been established by the arbitral community itself through commentary and, most importantly, soft law texts. An analysis of how these obligations have been crystallised allows an illustration of a number of interesting points, specifically: i) the regulatory norms applicable to international arbitrators have demonstrated a tendency to become institutionalised; and ii) the international arbitration community seems to respond

467 To this effect, for example, the English Arbitration Act establishes that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal*". English Arbitration Act 1996, Section 1(a). Similarly, the Spanish Arbitration Act remarks that: "*[a]ll arbitrators must be and remain independent and impartial throughout the arbitration.*". Spanish Arbitration Act 2003, Article 17(1).

468 French courts, for example. have remarked that "*the independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a judge, which excludes, in its very nature, any relation of dependence, particularly with the parties*." Or as Lord Clarke highlighted in Jivraj v Hashwani: "*[t]he dominant purpose of appointing an arbitrator is the impartial resolution of dispute between the parties in accordance with the terms of the agreement*".

469 See, amongst others, Article 11(1) ICC 2012 Rules, Article 11(1) 2013 HKIAC Administered Arbitration Rules and Article 13(1) 2016 SIAC Rules.

470 See, amongst others, Born, *International Commercial Arbitration* (n 4) 1759; Lew, Mistelis and Kröll (n 100) 255.

471 See, amongst others, Lew, Mistelis and Kröll (n 100) 6.

472 See, Stephan Schill, 'Conceptions of Legitimacy of International Arbitration' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 118.

to areas where incentives for non-compliance are higher by upping the level of detail of its rules. Before turning to these points, however, it will be necessary to review the concept and meaning of independence and impartiality, and why the duty of disclosure is a particularly sensitive topic in arbitration. These will be discussed next.

6.1.1 The concepts of independence, impartiality, and the duty of disclosure imposed on arbitrators

In conceptual terms, independence and impartiality are sometimes used to refer to two closely related but different ideas. Some authorities regard independence as concerned only with objective, external matters, involving the question as to whether an arbitrator has connections or relationships with a party (or its counsel) which render them – at least apparently[473] – dependent on the party. In contrast, impartiality is said to be concerned with subjective biases and predispositions, involving the dispute before the arbitrator.[474] In practical terms, however, independence and impartiality are terms often used together to refer generically to the idea that an arbitrator must be objectively and subjectively able to decide a dispute neutrally and fairly.

From this general obligation of independence and impartiality several practical duties for the arbitrators are derived. First, an arbitrator has a duty to decline to serve in an arbitration if they are not fully satisfied that they can serve impartially. Equally, an

473 See, IBA Rules of Ethics for International Arbitrators 1987, 3(2). For a discussion see Gary Born, *International Commercial Arbitration* (2 edition, Wolters Kluwer Law & Business 2014) 1762.

474 Born, *International Commercial Arbitration* (n 204) 734–735. See also, Luttrell (n 149) 21.

arbitrator should refuse to serve in an arbitral tribunal if they have a material connection to the parties, their counsel, or the dispute which would lead the arbitrator to not be independent.[475] In the same vein, and even if the arbitrator believes they could be independent and impartial, when from the point of view of a reasonable third person there are circumstances which give rise to justifiable doubts, the arbitrator also has a duty to decline the appointment.[476] Further, an arbitrator has also a duty to disclose any information to the parties that may give rise to doubts as to the arbitrator's impartiality or independence, even if they consider that such circumstances do not disqualify them from accepting the appointment.[477]

These obligations comprise an element of personal self-regulation imposed upon arbitrators. In the first instance it is left for the arbitrators to evaluate, according to their own understanding of the applicable norms, a possible situation of conflict of interest. Parties must then determine, based on the information disclosed by the arbitrator and the information they can independently obtain about the arbitrator, whether they are satisfied with their independence and impartiality. In case they are not, they may challenge the appointee.[478] While rules may vary, the challenge of one of the arbitrators' independence and impartiality will be in the first instance decided by the arbitral institution or the arbitral tribunal as a whole – i.e. the challenged arbitrator and remaining arbitrators if existing.[479]

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475 See IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), Standard 2(a). See Moses (n 190) 136.

476 See IBA Guidelines, Standard 2(b).

477 See IBA Guidelines, Standard 3(a).

478 See UNCITRAL Model Law, Article 13(2). See, ICC Arbitration Rules, Article 14.

479 See UNCITRAL Model Law, Article 13(3).

If the challenge is refused, parties will then have usually the right to escalate the matter to the competent national court.

Operating in an adversarial system, parties have an incentive to investigate whether arbitrators are independent and impartial. The choice to challenge is then analysed from a strategic perspective, with parties calculating the benefits, risks, and costs of undertaking a challenge. The decision is in the first moment kept within the community by being taken by the panel or by the arbitral institution. Still, in case the challenge is not accepted, recourse to national courts is possible, allowing for an element of external review to that more self-regulatory approach. It should be noted that if parties do not present an objection to the arbitration in a timely manner, any subsequent challenge regarding the information disclosed might be unsuccessful.[480]

6.1.2 The tension between arbitrators' short-term self-interest and the community interest

An arbitrator's decision to refuse an appointment or disclose a potential conflict of interest is one of the thorniest issues arbitrators face. By declining to serve, the arbitrator is often foregoing considerable payment and, sometimes, valuable opportunities to advance their careers. At the same time, as will be discussed in more detail in Chapter VII,[481] the arbitrator will also have to consider how accepting an appointment in situations where they

480 Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer Law International 2012) 1.

481 See, Chapter VII, Section 7.1.2.

should have refused, or failing to disclose connections to the parties, may jeopardise their position in the market.[482] Further, as will also be discussed in the next chapter, the decisions to refuse or disclose be influenced by personal moral codes of conduct, and social pressures originating from professional peers.

But also, it is worth considering how each individual arbitrator's decision to accept/ refuse an appointment and disclose/not disclose connections affects the community as a whole. As the success of voluntary commercial arbitration is ultimately linked to the belief that arbitrators produce unbiased decisions, violations of these obligations have the potential to affect not only those who break the norms but also other members of the community. [483] Conversely, arbitrators' compliance with these obligations produces positive impacts on other members of the community who benefit from the increased legitimacy of international arbitration.[484]

In this sense, the legitimacy of international arbitration depends on arbitrators voluntarily complying with the requirements of independence, impartiality, and disclosure obligations, spurring on the community as a whole to be interested in compliance.[485] As explained in Chapter V, this creates an incentive for the arbitral community to deal with

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482 See Herman Verbist and Erik Schäfer, *ICC Arbitration in Practice* (2nd edn, Wolters Kluwer 2015) 67. See also Paula Hodges, 'Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?' in Andrea Menaker (ed), *International arbitration and the rule of law: contribution and conformity* (Kluwer Law International 2017) 628.

483 See Hodges, 'Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?' (n 482) 603.

484 See James H Carter, 'The Culture of Arbitration and the Defense of Arbitral Legitimacy' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 102.

485 See Will Sheng Wilson Koh, 'Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges' (2017) 34 Journal of International Arbitration 711, 713; Nathalie Allen and Daisy Mallett, 'Arbitrator Disclosure - No Room For The Colour Blind' (2011) 7 Asian International Arbitration Journal 118, 119.

this issue by addressing it in soft law regulation and, due to the strong incentives for individual involvement in community initiatives, for members of the community to participate in these regulatory efforts. The IBA Guidelines on Conflicts of Interest represents one of the clearest examples of the community identifying and addressing an issue through a set of common rules. The guidelines will be discussed in more detail next.

6.1.3 The IBA Guidelines on Conflicts of Interest as an example of the tendency to institutionalise professional and ethical rules

As discussed in the previous chapter, professional and ethical obligations in international commercial arbitration have been through a process in the last few decades of crystallising into different texts. In a context where arbitrators may sometimes have strong short-term incentives to deviate from their obligations, but the community has a general strong interest in compliance, strong attention has been paid to the issues of impartiality, independence and disclosure. The community has addressed these issues by establishing a widely used text: the IBA Guidelines on Conflicts of Interest in International Arbitration. This represents one of the most effective instances of arbitral self-regulation, with the community successfully developing, spreading and largely self-accepting a set of norms.[486]

[486] See Hodges, 'Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?' (n 482) 604; Kaufmann-Kohler (n 410) 14; Fernández Arroyo (n 281) 75.

6.1.3.1 The structure and originality of the IBA Guidelines on Conflicts of Interest

One of the most interesting aspects of the IBA relates to its innovation and practical nature as a regulatory text within arbitration. Indeed, the Guidelines not only establish general standards regarding impartiality, independence, and disclosure, they also provide lists of practical applications of these general standards. They do so by providing a so-called 'traffic light system' – i.e. red (waivable and non-waivable), orange and green lists describing possible circumstances arbitrators may face.[487] While the situations described are by no means an exhaustive list,[488] they are intended to provide an overview of the type of circumstances where arbitrators should refuse an appointment or disclose a connection to the parties, as well as situations that such disclosure is not necessary.[489]

Situations described in the red list are either: i) serious enough to warrant that an arbitrator can only accept their nomination if the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator (waivable list); or ii) so serious that even if both parties, fully aware of the circumstances. expressly accept that arbitrator, they may not act in that case. An example of the first situation would be an arbitrator who is a lawyer in the same law firm as the counsel to one of the parties.[490] An example of the second would be an arbitrator who at the same time

487 See Hodges, 'Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?' (n 482) 602.

488 See de Witt Wijnen, Voser and Rao (n 458) 435.

489 See Luttrell (n 149) 201.

490 IBA Guidelines, 2.3.3. It is worth noting that this IBA Guidelines have a very strong focus on the participation of partners of law firms, especially those of significant dimension. See Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 349.

acts as a manager or director, or is a member of the supervisory board of one of the parties.[491]

Situations as those described in the orange list may or may not give rise to doubts as to the arbitrator's impartiality or independence depending on the full circumstances of the case.[492] They should, however, be disclosed by the arbitrator to the parties, which then will have the possibility to decide whether they want to challenge the arbitrator in the appropriate forum: the arbitral tribunal itself, the arbitral institutions or the competent national court. Examples of situations covered in the orange list include an arbitrator who has within the past three years served as counsel for one of the parties, or the arbitrator having publicly advocated a position on the case.[493]

Finally, the IBA Guidelines' green list also covers situations in which the arbitrator neither has a duty to disclose nor can the situation be used as the basis for a challenge to the arbitrator. Examples of these situations include: i) the arbitrator teaching in the same faculty or school as another arbitrator or one of the counsel to one of the parties; ii) the arbitrator holding an insignificant number of shares in one of the parties if such party is publicly listed; or iii) the arbitrator having a relationship with one of the parties or its affiliates through a social media network.[494] This green list has as an objective clarifying that some links between arbitrators and the parties and/or counsel should not serve as the

491 IBA Guidelines, 1.2.

492 See de Witt Wijnen, Voser and Rao (n 458) 434.

493 IBA Guidelines, 3.1.1 and 3.5.2.

494 IBA Guidelines, 4.3.3, 4.4.2 and 3.5.2.

basis of contention, an important goal in a context where some parties have been seen as abusing challenging mechanisms.[495]

6.1.3.2 The popularity and success of the IBA Guidelines as a regulatory initiative of the arbitral community

Different codes of ethics, guidelines of behaviour and codes of conduct directed to both international arbitrators and counsel have been developed with different degrees of acceptance and influence. As mentioned above, it is arguable that none of these texts have been more influential than the IBA Guidelines.[496] Albeit subject to criticism from some that see these Guidelines as inappropriate in particular markets, it has been nonetheless widely adopted by arbitral tribunals and arbitrators, and has often been referred to by national courts.[497] An interesting, albeit difficult to fully answer, question relates to knowing why some texts such as the IBA Guidelines have been accepted while others have largely been ignored.[498] While it is not easy to fully identify the set of the reasons that explain the wide acceptance of this text, some factors can be recognised as contributing to their popularity.

A first reason for the popularity of the Guidelines may derive from the fact that independence and impartiality are at its core complex open-ended concepts that need some

495 See Born, *International Commercial Arbitration* (n 4) 1842.

496 Luttrell, for example, argues that the IBA Guidelines are so widely used they are part of *lex mercatoria*. Luttrell (n 149) 27. See also Allen and Mallett (n 485) 121.

497 See Kaufmann-Kohler (n 410) 14; Hodges, 'Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?' (n 482) 212; Luttrell (n 149) 195.

498 See Hodges, 'Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?' (n 482) 576.

level of development.[499] Since state legislatures usually do not detail the type of situations that would lead arbitrators not to be independent or impartial, the need to establish some common ground between agents was clear. Without the emergence of a text generally accepted in the community, participants in the international commercial arbitration would be forced to either navigate a complex repository of national case law they might not always be familiar[500] with, or rules of thumb that might not be universally accepted inside or outside the community.

A second reason for the popularity of the Guidelines may also be related to its eminently practical nature and, in this context, the original labelling system. The system of red, orange and green lists has been praised as providing an accessible but at the same time flexible approach to the most common situations an arbitrator may face. In a context where arbitrators increasingly come from different jurisdictions and legal cultures, the IBA guidelines provide a simple and accessible reference tool to which arbitrators and parties may refer to as guidance. Also, albeit not often updated – only once in 2014 – the IBA Guidelines have been able to also incorporate new realities, such as the emergence of third-party funders within international arbitration, into their guidelines.

A final notable reason that helps explain the popularity of the IBA Guidelines relates to the standing and reputation of its authors. The IBA Guidelines were developed initially in 2004 by 19 very well-known members of the international arbitration community. In a similar fashion, the subcommittee responsible for its 2014 revision was also composed of key figures from the arbitral world. Likely the standing of its authors lent

499 See Kaufmann-Kohler (n 410) 14.

500 See Luttrell (n 149) 27.

prestige to the Guidelines. Further, the involvement of leading figures, all of them routinely selected to high profile arbitral tribunals, conceivably led to visibility and facilitated the use of the Guidelines. Still, it should be noted that the involvement of leading figures in the creation of a soft law text in international arbitration does not guarantee wide adoption.[501]

6.2 Arbitrators' obligation to guarantee the fairness of the arbitral proceedings

Closely related to the idea that an arbitrator must be independent and impartial is the notion that an arbitral proceeding must respect basic notions of procedural justice. International conventions, legal statutes, institutional rules, and leading commentators all point to the existence of clear obligations by arbitrators to guarantee procedural fairness.[502] Exploring this obligation will allow uncovering a different regulatory approach from the established regarding disclosure of conflicts of interests. As will be seen, regarding parties' procedural rights, the arbitral community produced less guidance, giving more latitude to arbitral tribunals to address these issues as they see fit. An interesting connected idea is that in regards to guaranteeing procedural rights to the parties, there is less tension between arbitrator's self-interest and their obligations. These ideas will be explored next.

501 See for example the case of the IBA Guidelines on Party Representation in International Arbitration which also involved many key members of the arbitral community in its elaboration. Despite some relevance, it has not seen the level of widespread adoption as the IBA Guidelines on Conflicts of Interest in International Arbitration.

502 See, for all, Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 Groningen Journal of International Law.

6.2.1 The concepts of due process and procedural fairness creating obligations for arbitrators

Under the current legal arrangements, parties are reasonably free to establish the rules that will apply to the solution of their dispute. They can, amongst other issues, decide the number of arbitrators that will decide the dispute, how and when parties shall present their submissions, and how and when hearings shall take place. The parties can do so by expressly defining these issues by agreement or by referring to institutional arbitral rules that will often regulate these issues. Typically, the procedural questions not addressed by the parties' agreement or the applicable rules will be solved by the arbitral tribunal, which is usually granted by the applicable laws and rules' broad discretion and flexibility in the conduct of arbitral proceedings.[503]

While great latitude is given to the parties and the arbitrators to establish the procedural rules that will guide the functioning of the arbitral tribunal, certain basic principles such as the right to present their case and the principle of equality of treatment between the parties must be respected independently of what rules the parties agreed upon.[504] These principles create obligations for arbitrators. These include allowing each party a fair opportunity to present its evidence and arguments, offering due notice of the start of any proceeding and of the time and place of any hearing and, where appropriate, ensure that the parties are informed of the procedural aspects of the process.[505]

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503 See Philipp Habegger, 'Saving Time and Costs in Arbitration' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2nd edn, Wolters Kluwer 2018) 2595.

504 See, amongst others, English Arbitration Act 1996, Section 33. º

505 See, CIArb's Code of Professional and Ethical Conduct for Members (October 2009), Rule 5. See also, CRP's Code of Ethics for Arbitrators in Commercial Disputes, Cannon IV.

6.2.2 The underlying incentives for compliance with obligations relating to due process obligations

Above, it was noted that in regards to their obligation to be independent and impartial, arbitrators sometimes face a tension between their own short-term interest of increasing their income by accepting an appointment and their obligation to comply with impartiality and independence. Such tension does not exist in the same way in regard to the obligation of arbitrators to guarantee procedural fairness. Respecting procedural fairness, in most situations, does not represent a significant loss to an arbitrator. Complying with a party's request to present documents, make a written submission, or correctly notifying the parties does not often entail direct significant costs beyond a possible increase in the arbitral tribunal workload.

On the other hand, not respecting these rules may displease at least one of the parties and open the arbitral award to the possibility to be annulled or refused enforcement in a court of law, consequences arbitrators generally would want to avoid.[506] In the current framework, in most circumstances incentives seem to lead arbitrators to comply with parties' procedural rights. In fact, this underlying incentive structure may help explain a tendency for what some have perceived as an over-protection of parties' procedural rights. Indeed, some have protested that arbitrators too often entertain dilatory requests by parties,

506 See Klaus Peter Berger and J Ole Jensen, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators' (2016) 32 Arbitration International 415, 420.

leading proceedings to drag more than it otherwise would be necessary.[507] This idea will be picked up again when discussing arbitrators' obligation of efficiency.[508]

6.2.3 Soft law as a bridge between different legal cultures and different understandings of arbitral procedures

Regulatory soft law in international commercial arbitration can be seen as having paid less attention to ideas of 'procedural fairness' when compared for example to the level of detail found regarding arbitrators' independence and impartiality obligations. In particular, there is less development regarding what is meant by concepts such as parties' equality or a right to fair hearing. That is however not to say that no rules exist relating to how parties' procedures should be conducted. The concern of such texts, however, does not seem to be to guide arbitrators to further protect parties' procedural rights. Rather, it seems directed at bridging different understandings of how arbitral proceedings should be conducted, a particular concern when parties come from different legal cultures.

6.2.3.1 The IBA Rules as another example of a widely adopted regulatory initiative of the arbitral community

The most well-known of these soft-law texts are the IBA Rules on Taking of Evidence in International Arbitration, a soft-law text that parties and arbitrators often adopt to govern

507 See ibid 418.

508 See Chapter VI, Section 6.3.

their proceedings and is influential even when not expressly agreed on.[509] Its origin can be traced back to 1983 Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, its current form having been developed in 1999 by a working group of the IBA and revised in 2010 to deal with perceived transformations in arbitration. As with the IBA Guidelines on Conflicts of Interest, the IBA Rules on Taking of Evidence were developed by key figures of the arbitration world, with some of the most well-known practitioners and arbitrators participating in either their creation or revision.[510]

The IBA Rules tackle several different issues, including document production, witness statements, expert witnesses, and evidentiary hearings. To a great extent, rather than creating obligations upon the arbitral tribunal, it directs parties on how to present their evidence, allowing the arbitral tribunal extensive powers and discretion in how to conduct the proceedings. Still, some obligations are imposed to the arbitral tribunal, in particular regarding the admissibility and assessment of the evidence. An example of such obligations can be found in Article 9.2) (b). This provision determines that the arbitral tribunal shall, at the request of a party or on its own motion, exclude evidence covered by legal impediment or privilege under the legal or ethical rules that the arbitral tribunal determines to be applicable.

509 Qualifying the IBA Guidelines as a 'commonly accepted standard', see Detlev Kühner, 'The Revised IBA Rules on the Taking of Evidence in International Arbitration' (2010) 27 Journal of International Arbitration 667.

510 See Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International 2010) 289.

6.2.3.2 The IBA Rules as an example of regulatory competition between different legal cultures?

As with the IBA Guidelines on Conflicts of Interest, the IBA Rules have not been unanimously praised. Criticism of the IBA Rules has focused on the idea that, despite the collaboration of members of different jurisdictions in their elaboration, these Rules have increasingly led arbitration proceedings to assume an adversarial nature more akin to the 'common law' litigation tradition.[511] In particular, there have been concerns that the IBA Rules may allow requests for document production that are too extensive a practice – sometimes analogous to the maligned discovery proceedings of US litigation – that has been criticised as it is seen to both significantly increase costs and delay arbitral proceedings.[512]

Beyond these apprehensions, it is also possible to speculate that some of those apprehensions betray an underlying market competition between legal cultures. Some from a civil law background may perceive the evolution of arbitration that increasingly relies on the importance of cross-examination, written witness statements, and document production to favour Anglo-American law firms and those trained in a 'common law' background where such litigation techniques are more common. It should, however, be noted that: i)

511 See David W Rivkin, 'The Revised IBA Rules on the Taking of Evidence' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation* (Brill Academic Publishers 2012) 212. See also, the Draft Prague Rules (Draft 1 September 2018): "*From a civil law perspective, the IBA Rules are still closer to common law traditions, as they follow a more adversarial approach regarding document production, fact witnesses and Party-appointed experts. In addition, the parties' entitlement to cross-examine witnesses is almost being taken for granted. These factors contribute greatly to the costs of arbitration, while their efficiency is sometimes rather questionable.*"

512 Noting the fears but concluding, in its experience, that the IBA rules allow to streamline arbitral processes, see ibid.

even among 'civil law' practitioners, many favour the application of IBA Rules;[513] and ii) this divide between 'civil law'/'common law' practitioners over the IBA Rules has not really extended to discussions over other soft law texts.[514]

Indeed, despite a few flares of tension between arbitral practitioners of different jurisdictions, the practice seems to indicate a globalisation of approaches to arbitral proceedings techniques and how arbitrators are supposed to act.[515] In this sense, it has lead arbitration to become increasingly insulated from local litigation approaches. Again, a competitive edge can be found by the arbitral community in separating arbitral proceedings' techniques from litigation. The more distinct arbitral proceedings are from domestic litigation, the more those who practice it are shielded from the potential competition of those who practice litigation.[516]

6.3 Arbitrators' obligation to be diligent, cost-efficient, and respecting reasonable timeframes

Closely interlinking with duties of due process is arbitrators' duties to be cost-efficient, diligent, and respecting reasonable timeframes for concluding arbitral proceedings. These obligations have become increasingly relevant due to the perception of arbitral

513 It should be noted that even in regards the IBA Guidelines on Taking of Evidence, its critics admit it has become an unavoidable tool for international arbitration tribunals and counsel alike. Matthias Scherer, 'Limits of the IBA Rules on the Taking of Evidence: Document Production Based on Contractual or Statutory Rights' (2010) 13 International Arbitration Law Review 195.

514 See Klaus Peter Berger, 'Common Law vs. Civil Law in International Arbitration: The Beginning or the End?' (2019) 36 Journal of International Arbitration 295, 303.

515 See McIlwrath and Savage (n 510) 225; Helmer (n 116) 37.

516 See Ginsburg (n 53) 1344.

proceedings' total costs have been escalating and proceedings have become lengthier.[517] Partially, this may be explained by the increased tendency from arbitrators to guarantee parties the ability to fully present their case as discussed above. Other factors, however, also seem to play a role. Before entering into an analysis of this issue and the regulatory approaches in this field, it will be first necessary to review what obligations are arbitrators expected to accomplish under these principles.

6.3.1 The concept of 'efficiency' and the duties required of international commercial arbitrators

As with the obligations to be independent and impartial and due process, the obligation to be 'efficient' can be found in national legislation,[518] arbitration rules,[519] soft law,[520] and the texts of leading commentators of international arbitration.[521] To this effect, the English and Wales Arbitration Act 1996 emphasises in its section 1 that as a general principle "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*." In this sense, these two ideas of timely decision

517 See Philipp Habegger, 'The Arbitrator's Duty of Efficiency: A Call for Increased Utilization of Arbitral Powers' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Wolters Kluwer 2017) 123.

518 See, for example, UNCITRAL Model Law, Article 14(1), determining the possibility of terminating an arbitrator's mandate if he fails to act with undue delay.

519 See, for example. UNCITRAL Arbitral Rules, Article 17(1).

520 See, for example, Canon I, paragraph F of the American Bar Association, Code of Ethics for Arbitrators in Commercial Disputes

521 See William K II Slate, 'Cost and Time Effectiveness of Arbitration' (2010) 3 Contemporary Asia Arbitration Journal 182; Rémy Gerbay, 'Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration' (2014) 25 American Journal of International Arbitration 223, 224.

and keeping costs reasonable can be seen as the core of the efficiency duty that arbitrators must comply with. These two ideas are worth analysing in more detail.

In regards to the idea of avoiding "*unnecessary delay,*" it is often highlighted that a well-functioning system of international commercial arbitration demands that arbitrators provide their award in reasonable time frames. In a context where international commercial arbitration has to an extent lost its edge as a time-saving dispute resolution mechanism,[522] the focus on increasing efficiency has been a concern increasingly of arbitral institutions and the community as a whole.[523] This is, in fact, one of the rare areas where several institutional arbitral rules and a few arbitral legislations provide clear substantive guidance on what metrics should be accomplished. To this effect, for example, the ICC, HKIAC and SCC all provide a soft (in the sense that it can be extended under some circumstances) time-limit of 6 months for the arbitral award to be produced.

It is important to highlight that the obligation is not only thought of as to determine that the arbitrators should not protract their own activity unnecessarily. Rather, it is also increasingly understood as creating an obligation for arbitrators to control behaviour resulting in delayed proceedings that parties may undertake. This will include a duty to limit parties of over-extending submissions and extensive unfocused evidence production. Also, and perhaps more critically, arbitrators are particularly expected to guarantee the conclusion of the arbitral proceedings in due time when one of the parties – usually a

522 See Franck, 'The Role of International Arbitrators' (n 3) 500; Hermann Bietz, 'On the State and Efficiency of International Arbitration - Could the German `Relevance Method` Be Useful or Not?' (2014) 2014 SchiedsVZ 121, 122.

523 See ICC, 'ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration' (2012).

respondent who considers it likely that they will lose the case – is not interested in a swift decision and repeatedly tries to stall the arbitral proceedings.

In regards to the obligation of avoiding "*unnecessary cost*," it is also possible to see it from a double perspective. First, there is an obligation of the arbitral tribunal to charge only 'reasonable' fees and expenses,[524] a special concern when it is upon the arbitral tribunal to determine its own fees and costs. This also, however, creates an obligation for the arbitral tribunal to control the behaviour of parties. Increasing emphasis is being put on the idea that an arbitral tribunal should not allow practices that unnecessarily increase the cost of the arbitral proceedings.[525] These are often expressed as an incentive for arbitrators to conduct proceedings in a way that avoids repeated extensive submissions and document production, unnecessary translation costs, and reliance on costly experts' reports, amongst similar concerns.

Finally, a different albeit connected obligation has also started to be emphasised: the idea that arbitrators are mandated to diligently prepare proceedings and the award themselves and should not delegate their obligations on non-members of the arbitral tribunal.[526] Indeed, several different actors have expressed that arbitrators must "*prepare appropriately for the dispute resolution process concerned*"[527] and "*devote the time and*

524 English Arbitration Act 1996, Section 64(1)

525 See Habegger (n 517) 126.

526 The exact limits to what constitutes acceptable and non-acceptable delegation remains, however, significantly controversial. See Felix Dasser and Emmanuel O Igbokwe, 'The Award and the Courts, Efficient Drafting of the Arbitral Award: Traditional Ways Revisited – Lesson Learned from the Past?' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2019* (Manz'sche Verlags-und Universitätsbuchhandlung;, 2019) 306.

527 CIArb's Code of Professional and Ethical Conduct for Members 2009, Rule 7.

attention to its completion that the parties are reasonably entitled to expect."[528] These concerns are ultimately linked with the perception that some arbitrators accept too many cases or cumulate the acceptance of appointments with too many other professional commitments, leading them to either not discharge their obligations in a timely fashion and/or subdelegate tasks that should be carried out directly by the arbitrators in either a tribunal secretary or a 'foreign' member to the tribunal.[529]

6.3.2 The underlying incentives for compliance and deviation in relation to the obligations of efficiency and diligence

The concern with 'efficiency' is a particularly thorny issue due to the dynamics of the arbitration market. In most markets, competitive pressures often lead providers to endeavour to provide goods and services at the lowest cost and/or highest quality to obtain an edge over other competitors. The particularities of the arbitration market, however, lead this process to not play in the same way in relation to arbitrators. As discussed in more detail in chapters III and VII, arbitrators are selected for reasons beyond the price and quality – in the sense of diligence – of the services they provide. In fact, as discussed, in those chapters, strategic decisions regarding which arbitrator will most advance the parties/counsel interests can play a decisive role in the arbitrators' selection.

That is not to say that are no incentives for arbitrators to be proactive, timely, keep cost and be diligent. Many of the selections undertaken are expected to favour the most

528 AAA's Code of Ethics for Arbitrators in Commercial Disputes 2003, Cannon I(b).

529 See Partasides (n 158).

competent 'arbitrators.' Still, countervailing incentives should be considered. First, as discussed above, arbitrators often seem to be particularly sensitive with guaranteeing parties' procedural rights, leading them to accept through unnecessary submissions, evidence production and procedural requests under the pressure to ensure parties' 'right to be heard' – a phenomenon that some have dubbed '*due process paranoia.*'[530] The underlying calculation by some arbitrators seems to be that the reputation cost of undertaking longer and/or more expensive arbitral proceedings is lower than that of not allowing parties to fully present their case.[531]

Second, arbitrators also seem to have incentives to deviate from their obligation to not over-accept nominations. Here the underlying calculation by some arbitrators seems to be that monetary and visibility gains from being appointed in a high number of proceedings trump the long-term reputation 'cost' of not being fully available for every proceeding.[532] Lack of transparency regarding arbitrators' past performance and/or availability can exacerbate these issues. It must also be said that this situation seems to be a result of the preference to select primarily seasoned practitioners, an expectable choice as discussed in Chapter III, on the context of a risk-averse and low-price competitive environment.[533]

530 See Berger and Jensen (n 506) 418.

531 In the context of decisions to set aside or not enforce an award being rare (see Chapter VIII, Section 8.3.2.2), making cautious procedural decisions has been compared to paying an insurance premium against an unlikely, but extremely damaging, event. See, Robin Oldenstam, 'Due Process Paranoia or Prudence?' in Patrik Schöldström and Alex Calissendorff (eds), *Stockholm Arbitration Yearbook 2019* (Wolters Kluwer 2019) 126.

532 Noting the temptation by many arbitrators to accept all, or at least too many, appointments, see Karl-Heinz Böckstiegel, 'Arbitrator's Case Management:Experiences and Suggestions' in Gerald Aksen and others (eds), *Global reflections on international law, commerce and dispute resolution : liber amicorum in honour of Robert Briner* (ICC 2005) 127.

533 See Chapter III, Section 3.4.2.

In any case, a situation akin to the discussed regarding the obligation of independence and impartiality emerges. While arbitrators may have an individual incentive to deviate from their obligations of efficiency and diligence by undertaking too many appointments, for example, the arbitral community as a whole has an incentive for compliance. Growing discontent with raising costs and long timeframes has been seen as a potential threat to the trust that users have in the international arbitration system.[534] To keep users of international commercial arbitration selecting the system, the arbitral community has an advantage if it is able to create the conditions to deliver awards within timeframes and with costs which that are at competitive with the alternatives.

6.3.3 The transfer of powers to the arbitral tribunal as a strategy to increase efficiency

The idea that arbitrators must be diligent and proceedings be conducted efficiently has found its way to many of the codes of ethics, arbitral rules and other texts that detail arbitrators' professional obligations. To this effect, for example, Canon I, paragraph F of the American Bar Association, Code of Ethics for Arbitrators in Commercial Disputes, establishes that: "*An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics.*" In a more tangible obligation, the IBA Rules determine that "*the Arbitral Tribunal shall exclude from evidence or production*

534 See William Park, 'Arbitration in Autumn' (2011) 2 Journal of International Dispute Settlement 287, 288; McIlwrath and Schroeder (n 128) 334.

any Document, statement, oral testimony or inspection" for compelling reasons "*considerations of procedural economy.*"[535]

Two points should be highlighted. First, it should be noted that the normative approach in regards to these obligations seems incidental, in the sense that instead of a detailed approach detailing procedures to reduce costs or time, mentions of 'efficiency' are added to texts that do not primarily address this question. Typically, mentions of notions such as 'availability', 'reasonable costs' and 'procedural economy' can commonly be found in arbitral rules, guidance notes and other similar texts. However, these are usually presented as broader goals that an arbitral tribunal is expected to achieve and not detailed rules on how to make arbitral proceedings more efficiently. Notable exceptions, such as the ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, should, however, be noted.

Second, the practical considerations of making proceedings more efficient seem to have been a primary concern of arbitral institutions.[536] As evidenced by the work of some arbitral institutions to benchmark the costs and duration of their proceedings against competitors, arbitral institutions appear to consider that keeping costs and duration of proceedings at a competitive level to be an important element of their goals.[537] However, rather than establishing more detailed procedural instruments, the dominant approach seems to be to transfer more powers to the arbitral tribunal to organise the proceedings

535 See IBA Rules, Article 9 para. 2 g).

536 See Michael Polkinghorne and Benjamin A Gill, 'Due Process Paranoia: Need We Be Cruel to Be Kind?' 34 Journal of International Arbitration 935, 941.

537 See, for example, LCIA, *Facts and Figures: Cost and Duration 2013-2016*, page 21 available at <https://www.lcia.org//media/download.aspx?MediaId=596> last accessed on 11 March 2020.

coupled with an increased reference to the importance of 'efficiency'. Sometimes, arbitral institutions use more blunt instruments such as making arbitrators' fees partially dependent on the time taken to complete the proceedings. These will be discussed further in Chapter VIII.[538]

6.4 Arbitrators' obligation to uphold fundamental principles of transnational public policy

One last obligation of arbitrators is important to note: the idea that arbitrators are expected to play a role as guardians of the legal order.[539] As will be seen, of all the obligations mentioned it is certainly the most intangible. The key underlying idea is reasonably straightforward, however. An arbitrator's role is akin to that of judges, leading them to hold in practice large powers that can affect not only the parties of the dispute, but also third parties both directly and indirectly. Two major concerns are at play here: first, that arbitral proceedings can be used to contravene dominant moral values – such as aid and abet the enforcement of corruption schemes – or, second, put at risk the regulatory agenda of states – such as being used to avoid competition law rules.

It has emerged that arbitrators are, at least under some circumstances, expected to not allow parties to use arbitral proceedings in these ways. It should be said that, conversely, what arbitrators are expected to do when faced with these situations – whether they should refuse an appointment, declare the underlying contract null and void and/or

538 See Chapter VIII, Section 8.1.1.2.

539 Lalive (n 11) 273.

contact the relevant authorities – is less clear and an area where guidance is less common. Still a brief analysis of these questions allows identifying some of the thorniest ethical and legal dilemmas that arbitrators may have to deal with. Also, a complex set of incentives can be uncovered. An analysis of these will be undertaken next.

6.4.1 The concepts of 'international public policy' and 'transnational public policy' within arbitration proceedings

In conceptual terms, the notions of 'international public policy' and 'transnational public policy' are a good starting point to identify the sort of professional obligations arbitrators may have to face. International public policy is one of the key concepts within international commercial arbitration, being used often in the context of the enforcement of arbitral awards. The New York Convention establishes that recognition and enforcement of an arbitral award may be refused if "*recognition or enforcement of the award would be contrary to the public policy of that country*."[540] Also, national legislative acts typically allow national courts to set aside or refuse enforcement arbitral awards when "*the award would be contrary to the public policy"* of the relevant State. [541]

While a notoriously elusive legal concept, 'international public policy' is usually used in simplistic terms to refer to the small set of a jurisdiction's mandatory norms which cannot be derogated from – even if a foreign legal system was selected by the parties as the applicable law (in this sense opposing itself to a broader concept of 'domestic public

[540] See New York Convention, Article V(2) b).

[541] See UNCITRAL Model Law, Article 34(2) b)(ii) and Article 36(2) b)(ii).

policy').[542] Despite a repeated preference, at least in arbitration-related literature for a restrictive interpretation of the concept of 'international public policy',[543] courts from different jurisdictions have very different views on how broad such a concept should be interpreted.[544] Still, for reference, 'international public policy' may include, for example, the situations where a party looks to enforce an illegal smuggling contract, contracts that contravene EU competition law, or decisions that seriously affect certain basic contractual principles.[545]

In arbitration-related literature, another concept emerged: the notion of 'transnational public policy' (also sometimes referred to as 'truly' international public policy). This even narrower notion is used to refer to a purported set of principles which are widely accepted across most legal systems and are so fundamental and unanimous across legal orders that they cannot be derogated by the parties or not applied by the arbitral tribunal independently of the law applicable to the dispute.[546] Again, the exact content of

542 Lalive (n 11) 259; Pierre Mayer, 'Effect of International Public Policy in International Arbitration?' in Loukas A Mistelis (ed), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 61.

543 In conceptual terms, public policy is potentially a very open-ended concept, allowing in theory national courts a large margin of discretion to not enforce arbitral awards. Commentators and national courts, particularly those with a more 'pro-arbitration' approach in their decisions, emphasise the need to interpret these clauses in a restrictive way. This narrative plays an important role in guaranteeing that the international commercial arbitration operates smoothly. Arbitration advocates are particularly concerned with the idea that if interpreted too broadly, the concept of 'public policy' may be used as basis to re-open the litigation of cases at national courts and therefore, defeating, the advantages of international arbitration. See Born, *International Commercial Arbitration* (n 4) 3654.

544 See Sormeh Bouzarjomehri and Eisa Amini, 'Public Policy as Ground for Refusal of International Arbitral Awards - A Comparison Between Different Judicial Practices' (2016) 9 Journal of Politics and Law 81, 84.

545 Such as the principle of good faith, *pacta sunt servanda* or the prohibition of *venire contra factum proprium*, that, if seriously violated, may lead a court not to enforce an award.See Kaufmann-Kohler and Rigozzi (n 157) 494.

546 See Buchanan (n 11) 514.

this concept is not unanimous. Transnational public policy would certainly determine that a contract that would uphold a situation of slavery to be unenforceable.[547] Arguably, it could also determine in a situation that has been increasingly addressed in arbitral proceedings, that at least under specific circumstances, a contract obtained through corruption will not be enforceable.[548]

6.4.2 The practical duties arbitrators are expected to fulfil by reference to their role as 'guardians of the international public order'

As a reflection of these ideas of 'international public policy' and 'transnational public policy,' it is clear that arbitrators have obligations that go beyond solving the dispute in accordance with the parties' specifications.[549] Although it may sometimes be unclear as to what extent such obligations bind arbitrators, there seems to have emerged some consensus around the idea that arbitrators are under a duty to produce an 'enforceable' award, even if this involves tackling issues that parties do not raise. In this sense, an arbitrator may raise on his own initiative questions of EU competition law, for example, even if parties have not raised such issues with the arbitral tribunal.[550] This will be particularly the case if the

547 See Mayer (n 542) 67.

548 See Carolyn B Lamm, Hansel T Pham and Rahim Moloo, 'Fraud and Corruption in International Arbitration' in Miguel Angel Fernandez-Ballester; and David Arias Lozano (eds), *Liber amicorum Bernardo Cremades* (Wolters Kluwer España 2010) 728.

549 See Mourre (n 463) 115.

550 See Robert B Von Mehren, 'The Eco-Swiss Case and International Arbitration' (2003) 19 Arbitration International 465, 468.

arbitrator considers that not addressing such questions would lead the arbitral award to be set aside or unenforceable in the relevant jurisdictions.

Obligations will be heightened when the arbitral tribunal faces a question that it may consider running against basic principles of law, namely those that may be considered transnational public policy. This is the case with corruption issues that affect the contractual relationship of the disputing parties. An argument can be made that arbitrators have a duty not only to raise corruption issues but also to investigate *sua sponte* and require the parties' cooperation, even if both parties are uninterested in exploring such issues, and/or the applicable substantive laws have less stringent requirements than international practice.[551] However, less clear is if arbitrators have a duty to communicate suspected corruption to the relevant authorities, as confidentiality obligations may be at play.[552]

Arbitrators obligations may be even clearer in more extreme situations. It seems to be unanimous that arbitrators are under a duty not to collaborate with so-called 'sham arbitrations' – i.e. arbitral proceedings that while in appearance intend to solve a dispute, in reality intend to achieve an illegitimate purpose.[553] A particular risk is that the arbitral process is hijacked to further a criminal purpose or to escape the application of a certain

551 See Domitille Baizeau and Tessa Hayes, 'The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, vol 19 (Kluwer Law International 2017).

552 See Vladimir Pavic, 'Bribery and International Commercial Arbitration - The Role of Mandatory Rules and Public Policy' (2012) 43 Victoria University of Wellington Law Review 661, 671. See also Pierre Heitzmann, 'Arbitration and Criminal Liability for Competition Law Violations in Europe' in Gordon Blanke and Phillip Landolt (eds), *EU and US Antitrust Arbitration: a Handbook for Practitioners*, vol 1 (Kluwer Law International 2011) 1276.

553 See Heitzmann (n 552) 1285.

regulation.[554] A possible example of the first situation would be having arbitration used to abet money laundering: parties may, for example, undertake a fraudulent dispute in order to justify an illicit increase in assets.[555] An example of the second situation would be parties using fake arbitral proceedings to circumvent capital control regulations.

6.4.3 The underlying incentives for compliance and non-compliance with considerations of public policy

Arbitrators' incentives to address questions of public policy present a peculiar grid. On the one side, there are incentives for arbitrators to comply with their obligations to guarantee that arbitral proceedings are not used for nefarious proposes. Getting involved in such arbitral proceedings might lead to a reputation cost and, in some of the most egregious cases, contend with deeply held moral values of the arbitrator. However, there may be a concern that this sort of incentive, although leading arbitrators not to get involved in these cases, may not lead to the optimal approach from a public-interest point of view. For example, it is possible to imagine cases where incentives may lead arbitrators to simply refuse or withdraw from an appointment even if the 'optimal' course of action from a

554 It's worth noting that in the words of Caron: "*In general, the arbitration community avoids discussion of the possibility that criminal activity somehow takes advantage of the arbitration framework. In significant part, this is because such criminal activity is the rare exception*." See David D Caron, 'Light and Dark in International Arbitration: The Virtues, Risks and Limits of Transparency' in Hong Kong International Arbitration (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (Wolters Kluwer 2019) 230.

555 See Andrew de Lotbiniere McDougall, 'International Arbitration and Money Laundering' (2004) 20 American University International Law Review 1021, 1023; Hodges and Greenaway (n 462) 304.

societal point of view would be in that particular case to, for example, declare the underlying contract null and void and report it to the relevant authorities.

Another concern relates to the particular case of sham arbitral proceedings discussed above.[556] In this case, parties will not necessarily use arbitrators and/or arbitral institutions operating in the market. If there is no real underlying dispute between parties, there is no advantage for parties to appoint 'real' arbitrators (beyond, perhaps, giving the sham arbitration a veneer of respectability). If parties select someone not related to the field and not intending to operate in the market as an arbitrator, reputation mechanisms will not play a relevant role in determining compliance. The particular situation of one-off arbitrators will be discussed in more detail in Chapter VII.[557]

6.4.4 The lack of 'soft law' regarding the duties of arbitrators in relation to public policy

An interesting aspect of the role of arbitrators concerning public policy is, at least until recently, the lack of soft regulatory norms addressing these issues.[558] This contrasts with other professional and ethical questions where, as discussed above, the arbitral community undertook significant work to develop and organise standards. Several reasons may help explain why such regulatory texts have not emerged in relation to these sorts of questions.

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556 It is worth noting that, from the discussions with members of the community, the perception seems to be that these situations are, in practice, very rare. See also Heitzmann (n 552) 1285.

557 See Chapter VII, Section 7.1.3.2.

558 See Stephan Wilske, 'International Arbitration and Its Dark Sides, in Particular Corruption: What Arbitral Institutions Could and Should Do to Tackle Such Unwelcome Issues' (2019) 12 Contemporary Asia Arbitration Journal 147, 160.

First, some of the questions discussed above have been perceived more as academic matters rather than actual issues arbitral tribunals would face on a frequent basis.[559] Also, the heterogeneity of possible issues makes guidance in regards to these issues difficult to make. Finally, in the particular case of 'sham arbitrations,' this sort of soft law guidance would have little persuasive power.

This trend of lack of guidance regarding these issues is perhaps changing. As arbitrability – i.e. the range of issues that arbitral tribunals can decide – has increased to allow arbitrators to deal with issues previously reserved to national courts, questions of public policy have appeared more often. Two issues, in particular, have risen in prominence. First, the question of contracts obtained through corruption have been a particular concern against the background of larger alarm with the effects of these practices.[560] Second, the question of money laundering, also a growing concern inside and outside legal circles, has been raised.[561] Both issues have been addressed in an increasing number of doctrinal articles that despite being academic in nature have practical advice on how arbitrators should deal with this issue.[562]

559 Commenting, that the concept of public policy, domestic, international and transnational continue to be found more in discussion and theory than in application and actual practice see, for example, Buchanan (n 11) 531.

560 See Michael Hwang and Kevin Lim, 'Corruption in Arbitration: Law and Reality' (2012) 8 Asian International Arbitration Journal 1.

561 See Kristine Karsten, 'Money Laundering: How It Works and Why You Should Be Concerned' in Kristine Karsten and Andrew Berkeley (eds), *Arbitration: money laundering, corruption and fraud* (ICC 2003).

562 Noting the proliferation of articles and studies on the appearance of issues of corruption (bribery in particular) before arbitration tribunals see Pavic (n 552). Also, a recent soft law text entitled '*Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators*' prepared by the Basel Institute on Governance should be noted.

Overall, such changes seem to indicate that when issues that put into danger the legitimacy of international commercial arbitration arise, the community, through the mechanisms and due to the incentives analysed in Chapter V, intervenes by creating regulatory norms to address the topic. International commercial arbitration's competition with other dispute resolution alternatives is dependent on states – and more specifically states' courts – enforcing arbitral awards and arbitration agreements without creating excessive burdens. Naturally, any systematic deference of states and state courts to commercial arbitration is dependent on a general trust regarding the ability of arbitrators to guarantee that arbitration proceedings are not used for nefarious prospects.[563] How the current market steers arbitrators to uphold these regulatory norms will be explored in the next chapter.

563 See Casella (n 111) 161.

CHAPTER VII

ARBITRATORS' COMPLIANCE WITH PROFESSIONAL NORMS

One of the most salient features of the arbitral profession is the inexistence of the deterrent mechanisms found in other apparently similar professions to guarantee compliance with professional norms.[564] Many, if not almost all, 'liberal professions' – such as lawyers, doctors or accountants – find that states typically enforce professional rules by resorting to some sort of public agency which oversees behaviour in the field, or by delegating powers to a state-backed professional self-regulatory body.[565] Serious sanctions such as banishment of the profession are often proposed. Arbitrators, however, do not have a central institutional framework responsible for monitoring and promoting compliance, nor do they face the threat of specific professional sanctions similar to those of other professions.[566]

564 For a discussion on the concept of deterrence, see Christopher Hodges, *Law and Corporate Behaviour : Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart Publishing 2015) 47.

565 For a definition of 'liberal profession' and a discussion of the role of professional bodies in the European context, see Tinne Heremans, *Professional Services in the EU Internal Market : Quality Regulation and Self-Regulation* (Hart Publishing 2012) Chapter 1.

566 The most approximate mechanism is CIArb's *'Complaints against Members*' system. However, Participation in CIArb is not mandatory nor CIArb has the power to enforce legally or de facto a prohibition by an individual to act as an arbitrator. Despite its large membership, CIArb only includes a small fraction of those acting as arbitrators. See also, Chapter VII, Section 8.2.1.

This chapter proposes that compliance by arbitrators with professional norms – such as the ones discussed in Chapter VI – is mostly left to a complex set of economic forces and social interactions. These regulatory mechanisms are then bolstered by a number of ad hoc legal mechanisms and institutional interventions that add a layer of protection against arbitrators' misconduct. These mechanisms will be the subject of analysis in Chapter VIII, but overall and in practice are not often used. Indeed, the low number of arbitral awards annulled,[567] the low success rate in the challenges to arbitrators[568] and the extremely few cases of criminal investigations into arbitrators' conduct[569] also seem to support the general impression that serious deviations by arbitrators are rare.

Against this background, this chapter proposes that this level of compliance is the result of arbitrators being provided with a strong set of incentives to abide by applicable norms and the selection of arbitrators favouring a population more inclined to comply. In order to clarify these two factors, this chapter will explore four interrelated forces: i) how the market provides incentives for arbitrators to comply; ii) how the particularities of entering the market help arbitrators being familiar with their professional obligations and preselects a complying population; iii) how the arbitral community plays a role by rewarding and sanctioning members and transmitting information regarding compliance; and iv) how these forces contribute to an 'internalisation' of norms by arbitrators.

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567 See, for example, Richard W Naimark and Stephanie E Keer, 'Post-Award Experience in International Commercial Arbitration' in Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International BV 2005) 263., where out of a sample of 153 international arbitration awards conducted by the AAA/ICDR only one was overturned in a court of law. See also Oldenstam (n 531) 125.

568 See Chapter VIII, Section 8.1.1.

569 See Chapter VIII, Section 8.5.

7.1 The key role of market incentives and strategies in 'regulating' behaviour of international commercial arbitrators

Under the current system of international arbitration, market forces are an essential determinant of arbitrators' behaviour.[570] As explored in Chapter III, arbitrators and arbitral institutions seem to act at least partially in a commercial fashion.[571] Indeed, there is considerable evidence to show that they adapt their behaviour to attract new business and/or maintain their market share.[572] As a first step to understand the particularities of the enforcement of professional and ethical obligations amongst arbitrators, it is necessary to explore how the market and legal structures of arbitration operate differently from other professions. From there it will be possible to determine when market incentives lead arbitrators to respect the ethical and professional obligations discussed in Chapter VI.

7.1.1 Lack of control of parties over the arbitrator they nominate and the arbitral tribunal as a whole

Before advancing a discussion on how the market provides an incentive for an arbitrator to comply with the applicable norms, it is important to understand how the particularities of the market and the legal framework in arbitration separate arbitrators from other professions. In this regard, the key important aspect to note is that parties – i.e. the 'final

570 See, Jemielniak (n 200) 100; Lynch (n 76) 112; Clay (n 27).

571 See Chapter III, Section 3.1.1.

572 As a commentator observed: "*[b]eing today recognized for what it is, namely a service industry, international arbitration has become a field of intense competition: competition between the arbitration sites, between the arbitral institutions, between counsel, between arbitrators, and even between the periodicals on international arbitration.*" Werner (n 202) 6.

consumers' – have limited to no control over the behaviour of 'their' arbitrator. A party usually lacks the repeated interactions with a particular arbitrator that would allow it to 'capture' them. How the long-term interactions that an arbitrator establishes with the 'paying consumer' are distinct from the ones taking place in other fields of professional practice will be explored next.

7.1.1.1 The tension between complying with professional standards and 'keeping the client happy'

In many professions, there is often an underlying opposition between having to follow professional standards and the dependency on that client's repeated business.[573] The need to satisfy their clients may provide perverse incentives that may lead these professionals to infringe their professional and ethical obligations.[574] Regulatory intervention is, therefore, often needed to provide counter-incentives and/or shape the market to guarantee that these professionals comply with their professional obligations. External auditors and lawyers provide illustrations of how these tensions operate and provide an interesting counterpoint to the position arbitrators are in. A brief reference to their regulation will allow a good starting point to better understand why and how enforcement of professional norms among arbitrators is different.

573 For a discussion see Hugh P Gunz and Sally P Gunz, 'Client Capture and the Professional Service Firm' (2008) 45 American Business Law Journal 685.

574 See Hugh P Gunz, Sally P Gunz and Ronit Dinovitzer, 'Professional Ethics: : Origins, Applications, and Developments' in Laura Empson and others (eds), *The Oxford Handbook of Professional Service Firms* (2015) 125.

a) The example of the external auditor: from financial scandals to heightened 'enforcement' regulation

Auditors provide a well-known example of how professional ethical standards often conflict with the economic interests of the professional.[575] On the one hand, auditors are expected to serve the public by being objective and acting with integrity in providing examinations of financial statements. On the other hand, auditors will sometimes be pressured to forego their integrity in order to sustain the economic bond to the client. A typical case will be the situation of the management pressuring the external auditor to confirm a financial statement which overstates the value of the company. As noted by a commentator:

> "*the audit contract suffers from the 'a dog will not bite the hand that feeds him' problem*" [576]

It should be noted that there are strong underlying economic and legal incentives for auditors to comply with their obligations. By not accurately reporting financial information, auditors may suffer a reputation cost or open themselves to possible litigation by third parties who relied on the information provided.[577] Still, these inbuilt deterrents are often not sufficient to guarantee that auditors correctly report financial information. This a

575 See Jonathan R Macey and Hillary A Sale, 'Observations on the Role of Commodification, Independence and Governance in the Accounting Industry' (2003) 48 Villanova Law Review.

576 Hollis Ashbaugh, 'Ethical Issues Related to the Provision of Audit and Non-Audit Services: Evidence from Academic Research' (2004) 52 Journal of Business Ethics 143, 144.

577 Noting that at one time such reputation mechanisms were sufficient to induce 'high quality financial reporting', see Macey and Sale (n 575) 1168.

particular concern, as shown by empirical research, when the audited firm represents a relevant source of ongoing income to the auditor firm.[578]

The difficult equilibrium described has prompted a different mixture of legislative and self-regulatory interventions, often heightened when serious financial scandals arise. For example, following a widely-publicised string of accounting and auditing frauds in the early 2000s, regulatory interventions in the US and later in Europe aimed to shape the incentives of auditors by creating, amongst other interventions: i) rules regarding disclosure of conflicts of interest; and iii) rotation of auditors. Together these interventions intend to limit the possibility of the service 'consumer' – i.e. the audited firm – 'capturing' the service provider – i.e. the auditing firm.

On top of these ex-ante interventions, also the option of public or quasi-public oversight agencies to discipline accounting firms should be highlighted. These agencies, such as the U.S. Securities and Exchange Commission (SEC), the Public Company Accounting Oversight Board (PCAOB) or the Financial Reporting Council (FRC), have the power to impose considerable penalties to auditors and auditing firms who violate the applicable regulations. Such fines often run into the millions.[579] It is important to again note that such blunt deterrents do not exist in regard to commercial arbitrators or arbitral institutions.

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578 Providing support for the idea that larger firms have greater power to persuade their auditors to approve erroneous or misleading financial statements see Theodore Eisenberg and Jonathan R Macey, 'Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firm Audits of Large Clients' (2004) 1 Journal of Empirical Legal Studies 263.

579 In the UK context, a list of cases is available at https://www.frc.org.uk <last visited on 9 February 2019>,

b) The example of lawyers: from the regulation of traditional 'professionals' to a 'legal industry'

A variation of what is essentially the same problem can be found regarding the members of the legal profession. While the exact contours of the professional ethics and regulation vary considerably from jurisdiction to jurisdiction, most legal systems recognise a public function for the members of the legal profession. To this effect, in England and Wales barristers are not only agents of their clients but also 'officers of the court,' and solicitors are expected to 'uphold the rule of law and the proper administration of justice.'[580] In France, *avocats* are considered to be not only representatives of their clients' interests but also '*auxiliaires de justice.*'[581] These ideas are often complemented with other more tangible ethical obligations such as duties of confidentiality and obligations to avoid conflicts of interest.[582]

In this regard, lawyers are in a situation somewhat akin to that of auditors. On the one hand, their presence in the market often depends on maintaining their accounts, giving their clients some theoretical ability to pressure the legal professionals they hire.[583] On the other hand, their professional obligations might mandate them to refuse to take unethical acts on behalf of their clients, such as misleading a court or unduly obstructing legal

580 See Legal Services Act 2007 Section 1(1). For an overview on the impact of the act see Andrew Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17 International Journal of the Legal Profession 195.

581 See Christophe Jamin, 'Services juridiques : la fin des professions?' (2012) 1 Pouvoirs 33.

582 See Solicitors Regulation Authority (SRA) Code of Ethics Chapters 3 and 4. See also Réglement Intérieur National de la Profession d'Avocat Articles 2 and 4.

583 Another variation of this problem can be found in regards to 'in-house' lawyers. On this topic, see Hugh P Gunz and Sally P Gunz, 'Hired Professional to Hired Gun: An Identity Theory Approach to Understanding the Ethical Behaviour of Professionals in Non-Professional Organizations' (2007) 60 Human Relations 851.

proceedings. Further, lawyers are sometimes in a position to explore the strong information asymmetries between themselves and their clients to engage in opportunistic behaviour, taking advantage of their clients' inability to evaluate the quality of the service provided.[584]

As in relation to auditors, in the legal profession, practitioners' self-interest can to some extent provide countervailing forces to the need of satisfying clients. In a market where quality is often difficult to observe, reputation is often a surrogate for quality.[585] Members of the legal profession, especially for those in areas of practice where reputation is particularly relevant, may want to avoid being involved in actions that will diminish their standing amongst their peers and the community due to pure long-term economic interests.[586] In many other situations, however, self-interest will not be sufficient, needing the reinforcement by other sets of incentives.

In most jurisdictions, enforcement of lawyers' ethical obligations has traditionally mostly relied on self-regulatory bodies composed by members of the profession that hold powers to discipline behaviour and apply sanctions, including the power to forbid someone from practising the profession.[587] Social pressures amongst peers and internalisation of certain understandings of their special role have also historically played a role in the regulation of the profession.[588] With the increasing business-like features of the 'legal

584 Camille Chaserant and Sophie Harnay, 'Self-Regulation of the Legal Profession and Quality in the Market for Legal Services: An Economic Analysis of Lawyers' Reputation' (2015) 39 European Journal of Law and Economics 431, 431.

585 See ibid 433.

586 See W Bradley Wendel, 'Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities' (2001) 54 Vanderbilt Law Review 1953, 1959.

587 See Chaserant and Harnay (n 584) 432.

588 See Michael Burrage, *Revolution and the Making of the Contemporary Legal Profession: England, France, and the United States* (Oxford University Press 2006) 32.

industry,' there has been in many jurisdictions an increasingly flexible interpretation of some traditional tenets of being a lawyer.[589] In particular, notions of independence of a lawyer regarding the client have often waned with the modernisation of the legal profession.

7.1.1.2 How arbitrators differ: the lack of 'pressure' of a particular 'consumer' over the arbitrator

In certain ways, similarities can be found between the position of an arbitrator and an auditor. All these agents are 'competing' within their specific markets with other highly specialised members of their field to be selected for what are often very profitable assignments. At the same time, they are expected to follow a number of ethical obligations that may not allow them to simply follow what the consumer of the service commands. In the case of auditors and, also to an extent, of lawyers, they are expected to guarantee the interests not only of who hires them but also third parties and the public at large by maintaining a level of independence from their clients. Arbitrators are expected to remain independent from the parties who appoint them and comply with a set of professional obligations discussed in Chapter VI, such as assuring due process, conducting proceedings efficiently, and guaranteeing that basic public policy principles are respected.

It is, however, important to note that international commercial arbitrators are in a considerably different position from both external auditors and lawyers. After the arbitrator has been nominated by a party, that party has few mechanisms to credibly influence their arbitrator. This derives from the fact that, as discussed in Chapters V and VI, the arbitral

589 See Christopher J Whelan and Neta Ziv, 'Privatizing Professionalism: Client Control of Lawyers' Ethics Colloquium: Globalization and the Legal Profession' (2011) 80 Fordham Law Review 2577.

practice has evolved to determine that an arbitrator cannot be successively nominated by the same company or group of companies.[590]These rules are not the result of centralised legislative interventions or imposed by state-backed professional bodies, but instead emerged from the combined effect of court decisions and the work of the arbitral community and arbitral professional associations.

While a party is most often not strictly forbidden to appoint an arbitrator which it has previously nominated in other cases, the arbitrator might be under an obligation to disclose the previous appointments and/or refuse the appointment.[591] If an arbitrator does not fulfil these obligations, they might be open to challenges by the other party[592] and/or lead the award to be annullable or non-enforceable.[593] Further, as it will be discussed in detail below, they might be perceived as untrustworthy and dishonest by the other members of the arbitral panel and, more broadly, by the arbitral institutions and the arbitral community at large.[594] This is particularly important as arbitrators are dependent on their reputation to continue finding work in the field.[595]

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590 See, inter alia, IBA Guidelines Orange List 3.1.3. For a discussion see Gomez-Acebo, *Party-Appointed Arbitrators in International Commercial Arbitration* (Kluwer Law International 2016), Chapter 5.

591 Further to Chapter VI and the references therein, see also, specifically, regarding the duty to disclose: Dominique Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues' 27 American University of International Law Review 18.

592 See, inter alia, article 14, 2017 ICC Rules; Article 12 UNCITRAL Model Law.

593 See, inter alia, Article 34 UNCITRAL Model Law. See also Born, *International Arbitration* (n 36) §16.03.

594 See also Lucy Greenwood and Mark Baker, 'Are Challenges Overused in International Arbitration?' (2013) 30 Journal of International Arbitration 101, 111.

595 See Yu Jin Tay and AJ van den Berg, 'Reflections on the Selection of Arbitrators in International Arbitration', *International Arbitration: The Coming of a New Age?* (Kluwer Law International, 2013) 126.

Since there are, in practice, severe limitations on a party's ability to nominate the same arbitrator in future arbitrations,[596] arbitrators know that keeping the particular party that nominated them content with their behaviour is not a high priority to guarantee future nominations.[597] This effect is compounded by the fact that, as described in Chapter III, a considerable number of nominations are in practice not undertaken by parties but rather by other nominating sources such as co-arbitrators and arbitral institutions. As such an arbitrator will often find it to be in its best long-term interest to display allegiance to the arbitral community – i.e. maintain and develop their position as a respected member of the community – rather than unwavering loyalty to their nominating party.

A second point to be noted is that in arbitration, parties have limited influence on the amount that the arbitrator will be paid. The fees to be paid are often regulated *ex-ante* within the rules of an arbitral institution or pre-determined before the start of the arbitral proceedings, or ultimately defined by the arbitral tribunal itself.[598] This again separates the relation between arbitrators from the relation established by an auditor or a lawyer with their clients. Lawyers and auditors can typically negotiate rates and terms of payment with clients. This, at least in theory, allows the client some leverage over the lawyer and auditor to shape their behaviour. On the contrary, in arbitration, a party cannot dangle a promise

596 To this effect, the IBA Guidelines on Conflicts of Interest, para. 3.1.3. establish that situations where "[t]*he arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties*" are in its 'orange list', i.e. create a duty of disclosure and may give raise to doubts about an arbitrators' independence and impartiality.

597 A relevant complication derives from the possibility of counsel 'concentrating' nominations – i.e. sizeable law firms leveraging the fact that they participate in numerous arbitrations to credibly influence arbitral behaviour. Limitations on the possibility of the counsel of the parties to repeatedly select the same arbitrators limits, at least partially, the possibility of these being 'captured' by law firms on behalf of the parties. See, in this particular, the IBA Guidelines on Conflicts of Interest, para. 3.3.8.

598 See McIlwrath and Savage (n 510) 267.

of increased payment or the 'threat' of decreased remuneration as a way of influencing the arbitrators' behaviour, since prices are usually pre-determined or ultimately fixed by the arbitrators.

Altogether, this means that a party has limited capability of steering an arbitrator to perform an action that contravenes the dominant rules in the field by tacitly or expressly promising future appointments. This means that arbitrators face the difficult equilibrium of satisfying the client and respecting 'professional norms' to a lesser extent than other professions have to deal with. Instead of trying to cultivate a relationship with particular clients, arbitrators must often pursue a strategy of developing networks within the community and, within this, displaying technical expertise and commitment to the dominant 'ethical' and professional norms. This idea and how it provides an effective incentive for compliance with both professional and ethical norms will be explored next.

7.1.2 How arbitrators' market strategies lead them to comply with professional rules

In analysing the role of market forces as a regulator of the behaviour of international commercial arbitrators, this section will focus on how the particularities of the international commercial arbitration market influence the regulation of international arbitrators by leading them to compete by projecting an image of being 'credible,' 'virtuous,' and in tune with the dominant understandings within the community. Since, as seen above, parties do not have a credible system of 'controlling' arbitrators, arbitrators will be less pressured to forego allegiance to the dominant understanding of what constitutes ethical behaviour in

this field. From there, the grid of economic gains and losses an arbitrator faces when deciding to comply, or not, with their professional obligations will be analysed.

7.1.2.1 'Virtue displays' as a key driver of competition in the international commercial arbitration market

A key to understanding how the current arbitration market works involves remembering that there is limited price competition between arbitrators. As explored in more detail in Chapter III, in the context of institutional arbitrations, competing on prices does not usually have any bearing on the likelihood of an arbitrator being selected as the formulas for defining prices are already pre-set. As also explored in the same chapter, in the context of ad hoc arbitrations, due to the way fees are arranged between arbitrators and the parties, and the fact that arbitrations often take place in a mitigated loser-pays system, arbitrators are not under strong pressures to compete through decreasing their fees.[599]

Since price competition is not a dominant strategy, arbitrators, therefore, compete mostly through other mechanisms. As also detailed in Chapter III, to increase the likelihood of being nominated arbitrators need to display knowledge of the field, develop networks within the arbitral community, and impress the other arbitrators on the panel and counsel.[600] These displays largely equate to a 'sunk-cost' by the prospective arbitrator that allows showing technical proficiency and engagement with arbitration to the community.[601] It must be borne in mind that, as better detailed in Chapter III, the arbitral community – i.e.

599 See Chapter III, Section 3.3.

600 See also Simões (n 360) 74; Séverine Menetrey, 'Un Exemple de "'marketing Arbitral'": Le Réseau Associatif' (2012) 2012 Revue de l'Arbitrage 752.

601 See Gaillard, 'Sociology of International Arbitration' (n 39) 13.

the practitioners specialised in arbitration – exercise (in practice) a very strong influence over who becomes a successful arbitrator.

Under these constraints, it becomes clear how the market provides incentives for arbitrators to comply with their professional obligations. Displaying a commitment to the dominant values of arbitration, such as independence, impartiality and procedural justice when making relevant decisions – like the decision to accept or not an appointment that could contend with an arbitrator's independence or accept or not a parties' submission – is certainly a way for arbitrators to demonstrate that they are reputable members of the community.[602] In turn, this raises the value of the arbitrator within the community and therefore the rewards they can obtain from participating in this market.[603]

An arbitrator who is perceived as ethical, professional, and impartial may therefore be more likely to be nominated.[604] First, parties who have to agree on a single arbitrator will find unacceptable an arbitrator they believe to be in favour of the other party. This in most circumstances, therefore, means that parties can find only agreement on an arbitrator which they both perceive as not biased in favour of the other party – i.e. impartial. Also,

602 "*A good arbitrator is one who imposes his ethical values, fully aware that this will affect his reputation and that his professional future will be benefited by conducting himself according to these values and not bending to the demands of a particular case.*" José Carlos Fernández Rozas, 'Clearer Ethics Guidelines and Comparative Standards for Arbitrators' in Bernardo María Cremades, Miguel Angel Fernández-Ballesteros and David Arias Lozano (eds), *Liber amicorum Bernardo Cremades* (La Ley 2010) 414.

603 There are interesting papers indicating empirical support of the notion that an arbitrator commitment to procedural justice increases his/her 'acceptability' for future cases. See namely Richard A Posthuma, James B Dworkin and Maris Stella Swift, 'Arbitrator Acceptability: Does Justice Matter? Arbitrator Acceptability' (2000) 39 Industrial Relations: A Journal of Economy and Society 313; Yongkyun Chung and Hong-Youl Ha, 'Arbitrator Acceptability in International Commercial Arbitration: The Trading Firm Perspective' (2016) 27 International Journal of Conflict Management 379.

604 See Bentolila (n 31) 151.

co-arbitrators or arbitral institutions have strong incentives to choose 'compliant' arbitrators when they have to make selections. Since their reputation would be negatively affected if they participated or organised arbitral tribunals which would not act in accordance with expectations, there are reasons to believe they are usually motivated to select 'norm complying' arbitrators.

Finally, it should be said that reputation as an impartial and independent decider may also increase the probability of an arbitrator being selected as a party-appointed arbitrator.[605] An arbitrator's 'value' to a party is partially dependent on their ability to persuade the remaining members of the arbitral tribunal.[606] This ability is itself dependent on the arbitrator's perceived legal technical expertise, and independence and neutrality.[607] While some predisposition towards the nominating party's arguments is to a degree considered acceptable behaviour, open partisanship will most often result in that co-arbitrator positions being disregarded by the rest of the panel.[608] Hence arbitrators, at least

605 See also ibid.

606 As Professor Martin Hunter explains "*when I am representing a client in arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias*". Hunter (n 271) 223.

607 As Horvath explains "*A party-appointed arbitrator that acts with bias will lose credibility with the chairman and could in fact prejudice the party he or she is attempting to help. If a chairman notices an arbitrator advocating inappropriately for the party that appointed him, the chairman may choose to draw a negative inference on the opinions of the biased arbitrator.*" Christian Klausegger and others (eds), 'Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?', *Austrian Yearbook on International Arbitration 2011* (Manz'sche Verlags-und Universitätsbuchhandlung;, 2011) 311.

608 See CN Brower and CB Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson--van Den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded' (2013) 29 Arbitration International 7, 14.

those who intend to act long-term in the market, have in most circumstances a long-term incentive to pursue an image of neutrality and technical proficiency.[609]

7.1.2.2 The costs of complying (or lack thereof) with arbitrators' professional obligations

Two further ideas are important to note. First, it should be remembered that complying with dominant values often has no significant costs for the arbitrators. For example, complying with the obligations of guaranteeing parties' procedural rights, confidentiality, and respecting time-frames often has low to no costs for the arbitrator. In these circumstances arbitrators have very few incentives not to comply. However, a key exception relates to the duty of independence and impartiality. In some cases, arbitrators' obligation to disclose information and eventually refuse a nomination where a conflict of interest arises, may carry a considerable cost for the arbitrator – in this case, the risk of not being nominated.

An abstract example helps to understand the sort of market incentives an arbitrator faces when deciding to comply or not with the sort of rules described in Chapter VI. Imagine, for example, that in a dispute between party '*a*' and party '*b*', arbitrator '*x*', whom parties were considering nominating for this case, has a connection to party '*a*', such as a previous contractual engagement for the provision of consulting services. In deciding to disclose this connection, arbitrator '*x*' has to consider that: i) disclosing the conflict of interests might result in not being nominated and therefore not being able to receive the fees from this one arbitration; but ii) such a serious violation of a well-established

609 See William Park, 'Arbitrator Integrity' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 280.

obligation of declaring conflicts of interest could jeopardise its reputation amongst the community and risk further nominations in the future.[610]

Overall, in the dominant market conditions, arbitrators, therefore, find an incentive to provide 'high-quality' instead of 'low-cost' services; i.e. arbitrators have an incentive to act in a way that conforms to the generally accepted professional and ethical rules and also satisfies counsel, arbitral institutions, and the wider community of peers instead of competing in prices. In situations where there are strong individual incentives for deviation, reputation mechanisms are important deterrents of irregular behaviour. Also, importantly, as it will be explored in Chapter VIII, awards that do not conform to professional and ethical rules have a higher likelihood of being annulled or not enforced, which may damage an arbitrator's reputation.[611]

The collection of individual decisions taken by the arbitral community, which tend to favour experience and 'good standing' within the community, acts as a filter which leads to a reasonably closed profession.[612] Assuming that parties, counsel and, more generally, the members of the community prefer arbitrators that show commitment to their professional and ethical obligations, it is therefore expected that in most situations, markets

610 See, on this point, Alan Scott Rau, 'On Integrity in Private Judging' (1998) 14 Arbitration International 115, 118. Also, arbitrator Carlos Lopéz, when discussing which factors must be taken into consideration when selecting an arbitrator, describes that "[a] *factor to take into account is the standing and influence of the arbitrator […] The arbitrator must generate respect amongst the other members of the tribunal, to be persuasive during their private deliberations. Such influence may arise from their reputation and status in the legal community, and partly depends on the appearance of absolute independence and impartiality of judgment*." López (n 269) 799.

611 See Born, *International Commercial Arbitration* (n 4) 1234. ("*[a]n arbitrator's reputation, with both parties and appointing authorities, is materially damaged by overreaching on jurisdictional issues, particularly if it results in an award being annulled or denied recognition in public proceedings.")*

612 See Simões (n 360) 74. See also McIlwrath and Savage (n 510) 254.

will provide incentives for arbitrators to fulfil their role. This, however, does not mean that arbitrators' strict economic self-interest will provide enough incentives to avoid deviating the dominant professional and ethical rules in all circumstances. This will be explored next.

7.1.3 The limits of markets in providing incentives for arbitrators to act in accordance with their professional and ethical obligations

There are situations where the market does not provide enough incentive for compliance with the applicable professional obligations of arbitrators. It should be noted that: i) the international arbitration market is considerably imperfect, being particularly rife with information asymmetries and agency problems; ii) arbitrators are not necessarily long-term players in the market; iii) the short-term gains of deviating can be larger than the long-term benefits of respecting the dominant values and rules in certain circumstances; and iv) both parties can collude with an 'arbitrator' to achieve an illicit goal. There are therefore situations where market pressures alone do not prescribe enough incentives for compliance. These four issues will be explored in turn.

7.1.3.1 Market imperfections in international arbitration: lack of information and principal-agent problems

There are situations where market incentives have a limited capability of steering arbitrators to respect their obligations. First, establishing that it is in the arbitrators' best interest to uphold their professional and ethical obligations relies on the assumption that the different actors selecting arbitrators not only prefer arbitrators who uphold these obligations but are also able to identify and select the arbitrators who respect them. Second,

as often identified in the economic literature, almost no market possesses the characteristics that allow perfect market outcomes.[613] Indeed, perfect competition scenarios rely on several assumptions which are not fully encountered in real-life scenarios, most notably the rationality of the agents.[614]

These general limitations in markets' functioning also take place in relation to international commercial arbitration. Many parties and counsel lack information regarding arbitrators' true 'quality' – i.e. their true level of independence and impartiality and technical expertise in crafting awards.[615] This is especially exacerbated due to the confidential nature of most arbitral proceedings. Parties therefore usually have to depend on their counsel to overcome their lack of knowledge when trying to select the most appropriate arbitrator. However, the knowledge that even law firms will have of arbitrators might vary significantly.

Closely linked to this idea, it should be noted that principal-agent problems may arise in the context of selecting arbitrators. A risk would be the possibility of counsel or (more rarely) board members of arbitral institutions 'capturing' the decision to further their own interests. For example, counsel may select arbitrators not in the best interest of their clients, but instead those that best conform to their own understanding of what an arbitrator

613 See, for all, Francis M Bator, 'The Anatomy of Market Failure' (1958) 72 The Quarterly Journal of Economics 351.

614 Indeed, modern economics that predict how agents act, increasingly rely on the concepts of bounded rationality, norm-based rationality, and empirically determined rationality. See David Colander, 'The Death of Neoclassical Economics' (2000) 22 Journal of the History of Economic Thought 127, 136.

615 Detailing the imperfections of international arbitration market, see Rogers, 'The Vocation of the International Arbitrator' (n 61) 967. Also expressing doubts on the ability of the market to provide a well-functioning and just system of arbitration, see Carrie Menkel-Meadow, 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not Arbitration Symposium' (2001) 56 University of Miami Law Review 949, 950.

should be, or who might be most helpful to their own career choices. For example, counsel could 'trade' nominations – i.e. attempting to increase the number of one's own appointments by expressly or implicitly appointing another player with the intent the appointee would appoint them back in the future. It should be noted that since parties often lack the level of information necessary to select the arbitrator, counsel often takes over this choice in practice.[616]

Still, imperfect information and principal-agent problems are present across markets and usually allow the creation of incentives that reward market actors who overall produce better services at lower prices than their competitors, albeit imperfectly. In the context of international commercial arbitration, the increasing competition between law firms and between arbitral institutions at least partially curtails the possibility of these decisions being 'captured' by these actors. It also must be born in mind that the high level of sophistication of most users of international arbitration allows them to better guarantee their long-term interests.

To this effect, law firms certainly are aware that losing arbitral proceedings may result in future loss of revenues from disgruntled clients who are either unhappy with their counsels' commitment to their interests or the perceived unfairness of the arbitral proceeding. Therefore, they have a strong incentive to optimise the choice of an arbitrator in a way that secures the interests of the party and its perception of arbitration as a fair method of solving disputes. Similarly, the people within arbitral institutions with the power

616 See Bentolila (n 31) 152. It should be noted in the White & Case and Queen Mary's survey on Choices in International Arbitration (2010), 68% of the corporate counsel surveyed said that they were not confident that they could make an informed choice of arbitrators without the input of external counsel.

to choose arbitrators have to take into consideration that systematic 'poor' choices may result in: i) a loss of reputation of that particular arbitral institution; and ii) a loss in the trust of commercial arbitration as a whole.

7.1.3.2 The problem of the non-repeating 'player' in the regulation of international commercial arbitration

As follows from what has been written, the argument presented is also dependent on the assumption that arbitrators are 'repeat' players; i.e. that they engage in the market repeatedly, working as arbitrators in different cases. The risk of 'losing' reputation by infringing norms is a concern mostly for those arbitrators who intend to continue operating in this market.[617] It should be noted that not all arbitrators are, or intend to be, 'repeating' players. Indeed, without any requirements of professionalisation, in theory parties, co-arbitrators, arbitral institutions, and courts can select someone with no interest in pursuing a career as an arbitrator and who therefore might have no incentive to calculate long-term effects of reputation costs.[618]

Any such concerns do not, however, seem to play a considerable role in international commercial arbitration. As detailed in Chapter III, parties', arbitral institutions', and co-arbitrators' selection of arbitrators usually follow conservative trends, with the vast majority of selections favouring experienced members of the community.

617 See Franck, 'The Role of International Arbitrators' (n 3) 517.

618 A variation of this problem relates to the situation where a particular party is the only realistic source of appointments to an arbitrator. As noted by Paulson: '*In the case of an arbitrator who considers that his only chance lies with the party which has already named him once, this might result in more or less dissimulated, but nevertheless systemic, favouritism*'. Paulsson, 'Ethics, Elitism, Eligibility' (n 201) 14. The limitations on reappointments noted above and in the previous chapter should however be born in mind.

Indeed, there is an overwhelming perception that entrance into the market is extremely challenging and obtaining a first nomination is a process that requires a deep investment in the field.[619] There are therefore reasons to believe that purely 'non-repeating' players are rare.[620]

Even when agents are truly non-repeating players, they must consider how a decrease in their reputation may affect their other professional pursuits. The clear majority of arbitrators, even when not planning to act in this function repeatedly, are still usually linked to the community by working as counsel, or have links to the industry to which the dispute relates. If the agent acts in a way that is incompatible with the dominant professional and ethical rules, that may jeopardise their reputation and therefore affect their ability to procure clients in other areas, most importantly as counsel in international arbitration and/or dispute resolution.[621]

7.1.3.3 Large one off-payments as a potential incentive for deviation

Finally, it should be noted that purely monetary incentives do not guarantee that arbitrators will not deviate from fulfilling their obligations. One simple example would be a party offering an arbitrator a one-off payment that is larger than the expected cost of reduced reputation and possible civil and criminal consequences, such as the risk of liability and

619 See also Simões (n 360) 74.

620 See also Tay and van den Berg (n 595) 126.

621 As noted by Schultz and Kovacs: '*Most arbitrators have other sources of income, typically legal counsel work, which usually are more lucrative, both in total and for equal time and effort. For such arbitrators, which likely form the great majority of arbitrators, it makes no economic sense to engage in certain behaviour* […that…] *reduces their chance of being used as counsel.*' Thomas Schultz and Robert Kovacs, 'The Law Is What the Arbitrator Had for Breakfast: How Income, Reputation, Justice, and Reprimand Act as Determinants of Arbitrator Behaviour' in Julio César Betancourt (ed), *Defining issues in international arbitration: celebrating 100 years of the Chartered Institute of Arbitrators* (2016) 246.

detection by criminal authorities. A more benign variant of the same problem is a prospective arbitrator that would be under an obligation to recuse himself from a case but would calculate that the reputational cost would be inferior than the fees obtained from accepting it. In these cases, the 'rational' arbitrator – i.e. the arbitrator concerned only about maximising their material self-interest (an unlikely category)[622] – would accept to deviate from their professional obligations.

Two notes about this topic are important, however. First, in real situations, people in general and arbitrators in particular will try to maximise not only income but also a combination of leisure, social relationships, work satisfaction and feelings of achievement, and, importantly for this discussion, a sense of personal integrity and reputation.[623] These considerations will often override the prospect of financial gain, leading arbitrators to comply with their professional and ethical obligations even if it would not be in their strict financial best interest to do so. This is an idea that will be picked up again at the end of this chapter.[624]

Second, it should also be noted that arbitral proceedings have mechanisms to deal with situations where one of the parties tries to subvert the arbitral proceedings by, for example, offering an illicit payment to one or more elements of the arbitral tribunal. The adversarial nature of the process creates a large incentive for the other party to monitor and

622 '*The evidence from cognitive psychology and behavioural sociology has indicated that economic factors and calculations, and a rational calculation of the economic costs and benefits, play at best a limited role in decisions made by individuals, groups and even commercial organisations*.' Hodges, *Law and Corporate Behaviour* (n 564) 109.

623 See on this point, more generally, Richard A Posner, 'Judicial Behavior and Performance: An Economic Approach' 23, 1260. See also Hodges, *Law and Corporate Behaviour* (n 564) 60.

624 See Chapter VII, Section 7.4.

report any wrongdoing. Parties will therefore often devote considerable resources to determining whether an arbitrator has not complied with any of the relevant rules. As it will be explored in Chapter VIII, the aggrieved party has several legal mechanisms by which to react in this situation, which include: i) requesting the arbitral award to be annulled; ii) requesting that the award is not recognised and enforced; and iii) requesting damages from the arbitrators that engage in such behaviours.

7.1.3.4 The problem of co-operative strategies by parties to subvert the arbitral proceedings

The current system, however, provides fewer safeguards regarding co-operative strategies between both parties and arbitrators to subvert arbitration. In some circumstances, parties may have a personal interest in manipulating arbitral proceedings in collusion with arbitrators to accomplish certain illicit goals.[625] A possibility would be, for example, both parties ordering the arbitral tribunal to ignore the fact that a contract was obtained through the corruption of public officials, or that the underlying contract was established to abet a money-laundering scheme. While it is extremely hard to know how common these kinds of situations are, it is possible that parties rely on arbitration as a way of avoiding the prying eyes of national courts.[626]

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625 For a discussion of this and related cases, see Bernardo M: Cremades and David Cairns, 'Trans-National Public Policy in International Arbitral Decisionmaking: The Cases of Bribery, Money Laundering and Fraud' in Kristine Karsten and Andrew Berkeley (eds), *Arbitration : money laundering, corruption and fraud* (ICC Pub 2003).

626 See Baizeau and Hayes (n 551) 234. It should be noted that such cases are not unheard off. The well known ICC Case No. 1110, decided in 1963 by Judge Lundgreen involved a case where both parties, in practice, asked the tribunal to decide their case in accordance with the terms of reference and ignore practices of corruption. Cremades and Cairns (n 625) 79.

If any such agreement and award are kept secret in order not to damage the arbitrator's reputation, and none of the parties has an interest in reneging on the illegal agreement, the market will not produce incentives to avoid this kind of behaviour. Further, parties will likely avoid the usage of mainstream arbitral institutions or well-known arbitrators, using instead service providers less concerned with the long-term effect of reputation costs.[627] Under the current system, it will largely be upon state criminal prosecution systems and public enforcement agencies to detect any such situations. These mechanisms will be explored further in Chapter VIII.

7.2 Entrance into the profession and its effect on the enforcement of professional obligations

Closely linking to the question of how market incentives shape arbitrators' compliance with professional and ethical obligations, it is important to analyse how access to the profession shapes this same question. Indeed, the long informal process of qualification and networking that the vast majority of arbitrators has to undertake prior to obtaining a nomination might influence the level of compliance with professional and ethical norms. First, the difficulties of accessing the arbitral profession may help to establish an environment where most arbitrators are aware of and committed to the dominant values of international arbitration. Speculatively, one may argue that the same process may also pre-

627 Some parties may however choose a reputable arbitral institutions precisely to give a veneer of legitimacy to corrupt dealings. Baizeau and Hayes (n 551) 234.

select a subset of the total population that may be less predisposed to deviating from accepted norms. These two ideas will be explored in turn.

7.2.1 The difficult process of entering the arbitral profession as making it more likely that arbitrators are versed in the dominant norms

Due to the market characteristics discussed above and in more detail in Chapter III, entrance into practice as an arbitrator is a complex and difficult process that demands a large sunk investment of time and money into creating the networks and technical expertise that will increase the likelihood of a first appointment. Becoming and maintaining a position as an arbitrator often involves a long process of: i) acquiring practical experience in the field; ii) participating in community gatherings, such as attending conferences and in professional associations; and iii) 'courting' and networking with other members of the community.[628]

This long process also provides an environment where future members of the community of arbitrators learn the written and unwritten norms dominant within the community. It must be noted, that both in national and international commercial arbitration, often arbitrators do not undertake specialised professional training (although more has over

[628] See Dolores Bentolila, *Arbitrators as Lawmakers* (Wolters Kluwer 2017) 150; Fernando Dias Simões, *Commercial Arbitration Between China and the Portuguese-Speaking World* (Wolters Kluwer Law & Business 2014) 74; Joshua DH Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press 2013) 59. See also McIlwrath and Savage (n 510) 254.

the years become available and increased in popularity).[629] To be considered for most appointments a would-be arbitrator has often to participate in this 'socialisation' process that often lasts a considerable number of years. In this process, would-be arbitrators necessarily learn the dominant discourses and tenets of the profession.

Through the cumulation of academic learning, practical experience and participation events would-be arbitrators learn about how conceptions such as impartiality, independence or confidentiality should guide arbitrators' behaviour. These same experiences expose would-be arbitrators to practical examples of situations where professional and ethical obligations are at stake. As discussed in Chapter V, through these processes members of the community become familiar with the key sources of understandings within the community, be it legislation provisions, court decisions, or commentary that shapes the content of these norms.

In practice, the efforts undertaken by the would-be members of the community in entering the field provide a similar function to the training and qualification through exams found in many professions. While no formal training is required, the significant amount of participation within the arbitral community before most members have a realistic possibility of entering the roster of international arbitrators provides a surrogate for the mandatory education and/or training demanded in other professions.

However, the way that this process takes place is markedly different for arbitrators. In most learned professions, a formal process of qualification ends with a candidate being

629 Typical cases include the training courses organized by CIArb and the advance arbitrator training developed by ICC. However as noted by McIlwrath and Savage "*Our impression, at any rate, is that many or most of the world's leading arbitrators have no formal training or qualifications as arbitrators.*" McIlwrath and Savage (n 510) 254.

declared, in a binary fashion, qualified or unqualified. The informal process of qualification that allows one to enter the arbitral profession rather produces an environment where each prospective arbitrator is bestowed with more or less legitimacy and visibility within the community. Due to the tendency of parties and other nominating authorities to select amongst exclusively elite members, the vast majority of nominations will, therefore, tend to flow to those who participated extensively in the informal process of qualification described above.

7.2.2 Entrance in the market and pre-selection of the population of international commercial arbitrators

As discussed in Chapter III, the particularities of the arbitral market, namely the difficulties of accessing the profession and the inability to outcompete more experienced members through lower prices, end up selecting only a very small number of would-be entrants.[630] Indeed, only a selected few of the many active members of the arbitral community actually become arbitrators.[631] The difficulties of entering the market might influence the level of compliance of international commercial arbitration due to how it pre-selects who enters this field. In particular, it arguably: i) allows the weeding-out of those not sufficiently committed to the profession and its values;[632] and ii) selects from those who might be less inclined to norm-breaking behaviour.

630 Karton (n 22) 59.

631 See Paulsson, 'Ethics, Elitism, Eligibility' (n 201) 19.

632 See Gaillard, 'Sociology of International Arbitration' (n 39) 13.

7.2.2.1 Possible pre-selection of 'true-believers' in the virtues of international arbitration and the role of the arbitrator

Regarding the first idea, it is important to note that the large amount of 'investment' needed to attempt to access the role of arbitrator and the incertitude and large-time frame of eventual recoupment might discourage those not sincerely committed to the field. Further, entering the arbitral community is not a simple process of cumulating 'markers' of technical expertise, such as writing articles and mingling with other members within conferences and associations. Rather, entrance and progress in the community both involve a long process in which each member is typically at the same time a competitor – as each member is usually vying for the same nominations and business opportunities – and a juror – since each member evaluates each other's legitimacy, technical expertise, and potential value as a contact.

This system might, therefore, allow the community to weed out members who do not conform to pre-defined notions of what an arbitrator should be. The repeated interactions between the arbitral community and the prospective arbitrator before they are allowed to enter the small 'circle' of arbitrators provides many opportunities for the members to evaluate whether they conform to what is considered acceptable behaviour and become acquainted with the written and unwritten rules of the community. If a member does not consistently commit to this area of law and its gatherings in a way which is considered appropriate by other members, it might diminish their chances of entering the roster of usual arbitrators.

This long process might contribute to pre-select a population as arbitrators which is tendentially and disproportionally composed of people who are truly committed to the

values of arbitration.[633] This is important as such population might be inclined to forego personal financial gains in order to conform to normative understandings of how an arbitrator should act. This is to mean that the population of those currently composing the arbitrators' roster might be more inclined to refuse to break a norm accepted within the arbitral community even when breaking such norm would yield a positive result.

7.2.2.2 Possible pre-selection of a population that due to its characteristics and place in society might be less inclined to engage in norm-breaking behaviour

Finally, it should be noted that the population that composes international arbitrators is a highly pre-selected set of individuals who are almost always older[634] and already possess successful careers, most often within the legal and/or academic professions. Such a population might be less inclined to participate in norm-breaking activity.[635] While plenty of evidence suggests that successful well-established individuals are not immune from engaging in norm-breaking activity, such members of society will often be more risk-averse. They will often prize adherence to norms and social respectability within their professional circles more dearly. Arbitrators who often are individuals at either the peak or

633 Noting that, although cynics may perceive the support of members of the arbitral in the expansion of international arbitration to be self-interested, many members of the community also support international arbitration as a matter of principle, see Stacy I Strong, 'Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking' (2016) 50 Akron Law Review 495, 520.

634 See Mirèze Philippe, 'How Has Female Participation at ICC Evolved? ICC Arbitrators, Court Members and Court's Secretaria' (2017) 2017 ICC Dispute Resolution Bulletin 37, 42.

635 In regard to the idea that an older population is less likely to engage in crime, it has been a truism of criminology that age negatively correlates with criminal behaviour. For a discussion, see, among many others, Travis Hirschi and Michael Gottfredson, 'Age and the Explanation of Crime' (1983) 89 American Journal of Sociology 552.

the twilight of their professional careers might be a population that on average will not display a preference for risky activity.

There is also an indication that the market also pre-selects those members who are perceived as being of good character and displaying integrity – i.e. those who appear more committed to upholding virtuous behaviours. Members displaying such characteristics will be more palatable choices as arbitrators. It is plausible that the perception of such characteristics correlates to non-norm-breaking behaviour to some extent. While outliers will naturally be present, it is conceivable albeit highly speculative that the characteristics favoured by the market in an arbitrator tend to form a population of members less interested in norm-breaking activity.

7.3 The role of the arbitral community in enforcing professional and ethical norms

The next step in understanding what leads arbitrators to fulfil their professional and ethical obligations involves exploring in more detail the relationship between the arbitrator and the 'arbitral community' – i.e. the mass of growing number of arbitrators, practitioners, and academics which have engaged in the arbitral trade and over time have established durable professional and sometimes personal relations between themselves. As we had the opportunity to discuss above and in Chapter III, the market mechanics of international commercial arbitration incentivise strong links among all participants members in this market. In turn, the interplay between the arbitral community and its constituent members

is a key factor in understanding why the prevalent attitude amongst international arbitrators has been complying with dominant values.

In understanding how the arbitral community contributes to an environment where arbitrators comply with their professional obligations, I will focus on two key ideas. First, I will explore how the arbitral community rewards members who comply with desirable behaviour and applicable norms and sometimes punishes those who do not. Finally, I will analyse how the arbitral community provides a network where information regarding compliance and arbitrators' professional and ethical 'credentials' is transmitted. These ideas will be seen in turn.

7.3.1 The role of the arbitral community in rewarding members who comply with norms and sanctioning those who do not

The role of the arbitral community in guaranteeing that professional and ethical rules do not stop at the moment of entrance by only 'admitting' well-connected members who are well versed in the canons and discourses of international arbitration into the profession. It is rather a continuous process by which members who comply with professional obligations are rewarded, and members who comply poorly with professional obligations and demonstrate questionable ethical behaviour face community-driven sanctions. These processes are, however, not necessarily straightforward due to the imperfect and asymmetric level of information the different players in the market have.

7.3.1.1 The arbitral community's role in rewarding members who comply with their legal and professional obligations

The importance of developing a relationship with other members in the arbitration field is a well-recognised feature of being successful in establishing oneself in the market. Establishing and maintaining relationships with the arbitral community is a permanent game that arbitrators know they cannot abandon and where they often invest considerable amounts of time and money. Cultivating relationships and involvement with the community are essential to increase the likelihood of being appointed as an arbitrator. As discussed in more detail in Chapter III, the arbitral community has a strong direct and indirect control over who gets appointed. Decisions regarding who gets nominated are taken by members of the community acting as heads of arbitral institutions, counsel, or co-arbitrators, and therefore a good relationship with all these actors is important for an arbitrator.

This gives the community as a whole leverage over the individual arbitrators and incentivises arbitrators to comply with the norms dominant in the community, at least in theory. Members who are deemed 'worthy' by the community – i.e. are knowledgeable, well-liked,[636] and ethically 'sound' – are in theory rewarded by the community with appointments to arbitral tribunals, speaking engagements, and elected and non-elected positions in arbitral institutions and professional organisations.[637] The arbitral community

[636] As noted by Moore: "*The standing of a professional with his nominal peers is, not surprisingly, a mixture of various overt and informal criteria, not infrequently mixed with personal judgments verging on the professional*". Wilbert Ellis Moore, *The Professions: Roles and Rules* (Russell Sage Foundation 1970) 150.

[637] Moore's description of how prestige among professionals is symbolized is very much applicable in the world of arbitration. The author notes that it can range from very subtle and informal deference,

and its members have a clear interest in enforcing standards of behaviour that promote the legitimacy and usage of international arbitration. Therefore, they will have an interest in reappointing and rewarding members who contribute to the success of international arbitration.

It is, however, difficult to determine how much progression and maintenance within the roster of active arbitrators is a result of perfect compliance with their professional obligations. Arbitrators' success is partially a function of previous success. Very well-connected and/or well-known arbitrators might continue finding work even if peers do not strongly rate their performance. Some have noted that after an arbitrator assumes a certain level of importance and notoriety within the community, it is very difficult to displace them from their position in the market. Still, the fact that most successful arbitrators are very frequently credited for the quality of their work and ethical attitude, may indicate that complying arbitrators are recognised and rewarded by the community.[638]

such as developed consensus among professionals concerning unusual skill or judgment to elaborate and ceremonial behaviour, such as election to honorific offices in professional associations, by citations and awards, testimonial dinners, and the like. ibid 154. Further the simple fact of being respected by peers may in itself a motivation for arbitrators to undertake good behaviour: As noted by Part, '*Few enticements to good behaviour are stronger for those who sit regularly as arbitrators than a colleague's appreciation of one's ability and integrity.*' Park, 'Rectitude in International Arbitration' (n 456) 491. On more general terms, noting the relevance of peers and elite esteem as a mechanism of social control in professions, see Larson (n 332) 227.

638 See for example Chamber and Partners list of most in-demand international arbitrators available at < https://chambers.com/guide/> accessed 12 April 2020, where 'preparedness' is one of most often pointed characteristics of top arbitrators, usually in conjunction with mentions of 'experience' and 'knowledge'.

7.3.1.2 The role of the arbitral community in punishing members who do not comply with their legal and professional obligations

The community further provides social sanctions for members who deviate from desirable behaviour.[639] In the context of a reasonably small community where there is a significant incentive to know the other players and the latest evolutions in the field, members will have their actions scrutinised and may face criticism if they infringe the professional norms of the profession. In theory, expressions of disapproval may take different forms, from criticism in more formal venues such as in academic and non-academic articles or in the speeches given in arbitral conferences, to more informal ways such as face-to-face transmission of disapproval.

It is important to note that in the world of international arbitration, clearly directed open criticism of a particular arbitrator in a public forum is beyond rare.[640] The collegiate nature of the arbitration, where all members look to improve their social standings, likely discourages a confrontational approach.[641] Criticism of peer behaviour in open forums is often undertaken through other methods such as 'war stories' where a member will recount

639 The existence of a system of social sanctions is by no means a particularity of the arbitral community. Indeed, all groups utilize, to different extents, ostracism and gossip, as well as other informal sanctions, as a sanction to those who violate moral norms. Chandra Sekhar Sripada and Stephen Stich, 'A Framework for the Psychology of Norms' in Stephen Stich (ed), *Collected Papers, Volume 2: Knowledge, Rationality, and Morality, 1978-2010* (Oxford University Press) 293.

640 Jan Paulson's criticism of Judge Abner Mikva for his actions as an arbitrator within the Loewen Arbitration, an arbitral NAFTA dispute that opposed the Loewen corporation to the United States, represents one of such instances. See Paulsson, 'Moral Hazard in International Dispute Resolution' (n 16) 345. See also V Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator - From Miami to Geneva' in David Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 129.

641 The reluctance to criticize the judgment or skill of a fellow professional is not however a particularity of arbitrators and can be found in other professions as a manifestation of collegiality. See Moore (n 636) 110.

an anecdotal story from his professional experience, often presenting him/herself as a principled character facing objectionable behaviour from a no-named antagonist. [642] In the same vein, arbitral institutions do not adopt a 'name and shame' attitude. While some voices have requested arbitral institutions to be more forthcoming regarding past experience with particular arbitrators, arbitral institutions usually do not make public any information regarding particular arbitrators' performance or behaviour.[643]

The fact that within the arbitral community public criticism of a particular arbitrator is rare, does not mean that the community does not provide negative reviews of bad performance or poor ethical behaviour. This, however, takes place through personal contacts, through which members of the community express displeasure to other members of the community about arbitrators they have worked with. This is a particularly important aspect prior to a party appointing an arbitrator to an arbitral proceeding. Typically, before making an appointment, counsel to the parties look to gather information among peers about the characteristics of a potential appointee.

642 Noting the relevance of 'war stories' as an informal method of social control in the legal profession see Wendel (n 586) 1984.

643 See David Hacking, 'Arbitration Is Only as Good as Its Arbitrators' in Loukas Mistelis and Stefan Kröll (eds), *International Arbitration and International Commercial Law: Synergy, Convergence, and Evolution : Liber Amicorum Eric Bergsten* (Kluwer Law International 2011) 227. See also Catherine A Rogers, 'The Arbitrator and the Arbitration Procedure, Transparency in Arbitrator Selection' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz'sche Verlags-und Universitätsbuchhandlung;, 2016) 80.

7.3.2 The role of the community in transmitting information regarding the professional and ethical 'credentials' of arbitrators

Closely related to the idea discussed above, it is important to note that the arbitral community works as a network where information about potential arbitrators is transmitted. In the professional regulation literature, the idea of 'asymmetric information' – in this particular context, the idea that 'consumers' are usually unable to fully determine the 'quality' and/or true expertise of a professional working in a specialised field – is often used as a justification for the need to intervene in these markets. This has, however, not been the case in the international arbitration market.

In the context of international commercial arbitration, where most arbitral awards and almost all arbitral tribunals and arbitral institutions' decisions are not available to third parties, the consumers – i.e. the parties who use arbitral services – may have, at least in theory, some difficulty in making an informed decision when selecting an arbitrator.[644] Due to the difficulties of evaluating the available information, parties often rely on the advice of, and sometimes fully delegate their choice to, their in-house and external legal counsel. These, in turn, often rely on their professional contacts within and outside the law firms to obtain further information regarding suitable candidates.

644 It should be noted that some information regarding the 'quality' of arbitrators can be obtained by the profiles that some arbitrators provide or are organized by specialized publications. Further, information can be inferred from the academic and non-academic publications many arbitrators produce, allowing to gather some information regarding the technical knowledge of the arbitrator regarding certain areas of law or their understandings of how arbitral proceedings should be conducted.

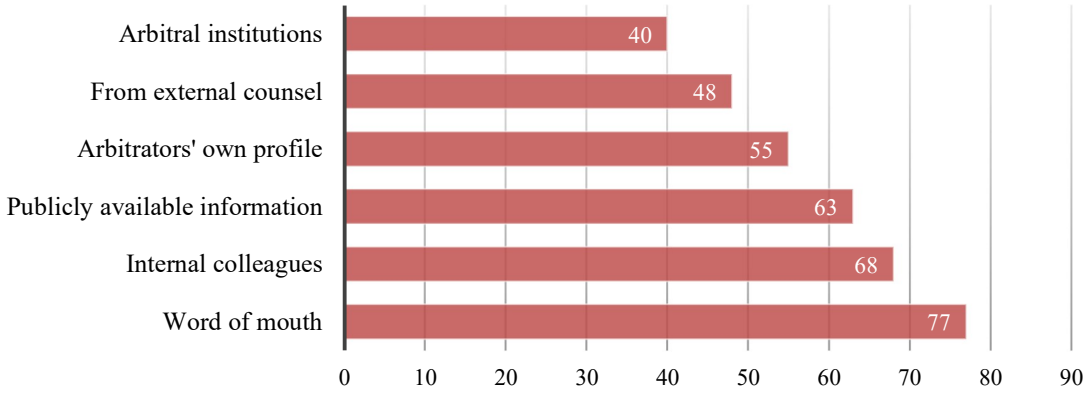

Fig. 10: Data on 'Where do you find your information about arbitrators?' adapted from QMUL's '*2018 International Arbitration Survey: The Evolution of International Arbitration*'

In this regard, the arbitral community functions as a network through which information about arbitrators can be communicated. Informal contacts among members of the community allow determining the professional expertise and ethical credentials of a prospective appointee.[645] The close level of contact among the members of this community as well as the repeated interactions among them facilitates these contacts and bestows upon members the confidence to approach other members regarding such issues.[646] As each member is incentivised to network within the community, they end up functioning as another point through which the information is distributed.

If the members of the arbitral community were not so proactive in establishing networks with other members, information about the quality of each individual member would be more difficult to assess. In this respect, the closed nature of the community

645 McIlwrath and Savage (n 510) 253.Some have noted the imperfect nature of such mechanisms. See, for example, Michael Mcilwrath, 'Grading the Arbitrator' (2007) 73 The Journal of the Chartered Institute of Arbitrators 224, 224.

646 As noted by Bermann: "*There may not be any other field of legal practice in which practitioners from around the world so regularly interact at conferences, symposia, training sessions and other events*". George A Bermann, 'American Exceptionalism in International Arbitration' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2011)* (Martinus Nijhoff Publishers 2012) 3.

spontaneously creates not only a system of 'rewards' and 'punishments' – mostly in the form of appointments and importance within the community or lack thereof – but also the mechanisms through which information regarding compliance is transmitted through the community.

7.4 The international commercial arbitration market and community, and the 'internalisation' of norms

Much of the discussion undertaken in this chapter regarding why international arbitrators comply with norms has been based on an analysis of how the market and the arbitral community often intertwine to reward international arbitrators with long-term monetary and non-monetary gains by complying with norms. This assumes the premise that norm compliance is driven by self-interest, at least defined in a broad sense. While it was also argued that the particular way the market is set tends to accumulate those truly committed to the values of arbitration, the thrust of the argument relied on the idea that lack of price competition and the reasonably closed nature of the arbitral community leads arbitrators to comply with norms as this is in most circumstances in their best interest.

It is important to note that decisions to comply are often not a reflection of an 'amoral calculator,' who calculates personal economic and non-economic benefits and costs from complying. Certain norms are followed because the subjects of the norm have simply internalised that certain behaviour is 'the right thing to do' or 'the way things are

done.'[647] This process by which an agent accepts a set of norms and values and acts in accordance with them is what can be called internalisation. Internalisation has a powerful effect in regulating behaviour and is often noted as a key driver of compliance.[648] Sometimes this process becomes so ingrained that compliance with norms becomes driven not by rationalised option but appears as an almost automatic, subconscious behaviour. As noted by a commentator:

> *'When I'd had my coffee this morning and went upstairs to get dressed for work, I never considered being a nudist for the day.'*[649]

What does this mean in regards to international arbitrators? First, it reminds us that arbitrators will respond to situations not only by callously calculating future gains and losses of money, social position, or their moral position regarding a certain issue or ideological preferences. Their compliance will also reflect how much arbitrators have internalised their role and their functions. Conceivably, an arbitrator does not fully consider the pros and cons of, for example, complying with the norm that determines its obligation of allowing a party to present a document – they simply comply with a norm they have internalised. It should be noted that in the world of arbitration, where many of the choices are taken in a high-stake environment by elite actors, it is expectable that decisions are

647 As noted by Kagan, Gunningham and Thornton: "*Sociological explanations of law-abidingness in individuals (among taxpayers, for example) suggest three basic motivations. One is fear of detection and punishment by government enforcement agents. The second is fear of humiliation or disgrace in the eyes of family members or social peers. The third is an internalized sense of duty, that is the desire to conform to internalized norms and beliefs about the right thing to do*." Robert Kagan, Neil Gunningham and D Thornton, 'Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects' in Christine Parker and Vibeke Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (2011).

648 See the classic Dennis H Wrong, 'The Oversocialized Conception of Man in Modern Sociology' (1961) 26 American Sociological Review 183.

649 Joshua M Epstein, 'Learning to Be Thoughtless: Social Norms and Individual Computation' 18 Computational Economics 9.

heavily rationalised, many other choices are undertaken routinely or as reflections of internalised roles.

Second, it raises the question of whether there are reasons to believe that the level of internalisation of norms by arbitrators will be significantly different from that of other professionals. In this respect, some of the particularities of the international arbitration market and community already discussed should be recalled. These allow speculation that within the arbitral community there might be a higher level of internalisation to the role and rules specific to the profession vis-à-vis other professions and their respective roles and rules. In particular, it is worth noting that: i) compliance is often a result of observing compliance in others; ii) internalisation is often the result of learning experiences; and iii) compliance with norms is more prevalent when there is a belief that these are the result of a fair process.

With regard to the first idea it should be noted that, as discussed above, in the market conditions of international arbitration, due to the existence of reputation competition between arbitrators, it is expected that in most circumstances arbitrators will find it in their best interest to adhere to the norms, and therefore non-compliance will be low. Importantly, compliance appears to also be a result of personally observing others complying or, more generally, the belief that others are complying.[650] Therefore, compliance by international arbitrators may conceivably be exacerbated as a result of compliance being the dominant observed behaviour in the field.

[650] See, for example the oft-noted fact in tax compliance literature that people are more willing to pay taxes if they believe that their friends and other citizens pay taxes. Eric A Posner, 'Law and Social Norms: The Case of Tax Compliance' (2000) 86 Virginia Law Review 1781, 1784.

Another relevant point discussed above is important to recall: entrance to the community demands a long process of committing to arbitration practice. This is expressed in practical terms by acquiring work and academic experience, joining community gatherings, and networking. It was argued that this long process forces would-be arbitrators in most cases to get familiar with the tenets of the fields, and may help exclude those uncommitted to the values of the field. It is also conceivable that this helps the process of internalisation and reinforcement of values.[651] It is important to note that education can provide people with information which, if successful, shapes their attitudes and values, and induces compliant behaviour.[652]

Finally, the process for which norms are created and imposed into the subjects seems to considerably influence the amount of internalisation and compliance.[653] When the subjects of norms perceive these to be produced by a legitimate authority, there is a larger tendency to comply.[654] Also, norms produced within a fair process, especially those where subjects consider having some degree of control over the process, tend to produce more compliance.[655] With regard to international arbitrators, and as discussed in Chapter V, where most norms are the result of an interactive process between the members of the community where norms slowly enter a commonly held set of values, principles, and

651 The same basic notion can be expressed in a different way, by emphasising a common 'culture of arbitration' which in turn drives compliant behaviour. See, for example, Ginsburg noting "*Actors engaged in repeated interaction over time produce culture. [The] common training and expertise, combined with interactive practices, produces a common set of expectations. These expectations, in turn, shape behaviour, though they are also subject to change as new norms arise*". Ginsburg (n 53) 1337.

652 See Jon G Sutinen and K Kuperan, 'A Socio-economic Theory of Regulatory Compliance' (1999) 26 International Journal of Social Economics 174, 184.

653 See ibid 182.

654 For a discussion see Tom R Tyler, *Why People Obey the Law* (Yale University Press 1990) 7.

655 See also ibid.

rules.[656] Since the norms applicable to international commercial arbitrators are rarely imposed in a top-down fashion, but rather are a collective creation by the community, it is conceivable that they are more easily internalised by arbitrators.

656 As noted by Bermann: "*The international arbitration community is in itself a densely integrated one, with widely shared assumptions and expectations concerning the ground rules for conduct in arbitration*". Bermann (n 646) 3.

CHAPTER VIII

ENFORCEMENT OF ARBITRATORS' PROFESSIONAL AND ETHICAL RULES

In Chapter VII, I explored how a set of incentives and the particular structure of the arbitral community tends to create an environment where arbitrators typically comply with their professional and ethical obligations. The underlying argument rested on the idea that the particular mechanisms of the arbitration market created long-term economic incentives for arbitrators to comply with their professional and ethical obligations. It argued that the particular structure of the arbitral market leads to an environment where those highly committed to the field and its dominant values are more likely to be selected to arbitral appointments. It further posited that the arbitral market contributed to a highly-cohesive community where members cultivate close relations, allowing for an environment where, within the community, information regarding the professional and ethical qualities of the members is transmitted.

This chapter completes an analysis of the grid of incentives leading arbitrators to comply with their professional and ethical duties by analysing how other institutions and mechanisms play a role in enforcing these obligations.[657] To further explore these

[657] It is worth noting that there have been voices requesting a more proactive in particular of arbitral institutions in enforcing arbitrators' ethical standards. See Fach Goméz (n 372) 14. Arguing for

mechanisms and institutions, this chapter will focus on the role played by: i) arbitral institutions; ii) arbitral professional associations; and ii) national courts in imposing these obligations. It will further analyse the role played by civil and criminal liability in enforcing these obligations. Throughout this chapter, a particular concern will be understanding not only how these institutions and mechanisms enforce these obligations, but also their limitations and how these mechanisms feedback into the reputation and economic mechanisms that dominate this market.

8.1 The role of arbitral institutions in enforcing professional and ethical rules

Arbitral institutions play a vital role in the development of arbitral proceedings and the arbitrators' services market.[658] As discussed in Chapter II, arbitral institutions have long been fundamental to the development and adoption of international arbitration and are crucial meeting points of the arbitration community. Their role is therefore, unsurprisingly, key in guaranteeing that arbitrators comply with their professional obligations.[659] In analysing how arbitral institutions influence compliance and enforcement of arbitrators' professional obligations, I will focus in particular on their role in: i) overseeing arbitrators' behaviour within arbitral proceeding in accordance with their institutional rules; and ii) influencing behaviour through their selections of arbitrators.

arbitral institutions to play a role in relation to arbitrators, akin to what the bar plays in relation to lawyers, see Rogers, 'The Vocation of the International Arbitrator' (n 61) 1011.

658 See Lynch (n 76) 110.

659 See Rogers, 'The Vocation of the International Arbitrator' (n 61) 983.

8.1.1 The role of the arbitral institutions in overseeing arbitrators' behaviour within arbitral proceedings

Arbitral institutions in their role as organisers of institutional arbitrations usually have within their rules considerable powers to oversee arbitrators' behaviour.[660] While there is considerable variance in the involvement of these institutions, with some taking a more interventionist role and others a more hands-off approach,[661] arbitral institutions often work as a safety net which guarantees users an institutional system of remedies against abuses of the process.[662] Arbitral institution involvement may include, amongst others: i) playing a role in selecting and/or confirming arbitrators; ii) providing a forum for arbitrators to be challenged; and iii) taking measures to guarantee that arbitrators act efficiently. These two last roles will be addressed in this section and the first will be picked up again when discussing arbitral institutions' interventions in the market.[663]

8.1.1.1 Arbitral institutions' powers to decide challenges and revoke the appointment of arbitrators

Arbitral institutions' function as a forum for parties to challenge arbitrators is one of the key roles usually associated with them. While the exact language of the institutional rules varies quite widely, it often allows arbitral institutions considerable latitude to remove

660 Still, it is important to note that arbitral institutions do not undertake the roles typically associated with professional regulators. Namely, they do not establish training requirements, undertake licensing or accreditation or demand formal continuing professional development (CPD) requirements.

661 For an overview, see Rémy Gerbay, *The Functions of Arbitral Institutions* (Kluwer Law International 2016) 54.

662 See Janice Lee, 'The Evolving Role of Institutional Arbitration in Preserving Parties' Due Process Rights' (2017) 10 Contemporary Asia Arbitration Journal (CAA Journal) 235.

663 See Chapter VIII, Section 8.1.2.

arbitrators that deviate from acceptable behaviour.[664] It allows parties to have a remedy against arbitrators who: i) failed to comply with their requirements to be independent or impartial by, for example, failing to disclose a connection with one of the parties or act in a partisan way during the proceedings; or ii) fail to advance an arbitration with reasonable diligence and dispatch.[665] Often, arbitral institutions also have the power to remove an arbitrator on their own motion, if they consider that a serious breach has been committed.[666]

In practice, arbitral institutions' ability to decide a challenge and remove an arbitrator works as a way of these institutions 'sanctioning' arbitrators who deviate from their obligations.[667] Being removed from their position represents to arbitrators: i) a 'direct cost' since they may lose their ability to, totally or partially, claim fees in relation to that case; and ii) an 'indirect cost' since it may diminish their reputation with the arbitral community and that arbitral institutions in particular.[668] The concern with these costs gives a strong incentive for arbitrators to comply with accepted behaviour and, in particular, with

664 For example, Article 14, ICC Rules 2017 establishes that "*A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement […]*". Other arbitral institution rules establish a closed list of grounds that allow an arbitrator challenged. However even those are often constructed with a broad language. See, for example, Article 10 LCIA Rules 2014.

665 For a discussion in the ICC Rules context, see Schwartz and Derains (n 74) 184.

666 The ICC Rules uses language that allows the institution broad discretion to remove an arbitrator, namely, when the ICC Court "*decides that the arbitrator is prevented de jure or de facto from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.*" See ICC 2017 Arbitration Rules, Article 15(2) Also using broad language allowing an removal of an arbitrator by the institution, see LCIA 2014 Arbitration Rules 10(1).

667 See Bentolila (n 31) 249.

668 It is important to note that traditionally decisions on arbitrators' challenges were not publicized by arbitral institutions. This is a practice that has somewhat evolved. See, Stone Sweet and Grisel (n 41) 227. In this sense, the LCIA has since 2011 made publicly available a database with decisions on arbitral challenges. Starting from 2015, ICC also changed its policy to start communicating to parties the reasons underlying their decisions on challenges to arbitrators. It is important to note that even in the case of LCIA, while some of the decisions are public, the name of the arbitrator is redacted

the applicable rules of the institution. It is important to note, however, that a decision by an arbitral institution to remove an arbitrator is not a common occurrence.

Institution	Number of new cases	Number of challenges	Challenges upheld	% Successful challenges
ICC (2017)	810	48	6	12,5%
LCIA (2017)	285	6	0	0%
SCC (2017)	108	6	0	0%
HKIAC (2017)	297	4	0	0%

Fig. 11: Breakdown of arbitral institutions' international arbitral cases[669]

As can be seen from the figures above, both challenges and especially arbitral institutions' decisions to remove an arbitrator are rare occurrences.[670] This is the case even when taking into consideration the situations where an arbitrator voluntarily steps down following a challenge.[671] Since the decision to revoke an arbitrator can often disrupt the smooth continuation of the arbitral proceedings, arbitral institutions are wary of taking this option, having to in practice weigh-in the gravity of the infringement and the practicalities of continuing the arbitration.[672] Still, the possibility of parties reacting through arbitral institutions against violations of arbitrators' obligations is an important safeguard to ensure that a readably accessible and quick deciding forum is available to the parties.

669 Data from the websites of the different arbitral institutions.

670 See also Born, *International Commercial Arbitration* (n 4) 1914., noting however that challenges have become more common in recent years.

671 See ibid 1920.

672 '*A successful challenge, in particular, can severely disrupt the arbitration if it occurs at an advanced stage of the proceedings*'. Schwartz and Derains (n 74) 184. See also Lucy Gordon-Vrbo and Dominik Vock, 'Commentary on the Swiss Rules, Article 12 [Removal of an Arbitrator]' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2nd edn, Wolters Kluwer 2018) 587.

8.1.1.2 Discretionary determination of fees to encourage arbitrators to conduct proceedings efficiently

A more recent instrument that some arbitral institutions started to use in order to incentivise arbitrators to comply with professional goals is to adapt arbitrators' fees.[673] In particular some arbitral institutions, most notably ICC, reward arbitrators by increasing their fees when they efficiently conduct proceedings and conversely reducing them when arbitrators are inefficient.[674] 'Efficiency' in this context primarily means rapidness and diligence in finalising the proceedings. The advantage of this instrument is allowing arbitral institutions to shape arbitrators' behaviour without having to undertake less 'extreme' measures such as removing an arbitrator.[675] Still, this is far from being a universal approach, with most arbitral institutions preferring not to discretionarily change arbitrators' fees, conceivably to it making costs and earnings less predictable for both parties and arbitrators.

673 See Warwas (n 186) 68. See also SIAC Code of Ethics 1.3.: "*The prospective arbitrator confirms that he understands that the Registrar of SIAC will take into account any failure by the prospective arbitrator to discharge his duties to ensure the fair, expeditious, economical and final determination of the dispute when fixing the quantum of fees payable to the arbitrator.*"

674 See ICC Arbitration Rules, Appendix III, Article 2. See also Vienna International Arbitral Centre 2018 Rules, Article 44(7) and SCC Article 49(3): '*In finally determining the Costs of the Arbitration, the Board shall have regard to the extent to which the Arbitral Tribunal has acted in an efficient and expeditious manner.*'

675 A similar measure would be to publicize the name of tardy or unethical arbitrators. See Stephan Wilske, 'The Duty of Arbitral Institutions to Preserve the Integrity of Arbitral Proceedings' (2017) 10 Contemporary Asia Arbitration Journal 201, 215. See also Chinese Arbitration Association, Taipei article 41 for an example. Public shaming of arbitrators is however an option almost never used by arbitral institutions. See, the remarks on the 'collegiality' of the arbitral community at Chapter VII, Section 7.3.1.2.

8.1.2 Arbitral institutions' power to shape the market for arbitrators and their effect on compliance with professional obligations

In addition to their powers to oversee arbitral proceedings, arbitral institutions also are important players in the market for arbitrators. Through their appointment decisions, and to a lesser extent through their selections to their arbitrators' lists, arbitral institutions have in practice a great influence over which arbitrators become successful in the market and which do not. Their selections, therefore, have the potential to influence compliance and be used to enforce professional norms. With the aim of better understanding how these selections influence compliance, I will focus on: i) how competition between arbitral institutions provide incentives for these to guarantee compliance by arbitrators; and ii) how arbitral institutions play a role in determining who successfully enters the market, tending to invite in those committed to the field.

8.1.2.1 Competitive pressures leading arbitral institutions to intervene in the arbitrators' market to guarantee compliance with professional norms

In Chapter III, when discussing the market for arbitral institutions, it was noted that arbitral institutions, despite charging fees for their services, do not act in a way fully akin to commercial entities.[676] It was, however, also noted that arbitral institutions are themselves increasingly competing in a global market.[677] As arbitral institutions gradually expand their operations more globally, a new era where arbitral institutions increasingly face off in the same markets has emerged. Guaranteeing that the arbitral proceedings established under

676 See Chapter III, Section 3.1.1.

677 See Simões (n 123) 303.

the banner of the institution are perceived as 'efficient' and 'high-quality' is a key aspect of maintaining their competitive edge in the market.[678] This, in turn, creates pressure in the downstream market for arbitrators for the latter to comply with these goals.

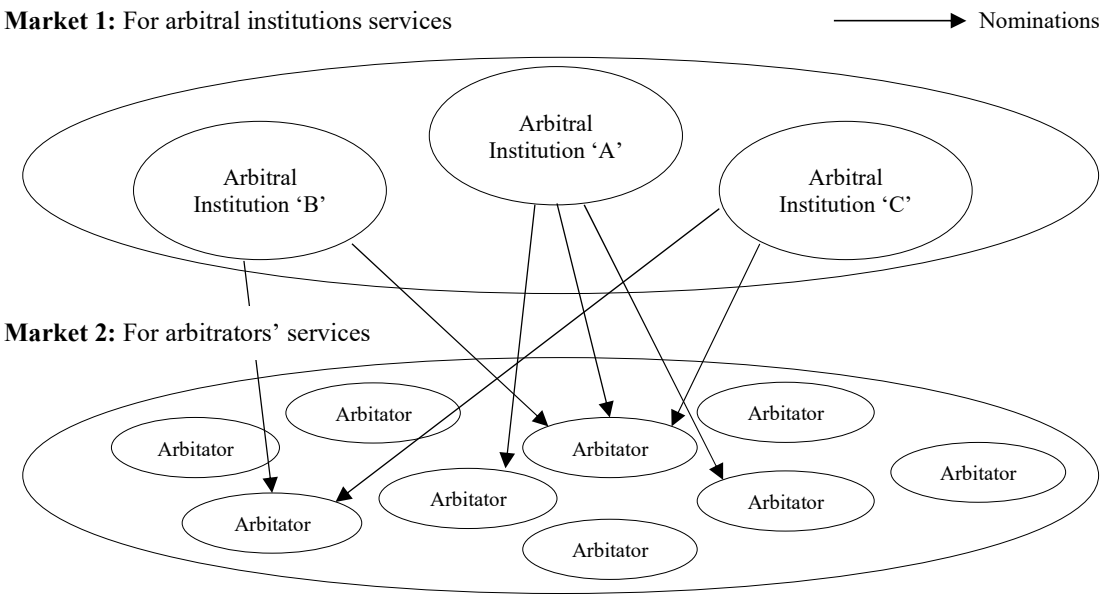

Fig. 12: Representation of the relationship between the market for arbitral institutions and for arbitrators

Arbitral institutions have a benefit in selecting arbitrators who help them assuring goals of promotion of the reputation of the arbitral institution and more widely arbitration as a system of resolving disputes.[679] The higher the level of competitive pressure on arbitral institutions market ('Market 1'), the higher the pressure they will conceivably put on arbitrators ('Market 2') for these to act in a way that will reflect positively on the institution. Conceivably, the inner dynamics of arbitral institutions may help exacerbate this tendency as the professional future of those working within arbitral institutions is often linked to the

678 See Warwas (n 186) 38.

679 See Bond (n 282) 8.

success of the institution itself. Indeed, holding a position or working within an arbitral institution is often used successfully as a stepping stone to increase the likelihood of being appointed in arbitration cases.

In any case, arbitrators are well aware of the importance of being on arbitral institutions' radars and maintaining a relationship with them.[680] Therefore, they will likely adapt their behaviour in order to comply with arbitral institutions' preferences and conceivably increase the likelihood of being appointed. Bad previous experiences, such as lack of responsiveness or efficiency by an arbitrator, are certainly taken into consideration by the arbitral institution when undertaking future appointments.[681] Conversely, arbitrators that are perceived to excel by an institution may see the likelihood of being nominated again increase. Consequently, the need to satisfy arbitral institutions provides a strong incentive for arbitrators to avoid acting in ways which are considered improper within arbitral circles.

To this extent, arbitral institutions have the potential to play a role of powerbrokers in determining what arbitrators become successful and to discipline what the 'arbitral community' perceives as errant behaviour by arbitrators. While arbitral institutions do not have by legal statute the power to legally stop arbitrators, to continue operating in the market they have (in practice) the ability to severely curtail the ability of an arbitrator – who has performed poorly ethically or otherwise – finding work. It should be noted that

680 Noting the link between 'super arbitrators' and arbitral institutions, see Grisel (n 53) 818.

681 The power of arbitral institutions to creature pressure on arbitrators through the implicit 'threat' of (informal) 'blacklisting' has been noted. See Ksenia Polonskaya, 'Arbitral Institutions' Response to Perceived Legitimacy Deficits: Promoting Diversity, Transparency and Expedition in Investor-State Arbitration' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (1st edn, Cambridge University Press 2019) 371.

typically no formal institutional decisions are taken to prospectively stop appointing an arbitrator, but more informally decisions can be made not to consider an arbitrator in the future.[682]

8.1.2.2 The role of arbitral institutions in selecting who successfully enters the profession and its influence on compliance

Another way arbitral institutions influence compliance relates to their key role in selecting who enters the 'profession.' As discussed in Chapter III, arbitral institutions are often the source of the first appointment in an arbitrator's career and are usually important in the early career of many arbitrators.[683] Being less pressured than parties to appoint highly influential and experienced arbitrators, arbitral institutions sometimes take the opportunity to appoint more junior members of the community, especially in the context of smaller scale, single-arbitrator proceedings.[684] Since previous experience serving as an arbitrator is in practice one of the key considerations in being nominated,[685] the importance of arbitral institutions in the process of 'recruiting' members into the community is, therefore, central.

The role of arbitral institutions in selecting who enters the market extends however beyond simply providing first appointments. Another important example of how an arbitral institution may play a role in helping a prospective arbitrator's career is adding their name

682 See Wilske, 'The Duty of Arbitral Institutions to Preserve the Integrity of Arbitral Proceedings' (n 675) 215.

683 See Tony Cole and others, 'Arbitration in the Americas: Report on a Survey of Arbitration Practitioners' (University of Leicester 2018) 29 and 45 available on the website <ciarglobal.com> last accessed 31 March 2020.

684 See Gerbay, ''How Does a New Arbitrator Get Their First Appointment?' (n 307) 2.

685 See Lucy Greenwood and Mark Baker, 'Getting a Better Balance on International Arbitration Tribunals' (2012) 28 Arbitration International 653, 658.

to the institution's roster of arbitrators. These are lists of arbitrators that, depending on the rules of the institution, may be relied upon by the institution in future appointments. Another example is inviting a potential member to participate in one of the arbitral institutions' events as a speaker. These decisions by arbitral institutions, while not guaranteeing appointments, signal quality and trust in that individual, helping the market identify those who are appropriate to be selected as arbitrators.

Since, as explored above, arbitral institutions rely on a reputation as a fair and independent institution as a key tool for competing in the market, they will benefit from scouting prospective arbitrators who will help them improve this reputation.[686] Arbitral institutions therefore have an incentive to maintain the close-knit nature of international arbitration, only adding new members who they have vetted and consider committed to the arbitral enterprise.[687] Due to the vast contact network they develop with many members of the community and their ability to observe previous work undertaken by prospective arbitrators when they act as counsel, arbitral institutions are arguably in a particularly good position to undertake this function.

686 See Franz T Schwarz and Christian W Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International BV 2009) 121. "[O]*f course, the VIAC, like any arbitral institution, strives to appoint arbitrators of quality, as a poor selection and offended parties will reflect badly on the institution's reputation*"

687 See Rogers, 'The Vocation of the International Arbitrator' (n 61) 975.

8.2 The role of professional associations in enforcing arbitrators' professional norms

If arbitral institutions play an important role in enforcing arbitrators' obligations, it should be noted that conversely professional associations play almost no role in the enforcement of these norms. In this point, it will be important to analyse both the role played by: i) arbitral professional associations, i.e. the voluntary associations that encompass professionals linked to arbitration; and ii) the role played by other professional associations that, albeit not directed to arbitration, might have members that also work as arbitrators. In particular, local bar associations, due to the fact that many arbitrators are also practising lawyers, could play a part in regulating arbitration. As it will be seen both kinds of associations play, however, a limited role. This will be seen in turn.

8.2.1 The role of arbitral professional associations in overseeing arbitrators' behaviour within arbitral proceedings

In Chapters IV and V, I argued that arbitral professional associations were considerably different from professional associations in other fields. One of the key aspects of this difference is that arbitral professional associations, despite taking an active role in developing professional norms, rarely intervene in actually enforcing those same standards.[688] In the same vein they also do not filter entrance, as membership is not a prerequisite to act in the market and these associations are typically open to any wishing to

[688] See Cameron L Sabin, 'The Adjudicatory Boat without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators' (2001) 87 Iowa Law Review 1337, 1354.

join.[689] In this sense, their direct role in enforcing professional norms may be qualified as minimal.[690] They mostly play an indirect role by reinforcing the close-knit nature of the arbitral community. This allows information about compliance to flow through the community in the fashion described in Chapter VII, allowing reputation sanctions to better work in this market.

A notable exception to this is the Chartered Institute of Arbitrators (CIArb). Founded as The Institute of Arbitrators in 1915, the Chartered Institute of Arbitrators comes closer in both aims and functioning to a professional association in the English tradition. It filters entrance by determining different grades of membership that can only be achieved by undertaking training organised by the Institute and/or demonstrated achievement in arbitration.[691] Pursuant to its by-laws, CIArb further has the power to

689 This is the case of international arbitration associations such as the International Council for International Arbitration (ICCA) that invites membership both from individuals and corporations, not determining specific pre-requisites for those wishing to join. In the same vein, national arbitral associations are usually open to entrants. As an example the Club Español de Arbitraje (CEA) determines in article 6 of its by-laws that membership should be composed by those that have "ample experience in arbitration". In practice, it does not however establish a filter of experience for membership. In the same vein, the Comité français de l'arbitrage (CFA) establishes in article 6 of its by-laws that membership is open to all jurists or representative of the business world interested in arbitration.

690 It should be noted that some national arbitral associations have in their statutes, provisions that allow disciplining of their members. To this effect, using broad language, the CEA by-laws, in its article 11, has powers to, inter alia, expel its members that display behaviour that seriously affects the 'interests of the association. See also CFA's by-laws allowing expulsion of members due to "serious breach". From communications with members of the respective arbitral communities, it is apparent that these provisions have, however, not been used to discipline members who have breached ethical duties within arbitral proceedings.

691 The CIArb establishes three membership categories: 'Associate', 'Member' and 'Fellow'. Associate, the lowest of the aforementioned categories, demands successfully completing one of CIArb's introductory courses or a minimum of six-months' experience in dispute avoidance or dispute management.

investigate and sanction allegations of misconduct by its members, a unique characteristic amongst the professional associations in the arbitral field.[692]

Two notes regarding the disciplining powers of CIArb are important. First, actual usage of these powers by CIArb seems rare,[693] with only two cases of sanctioning of its members being reported as of 2019.[694] Second, despite CIArb's popularity in and outside England, participation in this association is by no means universal. Many of the most active arbitrators are not affiliated with CIArb. Due to the voluntary nature of an association like CIArb, it is plausible that very strong enforcement could deter some participants from joining the association. This would be the case particularly in those environments where joining a particular association is not understood as key to being successful as an arbitrator. This is the case of arbitration, where despite arbitrators often joining multiple associations, membership in any particular one is not considered essential to operate in the market.

Still, the fact that CIArb cumulates the ability to discipline its member with one of the highest memberships amongst arbitral associations seems to indicate that it is not (only) an association's own members' resistance that explains why these rarely undertake an enforcement role of ethical obligations. Rather, it appears to simply be outside of arbitral associations' scope to assume these functions, and there are no significant internal voices requesting arbitral associations to be more proactive in this regard. Again, it is important

692 See, Royal Charter Bye-Laws and Schedule to the Bye-Laws, Article 5(6).

693 Sceptics have note that industry self-regulation is often marked by weak enforcement and secret and mild sanctioning. See Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19 Law & Policy 363, 370.

694 It is important to note, however, that CIArb does not make available comprehensive statistics on its disciplinary proceedings. See Report from The Club des Juristes, Report: The Arbitrators' Liability, June 2017, available at: <http://staging.leclubdesjuristes.com/wp-content/uploads/2017/06/CDJ_Rapports_Responsabilit%C3%A9-de-l%C2%B9arbitre_Juin-2017_UK_web.pdf>, last accessed 1 April 2019.

to note that, as explored in Chapter III, due to the fact that arbitrators are largely dependent of their integration in the community to continue operating in the market, formal decisions to 'expel' and 'suspend' a member are usually not necessary. Simple informal shunning of a member has largely the same effect.

8.2.2 The role of other professional associations in overseeing arbitrators' behaviour within arbitral proceedings

A potential role of other professional associations should also be noted. As most arbitrators cumulate this role with a membership of another profession, their actions as arbitrators can sometimes fall under the scope of the disciplinary powers of other professional associations. Since arbitrators most often cumulate work as legal counsel, local legal bars, in particular, could in theory exercise some level of discipline over arbitrators.[695] Arguably, some violations of professional norms by arbitrators could be construed, depending on the exact wording of the relevant statutory and ethical rules, as a violation of their local bar's ethical rules and open, in this way, an avenue for disciplinary action by the bar.[696]

Still, it should be noted that lawyers' local bars have usually not taken a proactive attitude in enforcing and disciplining lawyers in relation to their role as arbitrators. Exceptionally, some jurisdictions have enacted specific rules of conduct for domestic and

695 See Born, *International Commercial Arbitration* (n 4) 2892.

696 See Shari Maynard, 'The Current State of Arbitrator Ethics and Party Recourse Against Grievances' (2016) 8 Yearbook on Arbitration and Mediation 204, 217.

international arbitrators.[697] However, in most circumstances, it is generally understood that professional rules designed to regulate an attorney-client relationship do not specifically apply when a lawyer act as an arbitrator.[698] In a broader sense, local bars' disinterest in regulating international arbitration might derive from the notion that the field is only participated by a small, often elite, subsection of the legal profession who could be hindered if a stringent understanding of local norms would apply.[699]

8.3 The role of courts in enforcing arbitrators' professional and ethical obligations through their powers to oversee proceedings

Following an analysis of the role of arbitral institutions and professional associations in enforcing arbitrators' professional norms, it is important to analyse the role played by national courts in this regard. While under the current arbitration legislative frameworks national courts have mostly limited powers to intervene in arbitral proceedings, they still hold powers that allow them to review the actions undertaken by arbitrators. As will be seen, this allows courts to indirectly enforce arbitrators' professional obligations. Two important types of power in this regard are usually afforded to courts: i) deciding the removal of an arbitrator following a challenge by one of the parties; and ii) at the seat or

697 See, for e.g., Code of Conduct for Italian Lawyers, approved by the National Bar Council during the session of January 31st 2014, article 61.

698 See Born, *International Commercial Arbitration* (n 4) 1970..

699 For the same reasons, local bar associations are usually disinterested in regulating the conduct of their lawyers operating as counsel in international arbitrations, especially those taking place abroad. See Rogers, 'Fit and Function in Legal Ethics' (n 450) 341.

the place of enforcement annulling or refusing to enforce an arbitral award. These will be analysed in turn.

8.3.1 National courts' power to remove an arbitrator from arbitral proceedings

The first important power of national courts to regulate arbitrators relates to the possibility of removing an arbitrator from an arbitral proceeding. During arbitral proceedings, parties are usually entitled to have recourse to national courts at the seat of arbitration in case one or more of the arbitrators fail to comply with important obligations.[700] While the exact wording of the applicable provisions changes between jurisdictions, parties are usually entitled to challenge an arbitrator if: i) there are justifiable doubts as to the arbitrator's impartiality or independence; or ii) the arbitrator fails to perform his duties within a reasonable time frame. [701] Typically, courts intervene only after a first decision is taken by the arbitral tribunal itself and/or the arbitral institution responsible for organising the proceedings.[702]

700 It is important to note that a few jurisdictions do not allow interlocutory challenges of arbitrators. This is the case of the United States where the FAA does not envision interlocutory judicial challenges of arbitrators. See Born, *International Commercial Arbitration* (n 4) 1928. Other jurisdictions only allow national courts to hear challenges in the case of ad hoc arbitrations. See ibid 1926.

701 See UNCITRAL Model Articles 12 and 14.

702 To this effect, the UNCITRAL Model Law allows parties to challenge an arbitrators in case the arbitrator does not voluntarily withdraws from its position. The first decision it will be upon the arbitral tribunal to decide whether there are reasons to remove the arbitrator. If the tribunal refuses the challenge, the party will, usually have the possibility of requesting the competent national court to review the challenge. Rules from arbitral institutions, however, may allow it to first review the challenge in lieu of the arbitral tribunal. See, for example. ICC 2017 Arbitration Rules, article 14.

The possibility of parties requesting courts to revoke an arbitrator's mandate in this sense plays a regulatory role, as it modifies the grid of incentives an arbitrator faces. It plays an effect similar to the removal by an arbitral institution: by removing an arbitrator, a court imposes a direct cost on an arbitrator since they may be unable to recover fees from the case.[703] Further, an indirect cost may be burdened on the arbitrator. A high-profile removal from a case by a court might affect the arbitrator's reputation[704] and, in this sense, affect an arbitrator's ability to further find appointments in this field.[705] However, not all court decisions to remove an arbitrator will necessarily affect reputation in the same way. As will be discussed below, the arbitral community plays an important role in mediating these effects.

8.3.2 Regulatory effect of annulling or refusing enforcement of an arbitral award

Under the current system as described in more detail in Chapter II,[706] both national courts at the seat of arbitration and the courts of the jurisdiction where enforcement is sought may, in theory, scrutinise the award. At the seat of arbitration, national courts may, under some circumstances, review requests to set aside the award in accordance with the grounds

703 See 1996 English Arbitration Act, Article 24(4).

704 And conceivably also of the arbitral institution, if any, that was involved in the arbitrator's appointment. See Daele (n 480) 218.

705 Conversably, a strong pre-existing reputation can conceivably help, to an extent, shield arbitrators from challenges. Noting that in the well known *AT&T Corporation and Another v. Saudi Cable Company* case, the strong reputation and experience of the chairman of the arbitration were (amongst several other factors) considered in dismissing a challenge against him, see ibid 284.

706 See Chapter II, Section 2.3.4.

prescribed in the law of the seat. This usually includes serious violations of due process guarantees, such as the arbitral tribunal not allowing the possibility of a party presenting their case or formal requirements, such as the tribunal not being constituted in accordance with the agreement to the parties.[707] Importantly, it further allows the court to annul awards that contravene serious public policy considerations, such as an award which would run against dominant moral considerations in that particular jurisdiction.[708]

Further, in the jurisdiction where enforcement of an award is sought, national courts may refuse to recognise and enforce the award against the limited grounds prescribed in the New York Convention or where, in the rare cases that the Convention would not be applicable, the grounds defined by the law of the state where the enforcement takes place. These most often overlap with the grounds provided for setting aside an award.[709] Article V of the New York Convention, the key provision in this aspect, provides seven grounds that allow the court to not recognise and enforce the award, including the invalidity of the arbitration agreement, lack of proper notice of the arbitration proceedings, the award dealing with differences beyond the scope of the arbitration, and the award being against the public policy of the state.[710]

Together with the possibility of setting aside an award, the possibility of an arbitral award being refused enforcement operates as an incentive for arbitrators to comply with

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707 See UNCITRAL Model Law, Article 34.

708 For a discussion on the concept of international public policy in the arbitral context, see Chapter VI, Section 6.4.1.

709 See UNCITRAL Model Law Articles 34 and 36.

710 For an analysis of these grounds, see Emmanuel Gaillard and George A Bermann, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: New York, 1958* (BRILL 2017) 129.

their professional and ethical obligations. Courts provide a public forum that will review arbitrators' actions. Having an award set aside or refused enforcement may determine a reputation cost for those arbitrators that violate accepted norms. It is, however, important to note that the effects of these national courts' interventions have a more limited effect that could be otherwise anticipated, as their influence on the market is mediated by the arbitral community. Further courts are often expected by the arbitral community to have a hands-off approach regarding arbitration.[711] These ideas will be explored in more detail next.

8.3.2.1 Setting aside an arbitral award and refusing enforcement as incentives for compliance

When a losing party in an arbitral proceeding applies to have the arbitral award set aside or applies to have the enforcement of the award refused, these at least in part often involve arguments related to the acts and decisions taken by the arbitrators in the panel. Losing parties often argue that the arbitrators have violated due process principles or that the arbitral award, due to its content or the way it was obtained, violated the public policy of the concerned jurisdiction. By petitioning a court to set aside or stop enforcement of an arbitral award, the parties allow an arbitral tribunal to review the behaviour of arbitrators. While sometimes these are used merely as a dilatory tactic to avoid prompt enforcement, they also have the ability to affect arbitrators' incentives.

Arbitrators and the broader arbitral community pay considerable attention to the decisions of courts which scrutinise awards, especially those which decide to set aside or

711 See Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Process' (2008) 24 American University International Law Review 489, 537.

refuse enforcement. In a context where many arbitral awards are confidential, the information provided by courts – whose decisions are almost always non-confidential – is a relevant source of information regarding the general 'quality' of arbitral proceedings in a particular jurisdiction but also, in some circumstances, allow information to be obtained regarding specific arbitrators.[712] Even when the name of the arbitrator is not mentioned in the court decision, sometimes arbitration insiders will be able to identify the relevant arbitrator and/or such information might circulate within the community.

It is therefore conceivable that arbitrators incorporate the risk of their award being annulled or not enforced when deciding how to act in this market. It is plausible that arbitrators who often see their decisions set aside or refused enforcement may see their reputations in the market affected, especially if there is a general perception that the set-aside or non-enforcement derives from the lack of competency of a specific arbitrator. As 'virtue entrepreneurs,' arbitrators will therefore have strong incentives to avoid having their award set aside or refused enforcement since any allegation of misconduct made in a court of law against an arbitrator will easily become public and possibly present a threat to the arbitrator's reputation.[713]

Further, less market-driven mechanisms may also explain arbitrators' avoidance of being challenged or having their awards set aside or refused enforcement. Arbitrators may face feelings of embarrassment or indignation regarding challenges made by the parties or

712 Enforcement proceedings have been noted to provide one of the rare opportunities to have a glimpse inside the arbitral system. Rogers, 'Transparency in International Commercial Arbitration' (n 142) 1313.

713 As Karton writes: "*Rendering an award that is the subject of a successful challenge implies (in arbitrators' perception, if not always in fact) a failure on the part of the tribunal. It is a black mark on an arbitrator's résumé and may even affect his or her ability to garner future appointments*." Karton (n 22) 48. See also, Luttrell (n 149) 254.

having their award set aside or refused enforcement. The emotive tone of many arbitrators' responses to challenges or allegations of misconduct made at courts of law likely testifies not only to a desire to repair a damaged reputation but also to uneasiness or revolt in the face of such allegations.[714] Indeed, in more general terms, a strong aversion by judicial decision-makers, be it arbitrators or national judges, to being overturned is often identified.[715]

Overall, and independently of the reason that leads arbitrators to want to avoid court decisions not confirming their awards, it is clear that courts both at the seat and the place of enforcement do provide a mechanism of enforcing regulatory norms of behaviour in the market. By creating strings of decisions that punish certain behaviours, courts also act as enforcers of the dominant values regarding arbitration. As it is to be expected, the competent national courts at the jurisdictions where arbitrations are most commonly seated – places like London, Geneva, Paris or Singapore – play an enhanced enforcing role in this aspect.

8.3.2.2 The practical limits to the courts acting as 'regulators' of the behaviour of commercial arbitrators

The power of courts to regulate the behaviour of international commercial arbitrators is, however, more limited than otherwise would be expected. First, a decision by the court to annul and not enforce an award does not often impose a direct cost on arbitrators. Even if the award is annulled or determined not to be enforceable, arbitrators will usually retain

714 Luttrell (n 149) 254.

715 See Franck, 'The Role of International Arbitrators' (n 3) 512.

their fees (notwithstanding liability risks, discussed below). In this aspect, the effect of courts' decisions takes place through affecting arbitrators' reputation. It is important to note, however, that having decisions confirmed or annulled is only one of the many aspects that compose an arbitrator's reputation. Having a decision annulled may not have a significant effect on an arbitrators' career, especially a well-established one, as long as the facts that transpire are not perceived to be particularly scandalous.

It should further be noted that it is far from automatic that any court's decision would affect an arbitrator's reputation. Indeed, the arbitral community often bands together to criticise particular judicial decisions that it sees as not in line with best arbitral practices or are otherwise unfair, siding with the arbitrators' behaviour.[716] In this sense, the arbitral community mediates the influence courts have on the arbitral market. While the arbitral community offers a closely-knit network through which information regarding arbitrators can pass, it also comments on and contextualises those decisions. Through the many informal contacts taken in professional settings and community gatherings as well as a host of writings, the arbitral community filters if truly a deviation occurred and how serious it was.

Another important limitation to the courts' intervention in the arbitration market is the restricted role courts are expected to play.[717] As discussed in Chapter II, most

716 Observing that "[s]*ome less-developed*" have taken decisions refusing to enforce awards that are "*manifestly wrong*", see Born, *International Commercial Arbitration* (n 4) 3716.

717 In this sense, national courts have been argued as having to "*strike an exceedingly fine balance between party autonomy and a minimum competence for national judicial review*" as "*too much judicial review will transfer real decision power from the arbitral tribunal (…) to a national court whose party neutrality may be considerably less.*" William Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press 1992) 112.

legislators have constructed a framework with limited grounds to allow court intervention. Also, the dominant narrative establishes that courts should respect the autonomy of arbitral tribunals and avoid full reviews of the merits of the case.[718] As discussed in Chapter IV, some level of regulatory competition also takes place with jurisdictions that over-intervene in arbitral proceedings being shunned and running the risk of parties delocalising their proceedings to other jurisdictions. To the extent judges follow the dominant 'pro-arbitration' understandings and/or feel motivated by the enterprise of attracting arbitral proceedings to the jurisdiction, their intervention will be typically limited.[719]

Altogether it is therefore not surprising that the setting aside or refusals of enforcement of international arbitration awards are, in most jurisdictions, relatively rare.[720] Typically, courts only annul and/or refuse enforcement if arbitrators seriously infringe on their obligations. In the cases where national courts overextend their review, an arbitrator's position in the market will often not be affected as the community will understand it as an unwarranted decision. Still, courts play a role that can be defined "*as the north point on a compass that keeps arbitral proceedings on course*."[721] They provide a safety mechanism

718 Defining the idea that courts will not review the substance of arbitrators' decisions contained in foreign or nondomestic arbitral awards as a "*sacrosanct principle of international arbitration*", see Born, *International Commercial Arbitration* (n 4) 3706.

719 Noting the 'pro-arbitration' attitude of Hong Kong's Courts as a key to the success to Hong Kong as an arbitration hub, see Bao (n 414) 628.

720 Rogers, *Ethics in International Arbitration* (n 22) 239. See also Poudret and Besson (n 490) 845. Indicating he statistical likelihood for a challenge of an award to be successful before the Swedish Courts of Appeal to be only around 5%, see Oldenstam (n 531) 126.

721 Rogers, *Ethics in International Arbitration* (n 22) 239.

that helps guarantee parties recourse in case deviations happen and a forum whose power to review actions remains at the back of an arbitrator's head.[722]

8.4 Civil liability as a mechanism to enforce arbitrators' professional obligations

Closely linked to the courts' power to intervene in arbitral proceedings is the possibility of parties commencing parallel proceedings to set aside an award, looking to hold arbitrators' liable for a violation of their legal and contractual obligations. How this can be used to help enforce arbitrators' professional obligations is reasonably straightforward.[723] In theory, liability suits may comprise an important risk for arbitrators who do not comply with their professional and ethical obligations in general, potentially imposing a monetary cost on deviation. It is important to note, however, that many jurisdictions and arbitral institutions limit (to different extents) arbitrators' liability.[724] These limitations and a few examples of how the liability of arbitrators operates will be seen next.

722 The power of national courts to influence the grid of incentives' of arbitrators has inclusively led some to argue for a more stringent approach in reviewing arbitral awards. Most notably, Eric Posner has argued for national courts to take a 'probabilistic' merit review of arbitral awards as to incentivize arbitrators to respect mandatory rules. Eric A Posner, 'Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi' (1999) 39 Virginia Journal of International Law 647. This is a approach, however, not preferred by the arbitral community at large. See Born, *International Commercial Arbitration* (n 4) 3706.

723 See Andrew F Popper, 'In Defense of Deterrence' (2011) 75 Albany Law Review 181.

724 For an overview, see Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20 New York Law School Journal of International and Comparative Law 1.

8.4.1 Limitations of arbitrators' liability through legal acts and arbitral institutions rules

For understandable reasons, many jurisdictions limit the possibility of parties procuring damages from arbitrators, albeit to different degrees. While virtually no jurisdiction offers arbitrators full immunity from suit, in most states some level of protection is afforded, either by expressly limiting liability in legislative frameworks and/or by the effect of courts' decisions. Underlying this protection there are policy considerations which, albeit not uniformly accepted, have held sway inside and outside arbitration circles. The thrust of the argument relies on the idea that if arbitrators did not have at least some immunity from suit, they could face unwarranted pressure from disgruntled parties which could advance spurious lawsuits to harass arbitrators or as a tactic to derail arbitral proceedings.[725]

The idea of establishing legal regimes and legal interpretations has traditionally held considerable sway in common law jurisdictions, where legislative acts and courts often curtail the extent to which an arbitrator may be held liable.[726] For example, in England and Wales, the Arbitration Act 1996 provides that "*an arbitrator is not liable for anything done or omitted to do in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.*"[727] In the United States, courts have established generally an even more shielding framework of arbitrators,

725 See Lew, Mistelis and Kröll (n 100) 288.

726 See Fouchard and others (n 166) 591. See also Franck, 'The Liability of International Arbitrators' (n 724) 18.

727 English Arbitration Act 1996, section 29(1).

broadly equating arbitral immunity with judicial immunity, and therefore guaranteeing a very protective regime.[728]

In civil law countries, despite the question of arbitrators' immunity having traditionally been less a concern of courts and legislators, deference to the idea that arbitrators must be protected from suit also holds sway. For example, French courts have established a high threshold demanding arbitrators to incur in "*a personal breach equivalent to wilful misrepresentation or constitutive of fraud, gross negligence, or a denial of justice,*" often equating the protection given to arbitrators to that given to judges.[729] Also, in Germany, the Federal Supreme Court has held that the parties implicitly agreed that the liability of an arbitrator should not go further than that of a judge, even despite the German legal provisions not expressly addressing arbitrators' immunity.[730]

Finally, it should also be taken into consideration that arbitral institutions' rules often establish limit the liability of arbitrators and the arbitral institutions themselves.[731] For example, the ICC establishes that: "*The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with*

728 See Lew, Mistelis and Kröll (n 100) 292; Nadia Smahi, 'The Arbitrator's Liability and Immunity Under Swiss Law - Part I' (2016) 34 ASA Bulletin 876, 890..

729 See Cour de cassation - Première chambre civile, Arrêt n° 2 du 15 janvier 2014 (11-17.196). See also Lew, Mistelis and Kröll (n 100) 292; Fouchard and others (n 166) 588.

730 See Lew, Mistelis and Kröll (n 100) 292. See also Christian Hausmaninger, 'Civil Liability of Arbitrators-Comparative Analysis and Proposals for Reform' (1990) 7 Journal of International Arbitration 7, 36.

731 It should be noted that even without express rules determining exclusion of liability, arbitral immunity may extend to arbitral institutions. See Hausmaninger (n 730) 39.

the arbitration, except to the extent such limitation of liability is prohibited by applicable law."[732] Similar provisions are established for example in the LCIA, HKIAC and the SIAC rules.[733]

8.4.2 The rare number of instances arbitrators are held liable for damages

Despite the restrictive legal regime, still, courts do sporadically hold arbitrators liable. Such instances seem, however, to come very far and between. The oft-quoted *Raoul Duval v. V.* provides an example of how civil liability can provide negative consequences to arbitrators who deviate from the rules regarding independence and impartiality. In this case, the chairman of the arbitral tribunal started to work for one of the parties the day after the arbitral tribunal issued its award, a fact he failed to disclose.[734] Duval, after having the award vacated, sued the arbitrator for the damages caused. The Tribunal de Grand Instance, Paris, agreed that the arbitrator was contractually liable to pay the suing party the fees paid to the arbitrators, the arbitral institution and the costs of defence.

The Finnish Supreme Court case *Urho, Sirkka and Juuka Ruola v. X* provides another of the few examples where an arbitrator was held liable after seriously breaching their professional obligation.[735] In this case, following a successful annulment of an arbitral

732 Article 41 ICC Arbitration Rules.

733 See article 31 2014 LCIA Arbitration Rules, article 43 2013 HKIAC Administered Arbitration Rules and article 38 2016 SIAC Arbitration Rules.

734 For a background on the facts of the case see Michael Hwang, Katie Chung and Fong Cheng, 'Claims Against Arbitrators for Breach of Ethical Duties' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007* (BRILL 2008) 238.

735 See Martin Maisner, *Czech and Central European Yearbook of Arbitration - 2012: Party Autonomy versus Autonomy of Arbitrators* (Alexander J Bělohlávek and Naděžda Rozehnalova eds, Juris Publishing, Inc 2012) 157.

award determined in an ad hoc setting, the plaintiff started proceedings against the arbitrator for the costs and expenses of the arbitration. The Finish Supreme Court held that the arbitrator's failure to disclose that he had previously provided several legal opinions to the respondent company constituted a breach of contract. It therefore awarded the plaintiff the costs and expenses of the arbitration.

All in all, liability may be at the back of some arbitrators' heads, especially taking in consideration that being sued, even if ultimately the defendant prevails, might still impose considerable costs on the sued party. Still, the risk of liability seems to play at most a peripheral role in enforcing arbitrators' professional obligations.[736] First, the number of cases an arbitrator was successfully sued seems to be simply too small to be the key to explain arbitrators' compliance. Further, there does not seem to be a link between jurisdictions offering less protection to an arbitrator and higher levels of compliance. Indeed, the liability of arbitrators has not been a central point of discussion in arbitral circles,[737] perhaps indicating the perception that it is not, at least so far, a key concern for arbitrators' day to day career.

736 See Born, *International Commercial Arbitration* (n 4) 2012.

737 Noting discussions on civil liability of arbitrators to be often neglected, see Hausmaninger (n 730) 8.

8.5 Criminal liability as a mechanism to enforce arbitrators' professional obligations

One last point worth considering is the possibility of arbitrators being held criminally liable for actions undertaken in connection to their role as arbitrators. Criminal sanctions, most notably imprisonment, can obviously be a serious deterrent to illicit behaviour.[738] Further, criminal sanctions have the power to affect the agent by diminishing their reputation and social position.[739] In a reputation-driven market, as arbitration notably is, it is easy to understand that arbitrators would find any involvement in criminal proceedings something to be avoided at all costs.[740] This would open to states an avenue to control the actions of arbitrators,[741] either as a way to honestly try to further guarantee the fairness of arbitral proceedings or, more cynically, as a way to influence arbitrators not to rule against the interests of the state or some of its key figures.

As a general rule, jurisdictions have not opted to establish criminal norms specifically targeting arbitrators. Still, naturally, some serious deviations by arbitrators of their professional obligations can be construed as a violation of more general criminal

738 Summarizing the research on the deterrence power of criminal sanctions, see Daniel S Nagin, 'Criminal Deterrence Research at the Outset of the Twenty-First Century' (1998) 23 Crime and Justice 1. It is important to note that research has shown that more important that the harshness of the sentence, key factors to deterrence are swiftness of sentencing and the likelihood of detection. See also Peter J Henning, 'Is Deterrence Relevant in Sentencing White-Collar Criminals' (2015) 61 Wayne Law Review 27, 47.

739 Research has demonstrated that, for example, in the field of tax compliance, that the risk of public criminal proceedings, due to their strong effect on reputation and community stance, have a much more powerful deterrent effect than civil liability proceedings. See Steven Klepper and Daniel Nagin, 'Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecution' (1989) 23 Law and Society Review 209.

740 See Lin Yifei, *Judicial Review of Arbitration: Law and Practice in China* (Kluwer Law International 2018) 163.

741 See Mohamed Sweify, 'Criminal Sanctions Targeting Arbitrators: An Egyptian Perspective' (2019) 11 International Journal of Arab Arbitration 69, 106.

provisions, such as bribery. While this does not exclude the possibility that the threat of criminal prosecution is playing a role in dissuading arbitrators from undertaking serious criminal offences, it is important to note, as it will be seen below, that criminal proceedings against arbitrators seem to be very rare.[742] This offers some support to the generally-held notion that very serious deviations by arbitrators from their professional norms are unusual. These ideas will be further discussed next.

8.5.1 Examples of the criminal norms applicable to international arbitrators

Usually, criminal codes do not refer particularly to arbitration. Still, they generally contain provisions which are broad enough to allow, for example, prosecution of arbitrators that accept bribes or other similarly serious acts. For example, many definitions of bribery such as the Bribery Act 2010 established in the UK, which defines being bribed as requesting, accepting or agreeing to accept a financial or other advantages, in exchange for improperly performing a relevant function or activity,[743] can in theory allow criminal prosecution in situations where an arbitrator accepts an illicit payment from a party.[744] In the same vein, other criminal offences, such as fraud or forgery, may play a role in controlling arbitrators behaviour.

742 See Ramon Mullerat and Juliet Blanch, 'The Liability of Arbitrators: A Survey of Current Practice' (2007) 1 Dispute Resolution International 105. See also Born, *International Commercial Arbitration* (n 4) 2018.

743 See Hodges and Greenaway (n 462) 306.

744 See UK Bribery Act 2010, Section 2(4).

Sometimes criminal codes do have provisions that expressly mention arbitrators. This is, for example, the case of the German Criminal Code which deals specifically with arbitrators in several different provisions. It provides, amongst other provisions, that:

> *"**Section 332 (b)** – A judge or an arbitrator, who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or will in the future perform a judicial act and thereby violated or will violate his judicial duties shall be liable to imprisonment from one to ten years. In less serious cases the penalty shall be imprisonment from six months to five years. […]*
>
> ***Section 339 –** A judge, another public official or an arbitrator who in conducting or deciding a legal matter perverts the course of justice for the benefit or to the detriment of a party shall be liable to imprisonment from one to five years."*

Other similar provisions exist in the Swiss Criminal Code, the Austrian Criminal Code, and the Norwegian Criminal Code.[745] These are, however, not truly aimed specifically at arbitrators but rather mention arbitrators alongside other agents playing similar roles, such as judges and other public officials. While such provisions, in the context of arbitration, could in theory allow an avenue to prosecuting arbitrators, they seem to not be significantly used in these jurisdictions. In this sense, they are rather uncontroversial norms that do not seem to be a central concern of the arbitral community, with these norms receiving relatively little attention in arbitration-related literature.[746]

This is, however, not always the case. Sometimes, the passage of criminal provisions elicits strong concerns of the arbitral community, in particular if there is a concern that these provisions will not remain merely in the books and have the potential to

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745 See Swiss Criminal Code, Article 322, Austrian Criminal Code Article 304 and Norwegian Criminal Code Article 114.

746 See Born, *International Commercial Arbitration* (n 4) 2017.

be abused by authorities. Two examples, one resulting from one amendment to the Chinese criminal laws and another to the laws of the United Arab Emirates, deserve to be noted as they show how potential 'criminalisation' of arbitrators can lead to a strong reaction from the arbitral community at the domestic and the international level.

The first of these examples relates to an amendment to the Chinese Criminal Code providing imprisonment for those '*who intentionally run counter to facts and laws and twists the law when making a ruling in arbitration.*'[747] These changes became controversial within the Chinese arbitral community, igniting a debate between those against and for the provision.[748] The debate around such provisions cannot be separated from the fact that in China several accusations and arrests of arbitrators had been made.[749] It is important to note that despite the huge size of the Chinese domestic arbitration market, most of it is largely insulated from the international arbitration practice, having many idiosyncratic legal rules and practices.[750] Such provisions have therefore not been the subject of much attention in international arbitration circles, who often perceive Chinese domestic arbitration to be an outlier in international practice.

A more highly publicised case in international circles was the reaction to the passage of a criminal provision in the United Arab Emirates in 2016, which shows an example of the international arbitration community successfully opposing a legislative transformation. In what was perceived as a too broad construction the United Arab

747 See Chinese Criminal Code, Article 399.

748 See Duan Xiaosong, 'Criminal Liability of Arbitrators in China: Analysis and Proposals for Reform' (2014) 23 Pacific Rim Law & Policy Journal 343, 352.

749 The most high-profile of these cases was the arrest of Wang Shengchang. For an overview of the case see Wu Ming, 'The Strange Case of Wang Shengchang' (2007) 24 J. Int'l Arb. 63.

750 See Fan (n 124) 1.

Emirates Federal Penal Code provided that: "*Anyone who issues a decision, expresses an opinion, submits a report, presents a case or proves an incident in favour of or against a person, in contravention of the requirements of the duty of neutrality and integrity, while acting in his capacity as an arbitrator, expert, translator or fact-finder appointed by an administrative or judicial authority or selected by the parties, shall be punished by temporary imprisonment*."[751]

Across arbitration circles, this provision was seen as opening the possibility to dangerously prosecute international arbitrators.[752] Distrust in the local criminal system certainly played a role in the response against the provision. Also, it is important to note that contrary to the largely insulated Chinese domestic arbitration market, the Middle East has generally been an important source of work for international arbitrators and firms.[753] The reaction within the arbitral community was strong, with very high-profile members warning that such a measure could jeopardise arbitration in the Emirates. Further anecdotal instances of arbitrators refusing to participate in proceedings in the jurisdiction were reported.[754] Faced with the controversy, the provision was changed in 2018 to explicitly carve out arbitrators from the scope of the law, a decision that was welcomed in arbitration circles.[755]

751 United Arab Emirates Penal Code, Article 257 (repealed).

752 See Sweify (n 741) 70.

753 See Dezalay and Garth (n 22) 43.

754 See Sweify (n 741) 71.

755 See Sami Tannous and Matei Purice, 'The New UAE Federal Arbitration Law: Was It Worth the Wait?' (2018) 36 ASA Bulletin 866, 877; Alain Farhad, 'The United Arab Emirates' New Arbitration Legislation: A Giant Leap Forward?' (2019) 36 Journal of International Arbitration 523, 531.

Independently of how different countries deal with the question of criminalising serious arbitral misconducts, actual imprisonments, or even attempts to criminally prosecute arbitrators seem to be extremely rare.[756] This does not necessarily mean that arbitrators do not commonly undertake criminal behaviour.[757] Lack of criminal cases could stem instead from a lack of ability or willingness from authorities to detect and prosecute criminal behaviour. Although it is always difficult to determine the prevalence of criminal activity, from the discussions this author undertook with those within the arbitral community, the general impression seems to be that the kind of serious deviations that would amount to criminal behaviour was something they had not experienced or had knowledge of happening.

8.5.2 Examples of criminal proceedings brought against arbitrators

Three reported cases of criminal investigations into arbitrators' actions will be discussed next as they offer insight into the kind of behaviour that can result in criminal prosecution. Their analysis also allows seeing how different behaviours, different circumstances and different perceptions of the judicial system where the prosecution took place might elicit different reactions from the arbitral community, ranging from a perception that the behaviours were unacceptable to expressions of support to the arbitrators involved.[758] As

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756 See Mullerat and Blanch (n 742) 105. See also Born, *International Commercial Arbitration* (n 4) 2018.

757 Noting the difficulties of quantifying 'white-collar' crime in general, see Croall and Professor Hazel Croall, *Understanding White Collar Crime* (McGraw-Hill Education (UK) 2001) 21.

758 Manifestations of solidarity and even 'codes of silence' between those who share the same occupations or professions are not uncommon. See Geoffrey P Alpert, Jeffrey J Noble and Jeff

it will be seen, these perceptions may also be dependent of how trusted and well-known an arbitrator is within the community, with well-established figures being conceivably more likely to be supported by the community at large. These cases will be discussed next.

8.5.2.1 The Tapie Affaire: a case where politics met arbitration drawing significant media attention

The first example I will be discussing is likely the most high-profile case of alleged arbitral misconduct within commercial arbitration: the so-called *Tapie Affaire*. This case, whose full description surpass the scope of this text, was extensively reported not only in French media outlets but also foreign ones.[759] This attention was partly due to the many well-known political actors that got entangled in the proceedings, most notably Christine Lagarde, former French finance minister and head of IMF. At the core of case were serious allegations of improper conduct and lack of impartiality of a well-established French arbitrator and former judge named Pierre Estoup, leading to complex subsequent litigation where the validity of the award was discussed and criminal prosecution of Mr Estoup.

The case relates to a legal dispute between well-known French business tycoon, former politician and football club owner Bernard Tapie, and the Crédit Lyonnais, a French state-owned bank which would eventually discharge its liabilities to another French state company called Consortium de Réalisation (CDR). Mr Tapie alleged that the bank had fraudulently profited from his stake in the Adidas sports company. After years of litigation

Rojek, 'Solidarity and the Code of Silence' in Roger G Dunham and Geoffrey P Alpert (eds), *Critical Issues in Policing: Contemporary Readings* (7th edn, Waveland Press 2015) 106.

759 For a detailed summary of the facts of the case and subsequent litigation, see Clément Fouchard, '"L'affaire Tapie", a Review from an Arbitration Perspective' (2017) XIV Revista Brasileira de Arbitragem 94.

between Mr Tapie and CDR at the state courts without reaching a conclusion, the parties agreed to refer the dispute to binding arbitration. Christine Lagarde, at the time French finance minister, signed off the deal, allowing the case to proceed to arbitration.[760]

The three-member arbitral tribunal, composed by Pierre Estoup, Jean-Denis Bredin, and Pierre Mazeaud, three well-known figures in French legal circles, ruled in favour of Mr Tapie in 2008, awarding him *circa* €400 million.[761] The French government chose not to pursue an appeal or annulment of the award in the French courts. It would, however, emerge from criminal investigations made by the French authorities that Mr Estoup had extensive and undisclosed ties to both Mr Tapie and his lawyer in the case. These included Mr Estoup allegedly: i) concealing previously consultancy work provided to Mr Tapie's lawyer in connection to this and other related disputes; ii) receiving information about the case after the case had started from Tapie's advisors; and iii) maintaining a personal relation to Mr Tapie.

After this information came to light, the CDR group filed for revision of the award (*recours en révision*). The Paris Court of Appeal would decide on February 2015 that the request was admissible and retracted the award. The Court criticised the behaviour of Mr Estoup, who according to the court had "*deliberately and systematically directed the reflection of the tribunal in favour of the interests of the party that he intended to promote*

760 Ms Lagarde was herself brought to trial in connection with this case, being accused of 'culpable negligence' for having allowed the case to be decided by arbitration and having failed to challenge the arbitral award. The French courts ultimately decided to not be appropriate to inflict to Ms Lagarde any punishment in connection with these actions. See Alan Redfern, 'The Importance of Being Independent: Laws of Arbitration, Rules, Guidelines - and a Disastrous Award' (2017) 6 Indian Journal of Arbitration Law 9, 22.

761 Including an amount of €45 million for moral damages, a value considered abnormally high for French judicial standards. See Marc Henry, 'Arbitrage Tapie: Les Affres d'un Prejudice Moral Immoral' (2016) 34 ASA Bulletin 207.

by collusion with the latter and his counsel."[762] Both Mr Estoup, Mr Tapie, and his main lawyer Mr Lantourne were then charged with *escroquerie en bande organisée*, being however eventually acquitted, with the Criminal Court of Paris reportedly finding "*nothing in the case that confirmed*" the allegation that the arbitration pay-out was tainted by "*fraud.*"[763]

While Mr Estoup's very advanced age at the time of the facts supra discussed do not allow to provide a window on how involvement in a scandal of this nature impacts a career, the fallout of the case provides an example to how the arbitration community reacts to this sort of attention to the field. In this case, while the case drew considerable concern within the French arbitral community, it was not perceived as symptomatic of deeper problems with arbitration. Rather, the whole arbitration case was perceived as atypical and 'unrepresentative' of Parisian arbitration.[764] While it was lamented that part of the general public was introduced to arbitration due to the scandalous nature of this particular case, Paris courts were praised for their handling of the proceedings, with the annulment being presented as a demonstration of the system working.[765]

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762 See HSF Notes, *Paris Court of Appeal orders the retraction of an award made where one arbitrator lacked independence: the ongoing Tapie saga*, 4 March 2015, available at:< https://hsfnotes.com/> accessed 3 April 2020.

763 See France 24, *French tycoon Bernard Tapie acquitted of fraud*, 9 July 2019, available at <www.france24.com> accessed 3 April 2020.

764 Fouchard (n 759) 111.

765 ibid. See also Jehan-Damien Le Brusq, *The Tapie saga : Paris successfully passed the test*, Kluwer Arbitration Blog, 1 September 2016, available at <http://arbitrationblog.kluwerarbitration.com/> accessed 3 April 2020.

8.5.2.2 The conviction of arbitrator Yusof Holmes Abdullah as an example of criminal proceedings punishing serious deviations

A second reasonably high-profile case relates to the sentencing of the arbitrator Yusof Holmes Abdullah for making a false statement of independence to the Kuala Lumpur Regional Centre for Arbitration (KLRCA).[766] Mr. Holmes, a British chartered arbitrator with a degree from Imperial College and a permanent resident in Malaysia for over 25 years, was a well-known arbitrator in Malaysia with connections to local arbitration bodies, most notably being one of the founders of the CIArb's Malaysian branch. While not a household name in international circles, Mr Holmes had prior to the allegations reportedly acted as arbitrator in Malaysia, the Philippines, Thailand, Pakistan, Indonesia, Hong Kong, Singapore, Spain, and the United Kingdom.

In 2010, Mr Holmes, 66 at the time, was accused of soliciting a 2 million USD bribe from a Malaysian company director in an arbitration between a Malaysian construction company and a Chinese state-owned company, in an arbitration valued at 8 million USD. Mr Holmes was the sole arbitrator in these proceedings. While this first bribery allegation was not criminally pursued, a second allegation of Mr. Holmes having falsified a statement of independence presented to the KLRCA in connection with the case was brought to trial. He was eventually sentenced to 6 months in prison in January 2017, with the court accepting payment of a fine in lieu of carrying out the sentence.

766 See Andrea Menaker and Harpreet Dhillon, 'Article 52(1)(C)' in Julien Fouret, Rémy Gerbay and Gloria M Alvarez (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar Publishing 2019) 612.

The case of Mr Holmes is notable as one of the few reported cases where an arbitrator actually faced a conviction for an action undertaken within arbitral proceedings. It illustrates how criminal investigations can have the potential to work as a strong deterrent against the more serious deviations an arbitrator can incur. They also demonstrate how suspicion of criminal activity by an arbitrator may lead to their 'market value' to plummet. In the case of Mr Holmes, the moment suspicions arose he apparently resigned his work as an arbitrator and had, according to his lawyer, in light of the case and then conviction, seen his career destroyed and left unable to work as an arbitrator again. [767]

8.5.2.3 The allegations against Peruvian arbitrators following the Odebrecht scandal: solidarity amongst the arbitral community

The final example to be discussed relates the investigations undertaken on the conduct of 16 Peruvian arbitrators that were accused of receiving bribes from the Brazilian construction company Odebrecht.[768] The case itself relates to wider corruption practices by Odebrecht which, following numerous criminal investigations and the cooperation of several whistle-blowers, found itself at the centre of an impressive web of corruption scandals linking politicians and construction companies throughout Latin American and beyond.[769] In the particular case of Peru, Odebrecht key executives confessed to the

767 Mr Holmes' lawyer reportedly stated: "*With this conviction, my client's career is destroyed as he won't be able to work as an arbitrator again.*" The Star, "*Ex-chartered arbitrator gets jail*", 6 January 2017, available at <https://www.thestar.com.my/> accessed 3 April 2020.

768 See Carlos Rios Pizarro, *Mixing Righteous and Sinners: Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators*, Kluwer Arbitration Blog, 10 December 2019, available at <http://arbitrationblog.kluwerarbitration.com/> accessed 3 April 2020.

769 For an overview of the Odebrecht corruption scandals, see Diego Zysman-Quirós, 'White-Collar Crime in South and Central America: Corporate-State Crime, Governance, and the High Impact of the Odebrecht Corruption Case' in Melissa L Rorie (ed), *The Handbook of White-Collar Crime* (1st edn, Wiley 2019).

company bribing different governmental authorities to secure auctions for construction projects in Peru and further undertaking contractual surcharges.

While at the time of writing not all details were fully clear, the investigation's relation to arbitration seems to have emerged from investigations into a well-established and politically connected lawyer and arbitrator who had allegedly been bribed by Odebrecht and issued awards to benefit the company in exchange of generous money offers. The alleged bribe-taker had purportedly also used the money received to, on behalf of Odebrecht, bribe other arbitrators and illegally arrange the result of arbitral proceedings. Following the investigations, the alleged bribe-taker apparently entered into an agreement with the public prosecution office, naming sixteen arbitrators as allegedly involved in the bribing schemes to award Odebrecht fraudulent arbitral awards.

At this point it is important to note that within the sixteen arbitrators named, some were very well-established names within the Peruvian legal market. These were the cases of, Fernando Cantuarias, Franz Kundmuller, and Mario Castillo – three well-renowned arbitrators and scholars in Peru. Mr Cantuarias, in particular, was well-known even outside Peru, having strong links with international arbitral institutions and arbitral professional associations abroad.[770] Still, 14 of the 16 of the arbitrators, including the three arbitrators named above, were ordered to an 18-month pre-trial detention in November 2019.[771]

770 Mr Cantuarias was reportedly a member of, amongst other organisations, the Board of Reporters of Institute of Transnational Arbitration (ITA), the Latin American Group of the International Chamber of Commerce (ICC) and the Association for International Arbitration (AIA).

771 See Radio Programas del Perú (RPP), Juez dicta 18 meses de prisión preventiva contra Humberto Abanto y otros 13 árbitros por caso Odebrecht, 4 November 2019, available at <https://rpp.pe/> accessed on 3 April 2020.

The detention of these arbitrators, and Mr Cantuarias in particular, gave rise to strong manifestations of solidarity from the arbitral community. Many members of the arbitral community, inside and outside Peru, took to the media and online to express their views and show support. Further, key arbitral institutions wrote letters to the Public Prosecutor's office and Peruvian government showing their support for and trust in Mr Cantuarias.[772] In these letters and texts, members of the arbitral community often detailed how practices, such as pre-trial conferencing between parties and arbitrator and arbitrators self-establishing fees, were not a sign of 'corruption' as alleged by the prosecution but rather internationally accepted practices within international arbitration. It is important to note that this showing of support was not for all the accused but very much focused on the three-well established arbitrators and Mr Cantuarias in particular.

While at the time of writing investigations were still ongoing,[773] this case shows many revealing features about how criminal investigations interrelate with the arbitral community, the arbitral market and its potential regulatory effect. First, it might indicate a willingness by the arbitral community to establish distinctions between situations where they believe there was foul play from situations where they were not, walking away from the members in the first situation and showing support in the latter. Second, as discussed in Chapter IV, it might indicate that a large scandal may indeed spur regulatory transformations.

772 Most notably Alexis Mourre (President of the ICC Court of Arbitration). See Alexis Mourre letter dated 14 November 2019, <available at http://www.caeperu.com/noticias/pdf/alexis-mourre-presidente-de-la-corte-de-arbitraje-de-la-ICC.pdf > accessed 3 April 2020.

773 In December 2019, Mr Cantuarias, Mr Kundmuller, Mr Castillo and six other arbitrators were released, remaining, however, subject to significant restrictions on their freedom pending the corruption investigations.

Indeed, just two months after the arrests, the government of Peru published an urgent decree modifying several provisions of their arbitration law.[774] These changes, poorly received by the local and regional arbitral community, were all directed to giving more protection to the Peruvian State when it acts as a party in arbitration proceedings. As per the explanatory note of the bill, the amendment resulted from the Peruvian government believing that arbitration, albeit suitable for private disputes, is not an adequate dispute resolution for situations where the Peruvian state intervenes as a party. Namely it did not, according to the explanatory note, ensure the transparency of the proceedings or allow avoiding acts of corruption.

8.6 The peripheral and incidental nature of 'legal' recourse as a way of 'regulating' arbitrators

By way of conclusion, it should be noted that the mechanisms discussed in this chapter present an effect on arbitrators' compliance that is mostly incidental. In this sense, they have not been designed to primarily affect an arbitrator's grid of incentives but rather provide a safeguard for parties. For example, parties' rights to challenge arbitrators and awards seem to have been mostly intended to protect parties' rights to due process rather than as a system primarily designed to deter unwanted arbitrator's behaviour. This can be seen by the way that discussions around these mechanisms mostly focus on their 'normative' dimension rather than their 'regulatory' effect – i.e. smaller consideration is

774 See Peruvian Urgent Decree Nº 020-2020, 24 January 2020, modifying Decree-Law nº 1071.

paid on how these decisions affect the behaviour of arbitrators at large compared to assuring fairness and due process in that particular instance.[775]

This is not to stay that such mechanisms do not play an important effect in fostering compliance. As discussed, they can not only provide a direct cost for an arbitrator but, perhaps, more importantly, inflict an indirect cost by affecting their reputation. Also, the simple fact that these mechanisms exist might have a 'potential deterrent' effect even if in practice they are rarely applied. Still, it is worth noting that it is often the parties and not the arbitrator that bears the most direct cost of an arbitrator's misconduct.[776] This is typically the case of an arbitral award being refused enforcement, that in the context of arbitrators' very limited liability, might represent a limited to no cost to the arbitrator him/herself, but might represent significant losses not only for the 'winning' party (that will be unable to enforce their award) but also for the 'losing' party (that might, in conjunction with the 'winning party,' have to undertake in further litigation costs).

In another fashion, this also holds for other mechanisms discussed in this chapter. As seen above, civil liability and criminal liability have not, in most circumstances, been tailored specifically to deter arbitrators' misconduct. Rather, general legal provisions have sporadically been used as a basis to start proceedings against arbitrators. While further statutory detail on how these norms are to be interpreted in the arbitral context could bring clarity, there are good policy reasons not to allow a pervasive usage of these mechanisms. As discussed above, they might allow 'unscrupulous' parties to disrupt arbitral

775 Also the afterthought nature given to the question on whether arbitrators' can retain their fees following a challenge or an annulment of an award can be seen as an indication that modifying arbitrators' incentives for compliance is not a primary concern of these mechanisms.

776 See Park, 'Arbitration in Autumn' (n 534) 292; Hodges and Greenaway (n 462) 316.

proceedings. This, therefore, means that the 'reputation' and 'community-control' compliance mechanisms discussed in Chapter VII will have to continue to play a role if the light-touch oversight system currently in place is to continue operating. How this will play out against the background of a changing arbitral landscape will be discussed in the next chapter.

CHAPTER IX

THE CENTRAL ROLE OF THE ARBITRAL COMMUNITY IN DEFINING ITS REGULATION AND THE 'PROFESSIONALISM' OF ARBITRATORS

9.1. The arbitral market as a catalyst for the dominance of the arbitral community over its regulation

This thesis explores one key question: how the market in international commercial arbitration services leads arbitrators and the arbitral community to develop a unique and complex 'regulatory' framework.[777] It was argued that this framework shows a remarkable ability to create and enforce professional norms despite lacking centrally defined state-backed regulatory institutions similar to other professions. To explain how these norms are created and enforced, I focused on the relationship that develops between each arbitrator and the arbitral community as a whole. Understanding how the arbitral community self-regulates demands understanding not only how the arbitral community benefits from 'regulating' the behaviour of its members, but also why its members participate in constructing the regulatory framework and adhere to it.

[777] The power of the arbitral community to influence the design and, itself, create norms as led some to borrow the concept of 'epistemic community' do describe it. See, for example, Lynch (n 76) 94.-

This thesis argues that the way each member of the arbitral community adapts to the peculiar mechanics of the international arbitration market is the driver keeping this framework functioning. The de facto dominance of the arbitral community over who gets to be successful in the market, the low-level of price competition between arbitrators and the centrality of 'reputation' mechanisms lead to a unique interplay between each member and the community. The community as a whole benefits from the existence and enforcement of norms that guarantee a fair and efficient solving of disputes by arbitrators.[778] In turn, each individual member has an incentive to cooperate in advancing this agenda. Participation in this process is compensated with connections, appointments, and prestige. Non-participation and non-compliance lead the member to be forgotten by the community.

Sociology gives important insights into the mechanisms regulating arbitrators vis-à-vis other professions. As a discipline, sociology has long been fascinated by how some occupations evolved to be given a special treatment in terms of prestige and protection by society and the state.[779] The process of how some occupations evolved to acquire this special place in society has been dubbed 'professionalisation' by Anglo-American sociologists.[780] Ever since two major schools of thought emerged. The so-called 'functionalists' who characterised 'professionalisation' as a trade-off whereby professions

778 The idea that the arbitral community as whole benefits from the increased reputation of arbitration as a legal institution and trust in its ability in solving disputes is well summarized in the 'aphorism': "*a rising tide of arbitral business lifts all boats*". See Karton (n 22) 57.

779 Systemic study of the professions from a sociological perspective dates back at least to Talcott Parson's earlier works. See Talcott Parsons, 'The Professions and Social Structure' (1939) 17 Social forces 457. Explorations of the role of professions can be found by many of classical sociological theorists such as Weber, Durkheim, and Comte. See Thomas Brante, 'Sociological Approaches to the Professions' (1988) 31 Acta Sociologica 119, 120.

780 Most notably Wilensky (n 48).

acquire high socioeconomic status in exchange for employing in a non-exploitative way esoteric knowledge of great importance;[781] and the 'neo-weberians', who stressed that 'professionalisation' is, at its core, a strategy of social closure based on the creation of a state-sanctioned occupational monopoly, through interest group politics.[782]

Arbitrators present in the context of these two perspectives a curious case. Although arbitrators are often perceived as occupying an elite role, the arbitral community in general and arbitrators in particular have not engaged in advancing a 'closure of the market' agenda. This thesis posited that this was largely derived from the fact that, in this market, incumbent arbitrators are already well protected from potential competition. It argued that arbitrators would be generally worse off if the traditional set of protections other professions enjoy – such as a monopoly over the right to offer particular services and/or establishing licensing – were established.[783] Instead, current members benefit from incorporating new 'members' as they serve as further 'nodes,' helping expand the international market.[784]

In a sense, the market can be described as imperfect, fraught with barriers to entry, and lacking transparency.[785] The design of the appointment system, dominated in practice

781 Mike Saks, 'A Review of Theories of Professions, Organizations and Society: The Case for Neo-Weberianism, Neo-Institutionalism and Eclecticism' (2016) 3 Journal of Professions and Organization 170, 172. Functionalism is mostly linked to Talcott Parsons and his work the Stucture of Social Action.

782 Neo-Weberian analysis of the profession is usually associated, amongst others, with Elliot Freidson, see for example Eliot Freidson, *Professional Dominance: The Social Structure of Medical Care* (Transaction Publishers 1974) and Larson's seminal Larson (n 332).

783 See Chapter IV, Section 4.3.2.

784 See Ginsburg (n 53) 1342.

785 Catherine Rogers' descriptions of the arbitral market as deeply imperfect have been highly influential, becoming a common observation in many subsequent texts about arbitration. See Rogers, 'The Vocation of the International Arbitrator' (n 61).

by arbitration insiders, such as external counsel, arbitrators, and arbitral institutions, lead these to have a great influence over who gets appointed. Additionally, parties partly driven by strategic considerations and partly due to the difficulties of evaluating quality, tend to strongly prefer those already in the market. Altogether, this gives arbitration its oft-noted 'closed club' nature.[786] Still, the same market characteristics lead to adaptions that allow norms to be created and enforced.

The argument presented relies on the idea that the specificities of the market lead to the formation of a professional community distinct from the communities usually found in other professional fields. The need found by service providers to develop connections and network with other members leads to a much more integrated community than those found in other professions and other sub-fields of law. This, it was contended, allowed for information about norms and compliance to be transmitted across members, permitting a counter to the lack of transparency the arbitral market otherwise suffers.[787] It further creates an environment where each member evaluates and is evaluated by other members. Over time it filters the entrance to allow only a selected few to join the small roster of those who are routinely selected to be arbitrators.[788]

This thesis argued that this pre-selection may contribute to an environment where those acting as arbitrators are perhaps more intrinsically motivated to participate in the process of creating and enforcing norms.[789] This is important as strictly defined self-

786 See, Dezalay and Garth (n 22) 10; Rogers, 'The Vocation of the International Arbitrator' (n 61) 967.

787 See Chapter VII, Section 7.3.2.

788 See, Magdalene D'Silva, 'Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration' (2014) 5 Journal of International Dispute Settlement 605, 633.

789 See Chapter VII, Section 7.4.

interest does not explain the whole puzzle of norm creation and compliance within the arbitral community.[790] In an environment where well-known arbitrators often enjoy a protected position and deviation is, sometimes, difficult to identify, there would be situations where it could be in the best monetary self-interest of an arbitrator to deviate.[791] The general perception that serious deviations are extremely rare, brings to the forefront the notion that compliance with obligations and regulatory goals is dependent on multiple factors.[792]

So far, much of the debates around arbitration seem to have, most often implicitly, assumed that arbitrators in deciding to act 'ethically' or 'unethically' follow their best interest. Also, some regulatory interventions, such as arbitral institutions decisions to change arbitrators' fees to reward speedy dispute resolution, seem to work with the same logic. While these are naturally paramount considerations, broader considerations should be paid attention to. Behavioural psychology and criminology may offer a window to understand how the particular process of 'socialisation' and the characteristics of those within the community might play an important role in understanding why arbitrators comply and deviate from their obligations.[793] It also may open new avenues to understand

790 In more general terms, showing the complex interrelation between moral principles and self-interest, and ultimately suggesting that our understanding of moral questions is influenced, but not fully explained, by self-interest, see Peter DeScioli and others, 'Equity or Equality? Moral Judgments Follow the Money' (2014) 281 Proceedings of the Royal Society B: Biological Sciences 20142112.

791 See Chapter VII, Section 7.1.3.

792 See Christopher Hodges, 'Resetting Incentives, Remuneration and Trust' [2020] Oxford Legal Studies Research Paper No. 14/2020 21.

793 More generally, investigating the effect of 'irrational' systematic biases in arbitrators, see Franck and others (n 28).

how arbitrators and parties can be led to produce more fair and efficient dispute resolution.[794]

By way of conclusion, this chapter will next tie in the analysis of the regulatory framework that governs arbitrators with the discussions currently taking place within the arbitration community. It will first evaluate whether the regulatory framework analysed in this thesis can continue to lead arbitrators to create and comply with norms in a context where the arbitral community is increasing in size and becoming more heterogeneous. As it will be examined, there have been considerable transformations to the arbitration market and the arbitral community. Just a few decades ago a small clique of insiders dominated the field, but the success of arbitration meant that relationships are no longer contained in a group where all members know each other. This has created doubts amongst some within the arbitral community about whether there has been a breakdown of the sense of community and whether the pressures to comply with professional norms may be waning.

These questions will establish the groundwork for the last point of this thesis, where I will discuss whether there is a case for increased 'professionalism' – i.e. a case for advancing a more traditional regulation of arbitrators as a full-time profession and, in particular, a separation between the role of arbitrator and counsel in commercial arbitration. With this goal in mind, I will first discuss why such a transformation would be unlikely. I will in particular focus on why state legislatures, market forces, the arbitral community,

794 For example, there have been empirical observations showing that the way financial incentives shape behaviour is less straightforward than commonly assumed. Namely, large financial rewards have been shown to crowd out intrinsic motivation and have sometimes detrimental effects on performance. See, Hodges, 'Resetting Incentives, Remuneration and Trust' (n 792) 24. These observations offer an interesting starting point for discussions regarding the design of counsel, arbitral institutions and arbitral tribunals' fees.

and arbitral institutions would likely not pursue such development. Despite the unlikelihood of this scenario, I will still discuss whether professionalisation would be a positive step. As it will be seen this is an intriguing question which entails reimagining a very distinct regulatory system.

9.2 How does 'regulation' of behaviour in international commercial arbitration take place in a changing landscape?

One of the most oft-noted recent changes in the characteristics of the arbitral community is its increase in size and diversity.[795] In many ways, these changes have been celebrated. The (limited) increase in diversity, in terms of gender, race and nationality of elite commercial arbitrators has been welcomed by those within the community. Lack of gender diversity, in particular, has long been an issue drawing criticism from inside and outside the community,[796] with many initiatives undertaken to correct this unbalance.[797] To a smaller extent, also the increased number of participants has been used to negate ideas that arbitration is dominated by a small old-boys network, notions that, until recently, were often emphasised even inside arbitration circles.

These transformations have also, however, led to some level of discomfort. As the community became more heterogeneous, the idea that arbitration was entering a period

795 See Lucy Greenwood, 'Tipping the Balance–Diversity and Inclusion in International Arbitration' (2017) 33 Arbitration International 99.

796 See, for example, McIlwrath and Savage (n 510) 255.

797 Most notably the 'Arbitration Pledge' organized by Equal Representation in Arbitration (ERA), an initiative started in 2015 that invites members of the arbitral community to pledge to take steps to address the lack of gender diversity in arbitral tribunals.

where commitment to professional values was waning seemed to have taken hold around some circles. There seems to be an underlying idea that as arbitration became more popular and the initially small community grew exponentiality, new entrants might be less committed to the norms of the field.[798] These fears were expressed eloquently in a speech by Sundaresh Menon. In words that drew attention across the community, the Singapore Chief Justice argued:

> "*[i]mplied understandings or shared values no longer provide any meaningful means of shaping or influencing conduct in this context. Arbitrators can no longer consider themselves bound by peer standards, because there are no peers in the true sense, amidst all this diversity. […][t]he absence of common or defined ethical standards to guide such a great diversity of practitioners obviously poses serious difficulties and has the potential to create an uneven battleground that can ultimately affect fairness and integrity in international arbitration*".[799]

It is fair to note that the views expressed by Chief Justice Menon, albeit not a sole voice within the community, are perhaps more pessimistic than the majority view within arbitration circles.[800] Still, these views raise challenging questions. Namely, it brings to the forefront the possibility that an increased number of arbitrators and arbitral practitioners will not let the unique regulatory framework explored in this thesis to continue providing incentives for norms to be created and enforced. The increasing number of members in the group could, in theory, jeopardise the mechanisms for divulging information about these

798 See Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (n 152) 62.

799 Sundaresh Menon, 'Some Cautionary Notes for an Age of Opportunity' (Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013), available at <http://www.singaporelaw.sg/>.

800 In some arbitral circles it has become common to mention that a 'golden-age' of arbitration has passed. See, for example, Rivkin (n 14); Park, 'Arbitration in Autumn' (n 534) 288.

norms and the 'quality' of each member.[801] If each member of the community amid an increasing multitude of members is unable to identify the quality of each peer, the flow of information and peer pressure may break down.

It is certainly too early to fully anticipate how these transformations will affect the ability of the international commercial arbitration community to continue self-regulating. After all, the last two decades have been marked by continuous expansion and, while growth seems to be flattening out, the size and characteristics of the arbitration community have not yet stabilised.[802] Still, recent transformations in the field show that an increased number of arbitrators and practitioners does not have to mean a breakdown of the current set of incentives described in this thesis. The international commercial arbitration market has so far shown flexibility to accommodate these transformations and to continue to provide networks for information regarding each agent to flow.

Three developments, some of which have been alluded throughout this thesis, should be noted in particular. First, as discussed in Chapter V, the arbitration community is going through a process of developing and crystallising into written codes and texts their understandings about applicable norms. Due to the decentralised nature of the production of these texts and the relative recency of these efforts, it is uncertain to what extent these texts will be able to fully establish generally-held common ground. In many areas, the process of 'codifying' is still taking place. Still, how some of these texts, particularly the

801 Menkel-Meadow also points out how an increasing number of actors and standards may allow the 'technocratic' arguments of lawyers and arbitrators to justify almost any practice. Menkel-Meadow (n 615) 975.

802 See Global Arbitration News, International Arbitration Statistics 2018 – Another busy year for Arbitral Institutions, 2 July 2019, available at <https://globalarbitrationnews.com>

IBA Guidelines on Conflicts of Interest and the IBA Guidelines on Taking of Evidence, have been widely adopted, allowing the vision that over time the community organically tends to gravitate to a specific set of codified norms that are communicated widely across the community.

Second, technological developments have helped information to continue flowing through a bigger community, allowing reputation mechanisms to continue operating. The internet has become a cornerstone of dispersing information in this environment.[803] New publications with a strong online presence report on recent developments and the most important cases, as well as all the news relevant to the community.[804] Blogs, mailing lists, and social networks also allow members of the community to comment on cases and developments in the market. These information networks provide the community with a forum to discuss which behaviours are acceptable and to criticise behaviours that do not conform to the values held by the members of the community.

At the same time, the increasing size of the community also gave way to market adaptations that allow information to continue flowing. As international commercial arbitration expands, some international arbitrators have, to an extent, looked to differentiate themselves by ultra-specialising in market niches be it geographic or areas of practice. Further, new geographical centres have assumed increasing importance.[805] Around these

803 Arbitrators have increasingly relied on social media strategies as 'reputation' promotional tools, proliferating a new level of transparency in the market. See, Niuscha Bassari, 'Arbitrators and Their Online Identity' in Maud Piers and Christian Aschauer (eds), *Arbitration in the Digital Age: The Brave New World of Arbitration* (Cambridge University Press 2018) 246.

804 Examples of such publications and forums include the Global Arbitration Review (GAR), the Kluwer Arbitration Blog and the OGEMID mailing list, amongst many others.

805 Most notably Singapore and Hong Kong. See, for example, Kaplan (n 121).

centres new, smaller communities have formed. While arbitration has grown well beyond the point where even the most gregarious member of the arbitral community can know all the other members of the community, the way the community has splintered conceivably allows members to know other participants in the niche of the market they are familiar with.

This ultra-specialising also gave rise to more separate roles within the community. As was noted in Chapter II, some elite senior arbitrators have been changing the way they organise their practices, with some abandoning larger well-established law firms and establishing small legal boutiques dedicated to arbitration.[806] The increasing demands of independence and impartiality and the inner dynamics of large, elite law firms have made it more difficult, for some combining the role of partner at a top law firm and routinely accepting arbitral appointments. This raises important questions. Namely, it leads to the question of whether arbitrators should be pressured into 'professionalism' – i.e. if arbitrators should be a 'fully' separated and 'regulated' profession. First, however, it should be considered if such transformation would be possible against the background of the transformations taking place in the dispute resolution market. This will be analysed next.

806 See Chapter II, Section 2.2.4.

9.3. Can a transformation of the regulation' of arbitral markets take place?

The transformations mentioned above do not necessarily indicate 'professionalisation' of arbitrators, at least in a way equivalent to other professions. Even arbitrators operating in arbitration specialised boutiques – and it is important to note that this is only a minority of arbitrators – do continue, in most circumstances, offering their services as counsel and/or undertaking parallel professional and academic endeavours. In the same vein, and while arbitrators can increasingly be seen as a separate socio-professional category,[807] they do not currently seem to be in the process of developing characteristics similar to other organised professions.

As it currently stands there are virtually no pressures for introducing licensing or for educational requirements to be established, or for the institution of mandatory organisations overseeing the creation and application of ethical norms in the field.[808] Also, in the context of commercial arbitration, there are virtually no forces requesting a separation of arbitrators and lawyers as independent non-cumulative professions. Before discussing whether any such transformation would be advisable, it will be important to analyse who could promote regulatory changes in the field. Three forces that potentially can produce such changes will be analysed: i) alternatives created by the state to international arbitration; ii) changing market preferences; and iii) pushes by arbitral institutions and the arbitral community to regulate itself.

807 See Gaillard, 'Sociology of International Arbitration' (n 39) 4.

808 See Fach Goméz (n 372) 12.

9.3.1 Recent states intervention in the dispute resolution market: the creation of alternatives to arbitration

For reasons noted in Chapter IV, state legislatures are not prime candidates to develop strict regulation of arbitrators.[809] For the reasons detailed in that chapter, regulatory 'competition', driven by the ability of parties to select where their proceedings will take place and the lack of pressure from the arbitral community or other stakeholders, has led states to not deeply regulate arbitrators. Still, it is worth noting that some states have shown an increasing interest in international dispute resolution. Beyond a trend of legislative acts aimed to facilitate the usage of arbitration, some states have also looked to create alternatives to the usage of arbitration. Two types of initiatives should be noted: the passage of international treaties, fostering the usage of court litigation and mediation in the international sphere; and the development of international commercial courts.

In relation to international treaties, three recent international conventions should be noted: the Hague Choice of Court Convention, signed in 2005, the Hague Judgments Convention, signed in 2019, and the Singapore Mediation Convention, also signed in 2019. Further, many states have created commercial courts with the specific purpose of adjudicating and attracting international business disputes. China, the Netherlands, France, Germany, Singapore, Dubai, amongst others, have experimented establishing their own

809 See Chapter IV, Section 4.3.

models of courts dedicated to international commercial disputes.[810] In common, and typically finding inspiration in arbitration and the London Commercial Court, these courts use English, specialised judges, and fast-track procedures to broaden the appeal of the judiciary to solve commercial disputes.[811]

So far, however, these initiatives have not significantly transformed the international dispute resolution market. As of the moment of writing, neither the Hague Judgments Convention or the Singapore Mediation Convention are enforced, being unclear to what extent court litigation and mediation can truly become alternatives for international commercial disputes. Also, the international commercial courts currently in operation have not seen a large caseload. Despite some states seeing the potential in these venues as ways of propping up their local legal markets and help transform their jurisdictions into international hubs of dispute resolution,[812] these courts have so far not been able to establish themselves as alternatives to international arbitration on a large scale.[813]

It is also important to note that these initiatives do not present themselves as being motivated by weaknesses perceived in arbitration, but rather intended to create

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810 See Gary F Bell, 'The New International Commercial Courts - Competing with Arbitration - The Example of the Singapore International Commercial Court' (2018) 11 Contemporary Asia Arbitration Journal (CAA Journal) 193, 193.

811 See Andrew Godwin, Ian Ramsay and Miranda Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18 Melbourne Journal of International Law 219, 221; Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) 2019 International Journal of Procedural Law 4.

812 See Stephan Wilske, 'International Commercial Courts and Arbitration - Alternatives, Substitutes or Trojan Horse' (2018) 11 Contemporary Asia Arbitration Journal (CAA Journal) 153, 156.

813 The Singapore International Commercial Court (SICC) has been perhaps the most successful of the recent wave of international commercial courts, having had 16 reported cases in 2019. It is important to note that many of the SICC's cases are cases filed in the Singapore High Court and that the High Court determines that should come within the jurisdiction of the SICC, even if a jurisdiction agreement does not exist. See Bell (n 810) 212.

complementary mechanisms to arbitration.[814] In fact, they have often used arbitration-like solutions as an inspiration for their frameworks. Still, the combination of these initiatives may have the potential to create a competitive framework to arbitration.[815] In this way, it also opens an opportunity for states to indirectly regulate arbitration. By upping the competitiveness of the alternatives to arbitration, states conceivably will create pressure on arbitration providers to improve their quality/price ratio and address issues that would lead users to prefer other dispute resolution mechanisms.[816] This is however very different from the kind of more direct regulation states undertake in other professional markets.

9.3.2 Parties changing preferences as a catalyst for 'regulatory' changes

Even if states are not interested and/or capable of operating a transformation of the regulation of arbitrators, it would be possible that other actors will operate these changes. As an example, parties can 'force' arbitrators to become more professionalised by displaying a systematic preference for arbitrators operating full-time and/or appointing only those integrated within professional organisations that train, examine and supervise arbitrators. In the same vein, parties can have the same effect by selecting arbitral institutions that would play a role more akin to that of professional associations – i.e.

814 See Godwin, Ramsay and Webster (n 811) 223; Requejo Isidro (n 811) 34. Despite often affirming a complementary role to arbitration, perceived weaknesses of arbitration certainly played a role in the development of these courts. See Dalma R Demeter and Kayleigh M Smith, 'The Implications of International Commercial Courts on Arbitration' (2016) 33 Journal of International Arbitration 441, 442.

815 See M Hwang, 'Commercial Courts and International Arbitration--Competitors or Partners?' (2015) 31 Arbitration International 193, 194.

816 See Demeter and Smith (n 814) 469.

selecting arbitral institutions that would take a more hands-on approach in training, vetting and regulating arbitrators' behaviour.[817]

Over time these changes can happen. As discussed in Chapter II, preferences changed in the 1980s and 1990s showing an increased appointment of those who had a stronger specialised knowledge in arbitration instead of those with a background outside law or even in law but outside arbitration.[818] Some indications seem to point to the idea that the market is showing an increasing preference for those supported by teams, allowing them to deal with the progressively escalating technical and factual complexity of arbitral proceedings.[819] Still, currently, no trend of a systemic preference for 'professional' arbitrators by parties can be identified.[820]

While futurology regarding market preferences is a notoriously tricky endeavour, one could perhaps characterise the likelihood of parties starting systematically preferring 'professionalised' arbitrators as unlikely. It is true that as markets mature, specialisation typically takes places as it allows competitive advantages for those who specialise. However, in arbitration it seems that for most operating in the market the increased business opportunities of offering more than one type of service typically trumps the benefits of specialisation. Furthermore, there is a strong overlap between the skills and

817 Albeit most arbitral institutions have not taken serious steps to regulate arbitrators in a way akin to a professional association, there have been voices requesting a more pro-active role, most notably Rogers. See Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (n 152) 110.

818 See Chapter II, Section 2.2.

819 See Schultz and Kovacs (n 52).

820 From discussions of this author with those in the community, it seems that belonging to professional associations such as CIArb, that actively train and supervise arbitrators, may have been waning its appeal as a competitive advantage in the most mature arbitration markets.

knowledge needed to be an effective counsel and an arbitrator, leading to a lower benefit in specialising exclusively in one of these roles.

Decisions to appoint arbitrators are often complex strategic decisions, where the parties are not necessarily always trying to appoint the 'best' arbitrator, in the sense of the most well-prepared or the one most able to conclude the proceedings in an 'efficient' way. Often these decisions also involve many other calculations such as which prospective arbitrator would prove more advantageous for the party or more knowledgeable about the substantive issues at play in that case.[821] This means that while general trends might continue to move, it is more likely that arbitrators with different profiles will continue to be selected, ranging between those more 'professionalised' and others undertaking appointments in a more limited way.

9.3.3 The power of the arbitral community and arbitral institutions to determine 'regulatory' changes

If the market is not likely to organically lead to fully 'professionalised' arbitrators, other candidates could still perform this change. For example, the arbitral community could spontaneously self-regulate by determining the unacceptability of awards issued by 'part-time' arbitrators or those without 'accepted' qualifications. In a sense, any such radical transformation taking place is also an unlikely proposition. A proposal, for example, to outright eliminate the possibility of cumulating accepting appointments as arbitrator and

821 See Grant Hanessian and Lawrence W Newman, *International Arbitration Checklists* (2nd edn, Juris Publishing, Inc 2009) 45.

counsel or the introduction of mandatory would certainly receive opposition from most within the community,[822] be it due to authentic disagreement with the merits of any such proposal or, more cynically, due to the fact that any such transformation would negatively affect their income prospects.[823]

More measured steps are, however, far from outside of the realm of possibility.[824] The arbitral community has sometimes adopted understandings that do not conform necessarily to the best short-term interests of its elite members or even the majority of their members. Arguably, this was the case with the IBA Guidelines on Conflicts of Interest, discussed on Chapter VI, that opted for solutions that limited the ability of well-positioned arbitrators, namely those within large law firms, to be appointed more frequently.[825] In theory, the arbitral community could further expand understandings of conflicts of interest, independence and impartiality, leading a higher number of arbitrators opting to take arbitral appointments as their full-time professional endeavour.

Also, arbitral institutions could foster a 'professionalisation' of arbitrators. They could do so by selecting to primarily appoint 'full-time' arbitrators and in this way create further incentives for arbitrators to professionalise. Or, in an even more radical departure from current practices, arbitral institutions could assume a role more akin to those of

822 See, for example, Born, *International Commercial Arbitration* (n 4) 2048.

823 Noting that resistance in the international arbitration community to proposals for express ethical regulation or even self-regulation to be "*inevitable*", see Rogers, *Ethics in International Arbitration* (n 22) 225.

824 Franck for example comments : «*As the international arbitration constituency continues to expand arbitrators should give into their impulse to professionalize the services they render. By seeking out opportunities to enhance their independence and impartiality, this will benefit the integrity of international arbitration by confirming the neutrality and fairness of the underlying process*» Franck, 'The Role of International Arbitrators' (n 3) 520.

825 See David A Lawson, 'Impartiality and Independence of International Arbitrators' (2005) 23 ASA Bull. 22, 37.

traditional professional associations in other fields. They could do so by determining mandatory qualifications for arbitrators[826] and providing mandatory training for those wanting to be appointed within the arbitral institution, or creating and enforce ethical codes in the way that professional bodies self-regulate other professionals.[827]

In a way, this is also an unlikely outcome. Arbitral institutions are generally headed by either arbitrators or those with close ties to the field. They further depend, to an extent, of the arbitral community to attract parties to the institution. Therefore, arbitral institutions will typically not look to alienate the arbitral community. That said, these institutions have the ability to take steps that do not seem to be in line with the strict short-term interests of current arbitrators. Due to the market power of arbitral institutions, they can, to an extent, deviate from the short-term interests of the arbitrators and/or their clients. Some of the steps undertaken to increase transparency,[828] diversity of arbitration rosters[829] or efficiency

826 In the context of other fields of arbitration, arbitral institutions do sometimes take a more hands-on approach in establishing explicit requirements for arbitrators. This is the case of sports arbitration where the Court of Arbitration for Sport's maintains a closed list of arbitrators that must have '*appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language*'. Philippe Cavalieros and Janet Kim, 'Can the Arbitral Community Learn from Sports Arbitration?' (2015) 32 Journal of International Arbitration 237, 247.

827 There are a few examples of arbitral institutions taking a more pro-active role in the enforcement of arbitral obligations. Most notably the AAA and CAM have indicated that they may withdraw an arbitrator that fails to disclose conflicts of interest from their lists. See Fach Goméz (n 372) 69.

828 For example, the decision of ICC to publish limited information relating to arbitrators sitting in ICC cases, allowing parties to know how many ICC cases arbitrators have seated on, can in theory be a drawback to elite arbitrators as it might allow them to be challenged in future proceedings or allow criticism for accepting too many appointments. The very limited information disclosed limits, however, any significant drawback for arbitrators.

829 Efforts of some arbitral institutions to increase the diversity of the arbitrators appointed, namely trying to achieve more gender parity, rather than directed at benefiting the current roster of elite arbitrators (which is overwhelmingly composed by men) seem to be an attempt to counteract ideas that arbitration lacks diversity, which became a common criticism of arbitration.

of proceedings[830] may be used as examples of arbitral institutions deviating from the short term-interests of members of the community to promote the long-term legitimacy of arbitration.

9.4 Is 'professionalism' of international arbitrators to be encouraged?

Above I summarised why arbitrators transforming into a fully separate 'profession' is an unlikely outcome. While arbitral institutions and the arbitral community more generally could, if they so wished, force the 'professionalisation' of arbitrators by pushing for further separation of the function of arbitrators from other professional functions and push for regulation of entrance in the market, there seems to be no pressure to undertake any such radical transformations. Still, it is worth discussing whether such regulatory changes would be positive in the sense of producing a fairer and more efficient dispute resolution system, especially as through small steps, such as an increasingly stricter understanding of independence and impartiality, factual separation of the profession could be reached.

Within arbitral circles, discussions around this topic are usually framed with reference to the concept of 'double-hatting' – i.e. the practice of simultaneously combining the roles of arbitrator and counsel in different cases.[831] It is important to note that while to an extent contentious in the context of investment arbitration, the practice of double-hatting, perhaps surprising for those outside the field, is largely uncontroversial within

830 See, for example, the examples of arbitral institutions reducing arbitrators fees in case of delayed awards. See Chapter VIII, Section 8.1.2.

831 See Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 Journal of International Economic Law 301, 321.

commercial arbitration circles.[832] Forbidding 'double-hatting' and 'professionalisation' are, however, not exactly coinciding concepts. The latter would refer to a broader process of acquiring the characteristics typical of the profession, including, a monopoly of the 'professionals' over the possibility of offering services in the area and an active, state-backed, enforcement of formalised codes of ethic.

Arguments can be made in favour of undertaking a further separation of the role of 'arbitrator' and 'counsel,' either by forcing 'professionalism' of arbitrators or limiting double-hatting. If, as argued in Chapter VII, part of the incentives leading arbitrators to comply with professional and ethical norms derive from reputation mechanisms, limiting the possibility of those not operating in the market long-term of accepting appointments, would arguably help these reputation mechanisms to better operate.[833] Also, limiting the possibility of cumulating appointments as arbitrator and counsel would to an extent limit the possibility of 'trading' appointments – i.e. a practice of appointing a particular member as an arbitrator with the implicit or even explicit agreement of being appointed by the same member as an arbitrator in a future arbitration.[834]

Such changes would probably not find any traction within the arbitral community. Tradition, as in the arbitrators have not been historically a profession,[835] and perhaps self-

832 See Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Ethics and Empirics of Double Hatting' (2017) 6 ESIL Reflection 6.

833 In the context of international investment arbitration, it has been hypothesised that 'repeat-arbitrators', by opposition to 'one-short arbitrators', work as 'guardians of the regime'. Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 European Journal of International Law 551, 565.

834 See T Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 Arbitration International 495, 498.

835 See Gaillard, 'Sociology of International Arbitration' (n 39) 4.

interest, as few in the community would be interested in changing these state affairs, help explain this resistance. Several arguments have been used by those within the community to justify opposition to a prohibition of double-hatting.[836] Some have a more practical bent by pointing out that forbidding counsel acting as arbitrators would significantly weaken the pool of talent available to act as arbitrator.[837] Others focus on a more normative dimension, arguing that limiting double hatting would restrict parties' rights to freely select their arbitrator, and, in this sense, infringe their autonomy – one of the cornerstones of arbitration.[838]

A further note is warranted in my view. Establishing arbitrators as a fully separate profession would probably significantly change the underlying mechanisms shaping the regulation of the field. This would not necessarily mean that arbitrators would be similar to other professions. Arbitration would still be transnational in nature and likely would not be regulated across national lines.[839] Even in a model where arbitrators would be a separate profession, it would still be a market marked by low levels of price competition and that would tend to be a space difficult to enter for those not heavily invested in the field. Still, it would be possible that if arbitrators were a separate profession, they would push for

836 See Dennis H Hranitzky and Eduardo Silva Romero, 'The "Double Hat" Debate in International Arbitration' *New York Law Journal* (14 June 2010) available on <https://www.law.com/newyorklawjournal/> accessed on 9 April 2020.

837 See, in the context of investment arbitration, Langford, Behn and Lie (n 831) 322.

838 See Born, *International Commercial Arbitration* (n 4) 2048.

839 The increasingly transnational nature of professions, such as elite lawyers and accountants, has been a topic increasingly explored in the sociology of professions. Still strategies of closure in these elite subsects of their professional communities is significantly distinct of the situation found in arbitration. For an overview of closure professional strategies in a transnational setting, see Faulconbridge and Muzio (n 323).

measures to further entrench their position, such as the usage of 'closed list' of arbitrators by arbitral institutions.[840]

A separate arbitral profession would mean the emergence of a more 'polarised' community where each member would be less inclined to interact with others as peers.[841] In the current field, there are high incentives for engagement with the community, where those who participate in the community initiatives and gatherings see the likelihood of being appointed as an arbitrator increase. This creates incentives for wide participation in self-regulatory initiatives. In a polarised field where those operating as counsel cannot be directly 'rewarded' with the potential of appointments as arbitrators, it would be likely that their engagement with the rest of the community would wane.[842]

How the arbitral community would adapt is not fully known, but certainly a quite different way of creating regulatory norms in the field would emerge. Any changes in this regard should, therefore, be carefully considered. A fully professionalised and regulated arbitral profession could perhaps bring a semblance of legitimacy to the field and could address the issues of 'one-shot' arbitrators not concerned with reputation.[843] It could, however, also bring unpredictable changes to arbitration. The current design of commercial arbitration was largely the work of the arbitral community itself. These self-regulatory

840 Latvia is noteworthy for determining a mandatory system of closed-lists for arbitral institutions. This is an heavily criticised departure from international practice. See Toms Kruminš, 'Arbitration in Latvia: A Cautionary Tale?' (2017) 34 Journal of International Arbitration 303, 324.

841 See Gaillard, 'Sociology of International Arbitration' (n 39) 14.

842 This would not necessarily mean a breakdown of the ability of arbitration to continue producing its own regulatory framework. To an extent, arbitrators would likely be incentivized to interact with each other and with counsel and participate in the initiatives regarding their own status and applicable norms. Even counsel would to an extent likely be interested in participating in the community as they would likely still be invested in the state of arbitration as a whole.

843 See Franck, 'The Role of International Arbitrators' (n 3) 517.

efforts are not fully altruistic but rather the by-product of a complex 'game' through which elite members offer valuable work time legitimising arbitration and receive networking and community prestige that ultimately translates into appointments and success.

If the benefits of networking and community prestige would drop for a significant number of participants, the members of the arbitral community could conceivably quit participating in the creation (and to an extent in the enforcement) of the professional norms existing in the field. This would give rise to a vacuum that would certainly be filled by other players. Possibly arbitral institutions would be sufficiently incentivised to take a more proactive role in regulating arbitrators, creating and enforcing norms to maintain the legitimacy of arbitration.[844] Likely a smaller cadre of professionalised arbitrators would continue regulating efforts. It would, however, run the danger to advance a closure agenda that arbitration has so far avoided.

[844] In this context, it is worth noting that the 'legitimacy' of international arbitration has been increasingly presented as having to satisfy not only parties ('party legitimacy') or the arbitral community ('community legitimacy'), but also needs to take into account the interests of national societies ('national legitimacy') and global society as a whole ('global legitimacy'). See Stephan Schill, 'Developing a Framework for the Legitimacy of International Arbitration' in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges* (Wolters Kluwer Law & Business 2015) 827.

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