Model Law, "'arbitration' means any arbitration *whether or not administered by a permanent arbitral institution*" (emphasis added). The paramount significance of institutional arbitration is confirmed by the fact that the number of institutional arbitrations has grown steadily since the mid-twentieth century.[4] Likewise, the proliferation of arbitral institutions, whether on a global, regional or domestic level, whether offering specialized services for disputes arising in a particular branch of trade or industry, or offering arbitration services for all types of disputes, has accelerated in recent times[5]. Due to this global trend towards the "institutionalization of arbitration"[6] and the "multifaceted reality"[7] of institutional arbitration the number of existing arbitral institutions has become almost countless, both on the domestic and international level[8], as have the tasks they are performing.

The UNCITRAL Model Law also reflects the vital link between institutional arbitration and party autonomy. Art. 2 (d) of the Model Law provides:

> "where a provision of this Law […] leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination".

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or economic systems of the world", *see* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; *see* also GB Born, *International Commercial Arbitration* Vol. I (2nd edn, Kluwer 2014), § 1.04 [B] [1] [a], who concludes that: "the Model Law's contributions to the international arbitral process are enormous and it remains, appropriately, the dominant 'model' for national legislation dealing with international commercial arbitration."; Blackaby/Partasides, ibid, No 1.220: "It may be said that if the New York Convention put international arbitration on the world stage, it was the Model Law that made it a star, with appearances in states across the world".

4 R Gerbay, *The Functions of Arbitral Institutions* (Kluwer 2016), § 2.01 [A].

5 *See* Gaillard and Savage (n 2), No 323 et seq.; Blackaby and Partasides (n 2), No 1.158.

6 P Fouchard, *L'Arbitrage Commercial International* (Dalloz 1965), No 21; Gaillard and Savage (n 2), No 57.

7 Gerbay (n 4), § 3.01.

8 Ibid, § 2.01 [B].

The fact that the parties, by choosing a specific arbitral institution, endow this institution with the performance of numerous tasks during the arbitration leads to fundamental questions: Are the parties bound by this institution's arbitration rules to the extent that they are considered "mandatory"[9] by the arbitral institution? Does the arbitral institution, in exercising the administrative discretion granted to it under its rules, have the power to "overrule" a procedural agreement by the parties? Answering both questions in the affirmative would lead to a "party autonomy paradox": by agreeing to institutional arbitration as an exercise of party autonomy, the parties would at the same time agree to limit that very same autonomy. That outcome would be both paradoxical and problematic, given that "[t]he argument for arbitration begins with respect for private agreements"[10]. In fact, it is the respect for the parties' autonomy that has made arbitration distinctly different from, and more attractive than, the conduct of proceedings before domestic courts, which are usually trapped in a straight-jacket of mandatory procedural norms.

2. What is "Institutional" Arbitration?

Any discussion related to the relationship between institutional arbitration and party autonomy requires the identification of the essential characteristics of this type of arbitration. Very often, this determination is made by reference to the traditional "*ad hoc*"/"institutional" dichotomy[11]. While the first is gov-

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9 *See* for the reason why this term appears in quotation marks *infra* section 3.3.

10 J Paulsson, *The Idea of Arbitration* (OUP 2013), 2; *see* also W Park, When and Why Arbitration Matters in: G Beresford Hartwell (ed.) The Commercial Way to Justice, 1997, 73, 83, n. 26: "[…] the origin of the arbitrator's power lies in an act evidencing the parties' intent to waive the otherwise applicable rules of judicial jurisdiction in favor of private adjudication"; *see* also for party autonomy as the "juristic foundation of international commercial arbitration M Mustill, A New Arbitration Act for the United Kingdom? (1990) 6 Arbitration International 3, 31.

11 Blackaby/Partasides (n 2), No 1.140; Born (n 3), § 1.04 [C]; Gerbay (n 4), § 1.02 [A] [1]; *see* for a critical appraisal of these views B Warwas, *The Liability of Arbitral*

erned by rules tailor-made by the parties themselves, the latter is governed by rules which are pre-formulated and published by a body, the arbitral institution, which also administers the arbitration. By reference in their arbitration agreement –usually the model clause provided by the respective arbitral institution–, the parties make the rules of that arbitral institution part of their arbitration agreement[12]. The rules, therefore, "serve as the parties' procedural law"[13].

It was due to this code-like quality[14] of institutional arbitration rules that, in the early days of modern arbitration practice, the question was raised whether the increasing "institutionalization" of arbitration would lead to a "complete metamorphosis of international commercial arbitration" into a system that comes close to dispute resolution before domestic courts.[15] However, this effect of institutional arbitration follows from the will of the parties as expressed in their arbitration clause.[16] In this respect, institutional arbitration is just as much a "creature of contract"[17] as its *ad hoc* counterpart. The effect of

Institutions: Legitimacy Challenges and Functional Responses (Springer 2017), 20 et seq.

12 *See* generally Born (n 3), § 9.03 [A]: "When parties agree to arbitrate under institutional rules, they are deemed to have incorporated those rules into their agreement, and are therefore bound by such rules as a contractual matter"; *see* also Gaillard/Savage (n 2) No 359; Blackaby/Partasides (n 2), No 1-99; *see* also *Fabergé Inc. v Felsway Corp*, 539 N.Y.S. 2d 944, 946 (1st Dep't. 1989); *Haviland v Goldman Sachs & Co.*, 947 F.2d 601, 604 (2nd Cir. 1991).

13 *Thomson CSF v Groupement Sanitec Megco (Beyrouth)*, Rev d' Arb. 1998, 414 (French Cour de Cassation); Gaillard/ Savage (n 2), No 366; *see* also T Landau, 'The Effect of the New English Arbitration Act on Institutional Arbitration' (1996) 13 J Int'l Arb 113.

14 *See* for the "quasi normative" potential of private texts N Jansen, *The Making of Legal Authority* (OUP 2010), 43 et seq, concluding that "non-legislative reference texts may gain similar or even greater authority than legislative codifications" and complaining that so far "legal scholars [in analysing factors determining, legal authority of such texts] have mostly focused on factors of pure legal rationality", ibid at 138 and 141.

15 Fouchard (n 6), No 21.

16 Ibid, No 22: "[…] le fondement juridique de cet arbitrage-juridiction, on pourrait presque dire sa, couverture', reste toujours, officiellement, l'autonomie de la volonté: la licéité de l'arbitrage institutionnel, de l'arbitrage ‚pre-fabriqué' résulte, en droit positif, de cette autonomie[…]".

17 Bermann (n 2), 60.