

Table of content

List of abbreviations	21
Introduction	29
§1 Problem identification and delimitation	30
A. The concept of hybrid arbitration clauses	31
B. Procedure shopping - Reasons for hybrid arbitration clauses	32
C. The Insignia v. Alstom case	35
D. Other hybrid arbitration cases	37
E. Recent developments in institutional arbitration	39
§2 State of discussion	43
§3 Structure and research approach	48
Chapter 1: Party autonomy and the legislative framework	56
§4 Party autonomy to agree on hybrid arbitration under the law	57
A. Importance of party autonomy in international arbitration	57
I. An interplay of contract and private international law	58
II. Party autonomy in international arbitration conventions	59
III. Recognition of party autonomy by national arbitration laws	60
IV. Reasons for the supremacy of party autonomy	63
B. Limits to party autonomy and applicable laws	65
I. Law of arbitration: the seat principle	68
1. Choosing a place of arbitration	69
2. Place of arbitration, place of hearing, seat of the institution	71
3. Application of arbitration laws of states other than the seat?	74
II. Laws affecting the arbitration agreement	75
1. The search for conflict of laws rules for validity issues	77

Table of content

2. Initial considerations: substance v. procedure	78
3. Law of the arbitration agreement beyond the <i>lex arbitri</i>	81
4. Law applicable to the operability of the arbitration agreement	83
C. Limits to party autonomy in arbitration laws	86
I. Mandatory arbitration law - an overview	87
II. In particular: mandatory arbitration law against hybrid arbitration?	90
1. No general due process concerns	90
2. The skeletal legislation on institutional arbitration	91
a. Stipulations in international conventions	92
b. Rarity of national legislation on institutional arbitration	97
c. The quasi-regulative force of institutional practice	104
D. Relevant limits to party autonomy outside arbitration laws	106
§5 Private rules and party autonomy	107
A. Types of arbitration rules	108
B. Legal status and regime of arbitration rules	110
I. Lacking legislative or regulatory power of arbitral institutions	112
II. Arbitration rules as standard terms of the arbitration agreement?	114
III. Law applicable to arbitration rules	115
C. Soft law and arbitrator discretion	116
D. Interplay of institutional and arbitral discretion and party autonomy	119
§6 Hybrid arbitration from a normative perspective	122
A. Arbitral procedure and the hierarchy of norms	122
B. Validity of hybrid arbitration agreements in principle	124
Chapter 2: Qualifying hybrid arbitration (agreements)	126
§7 Categorisation of hybrid arbitration as institutional	126
A. Hybrid arbitration as a problem of defining institutional arbitration	127
I. Rejection of definitions based on the constitution of the tribunal	128
II. Rejection of definitions focussing on the applicable rules	129

III.	Preference for definitions based on institutional involvement	129
IV.	Degree of involvement of arbitral institutions	131
B.	Advantages and disadvantages of institutional arbitration	134
I.	Objective advantages	135
II.	Subjective advantages	136
III.	Objective, possible and perceived disadvantages	139
1.	Cost	139
2.	Bureaucracy	140
3.	Intransparency and lack of control	142
IV.	Shopping for advantages with hybrid arbitration agreements?	145
C.	Reality of intermediate forms of arbitration	146
I.	Institutions acting as appointing authority	147
II.	Facilitated ad hoc arbitration	147
III.	Semi-institutional arbitration, e.g. Hamburg Friendly Arbitration	150
IV.	»Wildcat arbitration« - ad hoc arbitration under institutional rules	151
1.	Articles 1 (2) and 6 (2) of the ICC Rules & ad hoc cases	152
2.	The Bovis Lend v. Jay-Tech case	154
V.	»Switching« from institutional to ad hoc arbitration	156
D.	Hybridity of arbitration administered under another institution's rules	157
§8	Qualification of hybrid arbitration agreements as pathological	157
A.	Essentialia and optional elements of an arbitration agreement	158
B.	The principle of effective interpretation and its limits	161
C.	Case study: Pathological institutional arbitration agreements	163
I.	Initial pathology: Drafting defects in the parties' sphere	163
1.	Ambiguous references to one or more institutions	164
a.	BGH judgment of 2 December 1982	166
b.	Lovelock v. Exportles - a decision of the English Court of Appeals	170
c.	Cour de Cassation, decisions of 20 February 2007 and 4 June 2009	172
2.	Hybrid arbitration a solution to ambiguity?	174
a.	The case HKL v. Rizq	174

Table of content

b. Critical comments of the decision	175
3. Distinction between deliberately hybrid & ambiguous clauses	177
a. HCCI Court award of 18 April 2000	178
b. The »ICC 500« case	181
II. Subsequent pathology: obstacles in the institution's sphere	184
1. Retrospective: Dissolution of the GDR's chamber of foreign trade	185
a. BGH decision of 20 January 1994	186
b. Evaluation and relevance for modern arbitration law	187
2. A current issue: The CIETAC split	190
a. The background of the creation of SHIAC and SCIA	190
b. Problems with »old« Shanghai or Shenzhen arbitration clauses	193
c. Some local Chinese jurisprudence on the CIETAC split	195
d. The SPC's 2013 notice on the CIETAC split	198
e. Further guidance from the SPC: the 2015 reply	199
f. Evaluation	200
3. Hybrid arbitration as a solution to subsequent pathology?	202
III. Are hybrid arbitration clauses initially or subsequently pathological?	203
§9 The qualification's consequences: inadvisability and possible cure	207
 Chapter 3: Opting-out aspect - derogation from institutional rules	 209
§10 Institutions' flexibility in relation to their rules	209
A. Institutional attitudes towards rule modifications: a case study	210
I. An example for the ICC's position: The Qimonda arbitration	210
II. SIAC's search for an acceptable position	211
III. CIETAC's apparent position	212
IV. The LCIA's flexibility proven in the Softwood Lumber Arbitrations	213

V.	A recall of the »ICC 500« case to indicate the AAA-ICDR's position	215
VI.	Recall of the DIS/DAS awards	215
VII.	The approach of one Swiss cantonal chamber of commerce	216
B.	A focus on essential (»mandatory«) institutional rules	218
I.	Essential ICC Rules	219
II.	Essential SIAC Rules	220
III.	Essential CIETAC Rules	222
IV.	Essential LCIA Rules	224
	1. Party autonomy under article 14 of the LCIA Rules (1998)	224
	2. Revisions introduced by the LCIA Rules (2014)	225
	3. General restrictions to modify powers of the institution	225
V.	Essential AAA-ICDR Rules	227
VI.	Essential DIS Rules	228
VII.	Essential Swiss Rules	229
C.	Controlling or lenient: negotiability of institutional services and rules	231
§11	The institution's right to refuse the administration of a case	232
A.	No duty of the institution to conclude a contract with the parties	233
I.	Nature and content of the Administration Contract	235
II.	Law applicable to the Administration Contract	236
	1. Law of the seat of the institution	237
	2. Law applicable to the arbitration agreement	238
	3. Law of the place of arbitration	239
	4. Own view and determination of the administering institution's »seat«	240
III.	Contract formation theories	243
	1. Theory 1 - parties accept the institution's offer ad incertas personas	244
	2. Theory 2 - request for arbitration as offer accepted by the institution	245
	3. Theory 3 - contract only concluded with the respondent's answer	247
IV.	Conclusions for requests for arbitration under different rules	247
B.	Practice test: refusal to administer as contract termination	251

Table of content

I.	Problem: Timing and communication of the institution's refusal	251
II.	Solution: Flexible contract with a both-sided termination right	252
	1. Arguments for a right to terminate the Administration Contract	253
	2. Limit to the right to termination	254
	3. Contractual termination & jurisdictional decision of the institution	255
III.	Support of the solution: hybrid arbitration and the »battle of forms«	255
	1. The »battle« of institutional rules	255
	2. Solutions discussed for »battle of forms« problems	257
	3. Appeasing the battle of institutional rules	260
IV.	The institution's restricted right to disregard rule derogations	263
C.	Effect on the arbitration agreement	264
I.	Overview of the République of Guinée cases	264
	1. The factual background	264
	2. The decisions of the TGI, Paris	265
	3. Partial annulment of the decisions by the CA, Paris	265
II.	Evaluation of the CA's ruling	266
III.	Fate of the arbitration agreement: reconsidering the TGI's decisions	268
§12	Hybrid arbitration agreements and autonomy of the institution	269
Chapter 4:	Opting-in aspect - applying another institution's rules	271
§13	The legality of administering hybrid arbitrations	272
A.	Institutional rules and copyright of the issuing institution	273
I.	Copyrightability of arbitration rules	275
	1. The originality/creativity threshold	276
	2. Arbitration rules as works in the public domain?	284
II.	Hybrid arbitration as infringement?	
	- the idea/expression dichotomy	288
	1. A parallel: copyright infringement of game rules and show formats?	291
	2. Exceptional protection of the content and integrity of a work	293

3. Application to the use of another institution's arbitration rules	295
III. Jurisdiction and applicable law problems: a hypothetical example case	297
1. Jurisdictional considerations	298
2. Conflict of laws analysis	301
B. Hybrid arbitration and trademark protection	304
I. Trademark mentioning v. trademark infringement	304
II. Dilution without confusion?	306
III. Excursus: The CIETAC split as a potential trademark issue	308
C. Administering hybrid arbitrations as unfair competition?	310
I. The problem to identify common principles among jurisdictions	311
II. Applicability of unfair competition law to arbitral institutions	313
1. Unfair competition in the non-profit sector	314
2. The market for administering arbitral proceedings	315
3. Relationship between unfair competition law and IP law	317
III. Unfair competition concepts possibly applicable to hybrid arbitration	321
1. The concept of exploitation or tarnishment of reputation	322
2. »Parasitisme« - a concept of exploitation of efforts	324
3. Common law: Passing off and misappropriation	327
4. A glance at Chinese unfair competition law	329
5. The tort of undue interference with contractual relations	331
IV. Jurisdiction and applicable law: three hypothetical situations	333
1. Relevance of the market place for jurisdiction?	334
2. Qualification of the reproached conduct and localisation of the market	336
D. Concluding reflections on the economics of exclusive institutional rules	340
§14 The feasibility of administering hybrid arbitrations	344
A. The test: applying substitution theory to a conflict of arbitration rules	344

Table of content

I.	A contract perspective: general contract interpretation rules	345
II.	A rule perspective: introduction to substitution and adaptation theories	346
III.	Parameter of equivalence: the applicable rule's purpose	351
	1. The functional equivalence test	352
	2. Equivalence of actors or acts?	353
IV.	Art. 1 (2) of the ICC Rules - per se an exclusion of substitution?	354
B.	Rules referring to the arbitral institution and their purpose	355
I.	Commencement of the proceedings	357
II.	Institutional decision on jurisdiction	361
	1. Distinction: review of filing requirements and contractual acceptance	362
	2. Rules on institutional decisions on jurisdiction and their scope	363
III.	Constitution of the arbitral tribunal	366
	1. Institutional determination of the number of arbitrators	367
	2. Appointment upon agreed or unopposed party nomination	368
	3. Confirmation of a co-arbitrator nominated by one party alone	371
	4. Institutional selection of a co-arbitrator for a defaulting party	372
	5. Default rules for the designation of the chairperson	375
	6. Institutional selection of a sole arbitrator or chairperson	377
IV.	Challenge and replacement of arbitrators	378
V.	Institutional control of the proceedings after the tribunal is constituted	381
VI.	Institutional influence on the award	384
VII.	Financial control	386
C.	General comparison of actors of different arbitral institutions	388
I.	The secretariats	388
II.	Multi-person bodies	391
	1. Comparison of the ICC, LCIA, SIAC and SCCAM	392

Table of content

2. The »Arbitration Court(s)« under CIETAC Rules (2015)	394
3. Other, multi-person bodies	395
III. Individuals: President, Chairman, Registrar, Secretary General	397
IV. The »administrator« under AAA-ICDR Rules	398
D. Adaptation of the rules to the administering institution's system	399
§15 Implementing hybrid arbitration: an institutional perspective	400
 Chapter 5: Hybrid Arbitration Clauses Before State Courts	 402
§16 Enforcing & challenging hybrid arbitration agreements	402
A. Enforcement in relation to the other party	403
I. Overview of potentially available actions	404
1. Action for dismissal or stay of litigation	404
2. Action for interlocutory declaratory relief	405
3. Actions for injunctive relief	407
4. Actions for review of arbitral decisions on jurisdiction	409
5. Actions for state court support	412
II. Selected problems of enforcing hybrid arbitration agreements	413
1. Allocation of competence	413
a. Negative effect of competence-competence?	414
b. Overview of national approaches	415
c. Plea for limited review of operability issues by state courts	419
d. A case for court support	422
2. The limited subjective res judicata effect	430
a. Institutions not concerned by inter partes effect of court orders	431
b. The decision HKL v- Rizq II	433
c. Anti-arbitration injunctions to solve institutional conflicts?	434
3. Review of and deference to institutional decisions	435
a. Myth of the »administrative nature« of institutional acts - part I	435
b. Provisional nature of the institution's decision on jurisdiction?	438

Table of content

c.	No interlocutory review of institutional confirmation of jurisdiction	439
d.	Indirect court »review« of institutional decline of jurisdiction	440
III.	State court powers to enforce (hybrid) institutional arbitration clauses	442
B.	Enforcement in relation to the designated institution	444
I.	Justiciability - the myth of the »administrative nature« - part II	444
II.	Liability of arbitral institutions	447
1.	Excursus: contractual liability of arbitrators	448
a.	Statutory provisions limiting arbitrator liability	448
b.	Judicial rulings on arbitrator liability	449
c.	Arbitration rules excluding arbitrator liability	451
2.	Application of the same principles to arbitral institutions?	452
3.	Institutional liability risks connected to hybrid arbitration	455
III.	Available remedies	457
C.	The fork in the road to enforce hybrid arbitration agreements	459
§17	Challenging & enforcing hybrid arbitration awards	461
A.	Probable grounds for challenge	463
I.	Invalidity of the arbitration agreement	463
II.	Procedural irregularities	465
III.	Irregularity in the constitution of the arbitral tribunal	469
IV.	Public policy	470
1.	What is public policy?	471
2.	Can private rules shape public policy?	473
3.	Public policy to protect interests of the rules issuing institution?	475
B.	Party invocation, preclusion and outcome-relevance	476
C.	The Hangzhou Intermediate People's Court's ruling	480
I.	Insignia's objections to recognition and enforcement	480
II.	The Hangzhou court's factual findings on the arbitration procedure	482
1.	The initial commencement of ICC arbitration	482

2. The circumstances of the case transferral to SIAC	482
3. The constitution of the arbitral tribunal	483
4. The hearing on jurisdiction and the Singapore courts' decisions	484
5. The hearing on the merits and the awards	484
III. The ratio of the Hangzhou court's decision	485
IV. Evaluation	485
§18 Enforcement risks of hybrid arbitration agreements	487
 Conclusion	 489
§19 Summary of findings	489
§20 Looking back for a way forward: A plea for institutional cooperation	495
§21 Recall of key propositions	497
 Deutschsprachige Zusammenfassung (summary in German)	 500
§22 Themeneinführung	500
§23 Ergebnisse	503
§24 Thesen der Arbeit	511
 Bibliography	 515
Primary sources	559
Treaties / conventions & multilateral declarations	559
EU legislation (Regulations & Directives)	560
National legislation, regulations and instruments issued by state organs	561
United Nations Model Laws, principles and reports	566
Arbitration rules & guidelines	567