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International Arbitral Institutions Have Not Gone Far Enough in Issuing Reasoned Decisions on Adjudicated Administrative Matters

Jesse Sherrett[1]

Abstract

Private international arbitral institutions have recently enacted reforms that allow for the issuance of reasoned decisions in connection with the decisions they take on adjudicated administrative matters, such as arbitrator challenges. Despite these welcome developments, the giving of reasons by international arbitral institutions in support of their decisions on contested administrative matters remains inconsistent and largely discretionary, and continues to fall well short of the practice among judicial and quasi-judicial bodies at the state level where reason-giving is well-entrenched and seen as central to judicial legitimacy and authority, particularly in liberal democratic societies. Several of the various rationales for reason-giving at the state level, such as transparency, accountability, predictability and quality, apply to important adjudicative decisions taken by international arbitral institutions in arbitration proceedings. There is also a strong appetite in the marketplace for more transparency and reason-giving by international arbitral institutions particularly in connection with arbitrator challenges and confirmations. In light of this, the leading private arbitral institutions would be well-advised to consider developing more robust practices for reason-giving in connection with the important administrative matters they regularly adjudicate, such as arbitrator challenges and confirmations, initial prima facie jurisdictional determinations and the consolidation of multiple proceedings.

A. Introduction

Private international arbitral institutions administer thousands of arbitrations each year. During the pendency of such arbitrations the administering institution tends to linger in the background in a limited, administrative role while the arbitral tribunal manages the proceedings. This is not to say that arbitral institutions are irrelevant to the conduct of the arbitration. Far from it. Arbitral institutions are called upon to render important administrative decisions at various phases of the arbitration, including initial *prima facie* jurisdictional determinations at the outset of the arbitration, whether to confirm an arbitrator nomination, whether to disqualify an arbitrator following a party's challenge or in the context of the replacement of an arbitrator at the institution's own initiative, and whether to consolidate multiple proceedings.

As no doubt many practitioners, parties and arbitrators can attest, these administrative decisions taken by arbitral institutions can have a significant impact on the conduct and outcome of the arbitration: a preferred party-appointed arbitrator may be rejected, an arbitrator challenge perceived to be meritorious may fail, and so on. Despite this, the decision-making processes of arbitral institutions in such instances tend to lack transparency, particularly with respect to the reasons justifying these important adjudicated administrative matters.

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For those on the receiving end of decisions by arbitral institutions on these matters, particularly adverse ones, the lack of stated reasons from the administering institution can be frustrating and cast doubt on the integrity of the process by which the decisions were made. As two prominent arbitration practitioners recently put it in relation to arbitrator challenges:

> *For those involved in the [arbitrator] challenge, be they the challenging party, the party defending the challenge, or the challenged arbitrator himself, it is a matter of basic fairness and natural justice to know the reasons underlying the ultimate challenge decision. If anyone were in any doubt about this, they need only ask a practitioner who has experienced the intense frustration of having many pages — perhaps volumes — of submissions on a crucial challenge decision disposed of in a one-line institutional 'yea' or 'nay.'*[2]

Thus, without giving reasons justifying, for example, the refusal to confirm a party-appointed arbitrator, the administering institution's decision-making process cannot be considered transparent and the institution will struggle to provide the parties with any concrete assurances that the decision was taken on principled grounds and, ultimately, that due process was rendered. In the absence of reasons from the institution, the real and perceived legitimacy of the decision will rest almost entirely on the integrity of an institution's internal decision-making procedures (to which parties to international arbitrations have limited insight) and its general reputation in the marketplace.

This is far from satisfactory and, as discussed below, recent surveys of the users of international arbitration suggest that there is a strong appetite in the market for more transparency from arbitral institutions, including a desire for more reasoned decisions on matters such as arbitrator confirmations and challenges.

Presumably as a response to these sentiments, there have recently been moves toward more transparency in arbitral institution decision-making, particularly in relation to arbitrator challenges. For example, in 2015 the International Chamber of Commerce ("ICC") announced new procedures providing for reasoned decisions on matters such as arbitrator challenges, arbitrator replacements and the consolidation of multiple proceedings, which were subsequently incorporated into the ICC's 2017 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration. The ICC has recently strengthened these practices in the 2021 ICC Rules, which essentially codify these procedures.

Certain other institutions such as the London Court of International Arbitration ("LCIA") have enacted procedures requiring reasoned decisions on arbitrator challenges and periodically publish anonymized decisions on challenges.

Despite these welcome developments, the giving of reasons by international arbitral institutions in support of their decisions on contested administrative matters remains inconsistent and largely discretionary, and continues to fall well short of the practice among judicial and quasi-judicial bodies at the state level where reason-giving is well-entrenched and seen as central to judicial legitimacy and authority, particularly in liberal democratic societies. Although different considerations undoubtedly apply to decisions taken by private international arbitral institutions, most of the underlying rationales for reason-giving at the state level, such as transparency, accountability, predictability and quality, apply to the

[2] Geoff Nicholas and Constantine Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish' (2007) 23(1) *Arbitration International* 7-8.

important adjudicative decisions taken by international arbitral institutions in arbitration proceedings.

This article takes the position that although they have recently made welcome reforms, international arbitral institutions should embrace a more consistent and widespread practice of issuing reasons for their decisions on important matters such as initial jurisdictional determinations, arbitrator confirmations, replacements and challenges as well as the consolidation of proceedings. The enhanced transparency, accountability and rigor associated with reason-giving by international arbitral institutions should have the effect of, among other things, improving the quality of the decisions they take, enhancing parties' confidence in the integrity of the decision-making process and providing for greater certainty to the market regarding the standards to be applied in future decisions.

B. The Current Approach of International Arbitral Institutions to Issuing Reasoned Decisions

International arbitral tribunals have long been required to issue reasons in support of their awards under the rules of the various leading international arbitral institutions.[3] International arbitral institutions have also frequently published awards (usually in anonymized form) to the market.[4] Despite this, it has only been until relatively recently that these institutions have embraced rules and procedures under which they themselves issue reasoned decisions on adjudicated administrative matters to parties and the wider market. To the extent this can be described as a trend, it has been an incremental one that has been taken up only by certain institutions and in a limited and patchwork manner.

ICC

The ICC has, to a significant extent, led the way in this regard. In October 2015,[5] the ICC announced that the ICC Court would give reasons in connection with the following matters, upon the request of any party in advance of the decision:

- ICC Court decisions on the challenge of an arbitrator pursuant to Article 14 of the ICC Rules;
- A decision by the ICC Court to initiate replacement arbitrator proceedings on its own initiative and to subsequently replace an arbitrator pursuant to Article 15(2) of the ICC Rules;
- ICC Court decisions to consolidate two or more arbitrations pursuant to Article 10 of the ICC Rules; and
- Where the ICC Secretary General refers a matter under Article 6(3) of the ICC Rules to the ICC Court for decision pursuant to Article 6(4) (i.e. a decision whether or not to proceed with the arbitration in circumstances where an Answer

[3] *See e.g.* Art. 32 of the 2017 ICC Rules; Art. 26.2 of the 2020 LCIA Rules.
[4] For example, the ICC maintains a database of published awards at <https://library.iccwbo.org/dr-awards.htm> accessed on 9 November 2020.
[5] *See* International Chamber of Commerce, 'ICC Court to communicate reasons as a new service to users' (8 October 2015) <https://iccwbo.org/media-wall/news-speeches/icc-court-to-communicate-reasons-as-a-newservice-to-users/> accessed on 9 November 2020.

has not been submitted or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration).[6]

This policy was subsequently incorporated into the ICC's 2017 *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration*.[7] Prior to the issuance of the policy, there was no formal mechanism for the ICC Court to provide reasons for its decisions on these and other matters.[8]

Although this policy was a welcome development, it had significant limitations, including:

- The policy did not apply to other important decisions that may be taken by the ICC Court, such as a decision not to confirm a party-nominated arbitrator pursuant to Article 13(1) of the ICC Rules, a decision not to follow the original nominating process of the parties following an arbitrator death or resignation pursuant to Article 15(4) of the ICC Rules, and a determination regarding whether or the extent to which prior proceedings should be repeated before a reconstituted tribunal pursuant to Article 15(4) of the ICC Rules;

- The policy did not include any commitment by the ICC to publish anonymized decisions of the ICC Court in the ICC Bulletin that would serve to inform parties and counsel of the standards applied by the ICC Court in its decisions on contentious administrative matters; and

- Under the policy, the ICC Court could impose a surcharge on the parties for the communication of reasons by the Court (although it is understood that the surcharge has never been applied in practice).[9]

Appendix II, Article 5 of the newly promulgated 2021 ICC Rules effectively codifies and, to some extent, strengthens the ICC's 2015 policy. The new rules provide for reasoned decisions from the ICC Court in connection with its adjudication of the following matters:

- ICC Court decisions on the challenge of an arbitrator pursuant to Article 14 of the ICC Rules;

- A decision by the ICC Court to initiate replacement arbitrator proceedings on its own initiative and to subsequently replace an arbitrator pursuant to Article 15(2) of the ICC Rules;

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[6] For arbitrations that are conducted under the ICC Rules in force prior to the entry into force of the 2017 Rules, the request for reasons must be made jointly by all parties.

[7] *See* Part II.D of the ICC's 1 March 2017 *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration*, available at: <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/> accessed on 9 November 2020.

[8] Article 11(4) of the 2012 ICC Rules provided: "The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated." This provision was amended in the 2017 ICC Rules to the following: "The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final."

[9] *See* International Chamber of Commerce, 'ICC Court to communicate reasons as a new service to users' (8 October 2015) <https://iccwbo.org/media-wall/news-speeches/icc-court-to-communicate-reasons-as-a-newservice-to-users/> accessed on 9 November 2020.

- ICC Court decisions to consolidate two or more arbitrations pursuant to Article 10 of the ICC Rules;

- The ICC Court's appointment of arbitrators pursuant to Articles 12(8) and (9) of the ICC Rules; and

- Where the ICC Secretary General refers a matter under Article 6(3) of the ICC Rules to the ICC Court for decision pursuant to Article 6(4).

As with the policy announced in 2015, any request for a reasoned decision from the ICC Court must be made by a party in advance of the decision.

Although these reforms are a welcome development, they still do not apply to ICC Court decisions relating to the confirmation of party-appointed arbitrators pursuant to Article 13(1) of the ICC Rules, decisions not to follow the original nominating process of the parties following an arbitrator death or resignation pursuant to Article 15(4) of the ICC Rules, and determinations regarding whether or the extent to which prior proceedings should be repeated before the reconstituted tribunal pursuant to Article 15(4) of the ICC Rules.

LCIA

Although the LCIA has for some time issued reasoned decisions on arbitrator challenges to the parties, it formalized this practice in Article 10.6 of the 2014 LCIA Rules, which provides in relevant part that "*[t]he LCIA Court's decision [on arbitrator challenges] shall be made in writing, with reasons; and a copy shall be transmitted by the Registrar to the parties, the challenged arbitrator and other members of the Arbitral Tribunal (if any)*."[10]

Notably, unlike the ICC Rules, which still allow at least some discretion by the ICC Court and require a party to request reasons in advance, the provision of reasoned decisions on arbitrator challenges by the LCIA Court is mandatory and automatic under Article 10.6 of the LCIA Rules.

Moreover, unlike the ICC, since 2006 the LCIA has periodically published anonymized decisions of the LCIA Court on arbitrator challenges.[11]

All other decisions taken by the LCIA Court are not required to be reasoned, which is made explicit in Article 29.1 of the LCIA Rules: "*The determinations of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal, unless otherwise directed by the LCIA Court. Save for reasoned decisions on arbitral challenges under Article 10, such determinations are to be treated as administrative in nature; and the LCIA Court shall not be required to give reasons for any such determination.*"

[10] It is noted that the 1998 LCIA Rules explicitly provided that the LCIA Court would *not* issue reasons for its decisions on all matters brought before it. *See* Article 29.1 of the 1998 LCIA Rules.
[11] *See* Thomas Walsh and Ruth Teitlebaum, 'The LCIA Court Decisions on Challenges to Arbitrators: An Introduction' (2011) 27(3) *Arbitration International* 283.

Singapore International Arbitration Centre ("SIAC")

In the 2016 SIAC Rules, SIAC introduced a provision requiring the SIAC Court to issue reasoned decisions on arbitrator challenges. Rule 16.4 of the 2016 SIAC Rules provides in relevant part that "*[t]he Court's decision on any challenge to an arbitrator under this Rule 16 shall be reasoned, unless otherwise agreed by the parties, and shall be issued to the parties by the Registrar. Any such decision on any challenge by the Court shall be final and not subject to appeal.*"

Although this is a welcome development, under the 2016 SIAC Rules, all other administrative decisions taken by the SIAC Court are not required to be accompanied by reasons. This policy is enshrined in Rule 40.1 of the 2016 SIAC Rules, which provides in relevant part that "*the decisions of the President, the Court and the Registrar with respect to all matters relating to an arbitration shall be conclusive and binding upon the parties and the Tribunal. The President, the Court and the Registrar shall not be required to provide reasons for such decisions, unless the Court determines otherwise or as may be provided in these Rules.*"

Hong Kong International Arbitration Centre ("HKIAC")

Article 2.2 of Section I of the HKIAC Rules provides that the "*HKIAC has no obligation to give reasons for any decision it makes in respect of any arbitration commenced under these Rules. Unless otherwise determined by HKIAC, all decisions made by HKIAC under these Rules are final and, to the extent permitted by any applicable law, not subject to appeal.*"

That said, the HKIAC's secretary general has stated that, in practice, the institution often does give reasons for decisions on arbitrator challenges "*on a case by case basis.*"[12]

Stockholm Chamber of Commerce ("SCC")

In 2017, the SCC adopted a policy to provide reasons for all decisions taken by the SCC Board on arbitrator challenges.[13] The policy does not, however, extend to any other matters adjudicated by the SCC Board. Since 2004, the SCC has also periodically published summaries of its Board's decisions on arbitrator challenges.[14]

International Centre for Dispute Resolution ("ICDR")

The ICDR is likely the most restrictive institution when it comes to providing reasoned decisions. There is no provision in the ICDR Rules for the issuance of reasons for decisions taken by the ICDR's Administrative Review Council, which is the administrative decision-making authority that resolves contentious administrative matters such as objections and

[12] *See* Douglas Thomson, 'ICC Court to give reasons for decisions' (*Global Arbitration Review*, 8 October 2015) <https://globalarbitrationreview.com/article/1034831/icc-court-to-give-reasons-for-decisions> accessed on 9 November 2020.

[13] *See* SCC Policy, Reasoned Decisions on Arbitrator Challenges (adopted by the SCC Board on 8 September 2017) <https://sccinstitute.com/media/293809/scc-internal-policy-re-reasoned-decisions-final.pdf> accessed on 4 February 2021.

[14] *See* Naomi Jeffreys, 'SCC to provide decisions on arbitrator challenges' (*Commercial Dispute Resolution*, 16 November 2017) <https://iclg.com/cdr/arbitration-and-adr/7748-scc-to-provide-decisions-on-arbitratorchallenges> accessed on 9 November 2020.

challenges to arbitrators. The Administrative Review Council's Guidelines make explicit that decisions taken by the Council are not to be issued with "*written reasoning.*"[15]

In summary, although there have been recent moves by international arbitral institutions to issue more reasoned decisions on contentious administrative matters, the practice continues to be limited, largely discretionary and inconsistently adopted.

C. Why Reason-Giving by International Arbitral Institutions Matters

Although there are important differences between the rationales for reason-giving in the context of judicial and quasi-judicial (e.g. administrative) decision-making at the state level, where the issuance of reasoned decisions is commonplace and well-entrenched particularly in liberal democracies,[16] certain of those rationales are nevertheless relevant to decision-making by arbitral institutions. These rationales include the importance of reason-giving in reinforcing judicial legitimacy and authority through facilitating the public's and the parties' participation and confidence in the judicial process, fostering judicial transparency, accountability and legitimacy, supporting the development of precedent and improving the accuracy and quality of judicial decisions.[17]

At a practical level, the rationales for reason-giving are compelling.

For the litigants in a given dispute, having judicial decisions accompanied by reasons allows them to verify whether the decision-maker has properly considered their positions, whether the applicable rules and standards have been faithfully and fairly applied and, ultimately, whether there has been due process in the circumstances. Moreover, where the reasoned decision is appealable,[18] litigants can challenge the decision and hold the decision-maker to account in supervisory or appellate courts, which in turn incentivizes accountability, rigor and accuracy in the decision-making process.

For the wider legal community, reason-giving also performs several important functions, including providing meaningful guidance on the content and application of relevant rules and standards, exposing judicial and quasi-judicial decisions to scrutiny and providing precedential and law-making value, particularly in common law jurisdictions. The publication of reasons may also disincentivize frivolous legal submissions.

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[15] *See* Part F of the ICDR's Overview and Guidelines for the Administrative Review Council, available at: <https://icdr.org/sites/default/files/document_repository/ICDR_IARC_Overview_Guidelines.pdf> accessed on 9 November 2020.

[16] For example, in Europe, Article 6 of the European Convention on Human Rights recognizes the right to reasons as part of the guarantee of a fair trial. In Article 41 of the EU Charter of Fundamental Rights, which sets out the "right to good administration," there is an "obligation of the administration [of the EU] to give reasons for its decisions". In the United States, in circumstances where the due process clauses of the Fourteenth and Fifteenth amendments are engaged, the giving of reasons for judicial and administrative decisions is generally part of the bundle of rights associated with a fair trial or hearing.

[17] *See e.g.* Mathilde Cohen (2015), "When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach," *Washington and Lee Law Review*, 72(2), 504-513 (discussing the various theoretical rationales for judicial reason-giving).

[18] In the context of arbitral institution decision-making, some jurisdictions subject certain aspects of institutions' decision-making to judicial review. For example, in Sweden, Section 34 of the Swedish Arbitration Act has the effect of giving parties to arbitral proceedings the right of court review of arbitral institutions' decisions on arbitrator challenges and appointments in connection with the validity of an award. Certain institutions also anticipate judicial review of institutional decision-making. *See e.g.* Article 6(4) of the ICC Rules, which contemplates that parties retain the right to have a competent court review a decision of the ICC Court as to whether there is a binding arbitration agreement.

For the wider public, reason-giving also provides meaningful guidance on the content and application of relevant rules and standards, allows for democratic participation in the judicial process and ensures that judicial institutions are transparent and accountable to the public.

To be sure, certain of these rationales for reason-giving do not necessarily have a straightforward application to decisions made by international arbitral institutions. The leading private international arbitral institutions are non-governmental organizations that are not accountable to the wider public and, as such, the liberal democratic functions of judicial reason-giving do not squarely apply to them. Moreover, the vast majority of international arbitration proceedings are private and confidential and therefore do not necessarily allow for the level of transparency associated with decision-making procedures at the state level.

Nevertheless, most of the rationales for reason-giving at the state level apply to decision-making by international arbitral institutions.

For the parties in a given arbitration, having a reasoned decision from the arbitral institution on, for example, an arbitrator challenge or an institution's refusal to confirm a party-appointed arbitrator would undoubtedly strengthen due process and institutional legitimacy and transparency by allowing parties to verify that the decision was taken by the institution on principled grounds and upon due consideration of the parties' arguments. Such decisions by arbitral institutions may also be appealable / reviewable in certain jurisdictions[19] and so having reasoned decisions would incentivize higher quality decisions and facilitate such judicial review.

From a wider perspective, although they may not be accountable to the general public, arbitral institutions are accountable to their customers, i.e. the users of international arbitration, and the wider arbitration community. If users and their counsel do not have confidence in the quality and integrity of an arbitral institution's decision-making processes, it goes without saying that they will be less likely to use that institution to administer their disputes, which would undermine the attractiveness of that institution in an increasingly competitive marketplace. International arbitral institutions are therefore incentivized to provide a competitive service that is responsive to users' needs and fosters real and perceived integrity and quality in their adjudication of important administrative matters.

The empirical evidence supports these observations and makes clear that transparency in the adjudicative decision-making processes of international arbitral institutions is valued by users and that they would like to see continued improvement in this area.

For example, Queen Mary's 2018 International Arbitration Survey found that the most important reason for users' choice of arbitral institution is its "general reputation and recognition" followed by the institution's "high level of administration," users' "previous experience with the institution," and the institution's "neutrality."[20] The survey also found that the "transparency of arbitrator challenge decisions" was among the top factors for selecting an arbitral institution.[21]

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[19] *Id.*

[20] Queen Mary University of London, White & Case, 2018 International Arbitration Survey: The Evolution of International Arbitration, p. 14, available at: <http://www.arbitration.qmul.ac.uk/media/arbitration/ docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed on 9 November 2020.

[21] *Id.*

Queen Mary's 2015 International Arbitration Survey found that the "transparency of arbitrator challenge decisions" was among the top 10 most important reasons for selecting an arbitral institution.[22] What is more, when asked what arbitral institutions could do to improve international arbitration, the survey found that a "recurring theme" was users' "discontent" with "*the lack of transparency in institutional decision-making in relation to the appointment of, and challenges to, arbitrators.*"[23] In this regard, the Survey noted that:

> *Respondents generally consider that increased transparency in institutional decision-making would be a positive development. In particular, they would appreciate the publication of reasoned decisions on arbitrator challenges and more insight into the drivers behind arbitrator selection by institutions. Interviewees suggested that institutions could inform parties of the selection criteria they used when selecting an arbitrator. Published reasoned disqualification decisions would, it was thought, give parties due process comfort because they would know that their application had been properly considered. There would also be a benefit for the arbitral community as a whole because this would provide insight into the circumstances on which meritorious challenges might be founded.*[24]

These survey findings echo several of the rationales for reason-giving, discussed above. They also confirm that there is a strong appetite among users of international arbitration for more transparency from arbitral institutions in connection with their adjudicated administrative decision-making, including a desire for more reasoned decisions particularly on arbitrator challenges and appointments.

Prominent international arbitration commentators have for some time also called for more reason-giving by international arbitral institutions and criticized arbitral institutions for their reticence in giving reasons for adjudicated administrative decisions, particularly in connection with arbitrator challenges.[25]

In the wider arbitration context, private international arbitral institutions may find it difficult to resist these calls for greater transparency in light of the growth in transparency at the leading investor-state arbitral institutions such as the International Centre for Settlement of Investment Disputes, which publishes decisions on arbitrator challenges and has procedures for public hearings and amicus curiae briefs and regularly publishes case materials and awards to the public.[26] The Permanent Court of Arbitration ("PCA") also issues reasoned decisions on arbitrator challenges which are published with the consent of the parties. The PCA also regularly publishes awards and other case documents on its website.

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[22] Queen Mary University of London, White & Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p. 18, available at: <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf> accessed on 9 November 2020.

[23] *Id* at p. 22.

[24] *Id.*

[25] *See e.g.* Gary Born, 'Institutions Need to Publish Arbitrator Challenge Decisions' (*Kluwer Arbitration Blog*, 10 May 2010) <http://arbitrationblog.kluwerarbitration.com/2010/05/10/institutions-need-to-publisharbitrator-challenge-decisions/> accessed on 9 November 2020; Yves Derains and Eric A. Schwartz, A Guide to the ICC Rules of Arbitration (2nd edn, Kluwer Law International 2005) 140; Nicholas and Partasides, supra note 2

[26] *See generally* UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration available at: <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-TransparencyE.pdf> accessed on 9 November 2020.

There are therefore ample reasons for arbitral institutions to continue to improve upon the transparency and integrity of their adjudicated administrative decision-making processes and to issue reasoned decisions more frequently and consistently.

D. Countervailing Considerations Against More Reasoned Decisions by Arbitral Institutions

There are, admittedly, countervailing considerations in connection with the issuance of more reasoned decisions by arbitral institutions that should be addressed, particularly concerns around losses in efficiency, cost-effectiveness and confidentiality.

In relation to efficiency, there may well be some downside to arbitral institutions issuing more reasoned decisions. If arbitral institutions are required to more regularly issue reasoned decisions, those decisions are likely to take longer to render, which could undermine expedition. Moreover, if institutions are required to regularly issue reasoned decisions, more resources will need to be committed by those institutions. In the ICC's case, efficiency and practicableness are particularly relevant because decisions on arbitrator challenges are usually taken in a plenary session of the entire ICC Court (although committees may be formed to make certain decisions[27]).

These concerns are well-founded and there is no doubt that enhanced requirements for reason-giving could increase the time it takes for institutions to issue their decisions on such matters. This is particularly the case for busier institutions, such as the ICC, where such decisions are taken regularly. That said, it is likely that parties wishing to have a reasoned decision on an important contentious administrative issue will be willing to accept a reasonable trade-off between expeditiousness and transparency. Moreover, for most institutions, any delays caused by the need to issue more reasoned decisions can be mitigated through proper resourcing and administration.

As to cost-effectiveness, the key question is how much additional marginal cost is associated with reason-giving. The ICC's policy announced in 2015 on the issuance of reasoned decisions – which set a cap of $5,000 on additional fees for issuing reasons in a particular case – suggests that the marginal additional cost is relatively low, particularly in high value disputes and when weighed against the benefits of reason-giving, discussed above.

Any confidentiality concerns are likely even less relevant when one considers that (a) reasoned awards are regularly issued in confidential arbitrations with little difficulty and controversy; (b) reasoned administrative decisions can be issued subject to confidentiality requirements; and (c) the publication of any confidential administrative decisions can be made subject to party agreement and can be properly anonymized so as to protect confidentiality.

In short, the countervailing concerns associated with more reason-giving by arbitral institutions can be effectively managed and should not overshadow or trump the downside of not providing reasoned decisions. As one commentator put it in relation to decisions on arbitrator challenges:

[27] In the ICC's case, decisions on arbitrator challenges need not be taken by the entire ICC Court and can be delegated to committees under the ICC Rules. *See* Article 1(4) of the ICC Rules.

> *The secrecy of the process in many arbitral regimes remains troublesome. On the one hand, an arbitral institution has a legitimate interest in preserving the confidentiality of its internal administration, and in ensuring that challenges are disposed of expeditiously so as not to delay an award on the merits. On the other hand, a party which challenges in good faith might lose confidence in the arbitral process if there is no explanation whatsoever why its arguments were not persuasive.*[28]

E. How International Arbitral Institutions Can Strengthen their Reason-Giving Practices

Most arbitral institutions' core adjudicative functions are in connection with initial *prima facie* jurisdictional determinations, arbitrator selection, confirmation and disqualification and, in certain circumstances, consolidation of multiple proceedings. These are often contentious matters in relation to which the parties will typically make detailed submissions to the administering institution after which a decision is made by the institution's adjudicative body.

As noted above, certain institutions already issue reasoned decisions on arbitrator challenges to the parties in a particular dispute. That said, apart from the LCIA, SIAC, SCC and the ICC, the issuance of reasons for such decisions is either wholly discretionary (e.g. at the HKIAC) or essentially non-existent (e.g. at the ICDR).

The practice of reason-giving by international arbitral institutions is even less prevalent in relation to decisions on objections to initial *prima facie* jurisdictional determinations as well as arbitrator appointments and consolidations, all of which can be quite contentious. Indeed, only the ICC has a procedure in place for issuing decisions on certain of these matters and, as discussed above, that procedure is still limited in a number of important respects.

In addition to all of this, the publication of administrative decisions to the wider arbitration community is relatively uncommon, with only the LCIA and SCC periodically publishing to the market anonymized decisions on arbitrator challenges.

In view of the rationales for reason-giving and market sentiment in relation to the need for more transparent decision-making by arbitral institutions, the leading institutions would be well-advised to consider further developing more robust practices for reason-giving in connection with these matters.

Among other potential reforms, institutions should consider one or more of the following:

- Adopting a mandatory practice of issuing reasoned decisions to the parties on all initial *prima facie* jurisdictional determinations made by arbitral institutions whether or not there is a request from a party, unless the parties agree otherwise. This is now the ICC policy (although that policy requires a request from a party in advance of the decision).

- Adopting a mandatory practice of issuing reasoned decisions to the parties on all arbitrator challenges whether or not there is a request from a party, unless the parties agree otherwise. This is essentially the current system under the LCIA rules and at the SCC.

[28] W. Michael Tupman, 'Challenge and Disqualification of Arbitrators in International Commercial Arbitration' (1989) 38 *International Comparative Law Quarterly* 51.

- Adopting a mandatory practice of issuing reasoned decisions on objections to arbitrator confirmations and contentious decisions on arbitrator replacements (whether at the request of a party or on the institution's own initiative), unless the parties agree otherwise. The nature and importance of decisions on these matters is barely distinguishable from decisions on arbitrator challenges and the decisions are often made on the basis of the same, or similar, criteria. Despite this, currently no arbitral institution issues reasoned decisions on contested arbitrator confirmations.

- Adopting a mandatory practice of issuing reasoned decisions on applications for the consolidation of multiple proceedings, unless the parties agree otherwise. As discussed above, the ICC's current practice is to issue such reasoned decisions only at the request of a party. There is no good reason why such reasoned decisions should not be issued as a matter of course, unless the parties agree to forego reasons.

- Unless a party objects, institutions also should consider publishing decisions on the above matters in anonymized form at regular intervals (e.g. quarterly or annually) so as to give more guidance to parties and counsel regarding the application of relevant rules and standards and to improve transparency. Although the LCIA and SCC have done this periodically, a more consistent approach from all institutions would improve transparency and give greater guidance to the wider international arbitration community.

There are undoubtedly other ways that the transparency of arbitral institution decision-making can be improved that should be considered by institutions alongside these potential reforms. Whatever proposals may be put on the table, it is important that there be a lively dialogue on these issues to keep the recent momentum in favor of more transparency going.

F. Conclusion

To their credit, international arbitral institutions have in recent years made strides in improving transparency in relation to their adjudicated administrative decisions, particularly the ICC. It is hoped that this trend continues and that institutions further strengthen their practices in this area, including adopting some or all of the reforms proposed in this article. On the basis of recent arbitration surveys, such reforms are likely to be well-received by users of international arbitration, their counsel and the wider international arbitration community and, more broadly, will improve the quality and integrity of private international arbitration as a popular dispute resolution mechanism.