The role of arbitral institutions under the 2010 UNCITRAL Arbitration Rules

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I. Introduction

The UNCITRAL Arbitration Rules (1976 and 2010) (UAR), together with the 1958 New York Convention on International Commercial Arbitration (NYC), as well as with the 1985 Model Law on International Commercial Arbitration (and its revision of 2006) (MAL) are without doubt the most successful and influential instruments in international commercial arbitration[2].

The 1976 UAR have been a very successful instrument in international arbitration for several reasons: the Rules, primarily designed for *ad hoc* arbitrations with no institutional guidance[3], have been for a long time the only model for

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2 All of them are available at the web page of UNCITRAL (The United Nations Commission on International Trade Law) (www.uncitral.org).

3 Jan PAULSSON/Georgios PETROCHILOS, Report on the Revision of the UNCITRAL Arbitration Rules, 2006, nº12.

ad hoc arbitration[4] and they are still the preferred model[5]; the Rules have been influential in the drafting of MAL –and so indirectly in may arbitration laws–, as well as in many institutional arbitration rules around the world that either have adopted the Rules as their institutional rules or had used them as a source of inspiration; and finally they have had an expanded use so not only for *ad hoc* commercial arbitrations but also to other areas.

Soon after the approval in 1976 of the UNCITRAL Arbitration Rules, they were used as procedural rules by the Iran-US Claims Tribunal[6]. The use of the Rules by this international tribunal has been the most important factor in the latter development and success of the UNCITRAL Arbitration Rules in a variety of situations which supersedes the initial consideration of the use of the rules for *ad hoc* proceedings in international commercial arbitration. In fact, the General Assembly Resolution[7] for the amendment of the 2010 Rules has recognized a wider use of the Rules:

> "Noting that the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties[8], investor-

4 Jeffrey M. WAINCYMER, New UNCITRAL Arbitration Rules: an introduction and evaluation. VJ, 2010, nº14, p.224.

5 "The Rules provide the leading set of arbitration rules for international ad hoc arbitration": Thomas WEBSTER, Handbook of UNCITRAL Arbitration. Sweet & Maxwell/Thomson Reuters, 2010, nº0-47.

6 In accordance with Article II.1 of the Claims Settlement Declaration, i.e., The Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of The United States of America and The Government of The Islamic Republic of Iran, 19 January 1981: "An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim (…)". In Article III.2 the use of the UNCITRAL Rules is established: "Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extend modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL Rules for appointing members of three-member tribunals shall apply mutatis mutandis to the appointment of the Tribunal".

7 A/RES/65/22, 10th January 2011.

8 Apart from the fact that parties in commercial disputes may agree on an *ad hoc* arbitration under UNCITRAL Arbitration Rules, the Rules are the default ones as prescribed in certain legal instruments such as *The United Nations Convention on the Law of the Sea* (1982) where Art.188.2 states that "(a) Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c)(i), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree", and c) "In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree".
See also annex III (Basic Conditions of Prospecting, exploration and Exploitation), Article 5.4: "Disputes as to whether offers made by the contractor are within the range of fair and reasonable commercial terms and conditions may be submitted by either party to binding commercial arbitration in accordance with the

State disputes[9], State-to-State disputes[10] and commercial disputes administered by arbitral institutions, in all parts of the world (….)".

To this non-exhaustive list, we might add others, like the use of the UNCITRAL Rules in domestic transactions[11], as well as in other non-commercial matters, such as civil or administrative; as a guide for procedural matters in the case of the The United Nations Compensation Commission (UNCC)[12]; and finally UAR as institutional or *ad hoc* rules adopted by legislators.

UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority".

9 *Ad hoc* arbitration under UAR is one of the options under bilateral (BIT) and multilateral investment treaties. See for example: Chapter XI of NAFTA (17 December 1994, that entried into force on 16 April 1998). Article 26 refers to investor-state disputes and states that one of the options for the investors is an ad hoc arbitral tribunal under UNCITRAL Arbitration Rules. ALVAREZ, Henri C. Arbitration Under the North American Free Trade Agreement. Arbitration International, 2000, vol.16, nº4, pp.393-430.
Also Art.10.16 DR-CAFTA (Free Trade Agreement between between USA and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic).
See: Energy Charter Treaty (Art.26.4). Also: Art.24.3 c) of the *US Model BIT* (2004).
It is the only option in some BIT´s such as the one between Bangladesh and Iran, 29th April 2001 (Articles 4 and 12); Art.11 BIT between Belarus and Iran, 4th July 1995; Article 9 BIT between Swiss Confederation and Panama, 19th October 1983.

10 To solve disputes between the signatories Sates of a Treaty. For example, multilaral Treaty, as in Art.27.3 f) Energy Charter Treaty (Settlement of Disputes between contracting parties), in relation with *ad hoc* arbitration: "In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties to the dispute or by the arbitrators". Or Art.27 NAFTA (North American Free Trade Agreement) between Canada/Mexico/USA.
Or in a BIT, see for example: Article II.3 *Claims Settlement Declaration*, 19 January 1981: The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration. And *US Model BIT* (2004), Article 37.1: *State-State Dispute Settlement*: "Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty". Following this model, see for example: Article VIII of the BIT between Argentina and USA, 14TH November 1991; and Article VII.1 BIT between USA and Romania, 1992.

11 As recognized by several authors: Pieter SANDERS, Commentary On Uncitral Arbitration Rules. In Pieter Sanders (ed), Yearbook Commercial Arbitration 1977 - Volume II, nº2.5; CARON/CAPLAN/PELLONPÄÄ. The UNCITRAL Arbitration Rules. A Commentary. Oxford University Press, 2006, p.21; and PATOCCHI/NIEDERMAIER, UNCITRAL Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº30-31.

12 The United Nations Compensation Commission (UNCC) was created in 1991 as a subsidiary organ of the United Nations Security Council under Security Council resolution 687 (1991) to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait in 1990-91.Decision 10: [S/AC.26/1992/10; 26 June 1992]. *Provisional Rules for Claims Procedure*, states in Article 43 (Additional Procedural Rulings) that: "Subject to the provision of this procedures, Commissioners may make such additional procedural rulings as may be necessary to complete work on particular cases or categories of cases. In so doing, the Commissioners may rely on the relevant UNCITRAL Rules for guidance". See considering the role of the UNCITRAL Rules in this field: Karl-Heinz BÖCKSTIEGEL, The Role of Arbitration within Today´s Challenges to the World Community and to International Law. Arbitration International, 2006, vol.22, nº2, p.170.

This paper will focus on one of the further development in the rules in relation with the role that institutions might have in arbitrations under the 2010 UNCITRAL Arbitration Rules[13]. Without doubt, the Rules "have strongly contributed to the development of the arbitration activities of many arbitral institutions in all parts of the world", as recognized by the 2012 UNCITRAL Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the 2010 UNCITRAL Arbitration Rules[14] (hereinafter 2012 UNCITRAL Recommendations). The Recommendations consider the different uses that institutions, and other interested bodies, including chambers of commerce and trade associations, might adopt in relation with the Rules[15]:

"a) They have served as a model for institutions drafting their own arbitration rules. The degree to which the UNCITRAL Arbitration Rules have been used as a drafting model ranges from inspiration to full adoption of the Rules;
b) Institutions have offered to administer disputes under the UNCITRAL Arbitration Rules or to render administrative services in *ad hoc* arbitrations under the Rules;
c) An institution (or a person) may be requested to act as appointing authority, as provided for under the UNCITRAL Arbitration Rules".

Due to the different roles that the institutions may play in arbitration proceedings under UAR, it is recommended that the institution makes a clear distinction and separation of the different services offered –as well as their costs[16]- in their rules or statutes in terms of transparency and certainty for the users of arbitration[17]:

- Administration of arbitral proceedings under its own rules.
- Administration of arbitral proceedings under UAR, which as it will be consider should include also the appointment of arbitrators.

13 A distinct but related aspect could be the role that the institutions and its rules played as a guide or suource of inspiration on the new 2010 UAR, but this is another story to be dealt with in a different article.
14 2012 UNCITRAL Recommendations, nº1.
15 2012 UNCITRAL Recommendations, nº6.
16 2012 UNCITRAL Recommendations, nº25.
17 As partially recognized by the 2012 UNCITRAL Recommendations, nº22: "It is further recommended that (a) The administrative procedures of the institution distinguish clearly between the functions of an appointing authority as envisaged under the UNCITRAL Arbitration Rules (see section D below) and other full or partial administrative assistance, and the institution should declare whether it is offering both or only one of these types of services; (b) An institution which is prepared either to fully administer a case under the UNCITRAL Arbitration Rules or to provide certain administrative services of a technical and secretarial nature describe in its administrative procedures the services offered; such services may be rendered upon request of the parties or the arbitral tribunal".
This is not always the case as we will be seen in this paper.

- Role as appointing authority in *ad hoc* arbitration proceedings under UAR or in other *ad hoc* arbitrations or even in other institutional arbitrations. To this role, it might be added some administrative services.
- Role as a provider of certain/partial administrative services in ad hoc proceedings under UAR or in institutional arbitrations. The latter situation is not expressly foreseen in the 2012 Recommendations but it is a service offered by some institutions[18].

In relation with the role of the institutions under the 1976 and 2010 UAR, a further evolvement is seen: the appointing authority and the designating authority have assumed more control over the arbitration process. This is due to the fact that since the adoption of the Rules in 1976, a rapid increase in the use of the Rules by institutions and also the practice by the parties to use the Rules with an institution administering them is being observed. In fact, several institutions did adopt procedures to fulfil that role under UAR (1976) and some either has just changed them to be in line with UAR (2010), or are in the process of creating new procedures for adopting them.

Finally, to avoid confusion, it is worth mentioning that neither UNCITRAL nor its Secretary function as appointing authorities. UNCITRAL is not an arbitral institution either. Therefore, it does not provide for the administration of the procedure or administrative services in relation with arbitration proceedings[19],

18 In this situation, the petitioner of the service might be the parties, the arbitrators or even another institution, for example, The PCA "offers hearing facilities at the Peace Palace and ancillary administrative services to tribunals operating ad-hoc or under the auspices of another institution". And Hong-Kong International Arbitration Center (HKIAC) in the answer to question 19 it states that: "Arbitrations may be held at the HKIAC even if administered by another arbitration institute, or if they are not institutionally administered".

19 This kind of mistake seems to be frequent and so UNCITRAL has needed to make an explanation on its web site on three ocassions in the same page. See on the following terms: "Consequently, UNCITRAL does not offer legal advice in specific disputes, and, in particular, does not nominate arbitrators, administer arbitrations, certify arbitral authorities, or recommend any legal practitioner for legal assistance"; "it is not within UNCITRAL's mandate, as set out by the General Assembly, to become involved in individual cases. UNCITRAL and its Secretariat do not act as an arbitral tribunal, administer arbitration proceedings, or otherwise perform any function related to individual arbitration proceedings, or any other system of public or private dispute settlement"; and finally: "it is beyond its mandate, and is indeed inappropriate for UNCITRAL, the Secretariat, or individual legal officers to offer advice regarding the interpretation of provisions of UNCITRAL texts or to otherwise offer legal advice. In particular, UNCITRAL does not administer arbitration or conciliation proceedings, nor does it provide services to public entities or private parties in connection with dispute settlement proceedings. Furthermore, UNCITRAL does not keep any list of potential arbitrators or conciliators, nor act as appointing authority under the UNCITRAL arbitration and conciliation rules".
But see the confusion derived from Article X.2 of The *Agreement among the Government of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of Philippines, The Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investmens*, 15 December 1987 (ASEAN Agreement): "If such a dispute cannot thus be settled within six months of its being raised, then either party can elect to submit the dispute for conciliation or arbitration and such election shall be binding on the other party. The

although recently a more active role in the involvement of UNCITRAL in the administration of the process is observed as a repository in investment-state arbitration under the 2014 UNCITRAL Transparency Rules[20].

II. The choice of the parties: *ad hoc* v. institutional arbitration. Limitations of party autonomy

There is no international uniform definition of these types of arbitration. Art.2 a) UNCITRAL Model Law on International Commercial Arbitration (1985) (MAL) considers for the purposes of this Law that:

> *a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution*[21].

Although the term *ad hoc* is not mentioned, from Art.2 a) MAL it is implied that there are two types of arbitration: one which is administered by a permanent arbitral institution (administered arbitration)[22], also named as institutional arbitration[23], and the other type which derives from the negative characterization of the former, i.e., an arbitration not administered by a permanent arbitral

dispute may be brought before the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN, whichever body the parties to the dispute mutually agree to appoint for the purposes of Conducting the arbitration".

20 See Art.8 (Repository of published information) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014): "The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL". The text expressly considers in Art.1.9 that "These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in *ad hoc* proceedings". Here the distinction lies between arbitrations subject to UAR and purely *ad hoc* proceedings.

21 The same definition is found in some arbitration laws that follows MAL, for example, section 2.1 Hong-Kong Arbitration Ordinance, 2011. For that purpose, HKIAC has issued the Arbitration (Appointment of Arbitrators and Umpires) Rules with the approval of the Chief of Justice as provided for in sections 24 and 30 of the Ordinance. Also, section 2.1 Mauritius International Commercial Arbitration Act (2008). See: similarly UNCITRAL Notes on Organizing Arbitral Procedings, 1996, note 1 (hereinafter UNCITRAL Notes).

22 Usually used interchangeable: for example: SANDERS, nº2.4; José María ABASCAL ZAMORA, Arbitraje institucional y Arbitraje ad hoc. El Financiero, 24 agosto 1994, p.6; and Julio TREVIÑO, El arbitraje comercial internacional de tipo ad hoc e institucional y el arbitraje de la Cámara de Comercio Internacional. Revista mexicana de derecho internacional privado: Academia Mexicana de Derecho Internacional Privado y Comparado (México, D.F.) octubre 1996, p.57.

23 Some authors considers that institutional arbitration is "a form of administered arbitration", although no explanation is made. See: SCHÜTZE, Introduction. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº1.

institution that we will refer to as *ad hoc*, following an universal name of this type of arbitration[24].

The main criteria to distinguish between *ad hoc* and institutional arbitration is derived from the definition in Art.2 a) MAL[25]. In administered arbitration or institutional arbitration the arbitral proceeding is administered not by the parties themselves but by a third party, an arbitral institution that functions permanently[26]. This wide definition was the result of the difficulties encountered when drafting the Model Law to find a more precise definition to distinguish both types of arbitration[27].

One of the choices to be made by the parties –usually when agreeing to arbitrate or afterwards[28]– is the type of arbitration, whether an *ad hoc* procedure or an arbitration administered by an arbitral institution[29]. Usually, parties in international arbitration will have a complete freedom of choice.

According to some statistics, institutional arbitration is the preferred option in commercial arbitration, less so in investment arbitration where an increase tendency in favor of *ad hoc* arbitration under UNCITRAL Arbitration Rules is seen[30]. Even

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24 Usually the commentators when referring to Art.2 a) MAL considers both *ad hoc* and institutional arbitration: Peter BINDER, International commercial arbitration and conciliation in UNCITRAL Model Law jurisdictions, 2010, nº1-047 referring to Art.2 a) MAL: "Thus, it applies to pure ad hoc arbitration and to any type of administered or institutional arbitration". And Houchih KUO, Refusal of a Taiwanese Court to recognize *ad hoc* arbitration: Implications and the future of ad hoc arbitration in Taiwan. 2012 Asian DR, p.59.

25 MAL refers indirectly to institutional arbitration in Art.2 e) to state a general rule for interpretation considering that "when where a provision of this Law, except article 28, 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".

26 Similarly The European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961 states in art.2 b) that the term "arbitration" shall mean not only settlement by arbitrators appointed for each case (*ad hoc* arbitration) but also by permanent arbitral institutions.

27 Vid. Syed AHMAD IDID, Ad hoc Arbitration versus Institutional Arbitration. The Law Review, 2006, p.245.

28 In practice, it is observed that it is not exceptional the situation where the parties agree on a set of arbitration rules either before or after the constitution of the arbitral tribunal: A/CN.9/826, nº47.

29 IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010, Guideline 1: "The parties should decide between institutional and *ad hoc* arbitration".

30 Vid. *International Arbitration Survey* (2010), *Choices in International Arbitration*. See also: *International Arbitration: Corporate Attitudes and Practices, 2008*, Price Waterhouse Coopers (PWC) and The School of International Arbitration de la Universidad de Queen Mary, p.7, where it is stated that in investment arbitration *ad hoc* proceedings amount up to 33%, and thus 67% opts for institutional arbitration. In relation with international commercial arbitration, the study reveals that 86% of the arbitration awards were rendered in institutional arbitratio, while only 14% were *ad hoc* arbitrations, being the result consistent with those analyzed in 2006 (id., p.8). Similarly James CASTELLO, UNCITRAL Arbitration Rules (2010) and UNCITRAL Rules on Transparency in Treaty-Based Investor State Arbitration (2013). General Editors: Mistelis/Shore/Ribeiro/Brekoulakis. Arbitration Rules. International Institution. Guides to International Arbitration. Juris, 2014, Nº4, 3rd edition, Uncit 5, refers that as of the end of 2013, aproximately 28% of all arbitrations initiated under investment treaties were governed by UAR.

some authors have considered that in commercial arbitration a change in favor of *ad hoc* arbitration is observed[31].

In terms of the advantages and disadvantages of *ad hoc* arbitration as compared to institutional arbitration, it depends upon the point of view of the scholars. However, rather than observing the choice from a positive or negative angle, a practical approach would pay attention to the different features that are present in *ad hoc* arbitration as compared to institutional arbitration to determine which of the two suits better the specific needs of the parties and their dispute.

Broadly speaking, institutional arbitration is probably a better option for the parties and/or the counsels who do not have experience in dealing with international arbitration[32] since they can count on with the assistance of the arbitral institution and its personnel, as well as with a set of arbitration rules administe-

31 The reason is the increasing popularity of arbitration as a method for solving disputes: the more the parties known and use arbitration, less useful is the institution. See: C. Mark BAKER/Efrén C. OLIVARES, *Ad hoc* International Arbitrations- The Way of the Future?. Liber Amicorum Abascal Part I. World Arbitration & Mediation Review, 2012, vol.6, nº1, p.35.

A preference for *ad hoc* arbitration is also observed in some countries such as Peru where *ad hoc* arbitrations amount to no less than 65% of the total number of arbitrations Peru. See: Carlos RUSKA MAGUIÑA, Arbitraje Ad hoc o Arbitraje Administrado. El Rol de las Instituciones Arbitrales en El Perú. El Arbitraje en Perú y el mundo. Director: Carlos Soto. Instituto Peruano de Arbitraje, 2008, p.91. And also in some Bilateral Trade Agreements (BTA), like the BTA between USA and Viet nam, where it does not only encourage the parties to submit disputes to arbitration but also to *ad hoc* arbitration under The UNCITRAL Arbitration Rules. See for example: Article 7 (Commercial Disputes):

"2. The parties encourage the adoption of arbitration for the settlement of disputes arising out of commercial transactions concluded between nationals or companies of the United States of America and nationals or companies of the Socialist Republic of Vietnam. Such arbitration may be provided for by agreements in contracts between such nationals and companies, or in a separate written agreement between them.

3. The parties to such transactions may provide for arbitration under any internationally recognized arbitration rules, including the UNCITRAL Rules of December 15, 1976, and any modifications thereto, in which case the parties should designate an Appointing Authority under said rules in a country other than USA or Vietnam.

4. The parties to the dispute, unless otherwise agreed between them, should specify as the place of arbitration a country other than USA or Vietnam, that is a party to the New York Convention.

5. Nothing in this Article shall be construed to prevent, and the parties shall not prohibit, the parties from agreeing upon any other form of arbitration or on the law to be applied in such arbitration, or other form of dispute settlement which they mutually prefer and agree best suits their particular needs.

6. Each party shall ensure that an effective means exists within its territory for the recognition and enforcement of arbitral awards".

According to the above mentioned BTA, "commercial dispute" means a dispute between parties to a commercial transaction which arises out of that transaction.

32 It is common place to refer to the advantages of institutional arbitration as compared with *ad hoc* arbitration. See, among many scholars: Nassib G. ZIADÉ, Reflections on the Role of Institutional Arbitration Between the Present and the Future. Arbitration International, 2009, vol.25, nº3, pp.427-430; Ramón MULLERAT, Ventajas e inconvenientes del arbitraje institucional. In Liber Amicorum Bernardo Cremades. Editores: Miguel Ángel Fernández-Ballester/David Arias. Madrid: La Ley, 2010, pp.867-872; and Robert COULSON, Practical advantages of administered arbitration: institutional vs ad hoc arbitration. World Arbitration and Mediation Report, 1993, pp.19-20, particularly comparing institutional arbitration with the *ad hoc* system under UAR.

red with a certain degree of experience and by professionals of the institution; an arbitration center that might also offer other related services to the parties[33].

On the other hand, for more sophisticated players who also want to keep strict confidentiality of the case, and want to retain full control of the arbitration proceedings, *ad hoc* arbitration is a better option because the parties have the freedom and flexibility to organize a tailored-made proceeding. It is also a good option when a State is part of the arbitration.

Despite the general principle of the freedom of the parties to choose the type of arbitration, certain limitations might be derived from the applicable law –generally, the law of the seat of the arbitration–, which might impose certain restrictions upon that choice.

Under some arbitration laws *ad hoc* proceedings are either forbidden in relation with certain kind of disputes, such as corporate disputes[34], or they are not expressly recognized[35], and thus in the first case only institutional arbitration is possible, and in the second an *ad hoc* arbitration award is no a "arbitral award" in the sense of the arbitration act because it was not made by an arbitral tribunal belonging to an institution whose establishment had been duly approved by Statute.

Similarly, in investment arbitration, although in very few cases, the investment Treaty might not have foreseen *ad hoc* arbitration as one of the possible options for the investor[36]. This would not usually be the case since most of the

33 See also comment 5 IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010 "Institutional arbitration may be beneficial for parties with little experience in international arbitration. The institution may contribute significant procedural 'know how' that helps the arbitration run effectively, and may even be able to assist when the parties have failed to anticipate something when drafting their arbitration clause. The services provided by an arbitral institution are often worth the relatively low administrative fee charged".

34 See Art.11 bis 3 Spanish Arbitration Act (2003, as amended in 2011): "A company's Articles of association may provide that any challenge to corporate resolutions by members or directors shall be subject to the decision of one or more arbitrators, designating an arbitration institution to administer the arbitration proceedings and appoint of the arbitrator(s)".

A similar situation in Italy: Art.34.2 Legislative Decree of 17 January 2003, nº5 (D.Lgs. n. 5/2003) that states that all the arbitrators ought to be appointed by a third party, otherwise the arbitration agreement is considered null. See a recent commentary of both Spanish and Italian Corporate Law by several scholars at the Law Review: *Giurisprudenza Italiana* - Giugno 2014, pp.1522-1544. As considered by Italian scholars: the parties are encouraged to choose institutional arbitration (see Eugenio DALMOTTO, Profili processuali dell'arbitrato societario in Italia, *Giurisprudenza Italiana* - Giugno 2014, p.1529).

By contrast no such limitation exists in other countries. For example, The Mauritius International Arbitration Act (2008) considers corporate arbitration in Art.3(6) and provides a Model Arbitration Clause (for GBL Companies) contained in the Second Schedule of the Act whereby it is clear the choice for *ad hoc* arbitration: "The arbitration shall be conducted pursuant to the Rules of [name of institution]. Where no institution is chosen, the arbitration shall be conducted pursuant to the rules set out in the Act".

35 For example, the failure in the Arbitration Act of the PR China (1998) to adopt the definition of arbitration in Art.2 a) MAL was seen in the *Jin Cheng Feng* decision as a refusal of a Taiwanese Court to recognized *ad hoc* arbitration. See: KUO, p.60.

36 For example: see Art.8 of the BIT between Korea and Viet Nam.

bilateral and multilateral investment treaties grant the investors the option of an *ad hoc* arbitration under The UNCITRAL Arbitration Rules.

If the arbitration agreement is silent on this choice[37], the option is for *ad hoc* arbitration[38] unless otherwise provided by the applicable Law. Generally, arbitration laws do not estipulate which one has the default role. This derives from the difficulty to decide among the various institutions that offer their arbitration services which one should have a default position.

However, the applicable Law might provide a default solution:

a) Institutional arbitration: Art.3 of The Inter-American Convention on International Commercial Arbitration (Panama Convention), 30th June 1975 that states: "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission" (CIAC). The CIAC has adopted as administered rules the 1976 UNCITRAL Arbitration Rules. Therefore the default position is for a institutional arbitration.
b) *Ad hoc* arbitration: Panama and Peru Arbitration Acts[39].
c) A different approach is seen in other legal texts where it is up to a third party to decide how to fill this gap and thus the type of arbitration[40].

37 We are not dealing with pathological clauses in this paper. But indeed if the parties refer to an institution although not to its rules the presumption is that the institution will administer the proceedings in accordance with its Rules. This is so recognized in Art.10 OHADA Uniform Act on Arbitration: "Except where the parties expressly exclude the application of certain provisions of the arbitration rules of an institution, submission to this arbitration institution shall bind them to apply the arbitration rules of such institution".

38 Also: LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration. Kluwer Law International, 2003, nº3-5.

39 Art.12 Panama Law on International and Commercial Arbitration, 8th January 2012: "En caso de falta de designación de una institución arbitral, se entenderá que el arbitraje es *ad hoc*". And also Art.7.3 Perú Arbitration Act (2008), where it also states that ad hoc arbitration is the solution when: "La misma regla se aplica cuando exista designación que sea incompatible o contradictoria entre dos o más instituciones, o cuando se haga referencia a una institución arbitral inexistente, o cuando la institución no acepte el encargo, salvo pacto distinto de las partes".

40 The European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961, Art.IV.6. "Where the arbitration agreement does not specify the mode of arbitration (arbitration by a permanent arbitral institution or an ad hoc arbitration) to which the parties have agreed to submit their dispute, and where the parties cannot agree thereon, the claimant shall be entitled to have recourse in this case to the procedure referred to in paragraph 3 to determine the question. The President of the competent Chamber of Commerce or the Special Committee, shall be entitled either to refer the parties to a permanent arbitral institution or to request the parties to appoint their arbitrator within such time-limits as the President of the competent Chamber of Commerce or the Special Committee may have fixed and to agree within such time-limits on the necessary measures for the functioning of the arbitration. In the latter case, the provisions of paragraphs 2, 3 and 4 of this Article shall apply".

Ad hoc arbitration is also the solution when the choice of an arbitral institution has a certain pathology that might not be resolved[41] and thus the institutional choice in the arbitration agreement ought to be considered invalid. This does not necessarily mean that the arbitration agreement is null. On the contrary, the consent of the parties to arbitrate, which is an essential element of the arbitration agreement, prevails and thus an *ad hoc* arbitration should be the result[42].

III. Are *ad hoc* arbitrations under the UNCITRAL Arbitration Rules a third type of arbitration?

The distinction between *ad hoc* v. institutional arbitration is the normal division found in scholarly writings[43] as well as in many legal arbitration systems, including the NYC[44] and even the recommended distinction for the parties´ choice[45]. As considered previously, for the MAL, the fundamental distinction is the administration of the arbitral proceedings by a permanent arbitral institution.

Although it is not always necessary to draw the line between those two types of arbitration (*ad hoc* v. institutional), there are some situations where it is mandatory to do so. Here the problem is how to characterize *ad hoc* arbitration clauses where the intervention of an institution is foreseen (either because the institution appoints the arbitrators and/or because the institution renders some administrative services)[46] or an *ad hoc* arbitration where a set of rules, UAR, is agreed by the parties. Is this an institutional arbitration or a third type of arbitration as it has been suggested by some scholars?.

41 There are some room to fill this gap. For example, The European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961, states in Art.IV.5 that "Where the parties have agreed to submit their disputes to a permanent arbitral institution without determining the institution in question and cannot agree thereon, the claimant may request the determination of such institution in conformity with the procedure referred to in paragraph 3 above".

42 An example of this is the case decided by the Tribunal of First Instance (Paris), 22 January 2010) where the arbitration agreement considered the ICC as the arbitration centre but eliminating two important features of the ICC Rules: the confirmation of the arbitrators (Art.13 ICC Arbitration Rules, 2012) and the revision of the award (Art.33). The ICC refused to administer the procedure unless the parties withdraw those limitations that was refused. The Paris Court considered that a valid *ad hoc* arbitration agreement was concluded and that the ICC was the appointing authority.

43 *Inter alia*: LEW/MISTELIS/KRÖLL, n°3-4; REDFERN/HUNTER, Law and Practice of International Commercial Arbitration. Thomson/Sweet and Maxwell, 2004, n°1-97; ABASCAL, p.5; and TREVIÑO, p.52.

44 Art.I.2 NYC although with a somehow old fashion language: "The term arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted".

45 IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010, Guideline 1.

46 Note that they can be different institutions. One appoints the arbitrators and the other rent the rooms for the hearings, for example.

There are two issues to be discussed. The first is whether the existence of a set of arbitration rules is an essential element for the distinction between *ad hoc* arbitrations and institutional arbitration (*infra* 3.1) The second is whether the special role given under UAR to the appointing authority implies that we are in the presence of a third type of arbitration (*infra* 3.2).

3.1. Arbitration rules are not essential for the distinction between *ad hoc* and institutional arbitration

The arbitration rules have the important function to interpret and integrate the agreement of the parties to arbitrate[47]. They provide a regulatory but a flexible framework directing the parties and the arbitrators "to act in a particular way"[48]. Furthermore, some arbitration laws even stipulate the specific matters to be covered by institutional arbitration rules[49]. Among those functions, the rendering of the award is not included as this is an exclusive role of the arbitrators and not the arbitral institutions[50].

Thus, critical in institutional arbitration is the functional separation and independence between the role of the administration of the proceedings and the issuance of the award[51]. Therefore, the merger of both functions that are seen in certain arbitration systems should be avoided in order to draw a clear cut between *ad hoc* and institutional arbitration. The separation of roles reinforces the main criteria for the distinction that lies in the administration of the proce-

47 Art. 2d) MAL. See also, for example, Arts. art.4 a) y b) Spanish Arbitration Act that states:
"When a provision of this Act:
a) Allows the parties the freedom to decide on a certain issue, such freedom includes the right of the parties to authorize a third party, including an arbitration institution, to take such decision, except in the case set forth in Article 34.
b) Refers to the arbitration agreement or to any other agreement between the parties, it shall be deemed to include the provisions of the arbitration rules to which the parties have submitted".
Similarly Art.1657 Civil and Commercial Code of Argentina (2014, but it will entry into force on the 1st January 2016) states that the arbitration rules agreed by the parties integrate the arbitration contract.

48 Note 3 UNCITRAL Notes.

49 See for example: Articles 39 and 40 of the Law of Arbitration and Mediation of Ecuador (1997); and Arts.13 and 14 Venezuela Commercial Arbitration Law (1998).

50 See comment 4 to IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010 when referring to institutional arbitration: "The institution does not decide the merits of the parties' dispute, however. This is left entirely to the arbitrators".

51 Art.1.2 ICC Arbitration Rules (2012): "The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals in accordance with the Rules of Arbitration of the ICC". See also, Appendix I (Organisation), Article 2 of the SCC (Stockholm Chamber of Commerce) Arbitration Rules (2010): "The SCC does not itself decide disputes".

dure: whether done by an arbitral institution (institutional arbitration) or by the arbitrators themselves (*ad hoc*).

The question that follows is whether the existence of a set of arbitration rules is an essential feature to distinguish between *ad hoc* and institutional arbitration. The answer is negative. Art.2 e) MAL considers the possible agreement of the parties to any arbitration rules, including both institutional arbitration rules as well as *ad hoc* arbitration rules, like UAR[52].

Although, a set of arbitration rules is an essential element for an arbitral institution, even required by some arbitration laws[53], is not crucial for the distinction between *ad hoc* and institutional arbitration[54] as proven by the fact that the parties in *ad hoc* proceedings might agree on a set of arbitration rules (i.e., the UNCITRAL Arbitration Rules[55], which are the rules to be recommended for *ad hoc* arbitrations[56]), or just design their own specific rules to follow. Leaving aside that the design of specific *ad hoc* rules might be problematic since certain pathologies might complicate the proceedings, what it is important to stress now is that *ad hoc* arbitration remains as such notwithstanding the express inclusion

52 See BINDER, nº1-057.

53 Art.14.2 Spanish Arbitration Act: "Arbitration institutions shall exercise their duties in accordance with their own rules". Art.12 Panama International and domestic commercial arbitration Law (8th January 2014) in fine: "Las instituciones de arbitraje nacionales y extranjeras ejercerán sus funciones conforme a sus propios reglamentos"; Art.40 Ecuador Arbitration Law and Art.13 Venezuela Arbitration Law.

54 See also: IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010, Guideline 2 in connection with Guideline 1: "Guideline 1: The parties should decide between institutional and *ad hoc* arbitration. Guideline 2: The parties should select a set of arbitration rules and use the model clause recommended for these arbitration rules as a starting point".
The European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961 seems to focus on a set of arbitration rules as a distinctive element between ad hoc and institutional arbitration. To this regard, Art.IV.1 states that "The parties to an arbitration agreement shall be free to submit their disputes: (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution, as opposed to ad hoc where, in conformity with paragraph 2, iii) "the parties are free to lay down the procedure to be followed by the arbitrators". Note, first, that at that time the UAR were not in existence and, second, that the freedom of the parties to lay down the procedure to be followed by the arbitrators (Art.19.1 MAL) is also fulfilled when choosing a set of arbitration rules.

55 This is expressly recognized for example in the Preamble (II) of the Spanish Arbitration Act: "the parties may submit to a specific regulation without entrusting a particular institution with administering the arbitration, in which case the arbitration regulations are also included in the parties' will". Some Spanish scholars consider this arbitration as a third type with the name of "arbitraje reglamentado" (Manuel OLIVENCIA, Artículo 4. En Comentarios a la Ley de Arbitraje. Ley 60/2003, de 23 de diciembre. Julio González Soria (coordinador). Aranzadi-Thomson Reuters, 2011, 2ª ed., p.79). Rightly critizing that it is not a third type but an *ad hoc* arbitration: José María ALONSO PUIG, El arbitraje institucional (artículo 14). Comentarios a la Ley de Arbitraje. Coordinadores: Alberto de Martín Muñoz y Santiago Hierro Anibarro. Madrid, Barcelona: Marcial Pons, 2006, p.685. See generally: Frederic MUNNÉ CATARINA, La Administración del Arbitraje. Instituciones Arbitrales y Procedimiento Prearbitral. Aranzadi, 2002.

56 In fact they have been recognized as such by Comment 9 to IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010. UAR are the only set of arbitration rules mentioned in regard to *ad hoc* arbitration in those Guidelines.

of UAR. Therefore, the agreement of the parties on an *ad hoc* arbitration under UAR does not change the type of arbitration and it is still an *ad hoc* arbitration[57].

The Secretariat´s commentary to MAL seems to refer also in its comments to Chapter III (Composition of the arbitral tribunal) to the distinction between *ad hoc* and institutional arbitration in terms of the use of a set of arbitration rules: "the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an *ad hoc* agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice". However, from our point of view, the comments of the UNCITRAL Secretariat should be understood not so much as to the differences between *ad hoc* and institutional arbitration based upon the existence of arbitration rules, but more in terms of the freedom of the parties in all kind of arbitrations to design the rules of procedure. This freedom is exercised by the parties when they choose a set of arbitration rules.

Although it is not the object of this paper, it is worth mentioning another possible situation that arises in practice, although is neither common nor desirable[58]: agreement of the parties to have an institution to administer the case under the set of rules of another arbitral institution[59]. For example, if the Madrid Court of Arbitration (CAM) were to agree to administer an arbitration proceeding under the ICC Arbitration Rules. In this case, an institutional arbitration would have been agreed by the parties, but *colloquially speaking* it would not be "an ICC arbitration" but a CAM arbitration that functions as administrator of the case under the set of arbitration rules agreed by the parties (ICC Arbitration Rules)[60].

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57 See also: ABASCAL ZAMORA, p.5; and TREVIÑO, pp.52-53, both also considering that UNCITRAL is not an arbitral institution. This is not however the key issue for the discussion but whether or not the roles of the appointing authority or the designating authority changes an *ad hoc* arbitration into an institutional one. Impliedly: LEW/MISTELIS/KRÖLL, nº3-11.

58 Comment 9 IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010: "When the parties have opted for institutional arbitration, the choice of arbitration rules should always coincide with that of the arbitral institution". Note the use of the imperative "should".
See also the recent discussion at UNCITRAL when revising the UNCITRAL Notes: "It was considered whether the Notes ought to mention the option of utilizing institutional rules without the arbitration being administered by that institution. It was said that such an approach must be treated with caution as such practice often led to confusion, delays and costs": See A/CN.9/826, nº45.

59 As foreseen by several arbitral institutions, for example, CRICA (Cairo Reginal Center for International Commercial Arbitration) that provides for institutional arbitration services according to its Rules or any other rules agreed upon by the parties (Arbitration Rules, 2011, p.9) or by HKIAC, as provided, for example, in somehow an unusual place: in the Q&A section, in the answer to question 18 "Parties to arbitrations heard at or administered by the HKIAC are free to choose the procedural rules for their arbitrations" or in its Practice Note on the Challenge of an Arbitrator, 1st November 2013: A challenge to an arbitrator (the "Challenged Arbitrator") 1. "…under the HKIAC Administered Arbitration Rules (the "Rules") or in an arbitration administered by HKIAC…".

60 Art.3 CAM Statutes: "The Court will administer the arbitration according to the provision of its Rules, unless expressly agreed otherwise by the parties, which will require the express approval of the Court".

3.2. The special role of the appointing authority under the UNCITRAL Arbitration Rules

a) The role of the appointing authority under UAR

Since in *ad hoc* proceedings there is no institution supporting the parties that administers the case, the UNCITRAL Rules design a system to help the parties when they are not able to agree on certain matters during the proceedings and particularly before the arbitral tribunal has been constituted, which includes also the moment of the nomination of the arbitrators. To this purpose the parties might be assisted during the proceedings by the so called appointing authority.

The UNCITRAL Rules encourages the parties for an early nomination of that authority, and so it is included as the first choice of the parties within its arbitration clause[61]. This is a recommended step in terms of efficiency and economy[62]. Of course, the agreement on the appointing authority can come at a later stage either at the very beginning of the arbitration when the notification and the reply to it (Arts.3.4 a) and 4.2 b) UAR that consider the nomination of an appointing authority as one of the proposals to be made by the parties) or at any later point in time (Art.6.1 UAR)[63].

This is without prejudice of the desire of some institutions to preserve their Rules only when administering by them. For example, Art.1.2 ICC Arbitration Rules (2012): "(…) The Court is the only body authorized to administer arbitrations under the Rules, including the scrutinity and approval of awards rendered in accordance with the Rules".

From our point of view, although the example considered is not a desirable situation, it is perfectly valid and so we disagree with the authors that have considered that this situation may be subject to challenge or being unenforceable on the ground foresee in Art.34.2 a) and 36.1 a) MAL. See: REINER/ASCHAUER, ICC Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº28, although we agree with them that it will not be an "ICC Arbitration".

61 See also IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010, Guideline 6 "(…) when *ad hoc* arbitration is chosen, should select an appointing authority", and Comments 9 and 32. In Comments 32 some important advice is giving to the parties: "The appointing authority may be an arbitral institution, a court, a trade or professional association, or another neutral entity. The parties should select an office or title (e.g., the president of an arbitral institution, the chief judge of a court, or the chair of a trade or professional association) rather than an individual (as such individual may be unable to act when called upon to do so). The parties should also make sure that the selected authority will agree to perform its duties if and when called upon to do so".

62 Badrinath SRINIVASAN, UNCITRAL Arbitration Rules 2010: a review. Christ University Law Journal, 2013, nº2, p.131; and James CASTELLO, Unveiling the 2010 UNCITRAL Arbitration Rules, Dispute resolution journal (New York), 2010, vol.65, nº2-3, p.6.

63 Note, as considered by Sarah GRIMMER, The expanded role of the appointing authority under the UNCITRAL Arbitration Rules 2010. Journal of International Arbitration, 2011, vol.28, nº5, p.502 that: "The new Rules do not require a default to have occurred before a party can request that an appointing authority be designated. This means that a party can ensure that an appointing authority is in place and ready to act from very early on in a case. This eliminates the delay that occurs under the 1976 Rules due to the fact that the party wishing to advance the case must wait for the other side to default on a time limit before it can begin the process of having an appointing authority designated".

Arbitral institutions are, of course, perfectly apt to develop this function as an appointing authority[64]. Following the principle of transparency and certainty, the 2012 Recommendations, nº29 advises generally that: "An institution that is willing to act as appointing authority under the UNCITRAL Arbitration Rules may indicate in its administrative procedures the various functions of an appointing authority envisaged by the Rules. It may also describe the manner in which it intends to perform these functions".

The 2012 Recommendations, nº30 also summarizes the functions that an appointing authority develops under UAR and further give some advice to the institutions. Those six main functions are:

"a) appointment of arbitrators[65];
b decisions on the challenge of arbitrators[66];
c) replacement of arbitrators;
d) assistance in fixing the fees of arbitrators[67];
e) participation in the review mechanism on the costs and fees; and
f) advisory comments regarding deposits[68]".

Under the 1976 Rules, the appointing authority's role was limited to: appointing arbitrators, deciding challenges to arbitrators, providing guidance to tribunals with respect to the amount of their fees, and consulting with tribunals on the amount of deposit payments[69].

If the parties do not agree on the appointing authority, the UNCITRAL Arbitration Rules provides that the Secretary-General of the PCA would designate the appointing authority[70], and now under the 2010 Arbitration Rules it is expressly recognized that the Secretary-General of the PCA could be the appointing authority itself if the parties so agree (art.6.1 UAR)[71]. During the

64 Also 2012 UNCITRAL Recommendations, nº28.

65 2012 UNCITRAL Recommendations, nº48.

66 2012 UNCITRAL Recommendations, nº50.

67 2012 UNCITRAL Recommendations, nº56.

68 2012 UNCITRAL Recommendations, nº62.

69 GRIMMER, The expanded role, p.501.

70 A/CN.9/634: "UNCITRAL Arbitration Rules: Report of the Secretary-General of the Permanent Court of Arbitration on its activities under the UNCITRAL Arbitration Rules since 1976", nº7-10 summarizes the procedure followed by the PCA to designate the appointing authority.

71 In other *ad hoc* proceedings, absent an institution that administer the case, the role of appointing authority when the parties cannot agree or one of them is in default is assumed by:
-The national competent Court: Art.15 Spanish Arbitration Act; Section 1035.3 German Arbitration Act (1998); Art.18 English Arbitration Act (1996); Arts.1452 and 1453 French Code of Civil Procedure; Article 1026.4

discussion of UAR, there was a proposal to have the PCA automatically as the appointing authority but this was rejected[72].

b) Institutions that act as appointing authority under UAR

An institution acting as appointing authority under UAR is by far the function that arbitral institutions do more often in practice. Many institutions provide this service as appointing authorities, either generally by referring to any *ad hoc* arbitration, such as CAM[73] or SIAC[74], or specifically in relation to UAR, in their rules or in the offer of their services to the parties.

Dutch Arbitration Act; and Art.IV.2 of The European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961.

-Generally by an arbitral institution, domestic or international, when required by one of the parties: Art.22 Panama International and domestic commercial arbitration law, 8th January 2014: "la designación será hecha, a petición de una de las partes, por una institución de arbitraje, nacional o internacional, de acuerdo con sus propios reglamentos"; this institution is also the default one in cases of challenges of arbitrators, Art.27; failure or impossibility to act of the arbitrator, Art.28.

-A specific arbitration center: Hong-Kong Arbitration Ordinance, 2011, section 13 gives that role to HKIAC; section 12 Mauritius International Arbitration Act (2008) gives it to the PCA (The Secretary-General), that also acts when the institution fails to do the appointment as considered in paragraphs 3 and 4 of the same section. Interesting to note is that section 18.2 of the said Law gives to the PCA a similar function to the one contemplated under Art.41.4 c) UAR. The Malaysian Arbitration Act has positioned the KLRCA as the appointing authority in several circumstances: Syed AHMAD IDID, Use of the UNCITRAL Arbitration Rules at Arbitral Institutions by Arbitral Institutions: The Case of Malaysia. Journal of International Arbitration, 2007, vol.24, nº1, pp.45-46; Art.23 e) Peru Arbitration Act (2008) when the arbitration is international considers as appointing authority the Chamber of Commerce of the place of arbitration or if not place has been agreed by the Chamber of Commerce of Lima. See also Art.30.3 for the removal of the arbitrators; and section 8.2 Singapur International Arbitration Act: "The Chairman of the Singapore International Arbitration Centre shall be taken to have been specified as the authority competent to perform the functions under Article 11(3) and (4) of the Model Law".

72 See Sophie NAPPERT, Comments on the UNCITRAL Arbitration Rules 2010. A Practitioner´s Guide. Juris, 2012, p.30; and James CASTELLO, Plus ça change, plus c´este la même chose: Eight Revisions not adopted in the 2010 UNCITRAL Arbitration Rules. ASA Bulletin, 2010, vol.28, nº4, pp.855-857.

73 Madrid Court of Arbitration, Art.2 d) CAM Statutes: "The Court is responsible for "acting as a nominating authority in arbitration proceedings not subject to the Rules".

74 Although SIAC has a special regime for UAR administered by SIAC, it just generally refers to its role as appointing authority without mentioning *ad hoc* cases under UAR. See SIAC schedule of fees.

Among the institutions that expressly refer to the role of appointing authority under UAR are: PCA[75]; ICSID[76]; AAA[77]; SCAI[78]; SCC[79]; WIPO[80]; LCIA[81];

75 In the person of its Secretary-General. "In addition to the role of designating appointing authorities, the Secretary-General of the PCA will act as the appointing authority under the UNCITRAL Arbitration Rules when the parties so agree" (http://www.pca-cpa.org/showpage.asp?pag_id=1061). It is worth to mention that this role was assumed before the revision of the 2010 Arbitration Rules: see A/CN.9/634: "UNCITRAL Arbitration Rules: Report of the Secretary-General of the Permanent Court of Arbitration on its activities under the UNCITRAL Arbitration Rules since 1976", nº5: "Since the adoption of the Rules, the PCA Secretary-General has received requests to designate, or to act as, an appointing authority in over 270 cases… The most common request is for the designation of an appointing authority to appoint a second arbitrator on behalf of a defaulting respondent". See also: Sarah GRIMMER, The permanent court of arbitration and the Uncitral arbitration rules: current interaction and future prospectives. Documento de Trabajo. Serie Arbitraje Internacional y Resolución Alternativa de Controversias Número 5/2009, p.10.
Examples in which the Secretary General of the PCA was the appointing authority either in an *ad hoc* arbitration or under UAR are found at the web site of the PCA, for example: BIT between Australia and the Lao People's Democratic Republic, Apr. 6, 1994. Annex B. "(3) If (…) agreement has not been reached on a Chairman of the Tribunal, either party to the dispute may request the Secretary-General of the Permanent Court of Arbitration at The Hague to make the necessary appointment". The investor has the option of an special arbitral tribunal which according to (5) "The Arbitral Tribunal shall, subject to the provisions of any agreement between the parties to the dispute, determine its procedure by reference to the rules of procedure contained in the Arbitration Rules of the United Nations Commission on International Trade Law adopted by the United Nations General Assembly in its Resolution 31/98 of 15 December 1976". See also Articles 4.5 and 12.5 BIT between Bangladesh and the Government of the Islamic Republic of Iran, Apr. 29, 2001. In this case, the arbitration is conducted under UAR (see Articles 4.8 and 12.8).
See also Article VII, BIT between USA and The Russian Federation, 1992; Article VII.2, BIT between USA and Romania, 1992; Article 9 BIT between Swiss Confederation and Panama, 19th October 1983; and Art.11.4 BIT between France and Haiti, 23 May 1984.
76 Usually in the person of the Secretary-General under some BIT´s, for example, BIT between Mexico and China where the investor has the option of UNCITRAL Rules and the appointing authority is the Secretary-General of ICSID (Arts.13.3 and 15.3).
Also, https://icsid.worldbank.org, among the Dispute Settlement facilities offered are that the Secretary General acting as appointing authority under UAR.
77 American Arbitration Association Procedures for Cases under the UNCITRAL Arbitration Rules, as amended and effective 2005. The model clause offers the role of the AAA as the Appointing Authority, without Administrative Services.
78 Swiss Chambers' Arbitration Institution which has its own Rules: Rules of the Swiss Chambers' Arbitration Institution ("SCAI") as Appointing Authority in UNCITRAL or other Ad hoc Arbitration Proceedings. This is a new service offered by the institution since 1st August 2014.
79 The Arbitration Institute of the Stockolm Chamber of Commerce (SCC) Procedures and Services Under The UNCITRAL Arbitration Rules, as in force as of 15 October 2011. It only refers to the service as appointing authority. According to the 2013 statistics: "Parties requested SCC administrative services as appointing authority (8) in ad-hoc arbitrations and one under the UNCITRAL Arbitration Rules"; and in 2012: parties "requested SCC administrative services in appointing experts (2), and SCC services in *ad hoc* (5) and UNCITRAL Arbitrations (3)".
More details about the procedure in the appointment of arbitrators under UAR: Annette MAGNUSSON, The SCC Experience of Investment Arbitration under UNCITRAL Rules. In Euro -Arab Investor- State Dispute Settlement: Recent Developments and Future Perspectives. Cairo, 10-11 October 2012, p.9.
80 WIPO Services under the UNCITRAL Arbitration Rules (1995): The Center will "1. act as appointing authority in cases involving intellectual property that are conducted under the UNCITRAL Arbitration Rules".
81 "The LCIA regularly acts both as appointing authority and as administrator in arbitrations conducted pursuant to the UNCITRAL arbitration rules" according to the information on its web site.

TRAC[82]; ICC[83]; HKIAC[84]; VIAC[85]; ICAC[86]; among others[87]. However, not all the institutions offer detailed rules on the role as appointing authority, or when they have drafted special rules, some need to be updated to be in line with 2010 UAR.

c) Arbitrations under UAR are not a hybrid or a third type of arbitration

After a review of the functions of the appointing authority under UAR, it is clear that those functions are also developed by the institutions in its own arbitration rules. This is one of the reasons considered by some scholars to consider that UAR is a mixed kind of arbitration. The question is even more important after the revision of the 1976 UAR.

It might be questioned after the revised UNCITRAL Arbitration Rules (2010) what is the result since an increase role of the appointing authority (as well as the designating authority)[88] is foreseen by the Rules[89]. Precisely the

82 Tehran Regional Arbitration Centre Internal Regulations states that it provides "assistance to *ad hoc* arbitrations, including acting as appointing authority, particularly in cases where they are taking place in accordance with the UNCITRAL Rules".

83 Art.3 Annex III (Costs of arbitration) of the 2012 ICC Arbitration Rules (The ICC as appointing authority) where the ICC might act as appointing authority in *ad hoc* proceedings under UAR or other *ad hoc* proceedings. It also provides a fee for additional services. See Rules of ICC as appointing authority (1st January 2004).

84 HKIAC Administered Arbitration Rules (2008) and (2013). Article 1.2: "Nothing in these Rules shall prevent parties to a dispute or arbitration agreement from naming the HKIAC as appointing authority, or from requesting certain administrative services from the HKIAC, without subjecting the arbitration to the provisions contained in these Rules. For the avoidance of doubt, these Rules shall not govern arbitrations where an agreement to arbitrate provides for arbitration under other rules adopted by the HKIAC from time to time". See also the fees for *ad hoc* arbitrations.

85 Vienna International Arbitral Center (VIAC) also acts as appointing authority under UAR according to LIEBSCHER, Vienna Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº14. Annex IV of the Vienna Rules (2013) refers generally to VIAC being requested to act as appointing authority and the cost of this service.

86 TRUNK, MKAS Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº5, the ICAC have issued the "Rules on the Support of the ICAC in arbitral proceedings pursuant to the UNCITRAL Arbitraition Rules", in force since 1st January 2000. So ICAC may act as appointing authority and as well as administrator of proceedings.

87 See also other institutions listed at: PATOCCHI/NIEDERMAIER, UNCITRAL Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº159-166; and WEBSTER, nº6-18 to 6-78.

88 The term was not as such recognized under UAR (1976) but it has been adopted under UAR (2010). The role of the designating authority is entrusted to the Secretary-General of the PCA. See Art.6 (Designating and appointing authorities). This *chapeau* is the only time within the Rules where the term is used.

89 For a comparison on this point, see: GRIMMER, The expanded role, pp.501-517. As rightly considered by the author: "The expansion of the appointing authority's role under the new Rules is significant; not only has the number of tasks assigned to it multiplied, but the gravity of those tasks has increased". However there is no discussion in the paper on whether this expanding role means or not a change in nature of the Rules, except that in the conclusions (id., pp.515-516), the author seems to consider UAR still as an *ad hoc* arbitration: "The UNCITRAL Rules were designed as an ad hoc set, flexible enough to be used by parties and tribunals alone, or with the assistance of an institution. With the expansion of the appointing authority's role, the 2010 Rules resemble more institutional rules in that they rely on a third party (other than a national court) for procedural decision-making support. The new roles endow appointing authorities with significant power

commentators that are in favor of classifying the UNCITRAL Arbitration Rules as a hybrid system or a third type of arbitration rely on the role of a third party in the arbitration process, i.e, the appointing authority which resembles the role of the institutions in administered arbitration. That´s why those commentators consider that the UNCITRAL Rules are not a form of *ad hoc* arbitration proper, but "rather a cross-breed lying somewhere between ad hoc arbitration and institutional arbitration"[90]. As seen, those authors base this assumption on the reliance of the rules to appoint the arbitrators and the orginal solution of creating the appointing authority ("they took over the concept of arbitral appointments made by a third party and applied it to ad hoc arbitration" which "brings the UNCITRAL Rules closer to administered arbitration")[91].

However, this is not entirely correct for several reasons:

First, institutions that administer cases do have a more extensive role and powers as compared to the functions of the appointing authority under UAR[92].

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and responsibility; they represent a considerable "step-up" from the 1976 Rules. However, barring the added power under Article 7(2) to submit a case to a sole arbitrator, the additional roles assigned to the appointing authority deal with exceptional circumstances. So while there is increased potential for appointing authority intervention, it seems that it would only be required on the rare occasion".

See also considering that the changes in the 2010 Rules "give more institutional colour to the rules": Matthew SKINNER/Sam LUTTRELL/Tom LEVI, The UNCITRAL Arbitration Rules 2010. Asian International Arbitration Journal, 2011, vol.7, issue 1, p.77. Or that there is a tendency for semi-institutional rules: Rodrigo MONARDES/Cristián RODRÍGUEZ, Comentario al Artículo 6. Nuevo Reglamento de Arbitraje de la CNUDMI 2010. Anotado y comentado. Pilar Perales Viscasillas/Ignacio Torterola (Directores). Buenos Aires: Legis, 2011, p.58.

90 PATOCCHI/NIEDERMAIER, UNCITRAL Rules, nº17, citing Prof. Fouchard and Hermann. The authors recognize that UAR are for *ad hoc* arbitrations (id., nº13) although considers that UAR (id., nº16-17) offers practically the same degree of predictability as any form of institutional arbitration, but arbitration under UNCITRAL Rules has one distinct advantage: party autonomy as to procedure is accepted more widely than in institutional arbitration.

See: considering UAR a modality of *ad hoc* arbitration: Aránzazú ROLDÁN, Arbitraje ad hoc. Diccionario Terminológico del Arbitraje Nacional e Internacional (Comercial y de Inversiones). Vol.18. Biblioteca de Arbitraje del Estudio Mario Castillo Freyre. Lima: Palestra, 2011, p.99.

91 PATOCCHI/NIEDERMAIER, UNCITRAL Rules, nº17.

Recently UNCITRAL discussed somehow this issue when revising the UNCITRAL Notes. It was considered that: "It was pointed out that the Notes should clarify that the option between ad hoc arbitration and institutional arbitration was not binary, but rather that ad hoc rules such as the UNCITRAL Arbitration Rules could be successfully administered by institutions. In that respect, it was suggested that the Notes could include a reference to the 2012 Recommendations to assist arbitral institutions and other interested bodies with regards to arbitrations under the UNCITRAL arbitration Rules 2010". See A/CN.9/826, nº46, but see: nº43: "It was also said that a list of options available to the parties, including agreeing on *ad hoc* or institutional rules, or administered arbitration, and the advantages of such options, could be enumerated".

92 Usually there is no definition of what an administration of an arbitration means in arbitration laws or rules. There are, however, some exceptions. For example: The SIAC Practice Note (2 January 2014) on Administered Cases on Appointment of Arbitrators, Arbitrators 'fees and Financial management considers in Rule 4 that Administration by the SIAC includes:

"a. Appointment of arbitrators;

Apart from the shared and common function of appointing the arbitrators usually in default situations or when the parties cannot agree, the institutions are a bridge or channel of communication between the parties and the arbitrators[93]: generally before the panel of arbitrators is constituted but also afterwards, or they receive a copy of all the communications to be made throughout the arbitration, or just the key documents of the arbitration, such as the request of arbitration and its response, the provisional timetable, and the award. They might require the parties to provide further information on its own motion; they might decide quasi-jurisdictional issues, such as prima facie jurisdiction, decisions related to the number of arbitrators, or to the independence and impartiality of the arbitrators, confirmation of arbitrators, removal, challenges, the place and the language of the arbitration, the kind of procedure (for example in cases where there is a expeditious proceeding in place), consolidation of cases, joinder of third parties, extensions of time periods, scrutinity of the award, advances on costs, fixing costs of the arbitration, fees payable to the arbitrators, and their expenses, etc. Of course, they also provide pure administrative services such as filing the award, servicing of witnessess, translation of documents, hearing rooms, deposit of costs, advance payments, etc. But the mere function of organizing a proceeding, i.e., all the acts of management necessary for the arbitration to be effective, such as material and personal means, is not enough to consider an institutional arbitration, otherwise that name ought to have been given to centers that are providers of those services but are not arbitration institutions[94]. Finally, the arbitration institutions might even help the parties to conciliate in accordance with some rules.

The conclusion is derived by a comparison of the role of the appointing authority under UAR, either with less intervening arbitration rules, or with more

b. Financial management of the arbitration;
c. Case management, which includes liaising with arbitrators, parties and their authorized representatives on proper delivery of notices, monitoring schedules and time lines for submissions, arranging hearing facilities and all other matters which facilitate the smooth conduct of the arbitration;
d. Where applicable, exercising such supervisory functions entrusted by the arbitration rules; and
e. Scrutiny and issuance of awards made by the Tribunal".

93 To this general function of institutions refers the 2012 UNCITRAL Recommendations, nº12, advising on how to modify in this regard Arts.3 and 4 UNCITRAL Arbitration Rules, taking also into consideration the possible use of the institution as a communication channel after the constitution of the Arbitral Tribunal (id., nº13), and whether the purpose is to receive the communications to notify them to the parties, or for the purposes of information.

94 But see a confusion in: Aránzazú ROLDÁN, Arbitraje institucional. Diccionario Terminológico del Arbitraje Nacional e Internacional (Comercial y de Inversiones). Vol.18. Biblioteca de Arbitraje del Estudio Mario Castillo Freyre. Lima: Palestra, 2011, p.206. Also *infra* VI, footnote 187.

regulating arbitration ules[95]. Crucial in the role of the institutions that administer cases under their own rules is their permanent presence, intervention and control during the whole arbitration procedure, although the degree of intervention might vary depending on the rules, while in the case of the appointing authority under UAR it might not even intervene during the whole arbitration process for the simple reason that its nomination is not mandatory and thus an *ad hoc* arbitration under UAR might entirely take place without that authority. And even when the appointing authority acts, it is generally a default situation and thus the powers of the appointing authority are secondary or derivative in situations where the parties cannot agree or one of them is on default. By contrast, in administered arbitration, the institutions have, as mentioned, a permanent presence throughout the arbitration and even a primary power in certain issues considered by them essential features or matters of their exclusive competence: confirmation of the arbitrators[96], scrutinity of the award[97], or the financial management of the arbitration[98].

Second, what ought to be considered original under UAR is not the creation of an appointing authority, but the idea of detaching the system from national law –*lex arbitri*– creating a self-sufficient contained default rule. In a non-UAR *ad hoc* situation, the parties always have the option to draft the arbitration clause nominating an appointing authority. In case of silence, where the arbitrators could not be appointed, this does not mean a deadlock situation that renders the arbitration agreement null. The parties may further agree on the appointing authority or there is always, as ultima ratio, the possibility to resort to the Courts of the

95 "There are significant differences between various arbitral institutions with regard to the scope as well as the level of administrative assistance and services provided. The organizational structure of arbitral institutions may also vary significantly. The supervision by the arbitral institutions over the proceedings may differ from institution to institution as well as the level of quality control exercised by these institutions". See: HOFBAUER/BURKART/BANDER/TARI, Survey on Scrutiny of Arbitral Institutions. En Arbitral Institutions Under Scrutiny: ASA Special Series No. 40, JurisNet, LLC, 2013, p.2. The survey contains interesting data related to the differences observed in arbitrations institutions around the world with the view of enhancing transparency in arbitration.

96 For example, Art.13 ICC Arbitration Rules (2012); Article 5.1 Swiss Arbitration Rules (2012); Section 7 and 8 LCIA Arbitration Rules (2014); Art.13.3 Madrid Arbitration Rules; Art.9 HKIAC Administered Arbitration Rules (2013); Arts.9 and 10 HKIAC Administered Arbitration Rules (2008); Art.24.2 CIETAC Arbitration Rules; Art.6.3 SIAC Arbitration Rules (2013); Art.25.3 JCAA Commercial Arbitration Rules (2014).

97 See, for example, Art.33 ICC Arbitration Rules (2012). As stated by several commentators the review of the award is crucial to the ICC, see: SCHÜTZE, Introduction, nº10, footnote 11 with more citations. Also the confirmation of the arbitrators: REINER/ASCHAUER, ICC Rules, nº27.
See also Art.49 CIETAC Arbitration Rules; Art.41 Madrid Arbitration Court; Art.28.2 SIAC Arbitration Rules (2013).

98 See for example SIAC. The SIAC Practice Note (2 January 2014) on Administered Cases on Appointment of Arbitrators, Arbitrators 'fees and Financial management considers in Rules 11 and 12 that: "11. The Tribunal shall not at any time issue directions concerning its own fees and expenses, and deposits thereof. 12. Any administrative matter concerning the costs or expenses in the arbitration shall be dealt with by the Registrar".

place of arbitration for the appointment of the arbitrators. Indeed, one might say that resorting to national courts is not the ideal answer to this problem or that it migh create delays in the proceedings, but it certainly cannot be the reason to create or design a hybrid type of arbitration in between *ad hoc* and institutional. The same can be said in relation to other functions of the appointing authority under UAR: challenge of arbitrators, and replacement, for example.

As a consequence, the system designed under UAR tries to overcome the possible deadlock situations between the parties in critical aspects of the proceedings by providing an efficient, uniform and international system that displaces the recourse to domestic courts and to procedural domestic laws[99]. It is under this perspective that one might consider that UAR do not mirror institutional arbitration but substitutes the role of domestic courts by a self-contained, uniform and international system.

This is confirmed for example when examining the *ad hoc* arbiration system before the creation of the 1976 UNCITRAL Rules where it was for the domestic courts to appoint the arbitrators in default situations or the President of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat at the time of the introduction of the request for arbitration; a system established in the European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961, which was one of the models used for the drafting of the 1976 UAR[100].

99 WEBSTER, nº 0-48, 0-49 and 6-4, rightly refers to the disadvantages of non-UNCITRAL *ad hoc* arbitrations and that UAR were intended to deal with those disadvantages: supervision of national courts, the influence of procedural laws and the lack of guidance of the agreement of the parties in regard to rules for *ad hoc* arbitrations. But see nº0-51 and 6-9 where the author somehow refers to a "hybrid system" in relation with the apppointing authority and makes a parallellism with institutional arbitration.
Impliedly also linking the appointing authority as a substitute of national courts: Stephen L. DRYMER, The Revised 2010 UNCITRAL Arbitration Rules: New Rules/New Roles for Designating and Appointing Authorities. ASA Bulletin, 2010, vol.28, nº4, pp.875-876. The author also states that: "the UNCITRAL Rules are not institutional rules, and UNCITRAL arbitration is not institutional". However the author also reflects that the 2010 Rules is a more institutionalise system (id., p.877).

100 SANDERS, nº2.1. The systems was rather complicated and a further presence of a special committee was also foreseen in the Convention. According to Art.IV.4 "When seized of a request the President or the Special Committee shall be entitled as need be:
(a) to appoint the sole arbitrator, presiding arbitrator, umpire, or referee;
(b) to replace the arbitrator(s) appointed under any procedure other than that referred to in paragraph 2 above;
(c) to determine the place of arbitration, provided that the arbitrator(s) may fix another place of arbitration;
(d) to establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s), provided that the arbitrators have not established these rules themselves in the absence of any agreement thereon between the parties". Also the Special Committee has the power to decide the type of arbitration (*ad hoc* or institutional) (Art.IV.6). It also acts as a default authority when the President of the Chamber of Commerce did not act (Art.IV.7). In the Annex to the Convention the procedure to nominate the members, duration, etc., are regulated at length.

The principle of freedom of the parties in the appointment of the arbitrators is a characteristic feature in arbitration whether *ad hoc*[101] or institutional. Normal features of an *ad hoc* arbitration are the power of the parties to tailor-make the proceedings by drafting their own set of rules of procedure and by appointing the arbitrators[102]. The principle of freedom of the parties is also fulfilled when agreeing to a set of arbitration rules, i.e., UAR, and where the appointment of the arbitrators is done by the parties. It is an essential element to consider in *ad hoc* arbitration that the parties have the right to appoint the arbitrators[103], but the parties may agree otherwise. The fact that the parties agree (or in fact are unable to do so) that a third person or institution –for example an arbitration center– will be in charge of appointing the arbitrators (only this role and not the administration of the procedure) does not change the type of arbitration as clearly derived from the UNCITRAL Arbitration Rules and MAL[104]. It is still an *ad hoc* arbitration, and it is not a third type of arbitration[105].

Third, it is fairly obvious that MAL did consider UAR and their specific arbitration designed system when drafting its definition of arbitration in Art.2 a). Although neither MAL refers to the term *ad hoc*, nor do so UAR in its title, it is clear that MAL only foresees two types of arbitration and that the distinction lies in the administration of the procedure by a permanent arbitral institution

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101 Art.2 Inter-American Convention on International Commercial Arbitration (Panama Convention), 30th June 1975: **"**Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person. Arbitrators may be nationals or foreigners". See also: Art.IV.1 b) i)) European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961.

102 Similarly The European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961, considers in Art.IV.1 b) that "1. The parties to an arbitration agreement shall be free to submit their disputes: (b) to an *ad hoc* arbitral procedure; in this case, they shall be free inter alia: (i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute; (ii) to determine the place of arbitration; and (iii) to lay down the procedure to be followed by the arbitrators".

103 European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961 states in art.2 b) that the term "arbitration" shall mean not only settlement by arbitrators appointed for each case (*ad hoc* arbitration) but also by permanent arbitral institutions.

104 See Articles 8-9 UNCITRAL Arbitration Rules (2010); and the definition of arbitration under Art.2 a) MAL.

105 For example, in Spanish doctrine, this situation is considered a third type of arbitration, named "arbitraje deferido" by some scholars: Baldomero ANDRÉS CIURANA, Las instituciones arbitrales nacionales (Desarrollo, fundamento y consolidación del arbitraje institucional). Actualidad Civil, 15-21 enero 2001, nº3, p.86. But it has been rejected, for example, by the decision of the Appellate Court of Madrid, 19 April 2007 (La Ley 66980): "El tercero al que las partes confieren el nombramiento de árbitros puede ser tanto una persona física como jurídica, incluyendo una institución arbitral; ahora bien, el hecho de que las partes encomienden la designación de los árbitros a una institución arbitral no implica, por sí solo, que el arbitraje sea institucional (administrado), pues es posible que las partes en un arbitraje *ad hoc* (no administrado) quieran únicamente a la institución como tercero que nombre a los árbitros; y el hecho de que las partes encomienden el nombramiento de árbitros a una persona jurídica tampoco implica, por sí solo, que el arbitraje sea institucional, máxime cuando esta persona jurídica puede carecer de la condición de institución arbitral por no tener reglamentación".

which is not the situation under UAR. This is explained by Prof. SANDERS[106] both in relation to the deletion of the term *ad hoc* from the initial drafting title of the Rules, as well as to the role of the appointing authority:

> "The significance of the phrase 'ad hoc arbitration' is not readily understood by the businessmen for whose use the Rules are designed. Normally, the phrase 'ad hoc arbitration' is used to denote arbitration that is not 'institutional arbitration'. While arbitration under the UNCITRAL Arbitration Rules cannot be regarded as institutional, administered arbitration, the Rules provide for reliance in certain cases on a so-called 'appointing authority', and it may be expected that in most cases existing arbitral institutions will be designated as 'appointing authority', although the parties are free to designate other institutions or persons to perform this function. It was therefore deemed advisable not to refer to 'ad hoc arbitration' in the title of the Rules, in order to avoid creating the mistaken impression that arbitral institutions were excluded from playing a role in arbitrations under the UNCITRAL Rules. On the contrary, it is expected that parties will often designate an arbitral institution to serve as the 'appointing authority'. A substantial number of existing arbitral institutions have already expressed their willingness to serve in that capacity".

Finally, the universal origin and character of UAR as opposed to arbitration rules designed by private associations or organizations is not essential in this discussion. The world wide character of the Rules[107] explains indeed the legitimacy behind the Rules created by UNCITRAL, the desire of the parties, particularly when a State is involved to agree on these Rules, as well as the great success as model rules and the expanding use of UAR, but has no impact with the issue of whether UAR is a third type of arbitration. Indeed, UAR have a seal of legitimacy, universalism and quality derived from its unique drafting process and so they are different to the drafting process of arbitration rules created by private organizations. However, in the discussion what it is important to consider are the will of the parties, the design of the process and the specific role entrusted to an institution.

106 SANDERS, nº2.4.

107 SANDERS, nº2.1: "The UNCITRAL Rules are designed for world-wide use. They are intended to be acceptable in both capitalist and socialist systems, in developed and developing countries and in common law as well as civil law jurisdictions".

Therefore, the conclusions are as follows:

- First, despite the role of the appointing authority and the increase of its functions under the Rules, and even if one were to consider that UAR at first were designed with the idea of covering both *ad hoc* as well as institutional arbitration and that this is probably one of the possible explanations of the appointing authority mirroring the role of the arbitral institutions[108], we are still in the presence of an *ad hoc* procedure since the parties retain the control of the procedure even in those situations in which the parties and/or the arbitrators ask for some administrative services to be rendered by the appointing authority[109].
- Second, if the global obligations of the parties are to organize and arrange by themselves the initiation of the arbitration, appoint the arbitrators and control the process by delineating the arbitration rules or by choosing already made rules such as UAR, the arbitration should be considered an *ad hoc* arbitration procedure despite the fact that an appointing authority (a person or institution) is agreed or that some administrative services might be required to be provided by an institution[110]. If the administration of the procedure, i.e., arbitration rules are agreed, and thus a certain control of the process is transferred to a permanent arbitral institution, which also provides the administrative services, this should be an institutional arbitration.
- Third, a dual or binary distinction between *ad hoc* arbitration and institutional arbiration is generally recognized, and despite the difficulties encountered in certain cases to disitinguish between *ad hoc* and institutional arbitration,

108 To this point, see: Clyde CROFT/Christopher KEE/Jeff WAINCYMER, A Guide to The UNCITRAL Arbitration Rules. Cambridge Universtiy Press, 2013, nº6.5.

109 See for example the services offered by CRICA (Cairo Reginal Center for International Commercial Arbitration) that offers: "Providing *ad hoc* arbitration with necessary technical and administrative assistance at the request of the parties". Among the scholars: referring to the different services provided by institutions without implying the role of an administrator: ALONSO PUIG, El arbitraje institucional, pp.686-687.

110 See The HKIAC Procedures for the administration of International Arbitration (Adopted to take effect from 31 March 2005) where it is stated that: "Neither the designation of the HKIAC as appointing authority under the Rules nor a request by the parties or the tribunal for specific and discrete administrative assistance from the HKIAC shall be construed as a designation of the HKIAC as administrator of the arbitration as described in these Procedures". These procedures were superseded by the Administered Arbitration Rules (2008) as stated in Art.1.3 that does not reflect on their rules this conclusion, although it is a right and valid one.
See also Comment 7 to IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010: "In *ad hoc* (or non-administered) arbitration, the burden of running the arbitral proceedings falls entirely on the parties and, once they have been appointed, the arbitrators. As explained below (Guideline 2), the parties can facilitate their task by selecting a set of arbitration rules designed for use in *ad hoc* arbitration. Although no arbitral institution is involved in running the arbitral proceedings, as explained below (Guideline 6), there still is a need to designate a neutral third party (known as an 'appointing authority') to select arbitrators and deal with possible vacancies if the parties cannot agree".

we think that the dual distinction ought to be preserved in terms of legal certainty and predictability. An introduction of a third type or even more types of arbitrations should be discouraged.

IV. The increase use of the UNCITRAL Arbitration Rules as the institutional rules of arbitral institutions or other interested bodies

The 1976 UNCITRAL Arbitration Rules were initially designed for *ad hoc* arbitrations particularly in international commercial contracts as stated in the General Assembly Resolution that accompanied the old 1976 Rules[111]. However, this reference to *ad hoc* arbitration has been deleted from the text of the General Assembly Resolution for the amendment of the 2010 Rules by stating that:

> "Noting that the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including (….) commercial disputes administered by arbitral institutions, in all parts of the world (….)"[112].

As noted, the Resolution of the General Assembly refers now to the use of the rules in institutional arbitration. This further development in the use of the Rules was even acknowledged before by UNCITRAL. In 1982, UNCITRAL published the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the 1976 UNCITRAL Arbitration Rules, latter amended in 2012 to cover the 2010 Revision of the Rules.

In the 1982 Recommendation, UNCITRAL recognized the variety of ways in which arbitral institutions used the UNCITRAL Arbitration Rules either as a model or as an adoption of the Rules (partially or totally). Since then, the use

111 Resolution 31/98, 15th December 1976: "Convinced that the establishment of rules for *ad hoc* arbitration that are acceptable in countries…..", "Recommends the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts".
Confirms a restricted scope of application to *ad hoc* arbitration according to the legislative history: Eric E. BERGSTEN, Some musings about the adoption of the UNCITRAL Arbitration Rules. The Vindobona Journal of International Commercial Law and Arbitration, 2005, vol.9, nº2, p.213. See also: PATOCCHI/NIEDERMAIER, UNCITRAL Rules, nº13: "The UNCITRAL Rules deliberately deal with arbitration detached from any arbitral institution…, the UNCITRAL Rules govern *ad hoc* arbitration, not institutional arbitration".
CASTELLO, Uncit 3, states that originally the title of UAR (1976) referred to *ad hoc* arbitration but this was finally deleted.

112 A/RES/65/22, 10th January 2011.

of the UNCITRAL Arbitration Rules has not ceased to increase in this role of institutional rules:

4.1. The UNCITRAL Rules as a model or guide

The UNCITRAL Rules have been used as one of the models by arbitration centers to draft their "own" set of rules[113]. In this case as the Rules are only one of the possible models and considering the close resemblance of arbitration rules in the world it would be advisable for the institution to mention its sources of inspiration[114].

4.2. The UNCITRAL Rules as arbitration rules of arbitral institutions

The adoption of the UNCITRAL Arbitration Rules by an institution, totally or partially, with the necessary changes to adapt them to institutional arbitration[115]

113 For example: the ACICA Arbitration Rules (Australian Centre for International Commercial Arbitration), where the main sources of inspiration have been the 1976 UNCITRAL Arbitration Rules and the Swiss Rules. See: S.R. LUTRELL/G.A. MOENS, Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration, p.2.
In the 2013 HKIAC Arbitration Rules there is no mention at all to the sources of inspiration, while when looking at the 2008 Arbitration Rules it is stated that: "The new Rules are based on the UNCITRAL Arbitration Rules and are inspired by the "light touch" administered approach of the Swiss International Rules of Arbitration". The 2004 Swiss Rules were based on 1976 UAR, the 2012 have a flavour also from UAR 2010, but also incorporates their experience in arbitration, the revision of MAL (2006), the IBA Rules of Evidence, ICC Rules (2012), and the SCC Rules (2010). See KARRER, Swiss Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº36.
The International Arbitration Rules of the AAA (1st March 1991) are too based upon the UNCITRAL Arbitration Rules. See: THÜMMEL, ICDR-IAR. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº2, and nº8 (are broadly modeled).
SIAC Rules have their visible root and role model in UAR and LCIA as considered by HIRTH, SIAC. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº5.
Finally, The Dubai International Arbitration Centre (DIAC) Rules of Arbitration of 2007 are based also in UAR but other Rules were also taken into account (ICC, LCIA, WIPO, SCC, AAA). See: KRATZCH, DIAC Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº15.

114 Furthermore some institutions recommend the use of UAR in international commercial arbitrations. See for example question 30 of HKIAC: "What are the UNCITRAL Arbitration Rules?: "The UNCITRAL Arbitration Rules were adopted by UNCITRAL in 1976, to provide a set of procedural rules appropriate for use in international commercial arbitrations generally. The UNCITRAL Arbitration Rules are recommended by the HKIAC for use in international arbitrations in Hong Kong. These Rules were subsequently amended in 2010". This advice, probably in conjunction with question 26, is that the recommendation is for arbitration with UAR and HKIAC as administrator.

115 See also 2012 UNCITRAL Recommendations, nº8: "Institutions adopting the UNCITRAL Arbitration Rules as their institutional rules will certainly need to add provisions, for instance on administrative services or fee schedules. In addition, formal modifications, affecting very few provisions of the UNCITRAL Arbitration Rules, as indicated below in paragraphs 9-17, should be taken into account".

is seen frequently now in the arbitration world, as UAR have been considered uniform international rules drafted not by a private association but for a world-wide international organization, well balanced, that gives the institution a *seal* of quality, neutrality and a well-balanced set of rules. This has been the case of arbitration institutions, such as:

- The arbitration centers constituted under The Asian-African Legal Consultative Organization (AALCO) that has established several regional arbitration centers that adopt UAR: Cairo Rules (CRCICA)[116], Kuala-Lumpur Rules (KLRCA)[117], Lagos Rules (RCICAL)[118] and Tehran Rules (TRAC)[119].
- Cyprus Rules (CAMC)[120]
- Qatar Rules (QICCA)[121]
- CIAC Rules[122]
- The different Rules offered by the Permanent Court of Arbitration (PCA) that reflects the adjustments made in the UNCITRAL Arbitration Rules (2010) or (1976) for the specific parties or subject-matter of the dispute[123].

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116 The Cairo Regional Centre for International Commercial Arbitration (CRCICA) Arbitration Rules (2011), "The present CRCICA Arbitration Rules are based upon the new UNCITRAL Arbitration Rules as revised in 2010, with minor modifications emanating mainly from the Centre's role as an arbitral institution and an appointing authority". See: http://www.crcica.org.eg/arbitration_rules.html.

117 KLRCA Arbitration Rules (Kuala-Lumpur Regional Centre for Arbitration) as revised in 2013, where it is stated that: "The KLRCA Arbitration Rules (hereinafter referred to as "Rules") shall be the UNCITRAL Arbitration Rules as modified in accordance with the rules": and AHMAD IDID, Use of the UNCITRAL Arbitration Rules, pp.37-48. Id., p.38 considering the adaptations to UAR in order to offer a supplementary degree of protection to the parties 'interests through a control over the choice of arbitrators, fees and delays.

118 The Regional Centre for International Commercial Arbitration (The Lagos Centre) Arbitration Rules were first drafted in 1999 and are adopted from the UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) Arbitration Rules which were in themselves adopted by the UN General Assembly in 1976.

119 Tehran Regional Arbitration Centre.

120 Cyprus Arbitration and Mediation Center (CAMC), Arbitration Rules.

121 See Qatar International Center for Conciliation and Arbitration (QICCA), Rules of Conciliation and Arbitration, in force since 1st May 2012, where it is stated that: "The Center seeks to follow the most recent trends in organizing conciliation and arbitration procedures through its adoption of the model rules prepared by the United Nations Commission for International Trade Law (UNCITRAL) as revised in 2010".

122 Inter-American Commission for Commercial Arbitration (IACAC), o Comisión Interamericana de Arbitraje Comercial (CIAC). As stated in the Preamble to the Rules: CIAC modified its rules of procedure adopting UAR (1976) with some minor modifications to consider the role of CIAC as an arbitral institution.

123 See in regard to The UNCITRAL Arbitration Rules (2010):

1) PCA Arbitration Rules (2012), 17th December 2012: "The Rules are optional and are based on the 2010 UNCITRAL Arbitration Rules with changes made in order to:

(i) Reflect the public international law elements that may arise in disputes involving a State, State controlled entity, and/or intergovernmental organization;

(ii) Indicate the role of the Secretary-General and the International Bureau of the PCA; and

(iii) Emphasize flexibility and party autonomy".

2) PCA Optional Rules for arbitration of disputes relating to outer space activities, effective December 6, 2011: "These Rules are based on the 2010 UNCITRAL Arbitration Rules with changes in order to:

As in our opinion, transparency duties are one of the main obligations that arbitral institutions should fulfill in practice even if not required by the arbitration law, in the interest of a high degree of certainty and credibility for the users[124], it would be useful if the institution as a first step were to indicate that they are modeled or inspired from UAR, which is not always the case[125]. A second step, that implies the first one, is also stated in the 2012 Recommendations, nº9: "it may be useful for the institution to consider indicating where those rules diverge from the UNCITRAL Arbitration Rules. Such indication may be helpful to the readers and potential users who would otherwise have to embark on a comparative analysis to identify any disparity". Again, this is not always the situation either because no indication at all is given as to the modifications operated in UAR[126]

(i) reflect the particular characteristics of disputes having an outer space component involving the use of outer space by States, international organizations and private entities;
(ii) reflect the public international law element that pertains to disputes that may involve States and the use of outer space, and international practice appropriate to such disputes;
(iii) indicate the role of the Secretary-General and the International Bureau of the Permanent Court of Arbitration (PCA) at The Hague;
(iv) provide freedom for the parties to choose to have an arbitral tribunal of one, three or five persons;
(v) provide for establishment of a specialized list of arbitrators mentioned in article 10 and a list of scientific and technical experts mentioned in article 29 of these Rules; and
(vi) provide suggestions for establishing procedures aimed at ensuring confidentiality.
See in relation to the 1976 Rules:
1) PCA Optional Rules for Arbitrating disputes between two States, 20 October 1992; These Rules have been considered in Art.25.2 of the BIT between Mexico and China for disputes between the contracting state parties: "The arbitral tribunal shall decide all questions relating to its competence and, subject to any agreement between the Contracting Parties, determine its own procedure, taking into account the PCA Optional Rules". Id., Art.24.2 BIT between Mexico and India (2008).
2) PCA Optional Rules for Arbitrating Disputes between two parties of which only one is a State, *Effective July 6, 1993*; These Rules have been agreed in Art.11.4 of the BIT between UK and Mexico, 12 May 2006 as one of the options for the investor: "A disputing investor may submit the claim to arbitration under the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two Parties of which only one is a State ("PCA Rules of Arbitration"). Under this Treaty the appointing authority is not the PCA but the Secretary-General of ICSID (Art.13.2). See also Art.14 in the case of consolidation of proceedings.
3) PCA Optional Rules for arbitration involving international organizations and States, *Effective July 1, 1996*;
4) PCA Optional Rules for Arbitration between international organizations and private parties, *Effective July 1, 1996;*
5) PCA Optional Rules for arbitration of disputes relating to natural resources and/or the environment, *Effective June 19, 200*.
All the texts are available at the web site of the PCA.

124 In fact the 2012 UNCITRAL Recommendations appeal to transparency and certainty, for example, in paragraph 16: "if the functions of an appointing authority are fulfilled by an organ of the institution, it is advisable to explain the composition of that organ and, if appropriate, the nomination process of its members, in an annex, for example. In the interest of certainty, it may be advisable for an institution to clarify whether the reference to the organ is meant to be to the function and not to the person as such (i.e. in case the person is not available, the function could be fulfilled by his or her deputy)".

125 See for example Cyprus Arbitration and Mediation Center (CAMC), Arbitration Rules. The rules are based upon UNCITRAL Arbitration Rules (2010), although it seems that there is no mention of it. The same might be said for the TRAC Rules, although based upon UAR (1976).

126 See for example QICCA Rules or CIAC Rules.

or the list of modifications is incomplete[127]. Furthermore, "it might be advisable to accompany the institutional rules with a short explanation of the reasons for the modifications"[128], but this is not usually done by the institutions[129].

Some of the institutions referred above (CRICA, KLRCA, RCICAL, TRAC, QICCA and PCA) have, however, added few significant changes to the UNCITRAL Arbitration Rules although the 2012 Recommendations by UNCITRAL advises to the contrary:

> "An institution that intends to do so should take into account the expectations of the parties that the rules of the institution will then faithfully follow the text of the UNCITRAL Arbitration Rules"[130]. In fact, some significant changes, apart from the logical modifications to adapt the rules to institutional arbitration, are observed on those Arbitration Rules as compared with UNCITRAL Arbitration Rules (2010), for example, in relation with more demanding duties of confidentiality[131] or a total exclusion of liability[132].

Indeed, among the necessary modifications to adapt UAR to institutional arbitration is that the institution would carry out the functions attributed to the appointing authority under the Rules[133] -without prejudice of the possible agreement of the parties designating a different appointing authority[134]-, and that the reference to the designating authority and/or The Secretary General of the PCA should be deleted or substituted by the arbitral institution as it fits, or as an alternative a general statement along the following lines could be added: "The

127 See further in the text in relation with the modification in the rules of confidentiality or liability.

128 2012 UNCITRAL Recommendations, nº 10.

129 But see on the contrary: the PCA Optional Rules.

130 2012 UNCITRAL Recommendations, nº7.

131 See for example: Art.40 CRICA Rules; and Rule 15 (Confidentiality) of the KLRCA Arbitration Rules. Also rules on confidentiality have been added to the PCA Optional Rules for arbitration of disputes relating to outer space activities, effective December 6, 2011. Article 17 adds new paragraphs 6-8. See also: Qatar International Center for Conciliation and Arbitration, Rules of Conciliation and Arbitration, in force since 1st May 2012, Article 41. Confidentiality; Art.4 RCICAL Rules; and Art.4 TRAC Rules.

132 KLRCA Arbitration Rules, Rule 16 (No Liability): "Neither the KLRCA nor the arbitral tribunal shall be liable to any party for any act or omission related to the conduct of the arbitral proceedings".
PCA Arbitration Rules (2012), 17th December 2012, and PCA Optional Rules for arbitration of disputes relating to outer space activities, effective December 6, 2011 contains almost identical provision on Exclusion of liability, Article 16: "The parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration".
Despite this modification, this one is not listed in the introduction to the changes operated into the UNCITRAL Arbitration Rules by those optional models.

133 2012 UNCITRAL Recommendations, nº15.

134 QICCA, Article 43.2 (h) states the list of arbitration costs including: "Any fees and expenses of the appointing authority in case the Center is not designated as the appointing authority".

functions of the appointing authority under the UNCITRAL Arbitration Rules are fulfilled by [name of the institution]"[135].

The adaptation of the UAR to institutional arbitration in relation with the appointment of arbitrators is a critical aspect in which the institutions should be very careful. The process of *transforming* the UNCITRAL Arbitration Rules into institutional rules is not only a question of substituting words ("appointing authority" with "the name of the institution") but a more complex one. In this situation, we are in the presence of a change in the very nature of the arbitration: from a typical *ad hoc* procedure to an administered one. This legally means not only the need for the institutions and their rules to fulfill the requirements that the law of the place where the institution is placed might require, but also to comply with the essential features and obligations that an institution should have. Although the first one would be easy to ascertain, the second one has not yet been shaped in an international and uniform way, and consequently this is in area in which UNCITRAL might be able to develop uniform standards.

4.3. Adoption of the UNCITRAL Arbitration Rules by the legislator as institutional rules or *ad hoc* rules

One of the most interesting developments in the use of the UNCITRAL Arbitration Rules is their adoption by national legislators as either institutional rules or the *ad hoc* rules for commercial disputes in general or for particular kinds of disputes. There are several examples that confirm the success of the UNCITRAL Rules beyond to what its drafters ever thought, i.e., outside the pure agreement of the parties[136].

- Nigeria: The Arbitration and Conciliation Act (1990) include in its First Schedule the UNCITRAL Arbitration Rules (1976). In accordance with Section 15(1) of the Act "The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the first schedule to this Act". This means that UAR are used as the most suitable "*ad hoc* arbitration rules" for domestic transactions, and it is without prejudice of the possible agreement of the parties in an international commercial

135 2012 UNCITRAL Recommendations, nº15.

136 Therefore it cannot be mantained the idea that "the UNCITRAL Rules thus apply only as a matter of agreement of the parties": PATOCCHI/NIEDERMAIER, UNCITRAL Rules, nº39.

agreement to agree on the application of the UNCITRAL Arbitration Rules as foresee in Section 53[137].

- Panama has adopted UAR as the administered rules in cases where a public entity is involved or for public contracts. Article 151 of the New Code of Private International Law (Law 7, 8th May 2014) considers for public contracts or for those contracts in which a state entity is a party, that the parties will be subject to UAR unless a different set of arbitration rules were agreed by the parties[138].
- Spain has adopted since 30th August 2013 UAR as institutional rules in relation with disputes in which the National Commission on the Markets and Competence is the administrator and the appointing authority. The arbitration procedure would be subject to UAR or, as the case may be, to those rules determined by the National Commission[139].

V. The administration of disputes under the UNCITRAL Arbitration Rules

The 2012 Recommendations (nº18) considers this possible role of UAR along the following lines: "One measure of the success of the UNCITRAL Arbitra-

137 Section 53 (Application of Arbitration Rules set out in the First Schedule) states that: "Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rule acceptable to the parties".

138 Article 151: "En el régimen de concesiones públicas o en aquellas otras contrataciones en que participe una empresa privada extranjera con una entidad estatal centralizada o descentralizada del Estado panameño, las diferencias derivadas de dicha concesión o contrataciones se someterán al procedimiento de arbitraje previsto en el Reglamento de Arbitraje de la CNUDMI, excepto en los casos en que se haya pactado un procedimiento y una reglamentación distinta. La sede del arbitraje será el centro de arbitraje libremente escogido por las partes. En ausencia de su determinación el arbitraje tendrá lugar en cualquier centro de arbitraje o de solución de conflictos reconocido dentro de la República de Panama. El tribunal arbitral será colegiado, cada parte designará un árbitro que podrá ser nacional o extranjero y estos escogerán al tercer árbitro. El derecho aplicable será el que determinen las partes en el acuerdo arbitral o pacto arbitral".

139 See: Royal Decree 657/2013, 30th of August, on the Organic Rules to the National Commission on the Markets and Competence (BOE, nº209, 31st August 2013): *Función arbitral*

1. La Comisión Nacional de los Mercados y la Competencia podrá desempeñar las funciones de arbitraje institucional, tanto de derecho como de equidad, que le encomienden las leyes y las que le sean sometidas voluntariamente por los operadores económicos en aplicación de la Ley 60/2003, de 23 de diciembre, de Arbitraje.
2. El procedimiento arbitral se ajustará a los principios de audiencia, prueba, contradicción e igualdad y se someterá a las reglas de la Comisión de las Naciones Unidas para el Derecho Mercantil o, en su caso, las que determine el Consejo de la Comisión Nacional de los Mercados y la Competencia. También podrá preverse la existencia de un procedimiento abreviado atendiendo al nivel de complejidad de la reclamación y su menor cuantía.
3. Corresponde al Consejo de la Comisión Nacional de los Mercados y la Competencia la administración del arbitraje, pudiendo cada una de las Salas, en atención a la materia objeto de la reclamación, designar árbitros y determinar los honorarios según los aranceles aprobados por el Consejo.

tion Rules in achieving broad applicability and in demonstrating their ability to meet the needs of parties in a wide range of legal cultures and types of disputes has been the significant number of independent institutions that have declared themselves willing to administer (and that do administer) arbitrations under the UNCITRAL Arbitration Rules, in addition to proceedings under their own rules. Some arbitral institutions have adopted procedural rules for offering to administer arbitrations under the UNCITRAL Arbitration Rules".

In terms of transparency and legal certainty, it would be advisable for the institution to expressly provide in their Rules or Statutes for the administration of arbitrations under UAR and to provide for the specific administrative services that would be given to the parties[140]. Precisely the 2012 Recommendations, nº20, insist on this transparency obligations when it is stated that:

> "It is advisable that the institution clarify the administrative services it would render by either:
> a) Listing them; or
> b) Proposing to the parties a text of the UNCITRAL Arbitration Rules highlighting the modifications made to the Rules for the sole purpose of the administration of the arbitral proceedings; in the latter case, it is recommended to indicate that the UNCITRAL Arbitration Rules are "as administered by [name of the institution]" so that the user is notified that there is a difference from the original UNCITRAL Arbitration Rules".

Even though there is quite a number of arbitral institutions that expressly provide for a full administration under UAR (*infra* 5.1), only few of them provides for a list of the administration services offered, or made available to the public the possible modifications of UAR when the Rues are administered by an institution. Therefore, the recommendation would be more transparency for the users of arbitration. Lack of information and/or information difficult to find would be an obstacle for the parties that may at the end choose the institutions that offer better services and provide sufficient information of their involvement throughout the proceedings so as to make an informative decision on whether to have UAR administered by a specific arbitration center.

140 See rejecting that the rules are the offer of the institution that is accepted by the parties when including the arbitration agreement with the rules of the institution: SCHÜTZE, Introduction, nº48-51; and Pilar PERALES VISCASILLAS, El seguro de responsabilidad civil en el arbitraje. Madrid: Mapfre, 2013, pp.176-181. Incorrectly, however, THÜMMEL, ICDR-IAR, nº18 stating that the Rules are a binding offer of the arbitral institution which is accepted by the parties when the arbitration clause is entered into.

5.1. Institutions that administer disputes under UAR

Among the institutions that expressly foresee the administration under UAR are PCA[141]; ICSID[142]; AAA[143]; HKIAC[144]; RCICAL[145]; SCC[146]; WIPO[147]; DIS[148];

141 The PCA has also received an increasing number of requests to provide full administrative support in arbitrations under the Rules [UNCITRAL Arbitration Rules]. See: A/CN.9/634: "UNCITRAL Arbitration Rules: Report of the Secretary-General of the Permanent Court of Arbitration on its activities under the UNCITRAL Arbitration Rules since 1976", nº6.

142 Among the Dispute Settelement facilities are acting as appointing authority under UAR, as well as: "At the request of the parties and the tribunal concerned, ICSID may also agree to provide administrative services for proceedings handled under the UNCITRAL Arbitration Rules. The services rendered by the Centre in such proceedings may range from limited assistance with the organization of hearings and fund-holding to full secretariat services in the administration of the case concerned". See ICSID web page.

143 American Arbitration Association Procedures for Cases under the UNCITRAL Arbitration Rules, As Amended and Effective on September 15, 2005. The model clause offered is clear about the intended role to administer the case, assuming also the institution the role of the appointing authority.

144 Art.1.3 HKIAC Administered Arbitration Rules (2008): "Where an agreement to arbitrate made after these Rules have come into effect provides for arbitration under the UNCITRAL Rules administered by the HKIAC (…)".

145 See the Foreword of the Arbitration Rules of the Centre (RCICAL: The Regional Centre for International Commercial Arbitration (The Lagos Centre) Arbitraition Rules) where it is stated that it would administer International Arbitration under other Arbitration Rules; for example, the UNCITRAL Rules.

146 The Arbitration Institute of the Stockolm Chamber of Commerce (SCC) Procedures and Services Under The UNCITRAL Arbitration Rules, as in force as of 15 October 2011. Although, those procedures only refers to the service as appointing authority, on its web site, the administration of domestic and international disputes in accordance with other procedures or rules agreed upon by the parties (e.g. the UNCITRAL Arbitration Rules) are also offered. but not details are provided. According to the information kindly provided to the author by Mrs. Magnusson, Secretary General SCC, the SCC is currently in the final stages of the process to adopt new rules for the administration of UNCITRAL cases.

Following MAGNUSSON, pp.7-8: "In the last decade, from 2002 to 2012, 36 disputes before the SCC have been administrated under the UNCITRAL Arbitration Rules. This includes both commercial disputes and investment treaty arbitrations. A review of the underlying agreements in SCC's UNCITRAL cases to date revels that joint venture agreements represent 32% of the disputes; BITs appear in 22% of the disputes and supply agreements in 16% of the disputes. Other UNCITRAL disputes brought by parties before the SCC involve share transfer agreements, purchase agreements, and disputes relating to employment issues (….). close to a third of the BIT based disputes before the SCC since 2001 are conducted under UNCITRAL Rules (…). In the 9 BIT -based disputes under the UNCITRAL Arbitration Rules since 2004, the SCC has requested to appoint the chairperson (4 cases); appoint a second arbitrator (3 cases); and decide upon challenges to arbitrators (2 cases)". There is no description of the administration under UAR in the article but it does provide details on the appointment of arbitrators. Curiously, ÖHRSTRÖM, SCC Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº11, considers that the information is about the role of SCC as appointing authority under UAR and other *ad hoc* arbitrations, but again there is no mention of the administration role.

147 The World Intellectual Property Organization (WIPO) that also lists the services available in its "WIPO Services under the UNCITRAL Arbitration Rules (1995)". The Center will: "2. provide administrative support services by acting as administrator in relation to such cases [UNCITRAL Arbitration Rules]".

148 DIS have a special set of rules to administer cases under UAR. See UNCITRAL Arbitration Rules Administered by the DIS (German Institution of Arbitration) (in force as from May 1, 2012). As stated in the Introduction to the Rules: "With the following UNCITRAL-Arbitration Rules Administered by the DIS the DIS provides a set of rules which allow the parties to benefit fully from the advantages of institutional arbitration whilst applying the UNCITRAL Arbitration Rules. Amendments to the UNCITRAL Arbitration Rules were only made to allow for the administration of the arbitral proceedings by the DIS. As a result, parties and legal counsel who have gained familiarity with and confidence in the UNCITRAL Arbitration Rules may rely on

LCIA[149]; SIAC[150]; ICAC[151]; and JCAA[152].

Generally, as the parties have agreed in their arbitration agreement to UAR as the procedural rules of the proceedings, and also have agreed that a certain institution would administer the case, it would be up to that institution to accept the administration of this kind of proceedings if nothing is said in its internal rules or regulations. Therefore, from a legal perspective, the party that submits the request of arbitration is making an offer to the institution to administer the case.

However, if, as it happens more and more frequently, the institution already recognizes the possibility to administer under UAR, then the request of arbitration would be an acceptance of the services offered by the institution save substantial modifications by the parties. This situation is seen more frequently in investment-state arbitration where the investor chooses *ad hoc* UNCITRAL Arbitration Rules but later agrees with the respondent State to have the procedure administered, for example, by the Permanent Court of Arbitration[153].

5.2. The tension between the principle of minimum interference with UAR and the administration of the arbitration by the institution

In the use of the rules we are analyzing now, the parties have agreed that their arbitration proceedings be governed by the UNCITRAL Arbitration Rules with an institution administering the case. In this situation, it is clear that the institution

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the uniform and full application of those rules and at the same time enjoy the benefits of arbitral proceedings under the auspices of an experienced arbitral institution".

149 "The LCIA regularly acts both as appointing authority and as administrator in arbitrations conducted pursuant to the UNCITRAL arbitration rules" as indicated on its web page, where it is stated that: "Recommended clauses for adoption by the parties for these purposes; the range of administrative services offered; and details of the LCIA charges for these services are available on request from the Secretariat".
According to some commentators: the administration of UAR by the LCIA amounts about 20% of the arbitrations received by the LCIA: KONRAD/HUNTER, LCIA Rules. Institutional Arbitration (editor Schütze). C.H.Beck-Hart-Nomos, 2012, nº8. As also indicated, nº9, the LCIA may also agree to act as a neutral fund holder in ad hoc proceedings.

150 Practice Notes on Case Administration, Appointment of Arbitrators & Financial Management of cases Under The UNCITRAL Rules 2010, 2 January 2014.

151 ICAC is International Commercial Arbitration Court at the Chamber of Commerce and Industry of the *Russian* Federation (MKAS in Russian): TRUNK, MKAS Rules, nº5, the ICAC have issued the "Rules on the Support of the ICAC in arbitral proceedings pursuant to the UNCITRAL Arbitraition Rules", in force since 1st January 2000. So ICAC may act as appointing authority and as well as administrator of proceedings.

152 The Japan Commercial Arbitration Association, 1 July 2009, which has its own "Administrative and Procedural Rules for Arbitration Under The UNCITRAL Arbitration Rules, as amended and effective on 1 July 2009.

153 See also the web page of the PCA where it considers the frequent role of administrator of the proceedings: "Full administrative services may be provided for cases involving a State, a State-controlled entity or an intergovernmental organization".

is not only in charge of the administrative related services but also the institution functions as an appointing authority[154]. In consequence, it is a very similar situation to the one just examined previously (*supra* IV.2) because in both the arbitration would be institutional arbitration where the UNCITRAL Arbitration Rules would be the basic text for the proceedings. It is not an *ad hoc* arbitration.

There is, however, an important difference with the situation already examined (*supra* IV.2) because at that point it is the institutions that adopt UAR as their institutional rules and so they are free to add as many changes as they find convenient, although the introduction of substantive changes is not very desirable, particularly if the publicity given by the institution is that UAR are their institutional arbitration rules. Now, however, it is the will of the parties to have the UNCITRAL Arbitration Rules as the rules for the arbitration but with an institution assuming the role of the appointing authority and the institution being in charge of the administration of the process. Therefore, the institution should interfere to the minimum with UAR[155], but at the same time be in line with the desire of the parties to have an institution administering the case.

Important to stress here is the change in the type of arbitration. It is not anymore an *ad hoc* arbitration under UAR but an administered arbitration where the rules of the arbitration are UAR. How to draw the border line between these two principles –minimum interference with UAR and intervention of an institution administering the case- would not be easy, but it is certainly possible.

In regard to the principle of the minimum interference with the arbitration system created under UAR, there are some arbitration rules that consider the revision of the award by the institution or the confirmation of the arbitrators while UAR do not foresee for those kind of control neither by the appointing authority nor by the designating authority. It would be contrary to the will of the parties if the institution were to confirm the arbitrators or to revise the award without

154 Impliedly in the Model Arbitration clause offered by the 2012 UNCITRAL Recommendations, nº26, letter a).
Expressly recognized for example in The "WIPO Services under the UNCITRAL Arbitration Rules (1995)": "If designated as administrator in addition to being designated as appointing authority…."; in the HKIAC Administered Arbitration Rules (2008): "Where an agreement to arbitrate made after these Rules have come into effect provides for arbitration under the UNCITRAL Rules administered by Art.1.3 of the HKIAC: "The HKIAC shall be the appointing authority"; or in SIAC Practice Notes on Case Administration, Appointment of Arbitrators & Financial Management ofr cases Under The UNCITRAL Rules 2010, 2 January 2014, in section 3 a): Administration by the SIAC includes a) Appointment of Arbitrators.

155 See also 2012 UNCITRAL Recommendations, nº20: "in devising administrative procedures or rules, the institutions should have due regard to the interests of the parties. Since the parties in these cases have agreed that the arbitration is to be conducted under the UNCITRAL Arbitration Rules, their expectations should not be frustrated by administrative rules that would conflict with the UNCITRAL Arbitration Rules. The modifications that the UNCITRAL Arbitration Rules would need to undergo to be administered by an institution are minimal and similar to those mentioned above in paragraphs 9-17".

the prior consent of the parties. There are good examples of the minimum interference with the UNCITRAL Arbitration Rules administered by an institution:

- HKIAC which expressly invites the parties to accept their arbitration rules[156], i.e., their own set of rules that are UAR administered by HKIAC.
- DIS, which has a special set of Rules for administering cases under UAR (2012), keeps to a minimum the changes in UAR as it is clearly evidenced by a comparison between the two different DIS set of rules. For example, in relation with the supervisory or control role of the institution under its own set of rules (DIS Arbitration Rules, 1998) whereby it has to confirm any arbitrator (section 17) and it is the DIS Secretariat who communicates one copy of the award to each party and keeps one original on file (section 36), and UAR administered by the DIS (2012) where no such control is established[157].
- SIAC, which has also set up a special regime for administering cases under UAR, has also renounced to keep some of its distinctive features found in the SIAC Arbitration Rules (2013) such as the confirmation of the arbitrators, the scrutiny of the award or its publication when administering cases under UAR[158].
- JIAC that also has its own special rules for UAR does not require the confirmation of the arbitrators by the institution, although it does so in Art.25.3 of its Commercial Arbitration Rules (2014).

156 Art.1.3 HKIAC Administered Arbitration Rules (2008): "Where an agreement to arbitrate made after these Rules have come into effect provides for arbitration under the UNCITRAL Rules administered by the HKIAC, the HKIAC shall be the appointing authority and the HKIAC Secretariat shall invite the parties in such a case to agree to the application of these Rules". No similar rule is provided in the 2013 Rules. It is an institutional arbitration, and this conclusion was clear in The HKIAC Procedures for the administration of International Arbitration (Adopted to take effect from 31 March 2005): "Unless otherwise stated, a request for administration by the HKIAC will be construed as a designation of the HKIAC as appointing authority and administrator pursuant to these Procedures". These procedures were superseded by the Administered Arbitration Rules (2008) as stated in Art.1.3 that does not reflect on their rules this conclusion, although it is a right and valid one with the clarification of Art.1.3 in relation with UNCITRAL Rules.

157 See in relation to the appointment of arbitrators: Art.9 and Annex I Appointing Committee of the DIS. The parties may agree on further functions to this Committee such as for example a confirmation: see Sección 14.4: (4) Further functions may be assigned to the "Appointing Committee". See also Art.34.7 UAR administered by DIS: "Communication of the award to the parties may be withheld until the costs of the arbitral proceedings have been paid in full to the arbitral tribunal and to the DIS".

158 Section 28.10 of the Arbitration Rules states that SIAC may publish any award with the names of the parties and other identifying information redacted. The SIAC Practice Not on Administered cases, appointment of arbitrators, arbitrators 'fees & financial management (2 January 2014) states in section 32 that "SIAC shall redact the names of the parties and other identifying information pertaining to matters relating to the proceedings from any award prior to its publication. SIAC shall consult with the parties, and may consult with the arbitrators prior to such publication".

In relation to the will of the parties of an institution administering the case under UAR, the functions to be developed by the institution when administering the case ought not be so simplistic or reduced to a minimum, i.e., substitution of the words "appointing authority" with the name of the given institution[159]. On the contrary, it should mean a real administration of the arbitration by the institution which in our opinion, at a minimum, means a permanent involvement of the institution during the proceedings but without interfering with the essential features under UAR.

Some guidance as to how to achieve such a difficult equilibrium is found in the special procedures adopted by some institutions that are willing to administer cases under UAR ranging from minimum intervention, such in the case of AAA or WIPO, a middle kind of intervention, such as in DIS or JACC, to the highest level of intervention of the institution, such in the case of SIAC, HKIAC and LCIA.

The SIAC Practice Notes on Case Administration, Appointment of Arbitrators & Financial Management of cases Under The UNCITRAL Rules 2010, 2 January 2014, states that the administration of SIAC includes:

"a) Appointment of arbitrators;
b) Financial management of the arbitration;
c) Case management, which includes liaising with arbitrators, parties and their authorized representatives on proper delivery of notices, monitoring schedules and time lines for submissions, arranging hearing facilities and all other matters which facilitate the smooth conduct of the arbitration;
d) Exercising such supervisory functions under the UNCITRAL Rules as may be necessary; and
e) Scrutiny and issuance of awards made by the Tribunal, if requested by the Tribunal"[160].

Furthermore, the key aspect of the permanent involvement of the institution throughout the whole process is achieved by a rule whereby the notifications and

159 Of course the 2012 UNCITRAL Recommendations, nº15 advise to do so pointing out to the different ways of doing it, either article by article or with a general reference. For the last option, see: UAR administered by the DIS (2012), Art.6.2: "The tasks assigned to the appointing authority under the UNCITRAL Arbitration Rules are assumed by the DIS Appointing Committee"; and Article 2 JCAA: "Appointing Authority: When a request for arbitration has been submitted under these Rules and unless otherwise agreed by the parties, the Association shall perform the functions of the appointing authority as set forth in the UNCITRAL Arbitration Rules".
Usually the reference to the designating authority should be deleted except in Art.41 UAR.

160 From our point of view, the Arbitral Tribunal should consult with the parties.

service of documents should be made through the institution[161]. This is without prejudice to another aspect that is essential when an institution administers a case: it should also exercise control on the financial aspects of the arbitration. This means that the institution should adopt a supervisory role or primary role in aspects related to: management of the advances and deposit of money, and control of the arbitrator´s fees and expenses of the arbitral tribunal[162]. The SIAC Practice Notes on Case Administration, Appointment of Arbitrators & Financial Management of cases Under The UNCITRAL Rules 2010, 2 January 2014, refers to those issues in sections 12-13:

> *SIAC Financial Management*
> "12. In lieu of Articles 41 and 43 of the UNCITRAL Rules, the financial management of the arbitration administered by the SIAC includes:
> a) fixing of Tribunal's fees and other terms of appointment;
> b) regular rendering of accounts;
> c) collecting deposits towards the costs of the arbitration; and
> d) processing the Tribunal's fees and expenses".
>
> *Tribunal Not to Make Directions Concerning Fees and Deposits*
> "13. The Tribunal shall not at any time issue directions concerning its own fees and expenses, and deposits thereof.
> 14. Any administrative matter concerning the costs or expenses in the arbitration shall be dealt with by the Registrar".

However, the SIAC Practice Note does not seem to respect the will of the parties in terms of a minimum interference with UAR at least in one matter which is the total exemption of liability found, as opposed to Art.16 UAR[163].

In the case of HKIAC Procedures for the Administration of International Arbitration (31st March 2005) the functions as administrator includes: commu-

161 Section 5 SIAC Practice Notes under UAR states that: "Any notice, Statement of Claim, Statement of Defense, Counterclaim, Reply (and any amendments thereto) as well as any communications, and notifications´, exchanged between the parties and the Tribunal shall also be sent to the Registrar".

162 The 2012 UNCITRAL Recommendations, nº17 advises that "The institution may include the fee review mechanism as set out in article 41 of the Rules (as adjusted to the needs of the institution)".

163 Section 33 of the Practice Notes states that: "SIAC, including the President, members of its Court, directors, officers, employees or agents, shall not be liable for anything done or omitted to be done in connection with the administration of any arbitration conducted under the UNCITRAL Rules".

nications, timing, logistic and procedural advice[164], costs, deposits[165], hearings rooms if at HKIAC with no cost to the parties. The rest of the services will be billed separately, although they may be arranged by the Center: stenographic transcripts, translation and interpretation, and registration of awards. The permanent involvement of the Center during the arbitration is seen in the procedure for the communications and written documents that should be exchanged through HKIAC and so expressly it is a modification of the Rules (section 9.1 "Notwithstanding the provision of the Rules….").

The LCIA upon request[166] provides the following services as administrator of an UNCITRAL arbitration:

a) establishing and maintaining a computerised procedural record to track the arbitration;
b) ensuring that milestone dates are met and advising the tribunal and parties when they are not;
c) maintaining a file of correspondence and submissions, enabling us to respond to any enquiries from the parties or the Tribunal and to provide any duplicate copies as may from time to time be required;
d) if and when requested to do so by the Tribunal, issuing procedural directions on their behalf – most typically, directions for advances on costs;
e) ensuring that communication between parties (or their lawyers) and the Tribunal are kept open (including ensuring that correspondence is copied to all relevant parties) and generally keeping the process moving, by such appropriately diplomatic intervention as may be required;
f) assisting, when asked to do so, in making any necessary practical arrangements for meetings or hearings (including, for example, arranging for services such as interpretation, court reporting, telephone or video conferencing);
g) when required, providing letters of invitation to assist with entry visas for the purpose of hearings;
h) where asked to do so, reviewing draft Awards for typographical and clerical errors and preparing and issuing certified copies of any Award (including notarisation if required);

164 Section 10.1: "The HKIAC will liaise with the arbitral tribunal and the parties to fix the time limits for the arbitration, as well as to establish the date, time and place of meetings, hearings, or otherwise, as required. 10.2: Upon request by the arbitral tribunal, the HKIAC will advise generally on applicable procedure under the Rules".

165 The Procedures establishes modifications to Art.41 UAR.

166 The information that follows was kindly provided to the author by the LCIA Registrar, Mrs Sarah Lancaster.

i) acting as a sounding board for the parties and Tribunal in relation to procedural matters;
j) lastly, lending the imprimatur of the LCIA to the conduct of the arbitration and to any Award rendered by the Tribunal.

In relation to the institutions that offer a minimum intervention as an administrator, the AAA offers a list of services and whether or not the cost is included in the administration. Those services relate to communications between the parties[167], hearings[168], hearings room-rentals, stenographic transcripts, interpretation, fees of Arbitrators and deposits, and other services. The first two are the services included in the administration fee, the others are billed separately. Therefore, if the case is administered by AAA, the institution will have a permanent involvement in the arbitration as a communication channel between the parties and the arbitrators and a control function in terms of time requirements[169].

Similarly to AAA, WIPO lists also the administrative services offered when administering a case under UAR, which besides the service as appointing authority it also includes communications, hearings, hearing room and party rooms, deposits, and registration of the awards. Those services are included in the administration fee but in relation with the hearing room only if the hearings are held in Geneva. Other additional services to be billed separately include: arranging for transcription services and interpretation; photocopying; secretarial assistance; and telephone, telefax and other communication facilities.

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167 American Arbitration Association Procedures for Cases under the UNCITRAL Arbitration Rules, as amended and effective 2005, explains that: "The experience of major arbitration agencies suggests that arbitrations are best served when communications--except at hearings--are transmitted through the arbitration administrator. Upon request, all oral or written communications from a party to the arbitral tribunal--except at hearings--may be directed to the AAA, which will transmit them to the arbitral tribunal and to the other parties".
Agreement by the parties that the AAA shall administer a case constitutes consent by the parties that, for purposes of compliance with the time requirements of the UNCITRAL Arbitration Rules, any written communication shall be deemed to have been received by the addressee when received by the AAA. When transmitting communications to a party, the AAA will use the address set forth in the notice of arbitration or any other address that has been furnished by a party in writing to the AAA".

168 American Arbitration Association Procedures for Cases under the UNCITRAL Arbitration Rules, as amended and effective 2005 states in relation to the communications that: "Upon request, the AAA will assist the arbitral tribunal to establish the date, time and place of hearings, giving such advance notice thereof to the parties as the tribunal determines pursuant to the UNCITRAL Arbitration Rules (Article 25, paragraph 1)".

169 American Arbitration Association Procedures for Cases under the UNCITRAL Arbitration Rules, as amended and effective 2005: "Agreement by the parties that the AAA shall administer a case constitutes consent by the parties that, for purposes of compliance with the time requirements of the UNCITRAL Arbitration Rules, any written communication shall be deemed to have been received by the addressee when received by the AAA. When transmitting communications to a party, the AAA will use the address set forth in the notice of arbitration or any other address that has been furnished by a party in writing to the AAA".

Finally, examples of a medium kind of intervention in UAR are JCAA and DIS.

Under DIS special rules for administering cases under UAR, only certain key communications should be communicated to DIS for it to transmit them to the parties, to the other party or, as the case may be to the arbitral tribunal, such as the notice of arbitration (Art.3.1), the response to the notice of arbitration (Art.4.2), the counterclaim (Art.4.6), and the award (Art.34.7). Some communications initiated only by one party should be also communicated to the DIS as well as to the other party, such in the case of a request of interpretation of the award (Art.37.1), the request for correction (Art.38.1) and the request for an additional award (Art.39.1). Furthermore, some supervisory role is assumed by DIS, for example, DIS on its own motion may at any time require proof of authority granted to the representative of the party in such a form as the DIS Secretariat may determine (Art.5). DIS may issue an order of termination of the arbitral proceedings in certain cases (Art.37.4). And DIS assumes also a control of the deposits made by the parties (Art.43). As far as other services, the DIS only refers in Annex 3, nº19 to the translation of documents other than in English, French or German, that might be arranged by DIS but billed separetely to the parties.

In relation with the role of JCAA under arbitrations conducted under UAR[170], the institution is the channel of communication between the parties before the constitution of the Arbitral Tribunal (Art.3) and afterwards all the communications should be made through the Association (Art.6), being the award serviced by the institution (Art.9.1). Besides, the institution after accepting a request for arbitration designates one of its offices as the secretariat in charge of administrative services (Art.5). The services offered are tape recordings and arrangements for interpreting, making a stenographic transcript and providing a hearing room and the like as necessary for conducting the arbitral proceedings (Art.7).

5.3. The PCA as administrator

In relation with the discussion just maintained, special mention is to be had to the PCA, because of its special role under UAR and so the experience gained over almost 40 years, its special feature of an international organization composed of 115 States and so the possible trust for them to choose the PCA as

170 Administrative and Procedural Rules for Arbitration Under The UNCITRAL Arbitration Rules, as amended and effective on 1 July 2009.

administrator[171], the fact that all of its model arbitration rules are based upon UAR (1976 or 2010) and that the role of appointing/designating authority and the administrative service are divided internally.

As it is clearly derived from the institutional role the Secretary-General of The PCA has under UAR, the functions of appointing authority/designating authority and the administration of the procedure or the offer of certain administrative services are divided. The latter are in charge of the PCA International Bureau, which may be appointed as registrar or administrative secretary for the case and carry out administrative tasks at the direction of the arbitral tribunal. This is certainly what happens in investment arbitration administered by the PCA, where it designates one or even more secretaries of the tribunal[172]. Therefore a permanent role of the PCA throughout the proceedings is also observed and thus complying with the features of administered arbitration.

Whether this conclusion is perceived as such by the PCA[173] might be subject of discussion as it seems that due to its traditional role under UAR the agreement of the parties on the arbitration clause to an institution administering the case does not mean necessarily that the institutions should function also as the appointing authority. To this point, the PCA Report "UNCITRAL Arbitration Rules: Report of the Secretary-General of the Permanent Court of Arbitration on its activities under the UNCITRAL Arbitration Rules since 1976"[174] considers *"Pathological" and problematic clauses* (nº16), an arbitration clause that "contains a reference to an administering body (in the real situation, proceedings under UAR *administered* by the LCIA) and one of the parties objects to that administering body acting as the appointing authority. In such cases, the usual practice of the PCA Secretary-General is to designate the administering body referred to in the clause (in the real situation, the LCIA) as the appointing authority, on the basis that the parties' prior agreement was to choose that administering body"[175].

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171 These two also in GRIMMER, The Permanent Court, pp.11-12 to explain the increase role of PCA as administrator.

172 See for example: PCA Case No. AA 227, Yukos Universal Limited (Isle of Man) v. The Russian Federation. As stated in the Final Award, 18 July 2014, nº15: "On 31 October 2005, a preliminary procedural hearing was held in The Hague, at which the Parties and members of the Tribunal signed Terms of Appointment confirming, inter alia that: (a) the members of the Tribunal had been validly appointed in accordance with the ECT and the UNCITRAL Rules; (b) the proceedings would be conducted in accordance with the UNCITRAL Rules; (c) the International Bureau of the PCA would act as registry (….)".

173 Similarly under the offer of administrative services of AAA and WIPO.

174 See: A/CN.9/634, at UNCITRAL website.

175 No surprise that the arbitration clause recommended by LCIA when administering arbitrations under UAR does include the specific mention of the LCIA as the appointing authority:
"*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the UNCITRAL Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.*

This is so because of the traditional structure for the PCA and its institutional role under UAR: the Secretary-General is the designating or the appointing authority, and when there is an administration of the case it is the international bureau of the PCA, the body entrusted with this role. Note, however, that the Secretary General of the PCA is the head of the International Bureau. In any case, the model arbitration clauses offered by the PCA follow this pattern[176], as well as the model clause offered by UNCITRAL. Does it mean that the PCA is impliedly considering this as a third type of arbitration? As analyzed before, the answer should be negative particularly if necessary to draw the distinction between those two types of arbitrations.

Furthermore, when looking at this issue from the perspective of an administered arbitration, another conclusion might be reached. From our point of view, the arbitration clause considered in one of the previous paragraphs by the PCA as pathological or problematic is neither of them. From our point of view the administration of a case by an institution also includes the appointment of arbitrators by that institution either under UAR or under other arbitration rules. This is the result when examining the set of arbitration rules of the major arbitration centers around the world as well as the model arbitration clauses offered. The rules include the power of the institutions to appoint the arbitrators which in our opinion should be considered an essential function to develop by an arbitral

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Any arbitration commenced pursuant to this clause shall be administered by the LCIA.
The appointing authority shall be the LCIA.
The LCIA schedule of fees and costs shall apply.
The number of arbitrators shall be [one/three].
The seat, or legal place of arbitration shall be [City and/or Country].
The language to be used in the arbitral proceedings shall be [ ].
The governing law of the contract shall be the substantive law of [ ]."
The model clause was kindly provided to the author by the LCIA Registrar, Mrs. Sarah Lancaster.

176 Model clause for the use of the Secretary-General as the Appointing Authority and the International Bureau as Administrator:
"Parties who agree to arbitrate under the UNCITRAL Arbitration Rules and to have the Secretary-General act as the appointing authority and the International Bureau provide administrative services may use the following clause:
Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract.
The appointing authority shall be the Secretary-General of the Permanent Court of Arbitration.
Note: parties might wish to consider adding:
(a) *The number of arbitrators shall be* . . . [one or three].
(b) *The place of arbitration shall be* [The Hague] [or other location].
(c) *The language(s) to be used in the arbitral proceedings shall be* . . . [insert choice].
(d) [For cases involving a State, a State-controlled entity or an intergovernmental organization] *The case shall be administered by the International Bureau of the Permanent Court of Arbitration".*

institution that ought to be foreseen in the arbitration rules of the institution[177], generally on a default basis. It is even mandatory under some arbitration laws[178].

In fact, the PCA seems to acknowledge this situation in the most recent set of arbitration rules, such as the PCA Arbitration Rules (2012) and the PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (2011), where the Secretary-General of the PCA shall serve as appointing authority, and the international bureau performs the administrative services, without the model arbitration clause making the distinction between appointment of the arbitrators and administration of the procedure[179], different to other model clauses of the same institution[180]. It is without doubt an administered arbitration[181] where the PCA has an active role[182]. The new functions expressly foreseen to the PCA under Art.6.1 UAR as an appointing authority might be behind the change and

177 Comment 4 to IBA Guidelines for Drafting International Arbitration Clauses, 7th October 2010: "In institutional (or administered) arbitration, an arbitral institution provides assistance in running the arbitral proceedings in exchange for a fee. The institution can assist with practical matters such as organizing hearings and handling communications with and payments to the arbitrators. The institution can also provide services such as appointing an arbitrator if a party defaults, deciding a challenge against an arbitrator and scrutinizing the award". It is not that the institution *can* provide for administrative services and that *can* provide the service of appointing an arbitrator if a party defaults. It is that the institution *must* provide both of them in its rules.

178 See Article 1452 CPC France: "If the parties have not agreed on the procedure for appointing the arbitrator(s): (1) Where there is to be a sole arbitrator and if the parties fail to agree on the arbitrator, he or she shall be appointed by the person responsible for administering the arbitration or, where there is no such person, by the judge acting in support of the arbitration; (2) Where there are to be three arbitrators, each party shall appoint an arbitrator and the two arbitrators so appointed shall appoint a third arbitrator. If a party fails to appoint an arbitrator within one month following receipt of a request to that effect by the other party, or if the two arbitrators fail to agree on the third arbitrator within one month of having accepted their mandate, the person responsible for administering the arbitration or, where there is no such person, the judge acting in support of the arbitration, shall appoint the third arbitrator".

179 The PCA Arbitration Rules (2012) offer two arbitration clauses. One for contracts: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012"; and the other one for treaties and other agreements: "Any dispute, controversy or claim arising out of or in relation to this [agreement] [treaty], or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled in accordance with the PCA Arbitration Rules 2012".

Note — Parties should consider adding:

The number of arbitrators shall be ... (one, three, or five);

(b) The place of arbitration shall be ... (town and country);

(c) The language to be used in the arbitral proceedings shall be ....

180 See for example the Model Clause for use in connection with the PCA Optional Rules for Arbitrating disputes relating to national resources and/or enviroment. Art.1.3 of the Rules states the functions of The International Bureau of the Permanent Court of Arbitration "shall take charge of the archives of the arbitration proceeding. In addition, upon written request of all the parties or of the arbitral tribunal, the International Bureau shall act as a channel of communication between the parties and the arbitral tribunal provides secretariat services and/or serve as registry". Idem: Art.1.3 of The PCA optional Rules for Arbitration between International Organizations and Private Parties, effective 1 July 1996.

181 It seems also the case for: Brooks W. DALY/ Evgeniya GORIATCHEVA/Hugh A. MEIGHEN, A Guide to the PCA Arbitration Rules. Oxford University Press, 2014, nº1.12.

182 Using the words of Judge Fausto POCAR, An introduction to the PCA´s Optional Rules for Arbitration of Disputes Relating to Outer Space Activities. Journal of Space Law, 2012, vol.38, p.184.

so the natural recognition that when an institution administers a case, it is also in charge of the appointment of arbitrators as well as the other functions that an appointing authority has under UAR.

The natural assumption is that the institution that administer the case also functions as the appointing authority and so the model arbitration clauses might be drafted as to recognize this situation. Otherwise a door is open for the parties to bifurcate the roles in an institutional arbitration, i.e., the parties agree that UAR is to be fully administered by an institution, but designate another institution as an appointing authority which is not a recommended situation. This is not an *ad hoc* arbitration but an institutional one.

A further comment follows on Art.1.4 of the PCA Arbitration Rules (2012) that states that:

> "The involvement of at least one State, State-controlled entity, or intergovernmental organization as a party to the dispute is not necessary for jurisdiction where all the parties have agreed to settle a dispute under these Rules. However, where the Secretary-General of the Permanent Court of Arbitration determines that no State, State-controlled entity, or intergovernmental organization is a party to the dispute, the Secretary-General may decide to limit the Permanent Court of Arbitration's role in the proceedings to the function of the Secretary-General as appointing authority, with the role of the International Bureau under these Rules to be assumed by the arbitral tribunal".

Although at a first sight may be a problematic provision, we think that the PCA is making an offer to administer the arbitration to parties when at least one of them is a State, while if no State is involved, it would be legally consider as an *invitatio ad offerendum* to the parties. The PCA, meaning the Secretary-General of the PCA, may reject the offer of the parties when the request for arbitration is submitted to it, counteroffering an *ad hoc* procedure where the PCA will only exercise the role as appointing authority. This legal approach we think is the one that better suits the purpose and objectives of the PCA as an intergovernmental organization devoted to States and the prospective risk of an otherwise offer to the public (private commercial parties) which implies the risk of the PCA being the administrator of a potential unknown and unlimited number of commercial cases around the world.

Save for the situation just indicated, the PCA Arbitration Rules (2012) are rules for institutional arbitration and so a direct involvement and permanent presence of the PCA is seen when analyzing the Rules, as evidenced by the fact

that copy of the most important writings should be also addressed to the International Bureau: notice of the arbitration and its response (Arts.3 and 4), notice of the challenge of an arbitrator (Art.13.2), the statements of claim and defense (Arts.20 and 21), the request for interpretation of the award or to the additional award (Arts.37 and 39). Also, the names and addresses of agents, party representatives, and other persons assisting the parties must be communicated to all parties to the International Bureau (Art.5.3). Furthermore, all communications to the arbitral tribunal by one party shall be communicated by that party to all other parties and the International Bureau (Art.17.4); the International Bureau is entrusted with the communication of the award to the parties (Art.34.6) and in cases involving only States, the parties shall communicate to the International Bureau the laws, regulations, or other documents evidencing the execution of the award (Art.34.7). Finally, a supervisory or control role is established in relation with periods of time (Arts.4.1, 8.2 b), 9.3 and 43.4) and the deposits (Art.43).

5.4. A final comment

Common features of all the models when administering arbitration proceedings under UAR are, first, the permanent involvement of the institution throughout the arbitration as a channel of communication between the parties and the arbitrators either as in charge of sending communications, or as informative means[183]. Second, the role of administration means also the appointment of arbitrators. Since the arbitration is not an *ad hoc* procedure, the institutions as well as the parties might be subject to special duties and obligations under the applicable law. The arbitration law might establish legal duties on the arbitral institution to control the appointment of the arbitrators[184], or the Law might require that

183 In relation to the communications the WIPO Special Rules states that: "The agreement of the parties that the Center will act as administrator shall constitute consent by the parties that, for the purpose of the application of the UNCITRAL Arbitration Rules, written communications shall be deemed to have been received by the addressee when received by the Center".

184 Article 14.3 Spanish Arbitration Act: "Arbitration institutions shall ensure compliance with conditions for the capacity of arbitrators, transparency in their appointment and also their independence".

Art.23 Panama International and Commercial Arbitration Act 8th January 2014: "Cuando proceda la designación de árbitros por una institución de arbitraje, esta tendrá en cuenta las condiciones requeridas por las partes en el acuerdo para el nombramiento de árbitros y tomará las medidas necesarias para garantizar el nombramiento de un árbitro independiente e imparcial. En el caso de que proceda designar un árbitro único o el tercer árbitro tendrá en cuenta asimismo la conveniencia de nombrar un árbitro de nacionalidad distinta a la de las partes y, en su caso, a la de los árbitros ya designados. La institución designada deberá realizar el nombramiento o los nombramientos requeridos dentro de un término de treinta días, contando a partir de la fecha en que sea recibida la solicitud correspondiente. Cuando proceda la designación de árbitros por una institución de arbitraje

for certain disputes, such as intra-corporate disputes, the appointment of the arbitrators be made only by the institution, therefore limiting party autonomy in these kinds of disputes[185].

The intensity of a further intervention by the institution varies depending on the model the institution decides to follow taking always into account the agreement of the parties that have opted for UAR as the set of arbitration rules to be applied.

VI. Institutions that provide some administrative services in *ad hoc* arbitrations under the UNCITRAL Arbitration rules

Arbitration institutions might offer partial administrative services related to *ad hoc* arbitrations under UAR or other *ad hoc* proceedings, which might include or not the role as appointing authority. In this situation, the arbitration is still an *ad hoc* arbitration and not an administered one[186]. Usually the distinction is not made by the institution. As an exception the HKIAC Administered Arbitration Rules of 2008/2013 states in Article 1.2 that: "Nothing in these Rules shall prevent parties to a dispute or arbitration agreement from naming the HKIAC as appointing authority, or from requesting certain administrative services from the HKIAC, without subjecting the arbitration to the provisions contained in these Rules (…)".

Generally when the institutions offer some administrative services, they do so in broad and general terms. There are, however, some institutions, such as the AAA and The PCA that includes a variety of services and lists them when providing services under UAR[187], following the 2012 UNCITRAL Recommendations, nº23 that offers a non-exhaustive list of possible services:

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nacional, esta deberá ser una institución autorizada conforme lo dispone el art.14, y, además, contar con una demostrada operatividad en la administración de los procesos arbitrales".

185 See *supra* Art.11 bis 3 Spanish Arbitration Act.

186 A description of the practice for this in *ad hoc* arbitration, also considering the services that might be provided by other entities: UNCITRAL Notes, nº25. Examples of entities that provide for administrative services, particularly in relation to hearings but are not arbitration centers are: The Stockholm International Hearing Centre and The ICC Hearing Centre that seems to offer their services whether or not the arbitration is subject to the ICC Rules.

187 First, a staff member of the PCA International Bureau may be appointed as registrar or administrative secretary for the case and carry out administrative tasks at the direction of the arbitral tribunal, which is usually done in investment cases. As indicated on its web site, the list of services is as follows: transmitting oral and written communications from the parties to the arbitral tribunal and vice-versa and between the parties; maintaining an archive of filings and correspondence; making all arrangements concerning the amounts of the arbitrators' fees and advance deposits to be made on account of such fees in consultation with the parties and the arbitrators; holding the party deposits and disbursing tribunal fees and expenses; assisting the arbitral

"a) Maintenance of a file of written communications;
b) Facilitating communication;
c) Providing necessary practical arrangements for meetings and hearings, including:
   (i) Assisting the arbitral tribunal in establishing the date, time and place of hearings;
   (ii) Meeting rooms for hearings or deliberations of the arbitral tribunal;
   (iii) Telephone conference and videoconference facilities;
   (iv) Stenographic transcripts of hearings;
   (v) Live streaming of hearings;
   (vi) Secretarial or clerical assistance;
   (vii) Making available or arranging for interpretation services;
   (viii) Facilitating entry visas for the purposes of hearings when required;
   (ix) Arranging accommodation for parties and arbitrators;
d) Providing fund-holding services;
e) Ensuring that procedurally important dates are followed and advising the arbitral tribunal and the parties when not adhered to;
f) Providing procedural directions on behalf of the tribunal, if and when required;
g) Providing secretarial or clerical assistance in other respects;
h) Providing assistance for obtaining certified copies of any award, including notarized copies, where required;
i) Providing assistance for the translation of arbitral awards;
j) Providing services with respect to the storage of arbitral awards and files relating to the arbitral proceedings".

The arbitration center offer of administrative services varies depending on the institution, and so not all of them have a full list of services or either are not able or do not want to provide some of them. To this regard the somehow opti-

tribunal to establish the date, time and place of hearings, and giving such advance notice thereof to the parties as the tribunal determines pursuant to the UNCITRAL Arbitration Rules (Art. 25(1)); making its hearing and meeting rooms in the Peace Palace available to the parties and the arbitral tribunal at no charge; costs of catering, court reporters, or other support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the parties; making arrangements for transcription, recording, interpretation, translation, catering, or other support associated with hearings or meetings at the Peace Palace or elsewhere, costs of which shall be borne by the parties; assisting with travel and hotel reservations, as well as procurement of visas; and carrying out any other tasks entrusted to it by the parties or the arbitral tribunal.

mistic vision of the UNCITRAL Notes as to the services that arbitral institutions are able to perform in practice is presently under revision[188].

188 For example UNCITRAL Notes, nº24 states that: "the institution will usually provide all or good part of the required administrative support to the arbitral tribunal", and particularly refers to the services of deposit (nº28-29), and to interpretation and translation. See: UNCITRAL Notes, nº19 states that "interpretation as well as translation services are often arranged by the arbitral institutions". In fact, according to the ICC and SCC experience those services are often arranged by the parties (A/CN.9/WG.II/WP.184, nº8, p.3 and p.9 in relation to Note 2), but indeed the institutions are able to arrange for those services as it happens with: HKIAC, LCIA, AAA, WIPO, and PCA. Also the SCC points out in relation to nº24 of the UNCITRAL Notes that: "may need redrafting as this practice may vary greatly between different institutions" (Id., WP.184, p.9).
The discussion about the purpoted revision of the UNCITRAL Notes is found at: A/CN.9/WG.II/WP.183, nº13. And: A/CN.9/826, nº68 y nº74.