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Scrutiny of Arbitral Awards by Arbitration Institutions in International Arbitration: Focusing on the ICC's Scrutiny of Award Process

국제중재에서 중재기관의 중재판정 검토에 대한 고찰
- ICC 국제중재기관의 중재판정에 대한 검토 규정을 중심으로 -

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국문초록

근래에는 세계 각지에 있는 당사자들이 외국 법원에 출석하지 않고도 적절하고 적합한 분쟁의 해결책을 제공받기 위하여 국제중재를 점차적으로 많이 사용하고 있다. 그리고 모든 중재 절차의 목적은 독립적인 중재판정부에 의하여 최종적이고 집행 가능한 중재판정을 받는 것이다. 한편, ICC와 같은 특정 국제중재기관의 국제중재규칙은, 중재판정부가 최종 중재판정에 서명하고 당사자에게

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발행하기 전에 중재판정을 해당 중재기관에 제출하여 해당 중재기관의 검토를 받도록 요구하고 있다. 이와 관련하여, 모든 국재중재기관의 국제중재규칙이 위와 같은 중재기관에 인한 중재판정의 검토를 규정하지는 않고 있지만, 이러한 규정의 흠결이 반드시 중재기관에 의한 검토가 불필요함을 의미한다고 보기는 어렵다. 따라서 저자는 ICC 국제중재기관의 중재판정에 대한 검토 절차를 상세히 살펴보고, 이러한 절차의 장단점을 파악하여, 다른 중재기관이 ICC의 중재판정 검토와 같은 절차를 도입함에 있어서 고려해야 할 바를 제시하고자 한다.

주제어 : 국제중재, 중재판정부, 중재판정, 중재판정에 대한 검토, ICC 국제중재기관

Ⅰ. Introduction

Arbitration is an alternative dispute resolution mechanism that provides the parties relevant and appropriate resolutions to their dispute(s) without having to resort to court litigation. International commercial arbitration has even more of a significance in that commercial parties from different parts of the world are able to resolve their disputes without having to present their cases before any foreign national courts, and thus, precluding the possibility of subjecting themselves to any unfair local bias. The foundation of any arbitration proceeding is the parties' arbitration agreement.[1] Therefore, the parties are free to enjoy their autonomy with respect to their arbitration proceedings as long as and to the extent that the parties agree. The objective of any arbitration – keeping aside the possibility that the parties may settle – is an enforceable, final award issued by an arbitral tribunal containing conclusions and/or resolutions for the matters in dispute. Certain

1) Simon Greenberg, Christopher Kee, J. Rosmesh Weeramantry, International Commercial Arbitration: An Asia-Pacific Perspective, p.144, Cambridge Univ. Press (2011).

prominent international arbitration institutions, notably the International Chamber of Commerce (ICC) and a few others, however, mandate that the arbitral tribunals submit their draft awards to the arbitral institution for a scrutiny of the award process before the final award is signed and issued to the parties.[2] This paper examines the draft award scrutiny process by arbitral institutions, in particular the ICC, and discusses relevant issues to determine whether such institutional scrutiny of awards is beneficial to the overall arbitral process by enhancing the enforceability of arbitral awards in light of the associated costs. In doing so, first in section II, some of the reportedly attractive aspects of international arbitration are introduced. In section III, the institutional scrutiny of arbitral awards along with some issues that the process raises are examined more in detail, and finally, concluding remarks are included in section IV.

Ⅱ. International Arbitration and Reasons for its Attractiveness to the Users

According to the "Improvements and Innovations in International Arbitration" survey conducted by the School of International Arbitration at Queen Mary University of London in 2015, the respondents[3] to the survey ranked

2) The International Chamber of Commerce (ICC) Arbitration Rules, Art. 34 (2017); The Singapore International Arbitration Centre (SIAC) Rules of International Arbitration, Art. 32.3 (2016). For the purposes of this paper, only the award scrutiny process by the ICC is examined in depth.

3) The respondent group consisted of academics (4%), staff of arbitral institutions (2%), arbitrators (11%), arbitrator and counsel in equal proportion (12%), expert witnesses (2%), in-house counsel (8%), private practitioners (49%), and other (judges, third party funders, mediators, government officials and respondents who did not specify their position) (12%). 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration by the School of International Arbitration at Queen Mary

'enforceability of awards' as the most valuable characteristic of international arbitration, which was very closely followed by 'avoiding specific legal systems/national courts.'[4] 'Selection of arbitrators' and 'confidentiality and privacy' ranked fourth and fifth, respectively, with 'finality' coming in seventh for most valuable characteristics of international arbitration.[5] Also, it should be noted that although efficiency – both in terms of time and cost – used to be the most appealing aspect of international arbitration in the past, cost has recently been reported as the worst feature of arbitration among other factors, such as, 'lack of speed.'[6]

With respect to most preferred arbitral institutions, the ICC has ranked first by a significant margin all in years 2006, 2010, and 2015, followed by the London Court of International Arbitration (LCIA).[7] The reasons for such strong preference for the ICC were reported as the 'internationalism' and 'high-quality services' of the ICC.[8] Moreover, also relevant for the purposes of this paper, 'scrutiny of award by institution' ranked as the sixth most important reason for the interviewees' preference for certain institutions, while the subgroup of arbitrators amongst the survey respondents rated 'scrutiny of awards' as the fourth most important reason why they preferred certain institutions.[9] As to how much the users of international arbitration value confidentiality, which is another well-known attractive feature of arbitration, the results of the "Choices in International Arbitration" survey also conducted by Queen Mary University in 2010 have revealed that 38% of the corporate respondents replied that they would still use arbitration even if arbitration

University of London at 51.

4) 2015 International Arbitration Survey, supra note 3, at 6.

5) Id.

6) 2015 International Arbitration Survey, supra note 3, at 2.

7) 2015 International Arbitration Survey, supra note 3, at 17.

8) Id.

9) 2015 International Arbitration Survey, supra note 3, at 18-19.

no longer offered the potential for confidentiality, and 35% responded that they would not use arbitration in such case. Therefore, it can be inferred that while confidentiality may be an important reason that parties – corporations, in particular – opt for arbitration, it is not the only reason why users choose arbitration.[10)]

Ⅲ. Scrutiny of Awards by the Arbitral Institutions

The institutional award scrutiny process, which the arbitral institution mandates that the arbitral tribunals submit their draft awards to the institution for its review of the award before the tribunals sign and issue the final award to the parties, is not a feature that is common to all arbitration institutions. Therefore, the scrutiny process is among the top reasons why some users of international arbitration prefer particular institutions as opposed to others, as indicated above. For instance, while the Hong Kong International Arbitration Centre (HKIAC) is one of prominent international arbitration institutions in the Asia-Pacific, its most updated arbitration rules (2013 HKIAC Administered Arbitration Rules) are silent as to scrutiny of arbitral awards. Also, the very recently revised 2016 International Arbitration Rules of the Korean Commercial Arbitration Board (KCAB), the 2014 London Court of International Arbitration (LCIA) Rules, as well as the 2017 Arbitration Rules of Arbitration Institute of the Stockholm Chamber of Commerce (SCC) do not contain any provision with respect to the institutional scrutiny of arbitral awards. Nevertheless, there are a few renowned international arbitration institutions, namely the Singapore International Arbitration Centre (SIAC) and the China International Economic and Trade Arbitration Commission

10) 2010 International Arbitration Survey: Choices in International Arbitration, by the School of International Arbitration at Queen Mary University of London, p.30.

(CIETAC), in addition to the ICC, with the scrutiny process in their rules. It is rather unclear whether the absence of any language related to the scrutiny of award process actually means that those institutions do not perform any review of their arbitral tribunals' awards at all. What is more likely is that there may be some scrutiny done to a certain extent by the institution, but to a lesser degree than what may be expressed in the rules of those institutions with mandatory scrutiny of draft awards process. These relevant institutional arbitration rules of the scrutiny process will be introduced, with most of the discussion focused on the ICC's draft award scrutiny process.

1. The SIAC and the CIETAC Arbitration Rules and their Scrutiny of Awards Processes

Article 32.3 of the 2016 Arbitration Rules of the SIAC provides that "Before making any Award, the Tribunal shall submit such Award in draft form to the Registrar. Unless the Registrar extends the period of time or unless otherwise agreed by the parties, the Tribunal shall submit the draft Award to the Registrar not later than 45 days from the date on which the Tribunal declares the proceedings closed. The Registrar may, as soon as practicable, suggest modifications as to the form of the Award and, without affecting the Tribunal's liberty to decide the dispute, draw the Tribunal's attention to points of substance. No Award shall be made by the Tribunal until it has been approved by the Registrar as to its form."[11] Also, article 51 of the 2015 CIETAC Arbitration Rules, which governs scrutiny of draft awards, sets forth the following: "The arbitral tribunal shall submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may

11) Arbitration Rules of the Singapore International Arbitration Centre, Art. 32 (2016).

bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected."[12] Because an emergency arbitrator may make a decision in a form of an order or an award pursuant to Appendix III, Article 6(1) of the CIETAC Arbitration Rules and Schedule 1 of the SIAC Arbitration rules, the draft of an emergency relief, if issued in a form of an award, must also be submitted to the respective institutions for the institutional award scrutiny process before the tribunal signs and issues the final emergency award.[13][14]

As set forth in the rules above, both the SIAC and CIETAC mandate that every award be subjected to scrutiny by the respective institution. On one hand, the SIAC may suggest changes to be made as to form of the award and also points of substance as long as the arbitrators' liberty to decide the case is not affected by such suggestions. On the other hand, the CIETAC Rules allow the institution to point to issues in the arbitral award on the condition that the tribunals' independence in rendering the award is not affected. The language of Article 51 of the CIETAC Rules appears to be more encompassing than that of the SIAC Article 32.3 in terms of what may be brought to the tribunals' attention by the institution during its scrutiny process, as there is no specific mention of limiting the scope of scrutiny to the form of an award. Nevertheless, neither institution provides guidance or explanation as to what sort of suggested modifications would be in line with not affecting the tribunal's liberty to decide the dispute or its independence in rendering the award. This type of rather unclear and ambiguous language and provisions as to the scope of institutional scrutiny of awards and the consequent associated problems are discussed more in

12) CIETAC Arbitration Rules, Art. 51 (2015).
13) CIETAC Arbitration Rules, App. III, Art. 6 (2015).
14) Arbitration Rules of the Singapore International Arbitration Centre, Schedule 1 (2016).

detail below when examining the ICC's award scrutiny process.

Additionally, the SIAC Rules are unique in that the time limit by which the arbitral tribunals must submit their draft awards to the institution – no later than 45 days from the date the proceedings have closed – is explicitly provided. This time window of 45 days is probably in place in order to encourage arbitral tribunals to draft their decisions as soon as practicable for the interests of the parties and also to address some of the concerns regarding whether delays in issuance of awards should be attributed to the institutional scrutiny process. However, even if the time limit may be fixed in the Rules, if the institution and/or the tribunals may extend such as needed, then such deadline may not have much of a significance.

2. The ICC Arbitral Award Scrutiny Process

The ICC's scrutiny of awards is known as "one of the cornerstone features" of the ICC arbitration,[15] and as demonstrated by the Queen Mary survey results, it is actually one of the reasons why some users of international arbitration prefer the ICC. According to the Secretariat's Guide to ICC Arbitration, the primary purpose of the ICC's award scrutiny process is "to improve the award's general accuracy, quality and persuasiveness," and basically, to maximize the award's enforceability.[16] In order to examine

15) Simon Greenberg, Christopher Kee, J. Rosmesh Weeramantry, International Commercial Arbitration: An Asia-Pacific Perspective, p.389, Cambridge Univ. Press (2011).

16) Gustav Flecke-Giammarco, The ICC Scrutiny Process and Enhanced Enforceability of Arbitral Awards, 24 J. Arb. Stud., 3, p.56 (2014). According to the Secretariat's Guide to ICC Arbitration the scrutiny process 'serves primarily to maximize the legal effectiveness of an award by identifying defects that could be used in an attempt to have it set aside at the place of arbitration or resist its enforcement elsewhere. Scrutiny also improves the award's general accuracy, quality and persuasiveness.' (Author quoting the Secretariat's Guide to ICC Arbitration, ICC Publication No. 729E, 2012, p. 327, para. 3-1181).

whether such process is beneficial to the overall arbitration process by enhancing the enforceability of the ICC awards, the process of the ICC scrutiny of awards itself is discussed in detail in this section.

(1) Mandatory Nature, Purpose, and Presented Issues

Article 34 of the 2017 ICC Arbitration Rules provides the following: "Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form."[17] As Article 34 of the ICC Rules makes it very clear, the award scrutiny process is mandatory in ICC arbitrations. However, there are some outstanding issues that are not so clear about this mandatory scrutiny process and thus raise some concern. For instance, while it is clear that the ICC scrutiny process is supposed to be limited in scope, it is rather unclear how the ICC Court's suggested modifications as *to the form of the award* would enhance the award's enforceability by contributing to its accuracy, quality and persuasiveness, as these aspects of an award would most likely deal with the *substantive merits of the award* and not the form of the award. Moreover, and also more importantly, it is unclear how the ICC Court manages to draw the tribunal's attention to points of substance of the draft award "*without affecting the liberty of decision*" of the tribunal, especially if the draft awards are sent back to tribunals (even multiple

17) 2017 ICC Arbitration Rules, Art. 34. The ICC scrutiny provision does not apply to any emergency measures granted by emergency arbitrators since any decision made by an emergency arbitrator shall be in the form of an order, not an award, pursuant to Article 29 of the ICC rules.

times, if the ICC Court deems it necessary) "in order for *the Court to fully understand the arbitral tribunal's reasoning and therefore to approve it in revised form.*"[18] These ambiguities should raise concerns not only from the perspectives of arbitral tribunals but also from those of the parties, who are the ultimate end-users of the arbitration process, for various reasons discussed below. Although it may be extremely helpful if the actual scrutiny process was made public or was somehow more transparent, due to the element of confidentiality inherent in arbitration processes and the general inaccessibility of awards to the public, examining such issues with available sources is therefore critical in providing some insight.

(2) The Process of Scrutiny of Awards

According to Gustav Flecke-Giammarco,[19] for each draft award scrutiny by the ICC, there are three different levels of review once it is submitted by the arbitral tribunal: firstly, the counsel heading the case management team in charge of the file prepares suggested improvements, including typographical and grammatical suggestions; secondly, the Secretary General, Deputy Secretary General, Managing Counsel, or General Counsel reviews the draft award and the corresponding suggestions; and thirdly, these documents are sent to the members of the ICC Court, who will attend the session to which the award will be submitted for its approval.[20] After each scrutiny process, the ICC Court takes one of the following actions regarding the draft award: 1) approve it with no comments back to the tribunal, 2) approve it subject to tribunal's consideration of the ICC Court's comments,

18) Id., at 61.

19) Gustav Flecke-Giammarco was a Counsel at the Secretariat of the ICC International Court of Arbitration at the time of writing his article.

20) Gustav Flecke-Giammarco, supra note 13, at 60.

or 3) send it back to the tribunal without the ICC Court's approval, pending further review of revised draft award(s).[21]

In 2004, out of 356 draft awards that were submitted to the ICC Court, 252 (70.79%) draft awards were approved subject to the comments by the ICC Court, 93 (26.12%) draft awards were straight-out approved with no comments by the ICC Court, and 11 (3.09%) awards were not approved.[22] In 2009, out of 415 draft awards that the ICC Court received, 382 (92.04%) draft awards were sent back to the tribunals with comments of the ICC Court.[23] And more recently in 2013, out of total of 511 draft awards submitted to the ICC Court, 466 (91.19%) awards were approved subject to the ICC Court's comments, 5 (0.98%) awards were approved with no comments by the ICC, and 40 (7.83%) awards were not approved by the ICC Court.[24] From such available data, the trend over time appears to be that the ICC Court has been approving more draft awards subject to its comments (up from about 70% to 91.92%), while approving significantly less draft awards without any comments (down to less than 1% from about 26%) within ten years. Every draft award gets reviewed by about 5 or 6 arbitration specialists in the ICC,[25] and for cases which the ICC determines include complex issues, dissenting opinions, state or state entities, those draft awards are submitted to a Plenary Session of the ICC Court that only meets once a month (as opposed to the weekly sessions), at the end of which, as many as up to 30 (ICC-related) people would have reviewed the

21) Gustav Flecke-Giammarco, supra note 13, at 61.

22) Gustav Flecke-Giammarco, supra note 13 at 51. It was noted with emphasis in the article (fn. 9) that when the ICC Court does not approve a draft award, because it has to be resubmitted to the ICC Court until it is ultimately approved, the non-approved awards have not been included in the "approved" category for the statistics.

23) Simon Greenberg, Christopher Kee, J. Rosmesh Weeramantry, supra note 12, at 389.

24) Gustav Flecke-Giammarco, supra note, 13, at 51.

25) Simon Greenberg, Christopher Kee, J. Rosmesh Weeramantry, supra note 12, at 389-90.

draft award to varying degrees.[26] It is difficult to imagine, however, that at the time the parties were signing their arbitration agreement, they would have anticipated as many as 30 or more people reviewing the award in their dispute, all before the parties themselves get the final award.[27]

(3) Time/Duration of the Scrutiny Process

No matter how expeditiously the award scrutiny process may get done, inevitably, it takes time that would not have been taken but for the process in place. Thus, even some of the arbitrators consider it time-consuming and unnecessary.[28] From an internal study conducted by the ICC, it was revealed that the entire process of the scrutiny process, counting from the date that the ICC Secretariat received the draft award to the date that the tribunal signed the final award, took 29.74 calendar days on average between years 2011 and 2013.[29] More specifically, from the date of the ICC Secretariat's receipt of the draft award to the date of the ICC Court's approval took 17.20 calendar days on average, and from the ICC Court's approval to the date of tribunal's signature on the award took 12.54 calendar days on average.[30] Although the ICC Arbitration Rules do not provide a specific time limit for completion of the scrutiny of awards process itself, Article 31 provides that arbitral tribunals must render their final awards within six months from the date of the last signature by the

26) Gustav Flecke-Giammarco, supra note 13, at 60.

27) However, some experienced and sophisticated users of ICC arbitration may not be surprised by this possibility.

28) Gustav Flecke-Giammarco, supra note 13, at 69.

29) Gustav Flecke-Giammarco, supra note 13, at 71.

30) Id., This data is from an ICC internal study of 225 awards rendered between 2011 and 2013 in the author's case management team. Additionally, the study revealed several outliers, which took as little as 7 days and as long as 83 days, as well.

arbitral tribunal or by the parties of the Term of Reference, or the ICC Court may fix a different time limit based on the procedural timetable established pursuant to Article 24(2).[31] Also, the ICC Court may extend this six-month time limit pursuant to a reasoned request from the tribunal or on the ICC Court's own initiative if it determines is necessary to do so.[32] Therefore, although the six months rule is in place, because the ICC Court may extend this time limit, and especially since if it determines that the case at issue presented a complex matter, requiring the relevant draft award to be sent to the Plenary Session as mentioned above, then the expected time frame of the scrutiny process may be extended, which would consequently delay the issuance of the final award to the parties. Even assuming that the six-month deadline is met most of the times, and taking the average time it took during the years 2011 to 2013 under consideration, then it would leave only about five months for the tribunals to deliberate, reach conclusions on the dispute and draft an award to submit for the ICC's review. Although it is not absolutely clear whether and how often the six-month deadline is extended by the ICC, it is highly likely that such deadline gets extended in practice, especially in light of having to dedicate about a month on average for the scrutiny of award process alone. Importantly, seeing no changes to the existing rules, the scrutiny process presumably serves the interests of the ICC well, even taking the time and costs associated with the scrutiny process under consideration. Lastly, unlike the SIAC and the CIETAC scrutiny provisions, the ICC scrutiny process does not apply to ICC emergency arbitrations, as an emergency arbitrator may only make decisions in a form of an order pursuant to Article 29(2) of the

31) Or if pursuant to application of Article 23(3), then within six months from the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the ICC Court. The ICC Arbitration Rules, Art. 31 (1).

32) The ICC Arbitration Rules, Art. 31 (2).

ICC Rules.[33] Therefore, the efficiency aspect of ICC emergency arbitrations would not be affected by the institution's scrutiny of draft awards.

(4) Issues Related to the Content of the ICC Court's Comments to Arbitral Tribunals Following its Scrutiny of Draft Awards

The ICC Court's comments and/or suggestions often pertain to verifying mathematical calculations with respect to amounts of damages, interests, and costs of arbitration in order to ensure that there are no computational or clerical errors in ICC arbitral awards.[34] Also, the ICC Court confirms that the draft award contains the tribunal's reasoning in support of its findings.[35] However, although the ICC scrutiny is arguably limited in scope as to the form of the award and points of substance that would not and should not affect the liberty of decision by the tribunals, there is no guidance as to what kind of comments related to the substance of these draft awards would or would not affect the liberty of tribunals' decisions and to what degree.[36] While the ICC Court's suggested corrections of typographical and computational errors deal with the "content" of draft awards, it is pretty clear that those types of comments would not affect the liberty of tribunals' decisions. However, Flecke-Giammarco cited that some comments related to substantive matters of the content of draft awards, such as, "consistency between factual conclusions and legal outcomes and any decisions as to factual issues" have been included in the ICC Court's comments to the tribunals "without affecting the arbitral tribunal's liberty of decision."[37] Furthermore, according to Jennifer Kirby, a former Deputy

33) 2017 ICC Arbitration Rules, Art. 29 (2).
34) Gustav Flecke-Giammarco, supra note 13, at 64-65.
35) Id.
36) Gustav Flecke-Giammarco, supra note 13, at 62.

Secretary General of the ICC Court, tribunals' draft awards benefit greatly from the ICC scrutiny due to typographical or computation errors, as well as "*erroneous legal reasoning* or even procedural errors so severe as to undermine the enforceability of the award altogether (emphasis added)."[38] Again, what is evident from Kirby's statement is that the ICC Court's scrutiny and its comments often pertain to quality and even accuracy of the tribunals' legal reasoning in their awards, all with the underlying presumption that such comments somehow would not affect the liberty of tribunals' decision.

This aspect of the award scrutiny process raises some serious concern, however. Firstly, the exclusive and narrow grounds on which recognition or enforcement of the arbitral award may be refused under Article V of the New York Convention are reasons primarily based on procedural due process rights of the parties.[39] Erroneous legal reasoning/findings or factual

37) Id.

38) Gustav Flecke-Giammarco, supra note 13, at 74. The author has quoted others, who have stated that the ICC scrutiny process provides important improvements to arbitral awards, enhancing their enforceability.

39) The Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) sets forth the following exhaustive list of grounds by which an arbitral award may be refused recognition and enforcement (upon request of the party): 1) the parties to an agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or 2) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or 3) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or 4) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or 5) the

findings by the arbitral tribunal are clearly not included in the exhaustive list of grounds under Article V of the New York Convention. In other words, even if on an uncommon occasion that a draft award included a tribunal's faulty or erroneous legal reasoning, the award's enforceability may not necessarily be undermined because, again, tribunals' erroneous legal reasoning and/or faulty factual findings are not grounds by which a party may challenge the enforceability of arbitral awards under the New York Convention. Thus, it is unclear why the ICC invests the time and resources in reviewing the substantive matters of draft awards, such as, accuracy of legal reasoning, in the name of "enhancing the enforceability of awards." There is no doubt that such process improves the actual quality of its awards, but enforceability of awards should be distinguished from high-quality and well-reasoned awards. Secondly, again, it is also unclear how the ICC Court's pointing out that the tribunal has erred in its legal reasoning and/or factual findings would not affect the liberty of decision by the tribunal, especially in light of current practice that whenever the tribunal does not incorporate the ICC Court's suggestions on the tribunal's draft award after the scrutiny, the tribunal is expected to explain to the ICC Court why such suggestions were not adopted.[40] Because all awards in ICC arbitrations are subject to the ICC Court's approval, it should be noted that the ICC Secretariat may also decide to *resubmit* the revised version of the draft award to the ICC Court if the Secretariat was genuinely concerned that the ICC Court's comments have not been

award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; (or if competent authority in the country where recognition and enforcement is sought finds that) 1) the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or 2) the recognition or enforcement of the award would be contrary to the public policy of that country.

40) Gustav Flecke-Giammarco, supra note 13, at 62.

adequately addressed by the tribunal.[41] If the ICC Court's comments are not supposed to affect the liberty of the tribunals' decisions, then, it would be more reasonable if the practice was that once the arbitral tribunal has made a decision with respect to the ICC's suggestions – whether to accept and incorporate or not – then that decision should be respected. The current practice that has been reported, in which the ICC staff determines whether or not the arbitral tribunal has sufficiently addressed the ICC's suggestions, this in and of itself most likely compromises the liberty of arbitral tribunal's decisions. Thirdly, this would also undermine the authority and autonomy of the tribunals in that there may be instances where although the tribunals are not in full agreement with the ICC Court's suggestions, they may be put in a position to accept such suggestions regardless. This may be more problematic at times because some arbitrators may care more about their reputation with arbitral institutions because they would like to be kept on the institutions' list/pool of arbitrators, and so, they probably would not want to give the impression that they are not being cooperative with the institutions, especially with such a prominent institution like the ICC. Although this is a very skeptical and pessimistic view, there truly is a genuine possibility as to compromising the arbitral tribunals' autonomy and independence, when they are expected to explain (even multiple times) why the ICC Court's suggestions are not going to be incorporated into the tribunals' awards. Arbitral tribunals are in charge of resolving the parties' disputes in an adjudicatory manner,[42] not the ICC or any other institution. Thus, the arbitral tribunals' authority and discretion as to substantial matters of the award should be given much deference and should not be questioned through award scrutiny by institutions even with

41) Gustav Flecke-Giammarco, supra note 13, at 62 fn.33.

42) Simon Greenberg, Christopher Kee, J. Rosmesh Weeramantry, supra note 12, at 268.

the purpose of "enhancing the enforceability" of awards. Surely, the ICC Court's ensuring consistency between factual findings and legal outcomes and the like may improve the overall quality of the ICC's arbitral awards, but then it remains questionable whether the scope of the scrutiny in practice is as limited as the ICC holds it out to be, as there is no clear line drawn between what sort of comments and suggestion by the ICC Court would or would not affect the liberty of tribunals' decisions.

Another noteworthy aspect of the ICC scrutiny process, however, is that if the ICC Court determines that the parties' right to be heard may have been impaired during the arbitral proceedings, then the ICC Court would frequently ask the tribunals to re-open the proceedings and grant such parties an opportunity to comment on specific issues of fact or law.[43] Albeit it is unknown how frequently the ICC Court raises issues of parties' due process rights and thereby suggests that parties be provided yet another opportunity to present their cases, this certainly seems to be going beyond the scrutiny's intended limited scope of merely making comments as to the form of awards and/or drawing attention to points of substance without affecting the liberty of tribunals' decisions. Rather, this may even be interfering with the tribunals' exclusive authority and discretion that they should be able to enjoy freely, for instance, with respect to treating all parties equally and granting fair opportunities for each party to present its case with due process concerns under the tribunals' consideration. Therefore, the question arises as to why the ICC goes so far as to perhaps even overstep on arbitral tribunals' exclusive authority to hear and decide the matters by exercising their discretion and judgment. This raises concern because arbitrators should make legal conclusions as well as other judgments related to their arbitration proceedings based on their expertise, experience,

43) Gustav Flecke-Giammarco, supra note 13, at 68.

and what had been presented during the proceedings, free from any concern of an institutional (or any other subsequent) review that would basically double check their work product.

By the same token, however, ensuring parties' procedural due process rights to a fundamentally fair hearing and process may properly serve the intended purpose of the ICC's award scrutiny process since the scrutiny in this instance *would* enhance the award's enforceability as it would likely preclude the possibility that the award gets challenged based on the grounds of parties' due process rights. Or, even if the award ends up being challenged, either to be set aside or be refused recognition or enforcement, if the award scrutiny process had allowed the parties more opportunities to present their cases before the issuance of the final award, then the award may better withstand such challenge. But the remaining issue, nevertheless, is that although possibly curing a defect in a party's right to be heard may enhance the award's enforceability, such suggestion by the ICC Court and not the tribunal itself before the issuance of final award would most likely undermine the tribunal's authority and independent decision-making powers. Thus, such process would exceed the intended limited scope of award scrutiny and interfere with the arbitral tribunals' duty to remain independent and impartial with respect to arbitration proceedings, as their authority and discretion would be undermined as a result of the institution's intervention.

Lastly, the ICC made an award "Checklist" in 2010 to provide guidance for arbitrators in drafting their awards. While this Checklist is not a mandatory or binding document, it has increased the arbitrators' awareness of the formal requirements of ICC awards and thereby has greatly helped the scrutiny process of the ICC Court.[44] So then, if the Checklist has

44) Gustav Flecke-Giammarco, supra note 13, at 73. According to the author, the Checklist actually serves as a useful tool in that with the notice of the ICC Court's approval of the tribunals' draft awards, the Checklist is sent along to the tribunal, notifying whether

proven to be effective in getting arbitral tribunals to write their awards in compliance with the ICC requirements, then the question arises as to the *actual need* for an additional layer of review of awards through the institutional scrutiny process to further control the quality of arbitral awards. Again, arbitral tribunals bear the responsibility of drafting an accurate and enforceable award at the end of each arbitral proceeding regardless of which institutional rules their proceedings are governed by. Thus, although from the institution's perspective, the process of scrutinizing draft awards may seem necessary to control and improve the quality of its arbitral awards, so that the ICC awards will be regarded highly throughout the world, at the same time, arbitral tribunals' authority and autonomy should be well-respected and should not be compromised in order to maintain an impartial and fair arbitral process overall.

(5) Additional Concerns Regarding the Award Scrutiny Process

Despite what has been discussed above, institutional scrutiny of awards may provide some sort of comfort to arbitrators, especially when dealing with legal or factual issues that they may be unfamiliar with.[45] For instance, if there are any special requirements or characteristics that may be specific to the place of arbitration and/or where enforcement of awards would be sought, the ICC has been able to inform the tribunals and make suggestions in accordance with such characteristics to enhance the enforceability of their awards.[46] This may be particularly useful to arbitrators who may not have had an ample amount of experience in a particular jurisdiction so

all the essential parts have been complied with.

45) It has been reported that advice from the institution and its experienced staff are often sought although the actual decision making is done by arbitrators. Gustav Flecke-Giammarco, supra note 13, at 53.

46) Gustav Flecke-Giammarco, supra note 13, at 66.

that they were unaware of characteristics that are unique to that locality. Thus, the ICC with its many years of experience and its resident-experts may serve as a great resource in this aspect. As Alan Redfern and Martin Hunter have stated, the ICC's award scrutiny process acts as "a measure of quality control" in order to make sure among other things that arbitrators deal with all the claims at issue.[47] This is in line with the perspective that the institution's scrutiny functions as a safeguard for arbitrators in that their inadvertent omission of claims and/or requests in the awards would most likely be prevented.[48] Nonetheless, as sole decision makers who have been selected by the parties to resolve certain matters in dispute, arbitrators have the obligation to put forth their best efforts in rendering accurate, enforceable, and final awards irrespective of institutional scrutiny of awards. Therefore, although it may even provide some comfort to arbitrators, especially in light of the international arbitration survey results, which revealed that arbitrators value scrutiny process more than other respondent groups, that their awards would be reviewed by a number of specialists in ICC arbitrations, arbitrators should not unreasonably rely on the scrutiny process to detect and correct errors in their awards.

Moreover, one of primary reasons that parties prefer arbitration as their dispute resolution method is that they are able to select, to a certain extent, the decision makers of their disputes.[49] However, the parties do not have any input with respect to the involvement of some of the ICC staff in charge of the scrutiny process, who may have varying, yet actual impact on the parties' final awards. Although by the virtue of having agreed to an ICC

47) Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, Oxford Univ. Press, p.582, para. 9.209 (5th Ed. 2009).

48) Gustav Flecke-Giammarco, supra note 13, at 63.

49) 2015 International Arbitration Survey, supra note 3, at 6. According to the responses to the survey, selection of arbitrators ranked 4th as the most valuable characteristic of international arbitration.

arbitration, the parties are deemed to have been knowingly bound by the ICC arbitration rules absent any carve-out provisions, it is highly likely that not all parties were aware of the possibility that as many as 30 people could be involved in rendering their final award at the time of signing their arbitration agreements. Furthermore, although confidentiality has not been reported as *the* single most important reason for choosing arbitration, and while it may be true that the ICC Court and the Secretariat have the duty to keep matters related to arbitral proceedings confidential like the arbitral tribunals,[50] the parties' reasonable expectations as to preserving confidentiality regarding matters related to their arbitration proceedings, such as, amounts in dispute, submitted documents, the full award, and even the existence of the dispute, may be compromised.[51] Then, consequently, the trust and accountability of the arbitral process may go down, which in the end would not serve anyone's interests. Although it may be important from the institutions' perspective to implement an extra step in their procedures to ensure that arbitral awards issued in their arbitrations are valid and enforceable, what should not get overlooked in the process is that the parties are the ultimate consumers of arbitration. While arbitrators and arbitration institutions are also necessary and/or facilitative components of arbitration, if the consumers of arbitration are dissatisfied, then the existence of such process may become less and less significant. Thus, while aspects that need improvement should be addressed and dealt with, we should not lose sight of the fundamental purpose of international arbitration, which is to provide parties from different parts of the world an appropriate dispute resolution

50) Gustav Flecke-Giammarco, supra note 13, at 69.

51) Respondents to the 2010 International Arbitration Survey by Queen Mary University also stated that amounts in dispute, the submitted documents, the full award, details in the award that allow identification of parties, the existence of the dispute, and the legal question to be decided should be kept confidential. 2010 International Arbitration Survey, supra note 10, at 31.

mechanism outside of the parties' national courts. By the same token, arbitrators' interests need to be protected and respected as discussed above.

Ⅳ. Conclusion

Although rather negative aspects of the arbitral institutions' – mainly the ICC's – award scrutiny process have been highlighted in this paper, the author is not suggesting that the ICC, the SIAC, or the CIETAC should dispense with such scrutiny process altogether. By examining the ICC's scrutiny of awards in particular, the author intended to point out some issues that may arise due to the institutional award scrutiny process, such as, the possibilities of interfering the autonomy, authority and discretion of arbitral tribunals, compromising reasonable expectations of the parties, and the potential for exceeding the intended limited scope of the scrutiny process itself. As aforementioned, the institutional scrutiny of awards is among one of the reasons why some users of international arbitration choose and prefer ICC arbitrations. This is a strong indication that for users who have familiarity with the process, they more likely than not have found it beneficial, whether it be in terms of enforceability of awards or completeness of awards, or other reasons. While it is unclear whether or not other arbitration institutions which are silent as to scrutiny of awards in their rules already have any institutional review mechanism in place, but if any institution was considering adopting the process like that of the ICC, some of the issues raised in this paper should be taken into consideration. The institutional award review process should ensure, to the extent practicable, that there are no computational, clerical errors by verifying that all digits that are supposed to be there are there and that mathematical calculations are correct, and such, but should exercise reasonable care as to

not serve as a mechanism of re-drafting arbitral awards by the institution. Therefore, keeping the institutional comments and suggestions limited to the form of the award (in a broader sense of "form" to include computational corrections) and not going beyond as to analyzing and reviewing the actual content and accuracy of the substantive matters of the award would be ideal, as such kind of review would be less time-consuming, and more importantly, the tribunals' authority and autonomy, and the parties' reasonable expectations in the arbitral process may be better respected.

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[Abstract]

Scrutiny of Arbitral Awards by Arbitration Institutions in International Arbitration:
Focusing on the ICC's Scrutiny of Award Process

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International arbitration has been increasingly successful in providing not only an alternate but also an appropriate and relevant dispute resolution mechanism for parties in different parts of the world so that they would not have to appear before foreign national courts. The objective of all arbitration proceedings is a final and enforceable award by a competent and independent arbitral tribunal. Arbitration rules of certain well-renowned international arbitration institutions, namely the ICC, mandate that arbitral tribunals submit drafts of their awards to the respective institution for institutional scrutiny of arbitral awards before the final award is signed by the tribunal and issued to the parties. While not all the arbitration rules set forth award scrutiny provisions, it is unclear whether such silence in the rules necessarily indicates no scrutiny is done by the institution. This paper examines the ICC draft award scrutiny process in order to determine the pros and cons of the process and raises some issues to be considered for other institutions that may be interested in adopting award scrutiny process as well.

Key words : international arbitration, arbitral tribunal, arbitral award, scrutiny of award, ICC