Scrutiny of the Award – Is It Really Helpful?

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"世上完美的人有兩種：一種已離世，另一種尚未出生。"

（Chinese proverb）[1]

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1 Chinese proverb, English translation: *"There are two kinds of perfect people: those who are dead and those who have not been born yet".*

ABSTRACT

The scrutiny process of arbitral awards has been highly discussed for years, due to the divergent views on the subject in the arbitral practice. Nonetheless, arbitral institutions have not shied away from this process. Quite to the contrary, this process has been, and remains, used by arbitral institutions. All the more so, the scrutiny process is becoming more and more established, as a rise in its codification and implementation has been seen in arbitral institutions' rules. Whether its benefits truly outweigh its disadvantages remains nevertheless questioned. It is undeniable that the scrutiny process of arbitral awards offers greater certainty by promoting an award's legal effectiveness and enforceability. This is essentially why such a process exists (putting aside the reputational aspect for arbitral institutions that comes by ensuring high enforceability rates of awards rendered under their aegis). However, from a practical angle, this review process is not without potential repercussions on the award itself. Arbitral institutions must hence remain careful as to not get carried away and refrain from an overambitious application of this process. In other words, arbitral institutions should not see this process as a way to point out every aspect of an award that they may not (fully) agree with. This would lead to a counterproductive application of the scrutiny process. Rather, arbitral institutions should stick to a tempered approach and see this process as a way to assist arbitrators in the redaction of their award. In the end, this scrutiny process should still be considered a very helpful tool for arbitrators in order to maximize their award's enforceability.

KEYWORDS
Enforceability **formal requirements** **procedural defects**
reasoning of the Arbitral Tribunal **scope of review**

I. INTRODUCTION

The concept of scrutiny of the award is not new and has always been the subject of debates and discussion in the international arbitration community.

Broadly speaking, scrutiny of an arbitral award is a process under which an arbitral award is carefully reviewed by the arbitral institution administering the arbitration. This is done prior to the issuance of the award, sometimes implicitly and sometimes explicitly, and ensures that the award does not entail any deficiencies, in particular such deficiencies, which might undermine the award's enforceability. In light of recent reforms to institutional arbitration rules, one may ask whether it is a feature that provides extra value to the arbitral process and thus, whether arbitral institutions should have recourse to this review process.

Debates regarding the scrutiny process of arbitral awards can be summarized as follows. One school of thought embraces the scrutiny process of awards. This is the view of the majority of the practice. The reason for such an approach is that the scrutiny process contributes to the enforceability of arbitral awards. It improves the quality of arbitral awards by spotting and correcting errors, which may have led to legal difficulties when wishing to enforce the award, thus possibly saving the parties a considerable amount of time at the enforcement stage.[2] As Article 42 of the ICC Arbitration Rules 2021 points out, *"… the Court and the arbitral tribunal … shall make every effort to make sure that the award is enforceable at law."* All and all, the view is that by minimizing the award's deficiencies, one maximizes the legal effectiveness of the award.[3]

Although an overwhelming amount of practitioners and scholars promote such a process, another school of thought remains sceptic to its true usefulness, opting for a more critical approach. Some may suggest that this scrutiny process may go

2 Gustav Flecke-Giammarco, *The ICC Scrutiny Process and Enhanced Enforceability of Arbitral Awards,* JOURNAL OF ARBITRATION STUDIES (1 September 2014) 47, 74-75; Corinne Truong-Nguyen, Chroniques des sentences arbitrales, JOURNAL DU DROIT INTERNATIONAL (1 July 2019) 896, 970-971.

3 JASON FRY, SIMON GREENBERG & FRANCESCA MAZZA, THE SECRETARIAT'S GUIDE TO ICC ARBITRATION 327, ¶ 3-1181 (ICC Publication, 2012).

against the independence principle to which arbitrators are subject,[4] or perhaps criticize the fact that parties are not made aware of the institution's comments and remarks during the scrutiny process.[5] Some also consider that this process may create delays in the proceedings as arbitral institutions cannot force the arbitrators to modify their award, the arbitrators, in turn, cannot force the institution to approve the award. There is thus an undeniable risk, though slim in practice, of each side blocking one another.[6] A certain discomfort of some senior arbitrators with the scrutiny process is undoubtedly owed to the fact that they do not like the idea that considerably younger lawyers working at the arbitral institutions are scrutinizing their work product. We call this the "vanity factor".

While is our view, and hence the opinion we will be defending in this article, that the advantages provided by the scrutiny process of awards outweigh its disadvantages.

While section II. of this article simply considers the scrutiny process from a theoretical standpoint, the subsequent part will adopt a more practical approach based on the first author's experience with scrutiny of arbitral awards (see below at section III.). This part of the article will show that, though this process presents various advantages, such a process must not be used in an overambitious manner. In other words, one must ensure a tempered application and limit it to specific aspects of the award. This article ends with the humble conclusion that the scrutiny process is beneficial to arbitrators and ensures a greater quality of awards, though

4 KARL-HEINZ SCHWAB, RECHT UND PRAXIS DER SCHIEDSGERICHTSBARKEIT DER INTERNATIONALEN HANDELSKAMMER 61 (Heymann, 1986); *See also Peter Schlosser, Ausländische Schiedssprüche und ordre public „international"*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS- IPRAX (1991) 218, 219; Walther Habscheid, *Die sogenannte Schiedsgerichtsbarkeit der Internationalen Handelskammer,* RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) (1998) 421, 424-425.

5 Peter Schlosser, *id.*

6 JEAN-FRANCOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 681, ¶ 757 (Sweet & Maxwell, 2nd edition, 2007).

its application should be limited to a reasonable review of formal and substantial aspects of an award (see below at section IV.).

II.A THEORITICAL APPROACH TO SCRUTINY OF THE AWARD

In order to determine whether the scrutiny process should be embraced by arbitral institutions, one must first grasp the notion itself better and see how it has been used by other arbitral institutions until now. Thus, we will go into the theoretical background of the notion, by looking at its characteristics and purpose (A.), before showing how this process is currently being used by arbitral institutions (B.).

A.What does scrutiny of the award mean?

1. Definition

The Cambridge dictionary defines scrutiny as *"the careful and detailed examination of something"*.[7] Scrutiny of an arbitral award is hence a careful and detailed examination of a draft arbitral award. In other words, it is a procedure under which a draft award is examined by an arbitral institution, prior to the arbitrators' signatures of the award.[8] The International Chamber of Commerce (the "ICC") *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration defines it as a "thorough procedure designed to ensure that all awards are of the best possible quality and are more likely to be*

7 CAMBRIDGE DICTIONARY https://dictionary.cambridge.org/dictionary/english/scrutiny (Accessed on 25 November 2020)

8 Martin Zahariev, *The Scrutiny of an Award: The Bulgarian Arbitral Institutions' Perspective,* KLUWER ARBITRATION BLOG (29 October 2005) http://arbitrationblog.kluwerarbitration.com/2015/10/29/the-scrutiny-of-an-award-the-bulgarian-arbitral-institutions-perspective/ (Accessed on 25 November 2020)

enforced by state courts." [9] On the one hand, this process may take place implicitly, meaning that an award is still being subjected to a review, though a scrutiny process is not explicitly provided in the arbitral institution's arbitration rules. On the other hand, this process may be explicitly provided for in the applicable institution's rules.

2. The scope of application

The scrutiny process is limited to awards, i.e. final awards, partial awards, interim awards, and so on. This excludes any other type of documents issued by arbitrators. For the purposes of this article and to refrain from going into extensive case law debates and interpretations depending on jurisdictions and arbitral institutions' rules, we will define an award – in line with the current ICC practice – as *"a decision that finally decides an issue in the case, or records an agreement of the parties settling the dispute."* [10]

One may also question the case of dissenting opinions. Dissenting opinions are not necessarily considered to be part of the scrutiny process, though it is a decision by one arbitrator, who simply did not agree with the outcome of the award. In ICC arbitration, the arbitrator wishing to submit a dissenting opinion must submit it to the International Court of Arbitration of the ICC (the "ICC Court") within a reasonable time after the submission of the draft award for scrutiny.[11] The ICC Court then simply takes note of the dissent but will not subject the dissent to scrutiny.[12] In certain circumstances, where the ICC Court considers that it raises

9 ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (1 January 2019) 18, ¶129.

10 THOMAS WEBSTER & MICHAEL BÜHLER, HANDBOOK OF ICC ARBITRATION: COMMENTARY AND MATERIALS 543, ¶ 34-6 (Sweet & Maxwell, 4th edition, 2018).

11 FRANK-BERND WEIGAND & ANTJE BAUMANN, PRACTITIONER's HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 1118, ¶ 16.859 (Oxford University Press, 3rd edition, 2019).

12 *Id.*

valid points, it may draw the majority's attention to these points.[13] The ICC Court may also draw the issue to the attention of the president of the arbitral tribunal, if it seems of greater importance.[14] It can further request modifications of the dissent where it violates fundamental principles (*e.g.* violation of the principle of confidentiality of the arbitral tribunal's deliberations).[15]

3. Scope of review

The scope of review is dependent on the applicable arbitration rules. Where some may limit the review to the formal issues of the award, other rules extend the review to the substance of the award.[16] The process can thus go from the review of typographical, computational errors, and general formal mistakes, to the review of procedural defects[17] and of the arbitral tribunal's reasoning, meaning anything relating to the merits of the award.[18]

Review of the formal requirements of the award consists in ensuring that the formal prerequisites of the award are complied with. This will depend on the award's requirements provided in the arbitral institution's rules[19] and in the law of the place of arbitration.[20] For example, the arbitral institution scrutinizing the

13 THOMAS WEBSTER, *supra* note 10, 550, ¶ 34-31.

14 *Id.*

15 JASON FRY, *supra* note 3, 336, ¶ 3-1213.

16 *See* Section II.B.

17 LAURENCE CRAIG, WILLIAM PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 377, ¶ 20.02 (Oceana Publications, 3rd edition, 2000).

18 *See e.g.,* for the scope of review of the ICC, FRANK-BERND WEIGAND, supra note 11, ¶ ¶ 16.862-16.866.

19 *See e.g.,* Art. 39 of the DIS Arbitration Rules 2018, which requires the names and addresses of the parties, their counsel and arbitrators, as well as the date of the award and the place of arbitration to be stated in the award.

20 LAURENCE CRAIG, *supra* note 17, 378, ¶ 20.03; *see e.g.,* under French Law, Art. 1513 of the French Civil Procedure Code requiring the signature of arbitrators in the award.

award may review whether the individual amounts awarded are consistent with the total amount awarded, whether the award satisfies the formal requirements of the law of the place of arbitration, whether all claims have been dealt with, whether all conditions necessary for a valid award are present, and simply ensure that no typographical mistakes are present.[21]

Review of potential procedural defects will occur when the arbitral institution has been made aware of a procedural deficiency, not necessarily revealed in the award.[22] This will essentially occur when a failure in the process of deliberations has been raised by arbitrators. For example, if the arbitral institution is informed that an element of the award has not been subject to deliberations by all arbitrators, the institution may return the award for deliberations on this issue.[23]

Review of the substance of the award consists in verifying that the award is coherent, constituent and most importantly, comprehensive.[24] To illustrate the importance of checking the understandability of an award, let us mention an anecdote, narrated to the first author by a former Deputy Secretary General of the ICC. This anecdote concerns a Turkish arbitral tribunal and a very poorly written English draft award. It so happened that neither the Counsel in charge of the case at the ICC Secretariat nor the former Deputy Secretary General of the ICC could understand the draft award submitted for scrutiny, as the award was simply not written in a comprehensible manner and in understandable English. Had the award been issued in that version, the award would have never been enforceable and would have been set aside – assuming that a state court would have qualified it as an arbitral award at all. The review of the substance may thus essentially constitute a review of the whole argumentation leading to the decision.[25] For example, it may be the review of the arbitral tribunal's jurisdiction, of any element determining the

21 *Id.*

22 *Id,* ¶ 20.02.

23 *Id.*

24 *Id.,* ¶ 20.04.

25 *Id.*

outcome of the case, or of the overall reasoning of the arbitral tribunal.

4. The purpose of the scrutiny process

The ultimate purpose of the scrutiny process of an arbitral award is to assess it, in order to ensure that no serious defects are present in the final award issued. The idea is *"to maximize the legal effectiveness of an award by identifying any defects that could be used in an attempt to have it set aside at the place of the arbitration or resist its enforcement elsewhere."*[26] It is a tool created to help arbitrators ensure the effectiveness and enforceability of their award. It is a measure of quality control of the award in the name of the referred arbitrators.[27] It is also intended at ensuring the legal sufficiency of the award to accomplish the result intended by the arbitrators.[28] In other words, it exists to avoid the issuance of flawed awards and enhances the acceptability of awards both by the parties and by jurisdictions enforcing it.[29]

This scrutiny process is also an important selling point for arbitral institutions. Indeed, the ability to provide high quality awards, with high enforceability rates is key for the arbitral institution's reputation, ensuring its attractiveness to international actors. One would logically not go to an arbitral institution where a high probability exists that the decision will not be enforceable.

B.Scrutiny of the award is not a new concept

Scrutiny of arbitral awards is not a new concept and is already being used by various arbitral institutions. This section will consider some examples of

26 JASON FRY, *supra* note 3, 327, ¶ 3-1181.

27 BLACKABY NIGEL, CONSTANTINE PARTASIDES, ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 568, ¶ 9.197 (Oxford University Press, 6th edition, 2015).

28 LAURENCE CRAIG, *supra* note 17, 378, ¶ 20.03.

29 *Id.*

arbitral institutions, which contain a scrutiny process for arbitral awards in their institutional rules. The idea with the following developments is not to simply list the provisions making mention of a scrutiny process, but to better understand the scope of application of this process in each institution and determine what the overall trend is.

1. The scrutiny process under the ICC Arbitration Rules

We shall first start with the most famous one, the scrutiny process under the ICC. It is one of the first arbitral institutions, if not the first, to have codified a scrutiny provision,[30] and it remains to this day the most commented one by scholars and practitioners when discussing scrutiny of arbitral awards. The scrutiny process is currently provided in Article 34 of the ICC Arbitration Rules 2017, and will remain without change in Article 34 of the new ICC Arbitration Rules 2021.[31] Article 34 on the scrutiny of the award by the ICC Court provides:

"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."

The ICC Arbitration Rules thus give express powers to the ICC Court to comment on draft awards. Every ICC award must undergo this process. Indeed, this provision is not waivable, and parties thus cannot decide to "opt out" of this scrutiny process.[32] This is due to the importance given to this process by the ICC. As we have mentioned earlier, it is a key aspect in promoting the good reputation of arbitral institutions, which is hence also the case for the ICC. In that respect, the

30 *See* Art. 21 of the ICC Arbitration Rules 1975.

31 *See* Art. 34 of the ICC Rules of Arbitration 2021.

32 HERMAN VERBIST, ERIK SCHAEFER & CHRISTOPHE IMHOOS, ICC ARBITRATION IN PRACTICE 107 (Kluwer Law International, 2nd edition, 2015).

ICC takes pride in the fact that its awards have a good record when it comes to the voluntary compliance with the award by parties, and the high enforcement rate.[33]

Going back to the powers given to the ICC Court, these can range from a simple correction of typographical and clerical mistakes, or errors of computation, to *"far-reaching remarks"* on the substance itself, which may lead to the redrafting of the award.[34] The ICC opts for an expansive approach by not only giving its Court the possibility to correct form mistakes, but also by giving it power to review the substance of the award. As we will see in the following provisions, this is the leading position taken in arbitration rules on scrutiny by arbitral institutions. As an extra precaution, the ICC also provides arbitrators with an *ICC Award Checklist*, which offers guidance for drafting an award and enumerates basic formalities that should be followed.[35]

Under the ICC Arbitration Rules, draft awards undergo a three-step review process.[36] The review starts with the Counsel of the team in charge of the arbitration that has followed the proceedings since the inception of the arbitration.[37] Then, the Secretary General, the Deputy Secretary General or the Managing Counsel review the draft.[38] Finally, after these two first preliminary reviews, the draft is submitted for the ICC Court's scrutiny.[39] The draft is then scrutinized at a Committee Session of the ICC Court or at a Plenary Session, depending on the matters involved.[40] Once the draft award has been reviewed, the amended draft is submitted to the

33 LAURENCE CRAIG, *supra* note 17, 377, ¶ 20.01; CHARLES BROWER & LEE MARKS, INTERNATIONAL COMMERCIAL ARBITRATION 69 (Law & Business, 1983).

34 JASON FRY, *supra* note 3, 328, ¶ 3-1182.

35 ICC Award Checklist (2017) https://iccwbo.org/content/uploads/sites/3/2016/04/ICC-Award-Checklist-English.pdf (Accessed on 24 November 2020).

36 ICC, Note 2017, *supra* note 9.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.,* ¶ 130.

Secretariat, which in turn informs the parties and the arbitral tribunal that the award was either approved or must be subjected to further scrutiny.[41] In any case, the parties are not informed of the comments made during scrutiny, as these are confidential.[42] Overall, the ICC provides an estimated time for scrutiny of three to four weeks for the whole process.[43]

Looking at the 2019 numbers, the ICC has reported that for a total of 586 awards, the vast majority of draft awards were approved subject to comments by the ICC Court, only 5 draft awards were approved without any comments at all, and 72 draft awards were approved only after having being returned to the arbitral tribunal for further consideration.[44] The mere fact that only 5 draft awards were approved without comments, for a total of 586 awards, not only shows the exhaustive use of this process, but perhaps may also indicate – at times – an overambitious way in which this process is being used by the ICC.

Though the ICC rightly takes pride in its scrutiny process, the system is not perfect. On the one hand, it happens even with ICC arbitral awards that they suffer from (sometimes even obvious) mistakes and require correction pursuant to Article 36 of the ICC Arbitration Rules.[45] On the other hand – and more often – it may happen that the ICC takes its role in scrutinizing awards and the reputational aspect from it too far.

41 *Id.,* ¶ 131.

42 THOMAS WEBSTER, supra note 10, 542, ¶ 34-4

43 *Id.*

44 ICC Dispute Resolution 2019 Statistics 16.

45 Very recently, the first author received an ICC award by consent with only four pages. Nevertheless, the ICC Secretariat had overlooked the fact that the award referred to an annex in its operative part, which, in fact, had been forgotten to be attached to the award. This was particularly deplorable because the ICC Secretariat was on alert that the sole arbitrator was inexperienced and had already proven to work in a rather lackadaisical manner. Quite ironically, in another ICC case another sole arbitrator who had worked for years as Counsel at the ICC Secretariat mixed up numbers in the operative part of his award. The then-Counsel in charge of the case at the ICC Secretariat and all other reviewers also failed to notice this defect. In both cases, applications for correction of the award had to be filed.

2. The scrutiny process under the DIS

The German Arbitration Institute (the "DIS") also now offers a scrutiny process for arbitral awards under Article 39 of the DIS Arbitration Rules 2018 on the content and form of the arbitral award. Article 34 of the old DIS Arbitration Rules 1998 only stated formal requirements for any award, such as the mention of the names of parties, their legal representatives and the arbitrators, the date on which the award was rendered and the place of arbitration.[46] No further review was undertaken or only done in an informal way, if time allowed to do so. The first author once experienced that five out of six decisions of the operative part of the award needed to be corrected after issuance of the award.[47]

Article 39.3 of the DIS Arbitration Rules 2018 now provides:

"The arbitral tribunal shall send a draft of the award to the DIS for review. The DIS may make observations with regard to form and may suggest other non-mandatory modifications to the arbitral tribunal. The arbitral tribunal shall remain exclusively responsible for the content of the award."

The purpose of now including this provision is said to improve DIS awards' quality by reducing the presence of unnecessary formal mistakes.[48] The DIS opts for an approach ensuring all around more flexibility to arbitral tribunals. Indeed, the DIS may only "suggest" formal changes and non-mandatory modifications to

46 *See* Art. 34 of the DIS Arbitration Rules 1998; Gerhard Wegen & Marcel Barth, *Comparison of the Institutional Arbitration Rules of the German Institute for Arbitration (DIS) and the Singapore International Arbitration Centre (SIAC),* ARBITRATION IN SINGAPORE AND GERMANY – RECENT DEVELOPMENTS (2009) 7, 19.

47 One of these decisions was even obviously defective, in the sense that it would have jumped to the eyes of any reviewer, even without any knowledge of the facts of the case. The award stated the following:"Respondent is ordered to pay USD 1 million (in words: EURO one million)."

48 DANIEL BUSSE, LUCIE GERHARDT, KLAUS-A. GERSTENMAIER, RICHARD HAPP, ROBERT HUNTER, RICHARD H. KREINDLER, DAVID QUINKE, RAMONA SCHARDT, ANKE SESSLER, ROLF TRITTMANN, PETER WOLRICH, THE DIS ARBITRATION RULES: AN ARTICLE-BY-ARTICLE COMMENTARY 599, ¶ 18(Kluwer Law International, 2020)

the arbitral tribunal, meaning that if the arbitral tribunal decides not to follow the observations made by the arbitral institution, it will theoretically not be subject to restrictions by the DIS. On the contrary, when looking at the ICC Arbitration Rules, the arbitral tribunal cannot render an award, unless it has been approved by the ICC Court. This limitation is not present under the DIS Arbitration Rules 2018.

Submitting an award for review remains nevertheless mandatory under the DIS Arbitration Rules 2018, meaning that a DIS arbitral tribunal will have to await the outcome of the review process before sending the signed award to the institution for transmission to the parties.[49] It has also been suggested by Richard Happ that it is unlikely that DIS will review the substance of draft awards extensively,[50] since the institution only has an incomplete knowledge of cases.[51] However, if it were to make a comment relating to a substantial aspect of the case, it will likely be important.[52] In such a situation, *"Arbitrators should take such advice very seriously."*[53] At the end, it is the DIS that adds the cover page with its logo to the award and transmits the award to the parties pursuant to Article 39.6 of the DIS Arbitration Rules 2018. In the event that the DIS should find that an award is egregious, defies common sense and all basic rules of natural justice, one should expect such a runaway arbitral tribunal to take the DIS' advice very seriously if it wants the award to be transmitted at any time to the parties. For example, one could imagine that the DIS would not transmit an arbitral award to the parties if its content would manifestly defy the international public order by, *e.g.,* ordering the respondent to pay a contractually stipulated bribe or purchase prices relating to illegal drug dealing.

Finally, Article 37 of the DIS Arbitration Rules 2018 sets a time limit for

49 *Id.,* 600, ¶ 19.

50 *Id.,*

51 *Id.,* ¶ 21. See Art. 27.8 of the DIS Arbitration Rules 2018, which provides that the DIS will only receive procedural orders and the procedural calendar from the arbitral tribunal.

52 *Id.,*

53 *Id.,*

the arbitral tribunal to send the draft award, which must be within three months after the last hearing or the last submission, whichever is the latest. Article 37 also provides sanctions when determining arbitrators' fees in case of noncompliance by the Arbitral Tribunal with this time limit. Where DIS provided a rather flexible approach, it nevertheless opts for a severe "motivation tool" to ensure the prompt submission of the draft award to the institution. On the other end, the institution does not have a time limit set to review the award.

3. The scrutiny process under the CCJA

Turning to another continent, the Common Court of Justice and Arbitration (the "CCJA" or the "Court"), which is part of the legal system of the Organization for the Harmonisation of Business Law in Africa (OHADA), also provides for a scrutiny process in its Arbitration Rules 2018. Article 23 on the preliminary review by the Court provides:

"23.1 The arbitral tribunal shall transmit its draft jurisdictional and partial awards which decide some of the parties' claims, and its final awards, to the Secretary General for review by the Court before signing.

The other awards shall not be submitted for prior review, they shall only be transmitted to the Court for information purposes.

23.2 The Court may propose purely formal amendments, draw the attention on the arbitral tribunal to claims which do not seem to have been addressed or mandatory statements which do not appear in the draft award, in the event that the award does not properly state the reasons on which it is based, or if there is an apparent contradiction in the reasoning, without, however, having the power to suggest a reasoning or a solution on the merits in respect of the dispute.

The Court shall examine the draft award submitted to it within a maximum period of one (1) month after its receipt."

The powers given to the CCJA are quite similar to those provided in the ICC Arbitration Rules. As for the ICC, the Court can suggest formal changes but it

can also draw attention to substantial aspects of the award. Nevertheless, it is not entitled to suggest a reasoning or solution on the merits. It may simply point out any deficiency present in the draft award. One may remember that the CCJA was subjected to criticisms due to its lack of independence and impartiality, which is the basis for the whole reformation of the CCJA.[54] In that respect, it has been pointed out that by reforming the CCJA system and adding such an extensive scrutiny process, the *"OHADA Legislator actually exposed the CCJA to more criticism of its impartiality by pushing it more toward the edge of possible undue interference in the arbitration process, and litigants at the risk of being deprived of necessary remedies against an award, which may be an indirect violation of the right of defense."*[55] It may thus be preferable that the Court does not act too ambitiously and remains prudent by limiting the review in any way possible when it comes to the substance of the award. This is nevertheless the topic for another discussion.

4. The scrutiny process under the SIAC

The Singapore International Arbitration Centre (the "SIAC") also provides for scrutiny of the award in the SIAC Arbitration Rules 2016. It should nevertheless be pointed out that the SIAC Arbitration Rules are currently undergoing a review process.[56] Article 32.3 of the SIAC Arbitration Rules 2016 provides:

"Before making any Award, the Tribunal shall submit such Award in draft

54 *See, e.g.,* Jean-Christophe Honlet, Liz Tout, James Langley & Marie-Hélène Ludwig, *Africa Overview,* INTERNATIONAL ARBITRATION REVIEW (2019) 1, 8; Philippe Fouchard, *Le système de d'arbitrage de l'Ohada : le démarrage,* PETITES AFFICHES (13 October 2004) 52, ¶1 5; Nadine Bakam, *Les modes alternatifs de règlement des différends dans l'espace OHADA: vers une nouvelle avancée ?*, LES CAHIERS DE L'ARBITRAGE (1 July 2017) 499.

55 MAHUTODJI JIMMY VITAL KODO, ARBITRATION IN AFRICA UNDER OHADA RULES 105 (Kluwer Law International, 2020).

56 Jack Ballantyne, *SIAC to revise arbitration rules,* GLOBAL ARBITRATION REVIEW (7 July 2020) https://globalarbitrationreview.com/siac-revise-arbitration-rules (Accessed on 24 November 2020).

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."

A scrutiny process has been included in SIAC arbitration for some time now, since the release of the 2007 Arbitration Rules.[57] Again, this was inspired by the ICC scrutiny process.[58] The process is mandatory, and no award can be issued unless it has been approved by the institution. A time limit for the arbitral tribunal's submission of the draft award to the Registrar is provided. It nevertheless does not provide for a time limit when it comes to the scrutiny process itself. In theory, the Registrar aims at returning comments on a draft award to the arbitral tribunal within two weeks, and 24 hours for an award by an emergency arbitrator.[59] When it comes to the scrutiny process itself, the SIAC bases its review of the form on an internal checklist listing the formal requirements that must be fulfilled by the award.[60]

For the substance, the Registrar may bring to the arbitral tribunal's attention any aspect of the dispute the tribunal failed to address, any confusing part of the award, and inconsistent or insufficient reasoning.[61] It can also point out any

57 *See* Art. 27.1 of the SIAC Arbitration Rules 2007.

58 JOHN CHOONG, MARK MANGAN & NICHOLAS LINGARD, A GUIDE TO THE SIAC ARBITRATION RULES 261, ¶ 14.14 (Oxford University Press, 2nd edition, 2018).

59 *Id.,* ¶ 14.17.

60 *Id.,* ¶ 14.19.

61 *Id.,* ¶ 14.20.

inconsistencies with the applicable law.[62] The SIAC may also address to the arbitral tribunal any costs allocation deficiencies.[63] Nevertheless, though the Registrar may review formal and substantial issues, this is limited by the fact that it must not affect the arbitral tribunal's liberty to decide, even if the arbitral institution is the one having the last word. Altogether, this process is considered a key step in ensuring that SIAC awards are of high quality, hence maximizing their enforceability.[64]

All and all, institutions seem to follow the model of the ICC, with the DIS separating itself by offering a more flexible approach.

III.A PRACTICAL APPROACH TO SCRUTINY OF THE AWARD

Now that we have a basic understanding of what scrutiny of awards is supposed to be, we can turn to a more practical approach. This section is based on the first author's personal experience as arbitrator and counsel and our overall opinions in this area.

All and all, we are siding with the supporters of this process, though we have also, through the first author's years of practice, discovered the adverse facet this process can have. Our general view is nonetheless that this process should be embraced as it can be proven quite useful (A.). Notwithstanding the obvious use of this process, one should remain careful and not conduct this scrutiny process in an overly ambitious manner striving for the "perfect" award, which would be counterproductive (B.).

62 *Id,*

63 *Id.,* ¶ 14.21.

64 *Id.,* ¶ 14.15; Khyati Raniwala, Singapore International Arbitration Centre, ARBITRATION WORLD (2018) 247, ¶ 12.1.

A.The usefulness of scrutiny of the award

As mentioned above, we tend to agree with the majority opinion promoting the scrutiny process, as it truly helps ensuring, or at the very least maximizing the award's enforceability. Indeed, by adding another level of control of the award, or perhaps simply an extra "set of eyes" to read through a draft award, one adds another level of security, which helps minimizing any potential mistakes in the final award, thus promoting its effectiveness. In addition, the arbitral institution may provide additional knowledge on local particularities, which the arbitral tribunal may not be aware of. Nevertheless, though this process presents clear benefits, certain arbitrators remain reluctant.

1. Institutional knowhow

The scrutiny process of arbitral awards is indeed useful because the arbitral institution provides additional knowledge relating to the effectiveness of awards in local jurisdictions. Indeed, the arbitral institution may bring to the arbitral tribunal's attention any particularity of the applicable law or the likely place of enforcement has.[65] For the most part, this is helpful because arbitrators may not necessarily be familiar with these local features, and even if they are, the scrutiny process by the arbitral institution may serve as a friendly reminder, in a case where these particularities were perhaps forgotten.

Let us turn to a very recent example from the first author's practice involving an arbitration in Germany, under German law, to illustrate the importance of this institutional knowhow and its usefulness. In the final award of this international arbitration with its place of arbitration in Frankfurt am Main (Germany), the sole arbitrator, who was Austrian, wrote that the key witness had testified under oath and heavily relied his decision on the testimony of this witness. Under Austrian law, an arbitrator is authorized to direct a witness to take an oath before he or she

65 JOHN CHOONG, *supra* note 58, ¶ 14.15.

testifies. Nevertheless, when concerned with German law, this would constitute a violation of the German ordre public because the administration of an oath is a judicial prerogative exclusively limited to judges. The fact that the sole arbitrator had stated in his award that a witness had testified under oath led to an action to set aside the award. Now, had the arbitral institution administering the dispute scrutinized the draft award, it would have made the arbitrator aware of this local particularity of German law and, hopefully, would have asked the arbitrator whether the witness truly testified under oath, or simply made a solemn declaration before testifying. Indeed, perhaps the arbitrator was simply using this expression as a figure of speech. Or perhaps not. In any case, the arbitral institution would have brought up this issue to the arbitrator's attention.

2. Flagrant mistakes

This added level of security could also come in quite handy for blatant, if not embarrassing, mistakes. For example, let us take the case from the first author's practice where an arbitral tribunal ordered a respondent to return an object to the claimant when, in fact, it was uncontested that this object was in claimant's possession but requested by respondent via a counterclaim to be returned to him. Obviously, the arbitrator had mixed up the facts. Glaring mistakes may very well happen to anyone. Nevertheless, this can lead to important practical consequences, such as the annulment of an award. This is precisely why a scrutiny process is useful. It will minimize the risks for such "on its face" mistakes to occur and ensure that what the arbitrators meant to decide is truly reflected in the award.

This process may also find itself to be particularly useful to minimize cases where an arbitral tribunal acts ultra petita. For example, if an award was to allocate more costs than what was requested by parties in their prayers for relief. The first author once experienced that a very well-known sole arbitrator awarded a higher interest rate than requested. Having the arbitral institution administering the dispute having a second look at what was asked to the arbitral tribunal and ensure that the

tribunal has acted within the terms of reference is essential.

The abovementioned examples demonstrate that even obvious mistakes are in fact not unusual, not even for experienced arbitrators. Making mistakes is inherent to human nature, which is why there is always some extra benefit if draft awards are scrutinized prior to issuance. This is particularly self-evident for draft awards by sole arbitrators who do not have the benefit of scrutiny by co-arbitrators. Nevertheless, some arbitrators remain less than enthusiastic when having their draft awards undergo this process.

3. The vanity issue of arbitrators

To this day, some arbitrators consider the scrutiny process to be undesirable.[66] It may be understandable that a renowned arbitrator may not appreciate a junior counsel reviewing his work product. As for everyone, and this is no different for arbitrators, the "pride" element that comes from a product of one's work is always present. We could see how having a junior (thus less experienced) counsel reviewing the product of a renowned arbitrator, with the precise purpose of finding everything that may be wrong with the draft award may be the source of arbitrators' frustrations.

However, arbitrators should see beyond these frustrations, as this is not the purpose of the scrutiny process. It is designed to be a helping tool, not the drudgery that comes with having to render an award. More importantly, it helps minimizing the risk of embarrassing mistakes such as the aforementioned ones. This is essentially why this process is so useful. It helps arbitrators, as famous and reputable as they may be, avoid mistakes inherent to the human fallibility, which is bound to make mistakes. More importantly, it helps them maintain their credibility as renowned arbitrator.

66 LAURENCE CRAIG, *supra* note 17, ¶ 20.01.

One should also not forget the importance of the document that is being reviewed. Rendering awards is not without practical consequences, as these are very powerful instruments,[67] hence the importance of reviewing such a document. As Jennifer Kirby considered:

"the power an arbitrator wields when rendering an award is exceptional. We are all familiar with the classical image of justice, with the scales in her left hand and a sword in her right. Well, in international arbitration that sword is more like an M16. In making his award, an arbitrator is generally issuing a decision that: (1) cannot be reviewed on the merits; and (2) is enforceable around the world. ... No state judge anywhere has anything like that kind of power." [68]

As famous as any arbitrator may be, the importance of the document that is being created must be kept in mind. This is especially the case in arbitration, since arbitrators are given enormous power but very little accountability,[69] and since very few "checks" exist once the award is rendered.[70]

Where one may fear or dislike this process, one should rather fear what will happen to his or her award when it has not undergone such review. Indeed, more than an extra burden, it is a safety check, the last tollgate, to ensure proper enforcement of an arbitral award. As Gary Born puts it, "experience teaches even the most self-confident arbitral tribunal that another set (or sets) of eyes can be helpful in catching mistakes and omissions."[71]

67 Jennifer Kirby, *What Is an Award, Anyway?*, JOURNAL OF INTERNATIONAL ARBITRATION (2014) 475, 478.

68 *Id.*

69 *Id.*

70 *Id.,* 479.

71 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3137 (Kluwer Law International, 2nd edition, 2014).

B.The limits to the use of scrutiny of the award – beware of overambitious reviews

Although scrutiny of awards can be a useful and helpful tool to ensure the award's future enforcement, the process does contain limitations. Indeed, when the process is being subjected to an overambitious application, this may go against efficiency considerations. This section will summarize situations in which this has happened in the first author's experience and conclude that arbitral institutions must refrain from such an approach. Rather, the scrutiny process should be conducted in a more reasonable manner.

1.Illustrations

The first author's experience shows that arbitral institutions sometimes use the scrutiny process in an exaggerated manner.

(a) The purely Austrian arbitration

To cite a first example, the first author was once chairman in a "very Austrian" ICC arbitration, where both parties were Austrian, the place of arbitration was in "*Wien*" (in English: "*Vienna*"), the language of the arbitral proceedings was German (*i.e.* the official language of Austria), regarding a power plant in Austria, and the applicable law was, you guessed it, the Austrian law. Needless to say, it was a purely Austrian arbitration. The first author submitted his draft award for scrutiny by the ICC. Bear in mind, the award was in German. The ICC reviewing the award pointed out the following "deficiency": In the award, the first author had stated that the place of arbitration is "Vienna, Austria"; nevertheless, the ICC pointed out that nowhere in the record was "Vienna, Austria" mentioned but only "Vienna" and requested the first author to provide evidence that the parties had really meant "Vienna, Austria". Indeed, the contracts did not make any mention of Austria, and had simply stated "Vienna". And it is correct that there are cities

called "Vienna" or "Wien" in Virginia or Wisconsin for example.[72] However, the contracts were purely national contracts, and the Austrian parties indeed did not think to mention that the contracts were to take place anywhere else but in Austria, since the whole contractual relationship was local and based in Vienna. No external international element was present. During the arbitral proceedings, no dispute arose as a consequence of this "issue". It would have been a complete waste of time and money and would have triggered great astonishment but also anger by the parties if the proceedings had been re-opened to clarify what the Austrian parties had meant with "Wien" (in English: "*Vienna*"). This constitutes a clear example of a case where a Counsel at the ICC Secretariat may have wanted to show how "super smart" he or she was, when, evidently, it was completely unnecessary.

In this Austrian case, another issue arose, which can fortunately constitute our second example. As you may recall, the award was written in the German language. Though that was the case, the award was submitted for review to non-German speakers, because of a conflict of interest with the only German speaker, not relevant for our purposes. The award was thus translated in the English language. The ICC Secretariat brought to the first author's attention that certain wording of the translated award was contradictory. This failure in consistency was nevertheless created by the ICC's inconsistent translation, and not a consequence of the award itself in the original language.

The moral of this Austrian case is that arbitral institutions should not take the scrutiny process too far. The counsel of the arbitral institution should also make good use of his or her common sense when reviewing an award.

(b) The footnote requirement

Another example would be one concerned with footnotes. It has happened to

72 Indeed, Wikipedia teaches us that there are two other cities called "Wien" in Missouri and Wisconsin and even more cities called *"Vienna"* in Alabama, Georgia, Illinois, Indiana, Louisiana, Maine, Maryland, Michigan, Missouri, New York, North Carolina, Ohio, Ontario (Canada), South Dakota, Texas, Virginia West Virginia and Wisconsin. There is even a city called *"New Vienna"* in Iowa and Ohio and a *"South Vienna"* in Ohio.

the first author that an arbitral institution requested his draft award to have more footnotes than the ones originally provided. The award was 60 pages long and had 40 footnotes. Requesting more footnotes in such a situation again constitutes an exaggerated application of the scrutiny process. An award should not be refused because an arbitral institution is not satisfied with the amount of footnotes provided. As any arbitrator may know, any footnote is not without consequences and risk, and one has to remain careful with where to use footnotes and where one is not necessary. Indeed, what to quote and what not to quote could very well open a Pandora's box. The wish for an arbitral institution to simply have more footnotes is not the purpose of a scrutiny process, especially since such addition would not necessarily make an award any clearer. The extent to which arbitral institutions sometimes go to contribute their two cents is in that sense troublesome and goes against efficiency considerations.

(c) The case where the arbitral institution is not convinced

To cite another example of the first author's experience as arbitrator, an award was planning to allocate the costs of the arbitration to the losing party. The arbitrator appointed by this losing party did not agree and announced that he would write a dissenting opinion because he felt that he should somehow give face to his former professor who served as counsel for this party. As a matter of fact, the points raised by the dissent were completely unfounded as they dealt with issues that had never been raised in the arbitration. These had the potential to undermine the award. In any case, it would have been a costly (and probably futile) exercise for the prevailing party to try to enforce the cost decision in the losing party's jurisdiction. This caused the first author and the dissenting arbitrator to come to a consensus where they decided that the dissenting arbitrator would not issue his dissent in exchange for each party bearing its own costs for the arbitral proceedings. The reasoning for the cost decision was – in light of its function as compromise - rather vague (*"in light of the circumstances"*).

Promptly, the draft award was not approved because – in light of the detailed

decision on the merits of the case - the reasoning provided for the cost decision was rather short and vague. Of course, the true reasoning for the cost decision – to avoid a dissenting opinion – could not be provided. The arbitral tribunal finally made the vague sentence a bit longer without adding substance ("*in light of the circumstances of this case, in particular the facts and the law* …"). Again, this seemed like an exaggerated application of the scrutiny process with little sensitivity for the dynamics of decision-making. An arbitral institution should not refuse to approve an award simply because it is not content with or fully convinced of the reasoning provided for the cost decision. Arbitral institutions should keep in mind that a consensus between members of an arbitral tribunal sometimes involves aspects, which may not be explicitly spelled out in the award.

2. The moral of the story

Arbitral institutions should not be overambitious. – It is quite astonishing to see the extent to which the scrutiny process can be used. In that way, we tend to agree with the critics of the scrutiny process. If this process is to be used in such a manner, it causes more harm than benefits. The scrutiny process of awards should not be subjected to such extreme application, nor is it how it is designed to be used. In other words, arbitral institutions should not be overambitious when it comes to the use of this process. This would constitute a significant waste of time for arbitral institutions as well as arbitrators – time that can frankly be put to better use. Arbitral institutions must remember that the arbitrator is the one deciding the case, and not the institution. The scrutiny process should thus be subjected to a "common sense" approach, meaning a balanced approach limited to a reasonable review of formal and substantial aspects of the award. There is no need to go into twisted manoeuvers to search for the needle in the haystack. It is henceforth fundamental that one keeps in mind the purpose of this process, which is to assist arbitrators accomplish the intended result of the decision and ensure the legal effectiveness and enforceability of the award.

IV. CONCLUSION

Coming back to the question as to whether arbitral institutions should have recourse to a scrutiny process or refrain from it, the answer is yes, it should be used. This process is already being used by various arbitral institutions worldwide. In addition, and as seen with ICC awards, it may contribute in guaranteeing a higher level of voluntary compliance of parties and ensures a higher enforceability rate of awards.[73] Overall, it is a system that works.

The advantages of the scrutiny process clearly outweigh its disadvantages. It is a safeguarding tool assisting arbitrators in the redaction of their award, ensuring the award's full effectiveness. Though some arbitrators may find this process to be an extra burden, we prefer to look at it in a more positive light and consider it as one less concern to have in mind when drafting an award. As we all know from experience, having a second set of eyes to review a draft is always helpful.

Nevertheless, the Keith Richard's "*make no mistake*"[74] approach by some arbitral institutions might be overambitious. It is sufficient to follow Bruce Springsteen's recommendation "*You better look hard and look twice*".[75] Indeed, if we tend to be for the use of this process, we also consider that its application should be tempered and balanced. Indeed, a balance must be struck between the ability to use such a process and the extent to which it is employed. Arbitral institutions should not get carried away and take this process as an opportunity to address any aspects they may dislike in a decision, or point out to any part of the reasoning they are not completely convinced of or that could be improved – even if the improvement comes with a lot of extra time and without jeopardizing the arbitral process' efficiency. In other words, the persons doing the scrutiny should assist the process but should not embark on a mission to show that they are the better arbitrator.

73 LAURENCE CRAIG, *supra* note 17, ¶ 20.01; CHARLES BROWER, *supra* note 33.

74 *"Make no mistake"* is a song by Keith Richard from his 1988 album *"Talk is Cheap"*.

75 This recommendation is a line from Bruce Springsteen's song *"Brilliant Disguise"* which appeared on his 1987 album *"Tunnel of Love"*.