

## **The application of arbitration in transnational private regulation: An analytical framework and recommendations for future research**

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### *1. Introduction*

This paper investigates the prospective application of arbitration by Transnational Private Regulation (TPR).<sup>1</sup> It builds on the study of TPR developed by Fabrizio Cafaggi et al.<sup>2</sup> TPR addresses the ever-increasing transfer of regulatory power from national to global levels, and from public to private regulators. TPR entails private regulatory co-operation beyond the jurisdictional boundaries of States through voluntary standards.<sup>3</sup> The regimes of TPR are built by a variety of actors, such as companies, NGOs, independent experts, and epistemic communities.<sup>4</sup> Examples of TPR can be found in food safety, forestry management, trade, and derivatives, among other fields.<sup>5</sup> More specifically, they concern private actors engaging in transnational coordination of standard setting such as the Forest Stewardship Council (FSC) that was developed to foster responsible management of the world's forests.<sup>6</sup>

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<sup>1</sup> The first draft of this paper was prepared at the European University Institute within the framework of the 'Casebook' Working Group led by Fabrizio Cafaggi and Rebecca Schmidt.

<sup>2</sup> F Cafaggi, 'Comparative Report. A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement' (2014) <[www.eesc.europa.eu/en/documents/comparative-analysis-transnational-private-regulation-legitimacy-quality-effectiveness-and-enforcement](http://www.eesc.europa.eu/en/documents/comparative-analysis-transnational-private-regulation-legitimacy-quality-effectiveness-and-enforcement)>.

<sup>3</sup> *ibid.*

<sup>4</sup> F Cafaggi, A Renda, R Schmidt, 'International Regulatory Co-Operation: Case Studies, Vol 3 Transnational Private Regulation and Water Management' (OECD Publishing 2013) 12.

<sup>5</sup> *ibid.* 10–11.

<sup>6</sup> See the website of the FSC at <<https://fsc.org/en/about-us>>.



There are four main characteristics of TPR: legitimacy, quality, effectiveness, and enforcement.<sup>7</sup> I will describe those four characteristics in brief here. First, the *legitimacy* of TPR is built around consent through voluntary entry, participation, and exit of regulated entities.<sup>8</sup> Important to this contribution is that the legitimacy of TPR goes beyond its legal dimension, measured by purely legal standards. Hence, the legitimacy of TPR is largely determined by standards developed by social and economic institutions relevant to specific TPR regimes. The role of those institutions in standard settings is higher in private TPR regimes than private-public TPR regimes, where some forms of compliance are mandatory. Second, the *quality* of TPR corresponds to the *ex ante* and *ex post* evaluation cycle of regulatory processes. It is also linked with the transparency of TPR. Third, the *effectiveness* of TPR is measured according to the extent to which the objectives of TPR (or selected TPR regimes) are met. And finally, *enforcement* of TPR is understood as ‘ensuring compliance with commitments’. Enforcement of TPR can take place through courts, administrative agencies, and private dispute resolution—including the arbitration at the core of this contribution.

Cafaggi’s study identified rather selective use of arbitration in TPR, but also recommended changes to make arbitration law more adaptable to TPR.<sup>9</sup> Furthermore, the study recommended that more specialized dispute resolution institutions are created to exclusively serve TPR.

Against this background, I shift the main focus of analysis from TPR to arbitration. Whereas Cafaggi argued that arbitration may be suitable for TPR as a means of private enforcement, in this paper I go even further, arguing that arbitration as a means of informal, out-of-court dispute resolution is well suited to strengthen the normativity of TPR. This is so because private arbitration actors (including, *inter alia*, arbitrators and arbitral institutions) are already equipped with the tools necessary to *facilitate* cross-border TPR, which is done through informal standards and procedures with origins in the communitarian values and reputational mechanisms used by different communities before the development of modern States. The roots of most private justice regimes—including arbitration—are informed by communitarian values such as collaboration,

<sup>7</sup> See generally Cafaggi, ‘Comparative Report’ (n 2).

<sup>8</sup> *ibid* 13.

<sup>9</sup> *ibid* 102.



participation, and personal trust. *Those values, together with other core characteristics of arbitration correspond to all core characteristics of TPR, making both systems comparable and complementary.*

The analytical framework incorporated in this paper follows the four core characteristics of TPR. Hence, the paper is organized into five sections. The first section contains the introduction. In the second section, I analyze the legitimacy of arbitration vis-à-vis the legitimacy of TPR. In the third section, I investigate the accountability of arbitration as a means of quality signaling vis-à-vis TPR. In the fourth section, I focus on the remedies available to arbitrators in a view of TPR's effectiveness. Finally, in the fifth section, I analyze enforcement through arbitration and its impact on the exclusiveness versus complementarity of TPR regimes. Conclusions follow, including recommendations for future research.

## *2. Three functions of arbitration and the legitimacy of TPR*

In my book, I identified three functions of arbitration: societal, legal, and economic.<sup>10</sup> The societal function goes to the core of historical values of arbitration, aiming at ensuring the social harmony among its early users. From the legal perspective, arbitration needs certain legal guarantees that selected types of disputes can be resolved through arbitration outside courts of law (that is, that disputes are arbitrable) and that arbitration outcomes—in the form of arbitration awards—will be legally binding and enforceable.<sup>11</sup> From the economic perspective, arbitration has a competitive dimension, in that it offers multiple rules and procedures to different parties operating within different sectors of industry. Arbitral institutions often compete against each other in this regard, and new actors (for example, tribunal secretaries) are increasingly entering the field. I now turn to these functions of arbitration to see how they correspond with the three dimensions of TPR's legitimacy, as defined by Cafaggi.

<sup>10</sup> BA Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Springer 2016).

<sup>11</sup> The section on legal dimension below focuses solely on arbitrability, as the enforceability part is covered in section 5.



### 2.1. *Early communitarian values of arbitration and the social dimension of legitimacy of TPR*

Arbitration is an old concept tracing back to the times of Ancient Greece.<sup>12</sup> Together with the growth of international commerce and the changes in the organization of a modern state, arbitration has gained its popularity as a neutral, private process which offers its users the expeditious, expertise, fair, and relatively cheap dispute resolution outside courts of law. Those characteristics have been considered the main ‘advantages’ of arbitration by its traditional users, such as commercial parties.

In the literature, the development of commercial arbitration is strongly linked with its use by medieval merchants who aimed to create a private, internal system of dispute resolution that could correspond to the basic principles of natural justice. To this extent, commercial arbitration also became a supporter of the medieval *lex mercatoria* (law of merchants) through which private, commercial norms could be enforced. The fact that arbitrators can refer to usages or rules of law instead of specific black letter laws has been long perceived as a tool to strengthen the exclusiveness of selected epistemic communities, such as traders. There have been studies exploring the relevance of arbitration for the emergence of non-state law (for example, *lex sportiva* or *lex informatica*) and non-judicial enforcement mechanisms with a support of arbitration.<sup>13</sup> Against this background, we can also distinguish the so-called new forms of arbitration vis-à-vis the traditional commercial arbitration.

The emerging growth of arbitration practice led towards the formation of different types of arbitration, which strongly detach from the classical concept of the process. In this line—and taking into account the aspect of consensuality—mandatory vis-à-vis voluntary arbitration has emerged. Moreover, against the background of traditionally binding arbitration, new forms of non-binding arbitration have been developed involving, *inter alia*: (a) pre-/post-dispute binding/non-binding

<sup>12</sup> See generally NGL Hammond, ‘Arbitration in Ancient Greece’ (1985) 1 *Arbitration Intl* 188–190.

<sup>13</sup> See for example: L Casini, ‘The Making of a Lex Sportiva by the Court of Arbitration for Sport’ in A von Bogdandy, I Venzke (eds) *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012) 439–69.



arbitration),<sup>14</sup> (b) conditionally and unilaterally binding arbitration,<sup>15</sup> and (c) combined non-binding arbitration.<sup>16</sup>

The changing usage of arbitration provoked an academic discussion on whether the emerging forms of the process could be, in fact, classified as arbitration. In addition, as noted above, the debate focused on the existent and prospective role that the new variants of arbitration play (preferably together with other forms of online dispute resolution, or ODR), or ideally could play in strengthening the normativity of transnational self-regulatory regimes in a way that ensures the exclusiveness and autonomy of *lex mercatoria* within the system created by medieval merchants.<sup>17</sup> Regarding problems with the classification, the consensus reached by academics thus far seems to involve the necessary rejection of the arguments of pure legal positivists, including a monist theory of legal system and a furthering of the approach providing for legal pluralism to accept the progressive evolution of the traditional arbitration pattern.<sup>18</sup> In practice, it is uncertain whether arbitration processes—short of their traditional, distinctive features or conducted in accordance with the rules developed solely by different TPR regimes—will or will not be perceived as arbitration by judges in courts of law.<sup>19</sup>

That being said, the academic discussion on definitions seem to be of little relevance for TPR. In fact, what matters is the informal nature of all types of arbitration, which constitutes the main means of securing the social legitimacy of TPR. How is this so? I argue that private arbitration actors are equipped with the tools necessary to strengthen the normativity of TPR. Those tools should be analysed within the context of the early goals of arbitration, which trace back to the communitarian values and

<sup>14</sup> CR Drahozal, RJ Friel, 'Consumer Arbitration in the European Union and the United States' (2002) 28 *North Carolina J Intl L & Commercial Regulation* 361–62.

<sup>15</sup> *ibid* 361–62; G Kaufmann-Kohler, 'Online Dispute Resolution and Its Significance for International Commercial Arbitration' in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Biener* (ICC Publishing 2005) 441.

<sup>16</sup> *ibid* 440–41.

<sup>17</sup> LE Trakman, 'From the Medieval Law Merchant to E-Merchant Law' (2003) 53 *U of Toronto L J* 265–304; T Schultz, 'Secondary Rules of Recognition and Relative Legality in Transnational Regimes' (2011) 56 *American J of Jurisprudence* 59–88.

<sup>18</sup> Compare a discussion on the legal systems in: T Schultz, 'Private Legal Systems: What Cyberspace Might Teach Legal Theorists' (2007) 10 *Yale J of L & Technology* 21–22.

<sup>19</sup> Kaufmann-Kohler (n 15) 437–456.



performance standards of regimes that applied arbitration to strengthen communitarian bonds before the development of a modern political system.

In fact, tracing back to the 17<sup>th</sup> century, arbitration was used by various communities as a means of informal, communitarian justice based on trust. The communities using arbitration were rather diverse, with participation from various religious, geographical, ethnic, or commercial communities.<sup>20</sup> As noticed by Auerbach, the rule for the application of non-judicial dispute resolution was rather simple: the tighter the community, the smaller the involvement of lawyers and adversarial procedures.<sup>21</sup> Also, the nature of arbitration differed when used in the 17<sup>th</sup> century. The roots of arbitration were built around communitarian values. For business communities, those values involved: participation, performance, and moral sanctions.<sup>22</sup> Those values complemented the internal dynamics of historical communities aiming at developing the system of justice outside law vis-à-vis its early users. Those values go to the core of the social dimension of the TPR's legitimacy, as defined by Cafaggi through the consent to enter, participate, and exit. In this line, the early values of arbitration seem to accommodate the non-legal (social) dimension of TPR. Further research should examine those early values of communitarian justice as protected via arbitration in *specific* communities, especially given that some of those values extend into contemporary TPR (for example, in trade).

#### 2.1.1. *Arbitrability and the legal dimension of legitimacy of TPR*

Generally, the scope of disputes that may be submitted to arbitration is determined by national laws. Two trends shall be identified here. First, there is an international consensus as to the subject matters which are inarbitrable: the family law, personal status and the criminal law.<sup>23</sup> Second, there is a trend towards the liberalization of the concept of arbitrability, which would allow the resolution of disputes that traditionally fell within the regulatory, public spheres.

<sup>20</sup> JS Auerbach, *Justice Without Law?* (OUP 1984) 19.

<sup>21</sup> *ibid.*

<sup>22</sup> Warwas (n 10) 168.

<sup>23</sup> LA Mistelis, 'Chapter 1 - Arbitrability - International & Comparative Perspectives. Is Arbitrability a National or an International Law Issue' in LA Mistelis, SL Brekoulakis (eds) *Arbitrability. International & Comparative Perspectives* (Wolters Kluwer 2009) 15.



Although it is said that domestic restrictions concerning arbitrability are rather insignificant in the world of international commercial arbitration (due to the minimal involvement of the domestic public policy issues), the situation seems opposite in the case of arbitration in TPR, in which the contractual (objective) (in)arbitrability is more limited by national authorities' prior confirmation of submitting certain statutory disputes to arbitration.<sup>24</sup> This public 'demarcation between state authority and the exercise of private rights'<sup>25</sup> has had a significant impact on the actual potential for the use of arbitration in TPR.

National regulation on arbitrability is strongly determined by public policy constraints. However, the extent to which public safeguards actually affect the arbitrability of regulatory disputes at the national level is also dependent upon the specific national approach to traditional arbitration. In this regard, in the US, the extension of the category of arbitrable disputes seems to be quite liberal, which is dictated by the federal policy generally favouring arbitration reflected in the Federal Arbitration Act of 1925 (FAA). Together with the decision of the US Supreme Court in *Shearson/American Express v. MacMahon* of 1987—in which the Court held the Respondents' Exchange Act arbitrable—arbitration has become a common means of resolution of disputes in the securities industry.<sup>26</sup>

Such hospitality towards arbitration also stands behind the progressive enforcement by US judges of arbitration clauses contained in business-to-consumer (B2C) contracts relevant in the context of e-commerce, one of the examples of TPR. Here, major controversies result from the arbitrations arising out of mandatory and binding pre-dispute arbitration agreements, which had been imposed on consumers either explicitly or implicitly. The consumer arbitration in the US—which originates in securities arbitration—has been widely encouraged since the judgement of the US Supreme Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995).<sup>27</sup> The Court stressed there that the hostile policy towards arbitration would be unlawful under the FAA. Therefore, the Court applied the provisions of the Act to the consumer contract as well.

<sup>24</sup> TE Carbonneau, F Janson, 'Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability' (1994) 2 *Tulane J Intl and Comparative L* 194–95.

<sup>25</sup> *ibid* 194.

<sup>26</sup> *Shearson/American Express v MacMahon* 482 US 220 (1987).

<sup>27</sup> JE Stjernlight, 'Consumer Arbitration' in E Brunet et al (eds) *Arbitration Law in America: A Critical Assessment* (CUP 2006) 130.



As a result of the judgement, consumer arbitration in the US expanded extensively in the context of health care, the work of financial institutions, and the selling of goods.<sup>28</sup>

In turn, the situation of consumer arbitration in Europe is slightly different, due to the specificity of the European regime on consumer protection and the standards of ADR underpinning the EU consumer ADR and ODR framework. Based on this framework, the consumer ADR and ODR is organized at the Member State level around the following seven principles: access to ADR, expertise, independence, impartiality, transparency, effectiveness, and fairness, liberty, and legality, as enshrined in the ADR Directive.<sup>29</sup>

When it comes to the TPR and e-commerce, the use of consumer arbitration undoubtedly oscillates between the goals of economic efficacy and fair transactions involving parties with unequal bargaining powers, including consumers on one side and e-commerce platforms on the other side. In this context, the issue at hand also has a constitutional dimension concerning the access to justice by individuals and the due process requirements in the judiciary, especially as far as the consumers' waiver of the right to go to court in Europe, and the companies' attempts to prevent consumers from proceeding with class actions in the US.<sup>30</sup> Moreover, some commentators notice that it is not the emergence of mandatory arbitration which itself constitutes the problem, but rather one party's (here, the corporation's) exclusive control of 'the design of the dispute resolution system' that raises more controversies.<sup>31</sup> The situation becomes even more complex when the e-commerce platforms operate globally. The (private international law) question emerges, then, of which laws and consumer arbitration models will apply to the transactions in question. The answer will be delivered on a case-by-case basis.

Lastly, the arbitrability of intra-company disputes has a particular relevance for the use of arbitration in TPR. Due to the public policy constraints, various company disputes—especially those regarding the

<sup>28</sup> *ibid* 131.

<sup>29</sup> B Warwas, 'Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice' in L Cadiet, B Hess, M Requejo Isidro (eds) *Privatizing Dispute Resolution: Trends and Limits* (Nomos 2019) 333.

<sup>30</sup> Sternlight (n 27) 131.

<sup>31</sup> LB Bingham, 'Control Over Dispute-System Design and Mandatory Commercial Arbitration' (2004) 67 *L and Contemporary Problems* 221.



validity of shareholders' meetings were traditionally perceived as inarbitrable.<sup>32</sup> However, in view of the progressive liberalization of national laws on arbitration, the wider use of arbitration has been permitted in various company disputes. This is the case in Italy and Spain, for example.<sup>33</sup>

Such national attempts to liberalise the arbitrability of intra-company disputes seems to be supported by various initiatives at the international level, including those taken by the OECD, which introduced the need for successful civil enforcement of shareholders' rights, including the reliance on efficient dispute settlement mechanisms like arbitration. In the past, the OECD organized two sets of meetings (in 2003, together with the UNCITRAL and the ICC; and in 2006, together with Stockholm Centre for Commercial Law and with the support of the Government of Japan) that aimed at evaluating the potential but also the problems associated with the reliance on, *inter alia*, arbitration, ADRs, or specialized courts in the context of corporate governance.<sup>34</sup> Subsequently—and after having acknowledged that arbitration, once properly introduced, protects the rights of shareholders more effectively than 'poor regulatory and judicial enforcement'—the OECD issued the Programme Statement for

<sup>32</sup> MP Perales Viscasillas, 'Chapter 14 - Arbitrability of (Intra-)Corporate Disputes' in LA Mistelis, SL Brekoulakis (n 23) 286.

<sup>33</sup> Accordingly, the Italian law through the Legislative Decree No 5 of 17 January 2003 (which took effect on 1<sup>st</sup> January 2004) introduced the regulation of certain facets of arbitration in close corporations, though without a reference to publicly-held or listed corporations (Pilar Perales Viscasillas (n 32) 281; A Anglani, F Liguori, 'Italy's New Arbitration Laws' (2007) *Eur Arbitration Rev* 49). Moreover, the reform of the Spanish arbitration law of 2011 expressly asserted arbitration of company disputes (Act 11/2011, of May 20, reforming Act 60/2003, of December 23, on Arbitration, and regulating institutional arbitration within the Public Administration). It is important to notice, however, that both Italian and Spanish regulations provide for the two similar restrictions to the conduct of corporate arbitrations: (1) the approval of the use of arbitration clauses in companies' by-laws or statutes requires the majority of two-thirds of the votes reflecting the corporate capital and (2) the arbitral tribunal to decide on corporate matters should be appointed by a third party (Italy) or the whole proceedings need to take a form of arbitration administered by an arbitral institution (Spain) (Anglani, Liguori, 49; M Gómez Jene, 'The New Spanish Arbitration Law Reform Act' *Conflictoflaws.Net*. Views and News in Private International Law (May 25 2011) available at <<http://conflictflaws.net/2011/the-new-spanish-arbitration-law-reform-act/>>.

<sup>34</sup> See: the OECD's website, section on 'Alternative Dispute Resolution and Corporate Governance' at <[www.oecd.org/document/48/0,3746,en\\_2649\\_37439\\_7093936\\_1\\_1\\_1\\_37439,00.htm](http://www.oecd.org/document/48/0,3746,en_2649_37439_7093936_1_1_1_37439,00.htm)>.



Corporate Governance and Arbitration of Company-Law Disputes (ACLD), which encouraged the global dialogue on the implementation of the ACLD at the horizontal level.<sup>35</sup> Based on the information on the OECD's website, currently, the OECD continues its efforts towards the development of the unified approach to enforcement through arbitration, as a means of shareholder protection in new markets.<sup>36</sup>

What emerges from the above presentation is the assumption that the changing but still rather fragmented regulation of arbitrability at the national level could be a strong incentive for transnational regulators to rely on arbitration, and to further adjust the traditional concept of the process to the dynamics of different TPR regimes, at least to the extent to which national authorities would allow such adjustment. This 'public' authorization of arbitration can be seen as a guarantee of the legal dimension of the legitimacy of TPR.

#### 2.1.2. *Competitive dimension of arbitration and the market legitimacy of TPR*

As noted in the introduction to this section, arbitration is also a business, and therefore the competition between different arbitration institutions is not surprising.<sup>37</sup> Yet, the changing function of arbitration increased the means of such competition by equipping institutions with new sets of rules and other soft-law instruments (for example, the American Arbitration Association (AAA)'s Consumer Due Process Protocol) falling within the regulatory areas. In this context, the AAA should be perceived as the leading market player. Due to the AAA's partnering with the US government to develop various ADRs programs, the AAA offers, *inter alia*, the following instruments in the regulatory sectors: the AAA Corporate Bankruptcy ADR: Solutions for Organizations in Distress, AAA Consumer Procedures, various ADRs in the internet (for example, AAA B2B E-Commerce Dispute Management Protocol and the ICDR Supplementary Procedures for the Internet Corporation for Assigned

<sup>35</sup> See *ibid* and the text of the Programme Statement for Corporate Governance and the ACLD available at the OECD's website <[www.oecd.org/corporate/ca/corporategovernanceprinciples/33963048.pdf](http://www.oecd.org/corporate/ca/corporategovernanceprinciples/33963048.pdf)>.

<sup>36</sup> *ibid*.

<sup>37</sup> A similar argument was developed in my book: Warwas (n 10) sec 2.3.2.2.2 including similar examples of competing dynamics between arbitral institutions.



Names and Numbers – ICANN), Securities Arbitration Supplementary Procedures, and different supplementary rules of arbitration in sports (ie the AAA Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes).<sup>38</sup> The case of sports is particularly relevant, as it clearly demonstrates the competition between commercial arbitral institutions (here, the AAA) and the organizations that were developed exclusively by the TPR to ensure the private, non-judicial enforcement (here, the Court of Arbitration For Sport, the CAS). Pursuant to the Code of the World Anti-Doping Agency (WADA)—and within the adjudication framework of U.S. Anti-Doping Agency (USADA)—the AAA, together with the CAS, administers appellate disputes review processes arising out of the anti-doping violation by athletes<sup>39</sup>. Also other institutions are involved in the competition, which takes place in regulatory spheres. This particularly involves the new mechanisms of dispute resolution on the internet (ODR). Furthermore, the management of domain name disputes seems a very competitive area, especially with regard to the ICANN’s approved dispute resolution service providers including both institutions specialized in the administration of internet disputes and institutions that deal mostly with the administration of commercial disputes.<sup>40</sup>

As seen above, arbitral institutions can be seen as economic institutions that increase the market legitimacy of TPR, through the specialization of their rules and competing dynamics, in that they affect the market choices of the participants to the TPR regimes, and to some extent also affect compliance (see the section below on enforcement). Future study should focus on the role of arbitral institutions in expanding the market of arbitration services within selected regulatory regimes in the context of the market dimension of legitimacy of TPR.

<sup>38</sup> ‘The American Arbitration Association: A Long History of Working with Government’ <[www.adr.org/sites/default/files/document\\_repository/AAA%20Government%20Services.pdf](http://www.adr.org/sites/default/files/document_repository/AAA%20Government%20Services.pdf)>.

<sup>39</sup> The AAA’s Sports Arbitration Practice: <[https://go.adr.org/sports-dispute-resolution.html?\\_ga=2.165168767.1145437271.1592295390-1113352589.1592295390](https://go.adr.org/sports-dispute-resolution.html?_ga=2.165168767.1145437271.1592295390-1113352589.1592295390)>.

<sup>40</sup> The List of Approved Dispute Resolution Providers is available at <[www.icann.org/en/dndr/udrp/approved-providers.htm](http://www.icann.org/en/dndr/udrp/approved-providers.htm)>.



### 3. *Accountability of arbitration and the quality signaling*

In this section, I analyse the accountability of arbitration and its potential impact on the quality signalling for the current and potential arbitration users, including through TPR. The accountability is assessed through the lens of arbitral institutions. I argue that those institutions, as sophisticated market players that regulate the accountability of other arbitration actors, have an impact on quality signalling, hence the expansion of arbitration into (new) TPR regimes.<sup>41</sup>

Arbitral institutions provide the organizational and procedural support for the parties and arbitrators. Notably, they also regulate the scope of accountability of private arbitrators (and other actors such as experts) towards parties to institutional arbitration by excluding the civil liability for the arbitrators' misconduct during the proceedings.

The scope of such exclusion differs, depending upon the wording of institutional arbitration rules. The 2017 version of the ICC Arbitration and ADR provides for the exception from the absolute exclusion of liability in cases in which such exclusion turns out to be prohibitive under the applicable law (Article 41 of the ICC Rules). As for the LCIA, Article 31 of the LCIA Arbitration Rules of 2014 excludes the liability of the LCIA, the LCIA Court, arbitrators, the Registrar, and any expert to the Arbitral Tribunal for any act or omission in connection with any arbitration 'save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law.'<sup>42</sup> It is said, hence, that the LCIA represents a qualified approach to the liability of its own arbitrators.<sup>43</sup>

Additionally, some arbitral institutions exclude the possibility of the participation of their employees, organs, and arbitrators in any legal or other proceedings arising out of the arbitration case after the award has

<sup>41</sup> I developed this argument in my book. Warwas (n 10) sec 3.4.1. The section below summarizes this argument and presents it in the context of TPR.

<sup>42</sup> Art 31 of the LCIA Arbitration Rules (2014) available at the website of the LCIA <[www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx#Article%2031](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2031)>.

<sup>43</sup> For a detailed analysis of institutional rules on liability and their analysis see Warwas (n 10) ch 4.



been delivered.<sup>44</sup> This amounts to almost absolute immunity ‘from process’ of those arbitral institutions.<sup>45</sup>

The general lack of accountability of (institutional) arbitration constitutes a serious obstacle in expanding the market of arbitration services with TPR regimes, if we assume that it affects the quality signalling by arbitration actors to its potential users.<sup>46</sup> All this distorts the competition between arbitral institutions in that potential arbitration users cannot make informed choices when deciding on arbitration as a form of dispute resolution in the first place not on their arbitration service provider in the second place. I argue that once arbitral institutions are willing to increase their accountability—be it, for example, through more liability under their rules—the quality signalling would increase, which could potentially also increase the arbitration usage in the field of TPR.

#### 4. Remedies available to arbitrators and the effectiveness of TPR

As mentioned above, the effectiveness of TPR is measured by the extent to which different TPR regimes manage to achieve their objectives. In this section, I analyze the scope of remedies available to arbitrators to investigate whether this scope is able to accommodate the objectives of TPR—and if so, to what extent. The objectives of TPR are understood here broadly. They mean the extent to which different TPR regimes function effectively, in a self-sustained manner.

The scope of remedies available to arbitrators is rather broad, and results from the relevant wording of the parties’ arbitration agreement or arbitration clause. The character and the nature of remedies to be granted by arbitrators may have an impact on the vacatur proceedings, when the relevant court faces the application for the annulment of the award. It is said that the choice of remedies should have a reasonable connection with the contract, and the character of its breach by the contractors.<sup>47</sup>

<sup>44</sup> See, for example, art 31.2 of the LCIA Arbitration Rules.

<sup>45</sup> On the concept of ‘immunity from process’ see Warwas (n 10) sec 4.2.3.

<sup>46</sup> As noted, I developed this argument in my book. See Warwas (n 10) 186–88.

<sup>47</sup> The nature of such necessary relationship was defined by the California Supreme Court in *Advanced Micro Devices (AMD) v Intel Corp* (9 Cal 4th 362, 885 P.2d 994, 36 Cal Rptr 2d 581 (1994)).



Moreover, some of the institutional arbitration rules expressly reflect on the scope of remedies available to arbitrators. Pursuant to AAA's Commercial Arbitration Rules of 2009 (the AAA's Rules), 'the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.'<sup>48</sup> Also, the arbitrator may make decisions other than a final award, such as interim, interlocutory, or partial rulings, orders, and awards in which he or she may include the assessment of the fees, expenses, and related compensation, as he or she deems necessary.<sup>49</sup> In addition, pursuant to the provision R-34, arbitrator may decide on interim measures within his/her own discretion. The AAA's Rules are also equipped with the Optional Rules for Emergency Measures of Protection, under which the emergency arbitrator may render an interim award of emergency relief, once the interested party has shown the necessary urgency of such a relief (Provision O-4). Similar provisions concerning the scope of remedies also exist with regard to other arbitral institutions.

The question arises here: what is the scope of remedies available to arbitrators who deal with disputes involving TPR? It seems that the new forms of arbitration may limit the scope of the performance of 'arbitrators' due to the specificity of the subject matter of disputes arising in TPR. This can be seen in the case of the Uniform Domain Name Dispute Resolution Policy (UDRP) developed by the ICANN. UDRP provides for the mandatory administrative proceedings (commonly referred to as arbitration) to be incorporated into the Registration Agreements to coordinate a dispute resolution processes between domain name holders (Registrants) and third parties (trademark or service mark owners).<sup>50</sup> Under the Rules for UDRP, any party whose rights have been violated by domain name registration can initiate proceedings by submitting a complaint to one of the ICANN's approved

<sup>48</sup> Provision R-43(a) of the AAA's Rules available at the AAA's website: <[www.adr.org/sites/default/files/Commercial%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Jun.%202001%2C%202009%20Fee%20schedule%20Jun.%201%2C%202010.pdf](http://www.adr.org/sites/default/files/Commercial%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Jun.%202001%2C%202009%20Fee%20schedule%20Jun.%201%2C%202010.pdf)>.

<sup>49</sup> Provision R-43(b) of the AAA's Rules.

<sup>50</sup> See Article 1 of the UDRP available at <[www.icann.org/resources/pages/policy-2012-02-25-en](http://www.icann.org/resources/pages/policy-2012-02-25-en)>.



service providers.<sup>51</sup> Notably, the ICANN's 'arbitration' covers only narrow categories of disputes (e.g. domain name infringements of trademarks or service-marks).<sup>52</sup> Also, the remedies available for the administrative panels are rather limited, and involve either a transfer of a domain name registration to the complainant or the cancellation of a domain name.<sup>53</sup> In fact, there is a raising criticism of the ICANN's proceedings, and some commentators claim that 'mandatory administration proceedings' do not exhaust a definition of arbitration and the fairness of the proceedings is questionable, as the ICANN's Rules seem to favour trademark owners over domain name holders.<sup>54</sup> These criticisms are an important argument when determining the potential impact of arbitration on the effectiveness of the internet regulation more specifically, and other TPR regimes more generally. Again, the relationship between the scope of remedies available to arbitrators and the effectiveness of TPR will need to be assessed on a case-by-case basis, given the specific characteristic of arbitration in different TPR regimes and the specific objectives of those regimes.

##### *5. Private enforcement of TPR through arbitration*

As noted, after the period of rather spontaneous development outside the law, arbitration started to be regulated at the domestic level through the adoption of various national codes and statutes, which acknowledged the autonomy of the process and also supported it with the public instruments ensuring the enforcement of arbitral agreements and awards (e.g. the US Federal Arbitration Act of 1925). The real breakthrough in the worldwide development of arbitration came together with the adoption by the United Nations of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1958, which provided the facilitation of the judicial recognition and enforcement of foreign and non-domestic arbitral awards by eliminating,

<sup>51</sup> Art 3(a) of the Rules for the UDRP, available at the ICANN's website: [www.icann.org/resources/pages/udrp-rules-2015-03-11-en](http://www.icann.org/resources/pages/udrp-rules-2015-03-11-en).

<sup>52</sup> Art 4(a) of the UDRP.

<sup>53</sup> Art 4(i) of the UDRP.

<sup>54</sup> SJ Ware, 'Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP' (2002) 6 J of Small and Emerging Business L 177.



*inter alia*, a double *exequatur* requirement enshrined in the previous enforcement instruments, such as the 1923 Geneva Protocol on Arbitration Clauses and the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927. The New York Convention has been widely ratified all around the world.

Although arbitration is a private process, in cases in which the parties do not voluntarily comply with arbitral awards, the enforcement of the awards needs to be provided by public courts at the national level. The standards for the public enforcement of foreign awards are set forth in Article V of the New York Convention of 1958.<sup>55</sup>

Those public standards of enforcement—together with the requirements as to the form of arbitration agreement (established by the New York Convention in Article II)—may undermine the enforcement (and hence the effectiveness of) some new variants of arbitration conducted online. Yet again, arbitration (be it in its traditional, commercial form or in its emerging forms, to be applied in TPR), operates through means of private compliance. This is the case even where public enforcement proceedings of arbitral awards take place in courts of law, as parties often negotiate those enforcement titles by means of private settlements. Moreover, the voluntary compliance with the outcomes of arbitration seem to be even more facilitated in TPR than in traditional arbitration, since TPR often encompasses monitoring schemes or additional, private dynamics of enforcement (through, for example, reputational dynamics). The interplay between those dynamics and arbitration should be the subject of further research.

In conclusion, although arbitration is not an exclusive means of enforcement of TPR, it seems to strongly complement public enforcement of TPR, which can be of benefit in those regimes where private and

<sup>55</sup> Art V of the New York Convention distinguishes between the grounds under which the enforcement of the award may be refused by a competent court at the request of the respondent (that is, the party against whom the award is invoked) and the cases in which the court is authorized to refuse to enforce the award *ex officio*. The first category concerns: incapacity of the parties to accept arbitration agreements or invalidity of arbitration agreements, violation of due process standards, the excess of authority by the arbitral tribunal, invalid composition of the arbitral tribunal, award not binding, set aside, or suspended. The second group of cases refers either to the inarbitrability of a dispute under the law of the country where the recognition or the enforcement is sought or to the (domestic) public policy constraints associated with the recognition or the enforcement of the award.



public regulators collaborate. Moreover, in truly private TPR regimes, arbitration (or arbitration-like procedures) can work together well towards increasing the private, non-judicial compliance with the internal TPR norms. The actual role of arbitration in increasing compliance to TPR should be studied in specific TPR regimes.

## 6. *Conclusions*

In this paper, I developed a theoretical framework for the analysis of arbitration and TPR. I argued that arbitration—through its societal, legal, and economic functions—can increase the legitimacy of TPR. Furthermore, I presented the interplay between the accountability of (institutional) arbitration and the quality signalling vis-à-vis TPR. Also, I studied the impact of the remedies available to arbitrators on the effectiveness of TPR. Finally, I examined the role of private enforcement through arbitration in securing the exclusiveness and complementarity of TPR and private-public regulation. *The characteristics of arbitration studied within this theoretical framework correspond to all core characteristics of TPR, making both systems comparable and complementary.* As such, I argued that arbitration serves as a means to strengthen the normativity of TPR beyond its solely private enforcement function, as identified by Cafaggi.

That being said, I formulated the following recommendations for further research, to prove the preliminary conclusions beyond the theoretical framework included in this paper.

*i.* Further research should examine the early values of communitarian justice as protected via arbitration in *specific* historical communities, to the extent that some of those values extend into contemporary TPR (for example, to commerce).

*ii.* Future study should focus on the role of arbitral institutions in expanding the market of arbitration services within selected regulatory regimes in the context of the market dimension of legitimacy of TPR.

*iii.* Arbitral institutions should work towards increasing the accountability of institutional arbitration, be it through more liability under their rules or through the incorporation of soft mechanisms of accountability such as *enforceable* codes of ethics, or codes of conduct for arbitrators and the members of arbitral institutions. This could increase the quality

signalling, which, in turn, could potentially increase the use of arbitration in the field of TPR.

*iv.* The relationship between the scope of remedies available to arbitrators and the effectiveness of TPR will need to be assessed on a case-by-case basis, given the specific characteristic of arbitration in different TPR regimes, and the specific objectives of those regimes.

*v.* Finally, the actual role of arbitration in increasing compliance in TPR should be studied in specific TPR regimes.

