

PARTY AUTONOMY AND REGIONAL HARMONIZATION OF
RULES IN INTERNATIONAL COMMERCIAL ARBITRATION

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In the last half of the twentieth century, the trend towards “world-wide harmonization of trade law” has increased steadily with the globalization of economies and the corresponding increase in transnational commerce.¹ Throughout this period, efforts have emerged to unify and harmonize international commercial law in order to promote international trade.² The two primary ways this was pursued during the twentieth century were unification of choice-of-law rules and harmonization or unification of substantive rules.³

Today efforts are being taken in a new area of harmonization: the procedural rules of arbitral institutions. Although the UN adopted the UNCITRAL Arbitration Rules in 1976,⁴ which have increased uniformity in ad hoc arbitration,⁵ institutional arbitration rules still vary dramatically even within regions. The recent adoption of the new Swiss Rules of International Arbitration,⁶ however, is sign of a change. Already an important center for international commercial arbitration,⁷ Switzerland has only become a more attractive choice for parties looking for predictable dispute resolution by providing one uniform set of procedural rules for the several Chambers of Commerce and Industry in Switzerland.

As of January 1, 2004, the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud, and Zurich each incorporated the Swiss Rules of

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1. Franco Ferrari, *Defining the Sphere of Application of the 1994 “UNIDROIT Principles of International Commercial Contracts”*, 69 TUL. L. REV. 1225, 1225 (1995).

2. Michael Kabik, *Through the Looking-Glass: International Trade in the “Wonderland” of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT’L TAX & BUS. LAW. 408, 409 (1992).

3. Ferrari, *supra* note 1, at 1226.

4. Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 U. KAN. L. REV. 779, 805 (2002).

5. Matthias Scherer, *New Rules of International Arbitration in Switzerland*, 4 INT’L ARB. L. REV. 119, 119 (2004).

6. Swiss Rules of International Arbitration, art. 1 (July 2004), available at http://www.swissarbitration.ch/pdf/SRIA_english.pdf [hereinafter Swiss Rules].

7. Scherer, *supra* note 5, at 119.

International Arbitration (“Swiss Rules”) as their applicable institutional rules for the purposes of international arbitration.⁸ The adoption of the new Swiss Rules reveals not only the benefits of regional harmonization of arbitral rules, but also the difficulties that harmonization can cause in the transitional period for parties that consented to a particular set of institutional rules now dramatically altered. Where relevant provisions of the Swiss Rules substantively differ from provisions of the rules applicable prior to 2004, the rights and obligations of the parties under a contract may be substantially altered without the consent of the parties.

Article 21(5) of the Swiss Rules is a primary example of a provision now applicable which can cause drastic changes to arbitration proceedings on contracts made prior to the application of the Swiss Rules.⁹ This article provides an arbitration tribunal with jurisdiction to hear set-off defenses “even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement.”¹⁰ While similar provisions were present in at least three of the Chambers’ rules applicable to international arbitration prior to the Swiss Rules,¹¹ the Geneva Rules, a popular choice worldwide for international arbitration, did not provide such extensive jurisdiction.¹² Article 21(5) is a powerful jurisdictional article which, when chosen by the parties, provides the authority for one arbitral tribunal to hear all disputes between the same parties, which in some cases may indeed provide the most efficient resolution of disputes.¹³ However, Article 21(5) now has the power to supercede agreements between the parties to arbitrate separate disputes elsewhere even in cases where parties could not have imagined its application based on their original agreement. The adoption of the Swiss Rules has now imposed this provision on parties which, given the choice, may never have agreed to grant such broad jurisdiction to one tribunal.¹⁴ Furthermore, parties in this situation

8. Swiss Rules, *supra* note 6, at art. 1.

9. *See id.* at art. 21(5).

10. *Id.*

11. *See* International Arbitration Rules of Zurich Chamber of Commerce (1 Jan. 1989), art. 27, available at <http://www.jurisint.org/doc/html/reg/en/2000jiregen32.html>; Arbitration and Conciliation Rules of Lugano (March 1997), art. 12, available at http://www.cciati.ch/archivio_arbitrato/arbitration.pdf.

12. *See* Chamber of Commerce and Industry of Geneva Arbitration Rules (1 May 2000), available at http://www.ccig.ch/images/pdf/reglement_arbitrage_ang.pdf.

13. *See* Swiss Rules, *supra* note 6, at art. 21(5).

14. This will only be the case for disputes arising out of contracts referencing the Geneva Rules or the rules of other Chambers which do not incorporate similar provisions to Article 21(5).

are unlikely to have anticipated the possibility of such a change as this provision is novel in international arbitration.¹⁵

This paper explores the conflict that arises between the basic arbitration principle that party autonomy is paramount in conducting arbitration, and the idea that arbitral institutions must be free to alter and improve their arbitration rules to promote uniformity and keep up with advancements in the field. Indeed, given the trend towards unification in international arbitration,¹⁶ parties choosing institutional arbitration should take into account the possibility of rule harmonization when drafting arbitration clauses. While Article 21(5) is a current example of how growing uniformity of arbitration rules may leave parties victim to provisions they may never have consented to, it is only one example of a problem likely to be reoccurring as other institutions join the trend towards uniformity.

This note focuses on the general problem of the tension between party autonomy and the importance of rule harmonization. The first section addresses the principle of party autonomy, specifically regarding choice of applicable procedural rules to apply to disputes arising out of a contract.¹⁷ The second section discusses the conflicting general rule that, where a set of rules referred to in an arbitration agreement has been amended since the time of contracting, the current amended rules are applicable to subsequent disputes.¹⁸ The third section focuses on the idea that the adoption of a new set of consolidated rules is something more than a mere amendment of the institutional arbitration rules. This section looks to the experiences of arbitral institutions in the wake of German Unification and the breakdown of the former Yugoslavia, wherein the trend was to incorporate material changes to arbitration only insofar as they promoted the parties' will and intent at the time of contracting.¹⁹

15. See Scherer, *supra* note 5, at 123.

16. See Ferrari, *supra* note 1, at 1225.

17. See U.N. Conference on Int'l Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. V(1)(d) (1958), available at http://www.uncitral.org/english/texts/arbitration/NY-conv/XXII_1_E.pdf [hereinafter *New York Convention*]; U.N. Commission on Int'l Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, art. 19(1), available at <http://www.uncitral.org/english/texts/arbitration/ml-arb-e.pdf> [hereinafter *UNCITRAL Model Law*].

18. See *Jurong Eng'g Ltd. v. Black & Veatch Singapore Pte Ltd.*, 1 SLR 333, para. 25 (Singapore High Court 2003), available at <http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=80415>; *Offshore Int'l S.A. v. Banco Cent. S.A.*, (1976) 2 Lloyd's Rep. 402, 408 (Q.B.); Herman Verbist, *Cepani (Belgian Centre for Arbitration and Mediation) Modifies its Rules*, 17 *ARB. INT'L* 89, 99 (2001).

19. See Alan Uzelac, *Succession of Arbitral Institutions*, 3 *CROAT. ARB. Y.B.* 71, 80-81, 84 (1996).

The note concludes by presenting a solution in the form of a compromise, whereby a substantial change in the rules of an arbitral institution should require an inquiry into the actual intent of the parties at the time of contracting, but only if the change in the rules substantially affects the rights of the parties, and the parties neither could have anticipated such a change nor would have likely agreed to it. In light of the move towards greater uniformity in international arbitration, however, parties should contract in anticipation of the possibility of rule harmonization by including provisions to account for significant changes in the applicable arbitration rules, thereby avoiding these conflicts from the start.

I. THE PRIMACY OF PARTY AUTONOMY

The authority of arbitral tribunals comes solely from agreements between parties.²⁰ As arbitration only exists as a result of party consent, the parties' choice of arbitration rules cannot easily be replaced by the unilateral decision of the arbitral institution.²¹ Thus, great consideration must be made of party intentions and expectations as a tribunal only has authority to hear disputes if the parties intend that it do so.²² Furthermore, in addition to the general principle for respecting party autonomy, the New York Convention²³ and UNCITRAL Model Law²⁴ also explicitly require respect for the parties' choice of procedural provisions. In the case of the New York Convention, where this choice is not respected, an arbitral award can be denied enforcement in the courts.²⁵ As a result, the implications of marginalizing the parties' choice of arbitration rules are not merely in the violation of general principles but could in fact result in the unenforceability of an award.²⁶

The authority that parties grant to tribunals is in the form of jurisdiction over particular disputes. One method of conferring jurisdiction on an arbitral tribunal is to include an arbitration agreement or clause in a contract between parties. An arbitration agreement acts as evidence of the parties' consent to

20. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 560 (2d ed. 2001); JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 99 (2003).

21. See LEW ET AL., *supra* note 20, at 412.

22. SIGVARD JARVIN, *Objections to Jurisdiction*, in *THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION* 83, 83 (Lawrence W. Newman & Richard D. Hill eds., 2004).

23. *New York Convention*, *supra* note 17, at art. V(1)(d).

24. *UNCITRAL Model Law*, *supra* note 17, at art. 19(1).

25. *New York Convention*, *supra* note 17, at art. V(1)(d).

26. See *id.*; BORN, *supra* note 20, at 414.

bestow jurisdiction on a tribunal to decide particular disputes, and one must look to the agreement to determine the extent of jurisdiction that the parties agreed to grant.²⁷ Because this grant of jurisdiction is voluntary, arbitration tribunals are limited to the scope of jurisdiction specified by the parties.²⁸

Parties choose to subject disputes to arbitration because they want a neutral and consensual method of dispute resolution.²⁹ Furthermore, by choosing an arbitration institution at the outset of the agreement, parties can avoid uncertainty and ensure predictability and fairness if a dispute does arise out of the agreement. Parties generally determine which agreements, and which disputes under those agreements, to subject to arbitration based on what will best serve the mutual interests of the parties. The ability to choose arbitration, and how the arbitration will be conducted, provides parties with the opportunity to construct a mutually beneficial arrangement to which both parties will voluntarily agree.

However, if the tribunal fails to respect the will of the parties by exceeding the mandate entrusted to it, these benefits are lost as the jurisdiction exercised may be outside the scope of what the parties bargained for and would voluntarily have chosen. If parties are unable to rely on arbitral tribunals to respect the jurisdictional boundaries set by the parties, the benefits of predictability and certainty will be lost, and parties would lose the incentive for choosing arbitration. Thus, in order to uphold the role that arbitration serves in the international commercial realm, arbitration tribunals must determine the parties' intent and act within that scope.³⁰

The fundamental principle that party autonomy underlies arbitration is recognized now by nearly all international arbitration laws, rules, and conventions.³¹ Many agreements between parties today include arbitration clauses with an explicit choice of law, and, in keeping with the principle of party autonomy, the parties' choice of law is "invariably" applied by arbitrators.³² The parties' freedom to choose what law will govern their dispute is also confirmed in most international arbitration rules.³³ This

27. LEW ET AL., *supra* note 20, at 100.

28. ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 248 (4th ed. 2004).

29. LEW ET AL., *supra* note 20, at 411-12.

30. *Id.*

31. EMMANUEL GAILLARD, *The Role of the Arbitrator in Determining the Applicable Law*, in *THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION*, *supra* note 22, at 185, 199.

32. W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* 712 (1997).

33. LEW ET AL., *supra* note 20, at 413.

freedom to choose the governing law is a logical extension of party autonomy to agree to submit to a favorable method of dispute resolution. Indeed, “few principles are more universally recognized in private international law” than the principle permitting parties to choose the governing law for their agreements.³⁴ Parties are able to better control the dispute resolution process by selecting appropriate and favorable laws to apply to their dispute, and are thus able to avoid being subjected to inappropriate or unfavorable laws at a later time.³⁵

Although the right of parties to choose the substantive law applicable to their dispute is “undisputed,”³⁶ there is some recognition of limitations on the parties’ choice of procedural rules. Where mandatory public policy or statutory restrictions applicable to arbitration exist in the law of the place of arbitration, those provisions will apply to the dispute even where the parties selected a different procedural law to apply.³⁷

However, beyond applicable mandatory provisions of the arbitral situs, which will only alter the parties’ choice of law where they directly conflict, the general liberty of parties to select procedural law to govern their disputes is widely recognized. The parties’ broad freedom to choose the procedures that govern their arbitration has become fundamental to international commercial arbitration today.³⁸ Indeed, this particular freedom is recognized in the New York Convention,³⁹ UNCITRAL Model Law,⁴⁰ the Swiss Law on Private International Law, and national arbitration statutes in many jurisdictions.⁴¹ Furthermore, even where mandatory rules may come in to limit the parties’ explicit choice of procedural rules, as parties to international agreements have the freedom to also select the location of arbitration,⁴² they can ensure that favorable mandatory provisions apply as well by careful selection of the arbitral location.

By stating which procedural rules are applicable to a dispute within an arbitration clause in a contract, parties express their common will and intent for how the arbitration will be conducted. The principle of party autonomy

34. JEAN-JACQUES ARNALDEZ ET AL., *Final Award in Case No. 6379 of 1990*, in 3 COLLECTION OF ICC ARBITRAL AWARDS (1991-1995) 134, 136 (1997) (final award in ICC Case No. 6379).

35. LEW ET AL., *supra* note 20, at 413.

36. *Id.* at 414; *see also* BORN, *supra* note 20, at 543.

37. BORN, *supra* note 20, at 415.

38. *Id.* at 434.

39. *New York Convention*, *supra* note 17, at art. V(1)(d).

40. *UNCITRAL Model Law*, *supra* note 17, at art. 19(1).

41. BORN, *supra* note 20, at 415, 434.

42. *See UNCITRAL Model Law*, *supra* note 17, at art. 20(1).

requires that this common expressed intent not be disregarded except in exceptional cases.⁴³ Often an international convention that is directly applicable to the dispute, such as the New York Convention, will require the arbitral tribunal to respect the parties' freedom to choose the governing rules.⁴⁴ However, even where no applicable convention requires this, tribunals generally draw upon the principle of party autonomy and look to the parties' selection regardless.⁴⁵ Indeed, the primary duty of an arbitration tribunal is to determine the parties' intent and give effect to that intent.⁴⁶ Thus, where the parties have an agreement laying out the manner of resolving disputes, the consensual nature of arbitration demands that the manner in which they have chosen to resolve their disputes be respected in every way possible.

II. INSTITUTIONAL ARBITRATION AND THE EXTENT OF CONSENT TO CHANGES IN THE CHOSEN RULES

As a general rule in international arbitration, where a set of rules implicated by an arbitration agreement has been amended between the time of contracting and commencement of arbitration, the amended rules are applicable to the dispute.⁴⁷ This principle is deemed not to violate party autonomy because parties choose institutional rules to apply to their dispute, and an institution is free to, and in fact is expected to, update its arbitration rules over time.⁴⁸ Furthermore, the parties have the option at the time of contracting to state in specific language that they want the institutional rules *applicable at the time of contracting* to be the governing arbitration rules for future disputes arising out of that contract.⁴⁹ However, unless this choice is made clear within the arbitration agreement, this intention will not be imputed, and it will be assumed that the parties intended for the most up-to-date version of the rules to apply.⁵⁰ This general principle may not sufficiently protect the will of the parties where the change in rules is greater than a mere

43. ARNALDEZ ET AL., *supra* note 34, at 135 (final award in ICC Case No. 6379).

44. *See New York Convention, supra* note 17, at art. V(1)(d); BORN, *supra* note 20, at 414.

45. *See BORN, supra* note 20, at 414-15.

46. LEW ET AL., *supra* note 20, at 412; *see also* ARNALDEZ ET AL., *supra* note 34, at 135-36.

47. *Jurong Eng'g Ltd. v. Black & Veatch Singapore Pte Ltd.*, 1 SLR 333, para. 25 (Singapore High Court 2003), *available at* <http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=80415>; *Offshore Int'l S.A. v. Banco Cent. S.A.*, (1976) 2 Lloyd's Rep. 402, 408 (Q.B.); *Verbist, supra* note 18, at 99.

48. REDFERN & HUNTER, *supra* note 28, at 52.

49. *Offshore Int'l S.A.*, 2 Lloyd's Rep. at 408.

50. *China Agribusiness Dev. Corp. v. Balli Trading*, (1998) 2 Lloyd's Rep. 76, 79 (Q.B.).

amendment,⁵¹ so consideration may be necessary in those situations to determine which provision should apply.

At the time of contracting, parties to an agreement can delineate the manner of arbitrating disputes in a variety of ways. Parties can either “direct[ly]” confer powers on the arbitrators by “agree[ing] expressly upon the powers they wish the arbitrators to exercise,” or “indirect[ly]” by agreeing to arbitrate “according to rules of arbitration, whether institutional or ad hoc.”⁵² If the parties specifically provide the parameters of a tribunal’s jurisdiction and the manner of arbitration within the agreement, little room remains for altering the parties’ initial decision. If the parties choose to indirectly confer powers on a tribunal by choosing arbitration in accordance with a specific set of institutional rules, they are exposed to a greater degree of uncertainty as the rules they relied on may be drastically amended prior to the time disputes arise.

Nevertheless, despite the potential uncertainty, parties continue to routinely opt for institutional arbitration rather than provide the specifics of arbitration procedures within arbitration agreements. Institutional arbitration has a number of benefits, beginning with the sheer ease of referring to the rules of an existing arbitral institution as opposed to the exhaustive exercise of delineating the details of the procedures within an arbitration agreement. Furthermore, institutional arbitration offers the benefit that the rules “have proved to work well in practice” and undergo revision periodically “to take account of new developments in the law and practice of international commercial arbitration.”⁵³ Thus, parties do not choose institutional rules despite the fact that they may change, but in hopes that they will be developed over time to keep up with current trends in the area. Not only should parties expect that changes in the applicable arbitration rules might be made prior to disputes arising, but they are “entitled to expect that institutional rules will be reviewed, and if necessary, revised at regular intervals.”⁵⁴ In fact, one of the basic requirements that parties look for in choosing an arbitral institution is that the rules of the institution are regularly “altered to reflect” changes in the practice of international commercial arbitration, “both nationally and internationally.”⁵⁵

51. Matthew Scherer makes this contention specifically regarding Article 21(5) of the Swiss Rules. Scherer, *supra* note 5, at 121.

52. REDFERN & HUNTER, *supra* note 28, at 235.

53. *Id.* at 48.

54. *Id.* at 52.

55. *Id.* at 51-52.

Disputes can arise many years after the conclusion of an arbitration agreement, so both the parties and the institution itself benefit from the application of updated rules. Whereas parties to an agreement may find more modern rules beneficial, the predictable application of one set of updated rules is imperative for arbitration institutions. Because “[p]rocedural provisions can easily become out of date and so become incapable of implementation,”⁵⁶ arbitral institutions must be in a position to alter their rules accordingly.⁵⁶ If parties to any dispute could demand that the rules in force at the time of contracting apply, arbitral tribunals could be subjected to having to apply any number of variations on the institutional rules in a given period. Such expectations would be difficult to fulfill and inefficient as standards would have to be reevaluated with every dispute based on what was current at the time of contracting.

This consequence could provide a disincentive to institutions regularly updating their procedural rules, which would hinder the evolution of international commercial arbitration as a whole. Additionally, if an institution were to fail to update its rules so as to leave them unchanged from the rules to which the current clients agreed, the institution would no longer be a viable professional institution as its procedures become out of date, thereby making it more difficult to effectively conduct arbitration.⁵⁷ Therefore, to benefit current and future clients, arbitration institutions, and the evolution of international arbitration generally, a reference to institutional rules in an arbitration agreement must be understood to implicate the application of the rules current at the time of arbitration.

The principle that the applicable institutional rules are those current at the time of arbitration is well entrenched in international arbitration. It is explicitly provided for in the texts of various institutional arbitration rules. The International Chamber of Commerce (ICC) Rules of Arbitration state, “Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed thereby to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration proceedings unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.”⁵⁸ Similar provisions can be found in the Rules of Arbitration of the London Court of International Arbitration⁵⁹ and the International Dispute

56. *Bunge S.A. v. Kruse*, (1979) 1 Lloyd’s Rep. 279, 286 (Q.B.).

57. See REDFERN & HUNTER, *supra* note 28, at 52.

58. Rules of Arbitration of the International Chamber of Commerce (1998), art. 6(1), available at <http://www.iccwbo.org/court/english/arbitration/rules.asp>.

59. LCIA Arbitration Rules (1998), available at http://www.lcia.org/ARB_folder/arb_english_

Resolution Procedure of the American Arbitration Association.⁶⁰ While such provisions generally do allow parties to expressly contract otherwise, the de facto rule is that the rules current when arbitration proceedings begin will apply.⁶¹

Even when the applicable arbitration rules do not include a provision stating specifically that the applicable rules to apply to a dispute are those in effect at the time of arbitration, this principle is still followed. It is generally accepted that, even without a provision in the rules providing this standard, “When the parties refer in their agreement to arbitration rules of an institution and this institution has amended its rules at the time of commencement of the arbitration procedure, the rules in force at the time of commencement . . . will be applicable, unless the parties have agreed otherwise.”⁶² This was the position of the ICC even before the amendments of 1998 which added the paragraph explicitly stating this principle.⁶³

This concept has also been reflected consistently in a number of court decisions in various jurisdictions.⁶⁴ According to the Queen’s Bench Division (Commercial Court) of Great Britain, “the code incorporated is that in force when the time for invoking and acting on the procedural provisions concerned arises.”⁶⁵ Furthermore, the type of change to the rules does not matter. In a case in Hong Kong, the judge, admitting that the new rules were indeed “more ‘liberal’ than those they replaced,” stated that “[t]he fact that the arbitral institution chosen by the parties has improved its rules between contract and arbitration is not sufficient to justify refusing enforcement” of an award made under the new rules.⁶⁶ Therefore, the parties, having consensually chosen institutional rules to govern future disputes, are expected to bear the risk of any changes to that institution’s rules prior to commencement of arbitration.

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60. International Dispute Resolution Procedures of the AAA (2005), art. 1, available at <http://www.adr.org/sp.asp?id=22090>.

61. *China Agribusiness Dev. Corp. v. Balli Trading*, (1998) 2 Lloyd’s Rep. 76, 79 (Q.B.).

62. Verbist, *supra* note 18, at 99.

63. See YVES DERAIS & ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 77 (1998) (stating that the new provision further confirms that the rules current at commencement of arbitration will apply).

64. See *Jurong Eng’g Ltd.*, 1 SLR at paras. 14, 22; *Bunge S.A.*, 1 Lloyd’s Rep. at 285; *Offshore Int’l S.A.*, 2 Lloyd’s Rep. at 408; *China Agribusiness Dev. Corp.*, 2 Lloyd’s Rep. at 79 (citing *Chen Jen Nun Dar Indus. & Trade Co. v. F.M. Int’l Ltd.*, [1992] 1 H.K.C. 328 (C.F.A.)).

65. *Bunge S.A.*, 1 Lloyd’s Rep. at 286.

66. *China Agribusiness Dev. Corp.*, 2 Lloyd’s Rep. at 79 (quoting *Chen Jen Nun Dar Indus.*, [1992] 1 H.K.C. at 335).

An analogy can be drawn to disputes which parties have consented to bring before a court of a particular forum. Like arbitration clauses, choice of forum clauses involve the consensual choice of the parties to subject themselves to dispute resolution according to the procedure of a particular forum.⁶⁷ When forum selection clauses are incorporated into agreements and a dispute is brought before a court in the selected jurisdiction, the procedural rules that apply are clearly those currently in effect rather than those that were in effect when the parties first chose the forum. The practical considerations for courts, as for tribunals, require that the applicable rules governing procedure be those which the court is in the practice of applying at that time.

In accordance with the principle of party autonomy, parties are able to specify at the time of contracting that future disputes be governed by the institutional rules in force at the time of contracting.⁶⁸ It is generally understood that if the parties intended for the outdated rules to apply to future disputes, “they could have so provided.”⁶⁹ Because such specification must be made in order for the original rules to apply, the party arguing for the application of those rules generally has the burden of proving that this was what the parties originally intended. Thus, if “the parties have not used clear enough words to contract out of the prima facie construction” of clauses incorporating institutional arbitration rules, then the applicable rules will be those at the time of arbitration.⁷⁰

III. CAN PARTY CONSENT BE IMPUTED WHEN A CHANGE TO THE RULES IS MORE THAN MERE AMENDMENT?

While it is well settled that the amendment of institutional rules after the time of contracting will not alter the application of the rules current at the time of arbitration to the proceedings on a dispute, replacing institutional rules with unified regional rules may be a different situation. Although parties may be said to have accepted the possibility of periodic amending of institutional rules,⁷¹ a wholesale replacement of those rules by a newly developed set of rules for a region is not so foreseeable. Therefore, in light of the central role which party consent plays in international arbitration, it is possible that a

67. See James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 913 (1999).

68. See *Jurong Eng'g Ltd.*, 1 SLR at 339-40.

69. *Offshore Int'l S.A.*, 2 Lloyd's Rep. at 408.

70. *China Agribusiness Dev. Corp.*, 2 Lloyd's Rep. at 79.

71. REDFERN & HUNTER, *supra* note 28, at 52.

different standard should apply where the subsequent change is so great that party consent to such a change cannot reasonably be imputed.

Although some limited case law does exist suggesting that the nature of a change in the rules is immaterial as to the issue of applying only the updated rules,⁷² this authority is both sparse and unconvincing in relation to the application of dramatic new provisions such as Article 21(5) of the Swiss Rules. When these unanticipated provisions become applicable to a dispute due to the adoption of a new set of rules by an institution, the primacy of party autonomy in arbitration should require a tribunal to be more considerate of the parties' likely intentions. Indeed, in historical instances of significant and unforeseen changes to arbitral institutions, respecting party intentions has been the primary concern.

Using the experiences of arbitral institutions in the wake of German reunification and the collapse of Yugoslavia, this section shows how the promotion of party will and intent at the time of contracting was the focus of how changes were incorporated into subsequent arbitration proceedings.⁷³ This approach is not unforeseen in efforts to respect parties' intent in resolution of commercial disputes as it is similar to how various jurisdictions deal with the question of consolidation of multi-party and multi-contract claims.⁷⁴ The focus, in each of these situations, is the promotion of party intent and autonomy. However, taking such a case-by-case approach with regard to regional harmonization, as is done with multi-party and multi-contract claims, would be an obstacle to the very goal of uniformity generally,⁷⁵ and of the Swiss Rules in particular,⁷⁶ as it would greatly hinder the efficiency and predictability of arbitral proceedings, and disputes would continue to arise from agreements made prior to the Swiss Rules for years to come.

While little authority exists as to what happens when a set of arbitration rules are replaced by another set through regional consolidation of rules, as occurred with the Swiss Rules,⁷⁷ the experience of arbitral institution succession in recent European history can be instructive. Although it is certainly true that the adoption of uniform regional arbitration rules is hardly

72. *Jurong Eng'g Ltd.*, 1 SLR at 339; *China Agribusiness Dev. Corp.*, 2 Lloyd's Rep. at 79.

73. See Uzelac, *supra* note 19, at 493; Daniel Levin, *Arbitral Succession in German Reunification: A Decision*, 2 AM. REV. INT'L ARB. 493 (1991).

74. Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L ARB. 43, 50-51 (1996).

75. Kabik, *supra* note 2, at 409.

76. Swiss Rules, *supra* note 6, at Introduction.

77. See *id.* at art. 1.

the same situation as the historical breakdown or unification of entire state structures, it is also true, as mentioned above, that a sweeping effort at rule harmonization is different from mere rule amendment by an institution. The examples of German Reunification and the breakdown of Yugoslavia are discussed, not as parallel situations, but as instructive experiences from which the international arbitration community can glean fundamental principles to be applied in other situations of unexpected change.

With German Reunification in 1990, the Arbitration Court at the Foreign Trade Chamber in Berlin, which was the only international arbitration institution in the German Democratic Republic, was declared dissolved by its members who simultaneously founded the Association for Promotion of Arbitration and transferred all of the powers of the old institution to the new.⁷⁸ Although some appellate courts in Germany affirmed the arbitration clauses referring to the old institution as valid consent to arbitrate under the new institution, the highest German court, the Federal Court of Justice in Karlsruhe, ruled that such clauses were invalidated by dissolution of the institution to which they gave authority.⁷⁹ According to the Karlsruhe court, "The legal status granted by means of the arbitration agreement . . . is not transferable to another organization without agreement of the contracting parties."⁸⁰ A Brussels court came to the same conclusion, that the authority in an arbitration clause was not transferable without consent of the parties, based on the determination that there was not sufficient continuity between the two arbitration courts.⁸¹

This reasoning has been attacked by many, but the weakness exposed is that it does not sufficiently respect the will of the parties. Arguably, having the disputes determined through arbitration under the new institution, which is functionally almost uniform to the old institution, would be more in line with the parties' intent than resolution by ordinary courts.⁸² Thus, following either the reasoning of the Karlsruhe court or that of its critics, one cannot assume that parties to an agreement entrusting authority to an arbitral institution are necessarily bound by changes imposed by that institution after the agreement is made. Rather, the will and intent of the parties must be the

78. Uzelac, *supra* note 19, at 80.

79. *Id.* at 81.

80. *Id.* at 82.

81. *Pierreux NV v. Transportmaschinen Handelshaus GmbH*, 1997 Y.B. Commercial Arb. (Rechtbank van Koophandel) 631, 631.

82. Levin, *supra* note 73, at 497-98.

key in determining how to apply an arbitration agreement following such changes.⁸³

Similar problems occurred with the collapse of the Yugoslav federation in the early 1990s. Many arbitral clauses throughout the region referred to the Foreign Trade Arbitration Court (FTAC) in Belgrade, which operated under the auspice of the Yugoslav Chamber of Economy. Open hostilities during the early 1990s made compliance with such agreements by parties outside of Serbia unattractive if not impossible.⁸⁴ According to the Zagreb High Commercial Court in Croatia, arbitration clauses referring to the FTAC no longer had legal effect because the Yugoslav Chamber of Economy now existed in a changed form, but even if it had not changed, it was now a foreign arbitration institution.⁸⁵ Given this major change in the circumstances of the FTAC, no basis existed for assuming that parties would have accepted arbitration clauses incorporating foreign arbitration institution.⁸⁶

The decision of the Croatian court reflects a primary concern with respecting the original intentions and expectations of the parties at the time of agreement.⁸⁷ Similarly, the Karlsruhe court in Germany prioritized party consent and intent over determinations made by the arbitral institution as to subsequent rights of the parties to arbitration agreements.⁸⁸ Even with the criticism of the Karlsruhe decision, the issue was not whether or not to look to the parties' will when dealing with institutional change, but how best to fulfill the parties' will. If indications exist suggesting that the parties would not have agreed to arbitrate under the changed conditions anyway, no basis may exist for binding the parties to those changed conditions.⁸⁹ However, as long as the factors on which the parties relied still exist despite changed circumstances, binding the parties to those changes will not infringe on party autonomy.⁹⁰ By utilizing this standard, arbitral tribunals can stay within the bounds of their mandate as intended by the parties, and party autonomy is protected even in light of unforeseen circumstances. This is the standard that

83. See *Pierreux NV v. Transportmaschinen Handelshaus GmbH*, 1997 Y.B. Commercial Arb. (Rechtbank van Koophandel) 631, 635-36.

84. Uzelac, *supra* note 19, at 83.

85. *Id.* at 84.

86. *Id.*

87. *See id.*

88. *See id.* at 81-82.

89. Jörg Kirchner & Arthur L. Marriott, *International Arbitration in the Aftermath of Socialism: The Example of the Berlin Court of Arbitration*, 10 J. INT'L ARB. 5, 12 (1993).

90. *Id.*

must be applied when any significant changes have occurred following an arbitration agreement that significantly affect subsequent arbitration.

The considerations suggested above are not unfounded in everyday arbitration determinations. Some commentators suggest that consideration of the intent of the parties at the time of contracting is necessary to ensure that significant changes in circumstance after contracting do not wrongfully infringe on party autonomy. Parties generally choose to submit their disputes to a particular arbitral institution based on a number of factors, including a specific set of arbitration rules, reputation of the institution, and enforceability of the award where enforceability would occur.⁹¹ If one of these factors or other major factors were to change following completion of the parties' agreement, some commentators suggest that the change would be significant enough to require a query into whether or not the parties would have agreed to arbitration under the new terms.⁹² Where the difference between what the parties originally submitted to under their agreement and what the parties are subjected to under subsequent changes is that significant, consent to those changes cannot be assumed based on the earlier agreement.⁹³ In the case of Article 21(5) of the Swiss Rules, recent commentary suggests that, despite the general principle that the rules current at the time of arbitration apply regardless of changes subsequent to contracting, a tribunal may have a basis for "revisiting the old rules" if the new rules contain a provision entirely unexpected by the parties.⁹⁴

In accordance with basic arbitration principles, when a material change occurs in the rules selected by the parties to govern arbitration on an agreement, party autonomy must still be respected, so the question becomes whether or not the parties would have agreed to arbitration in accordance with those changes.⁹⁵ Indeed, the principle that the rules applied by the arbitral tribunal must not be contrary to the parties' reasonable expectations based on the consensually chosen terms of the original agreement⁹⁶ affirms the importance of this consideration.⁹⁷ As discussed above, the tribunal may apply arbitration rules that have been changed since the agreement, or even a separate set of arbitration rules if they now apply under the terms of the

91. Uzelac, *supra* note 19, at 88.

92. *See id.*

93. LEW ET AL., *supra* note 20, at 158.

94. Scherer, *supra* note 5, at 121.

95. Uzelac, *supra* note 19, at 88.

96. *See New York Convention*, *supra* note 17, at art. V(1)(c) and (d); *UNCITRAL Model Law*, *supra* note 17, at art. 19(1).

97. LEW ET AL., *supra* note 20, at 424.

agreement, but this should only be permissible to the extent that the altered rules conform to the parties' intent and reasonable expectations as expressed in the arbitration agreement.⁹⁸ If, however, the factors on which the parties relied in their choices are still present even with the changes, so that the parties' intent would not be hindered by application of the changed rules, they may be deemed properly applicable.⁹⁹ Only by utilizing this condition of adherence to the original intent and reasonable expectations of the parties can the application of significantly altered rules be exercised in accord with the basic principles on which arbitration is founded.

CONCLUSION

A move towards greater uniformity of procedural rules in institutional arbitration would be advantageous both for institutions and for parties engaged in international commercial arbitration.¹⁰⁰ However, the benefits of increased predictability that result from increased uniformity and harmonization of international arbitration rules must not come at the cost of party autonomy in the transitional period. As the very basis for arbitration is party autonomy,¹⁰¹ the original intentions of the parties should not be sacrificed in the event of unforeseen changes. Parties must still be able to rely on the choices made during contracting, within reasonable expectations. To ensure that party autonomy is not sacrificed, an exception must be made to the default rule that the currently applicable procedural rules automatically apply. When an arbitral institution adopts a new set of rules encompassing substantially different provisions, consideration should be given to the parties' reasonable expectations and intentions at the time of contracting, and new provisions which negatively impact those expectations and intentions should not be applied in subsequent disputes.

98. Kirchner & Marriott, *supra* note 89.

99. *Id.* at 12.

100. See Kabik, *supra* note 2, at 409.

101. LEW ET AL., *supra* note 20, at 412.