

# DEROGATION FROM MANDATORY INSTITUTIONAL RULES: AN ANALYSIS OF THE CHALLENGES AND CONSEQUENCES

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## ABSTRACT

This article examines the complex interplay between party autonomy and mandatory institutional rules in international arbitration. While party autonomy is a fundamental principle of arbitration, arbitral institutions impose certain non-derogable rules that limit this autonomy. This article delves into the extent of derogation permitted by institutions of the institutional rules deemed mandatory by them and how it limits party autonomy. It builds on the existing scholarship of mandatory institutional rules and explores the means through which institutions seek to enforce such rules. The article identifies three categories of mandatory institutional rules: “flagship” or distinctive features of institutions, rules forbidding any amendment, and rules mirroring fundamental principles of international arbitration. The article analyzes the enforceability of these mandatory rules and explores three scenarios where parties attempt to derogate from them: after case registration, through stipulations in the arbitration agreement, and via hybrid arbitration clauses. When parties seek to override mandatory rules, institutions may either exceptionally allow the derogation or refuse to administer the dispute. The article demonstrates that national courts generally do not compel institutions to administer disputes against their will, leaving parties to convert to ad-hoc arbitration or approach a different institution. The article concludes that while institutions must preserve their core procedural characteristics, excessive rigidity may undermine arbitration's flexibility, emphasizing the need for stakeholders to understand how institutions treat their mandatory rules to make informed decisions in arbitration proceedings. This article offers a

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unique contribution to the ongoing discussions in international commercial arbitration, especially regarding the role and powers of arbitral institutions.

## I. INTRODUCTION

Party autonomy is regarded as arbitration's brooding and guiding spirit.<sup>1</sup> This is affirmed in modern national arbitration statutes and arbitration's institutional rules.<sup>2</sup> Since arbitration is the product of the parties' consent,<sup>3</sup> the parties are the masters of their proceedings.<sup>4</sup> Party autonomy, therefore, subject to the applicable law, bestows upon the parties the power to regulate the arbitration, especially with respect to the procedure governing the dispute.<sup>5</sup>

Institutional arbitrations honor party autonomy in two ways—first, the rules apply insofar as the parties referenced them in their arbitration agreement and second, by giving the parties freedom to choose the procedure to regulate the arbitration.<sup>6</sup> At the same time, by choosing a set of institutional rules, the parties limit their autonomy within the contours of the institutional rules.<sup>7</sup> As much as a limitation, it is also the biggest advantage of institutional arbitration—that, by opting for an arbitral institution, a complete set of prefabricated rules is automatically incorporated into the parties' arbitration agreement.<sup>8</sup> The rules are used as a guarantee

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<sup>1</sup> *PASL Wind Solutions Pvt Ltd v. GE Power Conversion India Pvt Ltd*, Civil Appeal No. 1647 of 2021 (Supreme Court of India).

<sup>2</sup> PETER TURNER & REZA MOHTASHAMI, *A GUIDE TO LCIA ARBITRATION RULES* 93 (2009).

<sup>3</sup> 1 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 155-156 (2020).

<sup>4</sup> V.V. VEEDER QC, *Whose Arbitration is it Anyway - The Parties' or the Arbitration Tribunals?* in *LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION* 87 (3d ed., 2014).

<sup>5</sup> Y. DERAIS & E. SCHWARTZ, *A GUIDE TO THE ICC RULES OF ARBITRATION* 1-8, 11-27 (2d ed., 2005); See Andrea Carlevaris, *Limits to Party Autonomy and Institutional Rules*, 8 EUR. INT'L ARB. J., no. 1, Mar. 2020, at 3, 5.

<sup>6</sup> See Carlevaris, *supra* note 5, at 3.

<sup>7</sup> *Id.*

<sup>8</sup> See NIGEL BLACKABY ET. AL, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* ¶ 1.161-1.162. (5th ed., 2009)