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Introduction

A recognized benefit of arbitration is the power of the disputants to select, usually in advance, the procedural rules that will govern their dispute resolution.[1] The right to determine procedural rules may be particularly important in transnational agreements where contracting parties are from States with different legal cultures. Of course, Parties capitalizing on this advantage do not draft new procedural rules for every transaction.[2] Instead, the parties incorporate procedural rules created by arbitral institutions into their agreements. This creates clear incentives for institutions to develop thorough yet flexible procedural rules. Despite this incentive, the rules themselves may be deficient in resolving a particular procedural issue. In these cases, the tribunal must make an important determination: Is there a gap in the rules that must be filled by an exercise of the tribunal's discretion or does the silence imply an intent to preclude a particular procedural mechanism?

Much has been written on the identification of gaps in party contracts by arbitral tribunals; however, the literature is largely silent on the identification of gaps in procedural rules.[3] In this paper I will

1. Nigel Blackaby et al., Redfern and Hunter on International Arbitration, § 1.104 (6th ed. 2015).

2. Some transactions may require more detailed procedural rules than others. For example, transactions involving multiple parties or state actors may encounter procedural issues inadequately dealt with by the chosen institutional rules. *See* Jan Paulsson et al., The Freshfields Guide to Arbitration Clauses in International Contracts 95–114 (3rd ed. 2010) (discussing recurring situations that can be resolved during the drafting stage of an arbitration agreement).

3. *See, e.g.*, Joseph Mamounas, *ICCA 2014. Gap Filling in International Arbitration: An Unsettled Territory*, Kluwer Arbitration Blog (Apr. 23, 2014), http://arbitration-

provide background on the nature and consequences of a gap and propose a Borrowed Rule Principle to help tribunals determine whether a gap exists. I will apply the Borrowed Rule Principle to two provisions from the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada Rules (CAM-CCBC Rules) to determine whether those provisions contain gaps that must be filled.

I. BACKGROUND

Section I will address two issues. First, I will discuss party consent, which provides two sources of power —the inherent power to define procedure and the power to fill gaps in the parties' contract — that enable arbitral tribunals to fill gaps in procedural rules. Subsequently, I will discuss the consequences of a tribunal finding a gap in the chosen procedural rules.

Under national and international arbitration law, arbitral tribunals are afforded a significant amount of power to resolve a dispute before it. However, this power is best described as dormant because a triggering event must occur before a tribunal can exercise it.[4] In all cases this triggering event is the consent of the involved parties.[5] By consenting to arbitration, parties fulfill the necessary condition for tribunals to exercise their adjudicatory powers created by national law and treaties to resolve the parties' dispute. Once parties have consented to arbitration, a tribunal's authority to fill gaps in the procedural rules can be characterized as arising from its inherent power to define procedure and its power to fill gaps in the parties' agreement. The tribunal's inherent power to fill procedural gaps is well recognized. Scholar Gary Born notes that a tribunal's power to fill procedural gaps "is one of the foundational elements of the international arbitral process."[6] A tribunal's inherent power to define procedure is also substantial, subject only to the parties' agreement, mandatory rules from the *lex arbitri*, and the tribunal's general duties.[7] The tribu-

blog.kluwerarbitration.com/2014/04/23/icca-2014-gap-filling-in-international-arbitration-an-unsettled-territory (discussing approaches to gap filling in party contracts).

4. *See* JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION § 2.2 (2012) (describing this understanding of arbitral tribunal power as "hybrid of consent and jurisdictional paradigms.").

5. ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION § 2.20, at 16 (Loukas Mistelis ed., 2012).

6. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 15.03, at 2145 (2nd ed. 2014).

7. WAINCYMER, *supra* note 4, at § 2.9.2, at 115.

nal's inherent authority may be authorized by Conventions, national law, or arbitral norms.[8]

The tribunal's power to fill gaps in the procedural rules selected by the parties can also be characterized as an exercise of the tribunal's authority to fill gaps in the parties' agreement. As noted above, the principle of party autonomy empowers the parties to contractually define the procedural rules applicable to the resolution of their dispute.[9] Thus, when a tribunal applies the procedural rules chosen by the parties, it is applying the terms of the parties' agreement.[10] When a tribunal's authority to apply the procedural rules is understood in these terms, it becomes apparent that a deficiency in the rules selected by the parties is actually a deficiency in the parties' agreement. In other words, a gap in the parties' agreement that the tribunal has the undisputed authority to fill.

The U.S. Supreme Court, in the case of *Green Tree Financial Corp. v. Bazzle*, highlighted the contractual nature of the tribunal's power to construe a parties' agreement to resolve procedural questions.[11] The issue presented by *Bazzle* was whether an arbitral tribunal had the power to arbitrate a class action claim where the arbitration agreement was silent on this type of procedure.[12] The Court concluded that whether the arbitration agreement permitted a class

8. *See, e.g.*, European Convention on International Commercial Arbitration of 1961, European Commission for Europe art. IV(4)(d), Apr. 21, 1961, 484 U.N.T.S. 349; U.N. COMM'N ON INT'L TRADE LAW, THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW [UNCITRAL] MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985: WITH AMENDMENTS AS ADOPTED IN 2006, art. 19(2), at 14, U.N. Doc A/40/17, annex I, U.N. Sales No. E.08.V.4 (2008), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter UNCITRAL]; *See* BORN, *supra* note 6, at § 15.03, at 1244-45.

9. The parties' power to choose the applicable procedural rules is memorialized at multiple levels of arbitration law. At the international level, Article V(1)(d) of the New York Convention permits a state to decline enforcement of an award if the arbitral proceedings did not comply with the parties' agreement. At the national level, the *lex arbitri* usually obligates a tribunal to give effect to the parties' chosen procedural rules. For example, Article 19(1) of the Uncitral Model Law on International Commercial Arbitration recognizes the parties' right to select procedural rules subject only to the mandatory rules of the Model Law. *See* BORN, *supra* note 6, at § 15.02(F), at 2144 (discussing national legislation limiting right of parties to determine procedural rules).

10. This is true even in cases where the institutional rules explicitly authorize the tribunal to fill gap in the applicable rules. After all, such an authorization only has effect by virtue of the parties' agreement. That is, absent contractual authorization to apply this particular rule, the rule itself would be devoid of power. *See, e.g.*, ICC Arbitration Rules, art. 19 (2017) ("The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on . . . .").

11. 539 U.S. 444 (2003).

12. *Id.* at 452-53.

proceeding was a question of interpretation to be resolved by the arbitrator in the dispute.[13] The Court's decision in *Bazzle* ties the arbitrator's power to resolve procedural gaps to the arbitrator's power to interpret the parties' agreement.[14] This link is significant because it provides a basis for arbitrators to exercise a similar power where procedural rules selected by the parties are silent on an issue.[15]

Having reviewed the two powers that tribunals can exercise to fill gaps in procedural rules, the close connection and even overlap between these powers should be evident. After all, an exercise of the inherent power of the tribunal to define procedure is limited by the procedural arrangements the parties made in their agreement. Thus, the inherent power of the tribunal to define procedure may be characterized as arising out of the tribunal's general power to fill gaps in the parties' agreement. Most States reject this characterization of a tribunal's authority and instead recognize the authority to fill procedural gaps as distinct from the power to fill contractual gaps.[16]

For example, the U.S. Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* appears to have adopted a more limited view of a tribunal's authority to fill procedural gaps.[17] *Stolt-Nielsen* involved a challenge to an arbitral tribunal's ruling that arose out of an anti-trust claim against the Appellant, a maritime shipping company.[18] Pursuant to the parties' agreement, the dispute was submitted to an arbitral tribunal constituted under and subject to the American Arbitration Association's Class Arbitration Rules.[19] The parties stipulated that their agreement was silent on the issue of class arbitration however the Rules required the tribunal to first consider whether the arbitration clause allowed for this type of arbitration.[20] The tribunal ultimately concluded that the contract did allow for class arbitration but stayed the proceedings to allow for judicial review.[21] The Appellant challenged the award, alleging that the tribunal's deci-

13. *Id.* at 453.

14. *Id.* at 451.

15. *Id.* at 453. The outcome in *Bazzle* should not be understood as a significant expansion of a tribunal's authority. Rather, *Bazzle* is noteworthy in that it demonstrated the source of the tribunal's authority to fill procedural gaps as arising from the contract rather than the rules themselves.

16. Compare UNCITRAL, *supra* note 8 (describing the procedural determination powers proscribed to arbitral tribunals) with UNICITRAL, *supra* note 8, at art. 28.

17. 559 U.S. 662 (2010).

18. *Id.* at 666-67.

19. *Id.* at 667.

20. *Id.* at 668.

21. *Id*. at 669.

sion was in "manifest disregard of the law."[22] The District Court for the Southern District of New York agreed and vacated the award.[23] This Second Circuit Court of Appeals reversed and the Supreme Court granted certiorari.[24]

The Supreme Court reversed the Court of Appeals and held that the tribunal's decision was in manifest disregard of the law because it failed to consider possible default rules either in applicable state or maritime law that would have filled the silence in the parties' agreement.[25] In so holding, the Court indicated that a tribunal may not "proceed[ ] as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation."[26] The Court clarified that "[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable."[27] This reasoning reveals two things. First, the Court has a somewhat narrow view of the Tribunal's authority to fill procedural gaps.[28] Second, the Court believes that the power to fill gaps is constrained to the interpretation of the parties' contract or application of relevant state and federal laws.[29]

The Court did distinguish the tribunal's decision on the permissibility of class actions as distinct from other procedural rulings, leaving open the possibility that a tribunal may have an inherent power to define procedure on less significant procedural questions.[30] Nevertheless, tribunals in the U.S. should be wary of making procedural determinations on the basis of their inherent power and instead should treat all procedural determinations as an effort to construe the parties' agreement.

While the precise nature of a tribunal's authority to fill procedural gaps may appear strictly academic, it effects what the tribunal must consider in making its procedural determination. If the tribunal can fill procedural gaps based solely on its inherent power to define

22. *Stolt-Nielsen S.A.*, 559 U.S. at 669-70 (internal quotation marks omitted).

23. *Id.* at 669.

24. *Id.* at 670.

25. *Id.* at 673, 678.

26. *Id.* at 673-74.

27. *Stolt-Nielsen S.A.*, 559 U.S. at 671 (*quoting* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001)).

28. Compare the Court's decision in *Stolt-Nielsen* with *Abaclat*, *infra* note 57.

29. *Stolt-Nielsen S.A.*, 559 U.S. at 676-77.

30. *Stolt-Nielsen S.A.*, 559 U.S. at 685 ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.").

procedure, then it is not limited by the intent or presumed intent of the parties. Put differently, the tribunal is not obligated to first construe the agreement and then, in the absence of direction, fill a contractual gap with its assessment of what the parties would have done had they contemplated the matter. Instead, the tribunal is empowered to consider a variety of sources like arbitral norms and commentaries on the applicable procedural rules that would otherwise be non-instructive as to party intent. In the wake of *Stolt-Nielsen*, however, tribunals in the U.S. should be careful when relying on these sources if such reliance could create the appearance that the tribunal was not effectuating the parties' intent.

I will now turn to a discussion of the consequences of finding a gap in the procedural rules. The consequences of finding or failing to find a gap in the parties' chosen procedural rules are limited from the perspective of the tribunal. It is axiomatic that tribunals have a significant amount of discretion to interpret the chosen procedural rules.[31] Indeed, the rules often further confirm the tribunal's authority to interpret the procedural rules and, in so doing, determine whether the rules contain a gap.[32] Because of this discretion, a tribunal's conclusion that a gap exists in the chosen procedural rules is unlikely to raise questions of award enforceability. However, the way in which a tribunal fills a procedural gap may raise concerns, particularly after the U.S. Supreme Court's decision in *Stolt-Nielsen*.

Having identified a gap in the applicable procedural rules, a tribunal must then decide how to fill that gap. As has been repeatedly emphasized, a tribunal has significant discretion in how it fills procedural gaps. However, tribunals should bear in mind the broader legal framework in which this decision is made to ensure the enforceability of its award. Preliminarily, a tribunal must always ensure that the procedural question is not addressed by a mandatory provision of the *lex arbitri*. If a mandatory provision on point exists in the *lex arbitri*, then the tribunal must apply this procedure regardless of whether a gap in the procedural rules exists. Any award issued, even if in full compliance with the chosen rules, will not be confirmed if it fails to comply with the national law that authorized the arbitration.

31. Gary Born describes the tribunal's discretion to fill in procedural gaps as "one of the foundational elements of the international arbitral process." BORN, *supra* note 6, at § 15.03, at 2145.

32. *See, e.g.*, Ctr. for Arbitration & Mediation of the Chamber of Commerce Brazil-Canada (CAM/CCBC) Arbitration Rules, art. 13 (Sept. 1, 2011) (granting tribunal authority to interpret rules based on majority vote of the arbitrators); ICC Rules of Arbitration, art. 19 (2017)(granting tribunal authority to select procedural rules after finding the ICC's rules are silent).

If the *lex arbitri* does not demand a particular outcome, a tribunal should consider any procedural norms established by the applicable enforcement treaty. For example, the provisions of the New York Convention are understood to "impose a uniform international standard of procedural fairness and equality."[33] Because of the paramount importance of issuing enforceable awards, tribunals should fill procedural gaps in a way that is sensitive to the norms established by the applicable enforcement convention even if it means providing less protection for other norms like cost minimization. In weighing competing arbitral norms, tribunals should consider any preferences expressed by national courts regarding which norms should be given priority in making procedural determinations. Gary Born notes that in the commercial context, a preference exists for "considerations of efficiency, party autonomy and equality of treatment, as distinguished from the parties' right to be heard."[34] Finally, a tribunal should bear in mind duties that arise out of broader norms of international arbitration.[35]

Two relevant norms that may influence a tribunal's exercise of its procedural discretion are the norms of commerciality and timeliness. In view of the norm of commerciality, a tribunal should exercise its procedural discretion in a way that protects the parties' procedural expectations that may have arisen based on international commercial practice rather than the parties' agreement.[36] Acknowledging and attempting to protect these types of interests is consistent with well-recognized principles of international commercial law.[37] The tribunal's duty to ensure timely resolution of the dispute should also be considered when filling procedural gaps. The duty of timeliness will often conflict with other norms so any exercise of a tribunal's procedural discretion on this basis should be carefully balanced against competing considerations such as the parties right to be heard.[38]

II. Borrowed Rule Principle as a Tool to Identify Gaps

In view of the tribunal's substantial discretion to interpret procedural rules, there does not appear to be a uniform understanding of

33. Born, *supra* note 6, at § 15.04(A)(1)(b), at 2157.

34. *Id.* at § 15.04(B)(1), at 2170.

35. Waincymer, *supra* note 4, at § 2.7.10.

36. Julian Lew, Contemporary Problems in International Arbitration, 540 (1978).

37. *See, e.g.*, United Nations Convention on the International Sales of Goods, art. 9(2), Mar. 2, 1987, U.N. Docs. A/CONF.97/19.

38. Waincymer, *supra* note 4, at § 2.7.9.2.

what constitutes a gap that must be filled in the exercise of a tribunal's discretion as opposed to silence that precludes a particular procedure. In the interest of procedural predictability and the uniform development of arbitral practice, institutions should move towards a defined approach for identifying gaps in institutional rules. To this end, I propose the recognition of a Borrowed Rule Principle to assist tribunals in the identification of procedural gaps.

Application of the Borrowed Rule Principle is straightforward; a tribunal engages in a comparative analysis of similar rules from other institutions to determine how those rules deal with the procedural question at issue. In the context of procedural gaps, the Borrowed Rule Principle would serve two functions. The first function is to provide preliminary evidence that a gap exists by acting as an interpretative tool. If a tribunal can confirm by reference to other rules that there is a clear practice to address certain well-known procedural issues, then the failure to address such an issue in a set of procedural rules is good evidence of a gap. In other words, the Borrowed Rule Principle will assist tribunals in the identification of gaps by providing context against which the rules were drafted and agreed to by the parties.

Using a Borrowed Rule Principle to identify gaps in procedural rules has several benefits. For example, identifying gaps by reference to other institutional rules will encourage more thorough rulemaking by institutions. As institutional rules become more sophisticated and deal with more expansive procedural questions, less detailed rules will become relatively less complete. If an institution perceives an unintended gap in its rules based on the development of other institutional rules, then it will either create a particular rule to deal with that issue or expressly reserve the matter for resolution by a tribunal's discretion. The Borrowed Rule Principle also recognizes and provides some protection for the expectations that parties may have developed based on their past experiences with arbitration. If a party has arbitrated under different institutional rules in the past, their expectations will be largely based on that experience. By encouraging institutions to consider other institutional practices in the development of their rules, they will be better equipped to understand, manage and preserve those expectations.

A possible criticism of the Borrowed Rule Principle is that it would diminish the discretion of the tribunal to interpret procedural rules and ultimately the flexibility of arbitral procedures. However, the promotion of procedural predictability outweighs the need to preserve arbitrator discretion particularly when, as is the case here, the trade-off between predictability and discretion is minimal. Procedural pre-

dictability, unlike the promotion of tribunal discretion, is a well-recognized policy objective in international arbitration and issues of fairness and justice are inextricably linked to parties' ability to predict the conduct of their proceedings.[39] Moreover, the Borrowed Rule Principle does not actually limit a tribunal's discretion. Tribunals would be free to apply the Borrowed Rule Principle and make findings without intervention from the institution or national courts. Indeed, developing a clear approach to identifying gaps in the procedural rules may encourage tribunals to exercise their discretion more freely if they are confident they have discretion on a particular procedural matter. For institutions that are truly interested in maximizing flexibility in their procedural rules, recognizing the Borrowed Rule Principle as a guideline rather than a binding canon may be a viable option. There are two justifications for using the Borrowed Rule Principle in this way. First, some States already recognize a similar principle known as the Borrowed Statute Rule in the interpretation of statutes.[40] Accordingly, the Borrowed Rule Principle provides a familiar approach for parties involved in arbitral proceedings. Second, the development of institutional rules is a careful process that is done after careful consideration of broader arbitral practice. Indeed, Professor Jeffrey Waincymer, notes that all institutions "engage in widespread comparative analysis in considering reforms" to their rules and "the UNCITRAL Rules will always be a guide in considering what issues to cover."[41] Because rules are developed in the context of careful and extensive comparative analysis, they should be understood and interpreted using a similar analytical approach.

The value of the Borrowed Rule Principle as an interpretative tool can be demonstrated by using it to identify a purported gap in Article 4 of the CAM-CCBC Rules. Article 4 of the CAM-CCBC Rules outlines a multi-step process to commence an arbitral proceeding. The initial step is contained in Article 4.1 which requires the claimant to notify the institution that it intends to commence proceedings against another party. This notice must contain certain documents calculated to apprise both the institution and the respondent of the nature of the claimant's claim. Article 4 chronologically concludes with Article 4.18 which relates to the signing of the terms of reference. Missing from this process is a clear statement of the point in time at which the proceed-

39. WAINCYMER, *supra* note 4, at §1.2.9 ("It is highly desirable that procedural determinations are consistent and predictable.").

40. *See* HILLEL LEVIN, STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE 239 (2nd ed. 2016).

41. WAINCYMER, *supra* note 4, at § 3.14.

ings are deemed to have commenced. An argument can be made that proceedings commence at the moment in time the claimant complies with Article 4.1 because this is the only section that ties commencement to a particular action. The tribunal must therefore resolve this question as a matter of interpretation

A tribunal using the Borrowed Rule Principle to identify a gap in Article 4 of the CAM-CCBC Rules must answer the following question: Do other rules define a particular point in time at which the arbitration has been commenced? The answer appears to be yes. As noted previously, the Uncitral Arbitration Rules are the most authoritative in terms of defining norms in arbitration rules.[42] Article 3(2) of those rules states: "Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent."[43] Similarly, Article 4(3) the ICC Rules of Arbitration provides that "The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration."[44] A review of other institutional rules confirms this practice.[45] Because there is a clear practice among institutions to define a particular point in time at which commencement occurs, the Borrowed Rule Principle suggests that there is a gap in the procedural rules.

The Borrowed Rule Principle should not be the only tool used to resolve interpretative questions. In some cases arbitral practice clearly endorses a particular procedural mechanisms that is embodied by the use of a term of art. For example, Article 8 of the CAM-CCBC Rules provides "[u]nless the parties have otherwise agreed, the Arbitral Tribunal can grant provisional measures, both injunctive and anticipatory, that can, at the discretion of the Arbitral Tribunal, be subject to the provision of guarantees by the requesting party."[46]

It is clear based on the language of Article 8 that a tribunal has the authority to grant provisional measures, but would this provision allow a tribunal to order security for costs? Reference to other institutional

42. WAINCYMER, *supra* note 4.

43. UNICITRAL art. III(2), supra note 8.

44. UNICITRAL art. IV(3), supra note 8.

45. *See, e.g.*, ARBITRATION INST. OF STOCKHOLM CHAMBER OF COMMERCE ARBITRATION RULES X, art. 8 (2017) (Swed.) [hereinafter AISCCC ARBITRATION RULES]; CHINA INT'L ECON. AND TRADE ARBITRATION COMM'N ARBITRATION RULES, art. 11 (promulgated by the China Council for the Promotion of International Trade/China International Commerce, Nov. 4, 2014, effective Jan. 1, 2015) [hereinafter CIETC ARBITRATION RULES]; LONDON COURT OF INT'L ARBITRATION RULES, art. 1.4 (2014) (Eng.) [hereinafter LCIA ARBITRATION RULES].

46. Ctr. for Arbitration & Mediation of the Chamber of Commerce Brazil-Canada (CAM/CCBC) Arbitration Rules, art. 8 (Sept. 1, 2011).

rules reveals only general grants of authority to tribunals to order provisional measures.[47] However, looking beyond other institutional rules, it is apparent that the power to grant provisional measures is widely regarded as including the power to order security for costs.[48] Tribunals should, therefore, use the Borrowed Rule Principle carefully and be mindful of terms of art that grant the tribunal broader authority than may initially be apparent.

The second function of the Borrowed Rule Principle is to provide evidence of intent when the nature of silence in procedural rules is in question. Historically, assessing the significance of silence in procedural rules has been a speculative if not conclusory process.[49] However, analyzing the context in which the silence occurs may assist tribunals in ascertaining the significance of the silence. Practically speaking, tribunals are likely to encounter two types of silence in procedural rules: intentional and unintentional. The value of the Borrowed Rule Principle here is to provide evidence that will allow the tribunal to characterize the nature of the silence it has encountered.

Intentional silence in the procedural rules implies that the institution considered but decided not to address a particular procedural issue.[50] In cases of intentional silence, there are two divergent though reasonable interpretations that may be clarified by applying the Borrowed Rule Principle.[51] One reasonable interpretation of intentional silence is that the institution contemplated the procedural issue but concluded that, in the interest of flexibility, it would not address the issue, instead leaving it to the tribunal's discretion. A second reasonable interpretation of the institution's intentional silence is that the institution made the decision to exclude a contemplated procedure as a matter of policy. Under this interpretation, a tribunal would not have the discretion to supplement the rules. An example of this interpreta-

47. UNITED NATIONS COMM'N ON INT'L TRADE LAW ARBITRATION RULES, art. 26 (2010) [hereinafter UNCITRAL Arbitration Rules]; CIETAC ARBITRATION RULES, art. 23; *But see* LCIA ARBITRATION RULES, art. 25, ¶ 25.2.

48. ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION, 5-84 (2005).

49. *See, e.g.,* UNICITRAL, *supra* note 8.

50. Although I discuss intentional silence in the context of the institution's intent, the intent of the parties in agreeing to the rules is also relevant. I will assume for purposes of this discussion, however, that the parties, by agreeing the institutional rules have adopted the intent of the institution when it created the rules.

51. A GUIDE TO THE NAI ARBITRATION RULES: INCLUDING A COMMENTARY ON DUTCH ARBITRATION LAW 266 (Bommel Van Der Bend et al. eds., 2009) ("[T]he absence of an explicit provision on a certain right of the parties could mean that . . .the parties [do] not hav[e] that right. . . It could, however, also mean . . . the arbitral tribunal may determine whether or not to grant this right to the parties.").

tion of silence can be seen in *Perenco v. Ecuador* where the tribunal interpreted intentional silence on the question of its power to reopen and reverse an award as the denial of its power to do so.[52] The tribunal took direction from other provisions in the rules in an effort to ascertain the amount of discretion available to it to develop appropriate procedures.[53] The tribunal concluded that a provision in the applicable rules limiting the parties' right to appeal the award prevented the tribunal's creation of procedural rules to reopen and review the award.

The second type of silence often encountered by tribunals is unintentional. Unintentional silence occurs when the parties' dispute presents a procedural question that was simply not contemplated by the institution when it developed the procedural rules or the parties when they agreed to the procedural rules. Unlike intentional silence, unintentional silence is not evidence of an effort to limit or expand the authority of the tribunal.

An example of unintentional silence frequently encountered by tribunals relates to whether the chosen procedural rules allow for class actions which are usually not expressly authorized by the procedural rules. This was the issue encountered by the tribunals in *Bazzle* and *Stolt-Nielsen*.[54] As noted previously, the tribunal in *Stolt-Nielsen* concluded that silence on the issue of class actions was meant that this was a discretionary issue for the tribunal and so allowed the proceedings to continue. This decision was reversed by the U.S. Supreme Court. Another tribunal, in the case of *Abaclat v. Argentine Republic*, addressed whether silence in the applicable procedural rules on the issue of "mass actions" precluded the creation of procedural rules necessary to arbitrate "mass action" claims.[55] The tribunal concluded that silence on mass actions was not an intentional effort to exclude this type of proceeding but rather a mere oversight by the creators of the rules.[56] The tribunal reasoned that because mass actions were "quasi inexistant" at the time the rules were promulgated, the creators of the rules merely failed to contemplate procedures for handling mass actions.[57] The tribunal then reasoned that, consistent with the spirit of

52. Perenco Ecuador Limited v. The Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, ¶ 77 (Apr. 10, 2015).

53. *Id.*

54. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); Stolt-Nielsen S.A. v. AnimalFeeds Int't Corp., 559 U.S. 662 (2010).

55. Abaclat and Others v. The Argentine Republic, ICSID Case No. ARB/07/05, Decision on Jurisdiction and Admissibility, ¶ 517 (Aug. 4, 2011).

56. *Id.* at ¶ 519.

57. *Id.* The decision in Abaclat was not unanimous. Professor Georges Abi- Saab, the arbitrator appointed by Argentina, argued that silence arising out of non-contemplation by

the applicable rules and Convention, a mass action proceeding was permissible.

Stolt-Nielsen and *Abaclat* paint different pictures of the nature of a tribunal's discretion to fill gaps created by unintentional silence. Obviously, for tribunals constituted under U.S. law, *Stolt-Nielsen* is the final word absent further clarification from the U.S. Supreme Court. For these tribunals, the Court did recognize a more limited form of tribunal discretion in cases where the procedural question was not as fundamental as whether class actions were permissible under the terms of the parties' agreement. It has been suggested that *Stolt-Nielsen* can be interpreted to apply only when tribunals "ignore all relevant sources of law and instead impose their own brand of [industrial] justice."[58] If this interpretation is correct, then *Stolt-Nielsen* is not inconsistent with *Abaclat* because the tribunal's reasoning there was based on what it understood to be the spirit of the applicable law. Whether this is the correct interpretation of *Abaclat* remains unclear but tribunals that bear in mind their general duties such as fair treatment of the parties and timely resolution of disputes will likely not run afoul of *Stolt-Nielsen* in minor procedural decisions. Tribunals constituted under non-U.S. law, likely have a level of discretion as reflected in *Abaclat* to fill unintended silence on procedural questions. This discretion arises out of the inherent power of the tribunal to decide procedure. As with tribunals seeking to avoid *Stolt-Nielsen* problems, tribunals exercising their general power to define procedure should bear in mind their general duties as they make procedural determinations.

The main value of the Borrowed Rule Principle in cases of silence in procedural rules is to provide evidence as to whether silence in a set of procedural rules was intentional or unintentional. Where other institutional rules address a particular procedural issue, the Borrowed Rule Principle supports a presumption that an institution was aware of this procedural issue but chose not to address it in its own rules. Accordingly, this silence can be characterized as intentional rather than unintentional. The Borrowed Rule Principle is of limited value in resolving the follow up question, that is, whether the silence was in-

the creators of the rules should not automatically be interpreted to allow the non-contemplated procedure. Abi-Saab's reasoning was predicated on whether Argentina could have consented to a mass action proceeding when it signed onto the convention that was the basis for arbitration if such a mass action proceeding was not contemplated at the time consent was given. This is consent with the U.S. Supreme Court's reasoning in Stolt-Nielsen. *See* Abaclat and Others v. The Argentine Republic, ICSID Case No. ARB/07/05, Dissenting Opinion to Decision on Jurisdiction and Admissibility, ¶ 165 (Aug. 4, 2011).

58. Mamounas, *supra* note 3.

tended to preclude a particular procedural mechanism or leave it to the discretion of the tribunal. The Borrowed Rule Principle may support the conclusion that, where the practice among institutions is to specifically define a particular procedural issue, the failure to do so in a set of rules is to deny that authority to the tribunal. However, this is not a necessary conclusion. In addition to being the product of extensive comparative analysis, institutional rules are also created against the backdrop of the tribunal's broad discretion to define procedure and it is a recognized norm in rule development to write broad rules with limited specification. In light of these two factors, tribunals should hesitate to use the Borrowed Rule Principle in cases of intentional silence to limit their authority.

CONCLUSION

Procedural rules in arbitration are broadly written in an effort to promote flexibility and the exercise of tribunal discretion. However, as demonstrated by *Stolt-Nielsen*, the lack of a defined approach to the identification of gaps in procedural rules makes the exercise of a tribunal's procedural discretion uncertain. To ameliorate this uncertainty, the arbitration community should promote the development of tools that facilitate the identification of procedural gaps that must be filled in an exercise of tribunal discretion. The Borrowed Rule Principle may help in this regard as it could assist tribunals as an interpretative tool to identify gaps in procedural rules and provide evidence where the intent behind silence in rules is unclear. Adopting the Borrowed Rule Principle as a part of broader arbitral practice has the potential to improve procedural predictability as well as to avoid situations like that encountered in *Stolt-Nielsen* where a tribunal inadvertently exceeds its procedural-making discretion.