

*William W. Park**

PROCEDURAL DEFAULT RULES REVISITED

Reprinted from *Arbitration Insights – Twenty Years of the Annual Lecture of the School of International Arbitration, Sponsored by Freshfields Bruckhaus Deringer* (Julian D.M. Lew and Loukas A. Mistelis eds, 2007)

* Professor of Law, Boston University. This retrospective comment takes a second look at ‘Arbitration’s Protean Nature’, originally delivered as the 2002 Annual Freshfields Bruckhaus Deringer Lecture, University of London Centre for Commercial Law Studies, School of International Arbitration. Copyright © 2003 William W. Park. Originally published in 19 ARB. INT. 279 (2003).

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I. INTRODUCTION

17-87 To enhance fairness in arbitral proceedings, the 2002 Freshfields Lecture suggested that institutional rules might provide greater specificity in case management protocols, subject always to the parties' agreement otherwise. The modest thesis of those remarks was that litigants often feel cheated when rules applicable to matters such as document production and evidence are adopted only *after* the birth of a particular quarrel.

17-88 The problem with default rules, of course, is that they limit arbitrator discretion, flexibility and freedom, a trinity that still triggers genuflection at arbitration conferences. At dinner following the lecture, several friends made clear that they greeted its proposal with the same enthusiasm normally reserved for ants at a Sunday school picnic.

17-89 Not all reactions were negative, however. Several lawyers spoke of clients who found it frustratingly unsatisfactory that detective work about a presiding arbitrator should remain the principal gauge for predicting procedural rulings. Some letters told stories of 'imperial arbitrators' whose disregard of due process was facilitated by the absence of fixed procedural rules. One in-house counsel said that his company had come to consider arbitration an unacceptable lottery of unpredictable results.⁷⁹

17-90 Since the lecture's publication, three factors have emerged as vital to discussions about the specific content of arbitration rules: (i) use of professional guidelines; (ii) resort to national law to fill procedural gaps; and (iii) increased awareness of the need for ground rules at the start of arbitration. Each concern provides an intellectual wrinkle to the analysis of how to achieve optimum counterpoise between flexibility and predictability.⁸⁰

II. PROFESSIONAL GUIDELINES: THE SOFT LAW OF ARBITRATION

17-91 Increasingly, arbitral proceedings see the influence of professional guidelines that address case management questions such as evidence, ethics and organization of proceedings. The International Bar Association has issued conflicts-of-interest guidelines⁸¹ and revised its rules on evidence.⁸² The

⁷⁹ Other scholars and practitioners explored the Lecture's proposal of a smörgåsbord approach to procedure, offering a menu selection of rules with British, Continental or American flavor. See Lawrence E. Newman & David Zaslowsky, *Cultural Predictability in International Arbitration*, NEW YORK LAW JOURNAL, 25 May 2004, at 3.

⁸⁰ On balancing these somewhat contradictory objectives, see DOMINIQUE HASCHER, COLLECTION OF PROCEDURAL DECISIONS IN ICC ARBITRATIONS (1997) at 135. Judge Hascher commented on a procedural order in ICC Case 7314/1996, where the tribunal said it 'does not intend' to allow extensions of time, thus giving itself an exit if its perspective changed. Approving an 'aspirational model' for rule-making, he observed: 'It is a matter of knowing how to reconcile firmness and flexibility, promptness and due process'. (*Il s'agira donc de savoir concilier la rigueur avec la souplesse, la nécessité d'être à l'heure avec celle des droits de la défense.*) See also Jan Paulsson, *The Timely Arbitrator*, in LIBER AMICORUM KARL-HEINZ BÖCKSTIEGEL 607 (2001).

⁸¹ IBA Guidelines on Conflicts of Interest in International Commercial Arbitration, approved by the IBA Council on 22 May 2004, published in 9 (No. 2) ARBITRATION & ADR (IBA) 7 (October 2004); See Markham Ball, *Probity Deconstructed – How Helpful, Really are the New IBA Guidelines on Conflicts of Interest in International Arbitration*, 15 WORLD ARB. & MEDIATION REP. 333 (Nov. 2004); Jan Paulsson, *Ethics and Codes of Conduct for a Multi-Disciplinary Institute*, 70 ARBITRATION 193 (2004), at 198-99.

⁸² See IBA Working Party, Commentary on the New IBA Rules of Evidence in International Commercial Arbitration, [2000] BUS. LAW INT'L. (Issue 2) 14. See also Michael Bühler &

American Arbitration Association modified its code of ethics for arbitrators.⁸³ The American College of Commercial Arbitrators published a compendium of 'Best Practices' for business arbitration.⁸⁴

17-92 Built on arbitral lore memorialized in articles, treatises and learned papers, these guidelines represent what might be called the 'soft law' of arbitral procedure, in distinction to the firmer norms imposed by statutes and treaties.⁸⁵ Nothing prevents parties from agreeing to override the guidelines, which enter the arbitration only when such agreement proves impossible.

17-93 The wisdom of such guidelines remains subject to continued discussion. Beyond cavil, however, their rules produce far-reaching effects, for the simple reason that they get cited, *faute de mieux*, to fill the gaps left by overly vague institutional rules. For example, the IBA Guidelines on Conflicts of Interest present 'red', 'orange' and 'green' lists enumerating elements that create varied levels of arbitrator disqualification.⁸⁶ Rightly or wrongly, this list has entered the canon of sacred documents cited when an arbitrator's independence is contested.

Carroll Dorgan, *Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration*, 17 J. INT'L ARB. 3 (No. 1) 2000. The rules are available at www.ibanet.org.

⁸³ See generally Ben Sheppard, *A New Era of Arbitrator Ethics in the United States*, 21 ARB. INT'L (2005) (forthcoming in Issue 1); Paul D. Friedland & John M. Townsend, *Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association*, 58 DISPUTE RESOLUTION J. 8 (Nov. 2003-Jan. 2004). The new Ethics Code, adopted jointly by the AAA and the ABA, permit a party-nominated arbitrator to be non-neutral only if so provided by the parties' agreement, the arbitration rules or applicable law. Similar changes were made in the AAA domestic commercial arbitration rules, which now establish a presumption of neutrality for all arbitrators.

⁸⁴ COLLEGE OF COMMERCIAL ARBITRATORS, *Guide to Best Practices in Commercial Arbitration* (October 2005). These build on a previous draft, presented to the CCA Meeting on 30 October 2004.

⁸⁵ For a recent survey of these non-governmental initiatives, William W. Park, *Three Studies in Change*, in ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES at 45-65 (W. W. Park, Oxford University Press, 2006).

⁸⁶ A 'red list' describes situations that give rise to justifiable doubts about an arbitrator's impartiality. Some are non-waivable (such as a financial interest in the outcome of the case), while others (such as a relationship with counsel) may be ignored by mutual consent. An 'orange list' covers scenarios (such as past service as counsel for a party) which the parties are deemed to have accepted if no objection is made after timely disclosure. Finally, a 'green list' enumerates cases (such as membership in the same professional organisation) that require no disclosure.

III. CASE MANAGEMENT AND PROCEDURAL DELOCALIZATION

17-94 The second development related to the use and misuse of rules concerns 'delocalization', a term that describes efforts to make arbitral procedure less dependent on the idiosyncrasies of national procedure.⁸⁷ At first blush, one might imagine that precise rules increase the risk of protocols that unduly favor a particular national outlook. Ironically, however, experience demonstrates that just the opposite may be true. Excessive flexibility often creates a procedural vacuum that permits arbitrators to impose their own peculiarities, which may endorse one party's parochial perspective. Even when adopted with the best of intentions, such local rules usually run counter to the parties' joint expectations at the time they initially agreed to arbitrate.

17-95 In a recent *ad hoc* proceeding in London, an American claimant and a British respondent had concluded an agreement that specified no rules for case management. The chairman, an Englishman of great distinction, announced that England's Civil Procedure Rules would apply on matters related to evidence and document production,⁸⁸ even though English arbitration law imposed no such requirement.⁸⁹

17-96 The British side was delighted. The American party, however, felt profoundly misled by the much-touted procedural neutrality of international arbitration. In such a situation, procedural default rules might have restrained the arbitrator's *excès de zèle* for his hometown form of justice, permitting the tribunal to ascertain facts according to more neutral procedural protocols.

⁸⁷ See e.g., PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, *TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL* (1996), Sections 1172-92 at 650-662.36; GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* (2004), Sections 2.05-2.07, at 20-22.

⁸⁸ Some English barristers will take a more nuanced view, suggesting that for London arbitrations English procedure should be 'the starting point' for creating procedural rules. In practice, this often creates a *de facto* acceptance of English procedure, reminiscent of the T.S. Eliot poem, 'Little Gidding', which concluded that 'the end of all our exploring will be to arrive where we started'.

⁸⁹ The 1996 English Arbitration Act establishes no mandatory norms on evidence or discovery. To the contrary, Section 34 grants the tribunal discretion on such procedural and evidential matters, subject only to the parties' right to agree otherwise.

IV. DUE PROCESS, RULES AND FLEXIBILITY

17-97 In large measure, arbitral due process requires that the parties know in advance what sort of case management to expect. Divergent views exist on questions such as document production, witness statements, experts, privilege and the scope of cross-examination. Good arguments can be mustered for more than one position. Whatever rule is adopted, however, parties should be able to anticipate its application in advance.

17-98 The problem with invocations of ‘flexibility’ lies in the term’s chameleon-like quality. As it changes colour depending on context, flexibility can detract from orderly case management. The losing side may see itself as the victim of unprincipled decision-making, feeling that procedures were adopted to favor one side after the arbitrator saw who would receive the rough edge of the rules. Conflicts may be less when both sides’ lawyers come from the same legal culture. Such is not always the case, however, in disputes arising from cross-border transactions.

17-99 By contrast, default rules can serve as constructive tools in promoting foreseeable proceedings, thereby fostering a perception that procedure is ‘regular’ and the parties are being treated equally. Law would hardly be law without an aspiration to grant similar treatment to those in similar situations.⁹⁰ Fidelity to pre-established standards reduces the prospect that a losing party will perceive the arbitrators’ *ex post facto* rule-making as simply an exercise in choosing norms to fit the desired outcome on the merits of the case.

17-100 Default rules implicate the principles of proportionality and balance between the general and the specific in legal process. Few argue that arbitration should have no flexibility at all. The question is how much. Today is that so

⁹⁰ H.L.A. Hart once observed,

‘We may say that [justice] consists of two parts: a uniform or constant feature, summarised in the precept ‘Treat like cases alike’ and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different. In this respect, justice is like the notion of what is genuine, tall, or warm, which contain an implicit reference to a standard which varies with the classification of the thing to which they are applied. A tall child may be the same height as a short man [and] a warm winter the same temperature as a cold summer’.

H.L.A. HART, *THE CONCEPT OF LAW* 156 (1961). Hart also refers to this as ‘justice in the administration of law’, not justice of the law itself. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 599 (1958).

many institutional rules lack substantive directions even on the most basic and vital questions, resulting in an unnecessary potential for mischief and discontent.⁹¹

17-101 In some cases, marriage of fairness and flexibility proves possible, giving everyone the best off all worlds.⁹² Not always, however. Like the man who hoped to get his girlfriend drunk while still keeping the wine bottle full, arbitrators seeking to provide fairness without rules may find their efforts sorely disappointed.

17-102 The benefits and burdens of flexibility were impressed on me during dinner at the home of a former student, a young woman of great intellect and charm who now practices trade law in Washington. The conversation turned to the plight of an absent female friend, who was dating a man whose frequent business trips took him to Chicago, where he was suspected of having a relationship with another woman. As one might expect, the dinner guests expressed disapproval. And rightly so.

17-103 Our hostess referred to the allegedly unfaithful boyfriend as a 'cad', an old-fashioned term for men who behave discourteously toward women. Curiosity led me to ask about the term's female equivalent. What word applies to a lady who encourages romantic overtures from more than one gentleman caller? 'How', I asked, 'would you describe a woman with two boyfriends?' With hardly a moment's reflection, my former student replied, 'Well, we would call her "flexible"'.

⁹¹ One example can be found in the way the International Chamber of Commerce Rules fail to address an arbitrator's contact with a single litigant. Although such *ex parte* communications are now subject to general disapproval, the ICC Rules contain no prohibition of the practice. One might make arguments about the 'spirit' of the rules, which in Article 15 say arbitrators should act 'fairly and impartially'. However, fairness and impartiality are notoriously malleable notions, as illustrated by the American practice which until 2004 allowed *ex parte* communication.

⁹² For a discussion of flexibility in a choice-of-law context, see Russell J. Weintraub, *Rome II and the Tension Between Predictability and Flexibility*, in 41 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATE E PROCESSUALE 561 (2005), commenting on the European Commission proposal for a regulation on law applicable to non-contractual obligations, called 'Rome II' to distinguish it from the earlier Rome Convention (1980) on applicable law in matters of contract. See European Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, EUR. PARL. DOC. (COM 427 final) (2003).

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17-104 In a social context, such elastic standards might not matter. The merits of flexibility may be less evident, however, when substantial assets are at stake in an arbitration whose integrity depends on even-handed and predictable procedure.