

## CHAPTER 7: THE PROCEDURAL SOFT LAW OF INTERNATIONAL ARBITRATION: NON-GOVERNMENTAL INSTRUMENTS

*William W. Park\**

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### I. THE CHALLENGE OF SOFT LAW

**7-1** The conference organizers set me the daunting task of exploring arbitration’s “non-national instruments,” which is to say the guidelines of professional groups and non-governmental organizations related to evidence, conflicts of interest, ethics and the organization of arbitral proceedings. Frequently these procedural standards build on the lore of international dispute resolution as memorialized in articles, treatises and learned symposium papers. These guidelines represent what might be called “soft law,” in distinction to the harder norms imposed by arbitration statutes and treaties, as well as the procedural framework adopted by the parties through choice of pre-established arbitration rules.

**7-2** The growth of procedural soft law has accelerated during the past half-dozen years. The International Bar Association (IBA) has revised its rules on evidence<sup>1</sup> and issued conflicts-of-interest guidelines.<sup>2</sup> New American Arbitration Association ethics guidelines retreat from the longstanding AAA practice of

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\* Professor of Law, Boston University. © 2005 William W. Park.

<sup>1</sup> See IBA Working Party, “Commentary on the New IBA Rules of Evidence in International Commercial Arbitration”, [2000] 2 *Bus Law Int’l* 14. See also Michael Bühler and Carroll Dorgan, “Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration”, 17(1) *J Int’l Arb* 3 (2000). The rules are available at [www.ibanet.org](http://www.ibanet.org).

<sup>2</sup> IBA Guidelines on Conflicts of Interest in International Commercial Arbitration, approved by the IBA Council on 22 May 2004, published in 9(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.

partisan party-nominated arbitrators.<sup>3</sup> UNCITRAL put out Notes on Organizing Arbitral Proceedings.<sup>4</sup> And this past autumn the American College of Commercial Arbitrators debated a compendium of “Best Practices” for business arbitration.<sup>5</sup>

**7-3** In some cases, the compromise reached in such principles may be helpful, while less so in other instances. But in almost all cases, these guidelines will have far-reaching effects, notwithstanding that they are non-binding on their face. During heated procedural debates they will be cited *faute de mieux*, for lack of anything better. The IBA Guidelines on Conflicts of Interest -- with their red, orange and green lists of illustrations indicating varying levels of arbitrator disqualification -- have been contested precisely because they will in fact affect arbitrator nominations as they enter the canon of sacred writings cited when an arbitrator’s independence is contested.<sup>6</sup>

**7-4** While the increase in such guidelines is beyond cavil, it is less clear whether the trend is a healthy one. Simply put, soft law serves as a constraint on arbitral autonomy. Any regulatory instrument will limit “flexibility” and “discretion” – those hallowed words that can trigger genuflection in even the most impious of arbitrators.

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<sup>3</sup> See generally Ben Sheppard Jr, “A New Era of Arbitrator Ethics in the United States”, 21 *Arb Int* 91 (2005); Paul Friedland & John Townsend, “Commentary on Changes to the Commercial Arbitration Rules of the American Arbitration Association”, 58 *Disp. Res. 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. See Preamble (“Note on Neutrality”) and Canon X, 2004 ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes. A similar change was made in the AAA domestic commercial arbitration rules, effective July 2003, which establish a presumption of neutrality for all arbitrators.

<sup>4</sup> “Notes on Organizing Arbitral Proceedings,” finalised in New York in June 1996, published in XXVII *UNCITRAL Yearbook*, part one, paras. 11-54 (1996).

<sup>5</sup> 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.

<sup>6</sup> A “red list” describes situations that give rise to justifiable doubts about an arbitrator’s impartiality. Some are non-waivable (e.g. a financial interest in the outcome of the case), while others (e.g. a relationship with counsel) may be ignored by mutual consent. An “orange list” covers scenarios (e.g. 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 (e.g. membership in the same professional organization) that require no disclosure.

**7-5** In a recent issue of *Cahiers de l'arbitrage*, the eminent Paris avocat Serge Lazareff likened procedural soft law to a loathsome skin disease, using the provocatively pejorative label *le prurit réglementaire* (“regulatory pruritus”). Serge began with a hypothetical conversation (at least I hope it was hypothetical) in which a lawyer at a hearing asks the Tribunal chairman for a pause in the testimony so he can relieve himself. “Monsieur le Président, puis-je aller aux toilettes?” Mr. Chairman, can I visit to the WC? The response is a resounding negative (“Non, mon cher Maître”) bolstered by citation to provisions of the Code of Conduct for Arbitral Hearings that stipulates precise numbers of bathroom breaks in function of the length of hearings.

## II. SOFT LAW AND THE ARBITRAL PROCESS

### *1. What Consumers Want: Balancing Fairness and Efficiency*

**7-6** There is certainly food for thought in our Gallic colleague’s whimsical scenario attacking excessive procedural guidelines. As Talleyrand reportedly observed, anything excessive becomes insignificant: *tout ce qui est excessif devient insignifiant*.

**7-7** Yet a more nuanced view might see procedural soft law as enhancing arbitration’s integrity. Modern arbitration is either blessed or plagued, depending on perspective, with a lack of fixed standards related to how arbitrators conduct proceedings. Little “hard law” exists with respect to how the specifics of how an arbitral tribunal should gather evidence and hear argument in its effort to determine the facts, interpret the contract, and apply the law governing the parties’ dispute.

**7-8** As in other areas, the devil is in the detail. How should the case in chief be presented: written statement? oral testimony? both written and oral? What objections justify excluding an exhibit? What degree of relevance justifies an order to produce documents? What sanctions should be imposed for refusal to comply with a discovery order? Battlegrounds are plentiful: the process for proving applicable law; time allocation among the litigants; issue preclusion; avoiding “trial by ambush;” fixing the proper role for legal authority; and even what to do if an arbitrator is abducted.

**7-9** In managing cases, arbitrators face a delicate counterpoise between efficiency and fairness. They must keep the process moving, while allowing

claims to be presented and defended fully enough that the parties feel they have been treated in a just fashion. Efficiency involves making the process shorter and cheaper. Fairness, however, can implicate the additional time and cost sometimes needed to provide a meaningful right to be heard.

**7-10** In arbitration, fairness requires some measure of efficiency, since justice too long delayed becomes justice denied. Likewise, without fairness an arbitral proceeding would hardly be efficient, since it would fail to deliver a key element of the desired product: a sense that justice had been respected. A chef who aimed to provide fine dining might fail either by making customers wait too long or by serving junk food instead of a gourmet meal.<sup>7</sup>

**7-11** Discussion of these competing goals brings to mind a conversation many years ago with the secretary general of a prominent arbitral institution. He was being interviewed following his retirement after a long career during which his organisation had seen a marked increase in caseload and prestige. When asked what he considered to be his most important achievement, the eminent elder statesman replied without a moment's hesitation,

Why, the greatest success was taking a process that had been quick and cheap and turning it into one that is now long and expensive. *Enfin!* At last we are respected.

The point, of course, was that business managers who complain about too much legal procedure also object to too little. Procedural formality is often another term for due process.

**7-12** The potential benefit of procedural soft law is that it can enhance the type of fairness business managers expect in dispute resolution, helping to strike the right equilibrium between fairness and efficiency. Arbitration is neither trial by combat nor a random process such as consulting the entrails of a chicken.

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<sup>7</sup> The competition between aspirations toward fairness and toward efficiency shows itself with particular starkness in connection with mass claims such as the so-called "Holocaust arbitrations" addressing insurance policies and bank accounts belonging to victims of Nazi persecution. Oral hearings can add to a sense of fairness; but with thousands of claimants, oral hearings mean considerable delay. To take another example, claims among competing heirs might normally be decided by reference to the legal system with the closest connection to the decedent account holder. In practice, however, this can mean having to decide which family member died last in a concentration camp, which might require interpreting a 1943 Hungarian simultaneous death statute. A somewhat arbitrary (i.e., less legally correct) set of succession guidelines might prove a more efficient way to proceed.

Rather, arbitration implies respect for a bundle of rights often called due process, which the British sometimes label as natural justice. Once summarized as “the duty to hear before condemning,”<sup>8</sup> due process lies at the core of what litigants seek in both arbitration and litigation.

**7-13** Like other elastic notions such as justice and equity, the term “due process” has no sacramental value in itself, but takes meaning from usage. Since one person’s delay is often another’s due process, notions of arbitral fairness evolve as they are incarnated into flesh and blood responses to specific problems, whose merit often depends on culturally conditioned baseline expectations. A lawyer from New York might say that fundamental fairness requires the respondent to produce certain documents even if adverse to its defence, while a lawyer from Paris or Geneva, used to a quite different legal system, would reply that the claimant should have thought about its proof before filing the claim.

**7-14** Most arbitration statutes and treaties contain some notions of due process, whether or not so-labelled. Although analogous concepts exist outside Anglo-American law jurisdictions, the precise translation into Continental equivalents remains elusive.<sup>9</sup> French law often speaks of “the right to be heard in an adversarial process” (*droit d’être entendu en procédure contradictoire*) or “the principle of contradictory process” (*principe de la contradiction*). Germans sometimes refer to the “fair-trial principle” (*rechtsstaatliche Verfahren*)<sup>10</sup> or speak of a “hearing in accordance with law” (*Anspruch auf rechtliches Gehör*).<sup>11</sup>

**7-15** The contours of arbitral due process are broad, focusing on (i) the right to be heard and (ii) an unbiased tribunal. While these rudiments of fairness often overlap, such is not always the case. Arbitrators who decide by flipping coins might be unbiased; but in failing to consider testimony they give no genuine

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<sup>8</sup> The phrase originated with the great orator and advocate Daniel Webster when he made his famous arguments to defend the charter of Dartmouth College. After asking rhetorically whether the Dartmouth trustees “lost their franchise by due course and process of law” Webster defined the concept as “law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial.” See *Trustees of Dartmouth v. Woodward*, 17 U.S. 518, 4 Wheaton’s Report 518 (1818), at Wheaton 581.

<sup>9</sup> For a recent discussion of due process in Islamic law, see Nudrat Majeed, “Good Faith and Due Process: Lessons from the Shari’ah”, 20 *Arb Int* 97 (2004).

<sup>10</sup> *Grundgesetz* Article 20(3) establishes a “rule of law principle” that has been interpreted by the Constitutional Court (*Bundesverfassungsgericht*) to encompass entitlement to *rechtsstaatliches Verfahren* (“procedure in accordance with the rule of law”).

<sup>11</sup> See *Grundgesetz* Article 103(1), reading *Vor Gericht hat jedermann Anspruch auf rechtliches Gehör*. (“In the courts every person shall be entitled to a hearing in accordance with law.”)

opportunity for proofs to be heard. Conversely, arbitrators who go through the motions of listening attentively to witnesses might still violate due process if they enter the arbitration with minds already decided. In some instances elements of fairness exist in tension one with another. Granting a party additional time for witness examination constitutes unequal treatment, but might justify itself in exceptional circumstances if one side bears a special burden of proof.

**7-16** Equality of arms among the parties constitutes yet another element of due process. An arbitrator might well decide to deny all right of oral depositions, believing the Anglo-American system to be unduly burdensome. However, the arbitrator could hardly consider requests for depositions by one side but not the other.

**7-17** It is here that procedural soft law presents its potential to foster a sense of equal treatment, by promoting the perception that procedure is “regular” and according to a “rule of law” principle. Indeed, one of the essential elements of law as it has been known in the Western world is that similar cases should be treated in a similar fashion. By contrast, when arbitrators invent procedural norms as cases unfold, choosing their procedural standards after knowing who will receive the rough end of a rule, one side may perceive application of different sets of weights and measures.

## 2. “Judicialisation”

**7-18** One oft-heard criticism of procedural soft law is that it leads to the “judicialisation” of arbitration: procedural transformation of arbitral dispute resolution to resemble court litigation more closely.<sup>12</sup> But is this really so bad?

**7-19** At first blush, judicialised arbitration may seem a contradiction in terms. Arbitration is presumed to present an alternative to legal formalities, a phrase often stirring images of the judicial waste satirized in the Dickensian inheritance

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<sup>12</sup> See generally the University of Virginia’s 12th Sokol Colloquium, *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Richard Lillich & Charles Brower eds., 1993), with contributions by C.F. Amerasinghe, R. Bilder, A. Bucher, Th. Carbonneau, A. Giardina, H. Holtzmann, C. Larsen, R. Lillich, A. Rovine, D. Stewart and Albert Jan van den Berg. For an exploration of the judicialisation of inter-governmental trade disputes, see J.H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and external Legitimacy of WTO Dispute Settlement”, 13 *Am. Rev. Int’l Arb.* 177 (2002). See also Gerald Phillips, “Is Creeping Legalism Infecting Arbitration?”, 58 *Disp. Res. J.* 37 (Feb./April 2003).

dispute *Jarndyce v. Jarndyce*, which had become so complicated that no living soul knew what it meant, and whose legal costs consumed the entire estate.

**7-20** What the Dickensian satire misses, of course, is that elements of legal process inevitably enter arbitration as soon as the litigants want a binding result. No one would much care about legal rights if either party could unilaterally elect to disregard the arbitrator's decision. But such is not normally the case. Arbitration proceeds in the shadow of judicial power, enlisted to seize assets and grant *res judicata* effect to awards.

**7-21** So it is not at all surprising that litigants expect ordered arbitral proceedings. Few business managers want a lottery of inconsistent results. When cases are won or lost, rather than negotiated away, procedural rights inevitably become an object of concern. By providing sign posts to these rights, procedural soft law enhances the prospect that similar cases will be treated in similar ways.

### *3. Institutional Rules*

**7-22** At this point, the careful observer might wonder what the fuss is all about. After all, institutions can always adopt rules to define the precise nature of the practices that will satisfy the litigants' senses of arbitral due process. So why does anyone need professional guidelines?

**7-23** Here we see a disjunction between rhetoric and reality. On the one hand, arbitral institutions consistently endorse flexibility and its twin sister, arbitrator discretion. On the other hand, more specific norms inhabit the less elastic world where lawyers *do* care about the "regular" way to do things.

**7-24** While cynics might suggest that these two approaches cohabit so arbitrators can hedge their bets (invoking discretion as an escape hatch and customary practices as rationale), better ways exist to explain this divergent evolution. The emphasis on flexibility likely represents a Darwinian survival mechanism, helping institutions market themselves globally by sidestepping tough questions about what fairness means when legal cultures diverge in matters such as discovery, the questioning of witnesses, use of experts and legal argument.<sup>13</sup> These

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<sup>13</sup> See Siegfried H. Elsing & John M. Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration", 18 *Arb. Int.* 59 (2002); Axel Baum, "Reconciling Anglo-Saxon and Civil Law Procedure: The Path to a Procedural Lex Arbitrationis", in: *Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel* 21 (R.

distinctions have often been noted between so-called “adversarial” and “inquisitorial” approaches, the former emphasizing the role of lawyers in controlling the proceedings (with the arbitrators simply listening to evidence and argument) and the latter granting the arbitrators a greater role in asking questions and directing the inquiry.

**7-25** The prevailing orthodoxy, of course, says that flexibility strengthens arbitration, and that arbitrators should have wide discretion to do what best fits each individual case.<sup>14</sup> It is an exceptional arbitration conference without at least one war story about a praiseworthy arbitrator (usually the speaker himself) who exercised just the right touch of procedural *je ne sais quoi* that made things come out right. And indeed, it would be hard to argue that proceedings should be forced into an ill-fitting straight-jacket of rules designed for some other controversy, rather than reflecting the contours of each particular case.

**7-26** Major institutional rules address the conduct of proceedings simply by saying that arbitrators may establish the facts by “all appropriate means,”<sup>15</sup> with the “widest discretion to discharge [their] duties”<sup>16</sup> in “whatever manner [the tribunal] considers appropriate.”<sup>17</sup> While this lack of direction might not matter when all arbitrators and counsel are cut from the same mould, such gaps might cause awkward confusion when one arbitrator or lawyer is doing his or her first international arbitration.

**7-27** It has sometimes been suggested that the homage paid to flexibility in major arbitration rules confirms the lack of users’ demand for more specific procedures. One wonders, however, whether the prevailing emphasis on flexibility

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Briner, L. Y. Fortier, K.-P. Berger & J. Bredow, eds., Carl Heymanns Verlag 2001); Paul D. Friedland, “A Standard Procedure for Presenting Evidence in International Arbitration”, *Mealey’s Int’l Arb. Rev.* 133 (1996); Markus Wirth, “Ihr Zeuge, Herr Rechtsanwalt! Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden”, 1(1) *Schieds VZ* (Jan./Feb. 2003); Piero Bernardini, “The Role of the International Arbitrator”, 20 *Arb. Int.* 113 (2004); Christopher Staughton, “Common Law and Civil Law Procedures: Which is More Inquisitorial? A Common Lawyer’s Response”, 5 *Arb. Int.* 352 (1989).

<sup>14</sup> For a contrasting view, see John Uff, “Predictability in International Arbitration”, *International Commercial Arbitration: Practical Perspectives* 151 (Construction Law Press, 2001), who provocatively suggests that “in most cases it is a matter of pure chance whether the parties to an international arbitration end up with what might objectively be called a ‘good’ resolution of their dispute.” *Id.* at 152.

<sup>15</sup> ICC Arbitration Rules, Art. 20.

<sup>16</sup> LCIA Arbitration Rules, Art. 14.2.

<sup>17</sup> UNCITRAL Rules, Art.18; AAA International Rules, Art. 16.

indicates an absence of demand or a paucity of supply. No empirical evidence drawn from modern arbitration indicates that more specific rules were tried and found wanting, rather than simply not having been tried at all.

**7-28** The soft law contained in the recent proliferation of professional guidelines does suggest that some of arbitration's users seek more rather than less procedural predictability. In contrast to this rhetoric of flexibility, the conduct of arbitral proceedings is often quite focused on fidelity to specific established norms. When a dispute arises over some procedural issue, such as privilege, discovery or witness sequestration, counsel frequently invoke what they believe to be the normal way to do things. These customary standards are believed to exist; they are summoned into play during procedural disagreements; and the parties' sense of having been treated fairly is linked to how well the norms have been respected.

**7-29** One difficulty in evaluating the impact of procedural soft law in the chameleon-like quality of the arbitral flexibility that soft law restricts. Flexibility is a concept that changes colour depending on context – not surprising for a word defined as the ability to adapt in response to new situations.<sup>18</sup> On a continuum between precision and generality, a flexible approach falls toward the “generality” end. Flexibility usually involves determining the specific rule after the procedural question arises: in essence, a type of *ex post facto* rule-making.

**7-30** In the real world, the flexibility implied by an absence of soft law guidelines can sometimes enhance performance of the arbitrator's tasks. But not always. And perhaps not usually. The very nature of the legal process contains an inherent tension between generality and specificity. Law would hardly be law without an aspiration to grant similar treatment to those in similar situations. An overly broad rule would fail by denying recognition to critical distinctions among different cases. No rule at all, however, will often detract from the parties' sense of fairness, which is often fostered more by fidelity to pre-established standards than by the content of the standards themselves.

**7-31** Intelligent soft law can provide guidance on repeat-offender trouble spots (such as discovery and privilege) without imposing undue rigidity on all aspects of the arbitral process. The search for procedural balance (evoking the Swedish

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<sup>18</sup> Usually the term is associated with words like “reasonable” and “appropriate” and used in juxtaposition or contrast to “rigid” or “strict.” Of course, the difference between flexible and rigid procedures is one of degree.

word *lagom*, meaning “not too much and not too little”) can be context-based without being open-ended.

#### *4. Divergent Cultural Baselines*

**7-32** When arbitration takes place among lawyers who share little common legal culture, the absence of pre-established procedural standards can create special problems. This is ironic, of course, since flexibility is understandably justified as the best way to address cultural diversity.

**7-33** The problem lies in the lack of common cross-cultural baselines. Parties can usually accept a ruling that follows a common pattern. Established norms articulating the “regular” way to do things reduces the risk that one side might perceive arbitrators to apply weights and measures chosen after knowing which side needs a thumb on the scale.

**7-34** Without shared expectations about regular ways of doing things, however, litigants lack common assumptions about what fairness means. The absence of standards fixed in advance, while perhaps making arbitration less cumbersome in some instances, can generate feelings of inequality. The existence of two different baselines means that any *ex post* choice by the arbitrators will deviate from one side’s sense of procedural integrity. Practices which constitute procedural rights in one system might elsewhere be unfamiliar, unethical or prohibited. Examples of include witness interviews<sup>19</sup> and oral depositions,<sup>20</sup> as well as the processes for appointing experts and determining admissibility of their testimony.<sup>21</sup>

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<sup>19</sup> See e.g., Art. 13 of Geneva’s *Us et coutumes de l’ordres des avocats* (“L’avocat doit s’interdire de discuter avec un témoin de sa déposition future et de l’influencer de quelque manière que ce soit”). By contrast, US lawyers would be considered lacking in diligence if they failed to rehearse their witnesses about the type of questions to be asked, in theory seen as a way to keep witnesses from being misled or surprised, and arguably making the testimony more accurate. See *Wigmore on Evidence* (4th ed., Aspen 2000) § 788; Thomas A. Mauet, *Pretrial* (4th ed., Aspen, 1999) at 40.

<sup>20</sup> The IBA Rules of Evidence make no provision for oral depositions analogous to Federal Rules of Civil Procedure, Rule 26(b)(1).

<sup>21</sup> In the United States, a so-called “Daubert” motion may be made to disqualify an expert because his or her method is not sufficiently reliable. See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), confirmed in Federal Rules of Evidence § 702. When scientific or technical knowledge will assist in understanding evidence, an expert witness qualified may testify in the form of an opinion if “the testimony is the product of reliable principles and methods.”

**7-35** One example of culture clash relates to communications from in-house lawyers, which are privileged in the United States<sup>22</sup> but not in many European countries.<sup>23</sup> How should an arbitrator choose between these divergent models of privilege?

**7-36** Arbitrators might give effect to the expectations relied upon at the place the relevant memo was written. Accordingly, a memo would be protected if sent by an in-house lawyer in New York. By contrast, advice given by an in-house counsel in Geneva would not be protected, since the Swiss lawyer presumably had no expectation of privilege.

**7-37** Such an approach has great theoretical merit if an arbitrator single-mindedly ignores all procedural expectations other than those related to privilege. But other expectations do exist, of course. In particular, the anticipation of equal treatment is likely to be shared by both sides. Instinctively, therefore, a good arbitrator would shrink from assigning procedural benefits and burdens unequally, allowing one side but not the other an opportunity to claim privilege on the very same type of document.<sup>24</sup> An arbitrator who gives one side such stark procedural handicaps would be inviting award vacatur.

**7-38** Procedural soft law on this much-vexed issue would have the benefit of establishing a protocols before proceedings begin – something that arbitrators and litigants often avoid, from fear of inviting unnecessary wrangling. The cost, of course, is often disruption in the serenity of the proceedings and party satisfaction. Perceptions of *ad personam* justice (what the French might call *justice à la tête du client*) increases the risk of tension between the tribunal and at least one of the parties.

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<sup>22</sup> See, e.g., *NCK Organization Ltd v. Bregman*, 542 F.2d 128, 133 (2d Cir. 1976).

<sup>23</sup> For example, in Switzerland, the notion of *avocat / Rechtsanwalt* depends on activity of an “independent” character, and the status of employee is disqualifying. See, e.g., Peter Burckhardt, “Legal Professional Secrecy and Privilege in Switzerland”, *IBA International Litigation News* 33 (October 2004); Bernard Corboz, “Le secret professionnel de l’avocat selon l’article 321 CP”, *Semaine Judiciaire* 77 (1993).

<sup>24</sup> Similarly, an American would be unlikely to have enthusiasm for a decision that allowed a Swiss company to obtain discovery from a company in New York (because that was the expectation in the United States), but did not allow discovery from the adversary in Geneva (because fishing expeditions were unknown there.)

5. Secondary Markets for Rules: Illustrating the Impact of Soft Law

**7-39** Professional guidelines have evolved to mitigate some of the above-mentioned hazards of arbitral discretion. The more specific norms of “secondary market” procedures represent in essence the invention of civil procedure on several levels. The following two problems might serve as illustrations.

(a) *Who Gets the Last Word?*

**7-40** The interaction of flexible discretion and concrete rules is illustrated by an English case decided in 2004, *Margulead v Exide*.<sup>25</sup> An Israeli-American joint venture went sour, ending up in an arbitration whose official seat was London. The sole arbitrator, wanting to finish before lunch on the final day of hearings, refused a right of reply to the Claimant’s lawyer. “You did [such an] admirable job of stating your case,” the arbitrator said to counsel, that a reply will not be necessary. The arbitrator later denied both the claim and the counterclaim, finding that mutual mistake of fact made the parties’ agreement unenforceable. The Israeli claimant challenged the award,<sup>26</sup> alleging serious procedural irregularity because it had not been given the last word, as apparently would have been normal in English courts for the claimant carrying the burden of proof.

**7-41** An English judge upheld the award, on the basis that a rule giving final say to claimants did not apply in arbitration. The judge looked first to the procedural framework accepted by the parties, which included a well-recognized set of arbitral provisions (the UNCITRAL Rules) and the IBA Rules of Evidence. Neither authority said who gets to speak last. The judge then turned to the English Arbitration Act, which also punted the question to the arbitrator.<sup>27</sup>

**7-42** But discretion was not enough. The reviewing court then made reference to a learned treatise that *did* set forth a rule, to the effect that in international arbitration parties normally have the right to make an *equal* number of submis-

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<sup>25</sup> *Margulead Ltd. v Exide Technologies*, High Court of Justice (Q.B., Commercial Court), 16 February, [2004] EWHC 1019 (Comm.) (Colman, J.).

<sup>26</sup> The challenge under Section 68(2)(a) of the 1996 Arbitration Act, referring to failure to comply with section 33 of the Act, which in turn imposes a general duty for the arbitral tribunal to act fairly and impartially, giving each side a reasonable opportunity to present its case. A secondary challenge was brought under Section 68(2)(d) of the Act for failure to deal with all the issues.

<sup>27</sup> The act said only that the arbitrator should “decide all procedural matters [including] ... whether and to what extent there should be oral or written evidence or submission.” 1996 Arbitration Act, Section 34(1) and 34(2)(h), cited in paragraphs 31 and 32 of Justice Colman’s opinion.

sions.<sup>28</sup> Thus, the failure to give claimant the last word comported with an established practice. One can only speculate on how the case would have been decided if a treatise had indicated a different rule.

*(b) Ex Parte Measures*

**7-43** The current debate over the arbitrator's right to grant *ex parte* interim measures of protection provides another point to ponder. Draft revisions of the UNCITRAL Model Law would permit arbitral orders on application of only one side.<sup>29</sup> Good arguments exist for and against the proposals.

**7-44** The interesting aspect of this debate lies in what is *not* being said. Would the question arise at all if arbitrators really did have discretion on the matter? But in fact, an uncodified rule imposes a general ban on deciding matters without hearing both sides, absent the parties' specific agreement to the contrary.<sup>30</sup>

### III. SOFT LAW AND THE IMPERIAL ARBITRATOR

**7-45** Ultimately, the tension between procedural soft law and unrestrained arbitral flexibility brings us full circle to the matter of an arbitrator's fidelity to the parties' shared *ex ante* expectations. While arbitrators are not expected to wear procedural straight jackets, and procedural guidelines can certainly contain "good cause shown" exceptions, most litigants anticipate a measure of ordered procedure as a prerequisite to equal treatment and due process.

**7-46** Such concerns about "*ad hoc* justice" have led some commentators to suggest that flexibility might be overrated, and to propose that arbitral institutions

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<sup>28</sup> Justice Colman cited Alan Redfern and Martin Hunter, *Law and Practice of International Arbitration* (3rd ed. Sweet & Maxwell 1999), para. 7-107 ("Who has the last word?") at 336, stating that the practice of giving the claimant two submission opportunities is "not widely followed, since arbitrators tend to feel, instinctively, that due process is generally served only if the parties are permitted an equal number of opportunities to make oral submissions."

<sup>29</sup> Draft Articles 17 and 17Bis are discussed in Hans van Houtte, "Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration", 20 *Arb Int* 85 (2004). See Report of the Working Group on Arbitration, 39th Session, Vienna, 10-14 November 2003, Document A/CN.9/545. See also John P. Gaffney, "Ex Parte Measures in International Arbitration", 3 *Int'l Arb. L. Rev.* (No. 4) 55 (Winter2002), providing a discussion of *ex parte* measures by courts as well as arbitrators.

<sup>30</sup> A similar consensus exists on the impropriety of an arbitrator's *ex parte* communications with one of the litigants, regardless of whether this leads to any ruling. Yet some major institutional rules (such as the ICC Rules) contain no explicit prohibition on *ex parte* communications between parties and arbitrators.

consider a smörgåsbord approach which would offer a menu of more specific provisions from which to choose: perhaps between procedure light and procedure heavy, or between rules with a Continental, English or an American flavor.

**7-47** Such an idea was floated in the Freshfields Lecture in 2002. During the dinner following the lecture, several members of the arbitral establishment indicated that such a proposal was about as welcome as a horde of ants at a Sunday school picnic. Surprisingly, after the lecture was published<sup>31</sup> a large number of letters to the author expressed relief that the question had been raised openly, and shared experiences of “imperial arbitrators” whose abusive disregard of evenhandedness was facilitated by the flexibility inherent in institutional rules. (And you know who you are.) But as Rudyard Kipling might have written, that is a story for another day.

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<sup>31</sup> William W. Park, “Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion”, 19 *Arb Int* 279 (2003).