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The 2002 Freshfields Lecture — Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion

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'In most matters it is more important that the applicable rule of law be settled than that it be settled right.' Louis Brandeis[1]

Synopsis

The Freshfields Lecture for 2002 questions the wisdom of unfettered arbitrator discretion. The author suggests that the absence of procedural constraint on the arbitral tribunal can create more problems than it solves, often giving the impression of an 'ad hoc justice' that damages the perceived legitimacy of the dispute resolution process. Challenging the prevailing orthodoxy about the costs and benefits of discretion, the Lecture explores the feasibility of including; in international arbitration provisions, a set of more precise procedural protocols in institutional provisions, to apply unless the litigants explicitly opt out of the default norms.

INTRODUCTION: THE WHY AND HOW OF ARBITRATION

A. Diversity of Motive and Method

LET US go back three-quarters of a century. In June 1927, the *National Geographic Magazine* published an article describing law reform under a Manchu emperor who reigned in the early eighteenth century. Emperor Kang-hsi decided that courts should be as bad as possible so his subjects would settle disputes by arbitration. Responding to a petition about judicial corruption, he decreed as follows:

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* Professor of Law, Boston University. Delivered on 4 December 2002 as the Annual Freshfields Bruckhaus Deringer Lecture, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London. Copyright © 2003 William W. Park. Special thanks are due to Bob Bone, Ron Cass, Jack Coe, Adam Samuel and Tony Weir for thoughtful comments and to Pelagia Ivanova; Barbara Lauriat and Erica Smith for helpful research assistance.

1 Louis Brandeis, J. in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393, 447 (1932) (holding non-taxable a lessee's oil income pursuant to government lease).

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> Lawsuits would tend to increase to a frightful extent if people were not afraid of the tribunals. ... I desire therefore that those who have recourse to the courts should be treated without any pity and in such a manner that they shall be disgusted with the law and tremble to appear before a magistrate. In this manner ... good citizens who may have difficulties among themselves will settle them like brothers by referring to the arbitration of some old man or the mayor of the commune. As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts.[2]

So here is one reason to arbitrate: the hope of avoiding a grossly mismanaged judicial system. But there are other motives. For international transactions, arbitration offers the hope of reducing bias and the prospect of parallel lawsuits in different countries. There may also be the expectation (whether warranted or not) of confidentiality and expertise. In some countries, such as the United States, arbitration has been fuelled by a hope of keeping consumer and employment cases away from sympathetic civil juries inclined to award high punitive damages.

Arbitrations also show enormous variation in the mechanisms used to establish the facts and the law. A letter of credit dispute might be arbitrated in a few hours on the basis of documents only. At the other extreme, a large construction case could involve years of proceedings, with pre-trial discovery, depositions, motions on applicable law and jurisdiction, as well as witness statements and extensive cross-examination.

This variety should not be surprising, since arbitration (like dispute resolution in general) runs the gamut from large investment controversies to small credit card debt collection. The spectrum of subject matter includes construction, baseball salaries, biotech licences, expropriation, joint ventures, auto franchises, distribution and agency contracts, employment discrimination, insurance, collective bargaining agreements and Internet domain name disputes.

The moral flavour of arbitration differs dramatically from context to context. The values of fairness and efficiency that commend arbitration to sophisticated business managers often serve to condemn the process in consumer cases, where an arbitration clause might require an ill-informed individual to seek uncertain remedies at an inaccessible venue.

Finally, the public image and aura of arbitration will vary depending on perspective. In Western Europe, arbitration traditionally took the moral high ground, portrayed as an exercise in self-governance by the commercial community involving co-operation between the private sector (which conducted the arbitration) and the state (which enforced the award). In cross-border commerce, arbitration also was seen as providing a way for companies from different parts of the world to level the procedural playing field.

In developing nations, however, arbitration has often been perceived in a much less glorious light, as a process whereby secret tribunals undermine national

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2 Frank Johnson Goodnow, 'The Geography of China: The Influence of Physical Environment on the History and Character of the Chinese People' in (1927) 51 *National Geographic Magazine* (June) 651, at 661–662. Professor Goodnow adds an editorial note to the effect that under these conditions law reform was 'naturally difficult'. Thanks are due to my friend Jim Groton for bringing this chestnut to my attention.

sovereignty and legitimate governmental regulations. Ironically, the latter view has recently gained currency among certain segments of the US population disturbed about NAFTA investment claims brought by Canadians.[3]

B. Common Themes

Yet, notwithstanding its chameleon-like character, arbitration maintains a core essence. Litigants renounce the jurisdiction of otherwise competent courts in favour of a private and binding dispute resolution mechanism. Arbitration institutions usually purport to promote equal treatment and basic notions of fairness. Arbitrators are expected to possess integrity, experience, and the ability to be both a good listener and a careful reader. In most cases, litigants also want their arbitrator to be intelligent, although at least one case comes to mind in which a lawyer sought to disqualify an arbitrator whose strong intellect made it unlikely that the lawyer's client would succeed with its clever but spurious arguments.

The interaction of arbitration's diversity of form and unity of essence brings to mind the elusive Greek sea-god Proteus, who had the gift of altering shape while his substance remained the same. Similarly, arbitration is constantly reinventing itself to adapt to each particular case and legal culture, while retaining a vital core which aims at final and impartial resolution of controversies outside national judicial systems.

I. ARBITRAL DISCRETION

A. The Benefits of Procedural Autonomy

One reaction to arbitration's protean nature has been an emphasis on broad grants of procedural discretion to the arbitrators. Arbitrators can conduct proceedings in almost any manner they deem best, as long as they respect the arbitral mission and accord the type of fundamental fairness usually called 'due process' in the United States and 'natural justice' in Britain, which includes both freedom from bias and allowing each side an equal right to be heard. Consulting the entrails of a disembowelled chicken might perhaps be off limits. Negative attitudes about augury aside, however, very few constraints limit the manner in which arbitrators go about their jobs.[4]

The absence of precise procedural rules is said to constitute arbitration's strength, by allowing creation of norms appropriate to the contours of each dispute. Established dogma teaches that much of arbitration's genius lies in giving carefully chosen individuals the freedom to apply just the right touch of this or that

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3 *See generally* Guillermo Aguilar Alvarez and William W. Park, 'The New Face of Investment Arbitration' in 28 *Yale J. Int'l Law* (2003).

4 For a theoretical discussion of the authority of arbitrators to create procedural rules, *see generally* Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration* (1989). *See also* Julian Critchlow, 'The Authority of Arbitrators to Make Rules' in (2002) 68 *Arbitration* 4.

procedural principle – the *je ne sais quoi* of justice that leads to innovative and clever compromises.[5] Like a bespoke tailor, the creative arbitrator cuts the procedural cloth to fit the particularities of each contest, rather than forcing all cases into the type of ill-fitting off-the-rack litigation garment found in national courts. While not totally false, this view is incomplete, as we shall see in a moment.

B. Two Meanings of 'Rules'

This discretionary power exists not only in ad hoc proceedings, but also when the parties agree to a set of prefabricated institutional provisions, such as those of the International Chamber of Commerce or the American Arbitration Association. Here we encounter a slight linguistic challenge. In arbitration, the term 'rules' can bear at least two different meanings. First, there are stipulated frameworks of pre-set provisions (like the ICC or the AAA arbitration rules) that address matters related to the appointment of arbitrators and basic requirements of initial filings.[6] Secondly, specific directives for conduct of the proceedings (in both fact-finding and legal argument) govern matters such as privilege and document production.

For better or for worse, rules in the first sense (prefabricated provisions) contain few rules in the second sense (canons for conduct of the proceedings), but leave the latter questions to the arbitrators. For example, the ICC Rules provide simply that the arbitrator may establish the facts by 'all appropriate means'.[7] Both the UNCITRAL and the AAA International Rules say that the tribunal may conduct the arbitration in 'whatever manner it considers appropriate'.[8] Even the LCIA Rules (which do a better job than most in transforming litigation practice into precise directives)[9] are explicit in giving the arbitral tribunal the 'widest discretion to discharge its duties'.[10]

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5 In reality, of course, arbitrators rarely innovate with new-minted procedures, but instead usually draw their decisions from practice in other cases and modified analogies to national legal systems. Thus arbitration remains derivative of the procedural norms established in court litigation.

6 This basic framework for an arbitration might also cover timetables for early filings, the presence of party representatives at hearings, procedures for challenging arbitrators, ways to address problematic situations such as multiple parties that cannot agree on an arbitrator; the treatment of new claims that arise during the proceedings; scrutiny (or lack thereof) of the award, correction of mathematical mistakes and financial matters such as how arbitrators get paid and whether attorneys' fees may be recovered.

7 ICC Arbitration Rules, art. 20. This applies as long as the arbitrators 'act fairly and impartially' so as to ensure that each party has a 'reasonable opportunity to present its case'. *See* ICC Arbitration Rules, art. 15.

8 UNCITRAL Rules, art. 18; AAA International Rules, art. 16. In art. 16(3) the Rules go further and state that the tribunal 'may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case'. By contrast, the AAA Commercial Arbitration Rules (used in domestic cases) provide that the parties shall produce evidence 'as the arbitrator may deem necessary'. *See* Rule 33, which continues that arbitrators may dispense with 'conformity to the legal rules of evidence'. Rule 34 adds that evidence by affidavit is to be given 'only such weight as the arbitrator deems it entitled'.

9 For example, the LCIA Arbitration Rules explicitly address witness preparation (art. 20.6), cross-examination (art. 20.5) and orders for the production of documents (art. 22.1(e)).

10 LCIA Arbitration Rules, art. 14.2.

The same grant of discretion is found in modern arbitration statutes.[11] Enlightened arbitration statutes today usually limit mandatory judicial review to matters such as bias, excess of authority and gross procedural irregularity.[12] In some cases they may also admonish the arbitrator to act with fairness and to adopt procedures suitable to the circumstances of the particular case.[13]

II. THE DOWN SIDE OF DISCRETION

A. The Need for Default Procedural Protocols

The time has come to present this article's tentative thesis, which with some simplification might be presented as follows: the benefits of arbitrator discretion are overrated; flexibility is not an unalloyed good; and arbitration's malleability often comes at an unjustifiable cost.[14] Therefore arbitral institutions should give serious consideration to adopting provisions with more precise procedural protocols to serve as default settings for the way arbitrations should actually be conducted. These directives would explicitly address questions such as documentary discovery, privilege, witness statements, order of memorials, allocation of hearing time, burden of proof and the extent of oral testimony.

Unrealistic expectations are resentments waiting to happen.[15] Arbitration is no exception. When an arbitrator adopts a model of procedural fairness different from what was anticipated by one of the parties, the arbitrator may well believe that his or her approach is 'the usual way things are done'. In an international context, however, competing experiences will almost always be available to indicate that other approaches are not uncommon. While a page of history is certainly

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[11] For a magisterial survey of modern arbitration law, *see* Jean-François Poudret and Sébastien Besson, *Droit comparé de l'arbitrage international* (2002).

[12] *See* William W. Park,'Why Courts Review Arbitral Awards' in R. Briner, L. Y. Fortier, K.-P. Berger and J. Bredow (eds), *Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel* (2001), p. 595; reprinted in (2001) 16 *Int'l Arb. Rep.* (November) 27.

[13] Section 33 of England's Arbitration Act 1996 admonishes the arbitrator to 'adopt procedures suitable to the circumstances of the particular case' and requires the tribunal to 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent', as well as to 'adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.

[14] The arbitration world seems to have at least one other skeptic who challenges the benefits of discretion. *See* John Uff, 'Predictability in International Arbitration' in *International Commercial Arbitration: Practical Perspectives* (2001), p. 151. After noting that arbitrator discretion results in uncertainties of both cost and proceeding length, Prof. Uff suggests (perhaps with a bit of dramatic hyperbole?) 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': *ibid.* p. 152. Stressing that predictability trumps flexibility, Prof. Uff urges that fundamental procedural decisions should be made at the time the contract is concluded.

[15] In considering parties' expectations, the relevant time is contract signature, when neither side is informed about any specific litigation strategy. These expectations are quite different from post-dispute inclinations to see virtue in whatever rules serve their strategic ends. In the latter case, during arbitration, lawyers' procedural preferences will depend on what might be called the 'ouch test' in which a particular rule is objectionable if it hurts the client's case.

worth a volume of logic,[16] arbitration's enormous variety means that even the best and the brightest may be reading from quite different pages — or may read from one page one day and another the next. An arbitrator might say, 'In my experience it is common to allow two rounds of briefs, with the respondent having the last word'. Yet on another day, with a slight adjustment in phraseology, the same arbitrator could assert the contrary, that it is 'not uncommon' to give the claimant the last word — and both statements would be correct.

The issue is not whether a model exists for a particular decision, but why one paradigm rather than another should prevail. While it seems almost axiomatic that parties themselves should be free to fashion their arbitration as they see fit, it is less evident that arbitrators ought to be in the business of setting norms for specific procedural questions on an ad hoc basis. For they may already have seen which side will be advantaged by one rule or the other.

This may not matter when all parties share or have adopted a common legal culture,[17] or belong to a relatively homogeneous community that shares confidence in the individuals chosen to decide the case. Two Boston law firms arbitrating before a well-known Boston arbitrator would normally be expected to behave professionally and accept rulings that comport with their common range of expectations on matters such as witness sequestration and document production.

However, if backgrounds and experiences differ materially, the ad hoc imposition of procedures uncustomary to one side and not announced in advance, risks reducing the perception of arbitration's legitimacy.[18] The aggrieved party may then feel justified attempting to disrupt and derail the proceedings with charges of procedural unfairness.

B. Arbitral Orthodoxy

To many in the arbitration community, any suggestion that arbitral discretion should be curtailed may be as welcome as ants at a picnic.[19] The flexibility

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[16] Frankfurter J. suggested this in *New York Trust Company* v. *Eisner*, 256 U.S. 345, 349 (1921) (upholding federal estate tax against constitutional attack).

[17] For example, shipping arbitration in London is certainly international, but proceeds under an accepted common legal culture. A quite different sociology attaches to arbitration of cross-border contracts related to joint ventures, sales, distribution agreements, licences and agency contracts.

[18] For a discussion of some of the tensions resulting from the heterogeneous nature of the world's legal cultures, *see* William W. Park, 'Arbitration's Discontents: Of Elephants and Pornography' in Ian Fletcher, Loukas Mistelis and Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (2001), p. 258; reprinted in (2001) 17 *Arb. Int'l* 263 and (2002) 17 *Int'l Arb. Rep.* (February) 20.

[19] In this connection, much of the history of English arbitration during the past three decades has involved a move toward flexibility, which is all right and good. But the starting point was a hyper-legalised arbitration culture. Prior to 1979 any award might well end up being retried in court under the 'case stated' procedure. In the United States now, there is a trend to allow appeal on the merits of the dispute — on the assumption that an unappealable award presents too great a risk because of arbitrator error. The problem, of course, is that appealable awards also present a risk: that of having to try the same case twice. The question is not whether to have rules, but how many and what kind.

inherent in arbitrator discretion not only constitutes a pillar of orthodoxy,[20] but rests on deeply entrenched practical considerations. Arbitral institutions that aspire to market their services globally are understandably shy about taking sides in long-standing debates between different national legal systems, particularly on those controversies that divide continental and Anglo-American civil litigation.[21] By leaving procedural matters to the arbitrators' discretion, institutions side-step the hard choices about what exactly it means to conduct a fair and efficient proceeding.

Consequently, one must recognise the enormous conceptual and practical problems attached to any suggestion of reduced arbitral discretion. More than once, the dilemmas of this topic have brought to mind the notice hanging at the entrance to Dante's Inferno: *Lasciate ogni speranza, voi che entrate* — 'Abandon all hope, you who enter here'.[22] Better minds than mine have sunk beneath the waves trying to resolve the tension between rules and discretion. As our French colleagues say, *Je m'interroge*. Thus, this article remains very much a work in progress, and invites the audience's merciless critique.

III. ARBITRATION'S ARCHITECTURE

A. Institutional Provisions

Let us return briefly to the architecture of arbitration. The American Arbitration Association lists over 30 different sets of arbitration provisions, with special procedures for securities transactions, finance, construction, collective bargaining, patents and employment disputes, as well as real estate transactions in Hawaii and Michigan and auto accidents in New York. On this side of the Atlantic, a visit to the Internet yields websites for at least a dozen London-based organisations devoted primarily to arbitration, and no less than 25 professional academies and trade associations that purport to sponsor arbitration as part of a more general mission. And there is no dearth of provisions developed by continental-based institutions and by Chambers of Commerce throughout the world.

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[20] For some, the suggestion of diminishing arbitrators' procedural liberty might bring to mind Dostoyevsky's story of the Grand Inquisitor. Ivan recounts a dream about a sixteenth century Inquisitor who tells Jesus that it was folly for him to have offered humankind freedom. 'Nothing has ever been more insupportable for a man and human society than freedom', says the Grand Inquisitor. *See* Fyodor Dostoyevsky, *The Brothers Karamazov*, Bk V ch. 5.

[21] Significant differences exist in at least five areas: (i) the familiar problems with discovery, discussed *infra*; (ii) the way documents are used at hearings (civil law practitioners may be less likely to expect that documents will be authenticated and explained by live witnesses); (iii) witness testimony (judges rather than lawyers ask most of the questions in civil law jurisdictions); (iv) experts (continentals tend to expect that the arbitral tribunal will appoint experts, while Americans usually insist on each side presenting its own experts); and (v) legal argument (the common law tradition relies more on cases while the continental practice has been to cite leading professorial commentaries). *See* Siegfried H. Elsing and John M. Townsend, 'Bridging the Common Law–Civil Law Divide in Arbitration' in (2002) 18 *Arb. Int'l* 59.

[22] Dante Alighieri, *Divine Comedy*, 'Inferno', III, 9.

In some cases these provisions do differ. For example, the AAA International Rules restrict punitive damages, while the domestic rules do not; and the LCIA Rules give the tribunal a clear right to join consenting third parties, which is not present in most other procedural frameworks.[23]

More often than not, however, these provisions are remarkably similar. Assuming that each side gets an opportunity to be heard, conduct of the proceedings is left to the arbitrators, permitting arbitral institutions to avoid the nitty-gritty procedural questions where the real demons lurk. Few pre-set arbitration provisions tell us whether pre-trial depositions are allowed, whether a party has a right to exclude one fact witness when another is testifying, or whether a log must be created to identify allegedly privileged documents withheld during discovery. Attempts at procedural precision usually involve not rules but 'guidelines' (such as the UNCITRAL Notes for Organizing Hearings)[24] which the arbitrators are free to ignore — and often do.

B. Illustrative Questions: Privilege and Discovery

The dark side of all this discretion lies in the discomfort that a litigant may feel when arbitrators make up the rules as they go along, divorced from any precise procedural canons set in advance. Discretion may not be objectionable within a close-knit community (for example, among the diamond dealers in Amsterdam) or when everyone shares or accepts a common legal culture (as might happen in a construction arbitration where the lawyers and arbitrators share long-standing professional relationships).[25] However, in a heterogeneous transaction with parties, lawyers and arbitrators from disparate places, anxiety rather than comfort may result from a level of arbitrator discretion that permits an arbitrator to make critical procedural decisions after he or she has sized up the parties and the controversy.[26]

To illustrate, imagine an arbitration between a Swiss company and a US corporation. One side requests pre-trial production of a memo created by in-house counsel. The other objects on the basis that the document is protected by privilege. What is the arbitrator to do?

In the United States, the attorney-client privilege generally applies equally to all lawyers, whether independent or employed by the client.[27] By contrast, in

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[23] Under art. 22.1(h) of the LCIA Rules, joinder may be ordered provided there is consent of the third person.

[24] UNCITRAL Notes on Organizing Arbitral Proceedings (1996). The ICC Report on Construction Arbitrations provides another example. *See* ICC Commission on International Arbitration, *Final Report on Construction Industry Arbitrations*, 9 April 2001 (Doc 420/414).

[25] In high stakes international construction arbitration in the United States, one often sees all lead counsel drawn from the active members of the American College of Construction Lawyers.

[26] No single appointing institution or set of litigation norms yet commands international confidence. Moreover, notwithstanding the growing corps of world class international arbitrators, tribunals still include individuals whose cultural backgrounds and predispositions may be quite different from that of a party.

[27] *See e.g.*, *NCK Organization Ltd* v. *Bregman*, 542 F.2d 128, 133 (2d Cir. 1976).

Switzerland and many other countries, only communications to outside counsel are protected by professional secrecy.[28]

Equally troublesome is the very notion of pre-trial document production. In many parts of the world, including most of continental Europe, litigants do no more than give each other advance copies of the documents to be relied upon during the hearings, so as to avoid undue surprise. By contrast, in the United States a practice has developed by which the parties must produce to each other broad categories of dispute-related material, including documents that might help prove the adversary's case. Discovery serves as a vacuum cleaner to hoover up even marginally relevant pieces of paper that might lead to admissible evidence.[29]

How should the arbitrator choose between these divergent models of privilege and discovery? One approach would be to apply rules in a discriminatory manner, looking to the parties' national practice and expectations. Accordingly, only communications to the US in-house lawyer would be privileged, and only the US side would be required to produce broad categories of documents.[30]

Instinctively, good arbitrators shrink from assigning procedural benefits and burdens according to the parties' national practices. Giving one side a stark procedural handicap is an excellent way to invite challenge to an award.[31] However, it can be perilous to decide which principles to follow after the proceedings have revealed the parties' positions, indicating who will get the awkward side of a rule.

C. Consensus and Legal Culture

Some questions, of course, will in practice be resolved by a race to the lowest common denominator. For example, in international arbitration it is now generally

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[28] Swiss professional secrecy attaches to Bar membership (the qualification of *avocat*), which in turn requires 'independence'. Lawyers with the status of employee are not usually registered with the cantonal Bar. *See generally* art. 231 of the Code Pénal, art. 13 of the Loi fédérale sur la libre circulation des avocats (Loi sur les avocats), 23 June 2000 (establishing the obligation of professional secrecy) and art. 29 of the Loi fédérale d'organisation judiciaire (limiting the right to represent clients to practising lawyers and university professors). *See generally*, Bernard Corboz, 'Le secret professionnel de l'avocat selon l'article 321 CP' in (1993) *Semaine Judiciaire* 77; Albert Stefan Trechsel, *Schweizerisches Strafgesetzbuch—Kurzkommentar* (2nd edn., Zürich, 1997). For helpful conversations on professional secrecy in Switzerland, thanks are due to my friends Philippe Neyroud, Anne-Véronique Schläpfer and Olivier Wehrli.

[29] *See* Federal Rules of Civil Procedure, Rule 26(b)(1). Sanctions for non-compliance, set forth in Rule 37, include preclusion of introduction of the evidence, striking certain pleadings and even fines for contempt of court. *See generally* Thomas Mauet, *Pretrial* (4th edn., 1999); John Beckerman, 'Confronting Civil Discovery's Fatal Flaws' in (2000) 84 *Minn. L. Rev.* 505; Irwin J. Hausman and Michael C. Harrington, 'Discovery in Arbitration: Have It Your Way' in (2002) 7 *ADR Currents* (March–May) 20. The alleged benefits of such discovery include a better perspective of the strengths and weaknesses in one's case, leading to settlement, or sharper definition of issues and greater ability to identify an adversary's misleading evidence.

[30] Under this approach email exchanges between in-house counsel in a large multinational (a US bank with a subsidiary) would be privileged from New York to Geneva but not in the other direction.

[31] While it might be argued that the Swiss party had no pre-dispute expectation of secrecy for in-house communications, and the Americans knew that they might have to produce documents, both sides' expectations would likely presume an equal basis for whatever privilege and document production might be granted.

expected that lawyers will prepare witnesses by discussing the case in pre-hearing interviews,[32] even though many countries forbid this practice.[33]

On other questions, however, no consensus exists. For documentary discovery, continental lawyers generally feel deeply about what they perceive as the abusive US 'fishing expeditions' and scatter-gun tactics. Conversely, many lawyers in the United States believe that the bargain for arbitration never included renunciation of what for them is a basic right to shoot first and aim later.

In addressing such questions, we are all laden with baseline baggage that pushes us to presume our own conclusion, according to culturally-influenced assumptions built into our backgrounds.[34] For example, two arbitrators might agree that there must be a reasonable 'proportionality' between the burden of producing a document and the document's potential for enlightening the tribunal. Yet, in applying such a proportionality principle, a Paris *avocat* would normally start with assumptions quite different from those of a New York litigator.

The matter of costs presents another illustration of cultural blinders. European arbitrators often assume that in international arbitration, automatically the loser will pay some portion of the winner's legal costs. In fact, major institutional rules stipulate simply that arbitrators have discretion to allocate attorneys' fees, but do not suggest how that power should be exercised.[35] In at least one significant part of the world commercial community (the United States), costs do not normally follow the event.

If such procedural questions are subject to recognised norms, a litigant that did not like a particular ruling could still recognise that either side might have got the short end of the stick. But in a mixed legal culture lacking a common procedural roadmap, the loser may feel not only the sting of defeat, but also a sense of injustice.[36]

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32 *See generally* George von Segesser, 'Witness Preparation' in (2002) 20 *ASA Bull.* 222.

33 *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' ('The attorney must abstain from discussing with a witness his future testimony and from influencing him in any way'.) German lawyers are likewise prohibited from interviewing witnesses out of court except in special circumstances. *See* John H. Langbein, 'The German Advantage in Civil Procedure' in (1985) 52 *Chicago L. Rev.* 823, at 834; John H. Langbein, 'Trashing 'The German Advantage'' in (1988) 82 *Nw. L. Rev.* 763. 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. Getting witnesses ready for testimony is seen as a way to keep the witness from being misled or surprised, arguably making the testimony more accurate. *See e.g., Hamdi & Ibrahim Mango Co. v. Fire Ass'n of Phila.*, 20 F.R.D. 181, 182 (S.D.N.Y. 1957); *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998). *See Wigmore on Evidence* (3rd edn.), § 788; Thomas A. Mauet, *Pretrial* (4th edn., 1999), pp. 40–48 describing techniques for interviewing witnesses.

34 The emotion attached to procedural expectations and baselines was brought home to me several years ago when I received a call from a former student at a large New York firm, who was about to file a request in his first ICC arbitration. With the fullest sincerity, he asked if it was true that the ICC Rules did not provide what he called 'even the most basic guarantee of pre-trial fairness'. By this oblique reference he meant the right to full US-style discovery. 'How can we prove our claim', he asked, 'without knowing what documents the other side has?' Of course, my student's continental counterpart might have had quite different expectations, anticipating that no claimant would commence arbitration without first having evidence.

35 *See* LCIA Arbitration Rules, art. 28.2; ICC Arbitration Rules, art. 31(3); AAA International Rules, art. 31(d).

IV. ALTERNATIVE PROCEDURAL MENUS

A. 'Rules Light' and 'Rules Rich'

Of course, the arbitral tribunal can always set forth a systematic set of rules in an initial procedural order, issued at the outset of the arbitration. Frequently, however, arbitrators may be tempted to keep the first order relatively simple, precisely to reduce the prospect of unnecessary wrangling among tribunal members, as well as litigants.

The more radical approach suggested today reverses the situation. Rather than a blank page to be completed by arbitrators, institutional provisions could contain specific protocols that the arbitrator would be required to apply unless modified by agreement of all parties.[37] Under the current regime of arbitrator discretion, the litigants are like diners in a fancy restaurant with a menu that we might call 'procedure light', which allows the chef to feed them whatever he wants, as long as each gets the same meal. To force the chef to add or subtract a dish, the diners must do so by a common accord.

By contrast, a better approach would make the litigants like a couple who are served a fixed meal that includes soup, fish, meat, vegetables, potatoes, salad, pudding and savories — which is to say, rules on privilege, discovery, time allocation and the like. One might call this a 'procedure heavy' or 'rules rich' menu. To change the menu the diners would have to indicate jointly what they did *not* wish to order, or what they wanted to add.

The reason for reversing the way dinner is served derives from the fact that once the arbitration begins, litigants almost by definition are more like a bickering old couple than an amorous twosome, and thus may not agree on much. The arbitrator is left to make up rules as he or she goes along, with the potential consequence that one side may receive procedure never expected and never really bargained for.

The problematic aspects of drafting such 'procedure heavy' protocols are obvious. It would be hard work, representing a tricky compromise between different norms.

But is difficulty the same as impossibility? Perhaps the drafters of more specific rules will end up like Don Quixote, tilting at windmills. But then again, they might get lucky, and be able to emulate international co-operation in other areas of commercial law.

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[36] A recent study by the affiliate of the American Arbitration Association found that parties to arbitration rate a 'fair and just' result as the most important element in arbitration, above all other considerations, including cost, finality, speed and privacy. *See* Richard W. Naimark and Stephanie E. Keer, 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People' in (2002) 30 *Int'l Bus. Lawyer* 203 (May).

[37] The relevant institutional provisions would likely list those rules that are to be non-waivable. To a limited degree, the ICC currently makes a distinction between mandatory and optional rules, providing in art. 7(6) that by the litigants' agreement ('insofar as the parties have not provided otherwise') the process for constituting the arbitral tribunal contained in arts 8–10 may be modified.

The International Bar Association Rules of Evidence provide a notable illustration of such successful cross-border compromise.[38] In suggesting more precise norms than those contained in most institutional arbitration provisions, the IBA Evidence Rules enhance what might be called the 'objectivisation' of arbitration.[39] For example, the Rules require that a request for document production must identify either particular documents or 'a narrow and specific category of documents' and describe how requested documents are 'relevant and material'.[40]

B. Supplementary 'Opt-In' Rules

If precise 'procedure heavy' provisions seem too radical, there are other precision-enhancing possibilities. Institutions might supplement their basic procedural framework with stand-alone procedural supplements, which the parties could adopt on an 'opt-in' basis, or the arbitrators might select at the beginning of the proceedings. At the least, arbitral institutions could explicitly affirm the arbitrators' power with respect to some of the more common procedural problems.

To maximise the value of such stand-alone procedures, basic institutional provisions (*e.g.*, the ICC or LCIA Rules) would confirm the arbitrators' power to apply the supplement even if the parties failed to do so. Such an 'override' by arbitrators would be important as a practical matter, since corporate lawyers often pay little attention to arbitration details when contracts are drafted; and once a dispute erupts, the litigants' tactical preferences crystallise to the point where agreement on procedural matters becomes difficult if not impossible. Agreement of all parties would be required to pre-empt the arbitrators' election of the supplementary rules.

Over time, such stand-alone supplements (assuming they represent reasonable compromises) might create generally accepted norms.[41] A litigant objecting to their application would then bear the burden of showing why they should not apply.

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38 Often incorporated into initial procedural orders on a 'for guidance' basis, the IBA Rules on the Taking of Evidence in International Commercial Arbitration were adopted in June 1999. *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 and Carroll Dorgan, 'Witness Testimony Pursuant to the IBA Rules of Evidence in International Commercial Arbitration' in (2000) 17(1) *J. Int'l Arb.* 3. The rules are available at www.ibanet.org.

39 In the United States, the Draft Principles and Rules on Transnational Civil Procedure, prepared under the auspices of the American Law Institute (ALI), represent another effort to achieve procedural compromise. Drafted by the ALI in co-operation with the Rome-based UNIDROIT (International Institute for the Unification of Private Law), Discussion Draft No. 3 was issued on 8 April 2002.

40 IBA Evidence Rules, art. 3. On the matter of whether a document request aims at a 'narrow and specific' class of documents, *see* IBA Rules of Evidence, art. 3. *See generally*, Nadia Darwazeh, 'Document Discovery and the IBA Rules of Evidence: A Practitioner's View' [2002] *Int. A.L.R.* (Issue 4) 101. No provision is made for depositions or for documents 'reasonably calculated' to lead to evidence as in FRCP, Rule 26(b)(1). Enumerated defences to document production or admission include lack of sufficient relevance, legal impediment or privilege, unreasonable burden, loss or destruction, commercial or technical confidentiality, political sensitivity and 'considerations of fairness or equality of the Parties': IBA Evidence Rules, art. 9(2).

41 The IBA Rules of Evidence represent a shift in legal culture precisely because they are perceived as a relatively neutral and fair compromise.

C. Gamesmanship, Over-Specificity and Escape Hatches

Rules, of course, bring their own unfortunate gamesmanship, and in some instances can impede efficient decision-making. Few would disagree that arbitrators should not be put into a straightjacket that requires strict rules of evidence or routine authentication of documents. Some things should be left to the arbitrator, while others should not. The trick is to know the difference.

In this connection, increased precision need not foreclose the proper exercise of discretion in the face of exceptional circumstances. Properly drafted institutional provisions would include appropriate safety valves and escape hatches to allow arbitrators to override the default rules for good cause shown. The starting point, however, would be the specific rules, not a blank page.

The so-called 'Holocaust Accounts' arbitration illustrates the risks of well-meaning but misguided *over*-specificity. In 1997 the Zürich-based Claims Resolution Tribunal (CRT) was established to decide claims related to dormant Swiss bank accounts belonging to victims of Nazi persecution. To maximize the credibility of this politically sensitive process, the CRT Rules initially imposed strict procedural mandates on how the arbitrators were to proceed in establishing ownership of the contested assets. For example, inheritance was subject to 'the law with which the matter in dispute has the closest connection'.[42] This otherwise reasonable principle often invited time-consuming squabbling among relatives of a deceased account holder,[43] and yielded particularly unfortunate results when accounts were small. In such instances arbitrator discretion to divide the funds would have been one reasonable alternative to the 'closest connection' test.[44]

V. LORE, LITERATURE AND FAIRNESS

A. Generally Accepted Norms

To some extent international practice has created consensus on arbitral norms on matters such as witness statements and the right to cross-examination. These

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[42] Rules of Procedure for the Claims Resolution Process, 15 October 1997, art. 16. The so-called 'CRT I' process terminated at the end of 2001 with the distribution of funds for all of the accounts originally published by the Swiss Bankers Association. Subsequent stages of the process ('CRT II') went forward under the direct control of a Special Master appointed by a federal court in New York, making distributions from a settlement fund without any substantial input from the original arbitrators, whose functions were terminated during the spring of 2002. CRT Rules are available at www.crt-ii.org

[43] If a husband and wife both perished along with their children, disposition of assets might well depend on the order of death. If the father died after the others, funds passed to his cousins in New Jersey; if the mother was the last to go, the account went to her relatives in London; and if the children survived both parents, then property was divided equally among the two sides of the family. Since the order of death was rarely evident, arbitrators might have to consult presumptions contained in the inheritance laws of 1943 Hungary or France (assuming these could be ascertained), to determine which deported family member was considered to have died last.

[44] Another option would have been for accounts to be distributed simply according to a hierarchy among family relationships. For example, in the absence of a will, the money would go to specified classes of account holder relatives in designated order and shares. Children and their heirs would take before siblings, who in turn would inherit before cousins.

norms, however, generally get picked up not in institutional provisions,[45] but in articles and books representing the experience of arbitration specialists which in turn constitute the folklore that future arbitration connoisseurs learn in training.[46]

There are several problems, however, with lore and literature that remain only hortatory and permissive. Above all, the folklore may not impress someone with little international arbitration experience, who is not yet (and may never be) a member of the club. A considerable disjunction exists between the arbitration aficionado and the newcomer. For the latter, there exists no arbiter of proper procedure. A US engineer serving as arbitrator in her first ICC proceedings might understandably see no reason to accept the authority of erudite articles written by clever Europeans who, notwithstanding their brilliance, were apparently unable to convince the ICC to incarnate these ideas into specific rules.[47] Moreover, on matters where much has been written but little settled, even the best of us remain prisoners of our idiosyncratic experiences, tempted to see our last case as the normal way to do things.[48]

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[45] On some other issues, arbitration rules are becoming more norm-specific. As mentioned elsewhere, art. 28(5) of the AAA International Rules restricts awards of punitive damages and art. L(d) of the AAA Optional Procedures for Large Complex Commercial Disputes permits depositions and interrogatories.

[46] *See e.g.,* Lucy Reed and Jonathan Sutcliffe, 'The 'Americanization' of International Arbitration' (2001) 16 *Int'l Arb. Rep.* 37; *see e.g.,* Julian Lew and Larry Shore, 'Harmonizing Cultural Differences in International Commercial Arbitration' in (1999) 54 *Dispute Resolution J.* (August) 32; Larry Shore, 'What Lawyers Need to Know About International Arbitration,' 20(1) *J. International Arbitration* 67 (2003); Karl-Heinz Bockstiegel, 'Major Criteria for International Arbitrators in Shaping an Efficient Procedure' in *Arbitration in the Next Decade* (ICC Int'l Ct. Bull. Supp. 1999); Jack J. Coe, 'Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness: Some Thoughts Concerning Arbitral Process Design' in (2002) 17 *Int'l Arb. Rep.* 22; Benjamin Davis, 'Laying Down a Gauntlet: The Thirty-Six Hour Chairman' in (1992) 3 *Amer. Rev. Int'l Arb.* 170; Lee M. Finkel and Robert F. Oberstein, 'Ten Commandments of Arbitration' in (2000) 5 *ADR Currents* (March) 19; Paul Friedland, 'Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration: Novel or Tested Standards?' in (2000) 17 *J. Int'l Arb.* 3; Howard M. Holzmann, 'Balancing the Need for Certainty and Flexibility in International Arbitration Procedure' in R. Lillich and C. Brower (eds), *International Arbitration in the 21st Century* (1993), p. 12; Mark Huleatt-James and Robert Hunter, 'The Laws and Rules Applicable to Evidence in International Arbitration Procedure' in *ibid*; Martin Hunter, 'Modern Trends in the Presentation of Evidence in International Commercial Arbitration' in (1992) 3 *Amer. Rev.* 204 ; Andreas F. Lowenfeld, 'The Two-Way Mirror: International Arbitration as Comparative Procedure' in (1995) *Mich. Y.B. Int'l Studies* 163; James J. Myers, 'Ten Techniques for Managing Arbitration Hearings' in (1996) 51 *Disp. Resol. J.* 28; Hilmar Raeschke-Kessler, 'Making Arbitration More Efficient: Settlement Initiatives by the Arbitral Tribunal' in (2002) 30 *Int'l Bus. Law.* 158; Alan Scott Rau and Edward F. Sherman, 'Tradition and Innovation in International Arbitration Procedure' in (1995) 30 *Tex. Int'l L.J.* 89; Arthur W. Rovine, 'Fast-Track Arbitration: A Step Away from Judicialization of International Arbitration' in Lillich and Brower (eds), *supra*; John Uff, 'The Bill Tompkins Memorial Lecture 1994' in (1995) 61 *Arbitration* 18.

[47] For example, if one side to an arbitration requests the arbitral tribunal to order the opposing party to provide guarantees as security for legal costs, arbitration specialists may take guidance from the discussion and standards elaborated in the House of Lords decision in the well-known (to specialists) *Ken-Ren* case. Why, however, should the House of Lords approach constitute authority to an arbitrator in New York appointed under the AAA, UNCITRAL or ICC Rules? *See Coppée Lavalin S.A.* v. *Ken-Ren Chemicals* [1995] 1 AC 38, in which a bankrupt claimant was able to fund an arbitral proceeding through a related entity, but not necessarily to pay the expenses that might be awarded against it in case of loss. *See generally* Claude Reymond, 'Security for Costs in International Arbitration' in (1994) 110 *Law Q. Rev.* 501.

[48] Over the years, it has been my good fortune to sit with some of the best arbitrators in the world (and you know who you are). Many of these eminent individuals have strong preferences for one set of procedures or another. Ironically, they often support their desired *modus operandi* with the confident assertion that 'we should

Arguments drawn from the purpose of arbitration are not always of much value. The side that wants to discourage broad document production will emphasise the goals of speed and economy. The party seeking the documents will stress that arbitration is not a flip of the coin or a roll of the dice, but requires decisions based on the facts, which can best be ascertained when all relevant documents are available to both sides.[49]

In any event, if lore and literature have indeed led to the emergence of common norms (for example, a presumption against oral depositions), it is hard to see what would be so wrong with reducing procedural strife by setting forth the consensus in a clear rule, subject always to the parties' right to opt out jointly. Either the norms are in fact widely accepted, and worthy of inclusion in a set of institutional provisions, or they are not commonly followed, and a litigant has an understandable concern about an arbitrator's ad hoc invention.

B. Perceptions of Fairness

Specific pre-set rules would normally increase each side's sense that procedural decisions were made in a principled fashion. The jagged side of a rule would not appear to be assigned *ad personam*, in what the French might call *justice à la tête du client* – justice according to the face of the customer. Moreover, enhanced arbitrator concentration would be a side benefit of fixed protocols, in that tribunal energy and attention would not be diverted from the merits of the case to procedural squabbling.

The existence of reasonably ascertainable standards lies at the heart of what Western civilization has considered to be the foundation for rational economic planning. In this context, one remembers the description of 'rule of law' presented by the economist von Hayek:

> Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[50]

One might also recall the work of the late Harvard philosopher John Rawls, who proposed that those who create law should remain behind what he called a 'veil of ignorance' about the exact contingencies to which a rule might apply.[51] To be

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do things the usual way'. Yet what is usual for one may seem odd or impractical to another, leading careful observers to wonder, 'If the best and the brightest do not agree, how can one expect arbitration newcomers to know what's right?'.

49 Even in non-international arbitration there may be disagreements about how arbitral objectives should play out in practice. For example, in domestic commercial arbitration, the AAA has no rule on whether pre-trial oral depositions are allowed, often giving rise to considerable acrimony and uncertainty.

50 Friedrich von Hayek, The Road to Serfdom (1944), p.72 . *See generally* Max Weber, *General Economic History* (F. Knight trans. 1966); Detlev F. Vagts, *Dispute Resolution Mechanism in International Business*, 203 Recueil des Cours (Hague Academy) (1987), p. 19.

51 *See* John Rawls, *A Theory of Justice* (1971), § 24, p. 136. Rawls affirmed *inter alia* that 'justice is the first virtue of social institution'.

just, rules should be uninformed by any existing litigation strategy.[52] In other words, they should not be created in function of what might be called the 'ouch test', which looks to see who gets hurt by a particular rule.[53]

The image of this 'veil of ignorance' helps explain the difference between an arbitrator who aspires to interpret pre-existing norms, and one who establishes procedures after receiving indications of how one model or another will likely affect the outcome of the case.[54]

VI. COSTS AND BENEFITS OF INNOVATION

A. Ex Ante and Ex Post Rule-Making

Of course, none of these questions about the tension between discretion and rules is unique to arbitration. Most of what we call law involves a continuum between generality and precision. To prevent dangerous driving, one might either (i) set defined speed limits, such as a prohibition on travel above 65 miles per hour, or in the alternative (ii) declare it unlawful to drive at 'unreasonable' speeds.[55] The first approach (which might be called *ex ante* rule-making) establishes precise rules of conduct before the controverted event, while under the second approach (*ex post* rule-making) a judge or arbitrator fixes the precise contours of behaviour only after the relevant incident. At present, most arbitration frameworks follow the latter approach, mandating only 'reasonable' and 'appropriate' procedures.

In order to warrant a change from the reasonableness standard to more precise *ex ante* rules, some hope must exist that an *ex ante* approach would meet a perceived need among litigants.[56] In economic terms, the argument might be made that if a need for more specific rules did exist, the market by now would have reacted. So if it ain't broke, don't fix it.[57]

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52 Rawls's notion of pure justice, of course, goes further, and suggests that those agreeing to particular principles should also be ignorant of their place in society, intelligence and strength.

53 On some matters the 'veil of ignorance' already finds limited recognition in arbitration. For example, although different methods exist to calculate arbitrators' fees (ICC looks to the amount in dispute, while AAA and LCIA base fees on time spent), no institution gives an arbitrator discretion to opt for one approach or the other (*ad valorem* or hourly) after seeing how the case develops.

54 Similar principles obtain with respect to the substantive law applied to the merits of the dispute, where most business managers seek predictability in normal commercial relations. As the late Dr. Francis Mann noted, 'No merchant of any experience would ever be prepared to submit to the unforeseeable consequences which arise from application of undefined and undefinable standards described as rules of a lex of unknown origin': F.A. Mann, 'Introduction' in T. Carbonneau (ed.), *Lex Mercatoria and Arbitration* (1990), p. xxi.

55 And of course, both methods implicate an authoritative adjudicatory process connected to stories: narratives of problems that law addresses, and the 'for instance' of how rules and standards should be applied.

56 An argument might also be made that specific rules can be justified by their effect on third parties affected by a case. For example, better arbitration rules might create more attractive options for neutral dispute resolution, which in turn would facilitate wealth-creating economic co-operation in cross-border commerce and investment. On the third party effects of predictable dispute resolution, *see* William W. Park, 'Neutrality, Predictability and Economic Cooperation' in (1995) 12 *J. Int'l Arb.* 99.

57 In this connection, it is worth noting that three of the largest arbitral institutions recently overhauled their rules (AAA in 1997, ICC and LCIA in 1998) without feeling compelled to take the path to specificity.

To some extent this is true. Parties to arbitration have long muddled through with the sketchiest of procedural structures.[58] So why change things now?

In a way, however, this 'not needed' argument is a bit like saying that Thomas Edison need not have invented the gramophone in 1876, since people had enjoyed live music for millenia. Analogously, the fact that modern arbitration is based on arbitrator discretion does not mean that precise protocols have been tried and found wanting, but simply that they have not been tried in earnest.[59] Unless Voltaire's Dr. Pangloss was correct in asserting that all is for the best in the best of all possible worlds,[60] the present system of arbitrator discretion derives more from institutional fear of alienating one constituency or another than from any reliable indication of what the business community really wants.

Until a major service-provider adopts 'rules-rich procedure' (or at least a stand-alone option for procedure-rich rules), it is hard to know how the market will respond. No empirical studies exist to permit falsification of one position or the other concerning rule specificity.[61] Only if and when an experiment is tried will we have any indication of whether greater *ex ante* precision is attractive to the enlightened.

B. Market Forces

A more serious debater might suggest that the decision to arbitrate itself indicates that market forces favour minimal procedural complexities. But the question is not whether arbitration means fewer rules, but rather which rules should be left out. Many reasons to arbitrate have nothing to do with simplicity, but derive from other concerns, such as fear of bias, a search for expertise and concern over crowded dockets.[62]

Of course, if the parties really want more detail, they can bargain for it. Unfortunately, when contracts are about to be signed, most business managers

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58 The argument that, in most cases, the parties and the arbitrators 'work things out' gives a strange echo of the approach of some transactional lawyers in failing to pay attention to contractual dispute resolution clauses. The problem, of course, is that the purpose of a dispute resolution clause is to address situations in which the parties can*not* achieve a suitable *modus operandi*.

59 Careful readers will note the rhetorical borrowing from G. K. Chesterton, who in quite another context observed that 'The Christian ideal has not been tried and found wanting; it has been found difficult and left untried': *see* Gilbert K. Chesterton, *What's Wrong With the World* (1910), ch. V 'The Unfinished Temple', p. 48.

60 Voltaire's *Candide* (1759) presents Dr. Pangloss as an incarnation of the ultra-optimistic theory of German philosopher Gottfried Wilhelm Leibniz, satirically summarised as *Tout est pour le mieux dans le meilleur des mondes possible. ibid.* ch. 30.

61 The confidentiality expected in most arbitration makes it highly unlikely that any meaningful survey could be conducted on how often arbitration clauses are left out of contracts because the parties wanted rules with greater precision. Thus, no theory about aggregate costs and benefits can be falsified in any scientifically meaningful way. The arbitration community is likely to remain in the land of anecdote concerning whether it is more costly to impose attention to rules when the contract is signed or when the dispute arises. Alternative conclusions can be reached by plugging in hypothetical numbers for billable hours at contract signature and during litigation, with hypothetical percentages of contracts ending in arbitration. Like discussions on the existence of God, doctrinal underpinning in the procedural specificity debate seems to be influenced as much by what people *want* to believe as by what evidence might indicate.

62 Concerns over due process almost inevitably end up with what one might call 'juridification' of arbitration, as the price of its procedural legitimacy.

have no inclination toward arguments about what they might call the 'technicalities' of dispute resolution.[63] Usually arbitration clauses will be 'cut and paste' jobs by transactional lawyers who have little relish for questions about evidence and briefing schedules. The corporate lawyers who write contracts are often out of touch with the procedural mishaps that occur during arbitration, and generally remain in the dark about how their arbitration clauses play out during litigation.[64] This absence of any well-informed reflection about the consequences of the arbitration clause[65] inhibits rational decision-making, which creates a market failure.

Only after the dispute arises, when the transaction has gone sour, does the importance of rules hit home. But at that stage of the business relationship each side will be seeking tactical advantage for its position, and thus, the litigants may not be able to agree on very much at all.

C. Risks of Reform

There are costs to any innovation, of course. To return to the gramophone analogy, even Edison's great invention had negative consequences, such as a decline in family togetherness around the old piano, and the arrival of annoying boom-boxes.

Clearly there will be drawbacks to a switch from 'procedure light' to 'procedure heavy.' At least four come to mind.

First, a shift to more specific rules would mean that lawyers and arbitrators must learn something new. Secondly, bargaining about the rules will add costs at contract signature. Thirdly, annulment motions would be more complicated, as losing parties cite non-observance of the rules as a ground for vacatur.

Finally, specific rules might cause some lawyers to counsel against arbitration, from fear of losing their margin to manoeuvre once the dispute arises.[66] Prior to the arbitration, parties do not necessarily know what rules will benefit them on matters such as discovery and punitive damages.[67] Litigation preferences become known only *after* the proverbial you-know-what hits the fan.[68]

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63 Evaluations of procedural complexity in arbitration bring to mind the old saw about one side's delay being the other's due process.

64 For example, the ICC Arbitration Rules are procedurally complex in at least two significant ways: (i) a requirement of Terms of Reference to clarify administrative matters and claims, and (ii) a provision for award review by the ICC 'Court' in Paris. Other arbitral institutions use shorter documents to begin the proceedings and subject awards to no institutional scrutiny.

65 The illogical fashion in which many decisions are made was recently given great public exposure by the award of the 2002 Nobel Prize in Economics to Daniel Kahneman (along with Vernon Smith), whose work with the late Amos Tversky illustrated cognitive errors involving probability.

66 For example, art. 19 of the ICC Arbitration Rules restricts presentation of new claims and counterclaims after establishment of the Terms of Reference. Only after a proceeding begins will a party know whether this rule constitutes a burden (because it prevents the party from bringing a new claim) or a benefit (because it prevents new claims by an opponent).

67 On occasion, a company or an industry may have a regular problem that could be affected by rules. For example, repeat issues might be identified in claims brought by distributors against manufacturers or by borrowers against financial institutions.

68 This inability to foresee a rule's future effect on litigation outcomes applies equally well to court proceedings, which is precisely why most legal systems contain codes of civil litigation norms established in advance of particular controversies.

The real question, however, is not whether there will be costs, but when costs will be incurred, and whether the potential payback from more specific rules outweighs possible drawbacks. At present, creation of specific procedures takes place after the dispute arises. By contrast, with more detailed rules lawyers would have to be alert to the default norms and negotiate around them.

Business managers will be unhappy about expenses in either case. If at contract signature the lawyers spend too much time discussing arbitration rules, there may be an extra two or three billable hours. The alternative might be a hundred billable hours to fight procedural battles during the litigation — albeit hours spent only in cases where the relationship breaks down.

Right now, it is easy to agree to arbitrate under most institutional provisions, precisely because they allow parties to remain ignorant about how their case may ultimately be arbitrated, rather than to bite the bullet at contract signature. Yet, for every instance in which a contract might omit an arbitration clause because default rules are too specific, there will be other cases in which arbitration clauses will be left out of contracts because risk-averse business managers reject a lottery of uncertain results,[69] having grown tired of how descriptions of the expected arbitral procedure usually end with the caveat: 'It all depends on whom we get as an arbitrator'.[70]

VII. THE DEVIL IN THE DETAILS

A. Triage and Drafting

Deciding when 'enough is enough' in rule-making will not be easy, either in the triage necessary to determine what questions should be subject to rules or the drafting of the substantive rules themselves.[71] The goal would be to give arbitrators

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[69] Disagreeable encounters with establishment of procedures after the arbitrators learn who gets the rough side of the rule may lead some managers simply to say 'never again' — at least until presented with an even less appealing forum proposal in a new and attractive deal. A set of more detailed procedural protocols would serve to rub the lawyers' noses in the problem, thus giving consumers of arbitral services more informed choices.

[70] Few business managers want to negotiate each aspect of the arbitral process *de novo* although ad hoc procedures may be more acceptable in some areas (such as insurance) than in others (such as distribution agreements), perhaps due to a relative degree of homogeneity in the prevailing business culture. Of course, one also sees ad hoc arbitration in investment and development concessions with developing countries, *perhaps* for the opposite reason: that at contract signing no one can agree on the arbitration framework.

[71] The quest for balance brings to mind the Swedish word *lagom*, meaning 'not too much and not too little', which some of my Swedish friends proudly claim is unique to their language, somehow being superior to 'enough' and 'just right'. A British judge articulated the contrast between arbitral discretion and rules as follows: 'There is a choice: on the one hand [arbitrators] will go their own way and invent their own practices as to the way they will exercise their discretion; on the other hand they will individually decide that while the arbitrator should not slavishly follow court procedures it is in the interest of justice that there should be a measure of predictability and certainty': Peter Bowsher, 'Security for Costs' in (1997) *Arbitration* (February) 36, at 38.

the tools to find out what happened in an efficient manner, while giving litigants the impression (and the reality) of fair and equal treatment.[72]

There is no reason that compromises should not be possible, since most procedural issues raise questions of degree rather than either/or propositions.[73] In questions of procedure, the way decisions are made matters less if the process is known in advance. Rather than looking for the ideal structure (what surfers call 'the perfect wave'), the drafters of procedural protocols must keep in mind the admonition of Brandeis J. that in most matters it is more important that 'the applicable rule be settled than that it be settled right'.

B. Surprise and Sequestration

Admittedly, drafting specific rules will be a slippery job. For example, it may be quite difficult to hit upon a rule that reconciles the different approaches to surprise during hearings. Most good arbitrators reject trial by ambush, requiring that each side give reasonable pre-hearing notice of exhibits and arguments. Beyond that, however, there are dramatic differences in the measure of information that must be shared with opponents in advance of the hearings.

There are those who see spontaneity in presentation of documents, as a positive element in encouraging candour, on the assumption that a witness caught off guard is less likely to give calculated responses that hide part of the truth. By contrast, others believe that giving advance notice of a document provides time for reflection that permits the witness and the law to understand the document's significance, and thus, (in theory) to arrive at a more informative presentation, which helps the slow-witted arbitrators to grasp what has happened.[74]

To take another example, there is much debate on whether one fact witness may be present when another is testifying. In some countries (such as the United States) a litigant may have a witness excluded from hearings when not presenting evidence (a process called sequestration), as a way to reduce the prospect that the testimony of one witness will influence that of another.[75]

Yet many argue against sequestration (invoking the very same goal of enhancing the search for truth), saying that the presence of one witness with knowledge of the facts will embarrass into greater truthfulness a witness otherwise inclined to stretch or embellish reality.[76]

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[72] The Appendix *infra* lists some illustrative questions which frequently must be addressed in international arbitral proceedings.

[73] It will, of course, be tricky to involve the right individuals in the drafting process. Those with experience may not have the time, and those with the time may not have the experience.

[74] In some arbitrations there are advance exchanges not only of documents on a general basis, but also delivery of specific exhibits intended for use in cross-examination, in order to permit opposing counsel to prepare a witness on what he or she can expect. For example, there may be a protocol to the effect that 48 hours before a party-controlled witness testifies, the lawyer from the other side will deliver to opposing counsel a binder of documents to be used in the cross-examination.

[75] *See* s. 615 of the Federal Rules of Evidence.

[76] The question is raised in the current discussion of so-called 'witness conferencing'. *See* Wolfgang Peter, 'Witness Conferencing' in (2002) 18 *Arb. Int'l* 3. The IBA Rules of Evidence provide in art. 8(2) that witnesses may 'be questioned at the same time and in confrontation with each other'.

As a parenthesis, in doing research on the question, I learned that the practice of separating witnesses goes back to Biblical times, and is recorded in the *Book of Susanna*, written during the Maccabean period.[77] The story tells how a virtuous woman rebuffs an immoral proposal from two scoundrels who take revenge by accusing her of committing adultery under a tree in her garden. As the honourable Susanna is about to be found guilty of what was then a capital crime, the prophet Daniel arrives, just in time, and says 'not so fast'. He orders the accusers separated. Questioning each in turn, he receives divergent descriptions of the tree under which the amorous adventure allegedly occurred. One scoundrel says 'acacia' tree and the other says 'aspen' tree, thus revealing perjury and permitting Susanna to be reunited with her family, and the two villains to be sent away for execution.

Even when a consensus has emerged on a particular practice, critical details may remain open to debate. For example, international arbitrators have developed a general practice of requiring witness statements to cover oral direct testimony.[78] Yet significant differences of opinion exist on whether direct oral testimony should be entirely replaced, or simply limited in scope, by such witness statements. Some arbitrators argue for elimination of all direct oral evidence as a way to reduce hearing time. By contrast, others fear such an extreme approach as unacceptably diminishing an arbitrator's ability to comprehend facts and evaluate witness credibility. Since most of us gain understanding by a combination of both reading and hearing, many arbitrators prefer a combination of written and oral testimony as the better approach to enlightening the tribunal. Moreover, the putative time savings are often illusory when counsel demand additional hours for cross-examination.

CONCLUSION

An American folk hero named Yogi Berra, once a catcher for the New York Yankees baseball team, is known for his colourful expressions, which simultaneously might mean everything and mean nothing. Giving directions to his house in New Jersey, Yogi once advised a friend, 'And when you come to a fork in the road, take it'.

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77 This story derives from a Greek translation of the Hebrew Scriptures occasioned by the Hellenistic influence in the ancient Mediterranean world. Legend put the number of translators at 72 (six from each tribe of Israel), thus giving the name 'Septuagint' (from *septuaginta*, or 70). The collection ultimately included some books (such as *Susanna*) outside the Hebrew canon, called the Apocrypha in some traditions.

78 Sometimes justified as a way to save time, pre-filed direct testimony can serve the deeper purpose of allowing counsel sufficient time to consider the other side's arguments and evidence, serving as *de facto* discovery. Each side sees in advance what sort of evidence the other has. Witness statements can have a down-side, however. If oral testimony goes beyond the scope of the statement, there might be motions to exclude otherwise useful evidence, file supplemental affidavits or recall witnesses for rebuttal. A party that ignored a requirement of advance written testimony would have an edge, since the other side would have unequal time to consider its adversary's evidence and thus (at least in theory) better inform the arbitrators on the merits of the case.

Modern arbitrators face challenges not unlike the one presented to Yogi Berra's guest. We know some decision is necessary, but the relevant rules provide little concrete guidance.

In cross-cultural business arbitration, the widespread assumptions about the benefits of arbitrator discretion may well turn out to be incorrect, regardless of a contrary conclusion for dispute resolution within close-knit communities that share a high level of trust in their arbitrators. Ironically, the ever-changing variety in the contours of disputes and the nationalities of the litigants may call for firmer procedural protocols established in advance of the arbitration. Arbitration's legitimacy is diminished when a litigant feels that procedures were invented as a way for the arbitrator to affect the outcome of the case.

My intent is not to urge radical reform. Some great Frenchman (Talleyrand usually receives credit) remarked that anything excessive becomes insignificant: '*tout ce qui est excessif est insignifiant*'. My hope is simply to stimulate a deeper dialogue on fine tuning the balance between *ex ante* and *ex post* rule-making, with the aim of arriving at an optimal counterpoise between rules and discretion. The completion of this task, of course, may well give us another article for another day.

APPENDIX

TWENTY-FIVE ILLUSTRATIVE PROCEDURAL ISSUES ARISING IN INTERNATIONAL COMMERCIAL ARBITRATION

1. May a party require fact witnesses to be excluded from the hearings when others are presenting testimony?
2. When may one side take pre-hearing oral depositions of the other side's witnesses?
3. May a party be ordered to turn over documents to its adversary that might hurt the producing party's case? If so, what showing is necessary to justify such an order?
4. May counsel prepare a witness for testimony before the hearings?
5. Are the communications of an in-house lawyer privileged?
6. Should a party invoking privilege as the basis for refusing to turn over documents be required to supply a log providing a description of the document and an explanation of the claimed privilege?
7. Should direct testimony be provided in the form of pre-filed written witness statements?
8. If witness statements are used, do they replace or simply supplement oral testimony? In this connection, may a party require that one of its witnesses be heard orally even if the other side does not request cross-examination?
9. If one side alleges fraud, may it be required to provide, at an early stage in the proceedings, a statement of particulars, indicating who said what to whom, when and where?
10. How are burdens of proof to be determined?
11. Which side has the 'last word', claimant or respondent?

12. When should arbitrators order documents to be kept confidential if both parties are unwilling to so stipulate?
13. When should a tribunal appoint experts?
14. On what questions should interim decisions take the form of awards rather than procedural orders?
15. At what stage should exhibits and witness statements be exchanged?
16. When is it appropriate to order security for costs?
17. When should pre-hearing and post-hearing memorials be simultaneous, and when should they be sequential?
18. When can issues be decided on a documents only basis? What types of questions lend themselves to such dispositive treatment without evidentiary hearings?
19. How far should the parties' counsel (rather than arbitrators) shoulder the principal responsibility for interrogating witnesses?
20. What rules of evidence apply when one side objects to a question, answer or document?
21. Should time be allocated on a 'chess clock' basis (each side is allotted the same number of hours) or an open-ended approach?
22. What grounds justify postponement of hearings?
23. What degree of familiarity between an arbitrator and a witness might require arbitrator disqualification?
24. Should witnesses testifying on the same subject present their evidence together? In this connection, should a distinction be made between fact witnesses and experts?
25. May witnesses testify by video conferencing to save the cost of long-distance travel even though one party requests their physical presence?