Arbitration as an autonomous transnational legal order

In a course held at The Hague Academy of International Law in 2008 Emmanuel Gaillard made some interesting considerations regarding the nature of arbitration. He presented three possible alternative solutions. The first identifies arbitration as a component of a specific national legal order, that of the place of arbitration. The second possible notion is that of multi-localized arbitration, since each State is free to determine the consequences of an arbitration award within its territory. Gaillard called this second notion "Westphalian" because it would be inspired with the juxtaposition between sovereign States which emerged from the Congress of Westphalia in 1648. According to the third possible view, arbitration is an autonomous transnational legal order. In this connection, Gaillard correctly pointed out that a legal order is autonomous when it has its own sources and is addressed to a community of its own. Indeed, the international arbitral order has all these characteristics. With a number of well-developed arguments, which it would be too long to repeat here, Gaillard then opted for the latter view - arbitration as an autonomous transnational legal order - as being the only one supported by the arbitration practice and even by the States’ domestic legal systems.

Gaillard conducted his analysis through an extensive review of the two traditional approaches to define what a legal order is: the positivist approach of Kelsen and his followers, according to which no rule of law exists outside State law or international law, and the institutional approach of Santi Romano and his followers, according to which every community, even a criminal organization, can express its own legal order (ubi communitas, ibi jus). Clearly, Gaillard followed this last approach in determining the nature of arbitration as an autonomous transnational legal order whose main subject is the business community. He summarized his conclusions as follows: “Le statut de “juge international” que certaines juridictions parmi les plus progressistes en la matière lui reconnaissent constitue la meilleure illustration du fait que l’arbitre peut être aujourd’hui considéré comme l’organe d’un ordre juridique propre”.

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1 E. Gaillard, Aspects philosophiques de l’arbitrage international, Les Livres de Poche de l’Académie de droit international de la Haye, Martinus Niijoff, Leiden/Boston, 2008, especially at 60 et seq. See also P. Lalive, L’ordre public transnational et l’arbitre international, in Liber Fausto Pocar, Milan, Giuffrè, 2009, at 602 et seq., who seems to share Gaillard’s conclusions.

2 H. Kelsen, Théorie générale du droit international public, in Recueil des cours, Vol. 42, 1932, at 121 et seq., at 152 et seq.

3 S. Romano, L’ordinamento giuridico – Studi sul concetto, le fonti ed i caratteri del diritto, Pisa, Mariotti, 1917, passim; R. Quadri, Cours général de droit international public, in Recueil des cours, Vol. 113, 1964, at 269.
In passing, if we share, as I think we should, these conclusions, we have also to conclude that, due to the fact that arbitration responds to the collective needs of the international business community to have a satisfactory dispute resolution system, the arbitrators, which are the organs of such transnational legal order, perform a public function, as I have maintained on another occasion.\footnote{U. Draetta, \textit{International Arbitration as a Public Function: Some Short Considerations}, in \textit{Revue de droit des affaires internationales}/\textit{International Business Law Journal}, 2012, at 319-326.}

Like any legal order, arbitration has substantive and procedural rules, which are also transnational in nature.

Regarding the substantive law provisions, it is widely recognized that, unlike domestic courts, arbitrators do not even abide by \textit{a lex fori}, neither are they tied to any particular set of rules of conflict, let alone when they have to determine the rule of law applicable to the dispute, failing a clear choice by the parties.\footnote{P. Lalive, \textit{L’ordre public transnational et l’arbitre international}, in \textit{Liber Fausto Pocar}, Milan, Giuffrè, 2009, at 601.} Actually, arbitrators can even directly apply the provisions of any legal system they consider appropriate, by-passing any domestic conflict-of-law criterion.

The regulations of the arbitral institutions often allow arbitrators to apply any “rule of law” (refer, only as an example, to Art. 21(1) of the ICC Arbitration Rules), opening the door to the application by the arbitrators of a set of transnational substantive rules, spontaneously created by the international business community and customary in their nature. Scholars have debated at length on the nature of these transnational rules, often called \textit{lex mercatoria}, which the UNIDROIT Principles of International Commercial Contracts have attempted to codify. I shall not indulge here on this debate, which is often highly theoretical. It is a fact, however, that arbitrators frequently apply the rules of \textit{lex mercatoria} in as much as they are independent from domestic rules and better adapted to the needs of the international business community; inversely, \textit{lex mercatoria} is able to develop and complement itself by arbitral awards, if and when published, and the precedents which they represent.\footnote{For interesting and persuasive comments on the notion of arbitral precedents, see A. Mourre, “\textit{Giurisprudenza arbitrale e confidenzialità nell’arbitrato internazionale}” in \textit{Arbitrato e riservatezza – Linee guida per la pubblicazione in forma anonima dei lodi arbitrali}, A. Malatesta e R. Sali (eds.), Cedam, Padua, 2011, at 59 et seq.} I do not think it is necessary to further expand in these considerations, as they are widely accepted by the arbitration community.

The conclusion to be drawn is that the substantive law provisions of the arbitration legal order are transnational in nature or can be identified with a transnational conflict-of-law approach.

**The emergence of a transnational set of procedural rules governing arbitration**

Alongside transnational rules of substantive nature, arbitration law has also witnessed the emergence of a set of transnational procedural rules governing arbitration proceedings. They have been sometimes called \textit{lex mercatoria processualis}.\footnote{P. Cavalieros, \textit{La confidentialité de l’arbitrage}, in \textit{Les Cahiers de l’arbitrage}, (by A. Mourre), Vol. III, 2006, at 60, for example, has spoken about a \textit{lex mercatoria processualis}, albeit in the limited context of...} One may criticize the very notion...
of *lex mercatoria processualis*, which has, in fact, been criticized, but it seems to me that we should look at the substance of the legal phenomena rather than their *nomen juris*, and, above all, avoid a too dogmatic approach.

First of all, procedural rules are certainly included in the various domestic arbitration laws applicable in the place of arbitration (*lex arbitri*). The existence of these domestic laws, however, does not contradict the transnational nature of the procedural rules applicable to arbitration. In fact, such domestic arbitration laws are often patterned along the lines of the UNCITRAL Model Law on International Commercial Arbitration of 1985 (amended in 2006) which is of course a transnational instrument. In addition, even when domestic arbitration laws do not follow the UNCITRAL Model Law, most of them give arbitrators a remarkably wide discretion to apply the procedural rules that they consider most appropriate, irrespective of the provisions of the national civil procedure codes applicable to the proceedings before the domestic ordinary courts. The only limitation generally concerns the domestic mandatory public law provisions.

Then, there are the arbitration procedural rules of the various arbitral institutions. Such rules are not part of any national law and are a-national in nature, as they apply to all arbitrations administered by that particular arbitral institution. It is true that these rules differ among themselves. It is nonetheless undeniable that, beyond any differences among them, there is a tendency towards the harmonization of the arbitration procedural rules of the various arbitration institutions. There are regular contacts among such institutions, which periodically review their regulations taking into consideration each other’s rules. Thus, a significant level of uniformity and universality is reached, at least with respect to certain fundamental principles of procedure.

For example, the arbitrators’ freedom to determine the rules governing the arbitration proceedings is generally recognized by almost all arbitration institution rules. It is sufficient, in this respect, to quote Art. 19 of the ICC Arbitration Rules where such freedom is reaffirmed “whether or not reference is ... made to the rules of procedure of a national law to be applied to the arbitration”. Art. 22(2) of the same ICC Rules strengthens the concept by adding that the arbitral tribunal “may adopt such procedural rules as it considers appropriate”. Indeed, a longstanding principle of international arbitration, incorporated in a decision dating back to 1976 (the ICC Award No. 1512), states that “the arbitrators have a wide discretion in matters of procedure”.

Hence, the general approach resulting both from the domestic arbitration laws and the arbitration rules of arbitral institutions, is that of allowing broad discretion to arbitrators in determining the procedural rules governing the proceedings, albeit with some limits,
essentially confined to the mandatory public order provisions of the *lex arbitri*, such as those concerning the principle of due process.

In order to provide some guidance to arbitrators in the exercise of such a broad discretion, in relatively recent times we have witnessed the proliferation, at a transnational level, of guidelines, codes of conduct and similar productions of “soft law” concerning the conduct of international arbitration proceedings. These rules are issued by many different professional associations, like the IBA, the American Law Institute, the American Arbitration Association, the CIArb, and others which do not need be mentioned because they are widely known. It is sufficient to quote the 2004 IBA Guidelines on Conflict of Interest in International Arbitration, the 2010 IBA Rules on the Taking of Evidence in International Arbitration and, most recently, the 2013 IBA Guidelines on Party Representation in International Arbitration. As rules of “soft law” they are not in themselves binding but this does not mean that they lack legal significance. As we know well, the legal relevance of a rule is not confined to its possibly binding nature, otherwise measures known as recommendations, which are so widespread in international law, would have no legal significance. In fact, the legal relevance of a provision of “soft law” is found, for example, in the legitimacy which benefits the person who voluntarily complies with it, as well as in the value attributed to it, when interpreting binding rules. Furthermore, “soft law” rules become binding when an arbitration agreement or any other agreement between the parties (for example, on the occasion of the signing of the Terms of Reference) provide for it.

It is this corpus of constantly evolving transnational procedural rules applicable to arbitration which one may, in an empirical and non-dogmatic sense, call *lex mercatoria processualis*. It is a corpus of delocalized and a-national rules because they are the spontaneous product of the international arbitration community and do not relate to any particular State legal system. To dismiss these transnational procedural rules as a set of non-binding rules which simply complement those of the domestic arbitration laws would appear arbitrary, or at least unacceptably reductive.

**The consequences on the distinction between domestic and international arbitration**

Arbitration is a dispute resolution mechanism available to the international business community which is global in nature. The emergence of a transnational set of procedural rules applicable to arbitration is consistent with such global nature.

From a conceptual point of view, there is nothing in such rules preventing their application to the entire range of possible arbitration proceedings. Actually, they do apply in all cases where the *lex arbitri* does not distinguish between “domestic” and “international” arbitration. In these cases, the transnational regime of arbitration is the same with respect to both “domestic” and “international” arbitrations and, actually, the distinction between the two is left with no or very limited relevance.

The debate between those who maintain that a “domestic” arbitration should be treated differently than an “international” arbitration (dualistic approach) and those who claim,
instead, that the regime should be the same (monistic approach) is still very high-spirited and I will not enter into such debate for the purposes of this paper.

I simply wish to remind, with respect to the various national arbitration laws, that, just as a rough indication with no pretense here to exhaustiveness, the dualistic system is adopted by France, Switzerland, Ireland, Greece, Russia and all the countries which have adopted the UNCITRAL Model Law without extending its scope of application to the “domestic” arbitration. On the opposite, the monistic approach is adopted in Europe by Austria, Belgium, Germany, Spain, Finland, Denmark, Norway, Poland, Sweden, Portugal, Holland and UK.

Italy, with its last 2006 Reform, has opted for the substantial elimination of the distinction between “domestic” and “international” arbitration, though many have expressed reservations about this choice.

It is however a fact that, as summarized by Poudret and Besson, the prevailing approach of the national arbitration laws, at least in Europe, is to choose a monistic approach: “Thus a clear majority of European countries, and even those which have recently adopted new legislation, are not of the opinion that the specific nature of international arbitration justifies different rules than those governing domestic arbitration”.

The monistic approach has the obvious advantage of the simplicity, while in the countries which have adopted the dualistic approach the criteria for distinguishing a “domestic” arbitration from an “international” one are not always very clear and give rise to frequent disputes.

Apart from this element, however, it is difficult to justify, on a conceptual basis, why the parties to a “domestic” arbitration should be deprived of a right to benefit from the transnational procedural rules that I have mentioned before. I see no reason in fact why they should be discriminated against, vis-à-vis parties to an “international” arbitration, as to their autonomy to choose the transnational procedural rules. This is why I think that such rules help developing a culture which goes towards the elimination of the distinction between “domestic” and “international” arbitration, in favour of a uniform regime which would best suit the global nature of arbitration as a transnational legal order.

The risks of overregulation and bureaucratization

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11 According to Art. 1504 of the French Arbitration Law, an arbitration is “international” when it "met en cause les intérêts du commerce international". For an interesting comment, see M. Winkler, La riforma francese del diritto dell’arbitrato, in Diritto del commercio internazionale, 2012, at 82 et seq.


Transnational procedural rules applicable to arbitration are being issued in such an increasing number that many have asked themselves whether the international arbitration community has placed itself on a slippery slope towards overregulation. This would definitely be a negative outcome, as it would limit the discretionary powers traditionally enjoyed by arbitrators when applying procedural rules. Such discretionary powers, when properly exercised, have proven to be one of the greatest and most attractive assets for arbitration as an institution, as they allow arbitrators to take procedural decisions tailored to the specific circumstances of the case, without having to follow one-size-fits-all solutions.

The subject has been in particularly addressed in an essay by Michael Schneider\(^\text{14}\) which is a must reading because of its entertaining and amusing nature.

Schneider ironically observed that “The principal objective of guidelines is to reduce the scope of independent thinking by their users and to replace it by what the Guideline Producers believe the users should think or do”. Along the same lines, Schneider added that “The ultimate objective of Guidelines Producers should be to render the guidelines so successful that the errors contained in them are no longer noticed as errors”. Schneider concluded that “If the process of guideline production continues, all aspects of arbitration will be fully covered by guidelines which are accepted as “best practices” and “state of the art”. When this happy moment is reached, the international arbitration community needs not to think any more”.

Apart from the hyperboles used on purpose by Schneider to stress his point, the real issue with the proliferation of transnational procedural rules for arbitration is the possible loss of the much needed flexibility by arbitrators in their decision-making process regarding procedural issues. I am inclined to believe that guideline producers must keep in mind that in this area, like in many others, “less is more”.

I think that some specific examples of possible overregulation can help clarifying the point I am trying to make.

I begin with the widely known 2010 IBA Rules on the Taking of Evidence in International Arbitration, in particular the provisions regarding document production.

It is known that in international commercial arbitration document production is not necessary unless agreed by the parties. Such agreement, if any, is rarely included in the arbitration clause. Generally, the agreement by the parties on document production results from the Terms of Reference (or other document serving the same purpose), where the parties and the arbitral tribunal agree that the IBA Rules apply to the proceedings. The IBA Rules contain indeed specific provisions on document production (Articles 2, 3 and 9). When they are adopted, the arbitral tribunal is therefore obliged to allow a document production according to the terms of the IBA Rules unless it specified that they will be used only as guidance for the

\(^{14}\) M. Schneider, The Essential Guidelines for the preparation of Guidelines, Directives, Notes, Protocols and other methods intended to help international arbitration practitioners to avoid the need for independent thinking and to promote the transformation of errors into “best practices”, Liber Amicorum Serge Lazareff, 2011, at 563 et seq.
arbitrators, which would therefore not be bound to observe them. Incidentally, it must be said that this specification is generally included in the Terms of Reference when the IBA Rules are mentioned among the procedural rules governing the proceedings. By this way, the arbitral tribunal retains a much needed margin of flexibility and discretion as to whether or not ordering document production.

The IBA Rules are conventionally considered as an appropriate compromise bridging the divide between civil law and common law systems in conducting international arbitrations. However, what the document production provisions of the IBA Rules end up doing is introducing common law features in a phase of the arbitration proceedings which essentially follows the civil law system.15 There should be no surprise, then, for the widespread criticism of the IBA Rules concerning document production.16

Criticisms of Articles 2, 3 and 9 of the IBA Rules are manifold.17

First of all, it is observed that the power of the arbitral tribunal under the IBA Rules to order document production is not limited to specific documents intended to prove a specific allegation by the requesting party. Indeed, Article 3.3(a)(ii) of the IBA Rules expressly permits, subject to certain limitations, production of documents that are identifiable only by category.

15 P. Hafer, The Provisions on the Discovery of Internal Documents in the IBA Rules of 1999, in Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in honor of Robert Briner, ICC Publishing, 2005, at 350 summarises his criticism of the IBA Rules on document production as follows: “It is submitted in this paper that the interest of a party that is not in possession of documents it needs to prove its allegations is adequately protected by the procedural system of most civil law countries. It is further submitted that most of the elements of the US discovery procedure, which the IBA Rules of 1999 would introduce into international commercial arbitration, were developed in light of the distinctive features of the US trial system. They do not fit into modern arbitral proceedings”. Less drastic appears to be K. Sachs, Use of documents and document discovery: “Fishing expeditions” versus transparency and burden of proof, in German Arbitration Journal SchiedsVZ, 5/2003, at 196, who thinks that the IBA Rules strike a very sound balance between the two conflicting procedural approaches and that “without such rules, the likelihood of disputes regarding document discovery issues seems even greater and it is certainly an advantage of the new rules that the scope of the disagreement between the parties has been narrowed”.


Such category of documents generally consists of internal documents existing within the requested party, such as confidential memoranda, internal reports and minutes of board and committee meetings. Because of their internal and often confidential nature, the requesting party can only presume that they exist, but cannot have any actual knowledge of their existence. As a consequence, the requesting party, in making the document production request, often hopes that the process will lead to the disclosure of documents which may help it in presenting its case or which may be the basis for further allegations for which it does not have the necessary evidence.

This presents two kinds of problems. First, the IBA Rules are meant to govern the taking of evidence, as indicated in their Article 1.1, not the mere collection of information. Secondly, such type of requests may turn into real “fishing expeditions”, which are generally considered as not admissible. It is true that Article 3.3 of the IBA Rules specifies that the category of documents requested must be “narrow and specific” and that the documents must be “relevant to the case and material to its outcome”. However, it may be at times very difficult for the arbitral tribunal, particularly when the request is made at the early stage of the proceedings, to discern whether the request is narrow and specific enough and whether it concerns documents which are relevant and material, as opposed to amounting to a fishing expedition. It must be considered, in this connection, that arbitral tribunals often show a disproportionate concern for the respect of due process and are reluctant to deny document production requests fearing the risk of challenges to the award.

Fishing expeditions are document production requests which are too general in nature and are not intended to prove or to substantiate a specific allegation that it is plausible or highly probable under the circumstances. Fishing expeditions should not be allowed in any case by the arbitral tribunal. Even the fact that the requested documents are reasonably believed to exist, or that they may be relevant and material, does not necessarily mean that there is a plausible assumption justifying an invasion into the requested party’s internal documents.

Furthermore, the application of the IBA Rules may lead to an unequal treatment of the parties. It must be considered, in this respect, that legal opinions expressed by in-house counsel are privileged in the common law countries and cannot be disclosed. No such protection exists in

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19 These considerations are made by P. Hafer, The Provisions on the Discovery of Internal Documents in the IBA Rules of 1999, in Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in honor of Robert Briner, ICC Publishing, 2005, at 361. The Author, quite appropriately, adds: “Fishing expeditions should not be permitted by arbitral tribunals, regardless of whether or not the IBA Rules on discovery apply. But while an arbitral tribunal not subject to these rules may simply reject a request that it qualifies as a fishing expedition, an arbitral tribunal operating under the IBA Rules of 1999 will have to be careful to avoid the complaint that by rejecting the request it has violated Article 3.3. Although there seems to be general agreement that even under the IBA Rules of 1999 fishing expeditions should not be permitted, Article 3 does not contain an express provision to this effect. Neither the requirement that the documents falling within the requested category are “reasonably believed to exist” nor the requirement that the documents are “relevant and material to the outcome of the case” clearly excludes fishing expeditions”. It should be noted that these observations, though made with respect to the 1999 IBA Rules, are fully valid also with the respect to the 2010 version of the IBA Rules, which contains no material difference as far as the document production provisions are concerned.
most of the civil law countries or under EU law, as it has been recently reaffirmed by the Court of Justice of the European Union.\textsuperscript{20}

It is true that many provisions of the IBA Rules specifically address the possible inequality of treatment which could derive from the above differences in legal systems. Article 9.2(g) allows the arbitral tribunal to deny production of documents based on “considerations of procedural economy, proportionality, fairness and equality of the Parties that the Arbitral Tribunal determines to be compelling”. Article 9.3(c), dealing expressly with the legal privilege, invites the arbitral tribunal to take into account “the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen”. Article 9.3(e) also emphasizes “the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules” (emphasis added).

Nevertheless, in spite of any rule, inequalities of treatment may simply arise from the fact that parties coming from a civil law country may not be fully aware of the attorney-client privilege existing in countries such as the US and therefore might not timely protect themselves as a US counterpart can do by adopting at the very outset appropriate steps to take advantages from the privilege of in-house counsel.\textsuperscript{21}

Finally, it must be considered that the IBA Rules on document production contain no effective sanction for their violation. An arbitral tribunal does not have the powers which courts have, to force the production of a document requested, specifying the sanctions applicable in case of non-compliance with the production order. Article 9.5 of the IBA Rules only says that the arbitral tribunal, in case a document is not produced by the requested party without a satisfactory explanation for such failure, “may infer that such document would be adverse to the interests of that Party”. However, such an inference may be meaningful only with respect to a request for some specific document relating to a specific allegation, but in most cases it may difficult for the arbitral tribunal to determine which inference should be drawn.\textsuperscript{22} In addition, as it has been rightly observed,\textsuperscript{23} adverse inference can hardly be considered as an effective sanction for not complying with a document production order. In fact, arbitrators may hesitate to admit that the burden of proof be discharged by inference only and may still conclude that adverse inference cannot actually shift such burden.

In conclusion, it is questionable whether the IBA Rules on document production end up furthering an efficient and economical development of the arbitration proceedings. On the


\textsuperscript{23} H. Van Houtte, Adverse Inference in International Arbitration, in T. Giovannini and A. Mourre (eds), Written Evidence and Discovery in International Arbitration, New Issues and Tendencies, Dossier ICC Institute of World Business Law (ICC Publication N. 698, 2009), at 206.
contrary, they may produce inefficiencies, delays and unnecessary costs. Most arbitral tribunals may feel compelled to give reasons to justify a denial of a document production request under the IBA Rules, even though, normally, arbitrators do not have an obligation to give reasons for issuing or refusing a document production order. However, the most perverse effect of the IBA Rules on document production seems to me that they imply that document production is a regular part of an arbitration proceeding, rather than the exception.  

To further stress the point I am trying to make regarding overregulation, I will finally address an easy target, the IBA Guidelines on Party Representation in International Arbitration, dated 25 May 2013, which have already been much criticised. Considering the differences in the various deontological rules for arbitration, the purpose of such Guidelines was that of establishing some rules in order to level the playing field when it comes to the duties of counsel in international arbitrations.

Of course, these Guidelines are not mandatory and apply only with the agreement of the parties or when the arbitral tribunal wishes to rely upon them after consultation with the parties (Guideline 1). They cover a variety of issues, such as party representation (Guidelines 4-6), communications with arbitrators (Guidelines 7-8), submissions to the arbitral tribunal (Guidelines 9-11), information exchange and disclosure (Guidelines 12-17), witnesses and experts (Guidelines 18-25) and remedy for misconduct (Guideline 26).

The purpose of the Guidelines is, as and of itself, a legitimate one, save for the fact that they often end up suggesting rules that are either plainly unnecessary or unduly limiting the discretionary powers of arbitrators.

For example, in the area of remedies for counsel’s misconduct, Guideline 26(c) specifically contemplates that the arbitral tribunal may “consider the Party Representative’s Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount...

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24 See the comment by L. Shore, Three Evidentiary Problems in International Arbitration: Producing the Adverse Document, Listening to the Document that does not Speak for Itself, and Seeing the Witness though her Written Statement, in German Arbitration Journal SchiedsVZ, 2004, at 77: “under the 1999 IBA Rules it is taken as a given that internal documents are part of the expected production, if they fall within the requested category”. See also P. Hafer, The Provisions on the Discovery of Internal Documents in the IBA Rules of 1999, in Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in honor of Robert Briner, ICC Publishing, 2005, at 362: “For legitimate requests to produce documents, the desired result can generally be achieved without using the IBA Rules of 1999, but rather by applying the rules that have been used for many years in traditional international arbitration ... A traditional arbitral tribunal, which is not bound by any specific rules and which can only rely on the sound judgement of the arbitrators, is not less flexible but more flexible than an arbitral tribunal applying Article 3 of the IBA Rules of 1999”.


the Party Representative’s Misconduct leads the Tribunal to a different apportionment of costs”.

The Guidelines provide for additional measures that the arbitral tribunal can take as remedies for counsel’s misconduct. Guideline 26(a) establishes that the arbitral tribunal may “admonish the Party Representative”. Guideline 26(b) contemplates that the arbitral tribunal may “draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative”. Finally, Guideline 26(c) states that the arbitral tribunal may “take any other appropriate measure in order to preserve the fairness and integrity of the proceedings”.

All such remedies are aimed at preserving the integrity and fairness of the arbitral proceedings (Guideline 27(a)), but can be adopted by the arbitral tribunal only after giving the parties due notice and a reasonable opportunity to be heard (incipit of Guideline 26). This underlines one of the pitfalls of overregulation. Without the Guidelines, it was already established practice that, in cases of counsel’s misconduct, the arbitral tribunal could admonish counsel and draw adverse inferences from their behaviors. These remedies could be taken without any need for giving advance notice to the affected party or a reasonable opportunity to be heard. The above mentioned Guidelines, while not adding anything new to the arsenal of measures already previously available to arbitrators in cases of counsel’s misconduct, appear now to suggest that giving advance notice and right to be heard are necessary prerequisites for the adoption of such measures. The implications could be particularly burdensome with respect to Guideline 26(c), which would require arbitrators to state in their award, when allocating costs, how much of the costs are attributable to the counsel’s misconduct, an obligation that arbitrators do not have under current standards.

Other guidelines are simply repetitive of current practices. I refer particularly to Guideline 727, which prohibits ex parte communications without defining the notion of ex parte communication. Guideline 828 provides then a list of admissible contacts with the prospective party-nominated arbitrator. Provisions like these confirm my concern about overregulation. As a matter of fact, such provisions contain nothing different from the established practice and sometimes state the obvious, such as the provision under (c) of Guideline 8 which allows some kind of communications (aimed at determining the prospective presiding arbitrator’s

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27 “Unless agreed otherwise by the Parties, and subject to the exceptions below, a Party Representative should not engage in any Ex Parte Communications with an Arbitrator concerning the arbitration”.

28 “It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:

(a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.

(c) A Party Representative may, if the Parties are in agreement that such communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(d) While communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute”.

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expertize, experience, ability, availability, willingness and the existence of potential conflicts of interest) when the parties agree to them. In addition, this kind of communications is generally admitted without any need of an agreement between the parties.

It is worth mentioning also Guideline 10\(^{29}\), which concerns the counsel’s duty to correct false submission of fact to the arbitral tribunal. However, false submission of law is not addressed by the Guidelines, thus apparently condoned. In addition, such duty to correct is subject to the absence of considerations regarding the confidential or privileged nature of the false fact submission provided - a qualification that may appear questionable.

**Conclusion**

In the light of all these remarks, I cannot hide the feeling that some of the transnational procedural rules which are being issued constitute a step toward a bureaucratization of the international arbitration which is not really needed, particularly in an area where the discretionary powers of the arbitrators are universally recognized and accepted as a necessary tool for arbitrators.

Indeed, the flexibility of arbitration proceedings is notoriously one of the reasons that push the business community to elect arbitration instead of litigation as the privileged dispute settlement means. The procedural rules, on which I addressed my attention here, should simply reflect this need of flexibility – a desperate need, in fact, given that State courts are plunging into workload. One should wonder what happens to arbitration if this element of flexibility disappears under the threat of a major bureaucratization. We should in this connection consider that, even if procedural rules are simple recommendations, the arbitration practice continues to tell the step from a recommended practice and a practice which should be adopted, sometimes only by acquiescence, is often a small one. The risks of overregulation and bureaucratization are real.

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\(^{29}\)“In the event that a Party Representative learns that he or she previously made a false statement of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission”.