

President's Message

The sense and non-sense of “para-regulatory texts” in international arbitration

There are now a large number of arbitration rules applicable to various forms of arbitral proceedings, with or without the support of institutions, and revised at regular intervals. Despite the growing number of institutions, these rules seem increasingly to resemble each other. They form the regulatory core of international arbitration. Beside them, has emerged another type of texts, often described as “guidelines”, “notes” and even as “rules”. These are designed to provide guidance, information, advice and directives to parties, arbitrators and institutions on a range of matters, such as the taking of evidence, conflicts of interest, arbitrators’ interviews, the conduct of counsel, the expenses which an arbitrator may claim or the use of secretaries to the tribunal. They are what we could call the international arbitration “para-regulatory texts”.

The number of institutions, associations and other groups of varying qualifications which issue such texts is continuously growing; so are the subject matters with which they deal and the number of texts produced. While the relevance, authority and usefulness varies from one text to another, taken together they form a thicket of continuously growing density.

Occasionally, one or the other of these texts has given rise to controversies or to some critical examination, including by leading Swiss scholars;¹ but no systematic analysis of the phenomenon as such and its impact on the *practice* of international arbitration seems to have been undertaken yet.

ASA suggests opening a debate on the increasing number of para-regulatory texts in international arbitration and proposes to deal with the subject at its forthcoming annual meeting in Bern on 24 September 2010.

Our goal will be to examine critically some of the most widely known and used para-regulatory texts and consider their status and impact in arbitration. More generally we are interested in the increasing spread of these texts as a relatively new phenomenon, and in examining the frequency with which they are referred to or used; the mandate, qualification and experience

¹ E.g. Professor Hirsch on the ICC Note on the use of Secretaries; Professor Fouchard on the “*Directives*” of UNCITRAL; more generally Professor Lalive on “*La fureur réglementaire*”; and recently several eminent arbitrators on the ICC questionnaire regarding the arbitrators’ availability which has met both enthusiastic support and strong objections.

of their authors; the areas which have been covered and those which have escaped the attention of potential “regulators”.

The debate will hopefully provide some insight into the effect of these texts on the practice of international arbitration and allow us to assess whether the trend is to be discouraged or to be further developed; and, as the case may be, what directions should it take. Eventually, we could even decide to prepare guidelines for ... the preparation of guidelines in international arbitration!

Details on the conference can be found on the ASA website and we look forward to seeing you all in Bern.

Geneva, May 2010

MICHAEL E. SCHNEIDER
ASA PRESIDENT

SAVE THE DATE
ICCA 50th Anniversary Conference
“Arbitration the next 50 years”
Geneva, 19-21 May 2011