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The Sense and Non-sense of Guidelines, Rules and other Para-regulatory Texts in International Arbitration

Daniele Favalli

Editor

Association Suisse de l'Arbitrage
Schweiz. Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association

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would not be two inconsistent decisions at the same time in Switzerland, which was the only situation described by the Swiss Federal Court in connection with *res judicata* and public policy.[51] It is thus debatable whether the principle of *res judicata* as such should form part of public policy or only the existence of two conflicting court judgments or arbitral awards. In either case, we submit it should be possible to have a court review the arbitral tribunal's decision either for violation or public policy or, which in our view would be more convincing, incorrect refusal to exercise jurisdiction, i.e. Article 130(2)(b) PILA.

6. CONCLUSION

In Switzerland parties have occasionally tried to challenge arbitral awards on the basis of a PRT. Although, to date, the Swiss Federal Court has never directly applied a PRT, it repeatedly referred to the IBA Guidelines on the Conflict of Interests in International Arbitration when assessing the independence and impartiality of arbitrators. It held that they were a useful tool that could contribute to the unification of standards in international arbitration in the area of conflicts of interests, and it made clear that the question of a conflict of interest would always have to be decided on a case-by-case basis. But non-compliance with other PRTs will hardly ever be a ground for annulment. According to long-standing case law, the non-compliance with procedural rules agreed by the parties does not automatically result in the annulment of the award. This is a sound approach. The annulment of arbitral awards is, and should be, limited to grave violations of due process.

[51] DTF 127 III 279, 283 ("est contraire à l'ordre public qu'il existe, dans un ordre juridique déterminé, deux décisions judiciaires contradictoires sur la même action et entre les mêmes parties, qui sont également et simultanément exécutoires").

Chapter 8

What Remains to Be Done? Future Para-regulatory Text Projects

*Phillip Landolt**

1. INTRODUCTION

The answer to the question "What remains to be done in regard to future para-regulatory text projects" plainly presupposes an understanding of the term "para-regulatory texts". It also presupposes that para-regulatory texts can in principle deliver benefits which outweigh any detriment they bring. It would otherwise remain only to call for the abolishment of existing para-regulatory texts in international arbitration.

The literature does not seem to have paid much attention to defining the concept of para-regulatory texts, and to articulating the functional basis of the concept so defined. By consequence, this chapter will begin by examining what para-regulatory texts may be as a coherent legal concept. In this chapter it will be contended that one needs to understand the concept of "para-regulatory texts" in international arbitration upon an analogy to the term as used in its original context, which is public law, especially international but also domestic.

Situating para-regulatory texts thus will allow an identification of the burdens and benefits which they entail, and will facilitate assessment of para-regulatory texts. The conclusion here will be that there are some burdens, but these may be managed, and they are at all events outweighed by the benefits. Accordingly, it will be recommended that the first thing that remains to be done is to ensure that the detrimental elements of any para-regulatory texts are minimised. There will then be an assessment of existing para-regulatory texts upon the qualitative criteria identified.

Lastly, principles to determine relative priority for para-regulatory texts on new subject areas will be elucidated, and in application of these principles a number of new subject areas will be suggested.

* Partner, LANDOLT & KOCH (phillip@landoltandkoch.com; www.landoltandkoch.com).

2. THE CONCEPT OF PARA-REGULATORY TEXTS IN THEIR ORIGINAL CONTEXT

The native soil of the concept of para-regulatory texts is public municipal and international law.[1] In this context it refers to texts without coercive legal effectiveness or with imperfect legal effectiveness in their origin.[2,3] The principal cause of such imperfect legal effectiveness is that the authority which promulgated the para-regulatory text did not intend for it to have full legal effectiveness. A second cause is that the body which promulgated it did not itself have full power to create a text of full legal effectiveness. A third cause is that the text itself is somehow not capable of carrying full legal effectiveness, because it requires something that it cannot objectively achieve, because there is a problem discerning the content of the text, or because it confers such broad discretion upon the implementing authorities that it is not the text itself which is legally effective, but rather the decisions of the implementing authority. Lastly, the concept may include situations where imperfect legal effectiveness stems from properties not inherent in the promulgating body or in the text itself, but for example from problems with the implementing authorities, who may be unwilling or incapable of ensuring full legal effectiveness.[4]

[1] An answer to the question as to why issues of soft law arise centrally in public international law is provided by P. Weil, 77 (1983) *Am. J. Int'l L.* 413 at 413 – 414: "As everyone knows, the international normative system, given the specific structure of the society it is called on to govern, is less elaborate and more rudimentary than domestic legal orders [...] Some of its structural weaknesses are too familiar to require lengthy treatment here: not only the inadequacy of its sanction mechanisms, but also the mediocrity of many of its norms. In regard to certain points, international law is still too controversial for it effectively to govern the conduct of states. On yet other points, the norm has remained at the stage of abstract general standards on which only the – necessarily slow – development of international law can confer concrete substance and precise meaning. For some time, however, writers have been apt to point out a further weakness: alongside 'hard law,' made up of the norms creating precise legal rights and obligations, the normative system of international law comprises, they note, more and more norms whose substance is so vague, so uncompelling, that *A*'s obligation and *B*'s right all but elude the mind."

[2] G. Kaufmann-Kohler, "Soft Law in International Arbitration: Codification and Normativity" in (2010) *Journal of International Dispute Settlement* 1 at 2: "[...] 'soft law' norms are generally understood to be those that cannot be enforced through public force." *See also* the public international law sources and commentaries on the concept cited there by Kaufmann-Kohler at her footnotes 1 and 2.

[3] A distinction between original lack of effectiveness and the gaining of legal effectiveness over time through independent agency is drawn in section 3 below. According to this distinction, a para-regulatory text may start bereft of legal effectiveness but may well take on legal effectiveness subsequently in some degree, or otherwise increase in legal effectiveness.

[4] Professor W. Michael Reisman, for example, accepts such situations as within the concept of "soft law". See Professor Reisman's remarks at 374 of (1988) 82 *Am. Soc'y Int'l L. Proc.* 371.

3. THE PROBLEM OF PARA-REGULATORY TEXTS

The problem-set of para-regulatory texts in public law is classically the following.

First, there is the concern to know the extent to which a norm is actually effective. The existence of the notion of para-regulatory status logically entails uncertainty as to the degree of bindingness of norms.

Secondly, there is the concern that para-regulatory texts increase the volume of potential norms, with the result that legal subjects are put to greater time and expense in ascertaining their legal position.

Thirdly, there is concern that para-regulatory texts may be accorded legal effects without proper legitimacy, for example where an official body which promulgated them did not intend that they should have such legal effects, or where they originate with a body without authority to create instruments of legal effects or full legal effects, since the democratic and participative processes of legislation are deficient or absent in such cases.

Lastly, there is concern that a para-regulatory text may gain in legal effect over time. This effectiveness-accumulation mechanism can operate variously, but factors favouring it are deference to the perceived authority of those sponsoring the para-regulatory text, deference to the authority of the wording of a para-regulatory text, convenience of reference to the para-regulatory text as a handy statement of the law or even as a ready source of norms, and the perceived authority of the para-regulatory text due to its familiarity and the frequent past usage of it. The principal concern here is that of the para-regulatory text being accorded legal effects by legal subjects in excess of its intrinsic authority.[5] The concern is therefore not just one of the qualities of para-regulatory norms, but also that para-regulatory texts will act as self-fulfilling predictions of the state of the law.

This dynamic dimension of legal effectiveness of para-regulatory texts also exacerbates the first three concerns. It increases uncertainty about what is and is not binding, and to what degree, at any particular time. Its general tendency also favours the multiplication of legal

[5] A similar idea is expressed by P. A. Karrer, "Law, Para-Regulatory Texts and People in International Arbitration: Predictability or Fureur Règlementaire?" in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, S. M. Kröll, L. A. Mistelis *et al.* eds. (Alphen aan den Rijn: Kluwer Law International, 2011) 291 at 298: "Many para-regulatory texts seek to further unification, but many unify even if this is not their goal. In fact, *any text, once it is written, makes borrowing easy* and leads to unexpected unification of the law." (emphasis supplied) *See* section 8.5 below ("Contribution to development of international arbitration law, practice and knowledge") for the view that the harmonisation effect of para-regulatory texts is actually a benefit.

norms, thus swelling the regulatory mass. It also tends to confer fuller legal effects on para-regulatory norms than is justified by reference to participation in the creation of the para-regulatory text.

4. WHAT ARE PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION?

On the functional analogy to paralegal texts in public international and public municipal law, para-regulatory texts in international arbitration must be texts which are issued seeking[6] to provide norms for application in an international arbitration, but which for one reason or another raise the same or similar concerns of imperfect legal effectiveness.

Since, as will be seen in section 6 below, the classic problems of para-regulatory texts arise in arbitration essentially in respect of decisions by the arbitrators to adopt norms for effective application, the only coherent conception of para-regulatory texts in the arbitration context is any text which has been issued with a view to furnishing norms *for the arbitral tribunal* to adopt and apply in the arbitration.[7]

Thus it is necessary that a para-regulatory text be prescriptive to some degree. Its purpose or primary purpose must be to guide arbitrators (and incidentally the parties) in decision-making in an arbitration. Accordingly, a text of guidelines or other recommendations can constitute a para-regulatory text. It may not, however, be written for purely academic purposes (providing information), even if invoked in arbitrators' decision-making processes.

A para-regulatory text may purport to state the law or legal practice. It may purport to prescribe a legal position where there is a gap in the law or it is unsettled. It may even purport to improve on the state of the law or legal practice, or otherwise depart from them.

Moreover, it must *formulate* norms, on the basis that this is what regulatory instruments do, and para-regulatory ones should be conceived of in the same way.[8]

[6] For the necessity of *intention* to provide guidance, see, in the context of public international law, J. Gold, "Strengthening the Soft International Law of Exchange Arrangements" in (1983) 77 *Am. J. Int'l L.* 443 at 443: "[...] the essential ingredient of soft law is the expectation that the states accepting these instruments will take their content seriously and will give them some measure of respect."

[7] For this reason model arbitration clauses do not act as para-regulatory texts – they are never adopted *by arbitral tribunals*.

[8] It may be noted that the concept of "soft law" is broader than that of para-regulatory texts. Soft law, as understood in Professor Kaufmann-Kohler's conceptually elucidating article (*op. cit.* in note 3) would appear to include para-regulatory norms which are not formulated as a set of rules, and indeed to contemplate any rule of any legal source however expressed which may be "perceived to be binding" obligations arising by operation of law without legal effects or with limited legal effects.

It may occur that the purpose or primary purpose of a learned argument or information on a topic may be to guide arbitrators in deciding on matters in an arbitration. But neither arguments nor information will ordinarily formulate rules. Thus the concept does not include learned arguments presenting conclusions on a matter of arbitration law or practice, or even a decision, such as an order or award, when used as guidance in an arbitration. It also does not include information on a topic, even if it purports to provide all of the relevant information on the topic (and is therefore potentially useful in making an arbitration-practice determination).

There is not just an equivalence reason for this formulation requirement but also a functional one. Where a text formulates norms its potential legal force will be different from texts which provide merely argument and information. First, words are generally accorded privileged and often paramount influence in systems of legal interpretation. Secondly, the legal paternity of the text matters more when it purports to formulate rules. Argument and information, by contrast, stand and fall on their own criteria of cogency. Thirdly, formulated texts are easier to identify and adopt for application. Vitally, formulated texts are especially amenable of adoption in advance of issues arising.

Para-regulatory texts can, however, deal comprehensively with a discrete area of law, or not. They can, for example, merely formulate and prescribe the application of a particular norm or particular grouping of norms without conscious subject-matter exhaustion.

Para-regulatory texts can be substantive[9] or procedural, and indeed can be both. The subject matter of para-regulatory texts is in practice principally procedural—since this is usually the big void. Also, one cannot conceive of arbitrators adopting a para-regulatory text on substance at the outset of an arbitration, that is, prior to full briefing from the parties. By consequence, the privileged occasion of application of para-regulatory texts does not really arise in respect of matters of substance. Moreover, para-regulatory text writers may also be unjustifiably reluctant to appear to encroach on arbitrators' substantive decision-making prerogatives. It is, however, important to note that, given the acknowledged vagaries in choice of law by arbitrators in the absence of party choice, the substantive law chosen by arbitrators will have operated very much like a para-regulatory text.

[9] A classic example of a substantive para-regulatory text is the International Law Commission's 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.

Interestingly, sets of arbitration rules, for example the ICC Rules, the LCIA Rules, the Swiss Rules, and the UNCITRAL Rules, are not generally thought of as para-regulatory texts. They are indeed almost never adopted by the arbitral tribunal. It is generally the parties who adopt them, for example in their arbitration clause, in advance of any dispute arising. When that occurs, their legal effectiveness is largely set. Moreover, arbitral rules generally include rules on the composition of the arbitral tribunal, and in this they generally foresee a role for an institution. So any attempt by an *ad hoc* arbitral tribunal once constituted to adopt a set of arbitral rules would risk calling into question the proper composition of the tribunal, and the institution contemplated under the rules may refuse to administer the arbitration.

5. PARA-REGULATORY TEXTS IN THE PRIVATE LAW CONTEXT

Legal effectiveness in private law presents the significant distinction that some of it (indeed, as regards private substantive law, most of it), proceeds from "regulation" adopted by the parties themselves, and is not directly imposed from official sources. States do of course impose legal consequences effectuating private agreement. They also do regulate directly in private matters, for example, to ensure the application of rules safeguarding important state interests, and the availability of rules in the absence of party stipulation, and to protect weaker parties. But, in principle, in respect of private law it is the parties themselves who dictate the regulation that will apply to their relation.

Once private matters come before the courts, however, the scope for private agreement on procedural matters is markedly constricted, given the public interests engaged in litigation before public courts. Arbitration stands, or should stand, in contrast to this such that the private law operation of para-regulatory texts as described in this section continues to operate.

Where private agreement is the direct source of legal effectiveness most elements of the classic problem-set of para-regulatory norms do not arise.

First, there is far less incidence of the question arising whether norms originating from official sources have legal effectiveness. Correspondingly, there ought also to be less concern about non-official norms acquiring legal effectiveness over time.

There ought also to be virtually no concern, or not the same concern, about legal subjects not being able to take cognisance of an

overgrown mass of norms. In public law, where norms of potential legal effectiveness are concerned, legal subjects fail to abide by them at their own *peril*, in accordance with the almost universally accepted principle that ignorance of the law is no excuse.[10] In private legal ordering, para-regulatory texts are not generally candidates for legal effects without the parties' having adopted them by agreement. Therefore the parties can generally ignore them, although they may feel that they may gain an *advantage* in invoking a para-regulatory text.

Again, in private legal ordering there ought to be little concern about para-regulatory texts being accorded legal effects without legitimacy, since the parties' agreement to them acts as gatekeeper to their having legal effects. This consent obviates most if not all concerns about legitimacy.

Lastly, the various factors which tend to elevate para-regulatory norms to a status beyond that which they properly should inhabit in terms of legal effects certainly operate in the private sphere. But again, unless the parties themselves agree to the application of para-regulatory texts, they are generally of no effect. So, at the very worst, the parties may consent to the application of a para-regulatory text on their own erroneously inflated view of its authority, but not on anyone else's erroneous view.

In fact, in private law sources of norms are difficult to distinguish functionally from mere argument and information on how to deal with whatever issue is at hand. All are apt to influence parties in the regulation which they ordain for themselves by agreement. One surely would not entertain the notion of proscribing argument and information on private law matters!

6. THE PROBLEM OF PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION

6.1. General

There are of course state to state arbitrations. There are also public law aspects of international arbitration engaging private interests, for example international conventions, such as the 1958 New York Convention, regulating the behaviour of states. There is also the application of substantive public international law in bilateral investment treaty arbitrations, and the application of mandatory norms. This all extends from public law. Where, however, as is

[10] As an unerring badge of such universality, the notion has attracted a Latin proverb, *ignorantia iuris nocet*.

overwhelmingly the case, only private interests are the subject of claims in an arbitration, most norms, both substantive and procedural, which are applied, will proceed from private law.

One may therefore be tempted to conclude that, as with other private legal ordering, the classic problems of para-regulatory norms do not arise in international arbitration. Yet upon closer examination it emerges that this is in fact *not* the case. The crucial differentiating factor is the role of the arbitral tribunal in the identification and creation of norms having legal effect in the arbitration.

Like legal norms emanating from the state, legal norms which become *effective* due to the arbitral tribunal's having chosen them are not agreed to by the parties, but are rather every bit as imposed upon the parties as norms sponsored by states are. Once the parties have exercised whatever rights of involvement they have in the composition of their arbitration tribunal, the parties individually have virtually no control over what the arbitral tribunal does. In the antagonistic context in which the parties invariably find themselves in arbitration, their opportunity to control the arbitral tribunal by their joint agreement is also trenchantly circumscribed in practice.

6.2. Uncertain Legal Effectiveness

Features of para-regulatory texts mentioned in section 4 above ("There is not just an equivalence reason for this formulation requirement ...") particularly recommend them for application by arbitrators. Yet para-regulatory texts may be unclear as to the degree of prescriptivity they are intended to possess when applied. Additionally, arbitrators themselves are entirely free as to the degree of legal force they ascribe to a para-regulatory text in adopting it. So there is concern about what potential para-regulatory texts the tribunal may draw inspiration from and decide to elevate to legal effectiveness and in what degree.

6.3. Volume of Para-regulatory Texts

Arbitrators are free to be promiscuous in their search for guidance in the establishing of legally effective norms, especially in procedural matters, but in practice also in substantive. There is also therefore concern that the volume of para-regulatory texts in international arbitration could become a problem. This concern is heightened by modern arbitration's increasing consciousness about costs and duration.

6.4. Legitimacy of Para-regulatory Texts

Para-regulatory texts in international arbitration do not generally enjoy the legitimacy of having been adopted by a representative legislature. The fact that most para-regulatory texts are issued by private bodies does raise a question about the legitimacy of para-regulatory texts. Indeed, private bodies are less apt to represent the broad range of interests of users than public bodies are. For example, the view may be taken that certain para-regulatory texts function as a fifth column pursuing the Americanisation of international arbitration. Worse, certain private bodies may be associated with certain policies of unequal advantage to various constituencies of users.

6.5. Excessive Deference to Para-regulatory Texts

There is a problem where in regard to the various features of a para-regulatory text an arbitral tribunal mistakenly ascribes to it greater authority than it is deserving of, that is, instead of judging the para-regulatory norm on its intrinsic legal merits and appropriateness for application in the specific case. Authority in this sense will generally mean a misplaced acceptance of the accuracy of the contents of the para-regulatory norm as a statement of prevailing views of practice or law, but can be any of a number of other bases of presumed appropriateness for application in a particular arbitration.

6.6. Other Concerns arising with Para-regulatory Texts in Arbitration

In arbitration, moreover, there is a set of concerns further to and different from those ensuing from para-regulatory texts in public law. Unlike with the usual set of concerns, certain of these other concerns may also arise where it is the parties who activate a para-regulatory text by their agreement that it will apply in the arbitration.[11]

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[11] *See* G. Kaufmann-Kohler, *op. cit.* in note 3 at 6, who identifies and addresses the difficult question of the eligibility for soft law status of instruments which may be adopted into force by the parties' agreement. Professor Kaufmann-Kohler affirms that once the application of an instrument (arbitration rules in her example) is agreed to by the parties it is no longer soft law. Kaufmann-Kohler states that before arbitration rules are agreed to by the parties they are soft law: "Albeit unenforceable for as long as they are not incorporated into a contract, these rules may nonetheless have an impact on other players, including other institutions, legislators and courts. Therefore, institutional arbitration rules undoubtedly are soft law [...]". One might, however, question whether effects or lack of effects other than those directly upon legal subjects may be relevant to status as soft law (seen also in Kaufmann-Kohler's treatment of the UNCITRAL Model

First, there is the concern that the availability and indeed the abundance of para-regulatory texts will induce arbitrators and indeed parties to adopt too tight a procedural regulation scheme with the result that the flexibility and informality of arbitration procedures are constricted.[12] Flexibility and informality are vital features in international arbitration procedures. Every case presents individual characteristics. There is a cost in needless complexity which formality often entails. [13]

Secondly, there is the concern that an overabundance of legal texts would confuse arbitrators as to which rule to follow. For example, if another authoritative set of guidelines on conflicts of interest were put into circulation, there may be difficulty reconciling them with the IBA guidelines, all the more so since on this set of topics arbitration rules usually and arbitration law systems always have their own requirements. Since the parties generally have the power to render rules applicable in an arbitration by their agreement, there is also concern about the parties (and their counsel) being confused by a surfeit of legal texts.

Thirdly, there is concern that para-regulatory texts will stunt the growth of arbitration law. Arbitrators and parties, so the thinking goes, will discontinue reflecting on underlying principles, and rotely reach for para-regulatory texts as conveniently accessible norms.

Law as soft law at 9 - 11). Rather, it is the fact that a text without full legal effect may be given effect or greater effect by the action of the arbitral tribunal which is the criterion of para-regulatory status in international arbitration. It is a para-regulatory text before this action by the arbitral tribunal, and even after, insofar as the arbitral tribunal maintains sufficiently broad discretion as to how it will treat the text.

12 *See* Kaufmann-Kohler, *op. cit.* in note 3 at 16.

13 *See* P. Lalive, "De la Fureur règlementaire" in (1994) 2 *ASA Bulletin* 213 at 219: "Is it not time to maintain or to regain a sense of proportion and of priorities, and to react against both the public and the private mania to seek to regulate everything minutely? As far as arbitration is concerned, this mania is a source of new and useless complications which in turn encourage reactions in favour of a return to a simpler day. [...]" ("N'est-il pas temps de garder, ou de retrouver le sens des proportions et des priorités, et de réagir aussi bien contre la manie publique que contre la manie privée de vouloir tout réglementer jusque dans le detail? En matière d'arbitrage, elle est source de complications nouvelles et inutiles, qui suscitent à leur tour des reactions en faveur d'un retour à la simplicité [...]".)

7. ASSESSMENT OF CONCERNS ABOUT PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION

7.1. Uncertainty about Legal Effectiveness

7.1.1. Assessment of the problem

It is true that there may be legal uncertainty about whether an arbitral tribunal may give effect to a para-regulatory norm, and about the precise legal quality of this effect.

It is, however, important not to fault para-regulatory texts for the pervasive concern of lack of legal certainty in international arbitration.[14] Arbitral tribunals are virtually unconstrained in drawing guidance from any source, of whatever original legal effectiveness, and they are virtually unconfined in how they treat that guidance. Often in matters of substance,[15] and routinely in procedural matters, arbitral tribunals search for relevant norms beyond the materials which the parties present to them. Arbitrators' greater activism in relation to procedure operates perhaps on the analogy to judges' powers to control their own procedure.

Moreover, in the private law context, including in relation to arbitration—other things being equal—the problem of uncertainty of legal effectiveness of norms is less severe than in the public law context. In the private law context norms which may potentially be given effects do not carry with them the weighty consequences of violation which many public law norms carry, such as fines, future exclusion from certain economic activities, and, in extreme cases, imprisonment.

At all events, para-regulatory texts, as the term is understood here, i.e. texts actually formulating norms, are a pretty finite corpus. It is currently no difficult exercise to identify the relevant para-regulatory texts and to forecast the prospects of their being applied by arbitrators.

Para-regulatory texts may actually operate as a partial antidote to legal uncertainty in international arbitration. Even before they are adopted by the tribunal they present a visible option with some likelihood of adoption. Moreover, their handiness encourages adoption prior to the arising of legal questions, thus eliminating or at least reducing legal certainty as to the norms applicable to these questions.

14 Some legal uncertainty is the necessary cost of flexibility. *See* W. W. Park, *Arbitration's Protean Nature* in *Arbitration of International Business Disputes* 457, 463 (Oxford: Oxford University Press, 2006).

15 *See* Ph. Landolt, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence" in 2012 28(2) *Arbitration International* 173.

Moreover, the parties are able at all times to reduce legal certainty by themselves adopting rules to govern their arbitration. This will have the usual effect of pre-empting the tribunal from adopting rules at variance whether in the form of a para-regulatory text or otherwise.

7.1.2. Recommendations in alleviation of the problem

What concerns there are here are largely amenable of alleviation. In particular, para-regulatory texts should be explicit about the degree of legal effectiveness they are intended to have if adopted for use in an arbitration. Para-regulatory texts should explicitly state their intended subject-matter scope and whether or not they are intended to be an exhaustive treatment of that scope, and other limits in their intended application. Legal certainty is best served if para-regulatory texts are an exhaustive treatment of their respective subject-matter. It is also advisable that para-regulatory texts indicate the reasoning in support of the norms which they formulate. But para-regulatory texts should clearly indicate the norms they are formulating, and in particular take care that there is no confusion between the text of norms, and the reasoning in support of them. They should be dated, and easily accessible.

When adopting them, arbitrators should also expressly indicate what degree of legal effectiveness they will have in the arbitration. Moreover, arbitrators should ensure that any para-regulatory texts which they give force to are specifically so designated as early as possible in the arbitration and they should at that time expressly exclude the adoption of any other para-regulatory texts at a later stage in the arbitration unless the parties agree otherwise. It is also open to the parties to reduce uncertainty by agreeing to the application of norms.

7.2. Volume of Para-regulatory Texts

7.2.1. Assessment of the problem

When one surveys the texts which purport to formulate rules for arbitrators (or parties) to adopt in an arbitration, one concludes that in fact the current volume is not at all unmanageable. Moreover, this information age brings not only the profusion of information, but also the tools with which to deal with information, such as increased accessibility, and electronic categorising and searching functions.

7.2.2. Recommendations in alleviation of the problem

Para-regulatory texts should be devised such as to minimise what concerns there are here. They should explicitly state their intended material scope and other limits of application so that arbitrators can know immediately whether they may be relevant and not waste time and money making this determination. Moreover, they should also provide clear information about their authors' credentials and specific expertise, and detail the process by which they were developed and adopted. They should be dated, and easily accessible.

Arbitrators should take the same action to counter these concerns as indicated in relation to concerns about uncertainty of legal effectiveness in section 7.1.2 above.

7.3. Legitimacy of Para-regulatory Texts

7.3.1. Assessment of the problem

Parties are not generally deprived of all participation in the process by which a para-regulatory text may be adopted by the arbitral tribunal. One may, rather, realistically contend that a party will often have exercised at least the degree of participation in the composition of their arbitral tribunal as any individual elector will have exercised in the composition of her legislature. Moreover, there is no participation in the creation of foreign public norms which will often apply to legal subjects. So judging by the usual standards of participation in rule making, there is little to criticise by way of illegitimacy when an arbitral tribunal applies a para-regulatory text.

More importantly perhaps, an arbitral tribunal will rarely confer legal effects upon a text in the arbitration without first consulting the parties and if the tribunal fails to do so, there may be an effective challenge to this decision.

So from this point of view, the third concern identified above, about the legitimacy of para-regulatory texts, is of less severity than in the public law context.[16]

In addition, even if the position advocated in a para-regulatory text is objectively wrong, there is benefit to the parties that there be *some rules* which may credibly be applied to regulate relations between the parties.[17]

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[16] *See also* G. Kaufmann-Kohler, *op. cit.* in note 3 at 16 - 17.

[17] *See* W. W. Park, *op. cit.* in note 16 at 457 quoting US Supreme Court Justice Louis Brandeis in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393, 447 (1932) as follows: "In

7.3.2. Recommendations in alleviation of the problem

To minimise problems of legitimacy, para-regulatory texts should carefully and explicitly note the composition, expertise and affiliations of those deciding upon the text, as well as the process by which the text was adopted, identifying and detailing in particular any consultation and testing process. This composition and consultation should be representative of all constituencies who may be affected by the para-regulatory text.

The arbitrators should always ensure that they consult with the parties about the para-regulatory texts which they propose to give legal effect to, and seek their agreement on such application.

The parties should take the initiative to cause the adoption of any para-regulatory text which they feel it useful to apply in their arbitration.

7.4. Excessive Deference

7.4.1. Assessment of the problem

Experienced arbitrators are unlikely to fall prey to ascribing excessive authority to para-regulatory texts. The danger of excessive deference to para-regulatory texts would appear to be largely confined to inexperienced arbitrators. An inexperienced arbitrator may well be impressed by the credentials of those who have adopted para-regulatory norms. He may also be impressed by the wording of a para-regulatory norm. Moreover, she may be persuaded by assertions that the para-regulatory norm is widely used to adopt it for use in an arbitration. This may operate as a substitute for an assessment of the contents of a para-regulatory norm on their merits, and the appropriateness of the para-regulatory norm in the particular case.

7.4.2. Recommendations in alleviation of the problem

The remedy for this real set of problems is to ensure the excellence of the paternity of para-regulatory norms, and, as applicable, the excellence of their contents and formulation as a statement of relevant law. The drafters should be expressly identified in the para-regulatory text, along with their expertise and affiliations. Para-regulatory texts should be dated, easily accessible, and there should be a forum for

most matters it is more important that the applicable rule of law be settled than that it be settled right."

public comment on them, also accessible to be viewed by potential users. A mechanism should be provided for to ensure that the para-regulatory text is reviewed periodically to ensure it moves with the times, and this mechanism should be expressly identified in the para-regulatory text. The para-regulatory text should include a discrete section providing the reasoning behind its formulations of legal rules.

Arbitrators and parties using para-regulatory texts should be ever mindful that the norms formulated are subject to and limited by the reasons behind them, and that if in their arbitration the reasons do not obtain then the particular stipulation in the para-regulatory norm does not apply, or applies only with modification.

7.5. Inflexibility and Excessive Formality

7.5.1. Assessment of the problem

The danger of incursion into procedural flexibility in arbitration is much exaggerated.[18] Flexibility is not an absolute value, and indeed it represents a trade-off against the value of legal certainty, which will be discussed in section 8.1 below.

Concerns about flexibility in arbitration are largely a legacy of a day when arbitration was ruled by legendary *grands hommes*,[19] the authority of whose procedural decisions and arbitration awards derived as much from the authority of their persons as from anything else.

From that day of government of men not laws, arbitration has evolved into a more technical institution.[20] Today the operation of

[18] *See contra*, P. Lalive, *op. cit.* in note 15 at 219. The central thrust of this article appears to be that para-regulatory texts undermine the flexibility and diversity crucial to arbitration.

[19] *See* Th. Schultz and R. Kovacs, "The Rise of a Third Generation of Arbitrators?" in (2012) 28 *Arbitration International* 161 at 162, commenting on *Dealing in Virtue* by Dezalay and Garth: "The main result of their research was the identification of two quite different generations of arbitrators. The first they called the 'Grand Old Men' [...]. They represented the past generation. They were people who had risen to the top of their national legal professions, but had not specialized in the field of arbitration; men whose legal and social aura made them credible arbitrators. [...] The second generation, which prevailed at the time of Dezalay and Garth's study, were assigned the name of 'Technocrats' by the authors. [...] Successful arbitrators of that generation typically acquired their credentials through activities in the field of international arbitration. They usually had a career almost entirely dedicated to arbitration. In 1996, the Dezalay and Garth study suggested that the principal quality, almost necessary and sufficient in terms of logic, required to be a successful arbitrator was a great command of the technicalities of arbitration. [...] It took a proper technician to master arbitration proceedings."

[20] W. W. Park, *op. cit.* in note 17 above at 463.

objective rules of procedure, preferably identifiable by the parties before the questions they are to regulate arise, has increased as a value vis-à-vis the value of flexibility.

Para-regulatory texts in arbitration are generally chosen only once the dispute has arisen, and therefore there is much more visibility about what procedures fit the concrete situation than there was at the contracting stage. At the dispute stage, the scope of necessary flexibility is generally quite modest.

Moreover, informality in days past was often a synonym for an unconscious or perhaps even conscious unwillingness to let the parties know their rights. Seen from the vantage point of the present day, the procedural void that was tolerated in the past, and arbitrators' refusal to issue procedural rules in advance, looks suspiciously self-serving, calculated to maintain the aura of the *grands hommes* as the embodiment of justice.

This lamentable condition was reminiscent of the primitive state of western legal development prior to 304 BC.[21] Times have changed. This is no age of servile deference to authority. It suffices to ride the train at school-arrival time in Geneva to satisfy oneself, moreover, that, if anything, this social reality is intensifying.

7.5.2. Recommendations in alleviation of the problem

Nonetheless, para-regulatory norms should be careful not to lay down unduly rigid and procrustean requirements. It is crucial that para-regulatory texts build in flexibility as to the application of their rules, such as identification of exceptions to the rules. Where necessary, the tribunal may adopt them as guidelines, but clearly this is to pay in

[21] Roman legend has it that prior to 304 BC only the pontifices were privy to the technical rules of legal procedure of Roman law (*legis actiones*) which they were using to rule on disputes. In that year the law's Prometheus, Gnaeus Flavius, a scribe to Appius Claudius Caecus, great patrician and pontifex, stole and published these rules, thereby first making them known to legal subjects, a great leap forward in law if ever there was one. See for example, the Digest of Justinian, D.1.2.6-7; *The Digest of Justinian*, vol. I, revised English translation edit., ed. and trans. A. Watson (Philadelphia: University of Pennsylvania Press, 1988): "[...] once the statute law of the Twelve Tables was passed, the *jus civile* started to emerge from them, and the *legis actiones* were put together from the same source. In relation to all these statutes, however, knowledge of their authoritative interpretation and conduct of the actions at law belonged to the College of Priests, one of whom was appointed each year to preside over private matters. The people followed this practice for nearly a hundred years. 7. Thereafter, when Appius Claudius had written out these actions-at-law and brought them back into a common form, his clerk Gnaeus Flavius, the son of a freedman, pirated the book and passed it over to the people at large. This service so ingratiated him with the citizenry that he became a tribune of the *plebs*, a senator and a curule aedile. [...]".

opacity what is gained in flexibility and informality. Moreover, even if a rule in a para-regulatory text appears to prescribe certain treatment, this should not prevent arbitrators and parties from finding reason not to follow it. As ever in the law, where the reason behind the law does not obtain, the law itself does not even claim to apply.[22]

7.6. Confusion

7.6.1. Assessment of the problem

It is true that it may be difficult to identify which para-regulatory text to follow in an arbitration. Many arbitrators do not have a background in arbitration law, and some may even be technical experts or confidantes of the parties and have no legal background.

7.6.2. Recommendations in alleviation of the problem

Para-regulatory texts need to be clear about their authors, their scope of application, and the reasons for their application. They should also preferably deal exhaustively with the entirety of a discrete area of law.

7.7. Ossification/Stereotyping

7.7.1. Assessment of the problem

Concerns have lastly been expressed that the excessive presence of para-regulatory norms would engender an ossification or stereotyping of the law, preventing or stunting its further development.

But there is little danger here. In arbitration there is a healthy interplay of adversarial interests which will test and try para-regulatory texts and the ideas behind them. The contributions to international arbitration are many and various, from all parts of the globe. Largely freed of state control, international arbitration is a free market of ideas which fears little any attempts to stifle it.

A variation on the ossification concern of para-regulatory texts is the fear that the prevalent use of para-regulatory norms may result in the atrophying of arbitrators' ability to reason from first principles.[23]

[22] *Cessante ratione legis cessat et ipsa lex.*

[23] This seems to be among the concerns with para-regulatory texts animating M. E. Schneider, "The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and other Methods intended to help International Arbitration

There will always be forceful arguments about the need for an historical and integrated understanding of the law and its sources. It seems, however, certain that the advantages of the succinct expression of an apparatus of legal norms which para-regulatory texts promise will prove to be of continuing comparative attractiveness in the modern day, with its explosion of information, and fierce concern for efficiency.[24]

7.7.2. Recommendations in alleviation of the problem

Little change if any is needed here. International arbitration is an admirable free market of ideas where opinions from all areas of the globe and representative of all interests may fairly contend. Individual arbitrators have every incentive not to rest upon their laurels. Parties scrutinise their every move, and this is, as has been noted, not an age of supine deference to authority.

8. BENEFITS OF PARA-REGULATORY TEXTS

8.1. Legal Certainty

It is quite obvious that para-regulatory texts serve the vital cause of legal predictability in international arbitration. Amplifying the otherwise sparse *Normendichte* in international arbitration is para-regulatory texts' most valuable office.

Crucially, para-regulatory texts offer a formulated set of norms especially suitable for adoption at the outset of the arbitration procedure, at the critical point where sufficient visibility of the material features of the particular dispute has become available.

Without para-regulatory norms, arbitration is racked by uncertainty. Procedurally, only a bare structure of requirements is ever given any legal enforcement. Substantively, there is no review of legal error (except on public policy matters), so arbitrators can virtually do what they want.

Practitioners to avoid the Need for Independent Thinking and to promote the Transformation of Errors into 'Best Practices'" in *Liber amicorum Serge Lazareff*, L. Lévy and Y. Derains, eds. (Paris: Editions Pedone, 2011) 563. See in particular page 565: "[...] the potential user should have some indication how the proposed guidelines provide assistance in the avoidance of independent thinking." and page 567: "When this happy moment is reached, the international arbitration community need not think any more."

[24] In fact, even in the early 19th century when this same debate erupted in Germany (known as the *Kodifikationsstreit*) it was the codification movement, championed by A. F. J. Thibaut (see *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*) which won the day over the position staked out quixotically by F. C. von Savigny (see *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*), seeking to preserve the integrity of the law and the perpetuation of its original sources.

It is also worth mentioning here that para-regulatory texts in arbitration can be given the degree of legal effectiveness which is appropriate to the particular situation. They can be adopted at any stage in the arbitration. They can be adopted as guidelines, or rules, or even as a consideration. They can be adopted with alteration in view of specific circumstances. They are "soft law" in a more positive sense, frequently overlooked, that they may be moulded for use in the particular circumstances with a view not only to substantive correctness but also to the optimal balance between flexibility and legal certainty.

8.2. Avoidance of Appearance of Arbitrator Bias

Arbitrator bias is the Achilles heel of international arbitration. Arbitrators are not as controlled by objective rules as judges are. Compared to judges, arbitrators generally possess vastly greater discretion in matters of substance and procedure. Yet the fact that they and those associated with them are generally active in other relevant economic activities, and the fact that parties generally have an influence in the selection of arbitrators, raise the possibility of bias. These two factors do not obtain in regard to judges.

The adoption of a rule by arbitrators prior to the arising of any question it is to be used to determine avoids suspicions of arbitrator bias. Where arbitrators identify and inform the parties of the relevant rule only once the question has arisen, the veil of ignorance as to which party will suffer by it and which will benefit is rent. Since para-regulatory texts are the tool *par excellence* for adopting rules prior to questions arising in an arbitration, they tend to serve the avoidance of the perception of arbitrator bias.

8.3. Efficiency

The availability of para-regulatory texts abridges the work of parties and the arbitral tribunal, making arbitration quicker and cheaper.[25] They shorten research. Always and increasingly one observes that the law is long, and life is short.[26] Even as guidelines, this goal is served by the restriction in the range of arguable outcomes. Everybody knows that the situation where the most time is spent

[25] *See* P. A. Karrer, *op. cit.* in note 4 above at 293: "Only 20 years ago, in many areas of the world, few had access to decent libraries. The internet changed this completely, as those involved in the Vis Moot could observe. Now everyone has easy access to a plethora of various texts. All supposed to help us with in our search of the law. There is now an embarras de richesses."

[26] *Ius longum vita brevis.*

haggling over a particular approach is not where counsel are experienced, but where counsel are not.

8.4. More Varied Participation in Arbitration

Para-regulatory texts open up counsel and arbitrator work to a wider community of practitioners. It is chiefly the uncertainty of arbitration practice which keeps non-arbitration specialists out. Para-regulatory texts reduce this uncertainty, and therefore reduce the barriers to entry. The increase in supply will drive down costs of arbitration. Practitioners from legal systems and countries where arbitration is not a traditional specialty will be able to involve themselves as counsel and arbitrators. Perspectives will be enriched, and the authority of arbitration and arbitration decision-making will be enhanced.

8.5. Contribution to Development of International Arbitration Law, Practice and Knowledge

Quite the opposite of ossifying arbitration law, practice and knowledge, para-regulatory norms are actually catalysts for debate and revisionary thinking. Once a body has committed a view of arbitration practice to the solemnity and visibility of a para-regulatory text, this acts as a lightening rod attracting comment and criticism. The IBA Evidence Rules, for instance, despite their manifest virtues, have been the subject of the most intense scrutiny and constructive criticism, which all has worked for the betterment of international arbitration.

Para-regulatory texts themselves often constitute a statement of excellence in law or practice. For example, they may provide a succinct and accurate exposition of the law or legal practice. Or they may identify and formulate a statement of the law or legal practice which clarifies the law or practice, or even which represents an improvement on law or legal practice. Where a sufficiently meritorious and representative group of practitioners engages in the process of creating a para-regulatory text there is every prospect of the result being a most useful contribution to international arbitration.

8.6. Promotion of Regularity of Arbitration Procedures

Para-regulatory texts favour regularity of arbitration procedures, and the establishment of uniform standards. In turn this delivers the advantage of assurance of formal equality, of like cases being treated alike. A further advantage is that if a subsequent tribunal is satisfied of the regularity of a former arbitral tribunal's procedures, it will be more apt to follow that former arbitration tribunal's award. Again, this favours like cases being treated alike. It also favours the development of the substantive law as arbitration awards are more readily susceptible of treatment as precedents.

9. COST-BENEFIT ANALYSIS

The conclusion seems irresistible that, providing certain precautions are taken in the creation, adoption and distribution of para-regulatory texts, their benefits decidedly outweigh their burdens. The only irreducible burden would appear to be the natural tendency for inexperienced arbitrators to ascribe more weight to para-regulatory texts than is justified by their intrinsic legal merits and appropriateness to a case.

On the other hand, para-regulatory texts properly employed inject vital predictability into arbitration, they favour reduction of the risk of appearance of arbitrators' bias, they enhance efficiency, they open up the door to broader participation in arbitration among potential counsel and arbitrators, they stimulate thinking about arbitration law and practice, and they favour the regularity of arbitration procedures which ensures that like cases are treated alike.

10. RECOMMENDATIONS FOR THE OPTIMISATION OF PARA-REGULATORY TEXTS

A brief summary of the action necessary to minimise any disadvantages of para-regulatory texts is as follows:

1. Those generating para-regulatory texts should endeavour to be representative and to consult with all relevant constituencies of potential users.
2. Those generating para-regulatory texts should arrange to review them at appropriate intervals to ensure that they continue to serve their purposes over time.
3. Those generating para-regulatory texts should clearly indicate on any drafts that they are not ready to be applied, should not be applied, and have only been released for discussion purposes.
4. Para-regulatory texts should explicitly identify their authors, and their authors' relevant expertise and affiliations.

5. Para-regulatory texts should explicitly identify the process by which they were generated, and in particular the consultations which were carried out as part of this.
6. Para-regulatory texts should be dated.
7. Para-regulatory texts should explicitly indicate what mechanism is foreseen for the review of the para-regulatory text over expressly stated intervals.
8. Para-regulatory texts should explicitly state their intended scope both by subject matter and by context of usage (i.e. limits on usage by applicable arbitration law or rules, by type of arbitration – international or domestic, commercial, investment or sport, etc.).
9. Para-regulatory texts should explicitly indicate whether or not they purport to be an exhaustive treatment of the legal area they deal with.
10. Para-regulatory texts should preferably be exhaustive approaches to recognised legal areas.
11. Para-regulatory texts should explicitly indicate the legal effectiveness they are intended to have when adopted by the arbitral tribunal or the parties.
12. Para-regulatory texts should be careful to avoid formulating norms which are overly-broad.
13. Para-regulatory texts should explicitly state that they should be applied consistently with the reasoning behind the formulated rule.
14. Para-regulatory texts should include a section clearly formulating norms which may be activated by adoption by the parties or the arbitral tribunal.
15. Para-regulatory texts should be accompanied by or include a statement of reasons behind the formulated norms, in such a way so as to ensure that there is no confusion between the formulated norms and the reasoning part.
16. Para-regulatory texts should be widely published, and in particular be freely available and easily accessible over the internet.
17. Fora for access to para-regulatory texts, the internet in particular, should invite comments on the para-regulatory texts, which, after appropriate quality control, should be available for other users to consult.
18. Arbitrators should remain conscious and wary of the tendency of para-regulatory texts to appear to be of greater authority than their intrinsic merits and appropriateness for a particular case may warrant.

19. Arbitrators should endeavour to adopt any para-regulatory texts at the same time at the initial stage of the arbitral procedure (along with or as part of "Procedural Order N° 1").
20. Arbitrators should always consult with the parties about the para-regulatory texts which they propose to give legal effect to, and seek their agreement on such application.
21. Arbitrators should expressly indicate the legal force of para-regulatory texts adopted for use in any particular arbitration.
22. Arbitrators should expressly indicate that no other para-regulatory texts will be adopted after the initial stage of the arbitration procedure, but that the arbitral tribunal may refer to or draw influence from the reasoning behind any particular para-regulatory text.
23. Parties should try to take the initiative in adopting any para-regulatory texts which together they would like to apply.

11. SUMMARY ASSESSMENT OF EXISTING PARA-REGULATORY TEXTS

The body involved in para-regulatory text creation which most fully meets the requirement of legitimacy is UNCITRAL. UNCITRAL enjoys particular legitimacy and expertise as an agency of the UN. Participation in it is accordingly vast. Its consultation processes are typically extremely thorough and extensive, as witnessed by those which led up to the UNCITRAL Model law and the UNCITRAL Arbitration Rules. Unfortunately, UNCITRAL has not been at all active in the creation of para-regulatory texts. In 1996 it issued Notes on Organising Arbitration Proceedings. This document was fiercely attacked by Professor Fouchard[27] and others. Much of Fouchard's criticism constituted in fact a dispute as to the advisability of major elements of UNCITRAL's recommendations,[28] notably the invariable holding of an early procedural meeting in any arbitration. That recommendation has, however, proved farsighted, such that today it is almost universally approved. The new ICC Rules have notably introduced an early procedural meeting as a requirement in all cases.[29]

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[27] Ph. Fouchard, "Une initiative contestable de la CNUDCI – A propos du projet de 'Directives pour les conférences préparatoires dans le cadre des procédures arbitrales'" in 1994 *Revue de l'arbitrage* 461.

[28] They were only ever recommendations, but the initial title of the instrument in French, designating it "Directives", erroneously and unattractively suggested that somehow the Notes were mandatory.

[29] Article 24 of the ICC Rules which entered into force on 1 January 2012.

The IBA Arbitration Committee also enjoys broad representation from across arbitration constituencies, although it may be thought to present a degree of imbalance in favour of large firms and of participants from the developed world. One understands that this may reflect the IBA membership, and a coalition of the willing in these essentially benevolent projects. Some IBA groups tasked with the creation of a para-regulatory text do consult publicly beyond the IBA membership. For instance, the IBA Task Force studying counsel ethics in international arbitration did so. It remains, however, that IBA para-regulatory texts have much to gain by the "co-opting" of participation from outside its membership, from more Africans, South Americans, and from more countries in Asia.

More than any body, the IBA Arbitration Committee has raised para-regulatory text-making closest to an art. Its para-regulatory texts generally identify clearly the individuals involved in making them, their country, and the firm they work at. They usually begin with a clear statement of their scope, and admonitions that they are to be used in accordance with reason, and often in accordance with broad principles, such as good faith. They are dated, and they indicate a schedule for revision. They are often accompanied by a substantial statement of the reasoning behind them, and why certain choices were made.[30]

Most famously, the IBA has promulgated Rules on Taking Evidence in International Arbitration (2010 edition), and also Guidelines on Arbitrators' Conflicts of Interest (2004). The IBA has also issued Guidelines for Drafting International Arbitration Clauses (7 October 2010). It has also issued Rules of Ethics for International Arbitrators. Lastly, the IBA has issued International Principles on Conduct of the Legal Profession (28 May 2011), but this is not specific to international arbitration, which does raise other issues. The IBA is in the process of considering the revision of its Rules of Ethics for International Arbitrators, and is studying the area of counsel ethics, with a view potentially to preparing a para-regulatory text on this subject.

After UNCITRAL and the IBA, the degree to which para-regulatory texts satisfy the criteria identified here declines steeply. The Chartered Institute of Arbitrators has long experience of international arbitration. It has promulgated a large number of para-regulatory texts judiciously selected on the whole to cover areas where there is a particular need for guidance. The following is a list of the Chartered Institute's para-regulatory texts:

[30] *See, for example* "Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration" which may be viewed at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx

Date	Title
30 Oct. 2011	Practice Guideline1: Guidelines for Arbitrators on how to approach an application for Provisional or Interim Relief
30 Oct. 2011	Practice Guideline 2: Guidelines for Arbitrators on how to approach an application for interim measures of protection
30 Oct. 2011	Practice Guideline 3: Guidelines for Arbitrators as to how to formulate their terms of remuneration
30 Oct. 2011	Guideline 4: Guideline for Arbitrators on Proceeding and Making Awards in Default of Party Participation
6 Dec. 2011	Guideline 5: Guidelines for Arbitrators regarding Documents-Only Arbitrations
30 Oct. 2011	Practice Guideline 6: Guidelines for arbitrators dealing with jurisdictional problems
6 Dec. 2011	Practice Guideline 7: Guidelines for Arbitrators on the use of ADR procedures
Undated	Practice Guideline 8: Guidelines for Arbitrators who Receive Notice of Arbitration Applications to the Court
Undated	Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration
Undated	Practice Guideline 10: Guidelines on the use of Tribunal-Appointed Experts, Legal Advisors and Assessors
Undated	Practice Guideline 11: Guideline on Security for Costs
Undated	Practice Guideline 13: Guidelines for Arbitrators on how to approach the making of awards on interest
Undated	Practice Guidelines 14: Guidelines for Arbitrators on how to approach an application for a Peremptory and 'Unless' Orders and related matters
Undated	Practice Guideline 15: Guidelines for Arbitrators on how to approach issues relating to Multi-Party Arbitrations
Undated	Practice Guideline 16: The Interviewing of Prospective Arbitrators

Date	Title
Undated	Practice Guideline 17: Guidelines for Arbitrators dealing with cases involving consumers and parties with significant differences of resources
Undated	Practice Guideline 18: Guidelines for Arbitrators on the Formalities for Drafting an Arbitral Award.
Undated	Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration
Undated	Protocol for E-Disclosure in Arbitration

These para-regulatory texts do not always expressly state their scope of application. It is in most cases, however, immediately clear from these texts that they focus in the first instance, more often than not, on the English experience of arbitration, and on English arbitration law. Moreover, all but the two "protocols" end with the following statement: "The guidelines are inevitably something of a permanent work in progress." This operates as a sort of unfortunate health warning for prospective users. Additionally, at the time of writing, the Chartered Institute, through its Practice and Standards Committee, is engaged in a process of review of all of its guidelines. The health warning and the revision process combine to create the impression of a disavowal of the current texts.

Moreover the Chartered Institute's guidelines often do not provide clear formulation of norms, and they intersperse reasoning with prescriptions for norms. Moreover, they fail to identify the *dramatis personae* who created them. That is a great pity, and a sizable wasted opportunity, given the wealth of experience at the Chartered Institute which doubtless has been deployed in the preparation of these instruments.

On the other hand, the two "protocols" do not state that they are drafts. They are issued with Chartered Institute branding, which also suggests that they are intended to be final statements and ready to be used. The Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration contains a foreword by Peter J. Rees, the Chairman of the Practice and Standards Committee of the Chartered Institute that expressly states that this protocol "provides a complete regime for the giving of [expert] evidence [...]".

The ICC Commission has prepared and published a great number of reports on many important arbitration subjects. Participation in the ICC Commission is extremely abundant, varied, and rich in experience. The process by which ICC Commission texts are adopted, whilst informal, is nonetheless rigorous and exacting. Almost without

exception, ICC Commission texts represent highly legitimate, incisive, state-of-the-art statements of arbitration law and practice. Few, however, actually formulate norms. They operate, rather, more in the way of argument and information, even appended to the ICC Rules, as is much of the substance of the conclusions of the ICC Commission report on Saving Time and Costs in International Arbitration.

The most important criticism of ICC Commission texts is that the ICC severely restricts their accessibility in only making most of them available for a price, and in not ventilating them freely over the internet. They are available in print at a charge, and also electronically on the ICC's International Dispute Resolution Library.[31] The ICC indeed has privileged global arbitration expertise which it can call on, but its overriding concern, at least at present, appears to be to prevent free-riding on it.

Many other arbitration institutions, and even bar associations,[32] have also issued para-regulatory texts on various issues, but often related to arbitrators' and counsel's ethics,[33] and on the conduct of arbitral proceedings. Leading law firms[34] and even leading individual practitioners[35] have also issued para-regulatory texts.

It would be inaccurate to say that there has been a carpet bombing of para-regulatory texts, but equally it would be disingenuous to deny that most major subject areas have already been favoured with one. It remains, however, that very few para-regulatory texts satisfy the requirements recommended in this chapter to any reasonable degree.

In conclusion, the very first action to be recommended is the adaptation and/or adoption of para-regulatory texts by appropriate bodies, especially UNCITRAL, which comply with the criteria identified here.

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[31] The ICC's International Dispute Resolution Library is available, with a subscription, at http://www.iccdrl.com/

[32] For example, the American Bar Association joined with the AAA in developing and issuing a Code of Ethics for Arbitrators in Commercial Disputes, last revised in 2004.

[33] A good overview of para-regulatory texts and other instruments on arbitrators' ethics is J. C. Fernández Rozas, "Clearer Ethics Guidelines and Comparative Standards for Arbitrators" in *Liber Amicorum Bernardo Cremades* (Madrid: La Ley, 2010) 413.

[34] For example, the "Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration".

[35] For example, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration" by Doak Bishop and Lucy Reed.

12. NEW SUBJECT AREAS FOR PARA-REGULATORY TEXTS

In determining what new areas should be recommended for a para-regulatory text it would appear helpful first to identify the principles determining subject matter in which para-regulatory texts are particularly useful.

The desiderata of avoidance of appearance of arbitrator bias, promoting efficiency, broader and more varied participation of counsel and arbitrators are fully advanced by the mere fact of the existence of a para-regulatory norm in possession of the characteristics designated in section 9 above.

Therefore in identifying the subject areas most needful of para-regulatory norms we shall concentrate on the other benefits of para-regulatory norms, in particular the chief benefit, legal certainty, but also contribution to the law, practice and knowledge of international arbitration. These two benefits go hand in hand for the most part.

The subject areas which benefit most from para-regulatory texts are therefore those where there is not just legal uncertainty but where there are real differences in approaches based on legal traditions or divergences in arbitration law systems. The height of legal uncertainty is where a party's legitimate expectations are frustrated by the rule ultimately selected. Moreover, where there are real differences in approach, arbitration law, practice and knowledge are advanced by the generation of a para-regulatory text.

Thus para-regulatory texts in the areas of counsel's professional conduct are especially helpful. Lawyers are generally subject to the professional conduct rules of the legal systems to which they are admitted as lawyers and to those in which they regularly practice, and these vary from one to another. In recognition of this acute functional need, para-regulatory texts abound in this area. Nonetheless, a clear and authoritative or at least hegemonic text is lacking in regard to subjects such as contact with witnesses, legal privilege, and fee structuring arrangements, such as conditional fees.

Other areas within this category in which para-regulatory texts would be welcome are: circumstances when arbitrators should and should not act to obtain factual and legal evidence[36], the participation of third parties in international arbitration including as *amici curiae*, burden and standard of proof, identification of categories of evidence and rules on weighting of evidence, law applicable to arbitration clauses, the treatment of mandatory norms by arbitrators, arbitration under equitable standards such as *ex aequo et bono*, confidentiality, and arbitrators' role in facilitating settlement.

[36] *See* Ph. Landolt, *op. cit.* in note 15 above.

A further set of areas is where the law is confused or otherwise unsatisfactory. Circumstances where it may be appropriate for arbitrators to refer to elements other than the strict *lex causae*, use of arbitral secretaries, rules governing the arbitral deliberations[37] are examples here.

A further type of area is where there is simply a void. Procedural questions are the classic instance of this type, for example duties on parties to disclose contrary evidence, and it would be most useful to have a para-regulatory text laying down a scheme for fast-track arbitration which integrates sufficient flexibility to account for developments as the case proceeds.[38]

13. CONCLUSIONS

Para-regulatory texts are on balance forces for the good in international arbitration. Thus the international arbitration community should continue to embrace them. But to minimise their potential detractions they and those who issue them should possess certain features, which it has been sought here to identify. Unfortunately, almost all existing para-regulatory texts require substantial improvement in order to do so. Such improvement is the most significant of future para-regulatory projects. New subject areas for para-regulatory texts should concentrate on delivering legal certainty, and developing the law, practice and knowledge of international arbitration. But a para-regulatory text exhibiting all recommended features is a welcome contribution to arbitration on most any subject matter.

[37] The IBA Rules of Ethics for International Arbitrators contain a brief section (9) on the arbitrators' deliberations.

[38] The Chartered Institute of Arbitrators has issued "Practice Guideline 5: Guidelines for Arbitrators regarding Documents-Only Arbitrations".