International Arbitration Guidelines: Safe Ports for Arbitral Storms

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International Arbitration Guidelines: Safe Ports for Arbitral Storms

Julio César Betancourt

Tim Hardy

Simon Nesbitt

Paul Klaas

Julio César Betancourt. Most of you probably know the story of the two salesmen who went on a business trip from Europe to Africa back in the 1900s. These guys wanted to find out if there was any opportunity for selling shoes. Upon arrival in Africa, they wrote telegrams back to Manchester. One of them wrote, "situation hopeless (full stop)—they don't wear shoes", and the other one wrote, "glorious opportunity. They don't have any shoes yet".[1]

[Laughter]

Now, there is a similar situation concerning the use of guidelines in the area of international arbitration, because there are some people who think that international arbitration practice guidelines are something to be avoided. Whereas there are some of us who think that these types of guidelines can be very useful, partly because they provide guidance as to what to do when you don't know what to do, and partly because they give us a certain degree of certainty and predictability.[2]

Since international arbitration is "shrouded in secrecy",[3] it can be said that practice guidelines could also be used for educational purposes, that is, to train the next generation of international arbitration enthusiasts. Dr Hans van Houtte describes the Chartered Institute of Arbitrators as "the most prolific issuer of arbitral guidelines".[4] Opinions may differ on

[1] Benjamin Zander, *The Transformative Power of Classical Music* (TED 2008).

[2] Gabrielle Kaufmann-Kohler, "Soft Law in International Arbitration: Codification and Normativity" (2010) 1 *Journal of International Dispute Settlement* 17.

[3] Julio César Betancourt, "Understanding the 'Authority' of International Tribunals: A Reply to Professor Jan Paulsson" (2013) 4 *Journal of International Dispute Settlement* 243.

[4] Hans van Houtte, "Arbitration Guidelines: Straitjacket or Compass" in Kaj I. Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (Juris Publishing 2010) 520.

whether this is a good or a bad initiative,[5] but the truth of the matter is that the development of guidelines is one of the Institute's main tasks.[6]

Before we go any further, let me ask you a question: why do we have guidelines in international arbitration? Because of time constraints, I don't expect you to answer my question, but I would like you to think about it. Professor Stipanowich explains that practice guidelines "were inspired in whole or in part by concerns about how arbitrators exercise the broad discretion they are accorded under leading arbitration rules to 'flesh out' procedures and manage the process".[7]

Regardless of whether you are for or against the utilisation of guidelines, one of the things that we ought to consider—before we can actually make an informed decision as to whether or not it makes sense to rely on practice guidelines—is what a guideline actually is. In the field of international arbitration, a guideline may be defined as an instrument that reflects commonly accepted practice and whose normative force "depends entirely on voluntary compliance".[8]

Such an instrument, therefore, is nothing more than a guidance on best practices in the international arbitration arena vis-à-vis certain issues that may arise out of or in connection with a given arbitral process. Professor Welser says that "'Best practices' in arbitration are standards for conducting arbitral proceedings which arbitrators and counsel should apply to provide users of arbitration with the highest possible level of efficiency and fairness in the resolution of their … disputes".[9]

If one posits that—in international arbitration—best practice guidelines are intended to achieve efficiency and fairness, it follows that, for the sake of completeness, it is sensible—if not desirable—to spell out a series of principles or guidelines that mirror the consensus of a widely recognised and truly international cadre of arbitration experts, otherwise one may conclude that, in arbitral proceedings, not everyone judges efficiency and fairness by the same standards.

William Park has argued that "At the present moment, the arbitration community remains at the starting point in elaborating guidelines. Thus it should not be surprising that standards go too far for some, while not far enough for others".[10] However, Gary Born has pointed out that it is not clear whether "entirely arbitrary or random procedures would be acceptable under most international and national law standards of due process and procedural fairness".[11]

As a result, it can be argued that, in some cases, practice guidelines can also be effectively utilised to measure an arbitrator's performance in terms of both "efficiency" and "fairness". These concepts have practical implications. For example, Appendix III, Article 2.2 of the ICC Rules of Arbitration (2012) states that in setting the arbitrator's fees, "efficiency" is one of the key factors. Further, Article 22.4 of the ICC Rules of Arbitration (2012) provides that the arbitral tribunal shall act "fairly".

[5] For an overview of the Institute's initiatives, see Julio César Betancourt, "The Chartered Institute of Arbitrators (1915–2015): The First 100 Years" (2015) 81(4) *Arbitration* 375–380.

[6] Article 14.6 (iii) of the 2014 Regulations of the Chartered Institute of Arbitrators stipulates that the Institute's Practice and Standards Committee (PSC) shall be responsible, among other things, for "developing and publishing on behalf of the Institute guidelines of good practice".

[7] Thomas J. Stipanowich, "Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings" (2014) 4 *Legal Studies Research Paper Series* 1. As to the notion of "arbitral discretion", see William W. Park, "Arbitration's Protean Nature: The Value of Rules and The Risks of Discretion" (2004) 19 *MEALEY'S International Arbitration Report* 1–21.

[8] Erik Nielsen, "Improving Environmental Governance through Soft Law: Lessons Learned from the Bali Declaration on Forest Law and Governance in Asia" in Lawrence E. Susskind, William Moomaw, and Nancy J. Waters (eds), *Papers on International Environmental Negotiation* (MIT-Harvard Public Disputes Program 2004) 132.

[9] Irene Welser and Giovanni De Berti, "The Arbitrator and the Arbitration Procedure - Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices" in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration* (Manz'sche Verlags- und Universitätsbuchhandlung 2010) 78.

[10] William W. Park, "A Fair Fight: Professional Guidelines in International Arbitration" (2014) 30 *Arbitration International* 425.

[11] See footnote 34, in Gary Born, "Principle of Judicial Non-Interference in International Arbitral Proceedings" (2014) 30 *University of Pennsylvania Journal of International Law* 1010.

Similar provisions can be found in the LCIA Arbitration Rules (2014), which employ phrases such as the "efficient conduct of the arbitration" (Article 5.4) or the arbitrators' "duty to act fairly" (Article 14.4.i). Consequently, it can be said that, in the absence of principles or guidelines, arbitrators may find themselves in a legal no-man's-land in which there is no way to predictably determine whether a given conduct can be regarded as efficient, inefficient, fair or unfair.

In the field of public international law, for example, research shows that the vast majority of United Nations Resolutions "have taken the format of Principles or Guidelines, which are typical forms of soft law".[12] Soft law, as we all know, is one of the main sources of international law and is usually "defined as [a set of] 'normative provisions contained in non-binding texts'",[13] in the sense that they may "lay down parameters … or provide guidance",[14] but they are not inexorably binding.

The example I've just given is highly relevant to our discussion because the use of international arbitration practice guidelines has been equated with the use of soft law. Toby Landau recently said that "The debate on soft law in the field of international law is becoming ever more important in the area of international arbitration, because regulation in the arbitral field today is now most likely to take the form of the softest of instruments (such as guidelines, principles … etc.)".[15]

In international arbitration, soft law has "been divided into procedural soft law … and substantive soft law".[16] Today's discussion has to do with three practice guidelines that are purely procedural, namely 1) Guideline on Jurisdictional Challenges, 2) Guideline on Applications for Interim Measures and 3) Guideline on Applications for Security for Costs.[17] These guidelines have sought to address some of the most commonly raised issues associated with the aforementioned themes.

The Institute's guidelines contain reasonably ascertainable standards that may give us an indication of how "efficient" and "fair" an arbitrator has been. Although these guidelines are, technically speaking, "soft law" and, therefore, not legally binding, they may potentially affect the way in which arbitrators decide cases or "the exercise of discretionary powers".[18] For this reason, it has been argued that "soft law serves as a constraint on arbitral autonomy".[19]

Nonetheless, it may be further argued that, oftentimes, arbitral autonomy "brings uncertainty, as practitioners and arbitrators from different jurisdictions may engage in the arbitral process with different expectations as to what that process will entail".[20] International arbitration practice guidelines "seek to codify best, or at least internationally accepted,

[12] Xuan Li, "Soft Law-making on Development: The Millennium Development Goals and Post-2015 Development Agenda" (2013) 10 *Manchester Journal of International Economic Law* 362.

[13] Shelton cited by Teresa Fajardo, in "Soft Law" *Oxford Bibliographies in International Law* (Oxford University Press 2014)*http://www.oxfordbibliographies.com/* [Accessed 26 February 2016].

[14] A. E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 *International and Comparative Law Quarterly* 907.

[15] Toby Landau and J. Romesh Weeramantry, "A Pause for Thought" in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age? ICCA Congress Series No. 17* (Kluwer Law International 2013) 509.

[16] Felix Lüth and Philipp K. Wagner, "Soft Law in International Arbitration - Some Thoughts on Legitimacy" (2012) 3 *StudZR* 411.

[17] The Chartered Institute of Arbitrators' international arbitration guidelines can be downloaded from the website at *https://www.ciarb.org/* [Accessed 26 February 2016].

[18] Alan Boyle, "Soft Law in *International Law*-Making" in Malcolm Evans (ed), International Law (Oxford University Press 2010) 128.

[19] William W. Park, "The Procedural Soft Law of International Arbitration: Non-Governmental Instruments" in Julian D. M. Lew and Loukas A. Mistelis (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 141.

[20] Paula Hodges, "The Proliferation of 'Soft Laws' in International Arbitration: Time to Draw the Line?" in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration* (Manz'sche Verlags- und Universitätsbuchhandlung 2015) 205.

practice and to offer parties the chance to introduce a degree of consistency and predictability to the arbitral process".[21]

The 2015 International Arbitration Survey demonstrates that there is "a positive perception [regarding the use of] guidelines and soft law instruments in international arbitration",[22] so there seems to be an optimistic stance towards the use of practice guidelines. To be clear, I am not advocating the "guidalisation" of international arbitration. I concur with Hans van Houtte's position that "guidelines should only be drafted on matters where the arbitration community needs guidance".[23]

The development of international arbitration practice guidelines is certainly not a panacea. Nor is it an attempt to curtail arbitral autonomy. It is our proposition that practice guidelines are just another tool in the arbitrators' armoury. Today's panel discussion is intended to stimulate a deeper scrutiny of certain problems that may arise in connection with a given arbitral process in which international arbitrators could apply the existing guidelines.

And now, without further ado, let me very quickly introduce both the moderator and tonight's panellists. Tim Hardy is the Head of the Commercial Disputes team at CMS Cameron McKenna in London. He is a Fellow of the Chartered Institute of Arbitrators and Chairman of the Institute's Practice and Standards Committee (PSC). He serves as counsel in arbitration proceedings and acts as arbitrator and mediator. Tim is also "the father" of the Institute's revised guidelines.

Simon Nesbitt QC is an arbitrator and arbitration counsel. He is a Fellow of the Chartered Institute of Arbitrators and has been involved in numerous international arbitrations under all of the major institutional rules, including the ICC, LCIA, SIAC, SCC, HKIAC and ICSID rules for parties from a wide range of industry sectors. Simon is a barrister member of Maitland Chambers and is also dual-qualified as an *avocat à cour* in France.

And, last but not least, Paul Klaas. Paul is a Fellow of the Chartered Institute of Arbitrators and has served as chair, wing, and sole arbitrator and as lead advocate in multiple LCIA, ICC, ICDR, AAA, JAMS, other institutional, industry, and *ad hoc* arbitrations since the 1980s. He teaches the international commercial arbitration courses at the Harvard Law School and the University of Minnesota Law School. Paul is dual qualified as an American lawyer and English barrister; he is an arbitrator member of Maitland Chambers.

Tim Hardy. I'm just going to make a few introductory remarks about the guidelines so as to help put them in context. I am grateful for Julio's explanation as to why guidelines are to be favoured. The new guidelines are different from all of the guidelines that have been written in international arbitration. They give guidance to arbitrators on the conduct of arbitration from cradle to grave—from the first interview of a prospective arbitrator to the drafting of the final award. So they cover all aspects of what an arbitrator may get involved in. The revised guidelines, three of which we will be looking at today, are also written from a neutral perspective. Neutral in that they do not favour any particular jurisdiction and they attempt to give "guidance" from a truly international perspective. They are not "rules". They are intended to help arbitrators in difficult situations, to work out what they could and should be thinking of, and guide them as to how they should get to making a decision on the issue in front of them. They are not set in stone. They are living, breathing guidelines, which we will keep under constant review. We know that not everybody will agree with them. We have undertaken a wide consultation with all of the Institute's branches throughout the world, and also with 60 of the faculty members who teach international

[21] Hodges, "The Proliferation of 'Soft Laws' in International Arbitration: Time to Draw the Line?" in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration* (2015) 205

[22] Queen Mary University of London's School of International Arbitration Survey, with Financial Support from White & Case (2015) 3.

[23] Hans van Houtte, "Arbitration Guidelines: Straitjacket or Compass" in Kaj I. Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (2010) 520, 528. The 2015 International Arbitration Survey shows that soft law and guidelines are "seen to supplement existing rules and laws, and to provide guidance where little or none exists", see Queen Mary University of London's School of International Arbitration Survey, with Financial Support from White & Case (2015) 3.

arbitration on behalf of the Institute. We received differing views as to what is the right guidance to give in different situations. We have tried to find the middle ground and to give, what we consider to be, proper guidance. Now, notwithstanding that, I know there will be differing views. I am very happy to listen to those views and take comments and suggestions for improvements. In fact, I encourage you to write to us with those comments at psc@ciarb.org. I think it's also important to stress—and we stress it time, and time, and time again in the guidelines—that they never replace the arbitration laws and rules, which are going to be applicable to the particular situation. Of course, the arbitrator must give pre-eminent and primary consideration to those particular laws or rules. I would now like to turn to the guidelines themselves and just show you the shape of them, which will help you through the discussion today. You will find that they are all written following the same standard template. They begin with a preamble introducing the subject followed by a number of principles in bold print, with a commentary on each of the principles explaining the reasoning in more detail. In addition, and this is a new departure from the previous guidelines, we considered it appropriate to include endnotes, so that if the reader wanted to understand the foundation for any particular statement and/or wanted to undertake some further reading around the specific issue, we have made reference to the sources that we have consulted when drafting the guidelines. So, without more, I would now like to embark upon the exciting adventure, which will occupy us for the next half hour or so, where the wingmen in this arbitration—and I should say I'm not the chair, I'm the moderator—are going to express their differing opinions on the issues arising from the three guidelines that we are looking at tonight, starting with jurisdictional challenges.

Simon Nesbitt QC. You're the voice of reason Tim, you're not necessarily the moderator, but we shall see.

[Laughter]

Paul Klaas. The first of the three published guidelines is the Guideline on Jurisdictional Challenges. My extreme suggestion is that a jurisdictional challenge—contrary to the guideline's suggestion—is one that should always be heard when it is raised, immediately. Jurisdiction is qualitatively different, it seems to me. It is more than just the quotidian issues of who wins and who loses, and how much. Jurisdiction is a challenge to the process itself, and those controlling the process should listen when someone says: "I shouldn't be here. You shouldn't be talking about this at all".

Simon Nesbitt QC. At the outset, can I just make clear that Paul and I are role-playing to a certain extent, so the views that are expressed are not necessarily our own! I hear what you say Paul, but, in my experience, jurisdiction is probably the most abused type of challenge, and the most frequent tactic employed by a disgruntled party to attempt to disrupt the arbitral process. If a challenge is raised late, it's probably tactical, and it probably shouldn't be allowed, and, if it's going to be heard at all, it should be heard alongside the merits. It shouldn't be given its own separate preliminary hearing. And apart from anything else, of course, as I'm sure you'll agree, it's perfectly possible for a party to lose or waive the right to challenge jurisdiction.

Paul Klaas. Well, your assumption that I would agree with you was highly optimistic, Simon. Yes, I have seen tactics where jurisdictional challenges are raised, in order to derail or delay an arbitration. But, I also see the tactic of parties being over-named—being brought into arbitrations baselessly, just in order to inflict risk or cost upon them. It is frustrating and unfair to say to those parties: "You know what, you're just going to have to bear the cost and the risk of this arbitration until the end, when we know everything and we will rule on the merits".

Simon Nesbitt QC. I'm not saying you necessarily put off everything until the end. I'm saying that you take it on a case-by-case basis. There may well be a case where it's obvious that a non-signatory has been brought in for tactical purposes. I might even, in an extreme case, agree with you, that it would be right for that to be decided at a relatively early stage.

But if you're going to do that, are you not to some extent pre-judging the merits of the jurisdictional challenge?

Paul Klaas. No, because I'm advocating hearing all jurisdictional challenges, whenever they're raised. So I avoid the pre-judgment problem. The efficiency of the proceedings, it seems to me, can be judged from a number of perspectives. You can sit there and have a very nice and efficient proceeding that actually should not be happening at all, in which you have a party before you who shouldn't be there, or you are considering an issue that you shouldn't be deciding in arbitration.

Simon Nesbitt QC. But that's a different thing. You're now talking about personal jurisdiction versus subject matter jurisdiction.

Paul Klaas. True.

Simon Nesbitt QC. So are you saying that we should adopt a different approach if it's an arbitrability issue, a subject matter issue? And, if so, where would we look to find the answer to that?

Paul Klaas. Well, we'd look to the CIArb's guidelines, I think, to get the answer to that! But surely, Simon, you raise a good question. A challenge to subject matter jurisdiction—for example, arguing that you are arbitrating a non-arbitrable issue—should not be deemed waived, no matter what. Personal jurisdiction, I grant you have a point. Those challenges could be purely tactical. If they come up late, I'd be highly suspicious.

Simon Nesbitt QC. There's something else I want to ask you. If we spot a jurisdictional problem, which the parties haven't raised, what do we do? Do we have the right to raise it and deal with it?

Paul Klaas. What do you think?

Simon Nesbitt QC. I'm asking you.

Paul Klaas. Subject matter jurisdiction, I would raise; personal jurisdiction, I wouldn't.

Simon Nesbitt QC. Ok, interesting.

Paul Klaas. How about you?

Simon Nesbitt QC. I'm not sure, I need some guidance.

Paul Klaas. Well you've got mine, and now you'll have Tim's.

[Laughter]

Tim Hardy. Let's have a look and see if we can find any guidance and help with the problems that have just been discussed. If we begin with the General Principles on page 4, we will see that there's a very helpful statement there that, unless otherwise agreed by the parties, arbitrators can consider and rule on their own jurisdiction when a party raises a jurisdictional challenge. That suggests that they should get on and deal with it in a timely fashion. Indeed, we find that stated more clearly, in Article 4 on page 17, which says that arbitrators should resolve any jurisdictional challenge in a timely and effective manner. When faced with a challenge to jurisdiction, they may decide on the jurisdiction separately from the merits, or deal with the jurisdictional challenge and the merits simultaneously. The commentary, which follows, gives consideration to the issues that would have to be taken into account when deciding whether to bifurcate the proceedings. Going back to one of the issues that Paul raised, Article 1, paragraph 5, specifically states that "if the arbitrators have a concern that the subject matter of the dispute is not arbitrable, and neither party has raised the issues, then the arbitrators may invite the parties to make submissions on the issue, before considering and ruling on whether they have jurisdiction".

Simon Nesbitt QC. It says "may" Tim. Shouldn't it be must? I think Paul would say it must be must.

Tim Hardy. Well, we have had many debates about "mays", "musts", "wills", "coulds" and "shoulds" in the drafting. And I can tell you, without fear of contradiction, that every time we put a "may" or a "must", the "must" always resulted in an argument, and the "may' did not. So, we decided, as a matter of editorial policy, that we should not be dictating what should happen. Because what actually should be the right decision will be determined on

the particular circumstances and facts of every case. And that is a paramount principle which runs throughout these guidelines.

Simon Nesbitt QC. Incidentally, if anybody wants to be the fourth or, even the fifth or the sixth arbitrator, and comment or contribute, please feel free. No need to save comments for the end.

Paul Klaas. Absolutely. Simon, you and I see eye to eye on everything.

[Laughter]

Tim Hardy. Now, another issue which was raised, was whether parties are raising jurisdictional challenges as a matter of good faith or whether they're trying to delay. You'll find there's some guidance on this particular aspect in the commentary on Article 1, paragraph 4, on page 9. If I jump to the end of that paragraph, it says "challenges are sometimes used to attempt to delay and/or to frustrate the arbitration. Arbitrators should therefore decide whether the party making the challenge is deemed to have waived its right to challenge because the challenge is made late, and there's no good reason to delay, or whether the party's position is inconsistent with an earlier stance". So, there are some considerations to take into account, which may mean that notwithstanding that there is a jurisdictional challenge, and notwithstanding that it may have the possibility of deciding the matter completely, just by reference to those considerations, it may be appropriate to allow the arbitration to proceed and to deal with the jurisdictional issue with everything else. The same issue is discussed on page 18, which concerns the commentary on Article 4, of factors to consider when determining whether to separate the decision on jurisdiction from the merits. And again, at paragraph b, if the challenge is closely related to the substantive issues of the dispute, where the arbitrator considers that it is a mere tactical device to delay the proceedings, arbitrators should continue with the proceedings and incorporate their decision on jurisdiction in the final award on the merits.

Simon Nesbitt QC. Tim, something I find quite helpful in the revised guidelines, which Paul and I didn't debate, is the question of admissibility versus jurisdiction where, for example, a respondent relies on non-compliance with a multi-tiered dispute resolution clause to try and stall the proceedings. It's not really a jurisdictional question, I think it's commonly accepted that this is an admissibility issue as opposed to a jurisdictional issue, although often parties do try and dress it up as a jurisdictional point.

Tim Hardy. Yes, and arbitrators have occasionally made the mistake of dealing with admissibility as a jurisdictional issue and vice versa. That can lead to an unnecessary challenge, so we thought it appropriate to include the distinction.

Simon Nesbitt QC. Should we move on to the thorny topic of interim measures?

Tim Hardy. Just one other aspect of the guidance I thought I'd draw your attention to, which is on page 11. The commentary on Article 2 makes the point that, where there are different legal cultures and different languages, it's good practice to take the parties' agreement as to the precise scope of the challenge, so there's no misunderstanding. In my experience, I've seen that it is a very sensible thing to do. Ok, gentlemen, I'm happy to move on to consider your differing views on the next guideline which is to do with applications for interim measures.

Simon Nesbitt QC. Well, you never know, we might agree.

Tim Hardy. I have a feeling.

Paul Klaas. The extreme position that I will take is to say that irreparable injury should be a pre-requisite. That is, an arbitrator should not grant interim measures of any kind, unless that which is being prevented or required cannot be compensated with money. It seems to me, that's an exceptionally rare phenomenon in international *commercial* arbitration. After all, it is international commercial arbitration. It's all about money. If money can compensate for an injury that a party wants an arbitrator either to avoid or to inflict on the other side with an interim measure, the arbitrator, it seems to me, should turn that request down.

Simon Nesbitt QC. If that is correct, if you say that it's exceptionally rare, why are there so many applications for interim measures, and so many orders made?

Paul Klaas. Error is rampant.

Simon Nesbitt QC. With respect, I think you're a little confused by the criteria that, as arbitrators, we have to apply. I don't necessarily agree that you have to find that *irreparable* harm would result unless you grant the measure. The test is a little more flexible than that in international arbitration. I hesitate to put a label on it, but it need not amount to much more than a risk of substantial or grave harm.

Paul Klaas. And how do you judge the grey zone then?

Simon Nesbitt QC. On a case-by-case basis.

Paul Klaas. And so you get to the uncertainty problem that Julio has just warned us all about. Once we wade into whether the party should receive an interim measure, that almost requires that the arbitrators pre-judge the merits. That is, you have to make some sort of a judgment as to whether the requested interim measure is appropriate or not under the merits of the case, whether using an irreparable injury standard or not. That's the quickest way to achieve an unenforceable award, which is the nightmare scenario of international arbitration.

Simon Nesbitt QC. Well, you're right. You do have to exercise some kind of judgment in relation to the merits. But it is perfectly possible to tread that line carefully and to establish, if you like, a prognosis of the merits rather than a diagnosis, which I think are the two concepts that you're perhaps confusing.

Paul Klaas. So, we should take great care… just as we might take great care to use no right angles when we make a square? In any event, if we go down that path and award an interim measure, I think, an arbitrator should always require posting security.

Simon Nesbitt QC. Always?

Paul Klaas. Always. What the arbitrators are doing is exercising the power that the parties have given them, to force a party to do something that they otherwise would not have to do, or to stop them doing something that they otherwise would be able to do. We should always protect the party upon which we are inflicting our interim measure because, if we are just making a prognosis, instead of a diagnosis, we might get it wrong.

Simon Nesbitt QC. How do you quantify security? What about the risk that that might stifle an otherwise meritorious application for interim measures? I mean, the next thing you'll be saying is that the parties might as well just go to court.

Paul Klaas. Parties, it seems to me, might as well just go to court. Interim measures from an arbitrator are too fraught with peril, of pre-judgment, of not being able to assess the bond, or of overestimating the injury that's likely to occur if they deny an interim measure. The courts are extremely good at considering interim measures. They're highly experienced; they have immediately enforceable decisions; they can bind third parties. And, going to court doesn't undercut the arbitration itself. All the rules contemplate that the parties might go to court for interim measures. That's where they should go, and avoid all these problems.

Simon Nesbitt QC. You're not concerned about multiplying the decision makers, increasing costs, elongating delay, and you're not worried about the fact that, actually, the parties chose arbitration, and going to court should be an exceptional measure? I think we need some guidance here.

Tim Hardy. Ok. Right, so I've noted down four basic headings, which I'm going to try to address. One is to do with a risk of harm, or, as Paul would say, irreparable harm. Whether or not, the concern that, from Paul's perspective, there has to be a pre-judging of the issues whereas, as Simon says, it's a matter of prognosis and diagnosis. Should we always require security, and might that stifle a legitimate claim? And then, why don't we go to court anyway? Let's have a quick dive into the guidance and see if we can find some help. So, the first issue, irreparable harm. If we look at Article 2, on pages 6 and 7, it details the criteria for granting interim measures. It says, when deciding whether to grant interim measures, arbitrators should examine all of the following criteria: prima facie establishment of jurisdiction, prima facie establishment of case on the merits and, three, a risk of harm,

which is not adequately reparable by an award of damages, if the measure is denied. It does not say a risk of irreparable harm but there's some further guidance on this in the commentary on page 9. It states that the arbitrators do not need to be satisfied that harm will *definitely* occur. Rather, they need to be satisfied that there is a *significant risk* that harm is likely. And then, at the last sentence, "the test to be applied to determine the level of harm that justifies the interim measure varies depending on the type of measure sought, and the circumstances of the case". There's an endnote there, which I would draw your attention to. So if you wanted to get some further reading as to whether the test should be just harm or irreparable harm, there are references to a number of the authorities we considered. It was our view that we didn't need to put in *irreparable* harm, and that it was sufficient to leave it as harm. Although, it obviously needs to be a significant … it's described here as a grave, serious or substantial harm.

Simon Nesbitt QC. So I was right.

Tim Hardy. You were on this occasion assisted more by the Guideline on Applications for Interim Measures. That doesn't mean you were necessarily right because we didn't hear all of the surrounding circumstances of the case.

Simon Nesbitt QC. Fair enough.

Paul Klaas. So, Simon was wrong. Any other comments? Comments on interim measures? Fourth, fifth, sixth arbitrators?

Audience 1: Are we allowed to talk?

Paul Klaas. Please.

Audience 1: I have a case where one party is proposing to break its contract. It's not a case where it's automatically compensated by damages. Damages these days are quite complicated to claim. The laws may require you to wait and see what circumstances arise in the future. And the party that wants the contract to be performed is not very happy just to wait and claim damages even though they may be entitled to them. They won't know what they are; they might meet a vigorous defence. So I suggest to you that it's not unreasonable for an interim measure to be allowed where, although it may not sound irreparable, it's a very damaging position for one party to allow a contract to be broken. Can I modify your view on that slightly?

Paul Klaas. No. In my current role-play, which is either to the far left or to the far right depending on your perspective, I think the response would be as follows: That's commerce. People break contracts. You should have protected yourself when you wrote the contract, or you should have investigated the party more thoroughly when you went into business with them. You don't go to an arbitrator and ask him or her to pre-judge the matter, and then before the contract has been breached, or the matter has been aired, or the defence has been heard, issue an interim measure. I mean, that's the process favoured only by the Queen of Hearts: "Sentence first. Trial later." Arbitration should not work that way. The party before you has just realised a commercial risk, and that's too bad, but it is not the role of commercial arbitration to make commerce risk-free. The complexity can certainly be an element of proving whether an injury is irreparable, for example, if you actually can't do the calculation. A start-up business might have a bright future, but no history of profits to extrapolate, so, in some jurisdictions, only speculative damages; hence, irreparable injury.

Tim Hardy. Right, one of the other issues that you raised was whether granting an interim measure is necessarily considered pre-judging the case. The guidelines are very clear on this point. Article 2, paragraph 3, on page 7, states that when assessing the criteria, arbitrators should take great care not to pre-judge or pre-determine the merits of the case itself. You'll find similar statements repeated at different parts of the commentary, but particularly if you look at page 10, there is a whole section on not pre-judging the case. Arbitrators should also emphasise to the parties that in reaching their decision, on the application, they have not pre-judged or fully decided any issue, because if they have done so it may result in later challenges to any award on the basis of lack of impartiality.

Simon Nesbitt QC. What about an application for an interim payment? By definition, if you're ordering one party to pay something to the other party, aren't you pre-judging the merits, to an extent? If say, the other side's claiming £20 million and they want an interim payment of £10 million and you give them £5 million. Are you not pre-judging the merits?

Tim Hardy. It depends what the circumstances are which justify the payments.

Simon Nesbitt QC. Well, let's say it's a debt claim and it looks on the face of it that there's a pretty flimsy defence, but of course you can't be sure of that until you've gone through all the evidence and completed the final hearing. Nonetheless, you know the other party is out of pocket and they need cash. Is that pre-judgment of the merits?

Tim Hardy. Maybe. But on the other hand, it depends on what you do. You may decide that they should post a bond that provides security. Another issue, which was also raised, was whether security should be provided. The guidance on that is covered on page 7, paragraph 4. It is expressed in terms of "may" require a party applying for an interim measure to provide security as a condition for granting the interim measure. There's quite a lengthy discussion of that on pages 11 and 12. The commentary picks up on a point, I think that you made, Simon—and this is on page 12—"arbitrators should consider factors such as the actual expense being incurred by the opposing party in complying with the measure, the potential damage to the opposing party if the measure is subsequently found to be unnecessary or inappropriate, and the financial capacity of the applicant to provide a security". More specifically "they should be wary of not stifling a meritorious application by making an order for security". The guideline also does acknowledge the fact that the arbitrators' ability to grant an interim measure, which is going to be effective, is limited by the nature of the arbitration, and the fact that it can't bind third parties. Therefore it does reflect the fact that, if that's necessary, it may be a good idea to go through the national courts rather than rely on the arbitrators to give you an interim measure, which actually is not going to be of any value to you. You find that in Article 3, paragraph 1, on page 13.

Simon Nesbitt QC. So Paul had a point. That's a shame.

Tim Hardy. Right, I think that covers everything we needed to touch on there. So we turn to the last tricky topic, which is security for costs.

Paul Klaas. Well, it sounds like there might be more accord than I would have expected because of the outbreak of concern here about stifling legitimate claims with excessive orders for security. Requiring security for costs, it seems to me, is very dangerous, in that what you are doing is doubling the risk, or doubling the investment, of parties who may be impecunious right at the beginning, or early in the proceeding. Those parties may have perfectly legitimate claims, but not the wherewithal to pursue them through arbitration as long as they are required to post their remaining assets at the beginning. Now, what's particularly disturbing about security for costs imposed upon an impecunious party with a genuine claim, is that they may be impecunious because of the behaviour of the other party, rendering them impecunious through their wrongdoing. So by requiring security for costs, we would add insult to injury, and really create irony, rather than do justice.

Simon Nesbitt QC. I know that in the US, the idea of the losing party paying the successful party's costs is pretty much anathema.

Paul Klaas. We Americans don't believe in costs.

[Laughter]

Simon Nesbitt QC. In international arbitration, the norm is that the tribunal will almost certainly award some of the respondent's costs against you if you're an unsuccessful claimant. So if you want to bring a claim, then securing the other side against the risk of their costs is simply part of the price of doing so. I hear what you're saying about an impecunious claimant, and the situation of the impecuniosity being *allegedly* caused or contributed to by the party being sued. That's a factor we can take into account, but you have to take each case on its own merits. And just because a claimant is impecunious doesn't make it any less likely to bring a frivolous claim than a claimant with deeper pockets, don't you think?

Paul Klaas. And here though, where and how would you avoid pre-judgement of the merits?

Simon Nesbitt QC. Well, it's like any other type of interim measure. You have to apply a sensible yardstick. As an arbitrator, you can get a feel for a prognosis of the merits, you're not finally judging anything, you're not hearing any final evidence—you're just getting an idea of it. You don't find that possible?

Paul Klaas. I don't. Should we impose security for costs on both parties, at which point you're beggaring both of them and forcing them to tie up their assets? It seems to me that's the only way to avoid pre-judging who is likely to win or lose, and who is likely to pay costs.

Simon Nesbitt QC. Even if there's no counterclaim? You would order the respondent to provide security for the claimant's costs?

Paul Klaas. Certainly. They could lose the claim, they could win the claim. Either way.

Simon Nesbitt QC. I feel the need for some guidance on this.

[Laughter]

Tim Hardy. Excellent. Let's turn to the Guideline on Applications for Security for Costs. If we look at the bottom of page 4, there's a rather handy list of the four-step process that you need to undertake when you begin considering such an application. First of all, whether you have jurisdiction to hear the dispute. Next, whether you have power to make an order for security for costs. Some rules allow it, many rules prohibit or are silent on the issue. So consideration has to be given as to whether it's in the inherent power of the arbitrators to grant security. Next, we have to decide the process for hearing the application. And then consider the application itself. In dealing with the application itself, if we look under the General Principles at paragraph 2, on page 4, it lists the factors, which have to be considered—prospects of success of the claim and the defence, the claimant's ability to satisfy an adverse costs award and the availability of the claimant's assets for enforceability of an adverse costs award and whether it's fair in all of the circumstances, for one party to provide security for the other party's costs. One issue was raised about stifling the claim of an impecunious party, and that's specifically dealt with in a couple of places. The first place I can find quickly is in paragraph 3, on page 3, which deals head on with the fact that, since the result of such an order can mean that the claimant can't proceed with their claim, great care should be taken before making such an order to avoid any injustice, including in particular avoiding unjustly stopping genuine claims by impecunious parties. On the issue of pre-judging, this is covered in the Guideline on Interim Measures—and, of course, security costs is an interim measure so all of the guidance there is equally applicable—but it's repeated again in Article 2 on page 6—"taking great care not to pre-judge or predetermine the merits of the case itself, arbitrators should consider whether on a preliminary view of the relative merits of the case, there may be a need for security for costs". You'll find further discussion and guidance of the issues to be taken into account on the following couple of pages. The discussion of the relative merits, of the fairness, of making an order or not, is dealt with on page 9. I would just make an editorial comment on the side. When we drafted this guideline, we did actually find it particularly difficult because security for costs is something which originated in the common law jurisdiction of England and Wales, so there's a lot of jurisprudence and a lot of law around the issue, whereas internationally, certainly in civil law countries, it's something that they're unfamiliar with. However, we have found in a number of international arbitrations with a civil law seat, where there is nothing in the institutional rules governing the arbitration, which makes any reference to security for costs, the arbitrators nevertheless granted security for costs. But they have done so in a more restrictive view than, I think, would be applied by arbitrators coming from an English—common law—tradition. Therefore, when writing this guideline, we tried to reflect the international approach to it, without reference to particularly common law or civil law. Not making a distinction, but drawing on what we thought were the common threads. And you'll see here some of the risk factors which are discussed. This takes up the point that

Paul was making around some of the risks associated with parties not being able to pay the costs, being a commercial risk which was accepted by the parties when they entered into the commercial contract. So that is set out in quite some detail on page 9 under "insolvency and accepted business risk".

Simon Nesbitt QC. Tim, can we take it that the guideline does not lend any support to Paul's suggestion that the hapless respondent, who is already facing a claim from the claimant, should in addition be required to provide security for the claimant's costs?

Tim Hardy. I've not found any situation where that's been ordered.

Paul Klaas. The Americans have an easy solution to this problem. Parties generally bear their own costs and, win or lose, never pay the other side's costs, so we avoid the whole problem. The pre-judging problem is intense in requiring one party to post security for costs. As to other interim measures, you can see how you could have a prognosis rather than a diagnosis. As to security for costs, you're saying "I think you're going to lose". Or very, very close.

Simon Nesbitt QC. No: you are focusing much more on ability to pay, difficulty of enforcement of any eventual costs award, etc. It's a very light consideration of the merits.

Tim Hardy. Well, I commend the guidance to you and suggest you take it home and read it thoroughly!

[Laughter]

That pretty much covers everything I wanted to say on the guidance on this particular topic. As I said previously, please, please do let us have your comments and suggestions, they would be gratefully received and taken account of.

Simon Nesbitt QC. What's the next one on the production line?

Tim Hardy. We're moving towards drafting awards. Particularly, we've done that because listening to the arbitration world, that's one where we think that, not so much many of the experienced arbitrators I see sitting in the room today, but certainly some of the more junior members of the profession would appreciate some guidance.

Audience 2. What type of guidance are you giving on writing awards?

Tim Hardy. Extensive guidance. It's actually based around the Institute's teaching on award writing for the Fellowship.

Audience 2. Dealing with knotty problem of whether the particular point isn't relevant to the decision of the arbitral tribunal but has been heavily argued by the parties on both sides. Which way do you come out there?

Tim Hardy. The draft at the moment includes guidance that due deference must be made to the arguments that have been presented to you. So you do need to reflect the consideration of those arguments, however tedious you may find that particular argument, you still need to respect it and reflect that you considered it. I hope you find them useful.

Audience 1. I'd just like to ask another question. In an international arbitration governed by English law, seated in England, are the speakers satisfied that we can ignore English law on the security for costs issue? Because English law on security for costs is very tough and you, more or less, have to prove that the paying party would be bankrupt or not able to meet an award. Whereas in your guidelines you've suggested that civil decisions don't apply, and the arbitrator has normally got a discretion. Are you satisfied that that is the position under English law? Because I normally, when doing this, would follow the English law guidelines.

Simon Nesbitt QC. Certainly if I'm arguing or resisting a security for costs application in a London-seated arbitration, yes, of course, I'll be citing English case law, especially if it's before three UK arbitrators.

Paul Klaas. And, of course, you can have varying arbitral rules that are incorporated in the contract, that would also affect what you're allowed to do.

Audience 1. Can I make one more point? As regards the taking of a preliminary review, the arbitration rules of the Chartered Institute and many other bodies, say that the points of claim must be accompanied by the relevant documents relied upon by the claimant. And

the same applies to the points of defence. Now, when you're an arbitrator and you've seen the points of claim and their documents, and the defence and their documents, without taking a view of the final decision, you do have some idea, if I may say so, of the merits of the claim. Would you accept that that's right?

Paul Klaas. Yes.

[Laughter]

Simon Nesbitt QC. That was hard for you to say, wasn't it?

Paul Klaas. Yes.

Audience 1. Thank you very much.

Paul Klaas. I spent eight years off-and-on in a Zurich Chamber of Commerce arbitration, where the arbitrator, at the end of every day, would offer us his "preliminary reflections". However, I noticed that his "preliminary reflections" were eerily predictive of how he would rule! Other questions or comments?

Audience 3. I've had a lot of interest in the last five or ten years, especially in the intercultural aspects of mediation and negotiation, and it's not necessary for you to comment now, but I'm not sure if Julio or somebody has mentioned this aspect [inaudible]. But if you haven't already, could I challenge you and your team to deal with intercultural aspects. We're here this evening talking about large chunks of process and fairness. And when it comes to process and fairness, intercultural differences can be enormous. Intercultural differences as between the various arbitrators, if there's a panel, and even as between the representatives and certainly the parties, and indeed their representatives. So in formulating guidance, my challenge, if not my invitation, is to give guidance on the filter, the cultural filter, through which decisions are made by arbitrators in reviewing, deciding on these various process aspects. But it's an invitation, not necessarily for you to comment now.

Tim Hardy. Well, I will comment in this way. This is something which has crossed my mind and which I've dismissed as just too difficult. However, I am delighted to look for new members of the PSC, who would be prepared to undertake the necessary drafting. So, quite seriously, if you would like to help us with looking at that, we most certainly would do it. But that is a massive topic.

Simon Nesbitt QC. Judging by the new guidelines, you obviously do try to take a cross-cultural or—as you said at the beginning—neutral approach. But that's incredibly difficult. I think that what you're talking about is a much bigger exercise.

Audience 3. And that may be wrong is what I would suggest. I'm not saying what is right. But, my learning about myself, in these five or ten years of research, is that I've not sufficiently or properly, in my view, with the benefit of hindsight, adopted the correct or appropriate filter.

Paul Klaas. Any other questions or comments?

Audience 4. I've noticed you've referred to mediation and to the notions of jurisdiction and admissibility. One of the points you've made was that if the parties have agreed in a contract to take someone to mediation, or friendly discussion, as we've seen in the courts, how far do you think an arbitration agreement and an arbitration can do that, in line with… now in the TCC and very much in the courts generally in England are very on top of that—that people don't just rush to court, and use it as a weapon rather than just settling it first. It seems to me that arbitration could be a way around that. You don't get the feeling in arbitration that you have to sit down and have a friendly discussion before you go. How far do you think that an arbitrator would have that jurisdiction generally, to enforce—because it's not always very certain in the contract how far one has to take this friendly discussion or mediation—can the arbitrator have that sort of jurisdiction to say, "no, I think you need to go back and chat before you come back here" or is it weaker than the courts?

Tim Hardy. No. An arbitrator faced with a challenge to the admissibility of the claim, may have to rule that it's not admissible because there's a mandatory process, which hasn't yet been undertaken. I know that—and I've seen this happen—arbitrators will, when faced with that, lean on the parties and say "ok, fine. Says here you are to have a mediation. What

we suggest you do is we stay the arbitration while you go off and have your mediation because you don't want to go through the troubling process of reappointing us again. So we'll stay for a period of time, you go off and do your mediation and come back. But if you force us to make a ruling on this, we're going to have to rule the claim is not admissible at the moment".

Simon Nesbitt QC. Yes, it depends on what the parties have agreed. If it's got mandatory wording in it.

Paul Klaas. One of the multicultural lenses that Tim raises is the separation of arbitration and mediation. We assume that the arbitrators and the mediators are different people, and we might recoil in horror otherwise. In the People's Republic of China, though, the law specifically allows the same person to both mediate and arbitrate a dispute. Now that's a really hard thing for an American or an English person to understand, but it works fine for one of the greatest civilisations on earth. We just think differently about it.

Simon Nesbitt QC. I had a case a few years ago where, the pre-arbitral step was that the parties should engage in friendly negotiations, and they couldn't start an arbitration until 40 days had passed. And the tribunal's jurisdiction—not the admissibility—the jurisdiction was challenged on the basis that our client had not engaged in friendly negotiations for every single one of those 40 days.

Paul Klaas. And the days on which they did negotiate they weren't friendly enough!

[Laughter]

Tim Hardy. If you look on the Institute's website you'll find the existing guideline on the use of ADR procedures by arbitrators. It does actually need reviewing, and we will be reviewing it. I've heard recently of some practitioners, who are undertaking an arb-med, not a med-arb. So they are actually hearing the parties' arguments as an arbitrator, writing an award, putting it in an envelope, and then taking the arbitrator hat off, putting on the mediator hat, and then mediating the dispute. If the parties aren't able to reach a settlement, then he takes off the mediator hat, puts back on the arbitrator hat and reads the award. But I'm told that they've never got to the point of opening the award. The threat of it sitting there has been sufficient to encourage the parties through the mediation to settle.

Julio César Betancourt. Paul, Tim, Simon, thank you so much!

[Applause]

Thank you all for taking the time to attend today's panel debate. We hope you will join us for the networking reception, which is taking place right outside the room.