

# Finding Elegance in Unexpected Places

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The theme of Berkeley Law's September 2018 Symposium honoring the memory of Professor David Caron was "The Elegance of International Law." This intriguing theme was taken from David's opening address, entitled "Confronting Complexity, Valuing Elegance," at the Annual Meeting of the American Society of International Law in April 2012.<sup>1</sup> His address opens with an analysis, drawing on a daunting array of sources and disciplines, probing the challenging notion of complexity. David then turns to examining the rule of elegance in devising solutions to complex problems. His reflections conclude with an admonition that "we should distrust complex solutions to complex problems and seek instead those that are elegant."<sup>2</sup>

Good lawyers have an intuitive sense of what David was talking about. They know that some examples of legal craftsmanship—analysis, writing, advocacy, or combinations of the three—have an intangible characteristic that sets them apart. These pieces of lawyering seem to render complicated matters simple. They impose structure and clarity upon what seem to be jumbles of facts and arguments. They somehow have the aura of being obvious, compelling, even graceful. They explain. The good lawyers, assessing these characteristics of clarity, grace, and simplicity and searching for a word to describe them, might conclude that they are *elegant*.

But, to borrow from Cole Porter,<sup>3</sup> what is this thing called elegance? And what does it have to do with international law? It's a complicated question. "A list of elegant things, like a list of obscene things, includes not a single trait in common across its members."<sup>4</sup> However, as good international lawyers, we can

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1. David D. Caron, *Confronting Complexity, Valuing Elegance*, 106 AM. SOC. INT'L L. PROC. 21 (2012).

2. *Id.* at 25.

3. "What is this Thing Called Love" was written by Cole Porter in 1929 for the musical review *Wake Up and Dream*. See Cole Porter, *What Is This Thing Called Love*, WIKIPEDIA, [https://en.wikipedia.org/wiki/What\\_Is\\_This\\_Thing\\_Called\\_Love%3F](https://en.wikipedia.org/wiki/What_Is_This_Thing_Called_Love%3F) (last visited Oct. 10, 2018).

4. Patrick House, *What is Elegance in Science?*, THE NEW YORKER (Aug. 17, 2015), <https://www.newyorker.com/tech/elements/what-is-elegance-in-science> [hereinafter House].

start trying to unpack it by looking at its ordinary meaning.<sup>5</sup> The word “elegance” is a noun, but the frayed student dictionary on my desk begins with its adjectival sibling “elegant,” for which one definition is “cleverly apt and simple.”<sup>6</sup> The more contemporary Oxford Internet Dictionary defines elegance as “the quality of being pleasingly ingenious and simple; neatness,” as in “the simplicity and elegance of the solution.”<sup>7</sup> The grande dame of English-language dictionaries, the multi-volume Oxford English Dictionary, offers multiple definitions, two relevant here. “Elegance,” say the Oxford English Dictionary’s scholarly compilers, can mean “tasteful correctness, harmonious simplicity in the choice and arrangement of words,” or perhaps more to the point, “ingenious simplicity, convenience, and effectiveness.”<sup>8</sup> In all of these definitions, one hears echoes of William of Ockham and his razor: the idea that, in general, a simple solution is to be preferred over the more complex one.

Many fields—art, engineering, physics, architecture—have their own conceptions of “elegance.” Software engineers strive for elegant code: one technology writer regards “software elegance” as “the ability to deliver software value with less code complexity.”<sup>9</sup> Another finds elegant software to be “simple, obvious, straightforward and [to require] very little intellectual effort to understand immediately.”<sup>10</sup> A Harvard astrophysicist offered another explanation of elegance:

There is something about the way things fit together, a kind of fluidity. If it is done right, and elegantly, you do not see all the individual parts, because they all fit together in a way that looks like a whole.<sup>11</sup>

Engineers apply the notion. In the world of civil engineering, “elegant” solutions to design and process problems are “those that meet user needs with minimal complexity. Whereas elegance can appear simple in hindsight, it represents a deeper understanding of the actual problem.”<sup>12</sup> That’s an interesting and important insight: Elegance represents a deeper understanding of the problem.

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5. Article 31(1) of the Vienna Convention on the Law of Treaties directs that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty . . .” Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

6. *Elegant*, WEBSTER’S NEW WORLD DICTIONARY AND THESAURUS 198 (1st ed. 1996).

7. *Elegance*, ENGLISH OXFORD LIVING DICTIONARIES (2018), <https://en.oxforddictionaries.com/definition/elegance> (last visited Sept. 27, 2018).

8. *Elegance*, THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 842–43 (1st ed. 1971).

9. Michael Muller, *Software Elegance*, CAST, <https://doc.casthighlight.com/software-elegance/> (last visited Sept. 4, 2018).

10. Joseph Dickerson, *What is software elegance?*, QUORA, <https://www.quora.com/What-is-software-elegance> (last visited Sept. 27, 2018).

11. Alyssa Goodman discussing tennis, in House, *supra* note 4.

12. Tripp Shealy & Leidy Klotz, *Encouraging Elegant Solutions by Applying Choice Architecture to Infrastructure Project Delivery*, CONSTRUCTION RESEARCH CONGRESS 574 (2014), <https://ascelibrary.org/doi/abs/10.1061/9780784413517.059>.

Roman lawyers had a somewhat different notion of elegance, but one that resonates with our contemporary notions. We are told that that for Roman jurists, the concept had a sort of aesthetic function, conveying the idea that a legal task was performed in a correct manner:

According to Hans Wieling of the University of Trier, *elegantia* is an aesthetic, not a legal term. The positive connotation of *elegantia* is that of fine and graceful conduct. But when the Roman jurists said that a case had been judged *elegantier*, they meant that the judgment was good and fair; and if they said that a jurist's opinion was *elegans*, it meant that he had handled the case accurately and properly.<sup>13</sup>

Thus, there are multiple aspects to the word: notions of neatness, of simplicity, that elegance lies in doing something accurately and properly, and—importantly—that it comes from deeper understanding of a problem.

As his writings demonstrate, David Caron thought deeply about the roles and functions of international dispute settlement. He wrote about tribunals, including several with which he was personally involved.<sup>14</sup> He theorized about tribunals' work.<sup>15</sup> He wrote about the law they apply.<sup>16</sup> He wrote as well about the process of decision-making and its limits.<sup>17</sup> David was himself an accomplished arbitrator and judge, serving on the tribunals in four concluded International Centre for Settlement of Investment Disputes arbitrations and several others underway at the time of his death,<sup>18</sup> as well as twice serving as a judge ad hoc on the International Court of Justice.<sup>19</sup>

All of these notions of elegance are at work in an area of law that played an important part in David's work on international dispute settlement—the United

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13. Luiz Fabiano Corrêa, *The Elegant but Indefinable Legal Art*, in SOUTHERN AFRICAN SOCIETY OF LEGAL HISTORIANS AND UNISA PRESS 212–13 (2013), [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1021-545X2013000200002](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2013000200002).

14. See, e.g., David D. Caron, *International Claims and Compensation Bodies*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 279 (Cesare Romano et al. eds., 2014); *Framing the Work of ICSID Annulment Committees*, 6 WORLD ARB. & MEDIATION REV. 173 (2012); *International Courts and Tribunals: Their Roles Amidst a World of Courts*, 26 ICSID REV. - FOREIGN INV. L.J. 1 (2011); *The Profound Significance of the UNCC for the Environment*, in GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: ENVIRONMENT LIABILITY 265 (Cymie Payne & Peter Sand eds., 2011).

15. See, e.g., David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401 (2006); David D. Caron, *Framing Political Theory of International Courts and Tribunals: Reflections on the Centennial*, 100 AM. SOC'Y INT'L L. 55 (2006).

16. See, e.g., David D. Caron, *The Interpretation of National Foreign Investment law as Unilateral Acts Under International Law*, in ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 649 (Mahnoush Arsanjani et al. eds., 2011); David D. Caron, *The United Nations Compensation Commission for Claims Arising out of the 1991 Gulf War: The "Arising Prior to" Decision*, 14 J. TRANSNAT'L L. & POL'Y 309 (2004).

17. See, e.g., David D. Caron, *Regulating Opacity: Shaping How Tribunals Think*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 379 (David D. Caron et al. eds., 2015).

18. *Arbitrators, Conciliators and Ad Hoc Committee Members*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/en/> (last visited Sept. 27, 2018).

19. *All Judges ad hoc*, INTERNATIONAL COURT OF JUSTICE, [www.icj-cij.org](http://www.icj-cij.org) (last visited Oct. 9, 2018).

Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. David arrived at the Iran US Claims Tribunal in The Hague in 1983 when the UNCITRAL Rules (the “Rules”), which were designed for use in international commercial arbitration, were relatively new. Over the following years, the Rules were tested in complex and often-heated Tribunal proceedings. They passed admirably, as successive Tribunal cases generated a body of practice and precedent. David collected the Tribunal’s orders and decisions, deploying another of his skills—as an archivist (or, as some friends thought, a packrat). He and his co-authors Lee Caplan and Matti Pellonpää used this material as a launch point for the first edition of their important commentary on the Rules.<sup>20</sup> As the Rules took hold and gained traction in additional settings, particularly in international investment arbitration, David and Lee Caplan produced an expanded second edition in 2013.<sup>21</sup>

What are these Rules? Why did David care about them? And why should we care? Rules of procedure are not very sexy. For many international law scholars, they are dull, mere mechanics undeserving of serious study. (One can search the tables of contents and indices of major international law treatises in vain for references to “procedure.”) But rules of procedure are essential for creating a stable space in which contending legal views can be presented and disputes decided in a coherent way. Procedure is what makes reasoned dispute settlement possible.<sup>22</sup>

However, constructing systems of adjudication that are both respected and effective is particularly challenging in the case of international legal disputes. The participants often come from different legal cultures. They bring with them different expectations about how legal proceedings should be conducted. Their disputes can take many forms and involve a variety of actors in a variety of combinations. They may involve natural and legal persons, government entities, and states. Any of these may be either claimants or respondents in a given case.

For many participants, international proceedings are unfamiliar and viewed with suspicion. This stands in contrast with national legal systems, where participants usually are familiar with their expected roles and have similar understandings of what is supposed to happen as a case progresses. Thus, international proceedings require procedures that are comprehensible and acceptable to participants from different legal traditions, sturdy enough to

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20. David D. Caron, Lee M. Caplan & Matti Pellonpää, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (2006).

21. David D. Caron & Lee M. Caplan, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (2nd ed. 2013) [hereinafter Caron & Caplan].

22. In his lecture *Understanding Why International Courts and Tribunals Look and Act as They Do*, David developed a related idea, concerning the role of tribunals’ constitutive documents as creating a space essential for dispute resolution. *Understanding Why International Courts and Tribunals Look and Act as They Do*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, [http://legal.un.org/avl/ls/Caron\\_CT.html#](http://legal.un.org/avl/ls/Caron_CT.html#) (last visited Oct. 10, 2018).

channel contentious litigation, but also flexible enough to accommodate the needs of particular parties and disputes.

The work of UNCITRAL has played a key role in meeting this need for efficient and flexible dispute settlement procedures acceptable across cultural boundaries. UNCITRAL is a small and relatively little known United Nations body established by the UN General Assembly in 1966 “to promote . . . the progressive harmonization and unification of the law of international trade.”<sup>23</sup> Its creation was “a component of the effort at that time to change the direction of the international economic order, to open it up to more actors.”<sup>24</sup> Member countries are elected to staggered six-year terms by the General Assembly with the stated objective of reflecting different legal traditions, levels of economic development, and different geographic regions.<sup>25</sup>

Over the years, UNCITRAL has developed a reputation for apolitical professionalism and technical competence:

Only a handful of social actors in the field of international arbitration have both the legitimacy and the ability to bring together a large number of actors with substantially different views in order to generate a consensus or at least a compromise . . . . [T]he most prominent of all unquestionably is UNCITRAL, which has evidenced its capacity to invite to the same working session actors with widely different agendas, and to generate norms that make room for the different positions . . . .<sup>26</sup>

Negotiations in UNCITRAL in the 1960s and 1970s led to a set of dispute settlement rules intended to work across legal and cultural boundaries. UNCITRAL provided a forum for participants to hammer out procedural rules intended to be acceptable across diverse legal traditions, including civil law, common law, and Soviet law. This negotiating process led to the General Assembly’s adoption in December 1976 of a resolution endorsing arbitration “as a method of settling disputes arising in the context of international commercial relations” and recommending use of the Rules, confirming the value of rules “acceptable in countries with different legal, social and economic systems.”<sup>27</sup>

The Rules were the result of “extensive deliberations and consultations with various interested international organizations and leading arbitration experts” under UNCITRAL’s auspices.<sup>28</sup> They were conceived of as an alternative to existing arbitration institutions, such as the International Chamber of Commerce Court of Arbitration, which some, at the time, saw as too expensive and as

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23. GA. Res. 2205 (XXI), United Nations Commission on International Trade Law (Dec. 17, 1966).

24. Caron & Caplan, *supra* note 21, at 2.

25. GA. Res. 2205 (XXI), United Nations Commission on International Trade Law (Dec. 17, 1966).

26. Emmanuel Gaillard, *Sociology of International Arbitration*, in *PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION* 187, 202 (David D. Caron et. al. eds., 2015).

27. G.A. Res. 31/98 (Dec. 15, 1976).

28. *UNCITRAL Arbitration Rules*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/arbitration-services/uncitral-arbitration-rules/> (last visited Oct. 10, 2018).

potentially reflecting subtle pro-western bias.<sup>29</sup> The Rules provide for a free-standing dispute settlement process that does not require the services of a supporting institution.<sup>30</sup> They envision a largely documents-based process, with detailed memorials and supporting written evidence filed prior to hearings, and a restricted role for oral hearings and oral testimony.<sup>31</sup> This overall approach is today the most common form for international arbitral proceedings.<sup>32</sup>

While the Rules were initially intended to serve in resolving international commercial disputes, they soon proved able to serve another significant function as a framework for resolving interstate disputes. At the time of the Hostage Crisis between the United States and Iran from 1979 to 1981, the rules “still had yet to experience wide usage.”<sup>33</sup> The Iran-US Claims Tribunal was their first big test.

A crucial element of the negotiations to end the Hostage Crisis was the need for an acceptable mechanism to address the parties’ legal claims.<sup>34</sup> Rather than trying to negotiate procedural rules, the negotiators grafted the Rules into the institutional DNA of a new arbitral institution, the Iran-United States Claims Tribunal.<sup>35</sup> Article II(2) of the Claims Settlement Declaration creating the Tribunal thus provides that it “shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law,” except as the parties or Tribunal might modify them.<sup>36</sup> With limited modifications reflecting the Tribunal’s unusual role and characteristics, the Rules have been used successfully in addressing a large and complex caseload. Judge Howard Holtzmann, a leading expert on the Rules and a long-serving judge on the Tribunal, observed:

The experience of the Tribunal demonstrates the remarkable effectiveness and flexibility of the UNCITRAL Rules. They have been comprehensive enough to provide firm procedural guidance in almost all circumstances that have arisen, notwithstanding the tense atmosphere—and occasional crises—that have characterized life at the Tribunal. Moreover, their flexibility has

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29. See Caron & Caplan, *supra* note 21, at 4.

30. Caron & Caplan, *supra* note 21, at 4.

31. See *UNCITRAL Arbitration Rules*, *passim*; see also Gary B. Born, *INTERNATIONAL ARBITRATION LAW AND PRACTICE* 165 (2012).

32. Judith Gill, *The Development of Legal Argument in Arbitration*, in *PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION* 398, 400–01 (David D. Caron et. al. eds., 2015).

33. Charles N. Brower & Jason D. Brusechke, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 17 (1998).

34. See Roberts B. Owen, *The Final Negotiations and Release in Algiers*, in *AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS* 303–04 (Paul H. Kreisberg ed., 1985).

35. There is extensive literature on the Tribunal. For a substantial bibliography, see *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION* 477–99 (David D. Caron & John R. Crook eds., 2000) [hereinafter Caron & Crook].

36. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 ILM 223, 230 (1981); 1 Iran-US CTR 9 (1983); 75 AJIL 422 (1981).

permitted the leeway necessary to implement innovative solutions devised to meet the unique problems of the Tribunal . . . .<sup>37</sup>

In short, the Tribunal experiment demonstrated that the Rules work. They provide a fair and flexible framework for resolving disputes between parties from different legal worlds, often in the face of stress and tension. This lesson was taken on board by a cohort of young professionals associated with the Tribunal, including David, Lucy Reed, and Lee Caplan. Many of these lawyers have subsequently become leaders in the international dispute settlement community.

Buoyed by their success at the Tribunal, the Rules are now utilized in many commercial and investment disputes. With slight modifications, they are also used in interstate disputes and by major international arbitration institutions. Adapted to varying degree, they provide the basis for the rules of a number of prominent arbitral institutions, including the Inter-American Arbitration Commission,<sup>38</sup> the Cairo International Commercial Arbitration Centre,<sup>39</sup> the Asian International Arbitration Centre (formerly the Kuala Lumpur Regional Centre for Arbitration),<sup>40</sup> the Hong Kong International Arbitration Centre,<sup>41</sup> and the American Arbitration Association's International Centre for Dispute Resolution.<sup>42</sup>

The Permanent Court of Arbitration (PCA) has utilized the Rules with limited adjustments as the foundation for several sets of optional rules for use by states involved in different kinds of disputes. The introduction to the earliest of these, the PCA's 1992 Optional Rules of Arbitrating Disputes Between Two States, explains the logic of this approach:

Experience in arbitrations since 1981 suggests that the UNCITRAL Arbitration Rules provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements, although they were originally designed for commercial arbitration.<sup>43</sup>

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37. Howard Holtzmann, *Drafting the Rules of the Tribunal*, in Caron & Crook, *supra* note 35, at 94 [hereinafter Holtzmann].

38. *Rules of Procedure of the Inter-American Arbitration Commission*, FOREIGN TRADE INFORMATION SYSTEM, [http://www.sice.oas.org/dispute/comarb/iacac/rop\\_e.asp](http://www.sice.oas.org/dispute/comarb/iacac/rop_e.asp) (last visited Oct. 9, 2018).

39. THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION RULES, <http://www.crcica.org> (last visited Oct. 9, 2018).

40. *AIAC Arbitration Rules, 2018*, ASIAN INTERNATIONAL ARBITRATION CENTRE, <http://www.aiac.world> (last visited Oct. 9, 2018).

41. The Hong Kong International Arbitration Centre has separate provisions for both administered and ad hoc arbitrations under the UNCITRAL Arbitration Rules. See HONG KONG INTERNATIONAL ARBITRATION CENTRE, <http://www.hkiac.org> (last visited Oct. 9, 2018).

42. Caron & Caplan, *supra* note 21, at 6-7.

43. *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, "Introduction"*, PERMANENT COURT OF ARBITRATION, <http://www.pca-cpa.org> (last visited October 9, 2018).

Other PCA rules based on the Rules include the PCA Arbitration Rules 2012<sup>44</sup> (designed for use in disputes involving various combinations of states, state entities, international organizations, and private parties), as well as optional rules for arbitration involving international organizations and states, between international organizations and private parties, and for disputes relating to natural resources and the environment.<sup>45</sup> A relatively recent addition is the PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities. The chairman of the group that developed these rules explained the logic of basing them on the Rules:

The UNCITRAL Rules are the most widely used set of procedural rules in international commercial arbitration. They are an attractive model because their provisions have generated, since the adoption of their first version in 1976 by the UNCITRAL, an amount of case law and academic commentary much larger than that inspired by any other set of procedural rules for arbitration. By relying on the phrasing of the UNCITRAL Rules—whenever a departure from their provisions was not called for by some unique aspect of space-related disputes—we tapped into a wealth of precedent, thus enhancing the degree of predictability in the interpretation and application of the Outer Space Rules.<sup>46</sup>

The PCA's optional rules have also been utilized in disputes between states, including *Republic of Ecuador v. United States, Croatia/Slovenia*, and the *Iron Rhine Arbitration* (Belgium/Netherlands). They were also employed in *Government of Sudan/Sudan People's Liberation Movement/Army*, the Abyei Arbitration. They have also been used in cases involving claims against international organizations, including *Mohamed Ismail Reygal v. UN High Commissioner for Refugees* and *District Municipality of La Punta (Peru) v. UN Office for Project Services*.<sup>47</sup>

The Rules have also been used in disputes between states and investors conducted either ad hoc or with the assistance of the PCA and other institutions. These have included such widely-noted cases as *Financial Performance Holdings B.V. (Netherlands) v. the Russian Federation*, in which a PCA-administered tribunal rendered a \$50 billion (US) award in claims growing out of the demise of Yukos Oil Company. Thus, as a leading arbitrator sums up the Rules' impact, "[t]heir influence on arbitration rules and practice generally cannot be overestimated . . ."<sup>48</sup>

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44. *PRC Arbitration Rules*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/> (last visited Oct. 10, 2018).

45. PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org> (last visited Oct. 9, 2018).

46. Fausto Pocar, *An Introduction to The PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities*, 38 J. SPACE L. 171, 180 (2012).

47. Information regarding the cited cases can be found at <https://pca-cpa.org>.

48. Allan Phillip, *A Century of Internationalization of International Arbitration: An Overview*, in THE INTERNATIONALIZATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 25 (Martin Hunter et al. eds., 1995).

What does any of this have to do with elegance, simple solutions, and deeper understanding? I submit that an important factor in the Rules' success is that they are often elegant, in the several senses considered earlier. In the span of few simply worded pages, they lay out a self-contained system. Not much can be taken out, but not much more is needed in order to conduct many international proceedings. The Rules accomplish this with a clarity and economy of language that makes some complex and controverted matters seem simple and self-evident. (Since the Rules were drafted in the 1970s, the male gender dominates, but they perhaps can be forgiven for that.) As Judge Holtzmann observed in the context of the Iran-US Claims Tribunal, "It is noteworthy that the drafting of the UNCITRAL rules is clear enough that there have been few, if any, arguments of their meaning, even when the text is being interpreted by persons with different mother tongues."<sup>49</sup>

A full analysis of the Rules is beyond the scope of this note, but a few of their provisions—some that seem quite simple, even naïve—quietly accomplish a great deal.

To begin, the structure of the Rules embodies a careful and harmonious, if not always obvious, balancing of the flexibility of arbitration with due process guarantees and other control mechanisms to assure that flexibility does not lead to arbitrariness or incoherence.<sup>50</sup> Article 1(1) makes clear that parties can amend the Rules to meet their particular needs, as often occurs. However, Article 1(2) makes clear that the Rules must yield to any mandatory provisions of applicable national law. Article 15(1) affirms a tribunal's broad authority to "conduct the arbitration in such manner as it considers appropriate," but Article 15(2) makes this broad grant of authority subject to important constraints: the UNCITRAL Rules themselves and two fundamental due process requirements. The parties must be "treated with equality" and at "any stage of the proceedings each party is given a reasonable opportunity of presenting its case." Other brief provisions confirm specific rights necessary to assure fairness, including parties' right to be represented by persons of their choice,<sup>51</sup> to receive copies of documents supplied to a tribunal,<sup>52</sup> and to be given advance notice of oral hearings.<sup>53</sup> Article 33(1) requires that Tribunals apply a designated law to the dispute; it can decide on the basis of non-legal considerations only when specifically authorized. Thus, throughout, autonomy is carefully balanced with restraint.

Other provisions quietly resolve long-standing problems. Article 9 requires that "A prospective arbitrator shall disclose . . . in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his

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49. Holtzmann, *supra* note 37, at 94.

50. See INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 264–65 (Howard Holtzmann & Edda Kristjánsdóttir eds., 2007).

51. UNCITRAL Arbitration Rule 4.

52. UNCITRAL Arbitration Rule 15(3).

53. UNCITRAL Arbitration Rule 25(1).

impartiality of independence.” Article 10 then provides that an arbitrator can be challenged if such circumstances exist. These few words quietly preclude the non-neutral arbitrator in international proceedings governed by the Rules. This puts a stake into the heart of a character who haunted many interstate mixed tribunals in the past, as fiercely partisan party-appointed arbitrators often deadlocked, leaving a beleaguered umpire to exercise the sole power of decision.<sup>54</sup> (The non-neutral arbitrator was still common in U.S. domestic arbitration in the 1970s as the Rules were being developed; she persists today in insurance, labor, and some other types of disputes.<sup>55</sup>)

The Rules also provide the means to solve a significant potential vulnerability of international arbitration—the non-cooperating party who does not respond to a notice of arbitration, appoint an arbitrator, or pulls the arbitrator appointed out of a proceeding.<sup>56</sup> In a few sentences, the Rules provide for an outside appointing authority, able to fill the void if a party does not play by the rules and fails to appear or make necessary appointments, or if party-appointed arbitrators are unable to agree on a presiding arbitrator. The Rules thus provide a mechanism for ensuring that a non-cooperating party cannot block proceedings. As a result, they significantly reduce the temptation for refusing to participate. The provisions authorizing the appointing authority have been applauded as a key characteristic of the Rules.<sup>57</sup>

More can be said, but these examples from the Rules should convey the point. Sometimes elegance lurks in pedestrian and unexpected places, even in places as unexpected as the Uniform Commercial Code.<sup>58</sup> A phrase, an argument, a law review article, or even a procedural rule looks simple and self-evident. But sometimes it isn't. It instead reflects a great deal of effort and craft. It “represents a deeper understanding of the problem.”

It is elegant.

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54. See A.H. FELLER, *THE MEXICAN CLAIMS COMMISSIONS 1923–34: A STUDY OF THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 40–41 (1935); MANLEY O HUDSON, *INTERNATIONAL TRIBUNALS* 19–20 (1944).

55. The American Arbitration Association's 2004 Code of Ethics for Arbitrators in Commercial Disputes observes that “parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral . . . .” Under the AAA Code, such arbitrators “may be predisposed toward the party who appointed them” and may communicate with the party that appointed them.

56. On the challenges posed by non-cooperating parties and the absent or non-cooperating arbitrator, see STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* 61–296 (1987).

57. See Jacomijn J. Van-Haersolte van Hof, *Commentary: UNCITRAL Arbitration Rules*, in BABIK BARIN, *CARSWELL'S HANDBOOK OF INTERNATIONAL DISPUTE RESOLUTION RULES* 28 (1999).

58. See Irving Younger, *In Praise of Simplicity*, 62 A.B.A.J. 632, 633 (1976). (“Beauty may exist in a legal system as well as in a saltcellar by Cellini. We should seek beauty everywhere and take pleasure in it wherever we find it, even in a statute.”) The author finds Section 2-302(1) of the Uniform Commercial Code to be “a thing of beauty.”