

THE CHALLENGES AND THE FUTURE OF COMMERCIAL AND INVESTMENT ARBITRATION

Liber Amicorum
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Edited by
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Warsaw 2015

HAS ARBITRATION GONE BEYOND BASIC CODIFICATION? UTILITY OF DISPUTE RESOLUTION BEST PRACTICES

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INTRODUCTION

Professor Jerzy Rajski's numerous publications illustrate his interest in various fields of law including arbitration. When the writer was honoured with an invitation to contribute to the *Liber Amicorum* in honour of Professor Rajski, she considered the significant number of subjects covered in his articles and their variety. One of the subjects concerned the codification of international commercial law.² Codification has been a subject of debate for several years in international arbitration. It therefore seemed to the writer that contributing to the *Liber Amicorum* on the issue of codification in arbitration is topical.

In the last two decades the international dispute resolution community has issued a significant number of codes of practice. We know that no business may be conducted without rules and codes. Codification is doubtless needed for transparency purposes and for harmonising practices to a certain extent. The difficulty is to discern between the need for guidance and the production of superfluous codes. Since the beginning of humanity, absence of discernment has been the source of controversy and conflicts.

The need to streamline some practices is uncontested considering the remarkable evolution of the dispute resolution field in recent decades and the numerous players in the international dispute resolution community. It has led the community to establish a wide range of best practices,

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The author wishes to thank Gillian Carmichael Lemaire, Karen Mills and Ileana Smeureanu for their input.

¹ J. Rajski, *La tendance vers la codification progressive du droit commercial international*, in: M.C.A. Colliard, *Droit et libertés à la fin du XX siècle*, Paris 1984.

lists, checklists, guides, guidelines, principles, techniques, protocols, policies, notes, tables and other guidance documents elaborated by organisations like the UNCITRAL, IBA, ICC, or by professionals. The diversity of designations reveals not only their variety, but also the difficulty in determining how these best practices may be considered or applied. These documents will be referred to indistinctly as 'tools', 'instruments', 'best practices' or 'codes of practice'.

The phenomenon of codification is probably necessary due to the increasing number of practitioners from a multitude of cultural and legal backgrounds and the need to codify practices in an attempt to speak the same language. Moreover, dispute resolution practitioners usually like to share with their peers those experiences which were successful and which could serve as a model, as well as bad experiences which could help their peers know the kind of pitfalls to be avoided.

The purpose of codes of practice is to facilitate the work of the parties in preparing and arguing their case, to assist the arbitrators in the organisation and conduct of the proceedings, to ensure that no pitfalls will prevent enforcement of the awards, to allow for cost-effective procedures, and to enable newcomers in arbitration to navigate in the dispute resolution environment.

Over-codifying may nonetheless lead to a countereffect by limiting autonomy – some areas of law have been left unregulated precisely for this reason – limiting flexibility or creativity, and worse, opening the door to controversy, contradicting interpretations, unfounded objections and challenges. Practitioners should neither rely solely on best practices, nor relinquish them as inspiration or guidance. While striking a balance is a difficult exercise, common sense should remain the guiding principle.

Writing about best practices used as tools in key phases of international arbitration may seem to be an academic exercise.³ Yet, in the last few years, the subject of best practices has become the centre of debates at several conferences around the world and has been discussed in several articles. It therefore seemed topical to contribute to the debate and share views about these tools which the writer considers useful, to a certain extent.

This article will discuss some of the pros and cons of dispute resolution best practices (1) and will mention some of those which are among the most

³ K. Mills, M. Philippe & I.M. Smeureanu, *Lists, Checklists, Guidelines, Principles, Techniques, Protocols, Best Practices: Are They Useful?*, Kluwer Arbitration Blog, 16 January 2014, <http://kluwerarbitrationblog.com/blog/2014/01/16/lists-checklists-guidelines-principles-techniques-protocols-best-practices-are-they-useful>.

widely known in international dispute resolution or which, in the writer's opinion, may deserve to be better known (2).

1. PROS AND CONS OF DISPUTE RESOLUTION BEST PRACTICES

Codes of practice are helpful and practical (1.1), but may not serve this purpose if improperly used (1.2), and require to be referred to with some discernment (1.3).

1.1. Arguments in favour of arbitration best practices

In the last two decades, there has been a proliferation of books, publications and articles about dispute resolution. Newsletters, news flashes and exchanges of information on list-serves have further added to this industry of arbitration documentation. The arbitration community has noticed this trend and sees in this abundance of material the desire of practitioners to share their knowledge and experience. This wealth of information is easily accessible to practitioners. However, in an age where practitioners are short of time and faced with a plethora of documentation to read, putting in place helpful guidance and establishing some harmonisation may be of valuable assistance in ensuring that the basic issues for each stage of a dispute resolution procedure are duly considered.

In a world of rapid progress, where a vast amount of information is communicated, best practices may assist arbitration users in finding support easily and rapidly. Best practices serve the purpose of providing practitioners with tools aimed at helping them make sure no step is omitted at any stage of the procedure. They are equally meant for professionals looking for support in their very busy lives, and for newcomers to arbitration keen on making efforts to ensure that arbitration is correctly conducted and that awards will be successfully enforced. At a recent conference it was explained that South Korean practitioners who were 'introduced to arbitration "pretty recently" have benefited a lot from best practices, which have helped them to adjust to the arbitral process'.⁴

Best practices are often referred to as soft law instruments. Unlike hard law, soft law refers to quasi-legal instruments which do not have any legally binding force, and may be defined as normative provisions contained

⁴ Reported by K. Karadelis in *Global Arbitration Review Making a Meal out of Best Practices*, 13 November 2014, <http://globalarbitrationreview.com>.

in non-binding texts.⁵ Soft law instruments do however carry some authority or may be perceived as binding.⁶ They become a 'reference', a 'best practice', a generally tested and accepted principle, especially in the field of international law and international dispute resolution, where legal texts on specific procedural aspects are lacking or the provisions of which do not provide sufficient guidance. Thus, some best practices have become key tools, such as the IBA Rules on the Taking of Evidence in international arbitration ('IBA Rules on Evidence'), although some practitioners tend to contest the authority of the drafters or of the bodies they represent, or to question their utility. It seems nevertheless more appropriate that codification of practices be drafted by practitioners from the international dispute resolution community as opposed to legislators who generally adapt rules for their jurisdictions that cannot apply universally.

The role played by soft law like the UNIDROIT Principles or the IBA Rules on Evidence have proven to be so useful that these tools are updated from time to time to take into account changes in practice, for instance, a reference to electronic documents was included in the IBA Rules on Evidence adopted in 2010. Had these instruments not had a remarkable success as noted by an author,⁷ they would probably not be revised by working groups who take the time to consider the issues anew and to update best practices.

The codification trend is no different from the trend of revising dispute resolution rules from time to time in order to include provisions not contemplated previously, as certain trends did not exist, or did not create any particular concern at the time of adopting or revising rules. The need for revising rules or for codifying practices becomes necessary when issues recurrently encountered have not been previously foreseen and deserve some organisation. Provisions previously considered as best practices are even sometimes incorporated into rules, for instance some of the recommendations of the ICC Techniques for Controlling Time and Costs in Arbitration have been incorporated into the 2012 ICC Arbitration and ADR Rules under Appendix IV related to Case Management Techniques.

Law firms also have their own best practices and some of them choose to share them publicly, like the Debevoise & Plimpton LLP Protocol to

⁵ D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford University Press, 2000, p. 292.

⁶ See a very interesting article about codification of soft law instruments, namely who prepares them, why and how, by G. Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, *Journal of International Dispute Settlement*, 2010, pp. 283–299.

⁷ *Ibid.*

Promote Efficiency in International Arbitration. There are also lists which are not self-standing documents but are part of books or articles, such as the 'preparatory conference' issues listed by an author in one of his articles.⁸ Some authors have chosen to incorporate a checklist of main issues to be addressed for each procedural stage at the beginning of each chapter in a book they devoted to International Arbitration Checklists.⁹

Despite some practitioners opposing the use of best practices as contrary to common sense, the majority of authors and working groups tend to promote best practices because they are aware of the fact that practitioners need practical tools they can reliably refer to. Similarly, practitioners have been calling for more guidance including that which can be gleaned through publication of awards.

Arbitration is an art as reputed practitioners define it. Yet it is no longer within the hands of highly experienced lawyers and arbitrators only, as arbitration has grown in popularity and is a dispute resolution mechanism used throughout the world. Experience may not exist in all generations and cultures. Hence, sharing knowledge and experience through recommendations may only benefit arbitration and the arbitration community; bad experiences may have an impact on arbitration as a whole. Best practices ensure that minimum standards are properly applied and that mistakes are prevented as much as possible. Young or new practitioners are not left without assistance and may either take inspiration or adopt tested practices to make sure procedural aspects are respected.

Although this trove of guidance and best practices has no binding effect, it can be extremely helpful in assisting not only less experienced practitioners but also the most experienced users. Best practices may assist in avoiding pitfalls at all stages: before a dispute arises, by drafting an effective arbitration clause; after it has arisen, by correctly preparing a request for arbitration; and when the arbitration process has already commenced, by conducting a procedure in the most appropriate way and by rendering an enforceable award. 'There is a need for a greater degree of self-regulation of the process to enhance its legitimacy' said an author.¹⁰

⁸ A.J. van den Berg, *Organizing an International Arbitration: Practice Pointers*, in: *The Leading Arbitrators' Guide to International Arbitration*, 2nd ed., Juris Publishing, Inc. 2008, pp. 149–170 (see page 157).

⁹ G. Hanessian & L.W. Newman (eds.), *International Arbitration Checklists*, 2nd ed., Baker & McKenzie International Dispute Resolution Practice Group, JurisNet, LLC, 2009.

¹⁰ Reported by L. Szolnoki in *Global Arbitration Review Veeder backs Paulsson's call to self-regulate*, 27 March 2014, <http://globalarbitrationreview.com>.

The writer shares the view of some practitioners who appreciate that these tools help establish a common playing field where practitioners from different generations, backgrounds and cultures attempt to speak one language. Speaking about 'clashes of culture', Jan Paulsson commented that 'modern practitioners have adopted a cosmopolitan approach which converges in a range of shared practices'.¹¹

Best practices help avoid bad surprises when practitioners operate under the assumption that everybody knows the rules of the game.¹² They prove to be helpful to users who have no lists or who wish to benefit from the experience of their peers. Moreover, 'some soft law instruments may serve as a written baseline for acceptable practices in international arbitrations', as stated by Klaus Peter Berger.¹³ In addition to the above mentioned benefits, harmonising practices may offer predictability to arbitration users, whether familiar or unfamiliar with arbitration practice. Matthieu de Boissésou considers pertinently that the logical reasoning according to which soft law instruments bear no risk for arbitration prevails, and that such instruments may in fact contribute to the efficiency of arbitration.¹⁴

In the same spirit and mindful of the need for some guidance, sometimes requested by the users, the Secretariat of the ICC Court of International Arbitration issued practice notes, for instance on the conduct of the arbitration, and two checklists: an ICC Award Checklist and a Checklist on Correction and Interpretation of Awards. The Checklists provide arbitrators acting under the ICC Rules of Arbitration with guidance when drafting awards or when correcting or interpreting awards, and are intended to facilitate the arbitrators' mission.¹⁵

¹¹ J. Paulsson, *The Idea of Arbitration*, Oxford University Press 2013, see page 179.

¹² See in this regard an interesting example provided in K.P. Berger, *Chapter 2: The In-House Counsel Who Went Astray: Ex-Parte Communications with Party-Appointed Arbitrators*, in: D. Baizeau & B. Ehle (eds.), *Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider)*, Kluwer Law International 2015, pp. 7–16.

¹³ *Ibid.*

¹⁴ M. de Boissésou *La 'Soft Law' dans l'arbitrage*, *Les Cahiers de l'Arbitrage*, 2014-3, pp. 519–523: the sentence in French at page 521 is as follows: 'De ce point de vue, triomphe en apparence le raisonnement logique qui a été mentionné, selon lequel les instruments de la 'soft law' ne comportent aucun risque pour l'arbitrage à l'efficacité duquel ils peuvent au contraire participer.'

¹⁵ Practice Notes and Checklists are available at <http://www.iccdri.com/practicenotes.aspx>. See an interesting article by T.J. Stipanowich *Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings*, Pepperdine University School of Law, Harnish Law Library, Legal Studies Research Paper Series, Paper Number 2014/4.

The soft law instruments serve the purpose for which they were meant: a reminder of a list of steps to keep in mind when addressing an issue or a phase of dispute resolution. Diaries are for remembering appointments; meeting agendas provide the persons attending the meeting with information on the subjects to be discussed, their order and sometimes the time allocated to each subject. Diaries and agendas are meant to assist in organising time and work, and to avoid forgetting commitments or subjects for discussion. Similarly, best practices serve as reminders or roadmaps. Like tables of contents, checklists – with concise structured information – are easier to remember than any amount of reading a person may undertake.

1.2. Arguments against arbitration best practices

The other side of the coin is clearly less convincing; nothing is entirely positive or negative. Certain codes of practice may aggravate rather than resolve problems, especially when they create confusion or when they are not used in the way for which they have been designed, when they are improperly applied, or when they are deliberately abused to attempt to delay or derail a procedure. Moreover, there are downsides to best practices when users lose control, or lack pragmatism to consider whether some recommendations may be used in a given case and in a specific situation. Furthermore, applying codes of practice without a minimum of discernment, knowledge, experience, or 'practice' in the field in which the codes are meant to apply, serves no purpose.

Opinions of practitioners differ about the usefulness of soft law instruments. Some reputed practitioners seem strongly opposed and consider best practices as 'an unwelcome and detrimental substitute for independent legal thinking by arbitrators and counsel',¹⁶ and that when 'all aspects are fully covered by guidelines [...] the international arbitration community need not think any more', as Michael Schneider summed up.¹⁷ V.V. Veeder is of the view that '[t]here is still too much to be said against the increasing introduction of new guidelines, codes, notes and rules [...]'.¹⁸ Other reputed practitioners have weighed the pros and cons

¹⁶ K.P. Berger, *Chapter 2: The In-House Counsel...*: the author cites Michael E. Schneider.

¹⁷ M.E. Schneider, *The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and other Methods intended to help International Arbitration Practitioners to avoid the Need for Independent Thinking and to promote the Transformation of Errors into 'Best Practices'*, in: L. Levy (ed.), *Liber Amicorum en l'honneur de Serge Lazareff*, pp. 563–567.

¹⁸ V.V. Veeder, *Is there any Need for a Code of Ethics for International Commercial Arbitrators*, Colloque du 4 février 2005 sur les Arbitres Internationaux, in Centre Français de Droit Comparé, vol. 8, 2005, pp. 187–193.

of codes of practice through a thorough examination of the reasons for both.¹⁹

Despite their usefulness, laying down rules of usage may serve ill-intentioned parties who may for instance argue that a situation is or is not covered by the best practices referred to, in order to challenge an arbitrator or challenge an award.

In addition, some recommendations are restrictive in their nature due to their detailed character and must not be used inflexibly as they cannot apply invariably to all situations. Common sense remains the basic rule in all circumstances.

Unsurprisingly, one of the most controversial set of principles is the IBA Guidelines on Party Representation in International Arbitration.²⁰ The controversy lies in the very nature of the Guidelines. It seems difficult to obtain a consensus on the usefulness of these guidelines, because they may not apply uniformly when they relate, among other things, to ethical rules applied differently depending on the jurisdictions in question; it is likewise difficult to evaluate and sanction misconduct. May strategies employed by parties' representatives be considered misconduct? In addition, the issue of the authority which may apply sanctions is not resolved. Should it be the arbitrators? It probably puts them in a delicate situation, not to mention the fact that their mission is to resolve a dispute; arbitrators already have the possibility to take into consideration the misconduct of a party at the time of deciding about the costs. Should sanctions be applied by arbitration institutions as suggested at a conference?²¹ It is not the role of institutions to do so; they have an administrative and not a jurisdictional role, and they are not involved in the procedure before the arbitrators. Furthermore, as highlighted by an author,²² widely publicised sanctions may prompt an appetite for litigation. As David Rivkin simply

¹⁹ G. Kaufmann-Kohler, *Soft Law in International Arbitration...*, pp. 283–299. M. de Boissésou, *La 'Soft Law'...*, pp. 519–523. Toby Landau QC at the opening LL.M. MIDS lecture in Geneva on 25 September 2014; Landau's excellent lecture on harmonising, codifying, and regularising may be heard on the MIDS website: <http://www.mids.ch/index.php?id=704>.

²⁰ IBA Guidelines on Party Representation in International Arbitration (2013): http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#partyrep.

²¹ Reported by K. Karadelis in *Global Arbitration Review*, *Legitimising arbitration: a tête-a-tête with the institutions*, 11 June 2014, <http://globalarbitrationreview.com>.

²² M.E. Schneider, *President's message: Yet another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation*, *ASA Bulletin*, Kluwer Law International, 2013, vol. 31, issue 3, pp. 497–501.

puts it, the rule should be that everyone must 'behave like ladies and gentlemen'.²³

The opportunity to gather practitioners around a table to brainstorm and attempt to draft suggested best practices may be considered useful if it is truly representative of a practice area and when a consensus is reached. It happens though, that consensus is sometimes reached only with difficulty, or is supposedly reached but in reality may have been reached to put an end to a discussion, or even that a proposal is adopted because a delegation from a country speaks better or louder or imposes its views on less experienced or less vocal delegations. The author refers for instance to discussions taking place within the UNCITRAL Working Group III on Online Dispute Resolution. It was entrusted with the drafting of a set of rules for a global online dispute resolution system to handle low-value, high-volume claims, but it has departed from its initial mandate to deal with consumer redress only, and has included business disputes and arbitration in its discussions.²⁴

1.3. Necessary discernment

Striking a balance, being pragmatic and adopting common sense remains indispensable.

Some practitioners tend to think that there are far too many tools and that experience and common sense should always prevail. Although this is true, the proliferation of publications calls for organisation of some indispensable information in order to offer practitioners instruments which are easy to find and easy to use, thanks to the conciseness and step-by-step guidance. Lack of guidance in certain areas is also a reason for establishing guidelines, like the Young ICCA Guide on Arbitral Secretaries.²⁵

Parties, or arbitrators with the agreement of the parties, may decide to refer to some of the best practices in their proceedings. They may also simply take inspiration from tried and tested practices. In any case, arbitrators may apply best practices in the manner that they determine most appropriate for the case.

²³ Report by A. Ross in Global Arbitration Review citing David W. Rivkin 'Everyone shall behave like Ladies and Gentlemen', 5 January 2015, <http://globalarbitrationreview.com>. See also W. W. Park *A Fair Fight: Professional Guidelines in International Arbitration*, Arbitration International, vol. 30, n°3, 2014, pp. 409–428.

²⁴ M. Philippe, *ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR*, International Journal of Online Dispute Resolution, 2014, vol. 1, issue 1, pp. 57–69.

²⁵ Young ICCA Guide on Arbitral Secretaries (2014): http://www.arbitration-icca.org/media/0/14054083023530/aa_arbitral_sec_guide_composite_12_march_2014.pdf.

The Redfern Schedule to track document production (see below) is a good example of a tool used by the arbitration community. It is available online, but has not been published as a best practice as such. It is used by arbitrators and parties when they consider it appropriate to use a ready-made tool in their given case. The same may be said about the Sachs Protocol (see below) that some practitioners have started to use because they think it may be a good solution to certain issues arising out of the appointment of experts. Another thoughtful list of tips or recommendations can be found in an article by two authors²⁶ who shared their experience in order to help their peers avoid bad experiences; they list questions, in what they called an 'arbitration autopsy checklist', that practitioners should ask themselves both before and after a dispute arises. The Chartered Institute of Arbitrators publishes professional practice guidelines and protocols available on its website, aimed at providing arbitrators with guidance for certain procedural issues, for instance on how to approach an application for provisional or interim relief.

These examples demonstrate that practical support is appreciated, although these tools were not published as best practices. Best practices may probably not be applied like rules or codes. Conversely, they may serve as tips, recommendations, guidance, reminders and roadmaps, and may be useful to assist practitioners in their day-to-day practice. They may be helpful if used in a logical way and when appropriate. Practitioners should keep control over the case and follow what common sense dictates in a particular situation.

Furthermore, some best practices have proven to be very practical and have been accepted naturally and used widely as they propose feasible solutions to recurrent issues; the IBA Rules on Evidence are a perfect example. On the other hand, the IBA Guidelines on Conflicts of Interest in International Arbitration may not be considered as generally accepted practices. The reason for which they are harder to accept and to apply is because the criteria for evaluation of disclosures and the perception of independence differ depending on the legal and cultural background.

Finally, soft law instruments are clearly present in international dispute resolution as revealed by a survey conducted about the use of soft law instruments,²⁷ although they enjoy different levels of acceptance and use by practitioners depending on their legal backgrounds.

²⁶ B. Leon & R. Kennedy, *An Arbitration Gone Bad – Not Arbitration Gone Bad*, *Commercial Litigation Review*, vol. 7, n° 1, February 2009.

²⁷ E. Mereminskaya, *Results of the Survey on the Use of Soft Law Instruments in International Arbitration*, *Kluwer Arbitration Blog*, 6 June 2014, <http://kluwerarbitrationblog.com/blog/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration>.

The writer questions the very nature of criticism raised against codification: despite the proliferation of best practices which are only guidance and tips provided to the dispute resolution community, is it not for practitioners to evaluate their usefulness in a specific situation? Best practices are not meant to be a substitute for the analytical views of arbitration practitioners about a dispute or a process. It is for practitioners to strike a balance.

The best way to conclude this examination of the pros and cons of dispute resolution best practices is to cite Toby Landau who recently lectured on Codification, Harmonisation and Other Misadventures.²⁸ The writer selected a few statements from the thorough and excellent analysis of the benefits and disadvantages of best practices. Regarding the usefulness of codification he explained that: 'Harmonisation is an ability to recognise international norms of good practice. It is to enhance efficiency. It is to reduce compliance and regulatory burdens, to reduce local complications for businesses that are operating nationally or trans-nationally. It creates stability, certainty by enabling parties to predict in advance the rules that are likely to apply to them. Alongside harmonisation is the connected but analytically distinct concept of codification. Why would one codify? The classical reasons are: accessibility, transparency, accountability, certainty, predictability.' Toby Landau also considered the negative aspects of codification and indicated amongst others that there is a basic difficulty with imposing universal, uniform, harmonised rules and that the harmonisation process assumes that there is one correct approach, one correct answer, one best way of doing things and that approach ought to be imposed worldwide. He added that it was true of the grand framework proposition, e.g. true for the New York Convention or the UNCITRAL model law, but that it is no longer the case when it comes to finer detail and micro-management. 'Why are we not rejoicing that there are differences? How can we possibly say that there is only one way of doing things?' he added.

In summary, in the author's view, best practices are very useful, but there is no such thing as one answer or a perfect solution. Thanks to the guidance provided in best practices, such tools can be used for what they are: guidance. To the question of whether or not to apply best practices, the answer should be: it depends. The appropriateness of the use of a soft law instrument depends on the elements of the case and probably the level of experience of the players involved.

²⁸ Readers may listen to the excellent lecture on Codification, Harmonisation and Other Misadventures of Toby Landau QC at the opening LL.M. MIDS lecture in Geneva on 25 September 2014 available on the MIDS website: <http://www.mids.ch/index.php?id=704>.

2. SELECTED DISPUTE RESOLUTION BEST PRACTICES

The purpose of this article is not to list codes of practice or to discuss them, but to mention some among the most widely known and used in international dispute resolution or which the author considers practical and deserving attention. An author commented about the waste of time and money on procedural skirmishes²⁹ generated by some best practices; yet, for the reasons discussed above, some of the best practices are useful.

IBA Guidelines for Drafting International Arbitration Clauses (2010):³⁰ Arbitration clauses are the door to arbitration and may determine the main procedural aspects of a case. Several checklists are available on the internet. The most widely-known, in addition to the IBA Guidelines, are probably Paul Friedland's *Arbitration Clauses for International Contracts*, Doak Bishop's *Practical Guide to Drafting International Arbitration Clauses* (both authors were members of the Task Force which drafted the IBA Guidelines), and Arif Hyder Ali's *Best Practices in Drafting Arbitration Clauses*.³¹ These instruments are indispensable, because experience demonstrates that more than half of arbitration clauses are ambiguous or badly drafted, often called **pathological**. In the worst case scenario, a badly drafted clause can even preclude arbitration. However experienced a drafter may be, it seems useful to refer to a list, at least to make sure that no basic principle has been forgotten and that complex situations have been correctly addressed as far as possible.

IBA Rules on the Taking of Evidence in International Arbitration (1999, amended in 2010):³² These are probably the most widely used guidelines in arbitration. Parties and arbitrators often adopt them as a part of the arbitral procedure, as can be seen in procedural orders, terms of reference and awards. Although there may remain differences in the conduct

²⁹ M.E. Schneider, *President's message...*

³⁰ IBA Guidelines for Drafting International Arbitration Clauses: http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#drafting.

³¹ P.D. Friedland, *Arbitration Clauses for International Contracts*, *Arbitration International*, 2010, vol. 26, issue 3, pp. 437–440. D. Bishop, *Practical Guide to Drafting International Arbitration Clauses*, <http://www.kslaw.com/library/pdf/bishop9.pdf>. A.H. Ali, *Best Practices in Drafting Arbitration Clauses*, http://www2.unitar.org/dfm/Resource_Center/BestPractices/bps7.htm.

³² IBA Rules on the Taking of Evidence in International Arbitration: http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#ArbitrationRules.

of international arbitration, as pointed out by an author, the 'harmonising effect of Articles 3 and 4 of the IBA Rules of Evidence (1999) has helped considerably'.³³ As highlighted by Gabrielle Kaufmann-Kohler,³⁴ these Rules are aimed at 'filling gaps in existing national legislation and to harmonise divergent national traditions and practices'.

IBA Guidelines on Conflicts of Interest in International Arbitration (2004, revised in 2014): In a ten-year period this has become the industry standard reference,³⁵ adopted by practitioners worldwide, including some arbitral institutions, in relation to disclosure of any matter which may give rise to doubts as to the arbitrators' impartiality or independence, and in relation to challenge of arbitrators. Whilst these guidelines help arbitrators assess types of situations that may require disclosures, the situations described in the practical application lists have unfortunately been the source of tactical objections to the appointment or challenge of arbitrators as reflected in some case law.³⁶ It is true that the green, orange and red lists, which deal with different categories of disclosure, provide examples to arbitrators who hesitate about whether a disclosure may, or should be made. However, such lists cannot possibly cover all situations, may 'increase the risk of default by an honest arbitrator making an honest mistake',³⁷ and may create more problems than they solve. Arbitrators

³³ V.V. Veeder, *Is there any Need...: Article 3 concerns Documents and Article 4 – Witnesses of Fact*.

³⁴ G. Kaufmann-Kohler, *Soft Law in International Arbitration...*

³⁵ G. Kaufmann-Kohler, *Soft Law in International Arbitration...: the author mentions an interesting analysis of how courts refer to soft law instruments and refers to case law by citing among others a Swiss Federal Tribunal decision in which it is stated that 'Such guidelines do not have the force of law; they are nonetheless a valuable tool, capable of contributing to harmonize and unify the standards applied in the field of international arbitration to conflict of interest issues'.*

³⁶ See case *A and Others v. B AS*, High Court of Justice, Queen's Bench Division, Commercial Court, Case No. 2011 Folio 108, 15 September 2011: a party who challenged an arbitrator argued that 'even if the present situation does not fall expressly within the Waivable Red List, the court should apply the approach of the IBA Guidelines by analogy on the basis that their spirit covers what should happen in all cases of potential conflict, irrespective of whether the facts of the particular case fall within the list'. The judge said that the 'IBA guidelines do not purport to be comprehensive, nor could they be [...] The Guidelines are to be applied with robust common sense and without pedantic and unduly formulaic interpretation [...]'. The judge held that the 'Guidelines are not intended to override national law'.

³⁷ V.V. Veeder, *Is there any Need...*

should rather step in the shoes of the parties to assess whether a situation may be considered to be of such a nature as to call into question the independence of the arbitrators in the eyes of the parties. This criteria is clearly stated in the ICC Arbitrator Statement of Acceptance, Availability, Impartiality and Independence, which is a good illustration of general guidance provided to arbitrators who are requested to make disclosures of any past or present relationship, direct or indirect, between them and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional, or of any other kind.³⁸ In case of doubt about whether a fact or a circumstance should be disclosed, the ICC Arbitrator Statement provides that any doubt must be resolved in favour of disclosure. Disclosures by arbitrators are always examined by the ICC on a case-by-case basis as situations are never the same, the perspective of the parties being different from one case to another. In addition, there is no universal standard of independence, not to mention that the independence standard has a subjective element.³⁹

IBA Guidelines on Party Representation in International Arbitration (2013):⁴⁰ It is probably too early to examine if and how these Guidelines are used and the type of questions they raise. It was clear from debates at recent conferences⁴¹ that ethical rules may be quite different from one jurisdiction to another, as discussed above, and that many practitioners are sceptical about the utility and the application of such Guidelines.⁴² Although some principles may be necessary, these Guidelines may raise more issues than they intended to solve.

³⁸ See in this regard A.M. Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC Bull, Special Supplement 2007 Independence of Arbitrators, 2005, pp. 7–43.

³⁹ J. Fry & S. Greenberg, *The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases*, ICC Bull, vol. 20, n° 2, 2009, pp. 12–32, and an Appendix on *References to the IBA Guidelines on Conflicts of Interest in International arbitration ('IBA Guidelines') when Deciding on Arbitrator Independence in ICC Cases* by S. Greenberg and J.R. Feris, pp. 33–40.

⁴⁰ IBA Guidelines on Party Representation in International Arbitration (2013): http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#partyrep.

⁴¹ See namely a report by K. Moyeed in *Global Arbitration Review London: A Rubik's Cube of Ethical Rules?*, 21 October 2014, <http://globalarbitrationreview.com>.

⁴² M.E. Schneider, *President's message...*

UNCITRAL Notes on Organizing Arbitral Proceedings (1996):⁴³

The purpose of these Notes is to assist arbitration practitioners by listing and briefly describing matters for possible consideration when organizing proceedings. They cover a broad range of situations that may arise in arbitration, as diverse as the choice of a set of arbitration rules, the choice of a place of arbitration, or the language of the procedure, issues of confidentiality, evidence, witnesses and so on, although not all matters addressed in the Notes may arise. They are very practical and are meant for universal use rather than being designed as best practices, and are similarly useful for practitioners, whether familiar or not with arbitration. The UNCITRAL Secretariat has carried out a survey on their use and indicated that practitioners find them useful. The Notes are currently under revision but the working group will ensure that their universal acceptability is preserved.

ICC Techniques for Controlling Time and Costs in Arbitration (2007, revised in 2012):⁴⁴ The very practical recommendations provided are aimed at reducing time and costs, which have been one of the primary concerns expressed in the arbitration community in the last ten years. They have turned out to be so useful that some of the techniques have been incorporated into one of the Appendices to the revised ICC Arbitration Rules (2012) devoted to case management.

ICC Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration (2014):⁴⁵ The Guide provides a checklist for the procedural decisions that need to be made at each principal phase of an arbitration. Useful in both large and small cases, it enables in-house counsel worldwide to participate effectively in tailoring the pro-

⁴³ UNCITRAL Notes on Organizing Arbitral Proceedings: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>. See also the report dated 25 November 2014 on the status of the current revision works: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V14/079/99/PDF/V1407999.pdf?OpenElement>.

⁴⁴ ICC Techniques for Controlling Time and Costs in Arbitration: <http://staging.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration>.

⁴⁵ M. Philippe, *Effective Management of Arbitration; A Guide for In-House Counsel and Other Party Representatives*, Kluwer Arbitration Blog, 22 July 2014, <http://kluwerarbitrationblog.com/blog/author/mirezepphilippe>. In his closing remarks, Jean-Claude Najjar said that the Guide is a do-it-yourself toolkit allowing the parties to take business decisions and to participate in the shaping of the arbitration.

cess throughout, in order to ensure the cost effectiveness of each arbitration. It is a very useful Guide and a 'do-it-yourself toolkit' as concluded by Jean-Claude Najjar at the launch conference.

Using Technology to resolve Business Disputes (2004):⁴⁶ The Task Force on IT in Arbitration of the ICC Commission on Arbitration has established unique and efficient lists on Issues to be Considered When Using IT in International Arbitration and Operating Standards for Using IT in International Arbitration, aimed at assisting parties and arbitrators in addressing IT-related issues as diverse as organizing paperless files and videoconferencing. It is a unique and very useful instrument which deserves to be better known and used. Although technology changes, the recommendations provided remain topical.

Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration (2011):⁴⁷ This report of the ICC Commission on Arbitration Task Force responds to the need for guidance in this field where production of electronic documents has become an increasing concern. The report states that the framework for the production of documents set out in the IBA Rules on the Taking of Evidence in International Arbitration is a valuable resource to help parties and arbitrators deal with the issue of document production, and expressly encompasses the production of electronic documents. The Task Force thus considered that it is not necessary to prescribe specific rules or guidelines which would be specially adapted to the production of electronic documents. Instead it decided to describe key features of electronic documents and how they may be managed. It also reiterated that the key to maintaining efficiency is to continue to adhere to general principles of specificity, relevance, materiality and proportionality.

⁴⁶ Using Technology to resolve Business Disputes: <http://www.iccdri.com/commissionreports.aspx>.

⁴⁷ Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production>. See an interesting article where authors discuss among others factors to be considered about proportionality of electronic discovery: J.L. Frank and J. Bédard *Electronic Discovery in International Arbitration*, *Dispute Resolution Journal*, November 2007/January 2008, pp. 63–72, <http://www.arbitralwomen.org/files/publication/0903180629534.pdf>.

Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration (2010):⁴⁸ As discussed above, law firms such as Debevoise have their own best practices that they may share publicly, which may be very helpful for their peers. This Protocol is an interesting overview of some principal steps identified in 25 tips, through which the firm expresses its commitment to explore ways of speeding up proceedings.⁴⁹

Redfern Schedule:⁵⁰ As also mentioned above, this schedule is essentially a table used to track document production. It includes four columns aimed at summarising the requested disclosures, the requesting party's justifications, the requested party's objections and the arbitrators' ruling on each request, thus having parties and arbitrators contribute to and centralise a complete record of disclosure requests. It appears to be used in many cases and can help reduce the time and cost involved in document production.

Sachs Protocol (2010):⁵¹ At the Rio de Janeiro ICCA Congress, Klaus Sachs presented a protocol intended to be an alternative approach to expert evidence. In order to remedy potential disadvantages of party-appointed experts and address the concern of tribunal-appointed experts, he suggested a concept of 'expert teaming' aimed at combining the advantages of both. The suggestion is that the parties provide a short list of potential experts agreeable to them and that the tribunal chooses one from each side's list, resulting in an expert team. As described by Martin Hunter,⁵² it is an 'ingenious "hybrid" system'. It is likely to address the concerns of users mainly on the cost-related process of appointing experts by tribunals in addition to experts appointed by parties. The draft report prepared by the expert team becomes a final report once the parties have had the opportunity to comment.⁵³ Such Protocol offers a practical solution which deserves to be better known.

⁴⁸ Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration: <http://www.debevoise.com/~media/files/capabilities/russia%20commercial%20arbitration/arbitration%20protocol.pdf>.

⁴⁹ K. Karadelis, *Making a Meal...*

⁵⁰ Redfern Schedule: http://law.academic.ru/6270/Redfern_Schedule.

⁵¹ Sachs Protocol: <http://www.lawlibrary.ie/rss/CPDArbitration09072011/15SachsProtocolOnExperts.pdf>.

⁵² M. Hunter, *Experts in International Arbitration*, Kluwer Arbitration Blog, 7 February 211, <http://kluwerarbitrationblog.com/blog/2011/02/07/experts-in-international-arbitration>.

⁵³ Reported by K. Karadelis in *Global Arbitration Review*, *Smart-arbitrating*, 27 October 2014, <http://globalarbitrationreview.com>.

Young ICCA Guide on Arbitral Secretaries (2014):⁵⁴ It is interesting to note from this guide that, in response to the question of whether the arbitral process would benefit from greater regulation of the role and function of arbitral secretaries, the majority of participants in the survey reported in the guide favoured regulation. Similarly, in response to the question of what form such regulation should take, an overwhelming majority favoured the form of 'guidelines of best practice as opposed to, for example, some form of binding appendices to arbitral institutional rules' (see page 3 of the Introduction to the project). The suggested best practices represent guidance in an area where an increasing number of tribunal secretaries are employed and where practitioners seek some transparency.

Finally, numerous checklists are published on the internet from different sources, although not all are tested or reputed. However, the plethora of such lists demonstrates and reinforces the need for guidance and knowledge-sharing.⁵⁵

CONCLUSION

From the writer's viewpoint, the utility of best practices, lists, checklists, guides, guidelines, principles, techniques, protocols, policies, notes, tables, and other guidance documents should not be undermined. They offer a summary of issues to verify in order to make sure that all appropriate actions have been taken and hopefully none forgotten. They enable practitioners to keep up with the ever-evolving practices and procedures in the field, and to participate in and conduct the most efficient arbitration procedures. These tools are meant to facilitate the work of practitioners and spare them the effort of 'reinventing the wheel'⁵⁶, with the ultimate goal of saving time and costs. Using these instruments does not mean that practitioners lack knowledge or experience, but shows that recommendations by peers may be useful even if practitioners have their own way of doing things. Overall, they contribute to making arbitration universal.

⁵⁴ Young ICCA Guide on Arbitral Secretaries: http://www.arbitration-icca.org/media/1/14123769188350/aa_arbitral_sec_guide_composite_11_march_2014.pdf.

⁵⁵ See for instance: Checklist for preparing for Arbitration (<http://danzpage.com/checklist-for-preparing-for-arbitration>); Checklist for Demand for Arbitration (www.baystreetchambers.com/checklist-for-arbitration); Notice of Arbitration Checklist (www.ceac-arbitration.com/index.php?id=12); Checklist for arbitrators (www.judiciary.state.nj.us/civil/checklistforarbitrators.pdf).

⁵⁶ K. Mills, M. Philippe & I.M. Smeureanu, *Lists, Checklists, Guidelines...*

Nonetheless, there are detrimental effects, as nothing is entirely positive or negative. Some codes of practice may aggravate rather than solve problems if they create confusion and are improperly used. There are downsides to best practices when the users lose control, or lack the pragmatism to consider whether some recommendations apply in a given case and in a specific situation. Codes of practice are meant to be guidance tools rather than educational material for people who know nothing or very little about dispute resolution.

In conclusion, using codes of practice without a modicum of discernment, and without knowledge and experience in the field in which the codes are meant to apply, serves no purpose. Striking a balance, being pragmatic, and adopting common sense remain the guiding principles.