

Gone with the wind... of arbitration

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INTRODUCTION

Paying a tribute to a friend, a mentor, a lawyer and an arbitrator of great intellectual and moral quality, a poet, is an honor and a pleasure. The author chose the French language to pay tribute to Samir Saleh, because of the subtleties of the language he enjoys using particularly in his poems. In order to contribute to this collection of testimonies gifted to a practitioner who knew how to keep a distance with events, with regard to both people and matters, the author looks back and reflects on a few changes and practices in the course of the past forty years in this fascinating field where ideas and innovations thrive. Knowing Samir's perspective on the changes in the arbitration world and the philosophical discussions he and I sometimes had, I hope that these few words will provide some input for further discussions about the swirling wind which renews the elements and inevitably sweeps away a few practices on its path. I therefore dedicate these words to Samir Saleh, whom I knew when he was the vice-president of the ICC International Court of Arbitration from 1982 to 1988.

It is clear that the arbitration world has changed since the 1970s, and arbitration has encountered increasing success. The example of the number of arbitration cases brought before the International Chamber of Commerce (ICC) since the 1970s is interesting to note. In 1970, 126 cases were filed; a decade later, in 1980, the number had doubled and reached 250; in 1990, a new increase was recorded, with 365 cases, in 2000 the number rose to 541, to reach 793 in 2010, more than twice of what it was twenty years before. In 2016, the ICC had already recorded 966 arbitration cases, which allows us to believe that by the end of the decade the number will exceed what was achieved a decade earlier.

Some changes were necessary evolutions; others seem questionable depending on the person assessing them. Duality is in everything. It is the principle of life itself, of Yin and Yang, nothing is completely positive or negative, and both aspects are complementary. The international community of arbitration usually manages to agree on common practices to adopt, and to

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establish guidelines for the benefit of the entire community in conjunction with all the profiles representing it.

There has been an acceleration of the changes in practice during the past decade. Their frequency sometimes makes it hard to follow the events. Practitioners barely have the time to assimilate new practices, new guides, new precedents, when others have already surfaced. At a recent conference, a practitioner underlined that there has been more changes in the past four years than in the previous forty years¹. Anecdotally, it seems that four million rulings are issued yearly in France, all types of disputes combined. This situation must be similar in several jurisdictions. The legal industry is productive.

The author wishes to revisit a few changes observed in the arbitration world (I) and in general practices (II), and to share some personal views.

I - NEW ENVIRONMENT, NEW POPULATION, NEW MINDSET

1. ARBITRATION COMMUNITY

Up until the 1970s and the early 1980s, the arbitration community in general, and in particular in Paris, had fewer practitioners. The community was composed of a few French and Anglo-Saxon law firms, and the small pool of arbitrators included former magistrates. Practitioners were essentially in Europe and in the United States. There were very few and almost no arbitrators and lawyers practicing arbitration in the former Eastern bloc countries, the Middle East, Africa, Asia and Latin America. From the 1990s, change became slowly visible, and gradually, thanks to arbitration courses and training, it became possible to find lawyers and arbitrators in several countries of all continents.

This era has benefitted from the remarkable input of practitioners and intellectuals who have shaped arbitration, mainly in the 1970s through the 1990s, with their writing, their teaching and their contributions to the world of arbitration, by laying the foundations and setting the rules of the field².

2. ARBITRATION USERS

In addition to the advantages of arbitration, several factors have contributed to its growth.

¹ Michael McIlwrath made this remark at a conference, reported by the Global Arbitration Review (GAR): "ICC New York Conference Explores Regional Arbitration Landscape", 19 September 2016.

² The author pays tribute to these fathers of arbitration, but will only mention hereafter practitioners and intellectuals she had the opportunity to know, or to hear for some of them (the information in brackets only mention one or a few of their contributions to enlighten readers who may not know them): Frédéric Eisemann (first Secretary General of the Court, author of the definition of the "pathological clause" among others, attributed to badly drafted clauses), Yves Derains (Secretary General of the Court from 1976 to 1981), Eric Schwartz (Secretary General of the Court from 1992 to 1996), Horacio Grigera-Naón (Secretary General of the Court from 1996 to 2001), Sigvard Jarvin (General Counsel of the Court from 1982 to 1987 and co-author of the collections on ICC arbitral awards), Dominique Hascher (General Counsel of the Court from 1990 to 1997, and who has greatly contributed to the arbitral jurisprudence as a magistrate), Jean-Jacques Arnaldez (co-author of the collections on ICC arbitral awards), Michel Gaudet (President of the Court of Arbitration from 1997 to 2006), Jean-Pierre Ancel (magistrate who contributed to the arbitral jurisprudence), Albert Jan van den Berg, Marc Blessing, Matthieu de Boissésou, Laurence Craig, Jean-Louis Delvolvé, Charles Jarrosson, Philippe Fouchard, Emmanuel Gaillard et Berthold Goldman (masters of arbitration who published a treatise on arbitration), Martin Hunter, Gabrielle Kaufmann-Kohler, Pierre Karrer, Catherine Kessedjian, François Knoepfler, Pierre Lalive, Serge Lazareff, Julian Lew, Eric Loquin, Pierre Mayer, William W. Park, Jan Paulsson, Jean-François Poudret, Alan Redfern, Claude Reymond, Pieter Sanders, Michael Schneider.

First, arbitration has known an extraordinary development for the past forty years mainly thanks to the tools provided to economic operators facilitating arbitration: the Model Law drafted by the United Nations Commission on International Trade Law (UNCITRAL), as well as the UNCITRAL Model Rules, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, signed by over 150 countries, which was the ideal tool that contributed to the success of arbitration. From the early 1990s, countries which were not familiar with arbitration or which were not favourable to arbitration, have one after the other adopted the UNCITRAL Model Law or taken inspiration from it. In the same way, those that have not signed the New York Convention have followed the example.

Secondly, around the same time, the participation of parties originating from developing countries, as well as States and State entities parties has increased. Parties originating from the former Eastern European bloc, African and Middle Eastern countries, who were in majority Respondents, gradually became Claimants. Likewise, Respondents who were not participating to the arbitration procedure³ gradually understood the importance of not playing the policy of the empty chair. They also started contributing to the payment of the advance on costs and also enforcing awards.

Thirdly, this success is also due to the training that occurred in the business and legal spheres with arbitration seminars, commentaries of decisions and specialised publications. For instance, at the ICC, Michel Gaudet, who chaired the Court from 1977 to 1988, implemented in 1979 a training programme which took the form of workshops, called "*Programme de l'Institut de dix ans*" (PIDA, in English "the Institute's ten year programme"), later renamed "*Programme de l'Institut pour le Développement de ses Activités*" ("the Institute's programme for the Development of its Activities"), to account for the time that passed. He considered that ten years would suffice to train practitioners to the use of arbitration. He was indeed right, since the knowledge of arbitration did improve. However, he did not foresee that the programme would stay relevant, as PIDA workshops have not ceased to be popular and to inspire other training programmes. He was a true visionary. New people are constantly added to the arbitration community, which makes these training programmes ever necessary. The Chartered Institute of Arbitrators is one of the organisations that has most contributed to the training of arbitrators. Finally, the Court's Presidents and Secretaries General, and the Court's counsels as well, have helped developing arbitration in Latin America and Asia in the 1990s, in the Middle East starting in the 2000s, and in Africa in the 2010s essentially. As early as the 2000s, Court's counsel and regional directors have started traveling more frequently to promote the arbitration services of the ICC around the world, and later, deputy counsel have joined the effort. Training and promoting dispute resolution services remain a significant part of the mission of practitioners in this field.

3. SPECIALISATION AND ARBITRATION COMPETITION

In the past, legal professionals were trained in litigation and had only acquired experience in arbitration by practicing it. Some arbitration courses were added to the other subjects of law in certain fields of study, probably starting from the 1980s. The most renowned Master of Laws (LL.M.) programmes in international arbitration were created towards the end of the 1990s. Universities teaching arbitration, notably Stockholm (Sweden), London (United Kingdom), Geneva (Switzerland), Versailles (France) and Miami (United States), have since trained a multitude of young talented individuals. In 2014, the University of Montpellier (France) started teaching

³ Parties had benefitted in the past from a compensation by the Compagnie française d'assurance pour le commerce extérieur (COFACE) upon presentation of an award issued in their favour, when the opposite party did not carry out the award.

arbitration entirely remotely using technology⁴. With arbitration flourishing, a specialisation in arbitration has become indispensable.

Moot court competitions in international commercial arbitration and investment arbitration have multiplied in the 2000s, first in English, and recently in French, Spanish and other languages. The “Willem C. Vis International Commercial Arbitration Moot” started in 1993 with about ten university teams, and has now over three hundred teams competing in Vienna each year and around one hundred in Hong Kong⁵. Other competitions also know growing success, such as the “Frankfurt Investment Arbitration Moot Court”.

Students who are trained in arbitration acquire their first experience with such competitions, thus increasing their chances of being hired, and joining the ranks of available individuals on the arbitration market. On the positive side, the arbitration world now benefits from a higher level of training, but on the negative side, there are more young trained practitioners than positions available on the market.

We have transitioned from on-the-job training, which is a unique experience, to an academic specialisation coupled with practice during valued and quality competitions.

4. THEN AND NOW...

These many developments and this fascinating openness inevitably have a downside, although it does not affect the success of arbitration. First, the arbitration community went from a “gentlemen” mindset to a “business” mindset. It is no longer the time for arbitration philosophy⁶, but for making this industry profitable. Furthermore, practitioners have become more litigious than before. Moreover, the Americanisation of arbitration (for instance the fact of having imported the American system of “discovery”) is now a benchmark in arbitration practice, and often at the expense of the idea that the arbitration procedure is supposed to be simpler than a court procedure. In addition, practitioners at the time considered that the educational aspect reflected in arbitral awards was essential, whereas in the mid-1990s, said aspect did not matter as much, because the educational aspect was covered in articles and conferences. While this remains a minority, more dilatory tactics are used to delay or derail a procedure. Some people do not hesitate to use them, although they would probably not have resorted to such practices if they were not pressured by their clients, or in order to satisfy them, and would have rather denounced these practices in other circumstances⁷.

5. IN-HOUSE COUNSEL

Arbitration has evolved for a long time in the world of lawyers, magistrates and in the academic sphere. In-house counsel were not or not sufficiently consulted or included in discussions and

⁴ Domestic and International Arbitration MOOC (Massive Open Online Course): <https://du-arbitrage.org>.

⁵ For more information on the history of the Vis Moot, see ArbitralWomen Newsletters n°3 of 18 May 2011 and n°14 of 25 May 2015: <http://www.arbitralwomen.org/Media/Newsletter>.

⁶ See Bruno Oppetit, “Philosophie de l’arbitrage commercial international” (Philosophy of international commercial arbitration), *Journal du droit international*, 1993, page 818; and Emmanuel Gaillard, “Aspects philosophiques du droit de l’arbitrage international”, *Livres de poche de l’Académie de droit international de La Haye*, 2008.

⁷ By the author, “Comment se manifestent certaines tactiques dilatoires dans l’arbitrage” (How are certain dilatory tactics manifested in arbitration), *Dalloz Affaires*, 1999, p. 1097.

working groups, and deplored the fact that they were ignored⁸. At the end of the 1990s, the arbitration world understood that in-house counsel were the main interlocutors among all users. Not only do they represent them, but they also know better than anyone else how companies work, the risks they are willing to take, the money they are willing to lose in order to keep clients that are temporarily on the opposite side, the way to save on procedural costs – which are among their case management criteria unlike lawyers – which strategies to use in any given situation, and so on. They know their companies' interests and generally stay very realistic in their approach.

In-house counsel have been invited to the table of working groups for the past ten years or so, and it would be unreasonable to engage in in-depth thinking without them present at the table. Their input is necessary to develop tools that are useful for parties and for arbitrators. Inviting them to the table was beneficial for the entire arbitration, mediation, and expertise communities.

Two ICC guides can be cited as an example of what their participation brought. The first one, "Techniques for Controlling Time and Costs in Arbitration" (*Techniques pour maîtriser le temps et les coûts de l'arbitrage*), gathers various tips relating to key stages of an arbitration procedure, from drafting the arbitration clause to commencing the procedure and all preliminary questions relating to the proceedings, to the procedure before the arbitral tribunal in all its stages⁹. The second one, "Efficient Management of the Arbitration Procedure" (*Gestion efficace de l'arbitrage*)¹⁰ is a practical tool intended for in-house counsel and other parties' representatives, and outlines a certain number of practices that users must take into consideration before filing the arbitration request and throughout the procedure, for a more efficient management. Collaboration between in-house counsel and lawyers is more productive when they explore options together and adopt appropriate decisions¹¹.

Some in-house counsel, such as Michael McIlwrath¹², have also contributed to very innovative initiatives, notably to require more transparency and information on arbitrators, in order to allow parties to make an informed choice when they are selecting arbitrators.

6. CAREERS AND MOVES

In-house counsel and lawyers used to be attached longer to the organisations, companies and law firms that employed them. Staying in the same firm ten years and more was common practice, and sometimes spending one's entire career there was indicative of loyalty and expertise in the field. Moving frequently was viewed negatively, as a sign of instability or lack of sufficient competence.

Things have been viewed differently in the past twenty years. The opposite phenomenon has become the norm. Counsel and lawyers move frequently and quickly. Staying in a position for less

⁸ Michael McIlwrath and Phil Ray, "The Global Pound Conference Reaches its Conclusion: User Focus is Now Mainstream", Kluwer Arbitration Blog, 5 July 2017: <http://kluwerarbitrationblog.com/2017/07/05/gpc/>.

⁹ Techniques pour maîtriser le temps et les coûts dans l'arbitrage, ICC Publication n°843, 2007: http://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0034.htm?l1=Commission+Reports; revised report in 2012: http://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0047.htm?l1=Commission+Reports.

¹⁰ Gestion efficace de l'arbitrage, ICC Publication n°866, 2014: http://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0051.htm?l1=Commission+Reports.

¹¹ See, by the author, "Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives", Kluwer Arbitration Blog, 22 July 2014: <http://kluwerarbitrationblog.com/2014/07/22/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives/>.

¹² Michael McIlwrath is Executive, Global Litigation Counsel at Baker Hughes, a General Electric company, and the author of several initiatives with the primary goal of making dispute resolution easier, faster and less costly for users.

than two years is now normal, and staying longer would be seen as lack of dynamism and sufficient competences to pursue one's career elsewhere. The author regards this interpretation as unjustified and deplores the loss of investment in training within a firm, at the expense of its development plan and of the quality of its services. The constant staff turnover causes a loss of the firm's knowledge of the practices and know-how ("*savoir-faire*"), which constitute an irreplaceable asset.

7. GENDER, REGIONAL AND GENERATIONAL DIVERSITY

The face of arbitration has changed. It is no longer male, pale and stale. It is now composed, although in a limited manner still, of women, regional and ethnic minorities, and younger people. Some statistics show that the average age of arbitrators has moved from 65-70 years in the 1980s and 1990s, to 55-60 in the 2000s. The average age of women arbitrators is ten years below that of men arbitrators¹³.

Some topics are, as always, part of a trend. Among the predominant topics in the arbitration world in the past three or four years, diversity and transparency are heavily featured.

Raising the issue of the dearth of women as arbitrators, counsel, speakers, or in any other role used to be taboo; worse, it was normal that women did not have a place in this field like their counterparts do. Women were just as talented and did the same job, but did not have a seat at the table. They had to stay hidden behind the scenes, or even act as prompters, but never appear¹⁴. Thanks in particular to the work undertaken by ArbitralWomen¹⁵, which opened the door, other initiatives were launched, such as the "Equal Representation in Arbitration Pledge"¹⁶, whose goal is to incite practitioners and users of arbitration to improve the visibility and presence of women in that field. The objective is to offer equal opportunities for equal qualifications.

In a survey conducted by a university on improvements and innovations in international arbitration, a majority of users expressed their wish to see a larger pool of arbitrators, in number, gender and diversity¹⁷. A variety and plurality of experiences and talents offer a much better result, a point that was mentioned in an ICCA conference¹⁸.

8. ARBITRATION CENTERS

How could we not mention the phenomenon of arbitration centers, which have sprung up like mushrooms? At the time, there were only a few centers. Among the most renowned and the most internationally used, there were the International Chamber of Commerce (ICC), the London Court

¹³ For more information on statistics see: "Speeding Up the Path for Gender Equality", TDM Issue May 2016; "How has Female Participation at ICC Evolved? ICC Arbitrators, Court Members and Court's Secretariat", ICC Dispute Resolution Bulletin, November 2017, issue n°3, page 37; "Achieving Gender Equality on the ICC International Court of Arbitration, a Giant Step", ICC Dispute Resolution Bulletin, November 2018, issue n°3, page 104.

¹⁴ See by the author the history of the access of women in the arbitration world: "When did the Doors to Dispute Resolution Open for Women?" TDM Special Issue on Diversity, vol. 12, issue n°4, July 2015.

¹⁵ ArbitralWomen is an organisation which gathers women from all horizons practicing dispute resolution, regardless of their role (arbitrator, mediator, expert, etc.) The organisation started informally in 1993, began to be more active in 2000 and was formally founded in 2005. Louise Barrington and the author are the founders.

¹⁶ Equal Representation in Arbitration (ERA) Pledge : <http://www.arbitrationpledge.com>

¹⁷ Queen Mary survey of 2015 : <http://www.arbitration.qmul.ac.uk/research/2015/>

¹⁸ Joseph Mamounas, "ICCA 2014. Does Male, Pale, and Stale Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change", Kluwer Arbitration Blog, 10 April 2014: <http://kluwerarbitrationblog.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/>.

of International Arbitration (LCIA), the American Arbitration Association (AAA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), a few specialised organisations, such as the London Maritime Arbitrators Association (London) or the Arbitration & Conciliation Association for Cinema and Audiovisual Media (*Association Arbitrage et Conciliation pour le Cinéma et l'Audiovisuel*) (Paris), and a few regional centers.

For the past twenty years, arbitration centers have started to multiply all around the world. Currently there is one center in every country. Some centers have managed to break through and to occupy a small part of the market, such as the Singapore International Arbitration Centre (SIAC) or the Hong Kong International Arbitration Centre (HKIAC). Some centers are part of local chambers of commerce. Several try to promote their activities by multiplying conferences and publications. Many of those centers have very few cases. Naturally, users tend to trust arbitration institutions with several decades of experience. Some who have brought their case before centers without experience have been unpleasantly surprised.

9. PUBLICATIONS

Another change within the past fifteen years is the ease with which practitioners can be published or be speakers. Sharing one's knowledge and experience used to be restricted to the elite. Digital publications since 2010 have made access to publication easier for a larger community of practitioners, some still unknown in the arbitration world, and some very young who make themselves known through publishing. They now have the possibility to communicate on their research, to comment on decisions or other news that can be of interest to the arbitration community. The Kluwer Arbitration Blog and Mediation Blog (Kluwer), Global Pound Conference Blog (GPC), Transnational Dispute Management (TDM), Commercial Dispute Resolution (CDR), LexisNexis are the most renowned and those are just a few¹⁹. The ICC Dispute Resolution Bulletin, which became digital in 2017²⁰, has a greater circulation than before, and welcomes more contributions from any practitioner writing on interesting topics.

Newsletters have quite literally invaded the arbitration world in the same way they have in other professional spheres. It is easy to widely distribute a newsletter electronically without investing in reproduction costs and postage, and similarly easy to forward the message to other potential readers. The practical aspect of digital communications is the ability to read newsletters at all times directly on a mobile phone. This is another sign of the times that has equally positive and negative aspects.

In addition to digital newsletters, the brief news items of the Global Arbitration Review (GAR)²¹, a media specialised in the publication of information relating to the dispute resolution world, have become inevitable. The GAR is the most renowned means of promoting conferences, publishing reports on events, communicating information on important arbitrations and awards, circulating information on lawyers and magistrates movements, in summary, all the information necessary to keep the dispute resolution world informed of every news, quickly and briefly.

¹⁹ Kluwer Arbitration Blog <http://kluwerarbitrationblog.com> and Kluwer Mediation Blog <http://kluwermediationblog.com>, Global Pound Conference Blog (GPC) <http://globalpoundconference.org>, Transnational Dispute Management (TDM) <https://www.transnational-dispute-management.com>, Commercial Dispute Resolution (CDR) <https://www.cdr-news.com> LexisNexis <http://www.lexisnexis.fr>.

²⁰ ICC Dispute Resolution Bulletin available on: <http://library.iccwbo.org/dr.htm>.

²¹ The Global Arbitration Review (GAR) exists since 2005, but became very popular starting from 2010: <http://globalarbitrationreview.com>.

10. EVENTS, MEDIA COVERAGE AND NETWORKING

Codes of ethics generally prohibit lawyers from advertising their services. They are sometimes in the media when a particular case is in the limelight, but they are not at the center of the communication. In arbitration things are very different.

In the past twenty years, the number of events including conferences, seminars, roundtables, working groups, annual meetings, international conventions, cocktail receptions, award ceremonies, has rocketed. Hardly a day goes by without an arbitration event being organised in several cities around the world; different events are sometimes hosted on the same day in the same city, making their promotion more complicated and participation more limited. To attract potential participants, hosts come up with a never-ending flow of ideas and inventions. Topics discussed on panels are sometimes not novel as it is alleged, for example, the dilatory tactics were renamed “guerilla tactics”.

Every practitioner wants to be a speaker at those events and any occasion is good to make a presentation, as these efforts are part of the marketing. This phenomenon is coupled with the hosts’ desire to include in their programmes numerous speakers that could attract the public. Oftentimes there are so many speakers that their speaking time is restricted to less than ten minutes. Conference programmes are sometimes so dense that assimilating information becomes very difficult. It must be noted that the great number of conferences necessarily includes repetitions, and that participants are aware that the value of their participation is not as much for the interest in an already known subject, than it is to listen to the peculiar experience of some speakers and for maintaining a professional network.

Events are then reported in newsletters, in the GAR, in distribution lists (listserv), such as the Oil-Gas-Energy-Mining-Infrastructure Dispute Management (OGEMID) list²², or in video and audio recording posted as podcasts on the internet or on YouTube.

The media coverage of such events is so ever-present that Charles Brower said during an award ceremony hosted by GAR “Hollywood’s annual Oscars extravaganza has nothing on us!”²³. The arbitration world is compared to the “showbiz” world. Everyone desires to be visible and known, including law firms, arbitration organisations, all kinds of arbitration associations and arbitration-specialised media. Everyone feels obligated to play the game which has become the norm in this community, probably fearing they might lose ground and therefore potential clients. A sociologist made a remarkable analysis of the changes and underlying concerns that trouble the field and determine its behavior²⁴.

Despite the exaggerated media coverage, the benefits of these events are not meaningless. In general, speakers do a good job of synthesizing a subject that practitioners do not have time to do. Events are also an opportunity to discover practitioners and to extend one’s personal network.

Moreover, the phenomenon of social networks has also taken over professional environments. Their increased usage facilitates even more excessive media coverage. Before, during and after events, speakers and participants post on Twitter, Facebook, LinkedIn, Instagram and other social networks, short statements sometimes with a photo taken on the spot to communicate on the

²² OGEMID is managed by TDM: <https://www.transnational-dispute-management.com/ogemid>.

²³ “Build on the Classic Model, Urges Brower”, *Global Arbitration Review*, 21 May 2012.

²⁴ Alison Ross “Dealing with Defensiveness: Garth Shares Views Two Decades after Seminal Book”, GAR, 18 November 2015.

conference topic, the speaker or one's own participation to the event. We "tweet", we "chat", in short we spend time seeing and being seen, informing and being informed, most likely in order to avoid being out of the loop and to stay present in the mind of others. One can wonder if that is really necessary. Each reader will have a point of view. Despite certain reluctance to this invasion, the author has recently been experimenting the useful side of these networks in order to promote a conference on "Online Dispute Resolution" (ODR), which is meant to advocate for the usage of technology to resolve disputes online, completely under-explored according to the author²⁵. The conference occurred less than two months after another big conference, the "Global Pound Conference" (GPC), which gathers practitioners to discuss the needs of users and the future of arbitration²⁶. There was a fear that after the GPC conference, the ODR conference would not gather enough practitioners to discuss the proposed topics. That was however not the case, and both conferences on the topic of the future of dispute resolution were highly successful.

Finally, being visible is considered essential and translates into hosting events, sponsoring them, getting the opportunity to be a speaker, and participating to them as often as possible. The arbitration world acknowledges that these events are an excellent opportunity for networking, which is of vital importance.

This change affects the legal practice itself, which normally requires research, reflection and writing, whereas nowadays the dispute resolution field requires spending almost half of one's time doing promotion through various events. Our profession has changed, it is no longer only intellectual, it now also includes a significant amount of marketing.

Regardless of the positive and negative aspects, in everything a proper balance remains essential.

11. BUSINESS DEVELOPMENT

Other new phenomena have emerged in a majority of law firms, companies and arbitration centers.

The first phenomenon appeared about a dozen years ago and pertains to a new department which did not exist before, at least not in such a structured way, the business development department. It is primarily responsible for hosting roundtables for a limited audience, conferences for a broader audience, cocktail receptions, distributing information in the form of newsletters, new book launches, organising presentations to potential new client firms, answering sponsoring requests, and so on. Promoting services and developing networks was indeed becoming essential to face the increased competition in the arbitration field.

12. COMPLIANCE

The second phenomenon, compliance, emerged during the last decade in the business community, and required the creation of a new department within law firms, companies and

²⁵ Conference on "Equal access to information and justice – Online dispute resolution" hosted in Paris on 12-13 June 2017 by the ICC : <https://iccwbo.org/event/equal-access-information-justice-online-dispute-resolution>; see reports "Are People Waking Up to Online Dispute Resolution" by Natasha Mellersh and the author, 22 May 2017: <https://blog.globalpoundconference.org/2017/05/22/are-people-waking-up-to-online-dispute-resolution>, and "The Paris ODR Conference, When Law Meets Tech", by Natasha Mellersh, 20 July 2017: <https://blog.globalpoundconference.org/2017/07/20/the-paris-odr-conference-when-law-meets-tech>.

²⁶ Paris Global Pound Conference on 26 April 2017: <http://paris2017.globalpoundconference.org>; see "Notes from the Paris GPC", by Natasha Mellersh, 11 May 2017: <https://blog.globalpoundconference.org/2017/05/11/notes-from-the-paris-gpc>.

arbitration centers. Although it is vital, it can be very constraining in certain aspects. Indeed, taking into account embargos against some countries²⁷, risks of money laundering and terrorist financing, as well as any factor that could disturb public order and safety, rules were implemented by state authorities and banks. The compliance department must ensure that every stage of a transaction or an arbitration procedure follows these rules. Therefore, compliance checks with the competent authorities require time and can delay the procedures that are subject to such checks.

13. MEDIATION

It is worth mentioning the importance of mediation, which will certainly become even more crucial in the future than it is now. In the past it was referred to as conciliation and the ICC Rules were named “ICC Rules of conciliation and arbitration” until the 1998 revision when conciliation was no longer part of the Rules. In 2012, the Rules were named “Rules of arbitration and ADR”, and in 2017 they became “Rules of arbitration – Rules of mediation”. In spite of that, and to this day, several commercial contracts still refer to the old designation, which shows that contract drafters do not pay attention to the correct designation of the arbitration institution and the rules they wish to refer to²⁸.

The ICC mediation center started in 2001 and the ICC ADR Rules were launched the same year. It replaced the conciliation Rules of 1988. The ADR Rules’ objective is to offer a framework for amicable dispute resolution with the help of a third party (neutral), through various techniques such as mediation, “mini-trials”, “neutral evaluation”, or other methods selected by the parties, including a combination of different techniques. In 2018, the Centre recorded 70 requests, 37 mediation cases, 24 expertise cases, 5 Dispute Board cases and 4 cases introduced under the DOCDEX Rules.

We are far from the success of arbitration; however, some factors indicate that mediation is of interest to an increasing number of users. First, the number of teams participating in the ICC mediation competitions has been steadily increasing. In the first edition in 2006 ten universities engaged in the competition, while in 2017, taking into account the great number of requests, the number was limited to 66 universities for logistical reasons.

Furthermore, the International Mediation Institute (IMI)²⁹ regularly hosts conferences in order to familiarise users with this mechanism which is part of dispute resolution techniques, and in order to get them acquainted with the advantages and usefulness of such a procedure compared to arbitration which is more constraining. To understand the general needs of users, the IMI launched a series of conferences called “Global Pound Conference” (GPC), which were held in about thirty cities around the world, starting in Singapore in April 2016 and ending in London in July 2017. It is a major international initiative which aims at outlining the future of dispute resolution. Practitioners and users of all profiles have participated in surveys and debates, expressed their needs and their visions of the future of dispute resolution. In general, what emerges is a clear trend in favour of mediation.

There was a time in the 1980s and early 1990s when it was common for arbitrators to attempt to reconcile the parties at a moment in the proceedings where the tribunal felt that the situation was

²⁷ Office of Foreign Assets Control: <https://sanctionssearch.ofac.treas.gov>.

²⁸ See on this topic by the author some examples and discussions that ambiguous clauses generate: “*Les pouvoirs de l’arbitre et de la Cour d’arbitrage de la CCI relatifs à leur compétence*”, *Revue de l’arbitrage*, 2006, page 591.

²⁹ International Mediation Institute: www.IMImediation.org.

favourable to such attempt. The arbitration community quickly became reluctant to make such an attempt for several reasons, including the arbitrator's continuity in his or her role as arbitrator after having worn the mediator's hat if this mission failed. In-house counsel find this reluctance absurd and contrary to the efficiency of dispute resolution³⁰.

It is true that multi-tiered clauses which are sometimes provided for by the parties – yet not enough although it could be very useful – contribute to encouraging them to attempt mediation. These clauses would benefit from being used more often to inspire the parties to try other means than arbitration, with the notorious advantages of saving time and cost. As of 2012, the ICC proposed such clauses among the model clauses published in its Rules, to remind the parties of the possibility of considering an attempt to reach an amicable settlement prior to any arbitration proceedings. Statistics suggest that such an attempt would not be in vain, since more than 25% of arbitrations are settled amicably when the parties meet to discuss the Terms of Reference. This demonstrates that in-person dialogue around a table can lead to settlement of some points of conflict that the parties believe can be overcome and sometimes of the entire dispute.

In-house counsel are very supportive of mediation and use it more naturally whenever lawyers are not invited to the proceedings at the beginning of the dispute.

14. TECHNOLOGY

Finally, how could we not mention technology that has invaded our lives? Companies began using computers to manage the live and activities of their businesses in the mid-1980s. Law firms and arbitration centres have gradually become computerised. The ICC was one of the pioneers among arbitration centres in computerising its services. It first created a case management system called ICABase (which is a database gathering information on the arbitration procedures it manages) in the late 1980s under the impulse of the President of the Court Alain Plantey. Similarly, under the impetus of President of the Court, Robert Briner in the 2000s, a NetCase platform was created, giving parties and arbitrators access to their arbitration cases in a secure space.³¹ The Pluridoc software developed by the University of Montpellier has also been installed to gather decisions taken by the Court in different circumstances³².

Information technology has been considered indispensable and a springboard for the future of dispute resolution services. Everything is accessible online, except justice³³! The author deplores the slow development of online dispute resolution services, both for civil and commercial disputes, when such services would give access to justice to thousands of litigants who lack the financial means or the necessary infrastructure to access such a right.

We should also mention the phenomenon of intelligent systems and predictive justice, which are being developed more and more. Taking into account the gigantic amount of information to discover and to know, including laws and case law of several jurisdictions, doctrines, codes and guides, as well as other useful information, it was necessary to find ways to organise such a quantity of data. Fortunately, predictive justice comes to our rescue to help us get to the bottom

³⁰ See footnote 8.

³¹ For more information on the NetCase platform created by the author, see "[NetCase: a new ICC Arbitration Facility](#)", Court of Arbitration Bulletin, Special Supplement 667 on Technology for Commercial Dispute Resolution, 2004, page 53.

³² Ben Davis created ICABase, the author created NetCase and Sylvie Picard Renault installed and managed Pluridoc which later became Spirit.

³³ By the author "We walked on the moon, justice is not yet online", Practical review of Prospective Innovation, March 2017, page 48.

of any given search³⁴. Some practitioners fear being replaced by increasingly sophisticated intelligent systems. Normally these systems are made to assist only. It is however true that with the constant evolution of technology, there are reasons to ask questions³⁵. Two practitioners, Samir Saleh and Nabil Antaki had warned the arbitration community against any drift: the former insisted on the importance of placing human beings at the centre of the questions that arise, and of “placing the aspect of speed in a perspective of ‘sap and blood’ as the philosophers of Ancient Greece said³⁶; the latter recalled that science is in the service of human beings and that “it is enough to fully benefit from it, to save what is essential, that is to say, the possibility of human dialogue”³⁷. Technology is an undeniable advancement but let us hope that human beings will not do without human beings...

II - CHANGE OF PRACTICE

1. COMPLEXITIES AND DIFFICULTIES

By the mid-1990s, the number of cases involving multiple parties and multiple contracts in ICC arbitrations were nearly one third of cases. Cases have become more complex, not only because of the multiplicity of parties and contracts, but also because of the ever-increasing financial and political stakes, parties who have become more litigious than before, objections to the appointment of arbitrators, challenges of arbitrators, and appeals to set aside awards. At the end of the 1990s, an additional factor of complexity was added to the ever-increasing factor of pressure: the need to respond to emails quickly and even immediately.

2. Conflicts of Interest and Challenges

The independence requirements pushing the limits of verification of conflicts of interest to the extreme have made the practise of arbitration increasingly difficult in the last twenty years. Any relationship, however remote, including in time, becomes grounds for objection to the appointment of arbitrators. The requirements are so high that many practitioners have had to leave law firms and work independently to increase their chances of being appointed, avoiding conflicts of interest arising from their firms’ affiliation. Parties often object to the appointment of arbitrators on different grounds, sometimes referring to the examples listed in the IBA Guide on Conflict of Interest³⁸. In the ICC statement of acceptance, availability, impartiality and independence to be completed by any prospective arbitrator prior to his or her appointment, the arbitrator must disclose any direct or indirect relationship he or she may have or has had with parties, their counsel or other representatives, or entities or individuals associated with such persons, whether financial, professional or of any other type, and any doubt must be resolved in favour of disclosure.

³⁴ See Antoine Garapon, “Les enjeux de la justice predictive” *Revue Pratique de la Prospective et de l’innovation*, 2016, n°1, page 28. See also the fascinating discussion on how our environment has evolved and continues to evolve by Louise Degos, “Un nouveau Decalogue pour le futur exercice des professionnels du droit?” *Revue Pratique de la Prospective et de l’innovation*, 2016, n°1, page 33.

³⁵ See an interesting analysis by José Maria de la Jara, Alejandra Infantes, and Daniela Palma “Machine Arbitrator: are we ready?”, *Kluwer Arbitrator Blog*, 3 May 2017: <http://kluwerarbitrationblog.com/2017/05/04/machine-arbitrator-are-we-ready/>.

³⁶ Samir Saleh “Improving International Arbitration: The Need for Speed and Trust, *Studies offered to Michel Gaudet*, ICC Publishing, 1998, page 209.

³⁷ Nabil Antaki, “Technology in the Service of International Arbitration,” *Improving International Arbitration: The Need for Speed and Trust, Studies offered to Michel Gaudet*, ICC Publishing, 1998, page 70.

³⁸ IBA Guidelines on Conflicts of Interest: https://www.ibanet.org/ENews_Archive/IBA_July_2008_ArbitrationMultipleLang.aspx.

Similarly, parties sometimes use dilatory tactics that have become more pronounced over the past twenty years. Any attempt to undermine the arbitrators, the procedure or the outcome of the arbitration is valid. Such challenges are often filed when arbitral awards are about to be rendered or partial awards just rendered. The timing is usually an indication of the challenging party's fear of the expected decision, or a desire to avoid that such award be rendered, or an attempt to have an award set aside if the challenge is successful. Over the past decade or so, a considerable number of challenges was based on an allegation of the arbitrator's mismanagement of the proceedings, which in no way constitutes a lack of independence justifying such a challenge. A lack of impartiality or any other ground may also be invoked under the ICC Rules of Arbitration, but challenges are equally not justified³⁹. On average, only one percent of challenges is accepted by the Court after careful consideration of the circumstances.

3. Dissenting Opinions

Frequently, arbitrators from the East European block, the Middle East and African countries issued dissenting opinions, most probably to protect themselves when the award was not in favour of the party that appointed them, usually State entities from their native countries. Some also used dilatory tactics to protect themselves or to comply with instructions received from the parties appointing them⁴⁰. This trend disappeared with the end of communism in Europe and with the familiarisation of users with arbitration through multiple training courses. Dissenting opinions sometimes shed light on legal issues considered during deliberations but not necessarily considered by the majority of arbitrators.

4. Confidentiality and Transparency

The confidentiality of the arbitration is one of the major advantages, but only implied since arbitration rules do not mention it. Information disclosed in the course and for the purposes of a proceeding by a party was not expressly protected. The 1995 *Esso* case⁴¹ suddenly raised awareness to the fact that to ensure the confidentiality of all information, express measures had to be taken. The Victoria Court of Appeal (Australia) ruled that the parties could not be prohibited from disclosing information on the grounds that it had been obtained in the course of the arbitration procedure, and that confidentiality was not an essential feature of arbitration⁴². Although it was an isolated decision, it shook the edifice of confidentiality in arbitration. Except mentioning that the Court's work was confidential, the ICC Rules of Arbitration only added a provision in this regard as of its 1998 Rules, which stipulated that the tribunal may take any measure to protect business secrets and confidential information. Confidentiality then began to be included in the Terms of Reference in order to ensure compliance. It can of course only be protected to the extent that the information is not already public.

³⁹ For examples of objections and challenges, see Anne-Marie Whitesell, "Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators", *Special Bulletin of the Court*, 2007, page 7; and Andrea Carlevaris and Rocio Digon, "Arbitrator Challenges under the ICC Rules and Practice", *ICC Dispute Resolution Bulletin*, 2016, issue n°1, page 23.

⁴⁰ Some examples are cited by the author in "Comment se manifestent certaines tactiques dilatoires dans l'arbitrage", *Dalloz Affaires*, 1999, page 1097, and in "Difficultés procédurales causées par les clauses compromissoires paritaires et les tribunaux arbitraux tronqués", *Gazette du Palais, Les cahiers du l'arbitrage*, n°309 to 310, of 5th and 6th November 2003, page 21.

⁴¹ High Court of Australia, 7 April 1995, *Esso/BHP v/Plowman*.

⁴² Edouard Bertrand, "Confidentiality of arbitration: evolution or mutation after the *Esso/BHP v/Plowman* case" *Revue de Droit des Affaires Internationales*, 1996, page 169.

However, the distinction between confidentiality and transparency is tenuous. This was the subject of a lively debate at a recent conference⁴³ where the main question was whether arbitration needed more transparency. It would seem, according to the conference, that the proposed transparency would concern “organisational” transparency relating to management of procedures by arbitration institutions, “legal” transparency relating to the publication of awards and “procedural” transparency proposing that procedures be held before public state courts, rather than before private arbitral tribunals, which is surprising. Roundtable discussions concluded that confidentiality and transparency are two non-exclusive and potentially co-existing objectives. On the other hand, users have admitted that if they resort to arbitration, it is precisely for confidentiality and are therefore opposed to more transparency. Finally, users consider that transparency efforts should not sacrifice confidentiality, and that limits should be respected.

Transparency efforts have clearly been visible since 2010. Transparency has become a marked trend in recent times. It has reached the point that the know-how which normally constitutes an asset reserved for those who develop it and who retain this useful privilege for their position on a market, has disappeared in favour of information sharing. Transparency is undeniably conducive to better knowledge of practices, greater predictability, and meets users’ expectations. But is it necessary to reveal everything including the know-how which is no longer a secret for anybody? Is this whirlwind not preventing us from assessing the potential unintended effects that may be to the detriment of those who possess know how? Striking a balance remains necessary.

Upon entry into force of the 2012 ICC Rules of Arbitration, the Court explained certain internal practices in a Note to the parties and arbitral tribunal on the conduct of arbitration under the ICC Rules⁴⁴, which has been revised several times, revealing more and more practices to inform users. For example, the practice relating to the reduction of arbitrators’ fees in the event of delay in the submission of draft awards to the Court⁴⁵.

In addition, the publication of the names of arbitrators appointed in ICC arbitrations registered as of 1st January 2016 was particularly appreciated by users. It answers a need to know the identity of the appointed arbitrators, the frequency of their appointment, the origin of their appointment, and with which arbitrators they co-arbitrated.

The trend towards transparency is so current that the topic was part of the *GAR Awards* in March 2017⁴⁶. Several transparency initiatives were on the shortlist. Three are emphasised to indicate the originality of the proposal and to demonstrate the change in the arbitration environment: Arbitrator Intelligence (AI), “Puppies or Kittens”, “Dispute Resolution Data”.

The first initiative aims to promote transparency, fairness and accountability in the selection of international arbitrators, and to ensure greater diversity in the appointment of arbitrators. The objective is to collect through a survey as much data as possible on the type of information sought by parties when selecting arbitrators. Institutions have signed agreements to share with AI data

⁴³ Rapport sur les débats de la conférence 2017 Vienna Arbitration Days by Victoria Pernt, “How much (more) transparency does commercial arbitration really need?”, Kluwer Arbitration Blog, 4 March 2017: <http://kluwerarbitrationblog.com/2017/03/04/how-much-more-transparency-does-commercial-arbitration-really-need>.

⁴⁴ Available on the ICC website: <https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists>.

⁴⁵ José Ricardo Feris, “New policies and practices at ICC: Towards greater efficiency and transparency in international arbitration”, ICC Dispute Resolution Bulletin, 2016, issue n°2, page 9.

⁴⁶ Lucy Greenwood, Catherine Rogers, Mirèze Philippe, Michael McIlwrath, “The winner of 2017 GAR Awards for best innovation: transparency & diversity”, Kluwer Arbitration Blog, 12 March 2017: <http://kluwerarbitrationblog.com/2017/03/12/the-winner-of-2017-gar-awards-for-best-innovation-transparency-diversity/>.

expunged of confidential information. Once the data has been analysed, it will be made available to users⁴⁷.

The second initiative, closely linked to the previous one, concerns the disclosure of information about arbitrators in order to give the parties greater visibility when selecting arbitrators. On the one hand, the same arbitrators are often selected while others are available. On the other hand, the parties have no available source of information other than the personal contacts when they are called upon to select arbitrators. At a meeting of the International Bar Association (IBA) in Vienna in October 2015, a project was presented and was the subject of heated debate. Its authors proposed that arbitrators disclose their preferences in procedural management techniques and other procedures, for example, if they favour the use of administrative secretary services⁴⁸. The authors of this initiative submitted a survey open to the public, which surprisingly revealed that arbitrators would generally support this request. The author may understand this disposition to disclose information. Twenty years ago, the number of arbitrators was much lower. They are now aware of the demands of the market and that in order to remain in a highly competitive environment it is necessary to satisfy the parties likely to appoint them and to disclose information on how they practise their role as arbitrators.

The many initiatives now align to motivate practitioners to think differently and to find other potential profile instead of always calling on the usual suspects thanks to the tools at their disposal. There was first a search tool for women arbitrators on ArbitralWomen website, inspired by a case management system search tool of the Court Secretariat; ArbitralWomen search tool inspired the Pledge tool⁴⁹. Then there were the two initiatives mentioned above, Arbitration Intelligence and Puppies and Kittens, which requested more information on arbitrators. Finally, there was the ICC initiative to publish the names of arbitrators appointed in ICC arbitrations. The Global Arbitration Review has drawn inspiration from all these initiatives to open a page on its website intended to publish profiles of arbitrators⁵⁰.

Finally, an initiative related to transparency concerns the supply of data that practitioners seek to have and which is not otherwise available. These statistical data come from several arbitration institutions that have agreed to share information after removing confidential data. The purpose of the innovation called Dispute Resolution Data⁵¹ is to analyse standard data allowing practitioners to better assess risk management and strategy.

5. Codification of Practices

There was a time when flexibility was required, and solutions or measures were adapted to each situation, based on legal texts and using common sense. Flexibility stills exists, since it is the principle and the benefit of arbitration. However, in the last twenty years or so, a variety of guides have been added to the basic instruments and imposed on practitioners, although they are not mandatory. Everything is now organised, framed and codified. The usefulness of these guides is

⁴⁷ Catherine Rogers initiated this project; for more information see "Wolters Kluwer announces collaboration with Arbitrator Intelligence", Kluwer Arbitration Blog, Crina Baltag, and 28 June 2017: <http://kluwerarbitrationblog.com/2017/06/28/wolters-kluwers-announces-collaboration-arbitrator-intelligence>.

⁴⁸ Ema Vidak-Gojkovic, Lucy Greenwood and Michael McIlwrath "Puppies and Kittens? How to Better Match Arbitrators to Party Expectations?", Kluwer Arbitration Blog, 8 August 2016: <http://kluwerarbitrationblog.com/2016/08/08/puppies-kittens-better-match-arbitrators-party-expectations-results>.

⁴⁹ These three research tools have been created by the author, in collaboration with Benjamin Davis for the ICC tool.

⁵⁰ Arbitrator Research Tool (ART) : <http://globalarbitrationreview.com/arbitrator-research-tool>.

⁵¹ Dispute Resolution Data, founded by Bill and Debi Slate: <http://www.disputeresolutiondata.com>.

not disputed, at least by the author⁵², but their multiplicity is criticised by some practitioners. For example, the IBA Guide on Party Representation⁵³, which purpose is to codify practices relating to conduct of party representatives and to sanction bad conduct, has been the subject of controversy⁵⁴. Indeed, establishing a code to regulate behaviours for a multitude of cultures having each its own norms and practices - which may potentially be conflicting – is likely to create more conflicts than it resolves according to some authors. It should be noted, however, that ethical issues are paramount and are regularly discussed, studied and published⁵⁵.

Thus, and taking into account the evolution of practises, the increase in the number of practitioners throughout the world with different levels of knowledge, experience and practices, the emergence of new tactics, and therefore new challenges in the management of procedures, it became essential to codify certain practices, following the example of the Rules on the Taking of Evidence⁵⁶. Codifications help to limit procedural surprises and help less experienced practitioners to avoid procedural errors. Experienced practitioners also find it useful to use these guides as a checklist to ensure that all the points they need to verify have not escaped their attention.

The downside of over codifying is that it gives additional ideas to any malicious party wishing to find arguments to challenge an arbitrator or his/her award, on the ground of all kinds of procedural errors or any actions that have not been followed in accordance with the practice guides.

6. Administrative Secretaries

The practice of appointing an administrative secretary was long criticised in the 1980s and 1990s and remains a hot topic to this day. Swiss arbitrators regularly appointed them. Pierre Lalive insisted on his right to use the services of an administrative secretary and challenged ICC's position in this regard. The ICC requested clarification of the mission entrusted to such a secretary, and requested that the arbitral tribunal bears the costs considering that it is unfair to impose them on the parties. Serge Lazareff considered that if the parties had designated him, it was up to him to assume his mission and to manage the procedure. As for Philippe Fouchard, he saw no use in it and was opposed to any unnecessary costs for the parties.

The foundations of the mission of an administrative secretary were used as grounds for the challenge of the three members of an arbitral tribunal before the English courts. A party alleged that the tribunal improperly delegated its role to the administrative secretary, violated its arbitration mandate and failed to disclose the existence, nature, extent and effect of the delegation of its arbitral role to the administrative secretary⁵⁷.

⁵² See by author, "Has Arbitration Gone Beyond Basic Codification? Utility of Dispute Resolution Best Practices", in the Challenges and in the Future of Commercial and Investment Arbitration, *Liber Amicorum* Professor Jerzy Rajski, Court of Arbitration Lewiatan, Warsaw.

⁵³ IBA Guidelines on Party Representation in International Arbitration: <https://www.ibanet.org/Search/Search.aspx?query=party%20representation>.

⁵⁴ Michael E. Schneider, "The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and other methods Intended to Help International Arbitration Practitioners to Avoid Need for Independent Thinking and to promote the Transformation of Errors into 'Best Practices'", in Laurent Levy (ed.), *Liber Amicorum* en l'honneur de Serge Lazareff, page 563.

⁵⁵ Stephen Schill, "The Case for Public Regulation of Professional Ethics for Counsel in International Arbitration", Kluwer Arbitration Blog, 7 July 2014; also see Catherine Rogers "Ethics in International Arbitration", Oxford University Press, 2014.

⁵⁶ IBA Rules on the Taking of Evidence in International Arbitration: [http://www.ibanet.org/LPD/Dispute Resolution Section/Arbitration/Projects.aspx#ArbitrationRules](http://www.ibanet.org/LPD/Dispute%20Resolution%20Section/Arbitration/Projects.aspx#ArbitrationRules).

⁵⁷ Peter Hirst, "When does a Tribunal Secretary Overstep the Mark?", Kluwer Arbitration Blog, 18 April 2017: <http://kluwerarbitrationblog.com/2017/04/18/when-does-a-tribunal-secretary-overstep-the-mark/>.

As the use of administrative secretary services became more and more common, it was necessary to regulate the practise. As early as the 1990s, the ICC issued a note on this subject explaining the policy and the practice relating to the appointment, duties and remuneration of administrative secretaries⁵⁸.

A group of young arbitrators, the Young ICCA (International Council for Commercial Arbitration), reflected on the subject and drafted a Guide on Arbitral secretaries⁵⁹ listing among other things the tasks that secretaries could perform.

The experience that administrative secretaries can acquire to better prepare themselves for arbitration missions is undeniable. Young practitioners are encouraged to accept this role, as it is considered the best school. Hilary Heilbron made it the subject of her speech at a conference on the International Women's Day⁶⁰. She recommended that a database be set up to enable arbitrators to find potential secretaries ready to accept this role.

7. Time and Costs

The time and cost of arbitration has been a concern for the past 15 years and remains a topical issue. Arbitration is criticised for being expensive and for provoking that either parties avoid submitting their disputes to arbitration, or that they use institutions which services are allegedly cheaper but whose quality is not comparable. In addition, a study carried out by the ICC revealed that only 2% of the arbitration costs went to the institution, 16% represented the arbitrators' fees and the remaining 82% constituted the fees of counsel representing the parties⁶¹. The updated study five years later revealed the same percentages. The inflation of expenses is visible and has been rising steadily over the past 30 years. It is caused by the parties and the lawyers they retain, who are generally responsible for the excesses⁶². Techniques have been developed in the form of a guide, including the Guide on Effective Management of Arbitration, to encourage parties to better manage time and costs⁶³.

8. Decisions Unfavourable to Arbitration

State courts occasionally render decisions considered unfavourable to arbitration and which have caused much ink to flow. This was the case for example of the *Dutco* decision⁶⁴ rendered by a French court which had set aside an award on the grounds of failure to respect the equality of the parties in the constitution of the arbitral tribunal. It is also the case of the *Ken Ren* decision⁶⁵ rendered by an English court which had interfered with the arbitration proceedings by taking a decision relating to the provision of security for costs, a decision which was normally for the arbitral tribunal to take.

⁵⁸ The note on administrative secretaries is now part of the Note to the parties and arbitral tribunals on the conduct of arbitration under the ICC Rules of Arbitration available on the ICC website (see note n°44).

⁵⁹ Young ICCA Guide on Arbitral Secretaries: http://www.arbitration-icca.org/media/1/14123769188350/aa_arbitral_sec_guide_composite_11_march_2014.pdf.

⁶⁰ The speech is available in ArbitralWomen Newsletter, Issue n°17, April 2016: https://s3.amazonaws.com/cdn-arbitralwomen/wp-content/uploads/2018/02/AW_Issue_17.pdf.

⁶¹ See footnote 9.

⁶² Michael Buhler, "Costs of Arbitration: Some Further Considerations", in *Global Reflections on International Law, Commerce and Dispute Resolution*, *Liber Amicorum* in Honor of Robert Briner, ICC Publishing 2005, page 179.

⁶³ See footnote 10.

⁶⁴ Supreme Court, 1st civil chamber, 7 January 1992, *Societies BKMI et Siemens c/ Societies Dutco*.

⁶⁵ House of Lords, 5 May 1994, *Coppee-Laval in SA/NV/ Ken-Ren Chemicals*.

Following these decisions, practitioners feared for the popularity of the seats of arbitration where such decisions were rendered. Indeed, when choosing the seat of arbitration, practitioners take these decisions into account and sometimes opt for other seats in order to avoid the pitfalls of the decisions taken by the courts of such jurisdictions. When faced with such difficulties that may put the arbitration procedures at risk, the institution administering the arbitration may have the means to circumvent the problem in certain circumstances. For example, when the arbitral tribunal is constituted in multi-party cases where the seat of arbitration is in France, in order to avoid the setbacks of the *Dutco* case and in the presence of parties who do not agree on the modalities of selection of the three arbitrators, the ICC may appoint the three arbitrators (Article 12.8), thus avoiding the inequality of the parties in the constitution of the arbitral tribunal. However, it has never been found that the courts in which such decisions were rendered have become undesirable, unless a state court has consistently been unfavourable to arbitration.

9. Emergency Procedures

Provisional and protective measures may be essential to protect the legitimate interests of a party. The 1998 Arbitration Rules introduced a provision to empower arbitral tribunals already constituted to take such measures at the request of a party. Accordingly, when ICC arbitration is in progress, such measures may be requested from the arbitral tribunal. In the absence of the latter and pending the constitution of a tribunal, unless a request for emergency measures is filed before state courts, the parties had no other means to preserve their rights. As early as the 2012 Rules of Arbitration, the ICC introduced a new provision allowing a party to have recourse to emergency arbitration⁶⁶. This procedure is regularly used and meets users' expectations.

Other arbitration centres have already added such a service to their range of services.

10. Expedited Procedures

Two former colleagues of the ICC are trail-blazers and deserve to be mentioned in this regard.

Benjamin Davis, the first ICC counsel to have managed a fast-track procedure in 1992 in two related cases worth several million US Dollars in seven weeks, tried to convince the community of the need to establish "fast-track" rules to manage procedures within very short deadlines and even drafted a project⁶⁷. A study was entrusted at the beginning of the 2000s, to the ICC Arbitration Commission, the outcome of which was a report concluding that it was not useful to add new rules since a provision of the Rules of Arbitration already allowed the parties to reduce the usual time limits⁶⁸.

Furthermore, Louise Barrington argued in the early 2000s in favour of arbitration rules for small disputes. The members of the ICC Arbitration Commission Working Group, which she chaired, reached a conclusion that she did not agree with: no rules are necessary mainly because it was difficult to define an amount in dispute that could be considered small, this concept being

⁶⁶ Andrea Carlevaris and José Ricardo Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases", ICC Dispute Resolution Bulletin, 2014, issue n°1, page 25.

⁶⁷ Benjamin Davis, Odette Legacé, M. Volkovitsch, "When Doctrines Meet: Fast Track Arbitration and the ICC Experience" *Journal of International Arbitration*, Vol. 10, n°4, 1993, page 69; also see by the author "Are specific fast-track arbitration rules necessary?", *Arbitration in Air and Space Law Including Telecommunications Activities*, Peace Palace Papers, International Bureau of the Permanent Court of Arbitration, published by Kluwer Law International, 2001, page 253.

⁶⁸ Antonias Dimolitsa, "Note on Expedited ICC Arbitration Procedure", *Bulletin of the Court*, 2002, n°1, page 29.

different from a country to another or from an industry to another. It was then decided to simply write a Guide for arbitrating small claims⁶⁹.

Some 15 years later, the issue of small claims and expedited proceedings was reconsidered in the light of the market developments and resulted in the preparation of an appendix to the Rules of Arbitration dedicated to expedited proceedings⁷⁰. Indeed, any dispute for which the amount is up to two million can benefit from a more simplified and rapid procedure to be completed in six months⁷¹.

Expedited procedures, like emergency measures, were already among the regulations made available to users by other arbitration centres. It was therefore appropriate to offer such services to ICC arbitration users.

12. Value Added Tax (VAT)

Practitioners may remember that the “*Von Hoffman case*” of 1996 caused a great stir. Bernd von Hoffman, a German arbitrator, contested the payment of the tax on his fees claimed by the German authorities, as the arbitrators’ fees had not been subject to such a tax until then. An interpretation of an article of the European Directive on the harmonisation of taxes due on the revenue was then sought from the European Court of Justice (ECJ). In a judgement of 16 September 1997⁷², the ECJ ruled that VAT on the services of an arbitrator was due in the country where the arbitrator was established, irrespective of the country of the parties to the arbitration. The arbitrators’ fees have since been taxed. Practitioners feared that parties would no longer appoint European arbitrators to avoid additional arbitration costs. Fortunately, this unwelcome decision did not prevent the parties from continuing to appoint arbitrators residing in Europe.

CONCLUSION

It would be unreasonable to conclude that all necessary developments that had to be made have been accomplished, just as it would be wrong to think that all these developments are indispensable. The arbitration world has undergone remarkable changes in the past forty years, even though some remain subject to reflection. The subject is exciting and is constantly moving. It is rare that a year goes by without seeing innovations by an arbitration centre, a think tank, professors, arbitrators, in-house counsel, lawyers or users. The arbitration community is active and continues to contribute to the improvement of dispute resolution services. The foundations and rules have been firmly established by our predecessors to whom we owe much, but we have not yet finished innovating.

These are some of the subjects which I will enjoy discussing with Samir Saleh whose analytical spirit has always been judicious.

⁶⁹ Louise Barrington “Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration”, Court Bulletin, 2003, n°1, page 29.

⁷⁰ Arbitration Rules and Mediation Rules: <https://iccwbo.org/publication/arbitrator-rules-mediation-rules-french-version/>.

⁷¹ See for more details on this procedure, José Ricardo Feris, “The 2017 ICC Rules of Arbitration and the New ICC Expedited Procedure Provisions”, ICC Dispute Resolution Bulletin, 2007, Issue n°1, page 63.

⁷² Christian Amand, “TVA communautaire et arbitrage”, Bulletin ASA, 1999, vol.17, issue n°1, page 13.