

Q&A with Professor Pierre Lalive

Last month *Global Arbitration Review* had the pleasure of interviewing Professor Pierre Lalive on his career and challenges facing arbitration today.



"Everybody with rudimentary knowledge about international arbitration knows his name and most have met him at one time or another (or will say that they have)," is how one publication describes him. Sarah Dookhun met with him at LALIVE Avocats in Geneva.

What do you enjoy most about working in the international arbitration field?

One of the great things about international arbitration is that you meet people by and large of a high intellectual level and you have direct contact with people from many different cultures and countries. The conflicts of cultures and the conflicts of rights and laws have always been of great interest to me. There is the legal interest, the human interest and the possibility of helping to bring peace in international relations. So I feel that, as arbitrator or as counsel, I am contributing to something that is useful and positive.

Is there anything that you wish you had done differently?

It has been a fantastic privilege to be a professor of law here in Switzerland. From the time I was appointed a full professor, more than 40 years ago, until I retired, no one has ever told me what to do. And that is why for many years I only accepted appointments as chairman of arbitral tribunals. But a few years ago, I started to think this may have been a mistake in the sense that I missed out on certain experience.

Like most people, when I accept party nominations, I make it clear that I am not going to defend that party's interests and that I reserve the right to

vote against them as it is my clear duty as an independent arbitrator. Parties always pretend that they totally accept this, but, in my experience, in reality it is not always the case.

Acting as arbitrator, generally, is enjoyable, human nature being what it is, because you have a feeling of power, within narrow limits. There is also the financial aspect, but this is often overrated and should not be the strongest force when considering whether or not to accept an appointment as arbitrator (which implies an element of public service).

Did you always plan to specialise in international arbitration?

No! I never intended to specialise in international arbitration. At university I was interested in international law and comparative law; at the time there were no lectures on international arbitration. I learned arbitration by practice.

Did you have a mentor and what was the essence of their advice?

I was lucky enough to become the assistant to two professors in Geneva, both of whom were well-known international arbitrators. One was Georges Sauser-Hall, a Swiss professor teaching private international law and a legal adviser to the Swiss government. The second was a great Belgian lawyer, Maurice Bourquin, teaching public international law at the Graduate Institute of International Affairs in Geneva. He conducted several cases before the ICJ, and thanks to him I had the privilege of acting as counsel for governments before the ICJ, which was fantastic.

Here I should mention the benefit of the organisation and the curriculum of legal studies in Switzerland. Contrary to what is, or was, the case in France – Swiss law schools never separated the teaching of public law and private law. The two branches of law were seen as foreign to each other in many countries and students had to specialise early and choose one direction or the other. Moreover you still had state court judges who had not studied public or private international law, or both (since these courses were not compulsory in the curriculum), and until recently it was the same for arbitrators. Now, given the evolution of international arbitration, especially investor-state arbitration, the two are combined and practitioners must have thorough knowledge of both.

Whilst I have had several mentors, a third one I should mention is Charles De Visscher, a Belgian professor and also a judge at the ICJ. I was his registrar in several interstate arbitrations, which was also a great experience. He was a great lawyer and very independent. In a dispute between Namibia and South Africa before the ICJ he voted independently and, as a result, since elections to the ICJ are largely political, he was not re-elected.

What would you say have been the major changes in the international arbitration market compared with when you began practising?

I would like to refer you to an interesting book called *Dealing in Virtue* by two sociologists, Yves Dezalay and Bryant Garth. They studied arbitrators' contributions to the development of law and international trade arbitration. And they explain what they call the Anglo-American conquest of the international arbitration market. They mention many people, including me, who belong to an "old generation of arbitrators" in what they call arbitration by professors.

International arbitration was indeed previously practised mainly by university people on the European continent. Then, gradually, law firms, especially US firms, discovered the market and entered it with their usual energy and intelligence. So that the "Americanisation" of arbitration is one major change.

Like many developments, it has its good and bad aspects. In the approach to and presentation of documents and facts, English and American counsel were and are often better. And I am certainly not hostile to the culture or to the law of England or the US – I have studied and taught there. But I see the danger of a certain loss of intellectual and moral content if you have only one country or culture exercising a dominant influence, whether it is the US or another country. I strongly believe in what I call the "comparative approach" in international arbitration.

In 1999 you provided a paper to the Chartered Institutes of Arbitrators journal on the challenges that international arbitration would face in the year's ahead [Towards a Decline of International Arbitration – Blackstone Volume 65 No. 4 1999] it would be interesting to ask you some questions based in part on the views expressed in that.

You use the word "complacency" in several places in that piece and suggest that the danger to the continued growth of international arbitration lies in complacency – you mention "a certain smugness and self-satisfaction within the arbitration community" – do you think the arbitration community still occasionally suffers from that flaw?

Yes, this danger within the arbitration community still exists. The number of international arbitrations has increased in a remarkable way, so that may be inevitable.

I delivered for many years a course on international arbitration at the University of Torino, in Italy. At the end I was often asked, "What should I do to become an international arbitrator?" My answer was "That's very easy – get older!"

That is common sense. If you were the general counsel of an international enterprise, would you take the risk to accept the future decision of a young practitioner who has little experience? It is a serious thing to sign an arbitration clause in a contract and there is no doubt that in this field experience counts for a lot. But is it all? I am often asked by parties and their counsel "Who would you recommend that we appoint as arbitrator?" And the answer is not easy. Yes, there is a certain danger of complacency in particular by arbitrators.

You also mentioned that one hears stories about quite well-known arbitrators that indicate they don't deserve the reputation they enjoy. Do you still hear such stories?

I do. I actually often hear that some arbitrators no longer make decisions or write their awards themselves. For me this is incredible because it is only when you write and choose between different ways of expressing your views that you can really have the feeling that you are not making an error when reaching a decision.

Such a practice seems totally unacceptable unless of course accepted in advance by the parties. I came across this issue at the Court of Arbitration for Sport (CAS) where, in a complex case, it became absolutely clear to me that the drafting of the decision had been delegated to one of the young employees of the Court.

Obviously, the argument that arbitrators should delegate certain limited tasks is not entirely devoid of value, but at least the rules of the game should be publicly known. In addition, I do acknowledge that, for instance, to prepare a draft of the summary of the procedure the arbitrators may use an assistant or secretary. But this is not the same as deciding a case at all.

Another view is that if you require arbitrators to write their own awards, it will cost much more. But when parties nominate their arbitrators they normally expect that the arbitrators will do the work themselves.

How should the community go about increasing the information available on the performance of leading arbitrators? Would you be in favour of the sorts of databases now being proposed where a great deal of information, including perhaps "feedback" from parties, can be accessed?

I am aware of a few cases where, after an award has been rendered, the arbitrators have organised a meeting with the parties to discuss their performance. It is exceptional and I have never done this, but it seems like a good idea. Of course, there are cases where the hostility between the parties is so great that this would simply be impossible.

I would not, however, be in favour of a database. I do not believe in lists of arbitrators either even if many organisations have them. Many of such lists are valueless since not to be on them, you have to have killed your father and your mother and been caught! The only reliable list of potential arbitrators is the "black list" and it can never be written.

I admit that when I have been asked to recommend an arbitrator, I have in my time made one or two recommendations that later proved to be erroneous. If you have not seen someone act as an arbitrator you do not really know what he or she will be like. You may know them quite well, have read their work and hold them in great esteem, but they may prove in practice to be bad arbitrators.

Nonetheless, recommendations by word of mouth are the only way to obtain reliable information. Of course it is not 100 per cent accurate 100 per cent of the time but it is the best way.

As an aside, I believe that in order to be a good arbitrator it is not only useful, but also necessary to have been counsel, and vice versa. A good counsel must understand the attitudes and responsibilities of arbitrators, the problems they face and how they react, and arbitrators must be or have been counsel to know the reality of presenting a case. I also think that nationality is usually unimportant. I do not believe in the reasoning that "he comes from that country and therefore he will have that reaction because he shares the

political view of his country". That is clearly false, especially in democratic countries where people often disagree with their government.

Overbooking receives a mention in the same piece. Could you describe your own approach to deciding how many cases one should accept? How many is "enough, but not too many"?

I am still surprised when some arbitrators claim that they have 20 or 30 cases ongoing at the same time – for me it is quite impossible – although I suppose some of these may be small cases.

One has of course to distinguish between the chairman or president of the tribunal, the party-appointed arbitrator and the sole arbitrator. Generally speaking, it is the president (or sole arbitrator) who writes the first draft of the award. So I cannot imagine that you can have more than five or six appointments at the same time, taking into account the different schedules of each case.

In addition, contrary to what some people might think, the length of a procedure does not depend only on the arbitrators but also on the counsel and the parties.

In a case where I acted as arbitrator, the parties stated that initially a decision had to be made in 10 months. But at the first meeting to organise the calendar, each of them asked for time limits that went way beyond 10 months! This shows the difference between the aspiration for quick justice and reality.

In 1999, you felt the bigger danger to international arbitration was maintaining quality. Today the conversation always seems to be about "time and cost". In your article you described the speed of arbitration in 1999 as a "prima facie" serious issue. Do you think the problem has increased since you were writing?

Some arbitrations do take a long time but I do not think that speed is necessarily always a good thing. Parties should be conscious of what is often a trade-off: whether they prefer speed to correctness or correctness to speed. In addition, the length of an arbitration may have a kind of educative value and contribute to a friendly settlement.

Cost is also quite a serious problem. Pierre Tercier, former chairman of the ICC, told me that the institution had analysed all the arbitration awards they had. They discovered that more than 80 per cent of the costs related to counsel, experts and other party-related expenses. Only the remainder was the costs of the arbitrators and the institution.

I had a case once at the ICC in which I was the sole arbitrator and I discovered that the fees I received were one tenth of what one of the counsel had received for his services, which had been quite mediocre!

What in your opinion drives the cost and speed of an arbitration? How therefore can the current concerns about time and cost be solved?

The development of international arbitration and its increased use means there are more cases with a lower value at stake, and sometimes the costs end up being higher than the value of the claim! I think the LCIA and the ICC and other institutions are studying means of providing low-cost, expedited arbitration for such cases, as it is already done under the Swiss Rules of International Arbitration.

Your firm now has a lecture that bears your name. Which of those lectures have you particularly enjoyed, and what subjects would you like to see covered in the series in the future?

I have to stress that I am not at the origin of this idea; it came from my colleagues at LALIVE. There have only been two such "Lalive Lectures" so far, one by Judge Rosalyn Higgins, President of the ICJ, and the second by Professor Pierre Mayer. They were very different but both of high quality, and very enjoyable.

This year's Freshfields lecture will be on "conflicts of culture in international arbitration" and particularly its interface with Sharia law. You have had a great deal of experience in the Gulf Region. How can international arbitrators really understand a culture other than their own, and reduce the effect of any culture clash?

This lecture will be given by Professor Ibrahim Fadlallah, and he is an excellent choice to discuss conflicts of cultures.

How international arbitrators can really understand a culture other than their own, for instance in relation to Sharia law? That is not necessarily easy.

At a recent conference in Stockholm, I heard a brilliant exposé precisely on this issue given by a young Egyptian lawyer called Karim Hafez. He explained, to sum it up, that Sharia law plays very little role in international trade relations, since it is mainly concerned with family law. Other areas of law, for example contract law in other Arab countries were largely influenced by Egyptian law, which was based on French law.

In order for international arbitrators to avoid culture clashes, universities should start training law students much more in international and comparative law. The paradox is that, even though we live in an increasingly globalised world, the curriculum of the majority of law faculties in the world is mostly domestic.

This is slowly changing, but there is danger that many lawyers, especially from great countries like the US, trained largely in one system of law, by and large see things in a domestic or parochial manner, for example only through American eyes or through common law eyes. This increases the risk of conflicts of cultures. Similarly Arab lawyers (although the unity of Arab countries is perhaps a myth), risk to see things through their own eyes.

Problems even arise between practitioners of neighbouring countries, such as France, Germany, Italy, etc trained in one particular legal system. It is a universal phenomenon. Yet, the main duty of the international arbitrator is to be open to other cultures. I think Swiss lawyers are particularly aware of this issue since they continuously experience conflicts of cultures within their multilingual country.

Thank you.