

President's Message

ASA Celebrates its 40th Birthday – A Time to Reflect on the Past and to Look Towards the Future

A new year, a new ASA Board (the first under the new Articles of Association), a new President... does this mean that there will be novelty in the ASA President's Messages? The answer is both "yes" and "no". President's Messages have hitherto been deliberately provocative, sometimes near-jocular in tone and always mind-teasing. A first President's Message may not be best time for deliberate provocativeness – but nor should it be a dreary, mind-numbing affair. Rather, let us indulge in a little celebration on ASA's 40th anniversary, not to engage in maudlin displays of self-congratulation but to reflect on ASA's past in an attempt to guess at its future.¹

To look at ASA's past is actually to travel back well before 1974, the year of ASA's founding. The "researching" for this President's Messages included a thorough and scientific examination of the records of ASA's forebears, and these go back all the way to minutes of meetings of the *Délégation suisse de l'arbitrage* (ASA's grandparent). The oldest surviving minutes date from 10 October 1959. To get an idea of the context, the minutes of this particular meeting comment on the recently adopted United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which had entered into force barely four months earlier. The assessment of the Convention's future importance is, to put it mildly, spot-on: "*Das Abkommen wird in der nächsten Zeit die wichtigste Quelle bei der Behandlung internationalen Schiedsgerichtsfragen darstellen. Fast sämtliche zentralen Rechtsfragen der internationalen Schiedsgerichtsbarkeit lassen sich in den Zusammenhang mit dem New Yorker Abkommen stellen*".²

The minutes of this meeting are further devoted to the preparation of an important conference, in collaboration with the *Comité français de l'arbitrage*. Some of the topics of interest in 1959 seem very, very far away. For instance, the question whether arbitral tribunal from behind the "*iron curtain*" (the term used in the minutes) are actually arbitral tribunals; or the deposit of arbitral awards at courts in order for them to be enforceable. By contrast, others remain very current even today. To take only a few examples,

¹ Future President's Messages will see a return to the previously prevailing style.

² Which translates into English as follows: "The Convention will shortly become the most important source for the resolution of legal issues relating to international arbitration. Almost all central legal issues in international arbitration can be put in relation with the New York Convention".

the members of the *Délégation suisse de l'arbitrage* had correctly recognised, already in 1959, the usefulness of secretaries to arbitral tribunals but also the legal issues related to the appointment of secretaries. Likewise, the independence of arbitrators was a key issue then as now. The minutes focus in particular on the independence of arbitrators vis-à-vis the party having appointed them. This reminds us of recent controversies on the very concept of party-appointed arbitrators. The minutes also include among the topics for discussion the question whether arbitrators are bound to apply national laws or whether they have greater freedom than judges in this respect; this theme remains the object of debate in the 21st century. A further issue that is, to say the least, of current interest is costs: the *Délégation suisse de l'arbitrage* even suggests exploring possibility of establishing an international scale of costs for ad hoc arbitration.

Where does this lead us for this President's Message? Let us take it step by step, drawing from further minutes of meetings of the *Comité suisse de l'arbitrage* and from documents dating from the early days of ASA.

Certain things have changed for the worse. At a meeting of 16 June 1971 of the *Comité suisse de l'arbitrage* (ASA's direct parent) one finds a record of efforts at uniformisation (the dreaded "U-word", a barbarous neologism that at the time would have been incomprehensible to most) aimed at proposing (the reader shudders)... model arbitral clauses. International standardisation is nowhere to be found. Although this conspicuous absence may perhaps be merely the by-product of European-centred parochialism, another and more plausible explanation is that many arbitration specialists were more attuned to users' needs then than now. As for costs, the equally dreaded "C-word", that bugaboo of arbitration: readers can only dream of the days when the daily rental cost of a meeting room at the stately *Schweizerhof* in Bern was 25 Swiss francs (as evidenced by a payment receipt unearthed by your servant during his fact-finding labours).

Happily, other things have changed for the better. Consider for example a list of ASA members from April 1975: all told 75 persons. Granted, this represents a quantum leap from the 15-or-so strong membership of the *Comité suisse de l'arbitrage* in 1961, which increased to 24 in 1971. However, it pales against the approximately 1,200 members of ASA today. More importantly, the composition of ASA has changed drastically. Of the 75 members listed in April 1975, only three were based outside of Switzerland (two in Paris, one in Milan). Today, about one-third of all ASA members are based outside of Switzerland. Most importantly, the gender gap is closing. There is not a single woman to be found in any of the members' lists of the *Délégation suisse de l'arbitrage*, of the *Comité suisse de*

l'arbitrage or in the list of ASA members of April 1975. Today, six out of the ASA Board's 25 members are women, and a woman, Gabrielle Kaufmann-Kohler, was ASA's President from 2001 to 2005. This is still far from good enough, but it is much, much better.

Perhaps most importantly, let us consider some things that have *not* changed.

First, a significant part of the *Comité suisse de l'arbitrage*'s work was devoted to the elaboration of the Swiss Intercantonal Treaty on Arbitration (the "Concordat"), which formed the backbone of Swiss arbitration law from 1969 until its replacement, for international arbitration, by Chapter 12 of the Swiss Act on Private International Law (the "PILA"). ASA was very heavily involved in the legislative process that led to the adoption of PILA's Chapter 12 – a state-of-the-art piece of legislation when it entered into force in 1989. ASA's traditional role in contributing to Swiss legislation on arbitration continues to this day: witness ASA's involvement in the now-current "light" revision of Chapter 12 – a top-priority project for ASA's new Board.

Second, a recurrent feature in ASA's past activities has been close collaboration with other major thought-centres for international arbitration. Minutes of meetings from the 1960s and 1970s are striking in that they evidence constant partnering with not only neighbours such as the *Comité français de l'arbitrage* or the International Chamber of Commerce, but also with more "exotic" institutions such as the Chamber of Commerce of the USSR or the Indian Council of Arbitration. At its meeting of 30 January 2014, ASA's Board recognised the importance of partnering with other major international players as a key instrument for the pursuit of ASA's purpose "*to promote the development of arbitration, in Switzerland and abroad*". In other words, there is strong continuity in this regard.

Third, minutes of a meeting of the *Comité suisse de l'arbitrage* in 1965 record that members were acutely aware of the leading role that Switzerland was called upon to play in the field of international arbitration, even (and actually in particular) where none of the parties had any connection to Switzerland: "*En outre, il faut insister sur le rôle international que la Suisse doit pouvoir jouer en matière d'arbitrage international, même s'il n'y a d'autre rattachement en Suisse que la convention sur le siège*".³ This was one of the driving factors of the *Comité suisse de l'arbitrage*'s actions⁴, and

³ "Moreover, one must insist on the international role that Switzerland must be able to play in the field of international arbitration, even if there is no other connection to Switzerland than the agreement on the seat."

⁴ For example, the *Comité suisse de l'arbitrage* lost no time in translating into English the 1969 Concordat, an effort that began in the early 1970s.

remains at the centre of ASA's preoccupations today. Switzerland cannot maintain its pre-eminent place without looking abroad. For this reason, the new Board of ASA includes eight arbitration users and practitioners based outside of Switzerland, i.e. nearly a third of all Board members.

Fourth, ASA remains committed to sharing and developing scientific and practical knowledge in the field of arbitration. The ASA Bulletin, which was launched in 1983, is still today one of the most respected journals in the international arbitration community, thanks to its high-level articles, reviews of recent case law and, crucially, publication of awards and procedural decisions taken from arbitral practice. This resolutely practice-oriented editorial policy has recently been reaffirmed and arbitration practitioners are warmly invited to provide the editor (mscherer@lalive.ch) with awards or procedural orders that illustrate current issues in arbitration.

Finally, and most importantly, minutes of a 1965 meeting of the *Comité suisse de l'arbitrage* emphasise the need to remain attuned to the needs of arbitral practice. Commenting on certain proposals made in relation to the draft Concordat, one member stressed that it was necessary to avoid reasonings based on "*exemples théoriques extrêmes*" (extreme examples taken from theory) and instead to always adopt solutions that are based "*sur les besoins et les données de la pratique*" (on the needs and data taken from practice). This, more than anything else, must continue to be ASA's Stella Polaris (or, depending on one's point of view, ASA's Sigma Octantis). This is a core ASA value that dictates everything that ASA does. It explains, for example, ASA's deep mistrust of ready-made standardised solutions.

This consideration is the engine for ASA's major new project, which is based on the recognition that each case is different, that each case deserves to be approached with a fresh eye, and that uniformity may be fine for some but can be highly unsatisfactory for many. ASA's Board decided at its meeting of 30 January 2014 to begin working on a major effort to promote tailor-made solutions over one-size-fits-all standards. In this project, ASA will identify the variety of possible solutions for typical issues arising in arbitral practice and to set out in simple terms what these solutions can be. ASA will also explain which of these solutions are best suited for which types of situations in practice, remaining mindful of the need to bear in mind the overall process so as to avoid patchworks (a less kind term would be a Frankenstein creature) of ill-matched components. And ASA will endeavour always to highlight the costs attendant to the various approaches.

The approach is therefore not to boil down differences to a common denominator, but to recognise that different solutions are best adapted to different cases. In this, ASA's approach is similar to that followed by the

UNCITRAL Notes on Organizing Arbitral Proceedings, and ASA shall also participate in UNCITRAL's upcoming efforts in revising these Notes.

ASA's project has, as yet, no fixed name. Provisionally and for want of a better term it has been called a "toolbox", a term that is meant to capture the variety of instruments to which practitioners can resort.⁵ It could be called a tailor's kit (whether for bespoke or made-to-measure arbitration is something over which more tiresome commentators are left to argue). Whatever the name, the project is at the heart of ASA's overarching core value: to anticipate and meet the real needs of users of international arbitration by preserving the flexibility that has made the process so successful.

There are many, many other topics one could think of when looking into the past and when attempting to glimpse into the future. This President's Message is not the place to review all of them. This exercise will be the subject of ASA's autumn conference in September 2014. What better way to celebrate a 40th birthday?

Geneva, January 2014

ELLIOTT GEISINGER

SAVE THE DATE

ASA General Meeting and Conference
5 September 2014, Bern

For more information see www.arbitration-ch.org

⁵ The term "toolbox" is not entirely satisfactory for it is perhaps a bit trivial – and has recently acquired unfortunate fiscal connotations for our French members and friends.