Guest Editorialist

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Meeting the Challenges of a Changing World

From the vantage point of the ICC, it is obvious that international commercial arbitration has been evolving at what appears to be a continually accelerating pace, calling for concomitant changes in the attitude and practice of all concerned with international arbitration, whether institutions, arbitrators, counsel or parties. Some of Jacques Werner's editorials have already touched upon certain of the points that will be raised below, but the perspective of an arbitral institution may be of interest.

While the confidentiality of most arbitral proceedings makes it impossible to quantify or qualify changes in the field of arbitration with absolute precision, the ICC experience probably offers a fairly accurate reflection of the world of international commercial arbitration, which constitutes virtually the totality of ICC arbitrations. In 1985 some 339 requests were filed with the ICC, involving parties from 50 different countries ranging from Albania to Zambia, arbitrators from 49 countries were appointed in ICC arbitrations, which were being conducted in some 30 different countries. Thirty seven nationalities are represented on the ICC Court, permitting a broad and continual exchange of views on arbitral developments throughout the world. It is difficult to imagine that any significant trend has not been brought to the attention of the ICC.

What are these changes that we perceive? First, which will surprise no one, is the breath-taking increase in the sheer number of arbitrations. By July 1976, after some 53 years of existence, 2978 requests for arbitration had been filed with the ICC. During the next decade, through July 1986, 2726 additional requests were filed, almost doubling in ten years the accumulation of the first 53 years. For the period between 1962 and 1965 the average number of cases submitted to the ICC was 64 per year. Between 1972 and 1975 the average grew

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to 153 cases per year. From 1981 to 1983 it was 268. In 1984 and 1985 the average was 319 cases.

The amounts at issue have also increased at perhaps an even faster pace. In 1983 Fréderic Eisemann estimated that in the pre-war period the disputes before the ICC were of an average amount at least 100 times lower than in present-day cases on turnkey contracts, on deliveries, investments, etc. Cases of over $ 1 billion are not unknown at the ICC. It is estimated that the present ICC caseload of some 630 cases involves about $ 9 billion in claims and counter-claims.

Third, international arbitration is becoming even more international and if "universality" has not yet been reached, it is being approached. Resort to ICC arbitration by parties from developing countries, governments and public enterprises is increasingly significant.

Fourth, a "qualitative" rather than "quantitative" observation, the ICC has observed an increase from every region of the world in what has impolitely and somewhat unfairly been called the "americanization" of arbitration; that is, a transfer to arbitration of the concept of "litigation as total warfare" which implies that every possible stop can and should be pulled out. This leads to massive memoranda, efforts to have more extensive discovery and more frequent resort to procedural ploys and manoeuvres (such as unfounded challenges to arbitrators and active recourse to State Courts at any and every stage of an arbitration whenever permitted by the local law), sometimes it would appear simply to obstruct or delay arbitrations.

Each of the phenomena just noted has created challenges which the ICC is taking various measures to meet. But the key point I wish to make is that all of the participants in arbitration—arbitral institutions, arbitrators, counsel, parties, as well as national legislatures and courts—must make appropriate adjustments to prevent international arbitration from choking to death on its own success.

Some specifics. The dramatic increase in the sheer numbers of arbitration cases has caused the ICC to increase its secretariat staff from 4 or 5 some 20 years ago to 23 today. Word processors have been installed over the past year and computer capability should be available before the end of this year. The ICC Court has become more vigorous in refusing to confirm as chairman or sole arbitrators persons who have demonstrated themselves to be excessively slow or otherwise unqualified to exercise the heavy responsibilities entailed in these positions. Based on its own experience and the suggestions contained in recent reports to the President of the ICC by a Group of "Users" and a Management Consultant organization asked in 1985 to examine ICC arbitration, the ICC Court and secretariat have already made a number of significant modifications

in their practice and are considering other changes including various revisions, which at this stage will be relatively limited, in the ICC arbitration rules.

New rules and practices have just been adopted by the ICC to make payment of arbitral costs less burdensome to the parties (a memorandum describing these changes is contained in this issue of the Journal of International Arbitration) and the ICC Court is increasingly vigilant to ensure that fees to arbitrators provide compensation commensurate with their efforts.

Arbitrators and potential arbitrators must also take account of evolution in the arbitration world. As more and more arbitrations are offered to an expanding but still relatively small pool of experienced arbitrators, they must have the discipline to turn down invitations to become an arbitrator if their calendar is so filled that they cannot possibly devote the time necessary to produce a final award within a reasonable time period, given the circumstances of the case and the applicable arbitral rules. Given the increasing resort to procedural manoeuvres, arbitrators must not hesitate to exercize their authority so as to actively "manage" a case. Early in the proceedings (such as when Terms of Reference are drafted in ICC cases) a time-table for the course of the arbitration should be established with the arbitrator ready and willing to use his authority to maintain it. As more parties come from beyond Europe and North America, Western arbitrators must be especially sensitive to not acting in a manner which needlessly and unintentionally causes offensive to counsel or parties from other cultures who may incorrectly perceive bias, thus leading to what are sometimes unnecessary challenges. Arbitrators contemplating one or more partial awards should ask themselves whether this is necessary, especially where the local law permits parties to bring such awards before local courts, thereby increasing costs and delays in the arbitration.

Parties to an arbitration can do much to effect the speed, cost and quality of arbitration. They can assure themselves that the arbitrator they propose or select has adequate time and will not delay the course of the arbitration because of a busy schedule. They (and their counsel) can give more attention to the negotiation and drafting of dispute settlement clauses in contracts, thereby avoiding lengthy procedural and jurisdictional disputes once arbitration is commenced.

Counsel obviously have obligations to their clients which must be met. But, as someone who has been a law clerk for an American judge and practised law both in New York and Paris, I am convinced—as are many lawyers I speak to—that a client is not well served when his counsel presents a brief so massive and complex that it cannot be readily absorbed and when procedures are so entangled that the arbitrator's reaction may well be one of conscious or

subconscious anger. Counsel are also best positioned to determine whether their national arbitral law is one which adequately meets the needs of modern international arbitration and, if it does not, to work with legislators and possibly the judiciary to change or reinterpret it.

Finally, Institutions, arbitrators and counsel must continue and perhaps even augment their generous efforts to ensure that those who are now coming to arbitration for the first time—especially from developing countries—have the opportunity to learn the law and lore of arbitration at colloquia, seminars, training programmes or through excellent publications such as this Journal.

I know from past experience that some who will read the present piece will consider that it is an effort by the ICC to shrug off critiques of ICC arbitration by attributing "blame" to others. Nothing can be further from the truth. The ICC is ready, able and willing to meet its responsibilities. It has over the past few years already made important modifications in its structure, practice and outlook to meet the needs of international commercial arbitration as it exists in today's world. If ICC users wish to point out other areas for improvement, I am more than happy to listen. But arbitration as an institution is undergoing tidal changes. Practices and attitudes developed when arbitration was still a "cottage industry"—and that was not long ago—can be maintained only at the risk of having arbitration wither before it can fulfil its promise and full potential. (The increasing development and use of "alternative dispute resolution procedures" other than arbitration is a sure sign of dissatisfaction with arbitration.) Effectively meeting the challenges posed by present trends in international arbitration is certainly possible, but only if those who most benefit from international arbitration have the foresight to work individually and together toward this end.