Editorial

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Maintaining the Essence of Arbitration

In an often-paraphrased remark, General von Clausewitz suggested that war is nothing more than the extension of politics by other means. If this concept were applied to the world of business, litigation could be considered as the ultimate extension of commercial relationships. Whether the analogy holds or not, in the eyes of many businessmen and lawyers arbitration is an intermediate solution, falling short of litigation in court, and preferable to a full-scale "legal war".

The preference for avoiding "legal war" has led in recent years to a notable increase in domestic and international arbitration. In the international context its one great attraction is without doubt the possibility of providing a neutral forum for all parties involved. It also offers other advantages, presumed or real: the hope that arbitration will

- avoid the increasingly complex procedures and legal in-fighting inherent in many national systems;
- be faster;
- be cheaper;
- perhaps produce a fairer or more practical result, free from legal technicalities.

Whether these hoped-for advantanges become reality or not depends on the particular case, and may also depend on the various points of view of those concerned. However, if arbitration is to be effective and accepted by the business community, it must guarantee most, preferably all, of the expected

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advantages. If the practices commonly associated with courtroom procedure creep into arbitration, much of its appeal will be lost.

There are abundant examples of dilatory or harassing tactics, for delaying or disrupting the normal arbitration process. One example is the increasing number of challenges to arbitrators, before institutional bodies such as the International Chamber of Commerce, and before the Courts. This trend is particularly disturbing because it strikes at the very essence of the arbitration process, in both theory and practice. An arbitrator, as opposed to a professional judge, by the nature of his background is more vulnerable to criticism or challenge, but arbitration essentially depends on the recognized integrity of arbitrators.

Some challenges are certainly justified, and indeed urgently required. There will probably always be some arbitrators who are unqualified, or biased, or simply too busy to complete the task properly. To a large extent this depends on the initial appointment or selection process. However, there are other cases which are unfortunately appearing more and more frequently, where the challenge is blatantly a delaying tactic by a losing party. It is used at the start, in the middle and even at the end of arbitration proceedings.

Apart from the egregious cases, the distinction between a *bona fide* challenge and a harassing tactic is seldom easy to determine. There is no easy solution. No convention, law or procedural rule can, or should, prevent a lawyer from challenging an arbitrator in order to prevent injustice. What is required is increasing awareness and active response on the part of arbitration institutions, arbitrators themselves and lawyers who recognize their parties' long-term interests.

It is important that appointing institutions, and the courts, show restraint in accepting challenges: where they are clearly unjustified, or untimely, a firm position must be taken, and quickly. The Rules of the ICC have recently been changed to limit the time for bringing a challenge to 30 days after the grounds become known; this is a sensible step in the right direction. In other extreme cases, some form of sanction should perhaps be considered.

Most arbitral institutions now require detailed disclosure statements by prospective arbitrators. These should be carefully monitored, and omissions or misstatements recorded as possible grounds for future disqualification. More importantly, prospective arbitrators should be sensitive to the problem themselves, and take particular care to decline any appointment where their independence, impartiality or even availability could be questioned. If they do not, problems may be created for the appointing party at a later stage and for arbitration as a whole.

However it is characterized, arbitration is a form of dispute resolution, and therefore a contest, if not a war, between two parties. Each party wants to win, and their lawyers must be free to use all proper procedures available to defend the interests of their clients. However, everyone involved, particularly the arbitrators and the arbitration institutions, must continue to resist efforts to invade arbitration with the harassing practices, the outer edge of the so-called "hardball" tactics, which have made courtroom litigation in many jurisdictions so burdensome and time-consuming. Challenges to arbitrators should be made with restraint, should be timely, and a heavy burden should clearly be on the challenging party.