Editorial

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A Hard Look at Economics

As a service industry to international trade, international arbitration cannot afford to ignore the changes occurring therein. These are momentous: there is the restoring of some form of market economy of the Eastern European countries, a consequence of their return to democracy; there is the trade liberalization movement swamping the world—through the GATT multilateral negotiations, through the bilateral free trade agreements promoted by the United States, through the internal evolution of various countries. All this means that several thousand new corporations will enter foreign trade, conclude contracts, and insert therein dispute settlement clauses. A common feature of most of these new entrants is that, in the age of capital scarcity into which we are entering, they will have very limited resources.

What kind of dispute settlement process will international arbitration offer to these new participants to international trade, who are potentially its new clients as well? With the exception of those of the specialized centres—in particular those dealing with maritime and agricultural commodities' disputes—arbitration procedures require well-heeled parties: the combination of the arbitration centre's fees, arbitrator's fees and counsel's costs together with the costs of evidence sessions (flying, lodging and compensation of witnesses, experts, translators, and stenographers, from various countries), can be staggering. If the parties manage to shoulder these costs with more or less good grace when the stakes are high, they simply refuse them in cases of small- or middle-sized claims, either renouncing to press claims, or settling at any cost: in both cases there remains a lingering feeling that, because of the absurd economics for small- and middle-sized claims, arbitral justice was justice denied.

The challenge for the international arbitral community is to devise low-budget but high-quality arbitral services for small- and middle-sized claims. Although this may sound at first like trying to square the circle, there are ways to achieve this. Not by underpaying arbitration centres, arbitrators or counsel—all work deserves its remuneration—but by devising new, better-adapted processes. In particular:

Greater use of the sole arbitrator

One important component of a case's costs are the arbitrator's fees, which are trebled in the case of three arbitrators. Still, many parties insist on appointing their

arbitrator, with the inescapable result of a panel of three arbitrators, as they are suspicious that the appointing authority might choose a sole arbitrator whom they dislike, or one with insufficient skill to hear the case. The cure is to build confidence in sole arbitrators by professionalizing their function and disseminating information on their qualifications, their records, their views; parties will be thus encouraged to agree on the person of a sole arbitrator, the apprehension of the unknown quantity having been dissipated. It is towards this end that we are working by publishing in our associated publication "Arbitration Materials" profiles of abitrators.

Promotion of the documents-only arbitration

The other major component of the costs of an international case are those of an evidentiary hearing. The question is consequently whether the use of documents-only arbitration should not be encouraged. Its obvious disadvantage, limiting the parties' ability to prove their case through live testimonies, should be weighed against these other considerations:

Firstly, experience shows that in a substantial number of cases the arbitrators could have made their decision on documents only, and that the hearing of live witnesses merely confirmed the opinion that the arbitrators had formed on studying the file. Secondly, and more importantly, low-cost documents-only proceedings will allow arbitration in cases where otherwise there would be no proceedings at all. For the right category of cases these considerations should outweigh whatever disadvantages might exist.

True, the arbitration rules of the major arbitral institutions provide for the possibility of the arbitrator deciding without a hearing should the parties agree thereto. However this possibility is rarely used, mainly because it is inherent to counsel duties, once the dispute has arisen, of not renouncing whatever evidentiary means might be needed in order to prove their case. It is consequently up to the arbitral institutions to take the lead by not only allowing but actively promoting, documents-only arbitration. This might, for instance, be done by promoting standard arbitration clauses, whereby parties would agree that for claims not exceeding a certain amount, the case will be heard by a sole arbitrator and exclusively on documents.

Arbitration institutions should also organize conferences so as to familiarize users with documents-only arbitration. The experience of the specialized arbitral institutions which practice this type of arbitration widely—the London Maritime Arbitrators Association, Society of Maritime Arbitrators, Inc., New York, The Grain and Feed Trade Association, prominent among them—should be explored, including the safeguard that whenever the arbitrator considers that he is not in a position to decide on documents only, he may refrain from doing so.