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THE CHANGING WORLD OF INTERNATIONAL ARBITRATION

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The article analyzes the activities of international arbitration, discusses the development of international arbitration over time.

One of the most characteristic features of this development has been the professionalization of international arbitration, which is evident in legal education, with international arbitration now being taught in various universities; in the way law firms organize themselves in international arbitration groups; in the practice of international arbitration institutions; and in the increasing activity of professional organizations. This development not only leads to an increasing institutionalization, but has also had the effect that arbitration increasingly resembles the judicial process that we are accustomed to from the domestic context [1].

Over the last thirty years or so, the practice of international arbitration has become relentlessly professional. This can be seen at the major universities, where 'international arbitration' is now taught at post-graduate level as a subject matter for study on its own terms, rather than as a footnote to a treatise on 'Private International Law' or, in the preferred phrase of some English lawyers, 'Conflicts of Law'. It can be seen at law firms worldwide, where partners and associates, who might at one time have been concerned only with litigation in their own national (or domestic) courts, are now part of an 'international arbitration group' ready to travel at a moment's notice to any part of the world, to represent their clients in international disputes before a 'neutral' tribunal of arbitrators, themselves drawn from different parts of the globe. It can be seen in the practice of the leading arbitral institutions, modernising their rules of arbitration to deal with new problems, such as the joinder of parties or the consolidation of separate arbitrations; and it can be seen in the work of professional associations such as the International Bar Association, with its worldwide conferences and seminars and its guidelines on subjects as diverse as 'conflicts of interest' and the 'presentation of evidence' in international arbitration.

This increased professionalism has not left arbitrators unscathed. In 1996, following extensive consultation and research with lawyers and users of international arbitration, Dezalay and Garth wrote of the contest between an earlier generation

of mostly European arbitrators — the 'grand old men', as they were called — and a younger generation of 'technocrats' [2].

But beyond the contest between generations about what and whose characteristics should be at the center of international commercial arbitration, this fight for power contains the true transformation that is taking place — the passage from one mode to another for the production of arbitration and the legitimation of arbitrators. As is the case for the entire field of business law, the AngloAmerican model of the business enterprise and merchant competition is tending to substitute itself for the Continental model of legal artisans and corporatist control over the profession. In the same way international commercial arbitration is moving from a small, closed group of self-regulating artisans to a more open and competitive business [3][1].

The growing popularity (and the attendant commercialization) of international arbitration did not escape criticism. In particular, the concern was that international arbitration was becoming too much like litigation in national courts. In a collection of essays published in 1994, Charles N Brower and Richard Lillich wrote of the increasing 'judicialization' of international commercial arbitration, commenting that 'arbitrations tend to be conducted more frequently with the procedural intricacy and formality more native to litigation in national Courts' and that they are 'more often subjected to judicial intervention and control'. In the same collection of essays, Professor Carbonneau reflected that arbitration had become 'an engine of adjudication indistinguishable from its judicial counterpart'. In 1998, Professor Pierre Lalive lamented the 'commercialization' of international arbitration, with new arbitral institutions springing up, 'pseudo seminars' being conducted by 'pseudo experts posing as specialists', to share their 'minimal experience' with a bemused audience Another critic, the late Serge Lazareff, noted that the success of international arbitration had contributed to its increased judicialization, with a new wave of counsel and arbitrators working to ensure that the procedure in arbitrations drew closer to the court procedures with which they themselves were familiar: 'wishing to confine themselves to their national law, which is the only one that they know and practice, they have tried to change the very nature of arbitration and have often succeeded' [4, *8–9*; 5].

Experienced US lawyers themselves have not been slow to criticise the changing nature of arbitration. One example among dozens illustrates this Many in-house counsel in the US have told me that they are completely turned off on arbitration because it is supposed to be speedy, efficacious and inexpensive, and it no longer is. With the expense approaching that of litigation, but without all of the procedural safeguards and appellate rights available in litigation, they ask why they should choose arbitration.

Criticism is more justified when it is directed at the time that is wasted, and the additional costs that are incurred, by unnecessary applications to the arbitral tribunal — for example, applications for interim relief which have little or no chance of succeeding; or 'fishing expeditions' involving extensive requests for the

[1] See also the comment of Ian Brownlie, Principles of Public International Law (7th edn, Oxford University Press 2008), 702.

production of documents, which no sensible tribunal is likely to allow. Criticism is also justified when tactics are employed by one or other of the parties which are intended to delay or even to disrupt the proceedings — for instance, the growing practice of lodging often unjustified challenges to arbitrators. What is needed in such situations (and this is perhaps the particular responsibility of the 'third generation of arbitrators' as they strive to be effective 'Managers') is to strike a proper balance, to find a way between Scylla and Charybdis. In short, to deal robustly with unnecessary procedural delays and diversions, but at the same time to ensure that the process of international arbitration satisfies its users by delivering a fair and proper result [6].

Some of those schooled in the practice of international arbitration over the last 30 years are growing concerned that the 'golden age' of international arbitration has come to an end. They believe that the streamlined process of the past-reliant not on rules, codes or guidelines, but on the discretion and judgment of the wise arbitrator — has regrettably given way to a 'judicialised' process that no longer serves users' interests in an efficient, tailored solution to a business dispute.

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Summary. It is one thing to regret, as Professor Lalive has understandably done, the 'commercialization' of international arbitration. It is another to regret its increased professionalism. In reality, the growing use and importance of international arbitration expects and demands increased professionalism, from both lawyers and arbitrators. The days of the amateur players are over. The old world of international arbitration has given way to the new.

References

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The article analyzes the activities of international arbitration. International Arbitration has undergone many changes over time, its activities expanded, but at the same time arbitrators services become more expensive and the settlement of the cases became less speedy. The most expensive were the arbiters of US services. However, the arbitration despite the criticism became one of the main instruments of resolving business disputes and at the same time arbitration has become more commercialized and the number of professional arbitrators and lawyers increased.

Аналізується діяльність міжнародного арбітражу, який піддавався багатьом змінам з плином часу. Його діяльність розширювалась, але водночас послуги арбітрів ставали дорожчими, а вирішення питань більш повільним. Найдорожчими вважають послуги арбітрів із США. Проте арбітраж став, незважаючи на критику, одним із головних інструментів вирішення бізнесових суперечок і більш комерціалізованим, а професіоналізм арбітрів та юристів зріс.

Анализируется деятельностьь международного арбитража, который подвергался многим изменениям с течением времени. Его деятельность расширялась, но вместе с тем услуги арбитров становились дороже, а решение вопросов более медленным. Наиболее дорогими стали услуги арбитров из США. Однако арбитраж стал, несмотря на критику, одним из главных инструментов решения бизнесовых споров и вместе с тем более коммерциализованным, а профессионализм арбитров и юристов вырос.

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