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CRISIS? WHAT CRISIS?* – THE DEVELOPMENT OF INTERNATIONAL ARBITRATION IN TOUGHER TIMES –

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ABSTRACT

The current financial crisis has been called the most serious crisis of its kind since the Great Depression in the 1930s. Several major institutions were caught in failure, were acquired under duress, or were subject to government takeover. The crisis rapidly developed and spread into a global economic shock, resulting in a number of European bank failures, dramatic declines in various stock indexes and even creating fears of a global economic collapse. Such fears of a global economic collapse appeared to affect all businesses and professions around the world. But has it really affected "all businesses and professions"? This paper looks at the

* Crisis? What Crisis? is the fourth album by progressive rock band Supertramp, released in 1975. The title was taken from a line in the 1973 Fred Zinnemann motion picture, *The Day of the Jackal.*

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current impact of the financial crisis in the field of international arbitration. On the basis of statistics gathered from various arbitral institutions around the world, the paper identifies a marked increase in arbitration cases being filed but anticipates a possible reduction of cases in the long-term. This paper also looks into measures that are being introduced to make arbitration more time and cost efficient as users become more cost-conscious and competition for arbitration services increases. Finally, the paper addresses certain arbitration "guerrilla tactics" some parties are adopting and how such tactics may be countered. The paper concludes that the competition for time- and cost-efficient services in arbitration will likely increase in the future but such competition and pressure must not allow guerrilla warfare tactics to be tolerated in arbitration.

KEYWORDS: *arbitration guerrillas, financial crisis, arbitral proceedings, ICC, alternative dispute resolution, time- and cost-efficiency*

I. INTRODUCTION

The current financial crisis has been called the most serious crisis of its kind since the Great Depression in the 1930s.[1] It reached its peak in September and October 2008. Several major institutions were caught in failure, were acquired under constraint, or were subject to government takeover, including landmark U.S. financial institutions such as Lehman Brothers, Merrill Lynch, Fannie Mae, Freddie Mac and AIG. The crisis rapidly developed and spread into a global economic shock, resulting in a number of European bank failures, dramatic declines in various stock indexes and even creating fears of a global economic collapse.

In Taiwan, foreign direct investment dropped by 50%.[2] In August 2009, unemployment in Taiwan reached 6.13% which is the highest level since introduction of the unemployment statistic in 1978.[3]

The fear of a global economic collapse appeared to affect all businesses and professions around the world. But does it really affect "all businesses and professions"? Well, there is the perception that the "Global Financial Crisis has presented diverse opportunities for arbitration practitioners"[4] and that it "does not require a clairvoyant to foretell the torrent of litigation that arises during a financial crisis."[5]

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[1] *See* in particular RICHARD A. POSNER, *Preface to* A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION, at vii; *see also* the Posner Economic Crisis Blog with a regular update of the book at The Atlantic, http://correspondents.theatlantic.com/richard_posner (last visited Nov. 25, 2009).

[2] Oliver Höflinger, *Ausländische Direktinvestitionen in Taiwan halbiert* [*Foreign Direct Investment in Taiwan Dropped by 50%*], AHK German Trade Office Taipei, Germany Trade & Invest (July 17, 2009), *available at* http://www.gtai.de/fdb-SE,MKT200907168003,Google.html (last visited Nov. 23, 2009).

[3] AHK German Trade Office Taipei, Germany Trade & Invest, *InfoBrief Taiwan*, 3 (Sept. 28, 2009). The report, however, also mentions that in the fourth quarter of 2009, Taiwan's gross national product increased by 5.79% after a decrease in the third quarter of 2009 by 2.67%. Also, for the year 2010, Taiwan's gross national product is expected to increase by 4.1% and its exports by 11.53%. The reason for this is the recovery of the economy in Taiwan as well as abroad, whereby the relatively stark increase is due to last year's particularly low base figures.

[4] Sam Luttrell, *Opportunities for Australian Arbitration Practitioners in the "Global Financial Crisis"*, 75(3) INT'L J. ARB. MEDIATION & DISP. MGMT. 415 (2009); *but see generally* Debbie Legall, *Survival of the Fittest*, INT'L BAR NEWS 31 (Aug. 2009) ("Like many other firms, law firms are not immune to the current economic crisis."), discussing redundancy programs at law firms; Tamara Loomis, *Has the Recession Forever Changed Large Law Firms?* AM. LAW., Oct. 6, 2009 ("Believe it: The worst economic downturn since the Great Depression has hit law firms hard."), *available at* http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202434302753&Has_the_Recession_Forever_Changed_Large_Law_Firms (last visited Nov. 25, 2009); Rachel J. Littman, *Finding the Silver Lining: The Recession and the Legal Employment Market*, N.Y. ST. B.A. J. 16, 16-22 (Sept. 2009).

[5] Faizal Latheet, *The Financial Crisis and Its Impact on International Litigation*, INT'L LITIG. NEWS 21, 21 (Sept. 2009), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=58E6F8C9-8B2D-46D4-9BD1-79837B47F48C (last visited Nov. 25, 2009); for early predictions, see Stephan Wilske & Todd J. Fox, *The Global Competition for the "Best" Place for International Arbitration – Myth, Prejudice, and Reality Bits*, *in* AUSTRIAN ARBITRATION YEARBOOK 2009 383, 418 (2009) ("Certainly, the most recent financial crisis may be an indication

Dr. Markus Wirth, the current president of the Swiss Arbitration Association [ASA], summarized this general expectation as follows:

> I wonder what impact the economic crisis will have on our trade, meaning cross-border dispute resolution. Over 30 years of practice in the field have taught me that bad times for the economy often mean busy times for dispute resolution practitioners. Businesses may become less prone to general settlements. Fewer opportunities for future profit making may cause management to refocus on minimizing losses from past business ventures gone wrong. Contracting business may free management resources to deal with ongoing business disputes that would otherwise have been considered to unnecessarily tie up management capacity. Deals that under normal circumstances would have been profitable suddenly turn out to be loss-making, fuelling attempts to curb losses by recovering from the party on the other side of the transaction.[6]

Part B of this article will examine these predictions and prophecies and will discuss with more detail and figures the impact of the economic crisis on international arbitration and mediation, both in the short-term and – as far as possible – in a more long-term perspective.

Markus Wirth goes on to discuss costs as follows:

> Businesses will be under dramatically increased pressure to save costs, including the costs of dispute resolution. Two consequences are foreseeable. First, parties to potential business disputes can be expected, more so than ever, to look around for alternative dispute resolution methods that are less costly than conventional arbitration. Second, where conventional arbitration remains the preferred tool or the one that must ultimately be resorted to, the demand for more time- and cost-effective arbitral proceedings will undoubtedly rise.[7]

Again, this ongoing call for more time- and cost-efficient arbitral proceedings has not been unheard of prior to the financial crisis but is now – in tougher times – even more pressing than ever. Thus, Part C of this article will have a look at new rules and regulations, as well as trends and techniques to deal with more time- and cost-efficient arbitral proceedings.

Finally, one may expect that quite a number of parties will be more aggressive in their pursuit of debts which will in turn affect the practice of arbitration. Other parties might have a strong interest in delaying or even derailing the arbitration with procedural tricks and even worse methods in order to avoid an arbitral award ordering them to pay money (which they might not have). These new tendencies, the more extreme form of which are referred to as "arbitration guerrilla tactics" will be described and analyzed in Part D. Last but not least, I will attempt to provide the reader with a conclusion and an outlook as to how matters might develop in the future (Part E.).

II. IMPACT OF FINANCIAL CRISIS ON THE NUMBER OF ARBITRATIONS

Obviously, the global financial crisis has triggered quite a lot of litigation and arbitration in Europe but also and allegedly particularly, in Asia.[8] IP litigation, in particular, has been on the rise.[9] The construction industry has also seen the downsizing of projects, late payments and contract terminations. These factors have combined to create an "arbitration boom".[10] Further, there are reports that the present economic downturn encouraged a number of countries to adopt protective trade measures which consequently caused the number of disputes in international trade to increase proportionally and will continue to do so.[11]

To move away from anecdotes and prophecies and focus more on hard

that the number of disputes will only increase."); as well as Gerhard Wegen & Stephan Wilske, *Introduction* to GETTING THE DEAL THROUGH – ARBITRATION 3, 4 (2009) ("The emerging global economic recession is expected to lead to more arbitrations pertaining to financial institutions in 2009.").

[6] Markus Wirth, *President's Message*, 27 ASA BULL. 195, 195 (2009); *see* Doug Jones, *Challenges for International Dispute Resolution in the Global Financial Crisis, Part I*, ASIAN DISP. REV. 91, 92 (July 2009) ("Demand for legal dispute resolution has traditionally been counter-cyclical."); Richard Woolley, *Legal MarketPlace Analysis: Commercial Litigation, in* WHO'S WHO LEGAL – COMMERCIAL LITIGATION 2009 2, 2 (David Boies et al., 2009) ("It is widely accepted that in a recession clients are more likely to pursue litigation. Disputes arise as finances withdraw, contracts become harder to perform and businesses fold.").

[7] Wirth, *supra* note 6, at 195.

[8] Katy Dowell, *Going East*, THE LAWYER, Sept. 2, 2009, *available at* http://www.thelawyer.com/going-east/1001804.article (last visited Nov. 25, 2009) (citing Sonya Leydecker of Herbert Smith, London who talks about her "*partners based in the South-East Asia and the Middle East who are riding a wave of litigation and arbitration*").

[9] *See* Diana Bentley, *Protect and Survive*, INT'L BAR NEWS 25, 26 (Aug. 2009); *see also* Dowell, *supra* note 8, at 1 (referring to Sonya Leydecker who mentions that in Japan IP instructions "have also gone up significantly").

[10] John Bellhouse & Luke Robottom, *Construction: Arbitration in the Middle East – When Is a Deal Not a Deal After All?*, 4(4) GLOBAL ARB. REV. 28, 28 (2009) (reporting that the numbers of those arbitrations are increasing significantly in the Middle East).

[11] Gonzalo Guzmán, *The Economic Crisis and the Increase in International Trade Disputes*, INT'L LITIG. NEWS 38, 40-41 (Sept. 2009), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=58E6F8C9-8B2D-46D4-9BD1-79837B47F48C (last visited Nov. 25, 2009) (arguing that "[*w*]*e have not seen the peak of the consequences of the crisis yet*").

facts and figures, I made inquiries with some of the leading international arbitration institutions as to whether the crisis had any concrete impact on the number of cases filed with a particular institution in the first half of 2009 compared with 2008. These short-term statistical effects of the financial crisis on the number of new arbitration cases will be discussed in the following Section A before turning to – admittedly more speculative – long-term effects of the financial crisis on the number of new arbitration cases (Section B).

A. Short-Term Statistical Effects

Not surprisingly, the turmoil in financial markets has led to a swift increase in disputes involving financial institutions. While these cases might drag on for quite some time, they most likely will not have a long-term effect on the overall number of arbitrations. Probably more interesting is whether the financial crisis will lead to an overall increase in parties' general eagerness to commence arbitration against their business partners.

1. Financial Industry Regulatory Authority [FINRA]. — In particular, the U.S. Financial Industry Regulatory Authority [FINRA] has experienced a dramatic increase in the number of cases referred to FINRA for arbitration. FINRA is the successor to the National Association of Securities Dealers, Inc. [NASD] and is the largest self-regulatory organization, i.e. non-governmental regulator for all securities firms doing business in the United States. Both individual and institutional customers can require a FINRA member to arbitrate disputes.[12] Also, disputes between FINRA members may be submitted to arbitration. The FINRA's Summary Arbitration Statistics August 2009 shows that in the month of August 2008, 3,018 new cases were filed, whereas in the month of August 2009 the number of new cases filed increased to 4,991.[13] This constitutes an increase of 65%. The number of cases filed in January 2009 has even doubled compared to a year earlier.[14] In particular, many claims over bonds issued by the collapsed U.S. financial services firm Lehman Brothers are apparently being referred to FINRA for arbitration.[15]

2. International Court of Arbitration of the International Chamber of Commerce [ICC]. — Emmanuel Jolivet, General Counsel at the ICC,

[12] For more information about FINRA, see http://www.finra.org (last visited Nov. 23, 2009).
[13] *See* FINRA – Dispute Resolution Statistics, http://www.finra.org/arbitrationmediation/aboutfinradr/statistics/index.htm (last visited Nov. 25, 2009).
[14] Clare Tanner & Paul F. Donahue, *Arbitration of Disputes Arising from the Financial Crisis*, K&L Gates Construction Law Blog (Mar. 19, 2009), http://www.klconstructionlawblog.com/2009/03/articles/international-arbitration/arbitration-of-disputes-arising-from-the-financial-crisis/ (last visited Nov. 25, 2009).
[15] Wegen & Wilske, *supra* note 5, at 4.

reported in August 2009 that the number of cases filed with the ICC in 2009 has "significantly increased compared to the same period of last year" and remarked that it is interesting to note that the ICC received a number of requests for arbitration related to hedge and investment funds as well as banks.[16] This is remarkable insofar as arbitration in banking and financial matters has for a long time been regarded as a "non topic".[17] Mr. Jolivet further reported that a major de-merger operation related to the crisis in the industry had also been subject to an ICC arbitration.[18] Recently, the Secretary General of the ICC, Jason Fry, expressed his view that there is almost certainly an increase in what he calls "straightforward debt claims" at the ICC. According to Mr. Fry there will probably be an increase in the number of cases that settle early and cases ultimately not pursued in the short run because parties might decide to withdraw claims rather than pursue impecunious or insolvent debtors.[19]

3. Arbitration Institute of the Stockholm Chamber of Commerce [SCC]. — Natalia Petrik, legal counsel at the SCC, reported that the case load at the SCC had increased in the first six months of 2009 by approximately 50% compared to 2008. Ms. Petrik reported that in 2008, the SCC had a record number of 176 new cases and that as of 21 August 2009, the SCC already had 154 new registered cases.[20]

4. German Institution of Arbitration [DIS]. — The DIS registered 67 new cases filed in the first half of 2009. The aggregate amount in dispute adds up to EUR 707 million. Compared with the case numbers of the first six months in 2008 (approx. 50 cases) this marks an increase of more than 30%. As of 30 September 2009, the total number of new cases at

[16] E-mail from Emmanuel Jolivet, General Counsel, to author (Aug. 6, 2009) (on file with author).
[17] *See* Gabrielle Kaufmann-Kohler, *Preface to* ARBITRATION IN BANKING AND FINANCIAL MATTERS, ASA SPECIAL SERIES 20, at v, v (Gabrielle Kaufmann-Kohler & Viviane Frossard eds., 2003); *see also* Georges Affaki, *A Banker's Approach to Arbitration*, *in* ARBITRATION IN BANKING AND FINANCIAL MATTERS, ASA SPECIAL SERIES 20 63, 63 (Gabrielle Kaufmann-Kohler & Viviane Frossard eds., 2003) ("The world of arbitration and the world of banking are apart."); *see also* Klaus Peter Berger, *Schiedsgerichtsbarkeit im modernen Finanzmarktgeschäft – Ein Überblick* [*Arbitration in the Modern Financial Market Business – An Overview*], *in* DEUTSCHE INSTITUTION FÜR SCHIEDSGERICHTSBARKEIT E.V. [GERMAN INSTITUTION OF ARBITRATION], Schiedsgerichtsbarkeit in Finanz- und Kapitalmarkttransaktionen, DIS-MAT XIV 3, 3 (2008) ("*Seit vielen Jahrzehnten versuchen Schiedsrechtsexperten immer wieder, Banken und andere Finanzmarktinstitutionen von den Vorteilen der Schiedsgerichtsbarkeit zu überzeugen. Bisher ohne großen Erfolg. Im Gegenteil: die Bankpraxis lässt auch heute noch ein tiefes Misstrauen gegenüber der 'privaten' Schiedsgerichtsbarkeit erkennen.* [Arbitration experts have been trying for decades to convince banks and other financial institutions of the advantages of arbitration – up to now with no success. On the contrary: Even today, banks still show a deep distrust with regard to 'private' arbitration].").
[18] E-mail from Emmanuel Jolivet, *supra* note 16.
[19] Alison Ross, *Under Scrutiny: The Changes at the ICC – An Interview with Jason Fry*, 4(5) GLOBAL ARB. REV. 11, 12 (2009), *available at* http://www.globalarbitrationreview.com/journal/article/19206/under-scrutiny-changes-icc-interview-jason-fry (last visited Nov. 25, 2009).
[20] E-mail from Natalia Petrik, Legal Counsel, to the author (Aug. 21, 2009) (on file with author).

the DIS amounted to 108 compared with a total of 116 in 2008.[21] However, as the numbers of proceedings initiated in the past five years also increased between 15% and 25%, the DIS is reluctant to conclude that the development of case numbers in 2009 can be exclusively attributed to the financial crisis.[22]

5. Swiss Chambers' Court of Arbitration and Mediation [SCCAM]. — Rainer Füeg, the President of the SCCAM announced that in the first five months of 2009, almost as many new cases had been filed with the SCCAM as in the whole of 2008. The SCCAM has consequently enlarged its staff.[23]

6. International Arbitral Centre of the Austrian Federal Economic Chamber. — The International Arbitral Centre of the Austrian Federal Economic Chamber also reported that it had experienced an increase in the number of new cases. As of 14 August 2009, 39 new claims have been filed compared to 26 as of August in 2008. The total number of new cases in 2008 was 51. Manfred Heider, the Secretary General of the International Arbitral Centre of the Austrian Federal Economic Chamber, further reported that the only significant change identifiable so far in Austria was that (with one important exception) the amounts in dispute are lower than in the years before.[24]

7. Hong Kong International Arbitration Centre [HKIAC]. — The HKIAC was not in a position to provide a breakdown of arbitration cases in August 2009. However, there is no doubt that the HKIAC is particularly affected by the economic crisis. On 31 October 2008, it was appointed by the Hong Kong Monetary Authority [HKMA] to act as service provider for the Lehman Brothers-related Investment Products Disputes Mediation and Arbitration Scheme [hereinafter the Scheme].[25] The purpose of the Scheme is to create a dispute resolution platform for the resolution of disputes between investors and banks in Lehman Brothers-related investment products. As of 18 February 2009, a total of 105 requests for mediation had been made under the Scheme. On 19 February 2009 the HKIAC reported the Scheme's success rate to be 100%.[26]

8. International Centre for Dispute Resolution [ICDR]. — The ICDR is the international division of the American Arbitration Association

[21] Inquiry by the author with Peter Kraft, Legal Counsel at the DIS Secretariat (Sept. 30, 2009) (on file with author).
[22] E-mail from Jens Bredow, Secretary General, to the author (Sept. 30, 2009) (on file with author).
[23] Rainer Füeg, Welcome Address at the ASA Conference in Berne: The Swiss Rules of International Arbitration – Five Years of Experience (June 19, 2009) (on file with author).
[24] E-mail from Manfred Heider, Secretary General, to the author (Aug. 14, 2009) (on file with author).
[25] Press Release, HKIAC, Mediation 100% Success for Lehman Brothers-Related Investment Product Cases (Feb. 19, 2009), http://www.hkiac.org/newspdf/16.pdf (last visited Nov. 25, 2009).
[26] *Id.*

[AAA] which was established in 1996 to provide dispute resolution services available in the US to individuals and organizations around the globe. Through the third quarter of 2009 a total of 658 cases have been filed with the ICDR, compared to 559 cases through the third quarter of 2008, representing an increase of approximately 18%.[27]

9. London Court of International Arbitration [LCIA]. — In his Director General's Report on Casework published in November 2008, Adrian Winstanley reported a significant acceleration in the number of cases referred to LCIA arbitration in 2008 which he assumed to be, at least in part, a result of the global economic turmoil.[28] No numbers with respect to the development in 2009 were available at the time.

B. Long-Term Effect

While arbitration practitioners are quite busy at the moment, for many the big question is how business will look like in two or three years.

1. Backlash in Reduction of Cases? — Rainer Füeg, President of the Swiss Chambers' Court of Arbitration and Mediation, quite correctly mentioned that a backlash in terms of fewer cases will be felt in about two to three years because the number of contracts being concluded at present is much lower than usual.[29] In particular, the number of M&A activities and especially private equity deals has decreased substantially as a result of the financial crisis. However, experience teaches that many cases only start to emerge two or three years after an economic crisis. Also, a number of claims are still at the stage of being evaluated at this point.[30] Indeed, one may also reasonably expect that numerous disputes need some time to materialize. However, the Secretary General of the ICC, Jason Fry, recently predicted that the number of commercial arbitration proceedings will fall in the long run. His prediction is based on a combination of two factors: (i) a decrease in contracts entered into leads to less arbitration agreements and ultimately less arbitral disputes; and (ii) once the economy begins to recover, growth returns will increase liquidity in the market which will encourage parties to enter into commercial transactions and settle their disputes. He furthermore predicted that there will probably be a time lag of

[27] E-mail from Mark Appel, Senior Vice-President, to the author (Oct. 8, 2009) (on file with author).
[28] *See* Director General's Report on Casework (Nov. 2008), http://www.lcia.org/NEWS_folder/news_archive7.htm (last visited Nov. 25, 2009).
[29] Füeg, *supra* note 23.
[30] *See, e.g.*, Woolley, *supra* note 6, at 4 ("There are also plenty of requests for advice on long-term contractual commitments."); *see also* Jan K. Schaefer, The Impact of the Financial Crisis on Commercial and Investment Arbitration, *presented at* the VII Young Arbitration Practitioners' (YAP) Annual Colloquium in Paris: The New Challenges of International Arbitration (Sept. 22, 2009) (on file with author) (predicting – consistent with experiences in the dot.com bubble crisis – a further increase in case load over the next years).

two years post-crisis before the caseload decreases.[31]

2. Investment Arbitrations and International Trade Disputes Need Time Prior to Filing. — It is particularly true for investment arbitrations that they need some time to materialize. The economic crisis has caused governments to adopt protectionist policies towards domestic industry in order to stimulate the economy. Governments might go as far as nationalizing assets and industries. Thus, disputes may arise where foreign investors feel they are not being treated the same as domestic investors because of such emergency nationalization measures.[32] The same applies to international trade disputes where companies are slow to gather information covering a sufficient period of time required to put their case to governments to initiate an investigation.[33]

3. Conclusion. — It is quite difficult to predict in total numbers what the arbitration landscape will look like in three or five years. However, in light of the still increasing overall popularity of arbitration and – frequent – lack of other compelling alternatives, it seems realistic to predict that we will experience a stabilization of the number of new cases but still at an overall increase.[34]

III. CALL FOR MORE TIME AND COST EFFICIENCY

It is obvious that in a time where many companies are struggling for survival, or are at least under increased pressure to save costs,[35] end-users of arbitration will increasingly question the costs of arbitration[36] and/or look for alternatives. The arbitration community has to meet these challenges. Indeed, it is a frequently heard complaint from the users of arbitration – namely companies – that "*arbitrations are too long and too costly*".[37]

A. Increasing Popularity of Fast-Track Arbitration Rules

[31] Ross, *supra* note 19, at 12.

[32] Pascal Lamy, *Report to the TPRB from the Director-General on the Financial and Economic Crisis and Trade-Related Developments* 1, 1 (Mar. 26, 2009), *available at* http://www.wto.org/english/news_e/news09_e/trdev_dg_report_14apr09_e.doc (last visited Nov. 23, 2009); Jones, *supra* note 6, at 93.

[33] Guzmán, supra note 11, at 40.

[34] Stephan Wilske, *The Global Competition for the 'Best' Place of Arbitration for International Arbitrations – A More or Less Biased Review of the Usual Suspects and Recent Newcomers –*, 1(1) CONTEMP. ASIA ARB. J. 21, 52 (2008).

[35] *See* Wirth, *supra* note 6, at 195.

[36] Dowell, *supra* note 8, at 2, quotes global litigation head Sonya Leydecker (Herbert Smith, London) who states that "*clients of all shapes and sizes have been asking the firm to 'share the pain' of the recession.*"

[37] Jörg Risse, *Procedural Risk Analysis: An ADR-Tool in Arbitration Proceedings*, *in* AUSTRIAN ARBITRATION YEARBOOK 2009 461, 461 (2009); *see* Wilske & Fox, *supra* note 5, at 418.

One of the responses of arbitral institutions is to offer fast-track arbitration. In its report on "*Techniques for Controlling Time and Costs in Arbitration*"[38], the ICC Commission on Arbitration recommended to considering "*setting out fast-track procedures in the arbitration clause*".[39]

1. Offers of Fast-Track Arbitration by Arbitration Institutions. — Article 32(1) of the ICC Rules of Arbitration allows the parties to agree to shorten the various time limits set out in these rules. However, any such agreement entered into following the constitution of an arbitral tribunal requires the approval of the arbitral tribunal. Also, the ICC International Court of Arbitration, on its own initiative, may extend any time limit.

Several international arbitration institutions have adopted a different approach and offer specific rules for so-called fast-track arbitration. Such include the WIPO Arbitration and Mediation Centre, which offers *WIPO Expedited Arbitration Rules*[40], and the Arbitration Institute of the Stockholm Chamber of Commerce which, as of 1 January 2007, offers *Rules for Expedited Arbitrations*.[41]

Slightly different methods are used by the Swiss Rules of International Arbitration (Swiss Rules) which provide in its Part V (Article 42) for an expedited procedure that applies if the parties so agree or if – subject to certain exceptions – the amount in dispute does not exceed CHF 1 million.[42]

In April 2008, the German Institution of Arbitration [DIS] introduced its *Supplementary Rules for Expedited Proceedings* which are aimed at complementing the regular DIS Arbitration Rules.[43] These new rules allow parties and arbitrators to conduct an arbitration within the space of six months (sole arbitrator) or nine months (three-member arbitral tribunal). To achieve this goal, the time limits under the regular DIS Arbitration Rules for the nomination of arbitrators are shortened, four-week deadlines for the submission of briefs are fixed in the Supplementary Rules and the common interest of the parties in expediting arbitration becomes a guiding principle

[38] The Int'l Chamber of Com. [ICC], Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, ICC Publication No. 843 (Aug. 2007), *available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf (last visited Nov. 25, 2009).

[39] *Id.* ¶15.

[40] World. Inte'l. Prop. Org. [WIPO], WIPO Expedited Arbitration Rules, WIPO Publication No. 446, effective from Oct. 1, 2002, *available at* http://www.wipo.int/amc/en/arbitration/expedited-rules (last visited Nov. 25, 2009).

[41] Arbi. Insti. of the Stockholm Chamber of Comm., Rules for Expedited Arbitrations (Jan. 1, 2007), *available at* http://www.sccinstitute.com/filearchive/1/12745/2007_expedited_rules_eng.pdf (last visited Nov. 25, 2009).

[42] Swiss Rules of International Arbitration (Swiss Rules) (Jan. 2006) art. 42, *available at* http://www.sccam.org/sa/download/SRIA_english.pdf (last visited Nov. 25, 2009).

[43] For a commentary on the DIS Supplementary Rules for Expedited Proceedings, see Klaus Peter Berger, *Die Ergänzenden Regeln für Beschleunigte Verfahren der Deutschen Institution für Schiedsgerichtsbarkeit* [*The Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration*], 3 SCHIEDSVZ [GERMAN ARB. J.] 105, 211 (2008).

for the exercise of the arbitral tribunal's procedural discretion. Also, the arbitral tribunal is expected to establish at the outset of the proceedings a procedural timetable and to inform the parties at an early stage of the proceedings of the issues it may regard as relevant and material to the outcome of the case.[44]

On 1 January 2009, the Court of Arbitration of Madrid [CAM] launched its new rules of arbitration, which also include a much-advertised innovation: the fast-track proceeding. It applies in cases where the total amount in dispute does not exceed EUR 100,000 or when agreed by the parties. Article 50 contains a sole arbitrator default rule, permits a shortened time frame for arbitrator appointment, provides for testimony, expert evidence, and overall closing arguments in a single hearing and establishes a shorter time period for the granting of the award.[45]

The International Institute for Conflict Prevention and Resolution [CPR] has become the latest arbitration provider to offer rules that will accelerate the arbitration process, further stimulating the debate on whether it is advisable to impose a strict time frame in advance on any case.[46]

2. Fast-Track Arbitration is No Cure-All. — Meanwhile, it is quite clear in practice that any fast-track arbitration only works properly if all the parties and the arbitral tribunal are willing to cooperate to speed up the process.[47] However, not all disputes are suitable for a fast-track procedure. It goes without saying that where one party has a positive disincentive to willingly cooperate in an accelerated procedure, this constitutes an insuperable hurdle.[48] Also, there are complex cases involving, for example, the use of experts or the hearing of numerous witnesses or the discovery of evidence where unrealistically short deadlines[49] simply do not work without violating fundamental principles of arbitration, such as the right to be heard or equal treatment of the parties.[50]

[44] *Id.* at 105.

[45] Calvin A. Hamilton & Luis Capiel, *The 2009 Rules of Arbitration*, 25(3) INT'L LITIG. Q. 1, 7 (2009) (concluding that with "*its new Rules and its cost advantages, the CAM is well equipped to enter into competition with the world's major courts of arbitration*").

[46] Kyriaki Karadelis, *CPR Launches Accelerated Arbitration Rules*, GLOBAL ARB. REV., Sept. 4, 2009, *available at* http://www.globalarbitrationreview.com/news/article/18747/cpr-launches-accelerated-arbitration-rules/ (last visited Nov. 25, 2009).

[47] ALAN REDFERN ET. AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 286-87 (4th ed. 2004), with a remarkable example of a high-profile ICC arbitration involving Formula 1 racing cars where the request for arbitration was filed with the ICC between Christmas Day and New Year's Eve and the parties received a fully reasoned arbitral award on the last day of January.

[48] *Id.* at 286.

[49] Karadelis, *supra* note 46, at 2 (quoting Paul Friedland: "*The temptation to set deadlines in advance should be avoided or tempered, because an unmet deadline may result in an invalid award, or at least extra expense and delay if the award were challenged due to tardiness.*").

[50] *See* Irene Welser & Christian Klausegger, *Fast Track Arbitration: Just Fast or Something Different?*, *in* AUSTRIAN ARBITRATION YEARBOOK 2009 259, 260, 267-69 (2009); Karadelis, *supra* note 46, at 2 (quoting Jennifer Kirby: "*If parties agree to a set-in-stone, binding time limit and it's not possible to meet it in keeping with due process, then parties may find themselves between a rock and a hard place: keep to the time limit and violate due process, or blow the time limit and risk that the arbitration agreement is considered to have expired.*").

B. Tougher Stance on Arbitrator Availability

To counter growing concerns as to whether arbitrators can devote sufficient time to the case in question,[51] as of 17 August 2009 the ICC International Court of Arbitration require arbitrators agreeing to serve in ICC arbitral proceedings to disclose details confirming their availability as well as their independence.

1. Transparency of Arbitrator Workload in ICC Arbitrations. — The prospective arbitrator must confirm on the basis of the information presently available to him or her that he or she can devote the time necessary to conduct the new arbitration diligently, efficiently and in accordance with the time limits stipulated in the ICC Rules of Arbitration. The prospective arbitrator must also confirm that he or she understands that "the ICC Court will consider the duration and conduct of the proceedings when fixing [the] fees".[52] In its official press release, the ICC International Court of Arbitration even made clear that in "extreme situations, arbitrators can be removed from office by reason of a failure to fulfill the functions within prescribed time limits."[53] The prospective arbitrator also has to list currently pending cases in which he or she is involved as tribunal chair/sole arbitrator, as co-arbitrator or as counsel, as well as any foreseeable conflicting demands in the upcoming 18 months.

Certainly, such an analysis of activities is not likely to provide a complete picture of a prospective arbitrator's availability over the course of an 18-month period, particularly with respect to large and complicated cases.[54] However, even though experienced arbitrators were at first shocked when they learned of this new ICC practice, the new ICC form will provide for greater transparency regarding arbitrator availability and overall workload and may serve to assist the general aim of resolving disputes within the prescribed time limits and – as time often translates into money – with reasonable costs.

2. Will New ICC Form Set the Standard? — At this point, it is not yet clear whether other arbitral institutions will follow this new ICC policy,

[51] ICC, Commission on Arbitration, *supra* note 38, ¶ 12 ("*Whether selecting a sole arbitrator or a three-person tribunal, it is advisable to make sufficient inquiries to ensure that the individuals selected have sufficient time to devote to the case in question.*").

[52] *See* new ICC form entitled *ICC Arbitrator Statement of Acceptance, Availability & Independence* (Aug. 2009) (on file with author).

[53] Press Release, ICC International Court of Arbitration, *ICC Takes Tougher Stance on Arbitrator Availability*, *available at* http://www.iccwbo.org/court/arbitration/index.html?id=32208 (last visited Nov. 25, 2009).

[54] Bree Farrugia, *ICC Requests Arbitrators to Disclose Details of Availability and Independence* (Aug. 12, 2009), Practical Law Company Arbitration, http://arbitration.practicallaw.com/4-386-7275 (last visited Nov. 25, 2009).

formally or informally. When selecting arbitrators, counsel, parties and the institutions should at least take into consideration their candidate's availability and – following the model of the new ICC form – inquire as to the arbitrator's currently pending cases and his or her foreseeable competing demands.[55] In particular, in situations where not only the outcome of the arbitration but – maybe of even greater significance – the time required for an arbitral award makes a difference, one may expect that the ICC International Court of Arbitration will set a new standard.

C. Increased Competition for Global Arbitration Business

The financial crisis and the corresponding demand by parties to offer time- and cost-efficient arbitration services will most likely foster competition for international dispute resolution services in various directions.

1. Competition by Governments and Arbitral Institutions to Attract International Arbitrations. — Currently, countries all over the world are increasingly attempting to attract international arbitrations.[56] Most recently, Singapore which is already a very established player not only in Asia but also on the international market has commenced to adopt some, but not all, of the UNCITRAL 2006 amendment.[57] Ing Loong Yang, a leading practitioner in Singapore, has been quoted as saying that:

> [T]he proposal is part of a wider initiative to make Singapore a leading destination for international arbitration work. Other initiatives have included a more cosmopolitan line-up at the highest level of the Singapore International Arbitration Centre, and the building of Maxwell Chambers, an integrated centre with state of the art hearing facilities and offices of leading arbitrators and arbitral institutes.[58]

[55] Uzma Balkiss Sulaiman, *ICC Arbitrators Must Disclose Availability*, GLOBAL ARB. REV., Aug. 3, 2009, *available at* http://www.globalarbitrationreview.com/news/article/18451/icc-arbitrators-disclose-availability/ (last visited Nov. 25, 2009) (quoting Karyl Nairn who says that the new form is a "good idea", as one of the biggest sources of frustration for clients is delay. She is further quoted as follows: "*There are some arbitrators who could be a lot better at communicating to parties and institutions in advance the existence of practical limitations on their availability to serve in the case. Having to list pending cases and commitments will focus their minds on the importance of having sufficient availability to serve properly.*").

[56] *See generally* Wilske, *supra* note 34; Wilske & Fox, *supra* note 5, at 383; *see also* Editorial, Asian Legal Business Issue 9.8 2, 2 (Aug. 2009) ("*Arbitration is big business for national governments, arbitral bodies and, of course, lawyers.*").

[57] Kyriaki Karadelis, *SINGAPORE: Singapore to Adopt Some of 2006 UNCITRAL Changes*, GLOBAL ARB. REV., July 29, 2009, *available at* http://www.globalarbitrationreview.com/shop/article/18422/singapore-adopt-2006-uncitral-changs/ (last visited Nov. 25, 2009).

[58] *Id.*

Hong Kong also strives to provide improved and modernized arbitration legislation that is in line with the UNCITRAL Model Law as currently drafted, and expects to "*reconfirm and strengthen Hong Kong's leading position in Asia*".[59] This is consistent with the administered arbitration rules of the Hong Kong International Arbitration Centre, which came into effect on 1 September 2008 and demonstrated the HKIAC's "*quest to be the leading centre for the resolution of international disputes in the region*".[60]

In favor of Australia, Sam Lutrell argues that the short- and long-term outcomes of the global financial crisis might help Australia's status as a seat for international arbitrations compared to its competitors Singapore and Hong Kong.[61]

In the Middle East, it seems that the launch of the Dubai International Financial Centre [DIFC] in September 2004 inspired several neighboring states.[62] As soon as October 2009, Bahrain is expected to open a competing alternative dispute resolution centre called the Bahrain Chamber for Dispute Resolution [BCDR], as has been revealed by the Bahrain Ministry of Justice.[63] Even Saudi Arabia is now expected to open a series of centers of economic development aimed at attracting outside investment, which will allegedly include an international arbitration centre designed to emulate the DIFC.[64]

Indeed, even "arbitration newcomers" are now increasingly jumping on the bandwagon. On 10 August 2009, the International Finance Corporation [IFC], a member of the World Bank Group, and Cambodia's Ministry of Commerce signed a Memorandum of Understanding to implement a three-year project for setting up the new National Arbitration Center of Cambodia [NAC], which will resolve business disputes and bolster

[59] Lorraine De Germiny, *Arbitration Law Reform in Hong-Kong: Furthering the UNCITRAL Model Law*, ASIAN DISP. RESOL. 73, 77 (2008).

[60] *See generally* Mark Lin, *An Introduction to the Administered Arbitration Rules of the Hong-Kong International Arbitration Centre*, ASIAN DISP. RESOL. 9, 9 (2009).

[61] Luttrell, *supra* note 4, at 420-21.

[62] *See* Gordon Blanke, *The DIFC: A Brave New World of Arbitration*, 75 INT'L J. ARB. MEDIATION & DISP. MGMT 422, 422-24 (2009).

[63] Katy Dowell, *Bahrain Teams with AAA to Launch Arbitration Centre*, THE LAWYER, Aug. 31, 2009, *available at* http://www.thelawyer.com/bahrain-teams-with-aaa-to-launch-arbitration-centre/1001785.article (last visited Nov. 25, 2009); Uzma Balkiss Sulaiman, *ICDR and Bahrain Plan to Hit Ground Running with New Regional Centre*, Global Arbitration Review, Aug. 26, 2009, *available at* http://www.globalarbitrationreview.com/news/article/18624/icdr-bahrain-plan-hit-ground-running-new-regional-centre/ (last visited Nov. 25, 2009) (quoting Philip Punwar who considers "*Bahrain a good location for a new arbitration centre but notes that it will face strong competition in a region crowded with similar players*", such as "*the independent Dubai International Arbitration Centre, the LCIA-backed DIFC-LCIA in Dubai's financial freezone, and Egypt's Cairo Regional Centre for International Commercial Arbitration.*").

[64] Dowell, *supra* note 63, at 8.

confidence in the commercial system.[65] The Kingdom of Cambodia is currently recruiting 50-60 applicants to be the first arbitrators of the NAC.[66] Recently the media reported on steps taken by even Rwanda's legislature towards establishing a new regional arbitration center in Kigali – this coming only months after the enforcement of the New York Convention in the country.[67] Indeed, as the former Chairman of the ICC International Court of Arbitration Pierre Tercier put it, there is a "*proliferation of arbitration centres of all kinds and standards and, linked to this, the increasing competition*".[68] This offers users a wider range of options to choose from and obliges arbitral institutions to improve their services where necessary and, above all, to make them better known.[69]

2. Increased Incentive for Innovation. — The call for more time and cost efficiency might also inspire arbitrators, prospective arbitrators, practitioners, users and academics to develop and promote ways and means to reach just and fair resolutions of international business disputes in a more time- and cost-efficient manner. One example could be the proposal by Michael Hwang to re-consider the traditional common law method of presentation of evidence. He suggests that it would often be preferable to break down the case into various issues and have both parties present their respective cases on an issue-by-issue basis.[70] Another such novel idea is Jörg Risse's mediation technique called "Procedural Risk Analysis" which he, quite correctly, considers "too good to be used in mediation proceedings alone".[71] The technique is based on a decision tree derived from claimant's request for arbitration and respondent's answer. The arbitral tribunal discusses with the parties whether this structure is correct without discussing the merits of individual arguments. What matters is the structure alone. If the parties agree on the structure, the parties are then asked to follow that structure in all subsequent written submissions. In order to develop such decision tree, the arbitrator must organize the complexity and determine the issues relevant to the outcome of the case. In

[65] Int'l Fin. Corp., *IFC Helps Establish Cambodia's First National Arbitration Center to Resolve Commercial Disputes* (Aug. 10, 2009), *available at* http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=BF9525619E3044238525760E004D7137 (last visited Nov. 25, 2009).

[66] For application forms, further information and submission of applications, see the Ministry of Commerce's homepage at http://www.moc.gov.kh (last visited Nov. 25, 2009).

[67] Alison Ross, *Rwanda Pushes for Arbitration Centre*, GLOBAL ARB. REV., Oct. 12, 2009, *available at* http://www.globalarbitrationreview.com/news/article/19015/ (last visited Nov. 25, 2009).

[68] Pierre Tercier, *Emerging Trends in ICC Arbitration and the Institution's Vision for the Future*, EUR. ARB. REV. 5, 5 (2007).

[69] *Id.* at 5.

[70] Michael Hwang, Trial by Issues, *presented at* the APRAG Conference in Seoul, Korea (June 22, 2009), published at Transnat'l Disp. Mgmt. (Oct. 2009) and the ensuing discussion at the news group Oil-Gas-Energy-Mining-Infrastructure Dispute Management (OGEMID).

[71] Risse, *supra* note 37, at 470.

a second step, the analyst (mediator or arbitrator) inserts probabilities into the decision tree which results in percentage values.[72] In a third and final step, the expectation value of the claim can be calculated.[73] Indeed, the decision tree is very apt to serve, not only as a tool for mediation or settlement negotiations, but also as a road map towards the final award.[74] Needless to say, there are more efficient techniques available to limit costs and provide for efficient arbitration proceedings.[75] What matters is that good techniques are developed, promoted and added to the repertoire of international arbitrations' "best practices".

3. Competition by Other Alternative Dispute Resolution Service Provider? — One disturbing trend is that arbitration is being increasingly perceived as a kind of "offshore litigation", which might render arbitration even costlier and more time-consuming than litigation.[76] It is evident that where other forms of alternative dispute resolution are promoted as cheaper and more efficient, arbitration institutions and arbitration practitioners should be aware that users have a choice. If arbitration no longer constitutes an efficient, cost-effective dispute resolution tool, users will undoubtedly turn to other mechanisms to settle their business disputes.[77]

IV. THE ARBITRATION "GUERILLA" PHENOMENA

The term "arbitration guerrillas" is borrowed from Michael Hwang's article "*Why is there still resistance to arbitration Asia?*".[78] In his experience, such "arbitration guerrillas" "*will try to exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes*

[72] *Id.* at 464.

[73] *Id.*

[74] *Id.* at 469.

[75] See in particular ICC, Commission on Arbitration, *supra* note 38; *see also* Christopher Newmark, *Controlling Time and Costs in Arbitration*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 81, 81-96 (Lawrence W. Newman & Richard D. Hill eds., 2d ed. 2008); Christoph Stippl & Gunnar Pickl, *Limiting Costs in Arbitration*, *in* AUSTRIAN ARBITRATION YEARBOOK 2009 213, 213-17 (2009); *Round Table – Solving the Time and Cost Conundrum*, 4(2) GLOBAL ARB. REV. 13, 13-24 (2009); *Round Table – The Dynamic of Time and Cost – the Sequel*, 4(3) GLOBAL ARB. REV. 15, 15-26 (2009).

[76] Wegen & Wilske, *supra* note 5, at 4; *see* Bernhard F. Meyer, The Swiss Rules of International Arbitration – Five Years of Experience, *presented at* the ASA Confererence on The Swiss Rules of International Arbitration – Five Years of Experience in Berne (June 19, 2009) (on file with author).

[77] Meyer, *supra* note 76, at 12 (on file with author); *see also* Wirth, *supra* note 6.

[78] Michael Hwang, *Why is There Still Resistance to Arbitration in Asia?*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION – LIBER AMICORUM IN HONOUR OF ROBERT BRINER 401, 401-11 (Gerald Aksen et al. eds., 2005) (describing respondents "*who are not interested in playing the game by the rules, usually because they have a bad case.*").

abortive or ineffective".[79]

Dr. Sam Luttrell, a young Australian arbitration practitioner and former lecturer at Murdoch University predicts that in coming months an already emerging trend will intensify where respondents' lawyers pushed by their clients to "buy time" will use all kinds of procedural tricks to delay or even derail arbitrations. He describes such measures as the "black arts" of arbitration and even sees this an opportunity for counsel to specialize, as he expects there will be a demand from clients for the "black arts".

A. The Various Manifestations of Guerrilla Tactics in Arbitration

Guerrilla tactics or "black arts" in arbitration often include – in addition to a technocratic application or abuse of procedural rules[80] – questionable if not illegal activities, as will be described in the following section on the various manifestations of guerrilla tactics in arbitration.[81]

1. Action Against Arbitrators. — Unfortunately, one of the standard guerrilla tactics in arbitration has become the harassing of arbitrators. This includes, for example, repeated and unmeritorious challenges, but also stalking. In a recent case, a respondent who saw his chances of succeeding in the arbitration dwindling and who had already challenged all members of the arbitral tribunal various times, even commenced court litigation in New York against the German chairman of a pending DIS arbitration, arguing that the chairman had infringed his confidentiality obligations.[82] Even though the respondent's action was dismissed, the chairman ended up with considerable legal costs for defending himself in the New York courts.[83]

A recent attempt by an arbitrator to strike back against a litigant and sue a lawyer in U.S. courts for wrongful use of several proceedings, however, was unsuccessful. The U.S. 3rd Circuit Court of Appeals ruled that even if a lawyer allegedly lodged false accusations in court papers to have the arbitrator disqualified, lawyers enjoy an "absolute privilege" that immunizes them from liability over any communication made in the course

[79] *Id.* at 401; *see* Steven A. Hammonds, *Spoliation in International Arbitration: It Is Time to Reconsider the "Dirty Wars" of the International Arbitral Process?*, 3(1) DISP. RESOL. INT'L 5, 5-30 (2009).

[80] *See, e.g.*, Hwang, *supra* note 78, at 402-03; *see also* Stephan Wilske, *"Internationalization of Law" in Arbitration – A Way to Escape Procedural Restrictions of National Law?*, *in* REFLECTIONS ON THE INTERNATIONAL PRACTICE OF LAW – LIBER AMICORUM FOR THE 35TH ANNIVERSARY OF BÄR & KARRER 257, 259-63 (Nedim Peter Vogt ed., 2004).

[81] Various manifestations of guerrilla tactics in international arbitration will be one topic of the 2010 Vienna Arbitration Days, Feb. 12-13, 2010, see http://www.viennaarbitrationdays.at/VAD_2010_flyer.pdf (last visited Nov. 25, 2009).

[82] United States v. Sdny Civil Practice, 241 N.Y.L.J., Jan. 12, 2009, at 17.

[83] Pursuant to the traditional "American Rule", attorney fees are not awardable to the winning party (i.e. each litigant must pay his own attorney fees) unless statutorily or contractually authorized. *See* BLACK'S LAW DICTIONARY 82 (6th ed. 1991).

of litigation.[84]

2. Action Against Counsel or Parties. — In the recent ICSID Libanco case against Turkey, allegations were made that wiretapping and other surveillance methods were used against counsel.[85]

While it remains to be seen whether these allegations will be proven, numerous experienced arbitration practitioners are fully aware of certain "guerrilla warfare" methods which have been displayed in important cases against counsel or party representatives.

In a New Jersey case, one lawyer even went as far as to assault the opposing party. The victim filed a complaint against the American Arbitration Association [AAA] and the sole arbitrator, claiming that the arbitrator had failed to "*control the proceedings*". The New Jersey court held that both the AAA and the arbitrator had a "*duty to control the proceedings, and the failure to do so fell outside the scope of arbitral immunity*". However, the New Jersey State Appellate Court held that arbitrators and arbitral organizations enjoy immunity from civil liability for injuries sustained by a party to the arbitration stemming from the arbitrator's alleged failure to "control the proceedings".[86] Thus, a lawyer or party representative who is physically attacked by his opponent during an arbitration hearing should rather rely on his self-defense skills than on any subsequent legal proceedings against the arbitrators or the arbitration institution.

3. Action Against Witnesses. — Unfortunately, it is meanwhile not uncommon for parties to attempt to intimidate witnesses from testifying at evidentiary hearings. Indeed, it is this author's unfortunate experience that in certain cases involving high stakes and influential parties, it is not unheard of that parties or counsel try to pressure witnesses with potentially damaging testimony not to appear at evidentiary hearings.[87] Witness

[84] *See* Naythons v. Stradley, Ronan, Stevens & Young LLP, No. 08-2527 (App. Ct. 3rd Cir. July 14, 2009); *see also* Shannon P. Duffy, *3rd Circuit Upholds Bar to Litigation Over Litigation* (July 31, 2009), http://www.law.com/jsp/article.jsp?id=1202432670982& thepage=1 (last visited Nov. 25, 2009).

[85] Skadden, Arps, Slate, Meagher & Flom (UK) LLP, *Paranoids Have Enemies Too: Wiretapping and Other Clandestine Information Gathering Techniques in International Arbitration*, (Oct. 7, 2008), http://www.linexlegal.com/content.php?content_id=68814 (last visited Nov. 25, 2009).

[86] *See* Malik v. Ruttenberg, 398 N.J.Super. 489, 942 A.2d 136 (Sup. Ct. App. Div. 2008); *see also* Charles Toutant, *Arbitrator is Not Liable for Attorney's Alleged Assault of Party, Court Says*, New York Law Journal, Mar. 4, 2008, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005560529 (last visited Nov. 25, 2009)..

[87] *See* Kensington Int'l Ltd. v. Republic of Congo, Slip Copy, 2007 WL 2456993 (S.D.N.Y. Aug. 24, 2007) (granting a motion for sanctions against a reputable U.S. law firm that in bad faith attempted to dissuade a non-party witness from attending a post-judgment deposition); Anthony Lin, *Cleary Sanctioned for Trying to Interfere with Testimony*, New York Law Journal, Aug. 28, 2007, http://www.law.com/jsp/LawArticlePC.jsp?id=1188205348758&slreturn=1&hbxlogin=1 (last visited Nov. 23, 2009); The Second U.S. Circuit Court of Appeals upheld the sanctions by its decision of July 1, 2008 (Cleary Gottlieb Steen & Hamilton v. Kensington Int'l, 07-4075-cv); *see*

intimidation also occurs in court proceedings.[88] It is frightening that such cases even occur in court litigation in so-called civilized countries. One has to expect that in international arbitration where the chances of meeting the same arbitral tribunal – and the same counsel of the opposing party – in another case are far more limited,[89] there is much more going on behind the scenes. In arbitral proceedings, more likely than not, such conduct would remain unpunished because arbitrators often shy away from investigating into such "murky area".[90]

In summary: There is much the "arbitration guerrillas" are able to do and are currently doing.

B. How to Deal with Arbitration Guerrilla Tactics

While one may or even should assume "*that lawyers are obliged to act ethically in arbitrations,*"[91] it is also correct that to a large extent international arbitration still "*dwells in an ethical no-man's land.*"[92]

1. Ethics in International Arbitration v. Guerrilla Tactics. — It is

also Anthony Lin, *2nd Circuit Upholds Sanctions Against Cleary Gottlieb*, New York Law Journal, July 2, 2008.

[88] David Bario, *Pfizer Lawyers Say Plaintiffs Guilty of Witness Intimidation in Neurontin Litigation*, AM. LAW., Sept. 21, 2009, http://www.law.com/jsp/LawArticlePC.jsp?id=1202433926780 (last visited Nov. 25, 2009); Susan Beck, *Did Pfizer Intimidate a Key Plaintiff Witness on the Eve of the Neurontin Trial?*, AM. LAW., Aug. 10, 2009, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202432898903 (last visited Nov. 25, 2009); Mark Fass, *Accused of Threatening Witnesses, Attorney Takes the Stand to Explain "Kill" Phrasing*, New York Law Journal, Aug. 5, 2009, http://www.law.com/jsp/article.jsp?id=12024327819168 (last visited Nov. 25, 2009); Mark Fass, *Prominent Attorney Charged with Witness Tampering Faces Heated Cross-Examination*, New York Law Journal, Aug. 6, 2009, http://www.law.com/jsp/article.jsp?id=1202432819168 (last visited, Nov. 25, 2009).

[89] William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19(3) ARB. INT'L 279, 284 (2003) ("*Two Boston law firms arbitrating before a well-known Boston arbitrator would normally be expected to behave professionally . . . .*").

[90] *See* Republic of Congo, *supra* note 87, at 10; *see also* Anthony Lin, *Dorsey Firm Sanctioned as Part of Judge's Manifesto on Civility in Legal Profession*, New York Law Journal, Nov. 30, 2007, http://www.law.com/jsp/article.jsp?id=1196361717516 (last visited Nov. 25, 2009) reporting on Wolters Kluwer Financial Services Inc. v. Scivantage, Slip Op., 07 Civ. 2353 (HB) 1 (S.D.N.Y. Nov. 30, 2007) (129-page decision arguing that "*there is a line beyond which . . . aggressive representation gives way to misconduct.*"); *see also* Anthony Lin, *Court Supervision of Attorney Ordered due to Lack of Civility*, New York Law Journal, Dec. 12, 2007, http://www.law.com/jsp/article.jsp?id=1197419755013 (last visited Nov. 25, 2009); Mark Hamblett, *2nd Circuit Reverses Reprimand of Dorsey & Whitney*, New York Law Journal, Apr. 22, 2009, http://www.law.com/jsp/article.jsp?id=120243009 6623 (last visited Nov. 25, 2009).

[91] Peter C. Thomas, *Disqualifying Lawyers in Arbitrations: Do the Arbitrators Play Any Proper Role?*, 1 AM. J. INT'L ARB. 562, 562 (1990).

[92] *See* Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 342 (2002); *see also* Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 3(5) TDM 10 (2006) ("*The proliferation of international disputes and international dispute resolution mechanisms requires that the international community pay much closer attention than in the post to the ethical standards necessary to ensure that the rule of law is observed in the settlement of international disputes.*").

said that ethical issues "come up more frequently in international arbitration than [one] would expect" and, indeed, there have been cases in which counsel have been subject to discipline by a professional regulatory authority.[93] However, the topic has been recognized by the international arbitration community and solutions are already discussed.[94] More and more often the question asked by Cyrus Benson "can professional ethics wait?"[95] is answered in the negative.

2. Efficient Sanctions to Ensure Minimum Standards of Civility in International Arbitration? — Guerrilla tactics in international arbitration often trigger substantial expenses. A highly efficient means available to arbitral tribunals for countering abusive procedural tactics is to place sanctions on abusive counsel or parties allowing such tactics. As decided by an ICC arbitral tribunal "procedural rights shall not be used abusively or exercised unreasonably".[96] In this case, the arbitral tribunal allocated costs between the parties by taking into account the abusive attitude of one party during the proceedings.[97] Also, the U.S. 2nd Circuit Court of Appeals recently ruled that an arbitration agreement where both parties consent to pay the expenses of their own arbitrator and attorneys does not bar the award of such expenses as a sanction for failing to arbitrate in good faith.[98] The court ruled that the "arbitrator's identification of bad faith gives rise to an exception to the general applicable American Rule that each party bears its own attorneys' fees".[99] Indeed, in the U.S. three recent cases should encourage those who would police arbitral proceedings using costs awards.[100]

[93] James Castello & Catherine Rogers, *Q & A: Is Arbitration an Ethical Wasteland?*, GLOBAL ARB. REV., June 17, 2009 (on file with author).

[94] *See* Wolfgang Peter, *Derailment and Delay Tactics: Some Possible Solutions*, 3(6) GLOBAL ARB. REV. 14, 14-16 (2008) (recognizing that distinguishing derailment from zealous representation is never simple); *see also* Janet Walker, *Ethics in Arbitration for Counsel and Arbitrators*, IBA ARB. COMMITTEE NEWSL. Mar. 2009, 10, 10-11.

[95] *See generally* Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3(1) DISP. RESOL. INT'L 78, 78-79 (2009) (arguing that there is a need for guidelines or a checklist on standards of professional ethics which form the backdrop for everything lawyers do).

[96] Final Award in Case No. 13209/DK/RCH dated Nov. 25, 2005, at 90, ¶ 328 (on file with author).

[97] *See* Stephan Wilske, *Cost Sanctions in the Event of Unreasonable Exercise or Abuse of Procedural Rights – A Way to Control Costs in International Arbitration?!*, 4 SCHIEDSVZ [GERMAN ARB. J.] 188, 188-91 (2006) (with reference to further practice of arbitral tribunals).

[98] *See* Mark Hamblett, *2nd Circuit: Arbitrators Can Upset Agreements on Payment of Expenses in the Event of Bad Faith*, New York Law Journal, Apr. 14, 2009, http://www.law.com/jsp/article.jsp?id=1202429874088 (last visited Nov. 25, 2009); *see also* Uzma Balkiss Sulaiman, *"Bad Faith" Costs Decision Upheld*, GLOBAL ARB. REV., (July 13, 2009), *available at* http://www.globalarbitrationreview.com/news/article/18117/ (last visited Nov. 25, 2009).

[99] ReliaStar Life Insurance Co. of New York v. EMC National Life Company, No. 07-0828-cv, slip opinion, at 14 (App. Ct. 2nd Cir. Apr. 9, 2009).

[100] *See* Mark Kantor, *Money Column: Costs as Sanction "Okay" Say Three Separate US Courts*, 4(4) GLOBAL ARB. REV., Sept. 2, 2009, *available at* http://www.globalarbitrationreview.com/jour

Sanctions may also be quite helpful when imposed on an abusive counsel. In one recently decided case, a U.S. federal court found that the lawyer's attempts to have a bankruptcy judge rescue himself from a bankruptcy case were in bad faith. [101] Admittedly, it is questionable whether an arbitral tribunal has the same power vis-à-vis counsel.

In domestic litigation, courts often have the power to even dismiss a case with prejudice as a sanction for willful misconduct by a party's counsel.[102] Arguably, an arbitral tribunal could do the same to sanction willful misconduct by a party or its counsel.

Finally, one possible sanction is also for the arbitral tribunal to work with adverse inferences, i.e. where the parties' conduct creates the presumption that, for example, a witness was intimidated to prevent him or her from appearing at evidentiary hearing, the arbitral tribunal should be able to assume that the witness' testimony would have damaged the abusive party's case.

In taking a clear stand in such situations, arbitrators would be serving not only the well-assessed interests and expectations of the parties,[103] but also the integrity of arbitration itself.[104]

One particularly good example to this end is the award in Desert Line Projects LLC v. The Republic of Yemen,[105] where the arbitral tribunal denied the respondent's request to dismiss the claimant's claim for moral damages (based, *inter alia*, on the claimant's contention that its executives had been intimidated by the respondent in relation to the contract) for failure to establish that the harassment of the claimant's executives was related to the contract at issue and attributable to the respondent.[106] Quite courageously and certainly perfectly aware of the fact that the award of moral damages might expose the arbitral tribunal to criticism,[107] the

nal/article/18705/money-column-costs-sanction-okay-say-three-separate-us-courts (last visited Nov. 23, 2009).

[101] *See* Leigh Jones, *Sanctions Sustained Against Crowell & Moring Partner*, NAT'L L.J., June 15, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202431452495 (last visited Nov. 23, 2009) (reporting that a federal appeals court had upheld a USD 372,000 sanction against a Crowell & Moring partner and affirmed his five-year suspension from practice in bankruptcy court in a big swath of Florida).

[102] *See e.g.*, Rhonda Salmeron v. Enterprise Recovery Systems, Inc., No. 08-3375 (App. Ct. 7th Cir. Aug. 27, 2009); *see also* Ben Hallman, *7th Circuit Upholds Dismissal of False Claims Act Case for "Flagrant" Attorney Misconduct*, AM. LAW., Aug. 31, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202433439153 (last visited Nov. 25, 2009).

[103] *See* Meyer, *supra* note 76, at 6.

[104] *See* Stephan Wilske & Martin Raible, *The Arbitrator as Guardian of International Public Policy: Should Arbitrators Go Beyond Solving Legal Issues?*, *in* THE FUTURE OF INVESTMENT ARBITRATION 249, 269 (Catherine A. Rogers & Roger P. Alford eds., 2009).

[105] Desert Line Projects LLC v. Republic of Yemen, ICSID (W. Bank) Case No. ARB/05/17 (Feb. 6, 2008).

[106] *Id.* ¶ 288.

[107] *See, e.g.*, *Moral Damages Award Sparks Debate*, GLOBAL ARB. REV., Feb. 22, 2008, *available at* http://www.globalarbitrationreview.com/news/article/14364/moral-damages-award-sparks-debate/ (last visited Nov. 24, 2009).

arbitral tribunal found:

> [T]hat the violation of the BIT by the Respondent, in particular the physical duress exerted on the executives of the Claimant, was malicious and is therefore constitutive of a fault-based liability. Therefore, the Respondent shall be liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature.[108]

In conclusion, arbitral tribunals have a full tool-box to counter guerilla tactics and to ensure civility in international arbitration.

V. CONCLUSION AND OUTLOOK

The financial crisis affects all businesses, including the business of international dispute resolution. While the number of arbitrations increased as a direct consequence of the financial crisis and most probably will keep arbitration practitioners busy for the coming years, these arbitration practitioners will also feel other impacts of the crisis on their practice. No doubt, we are living in tougher times and one very obvious phenomenon is the ever increasing pressure on costs. The competition for the best time- and cost-efficient services will most probably increase in the future. This is, at least from a user's perspective, very welcome. However, despite competition and pressure, arbitration practitioners should be cautious not to allow arbitration to tolerate guerrilla warfare practices. Arbitration remains one of the most commonly used forms of dispute resolution, arguably even more so in Asia.[109] We will see in a few years time whether and in how far the financial crisis will have shaped the practice of arbitration.

At this point, it is hopefully not too optimistic to conclude with the wisdom of Keith Richards, a man who has survived more than just one crisis: "*I feel very hopeful about the future. I find it all very enjoyable with a few peak surprises thrown in.*"[110]

[108] Republic of Yemen, *supra* note 105, ¶ 290.

[109] Editorial, *supra* note 56, at 2.

[110] JESSICA PALLINGTON WEST, WHAT WOULD KEITH RICHARDS DO?: DAILY AFFIRMATIONS FROM A ROCK AND ROLL SURVIVOR 123 (2009).

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