SO IS THERE ANYTHING *REALLY* WRONG WITH INTERNATIONAL ARBITRATION AS WE KNOW IT?

Charles N. Brower, Michael Pulos and Charles B. Rosenberg[*]

I could, of course, simply say "No, there is not!," then promptly sit down. That would satisfy some people's definition of the perfect speech: "Short and simple." To say nothing of facilitating enjoyment of your lunch. Before I entered what my former partner Stephen Bond has called "Arbitrator Heaven," however, I was a lifelong trial lawyer and advocate. Therefore I prefer to heed the Countess of Rousillon's instruction to her son Bertram in Shakespeare's "All's Well That Ends Well," namely to be "never tax'd for speech."[1] Thus I plough on.

There are among us "arbitrazhniks" individuals and organizations harboring the very human urge to be creative, to tinker, to "improve," to show themselves adept at perfecting the institution of international arbitration. Ours, like almost every field of endeavor, is also a highly competitive one. Solicitors, barristers and law firms all compete to build clientele. Since a winning record helps, our profession necessarily is exercised in an intensely competitive environment.

It won't surprise you to learn that even among professional international arbitrators there can be a certain rivalry. Everyone is attuned to learn every two years where Michael

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[1] *See* WILLIAM SHAKESPEARE, ALL'S WELL THAT ENDS WELL act 1, sc. 1.

Goldhaber has ranked them in the summer issue of The American Lawyer's "Focus Europe" Supplement. Each follows avidly on Global Arbitration Review, OGEMID, Investment Arbitration Reporter and elsewhere – to use an American baseball expression – "Who's on first?" The annual awards dinners of Chambers, the directory publisher, draw us by the hordes.

The same is true of arbitral institutions. Why else would the Secretary-General of the Permanent Court of Arbitration fly from The Hague to Seoul to attend "GAR Live's" gala awards dinner and receive the 2011 GAR prize for the year's most outstanding international arbitral institution?[2] Or the Honorary Vice President of the LCIA most recently step up in Stockholm to take in hand the 2012 prize for "innovation by an institution?"[3]

Hollywood's annual "Oscars" extravaganza has nothing on us!

This combination of our competitiveness, our inborn creativity, and the proliferation of external indicia marking our individual worth – let's call it our "Individual Net Professional Value," or "INPV" – leads to individual and institutional inventiveness. Thus the IBA has produced Guidelines for Drafting International Arbitration Clauses and Rules on the Taking of Evidence in International Arbitration,[4] as well as the well-known "traffic light" Guidelines on Conflicts of Interest in International Arbitration.[5] The ICC has just revised its arbitration rules,[6] as has UNCITRAL.[7] The triple-A in the United States publishes no fewer

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[2] *See* Tom Toulson & Alison Ross, *And the winner is . . . GAR's pick of the best*, GLOBAL ARB. REV., 4 Mar. 2011, http://www.globalarbitrationreview.com/news/article/29299/and-winner-is-gars-pick-best/.

[3] *See* Clemmie Splaton, *The winners take it all*, GLOBAL ARB. REV., 9 Mar. 2012, http://www.globalarbitrationreview.com/news/article/30387/the-winners-all/.

[4] International Bar Association, IBA GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES, 7 Oct. 2010.

[5] International Bar Association, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, 22 May 2004.

[6] ICC Arbitration Rules (2012).

[7] UNCITRAL Arbitration Rules (2010).

than 76 separate sets of rules, protocols and other dispute-settlement procedures.[8] The Chartered Institute of Arbitrators alone has produced 20 different sets of guidelines and protocols in addition to its rules for arbitration and mediation.[9] The Permanent Court of Arbitration in The Hague offers nine different sets of "Optional Rules" for the arbitration of disputes,[10] the most recent one being – get this! – its "Optional Rules for the Arbitration of Disputes Relating to Outer Space Activities."[11] How much more up-to-date can a 113-year-old institution be?

Alright. We are thus confronted with rampant inventiveness. Anything wrong with inventiveness? It is said that in 1783 while observing the first hot-air balloon used for human flight, Benjamin Franklin was asked, "What use is it?" He responded, "What use is a newborn baby?"[12] This classic response without an answer encapsulates the dilemma of inventiveness. Whether you have children, or you do not, you certainly are aware of the vastly varying trajectories of human lives. Thus inventiveness is no more, and no less, a virtue in the arbitration world than anywhere else.

So let's look at what is good inventiveness and what is not-so-good inventiveness.

In 1908 Henry Ford put his Model T on the road. It was indeed an invention, though one could say, I suppose, that it was just an improvement on the horse-and-buggy era, perhaps even going back to the Conestoga Wagon days. Both had an "engine" – one being

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[8] *See generally International Centre for Dispute Resolution*, AMERICAN ARBITRATION ASSOCIATION, www.adr.org/icdr.

[9] *See generally List of Guidelines, Protocols and Rules*, CHARTERED INSTITUTE OF ARBITRATORS, http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/.

[10] *See generally Rules of Procedure*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1188.

[11] Permanent Court of Arbitration, OPTIONAL RULES FOR ARBITRATION OF DISPUTES RELATING TO OUTER SPACE ACTIVITIES, 6 Dec. 2011.

[12] *See* ESMOND WRIGHT, FRANKLIN OF PHILADELPHIA 324.

internal combustion and the other equine. Both had a fuel system – the one gasoline and the other hay and oats. Both had a transmission – one with shiftable gears and a clutch, the other the whip. Both had a chassis, including a suspension system, wheels with a buffer between them and the road or trail, and a body, seats and something overhead. Even today, the basic system remains the same, though clearly with major improvements too numerous to mention.

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Along the way, however, there have been major disasters, and freakish outbreaks. How many here, if any, are old enough to remember the Edsel? A Ford model named after one of Henry's sons and produced only in 1958-1960, it became a synonym for failure, or at least white elephant status. At www.dictionary.com you'll find "Edsel"; it means "useless and unwanted."[14]

[13] *See Ford Model T*, FORD INSIDE NEWS, http://www.fordinsidenews.com/forums/album.php?albumid=71&attachmentid=2303.

[14] *See* DICTIONARY.COM, http://dictionary.reference.com/browse/edsel.

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If you were growing up earlier in the 1950's you would have experienced the Studebaker automobile, of which it was said at the time, "You can't tell whether it's going forwards or backwards!"


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As a student in Germany in the late 1950's, I was exposed to two popular automotive jokes: One was a single-passenger, front-opening, squarish vehicle sporting mostly windows, marketed as "Isetta," but popularly referred to as "human in aspic;" the other was a narrow two-passenger vehicle (one behind the other), low-slung, resembling a cross between a torpedo and an airplane cockpit, manufactured by Messerschmitt and referred to by all as a "two-man coffin."

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[15] *See The 50 Worst Cars of All Time*, TIME, http://www.time.com/time/specials/2007/article/0,28804,1658545_1657867_1657781,00.html.

[16] *See Studebaker*, WIKIPEDIA, http://en.wikipedia.org/wiki/Studebaker.

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What does all this have to do with international arbitration? Lots. The point is this: Attempts to alter the basic elements of a successful vehicle, in this case international arbitration, are doomed, and if universally adopted would spell the ruin of the vehicle; whereas genuine improvements, inventiveness that builds on the essential features of the vehicle, may – also may not – but *may* be beneficial to it.

Back to the road for an instant, or to the Oregon Trail. The Jay Treaty[19] might be regarded as the horse-and-buggy or Conestoga Wagon era of international arbitration, and the Alabama Claims Arbitration[20] as our Model T. The original, basic elements of the vehicle are, and remain, these:

- The disputing parties' freedom to play a direct role in the design of their arbitration, particularly including the right freely to select, individually and collectively, the members of the tribunal;
- Avoidance of the uncertainties, local practices and feared biases of foreign court systems;
- A greater possibility of the resulting award actually being obeyed by the losing

[17] *See BMW Isetta*, WIKIPEDIA, http://de.wikipedia.org/wiki/BMW_Isetta.

[18] *See Messerschmitt KR200*, WIKIPEDIA, http://en.wikipedia.org/wiki/Messerschmitt_KR200.

[19] Treaty of Amity, Commerce, and Navigation between His Britannic Majesty and the United States of America, signed 19 Nov. 1794.

[20] Treaty of Washington, signed 8 May 1871 (creating a five-member Tribunal of Arbitration to resolve the "Alabama Claims").

party, if need be through external enforcement.

My proposition is that any proposal that would alter any of the fundamental elements of international arbitration constitutes an unacceptable assault on the very institution of international arbitration. Conversely, any proposal that does not attack those fundamental elements, but instead is designed to enhance them, should be considered carefully and may be found to be an improvement of it.

Let me give you examples of each in order to illustrate what falls on which side of this divide.

Two recent proposals, one by Professor Jan Paulsson and one by Professor Albert Jan van den Berg, each constituted an attack on basic, foundational elements of international arbitration, which have been widely rejected, and from which, wisely, both of them subsequently have distanced themselves.[21]

First, Paulsson, perceiving a "moral hazard" in party appointments of arbitrators, in 2010 called for all such appointments to be scrapped, universally.[22] He urged that instead one of three alternatives be mandated:

- All arbitrators to be chosen jointly by both parties;
- All arbitrators to be appointed by a "neutral body," meaning basically an arbitral institution; or

[21] Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REVIEW: FOREIGN INVESTMENT L. J. 339 (FALL 2010); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush Arsanjani et al. eds.) (11 Feb. 2011). For a comprehensive critique of Paulsson's and van den Berg's proposals, *see* Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 6(3) WORLD ARB. & MEDIATION REV. (2012).

[22] *See* PAULSSON, *supra* note 21, at 348 ("The best way to avoid such incidents [of arbitrators acting unethically] is clearly to forbid the practice of unilateral appointments.").

- Unilateral appointments by parties of arbitrators only from a "pre-existing list of qualified arbitrators," apparently also established by some institution.[23]

I need not tell any of you what a sea change any of this would constitute in our historically-proven system.

In February 2012, Paulsson, commenting on criticism of his proposal, effectively withdrew it, stating that the LCIA Arbitration Rules should stand as a model.[24] Those Rules, of course, permit party-appointments exactly as they have been made for centuries.[25] Of course parties are free, if they so wish, as has always been the case, to opt for all appointments to be made by the LCIA. The issue here is one of parties having their choice, a fundamental element of international arbitration that must be preserved.

Second, van den Berg, for his part, has called for a prohibition of dissenting opinions in international arbitration, which also has been an important element of our system. In an article published in 2011, Van den Berg found that nearly all of the publicly available dissenting opinions in investment arbitrations have been written by the arbitrator appointed by the party who lost the case in whole or in part.[26] From that he concluded that "dissenting opinions [in investment arbitrations] barely serve a legitimate purpose in a system with unilateral appointments."[27] He therefore admonished party-appointed arbitrators to "observe the principle *nemine dissentiente*."[28] He, too, however, has thought better of his proposal. In

[23] *See id.* at 352.

[24] *See* Alison Ross, *Paulsson and van den Berg presume wrong, says Brower*, GLOBAL ARB. REV., 6 Feb. 2012, http://www.globalarbitrationreview.com/news/article/30147/paulsson-van-den-berg-wrong-says-brower/ [HEREINAFTER PAULSSON AND VAN DEN BERG PRESUME WRONG].

[25] *See* LCIA Arbitration Rules, art. 7(1) ("If the parties have agreed that any arbitrator is to be appointed by one or more of them or by any third person, that agreement shall be treated as an agreement to nominate an arbitrator for all purposes . . . .").

[26] *See* VAN DEN BERG, *supra* note 21.

[27] *See id.* at 831.

[28] *See id.* at 834.

February 2012, he was quoted as saying "I am not against dissenting opinions. I am, however, concerned about the aberration that dissenting opinions have deteriorated to 'mandatory dissents' by arbitrators appointed by the losing side."[29] Thus here, too, the dike has burst.

That is the negative side of the divide between good inventiveness and not-so-good inventiveness. Now let me turn to the positive side. Here it is useful to cite a number of "tweaks" to the system that have been proposed in recent years, and in some cases adopted.

- Emergency arbitrator rules. These now have been adopted by the triple-A's ICDR,[30] the SIAC,[31] the SCC,[32] and, most recently, the ICC.[33] These enable a party to seek urgent interim measures within the framework of an arbitration before the ultimate tribunal has been constituted. This is indeed a much-needed improvement.

- Toby Landau QC's proposal that five arbitrators be appointed in especially sensitive investment dispute arbitrations.[34] This respects the fundamental element of party choice, but will it attract a following in light of the additional costs involved, to say nothing of the difficulty of coordinating additional busy schedules? Too soon to tell.

- The Chartered Institute of Arbitrators Practice Guideline 16 on "The Interviewing of Prospective Arbitrators."[35] Designed to "keep pure" the

[29] *See* PAULSSON AND VAN DEN BERG PRESUME WRONG, *supra* note 24.

[30] ICDR Arbitration Rules, art. 37.

[31] SIAC Arbitration Rules (2010), art. 26(2), sched. 1.

[32] SCC Arbitration Rules, app. II.

[33] ICC Arbitration Rules (2012), art. 29, app. V.

[34] *See* Alison Ross, *Freshfields lecture 2011: saving investment arbitration from itself*, GLOBAL ARB. REV., 6 Dec. 2011, http://www.globalarbitrationreview.com/news/article/30021/freshfields-lecture-2011-saving-investment-arbitration-itself/.

[35] Committee of The Chartered Institute of Arbitrators, *Practice Guideline 16: The Interviewing of Prospective Arbitrators*, 77(4) ARBITRATION 447 (2011).

independence and impartiality of arbitrators, this is a controversial Guideline, as evidenced by the published criticisms of it by Gary Born and Mark Friedman, which criticisms I personally support.[36] In trying to "purify" the appointment process, this Guideline may have encroached too far on the arbitrating parties' freedom to choose.

- The Debevoise Protocol and its progeny. This prescribes that in considering appointment of arbitrators Debevoise's lawyers will always ask prospective arbitrators to "confirm their availability for hearings on an efficient and reasonably expeditious schedule."[37] A similar provision appears in the College of Commercial Arbitrators' "A Protocol for Arbitration Providers,"[38] and comparable requirements are now part of both ICSID's and the ICC's procedures.[39] Such measures are at least a prod to the conscience of prospective arbitrators and can only help.

- The Redfern Schedule. The utility of this well-known device for dealing effectively with requests for document production is beyond question.

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[36] *See id.* at 449, ¶ 3.1(7) (quoting Gary Born as criticizing the requirement that interviews with potential arbitrators be recorded as "not customary nor required and most practitioners would counsel against it"); *id.* at 3.1(4) (quoting Mark Friedman as claiming that "many practitioners . . . would abhor taping interviews as being intrusive, demeaning and perhaps even likely to provoke more litigation as disgruntled parties pore over every word in each for phrases they might pluck out to support a challenge").

[37] Debevoise & Plimpton LLP, DEBEVOISE & PLIMPTON LLP PROTOCOL TO PROMOTE EFFICIENCY IN INTERNATIONAL ARBITRATION, 2010, ¶ 1.

[38] The College of Commercial Arbitrators, A PROTOCOL FOR ARBITRATION PROVIDERS, 2010, at Action 12.

[39] International Chamber of Commerce, ICC ARBITRATOR STATEMENT OF ACCEPTANCE, AVAILABILITY AND INDEPENDENCE, Jan. 2010, http://www.iccwbo.org/uploadedFiles/Court/Arbitration/News/2010/January_SAAI.pdf; *see also* ICC Arbitration Rules (2012), art. 11(2) ("Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence . . . ."); *id.* at art. 13(1) ("In confirming or appointing arbitrators, the Court shall consider . . . the prospective arbitrator's availability . . . ."). The ICSID Secretariat has also begun requesting an arbitrator prior to accepting an appointment "to indicate the dates on which he/she will be unavailable during the first 24 months of a proceeding." *See* Letter from ICSID Secretariat, at Annex A (on file with authors).

- The IBA Rules on the Taking of Evidence in International Arbitration.[40] Rarely do arbitrating parties not agree for the tribunal to be "guided" by these Rules, though they may not be agreed to be mandatory. I have found them fairly universally to be so employed and to be quite useful as guides. The 2010 version's Article 9.2(b) on privilege is a welcome addition.[41]

- The Reed Retreat. Lucy Reed recommends her practice of having a "retreat" of the tribunal prior to the hearing to discuss the case and identify issues it would like the parties to address. In practice, more often than not, in my experience, the tribunal has gathered for dinner the evening before the hearing commences in order to have such a discussion. Sometimes the respective arbitrators' schedules preclude this, but some form of advance "brainstorming" of the case by the tribunal is indeed important. Again, a useful prod to the conscience of the arbitrator.

- The Sachs Protocol. At the 2010 ICCA Conference in Rio de Janeiro Dr. Klaus Sachs proposed that where an expert is required each party list three-to-five appropriately qualified experts, and that the tribunal then select one expert

[40] International Bar Association, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, 29 May 2010.

[41] *Id.* at art. 9.2(b) ("The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons . . . (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable."); *id.* at art. 9.3 ("In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.").

from each of the two lists, those two persons then to serve as the tribunal's expert team.[42] The proposal initially was met with some enthusiasm.[43] However, in the only case in which I have sat in which resort to the Sachs Protocol was suggested, the tribunal declined to adopt it.

- "Witness conferencing" or "hot-tubbing" of expert witnesses. Allegedly invented by Wolfgang Peter, this is a practice often used, but also frequently rejected, depending upon the particular circumstances of the case.[44]

- Amici curiae in investment dispute arbitrations. A growing practice, if still "suspect" in some eyes, I believe this has proven useful, at least in enhancing the transparency of such proceedings and thereby reducing the misimpressions that can arise in some quarters regarding the legitimacy of the proceedings.[45]

Well, that is a brief review of the types of arbitral inventiveness that do not tinker with the fundamental elements of international arbitration, and can, and often do, ensure that it is strengthened as an institution.

In closing, I want to promote, even stimulate, the right kind of inventiveness in all

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[42] Dr. Klaus Sachs, EXPERTS: NEUTRALS OR ADVOCATES.

[43] *See* Alison Ross, *A Sachs-y new approach to expert evidence?*, GLOBAL ARB. REV., 27 May 2010, http://www.globalarbitrationreview.com/news/article/28439/a-sachs-y-new-approach-expert-evidence.

[44] *See* Clemmie Spalton, *London: A hot-tub on hot-tubbing*, 6(5) GLOBAL ARB. REV., 12 Oct. 2011, http://www.globalarbitrationreview.com/journal/article/29875/london-hot-tub-hot-tubbing/; Sebastian Perry, *Quantum mechanics*, 6(2) GLOBAL. ARB. REV., 12 May 2011, http://www.globalarbitrationreview.com/news/article/29401/quantum-mechanics/.

[45] *See, e.g.*, Methanex Corp. v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," 15 Jan. 2001, ¶ 53, http://italaw.com/documents/Methanex-AmiciCuriae.pdf (finding that the tribunal has the power to accept *amicus* written submissions pursuant to Article 15(1) of the UNCITRAL Arbitration Rules); Piero Foresti, Laura de Carlia and others v. Republic of South Africa, Letter regarding Non-Disputing Parties, ICSID Case No. ARB(AF)/07/01, 5 Oct. 2009, http://italaw.com/documents/ForestiNon-DisputingPartiesOrder.pdf (allowing five non-disputing parties to participate in the arbitration in accordance with Rule 41(3) of the ICSID Additional Facility Rules); *see also* Statement of the Free Trade Commission on non-disputing party participation, NAFTA FREE TRADE COMMISSION, 7 Oct. 2004 (recommending that NAFTA Chapter 11 tribunals adopt certain procedures with respect to written submission by non-disputing parties).

"arbitrazhniks," as virtually anything in this world is indeed capable of improvement. Remember, however, that "change" and "improvement" are not synonyms. According to de Tocqueville, in America at least, "every change seems an improvement."[46] Anyone who persists in that belief following this lunchtime offering, however, runs the danger of harvesting the criticism directed by Thersites at Agamemnon in Shakespeare's "Troilus and Cressida": "[H]e has not so much brain as ear-wax."[47]

I thank you for your attention.

[46] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 167 ("America is a land of wonders, in which everything is in constant motion and every change seems an improvement.") (Henry Reeve, trans., Wordsworth Editions Ltd., ed. 1998) (originally published in French as DE LA DÉMOCRATIE EN AMÉRIQUE in 1835 and 1840).

[47] *See* WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 5, sc. 1.