



Dealing with Guerilla Tactics in International Arbitration: which tools for Counsel and Arbitrators?



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It is a privilege to be invited to speak at the KIAC International Arbitration Centre's 2014 Conference on the theme 'Emerging Issues in International Arbitration: What a New Arbitral Seat Can Anticipate.'. I would like to share with you my thoughts on a subject, whose importance in recent times, has been brought to the front burner as it rightfully should. It is the subject of unconventional and disruptive behavior in international arbitration popularly referred to as 'guerrilla tactics'.

Introduction

With globalization and advances in commerce and technology, the need for legal systems to adapt to mechanisms for enhancing alternative dispute resolution (ADR) methods continues to grow. The rising popularity of ADR can be explained by the increasing number of cases being handled by the traditional courts and the attendant delays, the perception that ADR imposes lower costs than litigation, a

preference for confidentiality and the desire of some parties to have greater control over the selection of the individuals who will settle their dispute on the basis of competence, experience and absence of bias¹ In dealing with guerrilla tactics in International Arbitration, it is paramount to first and foremost understand the consequence of the phrase "international arbitration" in relation to the subject of discourse, especially as terms in common use often elude definition.² It is sometimes said that every arbitration is a national arbitration in the sense that it must be held at a given place and is accordingly, subject to the national law of that place. Whilst this may be an interesting topic for debate, in practice, it is customary to distinguish between arbitrations which are purely "domestic" and those which are "international".

International arbitration is a process used by parties from different states to determine their

1 FI, Ajogwu, Commercial Arbitration in Nigeria: Law & Practice, 2nd edition P 3.

2 Discussed at the Kigali International Arbitration Conference (KIAC) 2014 International Arbitration Conference with the theme 'Emerging Issues in International Arbitration: What a New Arbitral Seat Can Anticipate', by FI Ajogwu and Günther J. Horvath.

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disputes before an impartial tribunal appointed by a commonly agreed method.³ International arbitration therefore, would simply suggest that parties to the arbitration are in different states or countries. Under the UNCITRAL Model Law, arbitration is international if:

a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.”⁴

Experience has confirmed the long-standing advantages of arbitration as compared to dispute resolution before domestic courts, some of which are:

- Neutrality of the dispute resolution forum;
- Legal and/or technical/commercial/cultural expertise of the arbitrators;

- Flexibility and confidentiality of the proceedings;
- Finality of the award; and
- Worldwide (International) enforceability of the award under the New York Convention.

What Constitutes Guerrilla Tactics in International Arbitration?

Parties to international business transactions are often driven by a desire to preserve their business relationship and prefer the friendly atmosphere of arbitral proceedings.⁵ However, subscribers to international arbitration increasingly complain about the length and cost and more recently, the tactics adopted by lawyers in the course of arbitral proceedings. These complaints reveal that arbitration has fallen victim of its own success.⁶ It has now become glaring that the lee-ways and advantages synonymous with arbitration also give room for disadvantages and procedures that are too notorious to be considered merely as bad behaviour.

Adverse conduct by parties/attorneys/lawyers in the course of arbitration proceedings may otherwise be regarded as bad behavior. However, the term guerrilla tactic is often used to describe those actions which are perceived as more hostile practices displayed by parties in arbitration in an attempt to gain a better advantage over the opposing party.

³ Clayton Utz, A guide to International Arbitration p. 2

⁴ Art. 1.(3).

⁵ Klaus Peter Berger, Private Dispute Resolution in International Business. P 308

⁶ Rivkin, Arb. Int'l (2008), 375, 377.

Till date, there is lack of clear definition of Guerrilla Tactics in International Arbitration, This accounts for why conduct identified by some attorneys as ‘guerrilla tactics’ would be defended by others as legitimate strategy, or even as part of an attorney’s obligation to diligently represent the client’s interest.⁷

The list of what constitutes Guerrilla Tactics in international arbitration is long and sometimes can hardly be distinguished from bad behaviour on the part of parties or counsel representing parties in an international arbitration, The following have been identified as Guerrilla Tactics in international arbitration:⁸

- convincing an arbitrator to go home rather than attend deliberations;
- death threats;
- changing counsel mid-proceedings to create a conflict with an arbitrator;
- wiretapping opposing counsel’s meeting rooms;
- hiding damaging documents that were ordered to be disclosed;
- raising many challenges to a single arbitral tribunal;
- physically assaulting the opposing party;
- raising excessive frivolous objections to ‘run the clock’ at an evidentiary hearing;
- threatening a witness to dissuade him from testifying; and

- absurdly excessive requests for document disclosure.

The diversity of commercial disputes results in a complex combination of different legal, regulatory and ethical background amongst the arbitrators and legal practitioners. There is no universal standard or body of rules or regulations to guide the ethics and procedures of parties in arbitration proceedings. There are however, different international bodies and institutions that have made available rules and principles of ethics to bind the conduct of parties in arbitration proceedings but the parties will have to agree to be bound by those rules and principles in the first place. An example is the International Bar Association Rules of Ethics for International Arbitrators.

FACTORS RESPONSIBLE FOR THE RISE IN THE USE OF GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION

First, there is the absence of a uniform legal framework regulating ethical conduct of counsel in international arbitration. Ethical issues that are prevalent in international arbitration are numerous and range from conflict of interest, incompetence, lack of candor, dishonesty, and improper communications with opposing parties, to improper arrangements for remuneration for legal representation.⁹ These ethical issues often metamorphose into “guerrilla tactics” in international arbitration. For instance, where a

7 Catherine A. Rogers, ‘Guerrilla Tactics in International Arbitration: Ethics, Practice, Remedies’ Legal Studies Research Paper No. 23-2013.

8 Günther J. Horvath, Stephan Wilske, Guerrilla Tactics in International Arbitration, International Arbitration Law Library, 2013, ISBN 13: 9789041140029.

Stephan Wilske, ‘Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough’, in Austrian Yearbook on International Arbitration, ed. Christian Klausegger et al. (Manz’sche Verlags-und Universitätsbuchhandlung, 2011), 315-319

9 Richard M. Mosk, ‘Attorney Ethics in International Arbitration’ (2010) S Berkley Journal of International Law Publicist 32, p. 33.

counsel who is incompetent in an international arbitration resorts to death threats to intimidate a fellow counsel; or where a counsel raises many challenges against a single tribunal arising from dishonesty.

Counsel representing parties in international arbitration usually come from different regulatory backgrounds with respect to laws that govern their professional conduct. As Mosk rightly pointed out, different regimes have a variety of rules or laws applicable to these ethical issues enumerated above. It is also relevant to point out that the extent to which choice of legal principles can govern professional conduct issues cannot be determined easily.¹⁰

Secondly, erring counsel in international arbitration proceedings cannot be subjected to any forum-state disciplinary system or mechanism as is the case with the judicial system. As there is no uniform code of conduct that binds counsel in international arbitration, there is also no chance of prosecuting or sanctioning any erring counsel or counsel adopting Guerrilla tactics in international arbitration. For instance every state has prescribed punishment or sanctions for counsel that violates the code or rules of the legal profession unlike in international arbitration. There is no oath in international arbitration which the violation can result in prosecution. In situations like this, counsel resort to all sorts of tactics including Guerrilla tactics which serve to favour their clients or their selfish interests.

Thirdly, international arbitral tribunals have very little or limited powers to discipline counsel or parties that engage in conduct that

is unacceptable and may be termed Guerrilla tactics. Because counsel appearing before an international arbitral tribunal are not licensed or regulated by that particular tribunal, they can afford to hide damaging evidence or treat a witness unfairly and with impunity.

Another issue or factor responsible for counsel engaging in acts which may be described as guerrilla tactics is that arbitrators are usually paid by parties and appointed by the counsel representing parties. Therefore, this creates a likelihood of bias on the part of arbitrators, and they are more likely to indulge counsel or parties that adopt guerrilla tactics. This raises the issue of arbitrators' independence and resoluteness. It has been argued that the concept of the "impartiality of party-appointed arbitrators" is mere pretence.¹¹

Tackling Guerrilla Tactics in International Arbitration

Consequently, where parties from two different countries decide to settle their dispute by arbitration, there is bound to be a clash of ethics. A common example is the practice of Ex parte communication which is common in some countries like China and even Nigeria but may be abhorred in other jurisdictions. The act of an arbitrator acting as a mediator and speaking to one party in the absence of another will be a ground to challenge the impartiality and independence of an arbitrator.

The principles of arbitration are the same as those for natural justice - *Audi alteram partem* which means that both parties should be heard and *Nemo iudex in causa sua* which means no man should be a judge in his own

¹⁰ Richard Mosk & Tom Ginsburg, 'Evidentiary Privileges in International Arbitration' (2001) 50 International and Comparative Law Quarterly 345.

¹¹ See Mosk, (n 13) at p. 36.

case. The principles in administrative law, are to ensure that the decisions of tribunals and governmental agencies are reached in a proper manner ensuring that all the parties are heard fairly and the decision is reached fairly too. Article 18 UNICITRAL Model Law safeguards the parties' basic procedural right of equal treatment and their right to be heard as the essential principles of arbitral due process. These basic procedural rights constitute the 'magna carta' of any arbitration.

'Unfortunately, the cardinal principles of natural justice and fair play that govern the resolution of disputes through arbitration, give the unscrupulous party and his wily lawyers a lot of scope. They will put the claimant to proof of each and every fact that has to be proved. They will find particulars and further and better discovery, the further the better discovery wears down the claimant's patience, eats into his pocket, and delays the dreadful hour of having to part with money. Attempts to fix an early date for hearing will be met with gloomy forecasts of its duration, and pleas for sympathy on behalf of counsel with no dates free until late next year'.¹²

The above quote gives a general but succinct description of the guerrilla tactics being used to delay and frustrate the claimant in an arbitration proceeding. The attempt will generally be to wear the claimant out until he has no will to push the case any further. Of course there is usually a lot of money hanging as the subject matter in arbitration disputes so a complete back down will just be wishful thinking. The fact that the adversarial system of litigation where the aim to hear both parties and decide fairly is also the downfall of arbitration. Arbitration tribunals however, do not have the judicial powers to dismiss poorly arbitrated proceedings for lack of

diligent prosecution or award cost for delays like in litigation. As arbitration is based on contract, some of these powers of the judges in litigation which are taken for granted are a necessity.

In arbitration, the concept of the independence and partiality of the arbitrators are familiar and concept principles that are strictly applied. In fact, the rules guiding arbitration proceedings in most if not all countries provide that parties can challenge the arbitrators seating in a tribunal where it is suspected or there is justifiable doubt that there may be conflict of interest or impartiality. It is also generally accepted that lack of independence and impartiality by an arbitrator is a ground to challenge an award.

It is unfortunate that these issues of cost and delay which were a few of the advantages of arbitration over litigation have become part and parcel of the cons of arbitration. The users of international arbitration are mostly corporate parties and, 'like speed, are impatient with delay, and abhor unnecessary costs'. The solution to the problems caused by the informal nature and practice historically (loosely used) associated with arbitration, is now the "the 'judicialization' of arbitration". This simply means that arbitration will have to be submerged into the judicial system and under the control and protection of judges for it to survive the attacks by practitioners of guerrilla tactics.

SUGGESTIONS & RECOMMENDATIONS

The International Chamber of Commerce (ICC) Commission on Arbitration and ADR submitted a Report titled *Techniques for Controlling Time and Costs in Arbitration*

¹² Thomas, Arbitration (1991), 9, 11

“...It should be noted that in some jurisdictions, it is common practice to prepare a witness.”

to assist the Parties and the Tribunal in Arbitration Proceedings. The Reports suggest that:

1. Fast-track procedures should be included to shorten the time spent arbitrating. Article 38(1) of the ICC Rules enables the parties to shorten the time limits provided for in the Rules. It is however difficult to draft this fast track clause because it is impossible to determine how long it will take to settle a dispute. The Report also advises against setting time limits for rendering the final award because it can create jurisdictional and enforcement problems if it turns out that the time limit set is unrealistic or not clearly defined.
2. A more detailed arbitration agreement setting out specific details of the arbitration procedure should be created after the dispute has arisen. This is because ‘the effects of a loose drafting approach are not felt at the drafting stage’. Rather it is when the dispute has arisen from an inelegant draft that blames abound, such as, ‘*had I known*’. An international arbitration agreement is a contract and so requires the existence of those ingredients for the validity of a contract. The Challenge to international arbitration is that many national laws have different requirements. These additional requirements range from separate execution of arbitration agreements to special prints for the arbitration clause.¹³ Parties are often encouraged to use the exact words of the arbitration clauses

suggested by the arbitral institution that they choose.

3. The post dispute agreement should be very detailed to cover the different ethical clashes that are common in international arbitration. A very succinct and familiar example is the differing opinions counsel have on pre-testimonial communication with witnesses. A scholar recounted that:

‘An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer’s view was that not to prepare a witness would be malpractice.’

It should be noted that in some jurisdictions, it is common practice to prepare a witness. This of course shows the differing opinions and how a clash of this seemingly minor opinion might be used by a ‘guerrilla’ to delay or frustrate proceedings by constantly challenging and disputing ethical differences.

4. On the selection of arbitrators, it will be better to have a sole arbitrator, selected and appointed by the ICC to ensure faster decision making and prevent the constant and unnecessary challenges faced by the arbitrator which may delay proceedings.
5. With regard to experience, the counsel and arbitrators to be appointed should have no time constraint and vast experience in case management.

¹³ Commercial Arbitration in Nigeria: Law & practice (Second Edition) P 192

Understandably, and as a result of the semblance between arbitration and litigation, it is advised that some of the judicial powers and privileges (as a Judge is a King in his own Court) granted to judges should be accorded arbitration panels. Due to the contractual nature of arbitration, even the laws that parties may subscribe themselves to willingly, may result in the parties autonomy by using expressions such as ‘*the parties are free to...*’ or ‘*unless otherwise agreed by the parties...*’. This freedom appears to be too wide in some instances because if one party is recalcitrant, the freedom which was intended to ease the proceedings may be employed as a tool to frustrate the proceedings. However, it is suggested that this freedom is a compensation for the lack of a right to appeal the substance of arbitral awards. With respect to Attorneys/Lawyers, it would be preferable if the “gladiator” acts of brazen Showmanship displayed in the Courtroom often to earn professional fees should not be entertained in arbitration proceedings.

The International Bar Association also provides Rules of Ethics for International Arbitrators. Although the provisions are not generally binding to all international arbitration or conciliation proceedings, parties may include a certain clause to be bound by the provisions of the Rules. The Rules cover, Acceptance of Appointment as Arbitrator, elements of bias, duty of disclosure, communication with parties, fees, duty of diligence, involvement in settlement proposals, confidentiality of deliberations, and the Fundamental Rule instructing Arbitrators to proceed diligently and efficiently to provide the parties with a just and effective resolution. The binding clause provides the consequence(s), which are removal from

position as arbitrator on the panel and forfeiting remuneration.

SUGGESTIONS FOR COUNSEL AND ARBITRATORS

Interim Measures

‘An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- a) maintain or restore the status quo pending determination of the dispute;
- b) take action that would prevent, or refrain from taking action that is less likely to cause current or imminent harm or prejudice to the arbitral process itself;
- c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
- d) preserve evidence that may be relevant and material to the resolution of the dispute.’¹⁴

Not all Arbitral Tribunals have the power or authority to order interim measures. However, it is generally a matter of practice and most arbitration laws confer the power to order interim measures on the arbitral tribunals. In line with the autonomy principle associated with arbitration, parties can also confer the power to order interim reliefs on the tribunal via the arbitration agreement. The parties will need to agree on how exactly the powers should be carried out. The arbitration agreement should provide that the arbitral panel must consider substantial prejudice, proportionality or balance of convenience, reasonable chance of success on the merits,

¹⁴ Art 17(2) of the revised UNICITRAL Model Law

“...To combat guerrilla tactics in international arbitration, arbitrators must do their absolute best to avoid giving room to recalcitrant parties whose objectives are to abuse or frustrate the arbitration process..”

urgency and that the appropriate security to be provided by the arbitral tribunal.¹⁵

The arbitral panel must however be careful in issuing interim measures. Consideration has to be given to the relevant laws of the State court (because it is only a court that can enforce the measure), and the measure that will be appropriate for the relevant contract. For example, in Switzerland, the tribunal is permitted to order measures not provided by the Swiss Private International Law Act (PILA). The problem with this being applied to other countries is that, since a state court may only issue measures that are admissible under its own rules of civil procedure applicable at the place and time where it is located, it may hinder the enforceability of such interim orders issued by an arbitral tribunal.¹⁶

It is however pertinent to note that these measures are only interim in nature and unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.¹⁷

Counsel must ensure that the International

Rules and Guidelines are included and set as the standard in an arbitration proceeding. This is because in the event that issues arise during the arbitration proceedings, including challenging the independence or impartiality of the arbitrator, the state in deciding, will have to give cognizance to the International Rule or Guideline because the agreement provides so. However, Courts are not eager to accept International Rules. A suggested reason is the belief that domestic law provides a comprehensive regime governing arbitrators' independence and impartiality.¹⁸

Avoiding Doubt

To combat guerrilla tactics in international arbitration, arbitrators must do their absolute best to avoid giving room to recalcitrant parties whose objectives are to abuse or frustrate the arbitration process. A common saying in our jurisdiction is; “prevention is better than cure” and this is a principle that parties to international arbitration proceedings should live by. Some of the common issues that parties encounter, will be distilled to serve as a caution sign. They include, challenging the arbitrators, the jurisdiction, governing laws and most importantly, the validity of the arbitration agreement.

15 Interim Relief in International Arbitration, *Dispute Resolution International* Vol. 1 No. 2 December 2007 pp 176-178

16 Interim Relief in International Arbitration, *Dispute Resolution International* Vol. 1 No. 2 December 2007 pp 179.

17 Redfern and Hunter, *Law and Practice of International Commercial Arbitration* p 338, notes 7-22.

18 *Dispute Resolution International*, IBA Guidelines on Conflict of Interest in International Arbitration p 6

Challenging Appointed Arbitrators

This is a window provided for by most countries and international institutions to ensure fair hearing in international arbitration. If a party reasonably suspects that an arbitrator is not independent and/or impartial, he has the right to challenge the arbitrator claiming that arbitrator is compromised and therefore will give an unfair and biased award.

The dictum ‘*nemo debet esse iudex in propria causa*’ is a principle of natural justice and it means that a party cannot be an arbitrator in his own case. It is also backed up by the IBA Guideline which provides that “no one is allowed to be his or her own judge” (i.e., there can be no identity between an arbitrator and a party). Although in Gary B. Born’s *International Commercial Arbitration*¹⁹, the author separates the features in disputes over an arbitrator’s independence and impartiality into different sub headings, I will classify them as different aspects of the principle that no man shall be a judge in his own cause.

Therefore, it is advised that parties should refrain from appointing arbitrators who have a pecuniary interest or otherwise in the disputes no matter how remote, arbitrators who are in the employment of a party to the dispute, or had prior involvement in the dispute, business, personal or family relationship with a party and prior representation of a party amongst others. It translates to the point that only experienced arbitrators should be involved in international arbitration. The arbitrators should practice full disclosure of conflict of interest, refrain from making comments or expressions of opinion during the arbitral

proceedings, and, avoid ex parte contacts during arbitration as some institutional rules and international rules forbids it.²⁰

Challenging Jurisdiction

During Post arbitration proceedings, some parties use the legitimate grounds for annulment of International Arbitral Awards, in order to frustrate the enforcement of the awards. Some of the grounds for annulment are: non—existent or invalid arbitration agreement, lack of fair hearing, failure to comply with agreed rules and procedures, ultra vires acts, lack of independence and impartiality of the arbitrators, fraud and public policy amongst others. It is therefore imperative that arbitrators ensure awards written in international arbitration are not tainted with such irregularities that may lead to the challenge of the jurisdiction of the tribunal or the award.

Dealing with Guerrilla Tactics that are Unethical

This quote “International arbitration dwells in an ethical no-man’s land”²¹, is an apt description of the peculiar nature of international arbitration and consequently the avenue that allows for guerrilla tactics. This is because proceedings are not regulated by the national laws that regulate arbitration on a local platform and therefore ethics and professionalism are sometimes sacrificed on the altar of freedom. The core substantial and procedural standards that a counsel should abide by are often abandoned and what is supposed to be a civilized dispute settlement becomes white—collar guerrilla warfare.

19 *International Commercial Arbitration; Selection, Challenge and Replacement of Arbitrators* pp 1517-1528

20 *International Commercial Arbitration; Selection, Challenge and Replacement of Arbitrators* pp 1517-1528

21 Rogers, *Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration*, 23 Mich. J. Int’l. 341, 342 (2002).

The core principles of a lawyer's professional conduct include "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system".²²

The understanding of some lawyers practicing guerrilla tactics may be hinged on the desire to earn their fees. They believe that the tactics are mere necessities to ensure they are zealously protecting and pursuing a client's legitimate interest.

As a general rule, arbitral tribunals may order whatever measures they deem necessary to protect the rights of the requesting party from harm that cannot later be remedied by the final award; or they may regulate the relationship between the parties during the arbitral proceedings.²³

Unreasonable Request for Documents:

Where a counsel representing a party in an international arbitration suspects the use of guerrilla tactics in the course of the arbitral proceedings, it is suggested that he should bring it to the attention of the arbitral tribunals with immediate effect so that the tribunal can deal with it decisively once and for all.

Conclusion

With the forum of international arbitration being likened to an ethical no man's land, counsel are determined to win at all costs. Scenarios are skilfully manipulated by counsel and parties like opponents in a game of chess. This has given rise to the need to checkmate the use of unethical strategies by

counsel. Aristotle's belief that nature abhors a vacuum is justified by the range of guerrilla tactics employed by counsel in international arbitration. Their creativity is fuelled by the impunity enjoyed by the parties to an international arbitration. Riding on the waves of globalization is the urgent need for the inclusion of international standards of ethical conduct to fill the current vacuum. Clearly, a balance has to be struck in order to ensure that the virtues for which arbitration is favoured are not turned into a vice. The intentment and spirit of arbitration must be upheld to ensure its continued relevance.

This paper is therefore an appeal for the enactment of binding regulations on codes of conduct to be adopted by parties and counsel to an international arbitration. Arbitral tribunals may also, without fear or favour, harness the full potential of their arbitral powers and ensure that neither party nor counsel to an international arbitration is allowed to unscrupulously manipulate proceedings. The enactment and enforcement of binding regulations on codes of conduct would not only accelerate arbitration and reduce costs, but also concretize its position as a foremost alternative dispute resolution mechanism. Arbitration is after all, a means to an end which is justice, and justice must not only be done, but must also be seen to be done.

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²² ABA, ABA Model Rules of Professional Conduct, Preamble.

²³ Wirth, Interim or Preventive Measures, p 32; Blessing, Introduction, to arbitration, pp 278-9, note 857, Interim Relief in International Arbitration, Dispute Resolution International Vol. 1 No. 2 December 2007 pp 178

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Thomas, *Arbitration* (1991), 9, 11 UNICITRAL Model Law

Wirth, *Interim or Preventive Measures*, p 32; Blessing, *Introduction, to arbitration*, pp 278-9, note 857, *Interim Relief in International Arbitration*, Dispute Resolution International Vol.1 No. 2 December 2007 pp 178.

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