

THE AILING ARBITRATOR — IDENTIFICATION, ABUSE AND PREVENTION OF A POTENTIALLY DANGEROUS DELAYING AND OBSTRUCTION TOOL

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“老驥伏櫪 志在千里”¹

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¹ English translation: “*An old steed in the stable aspires yet to gallop a thousand miles.*” This saying derives from a wisdom attributed to *Tsao Tsao*, one of the central figures of the Three Kingdoms period who was posthumously honored as “Emperor Wu of Wei”.

² English translation: “*General Lian Po is aging, can he still eat as much?*” General *Lian Po* was a prominent general of Zhao during the Warring States period of China. After *Lian Po* had left Zhao for Wei, Zhao’s border was constantly harassed by the Qin. Finally, the King of Zhao wanted *Lian*

ABSTRACT

This paper deals with the appointment of an ailing arbitrator, either unintentionally or as a very subtle guerrilla tactic, and the subsequent consequences. The consequences might be a delay or even an obstruction of time- and cost-efficient arbitral proceedings or an outcome that might be subject to legal recourse under Article V of the New York Convention. The author discusses the phenomenon of the ailing arbitrator in light of case law and arbitration practice as well as in light of national arbitration laws and institutional arbitration rules that provide a regulatory framework to prevent the appointment of arbitrators who are physically or mentally unfit or for their removal from the arbitral tribunal. The article also warns about stereotypes to be avoided when dealing with elderly arbitrators and any attempt to cynically use any such stereotypes to question unfavorable arbitral awards by blaming them on the alleged unfitness of an arbitrator. The author concludes that arbitral institutions should use their powers consciously in the appointment process as well as in any removal process. The parties should assist arbitral institutions by explaining early on what the case is about and what is expected from arbitrators. Arbitrator candidates should make sure that they have a full picture of what the case is about prior to accepting serving as an arbitrator, in particular if the case has the potential to drag on and be work-intensive. Also some critical self-assessment by more senior and fragile arbitrators of what is still doable and what might endanger the reputation of a life-time of achievement would often be helpful.

KEYWORDS: *ICSID, CAA Arbitration Rules, ICC Rules of Arbitration, LCIA Rules of Arbitration, Vienna Rules, English Arbitration Act, Federal Arbitration Act, Taiwanese Arbitration Law, UNCITRAL Model Law on International Commercial Arbitration, New York Convention, ailing Arbitrator, availability of Arbitrator, confused Arbitrator, elderly Arbitrator, guerrilla tactics, Indian ad hoc arbitration practice, physical and mental fitness of arbitrator, replacement of arbitrator, sleepy arbitrator*

Po to return to serve Zhao and sent an envoy to check whether *Lian Po* was still fit for war. However, the envoy was bribed by *Lian Po*'s enemy *Guo Kai* before he left for Wei. When the envoy met *Lian Po*, *Lian Po* proved that he was fit for war by eating a bucket of rice and 10 kilos of meat and even wearing his armor and riding on his horse. However, the envoy returned to Zhao and reported the following: "*Lian Po* may be old, but he is still able to eat plenty. However, during our meal, he went to the toilet 3 times." With this false report, the King of Zhao deemed *Lian Po* too old for war and did not summon him back to Zhao – which turned out to be a bad decision.