Speech Charles N. Brower – P.R.I.M.E. Conference 28 January 2014

In my experience there are three types of professionals for whom no challenge is ever too great; who truly think they can do anything:

1. Orthopedic surgeons, who in my country are almost exclusively male former college football players;
2. Engineers, who tell you they can build literally anything, leaving cost, of course, aside; and
3. Lawyers, particularly trial lawyers, legal advocates, "hired guns" if you will, courtroom champions, who, incidentally, carry this characteristic with them into their work as arbitrators if they become arbitrators.

In other words, arbitrators are not shrinking violets.

Now, with that in mind, let me cover a few truths that shape the future of P.R.I.M.E. Finance arbitration, including the use of its experts in both finance and arbitration.

First, the bulk of arbitrators, like most judges, are NOT specialists. They are bright, accomplished, keenly analytical, worldly wise, and their minds operate on the "bathtub" principle: They fill their brains up with everything they need to know about the next case; as soon as that case is over they pull the plug, empty out the “bathtub” and fill it with the next case after that, and their dockets range over the full panoply of business disputes.

Second, there is a reason for this non-specialist approach to adjudication. It reflects a majority decision in many countries that courts, hence arbitral tribunals,

should be ones of broad, general jurisdiction, at least in business matters, rather than ones of narrow specialization. In my country there have been periodic campaigns to establish specialist courts. Most often they have lost, or resulted in compromise. As an example of the latter, a United States taxpayer seeking to overturn a ruling of the Internal Revenue Service may apply to either a federal district court or the United States Tax Court. This preference for generalist adjudicators over specialist ones was sharply exemplified by an experienced patent lawyer who decided some years ago to merge his strictly patent law firm into my former firm, a global firm with significant strength in litigation. When I asked him why he did this, he said:

> It's simple. I can teach a really good trial lawyer all he or she needs to know about patent law for a particular case, but a patent lawyer simply cannot be taught how to try a case.

Third, there are, as always, exceptions to what I have just said. Most jurisdictions do have specialized courts limited to dealing, for example, with family matters such as divorce and custody, or criminal matters. The same is true for international arbitration. Specialized arbitral institutions, accompanying rules and small cadres of specialist arbitrators and counsel deal with disputes regarding, for example, various commodities, certain securities claims and maritime claims. Specialized courts and tribunals arise, in my view, where there is a category of disputes dominated by a limited range of common, largely repetitive factual and legal issues. In the field of arbitration these specialized fora arise ultimately from the will of the stakeholders.

With these truths in mind, what do they bode for the future of P.R.I.M.E. Finance arbitration? At this time in P.R.I.M.E.'s history, and being familiar with its roster of arbitration experts, I believe it is correct to say that those experts are

just that: Arbitration experts, not finance experts. Basically they are generalists, not specialists in the resolution of disputes concerning complex financial transactions. Doubtless this is due to fact that until now there has not been a large volume of such cases being arbitrated. In my own case over the course of the past 35 years I have sat as arbitrator in cases involving such diverse areas as the pricing of natural gas, various construction projects, a collision at sea, various applications of the industry-standard “Bermuda Form” insurance policy covering catastrophic liability, a fiber-optic undersea cable stretching eastward from England to Japan, treaty-based investment disputes (including expropriations), power purchase agreements, corruption etc. etc. The saying is "jack of all trades, master of none."

I will be the first to admit, however, that we arbitrators could not hope to do our work without the input of expert witnesses presented to us on disputed issues of fact and of law. At this point in time, it seems to me that anyone sitting as arbitrator in a P.R.I.M.E. case would be well served were the disputing parties to put forward in their cases the testimony of the most qualified experts in complex financial transactions, in particular, derivatives, namely those populating P.R.I.M.E.'s roster of finance experts. Going a step further, when sitting in an arbitration regarding something previously unfamiliar to me, I from time to time have been further comforted by the presence on the tribunal of fellow arbitrators who are quite familiar with the territory. In one of the early NAFTA cases involving Canada in which I sat, we - a German colleague and I - benefited from the elucidation we received from our Canadian colleague, who had spent 20 years in parliament and had held four ministerial portfolios, of the phenomenon of "royal assent" being required for the effectiveness of Canadian legislation. When appointed by the International Chamber of Commerce to chair the aforementioned gas-pricing arbitration I found myself flanked by two certified legal experts in the

subject matter. In the process of this trio reaching a unanimous award I frankly was comforted by the fact that my expert colleagues both saw things as I did. In the collision at sea case I mentioned one of my two colleagues was both a licensed master mariner - a ship's captain - , the profession he had exercised earlier in his life, and a solicitor specializing in maritime cases. Once more, his presence on the tribunal was beneficial, both to me and to our retired Law Lord colleague, and again we reached a unanimous award.

Thus, as of now, P.R.I.M.E. Finance tribunals, whether or not composed exclusively of P.R.I.M.E. arbitration experts or entirely without them, necessarily will be largely "generalist" ones. Correspondingly, however, those tribunals will benefit from the disputing parties employing and presenting to them subject matter experts such as are found among P.R.I.M.E.'s finance experts. Unless and until (1) either such finance experts acquire over time sufficient experience sitting as arbitrators or (2) arbitration experts acquire serious expertise in dealing with complex financial transactions, this situation will not change.

Thus it remains to be seen whether finance experts, unlike patent lawyers, can be taught to play an active role in a contentious environment. More broadly, only time will tell whether P.R.I.M.E. Finance arbitration evolves, by whatever means, to develop a very specialized group of arbitrators who also are experts in complex financial transactions, served by an equally specialized bar.