G.C.C. Commercial Arbitration

BULLETIN

Issue 17 G.C.C. COMMERCIAL ARBITRATION CENTRE DECEMBER 2000

THANKS TO THE GOVERNMENT OF BAHRAIN

We would like to express our sincere gratitude to the Government of Bahrain for having generously contributed new headquarters for the Centre. For more details on the Centre's new premises, please turn to page 17.

CURRENT BOARD MEMBERS

Ebrahim Zainal
Bahrain

Dr. Saleh Al Jery
Kuwait

Ali Al Alawi
Oman

Khalil Al Radwani
Qatar

Dr. Hassan E. Al Mulla
Saudi Arabia

Hassan Bin Shaikh
U.A.E.

BOD FOR NEXT TERM OF OFFICE

Centre's Sec. General
Yousif Zainal

TO COMMENCE FROM JANUARY 2001

Mohd. Eid Bokhammas
Bahrain

Waleed Al Dabbous
Kuwait

Mohd. Nasar Al Kiyumi
Oman

Bader Abdulla Al Darwish
Qatar

Dr. Ibrahim Essa Al Essa
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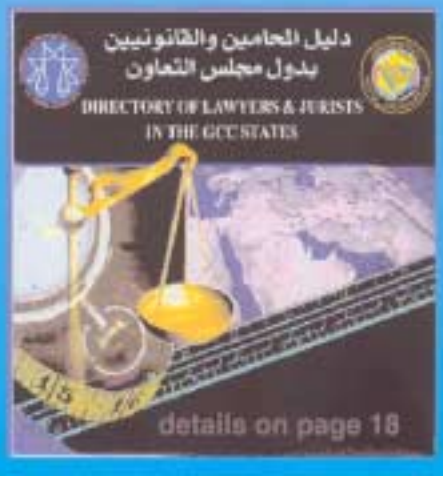
Khalifa Khamis Mattar
U.A.E.

A REPORT FROM THE BOD AT ITS 21st MEETING

The 21st meeting of the Centre's Board of Directors was convened at the premises of the Abu Dhabi Chamber of Commerce and Industry on 15th & 16th October 2000.

This meeting was attended by both the Centre's current Board of Directors as well as by the New Members of the Centre's Board, who would take up office from January 2001.

More details on Page 4



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----Chinese Proverb

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e-mail...

TO KEEP IN TOUCH`...

Members on the Centre's Panel of arbitrators and experts are hereby requested to kindly provide us with their e-mail addresses in order to develop better rapport between the Centre and its members.

Updated e-mail addresses would enable us to forward details pertaining to the latest developments and events that are being conducted by the Centre from time to time.

We appreciate your early response on being updated.

BOD meeting contd. from page 1

The Board members expressed their appreciation by convening this meeting in Abu Dhabi, the capital of the UAE, for two reasons. Primarily, the Board acknowledged the pivotal role played by the UAE in supporting mutual Gulf activities being conducted therein and secondly, used this as an opportunity to denote the progress made by the GCC Commercial Arbitration Centre.

The meeting was supported by a number of other separate meetings held with some ministers and official bodies in the UAE and included H. E. Sheikh Fahim Bin Sultan Al – Qasimi – Minister of Economy and Commerce, H.E. Mr. Mohammad Nakheerah Al -Dhaheri – Minister of Justice and Islamic Affairs, Mr. Abdulla Rashid Al - Kharji – Chairman of the Union of Chambers of Commerce and Industry in the UAE, Mr. Abdulla Sultan – the Secretary General of the Union and Mr. Mohammad Omar – Director of Abu Dhabi Chamber of Commerce and Industry.

Discussions with these ministers / officials focussed on enhancing mutual relationship in each others favour, stressing on the various possibilities that could be applied to create an awareness on the vital role played by arbitration in resolving disputes and finally as to how the role of the Centre could be further activated. In this connection, some of the possibilities that were discussed and emphasized were:

1. The importance of issuing an executive decision in favour of the Charter of the Centre by the UAE as it had been done by the State of Bahrain and Sultanate of Oman. The BOD also expressed their desire that the other GCC countries will follow suit.

2. To persuade through the Commercial Cooperation Committee (Minister of Commerce in the GCC Countries) and strongly recommend activating the Center's role in resolving disputes related to the Unified Economic Agreement and its executive decisions. This can be done by implementing the expected amendments to the Agreement so that it would clearly demarcate the Centre's active role which would accord with the assignment set to it in pursuance of Article 2/2 of its Charter which was approved by their Excellencies, the Leaders of the GCC States, during the 14th Summit in Riyadh in December 1993.

Thereby, the BOD emphasized on the need for establishing stronger ties in order to activate the provisions of the Unified Economic Agreement thus activating the role of the Centre with regard to the settlement of disputes related to the implementation of the Agreement.

3. The importance of unifying legal rules regulating the procedures of commercial arbitration in the GCC countries. In this respect, the Centre appreciates the measures undertaken by relevant authorities in the UAE towards the issuance of a New Arbitration Law.

4. The importance of development of methods and means which would ensure the strengthening and consolidating cooperative relationship among the Centre, Abu Dhabi Commercial Conciliation and Arbitration Centre and Dubai Commercial Conciliation and Arbitration Centre by forming a joint committee among these three Centres. The main function of the Committee would be to strengthen the existing ties among them and coordinate all matters related to arbitration in the Gulf, Arab and International levels thus promoting integration in the field of arbitration.

The meeting comprehensively discussed a number of reports on administrative, financial and organizational aspects. It reached appropriate decisions regarding each report.

The BOD expressed its satisfaction with the achievements attained by the Centre till date and emphasized the importance of continued efforts to activate the role of the Centre and its mechanisms by cooperation with its member chambers. In this respect, the BOD expressed its entire support to the Liaison Officers who had been nominated by the member chambers. It emphasized on the importance of cooperation among these Chambers to clearly define the functions of these Officers and chalk out a routine schedule for their operation. This may lead to creating offices and branches for the Centre at the Chambers of Commerce and Industry in each Gulf State in the future.

The BOD expressed its gratitude and appreciation towards the State of Bahrain and Sultanate of Oman for their issuance of executive decisions in favour of the Charter of the Centre. It also praised the efforts of the Kingdom of Saudi Arabia and the UAE and other GCC States towards the issuance of similar executive decisions.

The BOD approved the suggested budget for the year 2001. It also approved the new applications of the Centre's accredited experts.

At the end of the meeting, the BOD expressed its appreciation and gratitude to the State of the UAE for its continuous support to the Centre. It also praised the Union of Chambers of Commerce and Industry in the UAE as well as the Abu Dhabi Chamber of Commerce and Industry for hosting the meeting.

If witness statements are used, the evidence that a witness plans to give orally at the hearing is known in advance. The other party thus can better prepare its own examination of the witness and select the issues and witnesses it will present. The tribunal is also in a better position to follow and put questions to these witnesses. Witness statements may in this way reduce the length of oral hearings. For instance, they may be considered as the "evidence in chief" ("direct evidence"), so that extensive explanation by the witness becomes superfluous and examination by the other party can start immediately. In order to save on hearing time and expenses, very often the arbitral tribunal and the parties can also agree that witnesses whose statement is not contested by the opposing party do not have to be present at the hearing. [23] Of course, the drafting of a witness statement requires contacts between the witness and the party that is presenting him.

Article 4.5 of the IBA Rules of Evidence specifies that a witness statement shall contain:

- the name and address of a witness; any present and past relationship with any of the parties; his or her background and qualifications;
- a full and detailed description of the facts and the source of the witness's information [24]; and
- an affirmation of the truth of the statement confirmed by the witness's signature.

The IBA Rules do not require that the statement has to be made under oath. Arbitration practice and legal systems differ too much on this point. English arbitrators are said to give little weight to the written testimony of a party's witness. In many civil law systems, sworn declarations can only be made before the state court authorities, or a "notaire", which makes sworn affidavits too cumbersome. [25] Consequently, sworn affidavits cannot be the required form for witness statements in transnational arbitration proceedings. [26] The IBA Rules of Evidence simply require the witness to confirm that his or her statement is true to the best of his or her knowledge and belief.

Article 4.4 of the IBA Rules of Evidence leaves it to the arbitral tribunal to specify when the written statements have to be submitted. There is a basic choice to be made in this respect; Will both sides exchange their statements simultaneously or consecutively? Simultaneous exchanges cause less delay and lead to more disclosure and equality between parties. There is also less tailoring of statements to neutralize statements received from the other party. On the other hand, consecutive exchanges allow parties to focus better on the relevant points, which makes the statement more efficient. In order to combine the advantages of simultaneous and consecutive exchanges the arbitral tribunal may organize two rounds of simultaneous exchanges. In the second round, only information contained in the party's statements, submitted in the first round, should be addressed (see art. 4.6).

Hearing of Witnesses

Sometimes, witnesses may limit their testimony to a written statement.[27] As a general principle, however, witnesses who have submitted a written statement have to be available for oral questioning at a hearing, especially when their testimony has been contested. If a witness fails to attend, except by agreement of the parties, the arbitral tribunal shall disregard the witness statement unless exceptional circumstances justify this failure to attend (see art. 4.7). [28]

Recalcitrant Witnesses

If a witness whose testimony is requested by a party refuses to cooperate, that party may ask the arbitral tribunal to take whatever steps are available to obtain that testimony. The arbitral tribunal, however, will have full discretion whether to grant this request. If it considers the potential testimony of the witness not to be material, it will refuse to take the steps requested (see art. 4.10).

Under most arbitration laws, the arbitral tribunal may ask the State courts to compel the witness to appear or to examine the witness itself.[29] As a general rule, it shall be the State courts at the seat of arbitration which may help the arbitral tribunal with the recalcitrant witness. In transnational proceedings, however, witnesses often are not domiciled in the country where the arbitration has its seat. The arbitral tribunal may then have to request help from foreign courts, directly or indirectly. The power of an arbitral tribunal in such circumstances is, of course, limited to "whatever steps are legally available" to it (see art. 4.10).

Witness Requested by Tribunal

Witnesses of fact are the responsibility of the parties. The parties have to select the witnesses they will present and the issues on which they will testify. However, if the arbitral tribunal considers it useful to question a person who is not planned to appear for testimony, it can request such a witness to appear at the evidentiary hearing (see art. 4.11).

Article 5 – Party Appointed Experts

The 1993 IBA Rules of Evidence provided for witness statements to be delivered by "a witness of fact" as well as by "an expert", without making any further differentiation, except that Article 7 (g) allowed the arbitrator "to regulate the right of the parties to call expert witnesses and to make provisions with regard to their activities and the presentation of their evidence."

Modern arbitration rules specifically refer to party-appointed experts.[30] In particular, most of these rules expressly provide that a party can present its own expert witnesses to testify on the points at issue. In view of the recognition and development of the notion of party-designated experts, the need for expanding the IBA Rules of Evidence in this connection appeared a welcome improvement.

Early Disclosure of Expert Evidence

In accordance with the last paragraph of the Preamble, a party intending to rely on expert testimony must so notify the other party in advance. In the case of expert witnesses, such notification should come as soon as possible. As with other provisions of the IBA Rules of Evidence, the arbitral tribunal shall determine when the submission of Expert Reports shall occur (see art. 5.1). In scheduling the reports, the arbitral tribunal should consider the interaction of this provision with other submissions made by the parties, such as the supplemental witness statements provided in Article 4.6.

Content of the Expert Report

Article 5.2 sets forth what is generally encountered in expert reports, but the list should help standardizing their format in international arbitration. Most importantly, the expert report must describe "the method, evidence and information used in arriving at the conclusions" (see art. 5.2 ©). This information is required in order to place the other party in a position to discuss fully the expert report.

Article 5.2 (d) commits the expert to his or her Report. While this subsection copies the working found in Article 4.5 © dealing with fact witnesses, it should not be read as implying that the expert views his or her opinion as a definitive and unchallengable statement, but rather that he or she is fully prepared to stand by the expert report. Statements made by the expert in relation to facts which he or she investigated or found in reaching his or her conclusions certainly come within the purview of the "affirmation of the truth" required from the expert.

Pre-hearing Conference among Experts

Article 5.3 permits the arbitral tribunal to order the party-appointed experts to meet and to discuss the issues considered in their expert reports. If they can reach agreement on any issues, they shall record that agreement in writing.

The provisions of this section reflect today's current trends towards smoother and more efficient arbitration. The practice suggested here, when deemed appropriate by the arbitral tribunal, can prove a valuable device to render the proceeding more economical. Respectable experts from the same trade, who are likely to know each other, can identify relatively quickly the reasons for their diverging conclusions and work towards finding areas of agreement. The arbitral tribunal may also direct party-appointed experts to state the rationale for remaining disagreements. Where the experts have success and reach agreement, the parties and the arbitral tribunal will likely accept those findings, so that the arbitral process may proceed to the truly disputed aspects of the case.

Appearance of Experts at Evidentiary Hearings

Article 5.4 which compels a party-appointed expert to appear at an evidentiary hearing, was adopted in the wake of a debate among the members of the Working Party as to whether a fact witness having submitted a witness statement had to appear for questioning on his written Witness Statement. Once it was agreed that a fact witness had to testify, unless otherwise agreed by the parties, it became obvious that an expert witness should at least have a similar obligation. A consensus developed after the Working Party members recognized that in their individual practice as arbitrators, they would generally order witnesses who had submitted a written statement, especially an expert report, to appear live.

It is to be noted that, contrary to the situation of a fact witness having submitted a Witness Statement, the agreement of the parties alone is not sufficient to dispense with the appearance of a party-appointed expert at an evidentiary hearing. The arbitral tribunal must also agree. This requirement was added because the testimony of an expert report is more likely to have a determinative effect in the case, as compared at least to those witnesses who can testify only as to peripheral facts. As with fact witnesses, the expert report of a non-appearing party-appointed expert may nevertheless be accepted "in exceptional circumstance" if the arbitral tribunal so determines (see art. 5.5).

Article 5.6, like Article 4.9, was added late in

the process of finalising the Rules, mostly for the sake of efficiency and completeness. If the parties can agree that an expert witness or a fact witness need not appear, and if (in the case of a party-appointed expert) the arbitral tribunal concurs, the progress of the arbitration may be enhanced. To encourage such agreements where the content of the expert report or witness statement may not be material to the outcome, Articles 4.9 and 5.6 state that such an agreement does not reflect agreement on the content of the expert report or witness statement.

Finally, it is worth noting that the IBA Rules of Evidence do not address the question of an expert called upon to testify when such expert had previously been appointed by a national court in connection with the same issues. European parties frequently apply to their local courts, immediately upon the occurrence of an injury and long before arbitration is commenced, for the appointment of an expert to determine the cause of the damage and possible remedies or to preserve evidence. It is often difficult for an Anglo-American lawyer to be convinced that such a judicially appointed expert is by definition independent, as such an appointment has been first sought by the other party. In such circumstances, an arbitral tribunal will therefore have to determine how such an expert should be considered-as a party-appointed expert, a tribunal-appointed expert, or otherwise – and to issue directions with respect to the production in evidence of his or her report or with respect to his or her appearance at an evidentiary hearing.

Article 6 – Tribunal-appointed Experts

Article 6 regulates the appointment of independent experts by the arbitral tribunal. This practice is more generally followed in the civil law tradition, but it is becoming more frequent in international arbitration generally.

A general principle underlying Article 6 is the substantial involvement of the parties in the process, even though the expert is being appointed by the arbitral tribunal itself. Article 6.1 makes clear that the arbitral tribunal is to consult with the parties before appointing such an expert and also with respect to the terms of reference for such an expert. The parties also have an opportunity, pursuant to Article 6.2, to identify any potential conflicts of interest and to state any objections on such basis. Most importantly, parties have an opportunity to be involved in the information-gathering process by the tribunal-appointed expert and to respond to any report by that expert.

Article 6.3 provides the parties and their representatives with the right to receive any information obtained by the tribunal-appointed expert and to attend any inspection conducted by the expert. Article 6.5 permits the parties to examine any documents that the tribunal-appointed expert has examined and any correspondence between the arbitral tribunal and the tribunal-appointed expert. That Article also provides any party with the opportunity to respond to a report by a tribunal-appointed expert, within the time ordered by the arbitral tribunal. The Working Party believed strongly that parties should know what the arbitral tribunal is being told by a tribunal-appointed expert and to have an opportunity to rebut his or her conclusions. A party may respond either by making its own submission or by submitting an expert report by its party-appointed expert.

The tribunal-appointed expert shall be present at an evidentiary hearing and available for questioning at that hearing, so long as any party or the arbitral tribunal requests such presence. Article 6.6 permits the parties or their party-appointed experts to question the tribunal-appointed expert at the hearing. However, the scope of this questioning is limited to the issues covered in the responses provided pursuant to Article 6.5: namely, a party's submission or a responsive expert report by a tribunal-appointed experts. This provision is included to assure that the tribunal-appointed experts knows the subjects on which he or she will be questioned, in order to prepare his or her responses. The Working Party wanted to avoid situations where issues were raised involving the tribunal-appointed expert's report for the first time at the hearing, which would inevitably require an adjournment for the party-appointed expert to consider that issue before the hearing could resume.

Article 6.3 makes certain that the tribunal-appointed expert shall access to whatever information he or she needs to respond to the issues posed in his or her terms of reference. The tribunal-appointed expert may request the party to provide any relevant and material information, which includes relevant documents, goods, samples, property or access to a site for inspection. Parties have the right to object to such requests, based upon the provisions of Article 9.2. If such an objection is raised, the arbitral tribunal shall make a determination as to the materiality and the appropriateness of the tribunal-appointed expert's request in the manner provided in Articles 3.5-3.7, which concern requests to produce.

Finally, in Article 6.7, the IBA rules of Evidence make clear that it is the arbitral tribunal, not the tribunal-appointed expert, who is to determine the issues in the case. That Article provides that a tribunal-appointed expert's report "and its conclusions shall be assessed by the arbitral tribunal with due regard to all circumstances of the case".

Article 7 – On-site Inspection

Article 7 is a simple provision, making possible inspections of relevant goods or sites, which may help the decision-making process. Such inspections most frequently occur in construction arbitration, in which the arbitral tribunal visits the construction site in dispute.

Article 8 – evidentiary hearing

Article 8 deals with the evidentiary hearing, a term defined in Article 1, sometimes also called the main hearing. In most international arbitrations, this hearing is preceded by substantial preparation, on the principle that each party shall be entitled to know reasonably in advance the evidence on which the other parties rely (see Preamble, para. 4). There may have been a Terms of Reference or other type of preliminary or preparatory hearing. [31] There will have been an exchange of extensive written submissions containing allegations of fact and often discussions of law. Documents will have been submitted (see above, art.3). Witnesses of fact may have submitted written statements (see above, art 4). Party-appointed experts or tribunal-appointed experts may have submitted written expert reports (see above, arts. 5 and 6). The parties must have adequate notice of the evidentiary hearing. [32]

As a result of all this preparation, by the time the evidentiary hearing is conducted, the various participants in the arbitral process are likely to know each other better, and they will also know the case better than at the outset of the arbitration. [33]

Article 8 of the IBA Rules of Evidence is the most general of all the provisions. The Article provides a general framework for the procedure to be followed at the evidentiary hearing. This is necessary because the variety of procedures and order to be followed at an evidentiary hearing is enormous. Ordinarily, parties and the arbitral tribunal will be able to devise the best procedures for the circumstances of the case. While some of the special features described in Article 8 will be seen in many evidentiary hearings, an evidentiary hearing incorporating them all should be rare.

Managing the Hearing

Article 8.1 makes clear that the power to manage the evidentiary hearing rests with the arbitral tribunal, not the parties, an idea which originally came from civil law procedure but which has widely adopted. [34] The arbitral tribunal may limit or exclude questioning, or even the appearance of a witness, if it is irrelevant, immaterial, burdensome, duplicative or covered by a reason for objection set forth in Article 9.2. While some counsel are used to raising objections on the spot, the arbitral tribunal may also apply these standards on their own. This Article also finds objectionable unreasonably leading questions, which may render direct and re-direct testimony worthless. These provisions are all designed to give the arbitral tribunal the ability to focus the hearing on issues material to the outcome of the case and thereby make hearings more efficient.

Order of Witnesses

Article 8.2, in its first sentence, sets out the basic order of witnesses followed in many cases: claimant's witnesses, followed by respondent's witnesses, followed by rebuttal witnesses, if any, by the claimant. For each witness, testimony is first presented by the party offering that witness, followed by examination by the opposing party and then an opportunity for re-examination by the presenting party. Sometimes, any re-examination is limited to new matters raised in the previous oral testimony. Many arbitral tribunals ask their questions only towards the end, except for questions designed to help the process along or to make a witness feel comfortable. However, arbitral tribunals, particularly in more complex cases, are increasingly adapting these procedures to provide for better examination of the issues in dispute. Moreover, arbitral tribunals often hear oral argument by counsel for the parties, which may be a part of, or may be separate from, the evidentiary hearing. Therefore, the fourth sentence in Article 8.2 encourages arbitral tribunals to vary this order of proceeding in the manner best suited for the circumstances of that case. For example, the provision suggests the arrangement of testimony by particular issues or that witnesses be questioned at the same time and in confrontation with each other about particular issues. Such techniques may enable arbitral tribunals better to understand the contradictions in testimony and to be able to determine the weight and credibility to be given to the testimony. Ultimately, the IBA Rules of Evidence leave it to the arbitral tribunal and the parties to determine how best to proceed.

To be contd. in next issue

UNCITRAL AGAINST UNCITRAL

BY DR: MOHIELDIN ALAMELDIN

Contd. from issue 16

(e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon accompanied by other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(f) "Confirmer" means the person adding a confirmation to an undertaking;

(g) "Document" means a communication made in a form that provides a complete record thereof".

Confirmation may be added to the undertakings according to the UNCITRAL Rules; but it was not provided for in the uniform rules for demand guarantees of the ICC.

(12) Article 17 relating to issuance and irrevocability of undertaking stipulates in paragraph 1 that: "Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned".

This provision is very important because Article 9/d/iii of the UCP 500 contained a provision to the effect that the commitment begins (in cases of amending a credit or a standby credit) from the time of issuance, but it did not contain what is meant by issuance. This led to a controversy in this matter. Here, Article 7/1 interprets issuance to mean leaving the sphere of control of the guarantor/issuer. Thus issuance may be completed at the place and time where the undertaking is delivered at the place of business of the beneficiary or in his post box, because before this event the guarantor/issuer can, theoretically at least, restitute his undertaking, being under his control.

(13) Paragraph 2 of Article 7 stipulates that:

"An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary".

This paragraph is referred to by several subsequent articles. But it must be noted that any agreement between the guarantor/issuer and the beneficiary must not be harmful to the rights of the principal/applicant or the account party, otherwise it will be inoperative. It was better to make the Convention more clear on this point.

The form and contents of an undertaking are usually discussed first between the beneficiary and the applicant/principal; and the form referred to in Article 7/2 is not practical as it rarely occurs that the beneficiary goes in contact with the guarantor/issuer without the intervention of the principal/applicant.

Authentication is realized by signatures or, as a substitute, by cipher codes or swift, but we must note that a credit or stand by letter of credit transmitted by swift without reference to the UCP 500 shall notwithstanding be subject to the said UCP 500, and in such case the Convention may tactically lose its applicability.

(14) Article 7 contains two other paragraphs as follows:

(3) From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.

(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable".

The last paragraph is equivalent to Article 6/c of the UCP 500 and contrary to article 7 of the UCP 400. Indeed, the ICC was codifying the practice since 1933 and thus mentioned always the revocability of credits unless otherwise stated in the credit, but in the UCP 500 it began to try to guide the practice in this issue and the Convention followed it imposing the irrevocability of credits and undertakings. Irrevocability appears also in the uniform rules for demand guarantees of the ICC, Article 5.

(15) Article 8 relating to amendments provides that:

1. An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph 2 of Article 7.

2. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if the amendment has previously

been authorised by the beneficiary.

3. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, where any management has not previously been authorised by the beneficiary, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph 2 of Article 7.

4. An amendment of an undertaking has no effect on the rights and obligations of the principal /applicant (or an instructing party) or of a confirmer of the undertaking unless such person consents to the amendment".

This rule is similar to that of the UCP 500 contained in Article 9/d/iii thereof. The problem with the two sets of rules is: to what extent is the beneficiary entitled to delay his acceptance of the amendment. In other words, can the beneficiary stay silent till the time of presentation of the claim for payment and choose at that time between the amendment and the original commitment? The UCP answers positively and it seems that the draft convention is going in the same way as no limitation of the right of the beneficiary in this respect is found in the new rules.

To explain the risks implied in these rules we shall give two examples:

The first example: an undertaking in the form of a stand-by LC for one million Dollars was amended upon instructions from the applicant to be ten million Dollars. The beneficiary keeps silent until the time of shipping, where he seeks his 'personal interest' as follows: if the prices of the goods raised he ships goods for one million because the rest will be sold at higher prices. If prices went down he ships goods for ten million because he wants to get rid of his goods at a higher price than the current prices. This causes harm to the applicant but it cannot be cured because the whole of the said rules concentrate fraud in the international sale of goods in contrary with the Vienna Convention of 1980.

The second example: a stand-by letter of credit issued for goods to be shipped FOB from Venice and was amended afterwards upon instructions from the applicant to make shipment from Rome. If the beneficiary keeps silent until the time of shipping, he will cause great trouble for the applicant who is required to arrange for the transport from one of these ports and it will be too late for him to provide the required vessel.

The same problem arises where the port of destination is Jeddah on the Red Sea and the amendment made it Dammam on the Gulf. If the beneficiary do not accept the amendment, the applicant will differ between two ports the distance between them exceeds 1500 km!

Such prejudice to the applicant will not occur if the acceptance of the beneficiary is required before the amendment is issued or if a period of acceptance is stated after which and failing to have any answer, the amendment is considered accepted.

(16) Article 9 relating to transfer provides that:

1. The beneficiary's right to demand payment may be transferred only if authorised in the undertaking, and only to the extent and in the manner authorised in the undertaking.

2. If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorised person is required for the actual transfer, neither the guarantor/issuer nor any other authorised person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it".

It may be understood from this Article that transfer is always subject to the consent of the guarantor/issuer unless the undertaking states that the transfer does not need such consent. ICC uniform rules for demand guarantees are different as transfer is forbidden but the assignment of proceeds is allowed (Article 4).

(17) Article 10 relating to the assignment of proceeds stipulates that:

1. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

2. If the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, in a form referred to in 2 of Article 7, of the beneficiary's irrevocable assignment, payment to the assignees discharges the obligator, to the extent of its payment, from its liability under the undertaking".

This means that the proceeds of the undertaking are by their nature assignable to third parties, unless the undertaking states otherwise.

(18) Article 11 relating to cessation of the right to demand payment says:

1. The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement by the beneficiary of release from liability in a form referred to in paragraph 2 of Article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph 2 of Article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of Article 12.

2. The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in paragraphs (a) and (b) of paragraph (1) of this Article. However, in no case shall retention of any such document by the beneficiary after right to demand payment ceases in accordance with subparagraph (c) or (d) of paragraph (1) of the Article preserve any rights of the beneficiary under the undertaking".

We have a comment on sub paragraph (b) of para. 1 of this article. Where there is agreement on the termination of the undertaking it is not necessary to make such termination in the form stipulated in the undertaking nor in the form referred to in Article 7/2. Termination may be in any form agreed upon so long as such termination do not cause harm to the applicant or the instructing party.

As we have noted before, such means of termination or amendment do not usually occur between the guarantor/issuer and the beneficiary but rather between them and the principal/applicant who is always the link between them.

ICC uniform rules of demand guarantees contain similar provisions (Articles 23 and 24).

19. Article 12 relating to expiry stipulates that:

"The validity period of the undertaking expires:

(a) At the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows:

(b) If expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer is advised that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) If the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document and an expiry date has not been stated in addition, when six years have elapsed from the date of issuance of the undertaking".

This provision is costly, because during the period of six years of limitation the guarantor will continue to charge the principal commissions upon the independent guarantee, a matter which is too costly. ICC uniform rules for demand guarantees is more accurate as such period do not exceed six months from certain dates defined in Article 4.

20. Article 13 relating to the determination of rights and obligations provides that:

1. The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usage specifically referred to therein, and by the provisions of this Convention.

To be contd. in next issue

ARBITRATION WORKSHOP FOR CONTRACTS AND PROCUREMENT ENGINEERS
23rd – 25th October 2000.
Abu Dhabi – United Arab Emirates

A report by Mr. Geoffrey Hawker, English Barrister and International Arbitrator - UK

An Arbitration Workshop for Contracts and Procurement Engineers was held at the Hilton Corniche Residence Hotel, Abu Dhabi on 23rd, 24th and 25th October, 2000. The Workshop was organized jointly by the GCC Commercial Arbitration Centre and the Society of Engineers of the United Arab Emirates and was intended for Engineers and other Construction Professionals likely to become involved in arbitration, whether by giving evidence of fact or of opinion or through representing a contractor, Sub-contractor or Employer in a construction dispute. While not specifically intended for those aspiring to become Arbitrators, the Workshop nevertheless provided an informal introduction to a deeper study of the law and practice of arbitration. The Workshop Director was Mr. Brian Totterdill, an English Consulting Engineer and Arbitrator, who with Dr. Nael G. Bunni, a Chartered Engineer and International Arbitrator and Conciliator from Ireland conducted most of the proceedings. The other two lecturers were Mr. Essam Al Tamimi of Sharjah, a lawyer with an extensive practice throughout the U.A.E. and Mr. Geoffrey Hawker, an English-Barrister and International Arbitrator from England. Papers were presented and the discussion was conducted in English but Dr. Bunni and Mr. Al Tamimi were able to supplement the presentations with further comments in Arabic.

Following registration, the first day opened with short introductions by Mr. Yousif Zainal, the Centre's Secretary General, Dr. Khalil Ibrahim Al Husani, the Society's Vice Chairman and Dr. Nael G. Bunni in his capacity as President of the Chartered Institute of Arbitrators (based in England but with many branches around the world including a branch in Bahrain covering much the same regional area as the Centre). There followed four presentations covering the way in which disputes can arise in a construction project, measures to avoid conflict, claims procedures, negotiations, mediation/conciliation, adjudication and arbitration. The functions, rules and procedures of the GCC Centre and (for wider international disputes) the ICC (Paris), L.C.I.A. (London) and UNCITRAL (the United Nations Commission on International Trade Law) were explained and discussed, with particular reference to the legal background to arbitration in the Gulf area, relationships with the Courts and the FIDIC "family" of international engineering contract conditions.

The second day was devoted to a consideration of the GCC Centre's Rules in greater detail, followed by presentations and discussions on arbitration procedure in its various stages up to and including the Hearing, the taking of evidence of fact and of opinion, the wider functions and role of Experts, and the making and enforcement of a valid arbitral Award. Also covered were various opportunities (on the one hand) for saving time and money and typical problems and pitfalls (on the other hand) which might interrupt or otherwise delay the arbitral process.

Each session throughout the Workshop both provided for and gave rise to considerable discussion, usually involving most of the participants and a very wide range of topics. Discussion during coffee breaks and over lunch was also vigorous and informing.

On the third day a Mock Arbitration was staged, based on a scenario (handed out the previous evening) about the construction of a reinforced concrete road bridge which subsequently collapsed. Participants were divided into three "teams", one for the Claimant employer, another for the respondent Contractor and the third as an Arbitral Tribunal. Mr. Hawker, Mr. Totterdill and Mr. Al Tamimi respectively acted as Tutors for these three groups, with Dr. Bunni exercising overall supervision and control. Proceedings commenced with a short tutorial, followed by a Preliminary Meeting during which various challenges to jurisdiction and to the Tribunal itself were heard and determined and Directions for the proper conduct of the Arbitration were settled. There followed a further tutorial and then a Hearing of various issues in the Arbitration, during which participants acted as witnesses of fact and as experts, both under cross-examination, and as advocates for the Parties. The Tribunal then retired before returning to deliver a short but very workmanlike reasoned Award.

During the whole Workshop, and in particular on the third day, a considerable number of problems and issues were dealt with, both as to the technical engineering of the collapsed bridge and as to the tactics to be deployed during the various stages of disputes settlement. The participants – many of whom had not heretofore become involved in formal disputes settlement- joined in the discussions with great gusto, to the point that on the last day (which was a Public Holiday in Abu Dhabi) the allotted time was significantly exceeded and the directorate staff had some difficulty in bringing the proceedings to a halt in time for a somewhat late lunch.

Centre and the Dean of the Faculty of Law during the Conference on Environmental Legislation in the Arab Region which is to be held in 30 September – 1st October 2000 in Kuwait.

The two parties hereby invite relevant institutions and individuals to participate in the conference and send their papers to the Secretariat of the Centre as soon as possible. For more information, please contact the Centre.

ISSUANCE OF THE OMANI MINISTERIAL DECREE REGARDING PREMISSABILITY OF ARBITRATION IN ACCORDANCE WITH THE CENTRE'S CHARTER

MINISTERIAL DECREE NO. 88/2000 REGARDING THE GCC COMMERCIAL ARBITRATION CENTRE BASED IN THE STATE OF BAHRAIN

Pursuant to the Law of Arbitration in Civil and Commercial Disputes issued by the Royal Decree No. 47/97

- To the Decision of the Supreme Council of the Cooperation Council of the Arab States of the Gulf during its 14th Summit held in Riyadh – Kingdom of Saudi Arabia during 20 –22 December 1993 with regard to the establishment of the GCC Commercial Arbitration Centre

- To the aforementioned Centre's Arbitral Rules of Procedure approved in Riyadh on 16 November 1999;
- To the decision No. 10/2000 of the Council of Ministers issued during its Meeting on 4th April 2000,
- And on the basis of the requirements of public interest

The following decision has been taken:

Item (1) The parties to an Agreement in commercial disputes may refer to the GCC Commercial Arbitration Centre based in the State of Bahrain in accordance with the aforementioned Centre's Charter and Arbitral Rules of Procedure.

Item (2) This Decision is to be issued in the Official Gazette.

Mohammad Abdulla Bin Zahir Al-Hanayee
Minister of Justice

Issued in : 9/4/1421H
Corresponding to: 11/7/2000 AD

CONFERENCE ON ARBITRATION IN ENVIRONMENTAL DISPUTES
20 -22nd FEBRUARY, 2001.
KUWAIT

The First Meeting Between the Delegation of the Faculty of Law – Kuwait University and the GCC Commercial Arbitration Centre.

21, September 2000
Bahrain

By an official invitation from the Secretariat of the GCC Commercial Arbitration Centre, the Delegation of the Faculty of Law – Kuwait, headed by Prof. Dr. Fadhel Nasralla – Dean of the Faculty of Law, visited Bahrain for two days to hold a meeting with the Centre's Secretariat during 20 - 21st September 2000. The other members of the delegation were Professor Dr. Azeeza Al-Shareef – Head of General Law Division and Dr. Sayyid Ahmad Mahmood – Assistant Professor of Pleadings and Arbitration. They met the Secretariat's delegation headed by Mr. Yousif Zainal, the Secretary General of the Centre. Mr. Abbas Alawi Ali- the Centre's Financial and Administrative Manager and Dr. Abdul Majeed Al Baluchi – the Centre's Information Officer, also attended the meeting. The meeting was held at the Bahrain Chamber of Commerce and Industry.

In the beginning, Mr. Yousif Zainal welcomed the visiting delegates, thanked them for their acceptance of the invitation to attend the meeting and wished them a successful visit to Bahrain. He commended the Faculty of Law for being the oldest one among the faculties in the GCC countries and for its role in preparation of legal cadres in Kuwait as well as in other GCC countries.

In his turn, Dr. Nasralla thanked the Centre for hosting the meeting. He praised the role of the Centre as a regional / international mechanism for settlement of commercial disputes and for distributing arbitration awareness among the GCC countries. He expressed the readiness of the Faculty of Law to cooperate with the Centre in the fields of joint interest, particularly in holding relevant conferences and seminars and in exchanging information and knowledge related to settlement of commercial disputes through arbitration.

The two parties discussed the means of developing mutual relationship as well as joint cooperation. They expressed their willingness to ratify a joint cooperation agreement, the final draft of which will be discussed in a later stage at Kuwait.

On the other hand, the two parties discussed the matter of organizing a conference on Arbitration in Environmental Disputes which is to be conducted in Kuwait in the second half of February 2001 during the National Day and Freedom of Kuwait Celebrations "Welcome February". The two parties emphasized on the importance of conducting such a conference which would highlight the role of arbitration and alternative dispute resolution (ADR) in the settlement of environmental disputes in view of the fact that these disputes have recently increased on all local, regional and international levels.

Moreover, the difficulties arising from the matter of specifying the jurisdiction and the law, to be followed in many trans-boundary pollution events, make arbitration and ADR the most appropriate means for the settlement of environmental disputes.

The two parties have agreed to form an administrative committee as well as a scientific commission and entrust them with the task of organizing the aforementioned conference and following up the issues related to it, including the selection of relevant speeches and papers. It is agreed that the conference will be in Arabic and English language and direct translation of both languages will be available.

Another meeting will be held by the Secretary General of the Centre and the Dean of the Faculty of Law during the Conference on Environmental Legislation in the Arab Region which is to be held in 30 September – 1st October 2000 in Kuwait.

The two parties hereby invite relevant institutions and individuals to participate in the conference and send their papers to the Secretariat of the Centre as soon as possible. For more information, please contact the GCC Commercial Arbitration Centre.

A MEMORANDUM OF UNDERSTANDING BETWEEN THE GCC COMMERCIAL ARBITRATION CENTRE AND THE ISLAMIC CHAMBER OF COMMERCE AND INDUSTRY

Officially invited by the Secretary General of the Islamic Chamber of Commerce and Industry to attend the meetings of the General Assembly and the Executive Committee of the Islamic Chamber, held in Damascus, Syria from 26th -28th September 2000, the Centre was represented by its Secretary General, Mr. Yousif Zainal.

A Memorandum of Understanding (MOU) was also signed between both organizations on 27th September 2000. This was the first time the Centre had concluded an agreement of cooperation with such a large Islamic Commercial Institution which comprised of 56 Islamic Countries.

Pursuant to this agreement, the two organizations are to cooperate in promoting the use of arbitration and to create arbitral awareness by conducting joint activities such as seminars, symposia and conferences. The agreement also calls for both organizations to assist each other in the provision of facilities, exchange of their representatives and delegates in areas of specialties of similar nature, exchange of publications, researches, studies, bulletins and periodicals issued or prepared by any of them.

The MOU also calls for both organizations to work towards providing all necessary services for conducting arbitral proceedings for members of both organizations. The Centre would provide the necessary arbitration services for conduct of arbitral hearings in accordance with the Centre's Rules, when one of the parties to the dispute is a national of any GCC State. The Centre would also assist the Chamber by providing it with the lists of arbitrators/experts enlisted on its panel, with an appropriate venue for the conduct of arbitral proceedings which would include translators, secretarial and other necessary services for the conduct of an ad-hoc arbitration, when called upon to do so.

Each organization would encourage its members to actively participate in the activities being conducted by the other organization and vice versa.

The agreement would be valid until one of the parties withdraws, with agreement of the other, in writing, subject to 30 days notice.

WE LET YOU SPEAK ... THROUGH OUR BULLETIN

The Centre invites contributions of articles and materials of interest for publication in its future issues

Please feel free to submit articles, reports,... etc. on international events/developments in our Bulletin. All materials should be sent in text and disk (Microsoft Word Format) to:

GCC Commercial Arbitration Centre
P.O. Box 16100,
Bahrain
or by e-mail to arbit395@batelco.com.bh

MESSAGE FROM THE SECRETARY GENERAL

The official tenure of the current Board of Directors of the Centre came to an end on 31st December 2000 paving the way for a new set of Board members to take up office with effect from 1st January 2001. The basis of this change was in accordance with the Charter of the Centre which states that membership to the Board of Directors would be for a three-year term of office, at the expiry of which, could be renewed once only.

Under the able guidance of the first Board of Directors, the Centre had achieved great heights of success right from its initial stages of establishment, as they left no stone unturned during their period of tenure as Board members of the Centre. Their whole hearted contribution and strong motivation to make the Centre one of the foremost of its kind in the region, was also in line with the decision taken by the leaders of the GCC States, in December 1993, to establish the Centre as a regional/international mechanism for the settlement of commercial disputes in both the private and governmental sectors in the GCC countries.

It has been a great honor and privilege for me, in my capacity as Secretary General of the Centre, to be part and parcel of the progress made by the Centre in these very few years of its establishment. The Centre has provided me with an opportunity to learn and indulge more in arbitration where I, personally, have gained a vast experience in the field of international commercial arbitration. I am also confident that the ex- Board members would continue to extend their kind support by contributing towards the growth of the Centre, as it would only add to our credit to benefit from their rich source of experience.

The dawn of the New Year witnessed two radical changes: the first one refers to the new Board of Directors taking up office and the second to the new premises being generously contributed by the Government of Bahrain, in Adliya.

The current Board members will undoubtedly guide the Centre from its present status to reach greater horizons and to face challenges with confidence in the new millenium, especially as the Centre is moving to its new headquarters.

I wish the current Board members all success in their new portfolios and hope that we, at the Centre, would benefit from their able guidance and immense support.

The Secretariat of the Centre congratulates the new Board members on this occasion.

SEASON'S GREETINGS AND BEST WISHES FOR A BRIGHT AND HAPPY NEW YEAR

Symposium on Professional Scales of Lawyers and Management of Legal Firms

10th & 11th April 2001.
Muscat – Sultanate of Oman

A symposium on "Professional Scales of Lawyers and Management of Legal Firms" is to be held under the patronage of HE Mr. Mohammed Bin Abdullah Al Hanayee, Minister of Justice on 10th & 11th April 2001, in Muscat, Sultanate of Oman.

This is a first joint collaboration between the GCC Commercial Arbitration Centre and the International Bar Association and is being generously sponsored by the Chamber of Commerce and Industry, Oman.

Around 10 –12 speakers both from the region and from other parts of the world are expected to participate and contribute to this symposium. Some of the main subjects that would be of interest to the audience and which would be addressed at this symposium would relate to the general organization of the practice, which would include explaining the different status and roles of attorneys, profit sharing schemes, cooperation arrangements with other firms (domestic and foreign): alliances, affiliations and associations, regional and international networks, law firm recruiting and hiring, globalization of the legal profession and specialization of practices. The language of the symposium would be both Arabic and English with simultaneous translation.

All those interested in participating at this symposium are requested to contact the GCC Commercial Arbitration Centre, P.O. Box 16122, Bahrain on Tel: (973) 214800, Fax: (973) 214500 or E-mail: arbit395@batelco.com.bh.

GCC COMMERCIAL ARBITRATION CENTRE MOVES TO A NEW NEST

The Government of Bahrain have generously contributed a new premises for the Centre. The Centre is expected to function at its new premises from the beginning of the year 2001. The Centre provides 4 Arbitral Hearing rooms, fully air-conditioned and well-lit, suitable for the conduct of an arbitral hearing. The most modern equipment and skilled staff provide all necessary support services. Twenty-four hour access is available.

State-of-the-art telecommunications facilities are available in every room providing direct dialling, voicemail, conference calls, Internet connections, video-conferencing and a well-equipped library. Fax machines for general use are readily available and private facilities can be arranged on request. Fully featured digital photocopiers are available for general use and all types of transcription services are available together with support staff. Each hearing room is equipped with secure document storage facilities and arrangements can also be made for simultaneous translation and interpreters.

Assistance is also provided with regard to reserving and confirmation of air tickets, hotel accommodation, courier services and taxis.

DIRECTORY OF LAWYERS AND JURISTS IN THE GCC STATES.

The first edition of the Directory of Lawyers and Jurists in the GCC States is available at the Centre in two formats – CD-ROM and hard copy. This directory, in both Arabic and English languages, provides the user with concise information on a wide range of law firms in the GCC States.

The directory could be broadly classified under two main sections: Section one which deals with a classified collection of laws, rules and regulations relating to commercial arbitration in the GCC States and International Laws and Conventions for e.g. The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

Section two pertains to the enlistment in the directory which is again categorically divided into two parts: alphabetical enlistment and enlistment provided alphabetically under each GCC country.

Foreign law firms have also extended their kind support to the Centre by advertising the services being provided by them in the field of arbitration. This kind gesture of there is highly appreciated.

We appreciate your continued support extended to the Centre and hope that your kind cooperation would also be extended to contribute to the success of this project.

CONFERENCE ON ARBITRATION IN ENVIRONMENTAL DISPUTES

20th –22nd February 2001.
Kuwait

In furtherance to the meeting held on 21st September 2000, in Bahrain by the GCC Arbitration Centre and the Faculty of Law, University of Kuwait, the dates of the Conference has now been scheduled from 20th – 22nd February 2001 in Kuwait.

Around 20 speakers both from the region and from other parts of the world would be participating and presenting papers in Arabic and English languages which would also be simultaneously translated. It is expected that not less than 150 participants from different countries will attend this important conference.

Some of the topics that would be addressed at this conference are:

- Arbitration and the Law of the Sea; Recent Developments
- The Law Applicable to Arbitration of Environmental Law Damages
- Contradictions in Laws regarding the Civil Liabilities for Marine Environment Pollution by Oil
- Principles of Environmental Arbitration and their effects on evaluation of compensations for Oil Pollution
- Arbitration and Remediation of Polluted Sites.

Application forms for registration to the conference are being sent out in due course and we would appreciate your kind support, cooperation, and wholehearted participation to have a successful conference.

SYMPOSIUM ON SETTLEMENT OF COMMERCIAL DISPUTES RELATED TO TECHNOLOGY OF COMMUNICATION, INFORMATION AND ELECTRONIC COMMERCE

24th & 25th March 2001.
Bahrain.

A joint symposium on "Settlement of Commercial Disputes Related to Technology of Communication, Information and Electronic Commerce is to be jointly organized by the GCC Commercial Arbitration Centre and the Yemeni Centre for Conciliation and Arbitration (YCCA).

This symposium aims at focussing on the problems arising out of the advanced technological developments of which Communication, Information and E-Commerce are correlated entities which had created a notable impact on all socio-economic spheres. This symposium also reflects on the traditional trade relation paving the path for more interrogating questions and jurisprudent arguments and the courts attempt to find an answer for these new queries raised in light of lack of appropriate legislations which could cover the shortages in the legal and judicial systems.

On the other hand, it is envisaged that these new developments will lead to several problems and disputes whether in the field of commerce or finance or in the field of intellectual property. Therefore the symposium will discuss the mechanisms of dispute settlement in these vital sectors whereas search for more active and effective mechanisms is focussed in order to respond to the requirements of information and communication industry including the electronic commerce.