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G.C.C. Commercial Arbitration Centre Bulletin

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THE NEW PREMISES OF THE CENTRE... FOR MORE DETAILS TURN TO PAGE 14

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27TH JANUARY 2001... A LANDMARK FOR THE CENTRE

RECEPTION

NEW BOD MEMBERS... INITIATE THEIR ROLE

FARWEL BID TO FORMER BOD MEMBERS

NEWLY ELECTED BOD MEMBERS MEET FOR THE FIRST TIME...TO CONVENE THE 22ND MEETING OF THE CENTRE'S BOARD OF DIRECTORS

27th January 2001, Bahrain.

27th January is a landmark on the Centre's calendar. This date highlights 3 important events that are closely associated with each other; Primarily, farewell bid to the former BOD members, secondly, welcoming the newly elected BOD members who initiate their role by convening the 22nd meeting of the Centre's BOD in the new premises in Adliya and finally, to a very important event, being a reception held under the patronage of H. E. Mr. Ali Saleh Al Saleh, Bahrain Minister of Commerce, to commemorate the kind support and cooperation extended by the Government of Bahrain in recognition and appreciation of the outstanding role played by the Centre in the region.

The Centre's newly elected Board members, led by a representative of the Bahrain Chamber of Commerce and Chairman of the current session of the Centre's BOD, Mr. Mohammed Eid Rashid Bokhammas, commenced the meeting by welcoming his colleagues and the Centre's Secretary General to the 22nd meeting of the BOD.

This meeting was of significant importance as it was convened just after the conclusion of the GCC Summit which stressed on providing the Centre with a wide and important role to resolve commercial disputes arising out of the implementation of the Unified Economic Agreement and its Executive Resolution thereof.

The meeting, spread over a period of two days, featured meetings with some concerned Ministers in Bahrain, a press conference, a reception hosted to commemorate the Centre's new premises in addition to discussions and recommendations in connection to the work-plan to be set and implemented for the academic year.

At the outset, the BOD thanked the Host State of Bahrain for the support extended to the Centre and for the facilities provided to it in this regard. Appreciation and thanks was also expressed to HE Mr. Ali Saleh Al Saleh for having graciously accepted to patronage the reception.

The BOD also expressed its sincere thanks and gratitude to the State of Bahrain, Sultanate of Oman and the United Arab Emirates for having issued Executive Decisions in favor of the Centre's Charter whereby the provisions specified therein could be implemented.

The Board commended and upheld the decision taken by the GCC Summit and expressed its desire that the GCC Secretariat and the Executive Governmental Bodies would strive together to implement this decision and would bring the Centre to the forefront in resolving commercial disputes that may arise during interaction between commercial entities. In order to express their appreciation and gratitude to HE Sh. Jameel Al Hejailan, Secretary General of the GCC States and to HE Mr. Mohammed Abdullah Al Mullah, Secretary General of the Federation of the GCC Chambers, the BOD members decided to send in delegates who would not only thank their Excellencies for their kind support but would also urge them to further activate the role of the Centre.

The BOD was inspired with the cordial relationship being maintained between the Centre and other member chambers but expressed its desire to further develop and enhance this relationship, which it was sure, would lead to establishing stronger ties, resulting in joint activities being promoted to benefit the economic community in the GCC region thus successfully leading the Centre to the forefront in the field of

commercial arbitration.

A new strategy was introduced to familiarize the Centre and the role it can play in resolving commercial disputes both in the region and on an ad hoc basis.

Personalized visits with officers of high rank in Companies, Establishments and Financial Institutions, introducing the Centre and explaining, in detail, the vital role played by it in the field of commercial arbitration would be a first step towards creating arbitral awareness and promoting the cause for which the Centre has been established. Secondly, highlighting on the facilities available in the new premises by which disputes could be handled efficiently, expeditiously and at a reasonable cost, would be another way of how things could be exemplified.

In order to implement the above mentioned strategies, the BOD introduced a revised scale by reducing the fee to 50% on additional services which include: appointment of the arbitrator, providing lists of arbitrators registered on the Centre's panel, hearing rooms for the conduct of ad-hoc arbitration, secretarial services, direct interpretation and verbatim transcripts.

The BOD also instructed that more qualified Arab and Foreign personnel were to be registered on the Centre's panel, where recruitment would be made solely on the basis of their high calibration and expertise in the various fields of commercial arbitration.

The provisions mentioned in the agreements of cooperation entered into with various international and regional arbitral centres were to be activated and additional efforts to be exerted with the Islamic chamber in order to provide them with any required assistance in the field of commercial arbitration.

A concentrated effort in conducting more activities by the Centre jointly with other renowned arbitration centres to develop public intellect in the fields of Law, International Trade and Economy was next on the agenda. This year would witness a series of events being conducted by the Centre to fall in line with this decision expressed by the Board.

In order to promote the cause of the Centre and those of its publications, the BOD have instructed to contact the GCC Council and the Trade Attache abroad. The Centre would also have to play an active role with IFCAI (International Federation of Commercial Arbitration Institutions) as well as with the Arab Federation of Arbitration Centres in order to lead the region to the forefront in the arena of commercial arbitration.

WE VALUE YOUR INPUT

ENABLE US TO FULFIL YOUR REQUIREMENTS: The Centre welcomes any comments/suggestions you may have to improve its Bulletin being published every quarterly. We have, as an introductory effort, split the Bulletin into Arabic and English languages (as separate issues) to be distributed separately for the first time. Should you be interested in procuring a copy of the Bulletin in both languages, we would be pleased to forward them to you. We would also appreciate if you could comment on the quality of the Bulletin, its content, its outlay, way of presentation etc. suggesting as to how the same could be further improvised.

We look forward to your valuable suggestions and comments.

CHAIRMAN SPEAKS...

Mr. Mohammed Eid Rashid Bokhammas, Chairman of the current session of the Centre's Board of Directors, addresses one and all for the first time upon taking up office...

"Delivery of the 18th issue of the Centre's Bulletin at your doorstep will unfold the new premises of the Centre located in the heart of Adliya, Bahrain, in addition to the other regular news being brought to you every quarterly.

The facilities available at the new premises would provide a conducive atmosphere for the conduct of efficient, expeditious and cost efficient arbitral proceedings. 5 rooms have been allocated as arbitral hearing rooms and the latest of technology have been provided to induce parties to refer to arbitration at the Centre.

Another feature of significant importance was the decision pronounced by the GCC Summit and upheld by the Board of Directors. By this decision, the Centre's role in the region would be made more prominent in the resolution of disputes relating to the Unified Economic Agreement and its Executive Decisions thereof. This has created a positive impact on the masses, especially with regard to the economic sectors in the region, which I believe, is a confident move in favor of the Centre to further activate its role. Enacting and implementing this decision of the GCC Summit by those in authority for example, the Centre's Secretariat, the GCC Secretariat, Executive Authorities in the GCC Countries, the Commercial and Financial Cooperative Committees, would help in making this move a reality.

Pursuant to the issuance of an Executive Decree/Decision by the host country - State of Bahrain and that of the Sultanate of Oman and the United Arab Emirates in favor of the Charter of the Centre, we are anticipating that the other GCC States would follow suit. This would give the Centre more credibility in the region and would work its way in consolidating the legal framework of the Centre.

CENTRE'S ANNIVERSARY

21ST March witnesses the dawn of the 6th year since the establishment of the Centre in 1995. The tail end of the 5th year featured 3 radical changes: farewell to the former BOD members, new BOD members taking up office and finally the shifting of the Centre to its new premises.

This year would witness a series of events being conducted by the Centre in line with the decision of the Board of Directors. The provisions of the Agreements of Cooperation entered into with both regional and international organizations were to be activated. A new strategy introduced by the Board by which the fee was reduced to 50% on additional services like appointment of an arbitrator, list of the arbitrators registered on the Centre's panel, hearing rooms for the conduct of an ad hoc arbitration, secretarial services etc.

Therefore the 6th year seems to be more promising one in that the role of the Centre would be further enchanced, thus enabling it to accomplish its role as a leading arbitration Centre in the region.

UNCITRAL AGAINST UNCITRAL

An Article by Dr. Mohie Eldin Alam Eldin

Continued from Bulletin Issue 17

2. In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantees or stand by letters of credit practice".

Through this Article practice may combine to the Convention, the publication nos. 458 and 500 of the ICC as means of interpretation, being 'generally accepted international rules and usages of independent guarantees or stand by letters of credit practice' even where such rules are not subject to specific reference in the undertaking or in the transaction as a whole. The US District Court for the Southern District of New York in a recent opinion (Koola v. Citibank N. A.) acknowledged the UCP as "an internationally accepted codification of banking practice and custom". (See Documentary Credit Insight Vol. 1 No. 3 Summer 1995, p. 6).

(21) Article 14 relating to the standard of conduct and liability stipulates that:

1. In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

2. A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct".

Such provisions are also found in the ICC uniform rules for demand guarantees in Article 15.

(22) Article 15 relating to the demand provides that:

1. Any demand for payment under the undertaking shall be made in a form referred to in paragraph 2 of Article 7 and in conformity with the terms and conditions of the undertaking.

2. Unless otherwise stipulated in the undertaking, the demand and any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made, to the guarantor/issuer at the place where the undertaking was issued.

3. The beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith and that none of the elements referred to in subparagraphs (a), (b) and (c) of paragraph (1) of Article 19 are present."

Acting in good faith is presumed to be attested in the demand for payment at the time of presenting it. If the beneficiary has a bad faith, he will be liable to refund the payment he already received. The beneficiary is also deemed to certify that none of the cases of Article 19/1 are present; they relate to falsified documents, the case where the undertaking is not due or the demand has no conceivable basis. This also means that if such certification was proved to be faulty, refund of the payment received can be subject to a claim directed to the beneficiary.

23. Article 16 relating to the examination of the demand and the documents provides that:

1. The guarantor/issuer shall examine the demand and any accompanying documents in accordance with the standard of conduct referred to in paragraph 1 of Article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand by letter of credit practice.

2. Unless otherwise stipulated in the under

taking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days following the day of receipt of the demand and any accompanying documents, in which to:

a. Examine the demand and any accompanying documents;
b. Decide whether or not to pay;
c. If the decision is not to pay, issue notice thereof to the beneficiary.

The notice referred to in subparagraph (c) above shall, unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, be made by teletransmission or, if that is not possible, by other expeditious means and indicate the reason for the decision not to pay".

This Article stipulates the application of the 'international standard of independent guarantee or stand by letters of credit practice'. It must be noted that Article 13 of the UCP 500 used the same expression and queries are still raised to have a definition of what is meant by it. ICC uniform rules for demand guarantees did not contain the provision of seven days for examination of documents feeling that in guarantees the matter must be quicker as examination does not need the same time as documentary credits.

(24) Article 17 relating to payment stipulates that:

1. Subject to Article 19, the guarantor/issuer shall pay against a demand made in accordance with the provisions of Article 15. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

2. Any payment against a demand that is not in accordance with the provisions of Article 15 does not prejudice the rights of the principal/applicant".

(25) Article 18 relating to set off provides that:

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set off, except with any claim assigned to it by the principal/applicant or the instructing party".

(26) Article 19 relating to exception to payment obligation stipulates that:

1. If it is manifest and clear that:
(a) Any document is not genuine or has been falsified;
(b) No payment is due on the basis asserted in the demand and the supporting documents; or
(c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis, the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

2. For the purposes of subparagraph (c) of paragraph 1 of this Article, the following are types of situations in which a demand has no conceivable basis:
a. The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;
b. The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicated that such contingency falls within the risk to be covered by the undertaking;
c. The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;
d. Fulfillment of the underlying obligation has clearly been prevented by willful misconduct of the beneficiary;
e. In the case of a demand under a counter guarantee, the beneficiary of the counter guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter guarantee relates.

3. In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph 1 of this Article, the principal/applicant is entitled to provisional court measures in accordance with Article 20".

This Article will always be controversial. It revealed that the independent guarantee in the

Convention is not equivalent to a first demand guarantee, as the issuer or guarantor has the opportunity to judge the demand of payment and to say that the beneficiary has no right to receive payment, and this threatens the independence of the guarantee. Also, the drafting of this Article leads to saying that bringing a lawsuit by the issuer against the beneficiary to denounce his right is a sufficient cause to stop payment of the undertaking. The matter is different with the ICC uniform rules for demand guarantees as the guarantor has nothing to do with the real reasons behind the demand for payment so long as the required documents are presented and the attestation required by Article 20 is submitted to the effect that the principal is in breach and the respect which he is in breach. Cases of fraud are the sole justifying non-payment.

(27) Article 20 relating to provisional court measures provides that:

1. Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the circumstances referred to in subparagraphs (a), (b) and (c) of paragraph 1 of Article 19 is present, the court, on the basis of immediately available strong evidence, may:

a. Issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking; or
b. Issue a provisional order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

2. The court, when issuing a provisional order referred to in paragraph 1 of this Article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

3. The court may not issue a provisional order of the kind referred to in paragraph 1 of this Article based on any objection to payment other than those referred to in subparagraphs (a), (b) and (c) of paragraph 1 of Article 19, or use of the undertaking for a criminal purpose".

28. Article 21 relating to the choice of the applicable law stipulates that:

The undertaking is governed by the law the choice of which is:

a. Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or
b. Agreed elsewhere by the guarantor/issuer and the beneficiary".

29. Article 22 relating to determination of the applicable law provides that:

Failing a choice of law in accordance with Article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued."

30. Chapter seven contained final clauses in Articles 23 through 29 as follows:

Article 23 (Depositary): The Secretary General of the United Nations is the depositary of this Convention. As to the ICC uniform rules for demand guarantees there is no depositary but the rules takes its force from reference made to them in demand guarantees together with the number of publication.

Article 24 (Signature, ratification, acceptance, approval, accession):

1. This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until...(the date two years from the date of adoption).
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary General of the United Nations".

To be contd. in next issue

The IBA Rules of Evidence do not say whether witnesses who have not yet testified may be in the hearing rooms or whether witnesses who have testified may remain. This is left for the arbitral tribunal to decide, because it depends on the circumstances of the case, the nature of the dispute and of the persons involved.

The affirmation by a witness that he or she will tell the truth, as described in Article 8.3 is widely observed. Often, the arbitral tribunal will also simply admonish the witness to tell the truth, and sometimes it will additionally advise the witness of criminal sanctions applying at the seat of the arbitration or at the physical place of the hearing. Arbitral tribunals, at least in some countries, rarely swear in the witness themselves.

Where witnesses and experts have provided written witness statements or expert reports, they are first confirmed at the beginning of the testimony. The third sentence of art. 8.3 states the rule applied in many arbitrations where witness statements are used, that such statements may serve in lieu of the witness's direct testimony. Having the witness statement stand entirely in lieu of direct testimony provides an incentive for witness statements to be comprehensive, which will ensure that the benefits of using them in the first place will be enjoyed.

Nothing in the IBA Rules of Evidence, however, prevent an arbitral tribunal from hearing witnesses in other manners such as the traditional method in certain civil law countries where witnesses are initially questioned by the arbitral tribunal, followed by questioning by the parties. This is a technique, which presupposes a thorough knowledge of the file and a full study of the law by the arbitral tribunal.

In International commercial arbitration, there will rarely be a case where no witness will be heard. The reasons for this are several. Sometimes, the contemporary written record of the case is not always as complete as it should be. Moreover, documents will often be easier to understand if explained by live testimony, because the fact situation is often complex. There is also a psychological reason: if the arbitral tribunal hears what witnesses have to say, justice will be seen to be done. The parties will have the benefit of participating in a process that will not be entirely abstract and remote as a purely written procedure necessarily is. This is important in arbitration, which is a voluntary process.

Tribunal Witnesses

Inquisitorial powers of the arbitral tribunal follow from the lex arbitri of the seat of the arbitration. 35 Inquisitorial powers may also follow from the arbitration rules agreed by the parties. 36 The IBA Rules of Evidence do not provide for similarly sweeping inquisitorial powers of the arbitral tribunal, but Article 8.4 covers the main case where inquisitorial powers may be exercised: the hearing of a key witness who typically had an earlier association with both parties but whom the parties for some reason failed to persuade to appear, perhaps because they no longer have close ties with the witness. Such a tribunal witness will often be questioned in the inquisitorial fashion described above. To proceed in this fashion is not mandated, but almost suggested by the second sentence of Article 8.4.

At the close of an evidentiary hearing, the parties are sometimes invited to comment on the assessment of the evidence and on the law. Such comments may also be made in post-hearing briefs or at a separate "final" or "pleading" hearing, or in both manners. The IBA Rules of Evidence do not deal with this phase of the proceeding.

Article 9 - Admissibility and Assessment of the Evidence

Articles 1-8 of the IBA Rules of Evidence provide the mechanisms for the gathering and presentation of evidence to the arbitral tribunal. Article 9 provides the principles by which the arbitral tri

bunal should consider what evidence it should properly consider and how it should assess the evidence that is properly before it.

Article 9.1 states the general principle, also found in many institutional and ad hoc arbitration rules, that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence. Obviously, the arbitral tribunal shall exercise its discretion in making such determinations, which are central to its role.

Article 9.2 provides the limitations on admissible evidence, whether oral or written. These limitations also apply inter alia to the production of documents pursuant to Article 3 and inspections pursuant to Article 7. These limitations are important, for they preserve the lines of distinction between the rights of the parties and the authority of the arbitral tribunal. While the provision states that the arbitral tribunal "shall" exclude evidence meeting one of the specified exceptions, the arbitral tribunal obviously retains its discretion in order to determine whether one of the specified criteria have been met. Article 9.2 (a) states the simple proposition that the arbitral tribunal shall exclude evidence that is not sufficiently relevant or material to the outcome of the case. Article 9.2 (b) provides protection for documents and other evidence that may be covered by certain privileges, under the appropriate applicable law, such as the attorney-client privilege or professional secrecy. The Working Party felt that it was important that such privilege be recognized in international arbitration.

Article 9.2 (c) permits the arbitral tribunal to exclude from production or from evidence any documents or evidence, which would be an unreasonable burden to produce. This unreasonable burden can take many forms, and the nature of the burden is purposely left to the discretion of the arbitral tribunal. For example, it may involve the production of documents pursuant to a Request to Produce which, although properly identified pursuant to Article 3.3 (a) (I) and relevant and material to the outcome of the case, would because of their sheet quantity create an unreasonable burden on the receiving party to produce. Similarly, Article 9.2 (c) could cover a situation where a certain document exists and may even be considered to be within the party "possession, custody or control" of another (see art. 3.3), but which nevertheless could be unreasonably difficult for the party to obtain. Article 9.2 (d) is also straightforward, as a document that has been lost or destroyed cannot reasonably be produced.

Article 9.2 (e) and (f) involve special and related concerns. As noted above in the discussion of Article 3, the IBA Rules of Evidence reflect the belief that some internal documents are properly producable in international arbitration, even documents that may not be producable in a state court in certain nations. However, the Rules also recognize that some documents may be subject to such commercial or technical confidentiality concerns that they should not be required to be produced or introduced into evidence. When an earlier draft of the IBA Rules of Evidence referred only to such confidentiality, certain international political organizations pointed out that "commercial and technical confidentiality" might not include confidentiality within such organizations. Therefore, Article 9.2 (f) was added to put such special political or institutional sensitivity on an equal footing with commercial or technical confidentiality. In the case of both provisions, the arbitral tribunal retains the discretion to determine whether the considerations of confidentiality or sensitivity are sufficient to warrant the exclusion from evidence or production of those documents or other evidence. As noted in the Rules, the arbitral tribunal must find the concerns to be "compelling" in order to exclude the evidence. Article 9.3 also makes clear that the arbitral tribunal may make certain arrangements, such as entering a confidentiality agreement or order, to permit evidence to be considered subject to suitable confidentiality protection.

Article 9.2 (g) is a catch-all provision, intended to assure fairness and equality to all sides in the case. For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision. In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective, hearing.

Finally, as noted above in the discussion of Articles 3, Articles 9.4 and 9.5 create inferences where a party has failed to produce a document or make available other evidence required by the arbitral tribunal. The arbitral tribunal may then conclude that such document or evidence would be adverse to the interests of that party. Arbitral Tribunals routinely create such inferences in current practice.

Committee D of the IBA and the Working Party believe that the new IBA Rules of Evidence will provide an effective mechanism to assist parties in the conduct of international arbitrations. The committee has already heard reports of significant use of the Rules, even of earlier drafts of the Rules, and that parties and arbitral tribunals have found them to be useful. The Working Party hopes that the IBA Rules of Evidence will be a significant contribution to the future course of international arbitration.

End Notes:

1. The new IBA rules on the Taking of Evidence in International Commercial Arbitration were drafted by a Working Party appointed by the Committee on Arbitration and ADR of the International Bar Association (Committee D). The Working Party was led by Giovanni Ughi of Italy, and its members were Hans Bagner, Sweden; John Beechey, England; Jacques Buhart, France; Peter Caldwell, Hong Kong; Bernardo M. Cremades, Spain; Otto De Witt Wijnen, The Netherlands; Emmanuel Gaillard, France; Paul A. Gelinas, France, Pierre A. Karrer, Switzerland; Wolfgang Kuhn, Germany (former Chair of Committee D); Jan Paulsson, France, Hilmar Raeschke-Kessler, Germany; David W. Rivkin, United States (Chairman of Committee D); Hans van Houtte, Belgium; and Johnny Veeder, England. This article was drafted principally by Messrs De Witt Wijnen, Gelinas, Karrer, Raeschke-Kessler, Rivkin, Ughi and van Houtte, and it was reviewed and approved by all members of the Working Party.
2. Schwab/Walter, Schiedsgerichtsbarkeit [Arbitration], 5th ed., Munchen 1995, p. 139.
3. See UNCITRAL Model Law, art. 23; ICC Rules, art. 202(2); LCIA Rules, art. 15.6
4. Berger, International Economic of Arbitration, Kluwer 1993, p. 430 et seq: Born, International Commercial Arbitration in the United States, Kluwer 1994, p. 837; Bernstein/Tackaberry/Marriot/Wood, Handbook of Arbitration Practice, Sweet & Maxwell 1998, 2-308.
5. See, e. g. ICC Rules, art. 20 (1); LCIA Rules, art. 22.1 (c)
6. Jarvin, The ICC International Court of Arbitration Bulletin, "The new 1998 ICC Rules of Arbitration", 1997, p. 40
7. Schwab/Walter, supra, page 139
8. BGH WM 1999, 1844, 1845 et seq.
9. BGH NJW 1997, 2748 et seq.
10. See, e.g. ICC Rules, art. 20 (1); LCIA Rules, art. 22.1 (c)
11. Esso Australia Resources Limited v. Plowman [1995] 183 C.L.R. 10 (Australia); Dolling-Baker v. Merret [1990] W.L.R. 1205 (England); Hassneh Insurance [1993] Lloyd's Rep. 243 (England); Bulgarian Foreign Trade Bank v. A. I. Trade Finance Inc. Court of Appeal (Case T 1092-98, March 30, 1999), leave to appeal granted by Swedish Supreme Court). For institutional rules concerning confidentiality, see ICC Rules, art. 20 (7) International Arbitration Rules, art. 34; Zurich Chamber of Commerce, art. 51 See also Hans Bagner, "Confidentiality in International Commercial Arbitration Practice to be considered by the Swedish Supreme Court", Mealey's International Arbitration Report (V. 14, issue 9).
12. See on this difference, e.g., ICC award nr. 4815, J. D. I., 1996, 1042.
13. E.g. LCIA Rules, art. 20; AAA International Rules, art. 20.; UNCITRAL Arbitration Rules, art. 25.2; WIPO Arbitration Rules, art. 54.
14. See e.g ICC award nr. 7170 J. D. I. 1993, 1062.
15. 1983 IBA Rules, art. 5: "Within 60 days of the delivery of the last introductory submission made by the defendant or by the date agreed between the parties or determined by the arbitration..."
16. Draft IBA Rules of Evidence - at least 45 days: UNCITRAL Rules, art. 25.2 and AAA International Arbitration Rules, art. 20.2 - at least 15 days.
17. Ph. Fouchard e.a. Traite de l'arbitrage commercial international, Paris Litec 1996, nr. 1280 see e.g. ICCA New York Conference 1985, comparative Arbitration Practice and Public Policy in Arbitration, ICCA Kluwer 1987, 101; ICC

Award 7319, J.D.I.

18. It thus confirms the previous IBA Rules, art. 5.8 and also follows the LCIA Rules, art. 20.7

19. See J. P. Madelen, ASA Bulletin 1993, 438-445, 1994, 1102.

20. However, it is not excluded that attorneys from civil law countries deem it a violation of their ethical rules to contact witnesses. Consequently, LCIA art. 20.6 allows such contracts "subject to the mandatory provisions of any applicable law..."

21. M. Schneider, "Witnesses in International Arbitration", ASA Bulletin, 1993, p. 302, at 306.

22. UNCITRAL Notes para 67.

23. See IBA Rules of Evidence, art. 4.7. The possibility that uncontested witnesses can limit their testimony to the written statement and do not have to attend the hearing, is also provided in the LCIA Rules, art. 20.4

24. The IBA Rules of Evidence thus have opted for a full description of the facts, instead of a summary on which the witness has to elaborate at the hearing.

25. See on the use of sworn statements in arbitration: Comparative arbitration practice and public policy in arbitration, pp. 103 - 107.

26. Under LCIA Rules, art. 20.0 and WIPO Arbitration Rules, art. 54(d), the parties for instance, have the choice between mere signed statements or sworn affidavits, unless the tribunal has ordered otherwise.

27. E. g. UNCITRAL Arbitration Rules, art. 21.5

28. See also LCIA Rules, art. 20.4 and WIPO Arbitration Rules, art. 54(d).

29. E.g. UNCITRAL Arbitration Model Law, art. 27.

30. See, e.g. 1998 ICC Rules, art. 20 (3); 1997 AAA Rules, art. 22 (4); 1998 LCIA Rules, art. 21(2); 1994 WIPO Rules, art. 55 (c); UNCITRAL Rules, art. 27 (4).

31. See, ICC Rules, art. 18; UNCITRAL Notes on Organizing Arbitral Proceedings, para 17.

32. ICC Rules, art. 21 (1); UNCITRAL Arbitration Rules, art. 25 (1). The 15 days in art. 25 of the UNCITRAL Arbitration Rules are usually too short.

33. See ICC Rules, art. 20 (2).

34. See, e.g. ICC Rules, art. 21 (3).

35. See art. Subs. 2 lit. g., English Arbitration Act 1996.

36. See ICC Rules, art. 20.

HAVE YOUR SAY!!

The Centre invites contribution 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 format and on disk (MS Word format) to:

GCC Commercial Arbitration Centre
P.O. Box 16100, Manama
Bahrain
Tel: +973 825540
Fax: + 973 825580
E-mail: rbit395@batelco.com.bh

SEMINAR ON THE SETTLEMENT OF DISPUTES IN THE ERA OF TELECOMMUNICATIONS, INFORMATION TECHNOLOGY AND E-BUSINESS

9TH & 10TH MAY 2001.
BAHRAIN

A joint seminar on the Settlement of Commercial Disputes in the Era of Telecommunications, Information Technology and Electronic Business is to be jointly organized by the GCC Commercial Arbitration Centre and the Yemen Centre for Conciliation and Arbitration (YCCA).

This event, being the first combined effort of both organizations, is scheduled to be held in Bahrain on 9th and 10th of May 2001. This seminar aims at focussing on the problems arising out of the advanced technological developments of which Communication, Information and Electronic Business are correlated entities which had created a notable impact on all socio-economic spheres. This seminar 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 the 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 seminar 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.

This event is specially designed for Legislators, Judges, Arbitrators, Government Officials, Policy Makers, IT and Telecommunications Professionals, In-house lawyers, Lawyers in private practice, Web masters, Finance directors, or for anyone involved in the development of the on-line business.

Some of the speakers who have confirmed participation are Mr. Dominique Hascher - Judge, Court of Appeal, Paris, and ex-Deputy Secretary General of the International Court of Arbitration of the ICC, Dr. Hamzah Haddad - ex-Minister of Justice, Jordan, Mr. Arif Ali from WIPO, Ms. Rindala Beydoun from Al Tamimi & Company, Messers. Elizabeth A. Kelly and Shelley Rhinehart from Canada, Mr. Sudki Hassan Suleiman from Qatar, Dr. Ahmed Al Saed Al Sharaf Eldin and Mr. Hussam Lutfi from Egypt, Dr. Fawzi Mohd. Sami, Sharjah, and Mr. Ghazi Sharif Al Ghadri from Yemen Centre of Arbitration and Conciliation.

Prior to the event, a two-day Workshop on Contract Information Services will be held on 7th and 8th of May 2001 at the Diplomat Hotel. This workshop would be conducted in Arabic and would provide participants a sound background as to the topics that would be discussed and analyzed at the seminar.

We would very much appreciate if you could actively participate and benefit from the topics being discussed at this event, thereby contributing to the success to its success.

ندوة التمويل الإسلامي للمشاريع

٤-٦ يونيو ٢٠٠١م

دولة البحرين

Seminar on Islamic Project Finance
4-6 June 2001
Bahrain

UNION INTERNATIONAL DES AVOCATS (UIA)

الإتحاد الدولي للمحامين
INTERNATIONAL ASSOCIATION OF LAWYERS

A seminar on Islamic Project Finance is to be held in Bahrain from 4-6 June 2001. Being the first combined effort of both the GCC Commercial Arbitration Centre and that of the Union of Lawyers (UIA), this event is expected to draw around 100 participants from all over the GCC region.

Some of the topics that would be addressed but not limited to at this event are: Islamic Finance Techniques - the Options Available, the Role of Islamic Finance in Project Finance, Multi-Sourced Project Funds - Inter-creditor issues, a Case Study on the Rousch Power Project and Enforcement and Alternative Dispute Resolution.

Prior to the event, a Workshop on Islamic Project finance would be conducted in order to provide the participants with a broad overview of Project Finance in general with particular emphasis on Islamic Project Finance.

For more details, please get in touch with the GCC Commercial Arbitration Centre.

NEW PREMISES OF THE CENTRE

The new premises was officially inaugurated on 27th January 2001, by HE Mr. Ali Saleh Al Saleh, Bahrain Minister of Commerce, at a reception held at the Regency-InterContinental Hotel.

The new premises, being allotted by the Government of Bahrain to the Centre for its outstanding contribution to commercial arbitration in the region, would be seen as a leading arbitration Centre, with its modern premises well equipped with the latest available technology and in close proximity to other business Centres in the region.

The new premises would be an ideal venue for the conduct of arbitration. Separate hearing rooms totaling to 5 in number, provide excellent seating arrangements for an arbitral hearing being conducted either by a sole arbitrator or with adequate arrangements for the same being conducted by an arbitral tribunal, thus providing a conducive atmosphere for the conduct of arbitration.

The sound proof rooms with secure document storage facilities, are fully air-conditioned and well-lit, with state-of-the-art telecommunications facilities available in every room providing direct dialing, voicemail, conference calls, internet connections and video-conferencing. Fax machines for general use are readily available and private facilities could be arranged upon request. We do hope that all these facilities would encourage those in disputes to benefit from the arbitration services available at the Centre.

ARBITRATION IN THE MIDDLE EAST - THE MOTHER OF ALL MINEFIELDS?

By Mr. Abdullah Mutawi*

Before you next agree to be bound by an arbitration clause, which may need to be enforced in the Middle East, beware of the pitfalls you may encounter if a dispute arises. At first glance, codified court procedures and the use of recognized arbitral rules may give the illusion of certainty, whether desirable or otherwise. However, things may go awry at the stage of recognition and enforcement because of the differing legal regimes in place throughout the region.

Much of the commercial world has begun to wake up to arbitration as a dispute resolution mechanism which offers a number of distinct advantages over traditional court litigation. In line with this trend, the Middle East has seen a steady increase in the use of arbitration clauses in intra-regional and international commercial contracts. This can be observed across sectors from banking and finance through to insurance and reinsurance contracts in addition to the energy, construction and transportation sectors.

1.1 Arbitration in an Arab/Islamic context

Interestingly, the concept of arbitration has been around in the Middle East since at least 1876 when the Majallat Al Ahkam Al Adliah was produced as the codification of Shari'a (Islamic) law during the Ottoman period. This interpretation of Islamic Hanafi doctrine viewed the nature of an arbitral award as more like a contract between parties than something as weighty as a judgement of the court. Part of the reasoning for this was the need for an arbitrator to resort to the authority of the courts for enforcement.

By the end of the 19th Century, arbitration laws in a number of Arab countries were influenced by the British or French principles of the colonial powers although the Majallah continued to apply in much of the Arab world after the fall of the Ottoman Empire. The second half of the 20th Century however, witnessed a concerted effort by most Arab states to develop a form of national legislation governing arbitral rules and procedures.

In addition to this, many Arab countries have ratified or acceded to arbitration treaties such as the New York Convention 1 (see below) and the Washington Convention of the International Bank for Reconstruction and Development (ICSID)2. Worth noting also is the number of regional instruments which establish arbitration procedures. These range from the Arbitral Rules of the Gulf Cooperation Council (G.C.C.)3 to specialized agreement such as inter-Arab treaties modelled on ICSID 4 or capital investment treaties establishing arbitration procedures.5

1.2 Domestic arbitration

Domestic legislation governing arbitration in Arab states tends to follow one of four trends:

(i) Adopting the UNCITRAL Model Law of Arbitration - Bahrain, Egypt, Oman and Tunisia
(ii) Adoption of French Law concepts Algeria, Lebanon, Morocco
(iii) Adoption of Islamic Law Saudi Arabia, Yemen
(iv) Amendment of or enacting new legislation on arbitration - Iraq, Jordan, Kuwait, Libya, Syria and the United Arab Emirates.

If the arbitration clause simply specifies arbitration subject to the law and jurisdiction of the state in question, these are the rules that will apply.

As an alternative to submitting to domestic arbitration laws,6 parties to a transaction may wish to choose particular rules to apply such as GCC Rules, ICC Rules, LMAA Terms7 and so on. Where matters become potentially complicated however, is if a resulting award is to be enforced against a party in an Arab state different to the state which is the seat of arbitration.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

The New York Convention is an international treaty to which around 123 states have agreed to be bound by either accession or ratification. Article 1(3) of the Convention gives states options to limit the scope of the Convention in one of two ways. First, a contracting state may limit its application of the Convention to awards made in the territory of another contracting state (the "reciprocity provision"). Secondly, the contracting state may limit its application of the Convention to awards made in connection with disputes which are considered to be "commercial" under that state's domestic law (the "commercial disputes provision").

There are currently ten Arab states which have ratified the New York Convention:

Non-GCC States
Algeria (7 February 1989)
Egypt (9 March 1959)
Jordan (15 November 1979)
Morocco (12 February 1959)
Syrian Arab Republic (9 March 1959)
Tunisia (17 July 1967)

GCC States
Bahrain (6 April 1988)
Kuwait (28 April 1978)
Saudi Arabia (19 April 1994)
Oman (10th June 1998)

Of these states, Algeria, Morocco, Tunisia, Bahrain and Kuwait have all ratified or acceded to the convention subject to the reciprocity provision. Of those states, Algeria, Tunisia and Bahrain have also adopted the commercial disputes provision. Whilst this may seem reasonably harmless to the commercial litigant, it opens the door to a challenge based on domestic law regardless of the law applicable to the arbitration itself.

By way of hypothetical illustration, imagine that A enters into arbitration against B and seeks to enforce an award against B in B's home state. If B is Algerian, and decides to challenge the applicability of the New York Convention on the grounds that the award does not pertain to a commercial dispute, the Algerian court would determine this issue on the basis of the French law based national legislation in force in Algeria. If on the other hand B is Bahraini, such a challenge would be based on the national law based on the UNCITRAL Model Law together with the applicable provisions of Decree Law (9/1994 which specifically restricts the Bahrain system to commercial arbitrations. If B were Saudi Arabian or Yemeni, it would be for that particular state's Islamic law doctrine to determine the point.

1.3 New York v G.C.C.?

One of the most notable absences from this list of ratifying parties to the New York Convention is the United Arab Emirates. In practice, the UAE will enforce awards made in foreign jurisdictions on the basis of reciprocal treatment. This means that if a contracting state to the New York Convention is willing to enforce an award made in, say Dubai, then the Dubai court will enforce an award made in that state. Given therefore that Bahrain, for example, has ratified the Convention subject to reciprocity, then an award made in Bahrain will not be enforceable in Dubai and vice versa. It is worth mentioning that the same situation applies (vis a vis enforcement in the UAE) to arbitral awards made in the UK which also applies the reciprocity provision.

Interestingly, if the Bahraini and Emirates parties were to have specified GCC rules in their arbitration clause, the seat of arbitration would have been Bahrain, but the eventual award would be enforceable anywhere in the GCC (which include the UAE) by virtue of Article 36 (1) of the GCC Arbitral Rules of Procedure. Effectively, this means that the choice of the GCC Rules renders the issue of the New York Convention an irrelevance vis-‡-vis enforcement in the UAE. The same would also apply against a party in Qatar which is another notable absence from the list of ratifying parties to the New York Convention. Given the economic importance of these two jurisdictions, this analysis should encourage investors to look more seriously at GCC arbitration clauses.

Arbitration should certainly provide a better alternative to court litigation in the Middle East. However, it is of paramount importance that parties to a transaction are certain of the trajectory that arbitration might take if a dispute were to arise. Attention must be paid to a number of matters, which at the very least

should include:

1. The home state of the parties and the location of assets (if different) against which enforcement might be sought.
2. The law and jurisdiction to apply.
3. The most appropriate set of rules in the context of future enforcement.
4. Potential grounds for challenging the enforceability of an award in the jurisdiction where enforcement is sought.
5. The applicable law (French, Islamic, UNCITRAL or hybrid) which might apply to such a challenge.

Norton Rose Middle East and North Africa (MENA) Dispute Resolution Practice

Norton Rose first set up their practice in Bahrain 21 years ago at the invitation of the Bahrain Monetary Authority.

Their traditional areas of practice in the region were banking and finance related although a decision was taken nearly a decade ago to set up a MENA dispute resolution practice to complement the banking and finance service. The litigation team has during that time serviced their regional and international clients in order to provide a fully integrated multi-disciplinary service.

The main practice areas covered by the Bahrain based litigation team are banking, construction, shipping and insurance although they are able to provide a comprehensive service in other practice areas by drawing on the skills of lawyers based in London or one of their 11 other overseas offices.

ENDNOTES:

1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
2. International Convention on the Settlement of Investment Disputes 1965.
3. Arbitral Rules of Procedure of the GCC Commercial Cooperation Committee.
4. Agreement for the Settlement of Investment Disputes between the Arab Investment Receiving States and Nationals of Other States 1974.
5. The Inter Arab Agency for Investment Guarantee of 1970 and the Unified Agreement for the Investment of Arab Capital in Arab Countries of 1980.
6. By simply stipulating a particular law and jurisdiction to apply.
7. The applicable law and seat of arbitration would have to be explicitly stipulated (Art. 6) if these are to be outside England.

*** Mr. Abdullah Mutawi**

Abdullah Mutawi qualified in 1996 and has recently joined the Bahrain office of Norton Rose as head of the firm's dispute resolution practice in the Middle East. His principle areas of practices are shipping, insurance, energy, construction and banking litigation. Abdullah has wide experience of multi-party and multi-jurisdictional disputes which has given him a valuable knowledge of numerous treaty-based private international law regimes. He acts for insurers, re-insurers, ship owners, P & I clubs, commodity dealers, oil and gas companies, banks and other financial services companies in addition to contractors and sub-contractors.

WORDS OF WISDOM

The real tests of courage are much quieter. They are the inner tests, like remaining faithful when nobody's looking, like enduring pain when the room is empty, like standing alone when you are misunderstood.

Charles Swindoll,
Inspirational writer

THE CENTRE CELEBRATES .....27TH JANUARY 2001.

Under the patronage of HE Mr. Ali Saleh Al Saleh, Bahrain Minister of Commerce, the Chairman, Board Members and the Secretary General of the Centre extended a warm invitation to all Ministries, Chambers of Commerce and Officials of high rank to a reception on 27th January 2001 held at the Regency-InterContinental Hotel to commemorate the opening of the Centre's new premises in Al Adliya, Bahrain.

Mr. Mohammed Eid Rashid Bokhammas, Chairman of the current session of the Board of Directors inaugurated the ceremony by thanking the Government of Bahrain for its kind support and cooperation extended to the Centre. Mr. Yousif Zainal then addressed the gathering in which he thanked the Government of Bahrain for its immense support extended to the Centre, thanked the former BOD members for their guidance and support during the last 6 years where he stated that the Centre had gained recognition and a place for itself and welcomed the new BOD members to further guide and support the Centre during their term of office.

HE Mr. Ali Saleh Al Saleh then distributed momentos and certificates of appreciation to the former BOD members and declared the function open.

AMERICAN BAR ASSOCIATION TASK FORCE ON E-COMMERCE AND ADR

Five sections of the American Bar Association have jointly created a Task Force to create consensus-based protocols, workable guidelines and standards that can be implemented by parties to on-line transactions and by on-line dispute resolution providers. The Task Force will focus on the challenges raised by multi-jurisdictional business to business (B2B) and business to consumer (B2C) transactions. The five sections participating in this effort are the section of Dispute Resolution, the Section of Business Law, the Section of Litigation, the International Law and Practice Section and the Intellectual Property Law Section.

The Task Force will be the Working Group for gathering information and drafting proposed protocols, guidelines and standards. It will be chaired by Section of Dispute Resolution Vice chair, Mr. Bruce Mayerson.

The Vice Chair of the Task Force will be Karol K. Denniston of the section of Business Law. The Task Force consists of additional representatives of the five sections, a Reporter, Professor Anita Ramasastry, and an Assistant Reporter, Professor Ben Davis.

The Task Force has scheduled two initial public meetings. The first meeting will be held at the Fordham University of Washington School of Law in New York City on January 2001 and the second at the Wyndham Emerald Plaza in San Diego on February 17, 2001. Please contact Mrs. Anitha Ramasastry on Tel: 206 616 8441 or e-mail: arama@u.ashington.edu for further details.

THE GCC COMMERCIAL ARBITRATION CENTRE AT ITS NEW PREMISES

THE NEW PREMISES OF THE CENTRE BEING OFFICIALLY DECLARED OPEN BY H.E. MR. ALI SALEH AL SALEH, BAHRAIN MINISTER OF COMMERCE
27th January 2001.

SOME EXCERPTS

H.E. Mr. Ali Saleh Al Saleh being warmly received

Mr. Yousif Zainal Welcoming the gathering

Former & Current BOD members at the reception

Ceremony being inauguranted by His Excellency

Under Secretary with New BOD members & Secretary General of the Centre

Some of the invitees