FROM SECRETARY GENERAL

Three months from now the Centre will complete its fourth year of existence. Whether the Centre achieved more or less during this short period, a new reality has been created in the field of Commercial Arbitration in the GCC States. Signs of this reality are gradually becoming clearer through the active movement of this Gulf mechanism for the settlement of commercial disputes.

Such arbitration institutions need enough time to lay down a proper foundation for arbitration; this can be achieved by gaining confidence of the arbitration users and then the confidence in the arbitration institution itself, which was established to provide arbitration services.

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FROM THE BOARD OF DIRECTORS

AT THEIR 15th MEETING

This 15th meeting of the Centre’s Board of Directors was convened in the Sultanate of Oman on the 26th and 27th of September 1998, and chaired under the able guidance of Dr. Saleh Al Jary, Chairman of the current session of the Board of Directors.

The meeting could be categorized into two parts: the first part reviewed the regular report presented by the Centre’s Secretariat with regard to the activities conducted by it in addition to the discussion of various administrative, financial and organizational reforms. The second part however, devoted itself solely to meeting Omani officials of high rank in order to familiarize them with the significant role played by the Centre and the services it provided in both the private and public sectors.

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DIRECTORY OF LAW FIRMS OF THE GCC STATES

SECOND CALL FOR ENLISTMENT IN OUR DIRECTORY

We would like to advise those interested in enlisting in our directory that they are welcome to do so as the release of the Directory has been rescheduled to the end of June 1999 due to unforeseen technical problems. For further details on the directory please visit our Web Site on www.alnadoem.net/arbit
Under the Patronage of H.E. Mr. Ali Saleh Al Saleh, Minister of Commerce
Seminar on Training, Qualifications & Standards of International Arbitrators
14th - 15th November 1998
Manama - Bahrain

The seminar was opened by Dr. Abdullah Mansoor, Undersecretary to the Minister of Commerce; Mr. Antonio de Fina, President of the Court of International Arbitration - Australia; Mr. Ebrahim Zainal, Vice-Chairman of the Centre’s Board of Directors and Mr. Yousif Zainal, the Centre’s Secretary General.
Thank You...we sincerely appreciate your valuable support

The GCC Commercial Arbitration Centre would like to express its sincere gratitude to the sponsors and speakers who contributed immensely to the success of the seminar on Training, Qualifications and Standards of International Arbitrators which was held on the 14 and 15 of November 1998, in Manama – Bahrain. Sincere thanks are also extended to H.E. Mr. Ali Saleh Al Saleh, the Minister of Commerce for his staunch support and continued interest shown in the activities conducted by the Centre.

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THE SPEAKERS AND THE INSTITUTIONS REPRESENTED BY THEM:

Mr. A. A. de Fina
President, Court of International Arbitration – Australia

Mr. Richard H. Kreindler
JonesDay, Reavis & Pogue

Mr. Harold S. Crowter
Chairman, Chartered Institute of Arbitrators – U.K.

Mr. Charles Molineaux
American Arbitration Association

Mr. Bohuslav Klein
President, Arbitration Court of the Czech Republic

Dr. Amal El-Fazairy
Legal Consultant, Law Firm of Salah al Hejailan

Dr. Abdul Hamid El-ahdab
President, Arab Association of Arbitration

Ms. Karen Gough, Vice-President of the Chartered Institute of Arbitrators

Mr. Dominique Hascher
Justice, Cour de Cassation, Paris

Ma’awia El Nayal
Legal Consultant, Law Firm of Al Mahmood & Zu’bi
Manama – the capital of Bahrain, was the setting for an intensive, two-day seminar, which presented for the first time, anywhere, topics of immediate concern to international arbitration and mediation institutions for a discussion of potential solutions to issues which will help them successfully meet the challenges in providing the information and services that users and their representatives will demand in the twenty-first century. The seminar was forward-looking and focused on both the individual arbitrator or mediator, that is his/her training and powers, and the institution, its role and responsibilities to its panel members, on the one hand, and its users, on the other. Despite the highly technical subject matter, nearly 70 participants attended and enthusiastically engaged the experts in discussion, one of the most notable being after Mr. Ma'awia El-Nayal’s paper on the source and degree of state power either enjoyed or which should be enjoyed by arbitrators for the interim protection of property subject to a dispute. The conference was held in both Arabic and English through the use of simultaneous translation.

There were four speakers at the opening ceremony: Dr. Abdullah Mansoor, Undersecretary to the Minister of Commerce; Mr. Antonio A. de Fina, President of the Court of International Arbitration Australia; Mr. Ebrahim Zainal, Vice-Chairman of the Centre’s Board of Directors and Mr. Yousif Zainal, the Centre’s Secretary General.

Mr. Yousif Zainal gave a brief synopsis of the Centre’s historical background and its activities to achieve its present position of recognition amongst eminent international arbitration centres, such as those speaking at the conference. Then Mr. Ebrahim Zainal spoke on the importance of training, qualifications and standards of arbitrators to be competent in deciding cases with fairness and justice and voiced the need for international as well as regional agreements by nations on the preparatory and continuing training of arbitrators. Although arbitration has deep historical and religious roots in the Gulf States, Mr. Zainal observed that arbitration fell into disuse. But he was optimistic citing other professions, such as law and accounting, where education and training were successfully reintroduced to make regional professions aware of international practices. Mr. Zainal was confident regional arbitration and mediation practitioners could share a similar success and suggested the GCC Commercial Arbitration Centre, with its proven dedication to making its members and community aware of the fundamentals and latest advancements in international conflict resolution, could pave the way. He encouraged the Centre to converse with other centres throughout the world to agree on appropriate standards and warmly welcomed the arbitration centres American Arbitration Association, the Court of International Arbitration-Australia, the Law Firm of Jones Day, Reavis & Pogue, the Law Firm of Al Mahmood & Al Zubi, the ICC, The Chartered Institute of Arbitrators, The Arab Association for Arbitration, Arbitration Court of the Czech Republic and the Law Firm of Sheikh Saleh Al-Hejilani participating in this seminar for this very purpose.

Mr. Zainal noted that trained arbitrators support international trade and that through training Bahrain could become a regional and international centre of international arbitration.

H.E. Dr. Abdullah Mansoor spoke next and referenced a passage in the Koran in which Allah admonishes Muslims to be honest and just in determining the rights of people, all people. Dr. Mansoor then commented upon the serious issues to be raised in the seminar noting that the importance of training can never be ignored but especially now and in the twenty-first century when boundaries are breaking down due to accelerated trade relations, which has created the need for new mechanisms able to keep pace with global developments. This necessarily has caused and will continue to cause arbitration, itself, to evolve and arbitrators, experts acting as judges, must also be prepared to be familiar and competent, to at least a minimum, internationally acceptable level, in the procedures as well as substantive matters, such as in fields of ethics, international legislation and agreements, like the WTO’s GATT and TRIPS agreements. Dr. Mansoor recalled Bahrain’s original support for the establishment and success of the Centre in its unique role and emphasized continued support for the Centre and its activities by the government of Bahrain via the Amir, Prime Minister, Crown Prince and the Ministry of Commerce.

Mr. Tony de Fina then spoke on behalf of all the speakers. He first noted that international arbitration exists to support and assist international trade and that without arbitration many problems that do arise could not be dealt with in such manner. Therefore, the performance of arbitration is fundamental to trade and if traders lose confidence in the arbitration process, trade will diminish. Mr. de Fina turned his attention to the event and stated that this was the first conference to ask such fundamental questions on the training, qualifications and standards of arbitrators. International arbitration, he added ‘is principally driven by the West with little cognizance of Islamic law and Islamic growth in the world’ and that there is a need in the West to ask these same basic questions and consider the responses to be raised at this seminar. Mr. de Fina found “the GCC ahead of the rest of the world” in discussing these issues and hoped the ideas generated here would not be lost on the rest of the world. Mr. de Fina noted that the Chartered Institute of Arbitrators is exceptional in the education of arbitrators as it is basically the only internationally renowned institution that has implemented and mandated its very rigorous, training programmes and continuing professional standards on its members. (The Chartered Institute of Arbitrators did indeed take this conference extremely seriously by sending its Chairman of the Institute, Mr. Harold Crowter, and its Chairman of the Executive Committee, Ms. Karen Gough, as did the ICC which sent its General Counsel and Vice Secretary General, Mr. Dominique Hascher, who is now one of the justices of the Court of Appeal of Paris, and the Arbitration Court of the Czech Republic which sent its President, Mr. Bohuslav Klein. Mr. Charles Molineaux represented the American Arbitration Association. It is self-evident that the Australian Court of International Arbitration held this conference highly important). “Worlds learn from each other” and so, Mr. de Fina urged, the Western world can learn from the Arab world. Mr. de Fina concluded on a very positive note that whatever our beliefs may be they will carry us into the twenty-first century.

The good-will, the open desire to share and learn from others’ experiences and opinions and to consider the best way forward from the starting block of this seminar was evident from the opening ceremony and remained so throughout the two days. If proof is in the pudding then one only has to taste one of the conference’s conclusions and recommendations. It was overwhelmingly agreed that there is no minimum, international standard or recommended syllabus in training programmes for
that having programmes with floor standards recognized by the international community would be beneficial to all directly or indirectly involved with arbitration and that the best institution to devise and maintain such a system is the umbrella arbitration organization, IFCAI – the International Federation of Commercial Arbitration Institutions. Because IFCAI is a fledgling organization it is unlikely IFCAI could start immediate work on this project if approved; but it was also considered by those at the seminar to be timely to introduce the concept to IFCAI’s members and perhaps as early as IFCAI’s next meeting in New York in May 1999. Let us hope it gets on the agenda.

The first session, Initial Training, was chaired by Mr. Harold Crowter, who introduced two speakers after making opening remarks were particularly appropriate because the Chartered Institute of Arbitrators is the sole institution to have university degree standard, training programmes for its arbitrators. Mr. Richard Kreindler, a partner in the law firm of Jones Day, Reavis & Pogue, discussed two topics, Identification of Arbitrators and Necessary Training and Basic Areas in Introductory Syllabus of Fundamental Concepts. Mr. Tony de Fina then spoke on procedural and ethical conduct. These two speakers set the general ground for consideration of further initial and continuing training in specialized areas.

The second session was chaired by Dr. Abdul Hamid El-Ahbab, Chairman of the Arab Association for Arbitration. Where the morning session may be loosely characterized as inward-looking considerations of what an arbitrator should be and know, the afternoon session may be equally loosely characterized as outward-looking considerations in initial training of arbitrators. It focused on preparation of an arbitrator’s interaction with others, the state, the disputants and other members on a tribunal. Mr. Ma’awia El-Nayal from the law firm of Al-Mahmood and Al Za’bi discussed the use of interim protective devices and Mr. Dominique Hascher discussed communication and drafting.

The entire morning of the second day concentrated on Continuing Training, chaired by Mr. Tony de Fina. There were four speakers: Mr. Harold Crowter discussed the need and function of continuing training; Mr. Bohuslav Klein examined a mandatory system of minimum continuing professional development and came to the opposite conclusion practiced by the C. I. Arb., that is, “that no mandatory systems of the professional development, education and training of the arbitrators should be implemented both on international and national levels. Dr. Abdul Hamid El-Ahbab presented training in rules of procedure and evidence in common and civil law and Dr. Amal El-Faraj, a legal consultant with The Law Firm of Salah Al-Hejailan and representing The Euro-Arab Arbitration System, which was established in 1981 by eight (now there are ten) Euro-Arab Chambers of Commerce to introduce the concept and practice of arbitration in the modern Arab world, talked about training in other specialized areas.

In the ensuing open discussion Mr. Geoffrey Hawker pointed out that professional societies in specialized areas to which arbitrators may belong due to their primary profession, (to name a few, engineering, surveying and law), may also require continuing professional development through attendance at training sessions. A multi-approach system of continuing professional development is particularly attractive, not least due to the flexibility and efficiency such a system renders to arbitrators with hectic schedules, especially if the different professional bodies mutually respect and recognize each other’s training programmes. At the international level this could be coordinated through IFCAI or even through agreements of cooperation between international arbitration centres, whereby institutions exchange pertinent information for their mutual well being and development.

The afternoon of the 15th looked at Qualifications and Standards, albeit very briefly due to time constraints, and was chaired by Mr. Yousif Zainal. Ms. Karen Gough directed the attention of the audience to qualifications and standards of arbitrators and Mr. Charles Molincaux afterwards directed the topic to the role of arbitration institutions.

The G.C.C. Commercial Arbitration Centre greatly appreciates the individuals’ and institutions’ sincere dedication and wholehearted contribution to explore in such depth the vast range of issues involved in this seminar. You have given a deep well of knowledge and insight from which we will and other may draw for the universal advancement of arbitration and alternative dispute resolution. Indeed, the next day both the Crown Prince, H.H. Sheikh Hamad Bin Isa Al Khalifa, and the Minister of Commerce H. E. Mr. Ali Saleh Al Saleh, received the speakers and officials of the Centre to inquire further about the subject of the conference and to express support through various means, including professional training, for international arbitration in Bahrain. It was a great honour that the Crown Prince conveyed to his audience his personal interest in arbitration and the Centre.

The G.C.C. Commercial Arbitration Centre is especially grateful for the very generous support of its sponsors, without whose help this seminar would not have been possible. The Main sponsors were BATELCO, GULF AIR AND THE BAHRAIN PROMOTIONS AND MARKETING BOARD; and the sponsors were ARAB BANK plc, ABDULLAH & MAFOUZ INTERNATIONAL LAW FIRM.

Dr. Husain M. Al Baharna gained a Doctorate in Public International Law from the University of Cambridge and is Barrister-at-Law of Lincoln’s Inn (London).

His book on “British Extra-Territorial Jurisdiction in the Gulf 1913 – 1971” comprises of nine chapters, which reviews the evolution of political institutions in the Gulf countries and describes their judicial status in international relations. The book demonstrates, in general, the impact of the Indian-British judicial system on the evolution of the judicial and legal history of the Arab States of the Gulf formerly described as the British Protected States of the Gulf.
PROCEDURAL AND ETHICAL CONDUCT

Abridged extract of paper
By A A de Fina
Presented at the Conference on
Initial and Continuing Training and Qualifications and
Standards of International Arbitrators
Bahrain, 14 and 15 November 1998
(Authorities and references not provided)

1. Introduction

Whether or not parties will have confidence in arbitration depends upon the experience they or others have of the process.

Nearly all aspects of the arbitral process ultimately turn upon the capacity and ability of the arbitrator.

2. Role, Duties and Obligations of Institutions

2.1 General

Although there has been and continues to be criticism of institutional arbitrations, anecdotally the worldwide growth of international arbitration appears to be occurring at a much greater rate through institutional arbitrations rather than in ad hoc arbitrations.

Institutions are able to incorporate developments in the law of arbitration and to continuously refine and modify their rules and procedures to meet requirements of disputants generally. Institutions are also able to influence and be influenced by the knowledge and experience of other institutions to achieve a degree of harmonization of some fundamental aspects of international arbitration as expressed through institutional rules.

Harmonization provides some degree of universality such that disputing parties will not be faced with radically differing procedures wherever in the world and under what rules they choose to arbitrate.

2.2 Ad hoc arbitrations

The advocates of ad hoc arbitrations propose that these arbitrations are more economical in terms of time and money and can be tailored to meet the special requirements of each particular dispute. For the most part this would appear to ignore the reality that when a dispute or difference arises disputing parties will rarely agree anything and the likelihood of the parties agreeing to an arbitration to resolve disputes is not great.

2.3 Institutional Arbitration

The great benefit of institutions, particularly those of long standing, is that their rules are tailored in the light of experience over decades of use and involving, in some cases, thousands of arbitration. For the most part, institutional rules are clear and unequivocal and default procedures well established so that delay or destruction of an arbitration cannot be easily be brought about.

2.4 Institutions as supporting domestic systems of justice

The existence of arbitral institutions is seen and applied in many jurisdictions as adding to and supporting domestic systems of justice.

The general position adopted by most courts is to require certainty in agreements to arbitrate before directing parties to arbitration.

The provisions of the New York Convention requiring a court of a contracting state to direct to arbitration an action before it in relation to which there does exist an agreement to arbitrate may only be avoided if the court finds that such agreement is null and void, inoperative or incapable of being performed.

2.5 Institutional advice

Institutions may also provide to disputants advice and guidance on suitable arbitrators by virtue of their own knowledge and experience or that of other arbitral institutions with which they have contact. This service may facilitate agreement between the parties on the formation of an arbitral tribunal. Some arbitral institutions under their rules maintain formal panels of prospective arbitrators for appointment under their rules.

2.6 Institutional administrative facilities

Effectively all institutional rules require requests for arbitration to be filed with that institution. Thereafter the institution, through its secretariat, is involved in the administrative procedures of notification, distribution and requests, which are required to be carried out within certain stated time limits. As well as the administrative provisions there may be requirement for substantive action, for example, where parties have not agreed an arbitrator or an arbitral tribunal, where there is default provision or power of appointment of a chairman or president of an arbitral tribunal and in respect of directions for deposits for security of fees, costs and expenses of both the arbitral tribunal and the institution. Institutional rules also generally provide for challenge to and replacement of arbitrators.

2.7 Institutional Panels

Where an arbitral institution maintains a panel from which arbitrators are required to be drawn for arbitrations conducted under its rules and where an institution maintains or publishes a list of potential arbitrators it is essential that persons on that list have the knowledge, experience, capacity and ability to properly conduct arbitrations.

Similarly, where institutions make nominations or appointments there exists a duty and an obligation upon the institution to ensure, as far as possible that the person nominated or appointed is appropriate for the particular arbitration.

Inappropriateness of appointment has been the subject of critical curial determination in a number of countries.

In establishing and publishing panels of arbitrators, an institution might be seen as holding out the persons on the panel as having capacity and ability in arbitration which may not exist, and the institution might then be exposed to legal action.
2.8 Institutional Training

Some institutions provide or require training in arbitration as a prerequisite for listing on panels or for nomination or appointment. Although the law of arbitration may be uniquely available in dedicated courses or available as part of a wider ranging course of study and qualification in many training institutes, schools or universities around the world, the general practice has been for arbitral institutions as part of their own function to conduct seminars, conferences or training for arbitrators or potential arbitrators.

2.9 Basic Duties and Obligations of Institutions

Essentially, the duties and obligations of arbitral institutions acting in the area of international arbitrations are:

a. To ensure that their rules or the rules under which they operate, whether acting as an appointing authority or otherwise, are consistent with the modern law and practice of international commercial arbitration;

b. That the institution has in place competent and efficient facilities for the administration of arbitration including the handling of documents and receipt, holding and accounting for monies deposited in escrow as security;

c. That where appointment, nomination, recommendation or holding out of persons suitable to act as arbitrators is practised then those persons are appropriately qualified and experienced to handle arbitration.

3. Role, Duties and Obligations of Arbitrators in ad hoc or Institutional proceedings

3.1 General

The role, duties and obligations of arbitrators in arbitral proceedings, whether institutional or ad hoc, may be simply stated as requiring the production of an award which is "final and enforceable".

Within the term "final and enforceable" are effectively encompassed all detailed aspects of the role, duties and obligations of arbitrators.

Insofar as certain duties may also be imposed upon arbitrators by the rules and governing law, whether substantive or procedural, arbitrators must be cognizant of and prepared to commit and submit to those duties. Additionally, an arbitrator has a duty to act with due care, due diligence and judicially. Some obligations may be seen to be as much "moral" obligations as imperatives of law.

3.2 Avoidance of Delay

Perhaps the major criticism of international commercial arbitration has been and remains what is perceived as inordinate delays in the conducting of an arbitration and the rendering of an award.

There is understandably in the context of commercial disputes a desire on the part of the parties (or at least the claimant) for an arbitration to be conducted expeditiously.

Such expedition must, of course, be tempered by, among other things, issues relating to the size and complexity of the dispute, and the obligation to treat the parties with equality and to ensure that each party is given a full opportunity of presenting its case.

In accepting appointment an arbitrator is now more than ever in an environment where expedition is expected and thus bound to ensure that the necessary time and involvement to meet the timetables is absolutely committed. It is not sufficient or proper to attempt to order proceedings to meet the obligations, desires or convenience of the tribunal or some of its members. It is the parties' needs that must be satisfied within the context of proper conduct.

3.3 Discretion

All institutional rules allow varying levels of exercise of discretion by the arbitral tribunal in various aspects of the conduct of an arbitration governed by those rules. The general effect of such provisions is to allow the tribunal to conduct an arbitration in whatever manner it considers appropriate, but this discretion is not unlimited and will be fettered by the governing substantial and procedural law.

3.4 Exercise of discretion

An arbitral tribunal's exercise of its discretion must be capable of withstanding scrutiny and must be lawful. An important discretionary power and a significant distinguishing feature between domestic arbitration in most jurisdictions and international arbitrations generally, is the power of an arbitral tribunal under most international rules and laws to determine its own jurisdiction. In such circumstances a decision of the tribunal in an international arbitration as to jurisdiction is ordinarily not of itself reviewable by a court. This is so even where the procedural law of the arbitration (as a domestic procedural law) either does not give such a power to the arbitral tribunal.

An arbitral tribunal, under most rules, has wide discretion to establish other important aspects of an arbitration in the absence of agreement by the parties on those aspects – for example,

- the place of arbitration or location of hearings; or
- to approve an agreed place of arbitration;
- the language of the arbitration;
- expansion of arbitration proceedings and/or admission of new claims;
- appoints experts.

Additionally, the tribunal may

- determine the applicable rules of law;
- correct clerical errors and/or to interpret the award;
- direct interim measures of protection

3.5 Duties and Obligations of Arbitrators in ad hoc arbitrations

In ad hoc arbitrations it is likely that an arbitrator will have imposed a greater burden than that which would ordinarily flow by the arbitrator's duties and obligations under institutional arbitration. Absent the existence of well-established, considered and tested rules, it may be that the requirements established by the parties for the ad hoc arbitrations are ill conceived, impractical or impossible to implement.

In an ad hoc arbitration there ordinarily exists a greater need on the part of the arbitrator to be knowledgeable in great detail in the law and practice of arbitration and the governing substantive and procedural laws. The arbitrator will not have the benefit of rules and must apply the law to establish procedures and conduct not otherwise defined.

The question arises whether in circumstances of uncertainty or prospective or actual challenge the arbitrator has an obligation to go on or to withdraw to avoid possible adverse
consequences. Ordinarily, if brought before a court, the arbitrator cannot rely upon the parties for support and will be required to make a decision whether to act in self protection or in the interests of the arbitration will all of the possible consequences either way.

3.6 Role of Party Appointed Arbitrators

Where the parties to a dispute are from differing cultural, legal and language backgrounds, determinations, directions or orders made by the tribunal in the course of proceedings may potentially be seen as or actually affect the manner in which a party conducts or intends to conduct its case even leading to loss of confidence in the tribunal.

The role of the party appointed arbitrator in these situations is to ensure that such decisions as are made and the manner and terms of the conveyance to the parties are such that without detracting in any way from their intended effect such directions or orders do not offend to improperly prejudice a party.

3.7 Duty of Disclosure

Arbitrators are required, both as a general principle under particular rules to disclose any conflict or impediment that might exist in them proceeding as arbitrator. Where required by the rules governing an arbitration an arbitrator or a potential arbitrator shall make a statement of independence even if such statement is qualified. Even if there is no obligation under the governing rules to do so, failure to disclose an interest or impediment will ordinarily constitute misconduct and give rise to an ineffectual award.

4. Expert & Lay Witness

4.1 General

The three major legal systems of the world, common law, civil code and Islamic law, all provide for evidence as to facts to be given by lay witnesses in their processes for formal resolution of dispute but with varying degree of facility for evidence as to facts to be given by lay witnesses.

The distinction between lay and expert witnesses is generally two-fold but must be considered within the context of the rules governing an arbitration and the governing procedural and substantive laws. The particular distinction drawn in the common law between an expert witness and a lay witness may be simply stated that whilst an expert witness can give evidence as to facts in exactly the same manner and context as a lay witness, the expert witness is allowed to give opinion evidence on the basis of observed facts, advised facts or in hypothetical situations.

4.2 Tribunal appointed experts

The rules of many arbitral institutions contemplate and allow for a tribunal itself to appoint one or more independent experts to assist the tribunal.

It would appear that traditionally the need for experts to assist the tribunal in major part arises because almost all arbitral tribunals are formed from the ranks of lawyers.

An advantage of arbitration is that it provides the facility for the creation of specialist tribunals having a multiplicity of areas of expertise.

The now widely accepted and common practice of parties to adduce from expert witnesses called in their own case and the unfortunate but understandable desire of parties to match Each expert witness of the other party with one of their own, means that proceedings have brought before them considerable expertise from witnesses. If the tribunal has the capacity to properly deal with these expert witnesses and understand and apply the evidence so advanced, the need for a tribunal appointed expert may be reduced to a significant extent.

4.3 Dealing with Expert Witnesses

Other than allowing an expert to express opinions and the requirement of qualification to give such evidence as being an expert in the subject matter of the evidence given, the tribunal is generally not required to treat lay and expert witnesses differently. Depending upon the nature of the arbitration the tribunal may of itself act inquisitorial in respect of both lay and expert witnesses even if governed by a legal system, which is adversarial.

5. Two Party or Multi Party Disputes

5.1 General

Arbitration is created only by the agreement of the parties. Where there is no agreement there can be no arbitration. Ordinarily there are only two parties to such an agreement and as a consequence the arbitration of any dispute arising is limited to those parties.

Often, in many commercial transactions, particularly in the engineering and construction industry, there will be a large number of interdependent and interrelent activities all being carried out under different contracts between, for example, the proprietor and the head contractor, the head contract and sub-contractors, and sub-contractors and sub-sub-contractors. The cause of a dispute arising between a proprietor and the head contractor may very well flow from acts or omissions of a subcontractor or sub-sub-contractor. Without a procedure to link these disputes together such as exists in curial proceedings under the municipal law of most nation states arbitration is seen as unsatisfactory.

The two most recently modernized rules of major arbitral institutions, those of the ICC and LCIA, each make express provision for multi-party arbitrations.

In the rules that do make express reference to multiple parties and where a dispute is to be referred to a tribunal of three arbitrators rather than a sole arbitrator, the ICC rules require that the multiple claimants jointly, and the multiple respondents jointly, shall each nominate an arbitrator. Where this does not occur and where there is no agreement on the method of constitution of the arbitral tribunal the ICC Court of Arbitration appoints all of the members of the tribunal including the nomination of one of the members so appointed to act as chairman.

The effect of the provisions of the LCIA rules in respect of arbitration involving three or more parties is similar to that of the ICC rules, however the LCIA rules negate a provision that may exist in an arbitration agreement entitling each party to nominate an arbitrator.

5.2 Tribunals of more than 3 arbitrators

There is no reason why an arbitral tribunal could not be made up of more than three arbitrators in appropriate circumstances. It may be that in major disputes involving multiple parties a tribunal of more than three arbitrators may be constituted. However, in such circumstances, given the general convention of requiring majority awards any such tribunal should appropriately be formed of an uneven number of arbitrators.
5.3 Consolidation of Arbitrations

The consolidation of two or more arbitrations relating to the
same subject matter is advanced as overcoming the
disadvantage of privity of contract allowing arbitration
between only those parties which agree to arbitration as the
means of resolving their dispute, but where there are other
parties under different contractual relationships.

An arbitral tribunal or differing arbitral tribunals have no
power to consolidate proceedings absent agreement of all the
drty.

6. Enforcement and Consequences of Misconduct

6.1 General

Provisions for recognition and enforcement under the New
York Convention and the UNCITRAL Model Law are similar.
Both provide for setting aside, recognition and enforcement,
and ground for refusing recognition and enforcement. A
particular provision of the UNCITRAL Model Law is that
there is no restriction on the country in which an arbitral
award is made for the purposes of recognition and
enforcement.

Additionally, under the provisions of the New York
Convention recognition and enforcement can be denied by a
national court where the effect of reservations open to a
contracting party to the Convention have been adopted and
apply in the particular case in which enforcement is sought.

Under the New York Convention there are essentially five
grounds, which may be raised by a party objecting to
recognition. These are:

a. Incapacity of the parties or invalidity of the arbitration
   agreement;

b. Denial of a fair hearing;

c. A successive authority or lack of jurisdiction;

d. Procedural irregularities; and

e. That the award is invalid.

Additionally, there are two grounds that may be raised by a
court on its own motion when an application for recognition
or enforcement is made before it. These are

i. Arbitrability, that is that the subject matter of the
difference is not capable of settlement by arbitration
under the law of that country; and

ii. Public policy, that is that the recognition or
   enforcement of the award would be contrary to public
   policy in that country.

6.2 Misconduct by a tribunal

By consideration of the available grounds for denying
recognition and enforcement under the international
conventions on international private law conduct by an arbitral
tribunal that gives rise to establishing that the tribunal has
denied the party a fair hearing, has exercised excessive
authority, has proceeded without having jurisdiction or has
entered into areas where it had no jurisdiction or that it
did conduct the proceedings in such a manner as to create
irregularities may give rise to an unenforceable award.

The nature and character of arbitration is such that conduct
which in many other areas of professional activity may
amount to mistake or negligence, can be categorized as
misconduct. For example, refusing to admit certain evidence,
unilateral contact with a party, delay in delivering an award,
incorrectly applying the law, denying procedural fairness,
or the exhibiting of bias.

7. Ethical Considerations

7.1 General

To some extent ethics and misconduct are aspects of
arbitration, which are interrelated and interdependent. Ethics
are also not necessarily able to be precisely and expansively
defined. Conduct which might be ethical in one set of
circumstances may be quite unethical in others.

A breach of ethics might not itself constitute misconduct to
the extent of affecting the outcome of an arbitration, but will
almost certainly affect the standing and reputation of an
arbiter.

Ethics are as much a reflection of cultural and traditional
values as they are of perception. It is therefore quite possible
that identical conduct by an arbitral tribunal governed and
operating under one set of cultural and legal systems may be
acceptable when like conduct under another set of cultural and
legal systems might be deemed inappropriate.

7.2 Party appointed arbitrators

Perhaps the most significant area of controversy in relation to
ethics is that of permissible conduct of a party appointed
arbiter.

A party appointed arbitrator is expected by the appointing
party to fulfill a role of representing the interests of that party
but that can only be so to the extent that independence and
impartiality of the arbitrator is not compromised.

A party to a transnational dispute presenting its case before a
tribunal which is of itself composed of persons differing
cultural, legal and language background may not have legitimate
cause for concern that its contentions and arguments might not
be fully understood or appreciated.

If there is clear bias or lack of impartiality and independence
on the part of a party appointed arbitrator, which cannot be
negated or corrected then there are well established and
positive provisions for challenge and removal which must be
applied.

The difficulty is in what constitute “neutral” and “non-
neutral” behaviour. Even if a non-neutral arbitrator is
perceived or supposed to predisposed towards his appointing
party, in the international commercial arbitration world today
where the non-neutral is an arbitrator of standing and
reputation that arbitrator will not allow pre-disposition as a
reality, and in fact may go to great pains to ensure that the fact
of their appointment by one party will not effect or be seen to
effect the bringing of a judicial and impartial mind to the
matters before the tribunal. Perhaps even to over-
compensation.

7.3 Codes of Ethics

Some organizations have published Codes of Ethics for
guidance of arbitrators or prospective arbitrators.

The International Bar Association, the Chamber of National
and International Arbitration of Milan, and the American
Arbitration Association in conjunction with the American Bar
Association, have all published codes which do not form part of
any governing rules but nevertheless provide excellent
guidance to avoid circumstances which might otherwise
constitute misconduct and possibly give rise to a void or
unenforceable arbitral award, or serious consequences for an
arbiter.
However, the Chamber of National and International Arbitration of Milan "Ethics for Arbitrators" requires that in accepting appointment as arbitrator by the Chamber the arbitrator is bound to act according to the Ethics and provides that if an arbitrator breaches the code (of Ethics) that arbitrator may be replaced or if not replaced in order not to cause delay to arbitral proceedings, to refuse to appoint or confirm that person as an arbitrator in other arbitral proceedings.

To support the essential tenets the American Arbitration Association and American Bar Association Joint Code provides considerable detailed explanation and guidance.

The tenets are:
Canon I: An Arbitrator should uphold the integrity and fairness of the arbitration process.
Canon II: An Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.
Canon III: An arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety.
Canon IV: An arbitrator should conduct the proceedings fairly and diligently.

Canon V: An arbitrator should make decisions in a just, independent and deliberate manner.
Canon IV: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

8. CONCLUSION

The obligations of procedural and ethical conduct in and of arbitration are an extremely complex and to a significant extent undefinable matrix which depend upon the exact circumstance of each particular case.

How and when an arbitrator or an institution deals with procedural and ethical obligations ultimately reduces to knowledge, experience and ability or lack of these.

Training and qualification of arbitrators, potential arbitrators, administrators of institutions and lawyers practicing in the area of international arbitration is essential if this means of dispute resolution is to be both useful and to be widely adopted.

It is institutions that have the principal power and role in directing the future and it is institutions that must take the initiative.

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G.C.C. COMMERCIAL ARBITRATION CENTRE HOSTS A WORLD FIRST

The world’s first ever arbitration seminar dealing solely with the training and qualifications of international arbitrators was held in Bahrain on 14 and 15 November 1998.

The seminar drew upon eminent speakers from around the world and was attended by delegates from the Gulf States, Africa, Asia, Europe and the United Kingdom.

The speakers provided a detailed, critical and constructive programme on the main theme of the training and qualification of arbitrators but expanded into relevant issues relating particularly to the role of arbitral institutions and of arbitrator conduct and ethics.

A measure of the success and interest of participants in a seminar is often reflected by participant involvement in questions to speakers or panels and general commentary from the floor. The lively interest, the probing questions and the learned commentary from all participants reflected the great success of this seminar.

Speakers of the eminence of Mr. Harold Crowter, chairman of the Chartered Institute of Arbitrators of the United Kingdom, and Ms. Karen Gough, Vice-President of the Chartered Institute, Mr. Charles Molineaux of the American Arbitration Association, Justice Dominique Hascher now of the Cour de Cassation in Paris but for many years General Counsel and Vice Secretary General of the ICC Court of International Arbitration in Paris, Dr. Abdul Hamid El Ahday, President of the Azab Association for International Arbitration, Dr. Bohuslav Klein, President of the Arbitration Court of the Czech Republic, Mr. Ma’awia El Tahir El Naylor of Sudan, Mr. Richard Kreindler of Germany, together with Dr. Amal El Fazairy of Saudi Arabia provided a wide diversity of views, knowledge and experience.

Perhaps the most important general outcome of the seminar was the great commonality in thinking of the contributors from diverse areas of culture, tradition, language, legal system and faith which might otherwise be thought not to exist because of those very differences.

If proof was needed, this seminar established conclusively that in the international arbitration community there is a common purpose and a common aim to continually lift the standards of international commercial arbitration to better serve the international commercial community.

The GCC Commercial Arbitration Centre must be congratulated for its foresight and initiative in organizing this seminar which charts the way forward for the rest of the world in the fundamental requirement of providing transnational commercial dispute resolution processes of the highest quality and efficiency through ensuring competence, knowledge and ability in those people fundamental to the process – the arbitrators themselves.

A A de Fina
President
Court of International Arbitration
Australia.

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Approximately 200 participants attended this two-day seminar held at the Abu Dhabi Chamber of Commerce and Industry to discuss the use, development and investment aspects of arbitration in petroleum and other energy contracts. The event was opened by a speech from the patron, His Highness Sheikh Sultan bin Khalifa Al Nahyan, Chairman of the Court of the Crown Prince of Abu Dhabi, read by Mr. Mohammed Shabeeb Al Dhaheri, General Manager of the Abu Dhabi Chamber of Commerce and Industry. His Highness welcomed the speakers, participants and organizers and noted the importance of the seminar’s topic, first because the petroleum industry is the basis of nation’s and region’s economy and second because arbitration, nationally and internationally, is the best means of dispute resolution in the petroleum industry. H.H. Sheikh Al Nahyan pointed to fundamental issues, such as the choice of law, which would be discussed in the seminar and welcomes fora, such as this seminar, to develop and distribute information on arbitration for the awareness of people. Sheikh Sultan wished the seminar well in general and in proposing recommendations at the conclusion of two days’ discussions. The organizers, Mr. Auon Abdulla Al-Junaidi, General Manager of the Abu Dhabi Commercial Conciliation and Arbitration Centre, and Mr. Yousif Zainal, Secretary General of the GCC Commercial Arbitration Centre, also welcomed the speakers and audience to this important seminar. They expressed the importance of these meetings on specialized areas where practitioners and other experts would not otherwise have the opportunity to share ideas and experiences and encouraged all to lively participation. The seminar drew a large audience, mainly from the GCC countries, because the development and investment of energy sources is topical today, especially in context of the region’s natural gas reserves, and lessons have been and can be learnt from the region’s oil concession contracts.

His Highness Prince Dr. Bander Ben Salman Ben Mohammed Al-Saud, was the chairperson for the first day. H.H. Dr. Bandar in his opening address to the audience explained the importance of arbitration in solving disputes arising in oil and energy contracts, noting both the importance of the Middle East region as the largest source of oil for the world’s future needs and the importance of oil as the main revenue source for the GCC States. His Highness stressed that arbitration is acknowledged by all as one of the best ways to solve disputes adequately and peacefully and called upon all to utilize the region’s past experiences when shaping the future in this field.

The first two speakers set the historical background and present status of the issues involved in international and domestic arbitration in energy contracts. Dr. Badria Abdullah Al-Awadi spoke on the arbitration clause in petroleum contracts and the protection of international companies. Dr. Hussain M. Al-Baharna presented a paper on the arbitration clause of oil agreements between the governments of the Gulf region and foreign oil companies. Dr. Atef Suleiman’s presentation on arbitration in petroleum agreements looked at the strengths of arbitration procedures for dispute resolution generally, the adoption and development of arbitration clauses in Middle East oil concessions and specially referred to the experience of Abu Dhabi. One of the most contentious issues (foreign investors’ interests versus the host state’s economic, political and welfare interests) for both the speakers and the audience was expressed in the application, which necessarily included discussions on the limitations, of municipal and international law by international arbitral tribunals. After lengthy debate, one member of the audience strongly recommended that there should be a follow-up workshop on all the issues to be included in an arbitration clause based on the information provided by the speakers.

On the second day, Dr. Hussain Al Baharna chaired a panel of three speakers. Professor Thomas Waelder spoke on “Investment Arbitration under the Energy Charter Treaty from Dispute Settlement to Treaty Implementation”. His scholarly article and presentation examined the investment arbitration provisions of the Energy Charter Treaty within the Treaty’s general structure and objectives as well as its dispute settlement mechanism. Prof. Waelder’s paper had at least two purposes: first, it discussed a mechanism, the impact of which “is potentially very large and not yet fully explored or appreciated” and second, it might prompt discussion which “may help to appreciate the implication of choice between the major instruments of obtaining international economic law compliance—by investment arbitration against a state, by interstate arbitration espousing private investor claims, by an established and continuous supranational judiciary, by the traditional ‘soft procedures’ of diplomatic intervention and by direct application of international law obligations by national courts”. Dr. Moustafa Al-Sayed then presented his paper, “There is Nothing New Except What Has Been Forgotten: The Legal Nature and Applicable Law in Arbitration Involving Oil Contracts”. The last speaker, Mr. Charles Brown, reviewed recent developments to international arbitral procedures brought about by user need which have been assimilated into various methods of ADR (mediation, conciliation, mini trial, dispute resolution boards and adjudication) used independently or in conjunction with arbitration in his paper, “Arbitration and The Use of Adjudication Review Boards and Other Forms of Dispute Resolution”.

The G.C.C. Commercial Arbitration Centre and the Abu Dhabi Commercial Conciliation and Arbitration Centre appreciate the generous support of the Main Sponsor - Abu Dhabi Chamber of Commerce and Industry and the Co-Sponsors – Abu Dhabi National Oil Company, British Petroleum and Gulf Air, the official carrier of this event.
A Report on Recent Developments in International Arbitration in Lebanon

In the new Lebanese Code of Civil Procedure of 1983, there is a chapter devoted to international arbitration, comprising a reform which takes as its model the new French Code of Civil Procedure and adopts most of the latter's dispositions concerning such arbitration. The influence of French legal thinking is also to be seen in the distinction the former makes between internal arbitration on one hand and international arbitration on the other.

1. The Lebanese legislation for international arbitration lays down an objective criterion for defining the nature of such arbitration, considering thereby that international arbitration is any arbitration that involves the concerns of international commerce (article 809, al.1 of the Code of Lebanese Civil Procedure). The State and any bodies considered as moral persons from public sectors may have recourse to international arbitration to settle litigation arising from international commercial contracts to which they have committed themselves (article 809, al.2, of the Code of Lebanese Civil Procedure).

The whole question is of particular concern now that reconstruction in Lebanon is in full swing, with the Lebanese authorities concluding important agreements every year with international companies for carrying our major projects of infrastructure. In nearly all these contracts, the agreed means of settling disputes is the recourse to arbitration.

2. Of particular present importance is the ratification by the Lebanese State on 23rd April 1997, of the New York Convention of 10th June 1958 for the recognition and enforcement of foreign arbitral award.

3. Another new element is the amendment of Art.805 of the Code of Lebanese Civil Procedure passed on 20th June 1996, which came into effect on 12th December 1996. This amendment allows another means for obtaining the annulment of a decision of international arbitration given on appeal, namely to a higher court appeal (for "Cassation") as well as demanding a judgement stay of liable to execution.

The means of arbitration adopted are arbitration ad hoc, or institutionalized, or alternatively an adaptation of the rules of UNCITRAL.

It should be noted that the cases of appeal for annulment of a decision rendered by international arbitration are specifically limited to those laid down in article 817 of the New Code of Lebanese Civil Procedure. These are cases where the decision has been delivered without agreement on arbitration or on the basis of an agreement for arbitration which is null and void, or after expiry of the delay allowed for arbitrators, or has been delivered by arbitrators who have not been appointed in formity with the law, or has overstepped the limits of the mission fixed for the arbitrator, or has been delivered without due respect for the rights of the defence and for the regulations respecting public order.

4. The possibility of arbitration in Lebanon for cases otherwise coming under international arbitration is limited only by whatever concerns police regulations and public order and by what is covered in contracts for commercial representation.

This latter form of contract has given rise to lengthy controversy over the possibilities of submitting disputes where it is involved to arbitration. This discussion is to be explained by the fact that article 5 of Order in Council nº 34 dated 5th August 1967, lays down that despite any contrary agreement the law courts of the area where the commercial representative is operating are competent to consider cases arising from a contract of commercial representation. The question is whether the aforementioned article actually excludes agreement on arbitration over a case arising from a contract of commercial representation by reserving competence in such a matter uniquely to the courts of the district in which the commercial agent exercises his activity.

To begin with, a single judgement of the Court of Cassation admitted recourse to arbitration by the parties involved in a contract of representation (Civil Cassation, First Chamber, Judgement Nº 16 of 17th July, 1988). But this position was not subsequently confirmed by legal opinion, which considered that the clause for arbitration, like arbitration itself, was not applicable where commercial representation was concerned. (Beirut Court of First Instance, third Chamber, 16th June, 1993. Beirut Court of Appeal, first Chamber, 2nd September 1993).

This regulation also applies in international relations. It takes on the character of police law and public order when the representative exercises his activity in Lebanon. The aim of the Lebanese legislation is in fact to protect the commercial agent, who is considered to be the weaker party in relation to the firms he represents. The police laws are often laid down with the same intention in mind, particularly in the fields of labour contracts, contracts of consumption, and in this case of commercial representation.

In such cases the acceptance in Lebanon of decisions reached by international arbitration raises certain problems where contracts for commercial representation are involved.

5. A law recently published in the official gazette dated 12 November 1998 is going to encourage the use of arbitration in Lebanon because of the considerable reduction of the fees to be paid to the tribunals in order to obtain the mandate for execution and afterwards for the execution of the judgement in arbitration, whether internal or international.

This law nº 710 fixes a negligible fee of only LL seventy five thousand (50$) to be paid for obtaining the mandate for any judgement of a court of internal or international arbitration.

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USE OF ARBITRATION IN BANKING AND FINANCIAL SERVICES DISPUTES

A Paper Presented by Mr. David Wilson
Trowers & Hamlin – Sultanate of Oman

The purpose of this paper is to examine the circumstances in which arbitration can be a useful form of dispute resolution in the banking sector. Banking and arbitration are often regarded as two areas of activity which do not fit together very easily but there are situations where arbitration can be of interest to the banking community. In order to understand why arbitration has not been more widely used in the financial services sector, it is helpful to examine the different types of arbitration which are available and also to examine the elements of arbitration as this will help to illustrate the aspects of arbitration which can be useful.

A) Elements of Arbitration

1. What is arbitration?
Arbitration and mediation are terms, which are widely used. The main characteristic of arbitration is that it is a procedure whereby a private adjudication is made in relation to a commercial dispute by one or more arbitrators appointed by the parties who are in dispute. The crucial element of arbitration is that it is a private procedure where the parties involved have more control over how a dispute is resolved but it still involves an adjudication or decision made by an independent person or tribunal. Mediation is slightly different to the extent that the aim of a mediator is to try to bring the parties together so that they reach a compromise as between themselves.

2. What is needed for an arbitration?
Essentially what is needed for an arbitration is an agreement to arbitrate together with a dispute which falls within the terms of that arbitration agreement. An arbitration agreement can either be made after a dispute has arisen or can arise in terms of an arbitration clause in a commercial contract. That is the most common way in which a contract gives rise to an arbitration, although it is perfectly possible to have a separate agreement which deals specifically with arbitral arrangements. A dispute must be of a private nature – arbitration is not relevant to matters of criminal law or, generally, to matters arising in terms of central bank regulations or other forms of government regulation.

3. Commencing the arbitration
Generally speaking, an arbitration is started by one party giving notice to the other of the intention to arbitrate under the terms of the relevant arbitration agreement or clause. This notice will generally also trigger the establishment of the tribunal or a choice of an arbitrator. The initial notice can contain a proposal for a single arbitrator or alternatively a shortlist can be put forward and subsequent agreement reached between the parties. Where the arrangement contemplated in the arbitration agreement is a tribunal of three arbitrators, each party will generally nominate one arbitrator and the two so appointed then in turn agree on a third arbitrator, who is usually appointed to act as chairman. As an alternative, there can be agreement to request appointment of an arbitrator by a senior public official or a senior figure within a professional organization. For example, the Dubai Chamber of Commerce and Industry could be asked to select an arbitrator even if the parties have decided not to use the Chamber’s rules of arbitration and have instead agreed their own arrangements.

4. The arbitrator or tribunal
The parties to an arbitration are free to appoint anyone to be an arbitrator and the parties can therefore ensure that the arbitrator appointed is someone who has relevant expertise such as a construction engineer, insurance broker or a banker. Many judicial systems allow for reference of a case to an expert for appraisal but the use of arbitration allows the parties to have direct influence over the choice of an arbitrator rather than taking their luck with a list of enrolled experts maintained by a court or even the risk of a judge with no particular expertise in the relevant area deciding to deal with the case himself. Use of a tribunal offers the opportunity to bring together arbitrators from different areas of expertise, a banking dispute may well give rise to legal issues as well as banking issues and it may be useful to ensure that a lawyer is appointed as well as bankers.

5. Procedure
The main advantage of the arbitral procedure is the freedom, which it gives to the parties to decide how their disputes are to be resolved. The usual perceived benefit is the availability of a more informal procedure than may be required before a court. Beyond that, it is probably true to say that there is no standard arbitration procedure and anything is possible – from a simple adjudication on the basis of written submissions alone to a procedure which can involve full hearings and witness evidence. Where the case is something straightforward such as a simple non-payment on some form of debt instrument then there is scope for a very simple arbitration and I am aware of one adjudication which was made simply on the basis of written submissions by the bank and its borrower. Neither the bank nor the borrower saw each other’s submissions and the arbitrator was simply asked to rule on the basis of the two presentations which were made.

6. Award and costs
The final stage, whichever procedure has been adopted, is for the arbitrator or tribunal to issue an award and arbitrators generally have discretion to make an order as to arbitrators generally have discretion to make an order
to the costs involved. The cheaper the cost involved is often put forward as one of the advantages of an arbitration – that is more true in cases where a simplified procedure has been adopted.

7. Enforcement
The next stage is enforcement of the award and that is very much dependent upon the enforcement procedures which are available under the legal system where enforcement is required.

8. Continuing access to courts
One reason why bankers tend to have concerns over the use of arbitration is because there is sometimes a belief that once an arbitration process has been started, the bank loses the possibility of going to court for the purpose of obtaining interim attachments or other precautionary measures. That will often not be the case but again it is something which needs to be investigated before hand, as the position will vary much from one jurisdiction to another. You will find, however, that it will often be possible to obtain interim support from the courts even if an arbitration has been initiated.

B) Types of Arbitration

We had a brief discussion at the beginning of this paper as to the basic difference between arbitration and mediation and I would like to look in a little more detail at the different procedures that are available.

1. Ad hoc arbitrations
Ad hoc arbitrations are simply those, which follow a procedure, which has been developed entirely by the parties or alternatively left by them to be developed by the arbitrators. This can be a way of limiting administrative fees because there is no arbitral institution involved and also limiting arbitrator’s fees because an ad hoc arbitration is very easy to use as the basis for a quick and simple arbitral procedure. The speed and informality of an arbitration can depend upon the quality of the arbitrators. The other thing to bear in mind is that an ad hoc arbitration can be useful where the parties are agreed on the type of arbitration they want. On the other hand, where the parties do not agree and one party is clear in delaying proceedings, this can be much easier with an ad hoc arbitration. Where the arbitral rules of an institution are being used, there are usually ways of ensuring that the arbitration proceeds is not delayed unduly by one or other of the parties, usually by having the relevant institution take action to keep the proceedings moving.

2. Institutional arbitrations
Institutional arbitrations are those which are carried on in accordance with the arbitral rules of a public or private sector institution, such as the GCC Commercial Arbitration Centre or the Dubai Chamber of Commerce and Industry. Established international bodies include the International Chamber of Commerce, which has widely used rules of conciliation and arbitration which are implemented by the ICC Court of International Arbitration in Paris. The ICC’s location in Paris does not prevent arbitrations being held throughout the world under the ICC rules and I am currently involved as an arbitrator in one in Muscat. The

London Court of International Arbitration also has a well-established reputation. It was originally established in London in 1892 by the London Chamber of Commerce and the Corporation of the City London. Again, arbitrations under the rules of the LCIA take place in other countries.

Another body, which is based in London, is the Chartered Institute of Arbitrators, which tends to promote the arbitration rules of UNCITRAL (United Nations Commission on International Trade Law). As a general comment, the UNCITRAL Rules provide for a less regulated form of arbitration than the ICC rules: by comparison, ICC arbitration are very closely regulated, even down to the form of the awards. Oman has recently implemented a new arbitration law, which closely follows the UNCITRAL Model Law.

In addition to the kind of institutions mentioned, many countries also have provision for court supervised arbitrations, which can be worth looking at.

3. Mediation
I mention this again because the institutions mentioned above, such as the ICC and London Court of International Arbitration, also have conciliation rules that can assist with less regulated processes than full arbitrations.

4. International Centre for Settlement of Investment Disputes
One other institution, which is worth a mention, is ICSID, which exists in terms of a Convention signed in 1965. The purpose of this Convention is to allow overseas investors in member states to institute arbitral procedures against the government of the country in which they have invested. The Convention can be useful where international banks are lending to support government projects or projects, which enjoy some form of government support. The use of ICSID can be helpful in attracting international funding.

C) Uses of arbitration in a banking context

1. Confidentiality
One important aspect of court proceedings is that they are public. The idea that justice should be done and seen to be done is generally accepted. Where the parties wish to maintain confidentiality of their relationships, arbitration can offer important advantages. There will be many occasions where there is dispute between banker and a borrower in the context of an ongoing relationship, which neither party wishes to disrupt. Publicity concerning a dispute could be costly for both parties in terms of public perception as to what is actually going on. With privation arbitration, it should be possible to ensure that even if in fact there is an arbitration in progress it can be kept confidential.

2. Flexibility of procedure
This has been mentioned already but is an important and characteristic of arbitration. The parties can decide the form which evidence should take and could also have influence over when hearings are held. Arbitral tribunals could be convened and hearing conducted whenever the
parties agree, rather than having to wait weeks for the next court hearings. There are various tales of arbitration being initiated and conducted over the course of a weekend; obviously that is unusual in the real world but it does make an important point as to what can be achieved.

3. Access to expertise
Again, this point has been made but it can be particularly relevant in a banking context, particularly in relation to some of the more complex financial instruments which the international banking system now makes use of; or in relation to complex project financing. Even in simpler cases, there are often still major advantages to be had in using arbitrators with experience and expertise which is relevant to the nature of the dispute.

4. Neutrality
The point here is that there can be cases where one or other party to a transaction has reservations about submitting to the courts of the other party’s country. It is not necessarily because people have reason to expect a biased judgement – it can simply be because a bank is lending into a country which it has limited knowledge of.

The other advantage of picking a neutral location for an arbitration is that neither party has lost face by giving in to the other in terms of where disputes should be arbitrated. The use of a neutral jurisdiction is easier with arbitration than it is with court cases. If you agree to give the courts of a neutral country a jurisdiction then you must first take advice as to the laws of that jurisdiction. With arbitrations the arrangements remain a matter of contract (although there will still be the continuing question of whether an arbitral award in foreign jurisdiction can be enforced).

D) The reality of arbitration in the banking world
I would like to take a brief look at the event to which arbitration has been used in the banking sector. Arbitration has been widely used in the United States but it has not been quite so widely used in other countries.

1. The US experience
One reason which originally led bankers in America to use arbitration clauses was to try and get away from excessive jury awards and the kind of damaging publicity which can be a feature of the judicial system in the US. More recently, that has become less of a concern because there has been something of a reaction in America against the kind of awards which were becoming common at one stage in the 1980s and a lot of banks concentrated on improving customer service generally so that arbitration became simply one tool available in better management of customer expectations. That said, the experience which banks in America have had of arbitration has been very positive and has meant that many banks have continued to use arbitration clauses because of the perceived benefits which they have brought. The first bank to make wide use of arbitration was Bank of America which put binding arbitration clauses in all of its commercial documentation from 1986. A number of other banks followed suit although they all developed their own approaches depending upon the nature of their businesses and the different states in which they are active. In the early years the tendency was to use arbitration clauses in relation to commercial contracts but in July 1992 Bank of America adopted arbitration for use in relation to most of its retail business.

Obviously it takes time before banks actually become involved in arbitrations so there was a time lag between adoption of arbitration clauses and the use of arbitration as a real process in settling disputes; it was some time before banks started receiving back practical experience to tell them whether adopting arbitration clauses had actually been a good idea. Generally speaking the experience has been positive for the reasons which I highlighted in the previous part of the paper – essentially arbitration has offered a quicker, cheaper and more private way of settling disputes. That said, a common message, which has come through, is that there are far more problems created by a bad arbitration clause than no arbitration clause at all. This emphasizes the importance of taking the time to make a proper assessment of whether arbitration is actually going to be useful in relation to the particular business which you carry on and the particular jurisdictions where a bank is operating. An arbitration clause which is badly thought out (or just inappropriate) can be a disaster, particularly for banks, who are in the process of having account opening mandates signed in large numbers on a regular basis. A bank can end up being stuck with a bad arbitration clause for years afterwards in relation to thousands of customers.

There are other factors to be aware of in using arbitration clauses in the banking context. Experience in the US has shown that arbitration clauses can deter frivolous claims, partly because there is no useful publicity to be had in the context of an arbitration, but this certainly does not mean that a bank will never be liable. Arbitration simply offers one tool, which should form a part of a more general liability control policy, which should also include ongoing education of staff, improved approaches to customer relationships, etc. The simple fact is that, in the retail sector, most customer complaints can be handled with a sympathetic telephone call or a meeting with the manager. Wells Fargo Bank have taken the approach that they initially prefer to use a mediation process whereby the bank and its customers try to reach some form of compromise and they then fall back upon a binding arbitration clause if that compromise cannot be achieved.

One factor in the use of arbitration, which should not be overlooked, is the ability to enforce arbitration arrangements. The reason why arbitration has been popular in America may well have everything to do with the efficiency, reduced costs, swifter settlement of disputes, confidentiality, etc. but enforceability is the factor which underpins the arbitration process. A fundamental legal reason why arbitration had been popular in America is because none of the banks which have used arbitration clauses in their documents have had any real difficulties in having those arbitration clauses enforced and in having arbitration awards enforced.
2. Experience in other parts of the world

It has been acknowledged that arbitration in banking is much more rare outside America. The other legal system which is commonly used in international banking transactions is English law. Although arbitration has long been used under English law, it has not been widely used in the banking sector. That may change as a result of the new Arbitration Act which was introduced in 1996. In general terms, the effect of the Arbitration Act is to give the arbitrating parties more control over the arbitral process and to make it more difficult to go to court during that process. This is actually quite an important element in making arbitration work – if people see little difference between using an arbitration process on the one hand and going to court on the other then there may well be little perceived benefit in having an arbitration. The main worry would be that the advantages of speed and reduced costs are lost.

A common trait in banking circles is that if the subject matter is simple, it is not suited to arbitration. If a bank simply has a customer who has not repaid a loan then the assumption is that the issues are going to be straightforward and it is quicker and easier to go to court, get a judgement and enforce against the borrower. Whilst it is true that arbitration is useful in complex situations such as construction disputes, the lesson to draw is not that arbitration has no use in relation to banking – the lesson to draw is that what is needed is a simple arbitration process. The changes, which have been made in English law, may well assist in this by giving the parties greater freedom to make their own arrangements and by making it more difficult to sidestep those arrangements.

Coming closer home, a similar process can be seen in the Middle East. Bahrain, Dubai and Abu Dhabi have all established arbitration facilities and to some extent these developments have been prompted by a commercial need for a reasonably swift and effective dispute settlement process which avoids the difficulties and delays that can be experienced with court action.

In Bahrain, the arbitration centre has been established under the auspicious of the GCC; in the UAE this has been done through the chambers of commerce and industry. The same trend towards enhancing the arbitration process by giving control to the parties can also be seen in Oman where a new arbitration law was put in place early last year. The Oman law is closely modeled on the UNCITRAL tends to promote a less regulated process, which offers more flexibility in developing an arbitration process, which actually suits your business needs.

As a closing comment, there are perfectly useful arbitral bodies and arbitral rules available in the Gulf which are well worth examining for use in relation to banking, but is vitally important to make sure that any arbitration clause which is being used is tailored to the commercial needs of the relevant business. The kind of arbitration which is appropriate in a dispute over a deposit is going to be a much simpler and quicker arbitration than the kind of arbitration process which is appropriate in the context of a major project financing which has many complex and interconnected agreements. Arbitration does have benefits to offer the banking sector, but is important to assess the options, which are available in order to make sure that these benefits are realized.

The acceptance of the contracting parties, particularly in GCC States, in introducing and incorporating the arbitration clause of the Centre in their contracts is an important part of the arbitration process. We think that so far there is a good response to the efforts of the Centre to increase the number of contracts containing the Arbitration Clause of the Centre and the acceptance of this Clause by these parties means their clear recognition of the Centre’s jurisdiction in dealing with commercial disputes.

We are still looking forward for more response from the developing private sector, the public sector that dominates major projects and institutions either directly or indirectly, to benefit from the Centre’s mechanism and various programs and to consider it as the only competent authority in the GCC States that deals with regional and international commercial arbitration. The member Chambers of Commerce are urged to avoid duplication and work toward more coordination between the Centre and the arbitration and conciliation institutions of the Chamber of Commerce, so as to limit its work to local arbitration only and to encourage the GCC parties and GCC/foreign parties to refer to arbitration under the Centre’s umbrella in accordance with its Charter and Rules of Procedure.

The unification of all commercial arbitration rules in GCC States is a very important issue, and can be achieved either by issuing a unified law of commercial arbitration or by adopting the UN Model Law on Commercial Arbitration, as well as approving the New York Convention of 1985 on the Recognition and Enforcement of Foreign Awards.

With regard to the resolution of disputes arising out of the Unified Economic Agreement and its Implementing Orders, it would be better to approve the Centre as a jurisdictional authority by replacing the old mechanisms with the Centre’s mechanism when dealing with commercial exchange cases between GCC States.

Additional, full effort is required from all concerned authorities in particular member Chambers, executive authorities in Member States, the Secretariat of the Centre, the Secretariat of the GCC States, Chambers Federation, Professional Societies in the GCC States e.g. Lawyers, Engineers and Chartered Accountants etc) in order to accelerate the role of the Centre and to strengthen the rapport between the Centre and the requirements of the different economical sectors of the commercial services provided by the Centre.

Yousif Zainal
Secretary General.
NEW PUBLICATIONS 98-99

1. November seminar booklet & Papers presented

2. Directory of Law Firms of the GCC States

LEGAL PUBLICATIONS

3. The Convention on Enforcement of Judgements, Delegations & Judicial Notices in the GCC States

4. Law, Regulations and by laws of Arbitration and Conciliation in the GCC Countries An Inter-Comparative Study – By Dr. Mohideen Ismail Alameddin

NOVEMBER SEMINAR BOOKLET & PAPERS PRESENTED: The GCC Commercial Arbitration Centre organized a seminar on Training, Qualifications and Standards of International Arbitrators on the 14th & 15th of November 1998 in Manama – Bahrain. Around 10 arbitration institutions from all over the world actively participated and contributed a great deal to the success of this event. A booklet was published by the Centre commemorating this seminar in which a biographical description of the speaker, a background description of the institution represented by him and a brief synopsis of his paper was compiled along with the advertisements received from various companies as a token of supporting the Centre in its activities. This booklet is available at the Centre, free of cost for those interested but could not attend and also for those who would like to know more about this event in detail. The papers presented by the speakers along with the videocassettes (3 nos. for a 4-hour duration each) recorded live during this seminar are available at the Centre for the following rates:

<table>
<thead>
<tr>
<th>Category</th>
<th>Price</th>
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<tr>
<td>Members on the Centre’s panel</td>
<td>BD 20/-</td>
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<tr>
<td>Non-members</td>
<td>BD 30/-</td>
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<tr>
<td>Institutions</td>
<td>BD 40/-</td>
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Postage charges would be as follows: BD 10 for Kuwait, Qatar, Oman, Bahrain, U.A.E and BD 20/- for Saudi Arabia and other countries.

DIRECTORY OF LAW FIRMS IN THE GCC STATES: This is the second call for applications requesting enlistment in the Directory of Law firms of the GCC States. Those interested in enlisting themselves in this directory are welcome to do so. We would also like to advise those who have already enlisted but due to unforeseen technical difficulties the Directory would be published in June 1999 instead of as announced earlier as December 1998. Therefore, the last date for receipt of applications forms has been extended to 31st March 1999. For further details as to the tariff and print area specifications kindly visit our Web Site at the following address: www.alnadeem.net/arbit or get in touch with us at P.O. Box 2338, Manama, Bahrain Tel: (973) 214800, 211827 Fax: (973) 214500 E-mail: arbit395@batelco.com.bh

LEGAL PUBLICATIONS:

THE CONVENTION ON ENFORCEMENT OF JUDGEMENTS, DELEGATIONS & JUDICIAL NOTICES IN THE GCC STATES

As a first step in achieving its goal in the spread of legal culture and assisting legal researchers and practitioners in providing them with the legal texts of the conventions adopted by the GCC Summit, the GCC Commercial Arbitration Centre has great pleasure in publishing a booklet on "The Convention on Enforcement of Judgements, Delegations and Judicial Notices in the GCC States". This publication compiled in 3 languages Arabic, English and French is available at the Centre for a nominal price of BD 3,000 + postage/courier charges extra. Order forms are available at the Centre for those who wish to procure copies of this publication. We are sure that this publication would be an invaluable asset in your library.

LAWS, REGULATIONS AND BY - LAWS OF ARBITRATION AND CONCiliation IN THE GCC COUNTRIES

An Inter-Comparative Study – BY DR. MOHIDEEN ISMAIL ALAMEDDIN.

The main objective of this book is to compile the arbitration texts of the 6 GCC States and categorizing them into two sections; the first section, listed in alphabetical order, deals with the texts pertaining to civil procedures or arbitration rules, relevant by-laws and ministerial orders and consists of an inter-comparative study of these laws.

The second section lists the arbitration institutions in the 6 countries of the GCC starting from the GCC Commercial Arbitration Centre which has been established by an international convention, and the other arbitration centres follow suit in alphabetical order, with special notice to the U.A.E. where many arbitration institutions exists and therefore all respective rules have been listed.
The report submitted by the Secretariat consisted of the events and activities, which the Centre had organized and participated during the interim period between the 14th BOD meeting and its 15th meeting. The regional activities included the events conducted by the Centre in Bahrain and in U.A.E., and the international activities in which the Secretary General actively participated representing the Centre was highlighted by the Secretary General in his report. The report also included a paragraph on the expansion of the number of legal contracts, which incorporated the arbitration rules of the Centre between GCC parties, and between GCC and foreign parties.

The Board comprehended the efforts made by the Centre and congratulated it on the steady growth of its activities. It appreciated the interaction of some economical sectors with the Centre's efforts to increase the number of contracts which incorporated the Centre’s standard arbitration clause concluded between two parties of the GCC or between GCC Arab and foreign parties which eventually would lead to recourse to the Centre thus activating the role of the Centre to a greater extent.

The Board also emphasized the need to enhance and strengthen the Centre’s efforts for establishing stronger ties with the members of the Chambers of Commerce in the GCC States by organizing joint activities. It also stressed the need for the members of the Chambers and fellows to take advantage of the arbitration services provided by the Centre and urged them to incorporate the standard arbitration clause in their contracts.

The other vital point, which was stressed on by the Board, was that it directed the Secretariat to organize meetings with eminent law firms, GCC companies as well as with financial institutions. This could be achieved either during the course of the Board meetings or separately through coordination between the Secretary General of the Centre and the Board member of the concerned State of the GCC in order to enlighten them on the role and objectives of the Centre, its mechanism and what the Centre could offer to these entities in the form of its arbitration services. The Board also emphasized on the need of active interaction for the development of establishing stronger ties between the Arab-Non Arab chambers of commerce in order to draw their attention to the Centre’s role and its activities.

With regard to the Commercial Fraud Commission established in the GCC, the Board emphasized the need for more co-operation with the GCC Federation of Chambers in Dammam and expressed the willingness of the Centre to organize a seminar on Commercial Fraud, which was to be scheduled for the next year.

This seminar was to draw upon the significance of this subject in the region and to stress on its co-relation with the economical sector in the GCC States, with special reference made to its influence on the economy of these States.

The Board reviewed the financial report and memorandum submitted to it by the Secretariat with regard to the cost pertaining to arbitration procedures of the Centre. It also analyzed the internal financial regulations of the Centre as well as the initial presentation of the budget for the year 1999. The Board appreciated and expressed its gratitude for the continued support extended to the Centre by the Chambers of Commerce of the GCC States both morally and financially.

In its policy to expand its functions both regionally and internationally, the Board approved of the proposed Agreement of Co-operation between the Centre and the Yemen Centre for Conciliation and Arbitration and with the WIPO Arbitration Centre. The Board also approved the applications presented before it for the registration on the Centre’s panel to 195. The Secretary General also advised the Board of the increase in the number of arbitrators registered on the Centre’s Panel to 513.

Consecutive meetings were held by the members of the Board and the Secretary General with HE Mohammed Bin Ali Bin Nasser Al Alawi, Minister of State for Legal Affairs, Oman, HE Mr. Salim Al Khalili, chairman of the Oman Chamber of Commerce and Industry and with HE Mr. Humood Al Habshi, the Undersecretary of the Ministry of National Economy. In these meetings the representatives of the GCC aimed at thoroughly explaining and presenting the role of the Centre as a regional machinery to resolve commercial disputes as well as to throw light on the activities being conducted by the Centre. The Board also discussed appropriate means and ways available with the executive authorities in the member states of the GCC as well as with the Oman Chamber of Commerce and Industry to receive more support to conciliate its rules and also warmly encouraged and urged the parties concerned to incorporate the standard arbitration clause of the Centre in their contracts concluded with other parties in order to increase the number of these contracts.

The Board expressed its willingness to coordinate with the concerned ministries as well as with the member chambers in order to promote the work of the Centre and also to reinforce the idea of arbitration to be more consolidated as an effective measure to resolve commercial disputes. The available media and publicity was to be made use of effectively to spread the notion of just arbitration.

It is expected that the next Board meeting of the Centre would be held in the U.A.E. as the leadership is to be interchanged and Chairmanship transferred to the representative of the Union Chamber of Commerce and Industry of the U.A.E. this meeting is scheduled to be held early next year in accordance with the GCC rules.
In view of establishing stronger ties with other international arbitration institutions, the Secretariat of the GCC Commercial Arbitration Centre proposes to enter into agreements of cooperation with around 7 arbitration institutions from around the world.

This agreement with the WIPO Arbitration and Mediation Centre was approved by the Board in its 14th meeting and signed by the Secretary General of the GCC Commercial Arbitration Centre on the 4th of December 1998. This agreement reads as follows:

This Agreement is made between

COOPERATION AGREEMENT

The WIPO Arbitration and Mediation Centre
World Intellectual Property Organization
Geneva
Switzerland

and

The Gulf Cooperation Council
Commercial Arbitration Centre
Manama – Bahrain

Whereas,

A) The World Intellectual Property Organization (WIPO) is an intergovernmental organization and a specialized agency of the United Nations system of organizations with its headquarters located in Geneva, Switzerland, established to promote the protection of intellectual property throughout the world.

B) The WIPO Arbitration and Mediation Centre was established in 1994 as an administrative unit of the International Bureau of the World Intellectual Property Organization to provide services for the resolution of international commercial disputes involving intellectual property, in particular by administering dispute resolution procedures under the WIPO Rules for Mediation, Arbitration and Expedited Arbitration, as well as online procedures for the resolution of Internet domain name disputes.

C) The Gulf Cooperation Council Commercial Arbitration Centre was established by the leaders of the Gulf Cooperation Council for the Arab States of the Gulf (GCC) when the Charter of the Centre was adopted by the GCC Supreme Council during the 14th Summit in December 1993 in Riyadh, Saudi Arabia. In March 1995 the Centre had become fully functional and ready to fulfill its duties as an independent body having a separate juristic entity with its headquarters situated in Manama - Bahrain. The centre is empowered to examine commercial disputes arising between GCC nationals, or between them and others, and also administer commercial disputes arising from implementing the provisions of the GCC Unified Economic Agreement and the Resolutions contained therein if the parties agree in a written contract or in a subsequent agreement on arbitration within the framework of the Centre.

D) The Parties wish to promote alternative dispute resolution procedures for the settlement of international commercial disputes, in particular those involving intellectual property rights, as neutral dispute settlement mechanisms that are responsive to the needs and rapid pace of international trade and its evolving interdependent environment.

E) The Parties desire to disseminate information on the use of alternative dispute resolution procedures to contribute to a better understanding and accessibility of mediation and arbitration.

F) The Parties recognize the need for an increased awareness of the importance of intellectual property protection for the creation of an attractive framework to encourage foreign investment and transfer of technology.

G) The Parties wish to cooperate in the promotion of their common objectives.

Now the Parties agree as follows: