Message from the Chairman

The significance of the 19th BOD meeting held in Riyadh recently could be attributed solely to the meetings held with their Excellencies, the Saudian Ministers of Justice, Industry and Electricity, and Information as well as with the Secretary General of the GCC whom we had the honour and privilege to meet.

The focus of these meetings is reflected in the subjects that were put forth for discussion with their Excellencies. It was indeed a golden opportunity for the BOD members to discuss relevant matters directly with their Excellencies who had been assigned to implement the decisions adopted by the GCC Leaders which included the decision on the establishment of the GCC Commercial Arbitration Centre as well as other subsequent decisions pertaining to activate and consolidate economic cooperation.

A REPORT FROM THE BOARD AT ITS 19TH MEETING

The 19th meeting of the BOD of the Centre was convened in Riyadh – the Capital of Arab Culture and the headquarters of the Chairman of the current session of the Board of Directors from 12-14 February 2000.

This meeting could be categorized into two sections. The first part of the meeting held on 12th & 13th were discussions with their Excellencies the Minister of Industry and Electricity, the Minister of Justice and the Minister of Information on the one hand and those held with the Secretary General of the GCC on the other.

These discussions concentrated on establishing and further strengthening ties and business relationships.

CENTRE COMMEMORATES 5 YEARS OF ITS FORMATION

The Centre commemorates 5 years since its formation. The Secretary General of the Centre, Mr. Yousif Zainal, Ms. A.A. de Arco, President of the Court of International Arbitration - Australia and Mr. Richard Kneiller, Partner, Jonesday, Rives & Pogue take pleasure in conveying their message to readers of the Centre's Bulletin.

Mr. Yousif Zainal
A seminar on Disputes Resolution in Stock Exchange and Investment was held at the premises of the Oman Chamber of Commerce and Industry on 30th & 31st January 2000. This event was a joint effort of the G.C.C. Commercial Arbitration Centre, the Oman Stock Exchange and the Oman Chamber of Commerce and Industry.

The seminar was held under the auspices of H.E. Mr. Muhammad Bin Ali Bin Nasser Al Alawi, Minister of Legal Affairs. Seven speakers addressed various issues currently being faced by those in the field of Securities Industry and Investment in the region and at the international level. Papers were presented in both Arabic and English with simultaneous translation.

Registration were open from 8:00 to 9:00 on the first day followed by the opening ceremony which was addressed by the Centre's Secretary General, by a representative of the Oman Stock Exchange and a representative from the Oman Chamber of Commerce and Industry. The inaugural speech delivered by H.E. of H.E. Mr. Muhammad Bin Ali Bin Nasser Al Alawi, was very educative and provided a guideline to the participants of this event.

The main focus of this event was to highlight on the growing importance of the financial sector in the GCC States and the development of its roles in trade and investment, after the establishment and expansion of the Stock Exchange Markets with the increase in the volume of investments in the region, which called for a closer study to the settlement of disputes in this sector.

Experience has shown that arbitration is the best means for settlement of securities disputes. However, other alternative dispute settlement mechanisms, such as mediation, conciliation and other forms of ADR should also be considered by the merging stock markets, to complement arbitration and enhance their dispute resolution process.

The seminar was divided into four sessions, each session consisting of a panel of three, which included a chairperson and two speakers. Open discussions were held at the end of each session in order to enable the participants to ask questions and actively interact with the speakers.

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The following recommendations were made at the end of this seminar:

- The emerging markets should introduce reforms to their legislations in response to the various developments taking place in the region and at the international level in order to play a leading role in shaping the national economy of their respective countries, to face the challenges of the third Millennium and keep pace with the relentless steps of globalization.

- The exchanges in-house dispute resolution forums should, through legal reforms develop their capabilities, upgrade the standards and quality of their services, acquire a competitive edge and be in a position to provide fair and efficient dispute resolution services in accordance with the requirements of international recognized principles of just trials and fair dispensation of justice.

- As far as international disputes between brokers and their customers are concerned, arbitration should be conducted by arbitrators appointed by the parties not exclusively on the lists of arbitrators established by arbitration centres or institutions, and the venue of the arbitration should not be necessarily in the country of the concerned broker.

- Take particular account of the disputes that are likely to arise in financial services under the WTO, especially with regard to schedules of commitments and prudential measures.

- Recognize the overall satisfactory character of the dispute settlement mechanism under the WTO, while noting its possible shortcomings in matters of retaliation by small country against a major country, and call therefore on member countries to suggest means of making retaliation more effective for developing countries.

- The process of dispute resolution mechanism depends on the type of relationships, the policy consideration and interests at stake.

We would like to thank the Oman Chamber of Commerce and the Sultanate of Oman Market Authority for sponsoring and organizing this event jointly with us. Our appreciation and gratitude is extended to H. E. The Minister of Legal Affairs for his kind patronage.

Sincere thanks are also warmly extended to the Capital Market Authority and most of all, to all our speakers who have contributed a great deal to the success of this seminar.
21st of March 1995 witnessed the establishment of the GCC Commercial Arbitration Centre which was officially declared open during a press conference held at the premises of the Bahrain Chamber of Commerce and Industry. The last five years contributed a great deal to the arena of commercial arbitration through a number of activities that were conducted to inculcate and promote arbitral awareness in the GCC States.

The Centre, after having fulfilled its administrative and organizational frameworks, took rapid measures towards acquainting the relevant bodies with its functions, role and mechanism through various sources of media in the GCC countries. On identifying a lack of arbitral awareness, we, at the Centre, have devoted our whole attention completely towards creating, inculcating and spreading a sound legal and arbitral awareness in the region.

The Centre’s education programme is a vital and integral part of this mission. The Centre has therefore dedicated itself to training its professionals in dispute resolution techniques and maintaining awareness of the latest developments globally by offering regional residents a variety of courses taught by renowned experts from introductory courses in arbitration to highly specialized technical courses. The Centre’s Bulletin, published every quarterly as well as other publications being circulated from time to time have also contributed a great deal to inculcating and creating arbitral awareness in the region.

The Centre is also one of the first institutions in the Gulf which has become a member of the Internet Society and established its website on the World Wide Web, thus joining the others in the field of technology and media.

The Centre has also undertaken all measures to attract well-qualified Arab and foreign members to be registered on the Centre’s panel of arbitrators and experts. These members are enlisted and offer assistance when called upon in addition to help parties in dispute to appoint the appropriate arbitrator or expert of their choice to deal with their cases.

The Centre has gained remarkable recognition at regional, Arab and international meetings. It has strengthened its ties with members Chambers of the Federation of the Chambers and the GCC Secretariat. The Centre works in a spirit of friendly constructive cooperation with several Arab and foreign arbitral centres and has also entered in mutual agreements of cooperation with some of the most renowned arbitral centres of the world.

Being recognized as a sound arbitral organization and having gained a good reputation in the international arena, the Centre was appointed as a member to the IFCAI Council and the Centre’s Secretary General Mr. Yousif Zainal was appointed as one of the two councillors to this Council.

The services provided by the Centre in the economical sectors of the GCC countries have been acknowledged to an extent and it is now up to these sectors to derive benefit from the arbitral services rendered by the Centre. Disputes arising in the economical arena could be recoursed to arbitration under the Centre’s supervision. Furthermore, facilities at the Centre could be availed to carry out an ad-hoc arbitration. These sectors could also benefit from the arbitrators and experts’ list available at the Centre along with its other services.

The establishment of the GCC Centre and the GCC Rules has been an admirable and commendable effort. The GCC Rules in particular in some respects offer solutions to thorny problems of arbitration not to be found in some other, long-standing sets of rules. In the final analysis, the efforts reflected by the GCC Centre can be welcomed notwithstanding the already existing proliferation of other arbitration rules and institutions.

Not the least reason is that most other such rules and institutions bear little if any political, cultural and juridical relationship to this highly significant area of the world, the Arabian Gulf, where arbitration is clearly steadily gaining in acceptance and use, including in the area of banking and finance disputes.
between the Centre and the relevant governmental bodies in order to activate and support the Centre and the role played by it in the field of commercial arbitration. The Centre also stressed upon the importance of incorporating its Standard Arbitration Clause into all contracts entered into by the ministries, be it with other governmental bodies or organizations and urged their Excellencies to instruct the relevant governmental bodies to follow suit. This would not only highlight the role of the Centre and enhance the importance of referring disputes to arbitration under the Centre’s auspices, but would also help in the widespread of arbitration in both the public and private sectors. The bottom line of all these meetings held by the BOD members was to enhance the role played by the Centre in the field of Arbitration.

The second part of the meeting on 14th February was held between the Board members and the Centre’s Secretary General where all meetings with Ministers and officials of high rank held on 12 & 13 were evaluated. Measures as to how the Centre’s role could further be activated to its maximum in favor of arbitration in the GCC countries were discussed on the basis of the recommendations and feedback received as an outcome of these discussions.

This meeting was headed by Dr. Hassan Eisa Al Mulla, Chairman of the current session of the BOD and representative of the Saudi Council of Chambers of Commerce and Industry, in the presence of all the members representing the chambers of commerce in the GCC countries:

1. Mr. Ebrahim Mohammed Ali Zainal – Vice Chairman of the BOD, Representative of the Bahrain Chamber of Commerce and Industry.
2. Mr. Hassan Mohammed Bin Al Shaikh – Member of the BOD, Representative of the UAE Federation of Chambers of Commerce and Industry.
3. Mr. Ali Bin Khamis Al Alawi – Member of the BOD, Representative of the Oman Chamber of Commerce and Industry.
4. Mr. Khalid Ebrahim Al Radhiwani – Member of the BOD, Representative of the Qatar Chamber of Commerce and Industry.
5. Dr. Salah Khalifa Al Jeri – Member of the BOD, Representative of the Kuwait Chamber of Commerce and Industry.
6. Mr. Yousif Zainal – the Centre’s Secretary General.

Members who were also nominated as Board members for the next term of office at the Centre were present. These members would replace the current BOD members at the end of this calendar year. They were:

1. of the UAE Federation of Chambers of Commerce and Industry.
2. Mr. Mohammad Eid Bu-Khammas – Representative of the Bahrain Chamber of Commerce and Industry.
3. Dr. Ebrahim Essa Al Essa – Representative of the Saudi Chambers of Commerce and Industry.
5. Mr. Bader Abdulla Al Darweesh – Representative of the Qatar Chamber of Commerce and Industry.
6. Mr. Waleed Khalid Hmoud Al Dabboos – Representative of the Kuwait Chamber of Commerce and Industry.

In line with the usual procedures followed at all BOD meetings, a number of issues and reports were submitted to the Board members in which a report submitted by the Centre’s Secretariat on the activities and achievements made during the previous year was highlighted. This report clearly outlined the various meetings held with relevant official bodies in the member states, mobilizing the process of dealing with the Centre and with the concept of arbitration in particular.

Efforts being undertaken by the Centre to create arbitral awareness in the region is fast gaining ground and could be witnessed in the increase of the number of contracts into which the Centre’s Arbitration Clause has been incorporated. A number of institutions have now started to recognize the services provided by the Centre and are now seeking assistance for appointing an arbitrator or with regard to providing them with the Centre’s list of arbitrators. The number of members enlisted on the Centre’s panel has also increased to 557 arbitrators and 212 experts.

The Centre’s website has also witnessed remarkable changes both in appearance and content. Details with regard to the future activities being conducted by the Centre and other relevant information with regard to the bilateral agreements of cooperation entered into with various institutions, publications of the Centre being issued from time to time, the Charter and Rules of Procedure of the Centre, the list of arbitrators and experts who have opted to be enlisted on its website and many more relevant details have been incorporated. This has led to a rapid increase in the number of visitors to the Centre’s website.

The increase in the number of cooperative agreements entered into with both Arab and International institutions focus and highlight the vital role of the Centre and its participation at both Arab and International levels.
The Board members also carefully reviewed and scrutinized the obstacles that had slackened the progress of the Centre during the last five years. In fact, the Centre has encountered a few setbacks in the Gulf which had arisen due to slow implementation of decisions adopted thus resulting to the inability of the relevant parties of the Unified Economic Agreement to benefit from the services provided by the Centre.

The mandate of the Centre with regard to examining disputes relating to the Unified Economic Agreement was not activated. The hope relied on the Summit resolution in Riyadh recently which summoned the GCC Financial Economic Cooperation Committee to review the Unified Economic Agreement in a way to consolidate the productivity structure of the GCC countries and the increase of the role of the private sector to fulfill the joint interest of the GCC citizens.

The Leaders at the Riyadh Summit last November, reached an optimistic decision which, at the start, would be the establishment of a unified customs zone with the GCC and a unified customs tariff, adoption of a unified law for the customs department in all GCC countries, amendment on specific conditions on gaining national entity characteristics and finally the approval of the estate possession by the GCC citizens in the contracting countries.

All the aforementioned decisions adopted by the leaders of the GCC countries reflect a new atmosphere and positive trend towards a remarkable change in policy which would definitely have a positive effect on the whole united Gulf workplan, the joint Gulf projects and the GCC organizations, establishments and institutions, including the GCC Commercial Arbitration Centre.

On the other hand, the adoption of the charter of the GCC Commercial Arbitration Centre during the Riyadh Summit in December 1993 was aimed at preparing the legal instrument for resolving commercial disputes on the expectation that this Centre will develop and prosper within the Gulf Common Market and the consequences of this would lead to a unified Gulf economy. But due to the undue delay in creating such markets, hampered the establishment and decision of inter trade commerce in the way leaders of the GCC wished to, which eventually reflected on the Centre and its rules on resolving commercial disputes in the GCC.

However, there are encouraging indications towards developing a Gulf Common Market as the result of approval of the recommendations of the Riyadh Summit.

This would undoubtedly lead to new perspectives for the Gulf economic integration which would directly contribute in increasing the volume of commercial inter-exchange, enhancing the role played by the private sector in the socio-economic development in the GCC countries which are attracted towards globalization.

It is hoped that all these facts will have positive effects on the Centre and would highlight its role as a regional international mechanism for resolving commercial disputes.

At the end of the meeting, the BOD extended its thanks and gratitude to the Government of the Kingdom of Saudi Arabia for providing the necessary facilities to conduct the meeting in Riyadh successfully.

The Centre expressed its thanks and appreciation to the Council of Saudi Chambers of Commerce and Industry through its Secretary General, Engineer Usama Mohammad Makki Al Kurdi for the efforts exerted by him in order to organize meetings with relevant ministers and journalists.

The BOD expressed its gratitude to their Excellencies the Saudi Ministers who expressed their readiness to support the Centre. The meeting thanked the Secretary General of the GCC and appreciated his support and interest in the Centre.

The meeting expressed its satisfaction with regard to the position held by the GCC Federation of Chambers towards the Centre.

In line with its policy to encourage the economic sector to recourse to arbitration under the Centre’s auspices and with the trends to activate the regional cooperative mechanism after the Riyadh Summit and to meet the demands made by some economic entities, the BOD decided to reduce the administrative fee of the Centre to 50%.

The meeting adopted and sanctioned the proposed new budget of the Centre for the year 2000. The BOD also approved of the work schedule for this year emphasizing the need to overcome any obstacles with the cooperation of the GCC Secretariat and the GCC Federation of Chambers of Commerce and all executive bodies, ministries and industries in the GCC.

The BOD of the Centre also assured the Secretariat of its continued cooperation and support and wished the Centre a successful year ahead with more to come.
ENFORCEMENT OF FOREIGN JUDGMENTS

The Abu Dhabi Supreme Court of Cassation has recently enforced a Judgment in the UAE which was delivered in France against a trading company in Sharjah.

Claim

An action was filed by a French trading company (the “claimant”) against another trading company based in Sharjah (the “defendant”) before the Sharjah Civil Court (the Court of First Instance). The French Company requested the Sharjah Court to enforce a judgment obtained in France against the defendant ordering the Defendant to pay USD 690,981.19, L2, 517, FF 60,372.85 plus legal costs and interest. The Sharjah Civil Court delivered a judgment ratifying the French judgment as good for execution before the Sharjah Courts.

Sharjah Court of Appeal

The defendant appealed against the judgment to the Sharjah Court of Appeal (the “Court of Appeal”). The Court of Appeal upheld the judgment delivered by the Court of First Instance and dismissed the Appeal. The defendant appealed further to the UAE Supreme Court of Cassation (the "Supreme Court").

In its further appeal, the defendant submitted that the Sharjah Courts had determined that it was up to the French Courts to decide whether or not the procedure followed in the case was the proper procedure according to the French Law of Procedure, whereas in fact the judgment had violated the agreement signed between the UAE and France for the enforcement of judgments since the Sharjah Courts should have ascertained (as per the agreement) that the summons had been properly effected on the defendant. The defendant argued that, since the summons was not properly served, the foreign judgment should have been held to be null and void.

UAE Supreme Court of Cassation

The Supreme Court held that, according to Articles 21 and 22 of the UAE Civil Procedure Law, as far as the procedure relating to an action is concerned, the law of the country where an action is being heard will be applied to the procedure of the action, unless otherwise provided for in a special law or international treaty. Accordingly, the method of service regarding a summons will be effected according to the procedure applicable in the country where the action is being filed, the proceedings are being heard and the judgment is being delivered, unless such a procedure is contrary to public policy in the country where the judgment is to be executed. The Court added that it is established under Articles 13, 14 and 15 of Federal Decree No. 31 of 1992, ratifying the judicial co-operation between UAE and France which came into force on 27 April 1992 (and was implemented prior to the UAE Law of Procedure), that judgments delivered in France will be applicable and recognized in the United Arab Emirates according to Article 14 of the said Treaty and that the applicable law will be applied according to the international conflict of laws rules which are applicable to the procedure in the country where the action is filed.

Moreover, the Supreme Court stated that, when an application is made for the execution or enforcement of a judgment, the judgment will not be subject to any further appeal or review and the summons will be recognized according to the procedure of the country where the judgment is delivered in default, provided that it is not contrary to public policy, unless there has been a previous judgment delivered in the country on the same subject matter where the application is filed to enforce the judgment.

Further, the country where the action is filed will be conferred with jurisdiction in the matter if the action is filed against a person who is domiciled in that country at the time the action is filed or the contract is executed or implemented in that country or intended to be executed therein. In these circumstances, the judgment delivered in a foreign jurisdiction will not be subject to any review or appeal in the country where the application is made to enforce the judgment.

Reciprocal enforcement arrangements with France

The Supreme Court expressed the view that it was further evident from the statement provided by the French Council in Abu Dhabi that UAE judgments will be enforceable in France under Article 509 of the French Law of Procedure. In addition, it has been established under French Law (confirmed by the French Court of Cassation) that France will enforce a foreign judgment and respect the agreement signed between the parties.

It is further evident from the judgment which was
to be enforced in Sharjah that it had been delivered by a Commercial Court in France under Action No. 2884/94 on 28 January 1987, ratified by the French Court of Appeal in April 1989 under Action No. 1682/88 and upheld by the French Court of Cassation. The judgment was also ratified by the Ministry of Foreign Affairs in Paris, the UAE Embassy in Paris and the Ministry of Foreign Affairs in the UAE and was also translated.

**Basis for jurisdiction**

The Court stated that, since it was also evident from the judgment that the amount which was due related to a contracting agreement and was thus a commercial matter where both parties were trading companies, the Commercial Court in France maintained jurisdiction to hear the matter. It was also evident that the defendant had initiated the action against the claimant in France and that the claimant had filed a counterclaim before the French Court. Therefore, according to Article 14 of the abovementioned Treaty, the French court had jurisdiction to hear the case and the judgment delivered was within the jurisdiction of the French Court under the Treaty. Further, Article 19 of the UAE Civil Procedure Law states that the law of the country where the contract is executed will be applied and, in this case, it was clear that the contract was executed in France and therefore that French law would apply to it.

**Proper service under French Law**

The Court added that it was established that the summons, which was served on the defendant was effected via diplomatic channels and constituted proper service under the French Law of Procedure. The fact that the judgment had become final and was not subject to challenge in France confirmed that the judgment was good and final and was delivered in accordance with French law.

Accordingly, the defendant’s appeal was dismissed and the judgment delivered by the Sharjah Court upheld in the claimant’s favour.

*From the International Litigation News, January 2000, by Husam Houmani, Al Tamimi and Company, Dubai.*

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**Message from Chairman Contd. From page 1**

This would create a concrete basement for the conduct of future mutual relationships.

The various measures to be undertaken and efforts exerted by the Centre towards establishing and strengthening ties with relevant bodies in Saudi Arabia as well as in other GCC countries has always been and will be one of the areas of prime concern to the Centre. These bodies could play a substantial and vital role that contributes to the success of the Centre in consolidating commercial arbitration in the GCC countries, for which they still exercise a prominent hold.

Therefore, in order to pave the way and to help the Centre to achieve the purpose for which it had been established and to further enable it to stride successfully in the field of commercial arbitration, it is of prime importance that the Centre meets with these bodies and urge them to continue extending their support and cooperation to the Centre by incorporating the Standard Arbitration Clause in all contracts concluded with the relevant government or any of its other official bodies.

As it is well known, the widespread of arbitration as an optional measure for dispute settlement will undoubtedly encourage and attract foreign entities to invest in the GCC countries.

On the other hand, the relevant authorities in the GCC countries are also required to issue executive ordinance/decrees implementing and incorporating the provisions of the Centre’s practice and previous examples of other relevant GCC bodies such as the Gulf Standards Corporation and the Gulf Investment Corporation for which the GCC states have already issued appropriate legal executive ordinance to their charterers. This would be a pillar of support to the implementation of the awards issued by the Arbitration Panel of the Centre, and will grant it credibility and legal power, it will also lead to the completion of the procedural and legal aspects needed for the Centre to enjoy its character as an independent body and enable it to enjoy all the advantages and immunities mentioned in Articles 24, 25, 26 and 27 of the Charter.

We, at the Centre, welcome any suggestions or instructions towards the services rendered by the Centre and towards the strengthening of the role of the Centre as a regional and international mechanism established to offer its services to both the private and government sectors in the GCC countries.

We would like to express our gratitude and appreciation to their Excellencies the abovementioned Ministers and the Secretary General of the GCC. We would also like to extend our gratitude to the BOD’s Chambers of Commerce and Industry, in all GCC Countries particularly the Saudi Council of Chambers of Commerce and Industry who were generous enough to offer their support which indeed contributed a great deal to the success of this meeting.

Dr. Hassan Eissa Al Mulla  
Chairman.
Arbitrability is the faculty for the parties to an agreement to submit their disputes to arbitration. Some disputes may not be resolved by arbitration as they belong exclusively to the domain of courts.

The domain of arbitration is determined by internal laws in each state in accordance with its own political, social and economic policy.

Three kinds of disputes occur in transactions relating to securities:
1. Disputes between members of the Capital Markets Authority (stock exchange): the rules of the stock exchange often contain an arbitration (or a mediation) clause.
2. Take over bid: it may contain an arbitration clause for all disputes arising out of the acquisition of shares; it seems to be rare in practice.
3. Disputes between securities brokers and their customers: the present topic will be limited to this category of disputes.

1. Problems in securities industry

1) Most common matters arising between a broker-dealer and customers:

1. Unsuitability:

In making an investment recommendation to a client, he must answer to the question: "What is the financial profile of my customer and his future objectives?"

A broker must make recommendation that are consistent with a customer’s investment objectives, and risk tolerance. A broker has a duty to (only) recommend investments and trading strategies that are suitable for an investor.

An investment may be unsuitable in three cases:
1. a customer does not have the financial ability to incur the risk associated with a particular investment;
2. the investment did not correlate with the investor’s financial needs;
3. the customer did not know or understand the risk associated with a particular investment.

A broker has a duty to understand the risk the investor can or cannot assume, the tax consi-
commissions. The customer has to show that his broker has the intention to control (in light of investor’s objectives) and to defraud his customer.

There are three different ways to say whether the accounts were churned or not:

i. Determining the annualized rate of commissions charged in the account;

ii. The number of times the equity is turned over purchases (a monthly turnover ratio is equal to total amount of purchases made in an account divided by the number of months involved);

iii. The purchase and sale trading activity that occurs in the account.

Arbitrators must distinguish between the different types of accounts to say whether an account was churned or not. For example brokers know that retiree’s accounts mustn’t be the subject of frequent trading, where the objective of investors tends to be long term more than speculative transactions.

6. Price manipulations:

Price manipulation artificially increases or decreases the price of a security for purpose of generating profits to the (group) manipulating the price. This is often accomplished by fraudulently promoting an investment in an attempt to drive the price of the security up.

The brokerage firm can sell shares that they have previously purchased at dramatically lower values. It is also not uncommon to have that same organization sell shares that they do not own the price of a security has been dramatically increased in an effort to repurchase those securities at a later date after they have stopped artificially inflating the price of the security, and the price has declined.

This kind of claims occurs when brokerage firms, management funds or banks refuse to allow a customer to sell his securities. This is also called order failure.

7. Order failure:

Often when a brokerage firm is manipulating the price of a security, the brokers in that organization will not allow an individual to liquidate a security. Brokerage organization manipulating a price of security do not allow the customer to sell a price of the security. The price of a security should be determined by supply and demand (bid and ask orders).

If there is no demand to sell a security but there is a demand (created or actual) to purchase a security, the price will increase.

It is difficult, specially on emerging markets, for customers to prove that the broker fails to follow his explicit instructions to sell a security.

8. Overconcentration:

One of the most important rules of investing is diversification, sometimes by combining domestic and international investments. In financial capital markets theory, one can find the demonstration of how the total risk of a portfolio can be minimized by choosing investments negatively correlated between them.

If a broker concentrates an investor’s portfolio in any individual (stock) or type of investment, then risk associated with the portfolio is dramatically increased.

One must not forget that the risk related to international investment are so important. For example the changes in currencies rates (dramatic) changes in market value, political, economic and social events, lack of liquidity and informations, reliance on foreign legal remedies, and different market operations (clearing settlement of securities transactions and quotation for one security on two different markets).

9. Unregistered security:

It often occurs when stocks (for example US) registered in a state must be either registered in the other investor’s state or exempt from special registration requirement.

Conclusion:

Customers’ disputes against their brokerage firms are classified into basic categories. Some investors confuse between investing in non-risk banking financial products and exchange markets where the others are easily sued, may be because of easy means of dispute resolution arbitration. Since the broker’s recommendations are executed in good faith, full disclosure, respect to SRO’s rules, he cannot be liable if the recommended investment reveal to be not profitable.

In this past section, we describe the most frequent problems in the relation customer / broker that could be dramatical at the international level. The next section will discuss the classification of the investment in securities in developed markets. This classification organizes and facilitates the intervention of investor in international financial markets on one hand and can reduce the problems above-mentioned on the other hand.

International investment

Authorities in developed financial market try to find solutions in order to regulate the access for a domestic investor to the international securities. Claims arising from investment on two different
countries are more complex to resolve not only due to different ways of regulations (clearing, payment, quotation) but also to conflicts of laws to find whether a case is arbitrable or not.

i. Mutual funds: an investor has a large choice of choosing between global funds, regional or country funds, and international index funds.

ii. ADR, GDR or EDR: American Depositary Receipt, Global Depositary Receipt or European Depositary Receipt. For example, ADR are certificates issued by the US depositary banks to be equivalent to the principal (quoted on emerging markets). Banks will convert any dividends or other payment into Dollars. This category of investment present some disadvantages like informations which are not really available for investors, shareholders meetings where the investor cannot be present, considerable fees of depositary banks and expenses for the conversion of currencies, and the positive correlation between the receipt and performance of these emerging markets.

iii. US-trade foreign stocks: for example a Canadian security can be quoted on the American capital market because of the similarity of the clearing and settlement operations for the two markets.

iv. Stock trading on foreign markets: if the investor is not satisfied with the last three ways of investments above-mentioned he can always insist on choosing himself to operate with a financial intermediary in order to realize a maximum of return with an accepted level of risk.

For this category of securities claims are very complex to resolve, even by arbitration. It gave a reason to financial markets to invent conventions in order to simply harmonize trading in different markets and finally to find solutions for international claims where some of them are resolved amicably under the control of the self regulatory organizations and other (taking more time) resolved through arbitration or litigation.

II) Arbitration or litigation?

A transaction may, very exceptionally, give rise to a dispute. Arbitration seems to be an appropriate way for settling disputes related to securities transactions. In this section we will first determine whether investors have the possibility of arbitrating their controversies with brokers. The question of arbitrability is dealt in the second section, and finally we will discuss the problem of punitive damages in financial markets.

A. Arbitration: an international survey

We all know that the centre of securities trading is the United Kingdom. The British securities legislation has never rendered judicial process obligatory and arbitration seems to be their best way for resolving securities matters.

The result of appearance of the Arbitration Act 1996, following the Arbitration Acts 1979, 1975 and 1950, is that when there is an agreement between parties to settle securities-related disputes, English courts will compel arbitration.

Several Acts and authorities followed showing the strong determination to favour the arbitration in financial securities cases to courts: Financial Services Act 1986, Securities and Futures Administration (Clause providing that claims can be submitted to arbitration or courts must be carefully drafted because of the several interlocking contracts and the involvement of many products or parties) and Personal Investment Authority. English law does not prescribe any formal requirements for a valid arbitration agreement (written or oral).

A number of alternative disputes resolution imported from U.S.A. started to exist mediation judicial or expert appraisal and structured settlement procedure. Unlike judicial or expert appraisal the recommendation of the expert will issue from the legal or technical questions.

The ADR process does not result in a binding and enforceable award, and the parties cannot be compelled to reach a settlement. If an agreement is reached, it will be binding on the parties who should then enter into written settlement agreement for enforcement purposes.

Disputes in securities industry in the US are subject to Arbitration Act, Securities Act and Security Exchange Act.

The history of commercial disputes resolution was market by hostility to arbitration in the United States law. After the market crash in 1929, the securities-related disputes, settled by courts, were initially developed by the Securities Act 1933 and the Securities Exchange Act 1934. At this period, a customer was not obliged to submit to arbitration, in the presence of an arbitration clause, if the claim constituted a violation of the Securities Acts above-mentioned. Courts concluded in the case of Wilko v. Swain (1953) that the clause was non-valid based on the Securities Act 1933, Section 12 (2). Even in the presence of an explicit mutual intention of the parties to submit their claims to arbitration, courts held that arbitration was not capable to protect investors versus securities intermediaries.

In the Wilko case, court held that the arbitration was not mature enough to settle the dispute. Claims required the exercise of judicial direction to fairly assure their effectiveness. Arbitration proceeding were not suited to cases requiring subjective findings on the purpose and know-
ledge of an alleged violation. Wilko argued first that arbitration must make legal determinations without judicial instructions on law. Second, arbitration award may be made without the explanation of the arbitrator’s reasons and without a complete record of their proceedings. Third, under Federal courts, interpretations of the law by the arbitrators are not subject to judicial review for error in interpretation.

In 1983, in the matter Moses H. Cone Memorial Hospital v. Mercury Construction Corp, the Supreme Court held that any doubts concerning the scope of arbitral issues should be resolved in favour of arbitration.

In 1974, the new (international) factor appeared in the matter of Scherk v. Albert Culver Co. To show that trade and commerce in the world markets must be analyzed in an international context where (local) courts or laws will not be necessary the ideal way to resolve controversies. In fact, the two parties agreed to sign an arbitration clause in their contract whereby the American company acquired the shares of an European Business.

The dispute concerned the violation of the Securities Exchange Act 1934, namely to fraudulent representations of trademark rights. The distinction between domestic and international transactions appeared also in Mitsubishi Motor Corp. v. Soler Chrysler Plymouth Corp. (1985).

Important cases involving securities industry have followed between Wilko and Scherk:


B. Arbitrability:

To our opinion, the very big changing in securities litigation was Shearson / American Express v. Mc Mahon. The argument of the respondents (Mc Mahon) was that arbitration clauses in securities sales agreements generally are not freely negotiated.

Arbitration clauses are often included in standard contracts (between brokers and customers).

This situation irritates customers who consider it unenforceable contract of adhesion. Once again, unless public policy is not threatened arbitration clauses in standard contracts for securities transactions are enforceable.

Due to the complexity of some specific transactions, courts and self-regulatory organizations can decide that an arbitration clause (included in a standard contract) is not binding. Futures in finance have different rules in comparison with traditional instruments like stocks. For example, while the period of payment of stock is T+3 (many developed markets and emerging markets have changed from T+5 to T+3 especially after the dramatically consequences of the stock exchange 1987 crash), the time of settlement for future is T+1.

In commercial law, futures have special analysis:

i. Customers cannot be required to subscribe the arbitration clause.

ii. Firms are obliged (by the Commodity Futures Trading Commission) to accept investors even when they refuse to sign the arbitration clause.

iii. Customers who have signed an arbitration clause do have 45 days to choose to go to courts (see Commodity Exchange Act 1974).

C. Punitive damages

When a customer starts arbitration claiming that the risk of the investment in securities was unsuitable for him, the question is whether he has the right to claim damages. Will the calculation of damages be equal to the losses of investment or should we consider the time going from the commencement of the dispute till the arbitration award?

For example, a customer purchased 2000 shares of a stock at US$13. The dispute arises when the broker did not perform an order of selling those shares at US$ 15.

The price dropped down to US$12 and the customer, learning that his order was not performed, decides to hold the security. If we consider that the price, at the date of the claim was only US$6, the calculations of the damages are:

\[
=2000^* (13-12), \text{ or} \\
=2000^* (15-12), \text{ or} \\
=k[2000^* (13-12)] \text{ with } k \text{ an actualization term.}
\]

In any way, customer should never claim excess damages, because this situation will turn into a nightmare, or what we can call frivolous claims where he will pay his brokerage firm.

During many years, courts while accepting that securities-related disputes could be arbitrable, the question of awarding punitive damages by an arbitration tribunal was prohibited till only 1996. The argument was that the power to grant such penalties or sanctions are reserved to courts as a matter of public policy.

In Mastrobuono v. Shearson Lehman Hutton (1995) the parties’ choice of law was the law of...
New York and the arbitration proceedings were held in Chicago. The Supreme Court agreed that arbitrators can award punitive damages despite the fact that the law of New York prohibits damages awards in arbitration. The argument was the interpretation of the arbitration clause and the intention of the parties to submit such claims to arbitration. In fact, parties agreed to resolve all controversies by arbitration. Thus, interpreting the arbitration clause broadly as in Mitsubishi, there is an intention to arbitrate damages like any other dispute in their contract. Arbitrators have the same and equal power as courts in deciding punitive damages. If a party claimed ambiguity of the arbitration clause, the contract's interpretation by the common law showed that an ambiguous clause will be interpreted against its writer.

One of the advantages of arbitration is the direction. For this reason, it was so difficult to develop securities cases to show the efficiency of arbitration in resolving investment disputes. But in 1989 (USA) arbitration awards for domestic stock exchange matters (which are governed by Self Regulatory Organizations), for example NYSE or NASD, have been made public. During the period running from May 1989 to January 1991, a total of US$5.7 million of punitive damages were decided in 38 cases.

**Conclusion:**

Even if the case law relating to arbitration in securities industry is relatively rare, this means of settling disputes will certainly develop in the future for the same reasons it is so successful in the other business transactions. This is a new and prospective field for domestic and international arbitrator and we can predict that not only more and more disputes will be referred to arbitration but also that arbitrability of such disputes will be extended to matters that, at the present time, are considered as being arbitrable.

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**ICCA 2000.**

A series of Conferences were conducted in New Delhi, India, from the 1st to 5th of March 2000.

A Conference on "SAARC Arbitration Law and UNCITRAL Model Law" was held on Wednesday, 1st March at the Tansen Marg in New Delhi. This Conference was held under the auspices of the Federation of Indian Chambers of Commerce and Industry (FCCI).

The topic for discussion was "International Commercial Arbitration: The SAARC Experience" and was chaired by Mr. Fali S. Nariman. Representatives of the SAARC countries of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka along with some distinguished delegates to the ICCA Conference actively participated at this event.

ICCA Conference 2000 was convened from 2nd - 4th March 2000 hosted by the Indian Council of Arbitration. The inaugural session was held at Vidyam Bhavan, and His Excellency Mr. K. R. Narayanan, President of India, inaugurated the event. The Business Sessions of the Conference were organized at the Taj Palace. Although the conference dealt with a series of familiar subjects, all subjects were viewed from a single angle as to how parties may act at each stage so as to achieve judicial support of their expectations.

The conference was divided into four sessions and the subjects that were addressed at this conference were:

a. The Contract: What causes courts to disregard agreements to arbitrate, and how can such agreements be improved to avoid that fate?
b. Interim relief: How can it be obtained without harming the arbitral process?
c. The proceedings: How to avoid judicial interruptions.
d. Looking to enforcement: Awards that pass Judicial scrutiny.

The UNCITRAL -ICCA Judicial Colloquium was held on Sunday, 5th March at Hotel Le Meridien and was inaugurated by the Hon'ble Chief Justice of India Dr. A S Anand. This Conference was devoted to the role of national courts in respect of international commercial arbitration proceeds and awards. This Colloquium was open only to judges and other interested officials and the primary focus was on the application and interpretation of the relevant articles of 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Model Law on International Commercial Arbitration and its national enactments, especially the Arbitration and Conciliation Act, 1996.

Around 389 participants attended these conferences from all parts of the world.

An agreement of cooperation was signed between the GCC Commercial Arbitration Centre and the Indian Council of Arbitration on 3rd March 2000. This agreement of cooperation was concluded in order to establish stronger business ties between India and the GCC countries.
As the use and acceptance of arbitration and mediation grow around the world, so too, grow the stories being told of successes and failures experienced during the use of these processes. One thing is evident: every participant in ADR processes has an opinion. We hear theories about the proper background and experience of arbitration panels. We hear opinions about the proper way to conduct a hearing. We hear discussions about "Neutrality" and "Justice" and "Fairness". We hear talk about the speed and efficiency possible with arbitration. We hear about the greater level of satisfaction of parties in a dispute when they reach a mediated or conciliated settlement. These are, as stated, opinions only.

Can we say with certainty what is the proper moment for mediator intervention in a dispute? Can we speak to which combination of processes lead to the maximally optimized result, from the standpoint of both disputants? Is there a significant new body of learning about dispute resolution processes which provides technical guidance for our efforts to unravel the threads of conflict? The answers to these questions and many more like them would have to be "no".

With burgeoning interest in dispute resolution concepts such as arbitration, mediation, conciliation, regulatory negotiation, mini-trial, and a whole host of others, the formation of a Research Center dedicated to the study of dispute resolution presents itself as both timely and filled with promise.

The American Arbitration Association proposes to establish a self-governing center for research in this field, which would be both comprehensive in its coverage of the alternative dispute resolution field and truly new in its depth of focus on the practice and conduct of ADR processes. The goals of the Center would be accomplished by two methods.

Creating a Database

The primary inhibition of scientifically viable research in the field has been the inability of researchers to obtain sufficient and timely data. Since most ADR processes are private, even confidential, and since the locations and origins of the process are widely dispersed, studies in the field become quite difficult.

Beginning with the AAA’s own large database of case information, the Center proposes to establish a network of agencies, associations, and practitioners, around the world, which would pool data in exchange for the insights developed from the database. The database would be computer maintained, with safeguards for completeness, accuracy, and confidentiality. Access would be available only to those researchers whose projects received prior academic approval from the Research Advisory Committee of the Center. This Committee would be comprised of internationally respected academics who have shown distinction as researchers and theoreticians.

Collections of such information in a database will allow us all to develop a better picture concerning pattern and trend questions in the field. This might include issues as basic as how many cases, where the cases occur, what issues are presented to arbitrators, what remedies are being fashioned. With time, we will learn what and where there is growth, and where there is contraction. Trends will become apparent.

Designed Experiment Research

Each year, the Center would initiate a number of studies designed to explore specific attributes of the dispute process, to provide a deeper understanding of what occurs.

Do mediators with subject-matter expertise in technical disputes arrive at different results than generalists, process-expert mediators? In a multi-party dispute, what kinds of coalitions of interests form around various issues in dispute? Do attorney arbitrators achieve a different type of justice than non-attorney arbitrators? At what point in an arbitration is a pre-hearing, organizing conference most advantageous? What, if any, are the cost and time savings of the different dispute resolution processes? Do ADR processes provide a different kind of result than traditional legal systems? If parties sit at different locations around the negotiation table, will the results vary?

All these questions, and more, have answers that we should know, must know if our facility with dispute resolution processes is to advance sufficiently beyond the present level. Each researcher undertaking a study within this Center would submit to a peer-review process to ensure rigor of method and quality of conclusion.

Impact

There is abundant anecdotal evidence that business concerns throughout the world seek out ADR processes in the interest of time.
savings, cost savings, and business-intelligent results. Quite recently, there has been a surge of interest in ADR from nations looking to bolster their viability as a business environment, and desirable trading partner.

Interest is also growing in countries with strong ADR traditions like the U.S., Great Britain, and Germany for the potential social and economic enhancements to be gained by more efficacious use of conflict resolution processes.

How propitious it would be, then, to have factual findings about the processes, how to make them more useful, and the results. Ultimately, this is what the work of the Center will be about.

The name of the Center will be the Global Center for Dispute Resolution Research. It will be launched officially this month. The Association has committed significant start-up funds as seed money to make this Center a reality without further delay.

The Center will have two governing bodies – a Board of Trustees, who will deal with Governance and Funding, and a Research Advisory Committee, which will determine research agendas, make grants to researchers, and ensure that rigorous methods and analysis are utilized in the research.

The Center will disseminate research findings on an on-going basis, as studies are concluded. To the extent that findings have practical application, we will make information available to practitioners.

Organizations, such as the members of IFCAl who participate in the data-gathering project by submitting case-related information, will be invited to private briefings on trends and practice patterns in the world of arbitration and mediation. There will be stringent safeguards to protect the privacy of all data. The primary areas of focus will be business disputes, with a global perspective.

I hope and expect that next year at this time, I will be able to present to you information even more authoritative than my opinion...that is, information based on empirical, verifiable, practical research.

Richard W. Naimark is Senior Vice President of the American Arbitration Association, in charge of Strategic Planning, Research and Development and field operations.

DIRECTORY OF LAW FIRMS IN THE GCC STATES

The GCC Commercial Arbitration Centre is introducing a directory of Law Firms in the GCC States for the first time. This directory comes on a CD-ROM as well as a hard copy in both Arabic and English languages.

The CD-ROM is ready for circulation and can be availed at the Centre. The hard copy is now being printed and is expected to be ready in due course.

This directory contains National Laws, Regional and International Conventions pertaining to commercial arbitration in both Arabic and English (English wherever available), a State-wise enlistment and enlistment listing the law firms/individuals alphabetically.

Those interested in the CD-ROM are requested to place their orders at the Centre. Your orders could be faxed or E-mailed to us at the following address:

GCC Commercial Arbitration Centre
P.O. Box 2338, Manama, Bahrain
Fax: (973) 214500
E-mail: arbit395@batelco.com.bh
FIRST INTERNATIONAL CONFERENCE ON ENGINEERING ARBITRATION

Under the auspices of H.E. Shaikh Abdullah Bin Khalid Al Khalifa, the Minister of Justice and Islamic Affairs, the First International Conference on Engineering Arbitration is to be held from 15-17th May 2000 at the Gulf Hotel (G.I.C.C.) Bahrain.

This Conference is being organized jointly by the GCC Commercial Arbitration Centre and the Bahrain Society of Engineers.

Just prior to this Conference a two-day intensive course on Claims and Counterclaims is to be held on the 13 & 14th of May 2000 at the Gulf Hotel. The lecturer to this course would be Dr. Nael Busni, a Chartered Engineer, registered Chartered Arbitrator, Conciliator/Mediator and Visiting Professor in Construction Law and Contract Administration at Trinity College Dublin.

This course is specially designed towards the Middle East and provides specialist knowledge in the area of claims and counterclaims, how they arise; how they are initiated; submitted, calculated and analyzed; how they can be properly and successfully dealt with and controlled; and finally how they can be avoided. The course also includes sessions on how disputes arising from such claims and counterclaims could be dealt with successfully.

Gulf Air would be the official carrier and Gulf Hotel provides special rates to delegates attending this course/conference.

The main objective of the First International Conference on Engineering Arbitration would be to concentrate on arbitration topics relating to engineering disputes. The conference would be held in both Arabic and English with simultaneous translation.

The Conference would be addressed by 10 keynote speakers; David Brown an English solicitor and French ‘avocat’ from the Paris office of Shadbolt & Co., Dr. Nael Busni, a Chartered Engineer, registered Chartered Arbitrator, Conciliator/Mediator, Antonino De Fina, President of the Court of International Arbitration – Australia, Geoffrey Hawker, Chartered Civil Engineer and Barrister –U.K., Richard Kende, Partner, Jones Day Reavis & Pogue, Germany, Ma. Jacqueline Mims, Associate in the London Office of Baker & McKenzie, Brian Trotterdill, an independent Consulting Engineer, Prof. Fathi Wali, Professor of Procedural Law in the University of Cairo, Jeremy Winter, International partner of Baker and McKenzie and Dr. Mustafa Zainalabdeen, Under-secretary of Public Works at the Ministry of Public Works and Housing, Saudi Arabia.

Thirty two papers will be presented and a detailed list as to the names of the speakers and topics to be addressed by them could be availed from the Centre’s Website or from the Conference Secretariat.

Registration to the course and conference are still open and those interested are requested to contact the Conference Secretariat for further details at:

P.O. Box 835, Manama, Bahrain
Tel: 973 727100
Fax: 973 729819
E-mail: mohandis@batelco.com.bh.

I would like to cordially invite our members to continue extending the support and cooperation by participating and benefiting from this Course and Conference.