AMIRI DECREE NO. 6 OF 25TH APRIL 2000

H.H. Shaikh Hamad Bin Isa Al Khalifa, the Amir of the State of Bahrain, has issued an Executive Decree approving the Charter of the Centre which incorporates the establishment of the G.C.C. Commercial Arbitration Centre by Law No. 6 of 25th April 2000. *This Law is provided in detail on page 18*

FROM THE CHAIRMAN: THANKS AND APPRECIATION TO THE STATE OF BAHRAIN

His Highness Shaikh Hamad Bin Isa Al Khalifa, the Amir of the State of Bahrain, has issued a Decree concerning the approval of the Charter of the Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf, by Law No. 6 of the year 2000.

The issuance of this Decree has several significant implications:

First: it puts the Centre on its right path towards the completion of its overall legal framework. *Contd. on page 12*

20th Meeting of the Centre’s Board of Directors

The 20th Meeting of the Centre’s Board of Directors was convened in Manama, Bahrain on the 10th & 11th of May 2000. The meeting was chaired by Dr. Hassan Eissa Al Mulla, and attended by the members of both the current session as well as those nominated for the next session of the Board of Directors. *Turn to page 12 for a detailed report.*
First International Conference on Engineering Arbitration
15 - 17th May 2000.
Bahrain
THE BOARD MEMBERS OF THE CENTRE

Dr. Hasan Eisa Al Mulla - Chairman
Representative of the Council of Saudi Chambers of Commerce & Industry

Mr. Ebrahim Mohammed Zainal - Vice Chairman
Representative of the Bahrain Chamber of Commerce & Industry

Mr. Hassan Mohammed Bin Al Shaikh
Representative of the Dubai Chamber of Commerce & Industry

Mr. Ali Khamis Al Alawi
Representative of the Oman Chamber of Commerce & Industry

Dr. Salah Al Jeri
Representative of the Kuwait Chamber of Commerce & Industry

Mr. Khalil Al Radhwan
Representative of the Qatar Chamber of Commerce & Industry

THE CENTRE'S SECRETARY GENERAL

Mr. Yousif Z. A. M. Zainal

NOTE

The views expressed and information provided in this bulletin are neither necessarily those of the GCC Commercial Arbitration Centre nor those of its Board of Directors. The GCCAC has no liability whatsoever that may be placed upon it.

Standard Arbitration Clause of the Centre

"All disputes arising from or related to this contract shall be finally settled in accordance with the Charter of the Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf."

First International Conference on Engineering Arbitration

15th – 17th May 2000

Bahrain

We would like to take this opportunity to express our sincere heartfelt gratitude to the Prime Sponsors and Sponsor of this Conference. We would also like to thank Gulf Air for being kind enough for having accepted to be the official carrier of this important Conference.

Prime Sponsors of this Conference

H.E. Shaikh Abdullah Bin Fahd Al Khalifa,
the Minister of Justice and Islamic Affairs

Ms. Charalass Apostolides & Co. Ltd
(CHAPO) Bahrain

Sponsor

Mr. Majid M. Genoub
Saudi Arabia

Mr. Ahmed Mansoor Al Ali
Bahrain

Centre’s Bulletin

Issue 15
The insistent phone interrupted my thinking about the arbitral award. To my surprise the callers were the lawyers in the arbitration, had just finished the day before. They were phoning with an unusual request: Could I mediate the case? They had plunged into the imaginative use of ADR.

Med-arb is one thing, I thought. That’s when the mediator turns himself or herself into an arbitrator after the mediation has failed. And even that is not without its ethical problems. For example, what do you do with all the confidential information each side has given you during the mediation? But arb-med is rare. What if the parties don’t settle the matter during the mediation? Then you have been contaminated as in med-arb, but you also have a fairly fixed view going in as to how things ought to turn out— you’ve already written an award. And however gentle you may be, your suggestions will carry a lot of weight.

I told counsel I would do it on two conditions. First, they had to call the court where the matter was pending, get its approval, and write me a memorializing letter. Second, I would finish the award, seal it, bring it to the mediation, and leave it on the table in plain view. If they settled, I would rip the award up in their presence. If they didn’t, I would go to a mailbox with both of them and mail it to the court.

The court said yes and the parties said yes. The mediation lasted about a day, and they settled. What a flexible instrument alternative dispute resolution can be. And how much scope it allows for imagination.

Imagination, however, should not be practiced in certain precincts. Some of my arbitrating is international, and I have seen standard arbitration clauses of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), and the London Court of International Arbitration (LCIA). They are standard clauses with plain-vanilla selections or add-ons, or combination clauses—conciliation and arbitration. And I have seen clauses known in the literature as “pathological”.

Pathological clauses are ones that are diseased; when a dispute arises, they spawn problems unforeseen by their drafters. For example, “In the event of a dispute arising out of or in connection with the present contract, arbitration will be conducted under the American Arbitration Association Rules in Johannesburg or Amsterdam.” This clause raises several questions. (1) Which American Arbitration Association Rules— commercial, international, or employment? (2) Johannesburg or Amsterdam— which? (3) Which language—African, Dutch or English? (4) Which substantive law— South African, Dutch, or some other? (5) How many arbitrators should there be—one, or a panel of three?

This is an example of how counsel typically does not want imagination exercised. And the chances of getting post-dispute agreement on these matters are small.

At a recent International Chamber of Commerce conference on the ICC’s rules and administration of an ICC case, there was a presentation on clauses by Baker & McKenzie partner Doak Bishop. He presented this real-life pathological clause: “The umpire shall be a national of Switzerland who is fluent in both English and Spanish, with an engineering degree, substantial experience as an international arbitrator, and at least 20 years’ experience as an executive of an international energy company”. The drafters must be joking. And if they aren’t, what’s the hourly fee when this umpire is found?

Of course, you can have a split clause. Bishop presented this one: “For all claims between the parties, all liability issues shall be decided by a court in litigation, while all damage issues shall be resolved by final and binding arbitration.”

You can also have a consolidation clause: “If a party initiates multiple arbitrations, the subject matters of which are related by common questions of law or fact and which could result in conflicting awards or obligations, the parties agree that all such proceedings may be consolidated into a single arbitral proceeding”.

But there’s more: “The parties do not agree by this provision to authorize a class action or mass action.”

You might also want to address head-on the issue of interim measures— injunctions, attachments, and conservation orders. May the arbitrators grant them? May a party apply to a court for interim measures without
waiving the right to arbitrate? In an emergency, may the presiding arbitrator acting alone grant interim measures?

You might also think about addressing the bugbear of international arbitration: discovery. Most arbitrators, and all but American and British counsel, are dead set against discovery as it is known in American law firms and legal departments and the storage spaces they rent. Do you want to explicitly authorize document production? Oral depositions? Written interrogatories? audits? Interviews?

On the subject of discovery, anyone who practices in this area, including arbitrators, owes a debt of gratitude to David W. Rivkin, a partner with Debevoise & Plimpton in New York and chair of the International Bar Association's (IBA) committee on arbitration and ADR. With Rivkin's leadership the IBA recently approved Model Rules of Evidence.

These folks have tried skillfully to blend Anglo-American and European legal concepts to deal with discovery in international arbitration. There is nothing like having a French avocat or German Rechtsanwalt remind you that 'finishing expeditions' are against public policy to make you appreciate these rules.

Will the other contracting parties agree to various ADR clauses? And how will executives react to lawyers who are trying to anticipate 'unlikely' disputes with reams of technical clauses?

Going back to the arbitral example, when the project or deal is big enough, you can build into international contract clauses a sequence of ADR procedures: for example, an independent expert, followed by mediation (conciliation), followed by a dispute review board, followed by binding arbitration.

The United Kingdom is undergoing a sea change in its civil procedure rules, and the new rules have been built in encouragement for disputants to try ADR. There is in the United Kingdom a bustling outfit called the Centre for Dispute Resolution (CEDR). CEDR is scribing to provide commercial mediation services through its panel.

And CEDR is far more active in international mediations than any other group, including the American Arbitration Association. CEDR runs its own training and certification programs and has reached out broadly and aggressively across Europe. Last June it hosted a forum on global ADR development in London, which I attended. Victoria Wilson, director of legal services for Eurostar UK Ltd., described a mediation from the client's viewpoint. Eurostar is the train that runs under the English Channel. According to Wilson, the company had endured five years of disputes and three years of litigation between English and French parties. Eurostar UK wanted to continue using the equipment and services of its adversary, and the parties decided to try mediation. But the first problems were 'where' and 'who'.

Eurostar UK wanted the mediation to take place in the United Kingdom, in English, with a very experienced mediator. The French party wanted a French-speaking mediator with a technical background. In the end, the mediation took place in the United Kingdom, with two bilingual mediators, one with a lot of mediation experience, the other with a technical background. Though the results are confidential, the process apparently worked, since Eurostar is now rewriting all of its contracts to include mediation clauses.

The Brits seem to be applying that major ingredient of mediation: imagination. Another English mediator reported on a dispute that took place in South America, with insurance in the United Kingdom, and litigation in New York. The British mediator went on to report with a straight face that the lawyers in New York were "not known for their tenderness".

But the French are entering the arena, too. I have been asked by a French mediation service to be one of the two mediators in a bilingual mediation in Paris. I am hoping our disputants, a French company and a California company, will be as pleased as those in the Eurostar matter.

Robert M. Smith is a San Francisco mediator and arbitrator with a domestic and international practice. He is also an adjunct professor of law in San Francisco and the author of ADR for Financial Institutions (West Group 2d ed 1998).

-------------------------------

ADVERTISE IN OUR BULLETIN AND SEE THE DIFFERENCE

Advertise your legal publications in our Bulletin, which has a far reaching capacity and is circulated to all arbitration organizations, ministries, the various chambers of commerce and to legal firms around the world. The tariff for this advertisement have been revised and are as follows:

Full Page in 4 Color  BD 150.000
Half Page in 4 Color  BD 100.000
Full Page B&W       BD  75.000
Half Page B&W       BD  50.000

To advertise, send your details by fax (973) 214500 or
E-mail arbit395@batelco.com.bh
Commentary on the New IBA Rules of Evidence in International Commercial Arbitration

IBA Working Party

In every arbitration, the first issue the parties and their counsel-as well as the arbitral tribunal—must face is the determination of the procedures for that arbitration. The principal institutional and ad hoc rules provide the framework for the arbitration and add detailed provisions concerning matters such as initial statements of the case, appointment of arbitrators and challenges, and the nature of the award and costs—but they are purposely silent about how evidence should be gathered and presented in any arbitration pursuant to those rules.

Quite properly, the principal institutional and ad hoc rules do not require that every arbitration be conducted in the same manner and so allow parties flexibility in devising the procedures best suited for each arbitration. Party autonomy and flexibility are among the significant advantages of international arbitration.

However, in many cases this intentional gap in the rules can cause problems if the parties have conflicting views as to how the case should proceed. This is particularly so when the parties come from different legal backgrounds and cultures. Problems can also occur when one or both of the parties are inexperienced in international arbitration.

Nearly two decades ago, the International Bar Association set out to assist parties by providing a mechanism to fill the gap. In 1983, the IBA adopted the Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration. The IBA is uniquely suited to provide such guidance, as its Committee on Arbitration and ADR (Committee D) now has more than 1,650 arbitration practitioners from 107 countries around the world.

The 1983 Rules were generally well received and were frequently discussed at arbitration conferences as an example of the harmonisation procedures that can occur in international arbitrations.

However, over the last 16 years, the nature of international arbitration has changed significantly. New procedures have developed; different norms as to appropriate procedures have taken root; and the scope of international arbitration has grown considerably, as many regions of the world formerly inhospitable to international arbitration have now embraced it.

As a result, the 1983 Rules needed to be updated and revised, and in 1997 Committee D of the IBA formed a new Working Party, chaired by Giovanni Ughi of Italy, to do this. The Working Party consisted of 16 members (see fn 1). It held many meetings and discussed the Rules at public meetings of the IBA in Delhi in November 1997 and in Vancouver in September 1998. Drafts of the new IBA Rules on the Taking of Evidence in International Commercial Arbitration (the "IBA Rules of Evidence") were also circulated for public comment to Committee D members and others, and were discussed at numerous arbitration conferences. The Working Party considered comments received throughout this process in drafting the final IBA Rules of Evidence, which were adopted by the IBA Council on June 1, 1999.

The new IBA Rules of Evidence reflect, in the view of the Working Party, a useful harmonisation of the procedures commonly used in international arbitration. They contain procedures initially developed in civil law systems, in common law systems even in international arbitration processes themselves. Designed to assist parties in determining what procedures to use in their particular case, they present some (but not all) of the methods for conducting international arbitration proceedings. Parties and arbitral tribunals may adopt the IBA Rules of Evidence in whole or in part-at the time of drafting the arbitration clause in a contract or once an arbitration commences—or they may use them as guidelines. Parties are free to adapt them to the particular circumstances of each matter.

This article describes the essential provisions of the new IBA Rules and provides some background on how the Working Party came to some of the decisions it made in drafting them. The Working Party hopes this commentary will be helpful to parties in determining whether or not to use the IBA Rules of Evidence and how best to apply them in their particular arbitration. The Rules are available from the IBA office: fax+44 (0) 171 409 0456; e-mail: publications@int-bar.org.

Preamble

The Working Party believed that it was important for the IBA Rules of Evidence to identify certain general principles which governed the Rules, so that parties and arbitral tribunals could best understand how to apply them. These general principles are set forth in the Preamble to the new Rules. The Preamble is also important in illustrating both what the Rules hope to accomplish and what they do not intend to do.

(i) The Preamble notes the IBA Rules of Evidence are "designed to supplement the legal provisions in the institutional or ad hoc rules according to which the parties are conducting their arbitration." The Rules are not intended to provide an entire mechanism for the
conduct of an international arbitration. Parties must still select a set of institutional or ad hoc rules, such as those of the ICC, AAA, LCIA, or UNCITRAL, according to which they wish to conduct their arbitration, or they may design their own set of ad hoc rules. As noted earlier, the IBA Rules of Evidence instead fill in gaps intentionally left in those rules with respect to the taking of evidence.

(ii) The Working Party recognized that there is not a single best way to conduct all international arbitrations, and that the flexibility inherent in international arbitration procedures is an advantage. Therefore, the Working Party felt that it was important to note specifically, in para. 2 of the Preamble, that the IBA Rules of Evidence are not intended to limit this flexibility. Indeed, as noted in that paragraph, the IBA Rules of Evidence should be used by parties and arbitral tribunals in the manner that best suits them. They may adopt them in whole; they may use only certain provisions of them; they may use them simply as guidelines in developing their own procedures; or they may adopt them but vary certain provisions to fit the circumstances of their arbitration.

(iii) As the very first sentence of the Preamble notes, the IBA Rules of Evidence are intended to govern the taking of evidence "in an efficient and economical manner." This principle influenced the drafting of all the rules. The Working Party believed that as international arbitration grows more complex and the size of cases increases, it is important for parties and arbitral tribunals to find methods to resolve their disputes in the most effective and least costly manner. For that reason, para 3 of the Preamble encourages arbitral tribunals to identify to the parties, as early as possible the issues that they may regard as relevant and material to the outcome of the case. That paragraph also notes that a preliminary determination of certain issues may be appropriate. While the Working Party did not want to encourage litigation-style motion practice, the Working Party recognized that in some cases certain issues may resolve all or part of a case. In such circumstances, the arbitral tribunal should seek to resolve such matters first, so as to avoid potentially unnecessary work on issues that would not be determinative of the outcome.

(iv) The Preamble notes the overriding principle of the IBA Rules of Evidence that "the taking of evidence shall be conducted on the principle that each party shall be entitled to know, reasonably in advance of any evidentiary hearing, the evidence on which the other parties rely." This principle infuses all of the provisions of the Rules, as provisions for the exchange of documentary evidence, witness statements, and expert reports, among others, provide each party and the arbitral tribunal with significant information about each side's evidence. As noted above, the IBA Rules of Evidence are designed to avoid surprises about procedures, in order to assist parties that may be unfamiliar with international arbitration. Similarly, the IBA Rules of Evidence seek to avoid any surprises at the evidentiary hearing. The Working Party believed strongly that the best results are obtained when each party knows the arguments made by the other and is able to provide as effective a rebuttal head-on can the arbitral tribunal best determine the merits of the case.

Article 1 - Definitions

Article 1 of the IBA Rules of Evidence sets forth basic definitions to be applied in the Rules. The definitions are generally straightforward, with commonly understood meanings. The definitions themselves do not provide any substantive rules of conduct. One definition that is not so commonly used is that for "General Rules". This term refers to the IBA Rules of Evidence to the institutional or ad hoc rules according to which the parties are conducting their arbitration, such as those of the ICC, AAA, LCIA and UNCITRAL. The term is used in Article 2, which discusses among other things conflicts between the IBA Rules of Evidence and other rules that the parties have chosen to govern their arbitration proceeding.

Article 2 - Scope of Application

Because the IBA Rules of Evidence do not provide a complete framework for the conduct of international arbitration, but are instead focused only on issues relating to the taking of evidence, parties must select another set of rules, institutional or ad hoc, to govern their proceedings. In addition, international arbitrations are subject to mandatory law relating to arbitration procedure at the seat of the arbitration. Therefore, while the Working Party has strived to draft the IBA Rules of Evidence to conform with the principal institutional and ad hoc rules generally used by parties, conflicts may nevertheless arise with the other set of rules chosen by the parties (the "General Rules" in the parlance of the IBA Rules of Evidence) or any mandatory legal provisions. Article 2 sets forth several basic principles as to how arbitral tribunals should apply the IBA Rules of Evidence in the event of a conflict with any of these other provisions:

1. In a conflict between the IBA Rules of Evidence and mandatory legal provisions, the mandatory legal provisions shall govern.

2. In a conflict between the IBA Rules of Evidence and the General Rules (i.e. the institutional or ad hoc rules chosen by the parties), the arbitral tribunal shall try to harmonise the two sets of rules to the greatest extent possible. However, because party autonomy is central to any international arbitration, the parties have a right to resolve this conflict in the manner they choose, as long as both parties agree.

3. If a conflict exists regarding the meaning of the IBA Rules of Evidence, or if both the IBA Rules of Evidence and the General Rules are silent on a particular issue, then the IBA Rules of Evidence instruct the arbitral trib-
unal to apply the general principles of the IBA Rules of Evidence, such as those set forth in the Preamble, to the greatest extent possible.

Article 3- Production of Documents

Article 3 deals with documents that the parties wish to introduce as evidence into the arbitral proceedings. Documents are often the most reliable form of evidence for parties in arbitration. 2

Article 3 refers to three groups of documents: (1) documents which are at the party's own disposal; (2) documents which the party wants to use as evidence for its submissions but cannot produce on its own, because they are either in the possession of the other party in the arbitral proceedings or in the possession of a third party outside of the arbitration; and (3) documents which neither party has introduced or wants to introduce as evidence into the arbitral proceedings, but which are seen as relevant and material by the arbitral tribunal. In addition, Article 3 contains several general principles for the treatment of documents as evidence by the parties and by the arbitral tribunal.

Production of Documents Available to One Party

The IBA Rules of Evidence begin with the principle that each party shall introduce those documents available to it and on which it wants to rely as evidence. 3 This provision reflects the principle, generally accepted in both civil law and common law countries, that parties have a burden to come forward with the evidence that supports their case.

Article 3.1 contains for the first time in the IBA Rules of Evidence the phrase "within the time ordered by the arbitral tribunal". This phrase is repeated throughout the IBA Rules of Evidence when a submission is to be made or an action to be taken by the parties. An early draft of the IBA Rules of Evidence contained specific time-limits for each step to be taken pursuant to the Rules, but based on comments received the Working Party believed that the best course was to maintain maximum flexibility for the parties and arbitral tribunals. Therefore throughout the IBA Rules of Evidence, as here, time frames are left to be determined by the arbitral tribunal in each case, presumably in consultation with the parties. For example, with respect to the initial production of documents on which each party intends to rely, the specific time when such documents are to be submitted may vary depending upon how well framed are the issues in the initial pleadings. Time frames will also, of course, vary depending upon the complexity of the matter, the resources and locations of the parties and the particular circumstances of each case.

The Working Party also recognized that, following such an initial production of documents on which each party intends to rely, later submissions in the case, such as witness statements or expert reports, may make it necessary for parties to submit additional documents to rebut statements contained in such submissions. Article 3.10 provides for such a second round of submission of documents within each party's possession. Again, the arbitral tribunal is to determine when such a second round of production may take place.

Documents in the Possession of an Opposing Party

The issue of whether and in what conditions one party should be able to request production of documents from another party, i.e., document discovery-occupied much of the Working Party's discussions. This issue was also the focus of many of the comments received by the Working Party on earlier drafts. The vigor with which this issue was debated demonstrated that the question of document discovery is the key area in which practitioners from common law countries and civil law countries differ.

Principles

Nevertheless, the Working Party was able to reach agreement on certain principles governing document discovery relatively easily, as they came to believe that practices in international arbitration can be, and have been, harmonised to a large extent. The Working Party was guided by several principles:

1. Expansive American- or English-style discovery is generally inappropriate in international arbitration. 4 Rather, requests for documents to be produced should be carefully tailored to issues that are relevant to the determination of the merits of the case.

2. At the same time, however, the Working Party believed that there is a general consensus, even among practitioners from civil law countries, that some level of document discovery is appropriate in international arbitration. According to the procedural rules of the leading institutions in the field, arbitral tribunals are to establish the facts of the case "by all appropriate means." 5 This includes the competence of the arbitral tribunal to order one party to introduce certain internal documents into the arbitral proceedings upon request of the other party. 6

This Commentary has been reproduced from Business Law International Issue 2 ppl-122 - January 2000 ISSN 1467 632X without any amendments.

This write up would be continued in the following issues of the Bulletin due to shortage of space. The end notes provided by the author of this article will be provided at the end of this write up.
Procedural Issues in International Engineering
Arbitration from the Tribunal's Perspective

By: Richard H. Kreindler
Attorney at Law (New York), Avocat (Paris)
Partner, Jones Day Reavis & Pogue, Frankfurt

Introduction

The subject of procedural issues in international arbitration, and in particular international engineering arbitration, relates to the managing of the "conduct" of the arbitration from the various and often conflicting perspectives of the different participants and in its pre-and post-proceedings phases. From the tribunal's point of view, the issue of the conduct and behavior of the respective players requires management, and it must be recognized that such conduct can be and is manageable.

Managing such conduct depends on the interplay between one or more of the following elements which may play a role, particularly in a complex engineering or construction dispute: (i) the arbitral institution, (ii) the arbitrator or arbitrators, (iii) the counsel, (iv) the parties, (v) the operation of the applicable substantive law or laws, (vi) the involvement of fact and expert witnesses (both party-appointed and tribunal-designated), and (vii) the possible intercession of the local courts at the situs of the arbitration and elsewhere.

1. From "the Tribunal's Point of View"

Initially, from the perspective of the Arbitral Tribunal, it must be recognized that arbitration is normally a creature of contract. This will be the case irrespective of the jurisdiction or the nature of the underlying dispute. Accordingly, the existence of the arbitration agreement and the legitimacy of the Tribunal's jurisdiction to manage procedural issues hinge squarely on the validity and scope of the underlying agreement to arbitration. Such agreement to arbitration may or may not include express provisions or stipulations respecting the procedure in any future arbitration.

A. Addressing Procedure in the
Original Arbitration Agreement

Indeed in many complex engineering arbitrations issues of procedure are left largely, if not wholly, unspoken in the original agreement to arbitration. Depending on the parties' perspectives at the time of contracting, it may in fact be perceived as desirable or prudent to abstain from elaborate expressions of intent respecting procedure in a later engineering arbitration.

Accordingly, from the perspective of the Tribunal its mandate and discretion respecting such later procedure are to be grounded not so much in the parties' expression of their will and autonomy. Rather, the mandate and discretion of the Tribunal are to be rooted in the parties' contractual reference to a particular arbitral regime such as the ICC Rules and to a lex loci arbitri which results from the stipulation of an arbitral situs.

From the Tribunal's vantage point, here may be a tension between party autonomy on the one hand and mandatory constraints of public policy on the other. Such tension may arise whether or not the parties have entered into an advance agreement as to procedural details. For example, the parties may have agreed to a FIDIC or FIDIC-like dispute resolution mechanism with a fairly simple reference to the ICC Rules of Arbitration in an otherwise elaborate overall FIDIC mechanism. Such mechanism may include, e.g., reference to the Engineer, rendering of an Engineer's Decision, etc., within stipulated time periods.

B. Agreement to Procedure by
Reference to Arbitral Rules

In such case, by their lean reference to the ICC Rules of Arbitration the parties may in fact have agreed to detailed stipulations respecting the pre-arbitration dispute resolution procedure, but to few if any parameters of the arbitration procedure itself. In that case, party autonomy will consist largely of the reference to the ICC Rules of Arbitration. In turn, the Tribunal will understand that such reference to the ICC Rules brings with it express agreement to certain provisions of the ICC Rules-many of which exist in similar fashion in other major institutional and ad hoc arbitration rules-which impact on procedure.

These include notably Article 15 of the 1998 ICC Rules ("The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties, or failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.")

They also include Article 15(2) ("In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case") and Article 18(4) ("When drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal, after having consulted the parties, shall estab-
lish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and shall communicate it to the Court and the parties....). Of further note is Article 20(1) ("The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.")

In short, by the exercise of their party autonomy in making reference to an established set of rules the parties have bestowed on the Tribunal a set of strictures and guidelines which provide for considerable procedural discretion. This shall be the case particularly in those cases, as often arises in complex engineering arbitrations, where the parties are unable or unwilling to agree on procedural issues. And indeed whether or not the parties can make such agreement during the arbitration, the Tribunal still has the discretion, and the duty, to adopt or adapt such agreed rules insofar as they do not offend mandatory constraints and public policy, of a procedural nature.

C. The Tribunal’s Procedural Public Policy Duties

Such mandatory constraints and public policy impediments can exist at one or another of several locales, all of which can and should be considered in a timely and thorough fashion from the Tribunal's perspective. Indeed "can and should" is too mild a statement: the Tribunal must take such factors into consideration, as Article 35 of the new ICC Rules succinctly states: "In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to ensure that the Award is enforceable at law."

Query what the reasonable scope and nature of the Tribunal's duty is to balance party autonomy, Tribunal discretion and mandatory constraints in the management of the procedure of a complex engineering arbitration:

- Does a party agreement on procedure, whether in the original agreement to arbitrate or in a subsequent submission to arbitration or after the Tribunal has been constituted, merit blind adherence by the Tribunal as long as such agreement does not offend public policy?
- Does the Tribunal have a duty to carry out due diligence to ascertain the existence and nature of procedural public policy constraints at the place of arbitration?
- At the place of possible challenge or nullification proceedings in the rare cases where such proceedings may be held away from the place of arbitration (e.g., application of German or Indian law prior the recent UNCITRAL-inspired reforms in those countries)?
- At one or more putative places of enforcement away from the place of arbitration?
- Does the nature and scope of the Tribunal's duty in this respect depend on the degree to which the parties provide proof or information respecting such public policy constraints at any of these locales?

Ultimately, in an international engineering arbitration there is a substantial likelihood that more than one locale and more than one body of procedural public policy may be relevant to the parties' rights and duties. The Tribunal should be seen as having a duty to carry out a reasonable inquiry as to such public policy constraints on the procedural decisions to be made in the arbitration.

While it is perhaps more common for public policy violations to be claimed as a result of substantive dispositions in an international arbitration, issues of procedural public policy and other mandatory procedural norms may also arise, or be mixed with substantive issues. A reasonable and timely verification of the norms, particularly at the place of arbitration and the place of business or presence of substantial assets of the parties, should normally be seen as a requirement from the Tribunal's point of view. This is all the more important in those engineering arbitrations where the parties have agreed to elaborate procedural mechanisms in the original arbitration agreement or in a later compromise before the Tribunal takes office, and which the Tribunal is expected to embrace once it is seized with the file.

2. Commencing the Arbitration and Procedural Management

Let us progress to the actual commencement of an international engineering arbitration on the basis of a more or less procedurally detailed agreement to arbitrate. Particularly in a somewhat structured institutional arbitration such as under the ICC Rules with its Request and Answer mechanism, potentially a fair amount of procedural activity will have taken place before the Tribunal is even seized with the file.

This may be less the case in an ad hoc arbitration under, e.g., the UNCITRAL Rules, even in an otherwise complex and voluminous engineering arbitration. One reason, is large part, is the lack of need or desire to file elaborate initial pleadings before the ad hoc Tribunal is constituted. And indeed even in somewhat formalistic institutional arbitrations, an experienced party may intentionally refrain from engaging in extensive procedural and substantive pleading at the beginning stages of the arbitration precisely because it does not yet know the identity and background of the Tribunal which will adjudicate the case.

A. Procedure and the Parties’ Initial Positions

Accordingly, the Tribunal once seized with the file will need to appreciate that the parties' prior submissions on issues of procedure (as well as substance) may be a function of one or more factors which bear differing relation to the actual merits of the dispute:

- the time available to prepare the submission,
- the cost and other external constraints,
- the ability to master the procedural issues within the...
deadlines,
-the custody and control of documentary and testimonial evidence,
-the tactical decision to plead with more or less particularity including in the presence of jurisdictional reservations which may impact on whether the merits are to be heard at all, etc.

Thus from the claimant's perspective, the preparation of a proper and compelling request for arbitration in an engineering dispute may give rise to numerous tactical, procedural and substantive questions, the answers to which will influence the Tribunal's later handling of the proceedings:

-Should more or less factual and technical detail be included in the initial request?

-More or less substantive law underpinnings?

-More or less tailoring to the potential Tribunal's background, or at least to the background of the party arbitrator whom the Claimant may select before filing the initial request?

B. Procedural Conditions Precedent and Jurisdiction

Apart from these issues, one problem often arises in international engineering disputes which merits careful attention at the very beginning, and should likewise be a focus for the Respondent and for the Tribunal: namely, whether the request for arbitration complies with any contractually agreed conditions precedent to the right to commence the arbitration in the first place. Such conditions may include a FIDIC Clause 67 or similar mechanism requiring exhaustion of the engineer's Decision process. They may include a mediation and/or conciliation route prior to the entitlement to commence arbitration, etc.

In any event, numerous questions arise for the claimant, the Respondent and the Tribunal in this context:

-Has a Dispute arisen?
-Is Dispute defined?
-If a Dispute has arisen, what are the requirements for notifying or making known the occurrence of the dispute to the other party or to a third-party engineer or other participant?

-Have such notification requirements been met, waived or ignored?

-What are the requirements for holding, exhausting or otherwise rendering moot such pre-arbitration mechanisms; especially in the event the other party or third party fails or refuses to participate?

The answers to these questions can impact on the ultimate jurisdiction of the Tribunal to hear the merits of the dispute, or Dispute. Indeed a failure or refusal to reasonably implement and exhaust such mechanism has been deemed, under the case law of such countries at the United States and Germany, to result in a breach of contract and/or a lack of entitlement to commence a subsequent arbitration. The outcome may then be costly and lengthy arbitral proceedings leading to the Tribunal's denial of its jurisdiction. The outcome may also include referral of the parties back to the pre-arbitration dispute resolution mechanism. In the event of a failure of such mechanism, there may be a referral to a new arbitration consisting of the same or different arbitrators.

A Tribunal which fails to do justice to the jurisdictional relevance of the foregoing inquiries may itself tread a path which could lead to the non-enforceability of an award on the grounds of lack of ripeness, lack of standing and lack of jurisdiction.

3. Responding to the Commencement of Arbitration and Management

The Respondent's reaction to the commencement of an international engineering arbitration may or may not be a mirror image of the Claimant's commencement of the proceedings. Again, an experienced party may intentionally refrain from engaging in extensive procedural and substantive pleading at the beginning stages of the arbitration. It may do so precisely because it does not yet know the identity and background of the Tribunal which will adjudicate the case.

A. Answering the Claim and Constitution of Tribunal

From the Respondent's viewpoint in this regard, even if the Claimant has identified a party arbitrator in its request for arbitration, the Respondent may have reasons to contest such nomination mechanism and to refrain from naming its own party arbitrator.

An example of this predicament which can arise in multiparty engineering arbitrations involving either complex contractor-subcontractor relationships or multiparty contract relationships is the application of Article 10(2) of the new ICC Rules. This Rule provides that "...where all parties are unable to agree to a method for constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman..."

This paper was presented at the First Engineering Conference held in Manama, Bahrain conducted jointly by the GCC Commercial Arbitration Centre and the Bahrain Society of Engineers. This conference was held from 15 -17 May 2000 at the Gulf Hotel -Bahrain.

Due to shortage of space this paper would be continued in the next issue of the Centre's Bulletin.
Second: It puts an end to the legal argument which has lasted for about five years between those who consider that the Charter of the Centre itself is enough for execution without any need for an executive decision and those who consider that it is necessary to issue executive decisions regarding the establishment of the Charter of the Centre in each GCC member state.

Third: It motivates other GCC States to follow the example of Bahrain. In this respect, we would like to highly appreciate the efforts of the Secretary General of the GCC - H.E. Shaikh Jameel Al Hujailan who has sent messages to the GCC Member States urging them to issue executive decision of the Charter of the Centre.

Fourth: It answers the questions regarding the execution of the decisions and awards of arbitration issued by Arbitral Panels formed in accordance with the Charter of the Centre.

The issuance of this Amiri Decree is an enormous support to the Centre in its progress to serve different economic sectors in the field of settlement of commercial disputes by means of arbitration. It is one of the main and integral parts of the facilities offered by the State of Bahrain to the Centre since its establishment.

It is worth mentioning, and worth also thanking the State of Bahrain for being kind and generous enough to allocated premises to be used as the Centre's headquarters at its own expense which reflects the generosity of the State of Bahrain towards the Centre.

We would also like to thank and appreciate the political leaders of the Government of Bahrain and the relevant ministers who have spared no effort to support the Centre, give it the opportunity to progress successfully and enable it to fulfill its role designated to it by the leadership of the GCC.

different economic sectors in the GCC countries. They showed their intention to urge the relevant bodies in each of the Ministries to take advantage from the services rendered by the Centre and to include the Standard Arbitral Clause into their contracts concluded with local and regional as well as international parties.

2. The decision of the Federation of the GCC Chambers in its 25th Meeting held in Abu Dhabi on 28th March 2000 to continue to finance the budget of the Centre for three more years from the year 2001. The importance of this decision does not come from the financial support itself, but from the contentment of the GCC that the Centre has really become an important part of the mechanisms of the Gulf private sector which should be supported and activated. The GCC also decided in its aforementioned meeting urge the Governments of the GCC States and the GCC General Secretariat to intensify their efforts towards expanding information about the Centre as an important Gulf institution and support the activities of the Centre and to include the Standard Arbitral Clause of the Centre in its contracts concluded with other parties. In addition, the GCC States are urged to issue decrees and decisions to approve the Charter of the Centre so that the award issued by the Centre would have the necessary executive power.

The meeting discussed the developments related to the mandate regarding the commercial disputes arising from the execution of the Unified Economic Agreement and its executive decisions. As it is well known, the slowness of implementation of the Unified Economic Agreement and the negative attitudes in the joint Gulf actions have kept this mandate of the Centre aside. It is hoped that the decisions of the GCC Summit in Riyadh regarding the revision and development of the Unified Economic Agreement will be a relief and will strengthen the productive structures of the GCC States as well as enhance the role of the private sector and the mutual benefits of the GCC citizens.

In this respect, the Centre has strived to coordinate with the Consultative Body of the Supreme Council of the GCC and the Economic and Financial Cooperation Committee to let the Centre have a clear and main role which amending the provisions of the Unified Economic Agreement so that the advantages rendered by the Centre would be utilized in regard to settlement of disputes related to this Agreement.

The meeting discussed two important developments, which recently took place:

1. The issuance of the Amiri Decree Law No. 6 of 25 April 2000 regarding the approval of the Charter of the GCC Arbitration Centre. This approval would definitely put an end to the legal argument about the feasibility of issuance of an executive decision for the establishment of the Centre. The argument lasted for five years between those who supported the idea of issuing such a decision in the GCC States as an important issue and those who felt that there is no need for further executive decree.

The decision of the State of Bahrain is the result of exhausting efforts taken by the Centre since its establishment in order to convince the relevant bodies of the importance of issuing executive decisions of the Charter of the Centre in the Member States. The recent effort was the decision of the BOD in its previous meeting in Riyadh which emphasized the utmost importance of the existence of a legal instrument issued in each of the GCC Member States for execution of the decision of the GCC Supreme Council in regard to the approval of the Charter of the Centre, which had been adopted by the GCC Supreme Council in its meeting in Riyadh in December 1993, along the lines of other bodies under the umbrella with the GCC, such as the Gulf Standardization Organization and Gulf Investments.

In this regard, the BOD extends its thanks and gratitude to all ministers in the host country - Bahrain - particularly to those whom the members of the BOD have met: H.E. Mr. Ibrahim Mohammad Al Murtawa - Minister of Cabinet Affairs and Information, H.E. Ali Saleh Al Saleh - Minister of Commerce and H.E. Shaikh Abdul Rahman Bin Mohammed Al Khalifa - Deputy Minister of Justice and Islamic Affairs, who have spared no effort to support the Centre in its first steps towards progress. All of them expressed the support of the Government of Bahrain to the Centre as an important Gulf institution. They expressed their continuous support to the Centre to enable it to carry out its objectives to serve the
1. Introduction To The Commercial Arbitration Centre of the GCC

On May 25th, 1981, the Heads of the State of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates signed the Charter for the Co-operation Council for the Arab States of the Gulf (the “GCC”). The purpose of this regional organization, as set out in the Charter of the GCC, is to coordinate the integration and the interconnection between Member States in the fields of politics, education, social affairs, internal and external security, industry and trade. Its overriding objective is to achieve a certain degree of unity between them.

As the member States were rightly-expecting a fast growth of the cross-border commercial transactions, they decided to anticipate the cross-border disputes that would necessarily occur from time to time by adopting in 1993 a Charter (the “Charter”) instituting the GCC Commercial Arbitration Centre (the “Centre”). In March 1995, four months after the Arbitral Rules of Procedure for the Centre (the “Rules”) were adopted, the Centre was ready to fulfill its mission of supplying economic agents with facilities or organize the settlement of their disputes by the way of arbitration.

The Centre’s headquarters are situated in the State of Bahrain (Article 3 of the Charter) but it is independent from all the Governments of its member States. The Centre is a separate legal entity headed by a Board of Directors whose general mission is to “seek to realize the Centre’s objectives and carry out its duties” (Article 7 of the Charter). This Board of Directors is empowered in particular, to designate a Secretary-General who is “the Centre’s representative in all relations before the law courts, public agencies and private entities” (Article 8 of the Charter).

II. Jurisdiction of the Arbitral Tribunals formed under the Centre’s Rules

The jurisdiction of an arbitral tribunal as provided for in the Centre’s Rules is vast. For example, such a tribunal is competent to decide matters concerning commercial disputes that arise either between GCC nationals or between GCC nationals and foreign natural or legal persons. Therefore, it seems that the founders of the Centre did not intend it to deal with commercial disputes arising between an individual and a member of a foreign State.

In addition to this general competence, the Centre’s arbitral tribunals have also been granted by the Charter a special jurisdiction over commercial disputes linked to the implementation of the GCC Unified Economic Agreement and the resolutions issued for its implementation (Article 2 of the Charter).

All parties who wish to submit their disputes to arbitration under the Centre’s Rules must agree to do so in writing either in the form of an agreement specifically drawn up in order to refer existing disputes to arbitration under the Centre’s rules or by including an arbitration clause in their original contractual agreement (Article 10 of the Charter). In the latter case, a model arbitration clause is set out at Article 2.2 of the Rules for the parties to incorporate into their agreement.

It should also be noted that once the parties have consented to an arbitration agreement, they are precluded from referring the disputes which are covered by the said arbitration agreement to any other authority. They are also precluded from challenging the award passed by the arbitral tribunal (Article 2.1 of the Rules).

III. Constitution of the Arbitral Tribunal

An arbitral tribunal constituted under the Rules of the Centre will be comprised either of a single arbitrator or of three arbitrators. Although the parties remain free to choose the members of the tribunal, they can do so from a list of potential arbitrators established by the Centre (Article 8 of the Rules). Such practice, which might be very helpful for those of the parties who are inexperienced in the field of arbitration, is distinct from the usual practice of many arbitral institutions, such as that of the International Chamber of Commerce in Paris (the “ICC”), where, in the absence of such a list, arbitrators are appointed by the ICC on a case by case basis with the help of the ICC National Committees, which propose, upon request of the ICC, potential arbitrators.

In order to be listed on the Centre’s panel, an arbitrator ‘shall be a legal practitioner, judge or a person enjoying a wide experience and knowledge in commerce, industry or finance’. The arbitrator must also “be reputed for his good conduct, high integrity and independent views” (Article 11 of the Charter). In the event the parties have chosen to form a three arbitrators tribunal, the third arbitrator, who will chair the tribunal, is designated by the Secretary-General among the Centre’s panel. Also, in the event the parties cannot reach an agreement as to the constitution of their tribunal, the Secretary-General is also empowered by the Rules to select among the Centre’s arbitrator’s panel a single arbitrator or three arbitrators if he considers that the nature of the dispute requires him to do so (Article 11 of the Charter).

IV. The Proceedings
It should be noted that the parties to an arbitration initiated under the Centre's Rules are granted a great deal of liberty in relation to the conduct of the proceedings. Indeed, according to Article 4 of the Rules, the procedure established by the Rules themselves are not only intended to apply in the situation where the parties have not agreed otherwise. The parties are therefore free to agree to a different set of rules; they may even supplement the Rules of the Centre on the condition that these additional rules cannot affect the powers devolved to the Centre and to the arbitral tribunals by the Rules themselves. A further illustration of the flexibility allowed to the parties is set out at Article 25 of the Rules according to which although the parties are involved in an arbitration - which is obviously a jurisdictional means of dispute resolution-they may decide that their dispute should be resolved without having recourse to law, by requesting the arbitral tribunal to settle the dispute by means of reconciliation.

The freedom of the parties in the conduct of the proceedings is particularly evident when considering the following:

1. the language and the place of arbitration:

In relation to these two issues, the competence of the Centre and of the arbitral tribunal is supplementary. The parties are therefore completely free to choose the place and the language that best suit them. Where no such agreement has been reached, the Secretary General has the power to determine the place of arbitration while the arbitral tribunal decides on the applicable language or languages to be used in the proceedings (Article 6 and 7 of the Rules).

2. the applicable law to the dispute:

The parties to an arbitration administered by the Centre are free to choose the law that shall apply to their dispute. If they fail to choose an applicable law, the arbitral tribunal will apply the appropriate conflict of laws rules in order to determine which set of laws should be applicable in the particular circumstance before them. However, the law designated through this procedure must be reconcilable with the terms of the litigious contract from which the dispute arose as well as the rules and practices of international law (Article 12 of the Charter).

In summary, when examining the dispute that has been referred to it, an arbitral tribunal will decide the matter in accordance with: (i) the contract concluded between the parties as well as any subsequent agreement, (ii) the law chosen by the parties, (iii) the law with the most relevance to the dispute in accordance with those rules of conflicts of laws rules deemed most appropriate by the tribunal and finally (iv) all local and international business practices (Article 29 of the Rules).

3. the powers of the arbitrators:

As shown above, the Rules allow the parties a large degree of freedom in terms of the procedure for the dispute settlement process. However, the Rules also take into account the fact that although the parties have referred their dispute to arbitration, they are in effect still seeking justice, albeit through an alternative means of dispute resolution. The arbitrators are therefore empowered to act, in certain circumstances, as judges would. This is especially apparent in the following powers that arbitral tribunals, including those constituted under the Centre's Rules, are ordinarily granted.

i. the power to decide over its own competence:

A party to an arbitration administered under the Rules may seek to challenge the tribunal's jurisdiction in the proceedings on the basis of a lack of an arbitration agreement or the nullity of such agreement. On the condition that such a plea is made prior to the examination of the merits, the arbitral tribunal enjoys the exclusive power to rule on its own competence (Article 20 of the Rules).

ii. the power to administer the hearings:

Where the parties make no request for verbal hearings or for oral testimony from either witnesses or experts, the arbitral tribunal can decide whether such hearings are necessary or whether the proceedings should go ahead merely on the basis of the written submissions (Article 21 of the Rules). In the event the arbitral tribunal decides in favor of some form of oral testimony, it is its duty to inform the parties of the date, time and place that such hearings are due to take place (Article 22.1 of the Rules).

Another aspect of the power of the arbitral tribunal over the conduct of the proceedings is its ability to proceed with the arbitration where one of the parties is not present at the hearings and fails to justify his absence within a period of time set by the tribunal (Article 27 of the Rules).

During the course of an arbitration, it may be necessary for the arbitral tribunal to issue orders intended to preserve evidence, to protect assets or to maintain the status quo pending the outcome of the arbitration proceedings themselves. The Rules have therefore empowered arbitral tribunals, at the request of a party, to decide interim measures such as ordering the sale of perishable items or the deposit of the litigious goods with third parties (Article 28).

In relation to the examination of evidence, the arbitral tribunal enjoys the exclusive power of appreciation, which is to say that it has the right to reject any piece of evidence submitted by a party if it considers that such an action is necessary (Article 22.5 of the Rules).

Furthermore, the arbitral tribunal may request the parties, at any point during the proceedings, to produce other pieces of evidence that it may consider to be relevant to the proceedings; it may also decide to undertake
inspections and any additional investigation that it deems fit, including recourse to experts (Article 24 of the Rules).

Indeed, as long as the award is not rendered and when material reasons make it necessary, the arbitral tribunal may decide, either by itself or at the request of one party, to reopen the pleadings on the merits.

V. The Award

As soon as the pleadings come to an end, the tribunal convenes in order to begin the deliberation process at the end of which an award is rendered. This process is, however, optional when the arbitral tribunal is comprised of a single arbitrator (Article 31 of the Rules).

In the interest of promptness, the award must be rendered within a determined period of time fixed by the parties. Where the latter fail to do so, the award must be rendered within a maximum period of one hundred days from the date of referring the case to the tribunal. However, an extension of time may be granted by the Secretary-General if the arbitral tribunal requests one and justifies its request with reasonable grounds (Articles 32 and 33 of the Rules).

The tribunal’s award must be justified and reasoned, and should be considered binding and final by the parties to the dispute (Articles 34 and 36.1 of the Rules). As soon as the award is rendered, the tribunal can only act for the purpose of rectifying a material error in the award or in the interpretation of a particular point that may have arisen in the course of the proceedings, in the event that such a revision should be requested by the parties (Articles 37 and 38 of the Rules).

The enforcement of such an award in the GCC member States is subject to the issuance of an order by the relevant local judicial authority. There are however a limited number of cases, provided for by the Rules, where the judicial authority may refuse to issue such an order. This can only occur where one of the parties makes an application to this effect in the form of an application for annulment of the award, on the basis, for example, of a lack of an arbitration agreement, its nullity or a lack of competence of the Arbitrators (Articles 36.2 of the Rules).

VI. Conclusion

Because the Centre was established only quite recently and taking into account the fact that arbitration remains a highly confidential exercise, it is highly difficult to derive a conclusion as to the Centre’s efficiency, or even to obtain first information from those that the Centre is supposed to serve.

It is true, however, that the Centre is making a concerted effort to advertise its potential in becoming a natural partner of economic entities as they strive to settle their disputes as quickly and efficiently as possible. Such goals are justified considering the Centre’s well balanced Rules of Arbitration. The Centre’s main drawback however is the fact that the arbitral tribunals constituted under its Rules cannot hear disputes involving States and individuals. As a result, it is likely that companies that deal mainly with States will prefer to refer their disputes to other institutional arbitration centers that do not exclude such matters.

- This paper has been presented by the author at a seminar held in Abu Dhabi on 16th April 2000 entitled “Key Issues in International Commercial Arbitration” organized by Shearman & Sterling.

- The analysis made by the author in this paper express his own personal views as to the Rules of Arbitration of the Centre and the Centre is in no way bound to or liable for the views expressed herein.

- However, with regard to the place of arbitration, there was a typographical error in the printed copy of the translated English version of the Rules. We would like to correct it to the Tribunal who would be the deciding authority with regard to the venue of arbitration and not the Secretary General.

---

The text is continued on the next page.

---

In the image, there are some Arabic texts that seem to be the title of a publication or a reference. However, due to the resolution, the exact content is not discernible.
THE TECHNICAL ASPECTS OF INSURANCE ARBITRATION

BY: DR. HISHAM BABAN

The reason to address the above topics are stemmed from the fact that such arbitration considerably relies on insurance practices governing the insurance contract, though satisfying the legal and procedural aspects, rather than otherwise; as you all know that insurance, as an industry and as a trade, was the natural product of customs and usage; before being codified into concepts, terms and conditions, which are usually changing according to the insurance developments, dictated by the different aspects of life.

Therefore I rather refrain to discuss the traditional legal issues which are usually dictated by such topics, save when approaching a technical aspect.

1st Issue: Litigation is not the ideal process to solve the insurance disputes

We all know that litigation is becoming increasingly time and effort consuming, in addition to the prohibitive legal costs involved in almost everywhere. These factors negatively affect the insurance disputes, where delays to receive the claim amount in due time were repeated, accompanied by the accumulation of legal interests, and keeping the claim file open for a long period during which an outstanding claim provision, were provided.

In Jordan, the situation does not differ from the above, and by an overview two reasons could be identified:

1st reason: Moderate legal background in insurance disputes

Generally speaking, majority of insurance cases find their answers, when litigated, in the common law systems or other systems of law based thereupon and stemmed from the Anglo-Saxon jurisprudence, whereas our civil legislation concepts, usually governing the insurance contracts, could be easily traced to the Latin school of law, though affected, to certain degrees, by the Islamic schools of jurisprudence.

It follows that the insurers legal viewpoints are based on a terminology and concepts which are different from those of the judge or a legal advisor who is looking into the case without an insurance legal background which may assist in bridging the gap between the two ways of thinking, hence resorting to the general principles of law to solve the dispute.

Such paradoxical approaches to the insurance disputes usually lead to inconsistency in court decisions and prolonging the time for litigation.

2nd reason: Majority of insurance policies do not reflect the local legal background

Most of the policies in use are either copied or otherwise translated from foreign insurance policies hence resemble the characteristics of the legal system under which they were originally drafted, rather than reflecting our own legal system.

It may be argued, however, that the parties already agreed the terms and conditions of the contract according to which the insurance policy was issued. Such argument is usually rebutted by the judge who construes the ambiguity of the text in favour of the insured, or by considering certain terms and conditions as arbitrary and declare them void.

Though all was made in good faith, in his deliberation to ascertain justice, the judge would considerably prolong the time necessary for litigation.

By shading all that doubt on litigation, it seems but obvious to conclude that litigation, may not be the ideal process, as one hopes, to solve the insurance disputes.

The above conclusion may also be reached, though through a different set of reasons, by other colleagues, when throwing more light on this issue throughout their deliberations during the seminar.

2nd Issue: Arbitrating insurance disputes

Due to the difficulties witnessed in litigating insurance disputes, the reasons for which are already displayed, the insurance companies seem to be more in favour of taking their disputes to arbitration where it would be more professionally handled, hopefully through less complicated proceedings, hence saving in both time and cost, and achieving better results, maintaining the privacy of the dispute, when necessary, and without serving the commercial relationship with the claimant.

Taking all these objective features into consideration, let us, nevertheless, identify the main features of
this method to solve insurance disputes.

**Feature No. 1: Incorporating arbitration clause into an insurance policy, a contradiction.**

By Article 924-para.(4) of Jordan Civil Code, the arbitration clause shall be considered as void...

"If it was not incorporated in a special agreement, separate from the general conditions printed in the insurance policy". This stipulation is in consistency with similar texts appearing in the civil codes of other Arab Countries.

However, despite this stipulation, it is the practice of the insurance companies to incorporate as arbitration clause, in different shapes and wordings, within the general conditions of their policies, rather than attaching it to such policies as a separate agreement, in order to avoid the ruling of the law.

To argue this situation further, in order to consider the possibility of enforcing such a clause regardless of its illegality, two situations may arise: -

**In the 1st situation: the insured adherence to the arbitration clause as incorporated in the insurance policy:**

In this situation the insured's adherence may be construed as a waiver of the ruling which the legislator stipulated to protect the insured's interest; apart from the cases where the public order is at stake. Furthermore, such adherence turns the clause into an arbitration agreement by express acceptance, whether neither parties can revoke without their agreement to do so, or following a court judgment, unless the agreement stipulates otherwise (The Arbitration Act No. 18 of 1953 -Article 4).

In this situation the insurance company cannot plead the voidness of the clause as incorporated within the general conditions of the insurance policy issued by itself, as the insurer is not the party to whose interest the voidness was considered. In addition, the legal maxim stipulates that "Thee who strives to revoke what concluded on thy part, endeavors thereof shall be turned back thereto". (Jordan Civil Code, Article 238).

**In the 2nd situation: The insurer adherence to the arbitration clause**

In contrast with the first situation, the texts do not seem to assist the insurer, if the party to whose interest the voidness of the clause was considered unwilling to enforce that clause. The voidness of the clause may still be considered even by utilising the plea that the insured was aware of the arbitration clause within the general conditions, as this formality was already considered to protect the insured (Al-Waseet, A R Al-Sanhoori, Vol. 7, pp. 1197).

**Feature No. 2: Restrictive arbitration legal framework**

In addition to the obstacles we so far identified, more discouragement may still be witnessed even after concluding an arbitration agreement between the parties to the insurance contract.

The application of these agreements has clearly revealed that the restrictive nature of the legal framework governing such agreements as embodied in the existing Arbitration Act No. 18 of 1953, brings the parties more under the litigation concepts and procedures than enabling them to utilise their own agreement to solve the dispute.

Though a new draft of an arbitration legislation was revised since 1997, things remained unchanged, notwithstanding the national, regional and international schemes already established and implemented to update arbitration concepts and procedures, e.g. UNCITRAL Arbitration Rules 1976, and the Model Law 1985.

**3rd Issue: Necessary Changes**

By coming that far it is evident that neither the legal framework nor the available applications were sufficient to introduce arbitration as successful process to settle insurance disputes, which effectively eliminates litigation as a major system of settling these disputes.

This is, however, in contracts with Jordan's efforts to modernize and upgrade its economical legal framework to cope with global trends.

Having that in mind the following changes may be suggested:

**Change No. 1: Removal of arbitration clause from insurance policies**

Instead of the above controversial clause, now incorporated in the insurance policies, the following text may be inserted: "It is hereby agreed that all differences (disputes) arising from this contract shall be conclusively resolved in accordance to the Arbitration Agreement attached herewith".

By doing so, it would be the duty of the insurers to attach to the proposal forms, submitted to the insured
to complete and sign, an arbitration agreement for his consideration and signing if acceptable to him. This agreement shall be attached to the insurance policy when issued and delivered to the insured carrying both parties' signatures.

Though this agreement may overcome the voidness ruling in respect of the arbitration clauses incorporated in the insurance policies, such agreements shall continue to remain under the mercy of the existing Arbitration Act.

Change No. 2: Updating Arbitration legislation and procedures.

For the time being the existing draft of the Arbitration Act submitted in 1997, may be considered a suitable starting point for the change required.

It suffices to mention here that the new draft enables the parties to draft their arbitration agreements according to the rules and procedures adopted and implemented by specialized arbitration institutions of their choice. In which case the said parties may only need to mention in the document signed by both their agreement to conclusively resolve their disputes arising from insurance contract in accordance with the arbitration rules accredited by that authorised institution.

Change No. 3: Revising the legal framework of insurance policies

The time has come when the insurers have to take into consideration the legal requirements to which the contracts of insurance are usually subjected. This objective may be achieved by striking a balance between the coverage of the coverage of the risk as incorporated in the policy and the legal requirements necessary to conclude the insurance contract, without severely any technical agreements with their co-insurers or re-insurers.

Change No. 4: Establishing institutional arbitration

Though this aspect may be considered as a consequence of introducing the new legislation which shall permit the private corporate persons of public utility to regulate the rules and bases of resolving arbitration disputes, this task may be taken further by the establishing arbitration institutions dealing with different sectors of the economy.

The presence of sectoral arbitration centres shall improve the professional aspects of arbitration in that sector as it will increasingly attract the qualified persons who would be more capable to deal with the disputes of that sector.

Decree Law No. 6 of the Year 2000 regarding the Approval of the Charter of the Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf.

We, Hamad Bin Isa Al Khalifa, the Amir of the State of Bahrain after having viewed the Constitution,

the Amiri Decree No. 4 of 1975, and

the Charter of the Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf,

and based on the submission of the Ministry of Commerce,

and after the approval of the Council of Ministers,

have hereby decreed the following Law:

**ARTICLE 1**

The Charter of the Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf issued, by a decision taken by the Supreme Council of the Co-operation Council for the Arab States of the Gulf during its 14th Summit in 9th of Rajab 1414 Hijri corresponding to 22nd December 1993 in Riyadh, attached herein, is hereby approved.

**ARTICLE 2**

The Ministers, each in his respective capacity, shall implement this Law and it shall come into effect from the date of application thereof in the Official Gazette.

Hamad Bin Isa Al-Khalifa
Amir of the State of Bahrain.

Issued at Ar-Rifa Palace on 20th Muharram 1421 Hijri corresponding to 25th April 2000.