From the Chair...

Multiplicity of Gulf Arbitration Centres and institutions has posed a great surprise to several observers in the region. Most of the established arbitration centres and institutions are directly linked to the Chambers of Commerce and Industries in the GCC Countries, and create a matter of concern which stems from the objective fact that there has been no rapid increase in the number of commercial disputes being referred to arbitration and therefore the need for these centres cannot be wholly justified especially as the Chambers of Commerce and Industry in each of the GCC States have jointly established a regional arbitration Centre, the GCC Commercial Arbitration Centre, to deal with the disputes that have been referred to arbitration.

The GCC countries are envisaging to form collectively a political and socioeconomic system, which aims at integration in all walks of life.

Contd.... on page 3

DATABASE ON COMMERCIAL ARBITRATION & INTELLECTUAL PROPERTY IN THE GCC STATES

The GCC Commercial Arbitration Centre has decided to offer its services to compile a database on commercial arbitration and intellectual property in the GCC States. Amongst the Centre’s interests is electronically-stored and transferred information. This database will serve its member arbitrators and experts.

For more details turn to page 19
Our website address www.gccarbitration.com

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

Mr. Brian Totterdill  Dr. Nael G. Bunnin  Mr. Essam Al Tamimi

For more details on this Workshop, kindly refer page 15
Being advertised in the Centre's Bulletin is an added advantage as it is circulated to a majority of international arbitration centres around the world. The Centre's Bulletin has a far-reaching capacity and is also circulated to Ministries, Governmental Organizations, Societies, and Chambers of Commerce in the GCC countries in addition to most of the law offices both in the GCC region and around the world.

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Therefore multiplicity of these centres will not serve the idea of integration nor support the existence of an arbitration centre on a regional level.

The general tendency towards institutional arbitration is something commendable and would support the development of arbitration in the region. Nevertheless, the increase in the number of arbitration centres in a limited geographical and political region will not only deteriorate the development of constitutional arbitration but would also hamper the growth of a jointly established regional centre. As the GCC Commercial Arbitration Centre represents itself as an advanced mechanism for settlement of commercial disputes, formed by Leaders of the GCC States, multiplicity of other arbitration centres would create duality of work, scattering of efforts and squandering the sources which altogether lead to weakening the strategy of the GCC countries towards attaining unification and integration.

The Centre’s Board of Directors has analyzed and discussed this issue at length and has come up with the following recommendations:

1. The local arbitration centres and institutions which are linked to the chambers of commerce and industry in each GCC country shall restrict themselves to local arbitration and conciliation activities which they have been doing since their establishment while they should refer parties in disputes to the Centre to have the same resolved under its Rules of Procedure.

2. Arbitration between different GCC parties or between GCC and non-GCC parties shall be referred to the Centre.

3. The Centre shall strive to urge its members and other government and private organizations to incorporate the Standard Arbitration Clause of the Centre in their contracts concluded with other parties.

4. A work schedule shall be chalked out to make the different arbitration centres and institutions in the GCC Countries to be branches of the Centre in the long run.

These are some of the solutions, which, we believe would help to solve the matter.
Even in some civil law countries, a State court is entitled to order the production of internal documents, either upon request of one party or because it sees the need for these documents itself. From a German point of view, for example, this follows from the secondary onus of presentation and proof (sekundare Darlegungs- und Beweislast). It may be the case that one party, which would normally carry out the onus of presentation and proof, did not participate in the relevant events that it must present and therefore does not have concrete, first-hand knowledge of the decisive facts. If the other party has such first-hand knowledge it is reasonable to require the other party to introduce those documents available to it, which de facto places the onus of presentation and proof on that party.

3. The decision on the scope of document discovery - whether or not a party must introduce internal documents into the arbitral proceedings against its will - shall lie solely with the arbitral tribunal. Therefore, any request of one party for documents in the possession of another party is to be directed towards the arbitral tribunal, not towards the other party (see art. 3.2). Only the arbitral tribunal has the competence to make a decision on the request if the receiving party refuses to produce the requested documents voluntarily. The arbitral tribunal shall order the production if it is convinced inter alia that the requested documents are relevant and material to the outcome of the arbitral proceedings. These standards are set forth in article 3.6.

4. The scope of the permissible document request is also limited by certain objections described in Article 9.2 (see the discussion of these objections below). A party may raise any of the bases for objection in opposing the document request. If it does so, the arbitral tribunal must make a decision as to whether or not any of these objections apply, as well as on the propriety of the request for production itself (see art. 3.6).

The rules set forth in Articles 3.2 - 3.8 follow from the principles described above. These rules concerning requests for production of documents from other parties represent a well-balanced compromise between the broader view generally taken in common law countries and the more narrow view held generally in civil law countries. The IBA Rules of Evidence may be particularly useful, therefore, when an arbitration involves parties coming from these different legal backgrounds.

A continental European party may, for example, find that these Rules are very useful in seeking to restrict an overly broad request from a common law party, while a common lawyer may be able to use the Rules to obtain some documents from a European party that the latter may not otherwise wish to provide.

Procedures

Usually following the initial submission of documents on which each party intends to rely pursuant to Article 3.1, any party may submit a Request to Produce to the arbitral tribunal. This request must be submitted within the time ordered by the arbitral tribunal, as provided in Article 3.2. Article 3.3 provides certain requirements regarding the content of a Request to Produce, which are generally designed to make the request specifically describe the documents being sought. Article 3.3 is designed to prevent a broad “fishing expedition”, while at the same time permitting parties to request documents that can be reasonably identified and which can be shown to be relevant and material to the outcome of the case. This specificity of the information required by Article 3.3 is also designed to help the receiving party decide whether it wants to comply with the request voluntarily (as provided in art. 3.4), or if it wants to raise objections (art. 3.5). The specificity of the request is also designed to make it possible for the arbitral tribunal to decide, if there is an objection to the Request to Produce, whether or not to grant the request pursuant to the standards set forth in Article 3.6.

The Request to Produce must identify (i) the document or documents sought, described in sufficient detail; (ii) why the documents requested are relevant and material to the outcome of the case; and (iii) that the documents requested are not in the possession of the requesting party and the reasons why that party assumes the documents requested to be in the possession of the other party. In a compromise between the common law and civil law systems, the Request to Produce can identify documents either by describing an individual document (art. 3.3 (a) (i)) or by describing “in sufficient detail (including subject-matter)... a narrow and specific request category of documents that are reasonably believed to exist” (art. 3.3 (a) (ii)). The description of an individual document is reasonably straightforward. The IBA Rules of Evidence simply require that the description be “sufficient to identify” the document.

Permitting parties to ask for documents by category, however, prompted more discussion.
The Working Party did not want to open the door to “fishing expeditions”. However, the Working Party understood that some documents would be relevant and material and properly produced to the other side, but they may not be capable of specific identification. Indeed, all members of the Working Party, from common law and civil law countries alike, recognized that arbitrators would generally accept such requests if they were carefully tailored to produce relevant documents. For example, if an arbitration involves the termination by one party of a joint venture agreement, the other party may know that the notice of the termination was given on a certain date, that the Board of the other party must have made the decision to terminate at a meeting shortly before that notice, that certain documents must have been taken concerning the decision. The requesting party cannot identify the dates or the authors of such documents, but nevertheless can identify with some particularity the nature of the documents sought and the general time frame in which they would have been prepared. Such a request may qualify as a “narrow and specific category of documents”, as permitted under Article 3.3 (a) (ii).

As noted above, the provisions of Articles 3.3 (b) and (c) also serve as checks on the scope of any Request to Produce. The content of the requested document needs to relate to the issue in the case, and the relationship between the documents and the issues must be set forth with sufficient specificity so that the arbitral tribunal can understand the purpose for which the requesting party needs the requested documents. By requiring the requesting party to state that the documents sought are not in its own possession, the IBA Rules of Evidence seek to prevent unnecessary hassling of the opposing party by the requesting party.

Finally, as one additional limitation on the scope of documents to be requested from opposing parties pursuant to this Article, the Working Party added to Article 3.4 the requirement that any documents produced pursuant to a Request to Produce shall be sent not only to the other parties in the arbitration but also to the arbitral tribunal. Thus, any documents produced would automatically become a part of the record. The self-interest of parties should cause them thereby to limit the scope of their request, as they will not want to overburden the arbitrators with documents.

Because of the specificity required in the Request to Produce, it is likely that such a request will be made only after the issues have become sufficiently clear in the case. The precise timing of such a request will be determined by the arbitral tribunal. It will naturally depend upon the specificity of the initial pleadings, a Terms of Reference or other documents identifying the issues.

A party seeking to oppose entirely or to limit a Request to Produce must raise its objections in writing within the time ordered by the arbitral tribunal. As noted, the bases for objection shall be those set forth in Article 9.2 of the IBA Rules of Evidence (discussed below). If a party raises such objections, the arbitral tribunal must decide on the propriety of the Request to Produce. The arbitral tribunal should consult the parties regarding the Request to Produce and the objections and “in timely fashion” decide whether to accept some or all of the objections. The arbitral tribunal may order production of the documents sought in the Request to Produce only if it is convinced that (i) “the issues that the requesting party wishes to prove are relevant and material to the outcome of the case”, and (ii) none of the reasons for objection set forth in Article 9.2 apply”.

The IBA Rules of Evidence provide a method for determining this issue in certain exceptional cases. Occasionally, an objection –such as that a privilege applies or on the grounds of commercial confidentiality or special political or institutional sensitivity (see art. 9.2 (b), (e) and (f))—may require the arbitral tribunal first to review the document itself. The arbitral tribunal may decide that it cannot undertake such review by itself, either because if it were to decide that the objection were valid, it could not eliminate its knowledge of the document once it had been reviewed, or because of concerns of confidentiality. Therefore, Article 3.7 of the IBA Rules of Evidence provides that in such “exceptional circumstances”, when the arbitral tribunal determines that it should not review the document, it may appoint an independent and impartial expert, who is bound to confidentiality, to decide on the objection.

The expert, who would not necessarily need to be appointed pursuant to the terms of Article 6 of the IBA Rules of Evidence, would provide a report on the objection, but the arbitral tribunal is to make the final ruling as to its validity. If the objection is granted, then the document would be returned by the expert to the producing party, and it would not become a part of the arbitral proceeding. If, on the other hand, the objection is denied, then the expert would provide the document to the arbitral tribunal and to the other parties pursuant to the Request to Produce. In either event, the expert would also, of course, keep confidential the information learned in reviewing the document.
Requests to Produce by the Arbitral Tribunal

The IBA Rules of Evidence also permit the arbitral tribunal to seek certain documents that it considers to be relevant and material to the outcome of the case. First, a party may request a production of documents from a person or organization which is not a party to the arbitration. Some arbitration laws permit arbitral tribunals to take or to apply for certain steps, such as a subpoena, to obtain such documentation from non-parties. Therefore, Article 3.8 permits an arbitral tribunal "to take whatever steps are legally available to obtain the requested documents", as long as the arbitral tribunal determines that such documents would be "relevant and material to the outcome of the case". Presumably, the form of a Request to Produce pursuant to Article 3.8 should follow the requirements set forth in Article 3.3.

In addition, since the arbitral tribunal is required to establish the facts of the case by all appropriate means, it is also entitled to order a party to produce documents which had so far not been introduced as evidence into the proceedings (see art. 3.9). A party receiving such a request from an arbitral tribunal, however, has the same right to raise substantive objections, pursuant to Article 9.2, as if the documents had been sought in a Request to Produce by another party. If such objections are raised, the arbitral tribunal makes a decision based upon the considerations described above.

General Issues Regarding Documents

Copies

The IBA Rules of Evidence permit the production and submission into evidence of copies of documents, rather than originals. Of course, the copies must fully conform to the originals (see art. 3.11). The arbitral tribunal may request the production of an original document at any time, so if a party believes that the copy does not fully conform to the original document, it may ask the arbitral tribunal to require the production of that original.

Confidentiality

The Working Party discussed at length what confidentiality ought to be accorded to documents produced pursuant to the IBA Rules of Evidence. The issue of confidentiality in arbitration proceedings has been a difficult topic in recent years. Court decisions in various countries, such as Australia, England and Sweden, have considered the issue, while some institutional rules have also treated the subject.

The Working Party decided that the IBA Rules of Evidence should not seek to change the evolving standards with respect to confidentiality. Therefore, the IBA Rules of Evidence distinguish between documents submitted by a party in support of its own case and those documents submitted against its will pursuant to a Request to Produce or by other procedural order of the arbitral tribunal. The latter category of documents is subject to specific strictures to be kept confidential by the arbitral tribunal and by the other parties. Such documents may be used only in connection with the arbitration (see art. 3.12). However, the IBA Rules of Evidence take no position with respect to documents submitted voluntarily by a party in support of its case. The Rules state simply, "this requirement is without prejudice to all other obligations of confidentiality in arbitration". Therefore, parties must look to the institutional or ad hoc rules pursuant to which they are conducting the arbitration, or to the legal regime governing the arbitration, to determine what level of confidentiality would apply to such documents.

Inferences

Arbitral tribunals, of course, have no power to assure enforcement of their orders to produce documents. Therefore, Article 9.4 of the IBA Rules of Evidence provides that if a party fails to comply with a procedural order of an arbitral tribunal concerning the production of documents, then the arbitral tribunal may infer from this failure to comply that the content of the document would be adverse to the interests of that party. This inference also applies when an opposing party does not make a proper objection to a Request to Produce within the time-limit set by the arbitral tribunal, but nevertheless fails to produce requested documents.

Article 4 – Witnesses of Fact

In arbitration, the facts of the case are very often established through witnesses, who testify about events of which they have personal knowledge. This personal knowledge distinguishes the witnesses of fact from experts, who appraise objective technical data which are accessible to everyone. Witnesses of fact are covered by Article 4 of the IBA Rules of Evidence, experts are covered by the subsequent Articles 5 and 6.

Although witness testimony is less frequently used as evidence in civil law courts, where documentary evidence is preponderant, than in common law courts, arbitration proceedings in the civil law as well as in the common law tradition very often rely on witnesses. In the common law tradition, witnesses are questioned to be asked. In transnational arbitrations, the
arbitral tribunal and the parties should know how to handle witnesses of fact.

Arbitration rules and statutes are usually silent on witness testimony. The IBA Rules of Evidence thus fill in a substantial gap: Article 8 of the IBA Rules of Evidence, discussed later, spells out how witnesses are examined at the hearing; Article 4, to be discussed here, organizes the stages before this hearing.

**Information on Witnesses**

Article 4.1 requires each party to identify the witnesses on whose testimony it wants to rely, as well as the subject-matter of this testimony. Through this requirement, which is common practice and explicitly confirmed in a few arbitration rules, the opposing party cannot be surprised by unexpected witnesses or facts and can select its own evidence in response well in advance of the hearing.

Although the IBA Rules of Evidence do not require so, it would also be useful for each party to inform the arbitral tribunal and the other parties about the language in which the witness will testify. If the witness cannot present evidence in the language of the arbitration proceedings, translation has to be provided.

The 1983 IBA Rules imposed a fixed time period for this information or witnesses if parties did not agree or if the tribunal did not impose another time frame. The initial draft of the present IBA Rules of Evidence, as well as the UNCITRAL and AAA Arbitration Rules, required that the information must be given at least some time before the hearing. The final text of the new IBA Rules of Evidence leaves it entirely to the tribunal to impose the time within which the information has to be given.

**Affiliated Persons as Witnesses**

Differences exist among legal systems as to whether an executive employee, agent or other person affiliated with one of the parties in dispute can be heard as a witness. In the common law tradition, a party may be a witness in its own case, whereas in the civil law tradition only third party witnesses may testify.

Of course, in the civil law tradition persons in the employment of a party can be heard. Their status in the proceedings is, however, somewhat different from the witness's status. In many legal systems, they are not supposed to give evidence under oath as witnesses may do; they should also be permitted to stay in the room throughout the hearings, while the arbitral tribunal may decide that a witness

The ICC Arbitration Rules, art. 20(3), consequently distinguish "witnesses" from "any other person" to be heard. Art. 4.2 of the IBA Rules of Evidence, however, considers the party's officers, employees and other representatives to be witnesses for the purpose of the Rules. The arbitral tribunal may also consider the identity of a witness, and his or her affiliation with any party, as one of many factors that may or may not affect the weight to be given to such evidence (see art. 9.1).

**Preliminary Contacts Between Party and Witness**

There is an important difference between common and civil law traditions in the way parties may have contacts with the witnesses they offer. In the common law tradition, parties may discuss with their own witnesses the facts on which they will submit testimony. The degree of "witness preparation" may vary from a general overview of the issues at stake to an extensive rehearsal of witnesses' answers to questions to be asked. In European civil law countries, on the other hand, it is often against ethical rules of the national bar for a lawyer to discuss the case with a witness prior to his being heard by the court.

However, in transnational arbitration there can now be little doubt that a party and its counsel are, as a general rule, permitted to contact a potential witness on its behalf and question him or her about the facts of the dispute. In order to avoid misunderstandings, it should be known to the parties that they can contact their own witnesses prior to their testimony and that the other side is also entitled to do so. Moreover, when the arbitral tribunal considers a witness's testimony, it should be aware that such contacts may have taken place.

In order to ensure such a common understanding, the new IBA Rules of Evidence, in Article 4.3, confirm that it is not "improper" for a party or its lawyers to interview its own witnesses. At the same time, of course, the arbitral tribunal may consider the scope of any such interview and the effect, if any, on the credibility of the witness (see art. 9.1).

**Witness Statements**

Pursuant to the IBA Rules of Evidence, the arbitral tribunal may order the parties to submit to the arbitral tribunal and the other parties a written "Witness Statement" (see art. 4.4). The arbitral tribunal, in consultation with the parties, should determine whether or not to require such Witness Statements, depending on the circumstances of each case.

To be contd. in the next issue.
2nd. Judging the Parties’ Initial Procedural Stances

The Tribunal once seized with the file will likewise need to appreciate the Respondent’s prior submissions on issues of procedure (as well as substance). Such submissions may also be a function of one or more of the same factors which bore on the complexion of the request for arbitration. This may be all the more the case inasmuch as the Respondent may not have known of or expected the commencement of the arbitration, at least not at the actual time it arose.

Thus such issues as the time available to prepare the submission, the cost and other external constraints, the ability to master the procedural issues within the requisite time frame, the ability to master the language and substantive law issues within the deadlines, the custody and control of documentary and testimonial evidence, etc. may impact on the Respondent even more than on the Claimant. In particular, the Respondent may see fit to make a tactical, and in part cost-driven, decision to plead with more or less particularity depending on its raising of jurisdictional objections.

With or without jurisdictional objections, in a complex engineering or construction dispute the Respondent will be faced with the question of the extent to which his initial submissions should mirror, reply point by point to, or intentionally diverge from the submission of the Claimant. To the extent the Respondent has the luxury of time, or precisely when it does not, it may decide to diverge in detail, length, style and emphasis from the factual and legal presentation of the Claimant. At the one extreme is the “notice pleading” approach in which the Claimant’s allegations are admitted or denied point by point, without more. At the other extreme is the approach whereby the Respondent recasts and retells the story factually, technically and legally in its own, different manner, order and chronology. Often there will be a certain benefit to the Respondent from the knowledge of the designation of Claimant’s party arbitrator.

3rd Procedure on the Tribunal’s Receipt of the File

The result of this initial collision of interests and approaches from the Tribunal’s perspective is that upon being seized with the file, it may inherit a possible discordance of approaches and battle of mentalities (whether civil/common or civil/Shariah, etc.) which can impact on the procedure from the start. It is at this stage that the Tribunal’s task of managing the procedure begins, and often critical decisions impacting on the parties’ rights and the future course of the arbitration are called for at an early and expedited stage.

3. The Arbitral Tribunal and Management

Particularly in an ad hoc arbitration, but in many respects equally the case in a supervised institutional manner, a certain vacuum of authority may have prevailed until the Tribunal is seized with the file.

1st. Procedural Vacuum of Authority

In the pure or even semi-institutional (e.g. UNCITRAL) ad hoc case, there may be procedural or substantive questions for which no true “authority” exists. This may be the case notwithstanding the possible involvement of an appointing or supervisory authority. In such cases, decisions on these issues may be postponed until the Tribunal accedes to office or, especially in an emergency context, be addressed to a court or courts of appropriate jurisdiction.

In the institutional case, such vacuum of authority can exist to the same or almost the same extent. The result may be that the Tribunal will inherit postponed questions of procedure or be seized of a file reflecting the intervention of municipal courts on questions which may easily overlap with the jurisdictional purview of the Tribunal as it understands it or as a party understands it.

In the international engineering context, such questions may include one or another of the following:

- preservation or location of drawings and other technical documents,
- expulsion from or remaining on the work site,
- continuation or suspension of the work,
- inclusion in parallel suits or arbitrations involving nominated subcontractors,
- expert reports or decisions regarding quality or quantity issues of performance in advance of
the arbitration, and

-inclusion in parallel suits or arbitrations involving the Engineer or another similarly situated third party, etc.

2nd. Inheriting a Procedural Morass

The Tribunal will thus have inherited a file which may be replete with prior and still pending procedural spats and complications. This will be the case whether or not the parties are cooperating on procedure and whether or not a party partially or wholly defaults in its participation in the arbitration.

In the case of a defaulting party, the Tribunal will need to bear in mind the rights and duties respecting equal treatment, reasonable opportunity to be heard, etc. at the place of arbitration, any place of possible nullification proceedings if different, and the putative place or places of enforcement. The issues of due diligence and the scope of the Tribunal’s obligation to inform itself respecting enforceability have been addressed above.

Assuming the parties are not in default, it is nevertheless possible, if not likely, that they will be unable to agree on a substantial range of procedural issues. The Tribunal will then decide and dictate such issues, within its applicable discretion. In the case of the place of arbitration itself, which in turn impacts on procedural enforceability, the situs will often, but not always, have been stipulated by the parties or otherwise fixed by the institution.

3rd. Procedure and the Place of Arbitration

In some cases, depending on the rules or lack thereof, the Tribunal may find itself in the position of making this decision. This may also be a result of an intentional abdication by one or more parties of their right to choose or participate in the choice of the place of arbitration, either at the time of entering into the contract or subsequently. Should the decision fall to the Tribunal, it will need to ascribe appropriate importance to various factors when making such decision. These include:

-enforceability,
-cost,
-efficiency,
-practicability,
-relatedness,
-fairness and
-convenience.

Normally, in major institutional engineering arbitrations, the Tribunal need not be concerned with the determination of the place of arbitration.

Either the parties will have stipulated the place in their underlying agreement or, in the absence of any agreement or an unambiguous agreement according to the criteria applied by the arbitral institution, the place shall be fixed by the institution itself.

In view of the singular, albeit frequently overlooked, importance of the situs in international arbitration proceedings, Article 6 of the GCC Arbitral Rules is noteworthy. Article 6 states as follows: “Arbitration proceedings shall take place in the State of Bahrain unless the parties agree that they shall be conducted in another State, to be approved by the Tribunal upon consultation with the Secretary General. An award shall be rendered at the venue where the Arbitration has taken place”.

There is an express presumption here that any GCC Centre arbitration shall and must take place in Bahrain, although in fact some GCC Centre arbitrations may involve parties none of whom bear any relation to Bahrain. Furthermore, Article 6 begins by granting the parties the customary and unquestioned autonomy to fix any other place of arbitration which they desire. However, it then circumscribes that autonomy by subjecting such party choice to a requirement of approval by the arbitral tribunal in consultation with the Secretary General of the GCC.

There is no question that one of the goals behind the GCC Centre is to cater principally to contractual parties having a nexus in the GCC region. At the same time, there is also no question that unfettered party autonomy regarding the situs of the arbitration should not be perceived as inconsistent with that goal. Query, therefore, whether the requirement of obtaining “approval” from the tribunal and the Secretariat is a wise one, let alone in harmony with international arbitral jurisprudence.

With respect to exceptional circumstances which make arbitration impossible at the seat, the GCC provision provides no solution. Moreover, there seems little question that the parties should be given an absolute opportunity to take a position on a possible change of situs, normally in writing and with a tight deadline, apart from exceptional circumstances. Cf., e.g., Article 39(a) of the WIPO Rules: “Unless otherwise agreed by the parties, the place of arbitration shall be decided by the [WIPO] Center, taking into consideration any observations of the parties and the circumstances of the arbitration.”

4th. Procedure and the Parties’ Expectations

The principal procedural role of the Tribunal relates to the initial provisional timetable, the
bifurcation of the proceedings into a jurisdictional and a merits phase, and the merits phase in turn into a liability and a damages phase, etc. A host of other issues relating to the procedure may already have been addressed either in the arbitration agreement, in the prior party correspondence with the institution or in the initial party communications with the Tribunal. These may include such issues as the following:

- taking of evidence,
- burden of proof,
- witness examination,
- orders to compel production,
- subpoenas,
- language issues,
- methods of proving up substantive law and
- the role of experts.

In this regard, the Tribunal must be aware of the parties’ expressed or unexpressed expectations regarding the Tribunal’s procedural role. The Tribunal must also be aware of the parties’ occasionally faulty analogy to powers of a Tribunal which may automatically exist under domestic arbitration procedure but do not necessarily exist, without express party empowerment, under international arbitration procedure.

A case in point is the entitlement if any to act as amiable compositure or to rule ex aequo et bono and the entitlement or even duty, depending upon the applicable procedural rules, to conduct the proceedings in such a manner as to seek a settlement between the parties.

From the Tribunal’s perspective, absent emergency needs of the one or other party (e.g., petitions for conservatory or interim relief on an expedited basis), definitive attention to the procedural framework should normally not take place until the parties have had at least a certain opportunity to set forth their procedural, and substantive, positions in the case. In an institutional framework such as the ICC Rules, this will normally take place under Article 18 of the new Rules, and only after receipt of at least the Request for Arbitration, the Answer with or without Counterclaims, any Reply to the Counterclaim and the establishment of the Terms of Reference. In an ad hoc framework such as the UNCITRAL Rules, the basis for Tribunal disposition of initial procedural issues may be less extensive. An exception would be where the Tribunal postpones an initial procedural order and provisional timetable until after receipt of a fairly extensive initial memorial from both sides.

5th. Consultation of the Parties on Procedure

However this task is approached, it should be clear that the Tribunal needs to consult the Parties in devising the procedure. What the extent and nature of such “consultation” should or must be may be an open question. It is linked at least indirectly to the Tribunal’s and parties’ rights and duties respecting equal treatment, reasonable opportunity to be heard and other procedural bases for upholding or undermining the enforceability of an award at the place of arbitration or another place of enforcement.

The Tribunal need not overextend itself in preserving such rights in the face of an obstreperous or defaulting party. At the same time, it must also not forsake its duty of reasonableness with respect to such rights. The proper measure will invariably be a function of the law and practice at the place of arbitration, the practices and customs of the Tribunal, the submissions of the parties on such issues, and any additional guidelines or constraints of the institution involved.

6th. Establishing the Facts of the Case

Having established an initial procedural order and provisional timetable in most cases, from the Tribunal’s perspective, the next task will be the establishing of the facts of the case and its management. In an international engineering arbitration, this task may be little different from that in a straightforward commercial dispute. Alternatively, it may be radically different, as a direct result of the technical matters arising out of the engineering relationship.

Whether or not the parties are in a position to participate in the proceedings with a minimum of acrimony and friction, at this stage there may be multiple issues, including, eg.: 

- requests for oral hearing,
- consecutive versus simultaneous written pleadings,
- bifurcation of witness hearings and counsel pleadings,
- assertion of attorney-client or work-product privileges,
- debates as to the form and nature of witness and expert affidavits, and
- debates as to the form and nature of examination of witnesses and experts.

At the same time, there may be parallel procedural complications arising out of petitions for conservatory and interim measures from one or other local court. These may include petitions at the place of arbitration, and similar petitions directed to the Tribunal or directed to the courts via the Tribunal.

In addressing such disputes and needs in an ever-handed fashion, the Tribunal must attempt
to ascertain and balance the needs of the parties, the needs of the Tribunal in adjudicating the dispute, and the mandatory and other constraints of the place of arbitration and elsewhere. In so doing, particularly at an early stage of an engineering dispute which is destined to be somewhat protracted and complex, the Tribunal must endeavor to take seriously the parties' pleas regarding procedure. At the same time, the Tribunal must also "look behind" such pleas to determine what procedural framework is judicious in preserving the parties' right to an equal opportunity to be heard.

7th. Confidentiality of Proceedings

In establishing the facts of the case and marrying that process with an appropriate procedure, the Tribunal must likewise be sensitive to the issue of confidentiality. In the past, confidentiality in arbitral proceedings has essentially been taken for granted. It thus represented a perceived considerable advantage over publicly accessible municipal court litigation. Indeed it was understood that arbitration was a method of private dispute resolution.

Traditionally, therefore, parties and arbitrators have respected the confidentiality of the fact of the dispute, the evidence exchanged in the proceedings, the hearings and the result of the arbitration, namely the award. Such guarantee of confidentiality has had a general appeal for many merchants, particularly in the intellectual property area involving highly sensitive trade secrets as well as in the realm of sovereign and government disputes.

The decision Esso Australia Resources Ltd. and Others v. Plowman (Minister for Energy and Minerals) and Others (128 ALR 391 (1995)), rendered by the Australian High Court, ran counter to the widespread understanding elsewhere as to the confidentiality of arbitral proceedings. In that decision, the Australian court held, inter alia, that there was not necessarily a contractual legal basis to support confidentiality in commercial arbitration. The Court also found that confidentiality is not an essential attribute of a private arbitration. Thus, the Court held, there is no general prohibition in private arbitration on the publication of information disclosed during the proceedings.

The Australian decision has certainly been regarded in some circles as an unwelcome, and inapposite, break with the general principle of confidentiality. To what extent this decision should or will have an affect on courts' and arbitrators' attitudes toward confidentiality outside of Australia is of course a different question – and the answer might well be, very little. At the same time, the origins of the problem reside in various general factors, only some of which are addressed in, or affected by, the Australian decision.

There are inherent problems with the issue of confidentiality. First, the origins of the problem reside in large part in the paucity of statutory and case law bases actually bestowing a confidential character onto arbitral proceedings. Furthermore, confidentiality of arbitral proceedings may be considered secure only if extended to, and respected by, not only the parties, but also the presiding arbitrators and the arbitral institution, if any. Third, even in such a case the confidentiality of the proceedings may be vitiated or undermined by the intervention of the municipal courts before or during the arbitral proceedings.

Moreover, a party's attempt to set aside or to enforce the confidentiality held arbitral award may by necessity result in municipal court proceedings which are a matter of public record. Additionally, even where none of the foregoing eventualities result in a piercing of the veil of confidentiality, one of the parties may see fit to use one or another element of the prior arbitral proceedings in subsequent arbitral or municipal court proceedings.

In short, there are a number of ways in which the confidentiality of arbitration may be undermined, even where all of the players concerned are in fact at least originally determined to maintain it. In this context, it is all the more admirable that numerous arbitration proceedings involving highly sensitive and confidential issues regularly to remain secret, and even the fact of their existence does not see the light of day.

Even in those cases where the parties do not benefit from an express codification of confidentiality in the applicable rules, there are various guarantors or facilitators of secrecy in arbitration which are often overlooked. First among these guarantors or facilitators are confidentiality stipulations or protective orders. Their violation may result in liability for breach, the preclusion of certain evidence, or the assessment of fees. Second are specific provisions concerning access, ownership and destruction of information during and after the arbitration involving the information received. Third, the arbitrators and/or the national courts may be able to order, and enforce, provisional remedies preserving confidentiality. Particularly in the United States context, there is disagreement as to the compatibility of such

Furthermore, the greater the ability of the arbitrators to order discovery, the less likely the municipal courts are to become involved and thereby undermine the secrecy of proceedings. In this regard, Section 7 of the U.S. Federal Arbitration Act specifically provides that arbitrators may subpoena persons and documents, including non-party persons and documents, and that the penalties for enforcement of arbitral subpoenas are equivalent to those for other judicial bodies. Recently, this power has even been extended to non-parties outside the judicial district and beyond 100 miles of the situs of the arbitration: Amgen, Inc. v Kidney Centre of Delaware County, Ltd., 879 F. Supp. 878, 880, 883 (N. D. Ill. 1995). Furthermore, increasingly U.S. States have adopted international arbitration statutes, which in many cases specifically address and allow orders of discovery by the arbitral tribunal.

Finally, there is some basis, at least in the U.S. courts, to exclude documentary and testimonial evidence produced in a prior arbitral proceeding from being introduced into subsequent court proceedings. For example, in Samuels v. Mitchell, 155 F.R.D. 195 (N.D. Cal. 1994), the U.S. "attorney-client privilege" and "work-product" doctrines were held to apply to documents prepared for and during an international arbitration, but not necessarily to documents actually produced during the arbitral proceedings. And in International Insurance Co. v Peabody International Corp., No. 87-C464, 1988 U.S. Dist. LEXIS 5109 (N.D. Ill. June 1, 1988), a federal district court held that "arbitration is litigation within the scope of Rules 26(b) (3) [of the Federal Rules of Civil Procedure] and that work product protection extends beyond the close of the litigation to which it pertains to a second litigation." Id. At *14n.1.

Article 13 of the GCC Charter also raises the thorny issue of confidentiality of the proceedings in international arbitration. Article 13 (c) provides: "Save for the arbitrators Panel, the Centre’s papers and documents shall be confidential and no one, other than the parties to the arbitration case and the arbitrators, may have access thereto or obtain copies thereof except by the express approval of the parties to the dispute or if the Arbitral Tribunal feels such action necessary for passing a ruling in respect of the dispute."

Article 13 of the Charter attempts to address confidentiality head on. It first provides that they may do so "if the Arbitral Tribunal feels such action necessary for passing a ruling in respect of the dispute." Such action might presumably refer to actions by the tribunal to obtain court enforcement of an order or interim measure by the tribunal, in which case the court enforcement would normally be a matter of public record.

However, such action might also encompass actions by the parties to obtain interim or conservatory measures of the courts without the tribunal’s involvement, to which Article 13 does not appear to speak and which it does not appear to foresee. One party’s decision to involve a court in the arbitration could then be deemed to conflict with the requirement that the "documents shall be confidential and [that] no one, other than the parties to the arbitration case and the arbitrators, may have access thereto."

In analogous fashion, Article 14 of the Charter may promise more than it can actually deliver. It provides that "the agreement to refer the dispute to the Centre’s Arbitral Tribunal and the ruling of this tribunal in respect of its competence shall preclude the reference of the dispute or any action pursued upon hearing it before any other judicial authority in any state." Such a provision must of course be harmonized with the parties’ ability, and right in some cases, to institute parallel court proceedings before or even after the Centre’s jurisdiction has been invoked by one of them. Under Article II.3 of the June 10, 1958 United Nations ("New York") Convention on the Recognition and Enforcement of Foreign Arbitral Awards, published in 330 U.N.T.S. p. 38, No. 4739 (1959) and at 9 U.S.C.A. S 201 note (West Supp. 1989) (hereinafter "New York Convention"), a court is empowered to examine whether or not the arbitration agreement itself is null and void, inoperative or incapable of being performed; if it is not, then the parties will be referred back to arbitration.

4. Making of the Award and Management

The award on jurisdiction and particularly the award on the merits is largely a factual and substantive exercise. At the same time, it has a critical overlay of procedure which may impact substantially on the result.

One reason is of course the link between procedure on the one hand and issues of equal treatment, due process and also public policy on the other, as referenced above. Another reason is the influence of procedure on the manner, extent, order and adequacy of the factual, legal, technical and evidentiary presentation. In a complex engineering dispute which may also involve party- and/or tribunal appointed experts, this latter link may prove crucial.
1st. Party “Assistance” in Drafting the Award

The Tribunal should never be or be seen as being dependent on the parties for the conduct of the procedure. Nonetheless, the Tribunal should involve the parties in the procedure at every stage for the benefit of all concerned.

Leading up to the drafting of the award on jurisdiction, liability, damages or all of these matters, the Tribunal may rely in varying proportions on its own procedural skills on the one hand and on the parties’ duties to present their case on the other. Thorny procedural or quasi-procedural issues of burden of proof, applicable law, substance versus procedural, statutes of limitation, interest on damages, etc. may be critical for the award.

To the extent the procedure leading to the final phase has not allowed a clear picture on such issues to emerge, it is the Tribunal’s prerogative and indeed duty to remove such degrees of doubt on these questions as it believes impede the rendering of an adequate decision. The Tribunal may do so through a combination of factors:

-reliance on its prior experience,
-its appreciation of the case thus far,
-its additional self-education and
-its exhortations to the parties to provide additional submissions in the form of post-hearing briefs, etc.

5. Concluding Remarks

International arbitration tends to pose particular problems and challenges of procedure. These include the strictures and guidelines of the applicable rules, the mandatory law of the place of arbitration and likely place of nullification efforts, and the requirements of the place or places of foreign enforcement.

International engineering arbitration places special burdens on the parties and particularly the Tribunal to come to terms with these issues. This is especially the case in the presence of complex and/or voluminous technical documents and witness evidence, requirements of site visits and reliance on party-or tribunal-appointed experts.

From the Tribunal’s perspective, proper mastery of this challenge calls for a judicious balance between the needs and proclivities of the parties, the requirements of the applicable laws and the experience and discretion of the Tribunal. A failure to do justice to this challenge in the one or the other respect may vitiate the quality, fairness and enforceability of the arbitral process and award.

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Centre Represented by its Secretary General at a presentation in BAPCO 7th July 2000.

The Centre’s Secretary General was invited by The Bahrain Petroleum Company B.S.C. (Closed) Bahrain Refinery to deliver a presentation about the establishment and activities of the Centre on 7th July 2000 at their official premises.

The prime intent of this presentation was to highlight on the role-played by the Centre in the field of commercial arbitration and the services offered by it in the field of dispute resolution.

The Secretary General gave a one hour presentation which included a briefing as to the Centre’s establishment, the Organizational Structure of the Centre, the Charter and Arbitral Rules of Procedure, Agreements of Cooperation entered into with other foreign arbitral institutions, the activities conducted by the Centre, members on the Centre’s panel of arbitrators and accredited experts, and of the services provided by the Centre during an arbitral proceeding.

Among the attendees to this presentation were Mr. Abdul Hussain Mirza – Acting Chief Executive, Dr. Shaikh Mohammed Al Khalifa – General Manager Administration, Mr. Hussain Redha – General Manager Finance & Legal and around 20 other officials from different official cadres.

Mr. Abdulla Al Ameeri, Director of Contracts and organizer of this meeting, thanked Mr. Yousif Zainal for his presentation in which he expressed his appreciation and support to the Centre in the conduct of its activities. Mr. Ameeri assured the Secretary General of BAPCO’s concern to establish stronger ties and its intention to strengthen the relationship between the Company and the Centre in matters of mutual concern.
In a recent case the Swedish courts have determined that a party which fails to comply with the tribunal’s order to put up security for arbitration costs cannot be forced by a court order to do so.

The circumstances were the following:

The arbitral tribunal constituted in the case ordered both of the parties to put up security in an amount of SEK 250,000 (appr. EUR 30,000).

The respondent company informed the arbitral tribunal that they had no intention of putting up the requested security. However, they explained generously, they did not object to the claimant party putting up the whole security. This is also what transpired.

The claimant submitted a request to the Stockholm District Court asking it to order the delinquent adversary to effect the security payment. The claimant invoked the arbitral agreement and argued that it imposed a contractual duty on both of the parties to comply with any order by the arbitral tribunal to post security.

The respondent objected and denied that there was any obligation under law or following from legal precedents which constituted a duty to post security. Nor, continued the respondent, could any such duty be deemed to flow from the arbitral agreement.

The court denied the requested relief, stating briefly that there was no justification in the argument that a party on the basis of an arbitral agreement has a duty to comply with a request for security payment by the tribunal.

The disgruntled claimant appealed against the decision. The Court of Appeal was somewhat more elaborate in its reasoning and stated the following. It is an established practice that arbitrators request security payments to ensure the payment of their fees and disbursements. However, there is no duty vis-à-vis the arbitrators to put up the security. If security is not effectuated the arbitrators are entitled to terminate the case without deciding it on its merits. The posting of security does in no way purport to ensure the party’s interest to avoid having ultimately to defray all the costs.

For purposes of comparison it may be noted that courts in Germany have arrived at the opposite conclusion. The claimant in arbitral proceedings may turn to the state judiciary and request that the respondent be ordered to put up for security for costs. The court will also so order based on the reasoning that a party which enters into an arbitral agreement has undertaken a duty to actively promote the arbitration. However, it has not been considered permissible for the arbitrators themselves to order the payment of security as this would be considered a decision in the arbitrator’s own favour (in Germany and England arbitrators may not, as in Sweden, determine their own fees in the award).

Endnotes:
1 The Svea Court of Appeal, case No T 5807-99.

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Additional advantages for members registered on the Centre’s Panel of Arbitrator / Accredited Expert

Participation at the Centre’s seminars / conferences / workshops entitles you to various other advantages being provided by the Centre to its members. The Centre issues Gold, Silver and Bronze cards which entitle you to discounts in the fee for activities being conducted by the Centre in addition to a discount on purchase of the course documentation/seminar papers/pre-recorded video cassettes.

For further information on this added advantage, please contact us at the Centre.
ANOTHER STAGE IN LEGAL PROCEEDINGS?

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Issue No. 25 – April 2000.

Federal Law No. (26) of 1999 –
Conciliation Arbitration Committee
at Federal Courts.

Federal Law No. (26) of 1999 has recently come into force and is applicable to all federal courts in the UAE. The law essentially prohibits Federal Courts from initiating any civil / commercial claim before civil or Sharia court until it has been heard by the Conciliation and Arbitration Committee associated with the designated courts.

It is not clear how this new law will operate in practice. Presumably, the intention is to reduce the number of cases being referred to the civil courts. The conciliation and arbitration committee must settle disputes amicably or issue a decision within 30 days from the date of the parties appearing (although the period may be extended by mutual agreement of the parties) and there are no court fees.

This is a federal law, however, it is anticipated that the Emirates of Dubai and Ras Al Khaimah may be exempted.

Article 1 of the law states that the conciliation and arbitration committee will be presided over by a court judge and the committee itself will be made up of two members of the judicial authority who are “well known for their experience, neutrality and integrity”.

No doubt, practice will determine whether or not matters such as urgent attachment orders still remain in the civil courts with the requirement of filing a case within 8 days.

This is a significant change in judicial procedure. However, it is not exceptionally radical and can be compared with Saudi Arabian Civil judicial procedure which encourages any party or representative to a dispute to approach the governor or principality of the relevant Saudi region for a case review. The Governor’s office usually refers the matter to the Civil Rights Department, which in turn looks to the parties to settle their disputes. If the matter is not successfully settled, it is referred to the courts.

Moreover, the United Kingdom also has a preliminary adjudication procedure outlined under the Housing Grants and Construction Regeneration Act 1996 (the Construction Act). The Technology and Construction courts in England and Wales are actively pushing an initial neutral evaluation procedure before the matter is referred to the courts.

As the conciliation and arbitration committee’s regulating procedures become more available and the nature of the committee and how it operates becomes more established it will become the subject of other articles. For the more complicated cases (such as construction, shipping, banking etc.), the dispute resolution time is unlikely to be reduced.

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ARBITRATION WORKSHOP FOR CONTRACTS AND PROCUREMENT ENGINEERS

Contd. from page 1

Organized jointly by the GCC Commercial Arbitration Centre and the Society of Engineers – UAE, the Workshop tends to provide an Engineer to act successfully in any of the roles which requires a detailed knowledge of the arbitration process and procedures in addition to providing technical knowledge and experience.

Two internationally renowned experts in the field of Engineering Mr. Brian Totterdill and Dr. Nael G. Bunni along with two other speakers from the region Mr. Essam Al Tamimi and Mr. Abdul Rahim Al Awadhi would conduct the Workshop.

This Workshop would be conducted at the Hilton Corniche Residence in the UAE from 23rd to 25th October 2000.
“Independent guarantees” of the UNCITRAL Convention of 1995, is a term almost near to “demand guarantees” regulated by the ICC collection No. 458 issued in 1992. “Stand-by letters of credit” are also regulated by the UCP 500 issued in 1993 and by the publication 590 of the ICC regarding the Stand-by LCs. The sets of rules of the ICC take their force from the agreement of parties upon them, where the parties refer to one of these sets it applies. But the new UNCITRAL Rules is an international convention to be adhered to by states and not by individuals and this Convention will have the force of law and be applied unless excluded.

Stand-by LCs differ from demand guarantees in that they have a wider scope of application as they may relate to financial obligations as well as non financial obligations but demand guarantees relate always to financial obligations. Stand-by LCs may be confirmed, while in demand guarantees it is not current to confirm them. Stand-by may be paid at the counters of a bank other than the issuing bank, and this does not occur in demand guarantees. Stand-by may be used to guarantee the commitments of the issuing bank itself, but this idea is excluded from the sphere of demand guarantees which must be issued upon instructions from a principal or an instructing party. Insurance companies and financial institutions other than banks may issue stand-by LCs or demand guarantees and stand-by letters of credit, but do not cover indemnities (Guarantees are issued to secure the default of the debtor; whereas indemnities secure the loss caused by the debtor to the creditor. See: Lars Gorton, Lloyd’s Maritime and Commercial Law Quarterly, 1996, Part 1, February 1996, p. 42).

We shall give here below some comments and remarks on the said Convention containing the UNCITRAL Rules compared with the provisions of demand guarantees (Publication No. 458 of the ICC).

(1) It is noted the influence of the Anglo-Saxon legal concepts in the draft convention such as Article 14 (gross negligent conduct), Article 19 (willful misconduct) and Article 12 (the limitation of six years).

(2) As a whole the relevant sets of rules of the ICC tend to simplify and to consecrate prac-

ice, while the draft convention tends to be concise to the extent that it seems at the first reading to be complicated.

(3) The new Convention applies to international independent guarantees and stand-by LCs automatically in the member states, unless its application is excluded in the legal relationship between parties. If the UNCITRAL Rules are not excluded they will apply even where no reference is made to them. Article 1 of the draft Convention relating to the scope of applications says:

1. This convention applies to an international undertaking referred to in Article 2:

   a. If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State; or

   b. If the rules of private international law lead to the application of the law of a Contracting State, unless the undertaking excludes the application of the Convention.

2. This Convention applies also to an international letter of credit not falling within article 2 if it expressly states that it is subject to this Convention.

3. The provisions of article 21 and 22 (relating to the applicable law) apply to international undertakings covered by the Convention, if they expressly state that they are subject to the Convention.

4. The draft Convention includes international letters of credit not falling within the undertakings covered by the Convention, if they expressly state that they are subject to the Convention.

5. Local independent guarantees and stand by LCs are subject to the provisions of the national laws and not to the provisions of the Convention. Such local undertakings may follow the provisions of the Convention and in such case the Convention enters the national law by imitation in certain cases. The rules of Demand Guarantees (publication 458 of the ICC) apply to international as well as to local
guarantees if the said publication is expressly mentioned in the guarantee.

6. Article 2 of the Convention stipulates that:

1. For the purposes of this Convention, an undertaking is an independent commitment, known in international practice as an independent guarantee or as a stand by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

2. The undertaking may be given:

(a) At the request of or on the instruction of the customer ("principal/applicant") of the guarantor/issuer.
(b) On the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party;
(c) On behalf of the guarantor/issuer itself.

3. Payment may be stipulated in the undertaking to be made in any form, including:

(a) Payment in a specified currency or unit account;
(b) Acceptance of a bill of exchange (draft);
(c) Payment on a deferred basis;
(d) Supply of a specified item of value.

4. The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

The Convention is not confined to the independent guarantees and stand by LCs credit known in banking practice, but extends to include such undertakings where issued by any "institution" or "person". This may include civil as well as commercial guarantees even given by individuals who may not be aware of the meaning of a stand by letter of credit. The Convention may comprise the positions of: the surety of a debtor in a civil debt, the guarantor of a guarantor (certificateur in French), the partner who guarantees his company, if such obligations were independent from the underlying relationships. It may also comprise insurance policies issued in favour of third parties in international transactions.

The guarantor/issuer may undertake on behalf of the applicant, or on his own behalf, that is to say that the guarantor/issuer guarantees himself vis a vis the beneficiary (Article 2.2.c of the Convention). In this way the scope of application of the Convention will not be limited to the independent guarantees and stand by letters of credit, but may extend to personal undertakings emanating from any debtor in a civil or commercial relationship. The rules of demand guarantees of the ICC do not cover the case in which the guarantor guarantees himself.

The limited number of articles in the convention is not enough to cover this wide range of bilateral and unilateral undertakings provided for, and recourse to the applicable law is inevitable.

It is, also, well known that merger in ownership ("la confusion" in French) is a way of extinction of obligations. Meanwhile article 2.4 of the Convention makes such obligation survive if the guarantor/issuer is acting on behalf of another person. This solution is a good practical trend although not consistent with theoretical approaches.

7. The stand-by LC is not defined in the draft convention and it is sometimes misunderstood in practice. According to the ICC: "Stand by credits are considered to be the secondary means of payment, and therefore such credits should be issued available only against a certificate of default and should not be accompanied by any copies of the commercial documents" (See: Documentary credits insight: ICC Publication, vol. No. 1 no.4, Autumn 1995, p. 13).

8. Article 3 relating to the Independence of the undertaking, provides that:

(a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand by letters of credit or independent guarantees to which confirmations or counter guarantees relate); or
(b) Subject to any term or condition not appearing in the undertaking or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer’s sphere of operations”.

The independent undertaking or "l’obligation abstraite" in French is met in this article as well
as in article 3 of the UCP 500 and in article 3 of the uniform rules for demand guarantees.

9. Article 4 relating to the internationality of undertaking stipulates that:

1. An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

2. For the purposes of the preceding paragraph:

(a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking;

An undertaking is international in the following cases if any two of the following places exist in two different States:

i. the places of business of the guarantor/Issuer and the beneficiary;
ii. the places of business of the guarantor/issuer and the principal/applicant;
iii. the places of the guarantor/issuer and the instructing party;
iv. the places of the guarantor/issuer and the confirmer;
v. the places of the beneficiary and the principal/applicant;
vi. the places of the beneficiary and the confirmer;
vii. the places of the beneficiary and the instructing party;

iii. the places of the principal/applicant and the instructing party;
ix. the places of the confirmer and the principal/applicant;

x. the places of the confirmer and the instructing party.

The international character of the undertaking ensues that it will be subject to the provisions of the Convention. Meanwhile, a domestic undertaking may provide for the applicability of the Convention and in such case we believe that such undertaking will be subject to the provisions of the Convention, unless such provisions contradict an imperative rule in the relevant national law. ICC uniform rules for Demand guarantees did not deal with the international character of an undertaking because they were meant to govern international as well as domestic guarantees.

10. The draft Convention contained a chapter for interpretation (Articles 5 & 6). According to Article 5:

"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand by LCs".

Indeed, it is very difficult to realize uniformity in the application of the Convention, as the means of interpretation differ in Roman-Germanic countries from those in the common law countries. To maintain uniformity judges in different countries should be able to peruse legal decisions of courts in other countries to see how they interpret the Convention. Although such decisions are published, it is not possible to charge a judge to know what is going on in countries other than his, unless the UNCITRAL undertakes to convey to the ministries of justice the international trends.

11. Article 6 puts some definitions:

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "Undertaking" includes "counter guarantee" and "confirmation of an undertaking";

(b) "Guarantor/issuer" includes "counter guarantor" and "confirmer";

(c) "Counter guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded or made by, the person issuing that other undertaking;

(d) "Counter guarantor" means the person issuing a counter guarantee;

_to be contd. in the next issue_
The Centre having successfully completed 5 years since its formation in 1995 has contributed immensely to the arena of international commercial arbitration. A number of activities have been conducted in order to accelerate, inculcate and promote arbitral awareness in the region.

It is with pride that we say that the Centre is also one of the first institutions in the Gulf to become a member of the Internet Society and establish a website on the World Wide Web. In furtherance of this initiative, and in continuance of providing its members with added, updated features on its Website, the Centre would be creating a database relating to commercial arbitration in the GCC region. This database would also include regional and international commercial arbitration conventions ratified by, and effective in the GCC countries. It also includes some of the court precedents in some of these countries.

In order to facilitate access to the database, the Centre and Al-Nadeem Information Technology have devised some technical procedures. Through this, members of the Centre would be provided with a user's code and password. As a first time visitor to this database, the system will prompt the user to change his password, which we highly recommend in order to ensure the user's security and confidentiality.

This service is made available only to members (arbitrators and experts) who have renewed their membership to the Centre's Website. In addition to this facility, members are also provided with other advantages which include discount in both fee for courses / symposiums being conducted by the Centre and also for publications being issued by the Centre from time to time.

Members who are yet to renew their membership to the Centre's Website are requested to do so and benefit from this rich source of information available on its Website.

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".

FOR PROMPT SETTLEMENT OF YOUR DISPUTES

CONTACT

G.C.C. COMMERCIAL ARBITRATION CENTRE
CALL FOR PAPERS

SEMINAR ON AVIATION AND TOURISM – LEGAL PROBLEMS AND DISPUTES RESOLUTION

A seminar on “Aviation and Tourism –Legal Problems and Disputes Resolution” is to be held in Bahrain on the 3rd and 4th of February 2001 in Bahrain.

This seminar would be under the patronage of HH Shaikh Ali Bin Khalifa Al Khalifa, the Bahrain Minister for Transportation, and would focus on discussing the legal problems pertaining to aviation, air transportation and tourism sectors. This event is being organized in line with the first Arab Aviation Conference and Exhibition to be held from 5th – 7th February under His Highness’ patronage. The whole week would be solely dedicated to Aviation and is being entitled as the Arab Aviation week.

SYMPOSIUM ON ARBITRATION IN ENVIRONMENTAL DISPUTES

Synchronizing with the Kuwait National Day and Liberation Celebrations called “Hala Febraayer” a symposium is to be held in Kuwait on Arbitration in Environmental disputes, during the second half of February 2001.

Being jointly organized by the GCC Commercial Arbitration Centre and the College of Law and Islamic Sharia, Kuwait University, this symposium would focus on the Role of Arbitration and Alternative Dispute Resolution in settlement of disputes arising in the field of environmental issues.

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

As a first step towards continuous cooperation and coordination and as a first combined effort of both organizations a symposium on Settlement of Commercial Disputes Related to Technology of Communication, Information and Electronic Commerce is to be jointly conducted in Bahrain by the GCC Commercial Arbitration Centre and the Yemen Centre for Conciliation and Arbitration during March 2001.

This symposium will discuss the mechanisms of dispute settlement in the field of commerce, finance and intellectual property where search for more active and effective mechanism is focussed in order to respond to the requirements of information and communication industry including electronic commerce.

Authors are invited to submit papers relevant to any of the above-mentioned events, which should contain original views/ideas/analysis.

All correspondence must be addressed to The Secretary General, Mr. Yousif Zainal, GCC Commercial Arbitration Centre, P.O. Box 2338, Manama, Bahrain.

Further details on these events could be obtained by Tel: (973) 214800, Fax: (973) 214500, E-mail: arbit395@batelco.com.bh or could alternatively browsed through at our website at www.gccarbitration.com

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