Report From the Board at its 27th Meeting

Convened at its headquarters in Bahrain, the 27th meeting of the Board of Directors was held on 10th July 2002 at the Centre’s premises. The Board members of the Centre representing the Chambers of Commerce from the GCC States were present at this meeting.

This meeting was convened at a very crucial time when constitutional reforms were underway in the host country whereby State of Bahrain became Kingdom of Bahrain and at a time when the members of the Chambers of Commerce urged the GCC government through its Secretariat to continue contributing to the Centre’s budget and extend its support to widespread its activities thereby helping to develop and enhance administrative cadres. In light of an ambitious plan for the Centre to engage itself in specialized arbitration such as engineering, banking, maritime, e-commerce, insurance and re-insurance and in order to encourage international arbitrations at the Centre, this meeting discussed the possibilities of handling arbitration in the specialized fields.

An important feature associated with this meeting was the GCC Summit meeting convened in Muscat, which ratified the New Unified Economic Agreement clearly defining the role of the Centre in resolving disputes that may arise as a result of commercial interaction between commercial entities.

Contd. on page 15

International Federation of Commercial Arbitration Institutions

The International Federation of Commercial Arbitration Institutions (IFCAI) was founded in 1985 in New York to facilitate permanent relations between commercial arbitration institutions. IFCAI resorts to make known their services, and disseminate information on law, rules, awards and court decisions in the sphere of international arbitration and conciliation. The next IFCAI Conference to be held in Bahrain during March 2003 is entitled Justice and Fairness in International Commercial Arbitration.

A draft programme schedule has been drafted and is made available to our readers on page 15. This is just a tentative programme as mentioned earlier and is open to your valuable comments and suggestions.
WORKSHOP AND SEMINAR ON INTERNATIONAL CONTRACTS AND TRANSFER OF TECHNOLOGY
28-30 SEPTEMBER 2002
KINGDOM OF BAHRAIN
EXCERPTS FROM THE WORKSHOP HELD ON 28TH SEPTEMBER 2002
GULF HOTEL, KINGDOM OF BAHRAIN
BOARD OF DIRECTORS OF THE CENTRE


Mr. Bader Abdullah Al Darwish, *Vice Chairman* – Representative of the Qatar Chamber of Commerce and Industry.

Mr. Mohammed Eid Rashid Bokhammas, *Representative of the Bahrain chamber of Commerce and Industry.*

Mr. Waleed Khalid Al Daboos – *Representative of the Kuwait Chamber of Commerce and Industry.*

Dr. Ibrahim Eissa Al Eissa – *Representative of the Federation of Chambers of Commerce and Industry – Saudi Arabia.*

Mr. Khalifa Khamis Matar – *Representative of the UAE Union of Chambers of Commerce and Industry – United Arab Emirates*

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**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 GCCCAC has no liability whatsoever that may be placed upon it.

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e-mail: arbit395@batelco.com.bh

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**Standard Arbitration Clause of the GCC Commercial Arbitration 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."
REVERT

How may we be of assistance to you?

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For further details, please contact the Centre at the address provided on the next page.

TO KEEP IN TOUCH

Members on the Centre’s Panel of arbitrators and experts are hereby requested to kindly provide us with their e-mail addresses in order to enable better rapport between the Centre and its members.

Updated e-mail addresses would enable us to forward details pertaining to the latest developments and events that are being conducted by Centre from time to time.

We appreciate being updated with your contact details.
In the Construction and Engineering fields those advising interested third parties such as funders, joint venture partners and the end users of such construction projects have shown a marked preference for the continued use of Collateral Warranties, a particular English device for effectively placing upon the warrantor (one of the contracting parties) the same duties and obligations to a third party as are owed to the other contracting party. At present it is unclear whether the objections to opting into the Act are real or imagined, but while those who advise funders continue to prefer collateral warranties, and the professional indemnity insurers and those responsible for the design obligations in engineering projects adopt the same stance, the prospects for opting into the Act appear very limited.

The effect of collateral warranties if used in the Incinerator Project can be seen by adding this to the existing relationships.

Worldwide, the general consensus appears to be against compulsory consolidation with the notable exceptions of The Netherlands, Hong Kong, Australasia and some States in the USA. Even where legislation has been used to address the problem of multi-party arbitrations, the effectiveness of the legislation must be called into question where the parties retain the ability to opt in or opt out and particularly where the parties must all consent for the consolidation to be ordered.

THE USE OF THE SAME INSTITUTIONAL RULES FOR THE CONDUCT OF ARBITRATION

We have already seen that the UNCITRAL model law for those states that have adopted it does not provide for the consolidation of different arbitration disputes of similar or related matters. Similarly the AAA Rules do not contain any provision for consolidation. However some of the principal arbitration institutions including the ICC and the LCIA have taken significant steps forward.

Article 13.1(c) of the LCIA Arbitration Rules permits third parties to be joined in proceedings with their consent but there is no provision regarding joinder of related proceedings.

Article 16.1 of the Arbitration Rules of the Chamber of Commerce and Industry of Geneva provides:

"If an arbitration is initiated between parties already involved in another arbitration governed by these Rules, the Ccie may assign the second case to the arbitral tribunal appointed to decide the first case, in
which case the parties shall be deemed to have waived their rights to select an arbitrator in the second case”.

The ICC provides for consolidation in Article 4 paragraph 6:

“When a party submits a request in connection with the legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may at the request of a party decide to include the claims contained in the request in the pending proceedings provided that the terms of reference have not been signed or approved by the Court. Once the terms of reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to Article 19.” (My emphasis)

“Article 19-New Claims-After the terms of reference have been signed or approved by the Court, no party shall make new claims or counter claims which fall outside the limits of the terms of reference unless it has been authorized to do so by the arbitral tribunal which will consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances”.

It is important to note that the ICC requires "the request of a party" before considering consolidation and the usefulness of the clause remains limited given the condition that the new arbitration be joined before the terms of reference have been signed or approved by the ICC in the first arbitration.

Generally, the use and incorporation of the ICC or other institutional rules within the interrelated contracts on a complex engineering project will at least ensure a degree of harmonization even if formal consolidation or joinder cannot be achieved. For example, it can ensure that the same tribunal is constituted in all of the separate arbitration references. The application of a common set of rules will help to ensure a uniform approach to the way in which the dispute is conducted, whether by way of formal pleadings, statements of case, disclosure of documents, hearings, form of awards etc.

The advantage of providing for the disclosure or discovery of documents in a consistent form is of particular importance to avoid the confusion which can occur where one contract within a project is governed by English or American principles of law and another contract is governed by the principles of say French Law. Harmonization by the use of the same arbitration rules of procedure, will also include arrangements for oral hearings, levels of legal representation and rules relating to the provision of expert evidence. The use of a uniform set of rules, combined with a clearly thought out and drafted arbitration agreement which is common to all of the contracts to an engineering project can help to reduce the extent of the complex drafting that may be required.

DRAFTING AD HOC ARBITRATION AGREEMENT

Redfern and Hunter describe this as "consolidation by consent". Modern construction and engineering contracts are extremely complex legal and procedural structures and there is growing evidence of parties to major projects agreeing in advance that in the event of a dispute between some or all of the parties that such disputes be referred to a form of multi-party dispute resolution procedure. However as Redfern and Hunter observe,

"Drafting such a clause is not easy. It requires a close understanding of the nature of the relationship between the different parties, and of the type of disputes that may conceivably arise; and it calls for careful and detailed drafting. It is miles away from the standard or model form of arbitration clause under which most arbitrations are conducted".

Lawyers specializing in Construction and Engineering are regularly requested by Corporate lawyers preparing the funding and Joint Venture agreements to draft arbitration clauses. The construction lawyer faced with the task will probably admit to a degree of trepidation, because some years later the phone may ring and the caller says, "Do you remember the arbitration agreement clause
you drafted for the such and such project? Well it seems we have a dispute! Almost inevitably such a dispute if it arises will be of a type and scale which, however experienced he may be, the lawyer drafting the arbitration clause could never have imagined. The best that can be achieved is to cover most of the possible parties and type of dispute most of the time!

Before looking at the specific provisions for consolidation it is appropriate to look briefly at dynamics of multi-party dispute resolution (not simply arbitrations).

When problems arise on large construction and engineering projects attention turns to the possibility of litigation, arbitration or some form of alternative dispute resolution (ADR). The resolution of disputes or differences embraces everything from a friendly discussion over a meal leading to a brief note written on the back of a serviette and signed by both parties, to final arbitral awards of great complexity given by a panel of three international arbitrators or the decision of the highest court in the land. The first question therefore before any drafting starts is what sort of dispute resolution is appropriate for this project? In large projects the answer will often be a multi-tiered approach commencing with the decision-making procedure of an Engineer whether under a FIDIC or other form of contract followed by a form of review by the Engineer. Then there may be a Dispute Board, brought in to provide interim decisions, which can often diffuse tension and antagonism within dispute situations. Projects often require a senior officer of each of the parties to meet to consider the dispute in an attempt to reach an amicable solution and the meeting may be a contractual pre-condition to the commencement of more formal and final means of resolution. The various forms of ADR in some or other combination may also be appropriate. These include mediation, conciliation, early neutral evaluation, adjudication and the formulation of preliminary issues for consideration by an arbitral tribunal.

However whatever dispute resolution procedure is selected it must conclude with and provide a final and binding decision, and here the parties have an important choice to make. Either they can expressly provide in the contract for arbitration or leave the final decision to the Courts of the contract jurisdiction.

**WHAT SHOULD A MULTI PARTY ARBITRATION AGREEMENT CONTAIN?**

Due to the diversity of possible situations, the drafting of such an Agreement must be considered in the light of all the relevant circumstances on a project by project basis and for this reason the Delovne report in 1994 decided against proposing a standard form of agreement for multi party arbitration. Instead they set out a number of clauses covering a wide range of situations including both disputes between multiple parties to a single contract and multiple contracts with multiple parties.

To return to the Incinerator Project which I have used for illustrative purposes in this paper, an advisor attempting to draft an Arbitration Agreement on behalf of the owner might feel his objective was:

In the event of a dispute arising in connection with the Incinerator Project (including its funding, design, construction, operation and maintenance), then irrespective of the number of contracts and parties involved and affected, the dispute should be determined by the same tribunal at the same time. The party or parties in whose favour an arbitral award is made should be able to enforce any awards not only in the jurisdiction of the contract, but within the jurisdiction of each of the parties against whom the award is made.

To achieve our objective the following will be among the issues to be considered:

* Definition of the "Project" - it must be the same in every contract.
* The same Arbitrator(s) may perhaps be agreed and named when the contracts are entered and therefore before the dispute arises.
* The clause must be incorporated in every contract (it must be "back to back").
Although the Owner will be a party to many of the contracts and therefore exercise a degree of control and harmonization it will not be a party to all the contracts (for example the role of sub-contractors). Therefore it will be necessary to make provision for related contracts which form part of the project, and require those with whom the Owner contracts to agree to incorporate the clause in all the related contracts.

The clause must not offend against any jurisdiction in which enforcement may ultimately be required.

Two of the clauses appended to the Delvolve report are reproduced in the Appendix to this paper to illustrate how the task of drafting an effective clause may be approached.

For the Incinerator Project the following is offered for consideration and discussion.

**Arbitration Agreement for Contracts Relating to the Incinerator Project**

1. All disputes arising in connection with this Contract shall be finally decided by arbitration which shall be conducted by Mr. X in accordance with the rules of Arbitration of (ICC or LCIA or other) (hereinafter referred to as "the Arbitration").

2. A party to this Contract may require persons or entities not being parties to this Contract to be joined as parties to the Arbitration where at the time of commencement of the Arbitration, such persons or entities are substantially involved in a dispute in a related contract in which the issues are the same as, or connected with, issues whether of law or fact which arise in the Arbitration.

3. It is further agreed that in the event that a party to the Arbitration is required by a person or entity, not being a party to the Contract but being a party to a related contract, to be joined in a dispute which raises issues which are the same as or connected with issues whether of law or fact in the Arbitration, the Arbitration shall be consolidated with the related dispute and be finally determined by arbitration which shall be conducted by Mr. X in accordance with the rules of Arbitration of (ICC or LCIA or other).

4. A "related contract" is one arising in connection or associated with the Project.

- "Project" must itself be defined in the Contract.

The problems posed by multi party arbitration in large engineering and other projects have been and will continue to be an area of difficulty for those associated with such projects. The solution will continue to be determined by taking all the circumstances of the project into account. The jurisdiction in which the project is located may provide assistance by providing for consolidation and or joinder of disputes. The use of the standard rules of one of the international arbitral institutions can provide a degree of harmonization, but in most projects a customized arbitration agreement incorporated into all the project contracts will be required.

The imperfections of the proposed draft Arbitration Agreement for the Incinerator Project are all too obvious, but I hope it serves to illustrate the issues which must be considered in providing fair, efficient and cost effective provision for multi party arbitration in large international engineering projects.

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**ANNOUNCEMENT**

The Centre invites contribution of articles and materials for publications in future issues.

Please feel free to submit articles, reports, on international events/developments to be published in our Bulletin. Kindly forward all materials to the Secretary General to the contact details provided on page 3 in this bulletin.
The 9th Geneva Global Arbitration Forum  
December 4 and 5, 2002  
Geneva, Switzerland

Conference Programme

Wednesday, December 4, 2002

Morning

10:00 Pre-conference Workshop:  
The financing of arbitral claims  
Workshop conducted together with  
insurance and bank specialists

Afternoon:

First session: The making of the global arbitrator

14:00 Selecting arbitrators: The good, the bad  
and the amazing

14:45 So you want to become an arbitrator?  
A roadmap

15:45 Why lawyers only? Engineers, merchants  
and other “men of the trade” as arbitrators

16:45 Arbitrating in the public eye and under  
duress: The new paradigms for the global  
arbitrator

Thursday, December 5, 2002

Morning

Second session: Political arbitration

09:00 The Bahrain/Qatar boundary dispute:  
A success story

11:00 170 years after the Alabama case:  
Is this the time for the resurgence of  
political arbitration?

Afternoon:

Third session: With China and after Doha:  
A reality check of the functioning of the WTO dispute  
settlement system

14:00 TRIPS, the Doha Declaration and Public  
Health

15:00 The China Safeguard Mechanism, Safeguard  
Measures and the constant abuse of the rules

16:00 Improving the DSU, rethinking trade  
sanctions

Conference chairman: Jacques Werner

FOR FURTHER INFORMATION, PLEASE CONTACT

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Avoid the appearance of bias, but not actual bias? Not at all. Party concerns about fairness are serious. The reason that we cannot assume fairness is because many forces operate to undermine evenhanded treatment of litigants, even given the best of intentions by the decision-makers responsible for producing fair and just outcomes. There is ample evidence that judges and arbitrators, like other decision-makers, are influenced by their cultural backgrounds, their prior experiences, and their personal associations in formulating their understanding of and judging the behavior they must consider in reach their decisions. A classic study of decision-making in commercial arbitration demonstrated this influence.21 (Haggard & Mentschikoff, 1977; Mentschikoff & Haggard, 1977). The researchers had 20 different panels of arbitrators listen to a tape of the same contract dispute. The panel members were American Arbitration Association arbitrators, and half of them were brokers, while the remaining half were manufacturers. The case involved a contract dispute in which the plaintiff, a distributor who had agreed to purchase goods from the defendant, claimed that the defendant, a broker with the sole right to import the goods, had not been entitled to cancel the contract between the two parties. Each of the arbitrators indicated whether he would have decided the case in favor of the plaintiff or the defendant, and a comparison between the manufacturer arbitrators and the broker arbitrators indicated the effects of what the authors called affinity; the brokers were far more likely to favor a decision for the broker defendant than were the manufacturers. The difference in the pattern of responses was not attributable to nefarious motives, or even to any form of personal loyalty to a particular party, but rather arose from the natural alignment of interests based on shared experience.

Moreover, it is important to recognize that what we may be tempted to characterize as bias is this common perspective that come naturally from a shared experience. Thus, whether or not we call it bias, a shared cultural background may foster an unconscious shared perspective that would be perceived as bias by an observer from a different cultural background. Whatever the label, however, the result is an advantaging of one party over another or a tendency to see a witness with a particular background as more or less credible than a witness who has a different background. Whatever their source, beliefs about the world and preconceived notions about the likely credibility of particular witnesses affect how decision-makers evaluate evidence at trial. Decision-makers in all settings ordinarily scrutinize more carefully and are more likely to reject information that is inconsistent with their beliefs and expectations.22 It is generally easier for people to remember information that is consistent with their other beliefs than information that is inconsistent with them,23 and ambiguous information tends to be interpreted as consistent with already held beliefs.24 Indeed, one rationale for the American jury is that the institution invites multiple citizens with diverse backgrounds to pool their experiences and perceptions. If we add to the mix, the affinities that arise from genuine ties to the interests of the parties, the tension and potential influence of those affinities are likely to be further increased by what psychologists call the self-serving or egocentric bias, the tendency for people to reach judgments that are biased in a self-serving direction.25 Although the most prominent example of the dangers of this bias occurred recently in the troubles of the auditing firm of Arthur Anderson in the American ENRON scandal, the bias is ubiquitous—people "tend to conflate what is personally beneficial with what is fair or
moral. Studies of physicians, accountants, and even scientists reveal that despite codes of ethics, in the face of good intentions, and without conscious awareness, judgments tend to move in the direction of self-interest and confirmation of previously held beliefs. Thus, physicians tend to order more tests when they receive additional income as a result. Accountants asked to evaluate the dollar amount of inventory loss that an insured suffered in a fire—the amount of loss they set was dramatically higher when they were told that their client was the insured than when they were told it was the insurance company. Scientists judging the quality of a research report were influenced by whether the outcome supported the scientist’s prior beliefs.

Of course, physicians, auditors and scientists are typically not attorneys, and the arbitrators in the study I described earlier were not attorneys or judges or legal scholars, so one might be tempted to conclude that concerns about affinity and self-interest biases are harsh, or rather, that they would lose their power if the same studies were conducted using legally-qualified arbitrators. Although we have some anecdotal evidence to suggest that similar affinities arise with attorneys, a more systematic source of evidence comes from the extensive literature on judicial decision-making by American judges. This work is particularly interesting in revealing the influence of the background of the decision-maker on decision-making because much of the research has been done on federal appellate court judges who are appointed for life. Their lifetime tenure means that these judges are not subject to concerns about re-appointment that may lurk in the back of the consciousness of judges selected for a term of years or arbitrators who are appointed on a case-by-case basis. Because they generally sit in panels of three and, unlike some tribunals, are free to reach non-unanimous verdicts, it is possible to study the nature and extent to which differences among judges reaching verdicts on the same case arrive at different decisions. Political scientists and recently, some legal scholars, have examined the pattern of decision-making by these federal judges for evidence that background characteristics of the judges can explain some portion of the variation in their decisions. In a recent example of this genre of research, Brodney, Schiavoni, and Merritt (1999) looked at the 1224 appellate cases reviewing unfair labor practice claims issued by the federal courts of appeals over a seven year period. According to a strictly legal model of how cases are decided, attributes of a judge’s background should provide no information that will help to predict judicial decisions. In contrast, a social background perspective, while acknowledging the influence of case-specific facts and legal precedent, posits that biographical factors, such as personal traits, educational background, and prejudicial activities also help to explain judicial decisions. Brodney and his co-authors found, as have others, empirical support for the social background perspective. For example, whether the judge attended an elite college and whether the judge had experience as a practicing attorney representing management in labor matters were significant predictors of the positions that the judge took toward labor union claims about unfair labor practices. A purely doctrinal explanation of appellate court decisions cannot account for this result.

The influence of social background as well as the research showing that judges are subject to cognitive biases in the evaluation of evidence explain only a part of judicial decision-making. There is little doubt that the primary influence on judicial decisions is the evidence and applicable law. Nonetheless, the research reveals that when the evidence or law are somewhat ambiguous, there is ample room for non-evidentiary and extra-legal considerations to influence outcomes.

The best judges try hard to provide both sides to a dispute with an equal opportunity to persuade the court of the virtue of their positions, but it would be naïve to assume that they always succeed. The same struggle occurs in the attempt to ensure that arbitrators have the attributes identified by Mauro Rubino-Sammartano that include
Apossession of a balanced mind, @Aindependence, @A and Aimpartiality @ (p.320). the choice in international arbitration to avoid selecting a chairman from the same country as one of the parties is a further reflection of the effort to produce, and convey the appearance of producing, a fair and balanced tribunal.

It would be unrealistic, however, to ignore the possibility that structural features of arbitrator selection can influence the perspective of a party-appointed arbitrator, and it is here that I want to take up Neil Kaplan's invitation to be somewhat obstreperous. Let me suggest that there is a parallel to international arbitration panels that you may not, at first glance, recognize: to the party-appointed expert in litigation that is a standard feature of the adversary system in the United States. The party-appointed arbitrator is expected to understand the perspective of the party that appointed him, and to make certain that the chairperson and the other party-appointed arbitrator are fully informed as well. At the same time, the party appointed arbitrator cannot display partiality. To do so not only would be inconsistent with the duty of the arbitrator to exercise independent judgment, but also would have consequences for the arbitrator's reputation and would undermine his ability to influence his fellow panel members. Of course, in light of the affinities discussed earlier and the ability of a party to A>shop= for arbitrators with specific backgrounds and experiences@ in order to identify an arbitrator likely to be receptive to the party's perspective, the party-appointed arbitrator is likely to be more sympathetic to the position of the appointing party, even if the ultimate weight of the evidence favors the opposing party and the panel reaches a unanimous decision on the appropriate verdict.

How similar is this picture to the position of the party-appointed expert? The expert testifies under oath at trial, with an obligation to provide truthful answers to the questions he is asked. Moreover, this expert has a professional reputation to protect, and not only that reputation but also the nature of his testimony will follow him in future cases.

In fact, what the party-appointed expert says, unlike the questions or deliberation behavior of the party-appointed arbitrator, will become part of a public record. Parties, of course, can search for experts who have taken, or are likely to take, positions that favor the view that the party wants to advance. For example, recently a spate of cases have been making their way through American courts in which the plaintiffs allege that they have been stroke victims as a result of taking the drug Parlodol to suppress lactation after giving birth. Medical experts testifying for the plaintiffs in these cases are on record for having taken the position that Parlodol can cause strokes; experts for the defendants, not surprising, have reached the opposite conclusion. Each is more likely to find evidence persuasive that the plaintiff in the specific case did or did not experience a stroke due to her Parlodol exposure to the extent that it is consistent with the earlier views they have expressed.

American party-appointed experts are currently the subject of much critical comment in the United States, as they have been in England, and some efforts have been made to reduce their role and their influence by substituting or at least supplementing them with court-appointed experts. Parties and the attorneys who represent them are generally opposed to court-appointed experts. I suspect that the reason is very close to those that have encouraged the system of party-appointed arbitrators and the values of procedural justice. Some degree of party control encourages a sense of fairness that a tribunal, even one that decides against you, has received and considered all of the information you think should be part of its deliberations. The value of party control may be particularly crucial for the legitimacy of international arbitration in which parties may come to the table from not only different legal systems, but also with cultural differences that affect their perspectives (e.g. on what behaviors are appropriate).

One intriguing feature of the 3-member international arbitration panel that may act as an important constraint on partiality does
not exist for a party-appointed expert. While the prospect of repeat business incentive in both situations, the reputation of an arbitrator as fair and unbiased should increase the likelihood that he or she will receive appointments as the third member of the arbitration panel. If that incentive does affect behavior, there may be important differences in the behavior of arbitrators who frequently occupy the chairman's seat and those who do not. Unfortunately, no empirical study has tested either that hypothesis or indeed many hypotheses about patterns in arbitration. Although the ubiquitous self-serving bias would predict that the arbitrator will be influenced by having been previously appointed by one of the attorneys, albeit for another client, we do have no data on whether an arbitrator is more likely to favor the side of an attorney who has previously appointed him one time, five times, or ten times, or indeed the extent to which the reputational pressures for impartiality reduce this natural inclination to favor past (and potentially future) sources of appointment. Similarly, we do not have a direct test of the effects of the English system which permits colleagues to appear as advocate and arbitrator in the same proceeding, a structure that appears to invite cognitive and motivational biases that will give the party employing the arbitrator's colleague an edge. Thus, although the general literature on dispute resolution points clearly to the influence of perceptions of procedural justice on parties' reactions to arbitration, there is no direct analog we can draw on to examine the effects of the structure of international arbitration on the behavior of arbitrators.

III Concluding Remarks

This examination of the psychology of dispute resolution and its application to international arbitration reveal how procedures can have a crucial effect on the reactions of litigants and on their willingness to accept decisions even when those decisions do not favor them. It also shows why it is unrealistic to expect even highly trained and well-motivated arbitrators to be unaffected by their own experiences and backgrounds in the way they evaluate evidence. As a result, procedures loom large in ensuring that the methods of dispute resolution maximize both the appearance and the reality of procedural and substantive justice.

The discussion to this point leaves many questions unanswered that can be addressed only by knowing more about how arbitration proceedings unfold and how arbitrators reach their decisions. The exciting, but relatively young world of international arbitration has spawned a large body of scholarship and commentary, but most of the writing on the subject has been limited by the requirements of confidentiality that are a distinctive feature of international arbitration. There is, as a result, no study that has systematically observed and analyzed actual behavior and the decision-making process. Lest you think that such a research agenda for international arbitration merely represents another unrealistic professorial pipe dream, I want to close with an example to show that such apparently sensitive research can be carried out.

The jury in the United States in a constitutionally protected cultural icon, although it is frequently the subject of criticism. Its deliberations are confidential, and researchers interested in studying the jury have, for the past 50 years, set up mock cases and juries to study and interviewed jurors in real cases after their jury service was completed because they were not permitted to observe actual jury deliberations. Recently, with the permission of the Arizona Supreme Court, we were able, with the consent of the litigants and their attorneys, to videotape jury deliberations in 50 trials. The research was done with the understanding that only the researchers would have access to the tapes, and that any published results would not disclose the identity of the parties or their attorneys. Although the work is still in progress, my expectation C and that of those who have supported the research C is that this close study of a series of trials can provide insights and suggestions that could not be assembled through less direct means of study. Indeed, the project already has had that result but that is a subject for
an another occasion. I mention it here only to provide you with an example of what would appear on the surface to be an impossible institution to study directly, and to invite you to consider new ways, consistent with the demand of confidentiality, to examine the psychology of dispute resolution in the exciting forum you have created.

FOOTNOTES


30 In the Dutch legal system, for example, public dissent is not permitted. That is, majority decisions are announced publicly as if they were unanimous. Peter Van Koppen & Jan Ten Kate, Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decision-making, 18 Law & Society Review 225, 227, n.1 (1984).


33 Cognitive biases affect both judicial and lay judgments, although judges appear to be less affected by some biases than are laypersons. See e.g., Chris Cuthri, Jeffrey J. Rachlinski, 7 Andrew J. Wistrich, Inside the Judicial Mind, 86 Cornell L. Rev. 777 (2001).


38 Lord Woolf, ACCESS TO JUSTICE (1996).

39 The increased costs associated with a court-appointed expert also discourage their appointment in arbitration. See Peter Sheridan, Construction and Engineering Arbitration (1999), p 213.


41 Post-trial interviews with jurors are not permitted in some countries (e.g., England).

New applications for registrations to the Centre’s panel were also approved. The Board expressed its content with the working strategy followed by the Secretariat, which resulted in a rise in caseload this year. It further encouraged the Secretariat to continue its strenuous labour to attract more arbitration cases in order to maintain a constant increase in the number of cases being administered at the Centre.

The meeting also discussed the importance of coordination with the Secretary of the GCC to meet with HE Mr. Abdul Rahman Hamad Al Atiya, Secretary General of the GCC to discuss as to how the role of the Centre could be further improvised and activated, either in the context of the New Unified Economic Agreement or in relation to general commercial disputes.

In this respect, the Board members wished to discuss, in detail with His Excellency some tangible measures that could be implemented with a view to activate the Centre’s role.

They also suggested that some ministers and other official authorities could be directed to support the Centre in their attempt to serve the parties in resolving their disputes. For e.g. Disputes arising in Governmental sectors like oil, energy, aluminum, petrochemicals etc. were still being dominated by local courts. Therefore, measures could be undertaken to incorporate the Standard Arbitration Clause of the Centre through which not only could disputes be settled expeditiously but would also provide confidentiality and a cut in costs incurred while proceeding with a case. Cases could be arbitrated at the Centre, which provides a wide range of services for the conduct of an arbitral hearing.

The Board members concluded the meeting by expressing their sincere gratitude to the Government of Bahrain for its continuous support to the Centre and its special thanks to HE Mr. Ali Saleh Al Saleh and to the Bahrain Chamber of Commerce and Industry for their continued patronage and whole-hearted support.

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Recent International Developments in the Transfer of Technology

A paper presented by Mr. Stewart Shackleton, Baker & McKenzie

Kingdom of Bahrain

1. DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION – WT/ MIN(01)/DEC/1

The Ministerial Declaration (adopted 14 Nov 2001) contains a general mandate to set up a Working Party on the relationship between trade and the transfer of technology to developing countries (paragraph 37):

Trade and transfer of technology

37. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.
The Declaration refers separately (paragraphs 38 – 41) to the need for technical cooperation and capacity building to facilitate the transition of developing countries to WTO rules and disciplines. In other WTO agreements, reference is made to provision of technical assistance, with the same aim:

Technical cooperation and capacity building

38. We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable, and transition economies, as well as to members and observers without representation in Geneva. We reaffirm our support for the valuable work of the International Trade Centre, which should be enhanced.

39. We underscore the urgent necessity for the effective coordinated delivery of technical assistance with bilateral donors, in the OECD Development Assistance Committee and relevant international and regional intergovernmental institutions, within a coherent policy framework and timetable. In the coordinated delivery of technical assistance, we instruct the Director-General to consult with the relevant agencies, bilateral donors and beneficiaries, to identify ways of enhancing and rationalizing the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries and the Joint Integrated Technical Assistance Programme (JITAP).

40. We agree that there is a need for technical assistance to benefit from secure and predictable funding. We therefore instruct the Committee on Budget, Finance and Administration to develop a plan for adoption by the General Council in December 2001 that will ensure long-term funding for WTO technical assistance at an overall level no lower than that of the current year and commensurate with the activities outlined above.

41. We have established firm commitments on technical cooperation and capacity building in various paragraphs in this Ministerial Declaration. We reaffirm these specific commitments contained in paragraphs 16, 21, 24, 26, 27, 33, 38-40, 42 and 43, and also reaffirm the understanding in paragraph 2 on the important role of sustainably financed technical assistance and capacity-building programmes. We instruct the Director-General to report to the Fifth Session of the Ministerial Conference, with an interim report to the General Council in December 2002 on the implementation and adequacy of these commitments in the identified paragraphs.

II. TRIPS

The TRIPS Agreement recognizes the public policy objectives for the protection of intellectual property and the special needs of least-developed nations.

Article 7 – Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 – Principles

2. Appropriate measures, provided that they
are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

**Article 66 – Least Developed Country Members**

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.


**V. Implementation of Article 66.2**

12. The Council continued to discuss the implementation of this Article throughout the reporting period, which requires developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base. The matter has been under discussion in the Council since December 1998 and the Council has received information from 20 developed country Members on how the provision is being implemented in their territories. Since June 2000, has also before it a Secretariat note prepared upon a request from the Council, setting out the types of incentive measures that had been notified, with cross-references to where further details could be found, as well as a proposal received from Zambia relating to special and differential treatment in respect of technology transfer.

13. In October 2000, the Special Session of the General Council on Implementation invited the TRIPS Council, with a view to facilitating full implementation of Article 66.2, to give consideration to drawing up an illustrative list of incentives of the sort envisaged by Article 66.2; and to put on a regular and systematic basis its procedure for the notification and monitoring of measures in accordance with the provisions of Article 66.2 and, in doing so, to give consideration to avoiding unnecessary burdens in notification procedures. The TRIPS Council was also requested to give consideration to inviting other intergovernmental organizations to provide information on their activities aimed at technology capacity-building (see under VI below). The TRIPS Council discussed the matter for the first time at its meeting in November/December 2000 and reported on these discussions to the General Council on Implementation in December 2000. At the TRIPS Council's meeting in April 2001, least-developed country representatives indicated that they needed more time to be able to crystallize their thinking and prepare a proposal for how the work on this matter should be carried forward. At its meeting in June 2001, the TRIPS Council had a further discussion on the issue after having received a communication relevant to the matter from the delegation of Zambia. At its meeting in September 2001, some developed country Members provided specific information as to how incentives they made available had been used in practice. At that meeting, the Council also agreed to invite UNCTAD to update it on the work that was on-going in that Organization relevant to the implementation of Article 66.2, in particular as a result of the UNCTAD Expert Meeting on International Arrangements for Transfer of Technology in June 2001.

**VI. Information on Technology Capacity-Building**

14. The Council was requested by the Special Session of the General Council on Implementation of 18 October 2000 to invite other intergovernmental organizations to provide information on their activities aimed at technology capacity-building (see under V above). In this connection, the Council for
TRIPS agreed at its meeting in November/December 2000 to invite the secretariats of UNCTAD, WIPO, UNIDO, the World Bank and the CBD to provide written information on their activities on technology capacity-building prior to the Council's meeting in April 2001. In the reporting period, the TRIPS Council received such information from the CBD Secretariat, UNCTAD, UNIDO and WIPO and a communication from the delegation of Zambia relevant to this information. It discussed the matter at its meetings in June and September.

III. Agreement on Technical Barriers to Trade.

Article 11 – Technical Assistance to other Members

11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed and conditions regarding:

11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and
11.3.2 the methods by which their technical regulations can be best met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.

11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfill the obligations of membership or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfill the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members. To be continued next issue........
## Conference Programme

### DAY 1

<table>
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<tr>
<th>Time</th>
<th>Event</th>
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<tr>
<td>9.00</td>
<td>OPENING CEREMONY</td>
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<tr>
<td>9.30</td>
<td>IS THERE A UNIVERSAL CONCEPT OF JUSTICE AND FAIRNESS?</td>
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<td>11.00</td>
<td>COFFEE BREAK</td>
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<tr>
<td>11.30</td>
<td>RESPECTIVE ROLES IN SECURING JUSTICE AND FAIRNESS</td>
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<td>1. The arbitrator</td>
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<td>• Nationality</td>
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<td>2. The arbitral Institution</td>
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<td>• Appointing arbitrators</td>
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<td>• Overseeing the procedure</td>
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<td>• Controlling the award</td>
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### DAY 2

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<tr>
<td>9.00</td>
<td>RESPECTIVE ROLES IN SECURING JUSTICE AND FAIRNESS</td>
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<td>1. The Court</td>
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<td>• Decision on jurisdiction</td>
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<td>• Setting aside the award</td>
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<td>• Enforcement of the award</td>
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<td>10.30</td>
<td>Coffee Break</td>
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<tr>
<td>11.00</td>
<td>ORGANIZING THE PROCEEDINGS TO SECURE JUSTICE AND FAIRNESS</td>
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<td>• Affording the parties a</td>
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<td>• sufficient opportunity to present their respective case</td>
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<td>• Presentation of evidence</td>
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<td>• Organization of the hearing</td>
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<td>LUNCH</td>
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<td>14.00</td>
<td>ADAPTING THE PROCEDURE TO THE SUBJECT-MATTER OF THE DISPUTE</td>
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<td>• Investment</td>
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<td>• Transfer of technology</td>
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<td>• Construction</td>
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<td>16.00</td>
<td>CONCLUDING REMARKS</td>
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<td>16.30</td>
<td>END OF CONFERENCE</td>
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WORKSHOP AND SEMINAR ON INTERNATIONAL CONTRACTS AND TRANSFER OF TECHNOLOGY
28-30 SEPTEMBER 2002
KINGDOM OF BAHRAIN
EXCERPTS FROM THE SEMINAR HELD ON 29 & 30TH SEPTEMBER 2002
GULF HOTEL, KINGDOM OF BAHRAIN