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Editorial: Japanese Sentiment, Today & Tomorrow

Bill of Arbitration to be put before Diet to Repeal the Hundred-year Old Regime

At the vigorous helm of the reform-oriented Koizumi cabinet, the Bill to amend the Law of Arbitration 1890 will finally be submitted to the Diet for passage this year and the new Law is expected to come into effect sometime in 2004. The Arbitration Bill is said to be primarily based on the UNCITRAL Model Law. I hope that the new Law will make international users of arbitration feel it easier to agree to Japan as the place of arbitration.

Just for a preview of what the new Law may look like, you will find in this edition the Revised Draft Text of Arbitration Law 2001, which was made by Arbitration Law Study Group (headed by Prof. Akira Takakuwa) to amend the Draft Text of Law of Arbitration 1989. The Group revised the 1989 Draft, keeping abreast of the latest developments and also in line with the UNCITRAL Model Law. The official drafters of the Arbitration Bill have, among other things, closely reviewed and taken consideration of each provision of the Revised Draft Text in finalizing their own version.

TOMAC and CMAC Renew Co-operation Agreement

TOMAC (Tokyo Maritime Arbitration Commission) and CMAC (China Maritime Arbitration Commission) entered into a new Co-operation Agreement in Tokyo on 24th December 2002, to repeal the Maritime Arbitration Agreement singed by the same parties in Beijing in 1978. The signing ceremony was held at JSE's headquarters and Mr Kazuo Sato, Chairman of TOMAC, and Mr Kang Ming, Vice-Chairman of CMAC signed the new agreement in a very friendly atmosphere.

The 1978 Agreement was the first ever agreement of TOMAC with an international arbitral body in the world. At that time both parties wished to promote dispute resolution by arbitration. However, disputes have rarely been referred to arbitration under the former Agreement. That is perhaps because business people's awareness of alternative dispute resolution had not much developed yet. It may also because people in both China and Japan have traditionally preferred to negotiate and settle the dispute amicably prior to arbitration.

But people's attitudes are changing. Further, China has taken over United States of America as the biggest exporter to Japan in 2002. Needless to say, most part of the huge trade volume between our two countries is carried by sea. We will expect a growing

number of disputes to arise from there. Of course, it is the best way to avoid a dispute in the first place. However, unfortunately a dispute does arise from a day-to-day transaction. Therefore, we must at least provide users with a wider and more flexible choice of place of arbitration and arbitral organization. Further, our new agreement aims to promote dispute resolution through not only arbitration but also conciliation. We will thus co-operate in such fields as recommending suitable arbitrators and exchanging information on arbitral bodies in each other's country. I hope Japan and China can co-operate further in helping disputing people to resolve their dispute more promptly, more efficiently and more friendlily.

Takao Tateishi – General Editor

Arbitration Law Study Group Revises Draft Text of Arbitration Law

The Arbitration Law Study Group, headed by Prof. Akira Takakuwa, revised in 2001 the Draft Text of Law of Arbitration first publicized in 1989. The Group was formed in 1979 by prominent scholars to promote the study on arbitration, because it was strongly felt that Japan was lagging behind other industrialized nations in that field. Their steady efforts bore fruit as the Draft Text of Law of Arbitration 1989, which aimed to complement the Law of Arbitration 1890, with much inputs from the UNCITRAL Model Law 1985 and also in line with the commercial and social developments.

It was hoped that the Draft Text would be utilized for the purpose of the renovation and promotion of arbitration as a means of resolution of civil and commercial disputes. However, revision of the law of arbitration took place in many countries around the world in late 1980's and thereafter. The Group thus decided to amend the 1989 Draft Text to give it a more contemporary flavor.

The Revised Draft Text 2001 has in general imported many provisions of UNCITRAL Model Law. Some commentators may suggest that the Draft Text should virtually be the same as the UNCITRAL Model Law in view of the universality of the Model Law. But the Group's view is that because the UNCITRAL Model Law is not totally free from shortcomings and also because the Law of Arbitration should cover not only international disputes but domestic ones, it should be better to draft provisions in due consideration of domestic legislation rather than strictly in line with the UNCITRAL Model Law.

REVISED DRAFT TEXT OF LAW OF ARBITRATION 2001

Arbitration Law Study Group
(Chusai-Kenkyukai)

Note: This law shall be entitled the Law of Arbitration.

Chapter I General Provisions

Section 1 (Purpose)

The purpose of this law is to provide for the efficient and just resolution of disputes by arbitration.

Section 2 (Definitions)

For the purposes of this Law, arbitration means a private person or persons (each "an arbitrator" and collectively "the arbitrator") hearing a case and making an award (the "arbitral award") with respect to a dispute, pursuant to an agreement by the parties (the "arbitration agreement") to refer the resolution of a legal dispute to a private person or persons and be subject to his or their decision.

Section 3 (Jurisdiction of the Court)

(1) The court of competent jurisdiction to perform the functions referred to in each of the following items shall be the competent District Court having jurisdiction over the place designated for such item:

1 Appointment of initial or substitute arbitrator pursuant to Sections 15 and 18
The place of arbitration or domicile or address of the respondent. In the absence of the preceding places, the place where the right or legal relationship which is the subject matter of the arbitration could be heard by a court. In the absence of the preceding place, the place designated by the Rules of the Supreme Court, or, if there exists no place of arbitration domestically, the place designated by the Rules of the Supreme Court.

2 Adjudication relating to challenge of an arbitrator pursuant to Section 16
The place of arbitration. In the absence of the preceding place, the place of the general venue of the arbitrator being challenged. In the absence of the preceding place, the place designated by the Rules of the Supreme Court.

3 Co-operation in the taking of evidence pursuant to Section 25

The place of arbitration, the domicile or address of the person to be examined or the person in custody of documents, or the place where the thing to be inspected is located.

4 Deposit of the arbitral award pursuant to Section 35
The place of arbitration.

5 A declaration to permit enforcement upon an award ("enforcement order") pursuant to Section 38
The place of arbitration or the domicile or address of the obligor.

6 Setting aside of the arbitral award pursuant to Section 41
The place of arbitration or the domicile or address of the respondent.

7 Enforcement order of a foreign arbitral award pursuant to Section 46
The domicile or address of the obligor, or the place where the object of the claim or other attachable property of the debtor is found.

(2) The jurisdiction provided for in the preceding subsection shall be exclusive.

Section 4 (Matters not provided for in this Law)

[Removed]

Section 5 (Application of Treaties)

[Removed]

Chapter II Arbitration Agreement

Section 6 (Validity)

(1) An arbitration agreement shall be valid only when its subject matter is a defined right or legal relationship which may be determined by the parties.

(2) An arbitration agreement that relates to a future dispute shall be valid only if it relates to a dispute arising from a defined right or legal relationship.

Section 7 (Forms)

(1) An arbitration agreement shall be in writing. A writing shall include all means of telecommunication (including electronic, optical or other forms of data) which provide a record of the agreement.

(2) An arbitration agreement shall be deemed to be in writing if:

1 the arbitration agreement is contained in a document signed by one of the parties or in documents exchanged through the mails, telegrams, telex, facsimile or other means of telecommunications.

2 one party alleges the existence of an arbitration agreement in a written application

for arbitration or a written answer in court proceedings and the allegation is not disputed by the other party.

(3) Any reference in a contract to another document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause a part of the contract.

Section 8 (Separability)

An arbitration agreement shall be treated as an agreement independent from the other clauses of the contract of which it is a part. An arbitration agreement shall not become invalid *ipso jure* even if the contract of which it is a part is void or is voided, or has been rescinded or terminated.

Section 9 (Effects)

(1) If a party brings an action in a court, notwithstanding the existence of an arbitration agreement, the court shall, on application by the respondent, stay the court proceedings by a *kettei*-decision*, unless the agreement is void or incapable of being performed.

(2) An application pursuant to the preceding subsection shall not be permitted after a pleading on the merits of the dispute is made or a declaration during preparatory procedures for trial has been made.

(3) In the event that court proceedings have been stayed pursuant to subsection (1), the court shall, upon application by a party, resume the proceedings if it finds the continuation of the arbitral proceedings has become impossible, or if a judgment setting aside the arbitral award has become irrevocable and a renewed application for arbitration is not filed within 30 days thereafter.

(3 bis) In the event that court proceedings have been stayed pursuant to subsection (1), if the parties do not make an application to resume court proceedings within the time period that the court determines, the court proceedings shall be deemed withdrawn pursuant to an expiration of that period.

(4) An immediate *sokuji kokoku*-appeal** may be taken from the decision staying the court proceedings pursuant to subsection (1).

(5) An arbitrator may continue the arbitral proceedings notwithstanding the pendency of court proceedings.

Section 10 (Provisional Remedy by Court)

A party to an arbitration agreement may apply to a court for provisional remedy either prior to a reference to arbitration or during the arbitral proceedings.

Section 11 (Time Limit for Reference to Arbitration)

If an arbitration agreement provides a time limit for referring a matter to arbitration, after the expiration of the time limit, then court proceedings may be commenced.

Section 12 (Loss of Effect)

[Removed]

Chapter III Arbitrators

Section 13 (Qualifications)

(1) An arbitrator shall be a natural person.

(2) If an arbitration agreement designates a corporation or other entity as arbitrator, the entity shall be presumed to be designated as the arbitrator-appointing agency.

Section 14 (Number)

(1) The parties are free to determine the number of arbitrators by their agreement.

(2) In the absence of the parties' agreement, the number of arbitrators shall be three.

Section 15 (Appointment Procedure)

(1) The parties are free to agree upon a procedure for the appointment of the arbitrator.

(2) In the absence of the agreement referred to in the preceding subsection, or if an appointment is not made in accordance with such agreement:

1 In an arbitration by one arbitrator, the appointment shall be made by agreement of the parties.

2 In an arbitration by two or more arbitrators, each party shall appoint an equal number of arbitrators. If an odd number of arbitrators are to be appointed pursuant to the preceding Section, one arbitrator shall be further appointed by agreement of the arbitrators already appointed. A party who has appointed an arbitrator shall notify the other party thereof, and may demand the other party to appoint an arbitrator within 30 days of such notice.

(3) The court of competent jurisdiction shall, upon application by a party, appoint the arbitrator or arbitrators within 30 days by *kettei*-decision* if:

1 In the case of item 1 of the preceding subsection, the parties cannot agree on the appointment of the arbitrator to be appointed thereby; or

2 In the case of item 2 of the preceding subsection, a party fails to appoint an arbitrator within 30 days after the receipt of a notice from another party who has appointed an arbitrator, or, if an odd number of arbitrators are to be appointed pursuant to the preceding Section, the arbitrators already appointed cannot agree

on the further appointment of the last arbitrator.

(4) The appointment of an arbitrator pursuant to the preceding subsection is not subject to appeal.

Section 16 (Challenge)

(1) A party may challenge an arbitrator if there are any circumstances likely to interfere with the impartiality of the arbitration.

(2) An arbitrator shall immediately disclose to the parties the existence of any grounds that would constitute a ground of challenge.

(2 bis) The parties are free to agree upon a procedure for the challenge of an arbitrator; provided, however, that such procedure shall not prevent the application for challenge of an arbitrator to a court of competent jurisdiction pursuant to subsection (4) hereof.

(3) A motion for challenge of an arbitrator shall be filed with the arbitrator within 15 days after becoming aware of the ground of challenge for an arbitrator.

(4) If an arbitrator has dismissed a motion for challenge, or has failed to make a decision on a motion for challenge within 30 days of its filing, the challenging party may apply to the court of competent jurisdiction for a *kettei*-decision* on the challenge within 15 days of the date upon which notice of the dismissal was received or the date upon which 30 days have elapsed without any decision since the motion for challenge was made.

(5) If the time periods specified in the preceding two subsections hereof have elapsed despite the parties being aware of the existence of grounds of challenge for an arbitrator, such grounds may not constitute grounds for setting aside the arbitral award.

(6) The arbitrator or the arbitrators may continue the arbitral proceedings notwithstanding the pendency of a motion filed pursuant to subsection (4) hereof.

(7) The five preceding subsections shall apply *mutatis mutandis* to the qualifications for an arbitrator as agreed upon by the parties.

Section 17 (Withdrawal and Discharge)

(1) An arbitrator may not resign from his office unless a justifiable reason exists.

(2) The parties may by their agreement dismiss any arbitrator.

Section 18 (Substitute Arbitrator)

If it becomes necessary to substitute an arbitrator due to death, challenge, resignation or dismissal, a substitute arbitrator may be appointed in accordance with the procedures provided for in Section 15.

Section 19 (Responsibility of Arbitrator)

(1) An arbitrator shall perform his duties impartially, expeditiously and with integrity.

(2) An arbitrator shall not be responsible to the parties with respect to any act relating to the arbitration, except in cases where the act is due to intent or gross negligence.

Section 19 bis (Settlement and Mediation)

If so agreed by the parties, the arbitrator or arbitrators may attempt to effect a settlement or refer a matter to mediation (including mediation by a third party).

Chapter IV Arbitral Proceedings

Section 20 (Powers of Arbitrator)

(1) The arbitrator may rule on his own jurisdiction to make an arbitral award in the case referred to him.

(2) A plea that the arbitrator lacks jurisdiction in whole or in part cannot be raised after an answer on the merits has been submitted by the respondent; provided, however, that a plea may be raised after an answer has been submitted if there be a justifiable reason for the delay.

(3) A decision by the arbitrator that it has jurisdiction to make an arbitral award may be contested only by an action for setting aside the arbitral award or by a defense in the proceedings for enforcement order.

Section 21 (Principles of Procedure)

(1) The arbitrator shall treat the parties with equality and shall give each a full opportunity to present his claim and to present evidence.

(2) Subject to the provisions of the preceding subsection, the parties may agree upon the arbitral procedures. In the absence of such agreement, the arbitrator may decide upon the procedures.

(3) The parties shall endeavor to expedite the arbitral proceedings, and shall engage in the arbitral proceedings in good faith.

(4) The arbitrator may ask questions of and prompt the furnishing of evidence by the parties with respect to matters of fact or of law.

Section 22 (Place of Arbitration and Place of Arbitral Proceedings)

(1) The parties are free to agree on the place of arbitration. In the absence of such agreement, the arbitrator shall determine the place of arbitration.

(2) Unless otherwise agreed by the parties, the arbitrator may, if it deems necessary, meet at any place to hold a hearing, to examine evidence or to deliberate.

Section 23 (Commencement of Proceedings)

(1) Unless otherwise agreed by the parties, arbitral proceedings shall commence on the date on which the respondent receives a request for referral to arbitration or the date on which the respondent receives a notice of appointment of arbitrator made in advance of the referral to arbitration.

(2) An interruption of prescription period shall take effect upon the commencement of arbitral proceedings.

Section 24 (Interim Measures before Arbitral Award)

(1) Unless otherwise agreed by the parties, the arbitrator may, whenever it deems necessary, upon application by a party, order the other party or an interested person to perform or otherwise act on an obligation or enjoin the same, or order any other measure it deems proper, prior to making the arbitral award.

(2) The arbitrator may, whenever it deems necessary, order a party to provide appropriate security in connection with any measure ordered pursuant to the preceding subsection.

(3) Any interim measure ordered pursuant to the preceding two subsections shall not be enforceable.

Section 25 (Taking of Evidence)

(1) Unless otherwise agreed by the parties, the arbitrator may *ex-officio* take cognizance of facts and examine evidence.

(2) In taking of evidence from a witness or expert by the arbitrator, no oath may be compelled.

(3) The arbitrator or a party to the arbitration may request from the court of competent jurisdiction assistance in any taking of evidence which the arbitrator has deemed necessary to make an arbitral award.

(4) If a request is made pursuant to the preceding subsection, the court may order a witness or an expert to appear before the arbitrator, or may order a party or a third person to submit any document or tangible property in their possession to the arbitrator or permit the inspection of the same by the arbitrator.

Section 26 (Default by a Party)

(1) If a claimant fails to communicate his claim and the outline of the dispute, the arbitrator may issue an order terminating the arbitral proceedings.

(2) If a party fails to present his allegations and evidence, the arbitrator may continue the proceedings or make an arbitral award on the evidence already presented before it.

(3) If both parties fail to present their respective allegations and evidence, the

arbitrator may issue an order terminating the arbitral proceedings.

Section 27 (Withdrawal of Request)

The arbitrator shall issue an order terminating the arbitral proceedings if a claimant withdraws his claim and the other party agrees.

Section 28 (Right to Object)

If a party knows or could know of a violation of a provision relating to the arbitral proceedings but does not object without delay, he shall lose his right to object, unless it cannot be waived.

Section 28 bis (Joinder of Arbitration Case and Examination Proceedings)

Unless agreed by the parties, the arbitrator may not consolidate arbitration cases or examination proceedings.

Chapter V The Arbitral Award and Its Enforcement

Section 29 (Kinds of Arbitral Awards)

(1) The arbitrator shall make a final award when the claim has become ready for decision.

(2) When a part of a claim has become ready for decision, the arbitrator may make a final arbitral award as to that part. An independent action to set aside may be brought against such arbitral award.

(3) The arbitrator may, if it deems necessary, make an interlocutory award with respect to any substantive or procedural dispute arising during the arbitral proceedings. The arbitrator may not later make an award that differs from such interlocutory award. An independent action to set aside may not be brought against such award.

Section 30 (Rules Applicable to Substance of Dispute)

(1) The arbitrator must make an arbitral award in accordance with the rules of law. Notwithstanding the foregoing sentence, if the parties have otherwise agreed upon the standards of decision, an arbitral award shall be based upon the agreed standards of decision.

(1 bis) The arbitrator must decide in accordance with the provisions of the contract and must take into account the applicable customs.

(2) The arbitrator shall apply the law as determined by the conflict of laws rules that it deems appropriate. If the parties have designated a law as applicable to the substance of the dispute, the arbitrator shall apply such law.

Section 31 (Deliberation and Decision-Making by Arbitrator)

(1) Unless otherwise agreed by the parties, an arbitral award or any other ruling by a panel of more than one arbitrator shall be made by a majority of all the members; provided, however, that rulings on the conduct of the proceedings may be made by any single arbitrator so authorized by the other members of the panel.

(2) Unless otherwise agreed by the parties, if an arbitrator refuses to participate in the decision making, the remaining arbitrators may make a decision.

(3) An arbitrator must preserve the confidentiality of the deliberation and decision making.

Section 32 (Form and Content of Arbitral Award)

(1) An arbitral award shall be made in writing.

(2) An arbitral award shall be signed by the arbitrator and include:

1 the main conclusion of the arbitral award;

2 the reasons upon which the arbitral award is based;

3 the names of the parties;

4 the place of arbitration and the date of the arbitral award; and

5 a statement that the award is upon agreed terms of settlement, if such is the case.

(3) In arbitral proceedings involving a panel of more than one arbitrator, the signatures of the majority of all members of the panel shall be sufficient when there is an impediment to obtaining the signature or signatures of one or more other arbitrator or arbitrators; provided, however, that the other arbitrators must make a supplemental note regarding the arbitrator whose signature has been omitted.

(4) Notwithstanding the provisions of subsection (2) hereof, no reason need be stated in the arbitral award if the parties have agreed that no reason is necessary.

Section 33 (Settlement)

(1) If the parties have settled their dispute, the arbitrator shall, upon joint application by the parties, record the settlement in the form of an arbitral award on agreed terms, unless the arbitrator finds the settlement to be particularly unjust. In this case, no reason for the arbitral award need be stated.

(2) If the parties have settled their dispute and no application is made pursuant to the preceding subsection or an arbitral award is not made pursuant to the preceding subsection, the arbitrator shall issue an order terminating the arbitral proceedings.

Section 34 (Correction of and Addition to Arbitral Award)

(1) A party may, within 30 days after receipt of the arbitral award, with notice to the other party, apply to the arbitrator for correction of any computation errors, clerical or

typographical errors or any apparent errors of a similar nature in the arbitral award. If agreed by the parties, a party may, with notice to the other party, apply to the arbitrator for an interpretation of a specific point or part of the award.

(2) If the arbitrator finds the application made pursuant to the preceding subsection appropriate, it must within 30 days after receipt of such application make a correction or give an interpretation.

(3) Within 30 days after the date of the arbitral award, the arbitrator may *ex officio* correct any errors of the type referred to in subsection (1) hereof.

(4) Any corrections or interpretations shall be supplementally noted on the original and all authenticated copies of the arbitral award; provided, however, that if a correction cannot be supplementally noted on any authenticated copy of an arbitral award, an authenticated copy of the corrected arbitral award shall be prepared and served upon the parties.

(5) Upon application by a party within 30 days after receipt of the arbitral award, the arbitrator shall, within 60 days after the application, make an additional award with respect to claims omitted from the arbitral award. An independent action to set aside may be brought against such additional arbitral award.

(6) For the purpose of subsections (1) and (5) hereof, where the time limits for making application have not been complied with for reasons not attributable to a party, the arbitrator may extend the time limit to permit application by such party within two weeks after the cause of the delay has ceased.

Section 35 (Service and Deposit of Arbitral Award)

(1) The arbitrator shall serve an authenticated copy of the arbitral award upon each party.

(2) The arbitrator may deposit the original of the arbitral award, together with proof of service by registered mail or the proof of receipt, with the court of competent jurisdiction.

Section 36 (Effect of Arbitral Award)

The arbitral award shall have the same effect between the parties as a final and irrevocable judgment of a court.

Section 37 (Documents to be Submitted for Invocation or Enforcement of Arbitral Award)

A party seeking to invoke or enforce an arbitral award shall supply the original or a copy of the arbitration agreement and the original or an authenticated or duly certified copy of the arbitral award. If either the arbitral award or the arbitration agreement is not made in the Japanese language, the party shall supply a duly certified translation.

Section 38 (Enforcement of Arbitral Award)

(1) The arbitral award shall only be enforced if an enforcement order is granted by a court.

(2) No enforcement order shall be granted by a court if there exists a valid ground for setting aside the arbitral award.

(3) A court shall decide upon an application for an enforcement order by a *kettei*-decision* without holding formal oral proceedings; provided, however, that the court shall conduct a hearing of the other party. If the court in its discretion finds that formal oral proceedings are necessary, it shall render its decision by a *hanketsu*-decision***.

(4) A declaration for provisional execution shall be attached to an enforcement order.

(5) An objection may be brought against an enforcement order. If an objection is brought, the court shall hold formal oral proceedings and render its decision by a *hanketsu*-decision***.

(6) An objection pursuant to the preceding subsection may not be brought if more than two weeks have elapsed after the date upon which the *kettei*-decision granting the enforcement order has been served upon the parties. This time period may not be extended.

(7) An immediate *sokuji-kokoku*-appeal** may be taken from a *kettei*-decision* dismissing an application for enforcement order.

Section 39 (Publication of Arbitral Award)

(1) Unless otherwise agreed by the parties, an arbitral award shall not be made public.

(2) Notwithstanding the preceding subsection, if 10 years have elapsed from the date the arbitral award was made, the arbitral award may be made public excluding the identity of the parties, unless a party has objected.

Section 40 (Fees and Expenses of the Arbitrator)

(1) The arbitrator may determine the amount of fees of the arbitrator; provided, however, that if the parties and the arbitrator have otherwise agreed as to the fees of the arbitrator, such fees shall be determined according to such agreement.

(2) The arbitrator may require a party to deposit in advance a certain amount of money to be applied to payment of the arbitrator's fees and the expenses of the arbitral proceedings.

(3) Unless the parties have agreed as to the allocation of the fees or expenses, the arbitrator shall determine the allocation between the parties of the arbitrator's fees and the expenses of the arbitral proceedings and enter this determination in the main conclusion of the arbitral award.

Chapter VI Setting Aside of the Arbitral Award

Section 41 (Setting Aside of the Arbitral Award)

(1) Recourse against an arbitral award may only be made by an action for setting aside of the arbitral award.

(2) A court may set aside an arbitral award only if one or more of the following grounds has been established:

I The party seeking to set aside the arbitral award furnishes proof of any of the following:

1 a party to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid;

2 the party seeking to set aside the arbitral award was not given proper notice of the appointment of the arbitrator or proper notice of the arbitral proceedings, or was otherwise unable to defend his case;

3 the arbitral award relates to a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided, however, that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

4 the composition of the arbitrator or the arbitral procedure was not in accordance with the agreement of the parties or the provisions of this Law;

II A court finds that either of the following is applicable to the arbitral award:

1 the subject matter of the dispute is not capable of settlement by arbitration according to law;

2 the arbitral award is in contravention of public order or good morals.

(3) An action for setting aside the arbitral award may not be brought by a party if 3 months have elapsed from the date on which such party received the arbitral award. This time limit may not be extended.

Chapter VII Applicable Law and International Jurisdiction

Section 42 (Law Applicable to Arbitration Agreement)

The formation and effect of the arbitration agreement shall be governed by the law designated by the parties, or, failing such designation, shall be determined according to the law of the place of arbitration or the place where it is clear the arbitration will take place. If there is no place of arbitration or there is no place where it is clear the arbitration will take place, it shall be governed by the law which should be applied to the legal

relationship that is the subject of the arbitration.

Section 43 (Applicable Law as to the Form of Arbitration Agreement)

The form of the arbitration agreement shall be in accordance with the provisions of Section 7 of this Law.

Section 44 (Applicable Law as to Arbitrability)

[Removed]

Section 45 (International Jurisdiction and Procedure)

(1) A court shall render assistance and extend cooperation, and render a judgment in an action for setting aside the arbitral award in connection with an arbitration the place of which is within the territory of Japan. If the place of arbitration is not within the territory of Japan or if the place of arbitration has not been determined, a court shall render assistance and extend cooperation only if the arbitration has a close relationship to Japan.

(2) The rendering of assistance and the extension of cooperation pursuant to the preceding subsection shall be governed by this Law, notwithstanding any agreement by the parties.

Chapter VIII Recognition and Enforcement of Foreign Arbitral Award

Section 46 (Recognition and Enforcement)

Unless there exist grounds provided for in Section 48 of this Law, an arbitral award the place of which is not within the territory of Japan (referred to in this law as a "foreign arbitral award") shall be recognized as binding and shall enforceable.

Section 47 (Documents to be Submitted)

(1) In order to obtain recognition and enforcement of a foreign arbitral award, the party applying for such recognition and enforcement shall submit in its application the following items:

1 the duly authenticated original or duly certified copy of the award; and

2 the original or duly certified copy of the arbitration agreement.

(2) If the arbitral award or arbitration agreement has not been prepared in the Japanese language, the party seeking recognition and enforcement shall submit a Japanese language translation of such documents. Such translation must be certified by a certified public translator or a translator who has taken an oath or by a diplomatic or consular officer.

Section 48 (Grounds for Refusal of Recognition and Execution)

(1) The recognition and enforcement of a foreign arbitral award may only be refused if, by claim of the party to whose detriment the award is invoked, such party furnishes proof with respect to any of the following facts:

1 a party to the arbitration agreement was under some incapacity under the law applicable to such party, or the arbitration agreement is not valid under the law designated by the parties as the governing law or if no such law was specified, under the laws of the state in which the arbitral award was made;

2 the party to whose detriment the arbitral award is invoked was not given proper notice of the appointment of the arbitrator or proper notice of the arbitral proceedings or was otherwise unable to defend his case;

3 the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided, however, that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and declared to be enforceable;

4 the composition of the arbitrator or the arbitral procedure was not in accordance with the agreement of the parties or, if there was no such agreement, the laws of the state in which the arbitration was held;

5 the arbitral award has not yet become binding on the parties or has been set aside or suspended by an authority of the state in which the award was made or the state upon whose law the award was based.

(2) The recognition and enforcement of a foreign arbitral award may also be refused in either of the following cases:

1 the subject matter of the dispute is not capable of settlement by arbitration according to laws of Japan; or

2 recognition and enforcement of the arbitral award would be in contravention of public order or good morals in Japan.

Chapter IX Supplementary Provisions

Section 49 (Agreement for Arbitral Appraisal)

The provisions of the Law shall apply, insofar as the circumstances permit, to an agreement for arbitral appraisal and to an agreement with respect to adaptation and supplementation of a contract.

Section 50 (Contract Adaptation and Supplementation)

[Removed]

* *kettei*-decision: See Articles [87I, 119 and 122] of the Code of Civil Procedure
** *sokuji-kokoku*-appeal: See Articles [328 and 332] of the Code of Civil Procedure
****hanketsu*-decision: See Articles [114 and 243 *et seq*.] of the Code of Civil Procedure

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The Arbitration Agreement and Appointment – Latest Developments

*Philip Yang**

It is elementary knowledge to note that arbitration is a consensual method of dispute resolution and the source of jurisdiction comes from the arbitration agreement, usually in the form of a clause in the main contract. Therefore a good arbitration clause is absolutely essential. But what is a "good" clause for the particular contract? It is not an easy answer.

Difficulty in drafting a good arbitration clause

I have been a member of the Documentary Committee of Baltic and International Maritime Council (BIMCO) for 14 years. It is the world's largest shipowners organization. BIMCO has a lot of important and popular forms of contract to be used in international shipping and trade. Such as, the widely used bills of lading form of "Congenbill." I remember in all these years, the Documentary Committee had spent enormous energy, money and time to update or to revise the so-called "BIMCO Standard Arbitration Clause." It must have done so for at least 10, probably 15 times. Every time there was a change in law or terms (London Maritime Arbitrators' Association or LMAA Terms) in England or international shipping or trade practices, the clause has to be looked at. There was another revision in 2001. BIMCO was trying to incorporate the process of mediation into arbitration. In order to compel mediation, the revised clause stated that the tribunal can take into account a party's refusal to mediate when it comes to the allocation of costs at the end of the reference. My concern was, it isn't going to work because amongst several other practical difficulties, it could be against the English public policy. It is set out in Cl.60 of the Arbitration Act 1996 which says:

> *"An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen."*

But my comment was a little late (due to my own fault) in reaching BIMCO. Therefore it was too late to take it into account. In another word, the standard arbitration clause now used and recommended by BIMCO could have serious defects.

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* Arbitrator; Director of Philip Yang & Co Ltd.

I am not trying to wash dirty linen in public. I am only trying to illustrate how difficult and how technical it can be in the drafting of a good clause.

Let us now look at the real commercial world. Most merchants will not and need not be knowledgeable with arbitration. It is a difficult and ever changing subject. The merchants have better things to do. One message which often goes to them from the arbitral or legal community is to use model arbitration clauses. But the question is: what model? My experience tells me that model clauses are not necessary good drafting. There can also be other hidden agenda in promoting such clauses, usually prepared by arbitral institutions. Such as, to attract cases to the institution which is not necessarily appropriate.

So, unfortunately, the real life situation is that the problem of confused, uncertain, abbreviated or wordy arbitration clauses in contracts will continue to haunt us for a long time to come. Hong Kong International Arbitration Centre (HKIAC) is often confronted with such examples that will require highly ingenious imagination or skill of interpretation or construction. Even then, HKIAC can get it wrong. I recall a case some years ago in which HKIAC declined an application to appoint an arbitrator. It was a difficult arbitration clause in a sale contract. Eventually the claimant had to transfer the matter to GAFTA (Grain and Feed Trade Association) in London. But embarrassingly, GAFTA tribunal decided in an interim award that it has no jurisdiction and it should after all be a Hong Kong arbitration. The claimant must have spent a fortune in reaching that stage. It could even be a case of the claim being time barred and there is no turning back. The situation can then be dangerous. One can perceive why there is the Section 2GN in our Arbitration Ordinance. HKIAC needs protection of immunity as long as it acts honestly.

The inclination of HKIAC, I believe as I cannot speak for it, is always to make an appointment of arbitrator notwithstanding the strong objection of the other party (the respondent). HKIAC hopes to disassociate with the parties' arguments and leave the matter to be decided by the appointed arbitrator and/or the High Court (on appeal).

These principles of "competence-competence" and "separation" seem to work well in practice. It is now common to find that the parties willingly come before the arbitrators and argue on matters such as: Is there a valid contract in the first place? Are the parties the correct contractual parties? What is the proper contractual relationship between several parties? These are matters often raised in contracts from mainland China.

There are also a lot of arguments on whether the contract is void or voidable on grounds such as: want of considerations, illegality, duress, mistake, misrepresentation, repudiation, frustration, etc... The arbitrator will issue an interim award. The award can

be taken to the High Court to finally determine this matter. The provisions are all to be found in s.13(b) of the domestic regime in the Arbitration Ordinance and Article 16 of the UNCITRAL Model Law.

This method of handling jurisdiction disputes has given rise to a new problem as the case of Azov Shipping Co. v. Baltic Shipping Co. [1999] 2 Lloyd's Rep.159 illustrated. In that case, the arbitrator had heard evidence and arguments on a number of days and issued an interim award on jurisdiction. On appeal under s.67 of the English Act, the judge decided it was necessary to re-hear the whole case. It is expensive, wasteful and undesirable to say the least. Under the English Act, the arbitrator and/or the parties can refer the jurisdiction issue straight to the court. It is preferable to do so if it is known to the arbitrator that the case involves difficult matters of fact and law and appeal on the award is possible. But the practical problem is usually that the arbitrator senses it too late.

Construction of words and/or forms of an arbitration clause in a valid contract

Returning to the principle of "competence-competence," there is one area which does not concern the "separation principle." The existence and validity of the main contract is not in dispute, but the meaning of the wording or form of an arbitration clause is disputed. The dispute can affect, for instance, whether the jurisdiction given under the clause can be wide enough to cover certain types of disputed issues: see for instance Ocean Air-Condition Engineering Company v. Chevalier (Hong Kong) Limited, Civil Appeal No.152 of 2002.

Depending on what was written in clause, it can at times be extremely difficult or impossible to construe and reach a result that is reasonable and workable. For example, an arbitration clause I once encountered reads: *"Arbitration in Hong Kong before the Court."*

The form can also be in dispute. For example, English law is seemingly in conflict with regard to "incorporation by a general reference." In Secretary of State for Foreign Affairs v. The Percy Thomas Partnership [1995] CILL 1342, Judge Bowsher QC held that an arbitration clause contained in standard conditions of contract that were incorporated by reference into a contract was binding, even no specific reference was made to the arbitration clause in the incorporation provision.

But this is not the decision in many shipping cases concerning charter-party clauses incorporated in bills of lading: The "Merak" [1964] 2 Lloyd's Rep.527; The "Annefield" [1971] 1 Lloyd's Rep.1; The "Rena K" [1978] 1 Lloyd's Rep.545; The "Delos" [2001] 1

Lloyd's Rep.703.

I also recall in 1990 when Hong Kong adopted the UNCITRAL Model Law, we were faced with the very narrow definition and form of a valid arbitration agreement in Article 7. As a result, a lot of very explicit arbitration clauses have to be declared invalid: Hissan Trading Co. v. Orkin Shipping Corp. [1992] No. CL 39; H. Smal Ltd. v. Goldroyce Garment Ltd. [1994] 2 HKC 526.

Thankfully, this problem has been resolved by the enactment of Section 2AC in 1997. The definition and form has been enormously expanded. But it remains a dangerous trap for other countries opting to adopt UNCITRAL Model Law without the necessary amendment/clarification.

There are many more problems on this difficult issue of jurisdiction. Only good arbitration clauses in valid contracts can avoid this sort of arguments. But I have explained that it is not going to happen in the real commercial world.

This problem ought to be treated as a disadvantage in the dispute resolution system of arbitration vis-à-vis the court litigation. It can have serious consequences. Such as, the plaintiff or claimant can get it wrong in invoking an action. After being told by a stay or an interim award of the correct way, a lot of money and time has been spent and it could be too late to turn back because the claim has been time barred.

What is the bare minimum ingredient in a valid arbitration clause/ agreement?

To continue with what I have said, I am hoping to discuss what is the bare minimum ingredient that must go into a valid arbitration clause. I think we all know that matters like the number of arbitrators, the appointing authority, procedural steps, powers of the tribunal, language, fees, decision-making process, and many more need not be explicit because the Arbitration Ordinance has said it all in a fair, practical and reasonable manner. But surely the arbitration clause or agreement must still say something. What are they?

I was told that an abbreviated clause like "Arbitration to be settled in Hong Kong" or even "Arbitration Hong Kong" is sufficient: Tritonia Shipping Inc. v. South Nelson Forest Products Corpn. [1966] 1 Lloyd's Rep.114; The "Ioanna" [1978] 1 Lloyd's Rep.238. Therefore, I can identify two matters which ought be explicit in the clause in order to call it a valid and workable arbitration clause. The rest can be implied in the Arbitration Ordinance. Clearly the word "arbitration" is most important. Then the "seat" (or venue,

or place) is of secondary importance.

It is sensible. If the word "arbitration" is selected and agreed upon by the parties, there must be a strong presumption in support of it as their contractual intention. As to the "seat," Mustill and Boyd said it is not necessary: 2nd ed. P.107. But the seat determines the procedural law of the arbitration. Without it, the claimant may not be able to take Step 1 in finding the proper appointment authority (be it the court or a body) to constitute the tribunal.

But as the unabated problem of badly drafted arbitration clauses is with us, interesting cases continue to grow. I will touch on some of the recent English cases which somehow corrected or adjusted my previous views that the bare minimum in a valid and workable arbitration clause is to have the explicit word of "arbitration" and to provide for the "seat."

Is it important to have the word "arbitration"?

In a recent unreported case of David Wilson Homes Ltd. v. Survey Services Ltd & David Jonathan Marshall, Court of Appeal (Civil Division)(Judgment delivered 18 January 2001), the "arbitration clause" appearing in an insurance policy did not have the word "arbitration" in it. It reads:

> *"Any dispute or difference arising hereunder between the Assured and the Insurers shall be referred to a Queen's Counsel of the English Bar to be mutually agreed between the Insurers and the Assured or in the event of disagreement by the Chairman of the Bar Counsel."*

It was held in the first instance that the clause did not constitute a valid arbitration clause. But the insurers appealed and it was reversed.

One commentary by a law firm said: The key to determining whether a clause of the type in issue in this case constitutes an arbitration agreement is the intent of the parties. Where the intention is that an inquiry is to be in the nature of judicial inquiry and the outcome of that inquiry is to be final and binding then the clause in question will constitute an arbitration clause.

The trouble is, I do not see the words of "final and binding." There are a lot of dispute resolution methods these days. Why it has to be arbitration? Perhaps QCs are perceived to be adversarial and litigious professionals. But it is a fast changing world with many London QCs known to closely involve with mediations these days. Besides, what if the same clause is substituted with other professionals than QCs and the Bar Counsel?

Would the construction be different?

Seat of Arbitration

Under the English Arbitration Act of 1996, in s.2(1), the concept of the "seat" of arbitration was introduced in order to define which arbitrations would be subject to the statutory regime in Part One. In s.3 of the Act, it stated that the seat of the arbitration meant the juridical seat of arbitration. It should mean a location of a particular state or territory which is associated with a recognizable and distinct system of law. It is different with location(s) where the process or part of the process of arbitration is to be conducted, such as, to hold meetings, hearings, taking of evidence, signing of award, etc. The latter can be anywhere in the world at the discretion of the tribunal and/or convenience of the parties.

The word "seat" was occasionally found to be used in arbitration context well before the 1996 Act, such as in Union of India v. McDonnell Douglas [1993] 2 Lloyd's Rep.48, where the contract had an arbitration clause stating, *inter alia*, that: *"The seat of the arbitration proceedings shall be London, United Kingdom."* Other similar words being used are for instance "place of arbitration," "arbitration venue," etc.

(i) English law position

Under English law, an arbitration always has a "seat." As was said in Bank Mellat v. Helliniki Techniki S.A. [1984] QB 291 at p.301:

> *"arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law"* (is not acceptable)

The Departmental Advisory Committee on Arbitration Law Report on the Arbitration Bill also commented in Para.27:

> *"English law does not at present recognize the concept of an arbitration which has no seat and we do not recommend that it should do so."*

But unfortunately not every arbitration clause or agreement is clearly worded to enable the seat to be ascertained.

In some cases, no seat is mentioned in the arbitration clause or agreement and it causes no difficulty. ICC (International Chamber of Commerce) arbitration is a good example of not having to state the seat of the arbitration. It was once stated that roughly 20% of the cases left the seat to be determined by ICC Paris in accordance with Rule 14(1) of the

ICC Rules which provides that *"the place of arbitration shall be fixed by the Court unless agreed upon by the parties"*.

The LCIA (London Court of International Arbitration) Rules, Article 16.1 provides that where there is no choice of seat of arbitration, it shall be London unless the LCIA Court determines that another seat is more appropriate: ABB v. Keppel [1999] 2 Lloyd's Rep.24.

Whilst ICC or LCIA arbitrations with their Rules dealing with the question of seat pose no difficulty, it can be a nightmare problem in an *ad hoc* arbitration. Let us examine two cases, one before and one after the 1996 Act.

(ii) The case of Naviera Amazonica

The first one is Nav. Amazonica v. Cie. Internat. De Seguros [1988] 1 Lloyd's Rep. 116. The case is about a marine insurance policy between two Peruvian companies - the insurers and the shipowners of four vessels insured with the former company. In the typed indorsement of the policy, there were the crucial Spanish words of: *"Arbitraje bajo las Condiciones y Leyes de Londres."* The English translation is: *"Arbitration under the Laws and Conditions of London."*

The parties argued whether it was London or Lima arbitration. There was firstly the argument that the "Laws of London" referred to "English insurance law." But it was rejected by the Judge as the construction does not make sense if read as:

> *"Any dispute is to be settled by arbitration on the basis of English insurance law and practice."*

It was decided the context of "laws" must have intended to refer to the procedural rules in force in London.

Then there was the argument of a Lima arbitration applying English procedural law (The Arbitration Act 1950). It was found to be extremely difficult to work in practice.

In holding that the "seat" was London as *"a correct interpretation of this policy,"* Kerr L.J. said as follow:

> *"Moreover, this was a marine policy between insurers and shipowners who clearly operate internationally. It covered four deep-sea vessels classed in other countries. The premiums were stated in US dollars and had evidence been agreed with reference to reinsurance rates, probably abroad. General average or claims under the policy were to be settled in London. In such circumstances there is nothing surprising in concluding that these parties intended that any dispute under this*

policy should be arbitrated in London. And the present dispute about appropriate premium rates might well be arbitrated more conveniently in London than in Lima."

(iii) The case of Dubai v. Paymentech

The second one is a much more relevant and interesting case of Dubai v. Paymentech [2001] 1 Lloyd's Rep.65. The case concerns the internal dispute resolution system set up by the famous credit card company VISA. The system handles disputes between members of VISA. The common disputes are about a transaction being challenged by the card issuer (usually a bank) and the acquirer (a party who could sign a merchant and process a merchant's transaction through the VISA system) refuses to accept the challenge.

The facts of the case were: In 1997/1998, a large-scale fraud was perpetrated on the Bank ("Dubai Islamic Bank PJSC") by its chief executive officer with the assistance of other personnel in the Bank. One of the people allegedly involved was Mr. Sissoko. He held a VISA card that had been issued by the Bank.

Between November, 1997 and January, 1998, Mr. Sissoko's VISA card was used for 18 purchases of jewellery at Mayor's Fine Jewellers in Miami, involving a total sum in excess of US$1 million. The Bank said that the misuse of the VISA card was such that Mayor's accounts department and/or its vice president at the time (Mr Berzrihem) must have colluded with Mr. Sissoko to defraud the Bank.

The dispute resolution system by VISA is by two-tier arbitration. The first tier is to file documentation with VISA's International Arbitration/Compliance Committee in California. The arbitration process is by documents-only. The members will of course be notified of its decision.

The second tier is the appeal process. This is available in respect of disputed amounts of over US$100,000, but only if the member wishing to do so can provide new evidence. The VISA International Board is the appeal authority.

The arbitration agreement is binding on the members by the initial agreement to join VISA as a member.

But it is to be noted that there is no seat and/or procedural law of the arbitration expressed nor how they can be determined in the VISA regulations governing the system. In that respect, it is quite different with ICC Rules.

Continuing with the facts of the case, the Bank unfortunately lost in the first instance arbitration. It was held that insufficient evidence to support an allegation of collusion

between Mayor and Mr. Sissoko. The Bank then took up the appeal. It so happened that VISA International Board was having its next meeting in London and the appeal was taken up and decided. Unfortunately it was still against the Bank.

The Bank then took the case to the English High Court with a number of applications such as, seeking to set aside the award or alternatively remitting it for reconsideration, permissible to appeal, etc.

The first issue the High Court must consider was the "seat" of the arbitration. If it wasn't London, then the High Court simply has no jurisdiction or power to deal with many matters in the applications.

(iv) The guidance and factors to look for in search of the arbitration seat

The search for the seat agreed or intended by the parties has had some guidance in the 1996 Act. s.3. It is:

> *"(a) by the parties to the arbitration agreement, or*
>
> *(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or*
>
> *(c) by the arbitral tribunal if so authorized by the parties,*
>
> *or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances"* (underline my emphasis)

What is clear is that a failure to state the seat in an arbitration clause is not going to nullify the validity of the clause. There are ways or means to deal with the situation. The first one is to liberally construe the arbitration clauses or provisions like the earlier case of Nav. Amazonica.

The second one is leave it to the arbitral institution or the tribunal to decide as stated in s.3(b) and (c). It is perfectly workable as long as the arbitral institution or the constitution of tribunal is being stated in the arbitration clause or agreement. Such as, if it has identified ICC as the arbitral institution, then ICC can be left to designate the seat of the arbitration. Or, if it has identified HKIAC, so can HKIAC. But what if the arbitration clause does not give a clue of the arbitration institution or gives a wholly misleading name. Which institution is then empowered to designate? One has to bear in mind there are numerous arbitral institutions in the world and they are inclined to designate "seats" which are totally different between one another.

The same applies to the constitution of the tribunal. If the parties have agreed to how the

tribunal should be constituted or certain set of rules (like the UNCITRAL Model Rules) with provisions for how to constitute the tribunal, it would be fine. The tribunal can be completed first and the determination/designation of the seat can be left to them. But the reality is that an arbitration clause failing or neglecting to state the seat is not likely to have provisions in dealing with the constitution of the tribunal.

Then one goes back to square 1. Fortunately, s.3 continues to provide the final and last clue of having regard to "all the relevant circumstances."

This was what Mr. Justice Aikens did in Dubai v. Paymentech. His Lordship must first consider what "relevant circumstances" the 1996 Act refers to. Considering the determination of the seat of arbitration must exist from the outset and it cannot be changed short of parties' agreement/variation, Mr Justice Aikens felt it must be at the point at which the relevant arbitration begins. In this case that point would be when the Bank invoked the appeal process in May, 1999 and Paymentech submitted to it. His Lordship continued to say the "specific circumstances" as follows:

> *"The phrase must mean that a Court has to have regard to any connections with one or more particular countries that can be identified in relation to (i) the parties; (ii) the dispute which will be the subject of the arbitration; (iii) the proposed procedures in the arbitration, including (if known) the place of interlocutory and final hearings; (iv) the issues of the award or awards."*

Then His Lordship concluded that the seat in this case is probably in California and not in London. The reasons being:

1) Paymentech is based in Texas. The Bank is based in Dubai. VISA is based in California.

2) The VISA regulations have no express proper law provisions either as to the substantive regulations or as to the appeal arbitration process between members.

3) The VISA worldwide payment card scheme has its headquarters in California.

4) The dispute arose out of the transaction in Florida.

5) The regulations appear to contemplate that the appeal arbitral process will be handled through the VISA offices in California. Thus it is contemplated that notifications will be sent there; the process will be handled by the arbitration and compliance department in California. The merits will be considered by the arbitration committee which is based at VISA headquarters in California before being considered by the board. It is contemplated that the International Board will consider the merits of the appeal at a board meeting which could be anywhere in the world. It so happened in this case that the board met in

London at which the appeal of the Bank was heard.

6) The preparatory administrative work for the appeal and the consideration of the arbitration committee were not done in London. They were done in California.

7) The regulations appear to contemplate that notification of the result of the appeal process will be handled by VISA headquarters in California.

(v) The arbitration case in Hong Kong

Now, I am going to talk about a very recent Hong Kong arbitration which is identical to the above cases. The case was about a multi-million dollar joint venture agreement between two Chinese parties. One is the mainland Chinese party living in Qingdao. The other party is a Cayman Island company but the person actually behind it was originally from Taiwan who lived and worked in Beijing at the relevant time.

In a contract written in Chinese and signed by both parties, there was the arbitration agreement in Clause 8 which says:

> *"In the event of dispute in the execution of this contract by both parties, they should try to resolve it by conciliation. If it does not succeed, it should be arbitrated by applying to International Arbitration Centre (or 'Body')"* (free English translation).

You will notice that the seat of arbitration has not been stated. Whilst the institution of "International Arbitration Centre or Body" closely resembles the "Hong Kong International Arbitration Centre" or "HKIAC" in short, it seems weak to rely on and construe that the parties meant the same institution. What can be pointed out at this juncture is the arbitral institution referred to in Clause 8 is certainly very far from the Beijing institution of CIETAC (China International Economic and Trade Arbitration Commission). Therefore, the parties in agreeing to "International Arbitration Centre or Body" at the time of contracting were unlikely to have CIETAC in mind.

But the arbitral scene in mainland China is no longer simple. Pursuant to the 1994 Arbitration Law of PRC, Article 79, many local arbitral institutions were set up. Although many of them are geared to handle localized cases, there is nothing to prevent them from handling international ones. But most if not all of these local arbitral institutions have their names associated with the location, such as "Beijing Arbitration Commission" or "Shanghai Arbitration Commission." It is therefore unlikely that the parties at the time of contract were having those local arbitral institutions in mind.

But apart from the fact that the name of the institution designed in Clause 8 resembles

HKIAC, there is nothing else except one other factor that points to Hong Kong as the seat. It is in Clause 6 referring to cooperation of the parties in future listing of the joint venture company in the Hong Kong Stock Market.

Otherwise, the contract deals exclusively outside of Hong Kong. Such as, the potential customers of the joint venture are in mainland China and Taiwan. Raising funds are also targeted at companies/banks predominantly in Taiwan. The authorities to deal with are the mainland Chinese and Taiwanese authorities...

Under the aforesaid facts, the Cayman Island Company wearing the hat as claimant first applied to HKIAC for the appointment of a sole arbitrator. The respondent immediately objected on the ground that HKIAC was not the designated institution and has no jurisdiction. HKIAC did not deal with the difficulties and proceed to appoint me as the sole arbitrator. I was then left to handle the two parties. In order to avoid a default situation without the benefit of full arguments from both sides and/or the issue going to the Courts in mainland China or Hong Kong, I have worked very hard to break the ice between the party/ies and me. I have explained at length on how the arbitration law in Hong Kong works in dealing with an attack on jurisdiction which is in Article 16 of the UNCITRAL Model Law. I further ensured the parties that I would look at the issue objectively and carefully consider the submissions and evidence (if any) put forward by both parties and there should be a 50-50 chance that I would decide that Hong Kong was not the arbitration seat intended by the parties or appropriate under the circumstances. The remedy then for the dissatisfied party would be to apply to the High Court hoping to reverse my decision in an interim award within 30 days after its publication.

In explaining to and persuading the parties, I maintained everything must be in writing and copied to all parties. I have also chosen my words carefully in order not to misrepresent or erroneously induce the parties, especially the respondent who resisted participation in this arbitration.

The parties did argue fully before me. The respondent admitted that there was an agreement to arbitrate. But the seat should be in mainland China. The respondent did not however state which institution Clause 8 referred to and the claimant did not press for an answer.

Eventually, my decision by way of an interim award is that the seat of arbitration is in Hong Kong. The factors that lead me to so decide are:

1) Even though Hong Kong has not legislated along the lines of the 1996 English Arbitration Act, the ways and means to determine the arbitration seat set out in s.3 should be accepted and followed.

2) Although the parties were both domiciled in mainland China, the claimant actually was from Taiwan. I understand it is common these days that millions of merchants from Taiwan are setting up shops, offices and factories in mainland China. It is suspected that these people are skeptical of the judicial system in mainland China. It is for this reason that HKIAC had been doing a lot of work in recent years in promoting and positioning Hong Kong as a neutral, impartial, competent and convenient venue for parties from both sides of the Strait to resolve commercial disputes.

3) The institution named in Clause 8 of the contract closely resembles HKIAC.

4) The name of the designated institution is however very different from all the authorized institutions in mainland China.

5) Even more fatal to the respondent's argument is that the Arbitration Law of PRC in Article 16(iii) actually said that the arbitration institution must be correctly stated by the parties in the arbitration agreement. Article 18 went on to say if the agreement was unclear (such as, the correct name of the institution), then failing the further agreement of the parties, the arbitration agreement is null and void. I must say that it seems to be an unrealistic and restrictive approach to this sort of problem. The parties in dispute are not likely to agree to anything. In many cases the parties attacking the jurisdiction are the reluctant respondents (even with cast-iron defence in hand). Therefore, if I support the respondent in this case, the arbitration is not going to be revived in China before an appropriate institution. It could well be the end of the matter.

6) Therefore, accepting that this case has little to do with Hong Kong and there were many circumstances leading to mainland China as the appropriate seat, the overriding considerations earlier caused me to hold that the seat is in Hong Kong.

7) There is however nothing to stop me in designating locations in mainland China such as Beijing or Qingdao to deal with some of the process in this arbitration. But that is a different matter.

(15 October 2002)

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The Society of Maritime Arbitrators, Inc.
Recent Developments and Some Observations

Manfred W. Arnold *

Forty years in the context of many things is nothing to brag about. On the other hand, in today's fast-moving world, obsolescence is a fact of life, it is expected. Therefore, when something continues to work as it gets older and gains in reputation and respect, it is an acknowledgement that it was made from the "right stuff."

It seems appropriate that on the occasion of the Society of Maritime Arbitrator's 40th anniversary, I have the opportunity to write for "WaveLength."

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For those readers who are not readily familiar with the SMA and its origins, let me briefly describe its development.

According to records, maritime arbitration has been practiced in New York since the early 1800's[1] on an ad hoc basis. In 1963, a group of nine shipping men active in maritime arbitration created the SMA as a professional, not-for-profit organization for the promotion of arbitration in New York. Over the years, the Society grew in numbers and, at the present time, has settled at approximately 90 members.[2]

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In this paper, I will address three specific topics: conciliation and mediation – the SMA Shortened Arbitration Procedure – the awarding of costs and fees.

Conciliation and Mediation

Before addressing this topic, I should like to make a few comments about the concept of alternative dispute resolution (ADR). Resolution for many might be resolving something, one being the noun, the other the verb. To resolve a problem means to fix it or settle it, to clear it away or dispel it; a resolution is a formal expression of an opinion which is neither the law nor a statute, and something rather non-binding.

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* President, Westmarine, Inc.; Director and Past President, Society of Maritime Arbitrators, Inc.

1 The arbitration was summarized in a published booklet, "Report of the evidence and reasons of the award between Johannis Orlandos and Andreas Luriottis (Greek Deputies) and LeRoy Bayarad & Co. and G.G.&S. Howard," by the Arbitrators. New York, 1926.

2 The SMA has only full members and no associate or supporting members.

The purpose of alternative dispute resolution is to encourage the peaceable resolution of disputes and the early settlement of litigation through voluntary settlement procedures.[3]

Conciliation has been defined as the adjustment and settlement of a dispute in a friendly, non-aggressive manner. It is used in courts before trial with a view towards avoiding a trial (or an arbitration for that matter).

Mediation is the private, informal dispute resolution process in which a neutral third-party (the mediator) attempts to help the parties reach an agreement. It is an exploratory process in which the mediator evaluates, but does not have the power to impose rulings, directives or make a decision to determine the parties' liabilities in this confidential proceeding.

I have always been puzzled about the present-day attention given to conciliation and mediation, as they have been in existence in one form or another for centuries, particularly in countries influenced by Confucian principles. Moreover, in Western systems, aren't conciliation and/or mediation what experienced business people had been doing directly or with the intervention of their brokers? Why do we need people to tell us what to do when we ourselves know that the objective is to achieve the optimum return? Is it easier when a third party tells you that you are wrong?

Conciliation and/or mediation may well work for reasonable people as it has in the past. On the other hand, if you are not reasonable or do not like the result, you can walk away from it and initiate litigation. In my opinion, conciliation and/or mediation are good systems when common sense prevails and the parties are indeed interested in resolving their disagreements. For those who do not wish to accept the findings/ recommendations, the proceedings were nothing more than an additional layer of time and money and a costly and unsuccessful overture to binding litigation or arbitration.

In 1988, the SMA, seeing a possibility to introduce a non-confrontational dispute resolution option into their system, published their Rules of Conciliation,[4] which were based on the UNCITRAL Conciliation Rules.[5] A distinction between the SMA rules and those promulgated by other dispute resolution centers is that there is no co-mingling of the conciliation or mediation process with arbitration proceedings. The conciliator will not act as an arbitrator or as a representative or counsel in any arbitral or judicial proceeding of a dispute which was the subject of conciliation efforts. The rules also

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3 CPRC §154.002; *Keene Corp. v. Gardner*, 837 S.W.2d 224, 232 (Tex.App. Dallas 1992, writ denied); *Downey v. Gregory*, 757 S.W.2d 524, 525 (Tex.App. Houston [1st Dist] 1988).

4 This coincided with the SMA's lecture tour in the PRC (Shanghai, Beijing, Guangzhou) and Hong Kong.

5 United Nations Commission on International Trade Law; Resolution 35/52 adopted by the General Assembly on December 4, 1980.

forbid the production of a conciliator as a witness in subsequent judicial or arbitral proceedings.[6]

Should arbitrators act as mediators or conciliators? By all means, if they possess the qualifications and the temperament to handle the task. Conciliation and mediation entail advisory functions, whereas arbitration is a judicial function. The first recommends, the other one decides. The arbitrator, through his vow of impartiality, acts in the first instance as a judge, weighing the evidence and applying the law. It is a clinical process; a decision of right or wrong will be rendered without regard to economical consequences to the losing party. Mediation and conciliation, on the other hand, is in the end a trading process, a sequence of give and take, in which the mediator must be able to see the arguments and positions of the parties, digest the confidential input by them (and not everything may be black and white as in the law) and then work towards a hopefully mutually acceptable settlement.

Unfortunately, and despite all the press for ADR we have heard, conciliation was something which seemed not to be favored by U.S. litigants. When introducing the rules to the industry, someone commented that the gunfight at the O.K. Corral was something more akin to the American system of dispute resolution than conciliation, nevertheless, it has been stated that the USA leads the quest for ADR. I am not persuaded that, generally speaking, Americans (or for that matter many Europeans) readily accept the Confucian principles of conduct. Quoting from The Analects (Lun Yu), Confucius stated that "in hearing litigation, I am no different from any other man. But if you insist on a difference, it is, perhaps, that I try to get the parties not to resort to litigation in the first place."[7]

Even to those who are skeptical of the ultimate benefits of mediation, it must be obvious that there may be certain aspects of dispute resolution where mediation might be preferable. In an arbitration the panel may find A liable for damages of $5 million. Since A does not have sufficient assets to satisfy the award, B's chances of collecting are not good and in fact may be doubtful. The enforcement of the award by B may lead to the bankruptcy of A, making the award nothing more than a paper victory. Assuming that the liability issue had been decided by an arbitration panel, and then recognizing the commercial realities regarding A's financial position, the determination of damages may be much better dealt with by a mediator. By being privy to confidential information, individually supplied by the parties, the mediator can assess the financial capabilities of A and structure a payment schedule which will ensure that A remains a viable entity and B will receive payments of its amounts due.

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6 See Article 15 of the SMA Rules for Mediation.

7 The ANALECTS (Lun Yu).

In February 1999, the SMA published its Rules for Mediation, pursuant to which, under Article 4, the mediator shall act in an independent, neutral and impartial manner to assist the parties in reaching an amicable settlement of the dispute; the mediator shall be guided by principles of objectivity, fairness and justice.

A number of SMA members have undergone mediation training, some for the academic purpose of fully understanding the process and others stand ready to act in this field and indeed have completed mediations.

The mediation movement in the United States started off in big way with court-ordered mediation. Contracts which did not have an arbitration clause were brought into the court system, however, promptly kicked back into the mediation system to achieve a dispute resolution without further clogging the court dockets. There are a number of states in the U.S. where a judge will not hear a case unless the matter has been first dealt with in mediation.

A great number of organizations[8] were founded in the U.S. to deal with this new business and have been extremely successful in specific dispute areas other than charter party disputes.

The mediation process has now also made inroads, although to a lesser degree, into contracts and charter parties containing arbitration clauses.

In January 2002, BIMCO issued its Standard Dispute Resolution Clause incorporating a comprehensive Mediation Clause,[9] which provides for the alternative of London or New York.

The following quote is by an active mediator[10] who explained the popularity of the mediation process as follows:

> *"Offered the choice, it is not unreasonable to believe that most* [disputants] *would prefer to actively participate in the resolution of their disputes, rather than be confined in hearing rooms or court rooms surrounded by experts, exhibits, lawyers, judges or arbitrators who will impose resolutions upon them."*

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8 To list a few: Center for Public Resources, Inc.; Conflict Management, Inc.; Dispute Resolution Inc.; Endispute, Inc.; The Mediation Group; National Institute for Dispute Resolution; Mediate-Tech, Inc.; Rent-a-Judge; etc.

9 The full details are available from BIMCO's website, www.bimco.dk.

10 Roger M. Deitz, Esq., "An Introduction to Mediation."

Shortened Arbitration Procedure

An important step in the SMA's efforts to respond to industry demands was a total revision of the Simplified Procedure which had existed in its Rules for many years, but was hardly ever used. Maybe the title was not sufficiently attractive or invoked visions of simple as in ignorant or silly. Even the fact that the clause was included in certain charter party forms did not do much to promote its use.

Aware that substantial changes were needed, the SMA then drafted a document, now entitled Shortened Arbitration Procedure, for review by owners, charterers, attorneys, arbitrators, etc. The number of responses was quite extraordinary, and overwhelmingly in favor of the proposed changes, leading to the formal introduction of the procedure in December 1988. After some two years of gathering experience both by arbitrators and the users of the system, the SMA solicited further input from the industry. Again, based upon those responses, the document was updated in June 1991. The current Rules have been in force since March 2001.

In retrospect, it appears that the flaws with the Simplified Procedure lay in two areas, the first being the cap on the amounts in dispute ($15,000), the second, and more importantly, the prescribed selection process of the arbitrators. Not only was it cumbersome, but it also required the full cooperation of the parties. This proves that it is wise to have the mechanism in place at the time of the fixture because once the parties have a dispute, they are unlikely to agree on anything else.

Whatever initial skepticism there might have been as to a short form arbitration, it soon dissipated. The clause, as a supplement to an existing arbitration provision, has been adopted by a large segment of the industry and for some principals it has become part of their printed pro-forma contracts. In a very recent development, the Shortened Procedure has also been adopted as a model clause in New York real estate transactions.

Among the most noteworthy developments of this procedure is the more frequent use of sole arbitrators as well as the fact that parties continue to apply it even with relatively large sums at stake. The absence of a specific predetermined dollar amount in the document gives the parties the opportunity to establish their own guidelines at the time of negotiating the charter party. The dollar amount chosen by the parties might be determined by the size of the companies or the type of the transaction as well as the state of the freight market affecting the parties' cash flow.

As already stated, the trigger mechanism of the new procedure also tends to encourage the use of the sole arbitrator. It would appear that the experiences gained may also have led parties in "regular" arbitrations to consider the use of a sole arbitrator in larger and

more complex cases. This, in my opinion, confirms the industry's faith in the system as well as the realization that through its use, additional time and costs can be saved.

In line with the established New York arbitration practice to publish reasoned awards, decisions rendered under the Shortened Procedure in general follow the same routine and are part of the SMA's Award Service.

It stands to reason that the Shortened Procedure will not be suitable for all disputes and clearly that was not the intent for creating and promoting it. However, for many relatively straightforward cases or those of limited monetary magnitude, it offers the principals credible and welcome trade-offs. By foregoing full and formal proceedings with multiple fact and/or expert witnesses, elaborate briefings, etc., awards can be rendered in a much more expeditious and less costly manner, as the arbitrators' fees are limited. It is now a viable option for the parties with few and clearly established procedural steps to follow, thus rounding out the SMA's ADR procedures available to the industry.

Today, with more than a dozen years of positive experience with the procedure since its inception and coupled with the fact that other arbitration centers subsequently adopted similar systems, the SMA is pleased to have provided this viable and valuable alternative.

Awarding of Costs

A significant change has taken place in New York arbitration. In the past, under the "American Rule" which applied to court proceedings, the parties had to bear their own legal fees and expenses. The logic behind this concept is rooted in expectation of fairness and equal rights for all litigants. If, for example, an individual with limited means had a claim against a Fortune 500 company, under the "American Rule," the party could proceed with his claim without fear of retribution, as each side would have to pay its own legal fees and costs.

In the past, arbitrators, absent an agreement to the contrary, followed the "American Rule." In cases where arbitrators awarded fees and costs, although not provided for in the charter party, the courts held that if an award exceeded the scope of the arbitration agreement, it was not invalid in toto, but only so far as it was excessive and provided that the court could separate that issue which exceeded the submission.[11] Similarly, in *Sammi Line Co. v. Altamar Nav. S.A.*,[12] the arbitrators included a sum of $12,000 for attorneys'

[11] *Enterprise Wheel & Car Corp. v. United Steelworkers of America*, C.A. W.Va. 1959, 269 F.2d 327 reversed in part on other grounds 80 S.Ct. 1358, 363 U.S. 593, 4 L.Ed. 2d 1424.

[12] SMA Award 2029 (1984) vacated 1985, AMC 1790 (1985).

fees. In the petition to vacate the award, the fee/costs matter was the only issue; the court vacated this part of the award and confirmed the balance of the award.

In response to user comments and in view of the fact that we are dealing with disputes between commercial entities who entered into private contracts, the SMA now advocates (and has included it in its rules) the awarding of fees and costs when and where appropriate. Unlike London where the arbitrators award costs and fees with the Taxing Master then quantifying the award, New York arbitrators deal directly with the quantum in their awards.

This change has now been adopted to the point that in a recent case, costs and fees were the only contested items. After submissions had been made to the panel, the charterer paid the amounts claimed together with interest, leaving the owner with his claim for costs. The arbitrators addressed this single issue and rendered their award accordingly.[13]

Award Service

The publication of arbitration awards is still a topic which gives rise to discussion and disagreement.

Since its inception in 1963, the SMA has published approximately 3,800 awards rendered by its members; in addition, there are a number of awards which, by specific request of the parties, were not published.

Much has been said about whether or not arbitration awards should be published at all. In New York, we take it for granted that it is so. Those in opposition have raised the privacy aspect, and New York is sensitive to that issue. If there is a request by the parties to keep the proceedings private, arbitrators will respect this condition and the awards will not be referenced, even in an abridged version. One should keep in mind that the expectation of privacy is a matter of custom and not of law.[14]

New York has no problem with non-publication if that is the desire of the parties. From a practical standpoint, the number of awards not published is relatively small. From my own experience over a span of more than 30 years, maybe 10% of all decisions in which I have been involved have not been published at the request of the parties.

Why does New York publish awards? A few points come to mind, and in no specific order:

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[13] *Norwegian Gas Carriers A/S v. Western Energy Inc*., SMA Award 3630 (2000).

[14] *Hassneh Insurance Co. v. S.J. Mew ODB* (Comm. Court) December 22, 1992.

- It establishes a body of reference for arbitrators, attorneys and the users of the system. Although the arbitrators in New York are not bound by legal precedent, it is educational to read and analyze awards written by one's peers. Parties can, through the Lexis network, feed their problems into the computer and obtain the references to published awards which had previously dealt with the point in question. Seeing that the decisions for a certain fact pattern had gone overwhelmingly in favor of a charterer, the owner might decide that it might be more prudent to settle a claim. The availability of the published awards can also serve as a road map for staying out of trouble; chartering and operating people can learn from the mistakes which have been made by others.

- For the users of the system, it establishes a track record of how certain arbitrators deal with certain disputes. This aspect has somewhat of a split personality. The benefit is that one can select an arbitrator whose prior decisions support your own viewpoint. On the other hand, this procedure is also available to the opposing side, and would thereby provide for a more polarized panel with respect to the party-appointed arbitrators. When carried to an extreme, this could become a matter of strategy, making it essential to select the "right" third arbitrator.

- From time to time it happens that there are companies which repeatedly engage in questionable business practices or fail to meet their financial obligations. If the matter goes to arbitration and an award is issued, the publicity might alert others and possibly prevent recurring problems.

- Some of the SMA arbitrators have been involved in arbitrations dealing with securities, stocks and bonds. The New York Stock Exchange and the National Association of Security Dealers do not publish any decisions rendered. Just imagine the consequence of a prominent stock broker being found guilty of churning the accounts and this becoming public knowledge; then investors might avoid that particular broker, resulting in immediate revenue losses, even though, I would say, well deserved.

- In my opinion, the publication of awards also leads to accountability. The readers can follow the process of reasoning applied by the panel. It is not possible for the arbitrator to hide his position. Either the arbitrator agrees or he does not, which then leads to a dissent or a concurring opinion, if applicable.

The award service is available by subscription from the SMA or through access to the Lexis/Nexis system. A number of industry websites also carry precis of selected arbitration awards.

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One often hears references to the good old days when – no doubt aided by a selective memory – most things were better and easier. Looking back at the achievements of the past may be satisfying, but what we should do most is learn from the past and apply it to the future.

The SMA is user friendly and responsive to industry needs.[15] Guided by the leitmotif of the current SMA leadership "to get it right, to do it expeditiously and at a reasonable cost," the SMA looks forward to its continued role as an international center for dispute resolution, may it be arbitration or mediation.

(January 30, 2003)

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[15] The SMA website can be accessed as www.smany.org. It makes available the following documents:
1) SMA Arbitration Rules; 2) SMA Rules for Shortened Arbitration Procedure; 3) SMA Code of Ethics; 4) SMA Rules for Conciliation; 5) The U.S. Federal Arbitration Act (Title 9) - General Provisions - Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Inter-America Convention on International Commercial Arbitration; 6) SMA Rules for Mediation; 7) Guide to Maritime Arbitration in New York (FAQs in English and Spanish).
The website also contains the membership roster, the Award Service archives, SMA publications, including *The Arbitrator* and the SMA Salvage Agreement. The SMA has also published The Rules for Recreational and Small Vessel Salvage Arbitration.