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ARBITRATION IN B.O.T CONTRACTS

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ARBITRATION IN B.O.T. CONTRACTS
THE B.O.T.

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I dedicate this thesis to the Creator of all things, the source of all knowledge, the giver of life and all of the gifts that set us apart from the rest of His creation. . I am only the observer of the processes of life, recording what God has set up and other great men have deliberately confirmed.

To my Faithful Dad, Mom and my sisters who were always beside me and without their love and support I would have not achieved much in life.

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Abstract

Infrastructure privatization is initiated through various modes by different countries and can generally include the construction of new privately owned facilities, privatization of existing facilities, concessions or leases, and project financing. B.O.T. [Build-Operate-Transfer] means the government grants investment enterprises an operational concession for a period, permits them to construct and administrate certain public infrastructures by financing, and authorizes them to pay off loans, reclaim investment and make a profit through charging from users or selling products. At the expiration of the concessionary period, the infrastructure is transferred to the government without any expense. In such a legal relation, one subject is local government, and the other is investment enterprises. Their mutual rights and obligations relations are established by signing B.O.T. investment contracts.

Traditionally, in all countries conflict of laws has been confined to controversies under private law. Though the rules of law became less rigid in all states in the latter half of the twentieth century, it is routine for courts hearing controversies touching on more than one state, to consider applying foreign law to the substance of any particular controversy.

More generally, classical concepts of sovereignty and sovereign interests are resorted to in all kinds of contexts and relations between public and private sectors, such as B.O.T contracts, are increasing relatively. Thus the common to settle disputes is arbitration.

In many parts of the world, the private sectors have been using B.O.T. increasingly and resorting to arbitration to settle disputes that result from such relations. Arbitration implies that the parties agree to submit a dispute for settlement to private persons instead of court and thus avoiding the problems mentioned above.

Arbitration is a meaningful way to settle such disputes to protect investors' reasonable rights and interests. With Arbitration in B.O.T the best results may be obtained.

Key words B.O.T. contract- Dispute settlement - Arbitration

Introduction

Current trends indicate that public-private partnership (PPP) is increasingly gaining encouragement and acceptance. Promoting public-private partnership can also be found in the agenda of governments in developed and developing countries alike.

In Britain, public-private partnerships are at the heart of the government's attempts to revive its public services. Basically, the reason why governments use PPP is that they recognize that both the public and private sectors can benefit by pooling their resources to improve the delivery of basic services. It is argued that PPP offers an alternative to full privatization or government divestiture by combining the social responsibility, environmental awareness and public accountability of the public sector with the technology, managerial efficiency and entrepreneurial spirit of the private sector Although PPP is now widely accepted and experimented, it still faces certain challenges.

For one thing, governments are faced with the need to fulfill their responsibility for ensuring that all citizens have access to basic services while meeting the needs of the private investors. The private sector, on the other hand, needs to be persuaded that their investments in public sector projects offer more attractive returns than other available investment opportunities.

These challenges should be addressed to ensure PPP's sustainability.[1]

Disputes resulting from such conflicts are not always resolved by domestic courts. Contracting parties often agree that possible disputes concerning the contract will be settled through arbitration.

A clear understanding of the basic structure and organization of arbitration is therefore necessary. Here it is important to understand the B.O.T contract and the advantages that

[1] **Alicia B. Celestino**: Public Administration and Governance, University of the Philippines in Diliman, private –Public Sector Partnership, The B.O.T program 2002.

the latter gives to the economy of a host country. B.O.T. contract plays a very efficient role when its disputes are settled by arbitration. Governments are strongly recommended to adopt arbitration and B.O.T. contracts as one unit for efficiency.

The complex issues sometimes raised in arbitration have not been sufficiently discussed, but their solution may differ from one country to another. It is therefore necessary to consult the relevant literature.

Arbitration has two dimensions, contractual and judicial. On the one hand, arbitration is based on the agreement between the parties. The parties agree to submit a dispute for settlement to private persons instead of to a court. No arbitration is possible without such agreement.

On the other hand, the arbitrator exercises a judicial task and arbitration is part of procedural law.

Arbitration is based on arbitration law laying down the rules for the arbitration procedure and the legal effects of the award. Arbitration is under the direction and control of a court, which can resolve problems during the arbitral proceedings and enforce a correct award or annul an incorrect award. The arbitration proceedings are in principle subjected to the law of the country where the arbitration is to take place (the so-called "seat"). It is the court of the seat of arbitration that directs and controls the arbitration. Arbitration laws differ from country to country.

UNCITRAL drafted in 1985 a model law to bring more uniformity between the different arbitration laws. States may adopt this model law, even with some changes. Some state have already done so.[2]

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[2] United Nations UNCITRAL Model Law on International Commercial Arbitration (1985) [document on-line] (1985, accessed 25 May 2007), available at www.jus.uio.no/lm/un.arbitration.model.law.1985/doc; Internet.

CHAPTER I: The B.O.T. Contract

The most efficient method from the point of view of the governments to attract foreign investment in the public sector is partial or total privatization of state-owned enterprises, a process which transfers the ownership of existing assets, or rights to those assets, from the state to a foreign or domestic private entity, which will assume the duties and operation of the property. Unlike initiating new private-owned infrastructure facilities, complete and unilateral privatization of some existing state-owned industries or enterprises requires great confidence and commitment to political liberalism as loss of control and displacement of labor can virtually assure local opposition. Thus many developing countries are reluctant to give up control over certain strategic industries such as power generation, telecommunication and port development, to name only a few, to private sector investors, whether of domestic or alien origin.

Such industries are viewed as being important sources of economic revenue as well as an integral part of the effective operation of the government. The political complexities that can arise from total privatization of certain existing public sector enterprises have led some governments in developing countries to select alternative strategies such as allowing limited term operation or ownership to the private investors. Further, the increasing demand for developing infrastructure and the lack of ability of governments to finance the developmental requirements have also led to the development of various innovative financing techniques and instruments to finance infrastructure projects.

1 The B.O.T. Contract model

The build-operate-transfer (BOT) / design-build-operate-maintain (DBOM) model is an integrated partnership that combines the design and construction responsibilities of design-build procurements with operations and maintenance. These integrated PPPs

transfer design, construction, and operation of a single facility or group of assets to a private sector partner. This project delivery approach is practiced by several governments around the world and is known by a number of different names, including "turnkey" procurement, BOT, and DBOM.(United States Department of Transportation The most commonly used concepts of project financing adopted in recent years by the developing countries are the Build-Operate-Transfer (B.O.T.) models. Infrastructure privatization is initiated through various modes by different countries and can generally include the construction of new privately owned facilities, privatization of existing facilities, concessions or leases, and project financing. B.O.T. [Build-Operate-Transfer] means the government grants investment enterprises an operational concession for a period, permits them to construct and administrate certain public infrastructures by financing, and authorizes them to pay off loans, reclaim investment and make a profit through charging from users or selling products. At the expiration of the concessionary period, the infrastructure is transferred to the government without any expense. In such a legal relation, one subject is local government, and the other is investment enterprises. Their mutual rights and obligations relations are established by signing B.O.T. investment contracts.

The investment, construction and operation of the B.O.T. projects are constituted by a series of contracts in which the BOT Investment Contract plays a vital role as the backbone, while the dispute settlement clause of B.O.T. Investment Contracts is one of the necessary parts in the contracts.[3]

According to the Philippines Laws the *Build-operate-and-transfer* is - A *contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof.*

[3] **Asanga Gunawansa**, Financing of infrastructure development projects: "The B.O.T concept". National University of Singapore, August 2007.

Philippines Republic laws states that the project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding these proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment and its operating and maintenance expenses in the project. The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term, which is not to exceed fifty [50] years. In the case of an infrastructure or development facility whose operation requires a public utility franchise, the proponent must be Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent [60%] by Filipinos. "The build-operate-and-transfer shall include a supply-and-operate situation which is a contractual arrangement whereby the supplier of equipment and machinery for a given infrastructure facility, if the interest of the Government so requires, operates the facility, providing in the process technology transfer and training to Filipino nationals[4]

In order to understand more the concept of B.O.T. , its definition and its benefits on our societies and governments, we shall discuss the Lebanese B.O.T. experience and how it was beneficial and advantageous for Lebanon. We shall also study the Mandaluyong City experience since this is the most successful case of public private partnership in the Far East. It has won the Galing Pook Award, a national award recognizing best practices in local governance.

[4] Philippine Law "Republic act No.7718 an act amending certain sections of Republic Act no,6975, entitled "an act authorizing the financing, construction, operation and maintenance of infrastructure projects by the private sector, and for other purposes".

2 The Lebanese Experience

The lack of financial reserves available for the financing of Lebanon's development, reduction in foreign aid and the hesitation shown by international financial institutions to finance projects in the face of the country's increasing debt and economic instability have meant that Lebanon is increasingly turning to private funding and, particularly, to B.O.T.s to promote large infrastructure projects. Nevertheless, the B.O.T. arrangement is still rare in Lebanon, and only a few such projects have been implemented.

Two B.O.T. franchises pertaining to global standard for mobiles (GSM) networks were awarded in August 1994. This type of financing is unusual in this sector because of its sophisticated high-tech nature, which is subject to rapid change and to difficulty in predicting prices. Three companies, France Telecom, Mobile Liban and LibanCell (FTML) have already begun operating the network under twelve-year concessions.

Mobile Liban is 67 percent owned by France Telecom and 33 percent owned by the local company Mikati, and already has over 56,000 subscribers since starting services at the end of January 1995. LibanCell, which is owned by a group of local companies and Telecom Finland (14 percent), has attracted over 50,000 customers since launching operations in April 1995. Both consortiums that won the BOT contracts enjoyed political ties in Lebanon. The complex net of Lebanese politics resulted in the cancellation of the contracts in 2001 and the award of management contracts in 2004.

The digital cellular operators planed to increase their network capacity beyond the current 85,000 subscribers to keep up with demand. FTML had already signed a US$ 43 million contract with Ericsson for this purpose and LibanCell was considering a similar contract with Motorola and Siemens.

Additionally, Alcatel of France, Siemens of Germany and Ericsson of Sweden are due to install a modern telephone system of 1.2 million lines by September 1997 under conventional contracts worth just over US$ 500 million. Nowadays the number of cellular subscribers has passed the 500,000. Lebanon's government has also recently approved a draft law recognizing and legalizing electronic signatures and electronic documents, facilitating the growth of e-commerce. Lebanon will be the first Arab country to introduce such a law.

In general, these are some projects aimed at attracting investment and management expertise required to develop infrastructure. A variation on such structures involves contracts where an investor does not build or own any facilities, but shares in revenues from a state-owned operator in return for providing financing, management or both. Most of the types of structures discussed in the previous paragraph have experienced initial success in promoting network expansion. In part this was because they were not characterized as licenses to private operators but rather as contracts under which private contractors would build and operate telecommunications services "owned" by the government or by a state-owned operator. After evaluation, this arrangement allowed for private sector participation in telecommunications operators without breaching laws or policies that prevented private sector ownership of operators.

However, experience in Lebanon and elsewhere suggests that these models are not viable in the long term. Investors in B.O.T. projects lack the long-term security and equity interests of a licensee as a result of consecutive administrative corruption acts. They are therefore motivated to maximize short-term profitability at the expense of long-term network or service development. A B.O.T. must either terminate, with the resulting withdrawal of the private investor, or it must be converted into a true license. If the investor withdraws, the operator may or may not be able to continue to expand and

manage the service on its own. If the concession is converted to a license, serious questions may arise regarding the fairness and transparency of the licensing process.[5] Accordingly different approaches have been taken in different countries. In some cases, national licenses are issued, while in others, a distinction is made between regions or between rural and urban areas. In some cases, national licenses are offered in parallel with competing regional licenses for the same service, there are two basic types of selection processes:

2.1 The approaches

Licenses are offered according to different adopted approaches two of which are:

The Competitive selection based on a single quantitative criterion. Examples include

An auction where the highest bidder wins or a subsidized rural service competition, where the operator that bids the lowest subsidy wins this is on one hand. On the other hand another approach could be adopted, it is the Comparative evaluation based on a more subjective evaluation of one or more quantitative or qualitative criteria.

The single criterion approach is clearly the most transparent and simplest to use. It is the most consistent with international trade agreements, and approach most frequently recommended by international financial institutions and international development organizations that promote telecommunications sector reform. However, it may not always result in the selection of the best qualified applicant, and, in the case of an auction, it may result in the imposition of excessive costs on the sector. There are many variations on these two basic approaches. For example, in some cases, there is more than one quantitative criterion, with a weighting scheme for the various criteria that will result in a single "score". In other cases, numerical scores are given for essentially subjective

[5] Lebanese B.O.T,(accessed in March 2007),available at www.menabusinessguide.com/04_market/166_177.htm.

measures, such as the experience record of an applicant, or the quality of its management.

Several observations can be made about the choice of selection criteria:

Qualified applicants are motivated to devote financial and other resources to those aspects of their application that will form the basis of the selection decision.

Licensing selection is a zero-sum game. Each applicant has a finite amount of cash and other resources to devote to the proposed service. Resources which are allocated to one aspect of an application on which selection is based (i.e. the financial offer or accelerated roll-out commitments) are not available to fund other aspects of the operation which are not related to selection criteria (i.e. universal service, lower prices, introduction of enhanced services).

Transparency is increased by use of simple quantitative selection criteria. A competitive selection process that is based on subjective or qualitative criteria will be less transparent. The same is true of multiple criteria that cannot easily be compared. A lack of transparency undermines the credibility of the process and of the regulator. It also opens the door for complaints of bias, corruption or incompetence. To maximize transparency, a single financial or other quantitative selection criterion should be used. This can be derived by use of a formula which combines a number of selection criteria into a single numeric factor if desired.

Use of a single financial criterion does not mean that other service factors or licensing objectives are irrelevant. Important factors and objectives not used as selection criteria can be indirectly included in the qualification process. For example, coverage, rollout and universal service commitments can be specifically incorporated as license conditions that any successful applicant will have to comply with. All applicants will then incorporate

these minimum requirements into the calculation of their financial bid.[6]

3 Philipine Experience: Mandaluyong Case

Mandaluyong is a first-class city in terms of income. Its population as of the year 2000 was 323,000 with a growth rate of 2.41%. Its land area is relatively small, 26 sq km, comprising 4% of Metro Manila's total land area.

The Mandaluyong City Marketplace: A Partnership With The Private Sector Background of the Project (case study)

A public market is the most common local enterprise operated by local government units (LGUs), particularly the cities and municipalities in the Philippines. The number and size of a city's or municipality's public market is an indicator of its level of economic development as many economic activities are carried out in this facility. All cities have one or more public markets but not all municipalities. Lower-income class municipalities for instance, do not own a public market facility. The operation of a public market is also considered a public service.

Thus, Philippine cities and municipalities are mandated by the 1991 Local Government Code (Sec 17) to provide this basic facility and service. Mandaluyong City faced the problem of providing a new infrastructure facility when its public market was gutted by fire in August 1990. Confronted with the necessity and urgency of providing this facility/service to his constituents and constrained financially to construct a new market, Mayor Benjamin Abalos, the city's local chief executive, decided to implement stopgap measures while mulling over what measures were best to address the problem. He studied all options possible. Meantime, temporary stalls for vendors were constructed

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[6] Regulations and Applications, ICT Industry and Markets, Chapter: 6: OLD Unit 2: Licensing and Approvals .(accessed on 12 October 2007),available at www.NetTel@africa.com.

along the sidewalks of the street perpendicular to the burnt market's location. Stalls were also built in one part of a city park. This measure brought about untold inconvenience to the public. It created traffic congestion as market-goers and commuters alike milled along the busy street. Market goers also complained about the inconvenience of going to a street market especially during the rainy days. Since only the stalls have roofs, only the vendors were protected from the elements of the weather. Such set- up also created health and sanitation problems. As a result, numerous complaints from residents and offices along that street were a daily fare for the city government. This situation continued for more than a year. The city government was under tremendous pressure from the vendors and other constituents to build a new market. The mayor, in consultation with the City Council, decided to construct a multi-storey shopping mall cum market. This decision was premised on certain considerations:

***One** was the strong desire of the mayor for the city to have a shopping mall or commercial complex of its own.*

***Two**, he knew very well that the place where the mall would be built is strategically located as it was along a major artery of the city.*

***Three**, he was convinced that a project confined to the construction of a public market project (i.e. without the commercial complex component) would not attract the private sector to invest because of the high risks involved. It was likely that it would take a long period of time (more than 10 years) for the investor to recover its investment. The revenue stream expected from the operation of the market would not be very substantial since the city government could not rely on increasing stall rentals as such cost increases would surely be transferred by the vendors to the buying public.*

3.1 Tapping the Private Sector through the Build-Operate-Transfer Scheme

The mayor's dream for the city to own an urban infrastructure like a shopping mall was almost impossibility because the city government then did not have the financial means to fund a capital-intensive infrastructure project. Where to get the funding for the construction of this commercial complex was its primary problem. The city government ruled out availment of a huge loan from commercial banks on a long-term basis because a significant portion of city funds would just be tied up with yearly loan amortizations while such could be used to support other basic services of the city. The strong political will of the mayor to pursue his dream for his city, propelled him to go for the Build-Operate-Transfer (B.O.T.) scheme. At that time, the Philippine Congress had just passed the B.O.T. law and there were no implementing rules and regulations that could be used by the city government as a guide. Even government agencies like the Commission on Audit and the Department of Finance were at that time clueless on how to help the city government implement a B.O.T. program. Nonetheless, this did not deter the city government from pursuing its dream of building a shopping mall market through a B.O.T. scheme. The mayor scouted for developers, investors and businessmen who might be interested in the B.O.T. project. The Invitation to Pre-qualify for the B.O.T. project was advertised in major newspapers for several weeks in May 1991. It called for the construction of a seven-storey building.

3.2 Identifying the Right Private Sector Partner

Two conferences with interested parties/investors were held in 1991, one year after the burning of the public market. The first conference was attended by 13 interested

developers and investors. The concept of B.O.T. was explained to them. They were made to understand that they would have to shoulder all the costs in the construction of the commercial complex or mall and that the ownership of facility would have to be turned over to the city government upon completion of its construction. Subsequently, another conference was held. This time only five of the 13 attended. The eight others backed out immediately after the first conference. When the bidding for Prequalification was finally held, the number of interested parties dwindled to two. One of them, the Market Realty Development and Credit Funders Corporation won the bid. To further expand its capitalization, this business entity merged with nine other firms forming a business consortium with the name Macro Funders and Developers Incorporated (MFD). It was formed purposely for the B.O.T. project. The mayor was instrumental in the formation of this group. It was he who enlisted the help of his friends in the private sector to form the said business consortium (Interview with Atty. Ernesto Santos, former Administrator of Mandaluyong City and now Vice-President of Macro Funders and Developers, March 20, 2002).

The contract for the development, financing, construction and operation of the commercial center was awarded on August 29, 1991, one year after the burning of the old public market. The total cost was P377,468,932 (or US$12.5M). When the project was completed fully, the cost was almost P600M (or US$24.6M).

3.3 Basic Features of the B.O.T. Project

The winning bid is a seven-storey commercial complex located on a 6,700 sq.m lot along a busy street in Mandaluyong. Now known as The Marketplace, it consists of the following:

- *Public market, banks, pawnshops, grocery, service shops at the ground floor.*
- *Eateries and dry goods shops at the second and third floor.*

- *Parking areas at the fourth and fifth floor.*
- *Four cinemas, fast food center, gymnasium, billiard hall, bowling center, amusement center at the sixth and seventh floors.*

The winning bid was actually a combination of two BOT schemes: (1) Build-Transfer (BT) and (2) Develop-Operate-Transfer (DOT). Under the former, MFD constructs the public market and then transfers it to the city government upon completion. The public market, located at the ground floor of the commercial complex, was turned over in 1993 while the rest of the building or commercial complex was under construction. The city government started its operation in September 1994. It is a modern market complete with sanitation and toilet facilities underground drainage, electrical, plumbing and water facilities (Project Documents gathered from the MFD and Public Information Office of Mandaluyong City, undated).

Under the latter, MFD was granted the right to develop the space above the public market, in exchange for building the market itself. It constructed additional six storey of the commercial complex. It operates it for a period of 40 years. Thereafter, it will turn it over to the city government. The contract however provides an option for renewal. The city government does not collect rental fees from MFD to enable it recover its investment. Moreover, the city government does not share in any revenues generated from the commercial complex. Also, it does not collect real property taxes from MFD since ownership of the commercial complex building was transferred to the city government right after its completion in 1995 and the land occupied by the complex is owned by the city government. Operation of the Marketplace started in January 1996 (Project Documents gathered from the MFD and Public Information Office of Mandaluyong City, undated).

3.4 Negotiating with the Private Sector Partner

The cooperation of the private sector in financing a capital-intensive urban infrastructure was made possible through the negotiation skills of the city government headed by the mayor himself. The mayor was assisted by the city's administrator not just in the conceptualization of the project but throughout its implementation. According to the former administrator of the city government, there were actually no demands made by MFD, the private partner. It was in fact the city government itself that offered the private partner a two-year moratorium from payment of mayor's permit and building permits (Interview with Atty. Ernesto Santos, former Administrator of Mandaluyong City and now Vice-President of Macro Funders and Developers(MFD), March 25, 2002). This strategy would enable the private partner to attract business establishments to locate in the commercial complex. The city government also contracted the services of MFD to provide maintenance and security of the public market which is located on the ground floor of the commercial complex. For five years, it was MFD which maintained and secured the public market.[7]

3.5 Analysis of Problems Encountered

Engaging the participation of the private sector in the provision of a public facility and service that required enormous capital outlays was not an easy task for the city government of Mandaluyong. The major problems it encountered were the following:

- Getting the trust and confidence of the private entity. This was the most significant problem. It took the city government more than six months to convince a private contractor to enter into a joint venture where the city would provide the land and the private contractor provide the capital and expertise in the

[7] **Jorge Brion & Alicia B. Celestino,** "Public-private Sector Partnership for Urban Infrastructure: The Build- operate-Transfer Program of Mandaluyong City,1991, Plan :Distributed in 1991.

construction and management of the B.O.T. project.

- Difficulty on the part of the private contractor to obtain loans from the commercial banks. The MFD, the business consortium, could not use the land where the infrastructure was to be built as collateral because it is owned by the city government. This problem was however remedied by the business consortium by resorting to loans from commercial banks on an individual basis. This means that each member of the consortium was able to obtain a loan based on its individual financial capacity to pay (Interview with Atty. Ernesto Santos, former Administrator of Mandaluyong City and now Vice-President of Macro Funders and Developers, March 20, 2002).
- The B.O.T. entailed too much paperwork. This is a problem of lesser magnitude encountered in the B.O.T. project. Reports on technical and economic data requirements had to be prepared for the pre-qualification and bidding process. Somehow, the paper work was taxing on the part of the city government.

3.6 Interests

The beauty of this B.O.T. project is that it provides mutual benefits for the public and private sector partners. The joint project could not have succeeded if only one party benefited from it.

3.7 Benefits for the City Government:

For the city government, the B.O.T. scheme allowed it to develop and own the needed urban infrastructure without incurring a substantial financial burden. It was the private sector partner that provided the funds for the project.

- The city government was thus freed from paying loan amortizations, which could be utilized to fund other developmental projects and services.

- Conservative estimates of around P10-P20 M revenues per annum coming from the public market and business establishments in the commercial complex are now accruing to the city government coffers.

  This additional income is plowed back for the improvement of city government services.

- A new commercial district was developed. The increased activity in this area led to the appreciation of land values in its vicinity. Before the construction, the land in the area cost P8,000 per square meter. At present, it costs P28,000 to P30,000 per square meter.

  This can be translated in terms of higher real Benefits for the Private Sector Partner. The terms of the contract between the local government and the private sector developer allowed the latter to benefit from the project as well.

- MFD is now earning revenues from the operation of the numerous business establishments in the commercial complex. At present, the commercial complex registers a 95% occupancy. MFD was given the right to operate the complex for 40 years with the option for renewal. Technically, the MFD is leaser of the commercial complex since ownership belongs to the city government.

However, it is not receiving rent, to enable it to recoup its investment. According to the Vice-President of the firm, who used to be the administrator of the city government, the firm, which is now in its seventh year of operating the complex, has almost recovered its investment. Ninety percent (90%) of its loans have already been paid` (Interview with Atty.Ernesto Santos, March 25, 2002).

- It is also exempted from paying the real property taxes (around P10M annually) since it is the city government that owns the lot and the edifice. Other socio-economic benefits external to both the local government unit and its private

partner are various benefits brought about by the joint venture.

- The commercial complex not only serves the city population of Mandaluyong but also around 10% of the population of its neighboring LGUs such as the San Juan, Sta. Ana and St.Mesa, Manila.
- The commercial complex provides for a public market with all the facilities and amenities of a modern public market operated under the most convenient, sanitary and secured conditions.
- The market is controlled and supervised exclusively by the city government. The rental rates are fixed by the city government to guarantee that the goods are sold at the lowest possible prices and within the reach of the low-income group.
- The building of the commercial complex-*cum*-market generated employment. To date there are approximately more than 1,000 laborers employed therein.
- The perennial traffic problem in the area was solved by provision by the commercial complex of a two-level parking facility. Flooding, pollution and garbage problems were likewise solved by provisions for a centralized collection and spillway system, waste water and pollution control system being integrated in the project.

3.8 Findings from the Government perspective (negotiating issues)

As can be gleaned from the case presented, several lessons illustrating the success of the partnership can be drawn. These are the following:

The lessons learned from implementing the **Mandaluyong** Project Market can be broken down into three areas according to both government and private sector perspectives:

- Negotiating issues
- Packaging Issues
- Political issues

3.8.1 Accepting the loss of control:

A significant factor in the early stages of a **B.O.T.** project is that the government is usually troubled by sharing Research Triangle Institute power with the **B.O.T.** sponsor. The government must recognize that one cost of private investment through **B.OT.** Schemes are relinquishing a certain amount of control.

3.8.2 Developing one competent team to handle all negotiations:

The transfer of responsibilities to a task force is key to the timely execution of a **B.O.T.** project. Lack of a single point authority to negotiate and bind the government often results in a paralysis of the negotiations.

Governments are usually at a negotiating disadvantage, as they lack experience with the private sector organizational structure and financing models. In addition, they have limited exposure to the experts in the various fields required to pull off a **B.O.T.** program, such as financial experts, lawyers, investment bankers, and environmental specialists. Therefore, the government must be able to recruit expert advisors for this stage.

4 Packaging Issues

One of the main reasons for unsuccessful projects is the relative shortage of "packaging skills", such that all parties involved are in agreement at the start regarding the sharing of risks and revenues. Without the basic components of the project acceptable to all parties, no **B.O.T.** type project will be able to run smoothly.

4.1 Structuring a competitive project

The project should be structured competitively to secure the required funding. Profit has to be easily identifiable to the project participants and, moreover, must be partially linked to performance.

4.2 Establishing Competitive Selection Process

The selection of a project to be awarded must be accomplished on a competitive basis and evaluated by an independent and incorruptible expert panel, as they are under close political scrutiny. To select projects with even the slightest hint of favoritism would risk legal challenges by the "losers" and inevitably delay negotiations, as well as possible impediments to attracting financing. In general, any agreement reached between the parties must be a sound and unique business arrangement, one that will withstand the test of close public scrutiny. At the outset, it must be assumed that every aspect of the agreement will be carefully scrutinized by the public as well as by political opponents.

4.3 Readiness to provide credit enhancement

There is a common misconception concerning **B.O.T.** projects that the private sector should bear all risks (or alternatively, that the government should not provide any credit enhancements). Such an approach greatly threatens the feasibility of any Research Triangle Institute **B.O.T.** project. The efficient sharing of risks by the government and the private sector (done through credit enhancements) is critical for a B.O.T. project to be successful.

4.4 The local government and/or the project proponents should not be competitors

A major concern of the private company implementing the **BOT** project is the amount of revenue it generates from the project. Revenue would be affected if the implementing agency decided to build projects which compete directly with the **B.O.T.** project.

5 Political Issues

5.1 Developing an environment of low political risk

There needs to be a perception of low political risk in order to attract sound international institutional investors. Those projects which have been the most successful have been carried out in countries with relative political stability. This provides the investors with security to know that the project should be able to be completed without changes in the government's make-up, laws, and regulations.

5.2 Establishing a supportive policy framework

A legislative, legal and regulatory policy framework on issues ranging from foreign investment to the regulation of public utilities to actual **B.O.T.** programs should be in place before individual projects are implemented on an *ad hoc* basis. If this is not the **case**, there is a high probability that the total effort will lead to poor results. The establishment of such legislation is a prerequisite to the performance of a **B.O.T.** program. The earlier in the process that the legislation is established, the higher the potential to attract investors to the project.

The Philippines is fortunate because it already has much of this framework in place. In addition, such a policy framework will succeed if two criteria are met. First, projects

targeted for implementation as B.O.T.s must serve a pressing public need. Second, the government must recognize that its resources are limited, and thus that it will have to access private capital to finance these projects.

5.3 Forming a consensus between government entities

The consensus process within government is difficult and time-consuming. Since the issues span technical, fiscal, and economic questions, this framework must be based on a consensus among the relevant Cabinet members, and the concerns of vested interests, labor unions, consumers, other government officials and politicians.[8]

[8] Ibid.

CHAPTER II: Arbitration of International Business and Contracts

1 The Reason to Arbitrate

An agreement to arbitrate is in the first instance, an agreement on a forum selection agreement that avoids all (or nearly all) problems of jurisdiction. Without an agreement on the relation of a forum, a dispute between parties from different countries either involves the aggrieved party (plaintiff) litigating in the courts where the other party (defendant) is established, or litigating in its own country, with all the problems of judicial jurisdiction. As a result of the United Nations conventions on the recognition and enforcement of arbitral awards (the New York Convention) arbitral awards are easy to enforce, much easier worldwide than judgments of courts.

The problems of jurisdiction are obvious when studied in practical cases. The following case stresses the problems of jurisdiction and emphasizes the role of arbitration in businesses.

2 Case study: Kabushiki Kaisha Kansai Tekkosho v. Marubeni-Iida America Kaisha, The Henreijihe (Judicial reports) No 723 (1974), P 76 Osaka District Court, case No. 6686 (wa.civil) of 1970

On September 17, 1974, The Washington State Superior Court delivered a judgment as to U.S case no 2, which held that Y should pay the sum of 86000 U.S dollars to X, and this became final on October 17 of the same year. Opposing these law suits pending in the Washington State Court, Y brought a law suit against X in a Japanese court seeking a

judgment declaring the non existence of the right of indemnification that had been claimed against it in the U.S based on the product liability.

On October 9,1973, the Osaka District Court, by an interlocutory judgment (Japan case No.1), rejected X'S plea in abatement with respect to jurisdiction. It was held as one of the opinions of the court that although X contended that the institution of the lawsuit was illegal because it turned out to be a double action (article 231 of the Code of the Civil Procedure) with respect to the U.S. case No2, which had been pending in the U.S . This contention of Y's was groundless, because the word "court" in the said article should be construed to mean court of the U.S. and not to include a foreign court. On October 14, 1974, about one month after the United States judgment in No.2, the same court in Japan delivered a judgment to the effect that Y was under no obligation to indemnify X for damages claimed due to accident (Japan Case) No.2).

In 1976, X filed a lawsuit against Y in the same Japanese court requesting permission to execute the Washington State Court judgment (U.S. Case no 2).

On December 22, 1977, the Osaka District Court dismissed the request. It was held that it disturbed the order of the whole legal system to recognize the co-existence of judgments that were inconsistent with each other within the same judicial system, it was rightly held that it violated the order of Japan's judicial law to recognize a foreign judgment that was inconsistent with a Japanese judgment, in a case where a final judgment of a Japanese court had already been issued with regard to the same parties and same subject matter, Irrespective of the time of institution of the lawsuit, the time of the issuance of the judgment, and the time when the judgment became final and conclusive, and irrespective of the fact that the judgment of the foreign court was compatible with the public order or good morals in Japan. In the light of the foregoing, since the United States judgment subject of this request lacked a requisite, it couldn't be

Recognized as effective in Japan.[9]

Therefore, it was not necessary to pass on to other issues, and this court was of the opinion that the request of the plaintiff was without justification. Following these developments, the battle of lawsuits seems to have come to an end ten years after the accident, with the disastrous result of a conflict of *res judicata.*

As participation of public entities in the economy has grown, especially the B.O.T. approach which needs guarantees for foreign investors, such investors or private parties in general have become increasingly conscious of the especial problems of litigation against governments or governments instrumentalities. These problems have been faced to a significant extent and ameliorated in most commercial states in recent years. It is held everywhere that an agreement on commercial arbitration is a waiver of sovereign immunity both in the arbitration itself and in an action at the chosen situs to compel arbitration. In contracts between private enterprises in industrial states and private or State-owned entities in developing countries or centrally planned (or formerly centrally planned) economies, it frequently happens that the latter will insist on having its country's law applied.[10]

Earlier it was noted that project financing as a mode of infrastructure development can take many forms. Whatever the financial structure selected by the parties, all models of project financing will generally have the features dealt with above as an integral part. The specific structure selected in the case of infrastructure development in developing countries will depend on the extent of debt and equity required.

Although the popular use of B.O.O. / B.O.T. and other similar techniques of financing infrastructure commenced in the 1980's, it really cannot be identified as a new

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[9] **Andreas F. Lowenfeld,** International Litigation and Arbitration, American Casebook series 1993, West Publishing Company. St. Paul, Minn., 1993.chapter IV.

[10] Ibid.

development as often stated. In contrast it should be identified as a reawakening of an old concept. The earliest use of the concept can be traced back to 1782 in France where the Perrier brothers were granted a concessionary agreement similar to a B.O.T method, for water supply. Further, during the 19th century, these type of arrangements were adopted for water supply projects in Germany, Spain and France and for privately owned turnpike roads, similar to the present day toll roads in the U.S. and Britain. However the modern use of the idea came about in the 1980's with its introduction as a prominent method of financing infrastructure in Turkey as a part of the Government strategy to balance the budget.

Since then this type of project financing has become an instant attraction to both developed and developing countries. The need for regulation does not arise when infrastructure is provided on a monopoly basis by the government or a government owned institution. The provider of infrastructure in such cases either provides it according to its own rules or applies it accordingly to rules imposed by legislation as part of the system of government. The situation differs when infrastructure is to be provided in whole or in part by the private sector. In such cases, as the role of the Government moves from that of service provider to that of Supervisor of those providing the services, some form of a regulatory frame work will be required. The instrument forming the new regulatory framework may constitute an authorization or contract between the government and the service providers. All in all it shows the guarantees that the private sector should have in order to enter into such contracts.

Such guarantees rely on regulations that give equal rights to both parties, private and public. An agreement to arbitrate is in the first instance, a forum selection agreement that avoids problems of jurisdiction. Accordingly, maximum efficiency is accomplished by

settling the disputes of B.O.T. by arbitration.[11]

Disputes in international trade are not always resolved by a court. Contracting parties often agree that possible disputes concerning the contract should be settled through arbitration.

The chapter tackles mainly arbitration, It starts with dispute resolution in developing countries, it stresses the importance of the reason to arbitrate and having a request filed or of having an arbitration clause or an arbitration agreement in the contract, and it gives an example of such a clause and the formalities of such an agreement necessary in order for it to be accepted by the majority of states. This example would serve as grounds for stay or dismissal of court proceedings in all countries which have ratified the New York Convention and cases are mentioned to emphasize the role of this clause. The importance of such a procedure is highlighted where problems related to sovereignty occur. In addition to this it describes the arbitral institutions, rules, ways of conduct and implementation.

Arbitration is a legal institution for the resolution of disputes outside the courts whereby the parties to a dispute refer it to one or more persons (the "Arbitrators" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound.

In order to show the role arbitration plays in international business contracts, we have to clarify the meaning of the word *arbitration.* Thus the chapter dealt with the most important aspect of arbitration and a case study was given to throw light on its importance in the world of business and B.O.T. contracts. As we mentioned previously, disputes involving international trade and businesses are not always resolved by a court, since the contracting parties often agree that possible disputes concerning the contract are

[11] **Asanga Gunawansa,** "Financing of infrastructure development projects: The B.O.T concept". National University of Singapore, August 2007.

to be settled through arbitration.

The solution of such may differ from one country to another. Arbitration has two dimensions, contractual and judicial. On the one hand, arbitration is based on the agreement reached between parties. Arbitration implies that the parties agree to submit a dispute for settlement to private persons instead of to a court. No arbitration is possible without such agreement.

On the other hand, the arbitrator exercises a judicial role for arbitration is a part of procedural law. Arbitration is based on arbitration law laying down the rules for the arbitration procedure and the legal effects of the award. Arbitration is under the direction and control of a court, which can resolve problems during the arbitral proceedings and enforce a correct award or annul an incorrect award.[12]

It is of a major importance to say that arbitration is introduced by the filing of a Request for Arbitration on the basis of a previous agreement to accept arbitration.

The International Chamber of Commerce is an international institution that now binds 150 signing countries and it has always been the pioneer in developing modern international commercial arbitration. It is of high importance to study the ICC Arbitration Request and Agreement.

3 Filing a request

Arbitration is usually commenced by the filing of a request for arbitration. This can be presented to any institution, whether AAA (American Arbitration Association), LCIA (London Court of International Arbitration), ICC (International Criminal Court) or others. As long as ICC rules are mostly adopted, It's the best to study those rules.

In the case of ICC arbitration, however, the rules have always contemplated that more

[12] Hans van Houtte , The Law of International Trade, London: Sweet and Maxwell , 1995,p.387.

than a simple "notice" should be required for arbitration to be introduced. The request for arbitration, therefore, is intended to be a more substantial document than a mere "notice" and should not only serve to initiate the arbitration but also contain descriptive information concerning the nature and circumstances of the claim, as described further below. An important advantage of this is that the court is more fully informed about the nature of the arbitration than it otherwise would be when called upon to make decision concerning such matters as the constitution of the arbitral tribunal, the place of arbitration and the advance payment on costs for the arbitration. When a request for arbitration is received by the Secretariat, the Secretary General will ordinarily almost immediately (within one to two days) acknowledge receipt by sending a letter to the claimant confirming the same.

The Secretary General then assigns the new case to one of the Secretariat's counsels and also verifies whether the required filing fee and an adequate number of copies have been submitted together with the request. If this has been done, the counsel in charge of the file notifies the request to the respondent, normally within a week of its receipt by the Secretariat.

However if either the filing fee or an adequate number of copies has not been received, the request is not notified. Instead, the Secretariat first requests the claimant to furnish the required fee or copies. Although the secretariat normally insists on receiving these within two weeks, failing which the file may be closed, there have occasionally been instances when the secretariat has allowed the claimant a longer delay for compliance. In either case, however, the secretariat may be in possession of the request for arbitration for a relatively long period before it is notified to the respondent.[13]

[13] Yves Derains and Eric Schwarts, Commencing the Arbitration: A Guide to the New ICC Rules of Arbitration, The Hague: Kluwer Law international, 1998, p. 47 chapter 33.3.2.

3.1 Arbitration agreement

In June of 1958, after many years of negotiation, a convention was signed at the United Nations in New York concerning arbitration between private persons, "whether physical or legal". The basic idea of the New York convention was to make arbitral awards rendered in a foreign state enforceable in any party to the convention. Without such a convention, it had often been difficult or impossible to enforce an arbitral award outside the state in which the arbitration had taken place, where the defendant might well not be established or have assets. *In order to enforce in state Y an award made in state X, it was often necessary to bring an action in X on the award and then to bring an action in Y on the judgment of the X court. The New York Convention cuts through this procedure, and provides in article III that "each contracting state shall recognize arbitral awards made in foreign states on the same basis as it recognizes and enforces domestic awards." Notwithstanding its title, the New York Convention provides not only for enforcement of arbitral awards but also for enforcement of agreements to arbitrate, (article II) if an agreement for arbitration meets the requirements of article II (1) (II).*

The arbitration clause is not only the basis for arbitration, but often gives it its shape as well. An arbitration clause must therefore be carefully structured and worded. However, the arbitration clause seldom gets the attention it deserves. For example a clause stipulating dispute resolution by the International Chamber of Commerce provides for the settlement of disputes by arbitration as well as by conciliation. Moreover, does this clause only mention that the ICC is established in Paris or does it more specifically state that the seat of arbitration has to be in Paris?

Some arbitration clauses stipulate that the parties must first attempt to settle the dispute amicably before resorting to arbitration. Such a clause is only advice for the parties to attempt to settle amicably first. If this is seen to be impossible, there is no need for

lengthy and useless negotiation. Parties may submit immediately to arbitration.

Certain specific elements should preferably be included in an arbitration clause.

3.2 Standard clause

The arbitration clause of ICC reads in English:

"All disputes arising in connection with the present contract shall be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

This clause has also French, German and Spanish versions.

The UNCITRAL arbitration clause reads in English:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL arbitration rules as at present in force."

Parties may consider adding other provisions also[14]

The issue of the agreement is displayed in the following case. It focuses on the definition of the agreement in Article II of the New York Convention, as it is the case where we have a common context of an arbitration clause contained in one party's order or conformation form not signed and returned by the other party.

1.4. Case of Van Qalsum N.V. v. Chevalines S.A.
Tribunal du canton de Genève.
June 8, 1967
64Schweizerische juristen -Zeitung 56 (1968)

Considering that the Netherlands company van Walsum N.V of Rotterdam asserts that it concluded a contract for the sale of Argentine meat with Chevalines ,S.A. of Geneva, confirmed by a communication dated June 3, 1966 setting forth in telegraphic style

[14] International arbitration and litigation, (accessed in February 2007), available at mailto:arbitration@ccib.org.lb.Internet.

under different categories the conditions of the transaction, and indicating, opposite the word " arbitration" the Netherlands Oil, Fats, and Oil seed Trades Association in Rotterdam :

Considering that subsequently , van Walsun initiated arbitration against Chavelines before the arbitration tribunal of the said Association: that respondent made no appearance: and that on November 17, 1996 the tribunal awarded NFI 8574.19 to claimant , plus expenses; Considering that van Walsun has applied to this court for recognition and enforcement of this award, pursuant to the New York Convention, and that the respondent has moved for dismissal, on the ground that it has done nothing to recognize the jurisdiction of the Rotterdam tribunal, nor did it agree on any arbitration clause.

Considering that according to Article II(2) of the New York Convention , a written agreement is defined as a "clause" in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams; Considering that van Walsum has correctly pointed out that these expressions have introduced a new form, different from the written form required by Swiss Law: that this innovation, as it has explained, arose out of the practical necessities of international commerce, which make more use of telexes and telegrams than of letters or formal contracts; Considering however, that even if one accepts unsigned messages, it is nevertheless true that the New York Convention requires an exchange of letters or telegrams, which implies communications that reply or at least corresponds to one another in time and meaning, that there is no such evidence in the present case; Considering that the duplicate of the "order confirmation" of June 3,1966 was not issued by Chavalines but by claimant itself, and that this text was not returned to van Walsum by the respondent, though it did receive the original ; Conceding that the latest document evidencing the transaction in

question is the advice of opening of a letter of credit No.63877 of 15 June , which makes no mention of an arbitration clause or arbitration tribunal; Considering that it is true that case law has long ago added to the rules that silence cannot be considered agreement for an exception " when the rules of good faith require that a party manifest its disagreement if it intends not to be bound;"

Considering that silence concerning a letter of confirmation can be considered to constitute agreement when the offeror diverges in good faith from an oral agreement or refers in good faith to an agreement that he regards as complete;

Considering that in the present case van Walsum does not claim that an oral contract on the subject of arbitration was formed;

Considering that in introducing this clause in its letter of conformation, it proposed an addition to the contract which , unlike the other points in the contract, could not benefit from an implied acceptance;

Considering that it was nevertheless this circumstance that the arbitrators relied on to found their jurisdiction, in writing ".....the claimant has added to this contract a conformation dated 3 June, 1996, which the respondent has retained without protest;"

Considering that this fact is, however, not sufficient, either under the New York Convention or under Swiss law, to constitute an agreement to arbitrate;

And considering that absent agreement on this point, the award of the Rotterdam tribunal cannot be enforced in this country.

THE COURT : Dismisses the action and imposes costs on plaintiff.[15]

[15] Andreas F. Lowenfeld, International Litigation and Arbitration, American Casebook series ,West Publishing Company, St. Paul Minn., 1993.ch: IV.

4 Arbitral Institutions and Rules

International arbitration can take place purely by agreement between the parties, so-called *ad hoc* arbitration. Since 1976 an internationally agreed set of rules for international arbitration developed by the United Nations Commission on International Trade Law (UNICITRAL) has been available for use in *ad hoc* arbitrations, as well as being a model for use by other arbitration in institutions .Most international commercial arbitrations, however, are conducted under the auspices of institutions that are either devoted entirely to arbitration and related means of dispute settlement, such as the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA), or that have arbitration as one of their important functions such as the International Chamber of Commerce ICC or the Stockholm Chamber of Commerce. Probably the best known and most active of the institutions devoted to international arbitration is the court of arbitration of the International Chamber of Commerce, with headquarters in Paris, and National councils in most major commercial states.

The rules of Conciliation and Arbitration of the ICC, developed over many years, provide a convenient focus for this brief look at the process of so- called administered or institutional arbitration, with some mention of variation in the rules of other arbitral institutions.

4.1 Selecting arbitrators

An arbitration tribunal generally consists of three arbitrators. Each of the parties appoints an arbitrator. A third arbitrator is then appointed either by the already appointed arbitrators or by a nominated arbitration institution.

The nominated arbitration institution is also competent to appoint an arbitrator if one of the parties refuses to cooperate. When only one arbitrator has to adjudicate on a dispute

the parties usually have no difficulty over this appointment: however, when there is disagreement, the arbitrator must be appointed by the national arbitration institution nominated.

Altogether, it may fairly be said that there are good and bad arbitrations where justice does not always prevail, just as there are good and bad actions at law. On the one hand, in important cases arbitrators tend to devote more time than is available for judges in most of the world's commercial centers, and if there are three arbitrators, gross error is less likely than if the matter is heard before a single judge. On the other hand, if a Court of First Instance errs, appeal is available but in arbitration in general there is no appeal.

The increasing resort to arbitration affects not only in the total number of cases heard but also the volume of transnational contracts containing arbitration clauses, which suggests that in general arbitration has become the major, if not always the preferred, means of settlement of private disputes across national frontiers, more specifically about contracts that need speed, security and guarantees such as international investment contracts such as B.O.T.

4.2 Law applied by arbitrators

If the agreement to arbitrate contains a choice-of-law clause, it is always followed. For one thing, international arbitration is part of the tradition of party autonomy that includes the freedom to choose a forum and to choose the law to govern their relations. For another, arbitrators owe their jurisdiction to the agreement of the parties, and the choice-of-law clause is a condition of that agreement. In general the choice of a particular state's law will be construed as a reference to the internal law of that state. However, there may be instances when the conflict of laws rules of the chosen state might be applied as well .If the agreement to arbitrate does not contain a choice-of-law clause, several possibilities exist. The arbitrators might apply the law applicable at the place of arbitration, on the

assumption that designation of the *situs* constituted an implied choice of law. Alternatively the arbitrators might apply the conflict of laws rules of the place of arbitration. Some arbitrators and commentators favor one of these two approaches, which perhaps attribute more significance to the choice of a place of arbitration than may have been in the minds of the drafters of the contract, but has the advantage of limiting the discretion of the arbitrators to an objective and not outcome-based choice. Other arbitrators and commentators believe that the arbitrators should themselves decide on the applicable law, presumably on some basis involving the expectation of the parties, the jurisdiction having the most significant relationship with the transaction or the issues in question, or the place or performance. This is the preference expressed in the ICC rules. Still others believe that arbitrators should feel free, in the absence of agreement to the contrary, to apply a kind of international law merchant or *lex merchatoria* , which applies commonly accepted rules of law on such matters as a duty of good faith or a requirement of notice, in preference to rules peculiar to a particular state of which only one, but no the other party to the contract, could have been aware .

Finally, some arbitrators believe that it may not be necessary to make an initial determination of the applicable law and prefer to wait until they have a thorough knowledge of the case to see whether there is actually a legal issue between the parties at all, and if so whether on that issue there is a real conflict between the law, say, of the sellers' and buyers' state of domicile .This approach will often be suitable if the issue is performance under a contract – for instance whether the goods delivered comply with the specifications or whether the required services were performed according to an industry's standard.

This approach will not be useful if the issue is whether the person who signed the purported contract had the authority to bind his principal, or whether a claim is barred by

a given Statute of Limitations.

The following case focuses on the enforcement of arbitral awards, with very different results, and on the importance of having an agreement to specify the Law implemented.

4.3 Case study FREY v. CUCCARO

13th December,1974

In 1971, four Austrian firms entered into four separate contracts for the sale of lumber to the Italian firm Cuccaro. Each of the contracts contained a clause providing for arbitration of all disputes that might arise before the arbitral tribunal of the Vienna Commodity Exchange. When Cuccaro failed to make payments on time, the Austrian firms initiated arbitration proceedings in Vienna. Cuccaro did not appear at the arbitration, and the arbitral tribunal entered default awards against it on each of the four contracts. The four firms applied to the Court of Appeal in Naples for execution of the awards in accordance with Article III of the New York Convention. Each of the four contracts contained a clause stating as follows:

The present contract is based on the Austrian usages in lumber trade. In the case of dispute the parties shall resort to the arbitral tribunal of Vienna Commodity Exchange... The buyer and seller shall each sign two copies of the present contract and shall return one copy to [the broker in Vienna]. Signed copies of the contract forms were returned to the broker for only two of the contracts. As to these two contracts, the awards are valid and will be enforced. As to the other two contracts, enforcement will not be granted. The prevalence of the New York Convention over the rule that jurisdiction of Italian courts cannot be derogated by contract depends on compliance with the Convention, and in particular with the requirement in Article II of an agreement in writing, which is defined as an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. The claimant under the two contract of which signed copies were not

returned contend that their awards should also be enforced, because the contracts had been concluded and were to be performed in Austria, and the law of that country did not require a written agreement. This contention cannot be accepted. There is an unchallenged principle that the rules contained in international treaties prevail over internal laws of individual states.

It follows that the arbitration clause pursuant to which the Austrian claimants invoke the jurisdiction of the arbitral Tribunal in Vienna could be effectively concluded only in writing according to the requirements of the Convention.....

Accordingly, it is of importance to deal with issues arising in dispute settlement as they present themselves to an investor and a government or governmental entity seeking to arrive at an agreement for the settlement of possible future disputes. Submission of such disputes to national courts is most unlikely to be acceptable to either side. The investor will not wish to submit to the jurisdiction of the host country, whereas the host country will be reluctant to accept the jurisdiction of any foreign court, and it is commonly known to accept arbitration to settle disputes. Such acceptance would, moreover, be of value because it does not risk being frustrated by a plea of sovereign immunity from jurisdiction.[16]

[16] .Ibid.

CHAPTER III: Arbitration in B.O.T. Contracts

International investment disputes are a phenomenon that holds few secrets. They have been with us in one form or another for as long as economic and financial assets have been moving across national borders, with the result that these assets and the activities of those controlling them have become exposed to the exercise of the territorial jurisdiction of the host country. Since the end of World War II the foreign investment scene has been the subject of intense study and of dialogue as well as of confrontation. The issues covered range from the control of entry of foreign investment to its treatment by the host country, frequently with an emphasis on expropriation.

Since this chapter is concerned with possible disputes between states, it is well to realize that the initial parties to investment disputes are in most cases host countries on the one hand and private investors on the other. These disputes will become intergovernmental controversies when the investors' home governments espouse the cause of their nationals. Investment disputes may, however, also involve governments immediately, for example when they concern the application or interpretation of a treaty, or arise in the border area of international investment policy.

Until recently, issues relating to foreign investment were discussed almost exclusively in the context of North-South relations. They were not of immediate importance to the Eastern part of Europe. The nations of Eastern Europe, however, regularly support the developing countries (in multilateral forums) on basic issues of national sovereignty and of the need to control perceived injurious practices of foreign investors, in particular of what are known as multinational or transnational companies.

As a result of the political and economic developments in the east, foreign investment is becoming an increasingly important element in **East-West** relations.

The process of adaptation will be difficult even if reform of the economic structure of the

East is energetically pursued. In fact, there is an unavoidable risk that the very speed and zeal with which the process is undertaken, combined with the lack of local negotiating experience and managerial skills, may lead to some joint venture and privatization operations which will be criticized for not adequately protecting the host countries' national interests. Disputes may arise with investors concerning the interpretation of the applicable law and its implementation. A particular reason for disputes will be any change of the applicable law that repeals or curtails benefits which were previously enjoyed. When such disputes arise, an aggrieved investor or its home government will not be prepared to accept the host government's law or actions, or the decisions of the host country's courts, as operative.

The parties to the dispute may support the conflicting positions by relying on one or more of the following: United Nations resolutions, international dispute settlement treaties, or arbitration as a means of dispute settlement.[17]

1 Arbitration Clauses and Institutional Arbitration

Ad hoc arbitration and institutional arbitration have each their role to play in the broad field of international arbitration. By providing a ready-made mechanism and supplying the applicable rules, institutional arbitration has the advantage of doing a great deal of the work for the parties to the conflict. A potentially even greater advantage is that, either because of the pressure of community interest and the prestige of the institution concerned, or because of legal safeguards, the risk of recalcitrant parties is diminished. This is important especially in cases in which the complaining party relies on a compromissory clause, but is by no means to be disregarded in the case of a *compromis*

[17] United Nations UN UNCITRAL Arbitration Rules (1976) [document on-line] (1976 accessed on 24 March 2007), available at http://www.jus.uio.no/lm/un.arbitration.rules.1976/doc.html#48.internet.

concluded after the dispute has arisen. On the other side of the ledger may be entered possible constraints imposed by the institutional framework. They may be constituted by such matters as limited choice of arbitrators or limited freedom of the parties in their selection, rules of procedure from which the parties are not free to depart, or limitations of jurisdiction. These potential disadvantages would probably weigh more heavily when the relations between the parties are such as to have permitted the conclusion of a *compromis* after the dispute arose, whereas in the context of compromissory clauses they are more likely to be regarded as an acceptable trade-off against the advantage of greater certainty afforded by institutional arbitration.

1.1 The ICSID

The case in point is ICSID, The International Centre for Settlement of Investment Disputes. The Centre was created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States which was formulated by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) in 1965. *The English Text of the Convention 575UNTS 159 1965.*

It entered into force on October 14, 1966, thirty days after the deposit of the 20th Instrument of Ratification. As June 30,1973, 65 states had become "contracting states". As indicated, the center's activity is broadly limited to investment disputes arising between states and foreign investors.

1.2 Convention analysis

Many specific limitations to its scope, to its requirements and to its rules were imposed by the Convention.

First, however, a description will be given of the principal institutional features of the Convention to stress that the fact these features are based on a treaty, rather than on the

acceptance of an arbitral system or of arbitration rules by contract, or as the result of membership of a commercial, professional or arbitrational association. The reason why the authors and sponsors of the convention felt that a treaty basis was indispensable was the unequal standing in legal terms of the respective parties, private in one case, public in the other. A large part of the Convention is accordingly devoted to the establishment of a legal framework to give effect to, and prevent the frustration of, undertakings to resort to arbitration, provided these undertakings are within the four corners of the convention. The Convention addresses itself to preventing frustration of three different elements: the institution of proceedings, the conduct of proceedings, and the recognition and enforcement of awards. In so doing, the Convention has created an autonomous, self-contained procedural system.

While leaving the parties almost unlimited freedom as regards the constitution of the Arbitral Tribunal, the Convention contains a number of provisions designed to fill any gaps in the agreement between the parties and to ensure the constitution of a tribunal despite any refusal by either of the parties to cooperate to that end. Thus in the absence of agreement between the parties regarding the number of the arbitrators or the manner of their appointment, the tribunal will consist of three members, one member appointed by each party and a third member appointed by agreement of the parties. In the case where the tribunal is not constituted within 90 days after notice of the registration of the request for arbitration by the Secretary General of the Centre, the Chairman of the Administrative Council of the Centre, a post held *ex officio* by the President of the World Bank, will at the request of the most diligent party appoint the arbitrator or the arbitrators not yet appointed.

With respect to the conduct of proceedings, the Convention deals with two problem areas. The first is that of the rules of procedure. On this point the Convention provides

that, in the absence of any agreement of the parties to the contrary, the proceedings shall be conducted in accordance with the rules adopted by the Administrative Council of the Centre in force on the date when the parties consented to the jurisdiction of the Centre, and that any matters not covered by those rules shall be decided by the Arbitral Tribunal. The second problem area with which the convention deals is that of default, *i.e.*, failure of a party to appear or to cooperate in the proceedings. The Convention provides that while default by one party does not constitute an admission by that party of the facts argued by the other party, the latter may request the tribunal to deal with questions submitted to it and render an award.

Finally, the Convention deals with a subject that can create problems even in national arbitration, much more so in international arbitration, and most particularly in arbitral proceedings one of the parties to which is a government, namely that of recognition and enforcement of awards. The Convention provides that, subject only to certain remedies under the auspices of the center specified in the convention, awards shall be final and binding on the parties, which are under obligation to carry them out. In addition, the Convention provides that all contracting states, regardless of whether they or one of their nationals were parties to the arbitration, are required to recognize awards and to enforce pecuniary obligations imposed thereby as if they were final judgments of national courts. Although equating awards with final judgments, the Convention has not gone so far as to remove the obstacle to the execution of national judgments against foreign government constituted in most countries by the concept of sovereign immunity from execution. On the other hand, it must be realized that failure by a government to comply with an award would constitute a complete violation of an international treaty which, among other things, would entitle the national government of the private party to start a suit against the unwilling government in the International Court of Justice.

This review of relevant provisions of the Convention may suffice to show the unusual degree to which states have gone in creating an institutional framework designed to assure the effective implementation of undertakings to have recourse to arbitration. These states, and particularly the developing countries, were prepared to go this far in surrendering some of their freedom of action in order to create a climate propitious to a flow of international capital, in particular from the richer to the poorer countries. It is therefore not surprising that they have carefully limited the scope of activity of the Centre, or, in the terms of the Convention, the "jurisdiction of the Centre", by reference to the nature of the dispute, the nature of the parties and the assurance of mutuality of obligation between States and foreign investors. Looked at from the investors' point of view, it is these limitations and some other requirements of the Convention which are the price to be paid for the extraordinary regime established by the Convention.[18]

The following case studies another oppressive regime which is china and the limited implementation of B.O.T contract in it.

2 The Chinese example: Conflicts between International B.O.T. Investment Contracts and current Chinese laws

In order to understand the importance of arbitration as a way to settling disputes in B.O.T. contracts, we shall analyze a case throwing light on the anomalies involving countries either developing or with oppressive regimes, especially those concerning the sovereignty issue that we previously mentioned, while implementing a B.O.T. contract.

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[18] Aron Bronche ,*World Bank: ICSID, and Other Subjects of Public and Private International Law*, Martinus Nijhoff February 23rd,1995, p. 240-243.

2.1 Conflicts with Constitution

A B.O.T. contract is a concession agreement between government and investment enterprises. According to the first paragraph of article 18 in China's Constitution which states: *"The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organizations in accordance with the law of the People's Republic of China". The Chinese subject has been limited to "enterprises or other Chinese economic organizations", and the status of the B.O.T. contract, when one of whose parties are the government has not yet been confirmed in the legal system of Chinese foreign investment. Article 8 of The Guarantee Law of the People's Republic of China stipulates that, "state organs shall not be guarantors," but in the B.O.T. investment contracts, government often provides operation period guarantee, project service guarantee, non-competition guarantee, foreign exchange and outward guarantee, etc...*

A certain perspective suggests that the government's guarantee in the B.O.T. mode is a promise to the investor, showing the host government's willingness to accept the responsibility established in the B.O.T. Project Concession Contracts, in order to ensure the success of the process and the transfer of the B.O.T. project, and it is different from that stipulated in the Chinese Guarantee Law. In the B.O.T. mode, when concluding a concession contract with the project investor, the guarantee given by the host government for that project is actually the cost of taking back project facilities without compensation at the expiration of the concession period, instead of providing commercial credit for the implementing of the main contract in the guarantee relation. Therefore, provisions regarding common guarantee are not applied to the government guarantee in the B.O.T. contracts.

This perspective has not yet obtained acceptance by the Chinese legislative or judicial organs for conflicts with other Chinese laws.[19]

3 Analysis on Chinese dispute settlement Via The international conventions

There are mainly three dispute settlement modes, consultation, arbitration and lawsuit. Some believe that the B.O.T. Investment Contract, which is a domestic contract, in accordance with the Closest Connection Principal of Conflict Rules, should be decided not by foreign but by domestic courts. Here, authors have different opinions since Disputes of International B.O.T. Investment Contracts are transnational. Article 18 of the Convention Establishing the Multilateral Investment Guarantee Agency (**Seoul Convention**) stipulates that the host country shall accept that the investment guarantee agencies of investment states are entitled to exert subrogation right on debtor. Because of the establishment of the Multilateral Investment Guarantee Agency (MIGA), in accordance with this Convention, private investors' right of claim comes under international organs. Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**Washington Convention**) stipulates that the International Rules shall be applied to investment dispute settlement between citizens at home and abroad. The Convention also makes a clear stipulation on the award effect of the Arbitration Centre on the disputes, affirming that the award given by the Arbitration Centre shall be the final award to which both parties must abide, and not oppugned in the contracting country's courts. For example China joined the above two Conventions respectively on April 30th, 1988, and July1st, 1992, without any reservation.

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[19] Hans van Houtte ,*The Law of International Trade* and *Settlement of B.O.T.*: 18, 1995, p, 407-408 , *Investment Contract Disputes in China*. Author Xiaoliang Jiang. Translator Ting Fei.

The rights and obligations of the local government and the investment enterprises are equal when concluding B.O.T. investment contracts. From start to finish, both parties follow the path of negotiation on equal terms. As a result, the status of both parties involved in the settlement of a BOT investment dispute is equal. If arbitration is chosen as the way to settle disputes, each party shall enjoy coequal rights, carry out relevant obligations, and be bound by the award. The host country shall not accept the theory of "Public Order Reserve" as an excuse to nullify the force of award. As one party to the dispute, if the contracting government does not accept the award, then it fails in the obligation of abiding by the conventions.

In view of the conflicts between International B.O.T. Investment Contracts and Chinese laws, in order to avoid Chinese courts nullifying awards by applying their laws, we suggest contracting parties should choose a third-party Arbitration Committee to settle the B.O.T. contract disputes.

The second matter of major importance is that arbitration be commenced by filing a request for arbitration or by resort to a previous agreement for arbitration.

4 Enforcement of Awards

The arbitral award is binding on the parties because they agreed not only to submit any dispute to arbitration but also to accept the arbitration award. In most cases the arbitration award is voluntarily executed; it seldom happens that the losing party refuses to give effect to the award. If this refusal is unfounded the award must be enforced. However, if the losing party has well-founded legal objections to the arbitration award, the award may be challenged.

4.1 Voluntary Execution

Parties are deemed to be bound by the arbitral award "unless the award has been annulled". Many arbitration rules states this explicitly. Often the loosing party gives effect to the arbitral award voluntarily. There is frequently social and commercial pressure from the commercial sector to abide by the arbitration award and enterprises known for defaulting on arbitral award loose credibility. However, the arbitral award can be enforced where necessary through a court order.

4.2 Enforcement in the country of the seat

It sometimes happens in international commercial arbitration that the award must be enforced in the country of origin that is to say in the country of the seat of arbitration. This requires ratification of the award by a court for enforcement. By this ratification the court grants the arbitral award the same status as a judicial order; the arbitral awards can be enforced in the same way as a court order. The court only confirms the award after some examination of the arbitral procedure and of the award .This examination is in most countries rather superficial, but in some countries the court carries out a more thorough examination. It is therefore worthwhile to find out what the law of the seat says on the requirements and procedure for enforcement.

International commercial arbitration usually has its seat in a neutral place that is to say in a country different from those of the parties. In such a case enforcement in the country of the seat is often excluded as there are no assets of the loosing party in that country. When the award has to be enforced this must be done somewhere else, for instance in the country where the losing party is established.

4.3 Enforcement outside the seat of arbitration – New York Convention

Enforcement of an award in a country other than that of the seat in generally regulated by international treaties. The most important treaty in this respect is The New York Convention (1958) on the Enforcement of Foreign Arbitral Awards. This convention is enforced by about eighty states. Some of these countries apply the convention only when the award is made in a state that is also a signatory to the convention; other states apply the Convention to the enforcement of any foreign award, no matter where the award was made.

4.4 General Law

Permission for enforcement can also be sought under domestic law. This is the only way in countries where there are no convention facilities available. Moreover, national law often proves to be a useful source in countries with an arbitration statute with less stringent rules than the New York Convention [20]

4.5 Waiving the right of immunity

The Parties announce and guarantee that their contract is a commercial agreement, not a public or governmental act, so each of the parties waives the right to claim immunity from lawsuits with respect to itself or any of its assets on the grounds of sovereignty or otherwise under any law or in any jurisdiction. Each of the parties is restricted by civil and commercial law with respect to its obligations of the contract, and the conclusion and performance of this contract by each party constitutes private and commercial action but not the government's public action. Each of the parties presents evidence that the contract is a commercial activity, not the government's public activity. No party is entitled to

[20] Ibid

claim immunity from legal proceedings for itself or for any of its assets on the grounds of sovereignty or otherwise under any law or in any jurisdiction where an action may be brought for the enforcement of any of the obligations arising under, or relating to, the contract.

If either of the parties or any of their assets enjoy, or may afterwards acquire, any right to immunity from offset, legal procedure, detainment prior to judgment, other detainment or execution of judgment on the grounds of sovereignty or otherwise, such a party irrevocably waives such rights to immunity in respect of its obligations arising under or relating to the contract it is party to.[21]

The following case shows, the degree of transparency and efficiency in all matters of B.O.T implementation and Arbitration. All procedures vary from one country to another, one regime to another or one administrative entity to another.

4.6 Case study (Morocco)

Introduction

Morocco has a surface area of 447,000 km2, a population of 29.9 million in 2004, and an average population growth rate of 1.8% per annum over the 1990-1999 period, which decreased to 1.4% by 2004 (2.07% in urban areas versus 0.59% in rural areas). Its growth in domestic production was 5.2% during the 2002-2003 periods, and the per capita growth was 3.6% during the same period. The urban population of the country accounts for almost 16.5 millions, and this is expected to increase rapidly mainly due to the growing migration from the rural areas. This situation has created mounting pressure on the cities, which have not been able to cope with the demands in terms of services and infrastructural development. In terms of water supply, all of the urban population has

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[21] Maurice Way, *Essential Business Law: Arbitration*, London: Sweet and Maxwell, 1980.

access to drinking water. However, sanitation facilities are in the order of 58%, a percentage which has not varied during the last decades. During the 1990s, after a decade of successful macroeconomic stabilization, progressive economic liberalization, and deregulation of the economy, a program for private sector development was launched in Morocco. The basis for this privatization program lay in the Privatization Law, adopted in 1989, with an arbitration center offering its different services to the business community, to all business enterprises, to all private and public institutions, and to the government.

Two different sets of rules apply in arbitration:

- *The Optional Conciliation Rules, and*
- *The Arbitration Rules.*

With a list of 113 firms to be privatized by the end of 1998, after a slow start, the program was implemented in 1993, tallying 15.3 billion dirhams (DH) (of which 13.1 billion DH accrued to the government budget), with 52 EPICS (établissements publics à caractère industriel et commercial) and 125 of their subsidiaries privatized by 1998. The large number of enterprises which have been privatized has resulted in insignificant fiscal revenues (World Bank, 1999).

During this very active phase of privatization (1993-1997), there was an average of ten companies privatized per year. The country allocated significant resources, including the creation of a new Ministry dedicated to the task of privatization, which received additional support from donors. By relying on consulting firms and investment banks, the Government leveraged these resources. This privatization process provided the impetus regarding the water sector, so the concession for the public service for water supply and sanitation for Casablanca was granted by direct B.O.T. contract to Société Lyonnaise des Eaux for a 30- year period, without competitive bidding.7 The explanation advanced to national operators to justify this direct contract was that no local enterprise or group

of enterprises had the size or experience necessary to provide such a public service. In addition, the concession for the public service for water for Rabat was awarded by direct contract. However, the contract for the construction and use of the Port of Tangier, covering a 50-year period, was launched through international competitive bidding. Similarly, a concession was granted for the management of water and electricity in Tangier in 1999 following international competitive bidding (The World Bank,1999).In this case the losses in terms of water distribution in 2000 were 43 million dirhams and 10.5 million dirhams in 2001. For sanitation, the losses for 2001 were 2.5 million dirhams. In 2000, there was a provision for 33 million dirhams. It was estimated that for the end of the year 2002, there would be a profit of 8-9 million dirhams. The Government is well aware of the challenges imposed on Morocco by these privatization processes. It has realized that the introduction of arbitration as a way to settle disputes, procedures and new bidding documents, combined with the decentralized nature of procurement, requires the implementation of training programs so that agents can learn the skills needed to discharge their contract administration responsibilities. Moreover, past experience has shown that the degree of transparency and efficiency in procurement varies from one administrative entity to the next. Training of officials in charge of procurement and contract administration at both the operational and control levels will consequently be extremely important in all terms.

Accordingly one should look at the issues arising in dispute settlement as they will present themselves to an investor and a government or governmental entity seeking to arrive at an agreement for the settlement of possible future disputes. Submission of such disputes to national courts is most unlikely to be acceptable to either side. The investor will not wish to submit to the jurisdiction of the host country whereas the host country will be reluctant to accept the jurisdiction of any foreign court, and it is commonly known

to accept arbitration to settle disputes. Such acceptance will moreover be of value since awards do not risk being frustrated by a plea of sovereign immunity from jurisdiction.[22]

[22] Public-Private Partnership: case study from Morocco [document on-line] (accessed in March 2007), available at www.thirdworldcentre.org/morocco,2000; Internet.

CHAPTER IV: Lebanese Arbitration

In Lebanon, arbitration is applied to most types of disputes arising out of civil, administrative or commercial contracts, whether internal or international.

Arbitration has even permitted in administrative contracts since the Lebanese law N°440 dated 29 July 2002 expressly authorized the public legal entities (state-municipalities and public establishments) to include arbitration clauses in their administrative contracts (such as concessions and public works and BOT contracts).

Parties wishing to refer their disputes to arbitration have a choice between *ad hoc* arbitration in which the process will be administered by the arbitrators themselves and *institutional* arbitration in which the parties will designate an institution, such as the Lebanese Arbitration Center (LAC), to administer the arbitration process.

1 The Lebanese Arbitration Center

The Lebanese Arbitration Center (LAC)is the sole institution that provides administration and monitoring of services for arbitration proceedings in Lebanon, and it has been active in that field since its establishment in 1995.

The Lebanese Arbitration Center (LAC) offers its various different services to the business community, to all business enterprises whether or not they are members of the Chambers of Commerce and of Industry and Agriculture, to all private and public institutions, and to all governmental institution.

Two different sets of rules apply in arbitration:

- The Optional Conciliation Rules, and
- The Arbitration Rules

The (LAC) recommends that all parties wishing to make reference in their contracts to arbitration under the Center's Rules should use the following standard arbitration clause:

"All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration at the Beirut Chamber of Commerce and Industry by one or more arbitrators appointed in accordance with the said rules. The contracting parties declare accepting the provisions of the said rules and undertake to abide by them."

It might also be useful for the parties to stipulate in the arbitration clause itself the number of arbitrators, the law governing the merits, the seat (or place) and language of the arbitration.

A party wishing to have recourse to arbitration under the Lebanese Arbitration Center's Rules shall submit its Request for Arbitration to the Secretariat of the Court of Arbitration.

The Request for Arbitration shall *iter alia* contains the following information:

a) Names in full, description, and addresses of the parties,

b) A statement of the claimant's case,

c) The relevant agreements, and in particular the agreement to arbitrate, in addition to such documentation or information as to clearly serve to establish the circumstances of the case,

d) All relevant particulars concerning the number *of* arbitrators and their choice.

The Secretariat General sends a copy of the request and the documents annexed thereto to the respondent, who has to submit to its office his answer, and if he so wishes his counterclaim, within 30 days. It is important to note that if one of the parties refuses or fails to take part in the arbitration process, the arbitration will proceed notwithstanding such refusal or failure, provided that the Court of Arbitration is satisfied of the *prima facie* existence of an agreement for arbitration between the parties.

The Center oversees the arbitration process and, among other things, is responsible for

the following:

- First: appointing arbitrators or confirming, as the case may be, arbitrators nominated by the parties.
- Second: Deciding upon challenges of arbitrators;
- Third: Fixing and extending time limits;
- Fourth: Scrutinizing and approving all arbitral awards;
- Fifth: Fixing the arbitrators' fees taking into consideration the amount in dispute and on the basis of a published scale attached to the LAC Rules.

No award shall be signed until it has been approved by the Court as to its form. Before signing an award, whether partial or final, the arbitrator shall submit it in draft form to the Court of Arbitration for scrutiny. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance.

Scrutiny is a fundamental characteristic of institutional arbitration ensuring that arbitral awards are of the highest possible standards and thus less susceptible to annulment in the national courts than they might otherwise be.

In fact, in the eleven years during which the LAC has been monitoring arbitrations and Scrutinizing arbitral awards, there has not been one arbitral award rendered under the LAC Rules which has eventually been annulled.[23]

The award is considered as final and binding; it may receive immediately the Exequatur of the judicial authorities.

It should be noted that by submitting the dispute to arbitration by the LAC, the parties shall be deemed to have undertaken to carry the award without delay and having waived their right to any form of appeal insofar as such waiver can validly be made.

Furthermore, although arbitral awards may be challenged before the Court of Appeal by

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[23] Lebanese administrative law "law N°440 dated 29 July 2002", published in the Official Journal, issue number 43 on 1/ 8/ 2002.

way of "recourse in annulment" (in conformity with article 800 of the Lebanese Code of Civil Procedure), the grounds of challenge available against arbitral awards are limited. The role played by the Lebanese Arbitration Center is very important in ensuring that the arbitration process progresses rapidly and efficiently until a binding final award is rendered\ without the need for recourse to local courts.

1.1 Other activities of the Lebanese Arbitration Center

In addition to providing high-quality administration and monitoring services for arbitration proceedings, the LAC has been very active in organizing seminars and conferences targeting lawyers, judges and jurists as well as heads of companies, business executives and chartered accountants, to familiarize them with arbitration (and alternative dispute-resolution methods in general) so that they may appreciate its numerous advantages and thus more readily have recourse to arbitration as a means of resolving their disputes.

The LAC is also considering new approaches in order to further promote the practice of arbitration, such as organizing training workshops for people interested in becoming arbitrators, establishing practical guidelines dealing with the arbitration process. starting a newsletter, etc.

The success of the LAC is primarily due to the efforts of the Chamber of Commerce, Industry and Agriculture of Beirut and Mount Lebanon with the cooperation of the Chambers of Commerce, Industry and Agriculture of Tripoli, Sidon and Zahle, as well as other associations such as the Bankers Association, the Beirut Traders Association, the Insurance Companies Association and the Syndicate of Construction and Public Works Contractors.[24]

[24] Article 800 of Lebanese Code of Civil Procedure (20/06/1996).

2 The Enforcement of International Arbitral Awards in Lebanon Via The Lebanese Legal System

To begin with, it is worth noting that Lebanon is a country open to foreign investments especially by multinational companies and notably those involved in the services and tourism sectors. This situation has imposed on the Lebanese Government the obligation for providing the investors with the appropriate and necessary legal infrastructure and of making sure that they are respected.

Accordingly, an effective dispute settlement tool is thought to be essential to motivate foreign investment, especially if it originates from a country having different legal provisions from those adopted by the Lebanese Government, arbitration comes to play a leading role in this domain. As a result, in 1983 the government introduced modern arbitration legislation into its judicial system known as the Arbitration Act of 1983. *According to article 809 of the Lebanese Code of Civil Procedure L.C.C.P* "Arbitration is international if it involves international commercial interests."

The Lebanese system distinguishes between local and international arbitration, in the sense that one may encounter more flexibility and less restrictions in the chapter of the L.C.C.P pertaining to the international arbitration.[25]

2.1 The 2002 amendment

In 2002, Lebanese legislators passed a law amending some of the articles of the LCCP related to arbitration (the amendment). This was considered an important milestone for Lebanon adopting arbitration as one of its main means of settlement of disputes, notably international ones. An example of the intervention of the Lebanese legislature may be seen on 17/7/2001 when the Lebanese Conseil d'Etat had rendered two verdicts

[25] Article 809 of the Lebanese Code of Civil Procedure, the amendments brought by the Law n. 440 dated 29 July 2002.

concerning the contracts of the two cellular phone companies operating in Lebanon: Cellis and Libancell. In this case, the Lebanese Government had cancelled the two arbitration clauses in its contracts with the companies, and reaffirmed that its jurisdiction relating to the administrative contracts as passed by the Government couldn't be challenged.

It is worth noting here that the Lebanese legislation is not only well known to be influenced by with the French law but also with French doctrine and case law.

The amendment introduced by the Lebanese legislators in 2002 did dissipate the investors' concerns about the legal guarantee for the contracts they would sign in with the Lebanese state. This became notably important especially as the arbitration clause turned out to be a major guarantee for investments. In addition, and in the light of what the Conseil d'Etat had issued concerning verdicts canceling the arbitration clauses stipulated in the two companies' contracts, the new amendment came to confirm that it was rightfully applying the law that needed to be amended.

The amendments brought by the Law n. 440, dated 29 July 2002, explicitly recognized the ability of the state and its public institutions to enter into domestic and international arbitration, and made administrative contracts arbitrable and subject to international arbitration rule and procedures, and made administrative contracts arbitrable subject to the authorization of Council of Ministers[26].

This has greatly strengthened confidence in the Lebanese legal system in general and specifically in connection with arbitration.

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[26] Lebanese administrative law "law N°440 dated 29 July 2002". Published in the Official Journal, issue number 43 on 1/ 8/ 2002.

2.2 *The recognition of International Arbitral Awards and the Mechanism of Enforcement*

2.2.1 Conditions:

According to article 814 of the Lebanese Code of Civil Procedure related to International Arbitration, arbitral awards can only be recognized and granted proper enforcement if their existence is recognized by the parties concerned and if they are not obviously contradicting international public order.

Before further elaboration, it is worth mentioning that a basic distinction is to be drawn between recognition and enforcement. Recognition is incidental and could materialize during a trial or a proceeding which has no relation with the issue or conflict between the parties. This could be raised in the form of a claim or defense against the other party, whereas enforcement is considered an independent procedure and is always judged essential to give the issued award its effectiveness.

Thus, with reference to Article 814 of the L.C.C.P, two conditions are required for recognition and enforcement of an award:

2.2.2 The existence of an award must be proved:

Article 814 (sec2) clarifies the way awards may be proved. First, the original or a certified copy of the award must be presented together with the original or certified copy of the arbitration agreement. Second, if the award and the agreement to arbitrate are drafted in a foreign language, as often happens notably when an award issued abroad by an arbitration institution is involved, the two documents must be translated into the Arabic language by a certified translator.

2.2.3 There must be no obvious violation to international Public Policy:

At this stage, it must be proved that there is no obvious violation to international public policy , the rationale behind this step implies only a rapid examination by the competent judge of the documents in question. The in-depth revision and control is reserved to the court of appeal[27].

2.2.4 Procedures

Article 815 of the L.C.C.P refers back to articles 793 and 797 of the same code, which in their turn are related to national arbitration. Hence, according to Article 793, once the award has been issued, in order to obtain an enforcement order for it, one of the arbitrators or the more diligent party must deposit a draft of the decision, accompanied by a copy of the arbitration agreement, with the clerk of the court of first instance in the jurisdiction of which lies the agreed seat of arbitration. If for some reason this is not possible, the above mentioned documents may be delivered to the clerk of the court of first instance of Beirut.

The arbitrator should attach his signature to the copy deposed with the draft noting that the copy conforms to the original. This authentication may also be as well be performed by another competent authority (official) or by the chief clerk of the court.

Following a proper delivery procedure, a report must then be prepared by the clerk confirming the date of the award presentation to be delivered later for enforcement. After reviewing and examining the draft of the arbitral award and the agreement for arbitration, the President of the Court of First Instance where the award has been presented grants the enforcement order.

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[27] Article 814 Lebanese Code of Civil Procedure: LCCP (20/06/1996).

In the case of the arbitration process taking place abroad, a certified copy of the original arbitral award must be presented in order for it to be registered and for authority to enforce it to be obtained. In the cases where the dispute has to abide by the jurisdiction of the administrative courts, the execution order emanates from the President of the Council of State. The event of refusal of such an order, appeal against refusal could be claimed under the section for reclamations[28]

2.3 Setting Aside International Awards

In Lebanon, foreign and international awards are not subject to appeal, or to any other method of juridical review, including their being set aside.

"No recourse can be lodged directly against international arbitral awards issued abroad either by appeal or by annulment, because article 819 of the L.C.C.P provides that: an international arbitral award issued in Lebanon may be subject to annulment, and this means that international arbitral award issued abroad cannot be subject to such means of recourse, So the only way left for the parties is to make an appeal against the decision granting leave to enforce under specific conditions provided by law."[29]

Beirut court of APPEAL, 3rd section n°_ 1011/2000-3/4-/2003

An action for setting aside the award may be undertaken in Lebanon only for international awards rendered in Lebanon

"Since in many countries of the world, the setting aside of the award in the country where the arbitration was held shall (or at least may) lead to refusal of exequatur in the country where enforcement is requested (based on the mechanisms stipulated by the New York Convention itself), for example, this setting aside procedure organized under Lebanese Law seems particularly important" .An action for an award rendered in

[28] Article 815 Lebanese Code of Civil Procedure: LCCP (20/06/1996).
[29] Article 819 Lebanese Code of Civil Procedure: LCCP (20/06/1996), par, 2.

Lebanon to be set aside must be presented to the court of appeal in the jurisdiction in which the award was made within 30 days after the award notification day.

Failing to respond to such notifications could result in the award being set aside at any time without any time limits for enforcement. The grounds for setting aside an international award rendered in Lebanon, as provided in article 819, of the L.C.C.P examined within article 817 are five:

1. The arbitrator decides in the absence of an agreement to arbitrate or on the basis of a void or expired agreement.
2. The arbitral tribunal is irregularly appointed.
3. The arbitrators decide in a manner incompatible with the mission given to them.
4. Due process or fair hearing is not being respected.
5. The award is contrary to international public order.

These same five reasons mentioned above are to be invoked in the case of refusal of enforcement.

"These reasons seem to conform to the international trend in the field of arbitration and to confirm that the control of Lebanon jurisdictions over international arbitration awards seems very liberal. Thus it is obvious that most of these grounds (the first three, specifically) are mainly motivated by the desire to respect the intention of the parties. As to the last two grounds, they are considered as fundamental in all countries of the world, the first being considered as necessary for respecting the function of arbitration as real justice (due process) and the second for protecting the essential notions of the country concerned (international public policy)[30]

[30] Beirut Court of Appeal, 3rd section, decision n°: 1011/2000-3/4-/2003.

2.4 Means of Recourse against Judicial Review

Contrary to what has been discussed above, the possibility of setting aside an award in Lebanon applies only to international awards rendered in Lebanon. International arbitral awards whether raised in Lebanon or abroad are subject to a unified method of juridical review, i.e they are subject to appeal only when submitted for recognition and/or enforcement. It is worth noting here that a distinction to be drawn between an appeal against a decision refusing recognition and enforcement of an award and an appeal against a decision which grants leave to enforce or recognize the award.

2.4.1 Appeal against the decision refusing recognition or enforcement:

Recourse to appeal can be brought forward in an attempt to refuse recognition or granting of the enforcement order, based on of article 816 of the L.C.C.P. Article 816 of the L.C.C. P does not however specify the court competent to receive such recourse. It is therefore by reference to article 821, of the L.C.C.P. that one may apply article 804 - paragraph 1 of the code, referred to by article 821, and which stipulates that the appeal is made and judged according to the rules of litigation followed by the court of appeal. These rules include the method for filing the appeal, for the investigation and for the decision. Since the appeal in this case does not address the award itself but rather the decision refusing to recognize the award or to grant leave to enforce it, the court role here is confined to the examination of matters related to the enforcement and recognition without any considerations regarding the merits of the case[31].

[31] Article 816&821&804 of the Lebanese Code of Civil Procedure LCCP, (20/06/1996).

2.4.2 Appeal against the decision recognizing and/or granting leave to enforce:

The losing party in an international award has the right to appeal against the decision granting the recognition and enforcement of such an award. This is mainly because and as we have previously discussed, no direct recourse can be undertaken against international arbitral award issued abroad.

The only way a losing party can act in this regard is by waiting until the other party acquires a decision from the Lebanese court granting recognition or enforcement of the award and after which it may then enter a plea against it by lodging an appeal.

The appeal is brought before the court of appeal in the jurisdiction of which the ruling was made, within 30 days following the notification of the judge's decision. Accordingly an appeal against recognition and enforcement may be undertaken provided that the award has one of the following defects:

a. Absence, nullity or expiry of an arbitration agreement.

b. Irregular appointment of the arbitrators.

c. Noncompliance with the arbitrators' mission, as defined by the parties.

d. Non respect of due process of the principle of fair hearing.

e. Violation of a rule related to international public policy.

The above reasons are the same as the reasons for setting aside awards made in Lebanon and therefore it is of utmost importance to discuss them each one separately.

2.4.2.1 Absence, nullity or expiry of an arbitration agreement

Article 817 of the LCCP raises many questions when it mentions absence, nullity or expiry of an arbitration agreement as one of the grounds for making an appeal against the

decision granting recognition and/ or leave to enforce[32]. These questions revolve mainly around how the Lebanese Judge would rule regarding the validity of the agreement.

It is worth mentioning here that the arbitration agreement is independent of the contract that includes it, due to the autonomy principle of the arbitration agreement. This consequently would lead to the fact that even if the main contract becomes null or void, the arbitration agreement remains valid and this has been consistently taken into consideration by the Lebanese Jurisprudence:

"Whereas the appellant states that the arbitral clause is void since the whole contract was not executed between the two parties, and since the contract was signed by unqualified persons, whereas it is undisputed jurisprudentially and in the doctrine that the arbitral clause is independent of the contract in which it was included; it remains in force in itself regardless of the contract in which it was mentioned. Therefore, the claims of the appellant concerning this matter shall be rejected".

2.4.2.2 Irregular appointment of the arbitrators:

In order to decide whether such violations exist or not, since the Lebanese law does not tackle this issue, the court may rule depending on article 810 of the Lebanese Code of Civil Procedure, which states the following: *"the agreement for arbitration may designate the arbitrator or arbitrators directly, or by reference to a set of rules for arbitration, or it may provide for the method of their designation."*

In addition, the court may take several aspects into consideration such as the intention of the parties, the nature of the dispute or various other factors. The following is an example of the decision taken by a court of appeal where a court of appeal took the decision (Beirut court of Appeal "Decision n.464 / 2003- 3/4/2003"):

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[32] Edward Eid, Civil procedure: Arbitration, Part 12, Lebanon: Sader publisher, 1989.

"Whereas paragraph 5 of article 8 stipulates... Whereas both parties adopted the arbitration principle organized by legal person, which is represented by Aeroswisse organization, in accordance with the system adopted by the latter. This tacitly means that they incline, as for the procedures and rules of the arbitration, to the system adopted by that legal person, including the way of assigning the arbitrators.

"Whereas the same articles state that each party has the right to request the assignment of three arbitrators instead of only one in case the value of the lawsuit exceeds one hundred thousand dollars, which means that even if the value of the conflict exceeds one hundred thousand dollars, the principle remains the same, and it is that an Aeroswises Organization shall assign one arbitrator, unless one of the parties request the assignment of three arbitrators instead of only one.

" Whereas it is clear from the documents mentioned above and from the minutes of the arbitral trial that the appellant did not object the nomination of one arbitrator only and did not request at all the assignment of three arbitrators instead.

"Therefore, it is concluded that the appellant accepts the unique arbitrator and its claim concerning what was mentioned above shall be rejected."[33]

To conclude, the court of appeal rejected the notice submitted by the appellant who used clause 2 of article 817 in an attempt to disregard the order of the executive formula.

2.4.2.3 Noncompliance with the arbitrators mission, as defined by the parties

Usually, the parties specify in their arbitration clause the nature of the dispute that might arise; accordingly, the arbitrators must then settle the precise points of law according to the parties' requirements. The court's role in this regard involves ensuring that the

[33] Beirut Court of Appeal, 3rd section, "Decision n: 464 / 2003- 3/4/2003" The *Lebanese Review of Arbitration* (2003): 26.

arbitrator did not exceed the limits of the mission for which he was appointed. The arbitrator must specifically not overstep the mission conferred upon him by the parties in the following areas: subject of the dispute, scope of the mission, and the means he can adopt to end such a mission. The Lebanese jurisprudence ha tackled this issue and recently promulgated the following:

"Whereas, the appellant claims also under this reason that the arbitrator had overstepped the mission conferred, by deciding on matters beyond or far more than what exists in the arbitration agreement, and that is deciding whether there was corruption in the goods, focusing on the transportation of previous goods also playing a role of an expert giving his opinion in technical matters...[34]

Whereas, all the claims mentioned by the appellant in matters which relates to the merits, and of how the arbitral tribunal settled the dispute are matters beyond the jurisdiction of this court because it assumes to decide on the merit of the dispute...

And no place to check all this within the frame of this recourse ...

2.4.2.4 Non- respect of due process or of a fair hearing

This ground for appeal is considered one of the most important because it is related directly to the right of the parties to have a fair trial where they can express their opinions, present their requests, remarks and the necessary evidence. This would allow them as well to freely appear in oral hearing, bring their witnesses and the documents which seem useful to advance the case. Finally this ensures their notification and involvement in all the proceedings of the trial.

"The Beirut Court of Appeal held that an ICC award may be made in absentia, not with standing the fact that the terms of reference had not been signed by the defendant, and

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[34] Edward Eid, Civil procedure: Arbitration, Lebanon: Sader publishers, 1989.

this is because the latter had been repeatedly invited to do so. Furthermore, the dates of the arbitral hearings had been notified to the losing party, the defendant. Hence the arbitrator was justified in carrying on the arbitral proceedings in the absence of the defendant". The Beirut Court of appeal also ruled by declaring that:

"*Concerning the invalid representation of the appellant since the lawyer that represented the latter does not have a power of attorney that empowers him to do so, and since he lives outside of Switzerland, it is clear after the revision of the proxy of the said attorney , submitted with its translation in the primal file, that it expressly relates to the representation of the appellant by this attorney in the legal conflict between the appellant and Eat, on one hand. The residence of the lawyer outside Switzerland, on the other hand, has nothing to do with the deprivation or not of the appellant right of defense. Therefore, all the claims of the appellant concerning the invalidity of its representation shall be rejected".*[35]

2.4.2.5 Violation of international public order:

There is an important distinction to be made here between a domestic and international public order. The notion of public order or public policy has always been ambiguous, open ended and highly varied among different states, circumstances and time spans. So what is considered appropriate in a certain state may not be so in another. However, it is well known that the international public policy rules comprise the following: the international fundamental rules of natural law, the principles of universal Justice, and the general principles of morality adopted by the nations. Hence and back to article 817 of the Lebanese Code of Civil Procedure (sec5), it is stated that the appeal will be

[35] Beirut Court of Appeal, Decision n.464 / 2003- 3/4/2003".

recognized if the decision which grants recognition and or leave to enforce violates the rules of international and not national public order.

The court of Cassation reasons that the absence of arguments in a judgment or award governed by English law does not constitute a breach of international public policy. Also in another decision the Court of Cassation decided that the Court of Appeal had misinterpreted the law in refusing an enforcement order for a judgment made abroad which had contravened public policy by lack of given notice.[36]

Therefore, and in an attempt to conclude, one could argue that if an award is issued abroad in country X and was brought to be enforced in Lebanon, and even if the award contradicts the public order of country X, it will be enforced in Lebanon because the ground upon which the enforcement of awards would be refused is when such international awards contradict international public policy and not national policy.[37]

[36] Court of Civil Cassation, 1st Chamber –" Decision n:19- 19/11/1973" *Al ADL*, (1973).

[37] Nayla Comair-Obeid , "Investment encouragement within the framework of the Lebanese experience of dispute settlement". *Lawyers for the new millennium* Beirut Lebanon, 2003.

3 Conclusion

Following the research and analysis in this thesis, the author determines the advantages and efficiency of the B.O.T contract as well as the advantages arbitration offers in such contracts to create harmony that would improve in general, the economic complex nature of both the financial and legal areas. The research methodology was according to two criteria.

The Qualitative one relied on research in books, articles and journals from international sources.

The Quantitative one revolved around interviews and seminars emphasizing the role of the subjects dealt with in this research. Relatively these criteria require accurate knowledge, strategy, and commitment by all involved parties of the project success. This methodology helped perceive that despite the complex nature, the development of infrastructure is extremely important to developing countries if they are to move ahead in the modern world, as improved performance of infrastructure services would enable rapid development and provide better access to essential services for the people.

The BOO/BOT modes of project financing are increasingly getting popular among most developing countries due to precarious finances and the lack of technological expertise within the countries. In fact, most of such countries have no correlative laws to definitely regulate the BOT Investment Contracts. The uncertain factors should be fully considered from all aspects, and the relevant BOT cases would be studied when concluding a BOT Investment Contract, in order to avoid unnecessary investment disputes. In addition, the use of arbitration was appraised in public-private contracts using examples to stress on the opinion which says " The closer the contract was to arbitration and the more exhaustive and Comprehensive the arbitration clause in the BOT Investment Contracts is,

the better for the disputes to be favorably settled."

This research also shed the light on the Lebanese system of arbitration in an attempt to show how an international arbitral award may be recognized and enforced and what means of recourse can be lodged against it inside a country that has ratified the New York Convention.

The enactment of the Lebanese Law n. 440 dated 29 July 2002 brought amendments to the New Code of Civil Procedure and established the validity of arbitration clauses in administrative contracts. These amendments can, under certain conditions, be considered a very significant approach in encouraging arbitration in Lebanon. They highlight the intention of the Lebanese Government to rebuild confidence in the Lebanese system of arbitration. This law was enacted after the confidence was jeopardized, when the Lebanese Conseil d'Etat promulgated decisions on the 17th of July 2001 concerning the highly publicized arbitration dispute between the state and the two cellular mobile phone operators. This decision considered that the arbitration clauses stipulated in the concerned BOT contracts were null and void, thus violating a basic principle of international law and international arbitration. This principle bans states and public entities from involving an alleged lack of empowerment to withdraw from an arbitration agreement. Lastly, the parties seeking to settle their disputes through arbitration can consider the Lebanese system a legal ground that can facilitate enforcing their awards with maximum flexibility and minimum restrictions.

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Annex 1:

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958)

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or

enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
a) The duly authenticated original award or a duly certified copy thereof.
b) The original agreement referred to in article 11 or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or
b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until December 31, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary- General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary- General of the United Nations and shall take effect as from the ninetieth

day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:
a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
c) A federal State Party to this Convention shall at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit of such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:
a) Signatures and ratifications in accordance with article VIII;
b) Accessions in accordance with article IX;
c) Declarations and notifications under articles I, X and XI;
d) The date upon which this Convention enters into force in accordance with article XII;
e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York, June 10, 1958; entered into force for the United States December 29, 1970, subject to declarations. 21 UST 2517: TIAS 6997; 330 UNTS 3.
Implementing Legislation Pub. L., 91-368, 84 Stat 692, 9 USC 201-208.

Annex 2:

UNCITRAL Arbitration Rules (1976)

Section I. Introductory rules

SCOPE OF APPLICATION

Article 1

1. Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

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*MODEL ARBITRATION CLAUSE

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.
Note - Parties may wish to consider adding:
(a) The appointing authority shall be ... (name of institution or person);
(b) The number of arbitrators shall be ... (one or three);
(c) The place of arbitration shall be ... (town or country);
(d) The language(s) to be used in the arbitral proceedings shall be ...

NOTICE, CALCULATION OF PERIODS OF TIME

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee=s last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the

first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

NOTICE OF ARBITRATION

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:
(a) A demand that the dispute be referred to arbitration;
(b) The names and addresses of the parties;
(c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
(d) A reference to the contract out of or in relation to which the dispute arises;
(e) The general nature of the claim and an indication of the amount involved, if any;
(f) The relief or remedy sought;
(g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:
(a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;
(b) The notification of the appointment of an arbitrator referred to in article 7;
(c) The statement of claim referred to in article 18.

REPRESENTATION AND ASSISTANCE

Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

Section II. Composition of the arbitral tribunal

NUMBER OF ARBITRATORS

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

APPOINTMENT OF ARBITRATORS (Articles 6 to 8)

Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other:
(a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:
(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;
(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;
(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfill its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

CHALLENGE OF ARBITRATORS (Articles 9 to 12)

Article 9

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:
(a) When the initial appointment was made by an appointing authority, by that authority;
(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

REPLACEMENT OF AN ARBITRATOR

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

Section III. Arbitral proceedings

GENERAL PROVISIONS

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

PLACE OF ARBITRATION

Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

LANGUAGE

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENT OF CLAIM

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:
(a) The names and addresses of the parties;
(b) A statement of the facts supporting the claim;
(c) The points at issue;
(d) The relief or remedy sought.
The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

STATEMENT OF DEFENCE

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may

make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

AMENDMENTS TO THE CLAIM OR DEFENCE

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

FURTHER WRITTEN STATEMENTS

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

PERIODS OF TIME

Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

EVIDENCE AND HEARINGS (ARTICLES 24 AND 25)

Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

INTERIM MEASURES OF PROTECTION

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

EXPERTS

Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

DEFAULT

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his

statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

CLOSURE OF HEARINGS

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

WAIVER OF RULES

Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

Section IV. The award

DECISIONS

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

FORM AND EFFECT OF THE AWARD

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

INTERPRETATION OF THE AWARD

Article 35

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

CORRECTION OF THE AWARD

Article 36

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

ADDITIONAL AWARD

Article 37

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

COSTS (Articles 38 to 40)

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
(b) The travel and other expenses incurred by the arbitrators;
(c) The costs of expert advice and of other assistance required by the arbitral tribunal;
(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such

costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

DEPOSIT OF COSTS

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.