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Frank Stuart Dethridge Memorial Address

OPPORTUNITIES IN MULTIPARTY MARITIME ARBITRATION

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I cannot tell you how honoured and privileged I feel to have been asked to give this address in memory of a great maritime lawyer and in the footsteps of my illustrious predecessors who have delivered this opening address.

I have not had the honour of having known Frank Dethridge personally, but I have – if I may use a modern day term – ‘googled’ Frank. I can only say I am truly sorry to have missed the opportunity not only to meet such a learned, wise and considerate visionary but also to have worked with him. It was only in 1979, some three years after Frank Dethridge’s untimely death, that the occasion arose for me to instruct an Australian maritime lawyer to arrest a fleet of ships in Australian waters with the gratuitous assistance of the RAAF.

It was in that ‘hip town’ in Australia, otherwise known as Brisbane, where I grew up. A vivid recollection I have of my time in Brisbane is of a visionary address in 1964 by Sir Garfield Barwick, Australia’s then Minister for External Affairs and later its Chief Justice. In that address he said that Australia should give priority to its geographic environment and realise that its long-term future was with Asian countries. This was visionary because when you look at developments since then, there can be no doubt that Australia’s principal trade is with Asia. The same is true of New Zealand given that six of its current top 10 trading partners are Asian.

The state of international trade today, with Asia featuring in a central role, has prompted studies into the revival of the ‘Silk Road’, the ancient trade network linking Asia, the Mediterranean, North-East Africa and Europe.¹

The re-awakened ‘New Silk Road’ has resulted in significantly increased oil flows between the Middle East and China from 0.7 billion in 1999 to 4.1 billion QBTU (Quadrillion British Thermal Units – standard measure for total energy usage; 100 000 megawatts equate roughly to 3 QBTU) in 2009. It has also seen a rise in trade flows between the Middle East and China of US\$109 billion within 14 years with CAGR (Capitalised Annual Growth Rate) of 20 per cent and 28 per cent respectively.²

The trade flows are projected to grow at least three times by 2015.³ This is also reflected when you look at the growth in the number of direct flights each week between the Middle East and China in comparison to the number of direct flights between the Middle East and the US within the last 10 years.⁴

How does shipping feature in all of this?

The answer: it is central. North Asia accounts for more than three-quarters of global container throughput, and as was recently pointed out by Australia’s Attorney-General, Mr. Robert McClelland, Australia uses the sea to transport 99 per cent of the country’s exports. New Zealand’s appears to be of the same magnitude.⁵

As for Australia, in terms of value, the total nominal value of the seaborne trade between Asia and Australia in 2009 amounted to approximately US\$175 billion with a total tonnage carried of about 709 billion metric tons.

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¹ See Appendix image 1.

² See Appendix image 2.

³ See Appendix image 3.

⁴ See Appendix image 4.

⁵ See Appendix image 5.

All the major container carriers service Australia with the three largest being Maersk, MSC and CMA/ANL. As for the major bulk carriers, they all appear to be Asian, namely China Cosco, Japanese carriers and Hanjin.⁶

The total nominal value of the seaborne trade between New Zealand and Asia in 2009 amounted to approximately US\$19 billion with the total tonnage carried of about 16.5 billion metric tons. Interestingly, most of this went through Melbourne, which is fast developing into the port hub for New Zealand's exports to Asia. New Zealand is the largest dairy exporter in the world and China is its second largest trading partner with two-way trade in 2009 alone totalling US\$9.4 billion, with New Zealand exporting largely dairy products, timber and wool.

Approximately 10 carriers have dedicated Australia and New Zealand services, including Maersk, CMA/ANL, China Cosco, MOL, NYK, Tasman Orient Lines, Hamburg Sud, MISC and MSC. Others, like OOCL, HPL and PIL have New Zealand services that are part of a long-haul service such as the Europe/Americas service.⁷

Similarly, the New Silk Road has also begun to extend into Africa.⁸

It is no coincidence that this growth in trade, investment, transportation and maritime-related activities has inevitably brought with it an increase in disputes with parties increasingly opting for resolution by arbitration in the Asia-Pacific region.⁹ In 2007, Asia was the seat of 70 per cent of global reported cases. Thus, the emergence of two major arbitral centers, one in South-East Asia, namely the Singapore International Arbitration Centre, the other in East Asia, namely the Hong Kong International Arbitration Centre, and the opening of the new Australian International Dispute Centre in Sydney as well as the establishment of the Singapore Chamber of Maritime Arbitration to deal specifically with maritime and transportation disputes.

The legislature in a number of jurisdictions has at the same time either passed or is about to pass arbitration legislation putting in place the necessary modern framework for the efficient conduct of arbitral proceedings. Examples include the Australian *International Arbitration Amendment Act 2010* (Cth) which received Royal Assent on 6 July 2010,¹⁰ Singapore's *International Arbitration (Amendment) Act* which came into force on 1 January 2010,¹¹ the impending amendments to Hong Kong's *Arbitration Ordinance* cap 609 as well as India's *Arbitration and Conciliation Act 1996*. New Zealand has the singular distinction of being the first to have based its most recent arbitral legislation on the 2006 revised text of the UNCITRAL Model Law on International Commercial Arbitration.

Asia-Pacific now accounts for a significant major part of the world's economy and with the growth in arbitral venues in Asia-Pacific, the opportunity has arisen, I would suggest, for arbitral institutions to take another look at their rules to address and perhaps provide a workable framework for one of the major issues which has of late frequently arisen in international and maritime arbitrations: the joinder of, or intervention by, third parties absent consent by the parties to the arbitration agreement.

In a dispute in which I was recently involved as arbitrator, the claimant had sub-chartered a vessel from the respondent, which had in turn chartered the vessel from a third company 'A' on essentially back-to-back terms. The arbitration clause contained in the charterparty between the claimant and the respondent provided for arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC') and for English law to apply. The headcharter, between the respondent and A, had an arbitration clause which, however, provided for arbitration in a jurisdiction other than Singapore. Importantly, this rules out consolidation.

The dispute arose because the respondent had apparently failed to pay part of the hire to A under the headcharter. A, in the purported exercise of a lien it claimed it was entitled to exercise under the headcharter, consequently demanded payment from the claimant of all and any outstanding and future hire owed by the claimant to the respondent.

The respondent, apart from agreeing to the claimant making payment of hire directly to A, did not confirm the amount of hire due to it from the claimant. The claimant accordingly commenced arbitration proceedings against

⁶ See Appendix image 6.

⁷ See Appendix image 7.

⁸ See Appendix image 8.

⁹ See Appendix image 9.

¹⁰ This amended the *International Arbitration Act 1974* (Cth).

¹¹ This amended the *International Arbitration Act* (Singapore, cap 143A).

the respondent in Singapore for a determination essentially of the amount of hire due and payable by the claimant to the respondent. Significantly, the amount which the claimant claimed to be due and owing by it to the respondent was substantially less than the sum A asserted as being due and owing. Significantly as well in these arbitration proceedings, the respondent did not participate. The result was that for the purposes of determining the amount of hire due from the claimant to the respondent, the tribunal could only consider such evidence as was adduced by the claimant. To address this, A, notwithstanding that it was not a party to the arbitration agreement between the claimant and the respondent, applied to be joined as a party to the proceedings pursuant to Rule 24(b) of the then SIAC Rules, which vested the Tribunal with ‘the power to allow other parties to be joined in the arbitration with their express consent’.¹²

The claimant did not consent to A being so joined and the question that arose was whether the wording of SIAC Rule 24 was sufficiently wide to allow joinder of A on A’s application alone and solely on the basis of A’s consent. On its face, a literal reading of the provision supported such an extensive interpretation.

However, the difficulty with accepting such an interpretation – as has been eruditely surmised by a highly respected international arbitrator – is that ‘Like consummated romance, arbitration rests on consent’¹³.

At its very heart, arbitration is a product of contract and parties can therefore only arbitrate if they agree to do so. So could a third party on its own motion be permitted to participate in arbitral proceedings arising from an arbitration agreement to which it was clearly not a party and against the wishes of a party to the arbitration agreement?

National arbitration legislation is more often than not of little assistance on such joinder and intervention issues. Singapore’s *International Arbitration Act*¹⁴ reflects this. Australia’s recently reformed international arbitration legislation¹⁵ and New Zealand’s international arbitration legislation¹⁶ do not appear to address this particular issue either.

However, there are countries in Europe which have provided in their respective arbitration legislation for third party intervention. In Belgium, the issue is specifically addressed in Article 1698 of the Belgian *Judicial Code*, which provides for any affected party to be able to request the arbitral tribunal for leave to intervene in the arbitral proceedings. The intervention, however, requires an arbitration agreement between the third party and the parties to the dispute and the arbitral tribunal, which if it comprises more than one, must unanimously consent. Article 1045 of the Dutch *Code of Civil Procedure* contains a similar provision.

However, these provisions only partly address the issue. Another way of looking at these provisions is that they do not address the crux of the problem at all because even without such provisions in arbitration legislation, if all parties have agreed and signed an arbitration agreement, then joinder by any of the signatories is certainly permissible.

Interestingly Italy stands out as the only State, at least in Europe, which apparently provides in its legislation for a third party to join by way of intervention in circumstances where doing so is considered ‘necessary by law’ and even though the original parties to the arbitration proceedings do not consent.¹⁷

So national legislation not generally being of much assistance, what of the rules of arbitration institutions or associations?

A review of these arbitration rules reveals that most still reflect the traditional bipolar structure of arbitration of one claimant and one respondent or provide in the case of multi-party arbitration for a simplified concept of division into two categories, that is, of a claimant group on one side and a respondent group on the other. These, however, do not cater for multi-polar disputes involving multiple parties with divergent interests as have been

¹² The Singapore International Arbitration Centre, in its Arbitration Rules (which came into effect as recently as on 1 July 2010), has clarified the wording of Rule 24(2) and opted for the conservative narrow approach requiring consent. The provision now reads as follows:

A Tribunal shall have the power to upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties.

¹³ William Park, ‘Non-Signatories and International Contracts: An Arbitrator’s Dilemma’ in Belinda Macmahon (ed), *Multiple Parties in International Arbitration: Consent, Procedure and Enforcement* (Oxford, 2009) 1.

¹⁴ *International Arbitration Act* (Singapore, cap 143A, 2009 rev ed).

¹⁵ *International Arbitration Act 1974* (Cth) s 24.

¹⁶ *Arbitration Act No 99 1996* (NZ) sch 2 s 2.

¹⁷ *Code of Civil Procedure* (Italy) art 816. See also Giorgio Bernini, *Italian law of arbitration* (10 November 2009) International Council for Commercial Arbitration <http://www.arbitration-icca.org/media/0/12571315850070/bernini_arbitration_italy.pdf>.

emerging in recent years. Consequently, from the arbitral institution's perspective, the answer to the question of whether a third party applying on its own motion could be permitted to participate in arbitral proceedings without consent of the original parties would generally be a categorical *No*.

Arbitration institutions have by and large had less difficulty in providing for consolidation of arbitral proceedings without consent of parties. Rule 14(b) of the London Maritime Arbitrators Association Terms (2006) permits tribunals to direct consolidation of two or more arbitrations where these appear to raise common issues of fact or law and consolidation is in the interest of fairness, economy and expedition. In the main however, institutions have refrained from providing for joinder of or intervention by third parties absent consent.

The London Court of International Arbitration Rules permit, in Article 22.1(h), the joinder of a third party on the application of one of the original parties to the arbitration. This is provided the applying party and the third party consent to the joinder. Consent of the other original party to the proceedings is apparently not required.

The one maritime arbitration institution addressing the issue of joinder of a third party is the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange Inc. Its rules permit third parties to apply for joinder on their own accord, but for such joinder to be permitted, consent of all parties is required.¹⁸

However, this seems to be as far as the institutions or trade associations, with one exception, are prepared to go. New York's Society of Maritime Arbitrators Inc Rules do not address joinder. Neither do the rules of the Singapore Chamber of Maritime Arbitration, AMTAC or MLAA NZ.

The one exception, although not drafted specifically for maritime arbitrations, is in the Swiss Rules of International Arbitration ('Swiss Rules'). Article 4(2) provides:

Where a third party requests to participate in arbitral proceedings already pending under these Rules ... the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

This provision vests the tribunal with the power to join a third party to arbitral proceedings on the third party's application even if the original parties do not consent. The justification for this rule appears to have been the authors' endeavour to grant the arbitral tribunal the broadest possible flexibility in order 'to put the Swiss Rules in line with the current best practice in arbitral proceedings'.¹⁹

This bold innovation has not been received however with universal acclaim. Its critics have raised various concerns and I refer to and address some of these:

- (a) Such forced joining of a third party clashes with the original parties' justified expectations in the absence of any arbitration agreement with the third party, of having private bi-lateral proceedings.
- (b) Difficulties may arise at the enforcement stage as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*') presupposes that there must be an 'agreement in writing'²⁰ in order for an award to be enforced. Joining a third party which is not a signatory to the arbitration agreement thus brings with it a certain risk of the award being refused enforcement. The risk should however not be over-emphasised, as courts in various jurisdictions have been prepared to enforce awards in such circumstances.²¹

¹⁸ Tokyo Maritime Arbitration Commission (TOMAC) Arbitration Rules art 26 <http://www.jseinc.org/en/tomac/arbitration/ordinary_rules.html>.

¹⁹ Wolfgang Peter, *Some Observations on the New Swiss Rules of International Arbitration* (12 July 2004) JuSletter, n 18 <http://www.weblaw.ch/de/content_edition/jusletter/Artikel.asp?ArticleNr=3242>. Note 18 reads:

As it was not considered practicable to set out in the Swiss Rules a comprehensive designation of all conceivable scenarios, the drafters preferred to simply indicate that consolidation of arbitral proceedings and the participation of third parties may be ordered, thus affording the appropriate bodies (the Chamber, or the Arbitral Tribunal, as applicable) the necessary flexibility in deciding on each individual case.

²⁰ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) arts V(1)(a) and II ('*New York Convention*'). Further, the original of the arbitration agreement must be presented to the recognising court: *New York Convention* art IV(1)(b).

²¹ The risk of unenforceability should not be overemphasised. It is – to say the least – possible, if not even necessary, for the court before which enforcement of the award is sought to respect the findings of the arbitral tribunal's jurisdiction if, based on the court's own national law, it can overcome the form issue. In Switzerland for example, the Federal Supreme Court held that the form requirement only has to be applied to the original arbitration agreement but not to its extension to a non-signatory party, which is an issue of substantive validity: *X. S.A.L. Y. S.A.L. and A. v Z. Sàrl and Arbitral Tribunal*, Swiss Federal Supreme Court, 16 October 2003 reported in (2003) ATF 129 III 727, 736; (2004) 22 *Association Suisse de l'Arbitrage Bulletin* 364, 387. In *Int'l Paper Co. v Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411 (4th Cir, 2000), the U.S. Court of Appeal for the Fourth Circuit held that a party may be precluded (estopped) from claiming that the

- (c) Confidentiality. Privacy or confidentiality is one of the reasons parties choose arbitration over litigation. It allows the dispute, the underlying contract and any business secrets to remain undisclosed. Again, this issue of confidentiality should not be over-emphasised as the joinder is of a third party already usually familiar with the facts of the underlying dispute and who will be affected by its outcome.
- (d) The broad terms of Article 4(2) should not be read as doing away with the basic requirement of an arbitration, namely consent.²² Fortunately, however, not all share this view. Some for instance address the issue of consent by suggesting that the test is not so much consent but whether in the 'balance of interest between the party refusing, and the party requesting, joinder is clearly in favour of the requesting party'.²³

Should these concerns mark the end of a quest for an answer to this issue of joinder and intervention? I suggest not.

First, in a recent worldwide survey conducted of corporate counsel in order to better understand corporate practices and attitudes towards the use of arbitration in international commercial disputes, the respondents ranked the lack of mechanisms for third party joinder the third (after cost and time) most important disadvantage of arbitration. Thus, the importance of improving the framework for multiparty, multi-contract and multi-claim disputes.²⁴

Secondly, having such framework in place would also expand the ambit of arbitration to disputes that in some jurisdictions would otherwise have been considered inarbitrable due to the inability of arbitration proceedings once initiated to join or take into account third party interests. In Germany, for example, the Bundesgerichtshof recently decided to overrule its previous decision in which it had held that disputes amongst shareholders were inarbitrable for various reasons one which was the absence of a mechanism providing for the participation of all shareholders in the arbitral proceedings.²⁵

Thirdly, and very importantly, providing for related disputes between multiple parties to be heard in the same proceedings ensures that the arbitration proceedings remain in tune with their substantive background. Often, the nature of bilateral arbitration proceedings is such that it precludes consideration of all aspects of the dispute which involves parties other than the parties to the arbitration proceedings. The question then arises as to whether the two parties to the arbitration proceedings should be at liberty to in effect conclude bilateral arbitration agreements in the context of a multiparty dispute to the exclusion of the other parties notwithstanding that the results of such bilateral arbitral proceedings could well touch upon and may even adversely affect the legal and financial interests of third parties. It effectively creates an 'artificial discrepancy' between 'the substantive and the procedural' aspect of the same multiparty relationship.²⁶ Thus, for example, in the context of the employer's payment obligations in residential property constructions, the State of New Jersey in the United States has provided for third party interests by providing that 'any contractor, subcontractor or supplier whose interests are affected by the filing of a Notice of Unpaid Balance and Right to File Lien shall be permitted to join in the arbitration'.²⁷

Fourthly, providing for the hearing of related disputes between related parties in the same forum and with the same applicable laws may prove significantly more efficient in terms of cost and time than numerous separate proceedings.

Lastly, permitting joinder is one way to avoid conflicting decisions on issues of law and/or fact, which would serve two of the main objectives of arbitration – finality and certainty.

lack of signature disallowed the enforcement of the award if the party relied on the contract by requesting *other* provisions to be enforced to its benefit.

²² Andrea Meier, *Einbezug Dritter vor internationalen Schiedsgerichten* (Schulthess, 2007) 107.

²³ Nathalie Voser, 'Multi-party Disputes and Joinder of Third Parties' in Albert van den Berg (ed), *International Council for Commercial Arbitration Congress Series No 14, 50 Years of the New York Convention* (Kluwer, 2009) 396.

²⁴ Loukas Mistelis and Crina M. Baltag, 'Trends and Challenges in International Arbitration: Two Surveys of In-House Counsel of Major Corporations' (2008) 2(5) *World Arbitration & Mediation Review* 83.

²⁵ Thomas Lennarz, 'Germany: GmbH Shareholders Disputes now Arbitrable' (2010) 76 *Arbitration* 305, commenting on BGH decision II ZR 255/08 dated 6 April 2009.

²⁶ Stavros Brekoulakis, 'The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room' 113 *Pennsylvania State Law Review* 1165.

²⁷ See AAA *New Jersey Residential Construction Lien Arbitration Rules* r 5 and the provisions of the *New Jersey Construction Lien Law* (NJSA.2A: 44A-1).

The judiciary, certainly in some jurisdictions, has been prepared to adopt a broad approach to multi-party issues arising in arbitrations and to permit joinder absent consent. For example, in a decision of the Swiss Supreme Court on 5 December 2008, the court apparently for the first time disagreed with the tribunal's decision to reject an application by the respondent for joinder of two non-signatories to the arbitration agreement to arbitration proceedings conducted under the ICC Rules, thus in effect deciding that the tribunal could have directed joinder, even absent consent by the parties to the agreement.²⁸ It did so on the basis that the dispute giving rise to the arbitration was so closely intertwined with another contract to which the non-signatories were parties such that joinder was necessary.

The recent decision of the United States District Court for the Southern District of New York on 11 August 2010 is yet another example. The court applied US jurisprudence concerning the doctrine of estoppel to permit a non-signatory whose rights were closely 'intertwined' with the disputed provisions of the contract containing the arbitration clause, to compel the signatory party contesting the rights of the non-signatory to arbitrate their dispute.²⁹

In an address by Geoff Farnsworth as part of the MLAANZ Lecture Series almost a year ago, Geoff asked whether Australia and New Zealand should continue to be victims of history, perception and prejudice in the form of the ubiquitous 'exclusive London arbitration' clause and asked whether the time has now come for the local profession 'to create a system better than the [London] alternative', noting in this regard that whilst the work done by AMTAC and MLAANZ has been essential, to get to the next level these associations 'need to start small, but aim high'.³⁰ One such opportunity I suggest is for MLAANZ to provide a better system in respect of multi-party issues because these are on the rise given the hunger for natural resources not only in Australia's mines but also in New Zealand's agriculture. This hunger for natural resources must affect the trade flows between Australia, New Zealand and the rest of the world.

So much then for the New Silk Road, its opportunities for the maritime community in Australia and New Zealand and the opportunity as well as the challenge of drawing up an arbitral framework addressing all aspects of multi-party disputes including joinder of and intervention by third parties. Lest you begin to wonder if such framework is impossible, allow me to read to you an arbitration clause showing that nothing is insurmountable to a legally trained mind.

The clause was drafted in an attempt to cater for the insanity of the arbitrator. I first heard this in an address delivered by Fali Nariman at the ICCA conference in Dubai and it was again mentioned in a recent paper delivered by Neil Kaplan in Hong Kong. It has obviously, therefore, featured in many jurisdictions. The clause came from a contract between a German shipowner and a Japanese counterparty. In fact, it was drafted by a European lawyer who spoke Japanese but it has probably lost something in the translation. However, the point to bear in mind is that this clause is real. It reads and I quote:

(1) Should either party come to fear that the arbitrator is insane for reasons it comes to know after the commencement of the arbitration it may consult with the other party and should both parties agree that the arbitrator is likely to be insane, they should serve a notice of doubt on the arbitrator.

Matters giving rise to a notice of doubt must be extreme, including, but not limited to, continuous making of senseless remarks, absent-mindedness and odd conduct such as dancing alone in public without cause. The parties may serve a notice of doubt only once during the arbitration.

(2) On such notice of doubt being served the arbitrator may not refuse medical examination by psychiatric specialist at one of the hospitals listed in appendix 1.

(3) If, in the opinion of a psychiatric specialist, the examination would require more than four weeks, or that the psychiatric specialist is unable to conclude that the arbitrator is positively insane, then the arbitrator shall be deemed to be not insane. The medical examination shall be at the parties' cost and shall be conducted under the condition that the result will be made known only to the arbitrator and the parties.

(4) If the arbitrator is found insane, he shall resign in which event he shall not be entitled to the fee for the services he will have rendered.

²⁸ *A v B Ltd*, Swiss Federal Tribunal, 4A_376/2008, 5 December 2008 reported in (2009) 22 *Association Suisse de l'Arbitrage Bulletin* 762.

²⁹ *F. Hoffmann La Roche Ltd. v Qiagen Gaithersburg*, 9 Civ 7326 (SDNY, 2010).

³⁰ Geoff Farnsworth, 'Maritime Arbitration in Australia – A Cracked Holy Grail?' (Speech delivered at University of Newcastle Maritime Interest Group and MLAANZ Lecture Series, 28 October 2009) <<http://www.mk.com.au/documents/Paper%20%20Maritime%20Arbitration.pdf>>.

(5) If the arbitrator is found insane, each party shall pay to the arbitrator a get well fee of Y100 000 and one half of the disbursements in the amount the arbitrator will have expended in connection with the arbitration. If the arbitrator is found not insane as a result of the examination, the parties shall jointly provide him with a letter of apology and each party shall pay a so sorry fee of a Y1 million which they may treat as damages for tax purposes. The arbitrator may not, however, claim the time spent for medical examination as time spent for arbitration.

(6) Whilst the provisions of these clauses are not intended to permit the parties to take the arbitrator to the hospital by force, it does not bar the parties from initiating judicial proceedings for the removal of the arbitrator. Such proceeding may be resorted to any where the arbitrator refuses to subject himself to medical examination or, where the parties are not satisfied with the findings of the psychiatrist that the arbitrator is not insane. If parties initiate judicial proceedings and fail to remove the arbitrator, each party shall pay a nuisance fee of Y2 million. During such proceedings, the arbitrator may proceed, but the arbitrator may not render an award. If rendered, such award may not be enforced.

Ladies and Gentlemen, I think the time has come for me to conclude my address. I am reminded of the old saying that I must not overstay my welcome. Thank you for having given me the opportunity this morning to deliver this year's Frank Dethridge Memorial Address and to set the stage by this opening address for the conference. I wish this conference every success.

Appendix

The following slides were prepared by McKinsey & Company to whom I am most grateful. They are part of an extensive study by McKinsey on the re-awakening of the Silk Road, and were used to establish an introductory context to the address.

Image 1

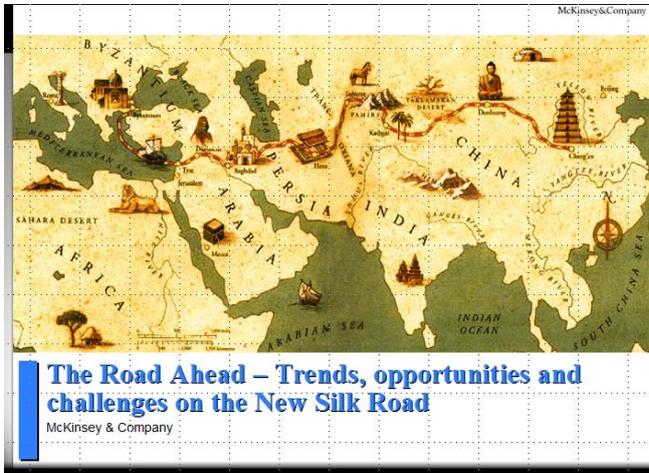


Image 2

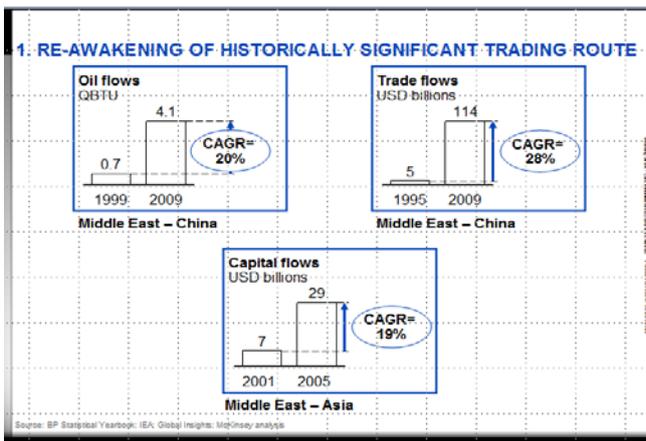


Image 3

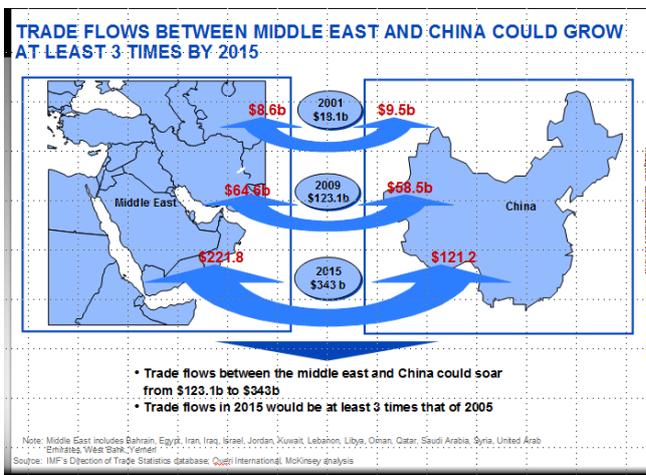


Image 4

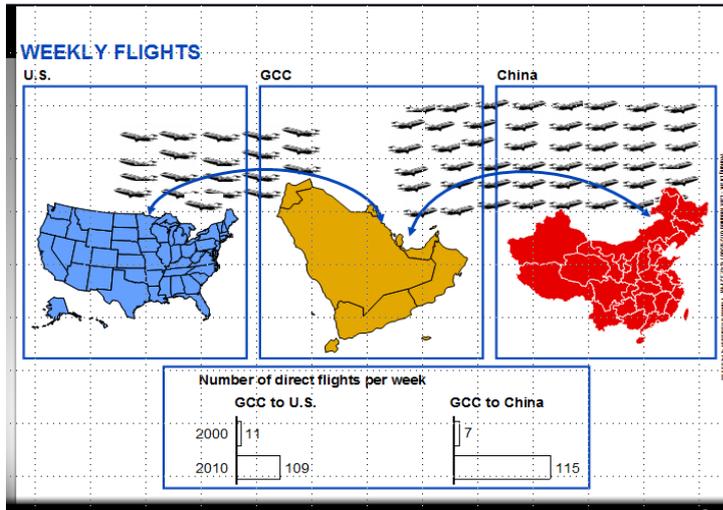


Image 5

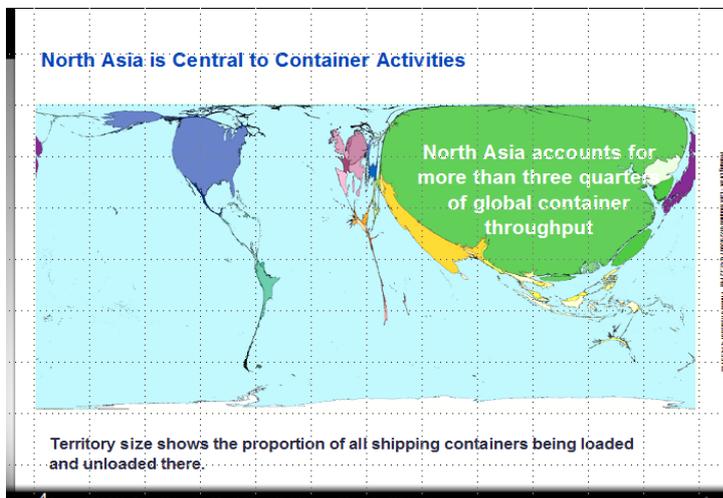


Image 6

Total seaborne trade between Asian States and Australia

2008 Seaborne Trade	Asia – Australia	Australia – Asia	Total
Seaborne Trade	75,604,332	99,290,301	174,894,633
Nominal Value (\$Thousands)			
Seaborne Metric Tons	33,127,690	675,517,895	708,645,585

Image 7

Seaborne trade between Asian States and New Zealand

2009 Seaborne Trade	Asia – NZ	NZ – Asia	Total
Seaborne Trade Nominal Value (\$Thousands)	10,772,714	8,499,083	19,271,797
Seaborne Metric Tons	6,225,484	10,153,005	16,378,489

Image 8

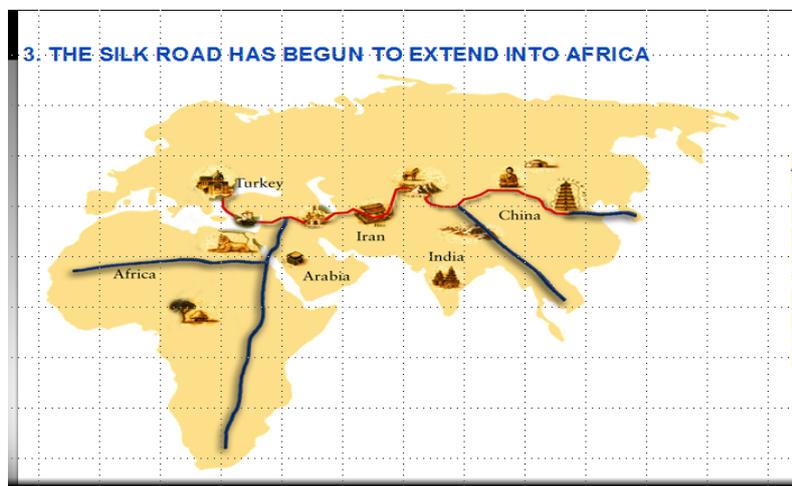


Image 9

KEY CHALLENGES – BUREAUCRATIC/SYSTEM BARRIERS

Interview quotes

Insufficient legal/regulatory infrastructure

- “Trade and investment disputes are usually resolved in private... there are **few organizations** that provide **legal advice and services** to foreign enterprises”
(Middle East expert, Ministry of Commerce, China)
- “**Legal contracts** do not protect us in China ... only having the right partners does”
(Major Gulf investor)

Source: Interviews