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On August 10, 1965, at the annual luncheon of the Section of Corporation, Banking and Business Law during the ABA's annual meeting in Miami, Donald B. Straus, President of the American Arbitration Association, discussed inter-American commercial arbitration and asked a rather crucial question, namely, was it a unicorn or was it a beast of burden? [1] Commercial arbitration had been enthusiastically discussed in the Western Hemisphere beginning as far back as 1888 with the Treaty of International Procedural Law, approved by the International Congress of Montevideo.[2] But while diplomats, professors, legal scholars and practicing lawyers had devoted considerable time discussing the subject and had written innumerable articles since 1888, it was not at all clear to Mr. Straus in August of 1965 that, for the practical businessman, inter-American commercial arbitration which is a technique for settling a dispute arising from a business transaction, was indeed a reality.[3] The parties, either because they had agreed to an arbitration clause in the original contract or because they subsequently agreed to submit the dispute to arbitration, voluntarily refer the dispute to one or more impartial persons who, based upon evidence presented in writing or at an oral hearing, make a final and binding determination

* Remarks made by Charles R. Norberg, General Counsel, Inter-American Commercial Arbitration Commission, at a Joint Meeting of the Sections of International and Comparative Law and Corporation, Banking and Business Law of the American Bar Association at its 91st Annual Meeting, Philadelphia, Pennsylvania, August 7, 1968.

[1] Straus, *Inter-American Commercial Arbitration: Unicorn or Beast of Burden?* 20 THE BUSINESS LAWYER 43-58 (1965).

[2] *See* VITA, Comparative Study of American Legislation Governing Commercial Arbitration, Inter-American High Commission, United States Section, 1928, Appendix D, at 59.

[3] For the authoritative discussion of arbitration, *see* Domke on Commercial Arbitration, Callaghan & Co., 1968.

of the dispute. Thus, under the rules of the American Arbitration Association, such an award must be rendered within thirty days after the close of the hearing. There is only limited appeal from such a decision, for example, on grounds of fraud or misconduct of the arbitrator or some denial of due process.

To resort to arbitration has, throughout the history of commercial activity, been recognized as a method of resolving disputes. Differences between the parties may arise due to delays in meeting delivery dates, differences over contract specifications, losses and damages in transit and similar causes.

In the international world, however, such disputes are further complicated by differences in language, culture, traditions and legal systems. And today's international trading patterns have been made additionally complex by the movement toward economic integration, thus creating new rules and regulations which in themselves create new sources of controversy.

Voluntary arbitration in foreign trade is a quick, practical, effective and inexpensive method for solving trade controversies. Parties to a dispute define the issue between them, they select the arbitrators themselves or agree upon a method of selection, they determine the place of arbitration to suit their mutual convenience and they agree in advance to accept the arbitrator's decision as final and binding.

In recognition of the growing awareness of the use of international commercial arbitration, the Seventh International Conference of American States, meeting in Montevideo, Uruguay, in 1933, enacted Resolution XLI on commercial arbitration, setting forth standards in matters of procedure and then saying:

> That with a view to establishing even closer relations among the commercial associations of the Americas entirely independent of official control, an inter-American commercial agency be appointed in order to represent the commercial interests of all republics, and to assume, as one of its most important functions, the responsibility of establishing an inter-American system of arbitration.[4]

The Commission is Established

Pursuant to that Resolution, in 1934 the American Arbitration Association established the Inter-American Commercial Arbitration

[4] Resolution XLI, Seventh International Conference of American States, Montevideo, Uruguay, 1933.

Commission with the initial chairman being the Honorable Spruille Braden and other officers being distinguished lawyers and businessmen from Latin America.

Since that date the Commission has effectively assisted in the resolution of approximately 2500 cases, some by way of a formal arbitration but many more involving trade complaints which were satisfactorily adjusted by the Commission exercising its good offices.

However, by 1965 the actual work of the Commission had dwindled to occasional correspondence and even more occasionally a dispute that was brought to its attention, usually for conciliation. In consequence, the American Arbitration Association resolved to make a detailed inquiry of the international trade situation in the Western Hemisphere, particularly as it related to the need for reestablishing the inter-American commercial arbitration system. The basic questions asked were: first, why did the earlier system fail to function effectively; and second, was there truly a need to reestablish and reorganize the Commission on a new basis.

During 1966, inquiries were sent to 235 business leaders, lawyers, bar associations, trade associations and government officials, supplemented by personal interviews in Mexico City, San José, Caracas, Bogotá, Lima, Río de Janeiro, Sao Paulo, Montevideo and Buenos Aires. The results of the inquiries revealed rather clearly that the old system failed to function, effectively for a number of important reasons.[5] First, the headquarters of the old system was in the offices of the American Arbitration Association in New York City and it was clear that Latin American businessmen did not believe that all business disputes to which Latin Americans were parties could be uniformly and efficiently resolved in New York City. Rather, it was thought that the system should be "Latinized," with perhaps the headquarters in Latin America rather than in New York City.

Second, to administer more efficiently an inter-American arbitration system each country ought to have a properly functioning national section, organized and administered pursuant to uniform standards of excellence and expertise. Such a national section would not only foster the growth of commercial arbitration within a country but it would serve as the focal point for processing inter-American arbitrations between businessmen of differing nationalities.

[5] Norberg, *Report on Inter-American Commercial Arbitration* submitted to the Meeting of the Inter-American Council of Commerce and Production, Mexico City, June 1966.

Third, the laws of the Latin American countries were effective roadblocks to a properly functioning inter-American commercial arbitration system essentially because, with the exceptions of Colombia and Ecuador, a clause to arbitrate a future dispute was not enforceable.

A Better System Needed

On the other hand, it was discovered that business, legal and government leaders were heavily in favor of a properly functioning hemispheric commercial arbitration system to provide them with a way to expedite international trade. To foster the growth of international trade and concomitantly the economic development of the countries of Latin America, the Organization of American States has in recent years continuously agreed on and emphasized a policy of stimulating foreign trade.[6] The financial requirements for economic development could not be met by funding from finances raised locally and supplemented by foreign aid from the United States, Western European countries and Japan. What was required was foreign exchange earned by increasing exports from the less developed countries.

But such a gradually increasing flow of exports from Latin America to the United States and to the Western European and Asian countries would bring with it an increased number of trade disputes and unless machinery existed for the convenient and expeditious resolution of these disputes, the future growth of foreign trade would be inhibited.

Additional blocks to increasing foreign trade result from the basic fact that the normal patterns of foreign trade have been overlaid by the movement towards economic integration.

The Treaty of Managua[7] and subsequent treaties established a Central American Common Market of the five Central American countries and left the door open for the accession of Panama. The Latin American Free Trade Association, established by the Treaty of Monte-

[6] *See* statement by Dr. Carlos Sanz de Santamaria, Chairman of the Inter-American Committee on the Alliance for Progress before the Fourth Annual Meeting of the Inter-American Economic and Social Council (IA-ECOSOC), OEA/SER. H/X.8 CIES/1017, at 22.

[7] *See generally,* U.S. Department of State Regional Office for Central America and Panama Affairs, *Economic Integration Treaties of Central America,* March 1964. *See also* Instituto Interamericano de Estudios Juridicos Internacionales Instrumentos Relativos a la Integracion Economica en America Latina, 1964. Norberg, *Central American Economic Integration,* The George Washington University International Law Society, Studies in Law and Economic Development, April 1966.

video,[8] has brought together all the South American countries and Mexico in something less than a common market but, hopefully, in an arrangement that removes the tariff barriers on selected commodities subject to international trading between the members of the LAFTA.

Thus, there was the beginning of the implementation of proposals for the creation of a single Latin American Common Market and the close economic integration of all the Latin American countries. Initially proposed by four outstanding Latin American economists in response to a letter from President Frei of Chile,[9] the concept has now become a formal part of accepted OAS policy and recently, pursuant to a suggestion of President Johnson, Dr. Felipe Herrera, President of the Inter-American Development Bank, established a working group to plan for early implementation of the economic integration of the Latin American countries.[10]

It was manifest that the plethora of treaties, rules and regulations already in existence at the Central American Common Market and Latin American Free Trade Association levels would be further complicated by new rules, procedures and regulations at the continental level. Thus, in thinking about restructuring the inter-American commercial arbitration system it was necessary to consider the desirability of establishing appropriate procedures at the national level (within a country), at the regional level (with the CACM and the LAFTA) and at the continental level (between Latin Americans and North Americans or between members of the regional groupings).

One further consideration was imposed by the existence of trade between Western Hemisphere businessmen and buisnessmen either of the European countries or of the Asian countries. In Europe, members of the European Economic Community had adopted [11] rules for conciliation and arbitration of commercial disputes while the Economic Commission for Asia and the Far East had created a center for conciliation and arbitration of commercial disputes, using rules somewhat similar to those of the European Economic Community.[12]

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[8] Treaty Establishing the Latin American Free Trade Association signed in Montevideo, Uruguay, 1960.

[9] Inter-American Development Bank, *Proposals for the Creation of the Latin American Common Market,* 1965.

[10] *Inter-American Development Bank Newsletter,* Vol. VI/2, April 1968.

[11] UN/ECAFE, Matters to be Discussed by the ECAFE Conference on Commercial Arbitration, E/CN.11/TRADE/CCA/L.1, page 38, 16 September 1965.

[12] UN/ECAFE, *Report of the Conference on Commercial Arbitration,* E/CN.11/TRADE/L.92, pages 5-24, 17 January 1966.

In consequence, in moving ahead to reorganize the arbitration system within the Western Hemisphere, it was necessary to think in terms of making it compatible with the commercial arbitration system within Europe and a similar system within the Economic Commission for Asia and the Far East.

The Initial Steps

During 1967 the above considerations and problems, together with many others, were presented to distinguished lawyers, businessmen and government officials of the Western Hemisphere at three separate meetings. The first, in Buenos Aires in early April, was organized by the Argentine Stock Exchange and the Buenos Aires Chamber of Commerce under the auspices of the Inter-American Commercial Arbitration Commission.[13] The second, held in San José, Costa Rica during the XV Conference of the Inter-American Bar Association, was essentially a symposium on the possibilities of commercial arbitration within the Central American Common Market.[14] The third, was a meeting in Rio de Janeiro in September, organized by the Commercial Association of Rio and the Brazilian Bar Association.[15] All three meetings were supported in principle and effectively assisted by the Inter-American Council of Commerce and Production and its members, especially in Buenos Aires and in Río.

A number of resolutions were either submitted to the plenary sessions for information, as in Buenos Aires, or adopted, as by the Inter-American Bar Association meeting in San José, Costa Rica. In essence, the resolutions found that it was desirable to reorganize and reinvigorate the Inter-American commercial arbitration system by reconstituting the Inter-American Commercial Arbitration Commission and by establishing a national section in each country. Each national section would send a delegate and an alternate to the reorganized Commission and, hence, a viable inter-American commercial arbitration system could be reestablished on a well-organized and self-financed basis.

[13] Argentine Stock Exchange, Documents of the First Conference on Inter-American Commercial Arbitration, April 1965.

[14] Inter-American Bar Association, Resolutions nos. 19 and 21, XVth Conference, San Jose, Costa Rica, 1967. For a resume of both the Buenos Aires and San Jose meetings, see the American Journal of International Law, Vol. 61, No. 4, October 1967, pages 1028-1030.

[15] Inter-American Commercial Arbitration Commission, *Report of the Meeting in Rio de Janeiro,* September 1967.

The Structure And Powers of The Commission

The supreme organ of the Commission would be its Governing Body on which each American state has the right to be represented by a delegate, having one vote and a tenure of office of three years.[16] In addition, the Inter-American Council of Commerce and Production and the Inter-American Bar Association are each entitled to appoint a delegate and an alternate.

The officers of the Commission are: President, Dr. José A. Martínez de Hoz, of Buenos Aires; Vice President, Mr. Donald B. Straus, of New York City; Director General, Dr. Carlos A. Dunshee de Abranches, of Río de Janeiro; Assistant to the President for Central American Common Market Affairs, Dr. Juan Edgar Picado; Assistant to the President for Latin American Free Trade Association Affairs, Dr. Policarpo A. Yurrebaso Viale, of Buenos Aires; and Legal Counsel and Director of the Washington office, Charles R. Norberg, Esq., of Washington, D.C.

The Commission is authorized to support the establishment of national arbitration sections; to issue rules and regulations and make the proper arrangements for conducting inter-American commercial arbitrations; to prepare and maintain in its offices lists of arbitrators, selected by the National Arbitration Sections; to recommend to the American states, the enactment of new laws on arbitration or the amendment of existing laws; to convene conferences on commercial arbitration; to organize and develop in cooperation with local institutions, educational and informational programs on commercial arbitration; to establish and maintain relations with other institutions and organizations interested in international commercial arbitration; and to act as a center for the conciliation of commercial disputes when so requested by the interested parties.[17]

The Commission has an Executive Committee, may have other permanent and special committees and arranges for its budget and finances so that the system will be financially self-supporting.

Several national sections are presently in existence, as for example, in Argentina, Brazil, Perú, Venezuela, Panamá, México, Costa Rica, and, of course, the United States, where the national section is the

[16] *Inter-American Commercial Arbitration Commission,* a report submitted to the National Chambers of Commerce and Industry; the Inter-American Council of Commerce and Production, Bar Associations and International Institutions of the Western Hemisphere, Annex B, April 1, 1968.

[17] *Id.*

American Arbitration Association. Recent correspondence indicates that national sections are in the process of being formed in all the other Latin American countries. On November 7-9, 1968, in Mexico City, there will be held the Second Conference on Inter-American Commercial Arbitration [18] and by that time it is anticipated that there will be a national section in each one of the Latin American countries, as well as the United States. Pursuant to correspondence with the Canadian Bar Association, it might well be that by November, there will be a national section in Canada as well.

How it Works

Assume now for a moment that either because of the existence of an arbitration clause in a contract or by way of a submission, the parties located in different countries agree to an arbitration and they ask the IACAC for its assistance. A party desiring to begin an arbitration communicates with the Commission, giving such information as the names and addresses of both parties, a brief statement of the controversy, a copy of the arbitration clause or submission, if any exists, the amount involved, if any, and the remedy sought.[19] This notice is first filed with the national section of the plaintiff, is forwarded by the national section to the Commission, where it is reviewed and, if found in order, is then forwarded to the national section having jurisdiction over the defendant. That national section communicates with the defendant who may then file an answering statement. Under the supervision and administration of the Commission, the parties are then given lists of possible arbitrators, in the event that they have not chosen an arbitrator themselves, and the Commission will then review the list of arbitrators as returned by the parties with indications of which arbitrators would be acceptable.

The Commission then designates the arbitrator or arbitrators and the locale of the arbitration if one has not already been determined by the parties themselves.

The arbitrator will then have his hearing which, because of the exigencies of geography in Latin America, will probably for the most part be based on written evidence. In the United States arbitrations for the most part are conducted through oral hearings but as the number

[18] The Second Conference on Inter-American Commercial Arbitration will be sponsored by the Chamber of Commerce of the City of Mexico and the Mexican Bar Association, under the auspices of the Inter-American Commercial Arbitration Commission.

[19] Rules of Procedure of the Inter-American Commercial Arbitration Commission, III, no. 7, 1951.

of arbitrations increase in the Latin American world, it is anticipated that the procedure to be followed will be that most in conformity with existing procedures to which Latin American lawyers have become accustomed, namely, utilization of documents as opposed to oral testimony of witnesses. Of course, if the parties wish, the written demands, answers, proofs and briefs can be supplemented by oral hearings as well.

The rules of the Inter-American Commercial Arbitration Commission are currently in the process of revision and, as revised, will be submitted to the Second Conference in Mexico City in November. Since the old rules have to some extent become known throughout the hemisphere during the course of the last 34 years, it is not anticipated that the revisions will be startlingly new. The rules will be subjected to modest modifications, particularly in the matter of the time within which certain actions must be taken and also the necessity for up-dating the administrative costs and fees that must be paid.

Enforcing An Award

Having now passed through the arbitration and arrived at an award, what can be said about the effectiveness and enforceability of a foreign arbitral award? As you all know, this is a complicated subject which cannot now be explored in detail. It is clear that if a foreign arbitral award is unenforceable in the country of the debtor, then the entire arbitral system will be of little use. As far as the United States is concerned, "the question of enforcement in this country of foreign arbitration awards does not present great difficulties in view of the liberal attitude which has been adopted by federal and state courts." [20] "Of greater importance to the development of foreign trade is the enforcement of awards rendered in the United States when the foreign debtor refuses voluntary satisfaction of the award. The American trader must then seek the assistance of the courts in the foreign country. Ascertainment of the position of the particular national law on the enforcement of awards rendered in another country is often difficult. Foreign court decisions on enforcement of awards are not easily available and some times not officially reported." [21]

To facilitate the functioning of an international commercial arbitration system, on June 10, 1958, the United Nations Conference on International Commercial Arbitration proposed a new convention on

[20] Domke, *American Arbitral Awards: Enforcement in Foreign Countries,* University of Illinois Law Forum, Vol. 1965, Fall, pages 399-410.

[21] *Id.*

the Recognition and Enforcement of Foreign Arbitral Awards.[22] The Convention provides for the general recognition of the validity of arbitral clauses in contracts and contains simplified and more effective procedures for the enforcement of foreign arbitral awards to which the parties have contractually submitted. The Convention provides for enforcement of an award by filing in court the original (or a certified copy) of the arbitral agreement and the award, whereupon enforcement follows unless the defendant establishes any one of five specified challenges, i.e., absence of a valid arbitral agreement, lack of a fair opportunity to be heard, an award in excess of the submission, improper arbitral procedure, or lack of finality of the award in the rendering state. Additionally, the court may, on its own motion, deny enforcement only on two specified grounds, i.e., that the subject matter is not arbitrable under the local law of the forum, or that enforcement would violate the public policy of the forum. If the defendant has instituted review proceedings in the rendering state, the court may, in its discretion, stay enforcement proceedings, and may also require the defendant to give suitable security.

It would, of course, greatly facilitate international trade and further the cause of arbitration if the United States became a party to this Convention. As of today, 33 countries have ratified the Convention, including only two countries in this hemisphere, namely, Ecuador and Trinidad-Tobago. It is hoped, however, that the United States will accede to the Convention since both the Department of State and the Department of Justice have now recommended its ratification and a message was sent [23] by the White House to the Senate Foreign Relations Committee urging that it give advice and consent to such action.

Recommendations of The ABA Committee

In May of 1960 the Committee on International Unification of Private Law of the Section of International and Comparative Law of the ABA, with Clifford J. Hynning, Esq., as Chairman, published a detailed and scholarly report analyzing the status of international commercial arbitration in the United States and the Geneva Treaties on international commercial arbitration, making a recommendation that the United States should accede to the United Nations Convention on International

[22] United Nations Conference on International Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* June 10, 1958.

[23] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *Message from the President of the United States,* Senate Document Executive E, 90th Congress, Second Session, 1968.

Commercial Arbitration.[24] Mr. Hynning and his Committee deserve great credit for their pioneering work in this field. Now, eight years later he can have the satisfaction of knowing that work and recommendations of his Committee are about to change the basic position of the United States with regard to this important question of recognition and enforcement of foreign arbitral awards.

A brief word should also be said about efforts made within the Western Hemisphere itself to change and unify laws relating to arbitration. The subject of arbitration law became a matter of important consideration to the Inter-American Council of Jurists and in 1956 in Mexico City the Council of Jurists adopted a model law on commercial arbitration, recommending its adoption by the several Latin American countries.[25] Since that time very little constructive action was taken other than in Colombia and Ecuador so that in 1967, at its meeting in Rio de Janeiro, the Inter-American Juridical Committee once more reviewed the status of the law related to commercial arbitration. In its comprehensive report [26] the Committee not only reiterated the desirability of adopting the model law of Mexico City but, further, proposed a new and simplified Convention on International Commercial Arbitration.[27] In effect, the proposed convention recognizes the validity of the arbitration clause, gives the arbitration award the same status as a court judgment, provides for the mutual enforceability of foreign arbitral awards and sets forth limited grounds for attacking such an arbitral award.

It is believed that such a Convention would be more easily acceded to by the respective states in the hemisphere and its objective more quickly accomplished than by waiting for separate and independent action in each country looking towards the adoption of a model arbitration law.

However, it would seem that first priority should be given to the adoption of the United Nations Convention of 1958, not only by the United States but by each one of the countries of the Latin American world. The objectives of the UN Convention and the OAS Proposed Convention are similar but the UN Convention is now and has been for

[24] American Bar Association, Section of International and Comparative Law, *Report of the Committee on International Unification of Private Law,* May, 1960.

[25] Pan American Union, *Final Act of the Third Meeting of the Inter-American Council of Jurists,* Mexico City, Mexico, January 17-February 4, 1956, Resolution VIII.

[26] Pan American Union, *Report of the Inter-American Juridical Committee on the Draft Convention on International Commercial Arbitration,* OEA/SER.I/VI.1 (English), February 19, 1968.

[27] *Id.*

earliest opportunity. The OAS Proposed Convention is still in draft form, has not been commented upon by the respective governments and, in consequence, has not been issued in final form by the Inter-American Juridical Committee and the Inter-American Juridical Council. It may be some time before the proposed OAS Convention is open for signature and present efforts should be to have all countries of the hemisphere sign the UN Convention of 1958.

Some other Considerations

There are several other considerations which could be the subject of comment, such as the relationship of the IACAC to the World Bank's International Centre for the Settlement of Investment Disputes.[28] Since this subject is being discussed separately, it need only be said that the IACAC is in close cooperation with the World Bank's Centre and the two systems will be meshed so that they can be cooperative and complementary.

It should also be noted that the United Nations Commission on International Trade Law, in its recent session in New York City, provided for a study of international commercial arbitration as a priority item on its agenda.[29] Hopefully, further progress will be made on creating a uniform approach to the use of arbitration in resolving international trade disputes.

Before closing, it is useful to indicate that the Department of State is quite sympathetic to efforts to revitalize the inter-American commercial arbitration system and to make it a more viable and effective instrument useful in facilitating international trade. At present, commercial attaches of the American embassies are able to devote only limited time to priority complaints of foreign nationals against American businessmen since the exigencies of personnel and budget require our representatives to utilize what time they have available to assist American businessmen.[30] Even at that, our commercial attache system is overloaded and many complaints cannot be given adequate attention.

In consequence, both the Departments of State and Commerce welcome the existence of a parallel system, provided by the Inter-Amer-

[28] International Bank for Reconstruction and Development, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* ICSID/2, March 18, 1965; and see also ICSID, Regulations and Rules.

[29] United Nations General Assembly, United Nations Commission on International Trade Law, A/CN.9/L.3, 19 February 1968.

[30] *See* U.S. Department of Commerce CA 8572 of February 24, 1966.

ten years available for ratification and should be acted upon at the ican Commercial Arbitration Commission, to either conciliate or arbitrate inter-American commercial disputes.

Along with the Departments of State and Commerce of the United States Government, the IACAC also counts upon the support of the Organization of American States, the Inter-American Development Bank, the World Bank, the Inter-American Council of Commerce and Production and the Inter-American Bar Association. With this kind of cooperation and support, the inter-American commercial arbitration system cannot help but succeed.

In conclusion, we are now in an era of expanding global foreign trade, complicated by regulations such as that imposed by GATT and the European Common Market with increasing pressures for preferential treatment from the less developed country members of UNCTAD. Within our own Western Hemisphere we have an increasing volume of foreign trade but it too must consider the technical requirements of the Central American Common Market and the Latin American Free Trade Association as we move towards a realization of the concept of the total Latin American Common Market.

Of course, disputes may be settled through court proceedings but it seems manifestly clear that arbitration offers another channel which is quicker, easier and cheaper. In the Western Hemisphere the responsibility for creating and maintaining such a viable arbitration system rests with the Inter-American Commercial Arbitration Commission. It is establishing a system which will be compatible in all respects with the arbitration programs of the European Common Market and of the Economic Commission for Asia and the Far East.

We began our consideration of this problem by raising the question which Donald Straus asked in Miami in August of 1965, i.e., is the inter-American arbitration system a unicorn or a beast of burden; is it a myth or a reality? During the past three years the evidence has been growing that the mythical unicorn is soon going to be put to work in earnest. International commercial arbitration is here to stay and the figure of 15,000 cases which are each year processed by the American Arbitration Association within the United States will, in the not too distant future, be closely approached by the number of inter-American commercial arbitration cases which will be processed by the Inter-American Commercial Arbitration Commission.