THE (PARTLY SIMILAR AND PARTLY CONTRASTING) DEMANDS ON JUDGES AND ARBITRATORS IN AN INCREASINGLY INTERNATIONAL AND DIVERSE WORLD

SPEECH AT THE INAUGURATION OF THE JAPAN INTERNATIONAL MEDIATION CENTRE, KYOTO

1. It is a great honour to be asked to speak at this inaugural conference of the Japan International Mediation Centre JIMC, and be sharing a platform with Itsuro Terada, the recent Chief Justice of Japan.

2. As a Judge in the United Kingdom between 1996 and 2017, I developed a particular interest in the resolution of disputes outside court, what is of course referred to in the UK and many other jurisdictions as Alternative Dispute Resolution, ADR, "alternative" because it is alternative to the traditional approach to resolving disputes, namely going to court, and asking a judge to decide.

3. At least in the UK, there are three principal types of ADR. First, mediation, which involves an independent person selected by the parties, a mediator, trying to assist the parties to arrive at a mutually agreed settlement. Secondly, early neutral evaluation, ENE, which involves an independent person selected by the parties, an evaluator, looking at the papers in the case and briefly listening to the parties or their lawyers explaining their arguments, and expressing a view as to the likely outcome, which the parties can accept – or reject. Thirdly, there is arbitration, which involves an independent tribunal selected by the parties, sometimes one but normally three people, conducting a procedure pretty similar to a trial and reaching a conclusion.

4. Before I became a Judge in 1996, I practised as an advocate, and, in my experience, arbitration was virtually the only form of ADR used in the UK, and it was almost exclusively limited to commercial disputes. But, around the time I became a judge, mediation started to become much more popular, and arbitration expanded into non-commercial cases, while ENE also became more used, especially in family law cases. This was for understandable reasons. Disputants and their advisers began to see the advantage of settling their disputes relatively informally and privately, and, at least when it comes to mediation and ENE, relatively quickly and cheaply. Unfortunately, as in so many countries, going to court in the UK can involve delays, excess costs and lack of judicial continuity (ie different judges dealing with the same case at different stages). If many disputants settle their dispute by ADR, it removes some of the pressure on an overworked courts system.

5. For these reasons, it became judicial policy in the United Kingdom to encourage parties to resolve their disputes by ADR, particularly by mediation. For three years, I had the mysterious title of Master of the Rolls, which meant that I was responsible for civil justice throughout England and Wales. Among many other duties, this involved me working out ways of encouraging parties to settle their disputes, primarily by mediation, rather than going to court, and this has been continued by my successors.

6. Of these three forms of ADR, mediation is the most informal and flexible, but the most uncertain in terms of outcome. There are not many procedural rules for a mediation. Whether one is talking about the procedure as to how a mediation is conducted, or whether one is talking about the outcome of a mediation, the parties can agree almost anything they like. Of course, much depends on the nature of the issue, and the approach and character of the parties and, indeed, of the mediator. However, the essential point is that, save that all those involved

should be honest, the procedure, like the outcome, is not constrained by rules, which has obvious attractions. The flexibility and freedom means that mediation has a downside: not only may the parties not reach a settlement: they may get nowhere near any sort of answer. There is therefore a risk that mediation ends up being a waste of time and money.

7. By contrast, while it is somewhat less formal than court litigation, an arbitration is pretty formal procedurally, and arbitrators' hands are tied by legal principles in terms of what they can order almost as much as judges' hands are tied. Arbitration is thus almost always more (often much more) expensive and slow than mediation. However, a big attraction of arbitration is that it is virtually guaranteed to bring an end to the dispute, because there will almost always be an answer which can be enforced by the parties.

8. ENE is somewhere between mediation and arbitration in terms of formality and certainty. As to certainty of outcome, the parties are bound to get an answer unlike mediation, but, unlike arbitration, they are not bound to accept the answer: they can walk away. So far as formality is concerned, because the evaluator must give an answer, he has to be more procedurally formal than a mediator, but as his decision is not binding on the parties, he is entitled to be more flexible than an arbitrator.

9. There is also the idea of combining mediation and arbitration – so-called med-arb – which has at least two variations. First, interrupting an arbitration at some point with a mediation carried out by a different person from the arbitrator to see if the parties can settle. Secondly, starting off with a mediation, and if it is not successful by a certain agreed time, converting the mediator into an arbitrator who then gives a decision which is binding on the parties. Each option seeks to have the best of both worlds. Med-arb has not proved very successful in the

United Kingdom. On the other hand, I understand that it works well in some other jurisdictions, including some parts of Eastern Asia.

10. This is an example of a much more general point, namely the fact that different countries have different legal traditions, experiences and cultures, indeed different approaches to resolving disputes. Lawyers, like any other group of people, tend to be quite traditional or conservative about their work. If you have been brought up to resolve your clients' dispute in a certain way, you will take quite a lot of persuading that you should change. Further, if a lawyer for one party proposes to the lawyer for the other party that their clients' dispute could be resolved in a certain way, the second lawyer's natural reaction will be to say no. That is because he will assume that the proposal is made because it suits the first lawyer's client, and must therefore be to the disadvantage of the second lawyer's client.

11. This is part of the tendency in the US and Europe, or at least in the UK, among both lawyers and clients, that, when it comes to resolving disputes, the assumed approach is to go into fighting mode - war the default position. So, if a med-arb is agreed, the initial mediation part is treated as part of the more confrontational arbitration process. Thus, in such a case, one or both of the parties may regard the mediation not so much as a genuine attempt to mediate, but more as an opportunity to impress the mediator-soon-to-be arbitrator with the strength of their case or the weakness of the other party's case. On the other hand, by contrast, in this part of the world, where are the presumptive method of resolving disputes is through negotiation, ie where diplomacy, rather than war, is the default position, the mediation part of a med-arb is much more likely to be taken seriously. Incidentally, it does occur to me that med-ENE may be worth considering. On the face of it, ENE is closer to mediation, and therefore a more natural system to convert to from mediation, than arbitration.

12.That thought leads me to make a point about cultural distinctions which strikes me as rather paradoxical in the light of what I have just said about the philosophical difference in attitude to dispute resolution between the East Asia and the UK/US. When it comes to pure mediation, I think that the geographical cultural distinctions I have described can be almost stood on their head. The tendency in Japan, where mediation has, I understand, been largely limited to family disputes, is for mediation to involve the mediator being very "judge-like" - in fact, they are I think very frequently are retired judges in that they often virtually tell the parties on what terms they should settle. In some ways it is more like the UK idea of ENE rather than mediation. This approach is in stark contrast to the traditional US/UK approach, which is for mediators to refuse to express any view about either party's arguments or prospects; the mediator's role has been seen very much as facilitating a settlement without expressing any view to anybody about the strength of any particular argument or how it might fare in court.

13.Interestingly, both extreme approaches are being abandoned, and consequently the two systems of mediation should be getting closer. As I understand it, with the benefit of knowing about and learning from the Western approach to mediation, Japanese mediators have been encouraged to be less prescriptive and more facilitative, particularly when it comes to extending mediation to commercial disputes. At the same time, quite possibly thanks in part to seeing the Oriental approach, UK mediators have been encouraged to be more prepared to express views on the likely outcome on some points if the dispute goes to court (or arbitration). Provided that such views are given with appropriate tact and sensitivity I think that it must represent a good idea, especially when the mediator is legally qualified, an above all, when the mediator is an experienced lawyer or former judge.

14. Talking of former judges, in the UK a judge cannot try a case in which he or she has acted as mediator or indeed as evaluator. To our eyes, once a person has tried to mediate a dispute he is conflicted from trying it, whether as a judge or arbitrator (unless the parties agree as they do in a med-arb). In family cases, judges sometimes try and mediate the parties to a settlement: if there is no settlement and the case goes to trial, a different judge has to hear the case. So too in the few cases where a judge has acted as an evaluator.

15. Another issue in the UK is whether mediation should be compulsory in all or some categories of case. While some judges used almost to force the parties to mediate, the present practice is that parties are warned that if they refuse to mediate they may be penalised by an order for costs in due course. I never required parties to mediate, as I thought it could often be unfair, not least because I did not know what negotiations had been going on already, and in any event the parties and their lawyers may well know that mediation would be a waste of money and time.

16. My remarks so far indicate that, at least in the UK, there is a very clear distinction between judges, on the one hand, and, on the other hand, ADR resolvers - mediators, evaluators and arbitrators. While much of what I am about to say about arbitrators applies to mediators and evaluators as well, it will be clearer if I contrast the position of judges and arbitrators as their roles are so similar – at least on the face of it.

17. Both judges and arbitrators have the same fundamental duty to the parties to a dispute to resolve the dispute honestly, dispassionately, and according to the law. However, a judge trying a case is a public figure with a public law duty owed to society, and the judge's duty to the parties is a secondary duty, in the sense that,

if it clashes with his duty to society, his duty to the parties must yield. By contrast, an arbitrator has a purely private law duty to the parties, arising out of contract. It is true that in almost all jurisdictions an arbitrator's duty is made subject to some statutory rules, which must be in the public interest (as they would not otherwise be in statute), but those rules do not alter the essentially exclusively private law nature of an arbitrator's duty.

18. The difference is clear from the very outset of any dispute. It is of the essence of litigation that the parties cannot select their judge. In a recent English case, Mostyn J emphasised that, when it comes to getting a judge to recuse himself for apparent bias, "the bar is set high because otherwise litigants might be tempted to engage in preliminary exercises of 'judge picking'"[1]. However, parties to an arbitration can of course select their arbitrators. Indeed, that is one of the perceived attractions of arbitration over litigation. Particularly if they would have to litigate in a foreign court, people are often uncomfortable about having to accept whichever judge the court system of the country concerned selects, without having the opportunity to stipulate the expertise or characteristics they are, often perfectly reasonably, looking for in their tribunal. As a matter of principle, the difference between the way the tribunal is selected epitomises the point that arbitration is consensual private arrangement.

19. Another difference, at least on the conventional view, is that arbitrators are unlike judges in that they have no duty to ensure that an arbitration is conducted without unnecessary delays, without unnecessarily long hearings, and without unnecessary expense. There is considerable force in this view. Public interest concerns which judges have to bear in mind, such as the appropriate use of courts, the availability of judges for other cases, and more generally the efficient use of

[1] *R (on the application of ZAI Corporate Finance Ltd) v AIM Disciplinary Committee of the London Stock Exchange PLC* [2017] EWHC 778 (Admin), para 26, per Mostyn J

public resources, have no part to play when it comes to arbitrations. Equally, if both parties are content to drag the proceedings out and to incur very substantial costs, on what ground can the arbitrators disapprove or seek to stop them, given that one of the founding principles of arbitration is that it is a consensual exercise?

20.However, it can be said that this discussion throws an indirect light on two connected and slightly uncomfortable aspects of arbitration. First, arbitrators often have a positive financial interest in not objecting to proceedings being dragged out or to a proliferation of hearings. Unnecessary or elongated hearings mean more money for the lawyers, but they also often mean more money for the arbitrators, as they are normally paid by the hour. Secondly, if arbitrators start criticising lawyers' charges and working practices in an arbitration, or penalising a party in costs, they are likely to find that they are nominated as arbitrators in the future rather less frequently than they might hope.

21.Now, I am far from saying that many arbitrators are consciously influenced by such factors, but self-interest has a nasty habit of subconsciously influencing one's decisions. I suspect, and I certainly hope, that the great majority of arbitrators would simply not be influenced by their own potential level of fees out of the particular arbitration, or their future appointment prospects. Nonetheless, given the importance of justice being seen to be done, there must still be some concern about a perception of self-interest could nonetheless be invoked in such a case.

22.Quite apart from this, there are grounds for challenging the conventional view that arbitrators have no sort of public duty. That challenge is based on the fact that arbitration has become such a significant means of dispute resolution, both in terms of the number of arbitrations and in terms of the types of dispute which are arbitrated, as well on the more specific fact that arbitrations not

infrequently have significant ramifications for people across the world. Bearing in mind these factors, there is a case for saying that it is no longer realistic to treat arbitration as a purely private consensual exercise. Thus, when deciding investor-state disputes, ISDS, arbitrators are often making decisions which "include awards which significantly impact on national economies and on regulatory systems within nation states", as Robert French the former Chief Justice of Australia explained in a 2014 lecture[2], and such decisions sometimes also involve effectively overruling national courts, even Supreme Courts. Indeed, as Robert French went on to say that arbitral decisions in ISDS cases "have general implications for national sovereignty, democratic governance and the rule of law within domestic legal systems"[3]. And, at a rather different end of the arbitration spectrum, there is growing concern in some quarters in the United States about the fact that employees are required to sign away their rights to go to court in return for the right (and obligation) to arbitrate[4].

23. The substantially increased public and global importance of arbitration can fairly be said to call into question the conventional view of the arbitrator simply as one of the parties to a private consensual arrangement who happens to have the responsibility of resolving a dispute, and to cast on an arbitrator a new, more public-interest type, judicial role compared with that which he or she has hitherto been assumed to enjoy. It can be argued that such a new aspect of arbitration is reflected by the requirements imposed on arbitrators by many of the arbitral institutions to proceed promptly[5] with any arbitration and not to delay their

[2] Chief Justice RS French AC, *Investor-State Dispute Settlement — A Cut Above the Courts*? 9 July 2014, Darwin https://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u9/frenchcj09jul14.pdf

[3] *Ibid*

[4] See eg http://prospect.org/article/signing-away-our-rights-0 and http://www.newsweek.com/can-companies-force-workers-go-arbitration-667623

[5] Most sets of rules are peppered with expressions such as "as soon as practicable",

awards unduly[6]. However, I suspect that such requirements are imposed more because of contemporary expectations of parties to arbitrations, and to ensure that arbitration remains a popular form of dispute resolution, than for public policy reasons.

24. While there is undoubtedly force in the contention that arbitration is now such a common way of dispute-resolution and so frequently far reaching in its effect that there is a public interest in arbitrators having more judge-like duties, it seems to me that it would be dangerous to run too far with that view. As a matter of principle, any attempt to impose public law duties on arbitrators, at least in normal commercial cases, whether intranational or international, would represent an interference with freedom of contract and the right of self-determination. It might also risk depriving commercial arbitration of some of its attraction. A more realistic approach might be to identify certain types of arbitration in which some judge-like, responsibilities would be placed on the arbitrators. ISDS are an obvious example, but there are other disputes, such as those relating to large public procurement contracts, which may give rise to public interest concerns[7]. Indeed, some countries recognise the special nature of awards in such disputes: the French courts have concluded that such awards must be reviewable by the Administrative Courts[8], and Brazilian statutory law requires such awards to be subject to public scrutiny[9]. Otherwise, I think that we have to let the market work, which should lead to maintaining and improving the performance of arbitrators, as I shall discuss a little later.

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[6] Ditto, and some are quite prescriptive – eg Article 31 of the ICC Rules provides that, subject to the ICC Court's power of extension, "The time limit within which the arbitral tribunal must render its final award is six months" from the date on which the Terms of Reference are agreed.

[7] The *e-Borders* case discussed by Stavros Brekoulakis in *The Protection of the Public Interest in Public Private Arbitrations* http://arbitrationblog.kluwerarbitration.com/2017/05/08/the-protection-of-the-public-interest-in-public-private-arbitrations/

[8] the decision of Tribunal des conflits in *INSERN v Fondation Letten F. Saugstad* (2010) and the 9 November 2016 decision of the Conseil d'Etat in Nr 388806, ECLI: FR: CEASS: 2016: 388806.20161109

[9] Law No 13,129 of 26 May 2015.

25. There are two other significant features of the difference between judging and arbitrating which I have not so far mentioned. Arbitration hearings are almost always private and arbitration awards are almost always private and unappealable, whereas court hearings are almost always public with judgments are almost always public and appealable. It is often said, and rightly said, that it is fundamental to the rule of law that court hearings take place in public and judgments are given in public. That is because it is the public should be able to see justice being dispensed and public oversight it helps ensure that judges behave themselves: sunlight, it was famously said by US Supreme Court Justice Brandeis[10], is the best disinfectant. Judges in the UK are and have been keen to support open justice: the UK Supreme Court led the way in ensuring that all its hearings were streamed so that they could be watched anywhere in the world.

26. Arbitration is very different, and, as in relation to the arbitrator's duties, save in relation to ISDS and some similar disputes, there is a case, which I think is very difficult to challenge both in terms of principle and in terms of practice, that parties should be entitled to agree that their dispute resolution arrangements outside court, whether through arbitration or otherwise, are conducted in, and subject to, complete privacy. As to ISDS arbitrations, a 2005 OECD report referred to "a general understanding among the Members of [its] Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of

[10] Quoted by Lord Steyn in *Turkington v. Times Newspapers Limited* [2000] UKHL 57 ([2001] 2 AC 277

jurisprudence"[11]. Also, the 2014 UNCITRAL Rules require most Treaty-based ISDS awards to be published[12]. And, the following year, the UN decided that all Treaty-based ISDS awards should be published[13]. And most International Centre for Settlement of Investment Disputes, ICSID, awards are published by consent, and details of ICSID arbitrations are required[14] to be published. But, as I say, it is hard to justify denying strict privacy to all, or at least the great majority of, what might be called purely commercial arbitrations, whether international or not.

27. However, the consequence of the arbitral proceedings and award being entirely private can, at least in theory, operate as an incentive to discourage arbitrators from being fair or from applying the law, particularly if application of legal principles would cause them to reach an outcome or decision which seems to them to be unfair or uncommercial. Judges not infrequently find themselves making decisions which are in accordance with the law but which they personally find unattractive in the light of the moral or commercial "merits" of the case as they see them. That is because it is inevitable that the law sometimes favours a party who has behaved badly, even dishonestly or dishonourably, over a party who has behaved well, and sometimes proper application of the law produces an unattractive result, particularly on unusual facts. However, knowing not only that they are sitting and giving their decision in private, but also that any decision is likely to be unappealable, an arbitrator must often be tempted to "cheat" when application of the law produces an unpalatable result.

28. The strict legal view, at least in the common law world, is, of course, that an arbitrator should apply the law in the same way as a judge. The common law

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[11] Transparency And Third Party Participation In Investor-State Dispute Settlement Procedures: Statement By The OECD Investment Committee - https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf
[12] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitrations, Article 3
[13] The Mauritius Convention - United Nations Convention on Transparency in Treaty-based Investor-State Arbitration
[14] ICSID Administrative and Financial Regulation 22

is not static, so, at least in my view, that means that an arbitrator can develop the law to a limited extent, in the same way as, but certainly no more than, a first instance trial judge. However, subject to that significant qualification, the traditional view is clear: an arbitrator is strictly required to apply the law. That is, I should say, a view to which I subscribe myself, and I would suggest that an arbitrator who consciously gives a decision or makes an award which does not comply with the law would be acting unprofessionally. However, I acknowledge that there is an argument that arbitrators should be entitled to be more flexible and commercial than judges in their approach, and I can see a real risk of an arbitrator, faced with a very unpalatable conclusion as a result of applying the law, justifying not doing so on the basis that arbitration should be more business-minded than litigation. In my view, however, that is a temptation which should be resisted. That is not so much, or at least that is not only, because it is wrong in principle: it is for two other connected reasons. First, such an attitude will almost inevitably lead to serious abuses, because, once an arbitrator decides that they are above the law, the habit of ignoring the law is likely to become pretty quickly engrained. Secondly, while departing from the law in the odd case may do little harm to the reputation of arbitration, I believe that that reputation will become badly dented if people start to think that arbitrators do not apply the law. As the Chinese have realised, it is essential for a country to have an impartial dispute resolution system and the rule of law in order for business to thrive, and business people will be reluctant to enter into transactions without knowing that they will be interpreted and enforced according to the law - and that is as true of arbitration as it is of litigation.

29. A paradoxical feature of arbitration is the conflict between the privacy of the arbitral process and the ability to choose your arbitrator. It is an attractive feature of arbitration as against litigation that parties can chose their own arbitrators, but it is not that easy to discover who is actually a good arbitrator

because arbitrations are subject to such stringent privacy rules. In this context, it is interesting to note that, in a pretty comprehensive survey carried out in 2015 by Queen Mary University of London (with over 760 written responses and over 100 interviews)[15], while arbitration was generally rated a pretty good way of resolving international commercial disputes, one of the complaints about arbitration was "lack of insight into arbitrators' efficiency" in that there is a concern about what is described in the report as a lack of "transparency regarding arbitrator performance to allow for informed appointments by parties". Indeed, later on the same survey states that a "recurring theme throughout the interviews was users' discontent with the lack of insight provided into institutions' efficiency and arbitrator performance, and the lack of transparency in institutional decision-making in relation to the appointment of, and challenges to, arbitrators". The survey also stated that the publication of redacted awards or summaries of awards was "not only favoured for its academic value and usefulness when arguing a case, but [was] also often named as a method to gain more insight into arbitrator performance and to encourage arbitrators to write high-quality awards".

30. Another significant difference between judicial and arbitral decisions, to which I have briefly referred, is in the ability to appeal. In almost any country you can appeal a judge's decision virtually as a matter of course if it appears that he may have gone wrong on a point of law. However, in many countries, you simply cannot appeal an arbitrator's decision on this ground, and in most other countries it is very difficult to do so. This is an important difference in principle and in practice.

31. So far as principle is concerned, the difference is attributable to two features I have already mentioned, namely that judges perform a public function

[15] 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf

in public. There is a public interest in a public servant being required to get the law right, and being corrected when he does not do so. Further, as a judge's decision is publicly available, people will assume that the law is as he has decided and may make their personal and business decisions on that assumption. So, it is important that people know that the law is not as the judge has declared. That is especially important in a common law system such as we have in the United Kingdom where judges can make and develop the law. No such principles apply to arbitrators, who, as I have said, have no public duties and whose decisions are given in private. Further, although arbitrators' decisions used to be freely appealable, for instance in the United Kingdom until 1979[16], the current philosophy is that the parties have agreed that their dispute should be determined by arbitration and, in the absence of good reason, it would be an interference with their agreement for a judge's view of the law to be substituted for that of the arbitration Tribunal. There is an additional practical reason, namely that parties to disputes want finality – they don't want the delay and uncertainty of appeals.

32. When I started practising law 45 years ago, arbitration was seen as a quick, cheap and informal way of resolving disputes, which avoided many of the more formal procedural requirements involved in court proceedings. On returning to the world of arbitration following my retiring as a judge after 21 years, I have discovered that those involved in arbitration has become much more concerned with procedural issues. Indeed, it appears to me that arbitrators are more concerned with procedural matters than judges. I think that this development is partly due to the difficulty of appealing on a point of substantive law. It makes a party who is disappointed with an arbitral decision focus on other issues, such a arbitrators being procedurally unfair, arbitrators not sticking to the procedure which they laid down, arbitrators not giving a party a fair chance to present its

[16] Compare the Arbitration Act 1950 with the Arbitration Act 1979

case, arbitrators being in some way unfair in the way they deal with an issue, or arbitrators not dealing with a point in their award.

33. This means that parties to arbitrations, and indeed arbitrators, have become almost obsessed with procedural issues – due process paranoia as it has been called in some quarters[17]. It is a tendency which has been reinforced by two types of problem which are sometimes encountered after an arbitration award has been made. The first problem is that of the occasional unduly harsh overruling by a judge of an arbitrator's procedural ruling. Some national courts seem, at least to a UK judge's view of things, to appear to adopt an inappropriately exacting approach when it comes to assessing arbitrators' procedural decisions. Secondly, and more frequently, successful parties sometimes encounter difficulties when seeking to enforce awards. One of the attractions of arbitration over litigation arises from the New York Convention, which enables arbitration awards to be enforced easily through the courts of countries which have signed up to the Convention, and very many countries have done so. However, judges in some of those countries sometimes appear to be reluctant to enforce awards and can be relatively easily persuaded to refuse enforcement because of some procedural defect, which is often insignificant or even illusory.

34. At any rate to a lawyer brought up in the common law tradition, such an exacting concern about procedural issues appears not merely undesirable, but positively inconsistent with what commercial people would expect. I fear, however, that the concern is exacerbated by the involvement of some institutions in arbitrations. It is not so much the rules which are made by those institutions: it is more their attitude to the drafting of the awards. When considering draft awards, their concern with procedural issues appears at times to verge on the obsessive.

[17] See Queen Mary College and White & Case, *Improvements and Innovations in International Arbitration* (2016)

Again, from my perspective, it is in surprising and stark contrast to the relative lack of interest on the part of many institutions when considering whether there are sufficient, or indeed any, reasons in the award as drafted to support the conclusions of substantive law reached by the tribunal. (I think that it is only fair to the institutions to add that there have been several occasions when their corrections to my drafts have been very welcome.)

35.Despite these downsides. very many companies and their lawyers prefer arbitration to litigation. Why is this? At a recent conference I attended in London, I mentioned in my introductory speech the perceived advantages of arbitration over litigation as they are understood by most independent lawyers and judges. Those advantages were – private hearing, private award, ability to choose one's tribunal, greater informality, international enforceability, and no right of appeal. I was interested that, later in the conference a panel of general counsel from various different substantial companies in different countries all agreed that, unless the litigation would be in the courts of a country whose judges could not be trusted, the only one of those factors which really mattered to them was international enforceability.

36.Sometimes, I think that at least in some legal circles, lawyers prefer arbitration to litigation because, as I have explained, arbitrators, unlike judges, do not exercise much control over unnecessarily expensive or time-consuming activities undertaken in the course of the arbitration, and so, to put it bluntly, lawyers can often make more money out of arbitration than out of litigation. Again, that is not a suggestion that anything dishonest is going on, but it is a suggestion that self-interest will inevitably influence any decision sub-consciously – in this case a decision whether to advise a client to arbitrate rather than litigate. I think that lawyers have to be careful in this connection. The costs of arbitration are in general getting very substantial, sometimes prohibitive, and

there is a danger that it could eventually price itself out of the market. The combination of increasing expense and due process paranoia is not a good one. Arbitration currently remains a popular way of resolving disputes, and it deserves to be so - provided that it is properly and proportionately conducted both by lawyers and by arbitrators. However, just as it is true that it is best if lawyers stop their clients getting into difficulties rather than helping them once they get into difficulties, it seems to me that if there are problems developing with arbitration, those involved should try and head them off before they become very serious, rather than waiting for the problems to appear and only then to try and cope with them.

37. Even now, then, it is the case that arbitration has developed, at least in some quarters, a reputation for slowness, due process paranoia and excessive cost. This means that arbitration is at risk of becoming less attractive, and, unless something is done, that state of affairs will continue. That inevitably means that those who might otherwise arbitrate will be more open than before to suggestions that they consider other, cheaper, quicker and less procedurally sclerotic means of resolving their disputes. Mediation is an obvious alternative, some would say the obvious alternative. Indeed, it is a win-win alternative: if it leads to a settlement, arbitration is avoided; if it fails, the parties can press ahead with arbitration. All this of course means that the foundation of the JIMC is very well timed for another reason in addition to those which have been given by previous distinguished speakers.

David Neuberger Kyoto, 20th November 2018