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"ARBITRATION: JUST WHAT ARE THE PARTIES AGREEING TO?"

BY

PROFESSOR PHILLIP CAPPER

It was nearly thirty-five years ago, as a very young lecturer at the University of Durham, I received a manuscript letter from what appeared to me to be a God. That is to say, any of you know anything about the English law contract will realise that the name Guenter Treitel is of enormous significance. But the curious thing about it was that it was addressed to me as "Dear Capper". He later explained to me, when I joined the Oxford faculty, that he thought it more affectionate than writing to me as "Dear Mr Capper". That is just one of those nice little things that you find in English traditions which someone who has not grown up in some circles — the Bar, the University of Oxford, some schools in England — would not understand and might even think was quite the opposite; dropping the title that might even seem to be a tiny bit curious.

On one occasion I was Counsel in an arbitration, with a QC appearing against me. As we held the arbitration in our offices I felt I was the host and so, at the end of the hearing, I turned to the sole arbitrator, a very well known arbitrator, and said, "*Sir, can we help you at all in getting your papers back to your Chambers*?" My Japanese clients were standing next me in earshot. The arbitrator said: "*No, it's quite alright, David's clerk is coming and he will take both our sets of boxes back*". David was the QC opposite me. You can imagine that the Japanese clients found curious such a close relationship between the arbitrator and the opposing Counsel.

These curious features and traditions that we have in this country do not always play well for us.

The reason I mention Guenter Treitel is because he went on to demonstrate to me that the purpose of lectures is, as he put it, "*To fly a kite — when giving a lecture, Phillip, fly a kite*; *there is no point in doing anything else*". There are other media for doing other things, but to fly a kite is what I want to do tonight.

I want to fly a kite which will take us incidentally from the beginning of the world (at least in a non-Darwinian sense) to the end of the world, for reasons that I will explain, and you can be reassured that I can cover that entire period in the allotted thirty-five minutes or so that I have to go.

I should remark that another element in what I am talking about tonight is the contrast of traditions in international arbitration. I have already begun to hint at some of those which are peculiar to our shores. Of course, other legal cultures do things very, very differently. It is not often as an advising lawyer, when you are involved in a dispute and receive a draft settlement agreement, that you can be heard (by your colleagues down the corridor!) laughing out loud at its drafting. I had co-counsel in Florida, and we were settling a matter. The purpose was to say that all claims to the date of this agreement were settled. Well, I did not laugh at the fact that the description of "*all claims*" took a page because there were so many "*whether notified or not*", "*whether known or not*", "*whether claimed or not*" and all the other words that went to the idea of the universe of claims. What I laughed at was that the concept of "*to the date of this agreement*"" had been drafted by my Florida co-counsel in the form "*from the beginning of the world to the date of this agreement*". I could not work out whether this was informed by a special form of political correctness or, on the contrary, it was informed by a past professional indemnity suit as to how to express such a time period.

The point is that we have in international commercial arbitration the most wonderful and enormous diversity, and that is a good thing. We have a diversity of arbitration even in England and Wales, and some will say that we are the world's leaders at it. There is an enormous diversity in the rest of the world, which is very different from some of the things that we do. You are probably already thinking, as I speak, of what those different forms of arbitration are: schemes for consumers run by the Chartered Institute of Arbitrators; special forms of maritime arbitration, some of them extraordinarily short; arbitrations conducted by lay individuals; arbitrations that go on for months and months with three distinguished arbitrators, perhaps members retired of the highest appellate tribunals in the world. Similarly, in the world beyond these shores, we have things as diverse as the two or three days that a

CIETAC arbitration might take, through to very extensive mechanisms for arbitration that might be found, for example, in the United States.

That diversity of arbitration led Professor Rusty Park to deliver his Freshfields Lecture some years ago on "*Arbitration's Protean Nature: the Value of Rules and the Risks of Discretion*". Some of you have heard me say before that it was a wonderful lecture to listen to, but the proposition was wholly unsustainable. Now, in the interval between Rusty Park's lecture then — in 2002, I think it was — and now I have come to realise that that was an unfair criticism. I think the conclusion is still unsustainable and I will explain what it was. But it does seem to me that his commentary on the nature of arbitration and the fact that we need to do something about it was right. I merely disagree with the pathway that he chose to go down in putting that right. Indeed, in that lecture, Rusty Park cited another article by our own John Uff, published at King's College London, in a book concerning international arbitration. There John had proposed a similar thesis, namely that there was an unpredictability about international commercial arbitration. Both John's previous article and Rusty Park's later lecture focused on the idea that there was a gap, a vacuum, an unpredictability, and Rusty saw it as a tension between discretion, the arbitrator's discretion, and the rules. What Rusty pressed for was the idea that there should be a system of much more detailed rules for international arbitration, the consequence of which would be that people coming to international commercial arbitration would know what they are agreeing to.

And that's my question: When people agree arbitration in the context of international commercial arbitration, what are they agreeing to?

Now, why "Protean" (as in Rusty's lecture)? Well, you know perhaps the English adjective "protean", meaning "variable, flexible". Of course, it comes from a God, one of the sea gods, albeit a servant of one of the sea gods, Proteus (— gods again, and not the last we will refer to).

Proteus, as you may remember, took on many forms and he has given us this idea of the many formed characteristics that Rusty says characterises arbitration. When Rusty said that what we needed to do was to introduce by prescription a higher level of predictable forms of rules that can be used in arbitration, he claimed that there was a unity of essence in international arbitration, which he sought to sketch out in his lecture.

I must confess I cannot think of the phase "unity of essence" without thinking about Peter Sellers and Dr Strangelove. As I look around, I reckon probably a third to half of the people in the room, at least, have had the opportunity to see the movie "*Dr Strangelove*". If you have not, I recommend it as one of the best films ever. You may remember, those of you that remember Dr Strangelove, that the reason I am thinking of "unity of essence" relates to the problem fixated on by the mad commander of a US air base. He had decided to initiate World War 3 himself by despatching the B52 bombers towards Russia.

This is a most interesting caricature of arbitration, the more you think about this movie, and I send you away tonight to think about more parallels between Dr Strangelove and international commercial arbitration. It fell to Peter Sellers, playing a seconded Group Captain — he could not have been more English in that particular role — trying to persuade the mad American General, who had completely flipped, that the General should reveal the code which would recall the bombers from their task. If you have seen it, look at it again; it is wonderful to see the contrast. In the exchanges which take place, it is a little like some of the practitioners in arbitration in England, like Group Captain Mandrake, trying to talk to some of the practitioners in international arbitration from United States, General Ripper.

Captain Mandrake works it out in the end because of the scribbling on the pad refers over and over again to "*purity of essence and peace on earth*". Mandrake worked out that the recall code was "POE" which is an acronym for "purity of essence" and "peace on earth". But it was too late because the prescriptive rules system which controlled the bombers in the air also provided that, even if a bomber was hopelessly disabled, it would carry on inevitably to its target, even if the recall code could be transmitted to it. Without spoiling the end of the film, what in fact, of course, happens is that, despite all of the careful rules — the prescriptive rules — nevertheless they do not prevent the world coming to an end. Hence the reference to the end of the world, with the wonderful tones of an English wonderful songstress whom you will remember singing "*We'll Meet Again*" but not before Peter Sellers, now performing the role of Dr Strangelove, has contemplated a new Eden where humanity might start again.

I can see from some of the faces in the room that this is a very happy memory of a very black comedy. But I ask you to look at it again in a new way because there is this wonderful caricature of different traditions. The more the English Group Captain tried to reason with the more than American mad General, the more one sees the shades of encounters in international commercial arbitration that are not entirely distant from that.

But let's come back to Proteus, because Proteus gives me a way to where I want to go. That is, how are we going to understand arbitration in Darwin's third century and in this new century that we are in. I think the answer to the question "*Arbitration: just what are we agreeing to?*" is that we are now agreeing to a system, but not as the English see it. It is towards that goal that I now want to move by returning to Proteus.

You may remember that the myth was that, in order to find the truth, you had to capture Proteus. You had to hold on to Proteus while he changed all his many forms. Two people did. Aristaeus did. Menelaus did. I am less interested in Aristaeus than in what Menelaus did. Menelaus captured Proteus and held on till the truth was revealed. I want us to capture the nature of this protean thing called international arbitration, through its many types, in order to see whether we cannot arrive at a better understanding of its true nature — because I believe that that nature has evolved over the last quarter century or so. I think the globalisation of world trade has changed it irrevocably to the point that we now have to approach the system of international commercial arbitration with different answers.

Well, there was another Menelaus. You may not know of this one. He comes much later than the mythical King of Sparta, the previous one who had captured Proteus. This is Menelaus of Alexandria. I suspect that John Uff and other engineers in the room may very well know of Menelaus of Alexandria because he is credited with the invention of the concept of the geodesic. Apparently — and I can say with no more authority than the next few words — a geodesic is that straight line which is the shortest rout between two points on a curved surface.

What on earth has this got to do with my subject? Well, of course, geodesics in England have become famous because of a place at the very end of the earth, Cornwall. In Cornwall is the Eden Project. At the Eden Project there are domes — geodesic domes indeed — designed like bubbles because they fit rather well on the uneven surface of the quarry floor.

What on earth has that Eden got to do with my topic? Well, I want to propose in one sense a new Eden, though not the kind that Dr Strangelove was hoping for in those last few moments of his planning. The Eden that I wish to debate is in fact Darwinian. Albeit that the non-Darwinian version of Eden saw the start of the world, the non-Darwinian Eden in Cornwall is based around something that you may or may not have heard of — biomes. Biomes you should know about because they are one of the most important things in the world. They

express the idea of the community of organic life around the earth. They are one of our eco systems. I want to refer to biomes because they are different from eco zones. They are both systems, but biomes describe not by reference to history or geography but rather by characteristics which are shared across national borders (as, for example, the marine biome or the biome which is tundra) — in other words, characteristics that describe systems that share the same characteristics and thrive by their nature. Indeed, there is a very interesting idea about the perfection of a biome which is called climax vegetation.

Climax vegetation, as you may know, is where vegetation has reached its perfect stable point without the intervention of humans, without entropic intervention, like the savannah, for example, where human kind is not interfering with its ability to thrive.

Now there is an Eden sense of arbitration which was fashionable in this country about ten years ago. It was characterised in a debate, as several of you in the room will remember, between Geoffrey Beresford Hartwell and Arthur Marriott Papers were written on the subject, with Geoffrey promoting the view that arbitration is so inherent that it is something which humans do without lawyers — they have done it forever without lawyers and it is lawyers who are polluting the process — whereas Arthur was of the view in those papers that arbitration is in fact a delegation of state function to individuals carrying out the role of arbitration.

Geoffrey had this kind of wonderfully Arcadian sense that the epitome of arbitration was shepherds and shepherdesses in the most simple of lifestyles solving other people's problems for them as disinterested third parties, in contrast to Arthur's state concept of delegation. Neither is right. Neither of those models from that debate ten years ago was right, because it seems to me that arbitration is a biome, and we have spent too long treating it as an eco zone. Eco zones, unlike biomes, are eco systems which are geographically or historically defined, and much of the arbitration literature which you read today still talks as if there is a common law view of international arbitration or a civil law view, or refers to this Swiss arbitration or this English arbitration.

When people agree arbitration, what are they agreeing to? My thesis is that the vast majority of business people in this world are not agreeing to national concepts, baggage-laden ideas of arbitration informed by the litigation practices of history and geography which is the eco zone way of looking at systems. Eco zones are the way we divide up the world by history and

geography; biomes are the way we divide up the world by a community of commonality of similar characteristics; and that is what I think international commercial arbitration is growing into. I see it as becoming a largely unitary system.

Of course, at the moment, we are not there. CIETAC will not carry on with its three day arbitrations and we already are not carrying on with our thirteen week arbitrations. The old contrasts are largely gone because the system is responding to the needs of the globalised market place. John Uff may remember that, in his paper which was cited by Rusty Park in the lecture on the Protean nature of arbitration, John had quoted from Gillis Wetter. Gillis Wetter had effectively used, without ever mentioning Darwin, a sort of commercial Darwinian idea. The quotation which you put in your paper, John, was that Gillis Wetter had said that arbitration has to be responsive to the free market place. It is effectively a system dependent on how business wants to use it, and if it does not respond to their needs, it will disappear — pure Darwinism and indeed, therefore, the concepts of biome rather than eco zone work.

Rusty Park's lecture, for me, provokes the thought, but not the solution, of how to capture the thing which Menelaus did, to capture this protean thing. But, as I said earlier, Rusty said it was a tension between arbitral discretion and rules. I do not think that is the real tension. It is a symptom of the tension because what he classified as arbitral discretion is indeed a way of describing the relative absence of prior clarity as to the key parts of process, before transmission of the files to the tribunal and the drafting of the award, as to which almost all rules and all laws everywhere are silent. There is a question of what to do there, but my theme tonight is that the system is populating that gap, but it is populating it not by prescriptive rules, but by a Darwinian type evolution in the commercial marketplace.

So in his lecture Rusty pressed for a way of dealing with this gap by prescriptive rules, by decreasing arbitral discretion and increasing the extent to which institutions and others publish laws *a priori* which might be more or less prescriptive but for which you might or might not have 'opt-in' arrangements. He even contemplated the idea of the arbitrator opting into them. The ICC would publish them; the LCIA would publish them; and at the end of his lecture Rusty proposed twenty-five issues on which he said this kind of silence exists and on which rules are needed now.

My solution is not a prescriptive solution, save that I have said that it is a biome and not an eco zone. In other words, it is not linked to history or geography. It is linked to common, shared objectives, which is why there is another biome which is investor treaty arbitration and another biome which is consumer scheme arbitrations and another biome, perhaps, which is the very special category of those rapid maritime and commodity related types of arbitration. However, if we see it that way, we start to realise why we should not inform international commercial arbitration from investment treaty arbitration because each is performing different functions. They are different biomes. They are plainly not eco zones because they are not geographically and historically related and separated. On the contrary, they are separated in the way in which biomes in the world are separated.

Evolution for me does the rest because the real tension is not between arbitral discretions and rules. The real tension, in my view, is between party autonomy and system. I think that party autonomy is built into the system, and by party autonomy I mean the dominance of the consensual agreement. I am denying the survival of the predominance of the agreement of the parties, the consensual basis, as the answer to almost everything in international commercial arbitration because it is not even true today. It is already changing in ways that I am going to demonstrate but I think it is going to change more. There are some things that will remain central – the selection of the arbitrators, the seat, perhaps the rules. But, at the moment, in the transition that we have seen over the last decade, we are in a new century, we need a new start. The new start is to face up to the fact that international commercial arbitration has outstripped national, historical, regional baggage into a new biome.

Last summer some of you in the room were there at an extraordinary catastrophe. It rivalled global warming. When you read about it the news was hot to the point of almost hysteria. It was IBA e-discovery. The IBA committee on arbitration had unleashed the awful topic of e-discovery. We read the extraordinary e-mail exchanges that charged around the world from some people who seemed to deny that e-discovery was of any relevance whatsoever to arbitration. Some of them probably did not have any idea of where in the world electromagnetically their e-mail resided, which will be an interesting place to start when thinking about e-discovery. There was so much hot air on whether or not this was a phenomenon. It was like climate change deniers. It was the same kind of reaction. People were saying "*We've got a problem, the world has changed; there's a volume of stuff happening*". It's a bit like sea level rising really, and we shall have to do something about it.

We cannot deal with the disclosure of documentary evidence which is stored electronically, in the same way as we have traditionally dealt with its disclosure in other ways. Yet we got a whole bunch of deniers. People came out of the woodwork denying that there was even a problem. It revealed that there was actually quite a cadre of people being trained in the same place, largely affected by claims tribunals, some years ago that had all been young people in a particular context and they had learned — this is the interesting point (there was an almost unswerving belief in most of the contributors to that debate) — that there was an *underlying system*. Even the people who railed against e-discovery were effectively articulating a belief in the system. Indeed their denial was based on the idea that there was a system, which to some extent they were trying to protect.

Now I understand that this idea of system, a biome for international commercial arbitration, something which is not rooted for all purposes in consensual agreement, will come to some communities more easily than others. For the French it is already clear. Most French arbitration thinkers think of the arbitrator "*comme juge*". The moment you have the transmission of the mandate, you have already given up a great deal of the parties' autonomy to the mandate of the tribunal which has its power to arbitrate. This why you do find Swiss, Belgian and French arbitrators who believe that the ICC Rules give them powers beyond party autonomy once they are appointed. So for some communities it is an easier idea. But there is change here too.

The climate is changing in England. Look at the decision in *C v D*. We got a judgment at first instance which fits with the rest of the world that says "*If you don't have an express choice of law in your arbitration agreement, you inform the choice of law governing the arbitration agreement from the seat, not from the choice of law for the rest of the agreement*". That is very, very significant. It fits very naturally with a civilian view, if there is a civilian view that is different, which is that in the absence of an express choice governing the law of the arbitration agreement, of course it should be the seat. And why? Because the seat feeds the system and you want the law governing the agreement to arbitrate to be the law of the system. You do not want a divergence. That's a 'system' answer. It is not about contractual autonomy. It is not about searching out the will of the parties. See the *Fiona Trust* case in the House of Lords: look how it drives away our English fascination with dancing around "*under or in connection with, out of or in relation to*", telling us that the answer to our question is what businessmen had in their minds at the time that they entered into the arbitration system.

You can find the same approach in Singapore last year — *Insigma v Alstom*. A pathological clause provided for ICC arbitration before the Singapore International Arbitration Committee. The Singapore courts uphold the arbitration agreement and treat it as meaning ICC rules administered by ourselves in Singapore *mutatis mutandis*. That is pretty bold. So you realise that, in instance after instance, around the world, especially in the common law world, we are seeing "*Let's uphold the arbitration agreement – the parties wanted to arbitrate – we will uphold the system*".

There was a very interesting award before the Stockholm Chamber on which I commented in the Stockholm Chamber Journal last year – again, exactly the same point. The pathological clause provided: "*Arbitration Committee in Sweden*". The Stockholm Chamber had no difficulty whatsoever in treating that as a reference to them – uphold the arbitration. Then there was a problem over what law governed the agreement to arbitrate because there was a genuine possibility that this was in conflict with mandatory public policy law in Egypt. The tribunal had no difficulty whatsoever in reaching the conclusion that since Sweden was the rules it must be the seat and, if it is the seat, that must be the law governing the agreement to arbitrate – it just flew straight past the tribunal as absolutely incontrovertibly obvious. These are signs of a biome style system.

So what populates my system? If we were to draw it in the way that the eco warriors think about their biomes, as I said, the marine tundra and so on, well of course it would have the New York Convention in it (which at least in England isn't law but it is implemented by law), it would have the Model Law in it which is not law at all but is enormously significant and growing. This is the point. It is a growing system which in a Darwinian sense is evolving.

Institutional rules have changed. However, if you look now at ICC, LCIA, DIAC, and SIAC, there is tremendous coherence and convergence of the way in which the rules are described. Indeed I am tempted to say that they have ceased to be prescriptive. The modern rules that we see from the leading institutions are not prescriptive – they are descriptive. They describe the same thing which is the growing system which is common through international commercial arbitration.

We also have "meta rules", and I think this is the interesting difference from what Rusty Park was suggesting. In a Darwinian biomes sense, we are growing meta rules to fill the gap. The meta rules that are filling the gap include the UNCITRAL notes on organising proceedings,

the IBA rules on evidence, the IBA guidance on conflicts, the ICDR's exchange on information guidance and three very interesting protocols from the Chartered Institute of Arbitrators (three of the best things to come out of the Chartered Institute of Arbitrators — on expert witnesses, e-discovery and appointments). These protocols form meta rules. They are not prescriptive – that is their genius – and that is why they work in a Darwinian sense because they develop through the marketplace into a working system. But people who agree to arbitration are, in my submission, agreeing to that system. They are looking for a minimal amount of freedom of choice and a maximum amount of assurance that the people who do this kind of thing have got a sensible system up and running.

One of those three protocols of the Chartered Institute (on the appointment and interviewing arbitrators) is fascinating. John Uff may remember that he and I were in a room in Barcelona some years ago, and I was talking about interviewing arbitrators which is now widely done. An English QC jumped up and said "*Phillip, this is outrageous. Are you telling me that people are coming along having ex-parte meetings with arbitrators before their appointment? This is dreadful"*. Then a leading and very well known French arbitrator stood up and said "*I feel I would have to be realistic about this. Of course one has an interview and one discusses limited things. One says one has no conflict. One says one is independent. One says that one is available"*. Then one of the most well known Spanish arbitrators stood up and said "*Let me tell you how it is in this country*". He said, "*I get a call in my office from a Mr Sanchez and Mr Sanchez says "Mr X, I have got this big problem. I need your help." "Well, what's the problem?" "We've got a big dispute that's got to go to arbitration" and he starts to tell me about the dispute and I said, "Well how do you want me to help you? Do you want me to be Counsel or do you want me to be arbitrator?" and Mr Sanchez says, "Look, I really don't mind. Whichever you like, I just want to win.""*

Now we have a protocol that guides us as a matter of system in a way which would be acceptable across different methods and the modern practice of appointing chairmen is an example. Chairmen are most frequently now appointed by interaction between the two parties nominated. It is not something that rules provide for; it is not something which typically the agreement provides for. It is almost universally done. It is rational. It is sensible. It is a system answer and no-one is offended by it. No-one's consensual agreement has been overridden. It is simply taken as read — another bit of the patchwork that fills the gap between transmission of the file and the award itself.

There is an excellent doctoral thesis at Queen Mary from Dr Stavros Brekoulakis. It relates to third parties. The whole subject of third parties and multi-party relationships with ICC is firmly on the agenda. I know that the ICC now effectively has meta rules for how it deals with the joinder and consolidation of proceedings in a way which the current rules do not describe but there is a practice there – there is a system that works. We also have the ***Dutco*** case which has meant that albeit now reflected in the rules, nevertheless the concept is not controversial. A few people say that in multi-party cases the LCIA 22.1(h) rule is controversial, but you do not get people saying that the ***Dutco*** rule in the ICC or the LCIA Rules is an outrage because it takes away from the parties the appointment of the whole tribunal. It is a system answer. You cannot make any sense of that by contractual agreement other than they agree to the Rules but none of the people who agree to the Rules thought about the ***Dutco*** problem when they did so. This is a system – a biome in operation.

I think the same is true with regard to privilege. I have already mentioned the IBA rules on Taking of Evidence. It seems to me that there is a trend of a rejection of jurisdictional niceties. It used to be true in this country, barely a decade ago, especially when there were arbitrations on the ICE construction contract, of which I guess there are very few now, that people used to dance around the notice of arbitration because it was the notice which defined the jurisdiction. The Rules themselves did not expand that very well. Now when you look at ICC arbitration and LCIA arbitration, when you scratch the surface, it is not at all clear that counterclaims are admissible. Have another look at both those sets of Rules. If you really, really examine them they do not empower by definition the hearing of counterclaims. Add in a stepped tier to the arbitration where the counterclaim has not yet gone through the previous step(s) and you have got a major jurisdictional problem. You will still find arbitrators who do not think there is a need at that point to force the counterclaimant to go back, that the rules allow him to bring a counterclaim – it is a system answer throughout.

What I believe we are seeing in answer to my question "*Arbitration: Just what are the Parties agreeing to*?" is a Darwinian, Eden style system — not in the original sense of Eden, not in the sense of Geoffrey Beresford Hartwell's shepherds and shepherdesses in the garden, still less the beginning of the world in a non-Darwinian sense, but the Eden Project and its biomes. I think we have got this geodesic inspired idea of biomes which represent in international commercial arbitration a system that the world expects us to improve. They expect us to be able to deal with joining parties. They expect us to be able to deal with

privilege questions, to deal with confidentiality questions, to deal with joinder and all the issues that go with the setting up of the tribunal. All they really want to do is to have some power and influence over the selection of the tribunal, possibly the seat and possibly the rules. The rest of it they expect the practitioners to get right; and it is a fiction that most of this depends on the consensual contractual arrangements.

Now, Guenter Treitel inspired me to the view that lectures were like flying a kite, so that is what I have tried to do — to fly a kite and to ask you whether it flies. What I am saying is quite challenging for London because London arbitrations are much more like eco zones. They are much more influenced by history and geography. I am asking that we re-classify arbitration as a biome, that is to say, a system that defies history and geography, in the hope that we will thereby identify what is the true unity of essence in this Protean thing without the calamities that beset the various characters in Dr Strangelove.

Questions

Q. It's a slightly superficial question but if you think this is a sort of un-English view of arbitration that you're proposing, why is London growing as a centre for arbitration?

A. That is an obvious dilemma. I think the answer is that much of what I have described is actually typified by the truly international arbitration and best practice that is already taking place in this city. That is to say, some of our worst excesses are now in the minority. Unfortunately there are perceptions around the world that that is not the case. I think there is an overstatement of the geographical baggage and historical baggage that we have but we have to be careful; it varies. I well remember appearing as Counsel in an arbitration in the City only a very few years ago and the hearing began with the sole arbitrator already in the room sat at the table in silence, and when everyone had settled down he turned to the Counsel whose application it was, that was his idea, not mine, and nodded and the poor clients who had paid to come all the way from California for this experience wondered what on earth was going on. It's just a simple little illustration, whereas in reality all good arbitrators are going to be shaking people's hands over the coffee cups and have done all those other things to make everyone remember that arbitrators are really only labour-only sub-contractors doing that task, wherever they may have been before.

Q. I like if I may, after congratulating Professor Capper on that marvellous lecture, to ask a question accepting his thesis. The question is how long you think it will take, and I ask that question for a particular reason. I sat in on the IBA session on discovery and I found it quite amusing because the Chairman began by saying we must remember this is arbitration. This is not the courts. This is not a national matter. We are here to see what the right system is for arbitration. But I noticed two things. First of all, all the speakers reflected on discovery either the view of the common law country, if they came from it, or the civil law country, if they came from it, and other views depending on their national systems but also what seemed to be accepted was that the practice adopted by any tribunal would be the one of the jurisdiction that it represented, so it did seem to be quite a long way from achieving the idea of a system.

A. Well, in answer to your first question I genuinely believe that it will be less than two decades. I think that in less than two decades we will be looking back at some of the

ways we saw arbitration as something very transitional to what it eventually became because global commerce demands that there be an effective system for cross-border disputes which does not involve national state courts. It will not tolerate the simple answer — it is, well, just too difficult to work out how to deal with third parties and just too difficult to work out how to deal with this or that. The question is the training. The reality is that the modern world of international arbitration training, of which there is a very great deal of good quality around the world, is being done on a different basis, and it is not resulting from people coming up through their national systems. But I am disappointed that that session lacked that view, because the reality is that the seat of the arbitration, if it is Model Law or Model Law plus, which the older territories are, generally speaking, we all know that none of those countries disposes answers to these kinds of questions through their arbitration law. That is the whole point. There are no prescriptive rules. It is another weakness of London that we probably too readily assume that we do everything the best in the world and the way we do it across the road in the courts is by definition of the superlative way and therefore it should inform the way we do it. There is no connection whatsoever between the seat of an arbitration and the evidence disclosure rules in the state courts in that place. No connection whatsoever.

Q. I am fascinated about living in a biome with a lot of other arbitrators and rules. My background tells me that e-discovery also leads to complete breach of confidentiality and that awards will become common knowledge. Do you have any vision in your biome of whether the speed with which leakage comes from confidential documents will progress to the national spread of arbitral practice as it was in the Middle Ages?

A. Confidentiality is broken not by e-discovery but by the nature of the media and the ease with which it is dealt and we already see that and so we have seen now for a long while. Indeed, if I remember rightly in the *Bulbank* case which is the Swedish contribution on the very topic of confidentiality, it was the publication, I think, on the web very soon after the decision which was said to have been the breach of the arbitration agreement which repudiated the obligation to arbitrate, which eventually failed, as you know. So it is not e-discovery as such. It is the medium. It is a very interesting question whether this system, which is undoubtedly growing, will lose confidentiality and that is quite difficult to judge.

One of the things I did in preparing for this Lecture was to look again at the last two Queen Mary surveys and see whether they seem to be either supportive or contrary to what I am saying and, as I read them, they are supportive, that is to say, I don't find trends in those reports contrary to what I am arguing for. Of course, confidentiality was not that high on the list of desiderata as I recall in the first survey. It was things like enforceability, flexibility, the selection of the arbitrators. So I suspect that we, in England, probably have the highest doctrine in the world for confidentiality and that might be a good thing. It is going back to the early question: "Why London?" There is a very good reason why people come to London. There is an infrastructure of probity and resilience, quality and choice together with infrastructure with non-legal infrastructure as well as legal infrastructure, which makes it a very good choice and very often it's allied with substantive law choice and, of course, English law is without question, the law of choice substantively in the world. That is another debate and another lecture but it is easy to see why that is. So maybe there are attractions to our high doctrine of confidentiality but I am not persuaded it is e-discovery as such. I think it is the nature of the media that enables these things to happen. What was the statistic that that young man who took a picture of the plane lying in the Hudson, who scooped every photography agency in the world which just ran round the world in a tremendous explosion of diffusion which is what happens. That will happen to our submissions as well.

Q. There is a considerable difference between the way disclosure is done in the common law jurisdictions to civil law jurisdictions. Do you see those combining in some way or one or the other becoming more prevalent within international arbitration or will they stay in separate biomes?

A. They are not separate biomes. The biome I am talking about is already unitary and that which you describe if I may say so is aberrant. I don't accept that it is the case that there is a civil law view which expresses itself through arbitrations and a common law view. In the various arbitrations where I have sat on tribunals of three, it has always been a mixed tribunal of individuals who came from a common law background by their original training and from a civilian background and we had no difficulty in arriving at arrangements that were never informed by our national baggage. On the contrary, there is in reality a coherence of attitude at international

level which isn't a million miles away from a slightly relaxed version of the post-Woolf standard directions in fact. The bit that is absent is putting in the documents from the other side that you know to exist that they haven't yet asked for, that third element in the post-Woolf standard directions. But I have to contest that. I was involved in arbitration as a sole arbitrator recently where I was unable to prevail at the first round of the case on the parties in a different common law jurisdiction themselves wanting to go by a listing process of the kind that we all remember from the old days. No, I don't accept that there are these two different communities. The reality is that the vast majority of good international arbitrations are already operating on a pretty well common standard. It may vary but it is not varying back international trend. It is varying as to appropriateness within the case.

Q. In the three years since I have been Director General of the Chartered Institute, Phillip, and I have spoken about it and its failings on a number of occasions and I am particularly delighted therefore that it's moving into, if you like, a more serious phase with the publication of the protocols and guidelines that you mention and I would just pay tribute to Doug James and Peter Rees QC as the people who steered these things through. Given your development of the biome theory and what you are actually talking about how you populate this with guidance in order to keep the corn stalks upright. Where the gaps and what are is the work that should be being done now to take the next step forward? I might just make the point, particularly about the protocol on appointments and interviewing, that when that was actually produced, as indeed the discovery protocol as well, there were howls of protest when it was first published at various levels, particularly in the States. It is interesting to go back a year later and discover that some of those who had actually been howling in protest, actually were using it.

A. The immediate priority is multi-party joinder consolidation and how to handle all that. That is the first one. By the way we don't have to populate the whole of this biome. It is populated. You have got to be careful to allow it to have its time. In other words, we mustn't interfere. That is the point.

Q. I just wondered to what extent — you didn't mention circling around the united universe where arbitrators develop and expand their tools and techniques of survival around the sharks of the State courts — effectively, is the space created by arbitration

defined by State courts and perhaps inconsistent views of different State courts on what effectively arbitrators can get away with either at the seat or when it comes to enforcement in other jurisdictions.

A. Well, one reason why we are doing so well in London is that on the international side of arbitration, our Courts have now shown over and over again that at the old criticism of us, that we were limiting the way in which you described is no longer true and because the appeal on the point of law is automatically excluded by most institutional rules, they will say in ICC, by merely agreeing that goes too and of course doesn't even apply if the governing law is not the law of England and Wales. You can still get tripped up by having a Stockholm Chamber arbitration in London. That will give you an appeal on a point of law, if you are not careful, but that doesn't compare at all to the strictures that you see in some other countries that have either not yet embraced the Model Law or have not implemented the Model Law, but I regard that as transient because only in the last week there has been a proposal for an international financial court. Why? Because financial problems that we are presently looking at are no respecters of national boundaries and national regulators, and the same is true of the dispute resolution mechanism that globalised world trade requires. We just have to wake up to it and the courts will eventually wake up to it too.