International Congress of Maritime Arbitrators X
Vancouver, 11 September 1991

by The Rt Hon Lord Justice Mustill

Introduction

A well-known periodical used to have a feature entitled — "The most unforgettable person I have ever met". Some of the choices seemed a little odd but the description exactly fits my recollection of Cedric Barclay. When I was asked to deliver the first of his eponymous lectures I was naturally touched, honoured and daunted, all at the same time. I was also relieved when told that this was not to be the occasion for a panegyric or even a reminiscence: relieved because the task has already been well and movingly performed, on several occasions, in a way on which I could not improve, and also because Cedric himself would have detested anything approaching the fulsome: conventional pieties being out of place. Cedric was not a pious man, although he was deeply serious.

Thus, when I set out to choose a subject I put out of my mind any such theme: although, as we shall see, it is almost impossible to talk about arbitrations without reference to the qualities which, in combination, made Cedric Barclay so unique. For a start, I set about looking through the journals which, both nationally and internationally serve the arbitration community, to see what are the contemporary pre-occupations of those concerned with arbitrations. They seem to be threefold.

First, there are the issues of theory. These come in various sorts. There are those areas of study whose difficulty and popularity vary inversely with their practical importance. As examples I would cite our old friend the *lex mercatoria*, and the concept of *competenz competenz*. These are

genuinely interesting, if one is interested in that sort of thing, but they have little or nothing to say to maritime arbitrators and I will pass them by, confident that nobody will notice the absence of my contribution from the container-loads of theses which they will continue to attract.

Other questions of theory are more deserving of study, and it is a pity that they are so little explored — perhaps because procedural law is mistakenly believed to have little conceptual interest. In a moment I shall urge that maritime arbitrators should step confidently and publicly into the arenas where these questions are fought out. But I shall not tackle any individual topics this afternoon, for a single lecture is not the best medium.

The second class of pre-occupations are practical in nature. Some of these are only too familiar. For example, multipartite disputes where the dispute resolution agreements along the different strands of the web are not the same. How to avoid duplication and inconsistency whilst respecting the parties' choice? To my colleague, Mr Justice Saville, I owe the following inspirational verse —

> "They said that the thing just couldn't be done, And he smiled and he said that he knew it. He tackled the thing that couldn't be done, And he couldn't do it."

Like the man in the rhyme I tackled consolidation and I couldn't do it — and have an unpublishable article to prove the fact. I shall not try again, whilst wishing luck to those present today who are more tenacious.

So also with the problem of the dilatory claimant. I used to assert the parenthood of a purely contractual analysis whilst this was a fashionable solution in England. Since it has proved me to be a total failure, I have been more discreet. Let others carry on the task.

There are of course many other practical problems, as the numerous papers addressed to this Congress will demonstrate. But these are beyond my recent personal experience, and I cannot do more than emphasise that the solutions to all practical problems must begin with a clear understanding of what an arbitration is, and of the juristic relationship

which an arbitration calls into being. I believe that we are still far short of such an understanding, and that more work in this area is of first priority. I return to this later.

Accordingly, it seemed right to fall back on the pre-occupations of the third kind: those concerned with the general interests of maritime arbitrations as an institution. Since it is some 20 years since these meetings first began, and since it is now ten years until the start of the next century, it seemed appropriate to look forward to that century, under a title such as "Excelsior: dispute resolution in the year 2001". I pause to emphasise 2001, because as Cedric Barclay would have been keen to point out it is then, not in the year 2000, that the next millennium will begin. I had indeed roughed out some ideas on these lines when the enterprise was rendered futile by circumstances of which the audience will need no reminding today. It is not simply that recent events have been extraordinary and unpredictable, but also that their speed of occurrence has continued to accelerate. Every day the newspapers' pages and the television screens have become densely packed with events which only a very few years ago would have seemed bizarre. Licensed and unlicensed violence everywhere. Sudden national and international political convulsions. Worldwide shifts of economic balances, and perhaps a state of semi-permanent economic instability. The decline of old moral orders and the upsurgence of others in their place. On the smaller scale, we see collapses of markets, the foundering of commercial enterprises whose names alone have been sufficient for decades to command respect; corruption everywhere, even at the level of heads of companies and heads of state; the resurgence of protectionism; the congelation of enterprise in the face of crippling interest rates; burning flags, weeping mothers and irate shareholders. Maps drawn a year ago are now obsolete. If one applied a maritime metaphor to world politics, one could say that all the perils described in the F C & S clauses have been at work. Perhaps most pointedly of all the peril which, before the unsentimentalists redrafted the standard hull clauses, use to feature in the S G policy: namely "suprisals". We have

had more than enough suprisals, of late.

In the face of events such as this it is plainly impossible to forecast even in the shortest term the future of what is essentially a parasitical — in a non-pejorative sense — economic activity such as arbitration. The future of arbitration is indissolubly linked with the future of economic structures on which it feeds. Thus, whilst it seems that participants in international arbitrations have spent money on lawyers, experts and arbitrators as if there were no tomorrow, this has only mirrored life in a larger economic world. If in the world at large it may begin to seem that there will be no tomorrow, of any kind to which we have become accustomed, the same may be true for international commerce, and hence for maritime arbitration. To stand here today and predict the shape of things to come would be absurd. I do not know who said, "I never make predictions, especially about the future." He was wise.

There is however a different kind of looking ahead. All forms of commercial arbitration, including the maritime variety have troubled times on the horizon. What the challenges will be, nobody can tell. To prepare for them I believe we need to plan for two kinds of action, both new to maritime arbitration. First, to strengthen and explore the intellectual underpinnings of the process. Of course, the massive volume of papers presented to this Congress displays the dedicated study which is already given to diverse specific issues. This must be continued but should, I suggest, be underpinned by a continuous coordinated and sustained attack on the more general theoretical questions which lie behind all the topics of present interest. Secondly, we should aim to integrate maritime arbitration into the wider community of international commercial arbitration.

In the quite short time available, let me give some examples of what I mean.

Too Reticent?

Cedric Barclay was not a vociferous man, but his voice was heard. The voice of maritime arbitration is not heard as it should be. Too little is said

to those who ought to be listening, about its practices, its importance and its theory. This is not altogether surprising. In the main, maritime arbitration has been a success. It has had no need to empire-build. Like the hedgehog, maritime arbitration has been content to do one thing very well. True, the absolute number of maritime arbitrations has probably been smaller than those in the fields of commodities and minor building disputes: the volume of which is now uncountable. These single-issue small arbitrations are socially or economically important and they make real demands of technical expertise. Nevertheless, they do not call for the combination of practical skill and experience with a capacity to handle oral proceedings which is required of the maritime arbitrator.

At the other extreme there are the very few, mainly very large, formal arbitrations of the type conducted under the auspices of, for example, the International Chamber of Commerce ("ICC"), or the International Centre for Settlement of Investment Disputes ("ICSID"). Skills of a high order these undoubtedly require: but there are not many of them. In the several decades of the ICC's existence, the total number of awards must remain in the very low thousands, if indeed it has reached four figures at all. The number of ICSID awards is a tiny handful. By comparison, there must, over the years, have been tens of thousand of awards stemming from shipping disputes. Comparatively short, inexpensive and informal, and yet making demands both on the intellectual attainments of the arbitrators and on their ability to combine judicial and technical skills.

Considering the scale of maritime arbitration, and the degree of technical expertise deployed, its profile in what may be termed the intellectual world of arbitration is also visibly low. I had a cause to rue this when participating, as a member of the U K delegation, in the debates which led up to the UNCITRAL Model Law ("Model Law"). It was both an honour and a pleasure to take part in these debates. A pleasure not only because of the high standard of discussion, but also because those present were genuinely anxious to sacrifice their own personal notions of how arbitration could best be conducted in order, so far as possible, to

accommodate all legitimate varieties of arbitral law and procedure. There was a refreshing absence of that forensic chauvinism which sometimes disfigures international debates in this field. Nevertheless, it must be recognised that the distinguished people who took part, whether they were professors of law or senior officials in government departments or executives of national arbitration institutions, were in the main more acquainted with the theory than with the practice of arbitration. Again, the majority of those who did have direct personal experience of arbitration had acquired it in the field of large-scale, formal, heavily-documented and very expensive arbitrations of a kind quite different from those with which this present Congress is concerned. Thus, when we set out to explain that various more informal arbitral proceedings, of which maritime arbitration was typical, would not fit at all well into the earlier drafts of the Model Law, the reaction was not hostility but incomprehension. The delegates simply did not know what we were talking about. We were fortunate that the US delegation included Mr Michael Hollering with his wide experience of arbitration in all shapes and sizes. Nevertheless, there was practically no delegation other than that of the UK which was equipped, or at least willing, to speak up for arbitration of this kind. One felt like the loving mother of the new army recruit who proudly assured her friends that in the whole platoon her son was the only one in step. The sensation that the licensed eccentrics of the UK were at it again was almost palpable within the marble halls. This was a great pity, not necessarily because the UK's views were right, but that no other delegation had set itself to enquire what kinds of arbitration the Model Law was meant to embrace. I suspect that the practical men in shipping took the view that the Model Law was some kind of United Nations extravaganza which would never catch on in practice to entail or to cause them any problems. Perhaps they were right; perhaps not.

But I really believe that the maritime community ought to be much more alert to potential developments in the field of arbitration which might affect its interests, and ought to be much more ready to band together to

bring those interests to the attention of the international trading community, and of those who have the power to legislate.

Again, I believe that maritime arbitrators are much too reticent to make their voices heard in the field of theory. They are well placed to do so. The pure technical single-issue arbitrations are very important, but they raise few questions of principle. At the other extreme, the block-busting macro-disputes which receive so much theoretical attention, and which indeed merit attention are few in number. Maritime arbitrations lie somewhere between. If one believes that arbitration law is concerned principally, if not solely, with the regulation of procedures in the arbitrations, then maritime arbitrators have built up a great body of experience in such regulation, which they could usefully systematise and pass on to others. If, by contrast, one heretically believes that an important part of arbitration law concerns the relationship between the arbitral process and the courts, then again maritime arbitrators have been well placed to observe this. I cannot speak for other jurisdictions, but in England a great proportion of our law of arbitration has derived from shipping disputes. Very little of this achieves the international exposure which it deserves. I do not say that maritime arbitrators never speak or write about their craft. They do, but what I would like to see are more ventures into what one may call the heavy-weight international journals of arbitration. This would stimulate the evolution of a theory of maritime arbitration. Such a theory is unlikely to be consistent with the transnationalist and mercatorist ideas of some theoreticians. This does not mean that one view of arbitration is preferable to another. But the introduction of methods, experience and ideas from one field to another may cause some initial surprise and shock, but in the end must be of benefit to all. Some degree of iconoclasm in the field in international arbitration is to my mind well overdue. But first we must capture the attention and intellectual engagement of the learned and influential writers who probably do not even know that this Congress is taking place.

Variety

At this stage I would like to add some words in praise of variety, at both the national and the international levels.

On the domestic scene, those who prepare and administer the rules of arbitral institutions have a responsibility to the trading community. There are obvious advantages for the parties to the arbitration if it is described in advance what they are to do and when they are to do it, since this diminishes the scope for misunderstandings and procedural dispute. The task of the institution itself, if it administers arbitrations, is obviously lightened if everyone operates within a defined framework. But there is a price to pay in the shape of a possible ossification. Commercial life is infinitely various. So also are commercial disputes. It is impossible to draft a detailed set of arbitration rules which will exactly answer the needs of all potential disputes. Sometimes a formal and rigorous structure is essential, if the contest is not to spiral out of control. Other arbitrations will function much better under a lighter procedural hand. To my mind, what matters is not that the rules should explicitly provide in advance what is to happen, come what may, but rather that once the dispute is under way and the arbitrators have taken office, the parties should know exactly what is expected of them. It is my firm belief that it makes very little difference whether the procedures can be denoted adversarial or inquisitorial, or a mixture of the two, or neither. The choice between various types of procedures rarely leads to injustice. It is misunderstandings and failures of communication which cause the trouble.

So also with the domestic law of arbitration. Every system of arbitration must stand in some relationship to the local courts. The number of things which can go wrong with an arbitration is surprisingly large: from a refusal by one party to participate in the arbitration at one extreme, to a failure to pay the arbitrator's hotel bill at the other. In each situation there is a choice. One possibility is that no external agency should be invoked in order to solve the problem. The local theory of arbitration may take the view that by agreeing to submit to the arbitral process the parties have taken

the risk that the problem will arise, and that if they cannot solve it amongst themselves, and if the chosen arbitrator has no sufficient contractual sanctions or personal moral authority to compel or negotiate a solution, that is just too bad. Many systems take this view in relation, for example, to the dilatory claimant and the careless or incompetent arbitrator. The other possibility is that the law will provide a solution to be imposed from the outside. In the past, one of the most potent sources of enforcement was peer-group disapproval. But this is now only a shadow of itself: perhaps because modern life is dominated by money, which far out-ranks group solidarity. Being posted on the Baltic Exchange is no longer the fearsome threat that it was when I was young. Institutional arbitration rules can, on occasion, prove useful, if they specifically contemplate the difficulty which has arisen: which is quite often the case. But even if they do, there is a limit to their effectiveness. The institution is appointed and acts by virtue of a contract with the parties and with the arbitrators. All well and good if the parties, having disobeyed the arbitrator are willing to obey the institution. But if they break their contract by disobeying once again, there is little more that the institution can do. In the end, the aggrieved party, or the aggrieved arbitrator, must either give up the unequal struggle or enforce the contract in the only way that contracts can be enforced: namely by recourse to the courts of law.

Thus, it seems to me obvious that domestic arbitration law must be primarily concerned with the relationship between the courts and those participating in arbitrations. There is of course an enormous gamut of options open to the parliamentary legislator and the judicial law maker, as to the shape of this relationship. The types of problem for which the courts can in principle be asked to provide a solution may be few or they may be wide. When intervention takes place, the powers of the court may be modest or far reaching. The language in which the powers are created and defined may be explicit or general. And so on. To my mind, none of this matters very much. What does matter is that the domestic law should be accessible, so that those who think of invoking it will be able to predict,

with reasonable confidence, whether the courts will intervene, and if so, what shape this intervention will have; and it must be flexible, so that the courts can allow the arbitral process to adapt, to evolve, to breathe, without any but the bare minimum of confinement necessary to secure the interests of justice.

It seems to me plain that within the international community an equal diversity of laws and philosophies should be allowed to flourish. We should I believe become alert when we hear the word, "harmonisation". It is an attractive word. Once a concept is given a pleasant name, it is easy to assume that the concept itself and the consequences of putting it into practice will automatically and invariably be good; and moreover, that anyone who does not agree is necessarily mistaken or even perverse. I often feel that "harmonisation" in the context of the harmonisation of municipal laws, conjures up the image of four kindly old gentlemen playing Haydn quartets; and that it carries with it the aftertaste that anyone who questions the aim of the harmonisation or its methods must be jurisprudentially tone deaf, and pig-headed to boot. If one were to substitute "regimentation" a different image would be brought to mind.

Quite apart from this the word is a misnomer. To harmonise domestic laws is to make them work systematically together, not to make them all the same. "Approximation" is a better term for that objective.

Now I do not mean to deny that approximation in the field of substantive law can yield solid benefits. There have been many important successes as well as a number of conspicuous failures. Amongst the successes the Hague Rules come most readily to mind. Harmonisation of procedural law is an altogether more difficult matter but it can be effected, provided the effort is not too ambitious. In our own field, we can cite the New York Convention of 1958 as an instance where an international measure with the effect of a limited approximation has proved highly beneficial. It will, however, be noted that I have said "with the effect of" rather than "with the aim of". The purpose of the New York Convention was to eliminate the two fundamental weaknesses which had haunted

international arbitration since its inception, namely the inability of the courts in certain important nations to enforce an agreement to submit future disputes to arbitration, and their inability to enforce international awards without double exequatur. An international convention was rightly perceived to be the most effective way of compelling these nations to make their laws more efficient. The result has been a measure of approximation — albeit incomplete, as Dr van den Berg's account of the differing ways in which the New York Convention has been interpreted in different countries will serve to make clear. But this approximation has been a by-product, not the realisation of an ideal.

In saying this I do not put in question the value of the Model Law. It would be ungracious to do so, as a guest in a Province which has cloven to it with such enthusiasm; and it would be inconsistent in one who has repeatedly affirmed a belief in the utility of the project. But it is utility, and not any ideal of harmonisation, which I extol. The Model Law serves two very important purposes. It provides those states which either have never possessed a developed law and practice of commercial arbitration, or which possess laws which are obsolete or disused, to acquire at a stroke a text which has been most carefully debated at great lengths by experts, and whose meaning, whilst in a number of instances obscure, is illuminated by ample and readily available travaux preparatories. Secondly, because where the Model Law is adopted in a particular state, the international arbitration law of that state will to some extent and for a time become more accessible. To some extent only, because there are important areas of arbitration theory and practice which the Model Law leaves untouched; and for a time only, because it will not be very long before the text of the Model Law becomes encrusted with a thick deposit of judicial exposition round the world to the great benefit of the conflict of laws industry, if not necessarily to anyone else. All the same, the project has demonstratable practical benefits which have made it well worthwhile.

It is, however, quite a different matter to suggest that the process of approximation should be extended to the whole field of arbitration, and

made mandatory. Such an enterprise would be doomed to founder on the ineradicable differences in the way in which practitioners and courts in the various countries will tackle the task of interpreting and applying the uniform law: these ways being determined by the general legal national culture; by ingrained methodological habits; and by a set of premises about the nature of a just resolution of disputes.

I am willing to go further than this, and question not only the practicability of such an enterprise but its validity in principle. Is there not a certain presumptuousness in assuming that there is one and only one only framework for the conduct of arbitration which is superior to all others, and that the framers of the universal international legislation have the secret of what it is?

Surely, the starting point should be that the whole point of arbitration lies in the freedom of the parties to choose the way in which they want to resolve their issues. There are myriads of possibilities, from the reference to a sole trade arbitrator who awards in light of contemporary documents without any formalities or even a hearing, to the full-blown adversarial procedure conducted by three professional arbitrators, addressed by phalanxes of lawyers, with their supporting cast of para-legals, experts, secretaries, transcribers, information technologists, photocopiers, hoteliers, caterers and every other trade you can think of, differing from proceedings in court only that they are notionally private, probably prolonged, and certainly more expensive.

From this vast repertory, the choices tend to be made in ways which vary from one country to another, influenced principally by two factors. The first and more obvious, takes the shape of the local arbitration law. This as I have said varies greatly in style and content. But is always there. The proponents of many systems take pride in their absence of judicial participation. This is a chimera. Every legal system has a sticking point, whether of revulsion at the means used to arrive at the award, or a sensation that some questions are too important to be left to the unrestricted acts of an arbitrator, at which the court intervenes to say: this far and no

further. The jurisdiction may be concealed under technical names such as *ordre publique,* arbitrability, due process or manifest disregard, but it is always there. Anyone who doubted this would I believe have been persuaded by a chance to hear the fascinating debates leading up to the Model Law. Where of course the domestic laws do differ radically between themselves is in the choice of instances where the court will intervene, and in the way the intervention is performed. But whilst these differences exist, there is no intellectual basis to say that the choice made by one system is "better" than that of another.

The other factor which goes to determine the way in which hearings before arbitral tribunals are actually conducted in practice is the general psychology of dispute resolution prevailing in the country in question. To a great extent this is a matter of national intellectual inheritance. From the infant school to the institute of higher education, from the sports magazine to the learned journal, the person who becomes the arbitrator, the lawyer or the judge, is throughout his lifetime in the grip of a cultural tradition which shapes the way he thinks. When he enters his specialised field, the way he thinks and the way that his forebears have thought pre-determine his assumptions, not only as to the best practical way of arriving at the just resolution of a dispute, but as to what the concept of a just resolution really means. These assumptions are remarkably tenacious. Even a person of wide culture, receptive to new ideas, is likely to fall automatically into accustomed modes of procedure when called upon to resolve a dispute. It is undeniable that an arbitration conducted in France is likely to be rather different from an arbitration in England. It is pointless to argue that one person is better than the other, for the question has no meaning in isolation from the pre-conceptions with which the enquirer begins. Different, however, they undoubtedly, are.

To the proponents of uniformity, this kaleidoscope of procedures appears an affront. I go with them this far, and no further. If the parties are unwise enough not to decide for themselves where the arbitration is to take place and leave it to the choice of a third party or to chance, they are at

risk that the method of resolution of their dispute, and perhaps the outcome of it, may depend on where the proceedings ultimately come to rest. But the cure is surely to eliminate the risk by nominating the venue in advance. To attempt the Herculean task of making all the world's arbitration laws the same, just for the sake of parties who have not taken this elementary precaution, seems quite out of scale. The task need not be attempted. Nor should it be, for the opportunity to choose between different procedural regimes, should be jealously guarded, not curtailed.

This does not mean that practitioners in different national regimes should press ahead without regard to what they may learn from other systems. Quite the reverse. But arbitration is a creature of contract. Absolute freedom of contract, in the sense espoused in the heyday of the common law, is a thing of the past. But the principle of party autonomy as it is called, the notion that the parties as adults should be free to choose their method of resolution so long as they do not complain about it afterwards, is still at the heart of arbitration, which cannot flourish unless the parties are given the widest possible scope for choosing both the procedures in the arbitration and the relationship in which those procedures stand to the national court. We should say with Kipling:

> "There are nine and sixty ways of constructing tribal laws.
> And-every-single-one-of-them-is-right."

I believe that far from making a fruitless and stultifying effort towards uniformity we should cleave to the freedom of the parties to say — "We like the way they do things there, that's where we want to go..."

What is the origin of the drive for uniformity?

In an important degree, it is of course fuelled by the genuine and reasoned belief that the co-existence of numerous different national laws is wasteful. This opinion is openly expressed, and we can argue about it with no harm done. But I believe that it is also underpinned by a series of assumptions which, because they are rarely articulated, are equally rarely questioned. I believe these assumptions to be wrong. I will briefly state and

discuss them in turn. First, there is the notion that transnationalist ideals demand the unification of national laws. I do not subscribe to these ideals, nor do I believe that they are meaningful. But even if they are sound, they do not call for unification. According to the transnationalist theory, there is a superior domain of procedural law, applying only to international arbitrations, and which applies automatically, to all international arbitrations, to the exclusion of all national laws. It is I suggest, obvious that this is nothing to do with unification, which seeks to bring national laws into conformity with one another: whereas transnationalism, by definition, treats national laws as irrelevant. This confusion of thought would not matter, but for the fact that transcendent procedural norms, like the transcendent substantive norms posited by the theory of the *lex mercatoria*, are regarded as having a superior status to the norms of national laws. Thus, what is called the "harmonisation" of national laws claims moral strength from the ideals of transnationalism.

Secondly, where the word "Arbitration" is used in an expression such as "the Arbitration now in progress in New York between X and Y", it does not help to define a concrete subject of this type. But unadorned, except by a capital A, the word does not describe an object but merely a set of particular ways of performing particular tasks. It is important to bear always in mind that "Arbitration" is only a label. Otherwise it is easy to fall into the successive errors of believing that arbitration has an existence of its own; that this existence carries with it a moral status; and that this status is necessarily worthy of respect. From that it is a short step to assume that anything, such as for example intervention by the court, which trenches upon the separate function of "Arbitration" as an institution must *ipso facto* be a bad thing.

Thus, in much theoretical writing about arbitration we see the author consciously or unconsciously adopting the stance that arbitration is a better way of resolving disputes than, for example, proceedings in court. Not only better in the practical sense of being private, informal, inexpensive, expert or whatever other advantages one claims for it, but better as being

ethically superior, simply by virtue of being "Arbitration". Those concerned in any capacity in an arbitration are assumed to be engaged in something more worthwhile, more praiseworthy, than those who litigate in court and should be left free to do so. The image is called up of an 18th century allegorical sculpture, in which the marble figure of "Arbitration" subdues a group of lesser forms, representing rancour, greed, self-interest, inharmoniousness and the like, whilst the mis-shapen figure of litigation lurks enviously in the background.

There might perhaps once have been a sound reason for giving arbitration this lofty status. The renaissance guildsmen, or the 19th century Bradford woolmerchants, who kept their disputes within their professional group, and were able to solve them by methods which did not require the physical sanctions of the state, might have been regarded as displaying self-discipline, a species of comradeship, and a respect for impartiality and for the moral and intellectual attributes of the chosen arbitration. All this, in the interest of maintaining the stability of the section of society from which the parties and the tribunal were drawn. But only a romantic could find any echoes in the majority of arbitrations today. There is precious little of self-discipline, comradeship or community spirit between the parties to a typical arbitration. One wishes to obtain the most money from his opponent; the other wishes to pay the least. They may well respect the impartiality and the skill of the arbitrator, but they do not look up to him as the master of the craft, as a leader of the social grouping. He is just another professional, who is paid to do a job. In such circumstances there is no justification for attributing any greater moral value to this particular professional exercise, than there is to any other method of dispute resolution, whether conducted by organs of the state, or taking the looser and more consensual forms now grouped under the name of "alternative dispute resolution".

The fallacy which we have been examining is repeated on a larger scale when one comes to the expression "international arbitration".

I must begin by saying that I have never understood why international

arbitration should be different in principle from any other kind of arbitration, although the practicalities may of course be different. The parties have contracted in their arbitration agreement to have their disputes resolved in country X, and if a particular method of arbitration would be appropriate on the assumption that A and B are both nationals of country X, why should it suddenly become inappropriate simply because one of the participants is a national of country Y? It is true that the foreign status of a party may be relevant when one comes to litigation, a non-consensual process, since the court might perhaps be more tender towards a party who is brought to country X against his will, than to the nationals of that country. But arbitration is consensual. If the parties agree to arbitration in country X, why should the foreigner be treated differently from anyone else; and not just the foreigner, since the proponents of international arbitration as a *ding am sich* assume that everyone involved has to submit to an entirely different regime. Perhaps there is a simple explanation which I have missed, but even if there is, why should it lead to the conclusion that international arbitration stands on a pinnacle of its own: worthier of respect than domestic arbitration, and much worthier than litigation?

I would not have devoted even this short time to what seems a purely philosophical issue, miles away from the practical problems addressed by all the excellent papers brought forward for this Congress, did I not believe that a false idealism is steadily encroaching into writing, thinking and litigating in the field of arbitration. We must not fall into the error of idealising arbitration, just as even great lawyers like Mr Justice Holmes and Sir Frederick Pollock began by praising the efficacy of common law methods, and eventually personalised and idealised these methods as "our lady of the common law". I do not for a moment advocate cynicism. Anyone who does a job of work should believe that the job is useful, and want to make sure that it is properly done. Arbitration is a useful job, and ought to be properly done, but it will only be hindered if it is surrounded by a halo of false romanticism. Some theoretical thinking about contemporary arbitration is essential, but it must be based on realism and

practicality. I would urge those present today to respond to this challenge by immersing themselves more deeply, more publicly and more insistently in getting the debate on arbitration back on the right lines.

What is Arbitration About?

I have suggested that there is a need for theoretical thinking in maritime arbitration, albeit with ultimate practical ends. It is a paradox that such thinking is in short supply precisely because those who engage regularly in arbitration are so eager to improve their performance; witness the large attendance at this Congress. As with many activities requiring skill, care and hard work the professionals assume that if they become even more skilful, take even more care and work even harder, the results will automatically be better. The more conscientious the craftsman the closer he gets to the work bench and the sharper he hones his existing techniques; but the less attention he spares to look around him to examine the context in which he is working, and to ask whether he might be more usefully employed doing something else. Many crafts have gone clean out of existence through such a lack of perspective. Wooden clog makers made better and better clogs. Bowyers made twangier and twangier bows. Hot type print workers cast more and more elaborate fonts. Special pleaders drew surebutters of increasing cunning. Yet their tasks ceased to matter, and their long established and real skills became of no account. The world had changed without their noticing and they had failed to change in phase.

This is not the occasion and I lack the knowledge to consider whether arbitration has started on this road. I guess that it cannot have gone very far, although there is a case for saying that when we talk of alternative dispute resolution ("ADR") we should be thinking of arbitration rather than to alternatives to the court. Lack of knowledge is in fact one of the major problems in making a concerted intellectual assault on arbitration as practised today. With arbitration in general, and maritime arbitration in particular, it is surprisingly hard to find out what actually happens. The air is thick with generalisations, assertions and claims about the pervasiveness

of arbitration, its success, its popularity and its advantages. These are backed by remarkably little in the shape of hard data. Statistics for proceedings in court are generated automatically through the court register, and are now collated and analysed as a matter of course. No comparable activity exists in respect of arbitration, partly of course because the procedure is by definition private, but also because nobody seems to be interested. This is a great pity. I have already suggested that the voice of maritime arbitration is not heard. Writers with the most powerful influence on the policies of states and institutions in this field leave maritime arbitration largely out of account. This is not surprising because no one takes the trouble to tell them even that maritime arbitration exists, or anything about it. The balance cannot be redressed by broad claims, which would be dismissed as hyperbolic, or by retelling personal and anecdotal experience, which could understandably be regarded as self-seeking. The arbitration world outside maritime arbitration must first be given a clear and documented description of the process, of its method and of its importance to international trade.

The problem is, that we have no picture of this ourselves. We ought to know how many maritime arbitrations are started; how many are finished; what size they are; how long they take; how many of them turn on documents alone; what proportion is conducted under the auspices of institutions; in how many instances the national court is asked to lend its support (for example, through interim measures of protection); in how many cases the court has been asked to intervene, as by recourse against the award; what proportion of awards are honoured spontaneously as against those which have to be enforced through the courts; and so on. Apart from a few figures published by some national institutions — which of course by omitting ad hoc arbitrations seriously underestimate the numbers — we have no idea of the answers to these and similar questions. When we can start to crunch some numbers, then will be the time to add descriptive material which will put the world on notice of what we are doing.

It is of course one thing to say this, and another to suggest how it can

be done. The sobering experience in England of the Departmental Advisory Committee on Arbitration has persuaded me that it is impossible to reconstruct arbitration statistics retrospectively. Either the records do not exist, or those who made them are far too concerned with the present and the future to have time for delving in the past. I suggest, however, that once it has been decided what kind of information should be garnered — and we should not look for too much, or those concerned will rapidly lose their enthusiasm — an arbitration group or association or institute in each country could set about persuading the maritime arbitrators of that country to keep numerical notes as they go along. There would be no need for any invasion of privacy, nor need the task be too laborious. Numbers alone are what is required from these national contributions. On that basis, a worldwide perspective of maritime arbitration could be achieved.

So far, I have spoken about the relationship of maritime arbitration with the outside world of theory and practice. Perhaps also we need to look outside our own confined sphere of influence. How do maritime arbitrations work in other countries? Some of us (myself not included) could claim an exchange of experience between the US and England. But where else? How many of us can claim a working knowledge sufficient at least to hear, if not to write about, a technical dispute in another language? We cannot all be polyglot like Cedric Barclay. Most of us now are too old to do more than polish the verdigris off the languages we already have. But perhaps we could encourage the young people to venture out into other tongues. Language is the key, not just to what is being said, but to what is being thought; and if we can be more cosmopolitan it will be a step towards a true internationalism of arbitration.

When we start to learn what actually happens — or perhaps we should not wait — I believe that we should begin to think more deeply about what kind of animal, or what mixture of animals, modern arbitration may be. How much does it retain of its former character of an honorific process performed by all in the spirit of cooperation and magnanimity for the good of the trading community? If it has lost its character, what is it now? Is it a

business? Or a branch of the home country's trading infrastructure? Or something more lofty, having an independent existence in the international sphere? These are important questions because the answers form the launch pad for a theoretical attack on current practical problems; and because, if the premises are woolly or sentimental, the practical solution will be wrong.

Let us take the example of an arbitrator who falls short of the standards of expertise, skill, care or diligence which the parties were entitled to expect. He does not just arrive at an award which is objectively unsound, for this is a risk which the parties engage to take, but he does so in a way which exposes him to justified complaints. By doing so, he may not only condemn one party to receive less, or pay more, than it would, but also involves both sides in waste of time and money. It is now taken for granted that the orthopaedic surgeon, soil engineer or tax accountant who fails the job must compensate the loser through the medium of civil process. So also with the lawyer, at least in some circumstances. But it seemed to be the received wisdom that when the professional seats himself in the arbitrator's chair to undertake a task which, in terms of hard work and deployment of claimed skills is no different from that which he performs in ordinary life he sloughs off his ordinary responsibility: a fortiori apparently if he is dealing with an international dispute. He is paid, and often handsomely paid, but he ceases in whole or in part to be accountable. Why is this?

The questions would not be difficult if posed in the context of a method of dispute resolution entirely insulated from ordinary legal process, and reinforced by extra-legal sanctions. Thus where a dispute between co-religionists is submitted to a religious tribunal, the agreement to submit is implicit in members of the congregation, and needs no explicit prior agreement and no status for its creation and enforcement. Cooperation in the procedure is similarly implicit as is obedience to the ultimate decision. Those involved in the system do not need, and deeply do not desire, that the ordinary civil law process shall be involved in any way. It is therefore an easy step to say that just as the procedure itself starts outside the national

judicial system, so also do any remedies which may exist for unsatisfactory performance by the tribunal.

The position used to be much the same as regards disputes between members of a guild. The jealously guarded independence and exclusiveness of the guild spoke for obedience to the decisions of the guild-master, and against an engagement of the civil power. The role of the masters, like that of the Rabbi or the Imam, depended on the personal and hierarchical relationship in which they stood to the disputants: ie it was a question of status, not of contract. To analyse the disappointed contestant's rights in terms of contractual or delictual duties owed by the tribunal would have been as psychologically impossible as it would be intellectually unsound.

Such methods of dispute resolution still exist today but not, one would readily assume, in the field of maritime trade. Is this assumption right? I am not sure. During the recent upsurge of interest in ADR it has been taken for granted that the category embraces arbitration. From this it is easy to pass to the idea that the juristic analysis of the relationships created by each type of ADR must be essentially the same. This is a misconception. If one can tackle the relationships in an arbitration entirely by reference to contract it does not follow that the same is true as regards, for example, those created by a consent to conciliation. I cannot follow through this topic today, but it is in urgent need of examination, for the mere fact that conciliation is by design looser and less ritualised than either litigation or arbitration gives greater scope for things to go wrong, or at least for it to be honestly thought that things have gone wrong. In a society where misfortune is greeted not with a sigh and shrug but a writ it cannot be very long before a disgruntled contestant sues a conciliator. To what extent should the courts admit such an action, and by what criteria should it be decided? May the courts perhaps say that we have here an essentially status-based relationship, to which ordinary contractual norms do not apply?

This leads us to methods which appear to have little to do with status and everything to do with business — (1) those conducted by lawyers as an integral part of their legal practice; and (2) those conducted under the

auspices of institutions whose raison d'etre is not primarily to serve a trade market but to enhance local prosperity, either directly by bringing in foreign earnings in the shape of lawyers and experts fees, room hire charges and the like, or because an arbitration facility is seen as something which a go-ahead town ought to be able to offer as part of a general repertoire of service — rather like an airport. Plainly there is nothing wrong in regarding arbitration in this light, and even if I thought there might be I could hardly say so, in the aftermath of the remarkably frank debates in the House of Lords leading up to the enactment of the Arbitration Act 1979. But although these forms of arbitration are perfectly legitimate it must be acknowledged that they look much more like business operations than the gratuitous and honorific occasions of the past, where the eminent man condescended to resolve the differences of those who looked up to him. If this is so, why should not those who offer their skills for money attract similar liabilities to those who do so in a different field?

On a happy occasion like this, to talk about arbitration in terms of the personal liabilities of arbitrators to parties, of parties to arbitrators, of arbitral institutions to everyone else, and indeed of the parties inter se would be to act as skeleton at the feast, quite apart from being impracticable in a single address. I take this only as an example of the way in which planning about practical issues, such as the need for liability insurance, must be based on sound theoretical principles. A civil judge is unlikely to be impressed by the bare assertion that arbitration is different. He will want to know what is so special about arbitration and about the relationships in which the parties stand to one another before he is persuaded that the ordinary doctrines of the civil law are automatically inapplicable, or are to be applied in some radically modified form.

I have chosen the potential liability of arbitrators as an example, not because it is the most important practical issue, but because it illustrates most clearly the need for clear conceptual thinking in this field. There are a number of other questions of prime importance which can be tackled more effectively if we start from a cogent theory of arbitration. I will mention

only a few, without developing them at all —

1. The cynical debtor who refuses to pay: the curse of modern commerce. He is doubly accursed because he exploits arbitration to waste time. How far does the theory of arbitration permit the arbitration to go towards a non-consensual summary process, to forestall the bankruptcy of the claimant in the face of penal interest rates, to the profit of the debtor, the greatest enthusiast for modern arbitration?
2. The choice of procedure. Notwithstanding the strictures of Dean Pound in his famous address of 1906, most arbitrations in the common law world other than in the "look, sniff" single issue commodity disputes seem to be locked into something resembling an adversarial procedure. It is a sign of how little information is broadcast that I cannot say anything with confidence about procedures elsewhere. My limited experience suggests that they are different. Does a proper analysis of the concepts of arbitration require this? How can two radically different procedures each be imperative? Is there not room for a synthesis of procedures? To what extent can this be imposed on the parties against their will?
3. The lazy lawyers. One of the weaknesses of modern arbitration is that the arbitrators seem to feel themselves be weak, lacking the state-backed sanctions of the judge. What principles enable one to know whether they have been over-bold?
4. The choice of law. An adequate theory of arbitration should point straight to a solution of questions relating to conflicts of curial laws which, against all expectations, are beginning to surface in practice.
5. The distinction between arbitration and other modes of dispute resolution. Although of only theoretical interest in the past, this will soon be of real practical importance. If the same person is appointed by the same institution for the same fee in respect of the same dispute, how will his powers, duties and liabilities change if he is to act as mediator rather than arbitrator?
6. The expert arbitrator who uses his own knowledge. The old-style arbitrator was appointed to do exactly this. The judge should never do

it. Without a theory of modern arbitration, how can we begin to decide what the arbitrator should do today?

7. The question of privacy, which is linked with the important question of the publication of awards and thence, to the development of a substantive law of commerce derived from arbitral jurisprudence. Also, obviously to the matter of dissenting opinions, and the secrecy of the deliberations. To what extent, and on what theoretical basis, is privacy of the essence of arbitration?

Skills

Arbitration thrives on its unique ability to deploy a wide combination of skills. It also thrives, or should thrive, on its ability to handle a wide variety of disputes. This is particularly so of maritime arbitration. Not all disputes call for the same combination of skills. I believe that we should set out to identify skills; to enhance them; and to ensure that the right combination is focused on the individual dispute to which they are appropriate.

For a start, one may make a first list of the kinds of skills which an arbitrator may be called on to possess — all of which, as it happens, were possessed by Cedric Barclay himself. Most obviously, there is a specific technical expertise in the subject matter of the dispute. It was in this that trade arbitration in its purest form resided and still does reside. The timber importer goes down to the wharf and climbs over the logs to see whether the buyer was right to reject them. The grain merchant spreads the samples on the table, and pronounces a 3% allowance. The maritime arbitrator goes through the voyage accounts, pencil in hand, deducting three hours for breakdowns at Seattle, 40% from the account for water barges at Mormagao and so on. There is no need for written statements of case or terms of reference, of the kind beloved by the ICC. Traditionally, awards are not motivated, because the parties want an answer, not a doctorate thesis. As to the place of the lawyer in this type of arbitration, harken to Cedric Barclay.

> "Why waste time and money teaching and explaining finite element analysis or the spiking of liquid hydrocarbon to an arbitrator who has no love of the subject and will never again make use of his newly acquired knowledge? ... Figuratively speaking the weakest link in the chain is the lawyer."

And again —

> "... There can be little hesitation in saying that in trade, engineering or quality arbitrations the interposition of a lawyer on the tribunal works as a brake on progress."

There is also a more general kind of technical expertise, employed where the arbitrator is chosen, not because he is expected to solve the dispute without technical assistance, but because he knows how to assess and exploit the help which he is given. Unlike the legal arbitrator who knows only paper concepts and ideas, he is not outfaced by technology. He is numerate. He knows what the words mean. He can build on a sound scientific or technological basis, to acquire a new knowledge in an old discipline, or perhaps to acquire an entirely new discipline. If he is a maritime arbitrator, it may be some time since he was at sea. There may be new equipment, new techniques. But he knows what an engine room is like; he knows what navigating is like; and he knows what the people who deal with ships are like. Given the right help, he is equipped to deal with any problem within his chosen field. Here, he is leagues ahead even of an acute lawyer, who cannot tell a volt from a spanner — even though I believe (pace Cedric Barclay) that there are lawyers who are canny enough to keep up, if the other members of the tribunal are experts.

There is another kind of skill, which has nothing to do with machinery and navigation, but with transactions and those who carry them out. Here again, times may well have changed since the arbitrator gained his practical experience. Fewer fixtures are now made face to face between brokers, notebook in hand, amidst the marble pillars of the Baltic Exchange. Methods of communication have become radically different,

and so perhaps has the general ethos. Nevertheless, there remains the invaluable ability, just as subtle as the capacity to get the feel of an engine room or of a cargo, namely to read a transaction; to sense what is really going on. This gift of commercial savoir faire comes only from experience, although I believe that one or two of the great judges of the past have acquired an inkling of it.

Next there is a general expertise in a different field, namely in matters of law. Nobody wants an arbitrator who is a walking digest of statutes and reported cases. But in some types of arbitration an ability to handle legal concepts is of cardinal importance, although the arbitrator will need the help of advocates in assembling the necessary material, in identifying the various conflicting considerations, and in recognising their strengths and weaknesses.

Finally, there are management skills, which are of two kinds. First, there is the ability to manage the proceedings. A good arbitrator will know that there is no uniquely correct way of conducting disputes. This is not just a matter of recognising the supposed antithesis between the so-called inquisitorial and adversarial procedures — so-called, because the differences within these categories are as wide as those between them. The good arbitrator will know what variations in procedure have been developed in the past and which varieties can safely be employed consistently with the domestic arbitration law under which he is working; can choose which is appropriate to the type of dispute with which he is faced; and, very importantly, can fix the parties squarely within the chosen framework, so that they know exactly what they must and must not do. In other words, the good arbitrator will confidently develop the available procedural resources.

The really good arbitrator is also skilled in something different. He can handle, not just the procedures, but also the people involved in them. Words such as "handle" and "manage" are odious in this context — people are not machines or donkeys. These words can also cause trouble. Parties and their advisers soon see through a tribunal which is trying to manipulate

them according to precepts of man-management. Nevertheless the establishment of a balanced relationship between the tribunal and those who appear before it makes all the difference. Here the arbitrator's task is more difficult than that of the judge, for two reasons.

First, because the authority of the arbitrator derives, in the ultimate, from his own moral stature. It is true that above the law court, as above the arbitration hall, stands the figure of justice, blindfold and with scales in one hand. True also that the gavel-banging judge is as feeble a figure as the gavel-banging arbitrator. But the figure of justice over the courts has a drawn sword in her other hand. In the well-run court nobody even thinks of this, but there in the background, very faint but quite unmistakable, is the distant chink of chains. The arbitrator has no such prop. Even the systems where the relationship with the court is close, the arbitrator must do it all for himself, or herself.

Secondly, the arbitrator often finds it hard to forget that he is appointed by consent. Only a bad judge does not care whether he dissatisfies or annoys the parties, but at the end of the day he is there as an instrument of state, not as the parties' nominee and it is for them to do as he says. An arbitrator is different. Leave aside the unspoken thought that the arbitrator, earning some of his living from this activity, may hope to be chosen again, whereas the judge wishes to be rid of the parties for good, and will never be short of work. There remains the idea, debilitating and misplaced, but often present, that an arbitrator should somehow distribute bits of justice between the parties, so that everyone goes away with something. This is the greatest enemy of just conduct, and an arbitrator needs firmness of spirit to overcome it. He needs also a delicate sensitivity to the atmosphere of the proceedings. Good arbitrators come in all kinds: gruff or genial; formal or relaxed; serious or jovial; taciturn or communicative. All have different methods which cannot slavishly be copied. Few would confidently essay Cedric Barclay's technique of circulating chocolates at moments of high tension. But the underlying combination of firmness and sensitivity is always there, in every good arbitrator who is required to do more than

inspect the object in dispute and report upon it.

This account of arbitration skills is sketchy and incomplete. I suggest that a real service would be performed by a full analysis of these skills. This should be followed by a study of two topics —

1. Training. Even judges have come to acknowledge that they have something to gain from what are euphemistically called in England "judicial studies". Training cannot equip an arbitrator with technical knowledge and experience, or with human qualities which he does not possess. But he (or she) can be helped to look out for and avoid common blunders. If he is inexperienced, he can learn by example. If he is not inexperienced he can compare his own experiences with those of others, particularly in different fields or jurisdictions. Of course some national arbitration associations already have training programmes, but Cedric Barclay wrote 22 years ago about training in an international perspective. One of his proposals was for a system of certification by an international college of arbitrators. I do not know whether the idea has ever been investigated. It strikes me as ambitious, but worth a second look. Perhaps more feasible, and certainly worthy of study, is a multinational exchange of skills, experience and ideas. Cedric Barclay saw obstacles in the shape of the difficulty of unifying arbitration procedures. I agree about unification, but do not see this as an obstacle. Rather the reverse. The more various the procedures the greater the repertory for international arbitration, and the greater the scope for stimulating new ideas and refreshing old ones by comparisons and exchanges of views. The present series of Congresses is a most valuable medium, and becomes more effective on every occasion. But they are intermittent and infrequent, I suggest that consideration should be given, not to an increase in frequency, but to the intercalation within the two year cycle of less ambitious, more local exchanges.
2. There remain the qualifications which are by their nature personal to the arbitrator himself. He cannot be equipped with practical experience, specific technical expertise, or general scientific background by any

> system of training, however thorough. He either has them, or does not. Since all arbitrators differ in their armoury of skills, and since few arbitrations are the same, not everyone is best suited to resolve the individual dispute. How to match the arbitrator to the arbitration, so that the available skills can best be brought to bear?

I do not think we can even attempt an answer to this question before we know more about what happens now. For example, with party-appointed arbitrators, what criteria govern the choice and who makes the choice? Where the umpire or third arbitrator is appointed by the party-appointed arbitrators, how do they set about the choice? If an institution makes the appointment, what steps are taken to ensure that it is suitable? How much does the board or the individual who makes it know about the arbitrator and about the dispute? Is there any follow-up, to see how the appointment has worked out?

If answers to these questions can be obtained and collated we may find some surprises. I believe that we can learn from each other, and improve the techniques of appointment. Indeed it may be that maritime arbitration, in this as in other respects, has lessons for the wider world of arbitration.

Ethics

It is as surprising as it is sad that moral standards have to be mentioned in a lecture of this kind. Of course there is always the risk of a rotten apple in every barrel. But what would an arbitrator of 35 years ago, when I first came into contact with maritime law, have made of an extract from a code of ethics for international arbitrators, quite recently published by an international legal group of the highest standing —

> " International arbitrators should be impartial, independent, competent, diligent and discreet . . . "
> "Arbitrators should proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias. "

> "A prospective arbitrator shall accept an appointment only if he is fully satisfied that he is able to discharge his duties without bias."
>
> "It is inappropriate to contact parties in order to solicit appointment as arbitrator."
>
> "No arbitrator should accept any gift or substantial hospitality, directly or indirectly, from any party to the arbitration ..."

I quote these provisions, not to deride the distinguished and practical lawyers who helped to draft them, but simply as an illustration of a change in the concept of arbitration which seems to have occurred within living memory. Originally, arbitrators were chosen honoris causa, and remunerated modestly if at all. Now they are well paid. It is rarely contemplated that persons will be appointed who cannot be relied upon, without an express undertaking, to administer justice truly and impartially. What is the point of the ethical code? If the person does not obey it intuitively, he will either not know what the code is talking about or will, smiling quietly, ignore it.

The juristic status of the code is also very strange. It does not bind the arbitrator at all, although it seems to be contemplated that he may adopt it by agreement. One must quote some more from the introduction to the code: "Whilst the [proposing body] hopes that they will be taken into account in the context of challenges to arbitrators, it is emphasised that these guidelines are not intended to create grounds for the setting aside of awards by national courts ... The [proposing body] takes the position that (whatever may be the case in domestic arbitration) international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of willful or reckless disregard of their legal obligations. Accordingly the [proposing association] wishes to make it clear that it is not the intention of these rules to create opportunities for aggrieved parties to sue international arbitrators in national courts. The normal sanction for breach of an ethical duty is removal from office, with consequent loss of entitlement to remuneration."

These strange provisions seem to me to exemplify the current absence of any clear idea of what modern arbitration is about. At one extreme, we may find what may be called the classical solution to the problem of the three-man tribunal (ie in which arbitrator X is appointed by party A and arbitrator Y is appointed by party B, and a third arbitrator, Z, is appointed either by X and Y acting together or by an institution) namely where one of them has been found not to have acted impartially. The solution being to hold that the resulting award was outside the arbitrator's mandate, and hence either ineffectual ab initio or worthy of being set aside. As between the parties there would be no remedies in damages. If X were the guilty arbitrator, A could have nobody to blame but himself for choosing him; B could have nobody to blame but himself for contracting that A should have the right to choose him. So also if Z were the offender, then neither party could complain, since they had run the risk of a misplaced appointment.

At the other extreme, under an entirely materialistic theory of arbitration, which regarded the process as one in which the parties paid the arbitrators to do a job, in the same way as they pay a house painter or a chartered accountant, there would be no difficulty in working out a contractual analysis which made X liable in contract to his appointer, A; liable in contract to B, through a species of agency; and also made Z liable to both parties, again through agency. Most domestic legal systems have shrunk from this extreme largely because until comparatively recently — (a) it has been thought indecent to hold arbitrators liable (ie the traditional approach) or (b) there has not been sufficient money involved to make it worthwhile to embark upon the difficult task of proving that the arbitrator was corrupt rather than lazy. The code of ethics seem to establish an uneasy composure. The shortcomings of the arbitrator yield no remedy against the award. How are they to yield any remedy even against the arbitrator, apart from his removal, which is not likely to be much consolation to a party to whom he may have caused the most grievous harm. The code, in the words which I have quoted, contemplates that the injured party may have remedies in a domestic arbitration. Not so,

however, in the case of an international arbitration, otherwise than in "extreme cases". Why should this be? Is it because the parties to international disputes are conceived to be willing to submit to almost any ethical failures on the part of the arbitrators (including arbitrators whom they themselves have had no part in choosing) rather than suffer the indignity of being brought before a national court? If so, I know of no evidence for this. Or is the answer that international arbitrators are regarded as fulfilling a loftier, more priestly role, setting them above the responsibilities of ordinary mortals? If so, whence comes the superior status, and if it exists why the perceived need to remind the arbitrators of the elementary facts of moral life?

Similar questions may be asked in relation to every contemporary attempt to formulate codes of behaviour in arbitration. Why do they set such high standards of behaviour in combination with such low standards of enforceability? Why, for that matter, is it thought necessary to enunciate any explicit standards at all? The answer lies, I suggest, in a combination of two factors. First, a realistic appreciation of the fact that commercial life has changed for the worse. Secondly, an unrealistic assumption that international arbitration has changed for the better. The remedies must, I suggest, be twofold. A rigorous enforcement of sanctions against offending arbitrators. In the past, where arbitrators were usually drawn from persons trading within a particular market system, the most powerful sanction consisted of extrusion from the market, or in less serious cases, the disapproval of his peers. Nowadays, this sanction scarcely exists, given the almost complete disappearance of close knit trading communities in which one participant cares about the opinion of another. Pace the drafters of the code from which I have quoted, it is only the domestic courts which have the opportunity to instill discipline. Nowadays the only source of an adequate discipline lies in the domestic courts. Unethical arbitrators should be punished, if unethical conduct is to be stamped out, and the punishment which matters is to hit them hard where it hurts them most — in the pocket.

Better, however, is to nip the problem in the bud. The downright dishonest arbitrators are going to be very few. Nobody can weed them out in advance or persuade them not to be dishonest. But the more dangerous cases are those where the unwholesome conduct is entirely or largely unconscious. The arbitrator has prejudices, social, intellectual, political, religious or moral against some groups of people; or he is pre-disposed in favour of others. He may be anxious to please one powerful contestant, or anxious not to displease another. Nobody is free from these pressures, although the great majority managed to withstand them in the great majority of cases. How can we make the number of failures even smaller? In two ways, both concerned with education.

The first kind of education is that which takes place in the working environment, without explicit didacticism. The young man or woman enters a well-run business and soon learns, simply by example that there are some things which must be done and some things which must not be done. He or she scarcely needs to be told — it is taken for granted. That these tacit moral codes, operating within the close personal environment of a trade, have become much attenuated in recent years would I believe be accepted by all. The fault lies not in the young, or even those whom the young instinctively copy, but rather with those who taught the teachers of the young. The clock cannot be entirely set back. The commercial world has irreversibly changed. Nevertheless an effort must be made, for it is only from within, by a process of group self-discipline, that standards can be restored.

There is also scope for us to teach ourselves self-discipline. Lord Hailsham once said this:

> "Impartiality does not consist of not having prejudices . . . We all have them. The art consists in the ability to discard prejudices [which] largely depend on a sufficient measure of self-awareness to be conscious of this defect of character, insofar as it is a defect, and to learn to recognise it when the devil comes and tempts one. My advice is: be aware of prejudices, and hang them upon the

peg with your raincoat before you come into court."

In addition to sharpening the ethical standards of themselves and their colleagues, arbitrators could do more to improve the performance of those who appear before them. Not the parties themselves, for if they have behaved badly this is likely to have happened before the arbitrator comes on the scene. But what about those who represent the parties? The lawyers and advocates, and it must be said in some cases, also the experts. Two hundred years ago, in his masterly work on arbitration, William Kyd observed that, "The passions of the client have a tendency to influence the mind of the advocate". Everyone recognises and approaches with caution the advocate who habitually lacks the objectivity to recognise that his client might possibly be wrong. Also, since arbitration is about winning and losing, and since contestants prefer, for reasons both of pride and their professional future to win rather than lose, there is always the risk that the lawyer and advocate may try too hard.

There is nothing new about this, and nothing peculiar to arbitration. In small professional worlds, these matters tend to sort themselves out. What at the English Bar would be called the discipline of the robing room, what in sociology would be called peer group pressure, usually provide the most effective form of maintaining standards. The sensation of an unwritten code, the pungent rebuke from a senior, are worth dozens of "deontological" formulae and tribunals of inquiry. But this works only within a limited professional universe. Where the professions are large, and the participants are not in regular contact, the mutual pressures are loosened. Everything about arbitration is now much bigger than it was 30 or 40 years ago. Moreover, I have sadly detected — or at least I think I have detected: one must be very careful when out of the mainstream of activity not to draw inferences from a few unhappy occasions a marked deterioration in the day-to-day behaviour of professional men. Not dishonest but discourtesy. A feeling always to be on the attack, to give nothing away, to be rude to the representative of the other side, is in some way more muscular and therefore more commendable than courteous and

measured dealings with one's opponents. One sees letters written between lawyers which would have drawn sharp reprimand from the senior people in the writer's firm some 20 or 30 years ago. Is this because the writer believes that he will gain merit in the eyes of his client by being offensive, in both senses of the word? Or is it simply a reflection of the fact that the writers have been brought up in a more aggressive and violent world? I do not know and we cannot discuss it here. I mention this only because there is a part here for arbitrators to play.

Without pomposity or the flexing of muscles they can firmly make it clear that this will not do. The judge stands outside the society which he judges, applying external norms. By contrast the arbitrator stands, or should stand, within the commercial society from which his office has sprung. This function is not limited to a bare decision of fact or non-fact, law or non-law. He is part of the internal regulating mechanism of the commercial community, and his duties, if performed to the full, are not limited to the individual dispute which comes before him, but extend to establishing an atmosphere in which commerce proceeds in a more orderly way, and in which disputes are also conducted in a way which is not only orderly, but which permits, after the dust of battle has settled, the parties once again to resume normal trading relationships. By reminding the impulsive and thoughtless of the right way to behave, the arbitrator can make a real contribution to the health of the commercial world.

How can we set about maintaining and if possible raising the standards of ethics in arbitration? The preferred method is to work from within. This can only be done by education, using the term in its broadest sense. Codes are to my mind of little value, except as a teaching model. There must be a continuous and coordinated effort on an international scale. Our task is to consider and plan how this can be achieved.

We must, however, recognise that education or no education, lapses will occur. If at all possible we should deal with them internally. If we cannot recreate the old sanction of peer group pressure, might it be possible to replace it with something similar? For this, there would have to

be a continuous body, authorised to apply ethical standards and to apply sanctions. What form could such sanctions take? What risk of liability would the body run, when imposing them?

Answers to these and similar questions cannot ever be attempted unless international maritime arbitration draws for itself a clear picture of what kind of arbitration it is, and aims to be.

Such a picture is also an essential starting point when we come to consider what happens when, if where there are no internal sanctions, or if they fail, the injured party seeks external recourse in the courts. It is pointless to assert in a code that the arbitrator is free from civil liability. The courts will simply pay no attention. What is needed is a clear picture of arbitration, reinforced by a rigourous intellectual account of why that picture requires that in a given situation the errant arbitrator is or is not to be held responsible. Once again this calls for concerted and hard headed study and research at the fundamental level.

Conclusion

I have touched on these individual topics only to illustrate my general theme, that maritime arbitration should step into public view, look around and assert itself. Of course much excellent work is done by national bodies, but it tends to be fragmentary and localised — sometimes we may say, parochial. Of course the best international meetings have great value. The variety and depth of the papers tendered this week bear witness to that. The effort is made: the attention is captured; the enthusiasm fired. But the latter, under pressure of daily life, the momentum drains away. Somehow our enquiries need to be kept moving forward, not repeating themselves. How precisely to achieve this I cannot and should not prescribe, looking as I now have to do at maritime arbitration from outside. Perhaps the words I have already used, "continuous, coordinated and sustained" give the flavour of the kind of efforts which are needed to provide the intellectual and structural railtrack on which maritime arbitration can move towards the millennium.

It may be said that such topics are too dry, too remote from the front line of practical arbitration to have found favour with the man after whom these lectures are named. That would be quite wrong. True, he was conspicuously free from the shackles of convention and the dry dust of pedantry. But he thought, wrote and spoke a great deal about the nature and functions of arbitration. I am confident that he would have agreed that arbitration, largely unsupported as it is from without, must be reinforced from within by sound intellectual struts. Then, from a position of strength, we can unite to develop and deploy the individual skills and qualities which I have mentioned. Then we can give the world of maritime arbitration what it needs and wants. Freshness of spirit. An arbitrator with whom the disputants feel at home.

In these last few words, Mr Chairman, I have done in spite of myself what I undertook not to do: I have described Cedric Barclay.

The Hon Judge Charles S Haight, Jr

Charles S Haight, Jr is a Senior United States District Judge for the Southern District of New York. Judge Haight was born on 23 September 1930. He graduated from Yale College and Yale Law School. From 1955 to 1957, he was a trial attorney with the Admiralty and Shipping Section of the United States Department of Justice in Washington DC, thereafter joining the firm of Haight, Gardner, Poor & Havens in New York, where he became a partner. Judge Haight was appointed to the District Court in 1976. He presides over civil and criminal trials and on occasion sits by designation on the Court of Appeals. Judge Haight has lectured and participated in seminars on maritime law and arbitration in the United States and other countries.