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Arbitration's Blade: International Arbitration and the Rule of Law

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I. Introduction

1. It is a privilege to speak to you at the commencement of this year's SIAC Congress, in a format that is obviously rather different from that of past years, this being the SIAC's first virtual Congress. That is but one of the many consequences of the global pandemic that has profoundly disrupted the patterns of international travel and commerce and the rhythms of our daily lives. For the courts, the pandemic forced us to confront the urgent challenge of sustaining access to justice and keeping the rule of law alive and well amidst a public health emergency. In the aftermath of COVID-19, we need the rule of law more than ever. It is only against the backdrop of clear and stable rules, and an efficient and accessible justice system, that society can begin the work of reorganising contractual relationships and restructuring troubled businesses.

* I am deeply grateful to my law clerks, Joanne Leong and Melissa Ng, and my colleagues, Assistant Registrars Elton Tan and Kenneth Wang, for all their assistance in the research for and preparation of this address.

2. International arbitration has long been a close partner of the courts in sustaining the rule of law, especially in the context of cross-border commerce. As the global economy navigates continuing restrictions on travel and the disruption of global supply chains and the labour market, it is timely that we critically examine the extent to which international arbitration does or does not meet the demands and basic values of the rule of law; and to the extent it does not, whether this offers cause for concern. This is the subject of my address today.

3. I will approach this in three parts. First, I will outline the content and purposes of the rule of law, and identify two objectives of the rule of law that I believe call for greater attention than they have hitherto attracted. I will then consider the extent to which international arbitration can claim to advance these values and purposes; first by evaluating the common structural features of international arbitration against them, and then by assessing the practice of international arbitration against the rubric of a particular rule of law value, that of accessibility and its dimensions of speed and affordability. In the third and final part of my address, I will draw a set of conclusions on the trade-offs that international arbitration has drawn as between its pursuit of rule of law values and other objectives. I will close by proposing an additional value which should now take its place within the pantheon of rule of law values, especially in this age of uncertainty; and which, I suggest, is a value that arbitration is uniquely capable of embodying.

II. The content and purposes of the rule of law

4. Let me begin with the content and purposes of the rule of law. This has been a central ideal in liberal political morality for centuries, first articulated by Aristotle¹ and then developed by thinkers ranging from Fortescue,² Locke³ and Montesquieu⁴ in the medieval and Enlightenment eras, to Dicey,⁵ Fuller,⁶ Dworkin⁷ and Raz⁸ in more modern times. But the edges of the concept have blurred over time, and with that has come some erosion of its meaning and reputation. The rule of law has been disparaged as an “exceedingly elusive notion”,⁹ a “self-congratulatory rhetorical device”,¹⁰ and even as nothing more than “magic words” to justify any conclusion.¹¹ While these labels are undoubtedly and unfairly hyperbolic, it is nevertheless true that the rule of law

¹ Aristotle, *The Politics* (c. 350BC), Stephen Everson (trans.) (Cambridge University Press, 1988).

² John Fortescue, *On the Laws and Governance of England* [1471], Shelley Lockwood ed (Cambridge University Press, 1997).

³ John Locke, *Two Treatises of Government* [1689], P. Laslett ed (Cambridge University Press, 1988) (“Locke”).

⁴ Charles Montesquieu, *The Spirit of the Laws* [1748], A. Cohler, C. Miller and H. Stone eds (Cambridge University Press, 1989).

⁵ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* [1885] (McMillan and Co, 1982).

⁶ Lon Fuller, *The Morality of Law* (Yale University Press, 1964) (“Fuller”).

⁷ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

⁸ Joseph Raz, “The Rule of Law and its Virtue” in *The Authority of Law* (Oxford University Press, 1979) (“Raz”).

⁹ Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) (“Tamanaha, On the Rule of Law”) at p3.

¹⁰ Judith Shklar, “Political Theory and the Rule of Law”, in A. Hutchinson and P. Monahan eds, *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987) at p1.

¹¹ Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?” in R Bellamy ed, *The Rule of Law and Separation of Powers* (Ashgate, 2005) (“Waldron”) at p119.

remains an “essentially contested concept”.¹² That is largely because politicians and philosophers across the ages have treated the concept as a “working political idea”, liberally modifying it to suit their diverse needs.¹³

5. For the rule of law to remain a useful concept, we should revisit its building blocks. I therefore propose to consider the concept of the rule of law as *a set of values generally recognised as essential to the proper functioning of a legal and political system*. This is a formal and largely neutral definition into which we can incorporate certain undisputed, and perhaps indisputable, elements.

A. The values of the rule of law

6. While there continues to be intense debate over whether substantive ideals such as democracy and human rights have a place within the concept of the rule of law¹⁴ – in other words, whether we should adopt a “thick” conception of the rule of law¹⁵ – a degree of consensus has coalesced around its formal and procedural aspects. These therefore will be the premises of my discussion.

¹² *Ibid.*

¹³ Jeremy Waldron, “The Rule of Law”, Stanford Encyclopedia of Philosophy (22 June 2016): <plato.stanford.edu/entries/rule-of-law>.

¹⁴ Brian Tamanaha, “The History and Elements of the Rule of Law” [2012] SJLS 232-247 (“Tamanaha, History and Elements”) at p234: <law.nus.edu.sg/sjls/articles/SJLS-Dec-12-232.pdf>.

¹⁵ Jeremy Waldron, “The Rule of Law and the Importance of Procedure” in James E Fleming ed, *Getting to the Rule of Law* (New York University Press, 2011) at p10.

7. The *formal* aspects of the rule of law focus on the content and promulgation of laws, most famously represented by Fuller's eight desiderata: that laws must be clear, consistent, practicable, stable, and of general application; they must be publicised and applied prospectively; and administered in a manner that is congruent with their purpose and content.¹⁶ Although some of these values – such as publicity and prospective applicability – are more directly relevant to enacted laws than processes of dispute resolution, I suggest that we can readily see how other values such as consistency of outcomes, practicability, and the clarity and stability of processes are equally applicable and essential to dispute resolution.

8. The *procedural* aspects of the rule of law centre on the institutions of justice and the processes by which they adjudicate disputes. These include the principles of natural justice such as the right to be heard, the impartiality and independence of adjudicators, and the safeguards of transparency and open justice.¹⁷ A further dimension is access to justice, which requires processes for dispute resolution to be reasonably fast, efficient and affordable. To these, I would add the principle of proportionality. Proportionality complements the goal of accessibility by requiring the nature, complexity and cost of the processes and solutions offered by the justice system to bear a

¹⁶ Fuller at p39. Fuller also referred to these *desiderata* as “the inner morality of law”.

¹⁷ Waldron at p10. Similar procedural and institutional considerations are seen in the fourth to seventh items on Raz's list: see Raz at pp216–217.

suitable relation to the nature, complexity and size of the legal problems that are before it.¹⁸

B. The purposes of the rule of law

9. In comparison to the *content* of the rule of law, much less attention has been paid to its *purposes*. Indeed, it has been said that the rule of law is “analogous to the notion of the Good”¹⁹ in the sense that “everyone is for it, but ha[s] contrasting convictions about what it is”, and also about what it is for. I believe it is not enough for us simply to recognise that the rule of law is a virtue; we must strive to understand *why* it is important, to enable us to make value judgments about *when*, if ever, it is sensible to pursue other competing objectives in preference to the rule of law.

10. Two broad strands of thought have emerged on the purpose of the rule of law. The first is that the rule of law promotes the liberty and dignity of individuals by demarcating clearly and prospectively the boundaries of what is permissible, thereby enabling individuals to plan their lives in advance.²⁰

¹⁸ Sundaresh Menon CJ, Negotiation and Conflict Management Group (NCMG) ADR Conference 2019, “Technology and the Changing Face of Justice” (14 November 2019) at para 57: <supremecourt.gov.sg/docs/default-source/default-document-library/ncmg---keynote-lecture.pdf>.

¹⁹ Tom Bingham, *The Rule of Law* (Penguin Books, 2010) (“Bingham”) at p5, citing Tamanaha, *On the Rule of Law* at p3.

²⁰ See, for instance, Locke at s 137; Friedrich A. Hayek, *The Road to Serfdom: Text and Documents*, Bruce Caldwell ed (University of Chicago Press, 2007) at p113; Bingham at p38; and Raz at pp220–221.

The second focuses on the control of state action and the need to curb the wilful and arbitrary exercise of power.²¹

11. I suggest that what unites these two strands is the pursuit of *legitimacy*, and that is perhaps the overarching purpose or mission of the rule of law. In his 2019 Reith Lectures,²² Lord Sumption examined *why* we obey institutions of the state, such as the justice system. The answer, he argued, lies not in the coercive power of the state but rather our respect for the legitimacy of its institutions. Legitimacy, in turn, depends on “a general acceptance of [the institution’s] decision-making processes: not necessarily of the decisions themselves, but of the method of making them”. In other words, our common acceptance of decision-making processes allows disagreements regarding particular decisions to be transcended.²³

12. If we go further to examine the *reason* for our acceptance of institutional decision-making processes, I suggest that we will find that the answer lies in the rule of law. We trust and have confidence in these processes precisely because of their general adherence to the values and principles that

²¹ See, for instance, Fuller at p40. As John Finnis has explained, a “tyranny devoted to pernicious ends has no self-sufficient reason to submit itself to the discipline of operating consistently through the demanding processes of law”: see John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) at p273.

²² These were subsequently published in a lightly edited form, in Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books, 2019) (“Sumption”).

²³ Sumption at pp24-25.

constitute the rule of law.²⁴ Put another way, the rule of law is the foundation of institutional legitimacy. Because it unites the goals of liberty, human dignity and good governance, legitimacy might even be recognised as the ultimate rationale or mission of the rule of law.

13. Serving the mission of legitimacy, at least in this context, is the endeavour to produce sound and accurate outcomes in disputes, meaning outcomes that are based on largely correct findings of fact and applications of law. That is so because the legitimacy of laws in society depends in large part upon their being correctly and fairly administered,²⁵ and to that end, the norms of procedural fairness required by the rule of law play a critical role. For instance, it is difficult to see how an adjudicator who is content to hear only one side of the argument, or unduly favours one party for reasons unconnected to the dispute, will be capable of reaching a fair and principled decision. The goal of accuracy also directly implicates the legitimacy of the justice system, because its ability to deliver sound and accurate outcomes according to law is a basic expectation of the public.

14. The aims of legitimacy and accuracy may also be seen, in turn, as reinforcing the rule of law in its most basic and literal sense; that is, *the rule of*

²⁴ See also Tamanaha, *History and Elements* at p232: “The rule of law is a major source of legitimation for governments in the modern world. A government that abides by the rule of law is seen as good and worthy of respect.”

²⁵ This ties in with one of Fuller’s *desiderata*, that of “congruence between the rules as announced and their actual administration”: Fuller at p39.

the law over people and government. By promoting both compliance with the law and the consistency of adjudicated outcomes with law, the values that constitute the rule of law facilitate the law's governance over society, and by that means promotes the effectiveness of law itself as an instrument for achieving social objectives.

III. International arbitration in the rule of law landscape

15. In that light, I turn to evaluate international arbitration against the values and purposes of the rule of law. We must begin by recognising that international arbitration has made a serious and concerted effort to safeguard certain fundamental rule of law values, in particular the requirements of due process. Nowhere is this more evident than in Article 18 of the Model Law,²⁶ sometimes termed the “Magna Carta” of arbitration,²⁷ which requires parties to be treated with equality and for each party to be given a full opportunity of presenting its case.²⁸

²⁶ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (“Model Law”): <uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf>.

²⁷ James Allsop, “International Commercial Arbitration – the Courts and the Rule of Law in the Asia Pacific Region”, 2nd Annual Global Arbitration Review Sydney (11 November 2014): <fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20141111>, citing H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1999) at p550; and *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 at 139.

²⁸ These requirements are echoed in the grounds for setting aside arbitral awards (Art 34(2)(a)(ii), Model Law), and of course in the New York Convention itself (Arts V(1)(b), United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958): <newyorkconvention.org/english>.)

16. But that only represents a starting point in our examination of arbitration's congruence with the values and purposes of the rule of law. I suggest that in the final analysis, what emerges is the conclusion that international arbitration can claim to support an *attenuated* model of the rule of law. I will explain this by first surveying four key features of international arbitration: its consent-based limitations; the confidentiality of arbitral awards; party appointment of arbitrators; and finally, the general absence of a right to a right answer.

A. Consent-based limitations

17. I begin with consent. The parties' agreement to submit disputes to arbitration remains the "foundation stone of modern international arbitration"²⁹ and the precondition for any valid arbitration.³⁰ But the fundamentally consensual nature of arbitration gives rise to constraints which also limit arbitration's ability to give full expression to the rule of law. Let me offer two examples.

²⁹ Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) ("Redfern and Hunter") at para 1.40.

³⁰ Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at para 2.10.

i. Multi-party and multi-contract disputes

18. First, because arbitration is tethered to consent, it has historically struggled to deal with disputes involving multiple parties, some of whom may not be signatories to the same, or for that matter to any, arbitration agreement. In the absence of consent, this has limited the ability of tribunals to join non-parties to, or to consolidate, arbitral proceedings.³¹ The problem is summarised thus in an ICC report on multi-party arbitrations:³²

The difficulties of multi-party arbitrations all result from a single cause. Arbitration has a *contractual basic*; only the common will of the contracting parties can entitle a person to bring a proceeding before an arbitral tribunal against another person, and oblige that other person to appear before it.

19. This longstanding constraint has only become more acute with the ascendance of international arbitration as the dispute resolution mechanism of choice for cross-border commercial disputes, which have grown more complex and multi-polar.³³ This was precisely the sort of dispute that arose in

³¹ Some institutional rules permit “forced joinder” in the sense that joinder is possible without the consent of all current and intended parties to the arbitration (eg, Art 22.1(viii) of the 2014 LCIA Rules and Art 4(2) of the 2012 Swiss Rules of International Arbitration), although the better view is that by subscribing to these rules, parties have in fact consented to such joinder: see *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 (“Astro”) at [176] and [196].

³² Emphasis added; International Chamber of Commerce, ICC Commission Reports, “Final Report on Multi-Party Arbitrations”: <library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0007.htm> at para 5.

³³ Through the ingenuity of counsel, concepts such as agency, veil-piercing, alter ego, estoppel and the “group of companies” doctrine have been deployed to circumvent the problem (for an overview, see William Park, “Non-signatories and international contracts: An arbitrator’s dilemma” in Permanent Court of Arbitration ed, *Multiple Party Actions in International Arbitration* (Oxford University Press, 2009): <arbitration-icca.org/media/4/80099054862031/media012571271340940park_joining_non-signatories.pdf>), but the

the *Astro* litigation,³⁴ which involved various companies from two media conglomerates that were all participants to the dispute, but not all of which were parties to the arbitration agreement. On appeal, the Court of Appeal declined to read a provision in an earlier version of the SIAC Rules³⁵ in a manner that would permit the tribunal to join non-parties to the arbitration without the consent of all the existing parties, emphasising that forced joinder is “utter anathema to the internal logic of consensual arbitration”.³⁶ With the updating of the SIAC Rules in 2010, the ambiguity in that provision was removed.³⁷

reality is that constraints in navigating multiple contracts and parties will always be an uncomfortable bedfellow of consensual arbitration. It remains, as Bernard Hanotiau has put it, a “classic problem in international arbitration”: see Bernard Hanotiau, “The Issue of Non-Signatory States” (2012) *The American Review of International Arbitration* vol. 23 at 379: <arbitration-icca.org/media/4/80338498467058/media213706072861900hanotiau_the_issue_of_non-signatory_states.pdf>.

³⁴ *Astro*.

³⁵ These were the SIAC Rules (3rd Ed, 1 July 2007) (“2007 SIAC Rules”). The provision in question was r 24(b) of the 2007 SIAC Rules, which gave the tribunal power to “allow other parties to be joined in the arbitration with their express consent”, and the question was whether such “other parties” included non-parties to the arbitration agreement, or referred only to existing parties to the arbitration agreement.

³⁶ *Astro* at [197].

³⁷ Rule 24.1(b) of the SIAC Rules (4th Ed, 1 July 2010) (“2010 SIAC Rules”) gives the Tribunal the power to, “upon the application of a party, allow one or more third parties to be joined in the arbitration, *provided that such person is a party to the arbitration agreement*, with the written consent of such third party” [emphasis added]. It is clear that under the 2010 SIAC Rules, only other parties to the arbitration agreement can be joined to the arbitration. See also *Astro* at [173], where the Court of Appeal made a similar observation on the 2013 version of the SIAC Rules, r 24.1(b) of which is identical to that in the 2010 SIAC Rules. Since 2016, the SIAC Rules allows both parties and non-parties to the arbitration to apply for an additional party to be joined, provided that either the additional party is *prima facie* bound by the arbitration agreement, or all parties (including the additional party) consent to the joinder (see Rules 7.1 and 7.8). The Court of Arbitration of SIAC or the tribunal (depending on whether the application was made before or after the constitution of the tribunal) then decides the application after hearing all parties, including the additional party to be joined (see Rules 7.4 and 7.10).

20. From a rule of law perspective, the difficulties generated by arbitration's limitations in effectively managing disputes involving multiple parties and contracts go beyond the inefficiency of multiple proceedings. There is the risk of contradictory findings and outcomes,³⁸ which can undermine individual rulings and encourage an unseemly race to enforcement. It can also raise the spectre of double recovery, and is inimical to the rule of law values of certainty and consistency. Gabrielle Kaufmann-Kohler has warned that this is a risk that "threatens the system" of arbitration as a whole, because "a system that produces inconsistent outcomes [is one that] loses credibility and, with credibility, the confidence of the users as well as of the governments which back the system".³⁹ These remarks also echo the need to sustain the legitimacy of international arbitration, which is contingent on its users' trust and confidence in its processes.

ii. Non-arbitrability

21. A second example is the doctrine of non-arbitrability, which applies to categories of disputes thought to be "incapable of settlement by arbitration". These are disputes that "so pervasively involve 'public' rights and concerns,

³⁸ Gary Born, *International Arbitration: Law and Practice* vol 1 (Kluwer Law International, 2012) at p 221.

³⁹ Gabrielle Kaufmann-Kohler, Herbert Smith Freehills and Singapore Management University School of Law Asian Arbitration Lecture 2015, "Multiple Proceedings in International Arbitration: Blessing or Plague?" (24 November 2015): <law.smu.edu.sg/sites/default/files/law/Final%20text%20of%20lecture%20incorporating%20ppt.pdf>.

or interests of third parties” that their resolution by private means is considered inappropriate.⁴⁰

22. That is not an indictment of the ability of arbitrators to deal with such issues, but simply a reflection of the limits of arbitration as a process rooted in contract.⁴¹ Decisions on matters such as bankruptcy, intellectual property and competition often involve a swathe of broader public or private interests which may not be adequately represented by the arbitrants, while having implications that go beyond them.⁴² Because arbitration is constrained by the privity of the parties’ agreement, it strains to support the participation of non-parties with connected rights and interests,⁴³ or the organisation and consistent treatment of these rights and interests.

23. That was why, in *Larsen Oil*,⁴⁴ the Court of Appeal held that claims concerning unfair preferences or transactions at an undervalue in the context of insolvency are not arbitrable. The outcomes of these claims directly affected the interests of a broader pool of creditors, most of whom would likely not be

⁴⁰ *Tomolugen Holdings Ltd and another v Silica Investors and other appeals* [2016] 1 SLR 373 (“*Tomolugen*”) at [71], citing Gary Born, *International Commercial Arbitration, Volume I: International Arbitration Agreements* (Wolters Kluwer, 2nd Ed, 2014) at p945.

⁴¹ Stavros Brekoulakis, “On arbitrability: Persisting misconceptions and new areas of concern” at paras 2-42–2-43 in Loukas Mistelis and Stavros Brekoulakis eds, *Arbitrability: International & Comparative Perspectives* (Wolters Kluwer, 2009) (“Brekoulakis”).

⁴² Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013) (“Paulsson”) at p123.

⁴³ Brekoulakis at paras 2-42 and 2-47.

⁴⁴ *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 (“*Larsen Oil*”).

parties to the arbitration. The effectiveness of the statutory collective enforcement procedure also demands that all such claims be consistently resolved, and arbitration is simply not well-positioned to promote that objective.⁴⁵

24. Implicit in the doctrine of non-arbitrability is the recognition that arbitration cannot deal satisfactorily with disputes engaging rights and interests beyond those of the arbitrants. The solution has been to exclude these disputes from arbitration. From a rule of law perspective, this means arbitration cannot contribute as fully to the law's governance of these matters as the courts, whose jurisdiction is founded upon bases other than consent. But that is better than the damage to the legitimacy of arbitration that would follow if disputes were heard and decided on a fragmented basis, without accounting for the rights of at least some affected parties or the operation of overarching regulatory schemes established in the public interest.

B. Confidentiality

25. I turn to a different facet of arbitral practice, which is regarded by many as one of arbitration's primary attractions, namely, the confidentiality of proceedings including that of arbitral awards.

⁴⁵ *Larsen Oil* at [45]. The Court of Appeal adopted similar reasoning in *Tomolugen* to hold that claims of minority oppression under s 216 of the Companies Act are, in contrast, arbitrable because they do not engage the same considerations: see *Tomolugen* at [84].

26. Although a handful of arbitral institutions have made efforts in recent years to promote the publication of arbitral awards,⁴⁶ it is safe to say that publication remains a largely uncommon practice.⁴⁷ The “vast majority” of awards are kept confidential,⁴⁸ either because of the parties’ explicit agreement⁴⁹ or an implied obligation of confidentiality, which several jurisdictions have favoured.⁵⁰

27. Jeremy Bentham famously said that “[w]here there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to

⁴⁶ See, for instance, ICC, “Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration” (1 January 2019) at paras 40-46: <iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>; and LCIA, “LCIA Releases Challenge Decisions Online” (12 February 2018): <lcia.org/News/lcia-releases-challenge-decisions-online.aspx>.

⁴⁷ Bernard Rix, Jones Day Professorship in Commercial Law Lecture, “Confidentiality in International Arbitration: Virtue or Vice?” (12 March 2015) (“Rix”): <law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf>; Doug Jones, 8th Asia Pacific ADR Conference, “A new path forward: efficiency through transparency” (20 September 2019) (“Jones, Efficiency through transparency”): <dougjones.info/content/uploads/2017/07/Seoul-Conference-Keynote-Doug-Jones-20190914-FINAL.pdf>; Bernard Eder, Chartered Institute of Arbitrators (London Branch) AGM Keynote Address, “Does arbitration stifle development of the law? Should s.69 be revitalised?” (28 April 2016) (“Eder”) at para 8: <arias.org.uk/wp-content/uploads/2016/05/CIARB-EDER-AGM-Keynote-Address-28-April-2016-AMND.pdf>; and Geoffrey Ma, Chartered Institute of Arbitrators Centenary Conference (20-21 March 2015) (“Ma”) at para 19: <ciarbasia.org/Centenary_Celebration/images/speeches/speech_GeoffreyMa.pdf>.

⁴⁸ Doug Jones, “Arbitrators as Law-Makers”, *Indian Journal of Arbitration Law* (“Jones, Arbitrators as Law-Makers”): <ijal.in/sites/default/files/IJAL%20Volume%206_Issue%202_Doug%20Jones.pdf>.

⁴⁹ This includes parties’ subscription to institutional rules of arbitration that require consent for publication. See, for example, Rule 39 of the SIAC Rules 2016 and Art 30.3 of the LCIA Rules 2014.

⁵⁰ These include the UK and Singapore: see *Dolling-Baker v Merrett* [1990] 1 WLR 1205 at 1213; and *Myanma Yaung Chi Oo Oo Ltd v Win Win Nu* [2003] 2 SLR(R) 547. In contrast, the Australian, US, and Swedish courts have declined to recognise the existence of such an implied obligation: for a detailed discussion, see Rix.

exertion and the surest of all guards against improbity.”⁵¹ In other words, the principle of transparency, also known as the principle of open justice,⁵² is not only an important rule of law value in itself, but also a key enabler of other values. I suggest that arbitration’s preference for a high degree of confidentiality affects its ability to sustain at least three other values of the rule of law, and also one of its purposes.

28. The first of these values is impartiality and probity, or at least their manifest appearance, because transparency incentivises accountability, and in turn, neutrality, and independence in decision-making. Confidentiality limits open scrutiny and the foundational principle that justice should not only be done but manifestly and undoubtedly be seen to be done.⁵³ There is therefore a connection between transparency and the preservation of public trust and confidence in the process of decision-making;⁵⁴ in other words, its legitimacy.⁵⁵

⁵¹ Jeremy Bentham, “Draught of a New Plan for the organisation of the Judicial Establishment in France: proposed as a Succedaneum to the Draught presented, for the same purpose, by the Committee of Constitution, to the National Assembly, December 21st, 1789”, printed in London, 1790.

⁵² Beverley McLachlin, Annual International Rule of Law Lecture, “Openness and the Rule of Law” (8 January 2014) (“McLachlin”): <barcouncil.org.uk/uploads/assets/f73b28a15dea0ec80/jan82014-12ptruleoflaw-annualinternationalruleoflawlecture.pdf>.

⁵³ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259. See also *Scott v Scott* [1913] AC 417 at 482 and *Nova Scotia (Attorney General v MacIntyre* [1982] 1 S.C.R. 175 at 185.

⁵⁴ See McLachlin: open justice “performs a therapeutic function by permitting the community to see that justice is done. ... [T]he open courts principle works to preserve public confidence in the administration of justice, which is essential to the rule of law.” See also Lord Neuberger, Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, “Arbitration and the Rule of Law” (20 March 2015) (“Neuberger”) at para 23: <supremecourt.uk/docs/speech-150320.pdf>; and L K Dore, “Public courts versus private justice: it’s time to let some sun shine in on alternative dispute resolution” (2006) 81 Chi-Kent L Rev 463 at 487.

⁵⁵ I also do not accept that the possibility of curial review sufficiently caters for the interests of transparency. Curial review of arbitral awards is only available on limited grounds and in limited circumstances, and is ultimately dependent on the affected party’s willingness and ability to seek relief from the courts. Curial

29. Second, there is an important but often overlooked relationship between transparency and efficiency in international arbitration. In a recent lecture, Professor Doug Jones observed that the publication of awards can offer essential information to parties and arbitrators alike and help them make better decisions. For instance, procedural innovations and best practices can be shared through published awards, helping future tribunals manage proceedings more efficiently. Parties can review past awards to assess their own prospects of success, devise more effective strategies, and gain insights into the case management skills of potential appointees.⁵⁶

30. The third rule of law value that confidentiality undermines is that of certainty and predictability in the law. I refer to the ongoing debate on whether the diversion of important commercial cases to arbitration will stunt the growth of commercial law and transform it into an “ossuary”.⁵⁷ Each side of the debate has attracted its share of supporters and detractors, but all of its key advocates acknowledge that the flow of commercial cases to the highest courts in the UK

review can therefore only be considered as one of the necessary safeguards for the fair and impartial conduct of arbitration.

⁵⁶ Jones, Efficiency through transparency. See also Rix on how publication would “make the selection of arbitrators easier and more transparent”, “encourage good procedure”, “promote the highest standards of arbitral decision-making and reasoning”, and avoid the need for disputants to have to “reinvent the wheel time and time again”.

⁵⁷ Lord Thomas, Bailii Lecture 2016, “Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration” (9 March 2016) (“Thomas”) at para 22: <judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailii-lecture-20160309.pdf>.

has slowed significantly, and this has limited the courts' ability to explain and develop the law.⁵⁸

31. Lord Thomas has argued (and others such as Lord Neuberger and Sir Bernard Rix have agreed)⁵⁹ that as a result of the courts having fewer opportunities to shape and expand the common law, “the degree of certainty in the law that comes through the provision of authoritative decisions of the court” has diminished. This has compromised the ability of individuals to understand their rights and obligations under the law, and hence “properly plan their affairs accordingly”.⁶⁰ Lord Thomas’ reference to the ability of the law to guide behaviour and serve as the foundation for planning is unmistakably the language of the rule of law. As Bentham himself argued, the law provides security for expectations, and it is upon expectations that plans for the future can be made.⁶¹

⁵⁸ Thomas at para 22; Neuberger at para 24 (that an increase in awards leads to a concomitant decrease in judgments, with the disadvantage in the common law world that the law does not develop and becomes “ossified”); Rix (who remarked that “our commercial law is going underground”); Eder at paras 6-7 (observing that it is an “undeniable fact” that the number of cases that reach the appellate courts has been dramatically reduced since the passing of the Arbitration Act 1979); David W. Rivkin, Clayton Utz and University of Sydney International Arbitration Lecture 2012, “The Impact of International Arbitration on the Rule of Law” (“Rivkin”) on how the non-publication of arbitral awards “does not contribute to the rule of law” and is “detrimental to the development of the law itself, particularly in common law systems where the growth of a body of law such as commercial law requires the continuous evolution of case law”: <claytonutz.com/internal/archive/ialecture/content/previous/2012/speech_2012>.

⁵⁹ *Ibid.*

⁶⁰ Thomas at para 23.

⁶¹ Jeremy Bentham, “Principles of the Civil Code” in CK Ogden ed, *The Theory of Legislation* (Kegan Paul, Trench, Trubner & Co, 1931) at p111. Sir Bernard Rix has also relevantly pointed out that certainty in *lex mercatoria*, in relation to which some leading members of the arbitral community are key proponents, is likewise dependent on the availability of arbitral awards in the public arena. The ability of international

32. In contrast, transparency fostered by the publication of awards would likely “impose a desirable discipline on arbitrators” in terms of the quality of the drafting and reasoning of arbitral awards,⁶² and to that extent it may advance the pursuit of accurate outcomes, which I have argued is one of the purposes of the rule of law. The sharpening of analysis and expression in arbitral awards may also foster greater acceptance of arbitrators’ decisions by the parties and their sense that their best arguments have been heard, understood and addressed, thus affording them a greater sense of closure.⁶³

33. For these reasons, I suggest that the custom of confidentiality limits the extent to which arbitration conforms to the traditional values of the rule of law, and might even impede its pursuit of legitimacy and accuracy.⁶⁴ Public

arbitration to contribute to the creation of a coherent and consistent set of rules capable of constituting a transnational commercial law is hampered by the opacity of reasoning and outcomes.

⁶² New York City Bar, Report by the Committee on International Commercial Disputes, “Publication of International Arbitration Awards and Decisions” (February 2014) at p2: <www2.nycbar.com/pdf/report/uploads/20072645-PublicationofInternationalArbitrationAwardsandDecisions.pdf>. Constantine Partasides QC and Simon Maynard have also suggested that publication and the ensuing public scrutiny will secure “behavioural advantages” on the part of arbitrators and counsel: see Constantine Partasides and Simon Maynard, “Raising the Curtain on English Arbitration”, (2017) *Arbitration International*, Vol 33, Issue 2, pp197-202 at pp201-202.

⁶³ Stefan Pislevik, “Precedent and development of law: Is it time for greater transparency in international commercial arbitration?” (2018), *Arbitration International*, Vol 34, Issue 2, pp241-260 at p249. Professor Stacie Strong has also suggested that badly written awards (meaning those that provide insufficient reasoning as opposed to those that reach the “wrong” conclusion) can not only diminish parties’ and society’s faith in the legitimacy of the arbitral process, but can also increase the time and cost associated with final resolution of a dispute, both by taking a longer time to write and by increasing the chance for a successful challenge to the award: see S. I. Strong, “Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy” (2015) *Michigan Journal of International Law*, Vol 37, Issue 1 at footnote 5.

⁶⁴ CJ Geoffrey Ma has in fact suggested that the gap between arbitration and the courts on confidentiality is the “biggest difference between arbitration and court proceedings” as partners in the administration of justice”: see Ma at paras 13–18.

trust and confidence – like in any relationship – is fundamentally premised on openness and candour, and the practice of broad confidentiality is in some ways the antithesis of that.

C. Party appointment of arbitrators

34. I turn to the third aspect, which is the party appointment of arbitrators. This has been said to be an “integral part of the arbitration process for more years than most people can remember”.⁶⁵ In the most recent edition of the White & Case Queen Mary University of London (“QMUL”) survey, the ability of parties to select their own arbitrators was identified as the fourth-most valuable characteristic of international arbitration.⁶⁶ It is unsurprising that the rules of leading arbitral institutions all support the party appointment of co-arbitrators.⁶⁷

35. Notwithstanding its popularity, the party appointment of arbitrators is an issue of abiding controversy. One of its foremost critics, Professor Jan

⁶⁵ Berwin Leighton Paisner, “International Arbitration Survey: Party Appointed Arbitrators” (2017) (“Berwin Leighton Paisner”) at p2: <bclplaw.com/images/content/1/4/v2/147194/BLP-Arbitration-survey-2017.pdf>.

⁶⁶ It was chosen by 39% of respondents; behind only the enforceability of awards, the ability to avoid specific legal systems or national courts, and flexibility: Queen Mary University of London and White & Case, “2018 International Arbitration Survey: The Evolution of International Arbitration” (“QMUL Survey”) at p7: <arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-Report.pdf>.

⁶⁷ For instance, the SIAC (Rule 11 of the SIAC Rules), the ICC (Art 12 of the ICC Rules of Arbitration), and the HKIAC (Art 8 of the HKIAC Administered Arbitration Rules 2018). While the LCIA Rules provide for the default appointment of all arbitrators by the LCIA Court (see LCIA Arbitration Rules (2014), Article 5), its 2018 statistics show that only 37% of arbitrators were appointed by the LCIA Court, while 46% were appointed by the parties and 17% by co-arbitrators: see LCIA, “2018 Annual Casework Report” at p12: <www.lcia.org/media/download.aspx/MediaID=772>.

Paulsson, has argued that the practice is a “moral hazard” and “fundamentally at odds with the very concept of arbitration”.⁶⁸ The late Professor Hans Smit has even suggested that “the reality is that many, if not most, ... party-appointed arbitrators respond to their personal incentives and become to a certain extent party advocates within a system that expects them to behave objectively”.⁶⁹ These views appear to be backed by anecdotal and even some statistical evidence, the latter indicating that in more than 95% of cases, dissenting opinions were written by the arbitrator nominated by the losing party.⁷⁰ In a 2017 study on party-appointed arbitrators conducted by Berwin Leighton Paisner, 55% of respondents who had sat as arbitrators reported having experienced a party-appointed arbitrator trying to favour the appointing party by some means; and 70% of respondents who had acted as counsel recounted situations where they believed a party-appointed arbitrator tried to favour the party who appointed him.⁷¹

⁶⁸ Paulsson at p156; see also Jan Paulsson, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law, “Moral Hazard in International Dispute Resolution” (29 April 2010): <arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf>.

⁶⁹ Hans Smit, “The Pernicious Institution of the Party-Appointed Arbitrator”, Columbia FDI Perspectives No 33 (14 December 2010) (“Smit”): <academiccommons.columbia.edu/doi/10.7916/D8G167Q9>.

⁷⁰ See Paulsson at p163, citing Alan Redfern, 2003 Freshfields Lecture, “Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly”, (2004) 20 Arb. Int. 223; Eduardo Silva Romero, “Brèves observations sur l’opinion dissidente” in José Rosell ed, *Les arbitres internationaux* 179 Société de législation compare, 2005); and Albert Jan van den Berg, “Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration” in Manoush H. Arsanjani, Jacob Katz Cogan and Robert D. Sloane eds, *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* 821 (Martinus Nijhoff, 2011).

⁷¹ Berwin Leighton Paisner at p6.

36. In a lecture I delivered in 2016, I suggested that we must clarify and refine our understanding of the proper role of the party-appointed arbitrator, and manage the risk factors inherent in this practice so as to meet the parties' legitimate expectations of fairness and maintain confidence in the institution of arbitration.⁷² These elements – procedural fairness and confidence in arbitration – are respectively a value and a purpose of the rule of law. And the practice of party appointment of arbitrators seems, at least potentially, out of line with them.

37. On the vital issue of confidence in arbitration, it has been suggested that “the ability to select one of the arbitrators gives a party a sense of control and proximity to the arbitration proceedings”, and this “engenders *confidence* in the process and its outcome”.⁷³ Charles Brower has argued as follows:⁷⁴

Parties will generally have greater faith in the arbitral process if they themselves are the creators of the tribunal that will judge them. There thus seems to be a close nexus between the perceived *legitimacy* of international arbitration and the parties' appointment of the arbitrators.

⁷² Sundaresh Menon CJ, Herbert Smith Freehills – Singapore Management University Asian Arbitration Lecture 2016, “Adjudicator, Advocate, or Something in Between? Coming to terms with the role of the party-appointed arbitrator” (24 November 2016) at paras 7 and 47: <supremecourt.gov.sg/Data/Editor/Documents/CJ%20speech%20at%20CIArb%20Presidential%20Lecture%202016.pdf>.

⁷³ Emphasis added; Berwin Leighton Paisner at p2.

⁷⁴ Charles N. Brower and Charles B. Rosenberg, “The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded”, *Arbitration International*, Volume 29, Issue 1, 1 March 2013, pp7-44: <international-arbitration-attorney.com/wp-content/uploads/arbitrationlawCharles_Brower_The_Death_of_the_Two-Headed_Nightingale_Speech_2.pdf>.

38. I respectfully disagree. When one considers *why* the faith of parties in the arbitral process might be said to be increased by the practice of party appointments, one encounters reasons that I suggest are unconvincing, such as the expectation that a party-appointed arbitrator will actually pay attention to the party's case,⁷⁵ or a desire that the financial incentives of appointment will lead the party-appointed arbitrator to favour the case of the appointor.⁷⁶ If these are the reasons why party appointments are said to enhance confidence in arbitration, then with respect, I see this as an indictment of arbitration and its legitimacy rather than as cause for celebration. But the more critical point is that the concept of legitimacy that I have discussed is fundamentally different from the "legitimacy" that Charles Brower has written about. The notion of legitimacy that lies at the heart of my discussion is public confidence in the processes of decision-making that springs from the *fairness* of those processes in general, due to their adherence to the rule of law. That is vastly different from confidence that stems from the ability of parties to *control* those processes in particular instances.

⁷⁵ Andreas F. Lowenfeld, "The Party-Appointed Arbitrator in International Controversies: Some Reflections," (1995) 30 Tex. Int'l L.J. 59 at p65: "At least one of the persons who will decide the case will listen carefully – even sympathetically – to the presentation, and if the arbitrator is well chosen, will study the documents with care."

⁷⁶ See Smit: "The incentive of the party and its counsel is to appoint an arbitrator who will win the case for them. That incentive will be particularly strong when its case, on the merits, is not particularly strong. ... Once selected, an arbitrator's personal incentive is to secure reemployment by providing his or her party with a favourable outcome."

D. No right to a right answer

39. I turn finally to the absence of a right to a right answer; meaning a decision that is generally correct on the facts and law. Sir Michael Kerr summed this up pithily when he noted that “when parties agree [to] arbitration, they buy the right to get the wrong answer.”⁷⁷

40. This is a deeply entrenched premise in international arbitration today, and is chiefly reflected in the general absence of a right of appeal and the limited grounds for setting aside arbitral awards. Apart from a few exceptions,⁷⁸ the balance internationally has come down “overwhelmingly in favour of finality and against judicial review, except in very limited circumstances”.⁷⁹ This seems to be consonant with the general objectives of parties who agree to arbitration.⁸⁰

41. This does not, of course, take away from the fact that parties do in fact *desire* a correct outcome. According to a study by Richard Naimark and Stephanie Keer, respondents rated a “fair and just result” above other goals

⁷⁷ Cited in Eder at para 14.

⁷⁸ For instance, the right to appeal on a question of law arising out of an award in s 69 of the UK Arbitration Act 1996.

⁷⁹ Redfern and Hunter at para 10.67.

⁸⁰ In a survey on choice of venue conducted by Berwin Leighton Paisner in 2014, 77% of respondents stated that they would be less likely to choose a seat if the local law contained a mandatory right of appeal: see Berwin Leighton Paisner, “International Arbitration: Research based report on choice of venue for international arbitration” (2014) at p9: <bclplaw.com/images/content/1/5/v2/150028/BLP-International-Arbitration-Survey-2014-FINAL.pdf>.

including cost, finality, speed and privacy.⁸¹ What parties want is not to be “outside the law”, but simply for their dispute to be resolved swiftly and in a manner that is free of the potential inefficiencies and idiosyncrasies of national courts.⁸² Professor William Park has therefore cautioned that arbitration’s pursuit of speed, efficiency and finality must be tempered by a “respect for the parties’ interest in correct decisions. The parties have no less interest in correct decisions than in efficient proceedings. ... In the long run, little satisfaction will come from awards that are quick and cheap at the price of being systemically wrong”.⁸³

42. In short, there is an abiding tension between the parties’ desire for right answers, on the one hand; and arbitration’s drive for finality, including its general exclusion of curial review, on the other. I suggest that when parties agree to binding arbitration, their primary objective is for their dispute to be decided *in accordance with the law* – in other words, they desire *the rule of the law* over their dispute – and to this end, finality is undoubtedly an important goal but perhaps not ultimately the defining one. If it were otherwise, parties could choose to abide, for instance, by the result of a coin toss, which would

⁸¹ William Park, “Arbitrators and Accuracy”, *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010) pp25–53 (“Park”) at p27, citing Richard W Naimark and Stephanie E Keer, “International Private Commercial Arbitration: Expectations & Perceptions of Attorneys & Business People” (May 2002) 30 *Int’l Bus Lawyer* 203.

⁸² See *Gateway Tech., Inc., v. MCI*, 64 F.3d 993 (5th Cir. 1995); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).

⁸³ Park at p27.

be infinitely quicker, cheaper and no less decisive. But that outcome would be determined not by law, but by chance; and worthy at most of the parties' reluctant acquiescence rather than of their respect.

IV. International arbitration and accessibility

43. Let me pause here to emphasise a critical point: my purpose is not to criticise the institution of arbitration, or to brand it a failure, or to say that it compares unfavourably with litigation, but rather to emphasise that there are some ways in which it appears to deviate from the typical expectations of the rule of law. I also acknowledge, especially importantly in this context, that many, if not all, of the features of international arbitration that I have discussed are present by design, not accident. Indeed, they have been intended features of arbitration since antiquity, when merchants and tradesmen desired a quick, efficient and practical means of dispute resolution, and learned men “versed in the law”⁸⁴ created consensual processes of private and binding dispute resolution to meet that need.⁸⁵

⁸⁴ Gary Born, *International Arbitration: Cases and Materials* (Wolters Kluwer, 2011) (“Born”) at p10, citing Hammond, “Arbitration in Ancient Greece”, 1 Arb. Int’l 188 (1985) (citing Homer, *The Illiad* XVIII. 497-508).

⁸⁵ As far back as ancient Greece, arbitration was known as “the natural and regular process of choice for those who preferred privacy”: see Born at p10, footnote 73, citing Derek Roebuck, *Ancient Greek Arbitration* (Holo Books The Arbitration Press, 2001) at pp348-349. Demosthenes, a well-known Greek statesman and orator, described a process by which it was lawful for parties to “choose whomsoever they wish[ed]” as arbitrator. Upon the conclusion of arbitration, parties were to “abide by [the arbitrator’s] decisions” and were precluded from “transfer[ring] the same charges [to a] court”: see Born at p10, citing Demosthenes, *Against Meidias*, in *Demosthenes Against Meidias, Androtion, Aristocrates, Timocrates, Aristogeiton* 69 at 94. Much the same process persisted in ancient Rome, where parties were permitted to opt out of the legal process by *compromissum*. This involved an agreement to refer a matter to an *arbiter*; and as in ancient Greece, the awards issued by the Roman *arbiters* were binding and subject to little curial oversight: “the award of the arbiter ... should be complied with, whether it is just or unjust, because the party who accepted the arbitration

44. It is remarkable how resilient some of these features of arbitration, which were invented to suit the commercial needs of ages long past,⁸⁶ have proved when we compare them to the model of arbitration we know today. But the same, I suggest, cannot be said in respect of arbitration's speed and affordability, which of course are key dimensions of accessibility. These were key aspirations from arbitration's beginnings, but somewhere along the line, the developing model of arbitration lost its ability to guarantee – or perhaps even to sufficiently value – these values of speed and economy.

45. Let me begin with affordability. The often eye-wateringly high cost of international arbitration is now a familiar and longstanding complaint of its users. In the 2018 QMUL Survey, cost was ranked by two-thirds of respondents as the worst characteristic of international arbitration. This has in

had only himself to blame": Born at p12, citing *Digest*, 4, 8, 27, 2 (Ulpian) in S Scott ed, III *The Civil Law* (1932). Party nomination of arbitrators was also a "common practice" during that era. This later expanded to the rest of Europe in the Middle Ages: see Born at pp13–15.

⁸⁶ By equipping arbitration with these features, merchants and traders expected corresponding benefits in their chosen process of dispute resolution. In England, Blackstone recounts that foreign businessmen trading in marketplaces resorted to arbitration as a means of "do[ing] justice expeditiously": see Born at p13, citing S Tucker, *Blackstone's Commentaries on the Laws of England*, Vol. 3, 33 (1803) (quoted in Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. Pa. L. Rev. 132 ("Wolaver"), 136 (1934-1935)). In 1419, the use of arbitration for foreign businessmen was mandated by King Edward I for the reason that these disputes required "speedy redress": Rivkin, citing Wolaver at 136. In France, arbitration was lauded as producing "pure, simple and pacific justice": see Born at p18, citing M. de Boisseson, *Le droit francais de l'arbitrage interne et international* (2nd Ed, 1990) (quoting Thouret, Member of Constituent Assembly). It was even legislatively declared in 1790 to be "the most reasonable means of terminating disputes between citizens": see Born at p18, citing Law of 16-24 August 1790, Art. 1. And in colonial America, early settlers heavily favoured arbitration for its "flexibility, practicality and speed", in contrast to the courts which were seen "not to apply commercial law in what the merchant community considered to be a just and expeditious fashion": see Born at pp20-21 and footnote 156, citing Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. Econ. & Org. 479, 481-85 (1995).

fact been an unbroken trend since the 2006 edition of the survey.⁸⁷ Of these costs, party costs (including lawyers' fees, and expenses related to witness and expert evidence) make up 83% of overall costs.⁸⁸ It is evident that the larger the costs incurred relative to the amount in dispute, the harder it will be to justify the decision to pursue arbitration,⁸⁹ and the less proportionate the manner in which the proceedings would likely have been conducted.

46. In the same survey, lack of speed was identified as the fourth-worst characteristic of international arbitration. The delays experienced were partly attributed to dilatory tactics employed by counsel that went unsanctioned, either because arbitrators were reluctant to do so or because they did not possess the appropriate tools. But the reasons for delay extended also to the conduct of arbitrators themselves. 80% of respondents believed that arbitration rules should prescribe consequences for delay generated by arbitrators, and 79% that deadlines for issuing awards should be mandated. On the whole, there was a clear consensus that "arbitrators should keep in

⁸⁷ QMUL Survey at p7. Of these costs, party costs (including lawyers' fees, and expenses related to witness and expert evidence) make up 83% of overall costs: see International Chamber of Commerce, ICC Commission Report, "Decisions on Costs in International Arbitration" (2015) at p3: <iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf>.

⁸⁸ International Chamber of Commerce, ICC Commission Report, "Decisions on Costs in International Arbitration" (2015) at p3: <iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf>.

⁸⁹ Veijo Heiskanen has argued that efficiency in arbitration may be measured against the indices of cost and time. The cost-efficiency of arbitration is assessed by comparing the likely cost of arbitration against the amount in dispute. The smaller the difference between the cost of arbitration and the disputed amount, the more cost-efficient arbitration is: Veijo Heiskanen, Kluwer Arbitration Blog, "Key to Efficiency in International Arbitration" (29 May 2015): <arbitrationblog.kluwerarbitration.com/2015/05/29/key-to-efficiency-in-international-arbitration/?doing_wp_cron=1591433830.71382808685302734357500>.

mind that their compliance with these deadlines is a legitimate expectation of the parties”.⁹⁰

47. I suggest it is no answer to these complaints to say that users of international arbitration have deep enough pockets, or that the disputed sums are large enough, so that it should not matter that costs are high or the waiting times long. I make two points.

48. First, and most obviously, these shortcomings are deeply corrosive of business confidence in international arbitration, which in turn tarnishes arbitration’s legitimacy. Chief Justice James Allsop of the Federal Court of Australia recently warned that if arbitration cannot live up to its promise as an efficient and cost-effective means of dispute resolution, then it “simply will not find favour with commercial parties”.⁹¹ Perhaps a harbinger of arbitration’s diminishing favour can be found in the 2018 QMUL survey itself, in that users now appear increasingly willing to explore dispute resolution options beyond arbitration. 49% of respondents reported that their preferred approach to dispute resolution was not international arbitration alone,⁹² but rather a combination of international arbitration and ADR which, in this context, likely encompasses mediation. This preference was far more pronounced in the in-

⁹⁰ QMUL Survey at p35 and footnote 50.

⁹¹ CJ James Allsop, ICCA Congress 2018, Sydney, opening keynote address, “Commercial and Investor-State Arbitration: The importance of recognising their differences” (16 April 2018) (“Allsop”) at para 39: <fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20180416>.

⁹² This was the preference of 48% of respondents.

house counsel subgroup, 60% of whom favoured combining international arbitration and ADR, with only half of that⁹³ voting for arbitration as a standalone option. That is a noticeable difference from the findings of the 2015 survey, in which only 34% preferred a combination of the two. The authors of the 2018 survey conclude that users are “increasingly resorting to various forms of ADR in the hope that a swifter and more cost-efficient resolution can be found to disputes before having them resolved by arbitration”.⁹⁴

49. My second point is that from an economic perspective, rising costs and waiting times can drastically increase the stakes of dispute resolution, which are already heightened in a system that lacks real opportunity for correction of error. These added investments of money and time will represent nothing more than wasted expenditure if they fail to enhance the prospect of a more just and accurate outcome. Part of this expenditure will of course never be recouped, even by the winner, and therefore simply represents a net loss for the parties. In sum, increased costs and waiting times can pose a powerful deterrent to *bona fide* attempts to vindicate rights. If this results in legitimate grievances going uncorrected, then the rule of law will inevitably be worse off.

V. Arbitration’s blade

⁹³ Specifically, 32%.

⁹⁴ QMUL Survey at p5.

A. *Choices and trade-offs*

50. Let me now gather these strands of analysis together and draw some conclusions about the place of international arbitration within the rule of law landscape, as well as the choices arbitration has made as between the rule of law and other objectives.

51. The broad conclusion as I foreshadowed at the beginning of my remarks is that international arbitration, in the form of its most common and preferred features and practices, can claim to support an attenuated model of the rule of law. That is because international arbitration, largely as a matter of design, does not commit to a number of key values and purposes of the general framework of the rule of law:

- (a) First, its limited ability to deal effectively with multiple contracts and proceedings creates a risk of inconsistent findings and outcomes, contrary to the rule of law values of consistency and finality.
- (b) Second, international arbitration is unsuited to resolving certain disputes which involve interests going beyond the immediate parties, with the consequence that it is unable to contribute as fully to the law's governance of these matters as the courts.

- (c) Third, its predisposition toward confidentiality is inconsistent with the rule of law values of transparency and open justice. As a result, it is less able to guarantee patent standards of impartiality and probity, contribute alongside scholarship and soft law to the exchange of best practices that can enhance the efficiency of proceedings, and facilitate the public development of the law so as to guide the conduct of individuals and businesses.
- (d) Fourth, its longstanding practice of permitting parties to unilaterally appoint arbitrators sits somewhat uneasily with the principle that adjudicators must both be impartial and be seen to be impartial. This in turn might undermine public trust and confidence in the process.
- (e) Fifth, its philosophy that parties have no right to a right answer has restricted the avenues for correction of error, which in turn widens the possibility that a portion of disputes will ultimately not be decided according to law.

52. What then is the consequence of international arbitration's incomplete adherence to the rule of law, and can this be justified? In his pathbreaking work *The Authority of Law*, Joseph Raz argues that the rule of law, important as it is, is "just one of the virtues which a legal system may possess and by

which it is to be judged”; in other words, the “rule of law is [not] the rule of the *good law*”.⁹⁵ Raz explains that the rule of law must “always ... be balanced against competing claims [posed by] other values”, whether these be human rights, democracy, justice, equality or others. This means that it *can* be reasonable and legitimate to accept a “lesser degree of conformity” to the rule of law where this assists in the “realisation of other goals” that are judged to be more important.⁹⁶ But as Professor Colleen Murphy has pointed out, this should not diminish the need for us to recognise that even in these circumstances, something valuable has thereby been lost, even though on balance its loss may be justified.⁹⁷

53. Applied to our discussion, the fact that international arbitration only supports an attenuated model of the rule of law is therefore not necessarily to be disparaged. To the extent the arbitral community has made a conscious choice to forgo some rule of law values in order to realise some other goals, that choice *can* clearly be regarded as reasonable and legitimate. For example, arbitration’s decision to pursue confidentiality at the expense of transparency has allowed users to preserve the secrecy of sensitive commercial information and even to conceal their involvement in such

⁹⁵ Emphasis added; Raz at p211.

⁹⁶ Raz at p228.

⁹⁷ Colleen Murphy, “Lon Fuller and the Moral Value of the Rule of Law” (2005) *Law and Philosophy* 24:239-262 at footnote 47. Murphy refers to the loss of something “morally” valuable, but as the present discussion does not delve into the debate about the connection between morality and the rule of law (as Fuller advocates), Professor Murphy’s point has been adapted for use here.

disputes for valuable reputational reasons.⁹⁸ The practice of party appointment of arbitrators has, as I have noted, been said to give parties a “sense of control [over] and proximity to” the proceedings,⁹⁹ notwithstanding the risks to the actual or apparent objectivity of the arbitrators so appointed. And by restricting appeals and the grounds upon which awards may be set aside, arbitration may avoid one type of cost, in terms of reduced speed and finality, albeit at another cost, in terms of losing some of the safeguards that increase the likelihood that disputes are decided according to the law.

54. My intention today is not to question the validity of these trade-offs or exchanges, but simply to invite the arbitral community to be cognisant of the cost in terms of rule of law values that is incurred in seeking to advance other objectives, and equally to invite conscious reflection on whether the price is still worth paying. What I have sought to do is to identify a framework and model to isolate the nature and extent of some of those costs, and explain why – in Professor Murphy’s words – something valuable has been lost in the balance. In the final analysis, the arbitral community must be its own judge of whether the gains are worth that sacrifice.

55. But I suggest that it would be wise, perhaps even essential, for such a process of introspection to be undertaken seriously and periodically. This will

⁹⁸ Rix.

⁹⁹ Berwin Leighton Paisner at p2.

enable us to keep pace with the ongoing development of arbitration as we assess whether it continues to provide a service to the commercial community that can fairly be described as fit for purpose. In that process of self-assessment, I suggest that the traditional rule of law values remain an essential yardstick for three reasons. First, because arbitration is unquestionably a full partner of the courts in the enterprise of the rule of law; second, because the rule of law is ultimately essential to public confidence in the justice system, including in arbitration, and hence, to an important extent, arbitration's continuing popularity and relevance; and third, because the rule of law framework imposes upon us the useful discipline of identifying *what* we are giving up, *why* we are prepared to do so, and *whether* that trade-off makes or continues to make sense.

56. This exercise is important and worthwhile because nobody would deny that arbitration has changed dramatically over the course of just the last few decades, whether in terms of its reach, the sophistication of its practitioners, the complexity of the disputes that have come to be resolved by arbitration, or the portion of the international dispute resolution space that arbitration has come to occupy, alongside but often at the expense of the courts. And there is every reason to expect that this will continue. But as arbitration grows, so must it mature, and improve in its ability to serve its constituents.

57. In that light, let me offer an example of the sort of reflection that might be undertaken. Early on, I noted that arbitration's foundation in consent limits its ability to deal with disputes involving interests beyond those of the consenting parties, giving rise to the risk of inconsistent findings on overlapping issues. To the extent there is a trade-off, we might conclude that that is an acceptable one because of consent's own unique benefits, namely, the ability to customise the resolution process to meet the particular needs of the dispute at hand. If this results in a process that is consistently streamlined and efficient, then that might well be a good that is worth securing even at some other cost. Of course, this would then invite further reflections such as whether the possibility of customisation, and the expected gains in terms of efficiency and speed, have been routinely and sufficiently realised to justify the cost.

58. Take another example. I referred to confidentiality as a cherished value of arbitration and counterposed it not only with another cherished value of the rule of law, namely, transparency; but also with the aim of achieving accurate outcomes.¹⁰⁰ Let me elaborate on that connection. Court judgments are routinely reviewed and critiqued by academics and in subsequent decisions as part of a systemic effort to correct, refine, and improve the law. By virtue of its confidentiality, the reasoning and outcomes in arbitration are

¹⁰⁰ See para 32 above.

largely exempt from the same scrutiny. If you couple that with the fact that awards are very largely immune from review for error, then you end up with the real prospect that a portion of disputes resolved by arbitration are not being resolved in accordance with the law, nor perhaps even recognised to have been erroneously decided. This might be viewed as an acceptable trade-off if it yields the benefits of speed and convenience, or is tempered by the pervasiveness of impartial and expert arbitrators who are more likely than not to get it right. But if these premises are no longer true, should we simply assume that the trade-off continues to be justified, especially when that trade-off or compromise was brokered in a different age with a different set of operating parameters that might have changed quite dramatically? If you add to that the somewhat unsettled, and potentially unsettling, questions concerning party-appointed arbitrators, one could end up imagining a caricature of arbitration.

59. Let me be clear yet again: I am not at all saying that arbitration has failed as an enterprise in the rule of law. Its growing prevalence suggests exactly the opposite. Rather, I reiterate my purpose today which is to suggest that arbitration must continually recall its indispensable role in the rule of law endeavour, and that those involved in its development and upkeep should regularly evaluate arbitration against the rule of law framework so as to determine whether the bargains that were struck during the initial design of

arbitration are still respected – or even worth respecting – in a world that is changing as quickly as arbitration itself.

60. By recognising the cost that inheres in those trade-offs, we are also led to the conclusion that there can be no reasonable justification where rule of law values are conceded without *any* returns. In the context of international arbitration, these are the values of affordability and speed, which were once thought, at least by some, to be among its greatest virtues. While significant efforts to address the problem of rising costs and delays have been made, especially in recent years,¹⁰¹ it continues to take a heavy toll on users' satisfaction and confidence. That is lamentable because, as I have suggested, arbitration was once designed and conceptualised as a process characterised by speed, affordability, simplicity and practicality. The problem of rising costs and delay is therefore intensely inimical to the original vision of arbitration and strikes at the very heart of what arbitration is, or was meant to be.

B. *Arbitration's blade*

61. In one of the most enduring and illuminating metaphors in legal philosophy, Raz summons the image of a knife and compares it to the law,

¹⁰¹ These include techniques and guidelines for promoting time- and cost-efficiency, the use of expedited procedures for small claims, cost orders to dissuade disruptive tactics, and incentives to arbitrators to render awards expeditiously by lowering or increasing fees depending on the speed of their work. For an overview, see Micha Bühler, Global Arbitration Review, "Costs" (29 November 2018): <globalarbitrationreview.com/chapter/1177437/costs#footnote-110>.

and the sharpness of the knife to the law's conformity with the rule of law.¹⁰² Just as the sharpness of a knife determines its ability to cut, the adherence of the law and legal system to the values of the rule of law determines their ability to promote the various purposes of the rule of law.

62. If we apply that metaphor to international arbitration, what results is surely a unique blade: sharp in some corners, dull in others, and with the rest of the blade somewhere in between. The metaphor helps us to think about the choices that were made in forging arbitration's blade. As Professor Paulsson has put it, arbitration is a valuable institution "in many but not all places, for many but not all purposes".¹⁰³ If this blade was meant to be wielded only by particular users for particular types of disputes, then its inadequacies from a rule of law perspective can be given the credit of design. But where its edges have been blunted through neglect, complacency or misuse, then arbitration becomes a poorer and less effective blade on the whole for no good reason, and if left to wear down may in time prove unfit for purpose.

VI. Conclusion: The "specific excellence" of arbitration

63. Let me bring my discussion to a close. In his book *The Idea of Arbitration*, Professor Paulsson describes arbitration as "the quintessence of

¹⁰² Raz at p225.

¹⁰³ Paulsson, foreword.

bespoke justice”¹⁰⁴ and as “freedom reconciled with law”.¹⁰⁵ But if that is advanced as a description of arbitration rather than a prescriptive statement of intent, then I question whether international arbitration has really lived up to that noble portrait.

64. Speaking at the 2018 ICCA Congress, Chief Justice Allsop observed that arbitration has come to develop the same process-driven costs that accompany poorly-managed litigation, which he described as a “cancer in the body of both”.¹⁰⁶ The “essential problem”, he said, is a “cultural” one; that “parties and their advisors have often ceased to view litigation and arbitration as a species of problem solving”.¹⁰⁷ The result is that costs are “incurred merely because [they] are seen to be usually required, or have become common practice”. They are the result of “unoriginality”, “a lack of lateral thinking”, and “the habit of thought that proceedings exist to create such processes or costs for their own sake, rather than for resolving the dispute”.¹⁰⁸ Chief Justice Allsop termed this the problem of “industrialisation”, which he regarded as “the greatest challenge [to] the continued popularity and indeed legitimacy of international commercial arbitration”.¹⁰⁹

¹⁰⁴ Paulsson at p7.

¹⁰⁵ Paulsson at p1.

¹⁰⁶ Allsop at para 39.

¹⁰⁷ Allsop at para 40.

¹⁰⁸ Allsop at para 53.

¹⁰⁹ Emphasis added; Allsop at para 52.

65. Chief Justice Allsop's remarks echo the cautionary words spoken almost a decade earlier by the moderator of our panel discussion today, Mr Toby Landau QC, at the 2009 Clayton Utz International Arbitration Lecture, also delivered in Sydney. Mr Landau warned that international arbitration was "headed on a dangerous track" because of "the solidification of a standard model of procedure" that had come to constitute the expectations of law firms and tribunals, and yet was increasingly incompatible with the actual needs of users and their disputes. That model, Mr Landau argued, combined the worst flaws of the civil and common law processes, resulting in long and unfocused written memorials, protracted and repetitive oral hearings, the thoughtless deployment of *pro forma* procedural orders, and document production on an unnecessarily large scale. All of this was so far removed from what users of arbitration actually wanted that he thought it would prove to be arbitration's "downfall", unless something was done.¹¹⁰

66. Given the clear resonance between these remarks of Chief Justice Allsop and Mr Landau, which were delivered almost a decade apart, there is reason to think that we have failed to move sufficiently in the intervening years to address what appears to be a real threat to the legitimacy of international arbitration. The disparity between the description of international arbitration as

¹¹⁰ Toby Landau, Clayton Utz and University of Sydney International Arbitration Lecture 2009, "The day before tomorrow: Future developments in international arbitration" (21 October 2009): <claytonutz.com/internal/archive/ialecture/content/previous/2009/speech_2009>.

“industrialised”, and the vision of arbitration as the “quintessence of bespoke justice”, is startling.

67. Yet surely, this vision of arbitration remains within our grasp; surely arbitration continues to hold the potential – perhaps more so than any other mode of dispute resolution – to offer bespoke justice through the customisation of pathways for the resolution of disputes. Although the consensual nature of arbitration presents it with constraints, it also equips arbitration with a defining advantage – and that is its unparalleled ability to adapt its procedures to meet the specific needs of disputes and disputants, navigate the evolving conditions of international commerce, and integrate the best features of various methods of dispute resolution. This, I propose, is the virtue of *agility*. To borrow an expression from Raz, agility is the “specific excellence” of arbitration.¹¹¹ It is important enough to be recognised as a rule of law value in its own right, and it is simply indispensable in this age we inhabit, which is characterised by pervasive change and the profound uncertainty that accompanies it. The virtue of agility is the sharpest point of arbitration’s blade, and arbitration’s custodians would do well to preserve it and put it to good use.

¹¹¹ See Raz at p225: just as “[b]eing sharp is an inherent good-making characteristic of knives ... conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the *specific excellence* of the law.” [emphasis added].

68. For decades, international arbitration has been favoured with extraordinary support and goodwill from the global community. Amidst the paralysis of decades-long struggles to find cohesive multilateral strategies for issues ranging from global health to climate change and the challenge of poverty, the world has somehow been able to forge a set of common solutions¹¹² to protect and secure the favoured role of arbitration. That is a real and frankly astonishing triumph of multilateralism and I choose to believe that it reflects a deep and near-universal belief in the cause of sensible dispute resolution for international commerce. That investment of trust and goodwill must never be forgotten or taken for granted by the custodians of arbitration, in whose hands arbitration's blade now rests, and who are duty-bound to keep that blade at the very cutting edge of international commercial dispute resolution.

69. Thank you all very much.

¹¹² These include instruments such as the New York Convention, the Model Law and the UNCITRAL Arbitration Rules, as well as guidelines such as the IBA Rules on the Taking of Evidence in International Arbitration.