JOHN BEECHEY, CBE
2ND BIENNIAL DR. JS ARCHIBALD QC MEMORIAL LECTURE
"'MOOD MUSIC FOR ARBITRATION?"
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BVI International Arbitration Centre

Some two years ago, installed in the ICC's new premises in Paris where I was completing my term of office as President of the ICC's International Court of Arbitration, I read the coverage in GAR (as one does) of a lecture delivered by my friend, Peter Goldsmith, in which he had thrown down something of a gauntlet to New York, London and Paris. He posed the question whether a new arbitration centre, in the BVI of all places, could not only challenge certain of the world's pre-eminent arbitration centres, but actually "knock them off their perch".

Having made a mental note to tease Peter about his provocation and to ask whether the BVI, of which I had only the haziest of impressions, was somewhere to be visited and whether Road Town, like an urban equivalent of Rafael Nadal's serving arm, was, by reason of its 800 and something thousand corporate inhabitants, somehow physically out of kilter with the rest of the BVI, I thought little more about it. Until out of the blue some weeks later, a call came from one Dawn Smith. Now for those of you, who have yet to experience this phenomenon, beware: she has honed the art of the sales pitch to perfection. Once hooked, it is a little late to reflect as Dorothy Parker once did, when asked what might be inscribed on her tombstone: "Wherever she went, including here, it was against her better judgment."

The result of that call is that, within the space of the last 18 months, I have come to know the BVI rather well in my capacity as Chairman of the Board of the BVI IAC. And today, I find myself following Peter Goldsmith to the podium to deliver this second Dr J. S. Archibald QC Memorial Lecture.

It is a privilege to do so. Without the energy, the vision and the commitment of Joseph Archibald, Peter Goldsmith's question would simply not have arisen. Throughout Dr Archibald's long and distinguished career run a number of threads, among them, a profound Methodist faith, a commitment to human rights and a determination to bring about judicial and court reform here in the BVI and in the eastern Caribbean. When diligence and utter integrity are complemented by the long experience of a practitioner with a truly international perspective, the insights gained from holding a number of high public and judicial offices, drive and determination, any cause has a formidable advocate.

It is the good fortune of the BVI that such a man should have been available for appointment to lead the Focus Group established by the BVI Financial Services Group in 2011, The work of that Group was seminal to the introduction, and subsequent enactment, of the 2013 Arbitration Act and the extension to the BVI of the New York Convention in the following year. The BVI may now fairly claim that it offers to users

a modern arbitral legislative framework, supported by a well-regarded Commercial Court. Arbitral awards rendered here are truly international currency.

Those are achievements, which, in themselves, are impressive testament to the work of the Focus Group. But its terms of reference went further: its remit was to consider the steps necessary to see the BVI on its way to becoming a recognised centre for international arbitration, which Dr Archibald foresaw as operating in two languages, English and Spanish.

When Peter Goldsmith delivered the Inaugural Archibald Lecture, the BVI International Arbitration Centre was still very much a concept. Barely two years on, the Centre is a reality. It has promulgated rules, which are anchored in modern best practice and it has published a first list of arbitrators, the compilation of which has been based on principles of cultural and gender diversity. Dr Archibald's criterion of two languages is well and truly met. In fact, the Centre can now offer to users the services of a world-class, multilingual panel of arbitrators and it is in a position to administer and host arbitrations conducted in many of the world's principal languages - certainly all of those widely used in the Caribbean and Latin America.

The most obvious demonstration of serious intent is this building. The venue for Peter Goldsmith's lecture was Maria's by the Sea. Thanks to the support and confidence of the BVI authorities, to some, if I may say so, inspired leadership on the part of the CEO of the Centre, Francois Lassalle, and the sheer hard work of the team of contractors, whom he has encouraged and cajoled in equal measure to complete the works in very short order, we meet here in the premises of the Centre. Before the layout and finishes were signed off, Francois had visited some of the other leading arbitration centres in Europe, North America and Asia. It is fair to say that he had done his homework and he learned a lot; the result is that the Centre has gone short on features such as expensive shelving, which lawyers rarely use, because it is never in the right place, and fixed panelling, which precludes any flexibility in the use of the space. And it has gone long on such things as the quaintly named modesty boards on the front of tables, copious numbers of power points and communal space for parties and arbitrators. Francois, with the full support of the BVI IAC Board, has also been obsessive about the installation of first-class sound proofing and modern IT.

On the basis of my own experience of established purpose-built arbitration centres in the likes of London, Paris, Hong Kong, New York, Singapore, Stockholm, Toronto and Washington D.C. (don't even go looking for one in Miami or Geneva), I can safely say that what you see here does indeed knock many of them off their perch. This is, on any view, a world-class facility of which the BVI may be justifiably proud. The BVI has, then, the law, the rules and the premises, but will there be the work to make this place, to adopt the phrase coined by my friend, Niccolo Landi, the epicentre for arbitration in the Caribbean?

The candid answer is that it takes a while for any new kid on this particular block to make its presence felt. There is no doubt whatever that we can fill this space with Court

hearings and conferences such as this, but the aim is to bring in arbitrations. And over time, I have every confidence that we will.

It is fair to say that the Centre has already received a number of enquiries, which will likely result in BVI IAC clauses being written into contracts. There has been a number of attempts, too, to institute proceedings under the administration of the Centre, but they have foundered, notwithstanding some quite ingenious proposals as to how the terms of existing arbitration agreements might be read to trigger the jurisdiction of the Centre. That is inevitable in that the Centre was not in existence when contracts, which are giving rise to disputes now, were negotiated, so the agreement of the parties to any subsequent change in the disputes resolution regime is required. But conferences such as this, which bring to the BVI arbitration practitioners and potential users of the Centre's services from around the world, and which showcase the Centre, are a powerful way of getting across the message that the place is real, and that it is not only up and running, but very much open for business.

For the time being, at least, access to the BVI will remain an issue. The need for many to make one flight change has not deterred parties from going to Geneva; two flight changes, however, are a disincentive. That will change with the implementation and completion of the airport expansion project. The inauguration of the jet link to Miami will be an important transitional step. A similar link to Panama would open up the BVI to one of the principal airline hubs in Latin America. In the meantime, the Centre's management is proactive in arranging transfers from the major regional airports into the BVI.

It is important to emphasise, too, that government is acting to ease immigration and related formalities, which would otherwise impact the ability of party representatives, witnesses, experts, counsel, tribunal members and critical support personnel, such as transcript writers and interpreters, freely to enter, and to conduct their arbitration business in, the BVI. The result is that parties and their counsel, who are looking for a stable, arbitration-friendly common-law based jurisdiction in this hemisphere as a possible alternative to the United States, whether for reasons of neutrality given the identity of the Parties or because of a concern that restrictions on access may become a real issue there, now have a viable alternative. There is nothing like the Centre anywhere else in the Caribbean - or the Americas south of Toronto for that matter - and I include in that New York City, where the local centre's premises are modest by comparison.[1]

Perhaps this is an opportune moment to take stock of the BVI IAC's standing in light of the London Centenary Principles proposed by the Chartered Institute of Arbitrators as the essential criteria for a successful international arbitration centre. There are ten principles:

[1] Since delivering this paper, my attention has been drawn to the fact that the Atlanta Center for International Arbitration and Mediation offers space for arbitrations. It does not administer arbitrations or maintain a roster of arbitrators.

1. A clear and effective modern arbitration law. The Territory has that.
2. An independent judiciary, familiar with international arbitration. The Territory has that, too.
3. Legal expertise in the jurisdiction available to deal with international arbitrations here. The BVI has a number of highly regarded practitioners well versed in international arbitrations. That number is set to grow and there is also considerable experience of co-counselling with other lawyers in international cases.
4. Legal education. There are active programmes in place and the Centre is playing its part.
5. The parties' right to their representatives of choice is guaranteed.
6. Ease of accessibility. Measures have been taken to address immigration and work permit issues for participants in international arbitrations conducted in the Territory. Improvement of air links in and out of the BVI is an issue to which government is giving priority.
7. Access to functioning arbitration facilities. The BVI IAC offers world-class facilities.
8. High ethical standards are demanded and maintained in the Territory.
9. Enforceability of awards is assured by the BVI's Arbitration Law and by the extension of the New York Convention to the Territory.
10. Tribunals and administrators fulfilling their obligations in good faith are assured of immunity from suit.

Overall, it is clear that the BVI already scores pretty high on that basis.

You might conclude that on the basis of what you have heard so far that the mood music for arbitration, certainly for the prospects for the BVI IAC and for the development of the BVI as a centre of arbitration of choice, is upbeat. There is good reason to be optimistic. In terms of international commercial arbitration, which is likely to form the substantial majority of the eventual workload of the Centre, the outward signs are that there is a burgeoning demand for arbitration services. Published caseload numbers for the leading arbitral institutions show a general upward trend year on year, 2016 being no exception. By way of example, the Stockholm Chamber recorded 199 new cases (103 international and 96 domestic) in 2016, its best performance yet. SIAC saw its caseload increase from 197 in 2014 to 244 in 2015 and on up to 307 cases last year and the ICC enjoyed a significant increase in new cases - up from 791 in 2015 to 996 cases last year. HKIAC and ICDR also reported increased caseloads as did CIETAC. The LCIA's 2016 results recorded a slight drop against 2015 to 253 new cases and 50 further cases in which it provided administrative or other support. It may be that the LCIA has been particularly susceptible to the impact of Russia-related sanctions, since for some years, it had been a centre of choice for Russian cases, but there is no reason to doubt that it remains a formidable player.

That is a market into which the Centre might expect to tap with some confidence. In addition to work, which might be expected to come to the Centre by virtue of the fact that it is the first such institution to be operational in a region, which has been poorly served in the past, it should seek to capitalise on the fact that this is a jurisdiction, which attracts an international client base, not least in the field of financial services. Now that

they know it is here, and here to stay, local and regional practitioners and legal advisers worldwide, whose clients operate through BVI-based corporate vehicles, should be encouraged to consider the BVI IAC as a serious and viable forum for the resolution of disputes. The question of the adoption of a BVI IAC arbitration clause should be a standard item on their contractual terms checklists.

To a certain degree, the destiny of the BVI IAC is in its own hands. It can, and must, ensure that it offers a level of service which stands scrutiny against that of the market leaders, that its cost and fee structures are competitive and that it meets current best practice in terms of both procedural transparency in its administration of its caseload and in ensuring that its tribunal appointments are appropriate to the case. It is equipped to do so and in its preliminary dealings with case referrals, I will say unequivocally that the CEO of the Centre, Francois Lassalle, and the acting Registrar, Joao Vilhena Valerio, have not put a foot wrong.
But it is not impervious to external pressures and both those, who are responsible for the Centre as well as those, who support and use its services, need to have an appreciation of the challenges with which international commercial arbitration is confronted.

Gary Born, who visited the Centre and gave a seminar here with Professor Brigitte Stern last February, delivered the first Judith S Kaye Lecture in New York a few months ago in memory of the great Judge, jurist and friend of arbitration that Judith was. He made headlines in the legal press with his warning to the arbitral community that: "Winter is Coming". He drew attention to the risk that the political and civil society backlash experienced in the field of investor-state arbitration might spill over into commercial arbitration. It was, he said, time for the arbitration community to defend itself against an "army of the undead", which, on the basis of "wildly wrong" perceptions that the current investor-state regime was pro-business and controlled by unelected, unaccountable and self-interested arbitrators in the pockets of investors, demanded more state control over the process. That is dark mood music indeed.

There is no doubt that the current system of investor-state arbitration is under intense and by no means benign scrutiny. The renunciation of the ICSID Convention by three South American States, Bolivia, Ecuador and Venezuela, the debate within the European Union about the effectiveness of intra-EU BITs and the treatment of disputes between EU investors and EU States pursuant to the Energy Charter Treaty and the hostility towards the current system of investor-state arbitration on the part of civil society, powerful NGOs and of political leadership on both sides of the Atlantic in the context of, first the TPP and, latterly, the stalled TTIP negotiations, are examples of an extraordinary hostility towards a process, which it is no exaggeration to say has been demonised in some quarters. Some of this hostility is doubtless politically motivated, but what it amounts to, whether sincerely held or merely opportunistic, is a very public vote of no confidence in the system.

When powerful political voices in the United States refer to arbitration as a system of "rigged pseudo courts"[2] and commentators in Europe call investor-state dispute settlement a "toxic mechanism [which] … forced into other trade agreements … has allowed big corporations to sue governments before secretive arbitration panels composed of corporate lawyers which bypass domestic courts and override the will of parliaments…."[3] it is time to sit up and take notice – in fact, there must be a real concern that it may be almost too late for the arbitral community to change the course of the debate in investor-state arbitration.

One of the most worrying aspects of these developments is that there seems to be little, if any, room for proper debate. It is a trite observation that if there is a good argument on the other side, you have got to understand it, but the most depressing feature of the discussion around the proposed investor state dispute settlement provisions in the context of TTIP was that no-one at the Commission or at the European Parliament was even prepared to give the arbitral community a hearing. Their minds were closed. Any solution was weighted in favour of the clamour of an anti-arbitration lobby long on inflammatory rhetoric and emotion and very short on fact and substance. As Professor David Caron pointed out in his Kaplan Lecture in Hong Kong last December: "If trust in the integrity of the process is lost, then the subsequent debate can be deeply emotional and not one easily rebutted by experts in the field."[4]

The essential elements of the attack upon investor-state arbitration remain, first, that disputes which affect national interests are in the hands of inherently biased arbitrators, who conduct non-transparent proceedings outside the law; second, that the rulings of these tribunals constitute an undesirable limit on the power of states to regulate in the public interest; third, the process is shrouded in secrecy; fourth, states never win – "arbitrators are not tenured judges with public authority as in domestic judicial systems, but a small clique of corporate lawyers who are appointed on an ad hoc basis and have a vested interest in ruling in favour of business"[5]; fifth, foreign investors benefit from superior protection; and sixth, arbitration is not reliable, because arbitrators are not bound by precedent and they are unaccountable, yet their decisions are imbued with finality.

These various strands are often intertwined. The now notorious disputes between Vattenfall and Germany, first, over the environmental restrictions placed upon the operation of a coal-fired power station in Northern Germany and subsequently over the shutdown of the German nuclear power industry in the wake of the Fukushima incident,

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[2] Senator Elizabeth Warren: 'The Trans-Pacific Partnership clause everyone should oppose' Washington Post 25 February 2015

[3] George Monbiot, 'The lies behind this transatlantic trade deal' Guardian, 22 December 2013

[4] David D. Caron: 'Light and Dark in International Arbitration: the Virtues, Risks and Limits of Trnasparency.'

[5] John Hilary: "The [TTIP: A Charter for Deregulation, An Attack on Jobs, An End to Democracy" (2014)

gave rise to harsh criticism of the arbitral process in the German press of which this is a tamer example:

> "It meets in Washington behind closed doors: a mysterious panel of three judges has the power to condemn a government to pay billions in compensation when a company's investment is at risk."[6]

Tellingly, a leader of the German Green Party in Hamburg was quoted as saying that:

> "It was a total surprise for us … As far as I knew, there were some [treaties] to protect German companies in the [developing] world or in dictatorships, but that a European company can sue Germany, that was totally a surprise to me."[7]

There is more than a hint of double-speak here: a spokesman for the environmental lobby, one of the most powerful of the voices raised against the protections afforded to investors under the current system, not least when those protections are enforced in favour of northern hemisphere investors against southern hemisphere states, seems to suggest that these protections are perfectly appropriate in the case of a German investor facing discriminatory treatment or worse at the hands of a third world government, but Heaven forfend that any such action should be brought against a EU member state by an EU investor.

The plain fact is that none of these complaints withstands proper scrutiny. The vast majority of those who sit as members of investor-state tribunals make every effort to fulfil their obligation to serve as independent decision makers, to find the true facts and to apply the law as they are called upon to do by the case at hand; the few notorious exceptions do not make the rule. Even a cursory look at the statistics debunk the myth that states always lose: the latest ICSID statistics reveal that a tribunal ruled on claims in 68% of cases, while 32% were settled or discontinued. And in the cases in which a tribunal did rule, jurisdiction was declined in 17% of cases, all claims were dismissed in 40% of the cases and claims were upheld in whole or in part in 43% of cases.

The suggestion that proceedings are conducted in secret cannot seriously be maintained in an age when the membership of ICSID, or ICSID administered, tribunals is routinely published, as are the awards rendered by those tribunals, ICSID proceedings have even been broadcast live, *amicus* briefs are regularly entertained and measures such as the 1 April 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration are in place. The arbitral community has been astute to respond to calls for transparency. It remains to be seen whether States will be as eager to sign up to the Mauritius Convention, thereby acknowledging their consent to the application of the Transparency Rules in proceedings whether or not conducted under the UNCITRAL Rules and brought under pre-April 2014 investment treaties. To date, there has hardly

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[6] Petra Pinzler, Wolfgang Uchatius and Kersten Kohlenberg: 'Im Namen des Geldes', 'Die Zeit', 10 March 2014

[7] 'The obscure legal system that lets corporations sue countries': Claire Provost and Matt Kennard, The Guardian, 10 June 2015

been a rush; nine States, including Canada, France, Germany the UK and the USA have signed up since the Treaty was opened for signature on 17 March 2015.

Empirical experience suggests that while investor-state tribunals are not bound by precedent, they are scrupulous to review previous decisions and to consider whether general principles outlined in them are apt to be adopted in the cases of which they are seised. Rights of appeal may be limited (in the ICSID system, they are enshrined in the annulment procedure under the Convention), but decisions are not capricious and merely because they may not be well received does not make them wrong.

I am inclined to think that David Caron is right to suggest that the investor-state arbitration model has become a proxy for that amorphous concept 'globalisation' and that because it is readily identifiable, it is an easy target for those who are hostile to some or all of what they believe globalisation represents. That is not an environment conducive to sensible and rational debate. My guess is that the existing investor-state model will be increasingly challenged. There must be a real possibility that pressure will increase for the adoption of a two-tier framework akin to that in the EU – Canada Trade Agreement ("CETA") whereby the constitution of the arbitral panel ('Investment Tribunal' in the language of CETA) and of the appellate tribunal is dictated by Canada and by the EU and drawn from a pool of adjudicators for which the criteria for appointment are weighted in favour of those who have previously held high national judicial office.

Chapter 8 of the CETA (the Investment Chapter) contemplates that the investment disputes panel be comprised of 15 members – five Canadian nationals, five EU nationals and five third country nationals – who will serve for five year terms, subject to one renewal. The investor has no say in the constitution of the tribunal. It is to be noted, too, that the CETA enshrines a commitment on the part of Canada and the EU to the creation of an international multilateral investment court and that the powers of the appellate tribunal include the ability to entertain applications based upon "manifest errors in the appreciation of facts, including the appreciation of the relevant domestic law" (Art. 8.28(2)(b)) as well as errors in the application or interpretation of the applicable law.

How much of this will spill over into international commercial arbitration is a question, which exercises many in the arbitral community - and rightly so. Again, I would agree with David Caron's view that:
"I do not see the transparency movement spilling over with anywhere near the same intensity to commercial arbitration because although international commercial arbitration certainly supports the conduct of international business, it is not associated with the phenomenon of
globalisation in the same way."

There is a number of reasons why that should be so, not least, because a business to business dispute is rarely going to impact a national interest or the interests of taxpayers. What is generally at stake is the interest of the immediate players, their shareholders and possibly their financial backers.

And the fact is that to the extent that transparency is demanded in international arbitration, the institutions are reacting, such that the procedures of the arbitral process are open to scrutiny. Institutions increasingly publish their statistics. A number have long since published sanitised awards. Since January 2016, the ICC has published information on the composition of ICC tribunals, including the names and nationalities of arbitrators and whether the appointment is the result of a party nomination or, in the case of a Sole or Presiding arbitrator, whether it is on the basis of a joint nomination of the parties or a direct appointment by the ICC Court. Institutions are increasingly making public their decisions on arbitrator challenges and they encourage tribunals to be proactive in their case management, sometimes, in the view of harassed arbitrators, to the point of being overly prescriptive. But there can be no doubt that accountability - of institutions and of tribunals – is now a principal feature of the arbitral process.

But if the pressures are not as acute as those facing investor-state arbitration, one cannot lose sight of the fact that in the United States, there is a hostility to arbitration of every hue, evident in articles in the national press, which reflect a process alien to anything that those in this room who are familiar with international commercial arbitration would recognise. Just one example:

"In practice, however, arbitration typically takes place in a conference room, where parties are seated around a large table. Witnesses may or may not be in the room. Parties may or may not have lawyers. The arbitrator sits at the head of the table. He or she is not a judge and does not wear a judicial robe or other ceremonial garb. Rather, the arbitrator can be any person the parties have designated, although they frequently are lawyers. There is no court reporter or jury.
The arbitrator convenes the hearing and usually begins by explaining that it is an informal proceeding not subject to formal rules of evidence or procedure. Rather, he or she explains that the arbitrator's role is to hear any evidence that either side wants to submit and then render a binding decision. Instead of excluding inadmissible evidence based on objections from lawyers, the arbitrator will generally hear all the evidence and then decide how much weight to give it in reaching a decision. Witnesses are sworn in by the arbitrator and the proceeding begins. During the hearing, the party who initiated the proceeding tells his or her
story and presents any documents or witnesses that support it. The other side has an opportunity to cross examine. Then the defending party presents its case, also subject to cross examination. The arbitrator may also ask questions of the witnesses.
After the close of the hearing, the arbitrator considers the evidence presented and issues an award. Often the award takes the form of a simple statement of who won, and the amount of the recovery, if any. Sometimes the arbitrator issues a written decision explaining the outcome. Once the arbitrator has ruled, there is no realistic possibility for appeal."

And distrust is fuelled further by a subliminal link between all forms of commercial arbitration, domestic and international, and the notorious consumer and employee so-called forced arbitration provisions buried away in the small print of the likes of credit

card agreements and employment contracts, which compel arbitration and preclude the ability to bring class action suits. In the autumn of 2015, the New York Times ran a series of op-eds under such titles as: "Arbitration Everywhere: Stacking the Deck of Justice" and "Arbitrating Disputes, Denying Justice" and which included such memorable observations as that of the Executive Director of Public Justice, who stated that on the basis of a "tangle of bans placed inside clauses added to contracts that no one reads in the first place, corporations are allowed to strip people of their constitutional right to go to Court. …. Imagine the reaction if you took away people's Second Amendment right to own a gun."

It must be emphasised that these are criticisms directed principally at US domestic arbitration, but public perception is immune to such 'subtle' differences with the result that all arbitration is tarred with the same brush.

It should be obvious that there is a world of a difference between the form of US domestic arbitration, which has attracted such criticism and the bulk of the workload of the international institutions, which the BVIIAC would seek to emulate, but nothing should be taken for granted and the Centre should be ready to speak to those differences.

There is pressure, too, from the newly created International Commercial Courts, which maintain that they can offer a cheaper and speedier service to users than the commercial arbitral institutions and which, it is inferred, none too subtly, on occasion, offer 'safer hands' than do international commercial arbitrators generally.

The champions of the new ICCs, among them, the Lord Chief Justice of England and Wales, suggest that they can deliver a service more cheaply than can the arbitral institutions and that their ability to render public judgments on matters arising out of standard forms of contract, jurisdictional issues, principles of law or important forms of interim relief will meet the concern raised in two recent public addresses by the Lord Chief Justice that cases, which might enable the courts to develop the law are being lost to arbitration. As the retired Court of Appeal judge, Sir Bernard Rix, who sits as a judge of the Singapore ICC as well as a commercial arbitrator, put it, albeit in a different context and with a different solution in mind: "as more and more international commercial cases go to arbitration rather than the courts, we are more and more losing sight of the basic feedstock of our commercial law."[8]

As to the first point, control of costs is something over which the institutions have limited powers. They can control their own charges and expenses and whilst they have to be able to attract good arbitrators, they can exercise some control over the costs of the tribunal. But the real expense in arbitration is party engendered costs. And it is no different in court proceedings. Only this past week, a case arising out of the public bail out of Royal Bank of Scotland was settled on the eve of trial in the Chancery Division. Mr Justice Hildyard was "staggered" to be told that the costs run up by RBS were of the order of £100 million. Any responsible arbitrator will seek to ensure that the

[8] Jones Day Professorship in Commercial Law: Lecture, SMU Singapore, 12 March 2015

proceedings are run efficiently and effectively and it is true that in apportioning costs, the tribunal can ensure that excessive costs are borne by the party that chose to incur them. But all too often, one hears the mantra that arbitration has become too expensive, as if it were the fault of the process. That is an issue of which the management of this Centre is well aware and it will not be slow to set the record straight.

As to the second, speed, the leading institutions have been well aware of the need to encourage procedural efficiency and tribunals are put under considerable pressure to ensure that it is achieved. They do not have the powers of compulsion available to a sitting judge, but the ICCs may be wary of using that blunt instrument too readily, if they wish to attract business away from the arbitral institutions when that business is largely provided by entities which have come to expect a substantive say in the procedure to be adopted.

As to the third, development of the law, I agree with Gary Born that there is something troublesome with the proposition that "disputes are there to make law as opposed to law being there to resolve disputes." International cases go to arbitration, because the parties concerned wish to resolve their disputes in private in a neutral forum, which affords them an option to enforce a final decision internationally pursuant to the New York Convention. In my experience, arbitrators will not readily accede to invitations to 'make law' and they will be scrupulous in their efforts to interpret and apply the law as it is set down by statute or code or, in common law jurisdictions, as it has been made by judges. If they get it seriously wrong in a way which goes beyond the immediate case, then there is scope for appeal and the courts will have their opportunity to state, or restate, the law.

To that extent, the new commercial courts may operate in parallel with the international arbitral institutions, but what they offer is something very different.

The leading arbitral institutions have come a long way in a relatively short period of time. Whether long established or relative newcomers, they have generally been responsive to the accelerated pace of change in user expectations and to the demands of an increasingly competitive market for their services. Some of those changes have been dramatic – who, even ten years ago, would have predicted the growth of the third-party funding market to the point that in the course of the past 12 months, legislation has been passed in Hong Kong and Singapore to accommodate it and the BVI surely cannot be far behind? That said, on 27 May 2017, the Irish Supreme Court by a 4-1 majority upheld the prohibition on third-party funding, albeit with some apparent reluctance and, as one Justice put it: "solely because of the continuing existence of ancient principles of law".

Faced with scepticism, or worse, as to the values of the process and of the institutions and arbitrators who are seen to epitomise it, the greatest asset of any institution is a reputation for unimpeachable integrity. The contagion of mistrust that afflicts investor-state arbitration is unlikely to spread to international commercial arbitration for the reasons that I have outlined. If I might be allowed one minor note in a piece set in an

otherwise major key, it would be this: in an offshore financial centre, or as the Daily Mail would doubtless put it in more pejorative terms, a 'tax haven', it will be essential to ensure that the BVI IAC takes all possible steps to ensure that the confidentiality attendant upon its proceedings is not seen, as David Caron put it, "as an opportunity for the facilitation of other than lawful business activity."

To sum up, investor-state arbitration finds itself under sustained attack. It is not easy to predict how far reaching change might prove to be. International commercial arbitration continues to thrive. The key to its success is its ability to keep pace with user demand and it has the advantage that it is not hobbled by the attention of public interest groups and the vagaries of political exigency and opportunism. It is not without its critics, though, as some of the commentary to which I have drawn attention makes clear. There is absolutely no room for complacency but with a fair wind, not necessarily a given in the Drake Channel, I am confident that this Centre will grow and thrive as Dr Joseph Archibald would have wished (and expected) it to do.