The Inaugural Cambridge Lecture of the Chartered Institute of Arbitrators, Cambridge, 4 June 2014

From Cambridge into the Law and the World of Arbitration

by

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In dedication to Lord Wedderburn of Charlton QC, Lord Griffiths of Govilon MC and Sir Edwin Jowitt and in memory of Lord Brittan of Spennithorne QC[1]

My first direct acquaintance with the law was at Cambridge University in the summer of 1959. Having taken Tripos Pt I in economics I was now going to take Tripos Pt II in law. We needed to get acquainted with this new subject and Bill Wedderburn, my College Law Tutor, arranged for us to take a special three-week course early in the summer vacation.

Our introduction was the late 19th-century case, which went to the Court of Appeal, of *Carlill v Carbolic Smoke Ball Co*.[2] The defendants (the Carbolic Smoke Ball Company) had offered in an advertisement a (so-called) medical preparation, called fittingly *carbolic smokeball*, as a protection against influenza. They went further and also offered to pay £100 to any person who succumbed to influenza having used their smokeball in the specified manner for the specified period. The plaintiff, on faith of this advertisement, bought and used the smokeball as prescribed but succumbed to influenza. She sued. Well, the defendants ran every defence imaginable—the advertisement was a "mere puff". They had no intention to create a contract with the plaintiff or anybody else and so forth. So I learned the difference between a contractual offer with the intention to create a legal relationship and "a mere invitation to treat".

By the end of my second year at Cambridge it was time to decide whether I wanted to embark on a career in the law and, if so, on which side of the profession. My difficulty was that my father, who was a solicitor in a London law firm, was advising me to go to the Bar and my uncle and godfather, himself a successful barrister,[3] was arguing I should become a solicitor. It was all resolved by Bill Wedderburn who guided me to the Middle Temple which was his Inn and of which, much later, he became a Bencher.

Joining the Middle Temple as a student was quite an experience. In those days the obligation on the students at the Middle Temple was to dine in Hall in every legal term for three years—six times per term if you were studying in London but three times each term if you were at a university out of London. There were in those days almost no law schools in Africa and in most parts of the British Commonwealth. Those, in particular, from Africa and the West Indies, who sought to become a barrister, had to come here to study. On every dining evening the Middle Temple Hall was packed with these students from abroad.

I have to confess those of us attending these dining evenings from Cambridge University did not behave well. While the students from the Commonwealth dutifully filled the Hall upstairs, we hid downstairs in the cloakroom waiting for the announcement that the Hall was full. When so, we were then allowed out of the back door on to Middle Temple Lane,

[1] See Author's Note at end of article.
[2] *Carlill v The Carbolic Smoke Ball Co* [1893] 1 Q.B. 256.
[3] George Waller. By then a Queen's Counsel on the North Eastern Circuit and later a High Court Judge completing his career in the Court of Appeal as Waller LJ.

having been registered for the dinner but without having to eat it.[4] This was just as well because the food was awful!

After Cambridge and taking the Bar Finals, it was time to seek a pupillage. This was all done on a personal introduction. I was very lucky to have two very fine pupil masters, Hugh Griffiths, who later climbed right to the top of the judiciary with a place in the Appellate Committee of the House of Lords, and Edwin Jowitt, who later, and fully deservedly, became a High Court Judge. At any one time Hugh's popularity was such that he had three or four pupils trooping across to the High Court in his footsteps. The pupillage with Edwin Jowitt was different because he had a big practice in the Midland Circuit which required me, as his pupil, to join him at Quarter Sessions and Assizes from Aylesbury to the south to Lincoln and Nottingham to the north. Edwin tells me that I was his only pupil. Since he was a very fine pupil master I can only assume that, having had me as his pupil, Edwin was not anxious ever again to have the same experience!

However, my first direct experience of the practice of law was not with one of my fine pupil masters but in the Bow Street Magistrates' Court. Very early one morning there were two cars in Parliament Square. There were then no traffic lights and the drivers of both cars were confident that they had the right of way. They didn't and their cars collided. I was the driver of one of the cars. The police decided to prosecute both of us for careless driving so we needed assistance at the Bow Street Magistrates' Court. It came in the form of two elegant young barristers dressed in black morning jackets and waistcoats and pin-striped trousers. Each advised that there was no defence to the charge of careless driving but they should succeed in enabling us to keep our licences. They did and once out of the Bow Street Magistrates' Court they put on their bowlers, bid a friendly farewell to their clients and with their umbrellas neatly folded strolled back to the Temple.[5]

A couple of years later, when I had been called to the Bar, I had to dress similarly with also, of course, a stiff white collar! Some judges were most meticulous about proper dress for those appearing in front of them and if, in their view, we were inappropriately dressed, we were told that he, the judge, could not "hear us". It did not help to speak louder!

There was also the issue what *we did* with the bowler hat! I found it very useful when I was pedalling my bike to the local railway station in Hertfordshire. It prevented the rain going down one's neck! In talking, a few days ago, to a colleague of those years ago, he recalled asking his Clerk why he should wear a bowler. "Well Sir", came the reply (our Clerks, however senior, and we, however junior, always addressed us, as "Sir"), "Well Sir, it is to pay respect to the Judges by doffing your bowler to them". This set a problem because, as a new Member of the Bar, he didn't know who were the Judges! So the answer was to doff the bowler to anyone, to their surprise, in the Temple who looked like a Judge![6]

Despite all of this, we did not, however, think our dress odd. It was true that we could be mistaken as waiters in the dining cars of British Railways (and asked to supply coffee to fellow passengers!) or be thought to be shop assistants in one of the London stores, Selfridges or Harrods (and asked the way to the ladies' lingerie department!), but this was fine because everybody in the 1960s was more formally dressed. Women (from all classes)

[4] The memory of this youthful misbehaviour still slightly shames me. Since one of my accomplices, a fellow law student from Cambridge University, Nicholas Phillips, later became Master of the Rolls, Lord Chief Justice and President of the Supreme Court I feel a little better although I am still rather haunted by the memory of the obedient diners in the Hall above!

[5] These young two barristers were John Marriage and Michael Wright. The former became a very successful criminal and civil lawyer on the South Eastern Circuit achieving the rank of Queen's Counsel. He sadly died before he could advance his career further. Michael Wright became a leading Queen's Counsel particularly in personal injury work, Chairman of the Bar Council and a High Court Judge. After stepping down from the Bench he presided as the Coroner at the inquest on the death of Jean Charles de Menezes who was controversially shot by the police at Stockwell tube station immediately following the London Underground bombings of 7 July 2005.

[6] The young barrister who received these instructions on wearing a bowler was Ken Rokison QC who kindly chaired this lecture. He also recalls the fear of young barristers of their Senior Clerk. Indeed he remembers another more senior member of his Chambers, Anthony Lloyd (later to become Lord Lloyd of Berwick in the House of Lords), being so careful of the Senior Clerk that he would climb out of the window in order to have his hair cut and return by the same route. On the author speaking to him, Lord Lloyd while not admitting this account, did not deny it!

would not go out without wearing hats. Indeed, in the early 1970s when I joined the House of Lords the few female Peeresses who were in the House invariably wore hats. Thus dressed Baroness Edith Summerskill, a redoubtable former Labour Member of the House of Commons, could be very scary! [7]

I had further experience of dressing up when, in a break in my pupillage, I was asked to be the Judge's Marshal to the High Court Judges (as they then were) Sir Harry Phillimore and Sir Cyril Salmon. The appointment was for the full Lent term in 1963 travelling round the entirety of the Midland Circuit. So now it was into a black morning coat with tails. These two and a half months on Circuit gave further insight into legal practice. As we progressed from the Assizes in one town to the Assizes in another town, we were not actually travelling in horse-drawn carriages with members of the Bar following us on horseback but the routine was much the same. Everything and everyone travelled from town to town. The Assize Clerk and Assistant Clerk packed all their inks, paper, blotting paper, bibles and all else into a large wicker basket to be unpacked again in the next town. It was the same with the Judges' cook who packed into her wicker basket salts, peppers and flour and everything else she needed on hand in the next Judges' Lodgings. Sometimes things went a bit wrong. The Judges' cook used to go mad when there was a full moon and required counselling from the Judge's butler and the "all-purpose" Judge's Marshal. I don't know if we did any good but she seemed a little less mad in the morning! Then there was the Assize Clerk who, with his podgy fingers, always had the greatest difficulty when sellotaping numbers on to Court exhibits. Indeed more often he succeeded in attaching the Court exhibit number to himself rather than to the exhibit! Much though the Marshal would have liked to have helped, it was no good. The Assize Clerk himself had become an exhibit! I was, however, able to witness advocacy of the highest standard. I can well remember the most brilliant cross-examination which I have ever heard then and now conducted by Geoffrey Lane QC who later became Lord Chief Justice.

His young client had been accused of murdering his young wife. They had been living together in a small caravan and tempers had flared. He had gripped her by the throat and she died. The defence was accidental death, not strangulation. So it was that Geoffrey Lane conducted a brilliant cross-examination of the pathologist in an attempt to establish that his client's fingers had not strangled his wife but had accidentally pressed upon the vagus nerve in his wife's neck causing her instant death. The vagus nerve controls the rate of the heart beat and when pressed hard in certain positions can completely stop the heart beating.

Back in London it was back to the quaint practices of the Bar. For example you never shook hands with another barrister. This was something merchants did when achieving deals. Members of the Bar had more respect for one another. This was all a bit quaint but not anything that really bothered us. Nor did it occur to us that the restrictive practices of the Bar was something that we should be worried about. Restrictive practices there were! As a member of the Bar you could not appear in the courts of any Circuit town without becoming, on election, a member of that Circuit. It went further. In certain towns you also had to become a member of the local Bar Mess. As recently told to me there was an occasion in one Circuit town when the Secretary of the local Bar Mess for East Anglia sought to prevent, with his arms outstretched on the steps of the court, another member of the same Circuit, from appearing in that court as he was not a member of the local Bar Mess![8] Moreover, when a member of the Bar wanted to appear in a court in another Circuit there was much formality. First he had to get the consent from that other Circuit so to appear. Secondly he could only appear if a Junior Counsel from that Circuit appeared with him under what was called a "kite brief". For this "off Circuit" appearance 50 Guineas had to

[7] I had good reason to be scared by Baroness Summerskill when making my Maiden Speech in the House of Lords. Thinking mistakenly that I had made an anti-feminist argument she turned on me in a terrifying assault.

[8] Sir Michael Wright recalled this incident to me, when helping my recollections for this lecture. As he further remembered it was all resolved by the offending barrister being immediately enrolled as a member of the local Bar Mess!

be paid into the Circuit funds. Thus the unfortunate client had this surcharge together with the fees for the kite brief—all on top of the regular fees for his chosen barrister. The preservation of practice rights seemed always more important than providing best service to the client. In order, for example, to get a case heard during the long summer vacation from the end of July to early October the client, through his barrister, had to persuade the vacation judge that the case was sufficiently urgent or important for it to be treated as "vacation business". If not, it would have to wait its turn, two months or more later, in the next legal term. The no touting rule was most strictly applied—notwithstanding that the barrister's clerk would spend almost all his time touting for his barrister! The use of business cards (the very word "business" was offensive!) was not permitted and socialising with solicitors was strictly forbidden. Thus, even though you were working closely with your instructing solicitor, who was staying in the same hotel, you had to dine in the Bar Mess rather than with him. As I witnessed as a Judge's Marshal, this was strictly applied.[9] Lonely solicitors dined alone! In case it could be thought that a barrister was acquiring work other than by the display of his forensic skills in court, it was also forbidden for a barrister to hold a conference with a solicitor and client in any place other than his chambers.[10] I can remember once appearing in the morning in court in Bedford with an afternoon conference booked with a Bedford solicitor and his client in London. The solicitor and his client travelled in the same train as me to London and were even in the same bus from St Pancras Station on the way to my chambers in the Temple. We were not permitted to notice one another. It was only when my Clerk knocked on the door of my room and introduced the solicitor and his client that we were able to speak.

The treatment of the long suffering female members of the Bar was extraordinary. A female member of the Bar was not permitted, for example, to become a member of a Circuit Bar Mess and would have to eat alone in the same hotel while her male colleagues were at dinner in the Circuit Bar Mess. There were no female Benchers in any of the four Inns of Court and it was only when the able Elizabeth Lane of 1 King's Bench Walk became a High Court Judge (the first woman to do so), that she was invited to become a Bencher of the Inner Temple. This set a problem for the Benchers at the Inner Temple who had to create, for the first time in the Inn, a ladies lavatory!

Out of this anachronism there were certain benefits which now have become lost. To begin with the Bar was very small in the late 1950s and early 1960s—only just topping 2,000 barristers. As cited by Anthony Sampson in his fascinating 1960s book, *The Anatomy of Britain*, the entire Bar could have embarked as passengers in the Cunard liner, *Queen Mary*.[11] Among these members of the Bar there would have been less than one hundred female barristers. Chambers were also very much smaller, on average only about 8–10 barristers, and under another restrictive practice, a maximum of two silks per Chambers. This, in turn, caused Chambers to have to split into two (as happened with 3 Essex Court) if more than two members wanted to be awarded silk! In contrast the membership of the Bar, as last published in 2014, is now 15,716 of which happily there are 5,545 female barristers—over a third of the Bar. Contrast too, today's Chambers in London and outside of 60 or 70 barristers including, in some Chambers, up to 20 or more silks.

The result of the small size of the Bar, the strictness of only practising on your Circuit was that members of the Bar generally knew one another and, with this, shared a large degree of trust. If you stated, for example, to a fellow barrister that you were in difficulties

[9] The dispute was between Geoffrey Lane QC, as he then was, and Graham Swanwick QC (later Swanwick J). The latter was the Leader of the Midland Circuit and the incident took place in a Midland Circuit Robing Room which, as the Judges' Marshall, I happened to witness. Geoffrey Lane showed no pleasure in the Bar Mess on that evening and went as soon as he could to show good manners to his instructing solicitor.

[10] I remember my uncle, George Waller, telling me that he had to get special permission from the Leader of his Circuit in order to visit a client at his home—that client being physically unable to attend a conference in George Waller's chambers.

[11] It was in this edition of *The Anatomy of Britain* that Anthony Sampson famously described the Benchers of the Four Inns as "the most selfish of all communities of men in all Britain".

in appearing in the same case on the following day, this was immediately trusted and the best accommodation would be made for you. That trust also existed importantly between the Bar and the Judiciary. Once again your word was trusted without challenge. Woe betide any member of the Bar who broke his word! Importantly this trust was the foundation of the relationship between Bench and Bar. It was not unusual if a problem came up during the course of a trial—a problem which Counsel did not wish to disclose in open court—that immediate arrangements would be made for Counsel on both sides to have a meeting with the Judge in his room to discuss the problem and to seek to find a solution to it. Another occurrence was the visit to the Judge in his room to ascertain what was the Judge's view on the likely sentence for the accused. Both Counsel for the prosecution and Counsel for the defence would attend this meeting which had the very sensible result that pleas of guilty were offered in the knowledge that, for example, the judge would not send the accused to prison. I can remember once when I was Edwin Jowitt's pupil, Edwin telephoning—in a one to one call—Geoffrey Lane who was Chairman of the Rutland Quarter Sessions (but was also a fellow member of Edwin's Chambers) to find out Geoffrey Lane's views on punishment relating to Edwin's client. Right up to the end of his days as Lord Chief Justice, Geoffrey Lane always thought that direct and trusted access to judges by Counsel was proper and helpful. Of course it was essential that, having indicated in private the likely sentence, the judge honoured his word. One day a judge did not. It went to the Court of Appeal and the practice was strictly curtailed.[12]

There was another feature of the practice of the law in those days. It can be described as creative advocacy. I mention again Geoffrey Lane because it was he, when a junior barrister at the Bedfordshire Quarter Sessions and when defending a client accused of stealing coal from a coal merchant, who went in the morning before court with his instructing solicitor to a local coal merchant and acquired two bags of coal of the same size and weight capacity as the alleged stolen bags. Then during his cross-examination of the coal merchant one of the coal bags was lugged into court by his instructing solicitor and his junior. It took two to bring it into the court room. The point was made and Geoffrey Lane got the instant and important concession. The coal bags couldn't have been carried away, as alleged by the prosecution, by the accused acting alone.

A little later I thought I would try the same piece of creative advocacy. I had been instructed to appear in a Magistrates' Court near Lavender Hill in a matrimonial case before the local justices. The wife was seeking a separation order and maintenance from my client the husband on the ground of "persistent cruelty"—then a required ground in the Magistrates' Courts. One of the allegations against my client was that he perpetrated the cruelty of shoving a whole pint milk bottle into a very private part of his wife's body. I was not a gynaecologist but I did think the milk bottle was a bit big for this to have been done. So passing, on my way to Court, a milk dairy I asked if I could have a clean and empty pint milk bottle. I think the milk dairyman thought this was a bit strange but he was nonetheless prepared to loan me a clean milk bottle on my promise to return it. This was going to be my big forensic triumph. I would pull the milk bottle out of my bag and the very sight of it would cause the wife to immediately withdraw this unpleasant allegation against my client. It did not work out that way. In the shouts of objection by Counsel for the wife: "Take away that milk bottle"—as if this nice clean milk bottle was somehow tainted—it seemed that he thought that the milk bottle was then and there to be inserted into the unfortunate woman. It was at that moment that the Chairman of the Justices started to show interest in the case. He looked straight at me and said "I can't see the milk bottle". I thought that was a bit odd because there it was on the table straight in front of me and him. Yet the

[12] *R. v Lisa Jane Johnson and Jayne Lorraine* (1990-91) 12 Cr. App. R. (S.) 219. There have been, in fact, a number of cases in which the propriety of what has been called "judicial indication" has been considered—the most significant ones being *R. v Turner* (1970) 2 All E.R. 281, in which Lord Parker CJ effectively gave a practice direction on judicial indication, and the more recent case of *R. v Goodyear* [2005] 3 All E.R. 117; [2005] 2 Cr. App. R. 20; [200]) EWCA Crim 888 where Lord Woolf CJ gave a new practice direction on judicial indication.

moment had been lost and into my barrister's briefcase went the milk bottle and back to the dairy. There was no forensic triumph!

The major feature of Circuit practice in the 1960s was that you did everything: crime in the Quarter Sessions and Assizes and civil work (personal injury claims, neighbours' disputes and so forth) in the County Courts. You were an expert in divorce to one set of solicitors and an expert in landlord and tenant to another set of solicitors. You had readily on hand Rayden on Divorce, Megarry on the Rent Acts, Stone's Justices' Manual, Paterson on Licensing, the Green Book for County Court cases and the White Book for High Court cases. At the outset you learned your trade with the smallest cases in the Magistrates' or County Court. When they were not around, your Clerk sent you to try and get a "Dock Brief" in which the accused would be brought up into the Dock and invited to choose, with the point of the finger, the young barrister he fancied to be his advocate. The fee, in cash, was two pounds four shillings and sixpence of which you had to pay two shillings and sixpence to your Clerk. I would be sent to the Middlesex Quarter Sessions in Parliament Square in the building now housing the Supreme Court. The Presiding Judge in that Court was Judge Ewen Montagu. During World War II he had been in charge of a deception of the enemy in the floating on to the shores of Spain of a dead man's body containing false papers[13] and later wrote the account of this in a book called *The Man who Never Was*.[14] However to us at the Bar, he was "The Judge who Bloody Well Is". The obtaining of a Dock Brief at the Middlesex Sessions, as my Clerk well knew when sending me there, was a learning experience!

In those early days, there were cases that went well and cases which were a disaster. There were interesting cases and other cases which were not. There were "affray" trials arising out of disturbances in towns (largely caused, I regret to recall, by race issues) and incest and bestiality cases from deep in Lincolnshire countryside. I can remember one such incest case when the accused was charged with incest of his daughter and granddaughter—she, poor child, being the same person.

One trial, in particular, sticks in the memory: the Great Train Robbery Trial at the Aylesbury Assizes, January to March 1964. I had a very humble role. I was second Junior Counsel for the defence of Brian Field. He was a solicitor's clerk and one quite well connected to the criminal world. It was a sophisticated robbery of a night Royal Mail train carrying bank notes to the value of £2.6 million (the equivalent to £46 million today) from Glasgow to Euston. As a result of the robbers' tampering with the signals the train was stopped by a red light contrived by them. It occurred near Leighton Buzzard in Buckinghamshire. Although nobody was killed, it was an aggressive robbery. The train driver, Jack Mills, was struck on the head by a cosh rendering him semi-conscious and leaving him with an injury from which he never recovered. According to the Prosecution, the role of my client, Brian Field, had been to take charge of the conveyancing of a property called Leatherslade Farm which was to be used by the robbers to lie low, within 45 minutes of the scene of the crime, until the initial hue and cry was over. It was also the place where the booty could be shared among criminals who intrinsically did not trust one another. My client Brian Field had an additional role in which he failed. He was meant to arrange for Leatherslade Farm to be burnt to the ground as soon as the robbers left it. His failure brought about the arrest and subsequent conviction of most of the train robbers. Although there was some attempt to wipe away the fingerprints the police found many of them in the farm house (including those of Ronnie Biggs[15] left after he had had a bath) and, somewhat amusingly,

[13] The purpose was to fool the enemy about the place and date of the impending invasion of Sicily by the Allies.

[14] Ewen Montagu was only given permission to publish this account of enemy deception in WWII because Duff Cooper (later Lord Norwich), a Conservative politician in the House of Commons in the 1920s and 1930s and the UK Ambassador to Paris immediately after WWII, somewhat improperly wrote, and had published, a novel entitled *Operation Heartbreak* which was based upon this enemy deception, to which he had been privy.

[15] Ronnie Biggs, who had been sentenced in 1963 to imprisonment with the other train robbers, managed (like Charlie Wilson) to escape out of jail and ended up in Brazil with which the UK has no Extradition Treaty. Nearly 40

other fingerprints on the cards and dice of the Monopoly game playing set in which the robbers had indulged while lying low. All the main participants in the train robbery had criminal records with their fingerprints lodged with Scotland Yard and, in the main, were quite easy to trace and find.

At the start, the defendants were arraigned in the beautiful Assize Court at Aylesbury but, owing to the number of defendants and counsel, the trial took place in the Hall of the Aylesbury Rural District Council. The judge, Edmund Davis J, was genial and efficient. After conviction the robbers were brought back to the Assize Court at Aylesbury for sentence. I was in court on that day. The first defendant to come up for sentence was Charlie Wilson, one of the most dangerous men among the train robbers and who years later was shot dead in Spain in a criminal feud. The sentence was the highest sentence, in terms of years of imprisonment, ever given in an English court. Describing the robbery as a "crime of sordid violence inspired by vast greed" the judge meted out a sentence of 30 years. Wilson flinched and a shudder went throughout the court room. As for Brian Field he was also found guilty and sentenced to 25 years of imprisonment.

Interestingly the Great Train Robbery Trial brought about a practice change of some significance. So many were the counsel, instructed in this trial, not members of the Midland Circuit (of which Buckinghamshire was part) that the requirements for the Circuit fee of 50 Guineas and the presence of kite briefs were waived. It was not a permanent change. I can remember later getting, as a Midland Circuiter, a kite brief but this was the beginning of the realisation that this restrictive practice, imposing financial penalties on lay clients, could not be sustained.

My arrival into the world of arbitration was not by way of arbitration practice but by way of Parliament and the Arbitration Act 1979. I have already given, as published in the *Arbitration* journal of the Chartered Institute a few years ago,[16] the extraordinary account of this arbitration law reform. It suffices to state that this reform would never have been achieved but for my luck in being successful in a House of Lords ballot for a three-hour back bencher debate and but for Mark Littman, a leading silk in the Commercial Bar, who had formed an arbitration action group called the London Arbitration Group (carrying initials which produced the unfortunate abbreviated name "LAG") and Bertie Vigrass of this Institute in getting the support of leading members of our judiciary in the House of Lords, most particularly Lord Diplock. So it was when I arrived in England from New York, where I was working, that Lords Diplock, Scarman and Wilberforce had already put their names down to participate in this debate of May 1978.[17] Later, when the 1978/79 Arbitration Bill was working its way through the House of Lords, Lords Denning, Rawlinson and Hailsham also came in support. There was also something else which brought this arbitral reform into our Statute Book. It was the choice by the Conservative Party to ask Lord Cullen of Ashbourne to speak from the Front Bench in this debate. As a retired stockbroker he knew nothing about arbitration but did know that Donaldson J (as he then was), the Presiding Judge of the Commercial Court, had developed an interest in this arbitration law reform. So it was that Lord Cullen of Ashbourne calculated that there were 5,000 large arbitrations being deterred annually from coming to London with the loss of earning power to England of £100,000 per arbitration. From this Lord Cullen of Ashbourne asserted that there was a £500 million annual loss in earnings to London—the equivalent today of perhaps £40 billion!

This much struck home with the Lord Chancellor, Lord Elwyn-Jones, who took it up in debate, and in private drew it to my attention. I thought it was a seriously exaggerated figure but in replying to the Lord Chancellor I merely stated that I had not made the calculation myself but I was sure it was a "large figure". It was a bad time then for the Labour

years later he voluntarily returned in 2001 to the UK to resume his prison sentence, from which he was released in 2009 on the grounds of ill health. He has subsequently died.

[16] (2010) 76 *Arbitration* 125–129.

[17] House of Lords Hansard 15.5.78 Vol.392 Cols 89–117.

Government—the "winter of discontent" was to beset them eight months later—-and what an opportunity it was for them to find favour with the City of London and to give (as essential for us) Government support to a simple uncontroversial piece of law reform. They took it and the "case stated" and the setting aside of awards for "errors of fact or law on the face of the award" procedures were swept away and, progressively through the work of the London International Arbitration Trust (LIAT)—well represented at the lecture—and the ambitious and able London legal community, London's unpopularity as a site for international arbitrations turned into one of trust and popularity.

Although I started to take on arbitration cases, in the practice of law, my continued involvement in arbitration law reform in Parliament was probably more important. So eventually when the Arbitration Bill of 1995, to become the Arbitration Act 1996, came before Parliament I was again able to take an active part in arbitration law reform. Indeed only the other day I was reminded of an amendment of mine which was accepted during the passage of this Bill. It related to the power of an arbitral tribunal, under what is now s.38 of the 1996 Act, to order a claimant to provide security for costs. When the Bill was introduced in the House of Lords the provision here was that, following High Court procedure, a proper ground for making such an order for security for costs could be based upon the respondent being resident abroad. Since the purpose of the Bill was to increase the attractiveness of international arbitrations taking place in England, I thought this provision as proposed in the Bill was somewhat counterproductive. It was therefore good that I got agreement in the House and there is now contained in s.38 the express provision that the power to order a claimant to provide security for costs should *not* be exercised on the ground of the respondent being resident abroad.

The presence of Law Lords, actively being involved in arbitral law reform but also sitting as judges in the Appellate Committee of the House of Lords, was nothing unusual at that time. Indeed later, during the passage of the 1995 Arbitration Bill, Lord Donaldson and Lord Mustill (one Master of the Rolls and the other a Law Lord) were particularly active. This provided the great benefit of those participating in this law reform having real and detailed knowledge of the subject but it had other curious consequences. The Appeal in the *Bremer Vulkan* case[18] did not fall under the 1979 Act but, by then, the Act had passed through Parliament. The issue was the wanton delay for over five years by the claimant in proceeding with its arbitral claim. Previously the court would have had no hesitation in intervening. No, said the House of Lords, as led by Lord Diplock, since arbitration was a "contractual" and "voluntary" process, it was for the arbitrators and parties to provide the remedy for delay, not the court. The Law Lords went even further in the *Nema* Appeal of 1981.[19] The 1979 Act was now in place and the trial judge had, on any view, correctly applied the words of the Act. No, said Lords Diplock and Roskill, it was necessary to look at the "Parliamentary intention" which somehow overrode the words of the Act! With their close personal knowledge, as part of the legislature, they were probably right about "Parliamentary intention" and, in *The Nema*, it produced the right result but Lords Diplock and Roskill were acting more as Parliamentarians than judges. Could our Supreme Court now do the same? In the purity of the "separation of powers" are we better off?

I have attempted to identify in this lecture some significant practice changes which have occurred since I was called to the Bar in 1963. There have also been significant changes in the practice of international arbitration. First, there has been an enormous increase in the number of international arbitrations conducted worldwide but most particularly conducted in and from London. I have no reliable statistics for 1979 but I doubt if there were more than a hundred or two in London of the big commercial international arbitrations. In the year 2000 I headed up a project which considered the quantity of international arbitrations

[18] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909; [1981] 1 All E.R. 289.
[19] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724; [1981] 2 All E.R. 1030.

in London and we came to a figure of between 600 and 700 international commercial arbitrations taking place in or from London. Today the figure must be much, much higher. One only has to look at the five-fold increase in the number of LCIA cases since the year 2000 and the sheer size of London's big law firms (with worldwide partners exceeding 500–600 per firm) and the presence in London of over 200 overseas law firms to know that cross-border transactional practices to and from London, including arbitral work, has become vast—and to think that until the 1967 Companies Act all partnerships were limited to 20 partners! We simply didn't know, at the time of the Arbitration Act of 1979—despite Lord Cullen's vision—what colossal results this Act (followed up very importantly by the 1996 Act) would have.

The second major change in the world of arbitration has been a most commendable joinder of common law and civil law practices. Indeed international arbitration today can be described as a blend of common law and civil law practices. Thus the use of cross-examination and proactive arbitral tribunals has been taken up with some enthusiasm by our civil law colleagues. On the other side the restraint on document discovery has been supported, if not applauded, by the common law participants in international arbitration. The IBA Rules of Evidence[20] are a good example of this commendable development.

Yet there have been other things that are not so good. When I was taking the Arbitration Act 1979 through the House of Lords international arbitration proceedings were more elegant and much less subject to aggression. Yes, there are large sums of money at stake and the issues can be very important to the parties, but there are ever-increasing efforts to impede or even derail the arbitration process when it suits a party to do so. Challenges to arbitrators[21] and now challenges to counsel[22] on the other side are not always for the genuine reason of preserving the integrity of the arbitration process but more to frustrate it. I give two recent examples. One is the challenge made against an arbitrator on pretty specious grounds which was rejected. This was then followed by a second challenge based upon the argument that the challenged arbitrator in this arbitration would have now become prejudiced against the party who made the challenge and for that reason should be removed![23] The other example is the challenge to counsel on the other side on the grounds that that counsel, having been in the same law firm as one of the arbitrators, and having worked under that arbitrator, was in a position of special knowledge about the arbitrator which other counsel in the arbitration did not have and for that reason he should be removed as counsel.[24]

While I am happy to record that these latter two challenges were rejected, it does identify undesirable processes which I fear will continue to be on the increase.

There is one interesting and significant development whose origin partly lies in the development of international arbitration and litigation in London. For many, many years right into the 1960s and early 1970s there were not, in the London law firms, litigation partners running their own departments. All litigation was handled by managing clerks. They were not trained in the law but picked up their trade (and some brilliantly) from the moment they arrived as young office boys. When therefore a corporate client needed litigation services, the corporate partner would summon a managing clerk who in turn would

[20] *IBA Rules on the Taking of Evidence in International Arbitration* (London: International Bar Association, 2010).

[21] As the statistics of the ICC, LCIA and ICDR show there has, over the years, been an increasing number of challenges against arbitrators, some on the slimmest of grounds. I remember a challenge being made in an arbitration in which I was involved against a very distinguished Canadian lawyer and arbitrator, when there was a total US embargo against trading with Cuba. The challenge was based upon the Canadian arbitrator being on the Board of a Canadian company which did business with Cuba and the grounds of it was that the arbitrator was involved in "anti-American activities" and should be treated as being biased against an American party in the arbitration!

[22] The two significant reported cases where the presence of counsel has been challenged in an arbitration are two ICSID cases: *Hrvatska Elektroprivreda v the Republic of Slovenia* (ICSID Case No.ARB/05/24) and *The Rometrol Group NV v Romania* (ICSID Case No.ARB/06/3). In the former the challenge succeeded and in the latter it did not. See fn.24 below.

[23] David Hacking, "Challenges: Theirs is to reason why" (2006) 1(6) Global Arbitration Review 26–29, *http://lordhacking.com/Documentation/Hacking%20Article%20on%20Arbitrator%20Challenges%20II.pdf* [Accessed 4 July 2016].

[24] *The Rometrol Group MV v Romania (ICSID Case No.ARB/06/3)* (ICSID Case No.ARB/06/3).

instruct counsel and away it would go! In the country it was different but even in country firms partners did not specialise, as such, in litigation.

As one London law firm discovered after another (perhaps as the old and worthy managing clerks were seeing their days were up) it was simply not practical or possible to conduct international arbitration and litigation without having partners with the capacity to run these disputes and to interact with their clients and opponents in an effective way. While the arrival of international arbitration in London law firms did not solely bring about this change, nearly all of the newly arrived litigation partners of the 1960s and early 1970s were engaged in international arbitration.

Change—although sometimes difficult to accommodate—is the challenge for us all of our personal and professional lives. I have had a varied professional career: 13 years as a Circuit barrister, 4½ years in New York qualifying as a US Attorney-at-Law, 20 years as a London solicitor, and now 16 years back at the Bar doing international arbitration. Every experience has been enriching and, as of now, still enriching. One of the delights for a lawyer is learning about the work and lives of those who seek our advice and help. As a solicitor in a very big European court case, I learned everything there was to be learned about sex and animals but this is a story for another time! Thank you to those of you here who form many components of my professional career—right up to my Middle Temple Vienna Moot students and my younger colleagues in Littleton Chambers—but my greatest thanks go to my pupil masters of long ago, Hugh Griffiths and Edwin Jowitt.

Author's Note

This paper is based on the Inaugural Cambridge Lecture which I had the honour to give at the Chartered Institute of Arbitrators in London, under the chairmanship of the distinguished international arbitrator, **Ken Rokison QC**, on 4 June 2014 and is dedicated to **Lord Wedderburn of Charlton QC**, **Lord Griffiths of Govilon MC** and **Sir Edwin Jowitt** and in memory of **Lord Brittan of Spennithorne QC**.

Bill Wedderburn became my Law Tutor at Clare College Cambridge in 1959 at a Summer Vacation Introductory Law Course and introduced me to the famous case of *Carlill v Carbolic Smoke Ball Co*. With his enormous zest for the law, he inspired me to go to the Bar. We were reunited when he joined the House of Lords and he remained a close friend until he died in 2012. Right to the end when presenting a point upon which he felt strongly—and this was not an infrequent occurrence—he would repeatedly brush back the lock of hair which kept descending over his brow. He was a superb teacher for which I owe him so much. **Hugh Griffiths** became my first pupil master in October 1962. He was a magnificent cricketer, golfer, lawyer and judge who had amazing panache whether meeting triumph or disaster and whose strength and ability permeated through to all he taught. He paid me the great compliment of wanting to come to this lecture but was prevented by a severe heart condition to which he sadly succumbed a year later. **Edwin Jowitt** became my second pupil master in September 1963. As an advocate he was supreme and quite wonderful at demonstrating the "art of advocacy". Happily he was able to attend this lecture and happily lives on. All of them were highly influential in providing to me whatever skills I have and my gratitude goes to each and every one of them.

My friendship with **Leon Brittan** went back to the late 1950s when we were at Cambridge together and active members of the Cambridge Union. At the same time as me, he trod the journey from Cambridge into the world of law, in which he firmly established himself before his high success in politics whatever that turbulent profession later served up to him. He was to have chaired this Lecture but had, at the last minute, to withdraw because of ill health which took him away at the beginning of last year.