

THE 2016 HONG KONG KAPLAN LECTURE

***“Lessons for the Future from the Past:
Individual Hedgehogs and Institutional Foxes”***

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Introduction: In preparing for this lecture, searching for a topic relating to Hong Kong and China, I was shown an article by Neil Kaplan on “The History and Development of Arbitration in Hong Kong”, published in 1996 – 20 years ago.² As you would expect from the author, it is a fascinating article on the origins of modern arbitration in Hong Kong, beginning with the arrival in 1841 of Hong Kong’s first senior colonial officer, Governor Pottinger, who introduced an Arbitration Ordinance in 1844. The ordinance was subsequently disallowed by the Colonial Office in London for spurious reasons; but it is clear that the idea of arbitration did not come from Governor Pottinger alone, but also from others dealing with commercial disputes at a time where there was no Supreme Court in Hong Kong. Who were these others, influenced by English and Chinese users seeking the resolution of their disputes by arbitration? It made me think of others largely unknown in other countries, who were also not governors, but who played a crucial part, as individuals, in the history and development of international commercial arbitration.

It is a fact that most armies, in practice, usually succeed or fail on the work not of their generals and staff but, rather of their captains and ordinary soldiers. The generals, as with governors, are rarely forgotten, with statues to their name. In the field of arbitration, who are the equivalent of these captains working with its ordinary users? Their names may be well known to some in their own life-time; and in their life-time, each may be much respected within their own community. As time passes, their names and contributions are forgotten, even though, indirectly, their influence may continue to be felt far beyond the community in which they worked. This is the story of a four such individuals, each of whom, I suggest, made a significant contribution in the long term to the current system of international commercial arbitration. Each acted, in the delphic phrase made famous by Sir Isaiah Berlin,

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² 1 *Y.B. Int’l Fin. & Econ. L.* 203 (1996). I am grateful to Ms Maria-Krystyna Duval for bringing this material to my attention.

as hedgehogs who knew one big thing and not as foxes who knew many things.³ Without initiatives from such individuals, international arbitration could not have developed as a pragmatic system of dispute resolution responsive to its users, mostly unlimited by geography and largely in disregard for political and economic differences.

Pavel Mincs: This story starts in the birthplace of Isaiah Berlin, the town of Riga in the Russian province of Livonia, now the capital of Latvia. Latvia was the birthplace of Pavel Mincs, a figure now almost unknown even in Latvia. Mincs was born in 1868, some 40 years before Isaiah Berlin, but from the same Jewish community in this mixed province dominated by Russian and German-speaking traders and merchants, exporting lumber and other goods to Western Europe. Mincs attended secondary school in Riga, graduated from the law school in St. Petersburg and received his post-graduate degree from Tartu University in Livonia. He first worked as a professional lawyer in Riga; and then, as a "dozent" or law professor at Moscow University in Czarist Russia.

For many years before 1917, Czarist Russia had favoured the amicable settlement of certain disputes by means of international arbitration. For disputes between States, it was a Czarist initiative that led to the Hague Peace Conferences in 1899 and 1907 and the establishment of the Permanent Court of Arbitration (the "PCA"). In particular, it was the intellectual energy of the Russian legal representative at the First Hague Conference, F.F. Martens, who was largely responsible for this remarkable achievement.⁴ Of course, most unfairly, it is the large portrait of Czar Nicholas II, as the general, which has dominated the Small Arbitration Room in the Peace Palace at The Hague - and not the arbitration captain Martens. As for Russian domestic arbitration between private persons, Russian law in Czarist times was primitive, even for disputes between commercial parties. Following the end of Czarist rule in February 1917, there was a new Minister of Justice under the Provisional Government, the non-marxist socialist, Kerensky. In his ministry, a young law professor was put in charge of arbitration law reform. He was Professor Pavel Mincs.

³ The phrase came from a poem by the ancient Greek poet, Archilochus. It remains unclear (at least to me) quite what Sir Isaiah Berlin meant by this phrase in *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (1953). Ronald Dworkin used the same phrase to propagate the idea that ethical and moral values depend upon one another, in *Justice for Hedgehogs* (2011). Here, it is used to contrast an individual's pursuit of a particular objective for the common good with an institution pursuing multiple competing ambitions for itself.

⁴ V.V. Pustogarov, *Our Martens: F.F. Martens: International Lawyer and Architect of Peace* (translated W.E. Butler, 2000); see also W.E. Butler, *Russia and the Law of Nations in Historical Perspective* (2009), pp. 264ff. F.F. Martens (1845-1909), who also called himself Friedrich Fromholz von Martens, was born in Livonia (now Latvia). His bust is now displayed, very belatedly, in the Small Arbitration Room at the Peace Palace.

In the chaos of an incomplete revolution, a desperate war with the Central Powers and the invasion by German troops deep into Russian territory, Professor Mincz drafted a new Russian arbitration law, with an historical commentary drawing on Roman, French and German laws.⁵ There was a precedent in the years following the French Revolution, where, as with Czarist Russia, there was profound mistrust of the old regime's state courts. The early revolutionary laws in France (1790 to 1793) guaranteed a citizen's right to have recourse to arbitration, which was advocated for users as the most rational method of resolving private disputes.⁶

This draft Russian law, taking the form of amendments to the old Czarist laws, was never enacted by the Russian legislature. As we know too well, there was a second revolution, or coup d'état, in October 1917; and arbitration under the new Soviet regime took a different direction. There was still to be a limited form of domestic arbitration between private persons enacted under the Soviet Civil Procedure Code of 1923; but after the end of the New Economic Policy in the late 1920s, that was made ineffective. In the 1920s, international commercial arbitration was frequently agreed between Soviet Russia and foreign traders and concessionaires; but after 1930, with the final demise of foreign concessions, that form of *ad hoc* international arbitration was abandoned by the USSR. However, the restructuring of Soviet foreign trade in the early 1930s ensured that international commercial arbitration revived with the foundation in Moscow of the Maritime Arbitration Commission in 1930 and of the Foreign Trade Arbitration Commission in 1932 (itself much later the model in China after its revolution in 1949 for FTAC, later renamed FETAC and CIETAC). Both Soviet arbitral institutions still exist in the Russian Federation, with the later re-formed and now called the International Commercial Arbitration Court. For a marxist-socialist country, with a centrally planned economy, it is perhaps hard to understand why the USSR continued to be interested in international commercial arbitration, whilst so hostile to international courts generally and, ostensibly, to its own legal history. It shows that foreign trade has its own apolitical imperatives; and, as with foreign trade, so too international commercial arbitration. It is a hard lesson for some to learn and re-learn; but, as some say, international arbitration remains 'the only game in town', with every available alternative worse.

⁵ The Mincz article and draft law were published in the Ministry of Justice's Journal of May-June 1917, Issues Nos 5-6, pp. 154ff. In 2005, these materials were re-published in "Treteiskii Sud" (Nos. 1, 2, 3 and 4) of 2005.

⁶ R. David, *L'arbitrage dans le Commerce International* (1981), p.126ff. As with Soviet Russia, private arbitration soon waned as the French Revolution developed into the Directorate and the Empire: see J-J Clère, "L'Arbitrage Révolutionnaire: Apogée et Déclin d'une Institution (1790-1806) 1981 *Rev.arb* 3.

Thus, in June 1946, Soviet arbitration specialists attended the first conference convened by the ICC in Paris, with a view to agreeing a uniform procedural law for international arbitration and improving upon the system of enforcing arbitration agreements and awards under the League of Nations' Geneva Protocol of 1923 and the Geneva Convention of 1927. An earlier attempt to do so by Professor René David, then of UNIDROIT, had failed in 1936. The so-called UNIDROIT draft model law had then been successfully opposed by the United Kingdom and its Dominions, for reasons which now seem at least obscure, if not mistaken. Neither the USSR nor the USA, for different reasons, had acceded to the arbitration treaties of the League of Nations. Now, in 1946 with the Cold War already begun, arbitration specialists from many countries met for three days at the ICC's headquarters in Paris to plan what eventually became the ICC's draft treaty of 1952/1953 leading to the United Nations' 1958 New York Arbitration Convention. It is significant that these specialists did not represent States, but attended as members of "the emerging community of arbitration practitioners itself".⁷

The names in the ICC's minutes of this meeting of June 1946 are familiar.⁸ They include Dr Pieter Sanders, then still the secretary to the Dutch Prime Minister; René David, now a Professor in Paris, and also from France, Jean Robert and René Arnaud; and from the ICC itself, Frédéric Eisemann. There were other specialists from many international institutions: the International Law Association, the Inter-American Commercial Arbitration Commission and the Canadian-American Commercial Arbitration Commission, and others. The British specialists were few, reflecting the United Kingdom's then indifference to the ICC: Sir Kenneth Lee, a banker, and Mr J.G. Allanby, the Registrar of the London Court of Arbitration (now the "LCIA"). The Soviet specialists came from the Maritime Arbitration and Foreign Trade Arbitration Commissions, including Professor Dimitri Ramzaitsev. He was a senior law professor and a legal specialist in foreign trade and international commercial arbitration. The USSR was not indifferent to the development of international commercial arbitration. It was to be one of the first Contracting States to accede to the 1958 New York Arbitration Convention; and its arbitration specialists (including Professor Ramzaitsev) were early supporters of ICCA, hosting the fourth ICCA conference in Moscow in 1972. (These

⁷ T. Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (2015), pp. 129ff.

⁸ I am grateful to Professor Jérôme Sgard for sending me a copy of these ICC minutes which he found in the archives of Columbia University, NY. See also his chapter "A Tale of Three Cities" in *Contractual Knowledge, A Hundred Years of Legal Experimentation in Global Markets* (2017).

also included the late Professor Lebedev, the chairman of the Maritime Arbitration Commission for many years and a strong supporter of the 1958 New York Convention and the 1985 UNCITRAL Model Law).

The lesson is two-fold. The movement towards a new regime for international commercial arbitration was no longer comprised of States. It had been so with the League of Nations and UNIDROIT; but now it now came from a community of arbitration specialists and users. There were no States attending this ICC conference in 1946; and, without these specialists, there would have been no ICC draft or New York Convention. Second, the Mincs draft of 1917 remained unknown to foreign scholars as a public document until 2005, when it was published in a Russian arbitration journal long after the end of Soviet rule.⁹ Yet its text and commentary cannot have been unknown to those Soviet jurists who worked on the text of the 1923 Soviet Civil Procedural Code, the foreign trade reforms of the early 1930s and from 1946 onwards the attempts at the ICC and the United Nations to promote international commercial arbitration, culminating in the 1958 New York Convention. This is a period of only 40 years, less than a working lifetime. After October 1917, the old legal institutions from Czarist times and from the Provisional Government disappeared and their laws proscribed, but the individual jurists remained the same individuals. Many of the new professors had been the same old professors.

For example, the Soviet Russian Civil Code of 1922 was drafted within four months, largely in response to foreign criticisms before and during the 1922 Genoa Economic Conference (influenced by the British Prime Minister, David Lloyd George) that Soviet Russia had no system of law sufficient to support any inward foreign investment in the form of concession agreements. This drafting exercise was a formidable achievement in such a short time; but it was of course impossible to draft such a code from scratch. In fact, there was no blank piece of paper. The new so-called first socialist civil code was drafted with the active support of individual jurists who had been Czarist professors working for many years on a new draft Czarist civil code dating way back to 1903 and much influenced by the civil codes of Germany, France and Switzerland, none marxist-socialist legal systems. For political reasons, that intellectual inheritance could never be acknowledged publicly at the time or later by Soviet commentators; but privately it was generally known. After the end of Soviet rule, it has at last been acknowledged. For example, in a recent translation of the current Russian

⁹ See footnote 5 above.

Civil Code, it is said in the preface co-written by a senior Russian jurist: “In the early years of the twentieth century, a Russian government commission published an excellent civil law codification in draft form, along with extensive commentary. War and revolution prevented this draft from becoming law, but the drafters of the Civil Code of 1922 drew on it – along with foreign sources – in a hasty but successful effort to provide a legislative basis for the emerging free market under the New Economic Policy of the early 1920s.”¹⁰ It is unfortunate that political imperatives seek to wipe clean the historical contribution of such individual draftsmen, along with their texts.

Hence, it is right that we should look more closely at the life of Professor Mincis. Pavel Mincis was his Latvian name. His Jewish name was Shmuel Favel Mintz. He emigrated from Russia in 1918 during the Civil War; and from 1921 he worked as a law professor at the University of Latvia, now an independent state and a member of the League of Nations. He became a Latvian politician, eventually the leader of the Latvian Jewish National-Democratic Party. He co-authored the Latvian constitution and was a Senator, a State Controller and a member of the Latvian Cabinet as Minister of Labour. Later, he acted as the interim president of the Latvian Supreme Court. From his legal bibliography, it does seem, regrettably, that after 1917 his legal interests lay in the field of criminal law and not arbitration. His younger brother was Dr Vladimir Mintz. He had also studied at Tartu University and from 1897 worked as a surgeon in Czarist Russia. After the Bolshevik Revolution, he became one of Lenin’s personal doctors. Upon treating Lenin, successfully, after the failed assassination by Fanny Kaplan in 1918 he asked Lenin to allow him to return to Riga; and, in gratitude for his medical skills, he was granted permission to emigrate from Soviet Russia.

In August 1941, following the German invasion of the USSR, Dr Mintz was arrested by the Nazis and died in Buchenwald concentration camp in 1945. His brother, Professor Pavel Mincis, was already dead. He had been arrested in Latvia in 1940 by its earlier invaders, the USSR, following the USSR’s annexation of Latvia under the Soviet-Nazi Pact of August 1939. Pavel Mincis was deported from Latvia (with his family); and he died in a prison at Taishet in early 1941, on his way to the Siberian camps. With his brother’s death four years later, it is a tragic and European story. We know little more than this of Professor Pavel Mincis, the arbitration captain; and yet there must be much more to his life and work still to

¹⁰ See O.M. Kozyr, P. B. Maggs & A.N Zhiltsov, Introduction, *Civil Code of the Russian Federation – First Part*, (2016); see also W.E. Butler, *Russian Law*, (2003; 2nd ed) p. 359.

be found in Latvian and Russian archives. From what little we do know, what is the lesson for us today? From a small step, in terrible times, a draft law during the short-lived Provisional Government caused a seed to be sown in Russian legal minds favourable to arbitration. It was not the only seed; but, with others in and outside Russia, it grew in time into the great oak-tree we now know as international commercial arbitration, which, with the New York Convention and the Amended UNCITRAL Model Law, overshadows revolutions, political differences and economic changes.

Dr Gaus: From Riga, we go to Berlin. Before 1933, Germany, particularly Berlin, was the world centre of international arbitration. The names of many of its captains remain well known: Martin Domke, Arthur Nussbaum, E.J. Cohn, Otto Kahn-Freund, Francis Mann and Heinrich Freund. The names of certain of its other captains are less well-known, including Dr Friedrich Gaus. Dr Gaus was the head of the legal department of the German Foreign Office from 1922 to 1943 (the *Auswärtiges Amt* or “AA”). He was a specialist in international law and arbitration, having drafted several arbitration treaties for Weimar Germany, including the 1925 Treaty of Arbitration between Germany and the USSR. He had also attended the Versailles Peace Conference in 1919 and the Genoa and Hague Conferences in 1922; and he later took part in the drafting in Moscow of the 1939 Nazi-Soviet Pact.

In 1933, there were several international commercial arbitrations taking place in Germany, under consensual arbitration clauses falling under the 1925 German-Soviet Treaty of Arbitration. One of these arbitrations in Hamburg concerned a dispute between a private German company and a Soviet state trading company, each of whom had appointed a German and Soviet arbitrator respectively in accordance with their arbitration clause. The third arbitrator, a German, was appointed by the German Court, as provided by the parties’ arbitration clause. However, there was in January 1933 a well-known political change in Germany, as also in April 1933 to its laws relating to arbitrators. There thus came a challenge by the German company to the Soviet arbitrator on the ground that he was disqualified to be an arbitrator under the new Nazi laws against non-Aryans. Under Article 1032(3) of the new 1933 Nazi Code of Civil Procedure (ZPO), non-Aryans could not be arbitrators. The leading German textbook on civil procedure confirmed this general prohibition.¹¹ The German Court upheld the challenge and removed the Soviet arbitrator under the Nazi ZPO.

¹¹ Article 1032(3) ZPO 1933, on persons legally incompetent to act as arbitrators, provided: “... *Abgelehnt werden können ferner Nichtarier im Sinne des Gesetzes zur Wiederherstellung des Berufsbeamtentums vom 7.*”

In Moscow, that decision was the subject of a highly critical article in *Izvestia* on 18 August 1933 by Professor A.G. Goikhbarg of the USSR Ministry of Foreign Trade's Legal Department.¹² He deplored the malign political influence of Nazi ministers on German judges and suggested that Soviet-German commercial disputes should be arbitrated not in Germany but "at some neutral location", thereby questioning the continuing efficacy of the 1925 Treaty. That in turn led to diplomatic exchanges between the USSR and Nazi Germany. Internally, the German Foreign Office in Berlin decided to seek the legal opinion of its own legal department as to the effect of the new Nazi ZPO on the 1925 Treaty. The German archives do not identify those who issued the legal opinion; but, as the most senior legal adviser in the AA and as a co-draftsman of the 1925 Treaty, that opinion almost certainly would have been prepared or approved by Dr Gaus.¹³

The AA's legal opinion dated 15 January 1934 explained that such an international arbitration in Germany was materially different from a domestic German arbitration.¹⁴ In addition to the parties' arbitration clause, the 1925 Treaty provided for international arbitration in either Germany or the USSR, with the right of the Soviet party to appoint any national of the USSR. There were few non-Aryans in the USSR as defined by Nazi laws; and such a limitation on qualified nationals would therefore subvert the object and purpose of the 1925 Treaty, effectively requiring the Soviet Party to appoint an Aryan *German* arbitrator and not a Soviet arbitrator at all. As explained in the opinion: "In actual fact it cannot be dismissed that the interests of the USSR may be negatively affected by the carrying out of the new German law ... For the Russians, there would therefore be a significant restriction to the group of persons whom they may appoint as arbitrators in Germany." The legal opinion concluded that the prohibition on non-Aryan arbitrators in the Nazi ZPO referred only to such persons "who can also be considered in Germany as officials ["Beamte"], i.e. only German members of the Reich." It did not apply to Soviet nationals appointed as arbitrators in an

April 1933 (Reichsgesetzbl. I, S. 175) und der dazu ergangenen Durchführungsverordnungen." See Jonas, ed., *Kommentar zur Zivilprozessordnung*, (1939; 16th ed). Dr M.R. Jonas, as an officer in the German Ministry of Justice, appears to have been involved in the drafting of this provision in the Nazi ZPO. See also Adolf Schönke, *Die Schiedsgerichtsbarkeit*, Vol 1 (1944), pp.107 & 86. The cited Nazi law of 7 April 1933 "for the restoration of the professional civil service" excluded non-Aryans from German public service, including the German judiciary: see <http://www.documentarchiv.de/ns/beamtinges.html>. For Nazi laws racially discriminating against German lawyers and judges generally, see J. Beatson and R. Zimmerman, eds., *Jurists Uprooted: German Speaking Emigré Lawyers in Twentieth-Century Britain* (2004).

¹² Doc 1, 370, 371 (Pol Archiv des AA R94759). Professor A.G. Goikhbarg had been one of the draftsmen for the 1922 Soviet Civil Code and its earlier Czarist drafts before 1917: see Butler (ibid) p. 359.

¹³ The opinion was issued by the AA's Russian Department IVA and sent (inter alios) to Dr M.R. Jonas at the Ministry of Justice under cover of a letter dated 18 January 1934 (signed by Dr Hey).

¹⁴ Doc I.372, *ibid*.

international arbitration tribunal. From a sense of caution, this opinion was subject to confirmation by the Ministry of Justice. The German Ministry of Justice confirmed the AA's opinion.¹⁵

Thus, the objection to non-Aryan Soviet arbitrators appointed by a Soviet party to an arbitration in Germany was rejected by the German Government's own arbitration specialists. Given the political times, this was a somewhat unusual and brave decision. Yet, its reasoning makes complete sense to us, quite apart from the rejection of the infamous Nazi ZPO. Domestic arbitration is different in principle from international commercial arbitration; and that distinction remains an important factor under many national laws on arbitration. With hindsight, this was another small but significant seed, albeit sown in the most terrible of times. So who was the sower of this seed?

Dr Gaus was not and never became a Nazi, one of the very few senior figures in the German Foreign Office who were not to join the National Socialist Party (voluntarily or otherwise). He was technically an Aryan under Nazi laws; but his wife was not. She was considered Jewish and therefore at great risk of arrest, deportation and worse. They somehow survived Nazi rule and the Second World War, apparently under the personal protection of successive German Foreign Ministers, including the Nazi minister, Ribbentrop, with whom Gaus worked closely as a 'Greek slave'. After 1945, Dr Gaus was attacked for his anti-Nazi evidence for prosecutors during the Nuremberg War Crimes Trials (where he also refused to testify in Ribbentrop's defence); but, by non-Nazis, he was also attacked for having worked at such a senior level with the Nazi regime, with personal knowledge of its gravest crimes.¹⁶ His reputation is still mixed, perhaps undeservedly so.¹⁷ Yet, as regards international commercial arbitration, he can be remembered as a hedgehog, associated with an idea that today forms an important part of the arbitral oak-tree.

¹⁵ The Ministry of Justice supported the AA's opinion, concluding: "...bei einem Schiedsgerichtsverfahren mit einem [Aus]länder für die Ablehnung eines von dem Ausländer # 1032 Abs. 3 Satz 2 kein Raum ist." (signed by Dr Volkmar).

¹⁶ One such critic was Ernst von Weizäcker, the former administrative head of the AA, who had faced (but escaped) the death penalty in the last of the Nuremberg War Crimes Trial (the "Wilhelmstrasse" trial). In his biography, he contrasts the role played by Gaus in support of the Allied prosecutors, in contrast to Gaus' servile role working in "Ribbentrop's ante-chamber": E. von Weizäcker, *Memoirs* (1951), p. 308.

¹⁷ M. Bloch, *Ribbentrop* (1992) pp. 209 & 246.; see also Eckart Conze, Norbert Frei, Peter Hayes, Moshe Zimmermann & ors, *Das Amt and die Vergangenheit* (2010); and Johannes Hürter, "The German Foreign Office", *Bulletin of the GHI*, 49 (2011) 81, part translation of the latter's "Das Auswärtige Amt", *Vierteljahreshefte für Zeitgeschichte* 59 (2011) 167. 59.

Brian Davenport: From Berlin, we move to London. Specifically, we move to a sub-basement lecture-room of King's College, London University, on a Friday in July 1994. It was the venue for a large conference of English arbitration specialists to discuss a draft bill and commentary on the new Arbitration Act proposed by the DAC, the Departmental Advisory Committee on the Law Arbitration. It was a critical meeting, with a massively important decision to be made by the Department of Trade and Industry (DTI), the Government ministry sponsoring (with increasing reluctance) the reforms of the United Kingdom's Arbitrations Acts 1950-1979.

The DTI had to choose between the minimalist arbitration bill drafted for the Government by Parliamentary Counsel hostile to the UNCITRAL Model Law and the less orthodox approach in the DAC's commentary largely influenced by users and the UNCITRAL Model Law.¹⁸ As commentators had rightly noted, the draft bill and the commentary bore little relationship to one another; and one clearly had to go. There were many arbitration captains in the lecture-room: Lord Mustill, the first DAC chairman; Lord Justice Steyn, the then-DAC chairman, Lord Ackner; and, as I recall, Lord Wilberforce and Neil Kaplan. It was a well-attended largemeeting; and the list of attendees goes on and on. As did, unfortunately, the speakers. One after the other, spreading darkness where there had been light, sowing confusion where there had been certainty; and all of them leaving the gloomy DTI none the wiser, albeit better informed that arbitral lunatics had indeed taken over the asylum. There then spoke a figure well known and much respected, whose contribution proved to be decisive. His name was Brian Davenport QC. He argued bluntly that there should be no compromise with the timid draft bill. What arbitration users needed should prevail; there was no point in accepting minimalist legislation; and it was far better for the DAC to refuse this mere half loaf. It should be the full loaf or nothing.

What followed is history. The DAC insisted upon the full loaf; the DTI eventually accepted the DAC's approach; and, later, under Lord Justice Saville as the third and last DAC chairman, the end product was the Arbitration Act 1996. The 1996 Act may not be perfect; no legislation with so many compromises could ever satisfy everyone; but it is manifestly *not* half a loaf. Without Brian Davenport's pugnacious contribution that Friday, I do not believe we could have seen the 1996 Act. The Government would have imposed a minimalist statute,

¹⁸ These two documents are published in (1994) *Arbitration International* 189.

mostly consolidating earlier legislation without reference to the UNCITRAL Model Law, to the disappointment of many users of London Arbitration.

Brian Davenport was called to the English Bar in 1960; from 1974 to 1980 he was Junior Counsel to the Board of Inland Revenue; he took silk in 1980; and he became a Law Commissioner in 1982, later working as a consultant with Norton Rose in London. He died in 2002, from a terrible illness (multiple sclerosis), with physical symptoms having badly affected his career. Lord Goff in his obituary for Gray's Inn wrote that Brian Davenport was one of the most distinguished lawyers of his generation; and that he would have been a great judge, probably destined for the House of Lords.¹⁹ He was certainly a very powerful advocate and, in the best sense, a lawyer's lawyer. Lord Goff also recalled meeting the Lord Chancellor, then Lord Hailsham, to resolve an apparent objection to Brian Davenport's appointment as a Law Commissioner, on the ground that, with his illness, he was no more than a "lame duck". As Lord Goff recalled, Lord Hailsham retorted: "I do not regard Davenport as a lame duck. I regard him as a ram caught in a thicket." His illness and premature death are remembered by his contemporaries as a great loss to the English legal system; but as arbitration specialists, we remember him best for his timely speech at King's College. It was again at the time a small seed; but it worked in making possible the 1996 Act. Brian Davenport was both a ram and a hedgehog.

Bertie Vigrass: Finally, we now move from London to Yorkshire, where he still lives in quiet retirement, well-known and much respected to many of us present here tonight. Bertie Vigrass was the Secretary, later the Secretary-General and Director General of the Institute of Arbitrators, from 1972 to 1986; and he then became the Director-General of the independent LCIA until his retirement many years later.²⁰ Before joining the Institute, Bertie Vigrass had been the executive director of the British Institute of Management; but he was no bureaucrat, still less a lawyer or, originally, an arbitration specialist at all.

He had been an engineering student at Loughborough University at the beginning of the Second World War. He volunteered in 1940 as a pilot in the Royal Navy's Fleet Air Arm. He flew solo after 6 hours' training in Tiger Moths, a remarkable achievement until you consider that, with the press of war, 10 hours was the maximum period allowed for all students to fly solo. As Bertie says, "it concentrated the mind." After further training in Canada, Greenwich

¹⁹ Lord Goff, *Gray's*, No 113, p.105.

²⁰ N. Watson, *A History of the Chartered Institute of Arbitrators* (2015), pp. 48ff.

and Scotland, in January 1942 as a pilot officer, he joined 8209 Squadron on the aircraft-carrier HMS “Illustrious”, flying single-engined Fairey Albacore torpedo-bomber bi-planes. He took part in the liberation of Madagascar, which was thought to be used by Japanese submarines attacking Allied shipping in the Indian Ocean. He was then the youngest carrier pilot in the Fleet Air Arm. It is said that carrier pilots have to be young before their sense of invincibility fades away; but Bertie’s stories make you feel that even invincibility might not suffice.

The LCIA, despite its origins in the 19th century, remained a fledgling institution for international arbitration until its new rules in 1980. Its growth since that date, particularly since its independence from the Institute, now the Chartered Institute of Arbitrators, has been as remarkable as it is surprising to those who knew it in the 1980s. That could not have happened without Sir Michael Kerr, the LCIA’s President. However, as he was the first to say, it *would* not have happened without Bertie Vigrass. His superlative administrative and imaginative fund-raising skills defy definition; they were somewhat unique and unorthodox; but they worked. There were of course awkward and impecunious times, best now forgotten. However, I do remember one discussion at an LCIA board meeting as to the difference under English law between fraudulent trading and wrongful trading, with no third option under consideration. I also remember Dr Wetter, the Swedish arbitration scholar, complaining again at the LCIA’s lack of reliable statistics, perennially blamed by Bertie on the IRA bombing which had destroyed the LCIA’s offices and archives in the Baltic Exchange, in the City of London. But, as Dr Wetter complained, how could that incident preclude reliable statistics for periods *after* the bombing? And when the Lord Chancellor asked Bertie Vigrass for the financial statistics to support the bill which became the Arbitration Act 1979, the eventual figure cited to him as relevant to the UK’s balance of payments was mistakenly enhanced by some 1,000%, with no fault attributable to Bertie – or at least not ostensibly so.²¹ Bertie Vigrass acted always in a good cause, to good effect. Without him, the LCIA and London Arbitration would be much diminished. With a “concentrated mind” from his flying days, he was another hedgehog in keeping the LCIA afloat in challenging circumstances.

Conclusion: In conclusion, why are any of these individuals important? We should recall the difference between hedgehogs and foxes. Curling up into an impregnable ball of sharp bristles in self-defence is certainly a big thing for a hedgehog; but that may not get it very far

²¹ See Lord Elwyn-Jones, on the Arbitration Bill’s second reading, *Hansard*, 12 December 1978, p. 436, col 1 and p.441, col 1.

compared to what an institutional fox can do in the field of arbitration. We see today large numbers of arbitral bodies, law firms and barristers' chambers competing with each other as rival businesses, seeking near-monopolies, promoting themselves with few restraints and meeting ambitious financial targets as absolute priorities. We cannot really complain at this, still less turn the clock back. It is a direct result of the enormous growth and success of arbitration over the last thirty years, from which we have all benefited as arbitration specialists. Yet, all these institutions are staffed by individuals. Many of the younger individuals, the new generation of arbitration specialists, are more knowledgeable and better trained than any in the past, whether acting as juniors to their principals, working in arbitration secretariats, as secretaries to tribunals or as teachers in law schools. They are the future of arbitration; and it is what they do as individuals for arbitration that will determine what that future will be. If they each act as an individual hedgehog and not as an indivisible part of an institutional fox, that future is good despite apparent difficulties - with one important caveat. This arbitral oak-tree has deep historical roots. In reforming and re-legitimising arbitration, there are ways to apply lessons from the past, without having to plant a new sapling every time or to re-invent an existing wheel. That is why, I suggest, these four and many other individuals from the past should remain important for us. Unlike most institutions, they each kept their minds as individuals on one big thing, without even knowing that it was to become so big.

[END]