International Arbitration at Queen Mary College, University of London, 73% of the respondents –in-house counsel at leading corporations around the world– preferred to use international arbitration, either alone or in conjunction with mediation. The study also found that 95% of corporations expected to continue using international arbitration. These respondents cited the advantages of international arbitration with which we are all familiar: the flexibility of procedure, the enforceability of the awards, the privacy that can be afforded to the process, and the ability of parties to select the arbitrators.

However, the survey also highlighted the dangers that are challenging the process. The respondents cited the expense and the length of time to resolve disputes as the two greatest disadvantages of international arbitration. It was quite striking that nearly two-thirds (65%) of the respondents believed international arbitration to be more expensive than trans-national litigation, and 23% more believed it to be as costly as trans-national litigation. Only 12% believed that international arbitration was less expensive. One-third of the respondents said that their corporation's most recent international arbitration case incurred costs greater than $1 million, and indeed 12% incurred costs greater than $5 million. Not surprisingly, the need for a mechanism to reduce arbitration costs was cited as one of the principal concerns of the corporations studied. Even the positive finding that 73% of PwC's respondents said that they preferred international arbitration had a danger sign: Less than half preferred international arbitration alone. The 73% figure was reached only when it included a preference to use international arbitration *along with* other alternative dispute resolution mechanisms in a multi-tiered process.

It is worth noting, perhaps, that in a 2003 study conducted by The American Arbitration Association, 58% of the corporate respondents said that arbitration decreased costs compared to litigation, and 67% said that arbitration decreased the time to decision compared to litigation. The differences between these figures may be due to the higher anticipated cost and length of American litigation compared to litigation in other parts of the world, since the PwC study had a broader geographical base of respondents.

In another survey, conducted by the accounting firm Grant Thornton, 80% of dispute resolution lawyers and 74% of the in-house lawyers said that they thought arbitration was expensive, and half of all participants thought that arbitration was slow.

We all know the causes of these concerns. The growth in caseloads has strained international arbitration institutions, parties, counsel, and the core of international arbitrators themselves. The complexity of cases today and the size of the claims have led to more extenuated proceedings, mountainous written submissions and longer hearings. Document discovery has become commonplace, even in Continental cases, and while the IBA Rules of Evidence have helped by providing standards to control the scope of discovery, other developments have caused new challenges. The growth in discovery of electronic documents is a test for all involved in arbitration (about which I will talk more later). The broad public policy issues raised in cases involving governments cause arbitrators to allow longer proceedings. Arbitrators who are too busy cannot schedule timely hearings and take a long time to draft the award. All of these factors today combine to create a crisis that we must find ways to resolve if international arbitration is going to continue to be the favored means of resolving international disputes.

The goals of international arbitration have not changed. In short, they can be neatly summarized as (1) a fair and neutral process, (2) conducted by intelligent and experienced arbitrators, (3) resulting in a timely and well-reasoned decision, and (4) benefiting from an effective enforcement mechanism.

The question that I wish to discuss in this speech is how we continue to achieve these goals in light of the challenges I have described. If we continue as is, the system may eventually collapse under its own weight.

We know that in today's world, the pace of change has accelerated. Modern business makes decisions, introduces new products, and buys and sells companies at a rapid pace. Performance statistics are reviewed daily, and quarterly results are intently scrutinized. While we all used to be content with reading a newspaper each morning, now we visit news websites several times a day, and news organizations feel that they must provide a steady stream of new news throughout the day.

In light of these developments, we cannot be content with taking two years to resolve a dispute. By then, the parties involved have long since moved past the business concerned with the dispute. Moreover, in many circumstances, the parties have had to break apart and follow new strategies, while if the dispute had been resolved more quickly perhaps those parties could have found a new way to work together. In the end, our arbitration decisions may properly allocate loss and gain between the two parties, but they do not contribute to the advancement of either side's broader interests or their ability to improve their own businesses.

In recent years, there have been some promising innovations that have, I believe, begun to ameliorate the length and cost of international arbitration proceedings – or at least have slowed their growth. The IBA Rules of Evidence have reduced the scope of document discovery and have made resolving discovery disputes easier by providing a commonly understood set of standards. Witness conferencing is used more often to focus expert testimony. More and more arbitrations are conducted using time limits, or chess clocks, to limit the amount of time each party has to present its case. In every case in which I have been involved where a chess clock is used, the time limit has forced the parties to present only material and relevant evidence, and it has avoided cumulative and unnecessary testimony. Never have I felt that important evidence was not able to be presented to the arbitral tribunal period. In my view, however, these reforms are insufficient.

Therefore, I propose a more radical solution. A return to basics Economists use an effective tool known as zero-based budgeting. In that process, one does not start with the prior year's budget and simply make revisions to that budget. Instead, one builds from scratch to identify only what expenses are necessary for the coming year. The arbitration community should adopt the same approach to international arbitration procedure. We can and should all build on experience from procedures developed in prior cases. However, we should not fall into the routine, as we too frequently do, of simply using the same procedures from case to case. At the beginning of each new case, parties and arbitrators should focus exactly on what is necessary -and only what is necessary- for that specific case. Is discovery necessary at all? How about witness statements? Memorials? Oral testimony?

Of course, I understand that there is a balance between efficiency and reaching the correct decision. Arbitration would be much cheaper and quicker if the arbitrators decided their cases by a coin flip or, as was done in ancient China, an archery contest. But we can still come to good decisions without as much process as we now have.

The original conception of arbitration was of two business people taking their dispute to a wise business person in whom they both trusted, describing their respective claims, and then asking the arbitrator to provide them with the best solution to their dispute. I will call that the Town Elder model. Modern disputes have grown too complex, of course, for that model in its purest form to have any current usefulness. However, my thesis is that in each case we should start with the Town Elder model and build into it only the additional

procedure that is necessary for that particular dispute. As I mentioned before: building from the ground up, rather than using a pre-conceived notion of how the case should proceed.

These needs were set out well in the General Principles or Preamble to the new Spanish Arbitration Act. The *Exposición de Motivos* recognizes that "arbitration, especially international commercial arbitration, is an institution that must evolve at the same pace as other legal institutions, or risks becoming outdated." The *Exposicion* goes on to describe the "need for the swiftness typical of arbitration to be adapted to practical demands." (EM pp.337, 348).

Let us look for a moment at each stage of the case and think about a different paradigm for proceeding in each.

One of the biggest causes of delay is simply in getting the case started. It takes on average about four months to constitute the arbitral tribunal. Why is that necessary? To be sure, selecting the right arbitrators is the key to having an effective and efficient arbitration, so the significance of this stage should not be short-changed. Nevertheless, the pool of experienced arbitrators is generally well known; it is growing; and there is now a vast amount of information available about prospective arbitrators. Parties should not blindly agree in their arbitration clause to allow each side as long as twenty or thirty days to name an arbitrator, when it can likely be done in a shorter period of time. Moreover, given the experience that institutions have with the arbitrators on their panels, they should be able to move with greater dispatch in naming arbitrators when they are required to do so or in proposing arbitrators to the parties.

It is enormously frustrating for the parties not even to be able to start the arbitration for such an extended period of time. Certainly, of course, if the case is filed in court, they can begin immediately. Recently, we had perhaps an extreme example of the delays that can occur at this phase. Last May, Occidental Petroleum filed an ICSID arbitration only two days after its properties in Ecuador were expropriated. In the request, Occidental asked for provisional measures, which by definition have some urgency. We had informed the ICSID Secretariat that these measures would be sought and that we would be filing the complaint promptly if expropriation occurred. Nevertheless, it took nine months to constitute the tribunal. By the time we finally had the hearing on our request for provisional measures, the nature of the relief we sought had to change considerably.

A number of institutions, including the AAA's ICDR, have implemented procedures to name arbitrators almost instantly when emergency measures are sought. So far, on the few occasions when these provisions have been tested, the institutions have succeeded in naming an appropriate arbitrator quickly. If appointments can be done so quickly in these circumstances, then surely we can shorten the calendar and start arbitrations in a much shorter time than now. A good goal would be roughly a month after they are filed.

Another difference between litigation and arbitration in which litigation may fare better is the availability of procedures for the early disposition of the case. A substantial minority of cases in court can be terminated through a mechanism such as a motion to dismiss or for summary judgment in the United States or in England. Through such a device, a court can determine that a claim has no merit or is meritorious without hearing all of the evidence on every issue. Naturally, this can result in substantial time and cost savings, and it is equally fair to the parties to decide a case in such a matter.