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Reform to Judicial Procedures for the Efficient Resolution of Commercial Disputes

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It is a very great honour to be invited to give this lecture and to take part in the subsequent discussion. I was last at a meeting in Lisbon in October 1992 when the Council of the Bars and Law Societies of Europe (CCBE) adopted a draft Directive on the right of EU lawyers to establish offices in other Member States using their home Bar qualification, and liberalised the rules under which an EU lawyer, who was established in another Member State, may be admitted as a full member of the host Bar or Law Society.

As you may know, a Directive which was substantially the same form as our draft was enacted in March 1998, and took effect on 14 March 2000 as Directive 98/5 EC. I should immediately pay tribute to Dr José Manuel Coelho Ribeiro of Lisbon who was President of the CCBE in 1992, and to Dr Sebastião Honorato who was leader of the Portuguese delegation to the CCBE at the time, for the very significant contribution which they made. It was a proud moment when Dr Coelho Ribeiro, as President, and I, as his successor, presented our draft Directive to the EC in November 1992 and were told that it was the first time that anyone had presented the Commission with a complete draft Directive for liberalising their own profession.

[1] Speech at the Universidade Autónoma de Lisboa by His Honour Judge John Toulmin CMG QC, 31 May 2001.

Before I became President of the CCBE, I had been a member of the CCBE for 10 years as a member of the United Kingdom delegation and then for 2 years as Vice President and in 1993 as President. I was also a member of the CCBE Standing Committee to the European Court in Luxembourg. My practice involved work with both civil lawyers on the continent of Europe and US lawyers. Before my appointment to the bench in the specialist Technology and Construction Court in November 1997, after 32 years as a practising barrister, my practice had included forms of alternative dispute resolution, both arbitration and mediation. One of the themes of my time as President of the CCBE was that in the United Kingdom, and in other European countries, the ability to litigate before the courts was the privilege of the rich, a privilege often denied on any reasonable basis even to the reasonably well-off.

Reform to judicial procedures for the efficient resolution of commercial disputes is about providing a just means of resolving disputes. I approach the subject, therefore, from a wider perspective than many practising judges. I have called this speech «the efficient resolution of commercial disputes» because the inefficiency of the legal system, with its unnecessary expense and delay, is the key to the greatest cause of its failure to provide civil justice.

Within the definition of commercial disputes I include not only those between entities which have the resources to pay out substantial sums in fees for litigation, but also those who do not. In Stroud's Judicial Dictionary, 4th edition 1971, commercial actions are defined as «any cause arising out of the ordinary transactions of merchants and tradres, and without prejudice to the generality of the foregoing words, any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage». My wider definition includes claims relating to the supply of new technology and claims which relate to the construction of buidings. It includes, for example, individuals who purchase goods which are of the wrong quantity or are not up to standard; small firms that need to install a computer system in their business; sub-

contractors who are suppliers of bathroom taps to the main contractors in a large building project for the construction of 500 houses. Although outside the subject of this talk, the same principles apply to the efficient disposal of all substantial civil disputes as to commercial disputes.

At the start I must enter two caveats. First I am speaking solely for myself. Secondly I must beware of assuming that the problems which exist in the English legal system also apply to the Portuguese legal system. I know less than I should about the Portuguese legal system. This concern that most lawyers and judges know very little of each other's legal system prompted me, with two colleagues of my former barristers' chambers, to edit two books, EC Legal Systems and EFTA Legal Systems, published in 1992 and 1993 which try to set out the basicsa of the legal systems of the different European states then in the EU and EFTA. Each chapter is written by a distinguished lawyer from that member state. The chapters were then edited in order that the information should follow a consistent pattern. The chapter on Portuguese law was written by Dr José Manuel Coelho Ribeiro. My understanding is that while there are significant differences between the civil procedure in England and Wales and Portugal, there are also significant similarities. These are evident particularly in relation to the procedure in court for the taking of witness evidence which proceeds by way of examination and cross-examination and in relation to the evidence of experts who are retained by the parties. No doubt in the discussion that will follow, I shall learn much more about this. One way of improving one's own system is to adopt procedures from other systems which work better than one's own.

I do understand that His Excellency the Public General Attorney of Portugal, Dr. Souto Moura, in a recent interview in the Portuguese Bar Journal, has talked about the crisis of justice in Portugal. In order to improve civil justice in smaller cases in England and Wales, the procedure in such cases has also been radically reformed. Although it is outside the scope of this paper, the changes might repay careful study. It is early days but the changes seem to

have been successful in reducing the cost and time taken for the resolution of small and less complicated civil disputes.

It is clear that the development of Alternative Dispute resolution is something of which all legal systems must take increasing account. Methods of dispute resolution outside court procedures which are alternative to the traditional action in the courts have been developed particularly during the last 20 years. The development started in the United States in response to complaints by major corporations about the cost and delays of the American legal system. As will appear, those criticisms have been echoed for England and Wales by the then Master of the Rolls, Lord Woolf, now the Lord Chief Justice of England and Wales, then the most senior civil Judge and now the most senior Judge in England and Wales.

Both his criticisms and his remedies repay careful study. The first applies a critique which can be applied both to an existing legal system and to proposed reforms including his own. The reforms as they have so far worked out in practice have in general been effective in meeting the criticisms.

Before going further I must consider a threshold question. Could not the resolution of commercial disputes be left to the new and innovative forms of alternative dispute resolution which have been developed in the United States and in Europe in response to the insdequacies of the court system? Many companies in the United States have written into their standard contracts that disputes are to be resolved by mediation, arbitration, early neutral evaluation or other forms of alternative dispute resolution. Perhaps it could be argued that generally the coutrs should encourage the use of these alternative dispute procedures rather than court procedures? The civil courts should be no more than a last resort. Then the state could save money on judges and courts and spend it on hospitals and schools or other desirable priorities. The argument would run along the lines that the more you reform the court procedures to make them efficient, the more you encourage parties to use the court system. It

would be much better to leave well alone and then everyone will use the new forms of dispute resolution which are independent of the courts.

The argument may be superficially attractive but it does have problems. The state has an interest in encouraging the resolution of disputes by alternative means, but it cannot and should not do so at the expense of improving its own procedures. I say cannot because under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms «in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law». This is a fundamental right. In requiring a hearing for the resolution of disputes within a reasonable time, the Convention allows room for argument as to what is reasonable. The goal must be to reduce the time between the start of proceedings and the hearing for the resolution of the dispute to that which is reasonably necessary to enable the parties to prepare for trial, and to accommodate the trial within the judicial system. Ideally this time should be measured in months, not in years. Justice delayed can easily become justice denied.

Even if the right to a public hearing had not been entrenched in an international convention, the failure by the state to provide a system for the fair and efficient disposal of civil disputes brings the whole legal system into disrepute and lessens the general respect in which it is held. After all, it is the part of the legal system in which any law abiding citizen may find himself or herself participating. In addition, the state needs to hold the ring between the strong and the weak and to ensure equality of arms between the parties so that civil disputes will be decided on the basis of justice and the rule of law. Also the state needs to provide, by way of interpretation of civil codes or through common law precedents, a guide to others as to how they should act in similar circumstances.

There is, in any event, no incompatibility between the state encouraging alternative methods of dispute resolution before trial and providing more efficient means of resolving disputes within the court procedure. Indeed the two must go together.

Let me put the criticisms in context. The English court system in the 1980s and 1990s has gone through two separate processes. During this time both the Commercial Court and the Technology and Construction Court have reformed their procedures for the resolution of commercial disputes so as to incorporate a number of the best aspects of international arbitration and conciliation procedures. These procedures have provided for more control by the Judge and more co-operation between the parties before trial and a more tightly controlled procedure at trial.

At the same time, there was an increasing concern throughout the civil justice system at the high cost and lack of efficiency in the traditional approach to litigation by the parties and their legal advisers. Under the traditional English system the claimants, not the judge, were the ones who had the responsibility to drive the litigation forward. The parties, not the judge, decided when the case was ready for trial. The parties largely determined the length of the trial – what witnesses they wished to call to give evidence and for how long those witnesses would give evidence. Litigation was highly adversarial. It was not unusual for the lawyers to write rude letters to each other which poisoned the atmosphere between them at an early stage of the litigation, or for lawyers on opposing sides to refuse to co-operate in the early stages of the litigation. The party which did not want the case to go trial, ususally the defendant, employed delaying tactics including making unnecessary applications during the procedure before trial for further information or disclosure of documents. Often lawyers felt that to agree with their opponents on procedural matters could easily be seen as a sign of weakness or as showing a lack of faith in their client's case.

After extensive consultation not only with the legal profession but also with users of the courts, including, for example, the alliance of independent retailers, the Confederation of British Industry and the national Consumer Council, the then head of the civil justice system, Lord Woolf, reported in July 1996.

His catalogue of inefficiencies in the system was comprehensive. He said that:

a) *the system was too unequal*; there was a lack of equality in procedure between the powerful and wealthy litigant and the under-resourced litigant;

b) *it was too expensive*; in many cases the costs exceeded the value of the claim;

c) *it was too uncertain*; the parties could not forecast with sufficient accuracy how much the litigation would cost and how long it would last. This induced a fear of the unknown;

d) *it was too slow*; claims took too long to be brought to trial;

e) *it was too complicated*; both the law and the procedure were incomprehensible to many litigants;

f) *it was too fragmented* in the way it was organised;

g) *it was too adversarial;* the cases were run by the parties; the rules of court were, all too often, ignored by the parties and not enforced by the court;

I add as an addendum to g) that the procedure was calculated to discourage parties from resolving their disputes before trial rather than being calculated to promote it.

Lord Woolf's criticisms form a useful series of yardsticks by which to judge all legal systems within the overall requirements of justice and fairness.

Lord Woolf's Report, which contained 300 recommendations, has been implemented. On 1 May 1999 new civil rpcedure rules (CPR) came into effect. These rules are designed to meet the criticisms which he made in his Report.

The fundamental change is reflected in the statement of «the overriding objective» in Part 1 of the CPR which transfers the ultimate control of litigation from the parties to the courts.

The «overriding objective» is for the court to deal with all cases justly. In the furtherance of this objective, the court is required to ensure that the parties are on an equl footing. The court is also required to deal with cases in ways which are proportionate, taking into account in particular (i) the amount of money involved, (ii) the importance of the case, (iii) the complexity of the issues and (iv) the financial position of each party. I have used these provisions to persuade parties to agree that, within the overall litigation, very small claims could be dealt with without any oral evidence or that some claims could be treated as representative of other similar claims.

Next, the court is required to ensure that the case is dealt with expeditiously and fairly. Finally the court is required to allot to the case an appropriate share of the court's resources. This last provision means that, apart from any other consideration, a court will need to have regard to the needs of other cases and other litigants in deciding when hearings should take place and how long they should last.

CPR Part 1.2 requires the court to give effect to the overriding objective. Most importantly, CPR 1.3 requires the parties to assist the court in furthering the overriding objective. This means that instead of being adversaries throughout the procedure, the parties are required to co-operate together in isolating those issues which are genuinely in dispute and in ensuring that such issues are tried

in the most efficient and cost-effective way. In many cases this requirement of the parties to co-operate in matters of procedure provides the climate within which they are able to resolve the areas of apparently fundamental dispute without the need for a formal trial. It is providing a dramatic and welcome change in how litigation is being pursued by litigants and their legal advisers. In the Technology and Construction Court I have seen parties go from positions of great antagonism at the start of proceedings, through reluctant co-operation required by me as the judge, to a position where the parties are working together in a constructive way to resolve their disputes and, where this is not possible to agree sensible procedures for the trial hearing. If a party fails to co-operatereasonably in the procedure, it may find itself being ordered to pay the other party for the additional costs which it has incurred as a result of the lack of co-operation. I have only had to do this twice in the last two years.

CPR Part 1.4 reinforces the duty of the court to manage cases actively including co-operation between the parties; identifying the issues at an early stage and, in a departure from previous practice, under Part 1.4 (2)(e) encouraging the parties to use alternative dispute resolution (particularly mediation) if the court considers that appropriate. The court is also required to facilitate the use of such procedure.

In order to demonstrate how the new procedures work in practice, I should set out the framework of the procedure in the Commercial Court and in the Technology and Construction Court (TCC). I shall restrict the description to two party litigation although frequently there are three or more parties to the disputes which are tried in these courts. The Commercial Court deals with traditional commercial cases; the TCC deals with litigation of particular complexity including construction, computer and environmental cases. The two courts effectively exercise parallel jurisdictions. Over 50% of litigants in the Commercial Court are not resident in the United Kingdom. The percentage in the TCC is smaller, but significant. In the TCC over 90% of cases are settled by the parties, most substantially before trial.

An innovation of the new procedure is to spell out in detail by way of a number of pre-action protocols the steps which a party must take in advance of bringing an action before the court. The protocols replace the general obligation of a party to set out, in a letter before action, its basic case and to give the proposed defendant an opportunity to respond.

The stated objectives of the new procedure are:

1. to encourage the exchange of early and full information about the claim;
2. to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and
3. to support the efficient management of proceedings where litigation cannot be avoided.

   The court can impose the sanction that where the protocol has not been adhered to, the court may order the party in default to pay the whole or part of the cost of the proceedings and may deprive that party of interest on the sums claimed which otherwise have been awarded [Practice Direction Protocols].

The Construction and Engineering pre-action Protocol requires the prospective claimant to set out in a very detailed letter what are essentially those matters which would be set out in due course in the Particulars of Claim. The defendant is required to respond by setting out in detail those matters which would be contained in the Defence. Thereafter there is to be a pre-action meeting at which the parties should attempt to resolve their dispute. If they are unable to do so, the parties should consider whether there is any form of alternative dispute resolution which would be more suitable than litigation. If they are unable to agree on any form of dispute resolution other than through the courts, they should try to agree whether or not a single joint expert can be appointed to resolve technical issues. They should also agree the extent of disclosure of documents and how the litigation is to be conducted.

It is too early to tell whether this and other Protocols will serve the purpose of promoting early and just settlements of disputes. If they are, in practice, applied sensibly by the parties and by judges, then I am confident that they will do so. They will be judged in due course by the test whether they promote just and voluntary settlements. The Protocols will have to pass some of Lord Woolf's tests in relation to the previous system. Does the detailed procedure, which the pre-action protocol lays down, give an unfair advantage to prospective defendants? Does it add disproportionately to the expense, particularly of the claimant? Does the procedure unreasonably delay the start of the litigation? Is it too complicated? My provisional answer in each case is «No», but we shall have to see how it works out in practice.

The next stage in the litigation is for the claimant to file the Particulars of Claim with the court. The claimant must set out a concise statement of the facts on which that party relies and the legal basis of the claims which are derived from those facts [CPR Part 16]. In so far as money is claimed, the claims must be quantified in money terms. The currency does not need to be in £'s sterling: it can be in foreign currency.

This is followed by a Defence which must set out the defendant's response to the claims – which facts in the Particulars of Claim are admitted and which are denied. Where the defendant has a different version of the facts yo yhat set out by the claimant it must be set out in the defence. If the defendant has any counter-claims against the claimant, these must be set out in the same manner as the claimant has set out its claims in the particulars of claims.

The next stage is the first Case Management Conference. In the TCC the same judge controls all the procedure in a particular case until trial and if possible hears the case at trial. In complex litigation this continuity is of crucial importance. It enabled recently 105 claims of the Spanish fishermen in Factortame to be resolved without the need for a full trial. Preliminary issues

which were relevant were considered by the Court and are reported in [2001] 1WLR 942.

In smaller claims the Defence will be filed before the first case management conference. In larger commercial cases, where it is appropriate to discuss with the parties at an early stage how the litigation is to be handled, the meeting may take place before the Defence is filed. This follows the normal practice in complex arbitrations where the first meeting with the arbitrators takes place at a very early stage in the procedure.

Before the meeting, the parties are required to fill in a standard form which asks whether the parties have considered mediation and if so whether they require a month's stay in the procedure. This has the effect of freezing the procedure for one month to see whether or not the parties can resolve their dispute without spending unnecessary money on the court procedure. They are also required to set out whether there is a pre-action protocol which applies, and whether it has been complied with ; whether experts are required ; how long it is estimated that the case will take in court and an estimate of how much it is expected to cost each party.

At the meeting, the judge needs to exercise both the traditional skills of the judge in making orders to ensure that the case is fully prepared for trial, and new skills in assessing whether, and if so how, the case can be prepared for settlement either through court procedures or alternative dispute resolution. Despite the number of issues which need to be considered, the time for the case management hearing of less complex cases is 30 minutes and even the hearings in the most complicated cases rarely take more than $2^{1/2}$ hours.

The judge must set a date for trial which will, in normal circumstances be a firm date to which the procedure must be tied and to which the parties must work. The timings vary, but to give an idea of the time scale in the TCC at the moment, a very complex case is likely to be given a trial date in May 2002 while a less complex case may be given a trial date as early as January 2001.

Giving a fixed trial date at this early stage is an important part of the procedure, both in relation to trial and potential settlement. It is important in relation to potential settlement that the parties know the date by which the dispute will be resolved in any event. Clearly the parties need to be given a date which enables them, along with their other commitments (and those of their lawyers), to have a reasonable time within which to complete the procedure.

Under Part 29 of the Rules, the judge, often with the agreement of the parties, will set dates for:

1. *Further pleadings*: after the defence (and counterclaim) there will often be a Reply (and Defence to Counterclaim) by the claimant, and if there is a Counterclaim, a Reply to the Defence to Counterclaim by the defendant. There may also be requests for further information which need to be answered.

2. *Precise quantification of all claims*: this is essential at an early stage if the parties are to have a basis for meaningful settlement discussions.

3. *Scott Schedule*: in a case where there is a multiplicity of claims e.g. items of detective work on a house or a ship, or a catalogue of problems caused by malfunctions of a computer system, these are set out in a schedule of individual items with columns for the parties to set out their rival contentions in respect of each individual item.

4. *Disclosure of documents*: under the English system a party is required to disclose all relevant documents on which it relies or which adversely affect its own or another party's case or support another party's case (although disclosure must be proportionate) and not simply those on which a party relies to support its own case.

5. *Witness statements*: this is the factual evidence of each witness on whom that party relies in order to prove its case.

6. *Experts*: the parties will consider with the judge what expert evidence is neede and how it is to be disclosed. Unless it is appropriate to appoint a single joint expert, each party will want to nominate its own expert. The experts are required by a stipulated date to prepare a statement setting out the matters on which they agree and those on which they disagree and the reasons for their disagreement. They are also required to produce their written reports by a stated date. I frequently require the experts to meet informally at a very early stage in the procedure. These meetings will be «without prejudice». The experts will be able to have an informal discussion and then to form a view of the strengths and weaknesses of their respective technical cases and to report back to their own side. This will often remove contentions which are based on misunderstandings and lead to the narrowing of issues or settlement at a very early stage. This is an important form of dispute resolution in the course of the procedure. The experts will normally be required to continue to meet as necessary. They will be required at a later stage in the procedure first to produce their joint statement of matters on which they agree and disagree (with their reasons for disagreement) and thereafter to produce their reports, often limited to those matters on which they have not reached agreement. The experts need the permission of the Judge if they are to give oral evidence at trial.

The innovation of the appointment of a single joint expert has proved particularly successful in resolving a technical issue like the valuation of a property. The appointment does not preclude a party from cross-examining the expert at trial if it does not accept his findings, but in practice a single joint expert's opinion is often accepted. If the single joint expert is asked to resolve what is, in effect, the sole issue between the parties, this is also a form of early dispute resolution grafted on to the procedures of the court. In some circumstances it may be an effective alternative to mediation.

The formal procedure and preparation for trial will provide not only for a trial date, but also the date before trial at which the form and procedure of the trial will be decided (pre-trial review). This will normally take place 6-8 weeks before trial.

Within this framework of early case management, the judge must take provision for the parties to have opportunities to resolve their disputes without the need for a full trial. First, the court must ask the parties whether they have in fact considered mediation. In appropriate cases the judge will urge the parties to reconsider any reluctance to agree to mediation. If the parties agree to mediation at a later stage when they have fuller understanding of each other's case, this can be ordered by the court. The court may make orders accommodating mediation at any stage in the procedure and not just at the first Case Management Conference.

The judge may, at a later stage, vary existing orders in order that time may be made in the timetable for the mediation to take place. The court may also make orders supporting the referral to mediation by ordering exchange of information and/or exchange of documents to ensure that the mediation has the best chance of success. Often when the parties are co-operating well enough to agree to mediation, they are able to agree to any exchange of necessary information/documents without the need for an order of the court.

I have already mentioned the appointment at the first Case Management Conference of a single joint expert who, may in effect, be resolver of disputes before trial and the early expert's meeting which may also promote an early resolution of the dispute. There other methods of assisting the parties to resolve their disputes without the need for a full trial on all the issues. The first two are within the traditional court structure. If the claimant or defendant has no real prospect of succeeding in its contentions on a particular issue or on the whole of the claim, those contentions, or the whole claim, may be struck out after a short hearing based on written evidence in which both parties have an

opportunity to participate [CPR Part 24]. Secondly, the parties may agree, or the court may order, certain issues to be tried as preliminary issues. These are issues which will either determine the whole of the dispute, or are issues of sufficient importance to the parties so that, once they are decided, they may enable the parties to resolve their disputes. It may be, for example, that the construction of a clause limiting liability under a contract, or a decision on which of disputed contractual terms apply, will enable the parties to resolve the litigation at a small fraction of the cost of a full trial.

An innovation, developed from alternative dispute resolution procedures in the United States, is that the court itself should be prepared to make an early neutral evaluation of the strengths and weaknesses of the parties' cases based on limited information focused on the main issues. It may make this evaluation either (with agreement of the parties) on the basis that the Judge's conclusions are binding, or on the basis that, if it does not lead to a settlement, the judge's decision will be confidential and will not be used in further proceedings and further that the judge will take no further part in the case unless both parties specifically agree. This procedure is used extensively in Israel and New Zealand. It is being developed more slowly in England and Wales. Two other possible procedures are orders for mini trials and the appointment of a neutral fact finding expert. These can be incorporated into the procedure but are more likely to take place independently.

Finally, and as importantly as any specific order, the judge must, at the case management conference, create an atmosphere of co-operation and realism between the parties. When confronted with the complicated nature of the procedure, the estimated cost to trial and the amount of time which lay witnesses will need to spend on the case, the parties sometimes realise for the first time that it is simply in their interest to resolve their disputes if they can. Even if they cannot go that far at the start of the procedure, if they can be required to agree on sensible procedures for trial preparation, they may be able to go on later to reach agreements on the substantive issues which had previously devided

them. This spirit of co-operation needs to be fostered by the judge at all the preparatory hearings. In a major case there are few more rewarding experiences than working actively with parties which are co-operating together to find the most efficient way from arguing before the court matters of genuine dispute, either in the course of the pre-trial procedure or at the trial itself.

It is of great importance that unless the circumstances change parties should comply strictly with the directions made at the Case Management Conference. Nevertheless there needs to be a mechanism under which short extensions of time can be given without jeopardising the trial date. If it is left to the parties alone to agree extensions of time, the whole timetable may be put at risk. I have evolved a simple means of enabling parties to extend deadlines or otherwise after the procedure. At he Case Management Conference, if the parties have agreed a tight schedule for trial preparation, I order that there will be no extensions of the timetable without permission of the court and that such permission is to be requested by fax before the due date for the step in the procedure. A party, after notifying the other parties, is able to communicate its request to the court and will receive a speedy response also by fax (which in normal circumstances will be agreement to the request). The court can ensure by this means that the parties will be ready for trial on the date which has been set at the first Case Management Conference. Once they have understood how informally the procedure works in practice, the parties have welcomed it.

At the pre-trial review, the judge's primary task is to put in place the procedures for the final preparation for trial and for the trial itself. At this stage, too, the judge must look for opportunities to help the parties to reach the greatest possible level of agreement and to confine the trial to the real disputes between the parties. The judge will set the procedure for the preparation of the bundles of documents for use at the trial and the date for the exchange of the written opening statements. It is, in my experience, important to have a core bundle of documents which will form the basis of the documentary cases of both sides. The judge will also consider the parties' proposals for the conduct

of the trial – the length of oral opening statements, the length of time to be allowed for cross-examination of witnesses and experts, and the time to be allowed for final written and oral submissions. At this stage I also require the parties to have a precise and up to date list of outstanding issues which need to be decided at trial and I discuss it with them. Also I will review the procedure which is being proposed against what the parties can realistically recover from the litigation and the overall costs which will have to be paid. Normally the losing party will be ordered to pay its opponent's costs as well as its own costs but this is not an invariable rule. A party which has caused costs to be unecessarily incurred can be ordered to pay the costs of that part of the litigation which has caused by its default. At this stage the Judge may point out to the parties that the litigation has become uneconomic in the sense that the value of the outstanding issues in dispute are outweighed by the costs of litigating them. The court will do this ehilst emphasising that the parties have a right to have their disputes decided by the judge if they so wish.

The trial itself will be tightly controlled within appropriate time limits. The written statements of witnesses and the reports of experts will normally be treated as their evidence subject to cross-examination by other parties. This cross-examination will be supplemented where appropriate by questioning from the judge. The experts will be required to meet after hearing the evidence of witnesses and before giving their expert evidence to see whether, even at that stage, they can reach further agreements on outstanding technical matters. The hearing will end in a complex case with written final submissions supplemented by oral submissions. In complex cases the judge will need time (often a number of weeks) in which to revirew the evidence and complete the written judgement.

The new system in England and Wales for the efficient resolution of commercial disputes depends on judges having not only the traditional judge's trial skills but also skills in dispute resolution. Previously the judge needed the legal knowledge, skill and judgement to preside over complex trials and to deal with preliminary legal issues which were put before him. He or she needed

to be able to handle the trial fairly, to understand and evaluate complex issues of fact and to relate the facts to the law. Now the judge needs to manage the whole process of litigation. He or she must judge when to take the initiative in the process and when to leave it to the parties to reach agreement. The judge needs to decide in the preliminary procedure when to press his point of view and when to defer to the wishes of the parties. It may be that discussions are continuing outside the procedure which may resolve the litigation. Sometimes the court can be told that such discussions are taking place (although not, of course, the nature of without prejudice discussions). Often the parties prefer not to disclose the fact to the court, so the judge must bear in mind that he may not necessarily have the full picture.

In managing the procedure the judge needs to understand all the options which are available, including mediation, the use of a single joint expert, the possibility of isolating preliminary issues, of early neutral evaluation and so on. Many judges who sit in the specialist Commercial Court and the TCC have had experience of these relatively new procedures in the course of their practice as barristers before becoming full-time judges. It is important that judges who try civil cases and particularly those, like TCC judges who are involved in case management, need to understand the processes of dispute resolution even if they themselves are not involved in it directly. In «ADR Principles and Practice» by Brown and Marriott (2nd edn 1999), the authors emphasise the importance of mediators bringing the parties together, persuading them to collaborate as far as they can in resolving their disputes, showing flexibility, diffusing conflict in areas where it is not necessary and taking into account, as far as they can, the background to the dispute which may or may not be expressed. These are the sort of skills in addition to the traditional skills, which judges must now have in order to manage commercial disputes through the courts. At present under the system of training for civil judges, forms of alternative dispute resolution are discussed. It is for consideration whether or not it would be important for judges, as part of their training, to see mediations and other forms of ADR at first hand.

How might our experience be of value to the Portuguese system?

1. It is useful to have stated objectives against which the procedures in any legal system can be judged. The «overriding objective» in the CPR is a useful yardstick. The requirement that litigants and their legal advisers must co-operate with each other in the conduct of the litigation has been of vital importance. Parties and their legal advisers are beginning to understand that co-operation, wherever possible, far from showing weakness is essential if costs are to be kept to a minimum and access to justice is to be a reality.

2. Lord Woolf's detailed critique of the previous system of civil procedure can be applied to any legal system. Put positively:

   (a) Does the system promote equality in the procedure between the litigants ?

   (b) Is the procedure sufficiently adaptable so that the cost of the litigation is no more than is reasonably necessary?

   (c) Is sufficient information provided by the Court so that the parties appearing before the court for the first time can understand the procedure, can forecast with sufficient accuracy how much the litigation will cost and how long it will last?

   (d) Are claims brought to trial within a reasonable period of time? the ideal would be that they are brought to trial as soon as practicable after the parties have had a proper opportunity to prepare their cases.

   (e) Is the procedure as simple as it can reasonably be made?

   (f) Is the procedure too adversarial? Does it provide sufficient opportunity for the parties to resolve voluntarily all or part of

their disputes at an early stage either within the court procedure or outside it? I add

(g) Does it use, to the maximum extent possible, modern advances in technology in order to reduce the cost to the parties? These techniques include mechanical recording of evidence, exchange of evidence on disk and the use of video links for taking evidence.

3. In order for judges to be able to control the procedures in the best interests of the parties, they need to understand fully the techniques and processes of alternative dispute resolution and to keep up with current developments.

4. It is a substantial advantage to have specialist judges to deal with complex disputes both at Case Management Stage and at trial. This advantage of having specialist judges is enhanced by the fact that there is a group of lawyers, both barristers and solicitors, who regularly appear in the Commercial Court and the TCC.

5. Although I have not discussed this in detail, ideally court complexes should provide modern facilities for the use of the parties outside court including conference rooms, copiers, faxes and e-mail. No doubt fees could be charged for these services.

I should end by repeating the caveat which I made at the beginning that an investigation of one legal system cannot provide answers as to how another legal system should be conducted. All it can do is to shed light on problems and solutions which that other legal system may find worth examining in considering what changes should be made.

Finally I should like to thank you once again for the great honour of inviting me to speak at this most distinguished gathering.