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International Commercial Dispute Resolution: The Challenge of the Twenty-first Century

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WHEN I reveal the theme for this lecture you may well think that I am a bit like the proverbial turkey extolling the virtues of Christmas. Looking into my crystal ball, I predict that over the next few years we shall experience a proportionate decline in the engagement of third parties for assistance in resolving mature international trade disputes. If I am right about this the current level of expansion of work for arbitrators and mediators will decline, and there will be an increasing demand for dispute *management* specialists rather than dispute *resolution* experts. I propose to try to explain my views as to how the dispute resolution community might react to this challenge.

From my perspective, as the twenty-first century gets under way, we are already seeing a movement away from the three classical forms of third party intervention in dispute resolution - the judge in his court; the arbitrator in his hotel conference room; and the mediator shuttling between the parties, trying to get the parties to reach some form of acceptable compromise settlement.

In Europe and the USA we now hear the phrase 'dispute management' used almost as often as the traditional term 'dispute resolution'. 'Dispute management' is a relatively new term and I am not sure that we could all agree on what it means. For me it means two things. First, and most important, it means *dispute avoidance*; secondly, it means that where the parties cannot avoid falling into dispute, they enter into a structured *direct negotiation* process designed to limit the occasions on which they will need to involve a third party to the barest possible minimum.

My main purpose today, after explaining *why* I think this is going to happen, is to take a look at the likely consequences for all of us who are from time to time involved as practitioners or teachers in the field of dispute resolution in international trade. If my prediction turns out to be right, what will it mean for lawyers, law firms and law schools? And, of course, how can we position ourselves

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to make a useful contribution to society at the same time as continuing to earn a modest living?

I. HISTORICAL FACTORS

To develop my theme I must first take a look at *where* we are today and *how* we got here. People from all cultures and in all civilizations have needed some means of settling disputes. It is not hard to think of examples. We are all familiar with the biblical story of Solomon's proposal to cut the baby in half. Many ancient societies referred disputes to village councils or tribal elders - Maori Tribes in New Zealand, for instance, used a combination of both.¹ Similar processes can be seen in China,² Mongolia,³ Japan,⁴ and India;⁵ traders from the Roman colonies could refer their disputes to the *Praetor Peregrinus*.⁶ Subjects in medieval England could seek the sovereign's ruling at his court;⁷ and so on throughout recorded history.

All of these procedures shared a common model: that is, resolution of disputes between citizens by third party intervention *after* the dispute had become a significant bone of contention between the parties.

I suggest that these two main features of the dispute resolution mechanisms used by our ancestors - the *process* (third party intervention) and the *timing* (that is, after the dispute has matured) - are still very much a part of today's landscape, and that the arrival of a new century presents us with an opportunity to take a fresh look at the validity of these features in the light of present conditions.

¹ Disputes could be resolved on a *Marae* by a process under *te tikanga o te marae*. Decisions were usually reached by consensus. Alternatively, disputes could be referred to a *kaumatua* as a type of third party mediator: (see Hudson, 'Tikanga Maori and the Mediation Process', unpublished LLM Research Paper (VUW, 1996)).

² Rulers after King Wu administered civil justice in China through committees during the Western Chou Dynasty (c. 1100): see (ed. Choen, Edwards and Chen) *Essays on China's Legal Tradition*, (Princeton, Princeton University Press, 1980).

³ Village committees usually resolved Mongolian disputes after the turn of the first century AD. Following the rule of Genghis Khan, these disputes could be resolved according to national law, the *Great Yassa*: see Butler, *The Mongolian Legal System* (The Hague, Martinus Nijhoff Publishers 1982).

⁴ By the mid-first century AD Japan had a fully fledged legal system under which officials applied the *Taihoitsuro*: see Seiichi Inao, *Biographical Dictionary of Japanese History* (Ottawa, Kondansha International Ltd 1978).

⁵ India has a rich legal history. In the *Smrti* period (c. 300 BC) various courts of justice, from regal councils to informal corporations of traders, were set up under the authority of the king: see Indra Deva Shrirama, *Growth of Legal System in Indian Society* (New Delhi, Allied Publishing 1980), in particular at p. 14.

⁶ Not, as is sometimes assumed, a 'travelling magistrate' but a commercial judge based in Rome who decided cases between travelling traders: see (ed. Boardman, Griffin and Murray) *Oxford History of the Classical World* (Oxford University Press, 1993).

⁷ The Norman Conquest brought with it the feudal system of tenure. One of the chief consequences of this was the King's right and duty, as supreme Lord, to hold a court for his tenants: see Holdsworth, *History of English Law* Vol. 1 (London, Methuen & Co Ltd 1922 3rd ed.), in particular pp. 24-5.

II. MODERN THIRD PARTY ASSISTED DISPUTE RESOLUTION

Most of today's commercial lawyers are trained to participate in three quite different types of dispute resolution techniques:⁸

- litigation in national courts;⁹
- arbitration, designed to achieve a *final and enforceable outcome*;
- ADR mechanisms such as mediation, conciliation,¹⁰ 'mini-trial', 'rent-a-judge', 'med-arb' and other 'touchy-feely' ways of engaging the intervention of a third party to achieve *agreed settlements* between the disputing parties.

Before I proceed with my main theme I need to say a few brief words about each of these tools; their respective places in the overall spectrum of dispute resolution mechanisms; and the uses to which they are best suited in the context of international trade.

(a) National Courts

Most of us would now accept that the days are gone when national courts are chosen *expressly* by the parties as their forum for resolving disputes arising out of international trade. Their role in resolving international trade disputes usually now arises where the parties have failed to make an express choice of forum in their contract.¹¹ National courts are therefore a *default* forum in the context I am addressing today.

Nonetheless, national courts generally do a good job when they are brought into play, particularly where the jurisdiction concerned has a specialized commercial court consisting of judges who have been promoted on merit from the local commercial bar. This is so in many common law countries, but not so often the case in civil law countries. There are some regions, and some countries, where the local courts cannot be relied upon to handle commercial disputes to the high standard that is required by the international trading community. A prime example is found in the Central and Eastern European nations of the former Soviet bloc which were parties to the now almost defunct Moscow Convention.

The judiciaries in those countries were not trained in commercial law. Their role was to administer criminal justice and to adjudicate on matrimonial disputes and other rights and obligations of citizens. Trade, both external and internal, was conducted by governmental organizations. Commercial disputes were directed to

⁸ Several highly respected institutions offer courses on negotiation, notably Harvard and Stanford universities.

⁹ There is as yet no international court for commercial disputes, as the ICJ deals only with disputes between states.

¹⁰ Some commentators consider that the difference between mediation and conciliation is that in conciliation the third party makes a recommendation for a possible settlement, whereas in mediation he does not. However, this is not universally accepted: see Mackie, Miles and Marsh, *Commercial Dispute Resolution* (London, Butterworths 1995). A plausible explanation is that mediation is an Anglo-Saxon word, whereas conciliation derives from civil law origins. The term mediation is used generically to cover both for present purposes.

¹¹ National courts do, however, have important supportive and supervisory roles in relation to arbitrations held within their territories.

the so-called 'arbitration courts' of the national chambers of commerce; this was not consensual arbitration as we know it in the capitalist world.

(b) Arbitration

The general preference for arbitration in *international* transactions has nothing to do with the advantages of speed and cost-saving, which are often emphasised at arbitration conferences. In practice, these advantages apply only in the context of domestic arbitration before a sole arbitrator and even then only in specialised fields such as maritime, commodities, rent reviews, documents-only consumer arbitrations and a few others.

The main reason why we see arbitration clauses in international commercial contracts is that corporations and governmental entities engaged in international trade are simply not willing to litigate in the other party's 'home' court. This is not just because of any perceived chauvinistic bias on the part of national judges. There are other much more practical reasons for not playing an 'away game' unless it is absolutely essential. For example, all the documents and witness testimony must be translated into the language used by the court in question. It may also be necessary to engage lawyers with local rights of audience, which means that at least one of the disputing parties will not be able to have its own trusted lawyers in the driver's seat.

The other positive feature of arbitration in the international context lies in the treaty obligation for enforcing arbitration awards across national boundaries. By contrast, it may be difficult to enforce a favourable judgment of a national court in another country, as there are no multilateral treaties covering the reciprocal enforcement of court judgments. As of June 2000, 121 countries had ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;¹² and about 30 jurisdictions had enacted legislation based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which provides a harmonized standard for national legislation to regulate private arbitration processes.

Arbitration will thus always be needed where for one reason or another a final and enforceable outcome is necessary. In my own career I have on a number of occasions seen situations where the client needed an *award* - a final and binding solution imposed by a third party - rather than an agreed compromise settlement or even a 'consent award'. Often not just money is at stake. Sometimes one party may be bankrupted if it does not achieve a complete victory. Matters of principle, or the positioning of a party in a long-term relationship, may be in issue. Sometimes a minister, or a senior governmental official, particularly in the less-developed countries, cannot afford to take the political responsibility of being a party to a compromise settlement. To illustrate the point I will describe a fairly typical example from my experiences in the mid-1960s in the Arab states in the Gulf region. On several occasions, on advising that I believed I could negotiate a

¹² See UNCITRAL's website: <http://www.un.org.at/uncitral/english/status/index/htm>

more favourable outcome than the likely result if the case was fought through to an arbitration award, the minister or official concerned would reply to the effect:

But, Martin, the public view is that this project [it may have been a power station, a hospital, a road or whatever] was disastrously bungled by my Ministry. If I approve a settlement the newspapers and hostile deputies in the National Assembly will attack me. I will even be accused of being bribed to pay the contractor's claims. It is not my money. If the arbitrators make a big award against us it doesn't matter. I will simply send it down to the Ministry of Finance with a request for a cheque. In public I will say that the arbitrators were incompetent ...

(c) Mediation

However, international arbitration is usually a lengthy and costly experience for the parties, and the outcome will generally be 'rights-based' rather than 'interest-based'. I shall mention these two concepts again later. During the 1990s, mediation and its associated ADR offshoots developed in the USA, primarily for use in disputes without any international element, have made a significant impact in the international arena and have proved that they can work just as well there, at least in certain types of cases that are susceptible to compromise solutions.

The reasons for using mediation as one of the preferred dispute resolution processes are, first, the commercial clientele's disenchantment with the cost and time involved in litigating in national courts and in arbitration; and secondly, a growing feeling amongst international traders that 'interest-based' solutions may produce better outcomes in the medium or long term than 'rights-based' solutions.

The result is that the major international arbitration institutions have been developing their ADR facilities and capabilities with understandable urgency, because these things are market-driven. The AAA, the ICC, ICSID, the LCIA and WIPO all promote their own sets of conciliation or mediation rules; and there are now also many domestic organizations around the world offering mediation services, particularly in the USA and other parts of the common law world. Most of these organizations offer training for budding mediators, and some of them offer diplomas or other opportunities for mediators to put letters after their names.

Mediators bring many useful skills to the bargaining table. In particular, they bring *neutrality* and a sense of *structured informality* to the proceedings. They may also receive information that neither side is willing to impart to the other, and then use this information as an element in their strategy to help nudge the parties towards agreement.

As part of the master's degree programme run at Nottingham Law School for litigation practitioners there has traditionally been a 'mediation weekend'. We have a rather complicated case study that contains a number of different settlement possibilities, and some dead-ends that cannot work out for one reason or another. There is no satisfactory 'rights-based' solution - one of the parties will be bankrupted if that route is taken.

We divide the class into about eight hypothetical 'law firms', depending on the size of the class. Four of the law firms represent the claimant, and four represent the respondent. Thus we have four groups working separately and simultaneously on the same case study. Faculty members and invited guests play the roles of the

four mediators, eight clients and so forth, and the scenario is played out over one and a half days.

We have experimented over the last four or five years with various different types of mediators - judges, QCs, senior litigation solicitors, professionally trained mediators (many of them not lawyers), professors and some other guests from overseas, particularly the USA.

On average, around three of the four groups achieve a settlement before the time runs out. Where the process fails, most groups think that the process was positively harmful, in that hostile positions hardened. In some of the successful groups, one of the parties often thought it had been 'bullied' into an unfavourable settlement by an over-aggressive mediator.

Some of the clients have felt that their lawyers were too focused on scoring points over the other side and lost sight of the client's interests. Very often the clients and their lawyers started to distrust the mediator, in the sense that they suspected that he was not conveying their position accurately to the other party, and that the other party did not appear to move at all. This atmosphere of suspicion tends to be fuelled by the seemingly long periods the parties are left waiting while the mediator is with the other side. On a few occasions the parties terminated their mediation at an early stage and proceeded by direct negotiation. On one occasion the clients fired their lawyers and sat down together with the mediator - and reached a settlement almost immediately.

All the participants - students, mediators, clients and tutors - invariably leave on the Sunday (a) exhausted and (b) with a lot of food for thought. It is not easy to formulate any definitive results, but here are some tentative conclusions:

- judges do not necessarily make good mediators: their approach tends to be 'rights-based', and their failure rate (in the sense of not achieving a settlement) is rather high;
- professionally trained mediators, with some notable exceptions, do no better than the average;
- litigation lawyers are often out of their depth when representing clients in mediations;
- mediation is far from the universal cure for all ills that its evangelical exponents would have us believe.

Nonetheless, I happily accept that, like arbitration, mediation has a genuine and valuable place in the spectrum of available dispute resolution mechanisms. There are occasions where a properly trained mediator can produce a result that adds value for the parties at a fraction of the cost of an adversarial process designed to achieve a 'rights-based' solution. I will refer further to 'rights-based' and 'interest-based' solutions later.

III. THE INVALIDITY OF ENTRENCHED ASSUMPTIONS

It seems clear to me that these three dispute resolution tools, litigation, arbitration and mediation, are all descendants of the ancient practice of resolving *mature* disputes through the *intervention of a third party* who has substantial formal or informal authority over the parties. Of course the role of the third party varies in each of the three different mechanisms, and the nature and progression of the dispute resolution processes are different. However, the historic fundamental has remained the same; and in my view we seem to have been brainwashed by our background into assuming that the way our forefathers have always done it is the appropriate way in today's circumstances.

The result is that for hundreds if not thousands of years law-makers, judges and litigation-orientated lawyers have steadfastly focused their attention - and earned their livings - by developing and refining increasingly sophisticated rules of substance and procedure. In the second half of the last century the problem was compounded by the proliferation of electronic devices that enable huge quantities of words to be set on paper and reproduced over and over again. These factors have had the cumulative effect of making speedy, inexpensive and fair resolution of disputes largely inaccessible to the small players engaged in international trade - and the pips are squeaking even for the big players.

In the USA the low esteem in which the public holds 'contingency fee plaintiff attorneys' has driven businessmen into the arms of the thriving ADR industry. But in turn that industry has itself generated a whole new and highly competitive and self-interested ball game. The sun never sets on the daily progression around the world of conferences promoting the causes and products of various ADR organizations and the people who make their livings on their coat-tails with messianic zeal.

Nonetheless, although there are no statistics, I believe most of us would accept an educated guess that, even taken together, the cases that involve the participation of a third party are only the visible tip of an enormous iceberg. Under the waterline, more than perhaps four-fifths of the ice mass represents the invisible bulk of disputes that never get anywhere near lawyers. Either they are 'nipped in the bud' before they can burst into flower; or they are resolved promptly by the parties reaching an agreement on an 'interest' basis rather than a 'rights' basis. The parties assess it to be advantageous to implement a solution reflecting elements such as fairness, maintenance of long-term relationships and which of them will feel less pain in 'taking a hit'. These elements have little to do with contractual rights and obligations; and the parties know, of course, that in at least the first two of the classical 'third party intervention' mechanisms referred to above the outcome will necessarily be based on a third party's assessment of their legal rights and obligations.

I am not suggesting that our existing third party dispute resolution mechanisms are about to be consigned to a Jurassic Park, eventually to become as extinct as the dinosaur. Far from it. All three will continue to have an essential role, albeit perhaps in a diminishing proportion of the whole of the iceberg as it grows

larger.¹³ It is inevitable that the iceberg will expand, because as international trade expands - as it must at least until we enter some form of new dark, perhaps post-nuclear-war, age - the number of disputes will expand. This follows as night follows day.

IV. THE INEVITABILITY OF CHANGE

I believe it is inevitable that international business will turn away from allowing disputes to fester until they mature into a state in which third party intervention becomes the only available option. We can already see examples. In 1998 I ran across one where a senior in-house litigation counsel at General Electric, a very large multinational corporation, explained at a conference that the company had developed a mechanism for 'early dispute evaluation'. Essentially this involved an internal review of all situations where disputes seem to be on the horizon, including objective assessments of the facts and legal position by a special section of the legal department. This assessment will then itself be reviewed by an internal panel which decides how to go forward, with a predisposition to settle the problem by negotiation unless there are clear indicators that a third party intervention mechanism should be brought into play. To me it seems clear that this kind of change is inevitable. It will happen whether we like it or not, and the competition between the existing approaches by the different branches of the international dispute resolution industry is merely a battle for market share in the proportionately diminishing cake of the visible 'above the waterline' sector of the iceberg.

My proposition is therefore that the resources and effort lavished on arbitration and mediation are essentially directed towards creating a series of refinements and variations on a well-worn concept. That they are useful variations with genuine application to certain situations is not in doubt, but nonetheless they are nothing more than refinements or variations, and they do not face up to the inevitable changes that lie ahead.

V. THE CHALLENGE

I now turn to discuss my suggested response to the challenge presented by these inevitable changes under three headings:

¹³ So long as there is no truly international court of arbitration, national courts will always play an essential role in enforcing arbitration agreements and awards, and supporting the arbitral process by appointing arbitrators and compelling evidence where necessary: see Holtzmann, 'Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards' in *The Internationalisation of International Arbitration* (The Hague, Kluwer, 1995) p. 109 *et seq.*; and Schwebel, 'The Creation and Operation of an International Court of Arbitral Awards' in *ibid.*, at p. 115 *et seq.* As mentioned earlier, national courts will also be needed in default of an agreed choice of forum by the parties.

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- Attitude
- Skills
- Structures

(a) *Attitude*

When an international businessman consults his lawyer about a commercial dispute, his main concern is what he should do next. Certainly he needs to have the best assessment that can be given as to his rights and obligations; but he also wants to develop a commercially orientated strategy for solving his problem.

Most techniques adopted in legal education do not prepare the young lawyer to meet this situation. It is apparent to me that we teach law as the study of litigation. In the common law countries much of our law is created by celebrated appellate court cases, and the system actually rewards students for focusing narrowly on the legal issues. In general, litigation lawyers are taught to focus on *rights*, not interests; on victories over enemies, not continuing relationships. However, the world of international commerce does not operate that way. To 'add value' in the modern world, lawyers need to develop an attitude that is consistent with the real interests of their clients. It follows that law students should be taught that the strict legal position is only one of the elements, albeit a significant one, in making business decisions.

Current training courses on negotiation sometimes teach students and practitioners to distinguish between the *apparent problem* and the *underlying problem*. For instance, a dispute about a late payment can really be caused by tension over slow or shoddy service. But they are still mostly taught to focus on *rights* and *obligations*, and these are often not the best pointer to an interest-based outcome to a dispute between real people.

One of the classic examples of an interest-based outcome, albeit an oversimplified one, was put forward by Fisher and Ury in their Harvard study *Getting to Yes*.¹⁴ The authors describe a dispute between two children about possession of an orange. Both children were adamant they wanted the orange, and argued about their *right* to have it. It so happened that the two children did not want the orange for the same reason. One wanted to eat the flesh, and the other wanted the peel to take to home to his mother so she could bake a cake. Neither a complete victory for one child nor a fifty-fifty (or any other) split would have maximized the children's joint interests. Of course this is an idealized example, but it makes an important point. Lawyers should learn from an early stage of their careers that they are employed to protect their client's *interests*, not merely to defend their legal *rights*.

This is what I mean by *attitude*. In my view the law schools have a significant role to play in changing the way that their graduates approach solving clients' problems; and the law firms need to capitalize on a new breed of entrants by encouraging them to develop this approach in their relationships with clients.

¹⁴ Robert Fisher and William Ury, *Getting to Yes* (Penguin 1991, 2nd ed.).

(b) Skills

An appropriate *attitude* can make a significant difference to a lawyer's usefulness to his client, but on its own it is not enough. If the legal profession is to retain its market share in the dispute resolution field it needs to ensure that the next generation of practitioners acquires dispute management skills. I referred earlier to two elements in this context: *dispute avoidance* and *direct negotiation*. Although separate disciplines, they both require broadly similar abilities. Insight into the needs and motivation of the other party is crucial. In international trade disputes this requires a highly developed understanding of cultural factors; this is, of course, much more profound than the superficial advice that we should, for example, never do business over breakfast with an Englishman; never over dinner with a Mexican.

Cross-cultural awareness requires an understanding that we inevitably see the world around us through spectacles fashioned by our own experience. This involves a web of predispositions, assumptions, and behavioural patterns. An example is that we trust people we like; and we like people whose thought processes we believe to be similar to our own. How often do you hear the expression 'he¹⁵ is on my wavelength'? If you can 'feed back' to the person you are communicating with his own body language, tonality, words and phrases, you will have a good chance of having that person say to themselves 'I can do business with this guy, he talks my language'. Some may remember that this is what British Prime Minister Margaret Thatcher said publicly of the Soviet leader Mikhail Gorbachev.

As a digression I should mention that all this is a far cry from my own experience as a young litigator at Freshfields in the mid-1960s. I can vividly recall being taught that any case that went to trial was a failure, and that the objective in all litigation was to get the most favourable outcome that could be achieved without going to trial. This seems fine so far. But the key phrase was 'winning without trial'; and in each case we would work out strategies for harassing the opposition with interlocutory applications, such as trying to freeze assets, at the same time as imposing on them the greatest possible burden with regard to discovery and so forth. The motto ran 'If you have them by the balls and squeeze hard enough, their hearts and minds will follow'.

Returning to cross-cultural matters, the negotiator dealing with a person from a different culture must realize that the comfort zone in which he operates is not likely to be the same zone in which the other party operates. The range of differences is of course a study in itself, and I mention briefly just a few. In Western cultures the contract tends to constitute a complete definition of the relationship between the parties. Most of us are familiar with the so-called 'entire agreement' clauses that are inserted in commercial contracts, particularly by North Americans. However, in some other countries, such as Japan, a contract only represents one part of a wider business understanding.¹⁶ Similarly, people from different cultural backgrounds approach problem-solving from entirely opposite

¹⁵ The masculine description of course includes the feminine throughout.

¹⁶ Trompenaars and Hampden-Turner, *Riding the Waves of Culture: Understanding Cultural Diversity in Business* (London, Nicholas Brealey Publishing 1997, 2nd ed.), pp. 39-40.

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directions. In Western cultures, universal rules or principles are to be applied equally in quite different situations.¹⁷ In other cultures, notably in the former Soviet Bloc countries, more attention is given to the unique circumstances of the relationship.¹⁸ Thus a Romanian might view a British approach as inflexible and disrespectful to the personal ties involved; whereas the Briton might view the Romanian approach as creating an unjustified exception in favour of a friend. In the Arab Middle East emotional and family ties play an important part in problem-solving. Recognizing and responding appropriately to these cultural differences is an important element in negotiations.

There are also some more specific negotiation skills. The Fisher and Ury study made a distinction between 'positional' and 'principled' negotiation. In the former, negotiators barter competitively, asking for far more than they expect to get and then giving way little by little until a position acceptable to the other side is discovered. In the latter, the negotiator assesses what the other side really wants (or needs) and then offers it in exchange for what he really wants himself.

Fisher and Ury also identified a number of 'pathological' negotiation techniques. A negotiator sometimes cannot resist the temptation to become involved in a battle of egos, and is determined to gain the upper hand over his opposite number. In particular, litigators called on to act as negotiators often get caught up in the adversarial process, developing an adrenaline high from the 'smell' of battle. They can sometimes become so absorbed in the process itself that they lose sight of the client's objectives.

I used to play an occasional golf game with the chairman of one of the UK's largest commercial property development companies. He told me that they fell into dispute with their joint venturer in connection with one of a number of ongoing property developments. Each side retained equally large and blue-chip London law firms, where the opposing litigants were represented by young litigation partners who were sparring with each other on various unrelated cases and did not get on well personally. The result was that the dispute escalated to an extraordinary level, notwithstanding several reminders from the clients on both sides that they were good friends doing much continuing business with each other. The matter was only resolved after the chairmen of the two client companies met at an industry social function and agreed to seek a joint meeting with the senior partners of the illustrious firms concerned, with a view to 'calling off the dogs'.

I accept that the provision of skills training is not a primary objective for law schools at undergraduate level. This is when the basic knowledge must be taught. At the level of continuing legal education for practitioners, which is now compulsory for those not grandfathered out, there is however a strong case for the law schools to get together with the profession to offer training in dispute management for young - or even senior - litigators. The law schools would provide the physical and logistical infrastructure in an academic setting; and the law firms would provide much of the faculty on a part-time footing.

¹⁷ *Ibid.*, at pp. 33-9.

¹⁸ *Ibid.*

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(c) Structures

Finally, I turn to the structural changes that might be contemplated in connection with dispute avoidance. My thoughts on this aspect may be best explained through two recent examples.

The first, which has been rated as a substantial success, is the construction of the huge new airport in Hong Kong. Many different parties were involved, operating under a complex spider's web of contracts collectively worth many billions of US dollars. Obviously the potential for conflicts over design, workmanship, delays, co-ordination and so forth was enormous. However, the parties did not simply cover every foreseeable eventuality in the contracts, and then leave disputes to be resolved when they matured. They created a dispute management scheme that involved an independent body called the Disputes Review Group. This Group was chaired by a former Hong Kong judge, supported by experts from various disciplines.¹⁹ They spent a good deal of time on the site as the project progressed;²⁰ and 'sniffed out' potential conflicts before they developed; and then defused them. It was a massive and intensive task, undertaken with great skill and determination. The result was that the airport was completed with only one substantial dispute referred to arbitration.

The second example is found in the contracts for the construction of the famous tunnel under the channel between the United Kingdom and France. These contracts also made provision for a 'pre-arbitral review process' by a 'panel of experts'. Sadly, the procedure did not prevent a number of very substantial disputes being referred to separate ICC arbitrations. Maybe the dispute management structure was inadequate; maybe the participants did not possess the necessary attitudes or skills. My old firm was involved in some of these arbitrations, and it is not for me to make value judgements. I merely comment that in one project the structure worked well; in the other it did not. Whatever the success of such fledgling efforts, it is clear that the use of dispute review boards, or similarly named bodies, is not simply another ADR device. It instead represents the emergence of a significant *structural* change aimed at the *prevention* of disputes - thus making that most modern of jargon phrases 'alternative dispute resolution' obsolete even before it has become a commonly recognized term in the international language of professionals in the industry.²¹

What sort of structures do I have in mind? Apart from pre-arbitral disputes

¹⁹ Initially the DRG was composed of eight persons, but one dropped out early in the process and was not replaced.

²⁰ Quarterly review meetings were held over the four and a half years of the project, each lasting four days and each involving extensive site visits.

²¹ By the end of the twentieth century there was still no transatlantic acceptance of the meaning of the phrase 'alternative dispute resolution'. Alternative to *what*? In Europe there was from the time of importation of the phrase a clear consensus that the term 'ADR' should be applied to mechanisms that are 'alternative' to procedures that lead to decisions of third parties that are final, binding and enforceable against the parties (*i.e.* decisions of courts and arbitrators). In the USA, however, the policy of the major arbitration institutions tends to be that the term 'ADR' should be applied to all dispute resolution mechanisms other than the judge in his courtroom. This enables them to offer both arbitration and mediation under the same broad umbrella term 'ADR'.

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review boards of the type I have mentioned, I suggest as a beginning some simple and basic ideas. Contracts might require a 'cooling off period' before any third party intervention is permitted. During that period the parties might commit themselves to take the negotiations out of the hands of the individuals most closely involved in the transaction and identify a trained 'trouble-shooter' from each side, briefed to solve the problem without recourse to third party intervention.

Another, linked, possibility would be for each side to create a small internal (or external) team to undertake a rigorous 'risk analysis' of all the relevant elements (including but not limited to legal rights). These teams could be required to make a presentation to a small panel of senior executives from each side. Of course only the largest corporations would be able to commit the necessary resources to a substantial exercise of this type; but it should not be beyond the capabilities of small companies, advised by their law firms, to develop structures that would be apt to be put in place for the company concerned and the type of transactions it undertakes.

These are just a few ideas. Much detailed applied research is needed in order to evaluate these and other possible dispute avoidance structures. In my view this research could be carried out under the wings of law schools with active support and participation from law firms and representatives of international business.

VI. CONCLUSION

Only genuine systemic change can alter the role that commercial lawyers, whether international or domestic, in independent practice or in-house, should play in dispute management. The reason that many lawyers do not negotiate well in a dispute resolution context is because historically it has not been their job. They are essentially litigators who sometimes participate in negotiation sessions, where they are often operating way outside their comfort zones largely because they are circumscribed by their background and training. Their overwhelming instincts are to 'screw' the other side.

I foresee a new breed of lawyers becoming actively involved in preventing potential disputes getting 'out of hand' before they mature into intractable situations. I envisage *dispute avoidance groups* being set up around the world, both as independent entities (not necessarily comprised wholly of lawyers) and also as teams within major law firms and in-house legal departments in large corporations. The investment required to design appropriate structures for individual industries, and to create the resources to implement such schemes, would surely be far exceeded by the direct and indirect costs of the litigation that could be averted; and the role of the lawyer would be at a much earlier stage of the process.²²

²² For a similar conclusion see Gilson and Mnookin, 'Co-operation and Competition in Litigation: Can Lawyers Dampen Conflict?' in Arrow, Mnookin, Ross, Tversky and Wilson, *Barriers to Conflict Resolution* (New York, W. W. Norton 1995), in particular at pp. 197-9.

In *Bleak House*, Charles Dickens wrote an entire novel about an impossibly convoluted Chancery suit that eventually ended in the lawyers absorbing the whole of the successful litigant's damages in costs. Of the Chancery Court, the book warns 'Suffer any wrong that can be done to you, rather than come here!' Have our existing methods of dispute resolution in international trade really broken out of this mould? Private arbitration and mediation systems are undoubtedly useful refinements of state-provided dispute resolution processes. They perform essential roles in appropriate circumstances, and will always be needed. Nevertheless, they are no more than refinements applied to a system that has been in use for tens of thousands of years. They are not truly innovative developments that are capable of providing a real response to the rapidly changing environment in which international commerce is conducted.

It is unlikely that the current narrow focus on the third party intervention model will last very far into the new century. As international business becomes more sophisticated, so will its desire to solve problems fast and painlessly. This will require attitudes, skills and structures designed to enable commercial transactions to be supervised effectively with the aim of preventing disputes from arising; and, when disputes prove to be unavoidable, for the parties to have available to them the separate but related attitudes, skills and structures to resolve them promptly and fairly through direct negotiation.

I hope that the next generation of international trade lawyers will be in a position to take a constructive part in these developments. The challenge that confronts law firms and law schools is to participate constructively in devising the type of structures I have described and to find ways of teaching the next generation the attitudes and skills they will need in order to operate successfully within those structures.