



## The Right Honourable Lord Donaldson of Lymington

### Commercial Disputes Resolution in the 90's



**John Francis Donaldson**  
(b. 6 October 1920)

At the conferment of the honorary degree of Doctor of Laws by the University of Southampton in July 1988, Lord Donaldson was described as “one of the country’s most distinguished lawyers, and has made a major contribution to the development of maritime law. His recommendations as chairman of the inquiry set up after the Braer disaster have been internationally acclaimed and almost universally enacted in subsequent legislation.”

Lord Donaldson studied at Trinity College, Cambridge. He was called to the Bar in 1946, and became a Bencher of his Inn, the Middle Temple, 20 years later. He had an extensive practice at the Commercial Bar, and was made a Queen’s Counsel in 1961.

Lord Donaldson became a Judge of the Queen’s Bench Division and Commercial Court in 1966. From 1971–1974, he was President of the National Industrial



Relations Court. In 1979 he was elevated to the Court of Appeal and was the Master of the Rolls from 1982–1992. In his long tenure of high judicial office, he was responsible for many groundbreaking decisions in the field of commercial law.

Lord Donaldson has a distinguished extra-judicial career in the field of public service. He was, amongst others, President of the Chartered Institute of Arbitrators from 1982–1986. He did much to make arbitration a more effective means of resolving commercial disputes, and he has written and spoken widely on this subject. He was a Vice-President of the British Maritime Law Association from 1969–1972 and has been President since 1979. He is also the Chairman of the Financial Law Panel.

In October 1997, Lord Donaldson was asked to review the Government's involvement in salvage and intervention in pollution incidents following the grounding and subsequent salvage of the *Sea Empress* at Milford Haven in 1996. His report *Command and Control: Report of Lord Donaldson's Review of Salvage and Intervention and their Command and Control* was presented to Parliament in March 1999.

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## Commercial Disputes Resolution in the 90's

Lord Donaldson of Lymington  
*Master of the Rolls, Court of Appeal*

**Y**our Majesty, Sultan Azlan Shah, Your Royal Highness  
Raja Nazrin Shah, distinguished guests.

May I begin by expressing my appreciation of the honour which you have done me by inviting me to deliver this prestigious lecture. It is an honour which is greatly increased by the gracious presence of His Majesty, a jurist of international distinction after whom the lecture is named.

My wife and I have only once before had the privilege of visiting your country. That was in 1983 and took the form of a very brief recreational visit to Penang on the way to a Commonwealth law conference in Hong Kong. It is both a privilege and a pleasure to be able to come here again and on this occasion to meet professional colleagues and see a different part of your great country.

Previous lectures have concentrated on particular aspects of substantive law. In this lecture I am departing from precedent and want to discuss a system rather than a particular aspect of the law. Let me explain why.

Substantive law, particularly in a commercial context, is complex and wide ranging. It has to regulate rights and liabilities in a very large number of different situations. It follows that any in-depth study of a particular aspect of that law, however valuable and important in itself,

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His Majesty Sultan Azlan  
Shah.*

may have only limited application to the daily lives of businessmen. It may be concerned with a problem which they have never met or will only meet rarely.

By contrast, there is one problem with which every businessman is all too familiar and will inevitably continue to be familiar. That is a commercial dispute. The one common need of all businessmen is for appropriate and efficient systems for resolving those disputes. Indeed, a feature

which distinguishes such disputes from those between other citizens is that businessmen recognise that bona fide disputes are inherent in business transactions. They accept that their sensible resolution is an integral part of commerce. By contrast, other citizens regard disputes as something which

should never have occurred. They regard them as something which are never their fault, but always the fault of the other party. That a dispute should ever have arisen is itself regarded as a personal affront. This fundamental difference in attitude enables special procedures to be developed for the resolution of commercial disputes.

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My experience in this field has necessarily centered upon London. However, it has also had an international perspective in that London has for at least a century been one of the biggest, and probably the biggest, centre for the settlement of such disputes worldwide. During 20 years as a practising barrister and subsequently 26 years as a judge, I have, so far as possible, specialised in commercial dispute resolution both in the courts and by means of arbitration.

As a result of the huge volume of trade which is undertaken through London or is subject to English law, legal practitioners and judges in England have a particular interest in seeking continually

to modernise and improve our system. It used to be said that “trade follows the flag”, but today it would be truer to say that “trade follows the law” and it will the more willingly follow that law if the legal system concerned takes full account of the need to provide for the resolution of disputes.

In discussing commercial dispute resolution in the remainder of the decade, it is worthwhile to look back at previous initiatives for two reasons. First, no wholly new system will be produced. We shall continue to build on what has gone before. Second, there are certain basic requirements which have not altered over the years and are not likely to do so in the foreseeable future. They are five in number:

1. *Speed*—Commercial men need to know quickly what their liabilities are and to be free to move on to the next transaction. For better or for worse they need to close their accounts.
2. *Economy*—Dispute resolution, although an integral part of commerce, produces no element of added value or profit. Money spent on it is, to that extent, rightly regarded as money wasted.
3. *Consistency and therefore a degree of predictability*—There is no room for gambling in commercial dispute resolution in the sense of adopting a system where the outcome will or may depend upon which judge or arbitrator determines the dispute. Once the facts are clear, it should within limits be possible, acting on the basis of precedent, to forecast the outcome of a dispute.
4. *Expertise*—There is a need for specialist expertise on the part of those charged with the task of resolving disputes. Without this there can never be speed, economy or consistency.
5. *A minimum of friction or aggravation*—“One off” transactions between commercial men are a rarity. When the particular dispute has been resolved, they are going to have to continue

to do business together. Any aftermath of bitterness or enmity would be inimical to the long term interests of all the parties to the dispute.

### A historical sketch

The first time when specialist commercial dispute resolution was undertaken by the English courts was the period 1756–1788. The Chief Justice of the day was the great Lord Mansfield. He recognised the need for consistency and predictability of decision and also for the expertise in the court. One of the problems facing him was that mercantile law was at that time in an underdeveloped state, particularly in relation to bills of exchange, insurance and shipping. His solution was to empanel a jury of experienced merchants who were familiar with the customs and usages of the City of London. This panel, although referred to as a jury, was quite unlike the modern Anglo-Saxon jury which consists of 12 men or women selected at random from the citizenry and having no particular expertise. Lord Mansfield's jurors were much more like technical commercial assessors.

It would be interesting to know more about the relationship between Lord Mansfield and his panel, but we do know that there were few changes in its membership and that the judge and his so-called jurymen became not only colleagues, but firm friends. Together they set out to clarify and develop the law merchant in the course and as part of the process of resolving disputes. They were supremely successful and achieved something of the status of a specialist legislature, since many of the customs and usages of the City of London, as declared by them, have become part of the law merchant applicable throughout the world. Whilst it will be impossible to re-invent Lord Mansfield and his jurymen as part of the dispute resolution machinery for use during the remainder of this century and beyond, there are those, including myself, who believe that they can be revived in a different form as a means of highlighting legal pitfalls and producing changes in the law with a view to minimising the scope for disputes. To this I will return at the end of this lecture.

With the death of Lord Mansfield, the impetus for providing a specialist commercial dispute resolution service seems to have faded. Commercial cases continued to be tried in the City of London, but this was largely as part of the ordinary civil work of the courts.

A century later, in the 1870's, a Royal Commission was appointed to review the working of the civil courts which had become far too slow and expensive and whose procedures were far too technical to be of real use in determining disputes between ordinary citizens, let alone between commercial men with their special requirements of speed and informality. The Judicature Commission, which reported in 1874, made extensive recommendations for the reform of the courts of law and equity, but it rejected demands from the commercial community for the creation of special tribunals whose members would be merchants rather than lawyers and for a system whereby judges would sit as arbitrators with a greater freedom to act informally. Instead, by a majority, the Commission recommended the establishment of special commercial courts where cases would continue to be tried by judges, but those judges could be assisted by commercial assessors.

The government of the day accepted the general recommendations for a reform of the civil courts, but rejected the recommendation for special courts or procedures for the trial of commercial cases. There followed a very surprising development and one which has had an enormous influence upon the development of London as an international centre for the resolution of commercial disputes. In 1895, the judges of the Queen's Bench Division of the High Court met and decided that if Parliament and the Government would not act, they would. They decided to establish a special list of commercial cases which would be tried by a judge with commercial experience.<sup>1</sup> They could not alter the formal statutory procedures and evidential rules, but concluded that their inherent jurisdiction to control their own courts enabled them, subject to the consent of the parties, to establish new procedures and dispense with the rules of evidence.

<sup>1</sup> Colman, *The Practice and Procedure of the Commercial Court*, 2nd edition, page 6.

Now you might think that this approach would not be very successful, because one party might well agree to the dispute being resolved by informal procedures and on the basis of evidence which would not be admitted in the other courts, but his opponent would be unlikely also to agree. This did not in fact happen and I think that I know why.

Even in the 1950's when I was practising in the Commercial Court many of its procedures and its attitudes towards the admissibility of evidence rested upon the consent of the parties rather than upon the official rules of court. For example, in the Commercial Court any evidence was admissible, provided that it was relevant. Any other objection, such as that it was hearsay, went merely to its weight, which the judge was well able to assess. I well remember appearing for a client who wanted to prove that there had been a strike of Australian stevedores at a particular time and place. To prove this, I tendered in evidence a cutting from a local newspaper. My opponent, who was unfamiliar with the ways of the Commercial Court, objected that this was quite inadmissible in evidence. It was blatant hearsay. The judge, later Lord Diplock, thought for a moment and then said, "You're quite right, Mr Smith. This evidence is wholly inadmissible. If you wish we will adjourn this case to enable a commission of inquiry to be sent to Australia to find out whether there was a strike and to report back. That is technically the correct way of proving this fact. However, before you decide what you want me to do, I ought perhaps to remind you that this will be a very expensive and time-consuming process. You must also remember that the judges of this court, like those of any other civil court, have a complete discretion to decide who shall pay the costs of the action. You might well find that I decided to order your clients to pay all the additional costs involved." Mr Smith quickly decided that he ought to withdraw his objection and cooperate in the Commercial Court's way of doing things.

However the consents were obtained, the "Commercial List", as the court was then called, was an immediate success. The first judge of the court, Mr Justice Matthew, adopted an entirely novel attitude



towards disputes resolution. The procedures in the ordinary courts were based upon the assumption that litigants were truly hostile to one another. It also assumed that they were inherently dishonest. It followed that everything, beginning almost with the identity and existence of the parties, had to be proved strictly. Mr Justice Matthew assumed, unless and until the contrary appeared to be the case, that litigants in the Commercial Court were not hostile to one another and were more honest than not. They were indeed in dispute, but they knew the width of the area of dispute and had no interest in widening it. He also assumed that they would be represented by expert and responsible lawyers.

Against this background it was usual for the parties and their lawyers to be invited to attend upon the judge within a short time after the writ was issued. There would then be a discussion in which the precise nature and extent of the dispute was defined. Often—indeed it was probably the usual practice—the judge would dispense with any written pleadings, instead merely make a note of the issues. I confess that I do not know how documentary discovery was arranged, but it was probably left to the lawyers. Certain it is, and this can be verified from the first volume of the *Commercial Cases Law Reports*, that the final hearings were brief, and judgment was often delivered within a short time of the writ having been issued.

Commercial litigation in the 90's is, I regret to say, neither as speedy nor as simple as it was in those days. This is due, in part at least, to the complexity of modern commerce and the unbelievable quantities of paper which are generated by modern equipment. In Mr Justice Matthew's day, people thought in their heads. Today they seem to think on paper and to preserve every scrap of that paper. However, it is important that every new generation of commercial lawyers should be reminded of the Matthew approach for two reasons. The first is that the basic approach is sound and needs to be applied to all commercial dispute resolution, whether in the courts, in arbitration or in any other form. The second is that it underlines the importance of the judge or arbitrator who will eventually decide the dispute being

personally involved in the interlocutory proceedings leading up to the final hearing. No other judge can persuade the parties to take sensible short cuts, because they would always have a suspicion that a different trial judge might see the case differently. No other judge has the same persuasive authority in suggesting a settlement, because he alone can drop convincing hints as to the likely outcome if the dispute proceeds to judgment.

### The Commercial Court

It was not until 1970<sup>2</sup> that the Commercial Court was formally established as such with its own special rules which are contained in Order 73 of the Rules of the Supreme Court. Nevertheless, the tradition has continued of “persuading” the parties to consent to a departure from the rules where this seems likely to speed the resolution of the dispute or to reduce costs. There are now ten High Court judges who are recognised by the Lord Chancellor as having the special expertise required for the hearing of commercial actions and at any one time six of these are normally engaged in the work of the Commercial Court. Regretfully I have to report that at this moment things are not normal because, for a variety of reasons, the number of judges available to sit in that court has temporarily been reduced, and the court has been plagued with a succession of very long cases. However, strenuous efforts are being made to overcome this problem and I trust that normal service will be resumed shortly.

The international character of the work of the court is demonstrated by the fact that in the calendar year 1991, in 65% of the cases tried in the court all parties came from outside the United Kingdom. In a further 23%, there was at least one foreign party and it was only in 12% of trials that all the parties were English.<sup>3</sup>

The other key factor in the work of the Commercial Court is that it has always sought to resolve disputes by amicable agreement between the parties rather than by judgment. That it is extremely successful in achieving this objective is shown by the fact that some

<sup>2</sup> Administration of Justice Act 1970, section 3, now Supreme Court Act 1981, section 6.

<sup>3</sup> Statement in open court by Evans J on 21 December 1991.

2,000 actions are begun in the court each year, but only about 100 of them come to trial.

Some of these actions would no doubt settle without the intervention of the court. However, the fact that there are some 3,000 interlocutory applications each year suggests strongly that the intervention of the court in clarifying the issues and drawing attention to the fundamental strengths and weaknesses of each party's case is a major factor in inducing a frame of mind in which settlement becomes a real option. In this context, I should draw attention to a feature which is unique to the Commercial Court, namely, that all interlocutory applications are heard by High Court judges and not by masters, that is to say junior judges. Furthermore, where possible, although this cannot always be achieved, they are heard by the judge who will ultimately try the case if it is not settled by agreement between the parties. The strength of this system lies in the fact that a High Court trial judge has the standing and authority to make suggestions as to ways in which the case can be tried more economically and, indeed, as to settlement which would not be so persuasive if they came from a more junior judge. It is, however, costly in the use of High Court judge power since it calls for six judges to be sitting simultaneously in different courts at any one time.

International trade tends to be centred on London—hence the need for the London Commercial Court and the fact that so much of its work is concerned with overseas disputes. But what might be described as “domestic” commerce is carried on both in London and in a number of provincial centres, such as Liverpool, Manchester, Leeds, Birmingham and Bristol. It is therefore somewhat surprising that similar specialist courts have until recently never been established in those centres. A start has now been made in Liverpool and Manchester and there are plans for such courts near London and in Bristol. There is some argument as to what they should be called in order to avoid confusion with the Commercial Court, and the current thinking favours “Mercantile Court”.

But I would not like you to think that it is only the Commercial Court which is mindful of the special needs of the commercial community.

### Panel on Take-overs and Mergers

In 1986, the High Court was faced with an application by Datafin plc seeking the judicial review and quashing of a decision of the City of London Panel on Take-overs and Mergers.<sup>4</sup> This had ruled that there had been no breach of its Code of Conduct in the course of the take-over battle which was still in progress.

The Panel is a unique body. It has no legal personality. It has no legal powers, whether derived from the common law, statute or the prerogative. It has no contractual rights. It is composed of a number of senior individuals representative of the London Financial Market and appointed by the Governor of the Bank of England. It promulgates, amends and interprets its Code of Conduct. It rules on whether there has been a breach of the Code, yet it has no power to impose sanctions.

However, de facto, it is a body of immense power. I say that because the Secretary of State for Trade and Industry, the International Stock Exchange and the various professional bodies will almost automatically accept its rulings that the Code has been breached and will impose severe disciplinary sanctions on all concerned in the breach.

The High Court ruled, correctly on the existing authorities, that it had no jurisdiction to judicially review the decision of a body of persons which was not exercising statutory or prerogative powers. The Court of Appeal reversed this decision, holding for the first time that the true test was whether the body was performing a public duty, which the Panel undoubtedly was. Whilst the court dismissed the appeal on its merits, it also laid down how this jurisdiction should be exercised in future.

<sup>4</sup>  
*R v Panel on Take-overs  
and Mergers, ex parte  
Datafin plc* [1987] 1 All  
ER 564

In take-over and merger situations, speed and certainty are of the essence. There was clearly a risk that parties to a take-over or merger would make applications to the court for purely tactical reasons in order to produce delay or uncertainty. The court therefore

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ruled that such applications should not be entertained until after the take-over or merger battle had been concluded. Only at that stage would it consider reviewing rulings by the Panel. In doing so, it would not quash those decisions, even if it considered them to have been clearly erroneous, for to do so would re-open the take-over or merger. Instead, it would give a declaratory judgment giving guidance to the Panel for the future. The furthest that it would go by way of injunctive order was

to prohibit disciplinary action against anyone whom the Panel had wrongly held to have acted in breach of its Code.

The House of Lords refused leave to appeal and the Court of Appeals decision is thus definitive of the law.

This novel development was welcomed by the financial markets. It was also welcomed by the Panel itself, since it headed off the very real possibility of statutory control being imposed on the Panel. The only criticism came from a few academic writers who complained that this amounted to legislation by the judiciary, which it probably did. "Judicial engineering" is perhaps the more apt description.

## **Arbitration**

I have been talking about courts as a means of resolving commercial disputes in the 90's, but it is almost certainly the case that the majority of such disputes are and will continue to be resolved not by litigation, but by arbitration. Here again, London has established

itself as one of the leading centres. Arbitrations can be divided into two classes—trade arbitrations and general arbitrations. A typical example of a trade organisation which supplies arbitration services for its members and for those using its forms of contract is the Grain & Feed Trade Association (GAFTA). In recognition of the fact that disputes are an integral and inevitable concomitant of commerce and that the existence of a trade arbitral tribunal benefits everyone in the trade, suitably qualified traders rather than lawyers form an arbitration panel and charge purely nominal fees for their services. The procedures adopted depend upon the nature of the dispute. Thus if the issue is whether a shipment was of “fair average quality” or conformed to sample, one arbitrator appointed by each party and an umpire appointed by the two arbitrators may need only to look at the grain or smell it. On the other hand, if the dispute concerns the true meaning of a trade contract, the tribunal will often have a legal adviser and will be addressed by lawyers, often at length.

GAFTA’s arbitration rules, like the rules of some other trade associations, provide for appeals to an appeal arbitral tribunal, also consisting of experienced traders advised where necessary by a lawyer. The number of arbitrations undertaken each year varies according to whether there are natural phenomena which affect the flow or quality of grain and feeding stuffs. In the year ending 30 September 1991 there were 214 arbitrations and 49 appeals, but this figure is, I think, untypically low. Certainly at the time of the great US soya bean export prohibition in the 1970’s, there were thousands of arbitrations. Unlike litigation, trade arbitrations normally end in an arbitral award, rather than in a consensual settlement. The reason for this is not clear, but it is probably related to the low cost of the procedure since, in a typical case, both parties will argue their own cases without the assistance of lawyers and, as I have pointed out, will not be required to pay significant sums to the arbitrators.

But besides trade associations whose arbitration services are ancillary to their principal activities, there are bodies whose sole

purpose is to provide arbitration services, usually on an international basis. Some, like the London Maritime Arbitrators Association, specialise in particular types of dispute. Others, like the London Court of International Arbitration (LCIA) and the Chartered Institute of Arbitrators, undertake the resolution of commercial disputes generally. Although some of the arbitrators on their panels are English, many are drawn from other countries, thus enabling a tribunal to be appointed consisting entirely of “neutrals” in terms of nationality. Very large sums of money are involved. Thus 45% of the disputes handled by the LCIA come in the US\$1–10 million range, the smallest sum in dispute having been US\$20,000 and the largest so far US\$600 million. In addition, there are organisations such as the International Chamber of Commerce in Paris which have London-based panels of arbitrators.

I have been speaking of the arbitration services based upon London, because they are those with which I am most familiar and they are, I believe, the most extensive which exist anywhere. However, as you will know, there are other smaller regional and national arbitration centres throughout the world. One is here in Kuala Lumpur. Others are in Singapore, Hong Kong and Australia.

The advantages of arbitration over litigation in the courts are fourfold:

1. *Privacy.* Although the English courts will seek to conceal commercially sensitive information when trying cases, this is more easily achieved by arbitration. In addition, resort to arbitration may well assist the parties by concealing from their competitors the very fact that there is a dispute in existence.
2. *Speed.* Although the courts can, if the need arises, move with startling speed, arbitration is in general quicker, because the supply of arbitrators is much larger than that of judges.
3. *Expertise.* By a suitable choice of arbitrator the parties can ensure that the tribunal itself has whatever specialised expertise

is considered desirable in the light of the subject matter of the dispute.

4. *Enforceability.* There are often difficulties in the way of enforcing the judgments of the courts of one country in the courts of another country. The existence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for the systematic enforcement of arbitration awards in the many countries which are parties to it. These, of course, include Malaysia.

The great potential disadvantage of arbitration is the fact that unless there is some supervisory control by the courts, arbitrators would be free to depart from the law and apply their own often idiosyncratic views as to what the justice of the case required. As a result, awards would become unpredictable and predictability of result is one of the prime requirements of commercial dispute resolution. Arbitrators also need to be able to call upon the power of the State to summon witnesses and obtain disclosure of documents, if those concerned are not minded to co-operate.

Both these points have long been recognised in England, and English law provides in the Arbitration Acts 1950–1979, following earlier Acts, for the courts: (a) to come to the assistance of arbitrators if so requested; and (b) to rule on questions of law which may arise in the course of an arbitration. Prior to 1979, this right to seek rulings on questions of law was widely abused, parties seeking a ruling on trifling or peripheral points simply in order to obtain delay and then appealing to the Court of Appeal against the High Court’s ruling. Section 1 of the 1979 Act and judicial decisions following upon it—notably *The Nema*<sup>5</sup>—have severely restricted this right of appeal by confining it to cases in which the ruling “could substantially affect the rights of the parties” and by introducing a requirement for leave to appeal being obtained from the High Court. Furthermore, the right to take such a ruling to the Court of Appeal has been further restricted

<sup>5</sup> *Pioneer Shipping Ltd v BTP Tioxide Ltd, Nema, The* [1982] AC 724; [1981] 2 All ER 1030; [1981] 3 WLR 292, HL.



to cases in which the High Court itself certifies that the issue is one of general public importance (see section 1(7)).

### Alternative Disputes Resolution

But straightforward litigation or arbitration are not the only means of resolving commercial disputes in the 90's. Much attention has recently been directed towards what is known as Alternative Disputes Resolution (ADR). Essentially, this describes systems which are designed to assist the parties to a dispute in a search for an amicable settlement. Their current popularity owes much to the cost both of litigation and of formal arbitration and to a recognition of the real commercial advantage of maintaining good business relationships notwithstanding the existence of the dispute. The various bodies "marketing" ADR, and I use the word "marketing" advisedly, all seek to make their own form appear different from, and better than, those of their competitors. However, they all fall into one or other of two broad categories.

*It is not the function of a mediator to express any concluded view as to who is right or who is wrong and still less to give a binding decision. His function is to explain to each party the weaknesses of that party's case and the strengths of the case of the opposing party.*

The first is mediation or conciliation. The terms are interchangeable, and for convenience, I will refer only to mediation. It is in the nature of a commercial dispute, like most other disputes, that each party considers that he has a far better case than his opponent. It is also a feature of human nature, in commerce as elsewhere, that no

amicable settlement is possible if both parties think that they will win. It is not the function of a mediator to express any concluded view as to who is right or who is wrong and still less to give a binding decision. His function is to explain to each party the weaknesses of that party's case and the strengths of the case of the opposing party. Ideally, he will persuade each party that they are likely to lose.

Having thus induced a frame of mind which makes settlement possible, he may make suggestions for a compromise. But if he does, they remain only suggestions. Neither party is under any obligation to accept them. However, it is claimed that this process does in fact produce settlements.

The second category of ADR is the mini-trial. This is designed to achieve the same result, but by a slightly different method. The key requirement is that senior executives of the parties, whether or not accompanied by their lawyers, shall appear before a neutral person. Each then deploys his case in summary form. It is an essential requirement that the executives have authority to settle the dispute and the theory is that, having appreciated the strengths and weaknesses of the respective cases as they emerge in the course of the mini-trial, they will be minded to settle. As with mediation, the neutral presider may tell the parties what, having heard the parties' cases, he thinks of each and may suggest a compromise settlement, but nothing that he says is in any way binding upon the parties.

It is of the essence of ADR that if it does not lead to a consensual settlement, there will have to be further proceedings leading to a decision binding upon the parties. It therefore merely adds to the costs unless there is, or is likely to be, a will to settle. My own view is that it is better offered as a voluntary and preliminary part of litigation or arbitration. There is then greater pressure to settle as the stage is set for a binding decision should no settlement result.

### **Ombudsmen**

No review of commercial disputes resolution in the 90's would be complete without a reference to the Ombudsmen appointed by the English banks, building societies and insurance companies. Their scope is limited in the sense that they only deal with complaints by individual customers, as contrasted with companies. The whole cost of the scheme is met by the industries concerned. They are a special blend of mediation and arbitration. Complaints are investigated

and the parties informed of the Ombudsman's preliminary decision. The complainant can, if he wishes, accept that decision, whereupon it becomes binding upon him and upon the bank, building society or insurance company concerned, since these organisations have agreed to accept any preliminary decision which is accepted by a complainant. Alternatively, the complainant can enter into negotiations based upon the preliminary decision, although these are unlikely to be successful. In the further alternative, he can litigate his claim, but very few complainants do so.

### Financial Law Panel

Last, but by no means least, I should like to give you news of the return of Lord Mansfield and his jurors, albeit in a new form. It is a pioneering enterprise designed not to resolve commercial disputes, but to avoid them. It is called the Financial Law Panel and is being set up by the Bank of England, the Corporation of the City of London and the London Wholesale Financial markets. It will consist of a legally qualified Chairman, three other lawyers and eight very senior and highly respected lay members who are involved in the financial markets on a day-to-day basis and will have supporting staff. Its purpose will be to identify problem areas in the law with which the financial markets are concerned. By "problem areas", I mean situations in which the law is not clear or in which the law prevents, or may prevent, business being transacted in ways to which no reasonable objection could be raised. Having identified such problem areas, the first task of the Panel will be to warn the market. It is thought that if the Panel had been in existence, it would have warned that recent borrowings by local authorities—the so-called interest swap transactions—might be held to be *ultra vires* the authorities concerned, and that the transactions would then not have been undertaken or would only have been undertaken in a different form. Having warned, it will seek to have the law clarified by test cases in the courts or amended by legislation.

There is reason to believe that where such test cases are brought before the English courts, those courts will depart from precedent and

welcome the submission by the Panel of what is known in the United States as a “Brandeis Brief”. This is a document which does not seek to express any view as to the merits of the views of the parties to the test case, but informs the court of the consequences for the markets of alternative decisions which may be open to the courts.

There is also reason to believe that if a legislative remedy is contemplated, it may be possible to avoid the inaction which seems to follow upon recommendations for changes in the law formulated by the Law Commission, a statutory body with a general responsibility for law reform. The basis for this belief is the specialised nature of the Financial Law Panel’s remit, the economic importance to the nation of the London Wholesale Financial markets and the fact that the Panel will have government “observers” who, if convinced of the sense of the Panel’s proposals, will wish, and be in a position, to promote remedial legislation as a matter of urgency. The Panel will also be able to give the Government authoritative advice on the commercial consequences of legislation which the Government may of its own initiative be minded to promote, and on draft European Community directives.

So far as I am aware, there is no similar body anywhere else in the world. I wish I could tell you more about its working, but the concept is so novel and so recently conceived that at present it has only reached the stage of the Panel’s Chairman being appointed. He is addressing you at this moment. If in the years to come I again visit Malaysia, I will tell you how it has worked out. 🍀