THE FUTURE OF ARBITRATION IN THE CHANGING WORLD OF DISPUTE RESOLUTION

Sir Peter Cresswell

The focus should be on the users

Any discussion of the future of arbitration should focus on what the users are likely to want. Your Master was, as a banker, a user of dispute resolution services. Users comprise companies and individuals throughout the world who choose to settle their disputes by arbitration. Where two international companies regularly do business together differences will arise in relation to a particular contract. The interest of the two companies is best served by resolving the dispute as quickly and cheaply as possible, with a view to maintaining a stream of future business. Future graduates from universities will be familiar with arbitration and mediation as means of settling disputes. The users are going to become increasingly sophisticated in relation to dispute resolution, and rightly so. Insufficient attention is paid to the views of users. How many arbitration conferences have you been to which have largely been addressed by lawyers or arbitrators? The Charter of this great Company restricts members to "practitioners and proponents" of private dispute resolution. Thus enthusiastic users and supporters of private dispute resolution services qualify as members. How many members of the Worshipful Company of Arbitrators are users as opposed to arbitrators or lawyers?

London as a centre for dispute resolution

Major firms of solicitors and accountants are now global. It is unrealistic to expect a global law firm, with offices in major centres throughout the world, to make the case for London as a dispute resolution centre. Who in 2013 is promoting London as a centre for dispute resolution? The Lord Mayor (supported by the Company of Arbitrators and the Financial Services Group of Livery Companies) is no doubt a powerful advocate. The Company of Arbitrators is "determined to be at the leading edge of ideas and development, in ways which cross boundaries between different dispute specialisations in all fields."

London has many advantages as an arbitration centre. These include the following:

-English commercial law has been applied and followed in numerous jurisdictions. It provides a strong element of commercial certainty;

-There is a large pool of experienced international arbitrators based here and overseas who are readily available to conduct arbitrations here;

-There is limited interference by the English Courts. The approach of the judges here is to uphold arbitration;

-London is well placed in terms of geography and time zones.

One of the best ways of advancing the case for London is to ensure that litigation, arbitration and mediation services are available here, ahead of elsewhere, in terms of speed, cost and expertise. It is for the users to say how London is doing in these respects.

But perhaps more important than the case for London is the case for arbitration worldwide.

I will concentrate on the future of commercial arbitration, as opposed to Investment Arbitration. Investment arbitration has become a widely used field of international dispute settlement following the bilateral investment treaties concluded from 1959 onwards and the ICSID Convention of 1965. But this lecture is concerned with the future of commercial arbitration. The future of commercial arbitration must be seen against the landscape of developments in other forms of dispute resolution. So before turning to commercial arbitration I will mention the Courts, Mediation, Adjudication and Expert Determination

The Courts

There has always been a close link between the Commercial Court and arbitration. Former Commercial Court judges were instrumental in bringing about the 1996 Act. The Commercial Court Users Committee, with members representing the world of arbitration, provides a regular meeting point between two complementary approaches to dispute resolution.

The Commercial Court (and the Chancery Division) offer a first class specialist service. The service is prompt. Any judge who is more than three months behind with a judgment has to report himself or herself to the Lord Chief Justice and the Lord Chancellor. Three months is the time limit for major judgments. Judgments in other cases are delivered within about a month or less. A number of overseas Courts have issued Practice Statements or the like promising that judgments will be delivered in two to three months following the completion of a hearing. In my opinion the future and reputation of commercial arbitration is

dependent in part on awards being made in less time than that taken (or at least a similar time to that taken) to produce judgments in the Courts.

The Courts are particularly appropriate for certain types of dispute. Where a standard form contract is widely used in shipping, insurance or banking and a definitive decision is required as to the construction of a clause or clauses, users (who want commercial certainty for the future) can go the Commercial Court and ask that any appeals are fast-tracked, so that a definitive ruling is obtained from the Court of Appeal or the Supreme Court.

The Courts are again particularly appropriate in cases where the claimant seeks to recover the proceeds of fraud, particularly where the money has left the jurisdiction.

Where there is group litigation the Courts are again appropriate. Thus the Commercial Court, responding to changing commercial circumstances and needs has dealt over the years with major disputes of the day – disputes following the collapse of the soya bean market, local authority swaps, claims by Kuwait against Iraq following the first Gulf War, the Lloyd's Litigation, film finance, Equitable Life, the aftermath of credit crunch, the oligarch cases etc.

Sometimes market wide disputes are solved by the parallel use of the Courts and alternative dispute resolution. Thus in the Lloyd's Litigation the Courts determined points of general principle (e.g. the duties of members and managing agents) with appeals fast tracked up to the House of Lords and then a number of lead or pilot cases (in the LMX and long tail categories of case). The second (successful) attempt at a market settlement was assisted by an ADR panel under the Chairmanship of Sir Michael Kerr. The panel provided the market with an assessment of individual claims, syndicate by syndicate, in the light of the guidance afforded by decisions of the Courts on points of general principle and in lead or pilot cases. Thus the largest piece of civil litigation this

jurisdiction has ever seen was eventually settled by the Courts and ADR working side by side.

The Woolf and the Jackson reforms have brought about considerable improvements. It should be remembered however that the development of case management techniques (equally appropriate in the field of arbitration) originated in the Commercial Court.

But despite reforms access to justice is available to the rich and sometimes the very poor, but the majority of individuals cannot afford to litigate. The Jackson Report contained a comprehensive analysis of, and recommendations in relation to:

-legal aid;
-before the event insurance;
-after the event insurance;
-conditional fee agreements;
-third party funding;
-contingency fees;
-contingent legal aid fund or supplementary legal aid scheme.

The prospect of any wider legal aid is unrealistic in times of austerity. I have one suggestion to make as to how legal aid might be funded. The proceeds of crime in the UK, held here and abroad, extend to many billions. The government agencies charged with chasing these proceeds only succeed in recovering a small proportion of the total (millions not billions). The recovery of the proceeds of crime from here and abroad requires highly specialist expertise. If the services of leading law firms, barristers and accountants were used a far greater recovery could be achieved and put towards the cost of at least retaining the current levels of legal aid.

But whatever the results of the Jackson Report, it is clear that access to justice will remain imperfect. For this reason any contribution that alternative dispute resolution can make to an imperfect world is for the better. I will return to this subject below.

Litigation and arbitration funders are probably here to stay, but given the issues that surround this relatively new area of commercial activity, a decision of the Supreme Court on the principles that should govern such funding would inform both providers and users of such funding.

Mediation

The CEDR Fifth Mediation Audit of May 2012 did not cover community or family mediation and did not include the statutory ACAS service or the HMCS Small Claims Mediation Service. The Audit showed that the current size of the civil and commercial mediation market is in the order of 8,000 cases per annum. This represents a year-on-year increase of about 15% since 2010.A group of just over 100 individual mediators are involved in around 85% of the cases. Mediators reported that just over 70% of their cases settled on the day, with another 20% settling shortly thereafter, so as to give an aggregate settlement rate of around 90%.

The conclusion to the Audit struck a chord with me –

"…we should focus on working together to expand the size of the pie [a word I dislike], rather than fight over our respective market shares, but this has so far proven difficult to achieve as the field is still very fragmented, with a plethora of individual mediators and service provider organisations. We are also

fragmented in terms of our diverse views as to the future and governance of the profession."

Whereas it would be interesting to hear from users as to the future of mediation and the impact that mediation is likely to have on the future of arbitration, I suggest the following.

1. One of the primary functions of a solicitor representing a client in civil litigation or arbitration is to seek to negotiate an appropriate settlement with the solicitor for the opposing party, at the earliest appropriate stage. Mediation has a role if this primary means of achieving a settlement has failed.

2. There is far greater use of facilitative mediation than evaluative mediation. But facilitative mediation should be principled. It should not be a horse trade. I do not agree with those who, when training mediators, teach that any well trained lay mediator can mediate a complicated commercial dispute. Thus in my opinion a mediator should not take on a mediation in say a charterparty dispute, unless he or she has expertise in, and knowledge of, shipping from a background in the industry or in maritime law.

3. I repeat the words of the Audit –that the mediation "field is still very fragmented, with a plethora of individual mediators and service provider organisations". The Civil Mediation Council will continue to face a huge challenge in fulfilling the role of (to use its words) " the recognised authority in the country for all matters related to civil, commercial, workplace and other non-family mediation." However I am sure that the CMC, under its new chairman Sir Alan Ward, will respond to this challenge. A key protection for the user is that major firms of solicitors know the leading mediators and are able to select a mediator who is appropriate to the particular dispute. But this does not remove the need for some regulation.

4. My experience (derived from about 50 mediations) is that difficult questions arise in mediations which call for clear professional guidance. I give two examples. First, what is the duty of the mediator if one party reveals in private session that it has evaded tax or committed some other criminal offence? Second, how are the conflicts of interest that arise where there is a Conditional Fee Arrangement to be handled? The CMC has helpfully published two Guidance Notes "The obligations of mediators under the Proceeds of Crime Act 2002" and "Mediations, CFAs and conflicts of interest." But more needs to be done to provide professional guidance to mediators. As an aside (as a member of the Professional Conduct Committee of the Chartered Institute of Arbitrators) I am struck by the fact that an arbitrator or mediator who is a member of the CIArb is subject to the CIArb professional conduct regime, but an arbitrator or mediator who is not a member of the CIArb is not subject to this regime. Many arbitrators and mediators are, of course, members of other professional bodies. But this is a subject which calls for further examination.

5. I think that the steady increase in the use of mediation will continue. It will be helped by the fact that future graduates from universities will be increasingly familiar with the use of mediation (as an alternative to litigation or arbitration) as a means of settling disputes. The Company of Arbitrators is to be congratulated on its (Third) Mediation Skills Competition for UK Students 2013, won by the Team from University College London. The UCL Team went on to take part in the 8th ICC International Commercial Mediation competition last month. The steady increase in the use of mediation is to be encouraged. It is in the interests of users. I doubt whether this trend will have a significant

impact on the future of arbitration. In for example the world of shipping and commodities, where there is a strong culture in favour of arbitration, the impact on arbitration is likely to be slight. But the great arbitral institutions and the wider arbitration community should never see mediation or other methods of dispute resolution as the enemy of arbitration.

Adjudication

Adjudication under the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and. Construction Act 2009) has for the past 13 years or more been the predominant means of deciding 'first tier' disputes in the construction industry.

Another development in the field of construction has been the increased use of dispute boards, also known as dispute adjudication boards or dispute resolution boards.

I take by way of example disputes under FIDIC Red and Yellow Book contracts. Disputes under such contracts should be referred to a dispute adjudication board. A DAB can be created at the start of the project or when a dispute occurs. It is an informal process which encourages party involvement and recognises the need for speed. The contracts provide that a DAB's decision will become final and binding 28 days after it is issued, if the parties do not give a notice of dissatisfaction. Where a notice of dissatisfaction is given, the parties are obliged to attempt the amicable settlement of their disputes. Unless such disputes are settled amicably, any dispute in respect of which the DAB's decision has not become final and binding will be settled by international arbitration.

Expert Determination

Expert Determination is a private process in which the parties agree that an independent technical expert will make a binding decision on technical or legal issues. The expert normally has power to base his or her decision on his or her own enquiries and expertise. The parties may choose to qualify the binding nature of the decision, for example with words such as "in the absence of manifest error". Expert determination is particularly suited to disputes as to valuation or of a purely technical nature across a range of sectors. QC clauses (providing for a binding decision of a QC) are sometimes used in insurance and other contracts. Expert Determination should be more widely used.

I turn to

Arbitration

Lord Donaldson once said "The shipping and commodity trades of the world are unusual in that they do not regard … arbitration with abhorrence. On the contrary, they regard it as a normal incident of commercial life – a civilised way of resolving the many differences of opinion which are bound to arise …As a result, a domestic arbitration service has grown up in London, which serves the shipping and commodity trades on a world-wide basis…. the arbitrators are not regarded as outsiders."

More maritime disputes are referred to arbitration in London than to any other place where arbitration services are offered.

Historically London has been (and remains) a leading arbitration centre for other types of business disputes - for example insurance and reinsurance,

derivatives, construction, oil and gas etc. But this is a very competitive market. It is of course for the users to decide where they wish their disputes to be determined and by reference to which system of law. London is today in competition with numerous other centres –New York, Paris, Switzerland, China, Japan, India, Hong Kong, Singapore to name but a few.

The advantages of arbitration include:

- The parties can choose who is to be their arbitrator.
- The arbitral process is private and confidential to the parties.
- An arbitration may be held at any convenient place and time.
- Arbitration procedure is flexible and can be tailored to the dispute.
- An arbitration may be administered by a leading institution.
- An award can be enforced in any country that has adopted the New York Convention

The disadvantages include:

- The costs of the arbitrator(s) have to be met.
- The award may not always be available as quickly as in Court proceedings.

Whereas it would be far better to hear from users as to what is necessary to secure the future of arbitration, I offer the following suggestions and comments in support of the future of commercial arbitration.

1. **Rules** The great arbitral institutions continue to update and revise their rules. In doing so particular emphasis should be placed (and no doubt is placed) on the views of users. A number of institutions have introduced expedited forms of process.

2. **LCIA Initiatives** The LCIA initiatives

   –LCIA India

   -Dubai IFC-LCIA Arbitration Centre and

   -LCIA-Mauritius IAC

   are to be welcomed.

   I prefer to think of the LCIA as the 'CIA' with its institutional headquarters based in London.

3. **Case Management** The ICC Report on Techniques for Controlling Time and Costs in Arbitration 2007, although a step in the right direction, could have gone even further in stressing the importance of effective arbitration management by the arbitrator(s). In my opinion proactive arbitration management is critical to the future of arbitration. Case management is highly developed in the Commercial Court. Proactive arbitration case management (tailored to the advantages of arbitration) by an experienced tribunal can reduce the time and cost of an

arbitration dramatically. This is a subject which deserves a lecture in its own right. In many arbitrations one party knowing that it is likely to be the paying party, will have no incentive to progress the case expeditiously. The tribunal needs to have a clear understanding of the issues so as to assist the parties to devise procedures that will deal with the particular issues in a manner appropriate to the individual issue. Directions should not be standard. They should be tailored. There is everything to be said for having senior representatives of each party at the first CMC. The approach of the tribunal should be to say to the parties – "This case needs to be managed by directions so that it is completed within ….months without incurring any unnecessary costs. How are we going to achieve this? Please confirm that the principal issues are A, B and C. Is it necessary to go into issue D? The tribunal is likely to be assisted in deciding issue E by production of the contemporary documents passing between X and Y only. Expert evidence is not likely to assist the tribunal with issue F, but it will assist with issue G, etc etc."

4. **Production** It is important to maintain the distinction between production of documents in arbitration and discovery or disclosure of documents in litigation. If this distinction is not maintained, one of the key advantages of arbitration will be lost. This is particularly important today when documents are held electronically. Under the ICC Rules issues such as whether and how much production of paper or electronic documents will occur are left up to the parties and the arbitrators. The IBA Rules of Evidence provide for the production by each party of

all documents on which it intends to rely and for a party's right to request the production of a specifically identified document or a narrow and specific category of documents that are relevant and material. The ICC Report 'Techniques for Managing Electronic Document Production…' in my opinion (although helpful) inevitably involved a compromise between the narrower approach to production in Europe and the wider approach in the United States. In most arbitrations the parties are able to manage production of electronic documents without help from the tribunal, but where there is difficulty there is no substitute for the tribunal managing production by way of precise directions, focussing on the issues in the case and relevance and materiality.

5. **Experts** I have firm views on the role of expert witnesses stemming from what I said on this subject in the 'Ikarian Reefer'. In arbitration it is for the tribunal, when giving directions allowing expert evidence, to underline the role and duties of expert witnesses. It is elementary that expert witnesses should understand that they are not advocates for the parties. They are on the side of the tribunal, to assist the tribunal in areas of expertise outwith the knowledge of the tribunal. I favour directions which ensure that the experts consider the same list of questions by reference to the same set of documents and other materials. This approach serves to narrow the issues. Otherwise the expert reports may be like two ships passing in the night.

6. **Delay in awards** According to the 2012 Berwin Leighton Paisner Report "Perceived Delay in the Arbitration Process", 66% of respondents indicated that they had at some time within the past 5 years felt dissatisfied about the time they had to wait for an award. I entirely agree with the 85 % of respondents who felt that rewarding the tribunal for producing its award expeditiously should not be necessary! Arbitrators, when giving directions as to the timetable, should include a deadline for the delivery of the award. This should be no longer than (and preferably shorter than) the time in which a Court judgment would be delivered. This will only happen if arbitral institutions obtain an undertaking from arbitrators to reserve the necessary award writing time after a hearing ends.

   In my opinion, save in the most exceptional cases, it is undesirable to allow the parties weeks to prepare final written submissions. There is a simple reason for this. Anyone who has written an award knows that it takes longer to produce the award if the tribunal has to come back to the case after an interval of several weeks.

   If I was a user I would want to be certain that the award was written by the tribunal and not by a Secretary.

7. **Med-arb** Some contracts include multi-tiered dispute resolution clauses. A multi-tiered clause may provide for informal negotiation, then formal mediation (and if this fails) arbitration. Whereas med-arb may be appropriate in a dispute resolution

clause, in my opinion the same person should not act as mediator and arbitrator.

8. **Settlements** The ICC Report on Techniques for Controlling Time and Costs in Arbitration sensibly recommended that

"The arbitral tribunal should consider informing the parties that they are free to settle all or part of the dispute at any time during the ongoing arbitration, either through direct negotiations or through any form of ADR proceedings."

A settlement should be viewed as a success by users, their representatives and arbitrators.

9. **Conflicts and challenges** As a former Chairman of the Bar of England and Wales I consider that the English Bar must (as it always has in the past) adapt. The international view is that it is undesirable to have an arbitrator and an advocate from the same chambers. More generally the fact that 'Arbitration International' published a "Special Challenges Issue" reflects a worrying trend towards an increased number of challenges. At the same time it is a reminder to arbitrators as to how circumspect they must be.

10. **Mediation not the enemy of arbitration** I repeat that the great arbitral institutions and the wider arbitration community should never see mediation or other methods of dispute resolution as the enemy of arbitration. User led developments are likely to result in greater use of a two stage approach to dispute resolution, for example conciliation or mediation followed by arbitration. The users (properly advised) will tailor their dispute

resolution clauses to their particular contract. Institutions and the market should embrace such developments. An approach which says “we only do arbitrations” will in my view prove to be short sighted.

11. **Gateway for appeals** Some years ago concern was expressed that the gateway for appeals under the Arbitration Act 1996 was too narrow (or being applied too narrowly by the Commercial Judges), with the result that there was (it was said) a dearth of new jurisprudence in the field of maritime law. I would be against revisiting the gateway. There is a need for finality in arbitration. If the users elect for arbitration they do so knowing how narrow the gateway is.

12. **Expansion into new fields** Whereas arbitration will continue to flourish in the traditional fields referred to above it needs to move into new fields. The list of IDRS managed ADR services is extensive. Some of the more heavily used schemes include:

    -the Travel Association Arbitration Scheme (ABTA);

    -the Funeral Arbitration Scheme;

    -the Motor Industry Repair Arbitration Scheme;

    -the Renewable Energy Association Conciliation and & Arbitration Scheme;

    -the Football Commissions and Tribunals.

    By way of example the ABTA Scheme enables customers and ABTA members to resolve disputes in a low cost, private and efficient way, without having to go to Court.

I suggest that there is considerable opportunity for expansion of such schemes in the field, for example, of consumer redress. With an increasing amount of retail and other business on line, there is scope for further schemes tailored to the requirements of such business. In some cases new schemes may involve arbitration or arbitration if conciliation fails. The arbitration may be on paper only and conducted for a fixed fee. There is a strong public interest in the expansion of such schemes, and the arbitration community should see such expansion as broadly supportive of arbitration generally and a small contribution to assisting greater access to justice.

These comments are not confined to England and Wales. They apply internationally. Greater attention will (and should) be paid in the future to techniques for resolving cross border disputes in respect of online business. EBay for example has its own Dispute Resolution Centre. New schemes may include (if conciliation fails) fixed price arbitration or mediation, on paper.

13. **CDP** I would like to see the City Disputes Panel brought back to life. There is (I suggest) no shortage of disputes or issues in the City which would benefit from the multi-disciplinary model which the CDP offered in the past. I will cite an example of the benefits of this model. The City Disputes Panel was approached by one of the major retail banks. A foreign exchange business that maintained accounts with the bank had folded. The business had operated by bulking up smaller orders and taking a

turn on the rate, thus offering consumers a better rate than the high street. The clients of the business - individuals planning to emigrate, small businesses making asset purchases and small and medium enterprises involved in regular trade – were left as unsecured creditors. The poor state of the company's records made it difficult to identify and quantify individual amounts owed. Many of the creditors claimed that the bank had failed properly to regulate the company's accounts and its activities. The bank argued that it had no such duty. There were over 500 potential claimants. The CDP was asked to design and establish a scheme for the review and determination of the claims. The rules of the scheme were prepared with the intention of providing a simple claims procedure and a speedy method of determination. All the claimants were invited to participate in the scheme and over 300 did so, including a substantial number who were part of an action group. The CDP appointed Lord Browne-Wilkinson, a retired former senior law lord, to chair the Review Board that would determine the claims. He was joined by a retired banker and an audit accountant. The review board held a three day hearing to resolve a number of points of law. The majority of the claims review process was conducted through written submissions. After the points of law had been dealt with, the Board was able to issue key points of determination, which allowed most of the claims to be resolved by agreement between the parties. About 10% needed to be formally determined by the Review Board – an exercise that took less than two days. The entire process, from opening the scheme to final closure, took just 18 months. Lord Browne-Wilkinson, writing in *The Times* after the scheme closed,

indicated his belief that the efficiency of the multidisciplinary tribunal model, with the required expertise available within the tribunal, was key to the success of the scheme and the speedy resolution of the many claims.

14. **CIArb** The worldwide educational role provided by the CIArb should be recognised, supported and advanced.

15. **Arbitration will grow in a global setting** Business is increasingly global and cross border. It is obviously attractive to businessmen to provide for settlement of disputes in a neutral venue with independent arbitrators with relevant expertise, applying a system of law that is certain and respected. International arbitration should grow in tandem with the globalization of trade and national economies.

Conclusion

It is a privilege to be an arbitrator. The role of an arbitrator is a professional not a business role. It is elementary that an arbitrator must show independence, integrity, impartiality and expertise. It is important to remember that any award will affect businesses and people. Arbitration must serve the users. I suggest that whether our interest is as arbitrators, advocates, advisers or users, we should try and give something back to arbitration. The world of mediation is too fragmented and the world of arbitration should not drift in this direction. There is a need to bring

together and coordinate all those who provide arbitration services from London.

Those who make a living from dispute resolution need to be more alive to, and responsive to, the needs of the users. Users today are better informed than in the past. With the internet and other information services users can look for alternative and better solutions, test the quality of particular forms of dispute resolution and share their concerns. Users expect speed, efficiency, cost effectiveness and certainty. Users want advisers who understand and have full regard to the users' commercial needs and who give realistic advice. Arbitrators, advisers, institutions and cities/countries that understand and focus on delivering the needs of users will flourish in the future.

So I finish where I started. The focus should be on the users.

I have no doubt that this great Company, under its current Master (a former user), will continue to strive to ensure that arbitration and other means of alternative dispute resolution measure up to what the users need and expect.