COMMENTS ON ARCHIVES BY A USER

1. My work, past and future, on the history of dispute resolution, relies on archives of one sort or another. Good history depends on finding and interpreting the best evidence, primary sources rather than discussions of other historians, however distinguished.

2. A process which included mediation and arbitration [M/A] has been generally practised in England and Wales from time immemorial. Litigation came later, with the state, as a particular alternative. There is ample evidence to show that, at least until the end of the 18th century, the state, as well as other communities, relied on M/A to deal routinely with most kinds of disputes, e.g. in the 16th century Elizabeth I's legal aid schemes, especially for widows; in the 17th Nathaniel Bacon, who accepted all kinds of referrals from the Government and the courts; in the 18th JPs' notebooks.

3. If legal history were about no more than development of law, it might be found in the law reports, as a process of constant refinement, each case building on precedent and leaving it better. That fits nicely the assumptions of social Darwinism, society evolving as species do. Whig history, even Marx, got that wrong. The evidence is against their assumption that we organise ourselves better now than they did in the past. Sometimes they did it better then – fairer, faster, cheaper, more accessible, inquisitorial and, most important, peacemaking, and with provision for the poor and women.

4. What do legal historians have to say about developments in dispute resolution in the last four centuries? Where better to start than with Holdsworth *History of English Law*, still the first place even non-legal historians go to; e.g. XII p187: 'In medieval England the courts did not look very favourably on a practice which tended to diminish their jurisdiction'. That misled non-historian Konrad Zweigert and has become gospel: 2nd edn p412: 'The Common Law has always been very suspicious of arbitration clauses'. My 'Myth of Judicial Jealousy' (1994) 10 *Arbn Intnl* 395-406 showed that to be simply wrong. *HEL* p188: 'YBB say an award could not operate as a conveyance'. True. But two pages later that has become: 'the rule that there could be no arbitration as to the title to real property'. I could produce hundreds such arbitrations, which the parties knew would give as good a title as any. I'll explain how if we have time later. *HEL* sinks deeper into error, p189: 'as a general rule criminal cases could not be referred'. I could produce thousands. I mean that, from earliest times to the end of the 18th century Routine, private and public M/A.

5. The best example of a land dispute is from a negative exception, rather than the positive thousands. Lady Anne Clifford, born c1590, was the only surviving

child of the Earl of Cumberland, who died when she was 15, leaving all his land to his brother, or so he thought. But he had only a life interest and was succeeded by his heir, Anne, who never gave up the fight to keep what was hers by Common Law, confirmed by a judgment of the Court of Common Pleas. At 19 she married the Earl of Dorset. From the start her family and her husband tried to get her to transfer her rights to her uncle. James I did all he could to force her to accept his arbitration. He browbeat her and the Archbishop of Canterbury called down the wrath of heaven. But Lady Anne Clifford - she always kept her own name – faced them down, as she did Cromwell in his turn. Every move is recorded in her diaries and a mass of other surviving documents. What a story! Unnoticed by Holdsworth or any other 'legal historian'. Even Antonia Fraser can claim that a married woman could not at Common Law own land – or even give her husband a birthday present. Tell that to little Annie Clifford who died at 86 enjoying legal ownership of most of Cumbria and half of North Yorkshire!

6. History shows what has been done, not that any of it is replicable. It can say nothing about what should be done. But if something can be shown to have worked well in the past, lessons may be learned. So historians must get it right, relying on the best evidence – usually documents in archives, of which I am a fortunate and grateful consumer.

I try to ignore the ringing jibe which Plautus has a soldier throw at a banker - and bankers were good for a laugh even 2,200 years ago:

*Stultior stulto fuisti si tabellis crederes* Plautus *Curculio* 551

You've been stupider than stupid, if you intend to rely on written documents!

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