THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

JUSTICE FOR HIRE: HAVE GAVEL, WILL TRAVEL (OR, ARBITRATORS AND THE JUDICIAL DUTY)

ADDRESS TO THE ANNUAL DINNER OF THE DIPLOMA IN INTERNATIONAL COMMERCIAL ARBITRATION

AUSTRALIAN BRANCH OF THE CHARTERED INSTITUTE OF ARBITRATORS

LAW SOCIETY OF NEW SOUTH WALES, SYDNEY

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1 I thought I might say something to you tonight about the art of being judicial. It is my understanding that many, if not most, of you who have completed the International Commercial Arbitration Diploma now practice as arbitrators. In effect, you have become private judges for hire. I confess that the term "private justice" has always brought to my mind the American Frontier – the old Wild West. I imagine an arbitrator's notice in the Tombstone *Daily Examiner* that reads: "Justice for Hire… have gavel, will travel".

2 This is not to suggest that arbitrators are cowboys. To the contrary. However, the realm of international commerce *is* a final frontier of sorts. Growth and development drive markets into uncharted territories where language and cultural barriers pose unique challenges and laws conflict. There is no municipal government responsible for public services such as dispute resolution. You, the arbitrator, are the itinerant judge for hire. Having answered the call of the quarrelling frontiersman to settle their disputes, you roll into town on the Santa Fe Express, and restore order and civility to the wide-open plains.

3 This probably stretches the metaphor past endurance; forgive me. There is a paucity of good arbitration anecdotes. The point I am trying to make is that the role of the international commercial arbitrator is inherently, and increasingly, judicial.

4 Of course, there remain important differences between arbitrators and judges; party control over the selection and appointment of the arbitrator is one obvious example. However, the similarities between the two roles are increasing of late, and extend beyond the fact that the qualities essential to good adjudication are common to both. The explosive growth of the arbitration industry in the last 50 years, as well as recent changes to arbitration laws and practice, challenge some of the basic distinctions between private arbitration and public justice. That arbitrators now play an important, perhaps even integral, role in the justice system, makes identifying the essential qualities and obligations of arbitrators a matter of public concern.

5 This concern is ever more pressing in international commercial dispute resolution, because there arbitration is the rule, not the exception. The primary avenue for asserting and protecting rights in dispute in international commerce is *private* adjudication. Each of you is a bearer, therefore, not only of dispute resolution, but also of primary justice. You consequently have a duty to conduct yourself judicially, and this duty is founded, or at least should be founded, on principles broader than the contracts that bind you and the parties to the dispute at hand. The foundation of this obligation, which I will call the judicial duty, and the art of discharging it by being judicial, is what I will address in the time that remains to me this evening.

A Short History of Private Justice

6 Once upon a time, the notion of "private justice" was anathema to the English Justice System and its descendants. In 1609, Coke, ever the champion of his own importance, held that an arbitration agreement was "by the law and of its own nature countermandable".[1] Two-hundred years later the United States Supreme Court referred to an arbitration tribunal as

[1] *Vynior's Case*, 8 Cohe. Rep 81b, 82a, 77 Eng Rep 597, 599 (England, King's Bench), cited in Greenberg et al. *International Commercial Arbitration: An Asia-Pacific Perspective* (2011: Cambridge UP), 5.

"a mere amicable tribunal", the decisions of which were viewed as essentially non-binding and irrelevant to the court's task.[2]

7 Of course, once upon an even older time, private arbitration was the norm. It significantly pre-dates the English justice system. Arbitration was prominent in ancient Egypt, China, Greece and Rome, and was the preferred method for resolving civil disputes in Europe during the Middle Ages. International sovereign disputes were frequently arbitrated by third-party heads of state. In fact, the most popular international arbitrator of the Middle Ages was the Pope. (Having said that, I am not sure I can include the Pope in my history of independent private arbitration, given that his awards came down with divine authority. Although "Divine gavel: Will travel" does have a nice ring to it).

8 Despite the English System's historical scepticism, individuals, commercial entities and sovereign states consistently sought the recourse of private arbitration to settle their disputes, even when enforceability in the courts was not available. The reasons why will be no mystery to the people in this room, and I will not waste your time waxing lyrical about the benefits of private arbitration. Except to say that party control, efficiency and confidentiality are but some of its attractive qualities. Also flexibility, industry expertise and neutrality. I hesitate to add "cost", because arbitration is not always cheaper than traditional court adjudication, but often the costs can be more easily anticipated and controlled than in domestic litigation. So, yes, let us add cost. That brings the advantages of arbitration to: party control, efficiency, confidentiality, flexibility, industry expertise, neutrality and cost. (What did the Romans ever do for us, you ask?)

9 Thus, even when enforceability of arbitral awards wasn't on offer under common law, commercial parties still often opted for arbitration over the courts.

[2] *Hobart v Drogan* 35 US 108 (1836) (US Supreme Court) at p 119, cited in Ibid.

10 Nowadays, not only is enforceability part of the deal, arbitral awards may be enforced in the state courts of most countries throughout the world, and the bases on which an award can be appealed or overturned are extremely limited. This is where things start to get interesting.

11 When you add enforceability and finality to the "What did the roman's ever do for us?" list of arbitration's attributes, you get an extremely attractive dispute resolution mechanism that is no longer the alternative to litigation, but the primary means of resolving international commercial disputes. You also get a mechanism that is starting to look very judicial; or rather, you get an arbitral tribunal wielding power that walks, talks and quacks like judicial power. And that changes the ball game.

12 Enter the judicial duty. Before I tell you exactly what I think this duty entails (and I will get there, I promise) I should say something about existing arbitrators' duties, and how they differ from judges' duties.

Duties

13 As you know, arbitrators already have a multiplicity of duties. Duties of disclosure, impartiality and independence, of fairness, and in many jurisdictions, duties of care. These duties are imposed indirectly by the underlying contracts or governing procedural laws of the arbitration. The model law also imposes duties on arbitrators directly, including duties of disclosure, to treat parties equally and to allow parties a full opportunity to present their cases. Such duties have the force of law (subject to arbitrator immunity in cases of due care), and I will therefore refer to them as "hard duties". They have parallels to judicial duties in that a lack of procedural fairness or perceived bias by the arbitrator may warrant setting aside the award, just as this would found a ground of appeal in a court of law.

14 Arbitration associations also have codes of ethics, which I will call "soft duties". Most of these refer explicitly to duties of integrity and fairness, disclosure and impartiality. However, while violation of such rules may

result in sanction or expulsion of the arbitrator from the association, they do not form part of the rules of any arbitration, they do not have the force of law, nor do they provide any grounds for judicial review.[3]

15 There is no direct equivalent to these soft duties for judges in common law jurisdictions – the procedure for sanctioning a misbehaving judge is extremely and justifiably arduous and of constitutional proportion. Yet, for almost every judge, the unspoken code of judicial conduct is the highest law. It includes all of the hard and soft duties I've already mentioned, and also something more. Judges have a duty beyond impartiality and fairness to the parties in the case immediately before them. They have a duty which stems from the very foundation and justification of their power: the rule of law. Judges have a duty to conduct themselves in a way that at all times upholds, protects and advances the rule of law.

16 How does this duty manifest itself in judicial conduct, in addition to the hard and soft duties I have already mentioned? It is embodied in a simple maxim so familiar that we often take it for granted: The notion that justice need not only be done, but be seen to be done. The practical application of this maxim is often difficult to achieve in arbitration, where the confidential nature of proceedings prohibits the publication of reasons. However, another method of encouraging the *perception* of justice which can be achieve directly through interaction with the parties, was put forward by the Vice-Chancellor of the UK High Court, Sir Robert Megarry. In a 1978 address on the "workings of the judicial mind", he said:

> Sometimes I ask students to say whom they consider to be the most important person in a courtroom. Many pick the judge; others give a variety of answers. Once one even opted for the usher, without being able to explain why. My answer, given unhesitatingly, is that it is the litigant who is going to lose. Naturally he will usually not know this until the case is at an end. But when the end comes, will he go away feeling that he has had a fair run and a full hearing? Some litigants, of course, are so unreasonable that nothing will satisfy them, even if they win. But take the reasonable defeated litigant (you will all have known many of these), and see whether he feels that he has had a fair crack of

[3] See for example Chartered Institute of Arbitrators *Code of Professional and Ethical Conduct for Members* (October 2009).

> the whip. One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process.[4]

17 While Sir Robert's concern is, at first blush, the losing litigant, it is more fundamentally the *appearance of justice beyond the courtroom* – a system in which even disappointed participants concede the fairness and justness of the process.

18 In this respect, arbitrators' duties have traditionally differed from judges. Arbitrators have owed duties only to the parties bound to them by contract, and, at a push, to the professional associations with which they affiliate. Arbitrators have not owed duties at large. But this is changing.

Being seen to be done

19 In 2004, the preamble to the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes was revised for the express purpose of reflecting the increasing use and influence of international arbitration. It now states that:

> the use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the *system of justice* on which our society relies for a *fair determination of legal rights*. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as the parties. (my emphasis)

20 In 2006, the London Court of International Arbitration announced a landmark decision to publish its reasons for decisions on challenges to arbitrators. It did so expressly for the purpose of providing guidance on the subtle and challenging ethics of impartial international arbitration.[5] Following this decision, the esteemed international arbitrator Charles N Brower observed that "the more intangible, but equally important, service provided by such publication is public reassurance as to the fairness and

[4] The Hon Sir Robert Megarry, "Temptations of the Bench" 1978 16 *Atlanta Law Review* 406 at 410.
[5] William Park, President of LCIA, in interview with Annalise Nelson, Klewer Arbitration Blog, 23 November 2011: www kluwerarbitrationblog.com.

legitimacy of the decision-making of arbitral institutions themselves."[6] Legitimacy through transparency is extremely difficult to achieve in a system in which confidentiality is a valuable, even essential, commodity. The publication of such procedural decisions by arbitral institutions may be an ideal way to walk the fine line between party confidentiality and procedural transparency.

21 Finally, almost all arbitration laws, rules and codes of ethics have now adopted an objective standard of impartiality for prospective arbitrators: an arbitrator whose impartiality would be questioned by a reasonable third party is prima facie disqualified from acting. This is to be contrasted with a subjective standard concerned only with partiality in the eyes of the parties. The adoption of the objective standard thus demonstrates an increasing awareness of and concern for the *appearance* of justice, not merely the subjective experience of the parties.

22 As arbitration becomes an integrated part of the justice system, and in the international commercial realm, establishes itself as the *primary* justice system, so public faith in and recognition of the fairness and legitimacy of arbitral processes and institutions becomes essential to faith in the wider justice system, and ultimately to the strength of the rule of law itself. Thus, I suggest, your duties as arbitrators now extend that extra measure to the judicial duty to be concerned with the appearance of justice. This is not only because it will enhance your reputation as an arbitrator and strengthen your industry (though, these are of course good ends in themselves) but because you now play a role in ensuring the strength of the rule of law internationally. That is no small thing.

23 It is, of course, not at all radical to suggest that arbitrators possess judicial qualities. The quasi-judicial nature of arbitrators has long been recognised implicitly in the laws of most common law jurisdictions which extend partial judicial immunity to arbitrators. More recently, the High Court of this

[6] Charles Brower, "Keynote Address: The Ethics of Arbitration: Perspectives from a practicing International Arbitrator" 2010 5 *Berkeley Journal of International Law Publicist* 1 at 20.

country stated that it is going too far to conclude that performance of the arbitral function is purely a private matter of contract.[7] Further, I do not doubt that all of you already hold yourselves to the highest ethical and moral standards of conduct, and I do not for a moment wish to imply that you have until now been doing anything less. My intention in suggesting a new "judicial duty" is simply ask you to so conduct yourselves with a mind, not only to justice as between the parties before you, but to the perception of justice beyond them. As confidentiality will in almost all cases prohibit the publication of reasons, I suggest that arbitrator's may discharge their judicial duty by adopting the approach of Sir Robert, and regarding the party who is to lose as the most important person in the arbitral room.

24 The alternative is that the rapid growth of the arbitration industry will be its own undoing. It is inevitable that as more parties arbitrate, so more disappointed parties will seek remedies in the courts. This is unavoidable. However, if the number of awards overturned on grounds of unfairness or bias also increases, future parties will question whether to include an arbitration clause in their commercial agreements at all. Further, courts will more readily interfere in arbitration proceedings. The High Court delivered what was perhaps a subtle warning last year when the majority stated that parties to arbitration proceedings have not given up the right to engage judicial power, and that the arbitration process is not wholly divorced from the exercise of public authority.

25 Even if the *proportion* of court vacated awards remains the same in relation to the number of parties arbitrating, the increasing number of court ordered remedies will create a *perception* of systemic failure and injustice. This is not fair to the vast majority of arbitrators whose conduct is beyond reproach, but it is the reality. As arbitration grows in the public conscience, the repercussions of individual failures to do justice will be felt across the entire industry. Standards of conduct and judicial duty are no longer just

[7] *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 at [20].

important, therefore, they are absolutely and unqualifiably essential to the success and future of the arbitration industry.

26 Now, this has all been a little bit heavy, and it is always good manners to say something nice about your host, so I will close my evening's address by reading to you from a recent purportedly scholarly analysis of the Vocation of International Arbitrator which describes you thusly:

> International Arbitrators are exceptionally talented individuals. Most speak multiple languages. They boast rich and multi-national educations from the world's most prestigious universities, and have vast experiences working in the highest echelons of diverse legal systems. Their multi-faceted, multi-cultural legal training is often supplemented by technical or industry specific expertise, and their cumulative credentials are frequently parlayed into professorships and enhanced by rich scholarly research. This profile depicts the elite individuals who adjudicate virtually all international commercial and trade-related disputes.[8]

27 If I might add, you are also all exceptionally good looking. Thank you for letting me bend your ears this evening. Good night.

[8] Catherine Rogers, "The Vocation of the International Arbitrator" (2004-2005) 20 American University International Law Review 957 at 958-959.