

Madam Minister, distinguished guests, ladies and gentlemen.

It's a great pleasure to speak at this 6th occasion of the presentation of the Bond University lecture in honour of Sir Gerard Brennan. I suspect I was invited at least partly because of my association with the Alliance Française in Brisbane. In fact I offered to speak in French out of politeness to our guest speaker, Mme Christine Lagarde. Email doesn't quite convey that certain *je ne sais quoi* accompanying such an offer. The tongue firmly wedged in my cheek wasn't visible – even to Margaret, my wife – let alone to Professor van Caenegem's secretary. So I sighed internally and assured them that, yes, I would speak in English.

Eh bien ...

An alternative I didn't canvass with anyone was a recitation of some extracts from the d'Antin Manuscript, that rediscovered French classic illustrating the close links between medieval French and, believe it or not, English nursery rhymes. It's now out of print but was published by Penguin in 1967 under the title "Mots d'heures, Gousses, Rames" – difficult to translate colloquially but meaning, literally, "Words of Hours, Pods, ...". "Rames" is a little harder to translate in context, perhaps "oars" or "paddles". The overall effect is a trifle perplexing but I suspect you will get the idea soon. Let me show you the cover first. And then I'll show you the first page of the text ...

Let me read the first poem for you to see if you get the idea ...

And now the second ...

You may still be perplexed. Perhaps I can ask Mme Lagarde to recite the first one too. I'm sure her old French sounds much better than mine.

...

Now, if you haven't quite cottoned on to the subtext yet, listen to the second poem once more – again through Mme Lagarde.

...

For those who still haven't seized the point let me give you the received version of the original verses ...

And before I leave this topic let me go back to the name of the book and ask who can translate it colloquially now ...?

So you can see that I've almost kept my promise to speak in English. I've also succeeded in asking a sophisticated French politician to recite "Humpty Dumpty" and "Old King Cole" to a serious and attentive audience. As we lawyers sometimes like to say – "Context is everything".

I was a trifle apprehensive when I was asked to make this speech. What could I say that was even vaguely humorous about a French foreign trade minister tasked to speak about "Law as an incentive for attractiveness to foreign investment and performance for globalisation"? When I discovered that she was an eminent lawyer and sometime president of Baker & McKenzie worldwide I began to relax. Her world view would surely be compatible with mine. She would be used to judges.

When I pursued my inquiries further I came to realise that she had been dealing with judges from her youth and assessed their foibles subtly and with a charming degree of French sophistication. Her logical approach to life is tempered by the realisation that judges too can be subjective, even affected by the struggles of influence – something that has annoyed her but from which she learned one of life’s lessons – that life is not always just. She has learned how to protect herself against perceived injustice. In fact she has reached that stage of enlightenment – even maturity - which appreciates that judicial arbitrariness need not be perceived as either discriminatory or dishonest. If only the local press were so charitable!

How did I discover this? If you are perceptive you may have realised that I was then translating loosely and clumsily from French – from the pages of Web Synchro and the popular journal “Toute la Natation”! Where else?

What, you may ask, is Web Synchro? Why a website in French devoted to synchronised swimming – which incidentally is full of the excitement generated by the impending world swimming championships in Melbourne, starting in a bit over a week.

Why was the Minister being philosophical about judges in that journal? Because, from her youth, she has viewed the world from an unexpectedly different angle – the bottom of a swimming pool – the domain of the synchronised swimmer. She competed at national level in France and obviously learned to take the rough with the

smooth from what Sir Anthony Mason, another of our retired Chief Justices, used to call the real judiciary - the dispensers of sporting justice.

How appropriate then for her to speak on an occasion that honours an Antipodean judge – viewed from down under – if you’ll forgive me.

Sir Gerard Brennan has been a significant figure in Australia’s legal world for all my professional life – leading silk, judge, president of the AAT, judge of the High Court and then Chief Justice of Australia. Those professional milestones were only part of the story. I knew him well before he achieved such prominence. Our families were friends, he a younger protégé of my father at the bar, and, with his family, a regular visitor to our house. He was always regarded as a very powerful and effective advocate, particularly before criminal juries in his youth, and before the highest appellate courts by the time of his own elevation to the bench. He became a judge of rare insight and philosophical depth who continues to have a significant influence on the development of the law here. I remain friends with a number of his children, in particular Fr Frank Brennan SJ and Madeline Brennan of the Queensland Bar.

It’s a pleasure and an honour for me to be able to speak at this function named for him.

Thank you, Minister, for coming to speak to us and we hope that your work proves fruitful in fostering more effective trading links between France and Australia. Both our countries are signatories to the Vienna Convention on the International Sale of Goods and a number of other treaties used in international trade. Australia has also,

for example, been involved, with many other countries including France, in the development of the UNIDROIT principles of international commercial contracts which may be used to interpret or supplement international law instruments and we may well be affected by attempts to harmonise European law through projects such as the statement of codified *Principles of European Contract Law* intended to apply in the EU, including the United Kingdom.

Although, our legal systems are different, they are not incompatible. About a year and a half ago I had the rare pleasure of attending a summer school on comparative law conducted at the Sorbonne by Cornell University using professors from both institutions. One of the lecturers perceived me as a strong adherent of the common law. He was an American lawyer with a French mother and possessed of a deep knowledge and respect for French law too. As he said to us then about the civil law as it is administered in France: go outside onto the street and observe how people behave, how they queue politely in the shops, how the traffic obeys the rules – and I hasten to say that it does – on the whole!

Respect for the rule of law is ingrained in both systems and we comprehend each other's institutions even if we have many differing rules and approaches to the resolution of disputes. By the same token much of the internal logic of the Code Civile finds its counterparts in the common law and, in Queensland, our criminal law is codified in a form that owes much to the nineteenth century Italian penal code.

Recent attempts here, particularly in New South Wales, to introduce an implied common law obligation that the parties perform a commercial contract by acting in

good faith towards one another have been influenced by the civilian systems, historically rooted in Roman law. The accepted wisdom of the common law has been that parties to contracts are expected to look after their own interests, *caveat emptor*, rather than, to use another Latin phrase, to act *bona fide* towards each other. A perceptive Belgian, French-speaking professor said of this tension that:

“The mistrust of Anglo-Saxon jurists for the general concept of good faith is equalled only by the imagination which they put towards multiplying particular concepts which lead to the same results.”¹

Incidentally, I came across his useful analysis in the Sorbonne’s library when I was researching a paper on the topic for delivery to a contract master class back here last year.

The links between our professions are becoming stronger. The Australian Bar recognised the usefulness of establishing links with the profession in France and Italy in recent years by holding very successful conferences in conjunction with the Paris Bar at the Palais de Justice in Paris in 2002 and with the Italian profession in Florence in 2004. It is easy to be cynical about the attractions of holding conferences in such beautiful cities but the foresight of the organisers will, I am sure, bear fruit in the increase in mutual comprehension of our systems.

¹ Prof. Jacques-Henri Michel in *La Bonne Foi*. Cahier No. 10, Centre de Recherches en Histoire du Droit et des Institutions, Facultés Universitaires Saint-Louis Bruxelles 1998 at (x):

“L’apport du droit anglo-saxon à la réflexion qui nous est proposée est tout aussi instructif. Je le résumerais volontiers en une phrase. La méfiance des juristes anglo-saxons à l’égard de la notion générale de bonne foi n’a d’égale que l’imagination qu’ils ont mise à multiplier les concepts particuliers qui en tiennent lieu tout en aboutissant aux mêmes résultats. Aujourd’hui, les besoins nés des échanges internationaux à dimension de la planète amènent les juristes de la tradition continentale et ceux de la *common law* à confronter leurs habitudes les plus enracinées pour en tirer les nécessaires conciliations exigées par la pratique. A lire la dernière contribution de notre volume, on s’aperçoit que le travail est d’ores et déjà entrepris et il y a tout lieu de penser que la voie est ainsi ouverte à des contacts fructueux qui, un jour sans doute, autoriseront une nouvelle synthèse.”

The Premier Président of the Cour de Cassation in Paris, a position similar to the position of Chief Justice here, is M. Guy Canivet. He spoke to the Australian Bar at those conferences in Paris and in Florence. He has also visited Australia several times in recent years – once for the quadrennial conference of the International Academy of Comparative Law held in Brisbane in 2002 and again for the centenary of our High Court in Canberra in 2003. As I can attest he is a welcoming host to visiting Australian judges.

As well as trade in goods there is a significant trade in ideas and services. Some of the ideas are ones about the law itself.

The introduction of a regime of moral rights in our copyright law several years ago owed much to the French origins of that idea that allows creators of original works to maintain some control over their future exploitation. We are yet to apply the other French idea of a “droit de suite” in copyright, permitting artists to benefit from later sales of their works, although the concept has been examined seriously here.

If our international trade develops further, the use of the Vienna convention to resolve disputes between French and Australian traders may well become more common. The International Court of Arbitration, based in Paris, provides one of the most commonly used means of resolving international trade disputes arising under that convention and I’m sure that there are many Australian lawyers who would appreciate the chance to use its services. I visited that body in July 2005, while I was studying comparative law at the Sorbonne, and was pleasantly surprised to find that one of its administrative staff was a lawyer from Melbourne. He saw a need to have more international

commercial arbitrators from Australia to appoint to the ICA's panels. So the opportunities exist for greater trade in goods, services and ideas between our countries where the role for lawyers can be significant.

Your role, Madame Lagarde, as minister for foreign trade, is very important. We appreciate your attendance here, thank you for it and admire the force that you bring to the position from your wealth of experience as a French lawyer who has practised extensively in one of the most important common law jurisdictions.

Minister, before I let you go, from the same source, Toute la Natation, I discovered that you systematically travel with your swimming costume, what we call togs in Queensland, your cap and goggles in your suitcase. I'm sure you know that you're visiting some of the best beaches in the world here and I hope you make the most of them.