THE CHARTERED INSTITUTE OF ARBITRATORS
WALES BRANCH

In association with

THE UNIVERSITY OF GLAMORGAN

ADJUDICATION FORUM

Glamorgan Business Court
University of Glamorgan, Treforest, Mid Glamorgan
Friday 7th May 2004

"KEYNOTE ADDRESS "

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Mr Chairman, Ladies and Gentlemen.

A keynote speech.

That is what I am scheduled to give you this afternoon. I have often wondered precisely what that means. Is it the tuning note often heard as an orchestra, perhaps assembled from around the world, perhaps just off the bus, seeks to tune its instruments so that there are no discordant notes in what follows?

Maybe it is no more than an opportunity for something to be seen to be happening during a period of grace for late arrival - a bit like the pappadums served in Indian Restaurants. Even if they are tasty in themselves, the main meal soon supervenes in the mind. And so it should.

We have, I hope, an interesting programme ahead. Given this opportunity, I will sound a keynote. A keynote that I hope will sound in your minds throughout the entire opera which follows.

And it is in one word "Service". On brief reflection, as I drafted this, I realised that there must be two words: "Service" and "Justice".

First, the question of Service.

Dispute Resolution Practitioners, to adopt one of our grand titles, seem to enjoy making a meal of the job. This morning, in another talk, I mentioned Mustill and Boyd's "Commercial Arbitration" which runs to 830 pages.

My office is engaged in an arbitration which has been running for ten years, during which one arbitrator has died and another retired. Costs are in millions of dollars.

Arbitration is now so complex that you must be a professional arbitrator to cope with it. Not just an engineer, however ingenious, not just a lawyer, however learned, but a professional arbitrator (who has to pay a lot for his qualification, by the way).

So atrocious was the position in modern Arbitration that the United Kingdom legislature was persuaded to introduce, in 1996, statutory adjudication for the construction industry, arguably the worst offender in aggravated arbitration.

We, not just in England and Wales, not even just in the United Kingdom at large or in the common law countries, but the arbitral community world wide, have destroyed the tradition of mercantile arbitration and replaced it with a beast of our own creation which is so expensive no ordinary user dare embark on it.

And we have destroyed the spirit of service with it.

• Eur Ing Prof Geoffrey M Beresford Hartwell, Chairman CIArb 1997.

The Arbitration Act 1996 did not succeed in correcting the trend, save in some domestic cases. The international trend to arbitral aggrandisement was too strong for Britain and anyway, our practitioners were unwilling to relinquish the milch-cow upon which they had come to rely.

It was intriguing that, instead of the perhaps obvious opportunity to introduce an alternative under Section 39 of the Arbitration Act 1996 (which deals with provisional orders which have the effect of provisional awards), Parliament decided that the construction industry needed its own new system - a rough and ready system for temporary decisions, which might become permanent, if left in place - Similar to that of the FIDIC series of contract.

And now, in the wake of many cases decided in the Courts, we are making Adjudication, more complex. I remember once, about 35 years ago, one party turning up with his lawyer to a meting with the Engineer. It was thought a bad show. Now, few in this country would go to an adjudication without some representation. Fortunately, they are of sterner stuff abroad, but that isn't the point. The point is that we - yes we, you and I, are driving adjudication down the same path.

So - back to my Keynote, or Keynotes.

"**Service":** Everyone in ADR owes their primary duty- to the parties - or rather to the joint purpose of the parties. And that purpose is not and cannot be to hand over the profit or benefit of a project to outsiders like us. An expensive drawn out procedure is unjust. Our duty is to keep it simple. If that means humbling ourselves, so much the better. ADR practitioners are servants of the parties or their processes are no more than tales told by an idiot, full of sound and fury and signifying nothing.

"**Justice":** the joint purpose of the parties cannot be that one may win against the proper rights of the other. It can only be that they are entitled to a fair outcome. I cannot anticipate what Mr Atkinson may say later, but I will say that every decision maker, be he adjudicator, arbitrator, expert, or even the project manager or director of a party, has a moral duty to make his decision fairly - and to me that is what a judicial decision implies.

Mr Chairman, when I wrote my notes, I had no intention to be quite so pious. Now, if there is a discordant note, it seems to be mine. On reflection, however, those are the Keynotes I wish to sound. Service and Justice. Keynotes and a challenge.

Thank you.

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