

**The Chartered Institute of Arbitrators
Centenary Conference 20 – 21 March 2015**

Speech by The Honourable Chief Justice Geoffrey Ma

1. As the Chartered Institute of Arbitrators celebrates its centenary, this year also sees celebrations of other important institutions and events. Primary among these is the commemoration of 800 years since the sealing of Magna Carta in 1215. The numerous events all over the world are a testament to the lasting significance of Magna Carta and it brings into focus, particularly this year but in truth perennially an important constant in any community, the appreciation of the rule of law and what it means. Like it or not, no discussion about society and all its facets can be complete without an appreciation of the true meaning of the rule of law. You will presently hear in a much anticipated keynote speech an analysis of this concept in the context of arbitration by Lord Neuberger of Abbotsbury.

2. I welcome all of you to this two-day event. Apart from the celebrations here in Hong Kong and overseas to mark the centenary of the Chartered Institute, it is also a time to reflect on more serious topics and perhaps also to take a step back to picture the wider role that you as arbitrators have in the community. The rule of law has as its mainstay the administration of justice. The two go hand in hand: a just and user-friendly set of laws (and in the commercial context, this means a consistent, clear and accessible set of commercial principles which provide essential guides to enable businesspersons to conduct their affairs) must go together with an effective machinery to administer them. It is this combination that provides in the commercial context the existence of an environment that is conducive to business and prosperity.

3. Last month, at the Global Law Summit in London,¹ I spoke about the Rule of Law and the Global Economy. The focal point of my speech was that there was (or at least should be) a tangible and direct link between economic investment and the existence of the rule of law in the place of the investment. The rule of law in this context means the “thick” definition of that concept,² that is, a broader, societal view of that concept as encompassing a respect not just of fundamental economic rights, but of fundamental human rights as a whole. This contrasts with the “thin” definition of the rule of law that, in the commercial context, consists of little more beyond a sound system of law and practice conducive only to economic development and investment. Under this definition, laws must possess those three qualities mentioned earlier: they must be consistent, clear and accessible; and of course, they must make commercial sense.

4. However, the preferable view is the “thick” definition of the rule of law. The reason why there should undoubtedly be a link as I have described and why fundamental human rights are relevant is that the rule of law is synonymous with justice, not in the abstract or as a metaphysical concept, but justice as it operates in practice for all. This has been recognized throughout the ages by the great commercial lawyers. These lawyers have not been content merely with the idea that the rule of law consisted of the “thin” type; they have embraced the necessity of the recognition of fundamental human rights as the foundation of all activity within a society, encompassing not only economic activity. Such lawyers have included Lord

¹ Global Law Summit, 23-25 February 2015, London.

² As used by Lord Bingham of Cornhill in his book *The Rule of Law* (Allen Lane, 2010) at p.67.

Mansfield who, apart from being generally recognized as the father of the English commercial law, was also responsible for the judgment in the important case of *R v Knowles ex parte Sommersett*,³ which firmly established the principle that slavery was prohibited in England and Wales. Other great commercial lawyers who have also been great human rights lawyers include Lord Bingham himself and Sir Sydney Kentridge QC.

5. The operation of justice in practice is known as the administration of justice. The administration of justice is the tangible means by which the operation in practice of the rule of law can be measured and it provides an empirical test in this regard. Before I proceed to articulate some features that help identify the existence, or non-existence, of the administration of justice, one must pose the question whether or not arbitration is truly a part of administration of justice in the first place.

6. Historically, the development of arbitration may suggest otherwise. Albeit undoubtedly a form of dispute resolution, nevertheless it was an institution by consensus in the sense that jurisdiction to resolve disputes was only given by the contractual agreement of the relevant parties. Courts do not derive their jurisdiction to resolve disputes from an agreement,⁴ much less are judges appointed by the parties to a dispute. Furthermore, many people do not see arbitrators as judges: they do not take a judicial oath, they are not appointed after undergoing a rigorous appointment process etc.

³ (1771-2) State Tr. 1.

⁴ Save perhaps where jurisdiction clauses are involved and even then the court's jurisdiction is not necessarily ousted.

7. Further, far from arbitral tribunals associating themselves with any court system, the philosophy of party autonomy has now become the underlying basis of the arbitration legislation of many jurisdictions. In Hong Kong's domestic legislation, the Arbitration Ordinance⁵ states⁶:-

- “(2) This Ordinance is based on the principles-
- (a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and
 - (b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance.”

8. Arbitral tribunals are of course able to determine every type of dispute referred to it, even where fraud is involved,⁷ and since the introduction of Article 16 of the Model Law, tribunals are able to determine their own jurisdiction under an arbitration agreement.⁸ In short, arbitrators are able to do almost everything that a judge can do, perhaps even more in some instances, with only limited recourse to the courts. The most important recourse in practice that a party to an arbitration may have to the courts is the support mechanism of the courts in the enforcement of awards. Time will tell the extent to which the jurisdiction in the courts to grant

⁵ Chapter 609 of the Laws of Hong Kong.

⁶ Section 3.

⁷ Previously, many arbitration statutes used to contain a fraud exception: for example, s 26 of the previous Arbitration Ordinance in Hong Kong, now repealed. Such provisions gave the court exclusive jurisdiction to determine the issue of fraud.

⁸ Kompetenz-Kompetenz; s 34 of the Arbitration Ordinance.

interim relief⁹ to support arbitrations, will be used to any degree of regularity. The right to challenge an award is limited unless the parties opt to be subject to the court's jurisdiction.¹⁰ Generally, when reference is made to the role of the courts, this is largely a reference to the supporting role of the courts. Commonly, when one hears of this or that jurisdiction being arbitration friendly or as supporting arbitration, this is the usual context in which such comments are made. I have myself often said that the courts will on whole simply not interfere with the arbitral process save to complement it.¹¹

9. Yet, by linking arbitration to the courts, one inevitably involves arbitration in the administration of justice. After all, quite simply, it is a stark reality that arbitrators, like judges, are intimately involved in ensuring just outcomes to disputes by making determinations in accordance with law. I do not use the term "in the business of justice" because the dispensing of justice is not a business and neither judges nor arbitrators should regard what they do as a business, as if furthering one's own interests is a primary objective.

10. In the Preface to the Third Edition to Arbitration in Hong Kong: A Practical Guide,¹² in referring to the

⁹ In Hong Kong, the powers are contained in s 45 of the Arbitration Ordinance. It may be said this reflected the common law.

¹⁰ In Hong Kong, the provisions of Schedule 2 to the Arbitration Ordinance enumerate the situations in which there may be recourse to the courts.

¹¹ See, for example, the Preface to First Edition of Arbitration in Hong Kong: A Practical Guide (Thomson Sweet & Maxwell Asia, 2003) by Mr Neil Kaplan QC and myself.

¹² Thomson Reuters, 2014.

complementary role of the courts, it is said¹³ that:-

“This is without doubt true but it is important to understand the underlying basis for this support: confidence in the ability in the arbitral process to resolve disputes in a just and efficient manner, based on an understanding of the rule of law.”

11. In *Hashwani v Jivraj*,¹⁴ the United Kingdom Supreme Court had to grapple with the issue whether a requirement in an arbitration agreement that arbitrators had to be respected members of a particular religious community, contravened an EC regulation in relation to employment equality prohibiting discrimination on religious grounds. In deciding that the regulation did not apply, Lord Clarke of Stone-cum-Ebony analyzed the function of arbitration. He said¹⁵:-

“The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. As the International Chamber of Commerce (“the ICC”) puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a “quasi-judicial adjudicator”: *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1992] QB 863, 885.”

In the same case, Lord Mance made reference to a 1904 law in Germany (in the Reichsgericht) which stated:-

¹³ By Mr Denis Brock and myself.

¹⁴ [2011] UKSC 40; [2011] 1 WLR 1872.

¹⁵ In para 41, at 1888 D-E.

“It does not seem permissible to treat the arbitrator as equivalent to a representative or an employee or an entrepreneur. His office has... an entirely special character, which distinguishes him from other persons handling the affairs of third parties. He has to decide a legal dispute in the same way as and instead of a judge, identifying the law by matching the relevant facts to the relevant legal provisions. The performance expected from him is the award, which constitutes the goal and outcome of his activity. It is true that the extent of his powers depends on the arbitration agreement, which can to a greater or lesser extent prescribe the way to that goal for him. But, apart from this restriction, his position is entirely free, freer than that of an ordinary judge.”

12. There is of course a public interest in the independent adjudication of disputes and this public interest underlies the activities of all who have the responsibilities to adjudicate, including arbitrators. The Arbitration Ordinance in Hong Kong, to which reference has already been made, refers specifically to “the public interest”. The reference to an independent adjudication is an important one. If, as is the common perception of an arbitrator’s function, independence in the adjudication process and the requirement to act at all times only in accordance with the law are pre-requisites, this is fast approaching, if not identical in substance to, the functions of a judge. For judges, independence in adjudication carries with it the moral courage to make decisions which may be unpopular,¹⁶ and so it is with arbitrators.

13. I take the view that arbitrators and the arbitral process are very much a part of the administration of justice. The community is entitled to expect arbitrators to play their role within the administration of justice. The community is also entitled to

¹⁶ Sir Sydney Kentridge QC “Free Country” (Hart Publishing, 2012) at 156, quoting Lord Judge, the former Lord Chief Justice of England and Wales.

have confidence in the arbitration system and to question, as it does in relation to the courts, whether arbitration adequately discharges the obligations placed on this institution. Any institution which purports to act in the public interest must subject itself to such an examination.

14. In assessing whether or not the administration of justice is effective, in other words, 'does its job', a number of FAQs often appear. Questions such as the considerations and approach adopted by the tribunal, the role of lawyers, the makeup of the tribunal, jurisdiction matters, the standard of advocacy, will arise and, incidentally, these are all matters which this two-day conference will cover.

15. But there are more basic facets to consider in order to satisfy the community that the administration of justice is well and good. I mention one in particular – transparency in the work of arbitrators. We in this room are confident and justified in our belief that arbitration is an established, viable and above all, effective form of dispute resolution. But how is the community to be satisfied in the same way that we are?

16. In the case of judges and the courts, it is important to convince members of the community that judges perform their constitutional mandate of determining cases according to the law and to its spirit. The transparency in the activities of the courts is demonstrated by the following critical features:-

- (1) The openness of court proceedings, such proceedings being open to the public.

- (2) The detailed and close reasoning in the judgments of the courts, and the public's ready accessibility to these judgments.

17. This form of transparency ensures that any member of the public – indeed the whole world – are able to see for themselves that the courts do act in accordance with the law and its spirit, and only these matters. Where criminal activity is revealed, the courts¹⁷ may, where appropriate, refer the matter to the prosecuting authorities. This is part of the public interest that is served as far as courts are concerned.

18. Yet these forms of transparency (public access to proceedings and the ready availability of the detailed reasons in arriving at decisions) are the very opposite of what occurs in arbitration. Confidentiality may perhaps not be everything in an arbitration but it is certainly its essence and represents perhaps the biggest difference between arbitration and court proceedings. The confidentiality aspect is reflected in many statutory forms. In Hong Kong, there are clear restrictions on proceedings involving arbitrations being heard in open court and restrictions on the reporting of proceedings heard otherwise than in open court.¹⁸ I mentioned earlier the ability of a court to report potential criminal activity to the prosecuting authorities. This is virtually unheard of in arbitrations. Gary Born in his textbook *International Commercial Arbitration*¹⁹ says this:-

¹⁷ I am here referring to the Hong Kong courts.

¹⁸ Sections 16 and 17 of the Arbitration Ordinance.

¹⁹ Second Edition (Kluwer Law Institute, 2014) at para13.04.

“ The tribunal should not proceed as a sort of private attorney general or investigating magistrate to seek out evidence of wrong-doing, detached from the arbitrators’ original mandate. In instances where applicable criminal law (typically of the arbitral seat) could require that the tribunal take further steps, such as reporting particular matters to law enforcement authorities the arbitrators must do so as a matter of their personal legal and civic obligations.

In some cases, arbitrators may conclude that an arbitration is being conducted for an illegitimate purpose (e.g., to facilitate a money laundering scheme). In these instances, arbitrators have an obligation to ascertain whether or not this is true and, if so, to take appropriate steps, including resigning their mandate or dismissing the arbitration *sua sponte* (of course, after hearing the parties).”

19. As regards the publication of awards, this has been for a long time a vexed issue. While much progress has been made to make available for publication reasoned awards, this is far from being in anyway standard, dependent as it is on agreement.

20. Realistically, it must therefore be left to other means by which the transparency of arbitration proceedings and the whole process of arbitration can be demonstrated. The objective here is of course to demonstrate that arbitration is an integral, respected and viable part of the administration of justice. The following is a non-exhaustive list of matters worth developing in this context:-

- (1) Greater engagement with the public by all involved in arbitration to explain the arbitral process.

- (2) The numerous articles and books available to the public in relation to arbitration, much of it available online, greatly assists. This can be expanded even further.
- (3) The development of seminars, conferences and workshops involving members of the public beyond just arbitrators.
- (4) Greater awareness made in universities and other similar institutions of the importance of arbitration, not only as part of a law course but also in other disciplines such as social sciences.
- (5) A greater appreciation among existing and future arbitrators that arbitration should not be regarded as a business, and to regard it more as an integral part of the administration of justice.

21. This is perhaps not the occasion to go into these and other matters more deeply. I wish once again to welcome everyone to this Conference. It looks at shaping the future of arbitration. This is one of those good opportunities to discuss this serious topic.