This paper was originally published in the Bulletin in December 1992. The author believe that it would be useful to reprint it to remind arbitrators and would be arbitrators of the philosophies they must fortify themselves with in order to carry their roles and responsibilities properly and effectively, and without fear or favour.

On Arbitrators, Advertising and Ethics

(A paper presented at the Regional Centre for Arbitration, Kuala Lumpur : An Arbitrator Development Programme: 22-23 January 1992)

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The familiar tale of the three blind men each with his own unique description of an elephant may aptly apply to laymen's notions of arbitration and arbitrators. They harbour feelings of respect, awe, admiration, envy, scepticism, cynicism or contempt, depending on the impressions gained from their personal encounters.

Encounters however are relatively few and arbitration is not a feature of the average person's experience, nor even that of the average practitioner of any profession, although most professionals have some degree of awareness of the subject and will quickly learn more about it when the need arises. Now all this might change and arbitrators might be poised to project themselves into the public eye, if one sector of the community prevails with its proposal to permit arbitrators to advertise. Some may react with disbelief, but self-styled "avant-garde" are actively propounding that arbitration is no different from any other professional business, and should fall in line with modern thinking on permitting professionals to publicise their services for the benefit of those who need them and do not know where to turn. Given the benefit of doubt, an admirable samaritan act it could be, but it cannot be justified by such simplistic argument. Serious issues surface, and these go to the very roots of the ethics of arbitration and arbitrators.

The office of arbitrator is commissioned only by appointment on a case-to-case basis and in the normal course of events expires upon publication of award in each case. In a wider sense the term "arbitrator" is often used to denote:

(i) an appointed arbitrator who holds current office *[hereinafter called "ARBITRATOR"]*;

(ii) one whose arbitral office has expired *[hereinafter called "arbitrator"]*;

(iii) one who aspires to arbitral office *[hereinafter called "arbitrator"]*.

The three categories are not mutually exclusive, and a person can be any or all of the three, at different times or all at the same time. The reason why I draw attention to such distinctions will become clear if you will bear with me.

Disputes are hideous monsters some of us are forced to live with from time to time. Disputes and their resolution with or without ARBITRATOR or Court usually cause much stress to the parties and contribute nothing to real economic growth. They actually hamper real economic growth, as parties and their staff, advisors and experts are diverted from their normal production activities to attend to dispute resolution. Nonetheless, disputes need to be resolved. The engines of real economic growth are: AGRICULTURE, MINING, MANUFACTURING and SERVICES. No doubt dispute resolution may be considered a service but it is a unique service in the sense that it does not produce anything that adds to the economic growth of society, but merely transfers money from one pocket to another. Thus notwithstanding its usefulness to parties in dispute, it is erroneous (as sometimes propagated) to say that arbitration (or dispute resolution) is "a growing industry".

The mention of advertising reminds me of an arbitrator canvassing for appointment (because he had not enough arbitration 'jobs' to do?) and prompted someone to remark:

"I should hope that ARBITRATION is one of the last remaining noble callings. Arbitrators perform their duty when called upon to do so but we should not wish that there will be more disputes to arbitrate."

Granted that disputes will arise independently of and not in answer to arbitrators' prayers (if any – God forbid!), and that a would-be ARBITRATOR's

private thoughts and motives towards each new dispute that rears its ugly head are not exposed to public scrutiny, yet we must be sure that our conduct should not lead the public to think they detect signs of joy. If arbitrators do not conduct themselves with proper decorum it might provoke others to indulge in reverie: *that it must be far more congenial to be arbitrating other people's problems than to be beset by one's own*. The crux of the matter is that the public regard of arbitrators, ARBITRATORS and ARBITRATION should not be tarnished by any kind of negative publicity. I fear that advertising by arbitrators, however 'dignified', could not but impress upon the public that the objective of such advertising is to tout for 'jobs' and promote lucrative ARBITRATION "practices" and that justice may well be compromised in the pursuit of such objective. Perhaps some noble soul might rise above suspicion if he advertised to offer his services gratis or for just a nominal fee to meet his basic needs and expenses, but that is another story.

I am not in favour of advertising by arbitrators. I firmly believe that it is inconsistent with the ethics of arbitration. In broad terms while "ethics" means for most professionals that with every commission he undertakes he works himself out of the job at optimum benefit-cost to his client, for the arbitrator the standard is somewhat higher and *he should wish that the odious events which call for his services would not happen too often if at all, let alone proffering his services in the market place! In other words, the ethics of arbitration requires that arbitrators shall be persons who uphold the kind of moral values which would make them "reluctant" ARBITRATORS who answer the call only if they are deemed fit for service to resolve disputes that regrettably arise, and the same ethics disqualify ardent self-serving candidates*. I recognise that such ideals are utopian and will be hard put to survive in the real utilitarian world but that does not mean that we should not keep them in sight (publicly) and in mind (privately) for at least, even though they may not be practised with religious fervour, they furnish guidelines that point the way towards some semblance of order.

While acknowledging that some professions have assumed more liberal attitudes towards advertising, we should remember that after all ARBITRATORS are not in the same boat as Counsel (of legal or any other discipline), but rather they are auxiliary to judiciary, no less! The difference between a Judge and an ARBITRATOR is that the latter is usually one who has specialist technical skill in the subject matter of the dispute, practises in his specialised field and not in the Judiciary as a Judge does, but is "co-opted" to temporary judiciary service if the occasion should ever arise for him to serve. It would not be proper for an arbitrator to advertise his availability or competence as a potential ARBITRATOR, anymore than it would be for anyone to publicly proffer himself as a potential Judge. Judges are remunerated for their services by the State and do not ask for fee from litigants. There is merit in structuring a similar system for arbitrators who see ARBITRATION as a full time calling thus allowing such arbitrators to make their arbitral services available within the framework of a public institution rather than through commercial enterprise. For the rest of our fraternity, let us continue to be called upon, for *we are not (and should not be) in the habit of calling upon potential ARBITRATION "clients"*.

Scholarly research may show that there are laws which account for the orderly behaviour of arbitrators and arbitration. Meanwhile, not having applied the rigorous scientific methods required to test and establish laws, I would state several hypotheses:

- Hypothesis I: An arbitrator abhors disputes but enjoys resolving them.
- Hypothesis II: An arbitrator does not practise. ("To practise" being understood as "to operate a business offering and rendering professional services")
- Hypothesis III: An arbitrator lives and thrives in a constant state of "non-practice" and his office is activated for the duration he is appointed to resolve a dispute.
- Hypothesis IV: An arbitrator has no clients.
- Hypothesis V: Arbitration is not a commercial enterprise or an industry.

Perhaps within such hypotheses, and others which are relevant, we might discover basic philosophies or tenets to guide us. It is a subject which merits diligent study by those who believe in arbitration as an institution for dispute resolution.

While it behoves the individual arbitrator to keep a low profile, a disputant who needs to resort to arbitration for the first time may well ask: "where can I find a suitable arbitrator?" This question can be answered by any of the arbitral or professional institutions such as RCAKL, MIArb, IEM, PAM, ISM, etc. Such institutions may publicise their role as bodies for referral whenever ARBITRATION services are required. Each institution should maintain a computerised list of members with particulars of their professional qualifications and specialised fields of experience. When a referral is made to the institution the computer records will be searched and a list made of the most appropriate persons who would then be notified and asked to respond to indicate their availability and from this enquiry a short-list of candidates can be prepared and sent to the disputing parties who may then communicate with some of the candidates selected from such a list and at this point these candidates can do their private "advertising" by mail.

To advertise or not to advertise? This question represents the tip of the iceberg that represents a much more serious and fundamental issue – to go or not to go commercial (i.e. to be in "practice" or "non-practice") – which is the real issue that needs to be addressed. ■

NB: This paper is based on the author's experience in construction industry arbitration. However it may be applicable to arbitration in other sectors.