

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
ACICA and CIArb International Arbitration Conference 2020

Welcome Address

Monday 12 October 2020*

1. It is my great pleasure to welcome you to the eighth International Arbitration Conference hosted by the Australian Centre of International Commercial Arbitration and the Chartered Institute of Arbitrators Australia.
2. As we gather for this Conference physically dispersed, I would like to recognise the various traditional lands on which we meet. This morning, I am speaking from the Supreme Court of New South Wales in Sydney CBD which is on the land of the Gadigal people of the Eora nation. I acknowledge and pay my respects to the Elders – past, present and emerging of the lands on which we all work and live.
3. Since its establishment in 2013, the International Arbitration Conference has provided a valuable opportunity for critical thought and debate on the role, practicalities and future of international arbitration in both Australia and abroad. The Conference forms part of the Australian Arbitration Week for 2020. There are not many areas of law that receive a week's worth of attention, nor, I dare say, can sustain the attention of its practitioners for so long, particularly something which starts with me speaking. But don't worry, it gets better. The comprehensive nature of the programme for the Australian Arbitration Week, ranging from panel discussions, round tables and even a virtual fireside chat, is testament to the vitality of the Australian international arbitration community.

*I express my thanks to my Research Director, Ms Jessica Elliott, for her assistance in the preparation of this address.

4. The theme of today's Conference, 'Bridging the Distance – Arbitration in the New Normal' of course reflects the strange times in which we are living. In times of significant upheaval and uncertainty, such as the present, I think that the value of conferences such as this one is more important than ever. The value of bringing practitioners from across the world to take stock of the immense changes that have occurred in just the past few months, whilst also looking to the future, cannot be underestimated. If ever there was a time for the international arbitration community to come together to engage in critical thought, debate and reflection, it is now – and this Conference provides just that opportunity.
5. As a result, whilst it is disappointing that I cannot welcome you to Sydney in person and that the proposed conference venue is predominantly being used as a quarantine centre; I was so pleased to hear that this Conference was going ahead in a virtual format. It is a testament to the commitment of the organisations that this Conference was not merely cancelled or postponed like many others. I commend and congratulate the organisers for their ingenuity in bringing us all together virtually.
6. I am also particularly pleased to see that the move to a virtual Conference has not diminished its ability to bring together a truly international community. Today, we are privileged to hear from practitioners from a total of nine countries, dialling in all the way from Mexico City to Kuala Lumpur, Cairo to London.
7. As always, the programme for today's Conference is diverse and engaging. The sessions range from those designed to fortify your virtual advocacy and technology skills, something which until six months was foreign to many practitioners, particularly, dare I say it, those in their more senior years, to those that address critical issues in international arbitration from mega projects, third party funding and the future of investor-state dispute resolution. We are, of course, also very fortunate to hear from Chief Justice Sundaresh Menon of the Supreme Court of Singapore followed by Justice Stephen Gagelar of the High Court of Australia delivering the Keynote Address.

8. In response to the pandemic, centres of dispute resolution across the world have been forced to change how they resolve disputes. Although remote hearings are not new to international arbitration, arbitral institutions have not been immune from this upheaval. Within the space of a few months, a 'new normal' has been reached for many of us.
9. It is of course very difficult to predict how long this period will last for. As the pandemic continues to run its course, I think that it is fair to say that many of these changes will be in place for a considerable period of time and will have a lasting impact on the resolution of disputes long after the pandemic has passed. I think it is important that we therefore do not see this period as merely a temporary period to be endured. Instead, in my opinion, there are important and long-term lessons to be learnt, both as a community, and as individual practitioners. I think that it is therefore essential that the international arbitration community is in the best position to not only navigate these times, but also to use this period to innovate and capitalise on these immense changes. The Conference today plays an important role in ensuring this.
10. I would comment that the pandemic has highlighted something that the international arbitration community has always appreciated - that domestic courts are not always best placed to resolve disputes, far from it. There can be little doubt that as the effects of the pandemic and consequent economic difficulties sink home, there will be an enormous amount of what is generally, but euphemistically called, dispute resolution. Arbitration, both internationally and domestically, has always been a vital complement to the courts system. It will now be needed more than ever. The inherent flexibility and high degree of control available to parties in arbitral proceedings offers unique advantages during these times. Of course, flexibility has always been one of the major drawcards of international arbitration. If ever there was a time for us to lean into this feature, it is now. In my opinion, the degree of flexibility inherent in arbitral proceedings means that international arbitration is uniquely poised to innovate during these times to continue providing efficient dispute resolution, free from the constraints faced by many domestic courts.

11. Perhaps giving the Australian arbitration sphere a plug, I would say that this inherent flexibility may also uniquely benefit Australia's position in the international arbitration landscape. As captured in the theme of this Conference, Australia's geographic isolation has been cited for years as a barrier to our competitiveness as a leading arbitral seat. However, in this 'new normal', where I dare say a large part of the world feels isolated by travel restrictions and lockdowns, I think that Australia's remoteness will be much less of a barrier moving forward.
12. In my opinion, international arbitration in the 'new normal' represents a significant opportunity for our community. The rapid proliferation of virtual hearings and the reality that international travel restrictions will likely exist for many months, if not years to come, will greatly assist the Australian arbitration community bridge the perceived distance between itself and the rest of the world. I think many parties will ask to what extent are hearings held in person necessary and at what cost? Another question likely to be asked by parties is whether established arbitral centres will retain their pull in a virtual world? More and more, I predict that there will be a shift away from established arbitral centres. This can only benefit Australia. In one sense, this is only another aspect of the disruption that modern technology is causing to established customs and practices. If there is a silver lining to come out of the pandemic, it may be the growing realisation that one doesn't need to fly across the world to a fixed arbitral centre to resolve disputes efficiently, skilfully and fairly.
13. Of course, the increase in virtual proceedings may overcome the tyranny of distance for Australia. However, as I'm sure many bleary-eyed participants joining us from overseas can attest, it does nothing to help the tyranny of time zones – both within Australia and overseas. Furthermore, the move to virtual dispute resolution raises its own set of complexities, many of which I am sure will be addressed today.
14. To conclude, I would like to reiterate my very warm welcome to all those attending the 2020 International Arbitration Conference. I have no doubt that

the discussions facilitated today will ensure that the Australian arbitration community is in the best position possible to not only navigate, but flourish in our 'new normal'.

15. On behalf of all the Conference participants, I would like to thank and congratulate the Conference planning committee and the Australian Centre of International Commercial Arbitration and the Chartered Institute of Arbitrators Australia.

16. I trust that you will enjoy the Conference.