ADDRESS BY THE HONOURABLE T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

FORUM: "THE AUSTRALIAN ARBITRATION OPTION"

AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION

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Professor Jones has very succinctly covered the excellent work of the Australian Centre for International Commercial Arbitration as well as our legislative and regulatory framework and I understand Michelle Smithe will cover the new Australian International Disputes Centre. As Chief Justice, it seems most appropriate that I should be the one to tell you something about Australian legal practitioners and courts, and the New South Wales Supreme Court in particular.

One of Australia's many strengths as a centre for international commercial arbitration is its possession of the English common law tradition. We think of arbitration as a relatively recent development, when in fact some level of respect for the arbitration process has been with the English law for as long as the laws of contract and estoppel. As proof, I will give a somewhat eccentric example that pre-dates the

historic decision of *Scott v Avery*[1], which first permitted contractual clauses to make arbitration a precondition to litigation in 1856.

Earlier in the 19th Century, a peculiar form of arbitration was in practice in County Down. Disputing parties placed a line of oats down the middle of a long table. At the end of the table they each placed a single kernel of corn. A turkey was then gently placed at the far end of the table to delicately peck her way up the line of oats, until she delivered her award in favour of one party or the other by taking his kernel of corn first.

The loser in one such arbitration appealed his case before the Chief Justice of the Assizes. He was being cross-examined by counsel as to whether the turkey had in fact selected his opponent's kernel, when the Chief Justice interrupted to ask what on earth a turkey had to do with the case. It was explained to his Honour that the turkey was a form of local arbitration. "Do you mean to tell me," the Chief Justice exclaimed indignantly, "that the plaintiff has brought this case in disregard of the award of an arbitrator?" Counsel replied that it was so. "Disgraceful!" the Chief Justice said, "Appeal dismissed with costs here

[1] *Scott v Avery* (1856) 5 HLC 811.

and below." It was then proclaimed to the Court: "The Lord Chief Justice affirms the turkey"[2].

I do not know if the Australian International Disputes Centre currently accommodates turkeys, or any form of game fowl for that matter. However if they did, I am sure the accommodation would be state of the art and the rates very competitive. I can also say that in the unusual event parties validly contracted to be bound by the decision of a bird, the Australia courts, in keeping with the UNCITRAL Model Rules, would be likely to seek to give effect to that agreement.

In all seriousness, Australia offers a sophisticated legal system entrenched in the best of the English tradition. It is complemented by proximity to and familiarity with the laws of India and the rest of the Asia-Pacific, and underpinned by the adoption of international instruments such as the Model Law. In New South Wales the recent introduction of the Commercial Arbitration Act 2010 in effect applies the Model Law with some amendments to our domestic arbitration. This will lead to both practitioners and courts in New South Wales becoming increasingly familiar with the law and practice relating to international arbitration. It is

[2] Recounted in R E Megarry *A New Miscellany-at-Law* 2005 (Hart Publishing: Oxford) 77-78, notable also for being recorded prior to the historic decision in *Scott v Avery* (1985) 5 HLC 811.

envisaged that the legislation, which so far can only be found in New South Wales, will be introduced to all other states.

I would like to use the remainder of my time today to mention each of the three tenets of Australia's growing reputation as a world-class, first-choice jurisdiction for international commercial arbitration: First, the Australian attitude towards arbitration generally, second, the quality of Australian legal practitioners, and third, the practice of the Australian judiciary and courts, and of the Supreme Court of New South Wales in particular.

First, within the Australian legal and commercial sectors it is recognised that courts are not always the best place to resolve disputes – far from it. This is particularly so for cross-border commercial disputes, in which the reasons to nominate resolution by arbitration are many. These include cost, speed, party control, and confidentiality. Australia, and New South Wales in particular, has embraced the arbitration option as a first-choice resolution mechanism for many such disputes. This places us in sync with the growing preference for arbitration among Indian businesses, which are already among the most frequent users of the Australian International Disputes Centre.

At our universities, alternative dispute resolution forms part of the core legal curriculum. It is also one of the fastest growing areas of graduate and post-graduate specialisation, with diplomas and masters by coursework degrees offered at most leading Australian institutions.

Among practitioners, familiarity with arbitration forms part of any successful legal practice, and specialisation in it increasingly forms the cornerstone of many.

In our courts, the legislative framework and reforms Professor Jones mentioned have created an environment of judicial support for arbitration in Australia, rather than a presumption of interference[3].

Finally, the sheer number of conferences, seminars and summits on arbitration and other forms of alternative dispute resolution held annually in Australia indicates a cultural shift within our legal and business communities, in which arbitration forms an essential and primary method of dispute resolution. Australia is therefore an optimum choice for the location of arbitration proceedings.

[3] The Hon Clyde Croft 'Arbitration Reform in Australia and the Arbitration List (List G) in the Commercial Court' (VSC) [2010] *Victorian Judicial Scholarship* 10.

The second tenet of our reputation as a world-class dispute resolution jurisdiction is the quality of Australian legal practitioners – both barristers and solicitors – who practice predominantly in arbitration proceedings. I have mentioned already that arbitration and other forms of alternative dispute resolution are ingrained within the Australian legal profession, and that Australian lawyers benefit from the English common law tradition. What some do not realise, however, Australia also benefits from an extremely diverse legal profession.

At least 26 per cent of legal practitioners in New South Wales were born overseas, for example, and of those more than one in three are from Asia. Australia has had close ties with South Asia in particular since the earliest European settlement, and the Indian community generally is the second largest non-Anglo group in Australia. This community represents a significant number of Australian lawyers of Indian descent, facilitate trade ties at the micro and macro levels between Indian and Australian businesses, and increases Australian familiarity with the diverse range of Indian cultural and commercial practices. Therefore, not only are Australian lawyers among the most highly trained and sought after in the world, they are also uniquely positioned to conduct and represent Indian clients in international commercial arbitration proceedings.

Finally on the subject of the legal profession, it should also be noted that our professional practice legislation and regulations allow and encourage foreign qualified legal practitioners, including those from India, to practice in New South Wales for the purpose of international arbitration being conducted there. A client's right to choose counsel, which Professor Jones has already mentioned, thus extends not only to the many outstanding Australian practitioners, but also to practitioners from a party's home jurisdiction as well.

Having, I hope successfully, sold you the Australian profession and legal environment generally, it remains only for me to mention our judiciary and court system. President James Allsop of the New South Wales Court of Appeal published a paper in April last year which demonstrated a clear trend in Australian judicial thinking in favour of arbitration. By surveying the judicial approach to arbitration in four key areas – the construction of arbitration clauses, arbitrability, public policy and separability – his Honour was able to demonstrate that the Australian judiciary has "sat up and listened" to the needs of the international commercial community by offering renewed support for arbitration proceedings.

This trend is being reinforced and encouraged by a newly established Judicial Liaison Committee, which is comprised of judges from each Australian jurisdiction who meet to report on and promote uniform approaches to commercial arbitration across the states.

In my capacity as Chief Justice I have also spoken frequently of my believe that the New South Wales Supreme Court exercising its supervisory jurisdiction should do whatever it can to support the legal profession in conducting the highest quality and most efficient arbitration work in New South Wales. This is in keeping with the overriding purpose of our civil procedure and court rules, which the *Civil Procedure Act* expressly states is to facilitate the just, quick and cheap resolution of the real issues in a dispute. It is also in pursuit of the goal Professor Jones and I share, to continually enhance Australia's reputation as a neutral or 'safe' seat for arbitration in the Asia-Pacific.

In furtherance of these objectives, I have just released a new Arbitration Practice Note for the Supreme Court. In New South Wales, Practice Notes determine the procedure to be followed by the court. The new Arbitration Note provides an efficient, inexpensive and relatively informal procedure for resolving disputes arising in the context of arbitration agreements, awards or proceedings.

The principal objective of the new procedure is to provide a completely stand-alone arbitration list, so that any disputes which arise are dealt with efficiently and in keeping with the objectives of the parties who elected arbitration as a means of dispute resolution. It recognises that most disputes that arise are ones in which the court will not be required to determine the ultimate dispute between the parties, but to facilitate its resolution by arbitration.

The procedure is summary. This means that the usual pleadings and order for hearing do not apply. Consistent with arbitration proceedings, the parties will consult amongst themselves as to the best method of bringing the matter forward to enable to court to perform its supervisory function. The earliest possible hearing date will be given, particularly where the proceedings may be delaying arbitral proceedings or the production of an award. Finally, a primary judge and a back-up judge experienced in commercial law generally and arbitration law in particular, will always be allocated to the arbitration list to ensure that matters are disposed of as quickly as possible.

The New South Wales Supreme Court is now primed to resolve arbitral disputes with the speed, flexibility and informality demanded by

parties who have chosen arbitration precisely because it embodies these characteristics.

Although I am of coursed biased in favour of the Supreme Court, I would be remiss if I did not mention that the Australian Federal Court has similarly embraced arbitration. The approaches of the State and Federal Courts across Australia are made consistent by the Model Law; both generally take a broad approach to the enforcement of arbitration agreements, and a restrictive approach to court intervention.[4] Our legal precedents in this area are also largely uniform, as we presumptively follow the rulings of parallel jurisdictions and the barrier to removing that presumption is high.

It has been my pleasure to address you this evening. It is not ordinarily the role of a Chief Justice to be a spokesperson for a particular legal product or industry. That I am here this evening is a reflection of my sincerest belief that Australia, and Sydney especially, is growing into a world-class centre for international commercial arbitration.

[4] Quote from Justice James Allsop, President NSW Court of Appeal, "International Arbitration and the Courts: the Australian Approach" (Address to CIArb's Asia Pacific Conference 2011, Investment and Innovation: International Dispute Resolution in the Asia Pacific, Sydney, April 2011) 2.

The exponential increase in regional trade across Asia and the Pacific, an enormous proportion of which originates in India, has created a corresponding need for a safe and neutral seat for the resolution of international commercial disputes. It is both in Australia's interest to be this seat, and in the interests of the region to opt for such a geographically proximate and legally sophisticated location.

Thank you for your interest and attention this evening. I will conclude now so as to allow as much time for questions as possible.