

Challenges and opportunities for Asia-Pacific international commercial arbitration and investor-state dispute settlement

@ University of Sydney Law School
FRIDAY 15 NOVEMBER 2019

Law Lounge (level 1)

(joint project with HKU:¹ following symposium there 15 July²)
Co-hosted by CAPLUS (Centre for Asian and Pacific Law at the University of Sydney)

Building on Reyes & Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia-Pacific* (Hart, 2018),³ this symposium examines more recent challenges for international commercial arbitration (ICA), especially the proliferation of international commercial courts, the 2018 UN Convention on enforcement of mediated settlement agreements, and dispute resolution for the Belt & Road initiative. The main focus is on **Hong Kong** and **Singapore** (competing jurisdictions in the top “Stage 4” for ICA venues, as identified by Reyes & Gu), **Australia** (a “Stage 3” venue), **China** and **Japan** (“Stage 2” venues).

The symposium will also compare approaches in these jurisdictions to investor-state dispute settlement (ISDS). Building on Chaisse and Nottage (eds) *International Investment Treaties and Arbitration Across Asia* (Brill, 2018),⁴ participants will chart evolving treaty practices and high-profile ISDS cases (including eg in **Indonesia**), assess whether these do or might impact on public attitudes even towards ICA or other forms of arbitration, and explore alternatives or complements to ISDS.

9-9.30	Registration	
9.30-9.40	Law School Welcome	Dean Simon Bronitt (USydney)
9.40-9.50	Symposium Welcome	Prof Luke Nottage (USydney) / Prof Shahla Ali (HKU)
9.50-10.10	“International Commercial Arbitration in Australia : Judicial Control over Arbitral Awards” ⁵	James Morrison (ACICA) with Dr Nobumichi Teramura (Adelaide U) and Prof Luke Nottage (USydney)

¹ Outline at

http://web.archive.org/web/20190406202010/http://blogs.usyd.edu.au/japaneselaw/2019/02/new_frontiers_in_intlarb.html

² See presentation Abstracts etc and program from this earlier symposium available respectively at http://web.archive.org/web/20190406201953/http://blogs.usyd.edu.au/japaneselaw/2019/03/new_frontiers_intldr2.html and <https://www.law.hku.hk/aiifl/challenges-and-opportunities-for-international-commercial-arbitration-and-investor-state-dispute-settlement-in-the-asia-pacific-region-mon-15-july-200-510-pm/>.

³ <https://www.bloomsbury.com/au/the-developing-world-of-arbitration-9781509910199/> (introductory chapter at <https://ssrn.com/abstract=3183550>)

⁴ <https://brill.com/view/title/36129> (introduction partly at <https://ssrn.com/abstract=2862272>)

⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379494. See also <http://arbitrationblog.kluwerarbitration.com/2018/09/20/australias-incapacity-international-commercial-arbitration/>.

10-10-30	“An Australian Perspective on Investment Treaty Negotiations and Investment Arbitration” ⁶	Prof Leon Trakman (UNSW)
10.30-10.50	“ Australia and International Commercial Courts”	Prof Marilyn Warren AC QC & Dr Clyde Croft AM SC (formerly/Supreme Court of Victoria)
10.50-11.20	COFFEE BREAK	
11.20-11.40	“Confidentiality versus Transparency in International Commercial Arbitration and ISDS in Australia and Japan”	Prof Luke Nottage
11.40-12.00	“Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?” ⁷	Dr Teramura with Prof James Claxton (Kobe U) and Prof Nottage
12-12.45	1 st Panel Discussion (with brief presentations) chaired by Prof Shahla Ali	Including Kevin Lindgren AM QC FAAL (formerly Federal Court), Dr Ben Hayward (Monash University), ⁸ Daniel Forster (Sparke Helmore / USydney), and Amokura Kawharu (Auckland University)
12.45-1.45	LUNCH BREAK	
1.45-2.05	“ISDS and Arbitration in Indonesia”	Prof Simon Butt (USydney)
2.05-2.25	“International Commercial Arbitration and ISDS Developments in Hong Kong in the Context of the Belt and Road Initiative” ⁹	Prof Shahla Ali
2.25-2.45	“Applying PRC’s BITs in HK and Macau SARs: Contradictions Between the Chinese Government and Investment Tribunals”	Tang Yi (HKU)
2.45-3.05	“Data Protection in Investment Arbitration: Privacy, Confidentiality and Transparency”	A/Prof Jeanne Huang (USydney)
3.05-3.35	COFFEE BREAK	
3.35-3.55	“Dispute Resolution in International and Bilateral Investment Agreements”	Wilson Mbugua (HKU)

⁶ See also Nottage, <https://www.eastasiaforum.org/2019/05/25/settling-investor-state-disputes-asia-pacific-style/>

⁷ <https://ssrn.com/abstract=3299097>

⁸ “Arbitration in Australia: Efficient, Effective, Economical? A Retrospective”

⁹ See also Bath, <https://www.eastasiaforum.org/2019/06/07/dispute-resolution-along-the-belt-and-road/>

3.55-4.45	2nd Panel discussion (with brief presentations) chaired by Prof Luke Nottage	Including Brenda Horrigan (ACICA President), Jonathan Redwood (Banco Chambers), Adj Prof Max Bonnell (USydney), and Prof Vivienne Bath (USydney)
4.45-5pm	Closing Remarks	Profs Ali & Nottage
5-6pm	REFRESHMENTS	
6.30pm	Dinner for Speakers hosted by Sydney Law School at Glebe Hotel	Invited speakers

SPEAKER BIOS

Dr. Shahla Ali is Professor and Associate Dean (International) and Deputy Director of the LLM in Arbitration and Dispute Resolution in the Faculty of Law at the University of Hong Kong. Her research and practice center on questions of governance, development and the resolution of cross-border disputes in the Asia Pacific region. Shahla is the author of *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice* (Edward Elgar, 2018), *Governing Disasters: Engaging Local Populations in Humanitarian Relief* (CUP, 2016); *Consumer Financial Dispute Resolution in a Comparative Context* (CUP, 2013) and *Resolving Disputes in the Asia Pacific Region* (Routledge, 2010) and writes for law journals in the area of comparative ADR.

Shahla has consulted with USAID, IFC/World Bank and the United Nations on issues pertaining to access to justice, peace process negotiation training and land use conflict resolution. She serves as a bilingual arbitrator (English/Chinese) with CIETAC, HKIAC (ADNDRC), SIAC and is a member of the IBA Drafting Committee for Investor-State Mediation Rules, the DOJ Mediation Regulatory Framework SubCommittee, the UN Mediation Roster and the FDRC Appointments Committee. Prior to HKU, she worked as an international trade attorney with Baker & McKenzie LLP in its San Francisco, California office. She received her JD and PhD from UC Berkeley in Jurisprudence and Social Policy and BA from Stanford University.

Vivienne Bath is Professor of Chinese and International Business Law at Sydney Law School and Director of the Centre for Asian and Pacific Law at the University of Sydney. Her teaching and research interests are in international business and economic law, private international law and Chinese law. She has first class honours in Chinese and in law from the Australian National University, and an LLM from Harvard Law School. She has also studied in China and Germany and has extensive professional experience in Sydney, New York and Hong Kong, specialising in international commercial law, with a focus on foreign investment and commercial transactions in China and the Asian region. Representative publications include: R Burnett and V Bath, *Law of International Business in Australasia* (Sydney, Federation Press 2009); V Bath, 'Foreign investment, the national interest and national security – foreign direct investment in Australia and China,' (2012) 34 *Sydney Law Review* 5-34, "Overlapping Jurisdiction and the Resolution of Disputes before Chinese and Foreign Courts," (2015-2016) 17 *Yearbook of International Private Law* 111-150 and "The South and Alternative Models of Trade and Investment Regulation – Chinese outbound investment and approaches to international investment agreements", in Fabio Morosini and Michelle Ratton Sanchez Badin (eds), *Recalibrating International Investment Law: Global South Initiatives*, Cambridge University Press, 2018.

Max Bonnell is an Executive Lawyer with Henry William Lawyers and an Adjunct Professor of Law at the University of Sydney. He has extensive experience of international arbitration, both as an advocate and as an arbitrator. He acted for the successful claimant in *White Industries v India*, the first ISDS case won by an Australian claimant, and the first successful claim against India.

Professor Simon Butt is Professor of Indonesian Law at the University of Sydney Law School, where teaches Indonesian law and Private International Law. He has written widely on Indonesian law, including *The Constitutional Court and Democracy in Indonesia* (Brill, 2015), *Corruption and Law in Indonesia* (Routledge, 2012), *The Constitution of Indonesia: a Contextual Analysis* (Hart, 2012, with co-author Tim Lindsey) and, most recently, *Indonesian Law* (Oxford University Press, 2018, with co-author Tim Lindsey).

James Claxton is a Professor of Law at Kobe University in Japan as well as an independent arbitrator and mediator. He teaches and researches in the fields of international investment law, business and human rights, and international dispute settlement. Previously, he was legal counsel at the International Centre for Settlement of Investment Disputes (ICSID) in Washington and attorney in the international arbitration practices of law firms in Paris. James regularly advises dispute resolution institutions in Asia and is a member of various working groups devoted to improving international dispute resolution systems.

The Hon Dr Clyde Croft AM SC is currently the judge in charge of the Arbitration List, the Taxation List, and a General Commercial List in the Commercial Court of the Supreme Court of Victoria. His Honour will, however, retire from the Court on 4 October 2019 and return to acting as a commercial arbitrator and mediator, internationally and in Australia.

Justice Croft has chaired the Expert Advisory Committee of the UNCITRAL National Co-ordination Committee of Australia (UNNCA) to support UNCITRAL Working Group II (Disputes) since May 2018. He represented the Asia Pacific Regional Arbitration Group (APRAG) at sessions of UNCITRAL Working Group II on International Arbitration from 2005 to 2010, revising the UNCITRAL Model Arbitration Law and the UNCITRAL Arbitration Rules. He is co-author of *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013). Justice Croft is a Life Fellow of the Australian Centre for International Commercial Arbitration (ACICA) and of the Institute of Arbitrators and Mediators Australia (IAMA), a Judicial Fellow of Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and a Fellow of the Chartered Institute of Arbitrators. He is also a Fellow of the Australian Academy of Law.

Prior to his Court appointment in 2009, Justice Croft practised extensively in property and commercial law and was an arbitrator and mediator in property, construction and general commercial disputes, domestically and internationally. He was appointed Senior Counsel in 2000 and holds the degrees of B Ec, LLB and LLM from Monash University, Melbourne, and PhD from the University of Cambridge. Justice Croft was made a Member of the Order of Australia on 26 January 2019 for significant service to the law, and to the judiciary, particularly through commercial arbitration.

Daniel Forster is an experienced commercial disputes Senior Associate at Sparke Helmore Lawyers, specialising in commercial conflict of laws and contractual disputes. He works with a wide range of corporate and government clients in various proceedings before courts and tribunals, as well as different forms of alternate dispute resolution. Daniel is a Member of the Chartered Institute of Arbitrators (MCI Arb) and attended the 37th Session of Working Group III to UNCITRAL (ISDS reform) with Justin Hogan-Doran on behalf of UNCCA as a LAWASIA delegate. Daniel has completed his Master of Laws (distinction) at the University of Sydney, and is currently completing his doctoral thesis under the supervision of Professors Luke Nottage and Chester Brown. His thesis focuses on the tension between mandatory laws of the forum and the role of party autonomy in commercial contracts.

Dr Benjamin Hayward is a Senior Lecturer in the Department of Business Law and Taxation, Monash Business School, Monash University. Dr Hayward holds a PhD in law from Monash University, with his doctoral research published as *Conflict of Laws and Arbitral Discretion - The Closest Connection Test* (Oxford University Press, 2017). Dr Hayward's research addresses a range of international commercial arbitration, international sales law, and private international law topics, including issues at the intersection of these three fields. Dr Hayward's research has been published in highly regarded national (*Sydney Law Review*, *Federal Law Review*) and international (*International and Comparative Law Quarterly*) journals, and he has presented his research to both national and international audiences at conferences, government workshops, law firms, universities, and continuing professional development seminars.

Brenda Horrigan is Head of International Arbitration – Australia at Herbert Smith Freehills, based in HSF's Sydney office. She is an Australian registered foreign lawyer admitted in Washington DC. Brenda has some 20 years' experience in international arbitration. Her practice is multifaceted; she works as counsel on complex international commercial and investment treaty arbitration matters at both the arbitration and enforcement stages, and also sits as an arbitrator. She began her career as a transactional lawyer, and that background provides valuable insight for clients into the underlying commercial and contractual aspects of their disputes.

Brenda serves as the President of ACICA, is a Fellow of the Chartered Institute of Arbitrators (Australia), and is listed on the panels of several arbitral institutions. She also served for several years as Global Adjunct Professor of Law at New York University Law School (Shanghai campus). Brenda has practiced in the US, Paris, Moscow, Shanghai and now Sydney, and is consistently ranked in Chambers and in Global Arbitration Review's Who's Who: Legal as a leading arbitration practitioner.

Dr Jeanne Huang is an Associate Professor at the University of Sydney Law School. Her previous positions include Senior Lecturer at the University of New South Wales in Australia, Associate Professor and Associate Dean at Shanghai University of International Business and Economics School of Law in China. She was awarded Pujiang Rencai (Pujiang Scholar) in 2011 and Shuguang Xuezhe (Dawn Scholar) in 2013 by Shanghai Education Committee. She obtained her Doctor of Juridical Science (S.J.D.) degree from Duke University School of Law in the US in 2010. She was a Foreign Research Fellow at

the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany, and also had research experience at The Hague Academy of International Law, and the Academy of International Arbitration Law, Paris, France.

She teaches and researches in the fields of private international law, e-commerce regulation, international investment law and dispute resolution (international litigation and arbitration). She has published four books including *Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Laws*, published by Hart Publishing in 2014. Her articles have appeared in many peer-reviewed law journals, such as *Journal of Private International Law* and *Journal of International Economic Law*. Eleven of her articles are indexed by SSCI. Her research has been heavily funded by China National Social Science Fund (equivalent to Australia ARC Fund), China Ministry of Education, the China Law Society, Shanghai Government Development and Research Center Fund, and Shanghai Philosophy and Social Science Fund. In 2015, she won the First Prize of Excellent Scholarship awarded by the China Society of Private International Law and the Nomination Award of the Dong Biwu Prize for Youth Research in Law. In addition, she works as an arbitrator at the Hong Kong International Arbitration Center, Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center), Nanjing Arbitration Commission and Xi'an Arbitration Commission. She also serves as expert witness on issues of private international law and Chinese law in courts in Australia and the US.

Amokura Kawharu is an Associate Professor at Auckland Law School and holds a BA/LLB(Hons) degree from Auckland University and an LLM with a major in international law from the University of Cambridge. She became member of the Law Faculty's academic staff in 2005 after working for several years in private commercial law practice in Auckland and in Sydney. Her research interests include international trade and investment law, arbitration, and international disputes resolution. She has published widely in these fields, including as co-author of the leading New Zealand treatise on arbitration law with Sir David Williams QC, *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, 2017).

Hon Kevin Lindgren AM QC FAAL. Kevin Lindgren was a Judge of the Federal Court of Australia from July 1994 for nearly 16 years until he retired in February 2010. When appointed to the Court he was practising as a Queen's Counsel at the Sydney Bar, mainly in commercial law. Since retiring as a Judge, he has pursued a busy practice in alternative dispute resolution, including arbitrations, mediations, expert determinations and early neutral evaluations, almost entirely in the broad area of commercial law, as well as writing activities. As at March 2019, Dr Lindgren had been arbitrator in 21 arbitrations, comprising 10 domestic and 11 international. In 17 of the 21 he has been sole arbitrator and in the other four, he has been a member of an arbitral tribunal of three members. He is the author of Part 12, "Commercial Arbitration", in *Business Law of Australia* (LexisNexis, loose-leaf), the author of the chapter, "The Choice between Litigation and Arbitration" in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis), and a Fellow of the Australian Centre for International Commercial Arbitration. Dr Lindgren is a Fellow, and currently the President, of the Australian Academy of Law. As well, he is Adjunct or Conjoint Professor in the Faculties of Law at the University of Sydney, UTS and the University of Newcastle.

Wilson Mbugua is a Doctoral Candidate in Law at the University of Hong Kong, and an Eurasia-Pacific Uninet fellow at the University of Salzburg. His research focuses on the current reforms of Bilateral Investment Treaties to safeguard states' right to regulate the environment. Mbugua holds a Master of Laws (LL.M) from Stockholm University, MA in Human Rights and Conflict Management from St'Anna School of Advanced Studies and a Bachelor of Laws (LL.B) from the University of Nairobi. Mbugua is a qualified advocate of the High Court of Kenya where he previously practiced law.

James (Jim) Morrison is Acting Secretary-General of ACICA and the Principal of Morrison Law. He is qualified in Australia and acts as arbitrator and counsel in international arbitrations. Jim was also formerly Counsel at the ICC International Court of Arbitration in Paris where he managed a team of lawyers responsible for the conduct of hundreds of international arbitrations taking place all over the world. He holds a Master's Degree in International Commercial Arbitration Law from the University of Stockholm.

Jim has acted and advised on various institutional and ad hoc arbitrations, including in cases under the rules of the ICC, SIAC, LCIA, CIETAC, ICDR, LMAA, ICSID, KCAB and UNCITRAL, as well as the English Arbitration Act and the Australian Uniform Commercial Arbitration Acts. These arbitrations have involved seats and disputes in Indonesia, Vietnam, France, Singapore, India, Australia, the United Kingdom, Switzerland, China, Japan and Korea. They have concerned a wide range of subject matters, including M&A, major construction and infrastructure projects, energy and resources, joint venture agreements, insurance, shipbuilding, intellectual property, hotel development and management. Jim has been named in the International Who's Who of Commercial Arbitration. He has participated in working groups to revise various institutional and ad hoc arbitration rules. Jim regularly speaks at arbitration conferences and lectures at universities. He is a former Co-Chair of Young ICCA, a co-author of the first English textbook on Korean arbitration law and regularly publishes in the field of international dispute resolution.

Dr Luke Nottage specialises in comparative and transnational business law (especially arbitration and product safety law), with a particular interest in Japan and the Asia-Pacific. He is Professor of Comparative and Transnational Business Law at Sydney Law School, founding Co-Director of the Australian Network for Japanese Law (ANJeL), and Associate Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS). Luke studied at Kyoto University (LLM) and Victoria University of Wellington (BCA, LLB, PhD), and first taught at the latter and then Kyushu University Law Faculty, before arriving at the University of Sydney in 2001. He has held fellowships at other leading institutions in Japan and Australia as well as Canada, Germany, Italy and Thailand. Publications include *Product Safety and Liability Law in Japan* (Routledge, 2004), *International Arbitration in Australia* (Federation Press, 2010, eds), *Foreign Investment and Dispute Resolution in Asia* (Routledge, 2011, eds), *International Investment Treaties and Arbitration Across Asia* (Brill, 2018, eds), *Contract Law in Japan* (Kluwer, 2019, with Hiroo Sono et al), and 11 other books.

Luke has or had executive roles in the Australia-Japan Society (NSW), the Law Council of Australia's International Law Section, the Australian Centre for International Commercial Arbitration, and the Asia-Pacific Forum for International Arbitration. Luke is also a Rules committee member of ACICA and listed on the Panel of Arbitrators for the AIAC

(formerly KLRCA), BAC, JCAA, KCAB, NZIAC, SCIA and TAI. Luke serves on Working Group 6 (examining arbitrator neutrality) for the Academic Forum on ISDS. He has consulted for law firms world-wide, the EC, the OECD, the UNDP, ASEAN and the Japanese government; and has made numerous public Submissions to the Australian government on investment treaties, arbitration and consumer law reform. He qualified as a lawyer in New Zealand in 1994 and in New South Wales in 2001.

Jonathan Redwood is a Sydney-based barrister with more than 20 years' experience in legal practice, and a Vice-President of ACICA. He was called to the Bar in 2006 and maintains a broad national practice encompassing high value commercial disputes as well as a regulatory and public law matters. He appears in arbitrations seated domestically and internationally both led and unled, and is ranked as a leading counsel for arbitration in the *Doyles Guide to the Legal Profession, Australia wide* (2017 & 2018).

Dr Nobumichi (Nobu) Teramura is Lecturer at the University of Adelaide Law School, specialising in international business law, with a particular interest in private international law, arbitration, contract law, and Japanese law. As a diligent and serious bilingual scholar, he has published and presented his research extensively in various journals and at academic conferences in different jurisdictions in both English and Japanese. He has also received scholarships and fellowships in highly competitive rounds from leading research institutions and foundations and from the Japanese Government. He was awarded a UNSW PhD Excellence Award with his thesis on “*Ex Aequo et Bono* as a Response to the ‘Over-Judicialisation’ of International Commercial Arbitration”.

Professor Trakman is former Dean of Law at the University of New South Wales, 2002-2007 and is currently a UNSW Professor of Law. He holds both Masters’ and Doctorate degrees earned at the Harvard Law School. He is author or editor of 9 books, over 40 book chapters and more than 100 articles published in international law journals. His primary areas of research are international dispute resolution, international investment law and contract law. He is active as an inter-governmental trade adjudicator, frequently appointed since 1993 by the US, Canadian and Mexican Governments under the NAFTA. Professor Trakman has also served as presided arbitrator or as co-arbitrator in over 120 international commercial arbitration disputes over the past 3 decades.

Professor the Hon Marilyn Warren AC QC was Chief Justice of the Supreme Court of Victoria 2003-2017 and a commercial judge of the Supreme Court 1998-2003. She is an international commercial arbitrator of Dawson Chambers in Melbourne and also a professor of Monash University, where she teaches various subjects including international arbitration.

Tang Yi is an MPhil candidate at the University of Hong Kong Faculty of Law, where she completed Bachelors degrees in Social Sciences (Government & Laws) and in Laws. Yi has served as a research assistant in the fields of both politics and law, and is currently working as a research assistant for Prof Gu Weixia on a number of projects relating to cross-border dispute resolution. Yi’s academic interests include international and comparative laws, international commercial and investment arbitration, and cross-border

legal issues, with a particular focus on China. Her MPhil research focuses on the application of PRC's BITs in Hong Kong and Macao SARs, explicates the conflict between Chinese government and international investment tribunals (highlighted in recent landmark investment arbitration cases such as *Tza Yap Shum* and *Sanum*), and proposes better protection for Hong Kong and Macao investors in the new context of cross-border integration and economic globalization.