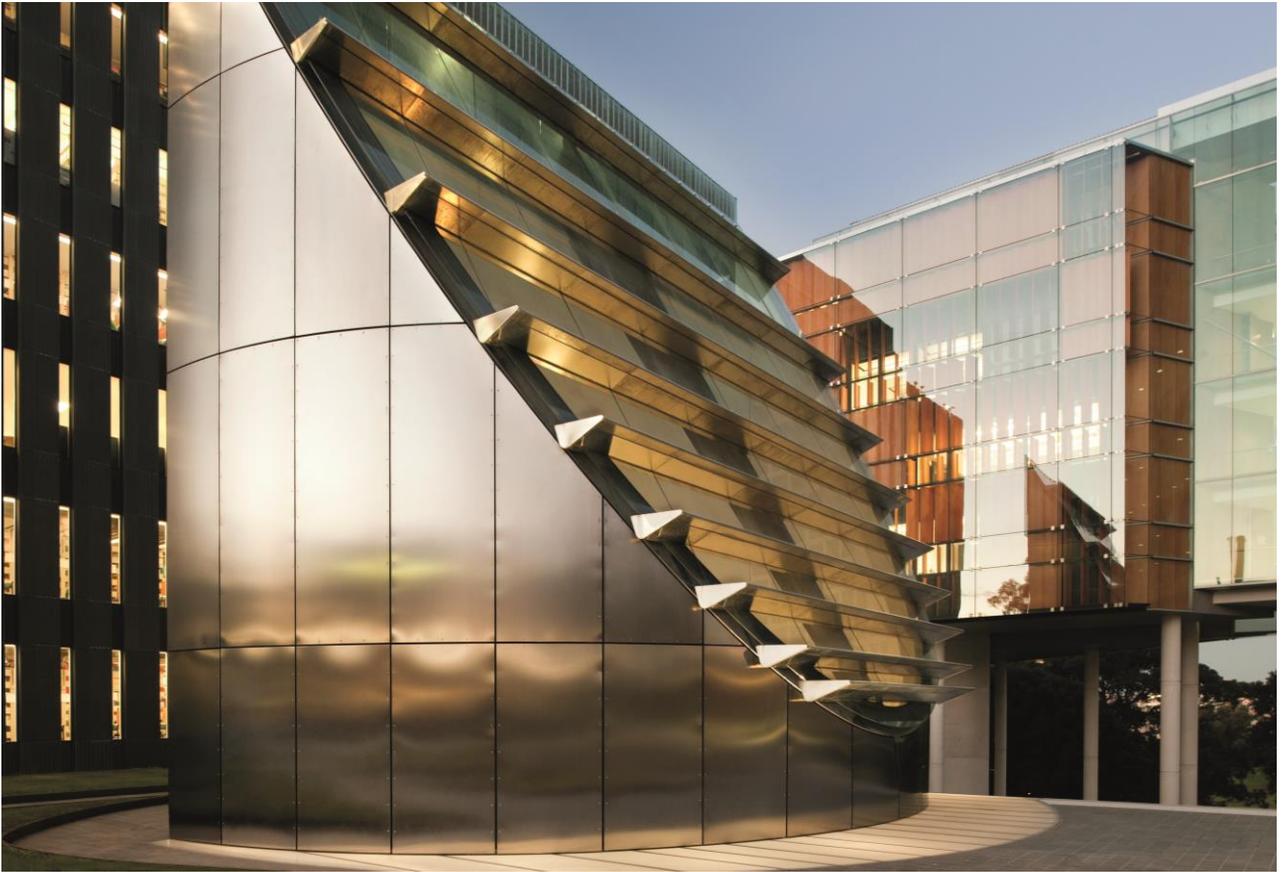




THE UNIVERSITY OF
SYDNEY



International Commercial Dispute Resolution for the 21st Century: Australian Perspectives

Thursday, 19 April 2018

9am – 5pm

Venue:

[Sydney Law School](#)

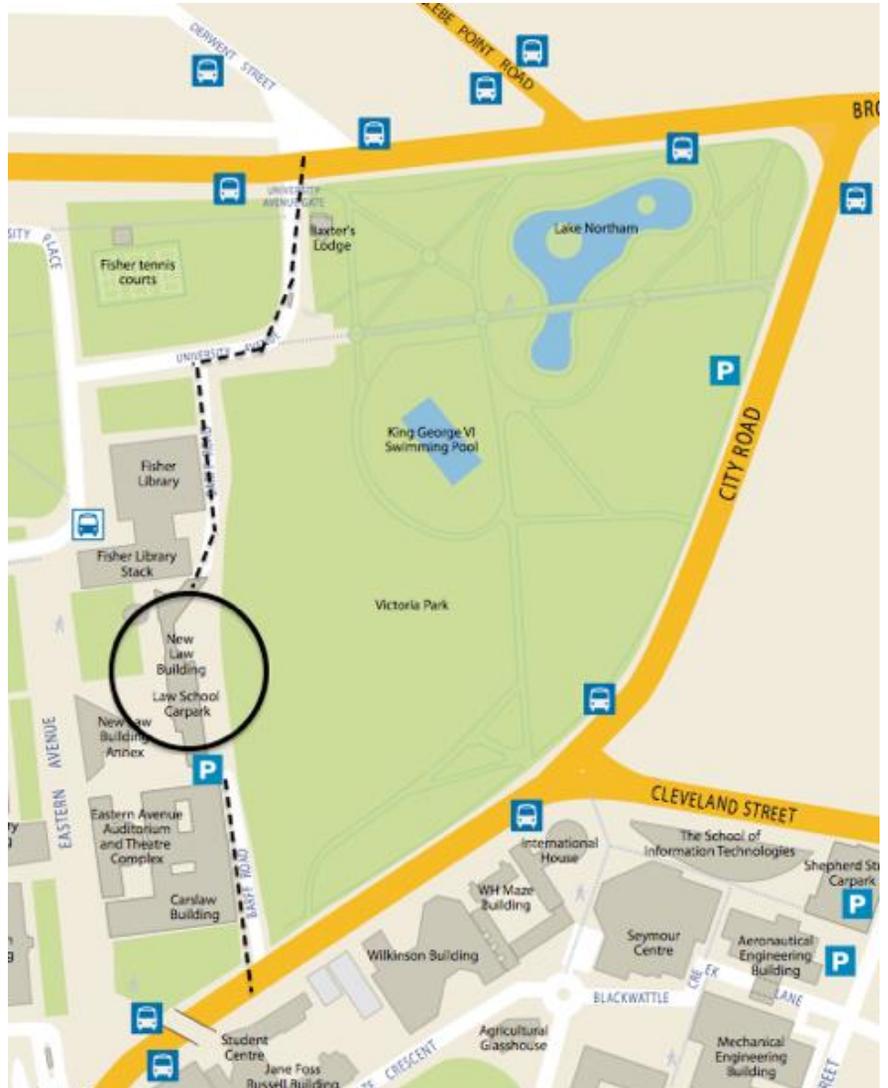
Common Room, level 4, New Law School Building (F10)

Camperdown, The University of Sydney



Location

Common Room (Level 4),
New Law Building (F10),
Eastern Avenue, University
of Sydney





		Speakers	Discussants
8.30 – 9.00am	Registration		
9.00 – 9.05am	Welcome	Professor Luke Nottage	
9.05 – 10.00am	Panel Discussion: The Future of Investor-State Arbitration amidst New Developments in Dispute Resolution for International Business	Prof Julien Chaisse (CUHK - chair), Patricia Holmes (DFAT), Dr Rajesh Sharma (RMIT) and A/Prof Amokura Kawharu (UAuckland)	
10.00 – 10.30am	Cross-border Litigation (including International commercial courts)	Prof Vivienne Bath	Dr Andrew Bell SC
10.30 - 11.00am	Morning tea		
11.00am – 12.00pm	International Commercial Arbitration and Mediation	Prof Catherine Rogers Jim Morrison & Luke Nottage	Esme Shirlow Prof Camilla Anderson
12.00 – 1.30pm	Lunch & book launch by Hon Robert French AC: Chaisse & Nottage (eds), <i>“International Investment Arbitration Across Asia”</i> (Brill, January 2018)		
1.30 – 2.30pm	Investor-State Arbitration	Prof Stephan Schill Dr Caroline Henckels	Ana Ubilava Hon Robert French AC
2.30 – 3.00pm	Afternoon tea		
	ISA Cont’d	Esme Shirlow	Prof Chester Brown
	Inter-state Dispute Settlement	Dr Brett Williams	Richard Braddock
3.30 – 4.00pm	General Discussion	Chaired by Luke Nottage	
4.00 – 5.00pm	Refreshments		



Abstracts & Biographies

Dr Caroline Henckels, Monash University

Title: *Public-Private Arbitration in Australia: Public Law Concerns, Private Law Responses*

Abstract:

Unlike investor-state arbitration, the phenomenon of commercial arbitration between governments and private actors has largely flown under the radar in Australia. By interpreting and applying domestic law to exercises of power by government, arbitrators contribute to governance, but without the hallmarks of the judicial process. There are no restrictions on federal or state governments' ability to enter contracts providing for arbitration of disputes. Moreover, the law regulating arbitration in Australia does not distinguish between public-private arbitrations and purely private arbitrations; as such, it cannot account for the public law dimension of some public-private disputes or account for the involvement of arbitrators in controlling government action. Meanwhile, although the past two decades have seen a growing awareness of the implications of the contracting out of public functions to private bodies in terms of public law accountability, Australian courts have generally not subjected decisions made under or pursuant to contracts to constitutional or administrative law review. As such, the choice of arbitration as the dispute resolution mechanism can operate to even further insulate exercises of public power from the already limited prospect of judicial scrutiny. Although the time might not yet have come for Australian law to confront these issues, any appreciable increase in the uptake of contracts relying on arbitration by government and one or two more high profile arbitration cases might well raise the spectre of domestic legislative reform to better protect the public interest.

Biography:

Dr Caroline Henckels is a Senior Lecturer in the Faculty of Law at Monash University. Caroline researches in the areas of public international law (with a focus on international economic law) and comparative public law. She is an Associate Editor of the *Journal of World Investment and Trade* and serves as peer reviewer for numerous academic journals and for the United Nations Conference on Trade and Development.

Before joining Monash, Caroline was a Vice-Chancellor's Postdoctoral Research Fellow in Law at the University of New South Wales. She has taught law at the University of Cambridge and the University of Melbourne, and has acted as consultant to the McCabe Centre for Law and Cancer and the Human Rights Law Centre. She holds a PhD from the University of Cambridge, an LLM from the University of Melbourne and an LLB from Victoria University of Wellington. Caroline is admitted to practice law in Victoria and in New Zealand.

Caroline is interested in supervising PhD and Honours students in areas including international investment law, WTO law and public law.



Dr Luke Nottage, The University of Sydney Law School

Title: *Accessing and Assessing Australia's International Arbitration Act*

Abstract:

This review identifies many positive trends in international commercial arbitration law and practice in Australia, especially over the last decade. Yet much work remains to be done, in light of some ongoing uncertainties in the statutory regime and associated case law, and comparatively few international arbitration case filings. The biggest challenge is for law reformers in relation to more controversial issues such as the arbitrability of various types of disputes, mandatory laws impacting on forum selection and choice of laws, the precise contours of the competence-competence principle, and confidentiality of arbitration-related court proceedings. Hopefully, a new phase of comprehensive legislative reform will be conducted through more open and structured public consultation than the three piecemeal amendments since 2015.

Biography:

Dr Luke Nottage specialises in international arbitration, contract law, consumer product safety law and corporate governance, with a particular interest in the Asia-Pacific region. He is Professor of Comparative and Transnational Business Law and Associate Director of the Centre for Asian and Pacific Law at the University of Sydney, where he has taught international commercial arbitration since 2001. His 14 books include *International Arbitration in Australia* (co-edited with Richard Garnett, 2010) and *International Investment Treaties and Arbitration Across Asia* (co-edited with Julien Chaisse, forthcoming from Brill). Luke is an ACICA Special Associate and founding member of its Rules drafting committee, and on the panel of arbitrators for the BAC, JCAA, KCAB, KLRCA, SCIA and TAI. He has served on committees within the Law Council of Australia, is Managing Director of Japanese Law Links Pty Ltd, and has consulted for law firms world-wide, ASEAN, the EC, OECD, UNCTAD, UNDP and the Japanese government.

Professor Stephan Schill, University of Amsterdam

Title: *A (Comparative) Constitutional Framework for Private-Public Arbitration and Its Legitimacy*

Abstract:

The presentation analyzes the challenges of arbitrating public-private disputes for constitutional principles, such as democracy, human rights, and the rule of law and develops a framework for conceptualizing legitimacy of private-public arbitration in a multi-jurisdictional system with little regulation under international law and few stringent control mechanisms under domestic law. The presentation introduces the idea that, absent a centralized way to control private-public arbitrations, a framework for legitimacy can be developed through comparative law analysis of the boundaries constitutional principles, like democracy, human rights, and the rule of law establish for private-public arbitration. It explores the conditions under which different domestic legal systems, as well as supranational regional regimes, permit private-public arbitrations and how they ensure that the public interest is not undermined by the resolution of private-public disputes through arbitration instead of litigation in domestic courts. In particular, it assesses whether, under which circumstances, and subject to which constraints and control mechanisms, constitutional law permits or restricts government-involvement in arbitration in a comparative perspective.

Biography:

Stephan W. Schill is Professor of International and Economic Law and Governance at the University of Amsterdam, where he heads the European Research Council-funded research project 'Transnational Public-Private Arbitration as Global Regulatory Governance'. He is admitted to the bar in Germany and New York, is a Member of the ICSID List of Conciliators, and acts as arbitrator in investor-state arbitrations. He serves as Editor-in-Chief of *The Journal of World Investment and Trade* and has published widely on international investment law and investor-state dispute settlement, including *The Multilateralization of International Investment Law* (CUP 2009), *International Investment Law and Comparative Public Law* (OUP 2010), *Practising Virtue: Inside International Arbitration* (OUP 2015 – with David Caron, Abby Cohen Smutny and Epaminontas Triantafyllou), *Transnational Law of Public Contracts* (Bruylant 2016 – with Mathias Audit) and *International Investment Law and the Global Financial Architecture* (Elgar Publishing 2017 – with Christian Tams and Rainer Hofmann).



Esmé Shirlow, King's College London

Title: Conflict, Comity or Control? Accounting for Domestic Decision-Making in the International Adjudication of Investment Claims

Abstract:

Despite the ubiquity of references to restraint, deferral, comity, and deference in discussions of investment treaty arbitration, the operation of these concepts in practice – or how they relate to each other – is still not well understood. This paper draws upon an empirical study of a unique dataset comprising all publicly available decisions rendered by investment treaty tribunals. The paper considers the range of devices used by international tribunals to give relevance to domestic decision-making authority. It develops a taxonomy to conceptualise how investment treaty tribunals delineate the role to be played on the international level by domestic legislative, executive and adjudicative decision-makers. The paper illuminates how international investment treaty tribunals are constructing and regulating the interface between domestic and international law and decision-making and identifies key shifts in their approaches to the relevance of domestic decisions over time and by decision type.

Biography:

Esmé Shirlow is a PhD candidate at King's College London. Her research focuses on the adjudication of private property cases under public international law. She is Assistant Editor (Australia/New Zealand Region) with Kluwer Arbitration Blog, and was previously a Senior Legal Officer with the Australian Government's Office of International Law. Esmé completed her LL.M. at the University of Cambridge, and an LL.B. and B.A. at the Australian National University. She is currently a visiting scholar at the ANU's School of Regulation and Global Governance (RegNet).
