3rd Geneva-Harvard-Renmin-Sydney Law School Conference

New Directions in Dispute Resolution

17-18 July 2015

Hosted by Sydney Law School
University of Sydney

UNIVERSITÉ DE GENÈVE | HARVARD LAW SCHOOL | RENMIN UNIVERSITY OF CHINA LAW SCHOOL | THE UNIVERSITY OF SYDNEY

THE UNIVERSITY OF SYDNEY

Sydney Law School

New Law Building (F10), Eastern Avenue, The University of Sydney NSW 2006

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University of Sydney Law School
17-18 July 2015
Pre-conference dinner and Day 1

Pre-conference dinner: Thursday 16 July

6.30pm — **Welcome dinner: Bambini Trust Restaurant & Wine Room,** St. James Trust Building, 185 Elizabeth Street

Day 1: Friday 17 July

8.20am — **Hotel bus transfer: There will be a daily bus transfer to and from the University for delegates staying at the Sir Stamford Hotel with Around Town Buses**

8.45-9.15am — **Common Room, level 4**
Registration opens
Arrival tea and coffee

9.15-9.30am — **Dean's Welcome and Conference Opening** - Professor Joellen Riley Sydney Law School

Acknowledgement of Country

9.30- 11am — **First Session:**

Cross-Border Commercial Disputes and International Commercial Arbitration

Professor Vivienne Bath (University of Sydney) – Overlapping Jurisdictions and the Resolution (or Non-Resolution) of Disputes

Professor Zhao Xiuwen (Renmin Law School) – Interim Measures and Emergency Arbitrator in International Commercial Arbitration

Professor Luke Nottage (University of Sydney) – In/formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia

Chair: Professor Chester Brown (University of Sydney)

11.00-11.15am — **Morning Tea**

11.15-12.15pm — **Second Session: Dispute Settlement in Family Law**

Professor Gian Paolo Romano (University of Geneva) – Inter-Country Disagreement on What is in the Best Interests of a Bi-national Child: Towards Bi-national Tribunals on Cross-Border Child Custody Litigation?

Dr Ghena Krayem (University of Sydney) – Family Dispute Resolution in Australia – Meeting the Needs of Australian Muslims

Chair: Professor Patrick Parkinson (University of Sydney)

12.15 - 1.15pm — **Lunch**

1.15 – 2.15pm — **Third Session: The Role of the Courts**

Sonya Willis (University of Sydney) – Managing to stay relevant: Can active case management by courts modernise our most traditional form of dispute resolution?

Miiko Kumar (University of Sydney) – Australian Reforms to Dispute Resolution

Chair: Professor Glenn Cohen (Harvard University)

2.15 – 3.45pm — **Fourth Session: Alternative Dispute Resolution**

Professor Alan Rycroft (University of Cape Town) – The Institutionalisation of Process Pluralism: The Problems and Potential of Entrenching ADR in Post-Apartheid South Africa

Professor Tang Weijian (Renmin Law School) – ADR in China

Professor Ye Lin (Renmin Law School) – China's Practice: Mediation in Resolving Civil and Commercial Disputes

Chair: Professor Christine Chappuis (University of Geneva)

3.45-4.15pm — **Afternoon tea**

4.30-5.30pm — Heritage tour of Sydney University grounds

5.30pm — Pre-dinner drinks at Nicholson Museum

6.30pm — Dinner: Sydney Law School, Faculty Common Room, level 4

9.45pm — **Bus transfer back to hotel**

Hotel and Bus Information for Delegates

HOTEL
Sir Stamford, Circular Quay
93 Macquarie Street
Sydney, NSW 2000
Telephone: +61-2 9252 4600

HOTEL BUS TRANSFERS (Around Town Buses)
There will be bus tranfers on Friday and Saturday from the hotel to the University and return for delegates staying at the Sir Stamford Hotel. Please wait at the street entrance of the hotel at the designated pick up times. Drop off/pick up
location at the University wiill be at the Fisher Library, adjacent to Sydney Law School

Day 2: Saturday 18 July

8.30am	**Hotel bus transfer to University**
9.00 – 10.30am	**First Session: Dispute Resolution in Specialised Fields (I)**
Law Foyer Level 2	**Professor Marc-André Renold** and **Dr Alessandro Chechi** (University of Geneva) – How Does the Tension between Nationalism and Internationalism Affect Dispute Resolution in Art and Cultural Heritage Matters? **Professor Glenn Cohen** (Harvard University) –Medical Tourism, Litigation, and Dispute Resolution **Patricia Lane** (University of Sydney) – Good faith, native title and resource development – statute, contract, and culture in resolving mining disputes over native title land **Chair: Professor Han Dayuan** (Renmin Law School)
10.30 – 11.00am	**Morning Tea**
11.00am – 12.00pm	**Second Session: The Resolution of Inter-State Disputes** **Professor Chester Brown** (University of Sydney) – Not such a "Cardinal Distinction"? Applicable Law in International Adjudication **Julian Wyatt** (University of Geneva) – The Use of Evidentiary Approaches from the Common Law, Civil Law and International Arbitration Traditions in the Increasingly Important Fact-Finding Aspects of State-to-State Dispute Resolution **Chair: Professor Tim Stephens** (University of Sydney)
12.00 – 1.15pm	**Lunch**
1.15 – 2.45pm	**Third Session: Dispute Resolution in Specialised Fields (II)** **Associate Professor Lu Haina** (Renmin Law School) - Labor Dispute Resolution in China: Latest Developments and Challenges **Professor Jacques de Werra** (University of Geneva) - How to Solve Global FRAND Patent Licensing Disputes: Can Courts and/or ADR Offer Fair Reasonable and Non-Discriminatory Dispute Resolution Mechanisms ("FRAND-DRM")? **Dr Zou Qizhao** (Renmin Law School) - Securities Dispute Resolution: Philosophy and Practice **Chair: Professor Joellen Riley** (University of Sydney)
2.45pm – 3.00pm	**Afternoon Tea**
3-3.30pm	**Closing Session**
3.30pm	**Bus transfer back to hotel**
6.00pm	**Dinner: Waterfront Restaurant, 27 Circular Quay West, The Rocks**

Post conference lunch: Sunday 19 July

12.30pm	**Lunch: Graze MCA, Ground Floor Terrace, Museum Of Contemporary Art,** 140 George St, The Rocks

WIFI Instructions

Step 1: Enable wireless on your device and select the network 'UniSydney-Guest'.
Step 2: Open your browser. You will be automatically directed to a log in page.
Step 3: Enter the username 'LawConference' and password 'LawConference1' (case sensitive)

CONFERENCE PARTICIPANTS

PROF KICHIMOTO ASAKA (UNIVERSITY OF TOKYO)

Professor of Law

Professor Asaka plans to research (a) the independent development of Australian Law and "Unity of Common Law" and (b) class actions in Australia, comparing Australian class action disputes with those in the US and recently commenced consumer group litigation in Japan. Professor Asaka plans to research at the University of Sydney from July to September 2015.

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VIVIENNE BATH (UNIVERSITY OF SYDNEY)

Professor of Chinese & International Business Law
Director, Centre for Asian and Pacific Law
Chair, Research Committee, China Studies Centre

Vivienne's teaching and research interests are in International Business Law and Chinese law (particularly Chinese investment and commercial law). She has first class honours in Chinese and in Law from the Australian National University, and a Master of Laws from Harvard University. She is admitted to practice in Australia, New York, England and Wales and Hong Kong and, prior to joining Sydney Law School, was a partner of international law firm Coudert Brothers. Vivienne 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 the People's Republic of China and the Asian region.

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CHESTER BROWN (UNIVERSITY OF SYDNEY)

Professor of International Law and International Arbitration
Associate Dean (International)

Chester Brown is Professor of International Law and International Arbitration at the Faculty of Law, University of Sydney; a Barrister at 7 Selborne Chambers, Sydney, and an overseas associate of Essex Court Chambers, London, and Maxwell Chambers, Singapore. He teaches and researches in the fields of public international law, international dispute settlement, international arbitration, international investment law, and private international law. He also maintains a practice in these fields, and has been involved as counsel in proceedings before the International Court of Justice, the Iran-United States Claims Tribunal, inter-State and investor-State arbitral tribunals, as well as in international commercial arbitrations.

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CHRISTINE CHAPPUIS (UNIVERSITY OF GENEVA)

Dean, Faculty of Law

Christine Chappuis is Professor at the Law Faculty of the University of Geneva, Switzerland, where she teaches methodology, contract and tort law. Her research focuses on those fields as well as on international contracts and international harmonization of contract law. Former member of a group of colleagues working on a restatement of the Swiss law of obligations funded by the Swiss National Science Foundation, she took part in the Working Group for the preparation of the third edition of the UNIDROIT Principles of International Commercial Contracts and is a member of the Groupe de Travail Contrats Internationaux. Admitted to the Bar, she was active as counsel to Geneva law firms before joining the University in 1999. Former president of the Geneva Law Society, she was also president of the General Assembly of Professors of the University of Geneva and is currently Dean of the Faculty of Law. She is author and editor of several important books and papers focusing, among others, on harmonization of contract law and contract practice. She obtained her PhD degree in 1989 and was awarded the Walter Hug prize among other honours.

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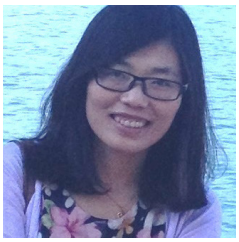
ALESSANDRO CHECHI (UNIVERSITY OF GENEVA)

Post-doctoral researcher, Art-Law Centre of the University of Geneva
Lecturer in public international law, Université Catholique of Lille

Alessandro (PhD European University Institute, LLM University College London, JD University of Siena) is a post-doctoral researcher at the Art-Law Centre of the University of Geneva and lecturer in public international law at the Université Catholique of Lille. He is reporter for Italy of the "International Law in Domestic Courts-Oxford University Press" project and member of the Editorial Committee of the "Italian Yearbook of International Law". He is the author of the book "The Settlement of International Cultural Heritage Disputes" (Oxford University Press, 2014).

CONFERENCE PARTICIPANTS



LEI CHEN (RENMIN LAW SCHOOL)

Director, International Office

Ms. Lei Chen, Director of the international office at Renmin Law School, got her bachelor degree and master degree in law respectively in 2009 and 2011 at Renmin Law School, and has worked at the international office of Renmin Law School since 2011. She is in charge of the international cooperation between Renmin Law School and its partners in Europe, Australia, New Zealand and Africa.
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GLENN COHEN (HARVARD UNIVERSITY)

Faculty Director, Petrie-Flom Center for Health Law Policy, Biotechnology & Bioethics

Professor, Harvard Law School and Faculty Director, Petrie-Flom Center for Health Law, Bioethics, and Biotechnology. Glenn is one of the world's leading experts on the intersection of bioethics and the law, as well as health law. He is the author of more than 80 articles and book chapters, and the author, editor, or co-editor of seven books. He was the youngest professor on the faculty at Harvard Law School (tenured or untenured) both when he joined the faculty in 2008 (at age 29) and when he was tenured as a full professor in 2013 (at age 34).
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JACQUES DE WERRA (UNIVERSITY OF GENEVA)

Vice-rector and Professor of contract law and intellectual property law

Jacques de Werra is professor of contract law and intellectual property law at the Law School of the University of Geneva, Switzerland. Jacques researches, publishes and speaks on topics related to various aspects of intellectual property law, contract law, particularly on the commercialization of intellectual property assets by way of transfer of technology, licensing and franchising, IT and Internet law, as well as on alternative dispute resolution mechanisms for IP and technology disputes. He is the organizer of the Internet l@w summer school (www.internetlaw-geneva.ch) and the coordinator for the University of Geneva of the WIPO - University of Geneva Summer school on Intellectual Property.
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DAYUAN HAN (RENMIN LAW SCHOOL)

Dean & Professor of Constitutional Law, Renmin University of China Law School
President, China Association of Constitutional Law
Executive Vice President, China Association of Legal Education

Dayuan Han, the Dean and Professor of Constitutional Law, has taught at Renmin University of China Law School since 1987, where his courses include constitutional law and comparative constitutional law. He held undergraduate degree in law from Jilin University, and received masters and Ph.D. degrees from Renmin University of China. Besides his many scholarly articles published in journals of law, his major books include *The Constitutional-Making Process of 1954 Constitution* (2014); *The Constitutional Logic of the Right to Life (2012); Research on Asian Constitutionalism* (2008); *Basic Theories of Constitutional Law* (2008); and *Comprehend the Spirit of Constitutional Law* (2008). Professor Han also serves as the President of China Association of Constitutional Law, and the Executive Vice President of China Association of Legal Education. He received honorary doctorate degree of Law at the University of Lapland, Finland in 2012, and the award of the Cheung Kong Scholar given by the Ministry of Education of China to honor his contribution to academic research and teaching.
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GHENA KRAYEM (UNIVERSITY OF SYDNEY)

Senior Lecturer

Ghena Krayem is a senior lecturer at the Faculty of Law, University of Sydney, teaching andresearching in the areas of constitutional and public law, legal ethics, the application of sharia in Australia, Muslim women and Islamic family law. She is the author of Islamic Family Law in Australia: To Recognise or not To Recognise (Melbourne University Publishing, 2014). Dr Krayem is a regular commentator on issues relating to the Muslim community. She is also a family dispute resolution practitioner with Legal Aid New South Wales, Australia.
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CONFERENCE PARTICIPANTS

MIIKO KUMAR (UNIVERSITY OF SYDNEY)

Senior Lecturer

Miiko Kumar is a Barrister and a Senior Lecturer in the Faculty of Law. Miiko teaches both compulsory and elective courses in Evidence and Procedure. Miiko was admitted as a solicitor in 1996 and called to the Bar in 2001. As a solicitor, she worked at the Office of the Director of Public Prosecutions (NSW) and Crown Solicitor's Office. She was a law reform officer at the Australian Law Reform Commission and worked on the adversarial system of litigation inquiry; Managing Justice, A Review of the Federal Civil Justice System, Report No 89 (2000). Miiko was an Advisory Committee Member and Consultant on the Australian Law Reform Commission's review of the Evidence Act; Uniform Evidence Law, Report No 102, (2005). Miiko is the co-author of Companion to Uniform Evidence Law with Stephen Odgers SC and Dr Elisabeth Peden, which was first published in 2004 (fourth edition published in 2012) and Principles of Civil Procedure in New South Wales (second edition published in 2012, with Dorne Boniface and Michael Legg). Miiko is also the examiner for the NSW Bar evidence exam and is a member of the Exam Working Party Committee of the NSW Bar Association.
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PATRICIA LANE (UNIVERSITY OF SYDNEY)

Senior Lecturer

Patricia Lane has worked in a variety of legal and administrative roles. She is a practitioner at the NSW Bar. She has also been a former Registrar and Member of the National Native Title Tribunal. Patricia has also participated in various peace negotiations concerning the Sudan as a resource person to mediators and parties in respect of land, environment, and natural resources.
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HAINA LU (RENMIN LAW SCHOOL)

Associate Professor
Director Human Rights Program

Haina Lu, Ph.D. in law from the Catholic University of Leuven (Belgium), associate professor of the Renmin University of China Law School. She also serves as the director of the human rights program at the Renmin Law School. Her research is focused on human right law, labor law, social security law, and migration studies. Her publications include "Personal Application of the Right to Work in the Age of Migration", in Netherlands Quarterly of Human Rights (2008); and the book Right to Work in China: Labour Legislation in the Light of the International Covenant on Economic, Social and Cultural Rights, Intersentia Publishing, 2011.
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LUKE NOTTAGE (UNIVERSITY OF SYDNEY)

Professor of Comparative and Transnational Business Law
Co-Director, Australian Network for Japanese Law

Professor Luke Nottage specialises in international arbitration, contract law, consumer product safety law and corporate governance, with a particular interest in Japan and the Asia-Pacific. He is founding Co-Director of the Australian Network for Japanese Law (ANJeL), Associate Director of the Centre for Asian and Pacific Law at the University of Sydney, and Comparative and Global Law Program coordinator for the Sydney Centre for International Law. Luke is also a Director of Japanese Law Links. His major research project over 2014-16 is an ARC Discovery Project on foreign investment dispute resolution. 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. Luke's publications include Product Safety and Liability Law in Japan (Routledge, 2004), Corporate Governance in the 21st Century: Japan's Gradual Transformation (Elgar, 2008, lead-edited with Leon Wolff and Kent Anderson), International Arbitration in Australia (Federation Press, 2010; lead-edited with Richard Garnett), Foreign Investment and Dispute Resolution Law and Practice in Asia (Routledge, 2011; edited with Vivienne Bath), Consumer Law and Policy in Australia and New Zealand (Federation Press, 2013; edited with Justin Malbon), Asia-Pacific Disaster Management (Springer, 2014, edited with Simon Butt and Hitoshi Nasu) and four other books.
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PATRICK PARKINSON (UNIVERSITY OF SYDNEY)

Professor of Family Law

Patrick Parkinson is a professor of law at the University of Sydney and a specialist in family law, child protection and the law of equity and trusts. He was President of the International Society of Family Law from 2011-2014. His books include Australian Family Law in Context (6th ed, 2015), Tradition and Change in Australian Law (5th ed, 2013), Family Law and the Indissolubility of Parenthood (2011), The Voice of a Child in Family Law Disputes (with Judy Cashmore, 2008), Child Sexual Abuse and the Churches (2nd ed, 2003) and Principles of Equity (editor, 2nd ed., 2003). Professor Parkinson served from 2004-2007 as Chairperson of the Family Law Council, an advisory body to the federal Attorney- General, and also chaired a review of the Child Support Scheme in 2004-05 which led to the enactment of major changes to the Child Support Scheme. Prof. Parkinson is also well-known for his community work concerning child protection. He has been a member of the NSW Child Protection Council, and was Chairperson of a major review of the state law concerning child protection which led to the enactment of the Children and Young Persons (Care and Protection) Act 1998. He also works with churches on child protection issues.
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MARC-ANDRE.RENOLD (UNIVERSITY OF GENEVA)

Professor of Art and Cultural Heritage Law
Director, Art-Law Centre

Marc-André Renold (Dr. iur., LL.M.) studied at the Universities of Geneva and Basel in Switzerland and at Yale University in the United States. He is Professor of art and cultural heritage law at the University of Geneva and the Director of its Art-Law Centre. He is also Attorney-at-law, Member of the Geneva Bar and is of counsel to a major Swiss- German law firm. His areas of practice are among others art and cultural heritage law, intellectual property and public and private international law. Marc-André Renold has been Visiting Professor at the Faculté Jean Monnet of the University of Paris Sud (2006-2007) and at the University of Lausanne (2008-2009). He has also lectured at the Hague Academy of International Law (Spring 2008) and the Institute for Mediterranean Heritage in Slovenia (summers of 2009 and 2010). He has been guest lecturer at the University Jean Moulin in Lyon, the Graduate Institute of International Studies in Geneva, as well as the Duke-Geneva Institute in Transnational Law. He is the author or co-author of several publications in the field of international and comparative art and cultural heritage law and has been, since its inception, an editor of the "Studies in Art Law" series (25 volumes published to date). He is the co-editor and co-author of Culture, Art and Law: Swiss and International Law (2009), the leading Swiss handbook written in German on the law of art and culture.
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PROFESSOR JOELLEN RILEY (UNIVERSITY OF SYDNEY)

Dean and Professor of Labour Law

Professor Joellen Riley, Dean at the faculty of law holds degrees in law from the Universities of Sydney and Oxford, and has been teaching and researching in the field of employment and labour law since 1998. She studied law after a number of years as a financial journalist, and spent some time in commercial legal practice before joining the University of Sydney. Her academic career includes some years on the staff of the Law Faculty of the University of New South Wales, where she taught principally in corporate and commercial law. Joellen is a Fellow of the Commercial Law Association.
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GIAN PAOLO ROMANO (UNIVERSITY OF GENEVA)

Professor of Law

Gian Paolo Romano is full professor at the Faculty of Law, University of Geneva, where he lectures on private international law, including international family law, international litigation and comparative law. He holds a dual PhD from the University of Paris 2 and the University of Padua (2005). For the period 2002-2010 he was scientific legal advisor at the Swiss Institute of Comparative Law, Lausanne, where he was responsible for private international law and Italian law. He is Co-Editor of the Yearbook of Private International Law. Gian Paolo Romano practised law in Italy, Belgium and England, served as Chairman in an international arbitration and currently advises a number of Swiss law firms in cross-border transactions and disputes, both in the family and commercial context.
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ALAN RYCROFT (UNIVERSITY OF CAPE TOWN)

Deputy Dean, Faculty of Law

Alan Rycroft (BA (Rhodes) LLB (Natal) LLM (London) is a qualified attorney, accredited arbitrator and mediator. Since 1983 he has been a law teacher, initially at the University of KwaZulu-Natal, in Durban, where from 1995 to 2000 he was Dean of the Faculty of Law. He moved to UCT in 2009 where he is the now the Deputy Dean and Professor of Commercial Law.Arising from his interest in labour law is an involvement in dispute resolution. Since 1988 he has been an accredited mediator and arbitrator. From 1996 he was a part-time Senior Commissioner with the Commission for Conciliation, Mediation and Arbitration (CCMA). He is the author of several books in the fields of labour law, dispute resolution and workplace harassment.
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TIM STEPHENS (UNIVERSITY OF SYDNEY)

Professor of International Law
Deputy Director, University of Sydney Institute of Marine Science
Australian Research Council Future Fellow

Dr Tim Stephens is Professor of International Law and Australian Research Council Future Fellow at the University of Sydney. Tim teaches and researches in public international law, with his published work focussing on the international law of the sea, international environmental law and international dispute settlement. He has published over 80 articles, book chapters and notes in Australian and international publications and has authored, co-authored or edited seven books. Major career works include The International Law of the Sea (Hart, 2010) with Donald R Rothwell and International Courts and Environmental Protection (Cambridge University Press, 2009). In 2010 Tim was awarded the International Union for the Conservation of Nature (IUCN) Academy of Environmental Law Junior Scholarship Prize for 'outstanding scholarship and contributions in the field of international environmental law'. He has been a consultant for several non-governmental organisations, including a long association of work for the International Fund for Animal Welfare in relation to cetacean conservation. In 2014, Tim was appointed, on the nomination of the Australian Government, to the List of Experts for the South Pacific Regional Fisheries Management Organisation. Between 2010 and 2013 Tim was Co-Director of the Sydney Centre for International Law. Tim has a PhD in law from the University of Sydney, an M.Phil in geography from the University of Cambridge, and a BA and LLB (both with Honours) from the University of Sydney. He is admitted as a legal practitioner in the Supreme Court of New South Wales.
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WEIJIAN TANG (RENMIN LAW SCHOOL)

Professor of Law

Dr. Weijian Tang, Professor of Renmin Law School. He got his Ph.D. in law from China University of Political Science and Law, and was the first doctor in civil procedure law in China. He worked in Renmin Law School as a post-doctoral fellow from 1995 to 1997 and was the first post-doctoral fellow in civil procedure law in China. He has worked at Renmin Law School since October 1997. He was promoted to associate professor in June 1998 and was promoted to professor on June 2002. He also served as the Vice President of Civil Procedure Law Institute of China Law Society, the Eleventh and Twelfth National Committee Member of CPPCC, the First Invited Supervisor of the Supreme People's Court, the Member of the Case Guidance Committee of the Supreme People's Procuratorate. His research interests focus on Chinese civil procedure law, comparative procedure law, evidence law, judicial system and bankruptcy law.
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SONYA WILLIS (UNIVERSITY OF SYDNEY)

Lecturer

Sonya lectures in civil and criminal procedure and private international law. Previously, Sonya spent many years as a commercial litigator at Blake Dawson (now Ashurst); taught conflict of laws, Vis international commercial arbitration moot, revenue law and business law at the University of Technology, Sydney and was a taxation specialist at an international accounting firm. Sonya is particularly interested in civil procedure and legal education. She is the author of Civil Procedure published by Palgrave Macmillan in 2012 and is currently undertaking doctoral research on the interaction between case management and procedural fairness.
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JULIAN WYATT (UNIVERSITY OF GENEVA)

PhD Candidate

Julian Wyatt is completing a PhD at the University of Geneva on static and dynamic treaty interpretation by international courts and tribunals and works as an international arbitration lawyer at LALIVE in Geneva. After initial legal studies and commercial litigation practice in Australia, Julian moved to Switzerland where he first studied, then taught and conducted research in public international law. He was notably a member of the French Environment Ministry's team at the Copenhagen climate conference and the Australian Attorney-General's team for the Whaling in the Antarctic (Australia v. Japan) case before the International Court of Justice.

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LIN YE (RENMIN LAW SCHOOL)

Professor of Law

Panel Arbitrator

Mr. Lin Ye, Ph.D.in law from Renmin University, professor of Renmin Law School; Panel arbitrator for China International Economic and Trade Arbitration Commission (CIETAC),Beijing Arbitration Commissions (BAC),Taiwan(China) Arbitration Center, and several other local arbitration commissions in China. Over 100 disputes have been arbitrated in the last 10 years. His research is focused on Commercial Law, Company Law, Security Law, and Consumer Protection Law.

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XIUWEN ZHAO (RENMIN LAW SCHOOL)

Professor of Law

Panel Arbitrator

Prof. Dr. Xiuwen Zhao, Renmin University of China Law School, Beijing, China panel arbitrator for China International Economic and Trade Arbitration Commission (CIETAC), World Intellectual Property Organization (WIPO) Arbitration and Conciliation Center, Singapore International Arbitration Center (SIAC), Kuala Lumpur Regional Centre for Arbitration (KLRCA) and several local arbitration commissions in China; over 300 disputes has been arbitrated in the last 26 yeas, including dozens of international cases involving a large amount of money under the administration of CIETAC, Beijing Arbitration Commission (BAC) and International Chamber of Commerce Court of International Arbitration (ICC Court). For more detail on her teaching career and related publications, see: http://arb.rucil.com.cn/english/

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QIZHAO ZOU (RENMIN LAW SCHOOL)

Post-doctoral researcher

Qizhao Zou, began his postdoctoral research at Renmin Law School in September of 2013 with main interests in securities, derivatives, property and contracts. Dr. Zou has a LLM from UCL (University College London) and a PHD in law from UIBE (University of International Business and Economics, Beijing). He participated in projects launched by SCRC aiming to offer legislative proposals for the amendment of Securities Law and drafting of Future Law. He is also a P.R.C. practicing lawyer.

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ABSTRACTS

In order based on program days and themes

FRIDAY 16 JULY
FIRST SESSION: CROSS-BORDER COMMERCIAL DISPUTES AND INTERNATIONAL COMMERCIAL ARBITRATION

Overlapping jurisdictions and the resolution (or non-resolution) of disputes, Vivienne Bath

As China and its companies become more important internationally, the legislative reach of Chinese law and the jurisdictional reach of Chinese courts become increasingly important. Recent cases in Australia, Singapore and the United Kingdom suggest that the role of the Chinese courts in taking jurisdiction over cases and recognising or giving effect to (or refusing to give effect to) the jurisdiction of foreign courts and tribunals is becoming increasingly significant in multi-jurisdictional disputes. A number of recent maritime cases demonstrate the potential for Chinese and foreign courts to come into conflict in relation to the exercise of jurisdiction and raise questions about the resolution of multi-jurisdictional litigation of cases. This is illustrated by the recent Australian cases of *CMA CGM SA v Ship 'Chou Shan'* [2014] FCA 74 (affirmed in *CMA CGM SA v Ship 'Chou Shan'* [2014] FCAFC 90) and *Atlasnavios Navegacao, LDA v The Ship "Xin Tai Hai"*(No 2) [2012] FCA 1497 both of which required consideration of the jurisdictional reach of the Chinese maritime courts. Similarly, the growing presence of Chinese companies and businesses overseas means that cases outside China often have a potential overlap with cases inside China in relation to evidence, enforcement, and the possibility of competing litigation. While these jurisdictional conflicts are certainly not new in an international sense, the role played by China, as a relatively new entrant into this area, and the approach taken by the Chinese courts, raises interesting issues in the areas of comparative private international law, Chinese law and policy, and international business law. This paper looks at the question of overlapping jurisdiction and the issues arise in resolving the resulting disputes.

Interim Measures and Emergency Arbitrator in the Global Economy, Xiuwen Zhao

Interim measures and emergency arbitrator is a hot topic in the international commercial arbitration circle. In most jurisdictions, arbitral tribunal may decide such measures upon the request of the parties. However, according to the current legislation on arbitration in the People's Republic of China, both arbitration commission and arbitral tribunal are incompetent to render award as to the interim measures of protection. And the relevant people's court has the exclusive jurisdiction in this regard. The Civil Procedure Law amended in 2012 added provision that the parties may apply interim measures of protection before that of arbitration. Such provision is a big progress no doubt. However, there is room for improvement comparing with the international legislation represented by the UNCITRAL(United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration and national legislation and judicial practices in some other countries, as well as arbitration rules in some prestigious international arbitration institutions. This paper is to study the provisions on the interim measures of protection in Civil Procedure Law of the PRC in 2012 and made comparison with international legislation and practices in some other countries and the world prestigious arbitration institutions, especially that of in China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules,2015.The author proposed her own point of view for further amendment of the provisions on the interim measures of protection in the Chinese legislation.

It is the author's view, that while amending the current legislation on international commercial arbitration, the Chinese legislature should take serious consideration on the relevant provisions in UNCITRAL Model Law on International Commercial Arbitration and its Arbitration Rules, as well as the arbitration law of some other states and the rules of some other arbitration institutions. The future law would better grant arbitral power to make decision on interim measures of protection upon the parties' request.

In/formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia, Luke Nottage

International arbitration, especially International Commercial Arbitration (ICA) of disputes among businesses, has experienced a dramatic diffusion from West to East over the last decade. Yet Section 2 of this paper begins by outlining a seemingly perennial tension between informality and formality (the 'in/formalization' tension), arguably linked respectively to more global or 'internationalist' versus more local or national approaches to dispute resolution by means of ICA (the 'glocalization' tension). Drawing on recent empirical studies, Sub-section 2.1 confirms the view expressed in 2012 by (now Chief Justice) Menon of Singapore that delays and especially costs are escalating in ICA. This both reflects and promotes formalization. For example, parties and legal experts are forced to become much careful and elaborate when drafting arbitration agreements, rules and legislation. Arbitral proceedings generate ever-growing volumes of submissions and documentary evidence. Hearings become more formalized. Challenges to arbitrators are more common. Awards become more detailed. Yet court proceedings are quite frequent.

Sub-section 2.2 suggests that this phenomenon may not be due simply to the growing complexity of cross-border business deals, and consequent disputes, but also to a major development that even Menon did not directly broach. There has been a dramatic worldwide expansion of (US- and UK-based) international law firms, and the emergence of large home-grown law firms in Asia, both typically operating on a 'billable hours' model at least for cross-border dispute resolution work. This meshes with a tradition of confidentiality in ICA that exacerbates information asymmetries and other issues, making it unlikely that the usual market forces of supply and demand will significantly dampen delays and legal fees (the major component of ICA costs).

Section 3 argues that these developments in ICA are particularly problematic as large law firms increasingly move into the somewhat overlapping yet distinct field of treaty-based Investor-State Arbitration (ISA). The latter has only recently found general acceptance in the Asian region, and concerns have recently (re-)emerged especially in India, Indonesia and even Australia, as foreign investors have launched high-profile claims of expropriation or other substantive investment treaty violations. In. Section 4 concludes, however, that moves underway towards greater transparency in ISA can help reduce some of these problems. Somewhat ironically, they are likely to persist in the world of ICA despite the growing concerns of users themselves, including a new wave of Asian companies that have started to resolve commercial disputes through international arbitration.

ABSTRACTS

SECOND SESSION: DISPUTE SETTLEMENT IN FAMILY LAW

Inter-Country Disagreement on What Is in the Best Interests of a "Bi-national" Child: Towards "Bi-national" Tribunals on Cross-Border Child Custody Litigation? Gian Paolo Romano

The increased movement of persons and businesses across the state lines has generated a significant increase in human relationships spanning across two or more countries, i.e. what one may call "bi-national" ("tri-national", etc.) relationships between private parties. To the extent that the applicable legal rules, whatever they are, leave the judge a wide discretion as to how best to apply the principles they encapsulate to each individual case, the risk arises that a "mono-national" adjudicator may be unable to rise up to the "bi-national" vision required by the "bi-national" character of the human relationship at stake, i.e. that the decision may ultimately be tainted with "forum bias" or "parochialism".

This may be particularly true in the child custody litigation, where the relevant rules merely instruct courts to settle disputes between private parties, and typically parents, by striving towards the child best (or overriding) interests. Tribunals of two countries with which a "bi-national" child has significant connections may each have its own "local" view of what the best interest of that particular child require in terms of custody rights and may think that the child will be better off if he or she will be brought up by the parent residing on its territory. The international instruments on child protection – particularly the 1996 Hague Children Convention and, to a lesser extent, the 1980 Hague Abduction Convention – have so far attempted to address the problem by allocating jurisdiction to one State while laying down common recognition rules to increase chances of the other State involved recognising such decision. However, the "mono-national" custody decision by one State involved is still today often not recognized by the other State involved because the other State involved has another idea of what procedural and substantive justice requires and may perceive the decision as being biased. The conflict of adjudications that may result ultimately drives these "bi-national" private relationships into legal no-man's land. This is clearly contrary to the interests of all persons, States and individuals, and particularly the child, who is faced with both a parental disagreement and an inter-country disagreement as to the country in which, and the parent with which, he or she is supposed to reside.

The proposed contribution will explore the possibility to set up "bi-national" tribunals, whose members would be appointed by judges of the countries involved in each particular case and make a joint, "bi-national" decision which is based on a "binational" vision and may legitimately be binding on the authorities of two countries because both have contributed to it. The contribution will also touch upon the potential for "bi-national" mediation and critically review the reasons why international arbitration is traditionally regarded as incompatible with child litigation.

Family Dispute Resolution in Australia – Meeting the Needs of Australian Muslims, Ghena Krayem

In recent years, Australia has placed a strong emphasis on mediation as a means of resolving family law disputes, recognising that it is best for all parties including children if they could be assisted to reach an agreement. This process of mediation is known as Family Dispute Resolution (FDR) and other than in exceptional circumstances where mediation is not suitable all parties must demonstrate that they have attempted mediation before bringing any property or children matters before the courts. This paper will explore the place of Family Dispute Resolution in the Australian context and the different ways in which it is operating through mainstream services such as Legal Aid NSW and Family Relationship Centres.

The paper will then consider how such a dispute resolution process fits in a multicultural Australian society which sees the population being drawn from various different cultural, religious, ethnic and linguistic backgrounds. In particular the paper will focus on the Australian Muslim community and the way in which it resolves its family law matters. Public discourse both in Australia as well as internationally has focused on demands of Muslim communities for some sort of accommodation or recognition of Islamic family law principles or 'shariah' resulting in a parallel legal system. However empirical research demonstrates that this isn't entirely accurate. Instead the paper, drawing on the findings of the first empirical research in Australia to examine the practices of Australian Muslims in the family law context, will argue that rather than a parallel legal system the focus should be on how the existing legal system can better meet the needs of all Australians in a multicultural society. In particular, it will be argued that the already established practice of FDR could be adapted to accommodate the needs of Australian Muslims, as well as other cultural and religious groups, and in doing so strengthening Australia's multicultural society without the need for different laws applying to different groups.

THIRD SESSION: THE ROLE OF THE COURTS

Managing to stay relevant: Can active case management by courts modernise our most traditional form of dispute resolution?, Sonya Willis

Litigation is the most traditional form of dispute resolution available in most jurisdictions today. Plagued by accusations of inefficiency, high cost, unnecessary bureaucracy, lack of access, lack of privacy, lack of flexibility and jurisdictional limitations; litigation has been fighting a rear guard action against its more recent competitors such as arbitration, mediation, conciliation and negotiation. in many jurisdictions, including Australia and the United Kingdom, courts are increasingly expected to take an active role in case management. This paper will consider how case management, at least in theory, is a tool which empowers courts to customise the litigation process and deliver greater flexibility and efficiency to litigants. The paper will explore how, in the 21st Century, civil procedure in both the United Kingdom and Australia has been influenced by legislative requirements for judges, lawyers and parties to prioritise procedural efficiency through active case management. The paper will then consider the impact of this increased focus on procedural efficiency on the common law requirement to afford litigants procedural fairness. Finally, this paper will consider whether active case management and the resultant increase in judicial discretion in Australian and the United Kingdom reflects a global trend in litigation.

Reforming Civil Procedure, Miiko Kumar

This paper will examine the reforms created by the Civil Procedure Act 2005 and Uniform Civil Procedure Rules 2005 to encourage the "just, quick and cheap" resolution of disputes.

ABSTRACTS

In order based on program days and themes

FOURTH SESSION: ALTERNATIVE DISPUTE RESOLUTION

The Institutionalisation of Process Pluralism: The Problems and Potential of Entrenching ADR in Post-Apartheid South Africa, Alan Rycroft

This paper explores why process pluralism (also referred to as co-existential justice) – the use of dispute resolution mechanisms alongside litigation – has been so slow to take root in South Africa and why, despite legislative intent, the institutionalization of process pluralism has largely been confined to employment disputes.

The constitutional negotiations in the early 1990's provided the opportunity for politicians and policy makers to re-imagine mechanisms for resolving constitutional, institutional, societal and personal disputes. Constitutional supremacy was chosen as the mechanism for resolving disputes of policy and principle.

One of the features of post-apartheid legislation has been the preference for specifying dispute resolution mechanisms, particularly conciliation, followed by arbitration, as the required methods of resolving disputes. Starting with the Constitution, the Public Proctector is given the power to resolve disputes by mediation, conciliation or negotiation. The Human Rights Commission may similarly by mediation, conciliation or negotiation endeavour to resolve any dispute involving a violation of human rights. Over 40 statutes since 1996 have made explicit provision for conciliation and arbitration. With few exceptions, no use is made of these provisions. Even the recent attempt to introduce mandatory mediation in civil disputes has been diluted to a voluntary option without consequences for non-participation.

The paper attempts to understand the slow progress in institutionalising ADR in South Africa. The paper ends by asking whether legal education contributes to the production of graduates ill-prepared as effective dispute resolvers.

ADR in China, Weijian Tang

It is the trend that the gradual development of modern society and the enhancement of the consciousness of civil right accelerate the diversification of the dispute types. But accordingly, the attempts on the innovation of dispute resolution which has gone through a progress from private remedy to public remedy, even now to social remedy, have never stopped. For this reason, ADR emerges. From the perspective of history, ADR, short for Alternative Dispute Resolution, stems from the US. It refers to all kinds of solutions, which conform to the peremptory norms and can be chosen by parties on their own to replace the procedure of litigation to solve the dispute. As the alternative ways of the litigation, ADR become compatible with it and play an increasingly important role in solving the civil disputes.

However, it is easy to understand that, based on the different legal culture and legal system, the details of ADR in different countries are not all the same. Moreover, the stipulations and the operations in countries also vary from one to another. Thus, there is no accurate limitation about the kinds of ADR. In other words, any non-litigation dispute solution can be defined as an ADR. Roughly speaking, ADR mainly contains early neutral evaluation, mediation, conciliation, mini-trial, arbitration, negotiation, the neutral listener agreement, rent-a-judge, fact finding, final offer arbitration and so on. Referring to China, ADR can be divided by two kinds. One is judicative ADR, and the other one is non-judicative ADR.

Firstly, the judicative ADR, which can be called as annexed ADR, refers to the quasi-judicial procedure, where the parties can solve the disputes in non-judgmental ways. There is a close relation between the judicative ADR and the contentious procedure because in the procedure of the judicative ADR, courts do not adopt the way of lawsuit, but they still play an important role in it. In China, the judicative ADR consists of three procedures.

They are the court mediation, the judicial confirmation of mediation agreement, and the procedure of hastening debt recovery. First, the definition of the court mediation means to solve the disputes between the two sides under the host of judges on the basis of parties' own will. According to the stipulation of Chinese Civil Procedure Law, in civil proceedings, the people's court shall promote mediation in accordance with the principle of voluntariness and legitimacy. A court decision shall be made promptly when mediation has failed. Because the court mediation in China is based on the litigation, it manifests the strong characteristic of inquisitorial system. That is, even if the mediation is set on the basis of parties' own will, the whole process is totally controlled by the court. Because of the strong control by the court, the parties have to take part in the procedure with the attitude of cooperation, compromise or even tolerance, rather than willingness and independence. In addition, the mediation procedure, which is made during the procedure of the court mediation, shall have the same legal effect as the effective judgments. Second, the judicial confirmation of mediation agreement means that, according to the common application of the both sides of parties for confirmation of a mediation agreement, which is made under the host of the people's mediation committee, the court shall make judicial review and judicial confirmation. If the application meets the provisions of the law, the mediation agreement shall be effective and one party may apply to the people's court for execution thereof when the other party refuses to fulfill or partly fulfill the agreement. This procedure was firstly written in 2012 civil procedure law, and it is also the first time to be established in the level of procedural law. The reason for setting this procedure is that it is beneficial to combine the social remedy and public remedy, which can make the way of public remedy protect and intensify the way of social remedy. Third, the procedure of hastening debt recovery means that, the basic people's court should send an order of payment directly to the debtor according the creditor's application for payment of a pecuniary debt or recovery of negotiable instruments when the creditor's application meets some lawful requirements. Without substantial hearing, it is creditors' best choice to acquire the effective legal instrument as a guarantee of their debt. Comparing with the ordinary trial procedure and summary procedure, the procedure of hastening debt recovery is much more simplified convenient and economical, which is of great importance to satisfy the need of market economy, improve lawsuit efficiency in practice and save judicial resources.

Secondly, the non-judicative ADR in China mainly contains four systems. They are people's mediation, administrative solving mechanism in civil disputes, arbitration system and special arbitration system. First, the people's mediation means to solve the disputes between the two sides under the host of people's mediation committee on the basis of parties' own will by ways of instruction, negotiation and communication. According to the stipulation of People's Mediation Law, the people's mediation committee is neither a national

judicial organ, nor a national administrative organ, but a nongovernmental and autonomous organization. As a result, it is not entitled with judicial authority and administrative jurisdiction. The activity of mediation conducted by it is nongovernmental, as well. Second, the definition of the administrative solving mechanism in civil disputes refers to the procedure that is conducted by national administrative organs or quasi-administrative. It contains two parts. One is administrative mediation, and the other one is administrative adjudication. The different between these two parts is whether there exist instructions of administrative organ forcing the two sides of the parties to solve the dispute or not. In the process of the administrative mediation, the agreement is generated on the two parties' own. The administrative organ shall not force them too much. Thus, one party may not apply to the administrative organ for execution thereof when the other party refuses to fulfill or partly fulfill the agreement. However, in the process of the administrative adjudication, the conclusions made by administrative organ do have mandatory effect. Third, the arbitration system is a technique for the resolution of disputes outside the courts. The parties to a dispute refer it to arbitration by one or more persons, and agree to be bound by the arbitration decision. A third party reviews the evidence in the case and imposes a decision that is legally binding on both sides and enforceable in the courts. The arbitration system in China is a flexible and efficient procedure for resolving both domestic and international disputes. The awards are binding, final and susceptible of enforcement anywhere in the world. Fourth, besides the arbitration stated above, there are still two special arbitration mechanisms in China. They are the mediation and arbitration mechanism of labor disputes, and the mediation and arbitration mechanism of countryside land contract management disputes. For the former, in the process of implementing Labor Law and Labor Contract Law, there might emerge some conflicts between employers and employees. After these conflicts emerge, the employers and employees can have a negotiation to solve it. If they do not want it or they fail to make it, they can refer it to mediation. If they still do not want it or some of them are not satisfied with the result of the mediation, they can refer it to the labor dispute arbitration committee for help. Either party may bring an action in the people's court against the arbitral award unless otherwise prescribed by law. For the latter, if there emerge some disputes about the countryside land contract management, the two sides of parties can solve it by negotiation, mediation, arbitration or litigation. As a creative dispute solution coming into public view, the mediation and arbitration mechanism of countryside land contract management disputes is an originally developed approach in China. It combines two traditional cultural sprits, "non-lawsuit" and "harmony", and is adapted to the local characteristic of rural society. The specialty of these two arbitration mechanisms is the fact that they put the mediation into the mechanism of arbitration and are stipulated outside the Arbitration Law. Besides, for many labor disputes, that arbitration mechanism becomes the compulsory preceding procedure of litigation.

The statement above is about the outline of ADR in China. As the number of the social disputes skyrockets, ADR in China has played an irreplaceable role in alleviating society's contradictions and promoting the construction of the ruled-by-law society. However, it is necessary to know that there are still some drawbacks in our ADR. As examples, firstly, for the judicial confirmation of mediation agreement, only when the mediation agreement is made under the host of people's mediation committee can it be applied to this system according to the content of the article 194 of Civil Procedure Law, which is inconsistent with the requirement of "mediation era" in China. Moreover, the courts in China have been implementing the activity of the connection of the litigation and mediation for years, winning many positive effects and approvals of the community. It seems to be not so appropriate that the compulsory stipulation, "only when the mediation agreement is made under the host of people's mediation committee", excludes all the other mediation, such as the administrative mediation, commercial mediation, social association's mediation, especially in the trend of "Mediation Era". What is worse, it may prevent the benign development of connection of the litigation and the mediation. Secondly, concerning the mediation system, it has a long history and has a profound cultural foundation in China, which has played an irreplaceable role in alleviating the social contradictions and maintaining social and political order. However, due to the lagging legislation, it is still not so easy to coordinate each mediation systems in the application of the law. It is a pity that some activities of mediation even cannot find the lawful regulations. These shortcomings prevent the further development of the system of the mediation. Thus, it is urgent to enact a unified and integrated mediation law to cater for the "mediation era" and lead the system of mediation to the legalized and standardized way. In this way, the integrated legal system for ADR can be finally established. Thirdly, for the same reason in the aspect of arbitration mechanism, it is undoubtedly beneficial for the coordination and the sustainable development of arbitration mechanism to add the mediation and arbitration mechanism of labor disputes, and the mediation and arbitration mechanism of countryside land contract management disputes to the Arbitration Law.

China's Practice Mediation in Resolving the Civil and Commercial Dispute, Ye Lin

To resolve civil and commercial disputes, an amicable settlement may be reached by the parties themselves, or the cases will go through litigation or arbitration procedures, during which amicable settlement led by the court or arbitration tribunal also plays as a highly significant means of dispute resolution and thus often applied. Since arbitration awards are not publicized, the rate of cases being amicably settled during arbitration cannot be counted; by contrast, court decisions are available to the general public and relevant statistics tells the rough rate of cases being amicably settled there.

While legal education and prevailing rules over dispute resolution play as direct reasons why amicable settlements are universally applied in civil and commercial cases, Chinese history, culture, tradition and politics also makes their contribution. Amicable settlement, originated from the ancient, has currently become a widely-accepted social notion and to some extent goes beyond settlement rules defined by litigation or arbitration procedures. At each and every stage during litigation or arbitration, amicable settlement is advocated.

The amicable settlement regime has its pros and cons. Does "amicable" settlement led by the court or arbitration tribunal remain amicable or it is de facto compulsory? Will the court or arbitration tribunal take into consideration factors other than evidences presented?

In cases where amicable settlement fails, court decisions or arbitration awards will really stay unaffected by offers made by the parties for amicable settlement?

Shall the relation between substantive justice and formal justice play as a significant indicator to evaluate amicable settlement regime and its effect? Shall it be peeled off from litigation and arbitration procedures? Is it proper to set up settlement organizations in the court or arbitration bodies? Is it justified that the court and the trade union reach understandings and then the trade union be empowered to lead the amicable settlement? Amicable settlement, originated from the ancient, is facing its unknown future.

SATURDAY 17 JULY
FIRST SESSION: FIRST SESSION: DISPUTE RESOLUTION IN SPECIALISED FIELDS (I)

How does the tension between nationalism and internationalism affect dispute resolution in art and cultural heritage matters?, Marc André Renold and Alessandro Chechi

The paper will use some of the results of the *ArThemis* database research of the University of Geneva. More than one hundred disputes relating to art and cultural heritage, the method used and the solutions reached are presented and analysed in this open-source database. A certain number of results have been drawn from this database already, but the "glocalisation" tension between a nationalistic (or "retentionist") and an internationalist (or "cosmopolitan") approach has yet to be examined.

The relationship between the two approaches was first described and analysed by US scholar, Professor John Henry Merryman, and it has led to much discussion in the art and cultural heritage law field. In a nutshell, the issue is the following: Should the resolution of disputes privilege the return and restitution of cultural heritage to the State of origin or rather favour the free international circulation of art?

The goal of the paper is to see if the dispute resolution mechanisms used (court procedure, arbitration, mediation or simple negotiation) have an impact on the solution found in terms of the nationalism v. internationalism debate. It also intends to review the extent to which "cross-fertilization" among the decision-makers affects one or the other approaches.

Medical Tourism, Litigation, and Dispute Resolution, Professor Glenn Cohen

Medical tourism is a growing multi-billion dollar industry involving millions of patients who travel abroad each year to get health care. Some seek legitimate services like hip replacements and travel to avoid queues, save money, or because their insurer has given them an incentive to do so. Others seek to circumvent prohibitions on accessing services at home and go abroad to receive abortions, assisted suicide, commercial surrogacy, or experimental stem cell treatments.

As I document in this talk, patients who travel abroad for health care will face significant obstacles to recovering in medical malpractice relating to personal jurisdiction, forum non conveniens, choice of law, and the enforcement of judgments. Can alternative dispute resolution systems step in to fill the gap? I will discuss arbitral procedures as well as fledgling insurance markets to cover patients who engage in medical tourism.

Good faith, native title and resource development – statute, contract, and culture in resolving mining disputes over native title land, Patricia Lane

This paper discusses the statutory requirement for miners and governments to negotiate in good faith with native title holders in respect of mining or exploration on native title land. If parties cannot reach agreement, the *Native Title Act 1993* provides for arbitration in the National Native Title Tribunal. As negotiation in good faith is a jurisdictional precondition for arbitration by the Tribunal, it is a critical gateway to the process for resolving disputes about whether or not mining or exploration can go ahead on native title land, and if so, on what conditions. The statutory obligation draws on understandings of the way in which good faith works in contract law, but the context in which the obligation is imposed means that the cultural values of the negotiating parties need to be taken into account. The paper considers the impact of the statutory obligation on the culture and conduct of the negotiating parties, and concludes that the statutory obligation has achieved more by promoting a culture of negotiation than through challenges to the conduct of individual negotiations.

SECOND SESSION: THE RESOLUTION OF INTER-STATE DISPUTES

Not such a "Cardinal Distinction"? Applicable Law in International Adjudication, Chester Brown

In the *MOX Plant case,* the Arbitral Tribunal established under the United Nations Convention on the Law of the Sea expressed the view that there was a "cardinal distinction" to be drawn between the jurisdiction of an international tribunal and the applicable law which governed the dispute, and that disputes arising under treaties other than the treaty conferring jurisdiction may be inadmissible. This paper examines whether this approach has been consistently applied by international courts and tribunals, drawing on the practice of (e.g.) the International Court of Justice, the International Tribunal for the Law of the Sea, WTO panels, and ad hoc arbitral tribunals. It also considers particular instances where attempts by litigants to expand the scope of a tribunal's subject-matter jurisdiction may be successful

The use of evidentiary approaches from the common law, civil law and international arbitration traditions in the increasingly important fact finding aspects of State to State dispute resolution, Julian Wyatt

For many years, disputes between States were the province of diplomacy, remaining outside the ambit of the court-like dispute settlement structures used by domestic legal systems. The relatively recent proliferation of international courts and tribunals has made international dispute resolution more similar to domestic dispute resolution, but important elements of the diplomatic approach have endured. In disputes between States, cases are still not only presented, but also adjudged with methods that pay implicit or explicit heed to the particular interests of States. The exclusion of non-State parties, a clear preference for written proceedings and pre-written oral submissions and very broad rules for the burden of proof are but a few examples of this phenomenon. Recently, however, things have begun to change.

My presentation will focus on the International Court of Justice and the WTO dispute settlement system; the two institutions that deal with the vast majority of State-to-State disputes. It will reveal how both the ICJ and the WTO are increasingly chipping away at the remnants left in their procedures and evidentiary rules by international law's traditional deference to the rights and privileges of States. The WTO adjudicatory bodies were, for example, quick to

dispense with the traditionally strong presumption that a State is acting in good faith and prompt to accept the participation of non-State actors such as NGOs, but have so far been slow to embrace adversarial fact-finding methods such as the cross-examination of experts. The ICJ, for its part, appears to have recently undergone what could be termed a "factual turn", opening a path toward the greater use of adversarial procedures like cross-examination, yet still uses a quite unsophisticated approach to issues such as the burden and standard of proof.

When third-party international dispute settlement first developed, public international law itself lacked the procedural rules it needed, so inspiration was found in analogous rules used by prominent international lawyers' domestic dispute resolution systems (of both the common law and civil law varieties). In their search for helpful and appropriate evidentiary tools for their increasingly important fact-finding function, modern-day international courts and tribunals will again be forced to look beyond public international law to dispute settlement systems with a better-established and more refined approach to factual matters. Both the ICJ and the WTO have traditionally drawn on a mix of common law and civil law approaches in such contexts. Going forward, they are also likely to rely heavily on one of the closest relatives of State-to-State dispute settlement: international arbitration, a now quite well-developed system that itself uses a hybrid common law / civil law approach. The evidentiarily more sophisticated State-to-State dispute settlement system that will soon emerge is therefore likely to be a hybrid of these traditions and thus an excellent example of the use of local legal approaches in a *sui generis* international context.

THIRD SESSION: DISPUTE RESOLUTION IN SPECIALISED FIELDS (II)

Labor Dispute Resolution in China: Latest Developments and Challenges, Lu Haina

China has a unique labor dispute resolution (LDRS) system, which is often called: "one arbitration, two trials". It means that arbitration is a mandatory step before disputing parties can bring a case before the court. Certainly, a broad concept of LDRS can also include mediation, labor inspection, collective negotiation and other possible forms that help to solve the disputes. The formal mechanism was designed in the 1990s in order to solve the labor disputes as many as possible at the arbitration stage, which is supposed to be speedier and cheaper and thus benefit workers. Nevertheless, the reality is that it causes the process of solving the dispute even longer because most disputes still end up at the court and thus dragged out for years. Certainly, there are complicated reasons behind this phenomenon.

Since 2007, legislative efforts have been made to reform the mechanism to ease the problem. These efforts include making arbitration final for certain types of disputes; strengthening the role of mediation at various levels; judicial confirmation of the mediation agreement; etc. But it does not appear that these efforts are successful or sufficient as the industrial relations got even more intense and the sheer number of labor disputes still increases significantly each year. It also has to do with the new features of labor disputes in China in the recent years, which bring more challenges to the existing mechanism and demands a more fundamental reform. In the past years, a significant change of China's industrial relations is the increasing number of strikes and collective disputes, which often ended with administrative intervention. Other increased disputes include those on labor dispatches, non-compete clauses, lay-offs after compliance investigation in foreign companies. In many cases, disputes are related to the local investment policy that was executed decades ago, such as more soften social insurance standards. As such, the current LDR system is facing the difficult task on payoff the historical debts. Also, lack of effective trade unions at the enterprise level, many disputes cannot be solved or mitigated by collective negotiations or mediations. All the pressure has therefore been shifted to the formal LDR system, which has already been overburdened partly due to its own institutional deficiencies.

The reality demands more fundamental reforms of the LDR system, which includes changing the structure of arbitration and litigation. More importantly, trade unions at the enterprise level need to be able to function as defenders of workers' interests. There are realistic approaches to achieve this goal, which includes effectively promoting the existing collective contract mechanism.

How to Solve Global FRAND Patent Licensing Disputes: Can Courts and/or ADR (arbitration) offer Fair Reasonable and Non Discriminatory Dispute Resolution Mechanisms (FRAND-DRM)? Jacques De Werra

Disputes about the enforcement of so-called standard essential patents (SEPs) - which are quite common in the information technology / telecommunication industries - raise thorny issues in many countries and regions of the world. While it is generally not disputed that SEPs must be made available to willing licensees under fair, reasonable and non-discriminatory terms (FRAND) - as requested by competition law - and that SEPs shall not be (mis)used by their owners as a threat to obtain exorbitant royalty fees from the users (i.e. the implementers) of the technologies covered by the SEPs, the issues of how and by whom FRAND terms shall be defined remain hotly debated. One issue relates to the way how FRAND disputes shall be solved, i.e. whether courts and/or arbitral tribunals shall decide on these issues and how the proceedings shall be structured.

An interesting case study is offered by the high profile European antitrust case between Samsung and Apple which led to a decision of the European Commission dated April 29, 2014 by which Samsung's commitments were validated and in which both court as well as arbitral proceedings were contemplated, whereby a similar (but not identical) approach was adopted in the US FRAND Motorola / Google antitrust case. These cases raise most interesting questions which shall be explored in the paper about the potential costs and benefits of formal or informal dispute resolution mechanisms for solving FRAND disputes and about the interest - or potentially the need - to keep local or rather to adopt global processes, in view of the global reach of FRAND patent licensing disputes. This will ultimately require to discuss what could constitute Fair Reasonable and Non Discriminatory Dispute Resolution Mechanisms (FRAND-DRM) and what formal / informal features and what local / global elements such mechanisms could potentially integrate.

ABSTRACTS

THE UNIVERSITY OF SYDNEY

Securities Dispute Resolution in China: Philosophy and Practice, Qizhao Zou

China's stock market was created mainly as a tool for SOE financing and reform, and not as a means of offering members of the general public a way to diversify their investment portfolios and hedge future risks. Accordingly, administrative governance substitutes for corporate governance and investor protection somewhat remains ineffective. Generally, liability serves at least two roles: deterrence and compensatory. In the context of Chinese securities dispute resolution, administrative and criminal liabilities fail to meet the first role and civil liability far from being functioning to "make whole" the investors that have been cheated owing to its weak substantive law and procedural arrangements. To better address the problems, investor protection is increasingly being viewed as the key to vibrant and efficient capital markets. The consensus is reached that "economic order and public interests of the society" and "the development of the socialist market economy" could be better guaranteed by way of investor protection. Calls for the reform or introduction of some regimes are emerging including reputational intermediaries to serve as gatekeepers, liability for secondary actors, liability standards and private enforcement in the courts, the SPC rules requiring that plaintiffs base their claims on a prior administrative action or criminal judgment, class action and administrative settlement.