



Wrap-up of Sydney Arbitration Week 2016

The Sydney Arbitration Week is an important event on the arbitration calendar, as it is a good opportunity for local and international participants to meet and discuss current issues in arbitration practice. Allens participated in this year's event, with our lawyers speaking, presenting and moderating many sessions. Our Sydney office also hosted the Young ICCA International Arbitration Skills Workshop. The Allens Arbitration group reports on some highlights from the week.

4th Annual International Arbitration Conference – 22 November 2016

Following welcoming remarks by His Honour Chief Justice Allsop of the Federal Court of Australia and a morning address by His Honour Chief Justice Bathurst of the Supreme Court of New South Wales, the 4th Annual International Arbitration Conference examined some of the biggest challenges facing the future of international arbitration.

One of the challenges discussed was the importance of keeping international arbitration efficient. This issue was discussed not just in the keynote address by Gary Born, of WilmerHale in London, but also in a panel that Andrea Martignoni, the Partner leading the Allens International Arbitration Group in Sydney, spoke in on 'Procedural and Time Issues in International Arbitration'. In this panel, Andrea, along with Leah Ratcliff, Head of Disputes at BHP Billiton, and Lisa Bingham, an Allens alumna now a Legal Counsel at the PCA, responded to fast-paced questions by the chair of the event (Nick Watts of Holman Fenwick Willan). The questions generated some lively debate among the delegates and covered issues such as use of post-hearing briefs, statements of issues, and use and timing of oral openings and closings. A suggestion was even raised by one eminent arbitrator that, in some circumstances, conclaves of witnesses of fact may be a useful way of teasing out the real issues between the parties.

ICC Asia & CIArb Australia Seminar – 23 November 2016

The International Chamber of Commerce (**ICC**) and Chartered Institute of Arbitrators (**CIArb**) provided an update on some current issues at the ICC. The panel, with the help of the audience, also brainstormed on ways to increase participation in arbitration in Australia. Abhinav Bhushan, the Director for South Asia for the ICC, provided an overview of the lifetime of an ICC award, and the ICC's level of scrutiny to ensure a high quality of awards. He also highlighted some of the ICC's newest policies, such as allowing arbitrators to allocate fees for each member of the tribunal, increased arbitrator transparency by publishing the names and nationalities of appointed arbitrators, and publication of the reasons on decisions relating to a challenge of an arbitrator and replacement proceedings. Gavin Denton, Chair of ICC Australia's Arbitration Committee & Head of Arbitration Chambers Hong Kong, noted that only 16.1 per cent of the ICC's arbitration cases have parties from the Asia Pacific Region, and Australia ranks 21st of individual nations for the number of parties involved in ICC disputes. Yet Australia ranks 9th of nationalities of arbitrators.

This suggests that Australian practitioners are renowned for their arbitration expertise, yet they might not have achieved this in Australia (Allens has a number of practitioners who have obtained experience in arbitration domestically and overseas). As a positive sign for the future, Gavin also noted that ICC Australia has made great efforts to increase female arbitrator appointments, increasing its appointments of women from 18.2 per cent in 2015, to 30 per cent in 2016 (whereas the ICC overall had a 10 per cent rate of female arbitrators in 2015).

Clayton Utz and University of Sydney International Arbitration Lecture – 23 November 2016

Elliott Geisinger, of Schellenberg Wittmer in Geneva, gave an insightful lecture entitled 'International Arbitration and Independence – Off the Beaten Track'. He provided an overview on the rules governing independence for the arbitrator, counsel and experts in five jurisdictions including Australia. He advocated for reflection on the purpose of why each type of user performs as he or she does. To this end, playing devil's advocate, he posed some thorny questions as to whether having excessive counsel involved, or using extensive document production, was in part a means of counsel meeting billing requirements (and implied that counsel could strive to be more efficient in this regard). He reflected on why experts hold steadfast to certain ideas, particularly those that appear in line with the client's wishes. He queried whether institutions were making new rules to increase visibility or to assist users (and recommended that the focus should be on the latter). Elliott did not appear to raise these queries as criticism, but rather to note the implied obligation that users have on self-policing in the face of conflicting interests and criticisms of an overly complex, expensive system.

ArbitralWomen Breakfast: Arbitration in China and the Asia/ Pacific Region – 24 November 2016

The ArbitralWomen's breakfast was an intimate panel session featuring female speakers including Jo Delaney, Brenda Horrigan, Daisy Mallett, Julie Soars and Erika Williams. The panellists mentioned useful practice tips for Asia, and, in particular, China, although much of the advice was equally applicable to universal practices. Warnings were given regarding the length of proceedings in courts in India (although this has improved recently) and having arbitration clauses that are so specific that an institution would not be able to find anyone to fulfil the requirements. The merits of multi-tiered clauses that require mediation were also discussed. It was recognised that often parties would use the required mediation as a delaying tactic, even though mediation can be commenced at any time if both parties are willing. However, the audience agreed that clauses requiring senior commercial people meeting in good faith often led to settlement. These issues are important reminders to all practitioners that careful reflection is necessary when drafting any dispute resolution clause.

AFIA Symposium – 24 November 2016

The AFIA symposium featured two panels of speakers, including Caroline Swartz-Zern, an overseas practitioner in Allens' Melbourne office. Both panels encouraged lively discussions from the panellists and members of the audience to tackle some of the most salient topics in international arbitration. The first panel queried whether international arbitration was really 'killing the common law', or whether the legal questions that most commercial arbitrations involve are so factually based that their outcomes would not contribute to the greater jurisprudence. They also tackled issues of judges acting as arbitrators, the importance of civil law traditions to international arbitration, and the overarching differences between arbitration and litigation.

Afterwards, the second panel focused on investment disputes and Australia's revival of investor state provisions. Caroline then led a discussion on third party funding and queried whether more regulation was necessary or if the discretion of a tribunal was enough to cover issues of privity with third party funders. She suggested that, in relation to disclosure of a third party funding agreement, provisions for disclosure should be made within the terms of reference or procedural orders regardless of whether a party suspects a party of using third party funding from the beginning. This suggestion is even more pertinent as third party funding moves away from being used only by indigent parties and begins to be more commonplace among large corporate parties.

Young ICCA Workshop: A Practical Guide to the New York Convention – 25 November 2016

Allens again hosted one of the liveliest events of Sydney Arbitration Week's calendar, the Young ICCA Skills workshop. This year's topic was a substantive one: enforcement of awards under the New York Convention. Allens Consultant James Morrison, along with a faculty of practitioners from all over the world, took participants through the prongs of the New York Convention. The faculty offered tips for proceedings from the beginning of a transaction (such as ensuring that the company with assets is the contracting party when drafting a dispute resolution clause) through to enforcing the award. Participants shared ideas on how to enforce an award against someone whose assets are otherwise unreachable, and shared experiences about obtaining a court order to stop a private jet from taking off, or seizing boats in Singapore's harbour.

Andrea Martignoni
Partner, Sydney
T +61 2 9230 4485
Andrea.Martignoni@allens.com.au

Peter O'Donahoo
Partner, Melbourne
T +61 3 9613 8742
Peter.O'Donahoo@allens.com.au

Andrew Maher
Partner, Melbourne
T +61 3 9613 8022
Andrew.Maher@allens.com.au

Nick Rudge
Partner, Melbourne
T +61 3 9613 8544
Nick.Rudge@allens.com.au

Phil Blaxill
Partner, Perth
T +61 8 9488 3739
Philip.Blaxill@allens.com.au

Jeremy Quan-Sing
Partner, Perth
T +61 8 9488 3790
Jeremy.Quan-Sing@allens.com.au

Michael Illott
Partner, Brisbane
T +61 7 3334 3234
Michael.Illott@allens.com.au