ArbitralWomen Newsletter

ARBITRAL WOMEN *Uniting and promoting women in dispute resolution*

www.arbitralwomen.org

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Equal Representation in Arbitration Pledge Launch Event - Freshfields, London - 18 May 2016

Inside Issue Nº 47

ArbitralWomen celebrates the increasing representation of women in arbitration

Welcome to the 47th edition of the Newsletter. As we honor and remember the legacy of United States Supreme Court Justice **Ruth Bader Ginsburg** on the one-year anniversary of her passing, we are grateful that her inspiring influence to advance women's rights and social justice continues to resound with the legal profession today.

The contents of this edition are outlined in the President's Column.

ArbitralWomen joins those who honor and remember the late United States Supreme Court Justice Ruth Bader Ginsburg, who notoriously championed the rights of women and other underrepresented groups, on the one-year anniversary of her passing in September 2020.

'Women belong in all places where decisions are being made. It shouldn't be that women are the exception'.
—US Supreme Court Justice Ruth Bader Ginsburg.

President's Column

Dana MacGrath, ArbitralWomen President and Independent Arbitrator

We are pleased to announce the launch of the **YAWP Speaker Panel Project** to develop opportunities for ArbitralWomen members under 40 years of age to build their professional profiles by serving as a moderator, speaker or volunteer at events organised or supported by ArbitralWomen and YAWP.

To participate please complete the survey available here on or before 30 September 2021. You must be a paid-up member of ArbitralWomen under the age of 40 to participate.

As we enter the September 'back to school' season, which many expected would also coincide with 'back to the office' and a re-opening of many parts of the world, we find ourselves having to pivot again in the face of the impact of the new Covid-19 variants spreading across many parts of the globe.

Notwithstanding these challenges, we continue to persevere. At this point, we are all well-familiar with virtual platforms and working from home, holding hearings and conferences remotely, and networking virtually and via social media. Many have learned to thrive in the 'new normal' that lingers longer than anticipated. In many ways, the arbitration community has become more inclusive by holding events on virtual platforms accessible to many more around the world at no or nominal cost. Mentoring programs, moot competitions and training courses have adapted to maximize the benefits of the virtual platforms. Overcoming adversity is something the international dispute resolution community is well-equipped to do.

One important part of the arbitration community's pandemic legacy of innovation, collaboration and new initiatives is greater diversity and inclusion. It has been truly inspiring to see such an earnest, widespread commitment to promoting gender equality and diversity in arbitration under such difficult circumstances.

In this edition of the Newsletter, we share a report celebrating the successes of the Equal Representation in Arbitration Pledge five years since its launch, an inspiring interview with Claudia Salomon – the first female President of the International Court of Arbitration of the International Chamber of Commerce, event reports on alternative dispute resolution conferences and webinars that took place in May and June 2021, and news you may have missed from the ArbitralWomen News Page.

Many thanks to all those who contributed event reports and articles for this edition, and to our fabulous ArbitralWomen Newsletter team for compiling the submissions and preparing content for it as well. To prepare each ArbitralWomen Newsletter, it '*takes a village*' (quoting former United States Secretary of State Hillary Rodham Clinton). We are fortunate to have wonderful contributors and team members among us who make each Newsletter possible.

Finally, I take this opportunity to join those who honor and remember the late United States Supreme Court Justice Ruth Bader Ginsburg, who passed just over a year ago on 18 September 2020. Justice Ginsburg's legacy of championing the rights of women and other underrepresented groups inspires many of us to continue to fight for gender equality.

U.S. Supreme Court Justice Ruth Bader Ginsburg

'*Fight for the things that you care about, but do it in a way that will lead others to join you*'.

—U.S. Supreme Court Justice Ruth Bader Ginsburg

Dana MacGrath
ArbitralWomen President
and Independent Arbitrator

Women Leaders in Arbitration

Claudia Salomon

On 1 July 2021, Claudia Salomon started as the new President of the ICC International Court of Arbitration, the first woman in this position in the ICC Court's almost 100-year history. In that role, she will set the direction of the ICC Court. And with the ICC Court's recognition as the world's leading arbitral institution, she will have the platform to shape international arbitration globally

With more than 25 years as counsel and arbitrator, Claudia has accumulated a wealth of experience and a world-class reputation. Most recently, she was global co-chair of Latham & Watkins' international arbitration practice. She is a graduate of Harvard Law School and Brandeis University, and she also spent a year studying at Somerville College, Oxford University. She is admitted to practice law in New York and England and Wales.

Patricia Nacimiento, ArbitralWomen Board member, interviewed Claudia Salomon, starting in mid-June 2021.

Although the pandemic did not allow for an in-person interview, Claudia's energy, optimism and commitment to her new role as President of the ICC Court was palpable, even on screen. To prepare for her move to Paris, she took intensive French lessons, recognising the importance of language for personal connections (and for daily life, *la vie quotidienne*). She is inspiring and engaging, and she has already changed the conversation around diversity in international arbitration.

What got you started in arbitration?

In *The Graduate*, there is a famous scene in which Walter Brooke, as Mr. McGuire, advises Dustin Hoffman in his legendary role as Benjamin Braddock, 'Plastics... There is a great future in plastics'.

In 1998, when I was interviewing in Phoenix, Arizona, the head of litigation at Squire, Sanders (now Squire, Patton Boggs), Mark Nadeau, said in essence, 'there is a great future in international arbitration'. That made sense to me, recognising that as cross-border trade would increase, so too would the use of international arbitration.

In the fall of 2001, my practice then shifted from a mix of commercial litigation and arbitration to a full-time international arbitration practice. I went to Prague, Czech Republic, on five-days' notice, originally for a month, and stayed there for three years. I was part of the team that represented the Czech Republic in what was then one of the largest investment treaty arbitrations *(Saluka Investments B.V. v. The Czech Republic)* and then handled both international commercial arbitration and investment treaty cases across Europe. In my last year there, I had three hearings in three months in three different cases.

In 2005, I joined DLA Piper in New York, first as counsel and then as partner, and I served as global co-chair of the international arbitration practice, building the practice from the ground up. I was particularly proud that two of the associates on the team in New York made partner, and one made counsel, reflecting the tremendous growth of the practice.

In 2013, I joined Latham & Watkins as partner and global co-chair of the international arbitration practice, working closely with my co-chairs, Fernando Mantilla-Serrano and Sophie Lamb QC. I was with Latham for eight years before I launched my independent arbitrator practice at the start of this year and began my term as President of the ICC Court as of 1 July 2021.

A brief lesson of history: How have your predecessors shaped the ICC Court of Arbitration? And what is your vision for your term of office?

Alexis Mourre focused on five lines of policy: The first was time and cost efficiency of arbitration, which led to the introduction of expedited procedures as well as time limits for the submission of draft awards. The second was transparency by providing reasons for the ICC Court's decisions, publishing information about the composition of tribunals and publishing awards. The third was establishing ethical standards for the conduct of arbitrators and counsel and adopting rules on the disclosure of conflicts. Fourth was diversity. Under Alexis Mourre's leadership, in 2018, the ICC Court achieved gender parity (a stark contrast to the ICC Court in 2015, which was only 10% women). Fifth was strengthening the global

In 2019 Claudia organised a gathering of New York Women in International arbitration

Claudia, second from left to right, during the Schiefelbein Global Dispute Resolution Conference on 17 January 2020

nature of ICC arbitration, opening two case management teams in São Paulo and Singapore (and now there is a new case management office in Abu Dhabi, adding to the already existing case management offices in New York and Hong Kong) and establishing both the Belt & Road Commission and the Africa Commissions.

My task is to ensure that the ICC Court not only retains its reputation as the world's preferred arbitral institution but is recognised as the world's leading provider of innovative dispute resolution —and dispute prevention services into its next centenary and is trusted globally for its integrity. We provide access to justice and the rule of law to facilitate peace, prosperity, and opportunity through global trade. My vision is that ICC's dispute resolution services will be the preferred, one-stop shop for the dispute resolution —and dispute avoidance— needs of business everywhere.

To ensure that the international arbitration process better reflects the expectations of the parties, international arbitration must have a client mindset. The aim is to increase in-house counsel engagement with the arbitration process, reflecting the current role of in-house counsel as true advisors to the business teams and assessors of risk.

How would your friends and colleagues describe you?

I hope my colleagues would say that I am extremely organised, know how to build and lead teams and solve problems. I hope my friends would say that I am a good friend.

The aim is to increase in-house counsel engagement with the arbitration process, reflecting the current role of in-house counsel as true advisors to the business teams and assessors of risk

Diversity is a much-used word these days – what does it mean to you? How will it impact your work in your new role?

Diversity is a key strength of the ICC Court and essential to the legitimacy of international arbitration. With the most diverse ICC Court in its history, with 195 members from 120 countries, and women in the majority and greater representation from Africa than ever before, we need to ensure we benefit from the full range of experiences and perspectives. This requires doing everything possible to create a safe and inclusive space that enables everyone to be their authentic self at the Court and in the broader international arbitration community, so that we reflect the global business community.

We are seeing great strides in gender diversity in international arbitration – with a significant increase in the number of women appointed as arbitrator, taking leadership roles and shaping the field. I now have the pleasure of serving as an arbitrator with an all women tribunal – with two former judges. But there is so much more work to be done. I want every woman interested in international arbitration to know they have a seat at the table.

And we must be focused on diversity broadly defined, including not only gender diversity, but race and ethnicity, geography, age, socio-economic diversity, LGBTQIA and importantly, disability inclusion.

In my first days in office, the ICC Commission on Arbitration and ADR, on my recommendation, issued a global call for interested candidates to participate in a new Task Force on Disability Inclusion and International Arbitration. As we hopefully emerge out of the pandemic, we are at a pivotal moment in which we have the opportunity to reshape how we work and can ensure the active participation of all skilled practitioners, including those with disabilities.

At the end of my first month as President of the ICC Court, ICC announced the creation of an LGBTQIA network, which aims to build on a range of ICC efforts to champion

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the benefits of diversity and inclusion, including the launch earlier this year of ICC World Business Pride, an ICC staff-led initiative to foster an inclusive environment for those in the LGBTQIA community.

More concrete steps to increase diversity and inclusion in international arbitration are to come.

Is there a place for investor-State disputes in the future and at the ICC Court?

Without a doubt, investment treaty arbitration is part of the caseload at the ICC Court, and the ICC Court has a good track record of handling investor-State disputes efficiently. Numerous investment treaties include ICC arbitration as an option for claimants.

What would you see as the major challenges for arbitration in general and specifically the ICC in the coming years?

We are in a highly competitive environment, so I am focused on three key aspects:

First is that crucial moment when companies are entering into a contract and drafting a dispute resolution clause – what is going to make them insist on ICC arbitration, and not some other method of resolving a dispute? General counsel tell us

Parties don't want to be in an arbitration; they want to resolve their dispute. We need to provide a suite of integrated services – the proverbial tools in a toolbox – to enable parties to achieve their objectives.

that they use ICC arbitration because ICC is the institution they trust.

Second is the period of time from when an arbitration is filed until an award is issued, assuring that the service the parties receive exceeds their expectations and is transparent and predictable. ICC's case management team is second to none.

Third is ensuring that we focus on the parties' objectives when they are in an arbitration. Parties don't want to be in an arbitration; they want to resolve their dispute. We need to provide a suite of integrated services —the proverbial tools in a toolbox— to enable parties to achieve their objectives. To meet the needs of the global business community, we also must meet the needs of SMEs and the demand for additional ADR —and dispute prevention— services.

A final question, Claudia: What is your own personal source of inspiration? Who or what inspires you?

The late Ruth Bader Ginsburg, former U.S. Supreme Court justice, is incredibly inspiring. I take to heart her statement, 'Fight for the things that you care about but do it in a way that will lead others to follow you'.

Equal Representation in Arbitration Pledge Five Years On

In May 2021, the Equal Representation in Arbitration Pledge celebrated its five-year anniversary since it was founded in 2016. The Pledge has two key objectives at its core: first, to improve the profile and representation of women in international arbitration; and second, to appoint women as arbitrators on an equal opportunity basis.

History and development of the Pledge

The Pledge was originally conceived at an event hosted by ArbitralWomen member **Sylvia Noury**, Partner and Head of the London International Arbitration Group at Freshfields Bruckhaus Deringer LLP, in 2015, which was aimed at identifying positive action to address the issue of the severe lack of female representation in arbitral tribunals across the world. Over the ensuing months, the draft Pledge was refined through further consultation with a range of stakeholders, including representatives from arbitral institutions, law firms and corporations, in all of the major arbitration centres.

The Pledge then launched in May 2016 with 300 signatories, ensuring its broad support across different regions and institutions. As of 6 August 2021, the Pledge has garnered over 4,700 signatories from over 113 countries and enjoys support from over 900 organisations including law firms, arbitral institutions, corporations and governmental institutions.

The growth and development of the ERA Pledge has gone hand in hand with the increase in the transparency surrounding female representation on arbitral tribunals, particularly the increase in the publication and reporting of statistics on the gender breakdown of tribunals. Before 2015, such statistics were not widely published and much of the data was only gathered informally, thanks, notably, to the huge efforts of ArbitralWomen member **Lucy Greenwood**. One of the key early successes of the Pledge was that, in

response to signing the Pledge many of the major arbitral institutions, such as the LCIA, the ICC, ICSID and the HKIAC, now publish the statistics of the percentage of female arbitrators appointed.

More than just the publication of these statistics, the figures published by these arbitral institutions also highlight the progress being made towards the equal representation of women on tribunals. According to Lucy Greenwood's data, in 2015, only around 10% of tribunal members were female. By 2019, the average percentage of female arbitrator appointments across various arbitral institutions had risen to 21.5%, according to the report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings.

This report also revealed that the main drivers of progress in equal representation came from the arbitral institutions themselves: on average, 34% of appointments of arbitrators by institutions were women, compared to 13.9% female appointments by parties. This has highlighted the continuing areas for progress to be made, in encouraging parties to an arbitration to appoint more women as arbitrators.

In order to address this, as well as other issues (such as the under-representation of female arbitrators in professional directories), the Pledge offers services to assist parties in identifying female arbitrators whom they may not have otherwise come across. The Arbitrator Search Tool, which was launched at the same time as the Pledge itself, helps users to find female arbitrators meeting the requisite criteria for a particular dispute. The service is operated by the Pledge Search Committee, which is made up of representatives of arbitral institutions who volunteer to assist on a short, medium or long-term basis with responding to requests. The Committee is currently expanding its membership to help carry out its functions and, importantly, to increase the geographical diversity of the responses to searches.

Current organisational structure of the Pledge

The Pledge is headed by a Global Steering Committee, currently co-chaired by Sylvia Noury and **Samantha Bakstad**, Senior Legal Counsel at BP. The Global Steering Committee oversees and operates through its sub-committees, which themselves have specific areas of focus. Examples of these sub-committees include the Corporate Sub-Committee; the India Sub-Committee; the Latin America Sub-Committee; the Africa Sub-Committee; the Middle East Sub-Committee; and the Young Practitioners Sub-Committee.

In addition to generally encouraging individuals and organisations to sign up to the Pledge and its commitments, the Global Steering Committee, its members and sub-committees organise events and initiatives to promote the Pledge's objectives in more targeted and focused ways. For example: the Corporate Sub-Committee has published guidelines for corporate users of arbitration to highlight ways in which corporations can implement the goals of the Pledge's initiatives; the Paris members of the Global Steering Committee have launched a Checklist of Best Practices for the Selection of Arbitrators; the Young Practitioners Sub-Committee has entered into a partnership with the Chartered Institute of Arbitrators (CIArb) to provide ERA members with discounted training; and the Africa Sub-Committee has organised a 'Meet the Female African Arbitrator' series, to name but a few examples.

Since 2019, the Pledge has supported the 'ERA Pledge Award', presented at the annual Global Arbitration Review (GAR) Awards Ceremony. This award is intended to recognise and award outstanding efforts with respect to gender diversity in international arbitration. Nominations are put forward to the Pledge team and voted on by the GAR readership.

For more information on the ERA Pledge, including details of its events and its initiatives, please visit the Pledge website and follow the Pledge on LinkedIn.

Submitted by Stephanie Mbonu, Global Projects Lead, and Marco Hughes, Trainee Solicitor, both members of the International Arbitration Group at Freshfields Bruckhaus Deringer LLP, London, UK

2019 Statistics taken from the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings

Reports on Events

ABA International Law Section's International Arbitration Skills Masterclass, on 5-6 May 2021, by Webinar

Left to right: Carlos Concepción, Kate Brown de Vejar, Melissa Gorsline, Aníbal Sabater, Gonzalo Stampa

On 5-6 May 2021, the International Law Section of the American Bar Association (ABA SIL) held the first International Arbitration Skills Masterclass, featuring a combination of plenary sessions, roundtable discussions, and practice sessions. Approximately 100 participants from the United States, Canada, Russia, Egypt, India, and Latin America met virtually to learn and practice oral advocacy skills tailored to international arbitration. The faculty included a diverse group of top arbitration practitioners.

The event started promptly with welcoming remarks by **Daniel Gonzalez** and **William Hill** (Miami), followed by the first plenary session focused on 'Opening Statements'. Moderator **Al Lindsay** (Miami), with contributions from **Adriana Braghetta** (São Paulo), **Francisco González de Cossío** (Mexico City), **Bernard Hanotiau** (Brussels), and **Paula Hodges** (London), provided useful advice on what makes a strong opening statement. Following the panel, participants were separated into groups of four and moved to break-out rooms where they each presented opening statements to a faculty member, who then provided feedback.

The participants then reconvened for the plenary session on 'Cross-examination and Redirect of Fact Witnesses'. **Carlos Concepción** (Miami) led this discussion, with contributions from **Kate Brown de Vejar** (Mexico City), **Melissa Gorsline** (Washington DC), **Aníbal Sabater** (NY), and **Gonzalo Stampa** (Madrid). The panellists discussed proper techniques for cross-examining and redirecting fact witnesses, with a focus on the nuances that arise when counsel and the tribunal are from different legal and cultural backgrounds. After the panel, the participants practiced cross-examining and redirecting well-prepared volunteers posing as fact witnesses in separate virtual rooms and received feedback from a faculty member.

A 'Practitioner Roundtable', moderated by **Rafael Ribeiro** (Miami), with panellists Tai-Heng Cheng (New York), Érica **Franzetti** (Washington DC), **Tafadzwa Pasipanodya** (Washington DC), and **Richard Lorenzo** (Miami), closed the first day. The roundtable focused on a wide range of practical issues. For example, the panellists shared their insights about how to break into the world of international arbitration; offered their views on how clients and tribunals have been embracing technological innovations; and addressed the evolution of diversity and inclusion issues in the context of international arbitration.

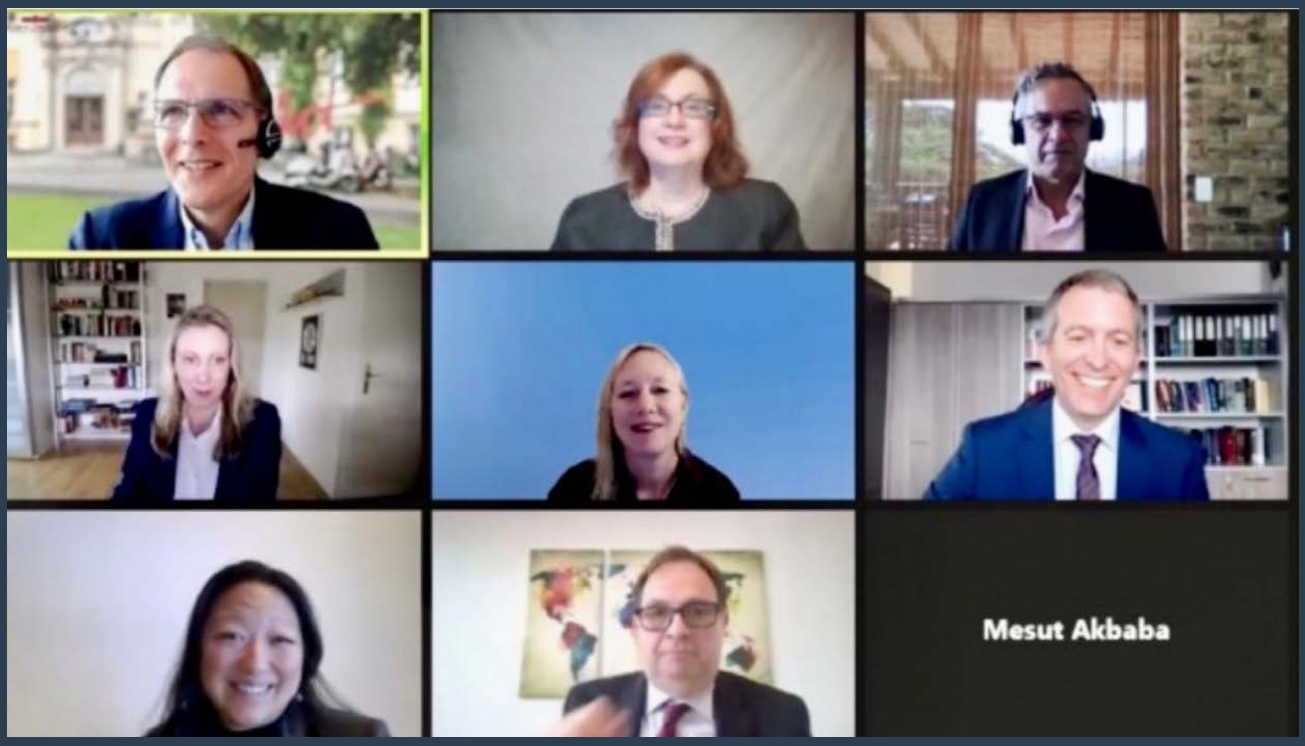
The second day began with a plenary session on 'Cross-examining and Redirecting Expert Witnesses'. This session was led by **Yasmine Lahlou** (New York), with contributions from **Brian Casey** (Toronto), **Jan Paulsson** (Dubai), and **Daniel Gonzalez** (Miami). Following the plenary session, the participants again split into groups and practiced cross-examination and redirecting skills on volunteer experts from well-recognised arbitration firms. Participants received feedback from the faculty members and the experts.

In the afternoon, the participants joined the plenary session on 'Closing Statements', which was moderated by **Kathleen Paisley** (Brussels), and included **Betsy Hellman** (Washington DC), **William Hill** (Miami), and **David Rivkin** (New York) as panellists. Once in their break-out rooms, each participant delivered a closing statement to a faculty member, who provided feedback.

Next, the participants reconvened for an 'Expert Roundtable' led by **Bart Wasiak** (London), with contributions from seasoned arbitration experts **Sirshar Qureshi** (Bratislava), **Neal Mizrahi** (Toronto), **Tim Hart** (Washington DC), and **Laura Hardin** (Houston). The first International Arbitration Skills Masterclass ended with a virtual networking event for participants, faculty, and experts.

Submitted by Melissa Stear Gorsline, ArbitralWomen member, Partner, Jones Day, Washington DC, US; Érica Franzetti, ArbitralWomen member, Partner, Dechert LLP, Washington DC, US, and Maria Pradilla Picas, Associate, Jones Day, Washington DC, US.

Arbitrating the Vis Case in Practice, on 7 May 2021, by Webinar

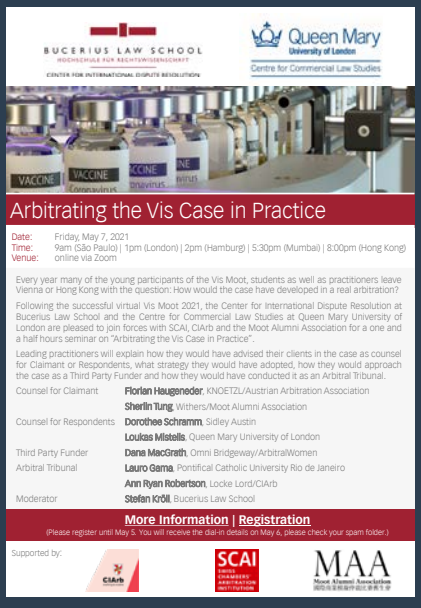


Top to bottom, left to right: Stefan Kröll, Ann Ryan Robertson, Lauro Gama, Dorothee Schramm, Dana MacGrath, Florian Haugeneder, Sherlin Tung and Loukas Mistelis

As a corollary to the 2021 Willem C. Vis International Commercial Arbitration Moot, on 7 May 2021, a webinar on 'Arbitrating the Vis Case in Practice' was organised jointly by Bucerius Law School's Centre for International Dispute Resolution and Queen Mary's Centre for Commercial Law Studies. The event addressed how practitioners, arbitrators and third-party funders might approach the fact pattern set out in the 2020/2021 Vis Moot Problem in a 'real life' setting. **Stefan Kröll**, a Director of Vis Moot Vienna and author of the Problem, served as the master of ceremonies.

Panellists presenting the perspective of the arbitral tribunal included the arbitrators from Vis Vienna's final round: **Lauro Gama** as a co-arbitrator, together with ArbitralWomen members **Ann Ryan Robertson**, the other co-arbitrator, and **Gabrielle Nater-Bass** (a former ArbitralWomen Vice President) as Chair.

Counsel for Claimant included ArbitralWomen member **Sherlin Tung** and **Florian Haugeneder**. Respondents were represented by ArbitralWomen member **Dorothee Schramm** and **Loukas Mistelis**. ArbitralWomen President **Dana MacGrath** discussed the role of the third-party funder, both in general and in light of the specific factual and legal elements of the Problem, explaining what considerations a third-party funder might take into account in deciding whether to fund the arbitration.



Sherlin Tung and Florian Haugeneder explained how they would have approached such a scenario with a client and also provided some insights on why parties may decide to commence arbitrations.

Ann Ryan Robertson and Dorothee Schramm provided views on the persuasiveness of the arguments, offered personal experiences when faced with similar issues, and discussed which side, in their view, would prevail in a 'real life' arbitration based on the facts in the Problem.

The event was well attended, and the audience was very engaged in the chat/Q&A.

Submitted by ArbitralWomen members Ann Ryan Robertson, Partner, Locke Lord LLP, Houston, US; Dorothee Schramm, Partner, Sidley Austin LLP, Geneva, Switzerland; Sherlin Tung, Partner, Withersworldwide, Hong Kong, and ArbitralWomen President Dana MacGrath, Independent Arbitrator, MacGrath Arbitration, New York, US

3rd Sciences Po Mayer Brown Arbitration Lecture: National Courts and Investment Tribunals – Competition or Coordination? on 10 May 2021, by Webinar

Gabrielle Kaufmann-Kohler

On 10 May 2021, the 3rd Sciences Po-Mayer Brown Arbitration Lecture (SPMBAL) was delivered by Professor **Gabrielle Kaufmann-Kohler** on the topic of 'National Courts & Investment Tribunals: Competition or Coordination?'. Co-hosting the event were **Dany Khayat** (Mayer Brown) and Professor **Diego Fernández Arroyo** (Sciences Po). The lecture was followed by a lively discussion with panellists Judge **Dominique Hascher** (Cour de Cassation/Supreme Judicial Court of France), **Eduardo Silva Romero** (Dechert) and **Marie Stoyanov** (Allen & Overy).

Professor Kaufmann-Kohler commenced her lecture by mapping out the current position on the relationship between courts and investment tribunals. She identified three main areas of interaction:

1. National courts support and control investment tribunals

The traditional function of the courts at the seat of the arbitration is to support arbitration and exercise control through annulment of awards. In addition, the courts at the place of enforcement exercise control at the level of enforcement proceedings. This interaction, which only comes to bear in non-ICSID investment arbitrations, may raise concerns of court decisions reaching inconsistent legal outcomes when it comes to interpreting identical or similarly worded treaty requirements, in particular in the area of jurisdiction.

2. Investment tribunals assess international responsibility engaged through court conduct

Another instance of interaction is when investment tribunals determine whether the conduct of national courts breaches international treaty standards and could thereby engage the international responsibility of the State to which they belong. The typical standard of protection is a claim for denial of justice, which can only be brought before investment tribunals if local remedies have been exhausted.

3. National courts and investment tribunals exercise competing jurisdiction

The last area of interplay and the main focus of the lecture is represented by situations in which a national court and an investment tribunal both have jurisdiction over the same dispute. Professor Kaufmann-Kohler clarified that by 'same dispute', she referred to a disagreement about a state measure that has caused the same harm, and not to the application of the *res judicata*'s triple identity test..

She focused on the concurrence of national and international bases and fora. To illustrate, she discussed the concurrence of treaty and contract claims as shown in the cases against Argentina. She also mentioned the cases of *Vattenfall v. Germany* as another example where there is a concurrence between administrative constitutional law remedies and treaty claims.

Professor Kaufmann-Kohler then elaborated on how the current investment framework deals with these competing jurisdictions. Although there are general principles of law that seek to avoid the multiplication of proceedings over the same disputes, she observed that main principles such as *res judicata* and abuse of process are not really suited for the kind of situations she mentioned. State practice as reflected in investment treaties appears more relevant.

Many treaties are silent on competing jurisdictions. Consequently, each dispute resolution body that is seized and has jurisdiction must carry out its mandate and issue a decision. Other treaties attempt to coordinate the interaction in essentially two ways: providing an alternative or a sequential jurisdiction. The *alternative approach* implies that the investor may choose between local courts and investment arbitration. This choice can be modelled in either a fork-in-the road clause or in a waiver clause. Professor Kaufmann-Kohler shared her preference for waiver clauses, as they do not discourage local proceedings. On the other hand, the *sequential approach* mandates that the investor first seizes domestic courts before starting investment arbitration, as seen in the traditional exhaustion of local remedies rule.

In the second part of her lecture, Professor Kaufmann-Kohler presented an assessment of the current system and the ways forward. She opined that the main criticisms — e.g., discrimination against local investors, no actual need for investor-State dispute settlement (ISDS) — do not arise from the current system as it operates, but from the existence of ISDS itself. In addressing the criticism on unequal treatment of local investors, she referred to the view of the Court of Justice of the European Union (in its Opinion 1/17) that the investment dispute resolution mechanism in the Comprehensive and Economic Trade Agreement (CETA) does not provide preferential treatment, but rather levels the playing field between foreigners and locals. As to the concern on the

Left to right: Diego Fernández Arroyo, Eduardo Silva Romero, Gabrielle Kaufmann-Kohler, Dominique Hascher, Dany Khayat

lack of actual need for ISDS, Professor Kaufmann-Kohler recalled the reasons why it was created in the first place. This was followed by an overview of the ISDS reforms that are currently being envisaged and whether they address the interactions discussed at the beginning of the lecture.

In concluding, Professor Kaufmann-Kohler described the current system as a complex investment protection system in which investment tribunals and national courts share responsibilities. In some areas, the allocation of tasks is rational and effective and there is coordination. In others, the division of labour is sub-optimal and creates inefficiencies and risks of tension or competition. In the latter area, improvement is needed towards the end goal, i.e., to reach a fair and efficient administration of justice.

The panel discussion kicked off with Eduardo Silva Romero's comments on some issues tackled during the lecture. He distinguished the role of the courts in controlling commercial arbitration awards *vis-à-vis* investment arbitration awards. In particular, he noted that the issue of consent is more complicated in investment arbitration, which poses the question, from a *de lege ferenda* perspective, whether national courts should have a limited power to review investment arbitration awards, like that in ICSID arbitration, instead of *de novo* review.

Eduardo Silva Romero shared his reservations on the current reform proposals. As to the proposed appellate mechanism, for instance, he feels it may cause delay in the proceedings. The proposed investment court may be unattractive to investors, who are the main users of the ISDS. More investors now negotiate contracts with ICC or other arbitral institutions' clauses, as commercial arbitration seems to be easier than investment arbitration. In concluding his comments, he observed that part of the solution is the view—as highlighted in many investment arbitration awards— that the tribunal must consider the trends of case law in investment arbitration, because it has a duty of consistency towards the community of States and investors.

Professor Kaufmann-Kohler, in response to Eduardo Silva Romero's presentation, commented that the emerging trend on investors favouring commercial arbitration clauses is a good reason to maintain a system of investment arbitration. Otherwise, small and medium enterprises (SMEs) and other investors who do not have the leverage to negotiate arbitration clauses would be left only with recourse to national courts.

Marie Stoyanov shared her views on whether adjudicatory fragmentation is advisable or will inevitably lead to a desire for some harmony and consistency. She noted that fragmentation and consistency of approaches already exist among domestic courts on several issues. For instance, the issue of whether *res judicata* is part of public policy and needs to be reviewed by the courts is addressed differently even among EU Member States. Also, the issue of whether the statute of limitations is a question of jurisdiction or admissibility affects the degree of review that the court of the seat of the arbitration will apply. Marie Stoyanov observed that the concern may not be limited to the interplay between courts and investment arbitral tribunals, but it also relates to how courts oversee the acts of States: either as contractual parties or as sovereigns. The discussion may soon shift to whether the distinguishing factor is the treaty or the fact that the State's purse is at issue. She also touched on the issue of corruption in arbitration and the divergence in how national courts address it, i.e., as either a new argument for jurisdiction or in terms of the evidence that can be presented.

Professor Kaufmann-Kohler agreed that there may not be an answer to the

Marie Stoyanov

inconsistency resulting from these issues, considering that courts will always apply their own rules of procedure. A multilateral investment court may be a solution.

Finally, Judge Hascher contested Eduardo Silva Romero's view on limiting the national courts' power of review over investment arbitration awards. In his view, a court that is fit to control commercial arbitration awards should also be prepared to look into investment laws. Judge Hascher shared that, based on his judicial experience, the major issue is determining jurisdiction. He emphasised that although courts may come up with different outcomes in reviewing investment arbitration awards, there must be an effort, as treaty interpreters, to apply the Vienna Convention on the Law of Treaties (VCLT) as a central instrument that would lead to a more or less harmonised interpretation.

Prof. Kaufmann-Kohler took a more sceptical view on the harmonisation effect of VCLT. Even if some courts apply it, they may still reach different solutions on the same issues. She suggested that a harmonising effect may also be achieved through a judicial dialogue by courts and tribunals considering the jurisprudence of other dispute settlement bodies.

The panel concluded its discussion with a lively Q&A session. Co-moderators Dany Khayat and Professor Fernandez-Arroyo posed insightful questions to the panel on other interesting issues, such as those arising in the context of politicisation of investment disputes. The recording of the event is available on Mayer Brown's YouTube channel.

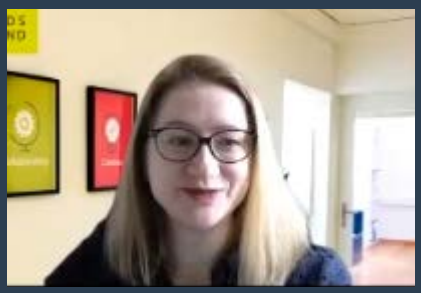
Submitted by ArbitralWomen member Alina Leoveanu, Senior Legal Consultant at Mayer Brown (Paris) and Nusaybah Muti, Trainee Solicitor at Mayer Brown, Paris, France.

LIDW 2021: How Not to Apply for Litigation Funding, on 11 May 2021, by Webinar

On 11 May 2021, ArbitralWomen member **Claire Stockford** (Partner at Eversheds Sutherland), participated in the London International Disputes Week (LIDW) programme, in an online panel event entitled 'How not to apply for litigation funding'. Other panellists included **Stephen O'Dowd**, Senior Director of Funding at Harbour Litigation Funding, **Chirag Karia QC** of Quadrant Chambers and **Glenn Newberry**, Head of Costs and Litigation Funding at Eversheds Sutherland.

The aim of the session was to examine some of the pitfalls of applying for litigation funding, based on real life examples (anonymised to save blushes). Here are a few of the takeaways from the session:

1. **Experience**. It might seem obvious, but when investing in a case, funders want to understand the track record of the team that will be running it, in the same type of cases. A big firm name, or a strong reputation in other disputes areas are not likely to be enough to persuade a funder to part with its money.
2. **Merits**. When approaching a funder, it is important to present the merits of the case in a full and frank way, and to appreciate where the value



Claire Stockford

of the case sits in relation to the strengths and weaknesses of the merits. Funders will often be wary of cases that are heavily reliant on oral testimony to succeed.
3. **Economics**. Litigation funders are making a financial investment in the legal proceedings, therefore the economics need to make sense. The amount of the likely recovery needs to be sufficient for the funder to make a return on its investment, and for the funded party to be satisfied with its recovery.
4. Budgets. Litigation funders understand that litigation can be unpredictable, but a realistic budget is an essential element to include when proposing a case to funders. Where the budget is supported by data extracted from similar cases, this can add to its robustness.
5. **Damages**. Estimates of loss are absolutely key to a funder's consideration of a case but can be really difficult to produce. Client knowledge can be really helpful, but sometimes it will be necessary to bring an accountant or economist on board, when applying for funding, to help the funder understand the calculation of quantum and demonstrate that it is realistic.
6. **Recoverability**. This is a key consideration for funders. A successful judgment or award is no more than an expensive piece of paper, unless the losing party complies or there are assets against which enforcement can be carried out, located in a jurisdiction with supportive courts.
7. **Attitude**. Finally, when approaching a funder, it is important to sell the case and to show enthusiasm for it. One way a lawyer can demonstrate to a funder their genuine interest in the case is to put some of their own fees at risk by offering some form of contingency element in jurisdictions where this is permitted.

Submitted by Claire Stockford, ArbitralWomen member, Partner (Barrister), Eversheds Sutherland (International) LLP, London, UK

LIDW 2021: Corporate Counsel Roundtable on the Top Priorities When Navigating Global Disputes, on 12 May 2021, by Webinar

In line with London International Disputes Week (LIDW)'s promise to deliver exceptional events focusing on international dispute resolution (and London) and give a voice to in-house lawyers, its eleventh session —on 12 May 2021— concentrated on corporate counsel's priorities when navigating global disputes. **Kai-Uwe Karl** (Senior Counsel, General Electric) and **Loukas Mistelis** (Professor, Queen Mary University of London) elegantly moderated the discussion. The speakers – **Stephan Balthasar** (Senior Legal Counsel, Allianz SE), **Glenn Baumgarten** (Senior Counsel, Deutsche Telecom), **Teresa Garcia-Reyes** (VP-Litigation, Baker Hughes Company), **Alison Pearsall** (ArbitralWomen Board member, Senior Group Counsel, Veolia) – brought to the table their views and practical insights on different topics. The discussion focused on litigation, arbitration, and mediation; how to streamline arbitration proceedings to reduce costs and delays; London as an arbitral seat, and whether Brexit might impact it.

You can read a detailed summary of this event on Kluwer Arbitration Blog.

Submitted by Giammarco Rao, Adjunct Lecturer at the School of International Arbitration, Queen Mary, University of London

ICC YAF Webinar: Read Between the Lines. The Unwritten Rules of a Career in International Arbitration: The Junior Years, on 14 May 2021, by Webinar

The beginning of a career in any field is seldom straightforward or intuitive. A career in international arbitration is no exception. In addition to the steps one has to take in order to enter this highly competitive field —study in the right programs, get good internships, work hard, network in the right places at the right time, keep learning—, there are additional layers of complexity due to its multicultural dimension, the high pressure that comes with the job and the often clashing demands on one's time.

The ICC YAF webinar 'Read Between the Lines. The Unwritten Rules of a Career in International Arbitration: The Junior Years', which took place on 14 May 2021, was the first webinar in a series of events focused on the soft skills arbitration practitioners need in order to build a strong career, with an emphasis on practical real-life situations and the strategic approaches one could have in order to meet various challenges.

The webinar was kindly hosted by Jones Day and was very well attended, with more than 250 participants joining live from all continents. In an incredible show of solidarity, the following international associations lent their support to this ICC YAF event: CEPANI40, ArbitralWomen, Club Español del Arbitraje, ACICA45, PT-VYAP Portugal Very Young Arbitration Practitioners, MAD VYAP – Madrid Very Young Arbitration Practitioners, Paris Baby Arbitration, London VYAP – London Very Young Arbitration Practitioners and YRAP – Young Romanian Arbitration Practitioners.

Anna Masser (Partner, Allen & Overy, Frankfurt), **Alya Ladjimi** (Manager, ICC International Centre for ADR, Paris), Prof. Dr. **Mohamed Abdel Wahab** (Partner, Zulficar & Partners, Cairo) and **Emilio Paolo Villano** (Partner, ELEXI, Brussels-Turin) took turns answering the participants' questions about the unwritten rules of the junior years in international arbitration.

The below is a small selection of the answers given to questions raised by the participants who joined the webinar:

1. The speakers agreed that LL.M. programmes are not an absolute necessity, but can be a useful complement on a CV. Furthermore, an LL.M. in the U.S. is not a necessity and students should also explore educational programmes in developing markets, such as in Southeast Asia, and Australia, which offer valuable programmes for competitive tuition fees.
2. Depending on the region, law firms may view a lawyer leaving the firm in order to pursue an LL.M. differently. In some jurisdictions, this is perceived as normal, while in others, firms prefer to hire someone after their LL.M. As in many other matters, prior research is key.
3. A Ph.D. program will not necessarily confer an advantage in terms of employability. Here too, there are important cultural differences which need to be explored.
4. A good CV is important, but not enough when applying to law firms. Employers will need to see that a candidate's trajectory shows passion for the field, sincerity and, for some, a certain

degree of humility is important. A bespoke application is also key. A candidate's personal skills and likeability play a major role in any interview.

5. The fact that a candidate does not come from a traditional arbitration hub jurisdiction is no longer a disadvantage, as the international arbitration market has become larger, more global and more diverse, with disappearing territorial barriers. A candidate should research the work done by firms and find those firms that may be focusing on his/her jurisdiction(s) of interest and/or desired specialization.
6. Juniors can express an interest in being assigned to particular cases, but they first need to impress through quality work, a good attitude and their ability to fit in a team.
7. If juniors are overworked, they should be able to bring this issue to the attention of the supervising partner in a professional way. This could even be considered a must since it risks jeopardising the entire team's deliverables.
8. In order to build a professional network outside of the firm, juniors should carefully consider the firm's policies and sign up to international organisations for young practitioners. To get the most value from this network, they should get involved in the organisation's activities, gradually build relationships from there and, with time, run for leadership positions.
9. Juniors should keep an open mind when representing a variety of clients. All clients deserve good representation as part of their right to be heard. Moreover, due to the expansion of the arbitration market, there are now opportunities in fields that were previously outside of the remit of arbitration, such as climate change.

The event was organised and moderated by Iuliana Iancu, Emily Hay and Vanessa Foncke, all three of Jones Day (Brussels office).

Stay tuned for the second event in these series, focused on mid-level associates (3 to 7 years post-qualification experience)!

Submitted by ArbitralWomen members Iuliana Iancu, Emily Hay and Vanessa Foncke (Partner, Counsel and Partner, respectively, Jones Day, Brussels, Belgium)

'Shining Bright(er): A Junior Lawyer's Guide to Raising Profile in International Arbitration', on 19 May 2021, by Webinar

Top to bottom, left to right: Sneha Ashtikar, Karolina Latasz, Samantha Rowe, Neza Leroy, Lucia Bizikova, Mark Feldner

After a challenging fifteen months, we are starting to see the light at the end of the tunnel. With the restrictions gradually easing and the return to the office becoming a reality, many very young arbitration lawyers have been asking themselves what they can do to start (or restart) building their profile in international arbitration and get their career back on track.

Profile building in international arbitration was the main topic of a recent interactive webinar organised by London VYAP (London Very Young Arbitration Practitioners) which took place on 19 May 2021. As part of a panel discussion that was moderated by **Lucia Bizikova** (London VYAP / DLA Piper), ArbitralWomen member **Sam Rowe** (Partner, Debevoise & Plimpton) and **Sneha Ashtikar** (Head of Marketing, Jus Mundi) discussed the importance of developing relationships internally and productive ways of using social media. They also shared their experience of adapting to the London, Paris and New York styles of self-promotion.

Think of internal promotion before seeking external recognition

Sam emphasised the importance of having a good base and of building one's profile internally before aiming for external recognition. She explained that our peers and senior colleagues are always our biggest promoters and are vital to every junior lawyer's career progression. She gave five essential tips for building a profile within one's firm:

1. be as substantively excellent as you can be and never let anything leave your desk unless you would be comfortable for it to go to a client;
2. treat your internal seniors as clients, each step should be viewed as building a client relationship;
3. understand that mentorship and sponsorship is a two-way street – you need to support your mentors and provide them with excellent service– they will go out of their way to support and promote you in return;
4. volunteer, but do not overcommit, to

business development; and
5. find your passion and share the work by creating opportunities for yourself and other members of your team.

Social media and LinkedIn

Sneha continued the discussion by sharing her experience and providing some useful tips on marketing and self-promotion, including a live, mini-tutorial on LinkedIn features and tools. She discussed the importance of finding one's voice on different social media platforms and getting comfortable with the tone and preferred approach. She explained that to create meaningful content it was important to have a narrow focus and consistency and emphasised the need to adapt the social media strategy to the target audience and its geographical location, noting that 4 pm was usually her favourite time to post on LinkedIn.

Do women have to market themselves differently?

Finally, Sam touched on the million-dollar question, i.e., whether women professionals are required or expected to take a different approach to self-promotion than their male colleagues. She debunked this myth and said that we have moved beyond the stage where female/male divide was decisive. She acknowledged the differences in approach but spun the story positively by noting that if she was a minority in a meeting or other professional setting, this made her stand out more, which she used to her advantage. Sam ended the panel discussion by observing that, while women do not necessarily need to market themselves differently, they still may have to work a bit harder to build their reputation in the market!

The webinar was sponsored by ArbitralWomen, Jus Mundi, International Centre for Dispute Resolution (ICDR), Chartered Institute of Arbitrators' Young Members Group, Careers in Arbitration and Tales of the Tribunal.

Further information about the webinar, upcoming events and our projects can be found on the London VYAP website and LinkedIn page, or by getting in touch with the London VYAP Executive Committee – Lucia Bizikova (DLA Piper), Karolina Latasz (Allen & Overy) and Neza Leroy (Quinn Emanuel).

Submitted by Lucia Bizikova, Trainee Solicitor, DLA Piper, London, UK

Delos TagTime Series, Season 3, Episode 8: Julian Lew QC on 'What is the Role of Counsel in International Arbitration?', on 19 May 2021, by Webinar

Left to right: Kabir Duggal, Amanda Lee, Julian Lew

On 19 May 2021, Julian Lew QC (Queen Mary University of London) explored the multifaceted role of counsel in international arbitration. This webinar was part of Delos Dispute Resolution's 'TagTime' series, supported by ArbitralWomen and presented by ArbitralWomen Board member **Amanda Lee** and **Kabir Duggal** (Senior Legal Advisor, Arnold & Porter, New York).

Julian focused on counsel's relationship with the tribunal. Before diving into the subject, he raised two questions that guided the discussion:

'What does counsel expect and wish to take away from the arbitration?'; and

'What does the tribunal need and expect from counsel?'

In simple terms, counsel's role is to win and get the result the client wants. In this context, Julian raised other questions such as 'how does counsel win for his or her client?'; 'are there any guidelines?'; 'does counsel need certain qualifications or even have to be a lawyer?' Julian also referred to counsel's tendency to present the case and interact with the tribunal as they would in their national courts.

Further, Julian highlighted the four roles of counsel:

to advise the client on the merits after a thorough analysis of the facts, evidence, and law;

to represent the client and their arguments;

to present the case at the hearing, examine witnesses and experts; and

to uphold ethical standards of honesty and integrity.

While there have been efforts by the arbitration community to har-

monise ethical rules, the meaning of such rules is not very clear. Difficulties may arise when counsel from diverse jurisdictional backgrounds understand the duty of honesty and integrity in different ways. Uncertainty remains regarding how far arbitrators can go to sanction ethical breaches by counsel.

The expectations of a tribunal are not absolute and differ from case to case, depending on the jurisdiction, training, and cultural background of the arbitrators, counsel, and parties. Whether the tribunal's expectations are satisfied depends on how well counsel present the case.

Therefore, most tribunals expect counsel to explain the case and issues, and to request orders sought at the beginning of the pleadings. Counsel should take this opportunity to help the tribunal identify the issues that are of primary concern to the case and guide the arbitrators to the answers and relevant evidence. Julian highlighted that a great counsel introduces the case and arguments with clarity, however complicated the law and facts may be.

Counsel should seek not to overcomplicate the case, as this may cause delays, require more witnesses, and introduce issues that are not relevant to the tribunal's determinations. Last, the use of exaggerated, derogatory, and repetitious language should be avoided because it does not add to the substance of the case.

Julian tagged ArbitralWomen member Patricia Shaughnessy to appear as a guest on a future episode of the series.

Submitted by Anne-Marie Grigorescu, New York State attorney-at-law (pending admission)

The Rising Arbitrator's Challenge: Navigating the Promise and Perils of Your First Appointments: Australia and New Zealand, on 20 May 2021, by Webinar

Top to bottom, left to right: Rocio Digon, Lucy Martinez, Anna Kirk, Jun Wang, Caroline Swartz-Zern and Erika Williams

On 20 May 2021 the fifth webinar of the series 'The Rising Arbitrator's Challenge: Navigating the Premise and Perils of Your First Appointment(s)', covering Australia and New Zealand, was presented by ACICA45, in collaboration with the Rising Arbitrators Initiative (RAI). RAI was created in September 2020 to support arbitration practitioners under 45 who have either already received their first arbitrator appointments or have at least seven years of professional experience.

The aim of the series of events is to bring discussions around the main issues which arbitrators face in their first appointments and how they overcome the challenges. The series brings rising arbitrators together as well as representatives of arbitral institutions and aims to support practitioners tackling their first appointments.

The 20 May 2021 webinar focused on Australia and New Zealand and was moderated by ArbitralWomen Board member **Erika Williams** (Williams Arbitration). **Rocio Digon**, RAI co-founder and legal consultant at White & Case, gave the opening remarks, briefly introducing the RAI initiative to the audience.

The panel consisted of four speakers: **Caroline Swartz-Zern** (Australian Centre for International Commercial Arbitration), ArbitralWomen member **Lucy Martinez** (Martinez Arbitration), **Jun Wang** (Fitzgerald Lawyers) and ArbitralWomen member **Anna Kirk** (Bankside Chambers).

To read more about this event, please see the Kluwer Arbitration Blog post by Zuzanna Cieplińska.

Submitted by Erika Williams, ArbitralWomen Board member, Independent Arbitration Practitioner, Williams Arbitration, Brisbane, Australia

Charting the Future in International Arbitration, on 20 May 2021, by Webinar

On 19 and 20 May 2021, the International Law Association-Canada (ILA Canada) held its second biennial conference titled 'International Arbitration: Charting the Path Ahead'.

On 20 May 2021, ArbitralWomen member and Partner at Blake, Cassels & Graydon LLP, **Laura Cundari**, joined a panel chaired by **Oonagh E. Fitzgerald**, Senior Fellow, Human Rights Research & Education Centre, University of Ottawa.

The panel, titled 'Charting the Future in International Arbitration', canvased a variety of procedural and substantive reforms that are underway or under discussion. Laura Cundari's presentation focused on recent rule changes implemented by domestic and international arbitral institutions to maximise efficiency in arbitration. She discussed a variety of developments, including the expansion of expedited procedures and the efforts to support virtual hearings during the Covid-19 pandemic and beyond.

Panel member **David Pavot**, Professor, Research Chair on Anti-doping in Sports, Business School, *Université de Sherbrooke*, presented in French on current issues in the Court of Arbitration for Sport. His presentation was followed by an interesting discussion by **Gus Van Harten,** Professor and Associate Dean (Academic), Osgoode Hall Law School, York University, on the distinction between international commercial arbitration and international investment arbitration. Finally, **Ksenia Polonskaya,** Professor, Department of Law and Legal Studies, Carleton University, provided a thought-provoking talk on the limits of corporate social responsibility in investment arbitration.

Catherine Kessedjian, *Professeur émérite, Université Panthéon-Assas Paris II*, served as commentator and did a wonderful job tying these diverse topics together in a bilingual format. It was an interesting discussion that covered academic, ethical and practical dimensions of international arbitration, all with a view to the future.

Click here to watch a recording of the webinar.

Submitted by ArbitralWomen member Laura Cundari, FCIArb, Partner, Blake, Cassels & Graydon LLP, Vancouver, Canada

New Opportunities for Arbitration Lawyers: Climate Change, Outer Space and Human Rights, on 25 May 2021, by Webinar

On 25 May 2021, Young Arbitral Women Practitioners (YAWP), Holland & Knight and Rising Arbitrators Initiative (RAI) co-hosted a webinar to discuss climate change, outer space, and human rights as non-traditional areas in which international arbitration is becoming increasingly relevant as a means of resolving disputes.

Following opening remarks by YAWP Steering Committee member **Montserrat Manzano** (Von Wobeser y Sierra, Mexico City), ArbitralWomen member **Krystle Baptista** (KB International Law & Arbitration, Madrid) moderated the panel composed of **Gretta Walters** (Chaffetz Lindsey, New York), ArbitralWomen member **Laura Yvonne Zielinski** (Holland & Knight, Mexico City), and **Juan Ignacio Massun** (Permanent Court of Arbitration, Buenos Aires).

First, with respect to outer space, Laura Y. Zielinski observed that the existing governing legal framework dates back to a time before the commercialisation of space ventures, when only governments performed activities in space. Only recently have technological developments reduced the cost of space ventures and prompted the privatisation of satellite operations, and therefore opened the field to commercial actors. Arbitration may offer a crucial tool to this market to guarantee the protection of such actors' activities and investments. The panel noted that in 2011 the PCA issued the as-yet-not-applied 'Optional Rules for Arbitration of Disputes Relating to Outer Space

Activities', which are tailored to allow for outer space experts to be appointed as arbitrators and have confidentiality provisions designed to protect the intellectual property and national security interests pertaining to outer space activities. The panel also noted the relevance of investor-State arbitration to such activities, highlighting the decision in *Devas v. India*, where the tribunal held the Mauritius-India BIT applicable to the rights over satellite spectrum.

Second, Ignacio Massun discussed the potential value of the Hague Rules on Business and Human Rights Arbitration in the context of disputes in industries that impact human rights. The Hague Rules are based on the non-binding UN Guiding Principles on Business and Human Rights and have various features that facilitate the involvement of interested parties in arbitrations that arise from activities in such industries. For instance, Article 19 allows parties to consolidate claims and join mass claims of human rights' violations, whereas Article 25 allows for summary dismissal of meritless claims. For interested third parties, Article 28 facilitates the submission of *amicus curiae* submissions.

ARBITRAL WOMEN YAWP Holland & Knight

NEW OPPORTUNITIES FOR ARBITRATION LAWYERS: CLIMATE CHANGE, OUTER SPACE AND HUMAN RIGHTS

TUESDAY, MAY 25 | 10:00 a.m. ET/9:00 a.m. CT

Please join Young ArbitralWomen Practitioners (YAWP) for an international panel discussion hosted by Holland & Knight and supported by the Rising Arbitrators Initiative.

Arbitration has proved beneficial for numerous industries, including energy, construction and telecommunications. It also has shown potential beyond its traditional use. Our speakers will address three areas in which international arbitration is becoming increasingly relevant as a means for dispute resolution.

- **Climate Change:** A highly debated and controversial issue that affects numerous industries and government policies, climate change is playing a bigger role and becoming a greater catalyst in international disputes.
- **Outer Space:** Once strictly in the hands of governments, private capital continues to raise its bets on the industry with investments in satellites, space tourism and the viability of a colony on Mars or asteroid mining. The often specialized and international nature of space activities could make international arbitration the dispute resolution mechanism of choice.
- **Human Rights:** The Hague Rules on Business and Human Rights Arbitration, launched in December 2019, help establish an international private judicial dispute resolution avenue available to parties involved in business and human rights issues as claimants and defendants.

We hope you will join us for this in-depth and informative presentation.

Opening Remarks: Montserrat Manzano | Steering Committee, YAWP, Mexico City

Moderator: Krystle Baptista | KB International Law & Arbitration, Madrid

Speakers: Gretta Walters | Cheffetz Lindsey, New York
Laura Yvonne Zielinski | Holland & Knight, Mexico City
Juan Ignacio Massun | Permanent Court of Arbitration, Buenos Aires

Date/Time: Tuesday, May 25, 2021
10:00 – 11:30 a.m. ET
9:00 – 10:30 a.m. CT
8:00 – 9:30 a.m. MT
7:00 – 8:30 a.m. PT

RSVP:

Space is limited. Please register online by May 24.

Connect With Us:

Holland & Knight ARBITRAL WOMEN YAWP RAI

Finally, Gretta Walters explained that notwithstanding the traditional failure for investment treaties to provide an avenue by which to enforce environmental protection obligations, there are gradual signs of change towards the protection of environmental protection obligations. The panel observed that, among other features, the 2019 Netherlands Model BIT includes a 'sustainable development' section that affirms the States' commitment to the Paris Agreement and reaffirms the investors' duty to comply with all domestic laws (including environmental laws). Additionally, the panel noted that various BITs, including the 2021 Singapore-Indonesia BIT, stipulate that States may regulate environmental protection without such regulation constituting a treaty breach.

A longer report on this event may be found here (Kluwer Arbitration Blog).

Submitted by Alexander Barnes, Associate, Von Wobeser y Sierra, Mexico City, Mexico

Delos TagTime Series, Season 3, Episode 9: Patricia Shaughnessy on 'Settlement in Arbitration: The Changing Role of the Arbitrators', on 2 June 2021, by Webinar

Left to right: Kabir Duggal, Amanda Lee, Patricia Shaughnessy

On 2 June 2021, ArbitralWomen member **Patricia Shaughnessy** discussed the changing role of the arbitrator in facilitating settlement in arbitration proceedings. This webinar was part of Delos Dispute Resolution's 'TagTime' series, supported by ArbitralWomen and presented by ArbitralWomen Board member **Amanda Lee** and **Kabir Duggal**.

Recently, the role of the arbitrator in encouraging and facilitating settlement has sparked much attention in the arbitration community. Several practitioners have argued that arbitrators should be regarded as dispute resolvers, and not simply as decision-makers.

While Patricia agrees with this proposition, she also sees the arbitrator as an adjudicator who is in the middle of the dispute, like an 'ice hockey referee' and a settlement facilitator.

According to institutional statistics, about 30-40% of all commenced arbitrations are withdrawn, dismissed or end with a consent award. Most arbitration stakeholders favour settlement because it provides the most efficient and most effective resolution

of disputes, if enforceable.

Mediation and hybrid processes (Med-Arb, Arb-Med-Arb) have been growing in popularity. The Singapore Convention represents a promising instrument to enhance and enable mediation as an effective international dispute resolution mechanism.

The regulated role of the arbitrator as settlement facilitator is seen in Article 3(1) of the CEDR Rules for the Facilitation of Settlement in International Arbitration (2009) and Article 26 and 27.4 of the DIS Rules (2018). Similarly, Article 9 of the Prague Rules (2018) provides that arbitrators may assist the parties in amicable settlement and act as mediators, whilst Appendix IV CMT (h) of the ICC Rules (2021) uses softer language and merely encourages the parties to consider opportunities for settlement. Article 30 of the UNCITRAL Model Law (2010) allows for settlement and provides that the arbitrator may render a consent award, as does Article 36 of the UNCITRAL Rules (2010).

However, the interchangeability of the role of mediator, settlement facilitator, and arbitrator may give rise to ethical issues and potential difficulties when enforcing an award.

In the context of settlements and consent awards, Patricia offered some food for thought by posing questions like 'Do arbitrators need a dispute to adjudicate?' or 'Should arbitrators ensure the integrity of the consent award that may be enforced?', particularly when the tribunal is constituted post-settlement, solely to render a consent award.

These questions are particularly thorny in the light of Article II (1) of the New York Convention, which may block enforcement.

Further, Patricia noted that consent awards enjoy the same status as other awards and are subject to the same conditions, except that reasons may not be required. Most institutional rules provide that parties may jointly request that the tribunal render a consent award. The request is granted at the tribunal's discretion. Patricia highlighted potential considerations that arbitrators should ponder when exercising such discretion.

Last, she noted that potential issues could arise with consent awards, including the lack of authority/capacity of parties or lawyers to settle the dispute, overbroad settlements, arbitrability and public policy, corruption concerns and the effect of such awards on third parties.

Patricia tagged **Baiju Vasani** to appear as a guest on a future episode of the series.

Submitted by Anne-Marie Grigorescu, New York State Bar, admission pending

The FIAA International Arbitration Advocacy Workshop on Questioning of Fact Witnesses in International Arbitration, on 3-5 June 2021, by Webinar

The Foundation for International Arbitration Advocacy ("FIAA") organises workshops twice a year with the aim to provide advocacy training specially tailored to international arbitration. The first workshop of 2021, which was dedicated to the **EMEA region**, took place virtually on 3-5 June 2021 with particular focus on **examining fact witnesses**. Twenty-five accomplished lawyers participated in the workshops, which started with two days of intense training followed by mock hearings for all the participants.

The two-day training was aimed at lawyers mainly from the Civil Law tradition, with English as their second or third language. The purpose was to help the participants develop as advocates through intensive training with particular focus on enhancing their Technique, Organisation and Communication skills ('TOC'). The participants practised on a particular case and a Case file and materials, including written pleadings, exhibits and witness statements, were distributed to the participants and arbitrators.

The objective of the mock hearings was to establish a professional and realistic environment for the advocacy exercises. They involved two teams of two lawyers each, who played the role of Claimant or Respondent respectively before a panel of three arbitrators. Each of the participants gave his/her opening statements, followed by direct, cross and re-direct examination, where each of the participants played in turn the role of Counsel and witness, and closing statements at the end. For the majority

of the participants, the mock hearings were their first advocacy experience. Questions were sometimes put to the participants by the arbitral tribunals, to give a taste of true hearings. At the end, the arbitrators gave their feedback to each of the four participants on their "TOC" skills with a focus on what the participant can REPEAT; IMPROVE on; and Pitfall to be AVOIDED in the FUTURE.

A closing ceremony followed. **Wendy Miles**, QC, Barrister at Twenty Essex Chambers, Chair of FIAA, first thanked the FIAA organisers and organizing committee, **Bernd Ehle,** Partner at Lalive, **Michael Ostrove,** Global Co-Chair of International Arbitration at DLA Piper, and **Ndanga Kamau**, Founder of Ndanga Kamau Law, and expressed the FIAA's special appreciation and gratitude to the Senior Arbitrators and all the other panel members. The certificates were awarded to each of the participants who were called to open their cameras. The arbitrators also received a beautiful gift of native trees grown in New Zealand ('Trees that Count') named after each one of them. The gift perfectly reflected the FIAA's commitment to a greener environment.

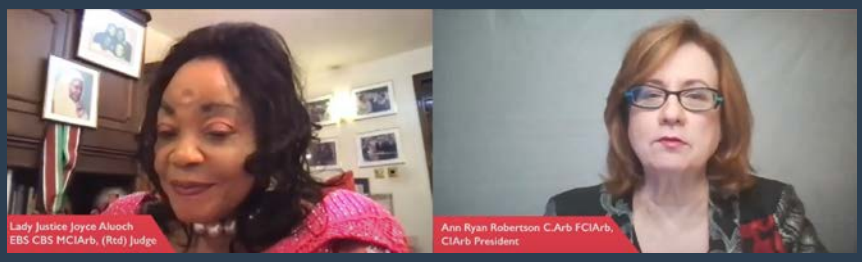
The participants showcased high advocacy skills before renowned counsel and arbitrators coming from the four corners of the world with special expertise in the EMEA region.

ArbitralWomen was massively represented, with three of the seven Senior Arbitrators composing the panels acting as presiding arbitrators, **Funke Adekoya,** SAN, Partner at ÆLEX, **Annet Van Hooft,** Founder of Van Hooft Legal, and **Sally El Sawah**, PhD, Co-Founder of Junction and Principal of El Sawah Law, and Wendy Miles, QC, shepherding all seven Panels.

The FIAA course is an exceptionally stimulating experience for both participants and arbitrators. For young advocates and law firms, it is a great opportunity for building capacity. For arbitration practitioners who are keen on paying back to the community, it is a very rewarding experience.

Submitted by Dr Sally El Sawah, ArbitralWomen member, Co-Founder of Junction, Principal of El Sawah Law | Paris, France and Cairo, Egypt

CIArb Roebuck Lecture: The Impact of Singapore Mediation Convention, both on mediation and arbitration, on 10 June 2021, by Webinar



The Chartered Institute of Arbitrators (CIArb) and global CIArb President **Ann Ryan Robertson** C.Arb FCIArb, International Partner, Locke Lord LLP, Houston, Texas USA, hosted the CIArb's 11th Roebuck Lecture on 10 June 2021.

The Roebuck Lecture has historically been an in-person event in London with attendance limited to around 200 people. Due to the pandemic, this year's lecture was delivered by Zoom with over 675 people from across the globe in attendance.

The Hon Lady Justice **Joyce Alouch** EBS CBS MCIArb (Rtd) Judge, Certified International Mediator (IMI), Certified Advanced Mediator, Chartered Mediator and Accredited Mediator, delivered the lecture on the theme: 'The Impact of the Singapore Mediation Convention, both on mediation and arbitration'. Justice Alouch explored the history of the Convention and certain of the formalities required in order to secure enforcement of a mediated settlement agreement. She noted: '[o]ne important distinction is that, unlike judgments or arbitral awards, settlement agreements under the Convention do not have a nationality' and a Convention Member State's obligation to enforce mediated settlement agreements is not limited to agreements emanating from another Convention Member State.

Following Justice Alouch's remarks, Ann Ryan Robertson and Justice Alouch engaged in a lively question and answer session regarding the Convention and its impact on arbitration and mediation, concluding that although in its infancy, the Convention has the potential to strengthen the use of mediation in cross-border disputes. It was noted that, while at present there are only 6 signatories to the Singapore Convention, the New York Convention, which came into force in 1958, likewise did not garner numerous signatures in its first few years. Significantly, the United States did not ratify the New York Convention until 1970, with the United Kingdom following in 1975. Ann Robertson and Justice Alouch also compared the mediation practices of their home countries, the United States and Kenya, respectively, to explore if there is an emerging universal mediation standard.

Click here to access a recording of the Lecture.

Submitted by Ann Ryan Robertson, C.Arb FCIArb, ArbitralWomen member, International Partner, Locke Lord LLP, Houston, Texas, USA

Independence and Impartiality in International and Investment Treaty Arbitration, on 14 June 2021, by Webinar

Left to right: Anna Howard, Gisèle Stephens-Chu, Monty Taylor, Stavros Brekoulakis, Gabriel Bottini

On 14 June 2021, the Centre for Commercial Law Studies of Queen Mary, University of London (QMUL), hosted a virtual event on the topic of independence and impartiality in international arbitration, featuring a panel discussion between **Gabriel Bottini** (Uría Menéndez), ArbitralWomen Board member **Gisèle Stephens-Chu** (Stephens Chu Dispute Resolution) and **Monty Taylor** (Arnold & Porter), moderated by Professor **Stavros Brekoulakis** (QMUL) and ArbitralWomen member Dr. **Anna Howard** (QMUL). The event was attended by approximately 100 participants from around the world.

By way of introduction, Stavros Brekoulakis noted that some of the ISDS reform proposals —such as the EU proposal to move to an investment court system— are made in response to accusations of arbitrators' lack of impartiality in investor-State arbitration. Recent institutional efforts to regulate arbitrator conduct, most notably the ICSID/UNCITRAL draft Code of Conduct, proceed on the assumption that there is some truth in these accusations. Yet, his own experience and empirical research suggest that such accusations are too simplistic.

Distinguishing between partiality to a party and issue conflict, Monty Taylor noted that the latter was far more frequent in ISDS. Predisposition to certain views may be problematic if it rose to prejudging the case. However, consistent rulings on certain issues should not be a cause for concern. Gisèle Stephens-Chu observed that judges in state courts are often known for having certain views, without being criticised for lack of impartiality. Having general views does not preclude an arbitrator from having an open mind with respect to the specific matter to be decided.

Turning to the respective roles of the members of an arbitral tribunal, Gisèle further commented that, as the person in control of the proceedings, the chair plays a special part in guaranteeing the impartiality of the tribunal: while (s)he must engage with the co-arbitrators' views, and seek to build a consensus, (s)he must retain control of the decision-making process by maintaining some independence from the co-arbitrators and forming her/his own views on all the issues to be decided. Gabriel Bottini noted that some party-appointed arbitrators, in deliberations, consider that they have a special duty to ensure their appointing party's position is fairly considered. While that approach is respectable, he preferred the alternative position that all arbitrators are subject to the same standards and must consider both sides' views in the same way. Monty Taylor noted that the former approach did not create an inherent problem in terms of impartiality, because in most cases any partisan approach would be adequately policed during the deliberations. Gisèle noted that clients remained overwhelmingly in favour of party appointments, reflecting an expectation that their appointee will be sympathetic to, or at least understand their case. However, given the spectrum of different behaviour among party-appointed arbitrators, it may be desirable to define what constitutes acceptable behaviour —e.g., ensuring that the appointing party's case is properly heard and understood by the other arbitrators— and what does not, i.e., advocating on behalf of the appointing party in the decision-making.

Generally, the panellists shared the view that arbitrators should not be too passive during hearings out of due process concerns but must feel able —in the same way as judges in many legal cultures— to ask questions that test both sides' cases appropriately and ensure that counsel have an opportunity to address all key issues.

Turning to repeat appointments, Gabriel Bottini observed that ISDS proceedings generally involve questions of public interest, the adjudication of which may be influenced by arbitrators' general political or other views. The fact that some arbitrators are routinely appointed by one type of litigant may simply reflect how that person thinks, which should not constitute a ground for challenge. Stavros Brekoulakis concurred, noting that it was important to have a diversity of views in the deliberations: some arbitrators may understand better how States work, while others may be more attuned to the importance of foreign investment. Monty Taylor observed that counsel and clients would vet arbitrator candidates and seek to determine, from their prior decisions, what their position might be on the issues in a given case. Yet, however rigorous the vetting may be, it is not always possible to discern from published decisions or indeed questions

during the hearing what the arbitrator's position on a specific case might be.

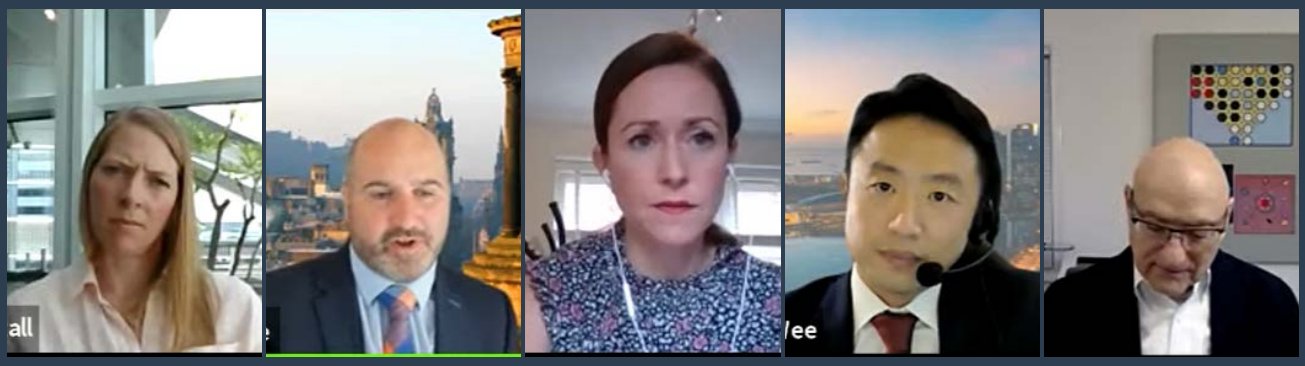
Regarding challenges, Gabriel Bottini noted that arbitrators had become much more cautious with respect to their disclosures. However, as noted by Monty Taylor, challenges remain rare and are very much the nuclear option. Gisèle Stephens-Chu noted that, while challenges may not have statistically increased, they appeared to be becoming more 'creative', in particular those based on disclosures (or lack thereof) by arbitrators.

The panellists concurred that, in practice, concerns about arbitrators' impartiality in ISDS were largely unfounded, given the standards already in place and the self-regulating nature of the system. However, given the backlash against ISDS, it is evident that some reform efforts, combined with better communication about the process, are necessary to respond to the public's concerns.

Click here to watch a recording of the event.

Submitted by Gisèle Stephens-Chu, ArbitralWomen Board member, Stephens Chu Dispute Resolution, Paris, France.

ICC Annual Arbitration & ADR Conference: 'Med-Arb: The best of both worlds or an unnecessary intermediary?' on 23 June 2021, by Webinar



Left to right: Clea Bidgelow, Brandon Malone, Hannah Ambrose, Teck Wee Tiong and Mark Morril

The ICC Annual Arbitration & ADR Conference took place virtually on 23–25 June 2021. Day 1 of the conference addressed the Practicalities of Alternative Dispute Resolution with two teams being asked to argue in favour of, and against the motion: 'Med-Arb: The best of both worlds or an unnecessary intermediary?'

Mediation and arbitration are two very different forms of dispute resolution, often considered to be the opposite ends of the dispute resolution spectrum. On the one hand, arbitration is a formalised process involving the application of the law to the facts of the case in an adversarial setting, where the tribunal's decision is final and binding on the parties who have submitted to its jurisdiction as a matter of contract or as a feature of a treaty. Mediation, on the other hand, is a consensual process that focuses on the parties' needs and interests, without imposing a decision on them and rather encourages parties to reach their own agreement.

The lively discussion was chaired by **Brandon Malone** (Brandon Malone & Company and ICC Arbitration & ADR Committee Member). Arbitral Women member **Clea Bigelow-Nuttall** (Pinsent Masons) began by defining the hybrid Med-Arb process in its own right, distinct from conducting a mediation within an arbitration. She promoted the legitimacy of this process as the 'best of both worlds', in terms of ADR mechanisms, due to its innovating cost and time saving advantages. **Teck Wee Tiong** (WongPartnership LLP) concurred that one of the primary advantages of Med-Arb was the efficiency of disposing of disputes amicably and narrowing down the differences of the parties even if the mediation was not eventually successful. In addition, he offered some practical advantages of the process, such as that it allows businesses to focus on their commercial interests and objectives. He then described the cultural factors that lead to Med-Arb's popularity in certain jurisdictions particularly, more than in others.

Balanced against the above are a number of significant drawbacks and risks inherent to Med-Arb, which **Hannah Ambrose** (HSF) and **Mark Morril** (Independent Arbitrator & Mediator) argued include the emergence of better tools that integrate the adjudicative and non-adjudicative processes. Key amongst the pitfalls are the enforcement risks in the mixing of the roles, and the reluctance of users/practitioners where the 'double-hatting' of a mediator assuming the role of arbitrator is seen as causing conflict and challenges to the arbitration itself and the eventual

award being rendered unenforceable on grounds of public policy. It is therefore crucial that arbitration agreements embody the parties' informed consent, that the latter are aware of the risks and process-driven limitations and that their expectations are carefully managed.

Submitted by Scheherazade Dubash, ArbitralWomen member, Senior Practice Development Lawyer, Pinsent Masons, London, UK

ACICA Rules Road Show event, on 24 June 2021, in Brisbane, Australia

Left to Right: Mark Johnston, Russell Thirgood, Melissa Yeo, Jennifer Barrett, Erika Williams, Alexandra McVay

The first Australian Centre for International Commercial Arbitration (ACICA) Rules 2021 Road Show event took place in Brisbane on 24 June 2021. It was an animated enactment of arbitral proceedings using the newly published ACICA Rules 2021 which came into effect on 1 April 2021. The event was the brainchild of ArbitralWomen Board member, **Erika Williams**, Counsel, ACICA and Independent Arbitration Practitioner, and moderated by ArbitralWomen member, **Jennifer Barrett**, Of Counsel, Corrs Chambers Westgarth. The generous host was **Natalie Caton**, Partner, DLA Piper. Panellists included: Erika Williams (acting as ACICA); **Mark Johnston**, Barrister, North Quarter Lane Chambers and Maxwell 42 International Arbitration Chambers (acting as Claimant's Counsel); **Melissa Yeo**, Senior Associate, Ashurst (acting as Respondents' Counsel); **Russell Thirgood**, Independent International Arbitrator (acting as Arbitrator) and **Alexandra McVay**, Investment Manager, Omni Bridgeway (acting as Third-party Funder).

To illustrate how the changes to the ACICA Rules would operate in practice, the panellists role-played international arbitral proceedings governed by the ACICA Rules 2021 using a hypothetical scenario involving the termination of a contract for supply of coal between an Australian Steel making company (Claimant) and a Chinese entity that acts an intermediary and on-sells Australian coal (Purchaser) and its parent company, also a Chinese entity (collectively, Respondents). The contract in question included a guarantee from Purchaser's parent company. Purchaser terminated the contract based on misrepresentation of the quality of the coal. Claimant then commenced arbitration against Purchaser under the contract and the parent company under the guarantee.

The panel's interactive approach was successful in demonstrating the practical effect of key amendments to the ACICA Rules which have been adopted to reflect developments in international best practice and to further enhance the arbitration experience for all users. In particular, the event focused on improved online practices developed during the Covid-19 pandemic, expanded scope for consolidation and multi-contract arbitrations (including the addition of the ability to commence one arbitration in respect of disputes under multiple contracts and the ability to consolidate arbitrations when the parties to the arbitrations are not the same), effective case management (increased institutional supervision of tribunal appointments, requirement that tribunals raise alternative dispute resolution methods and a time frame for the rendering of an arbitral award) and disclosure of third-party funding arrangements. In addition to many senior practitioners, the audience included a cohort of early career arbitration practitioners who benefited from a lively and memorable play-by-play of an arbitration proceeding involving key stakeholders.

Submitted by Josephine Allan, Associate, Corrs Chambers Westgarth, Brisbane, Australia

5th ICC European Conference on International Arbitration, on 28 June 2021, by Webinar

Top to bottom, left to right : George A. Bermann, Claudia T. Salomon, Hjordis Birna Hjartardottir, Lorraine de Germiny, Sebastiano Nessi, Olga Hamama, Silvia Martínez Sastre, Claire Bright, Ursula Kriebaum, Alexander Marcopoulos, Marney L. Cheek, Elena Gutiérrez García de Cortázar, Sophie J. Lamb, Michael Polkinghorne, Malgorzata Surdek, Charles Kaplan

The ICC European Conference is an annual event that explores hot topics from the world of arbitration. In the fifth edition, four panels of speakers consisting of practitioners, academics, and ICC Court members discussed the most pertinent institutional developments and the evolution of arbitration across the continent as well as potential developments the future holds.

The first panel, moderated by **Hjordis Birna Hjartardottir** (ICC Secretariat), considered recent key court decisions and other developments, their implications and potential future trends looking at the past two years. **Lorraine de Germiny** (LALIVE) discussed the increased attractiveness of London-seated arbitrations in the aftermath of Brexit and *Achmea*, due to the additional protection EU investors could obtain from EU-UK BITs if they choose to restructure their investments through the UK. **Sebastiano Nessi** (ICC YAF Representative for Europe and Russia; Schellenberg Wittmer) assured that Switzerland, despite competition from the UK, would implement measures to remain at the forefront of international arbitration, as already evidenced by a recent revision of its arbitration law. **Silvia Martinez Sastre** (Hogan Lovells) discussed judicial control and shifting boundaries of public policy in Spain. **Olga Hamama** (V29 Legal) contributed to the discussion addressing the recent developments in climate change-related arbitration proceedings which also led to state court proceedings in Germany.

During the fireside chat, **Claudia T. Salomon (**ICC Court President) and **George A. Bermann** (Columbia University School of Law) reflected on the growth of arbitration practice, from a niche specialisation to one that currently attracts many young lawyers. They also touched upon the unimaginable technological transformation and innovation in the field, that creates both opportunities and challenges in everyday practice of international arbitration.

The third session, moderated by **Marney L. Cheek** (Covington & Burling), addressed developments in legislation, case law and remedies in business and human rights. To start off, **Alexander Marcopoulos** (Shearman & Sterling) noted an important distinction between human rights at sea and on land. He discussed the practicality of arbitration in the context of human rights at sea, emphasising that arbitration can be used to circumvent jurisdictional issues. **Claire Bright** (Nova School of Law Portugal) focused on human rights on land and the more frequent use of mandatory compliance mechanism, rather than soft law, to protect these rights. **Ursula Kriebaum** (University of Vienna, Austria) introduced the Hague Rules and evaluated their usefulness when resolving business and human rights disputes.

The final session, moderated by **Sophie J. Lamb** QC (Latham & Watkins, ICC Court Member) consisted of Oxford-style debates. First, **Charles Kaplan** (Orrick) and **Małgorzata Surdek-Janicka** (CMS, ICC Court Vice President) argued on the extent to which artificial intelligence and big data will affect the work of counsel and arbitrators in the next ten years. **Hannah Tümpel** (UWC International) and **Kai-Uwe Karl** (GE Renewable Energy) disagreed on whether mediation should be made compulsory, although they agreed that attempting mediation is always in the interest of the parties to a dispute. **Elena Gutierrez Garcia de Cortazar** (independent arbitrator and professor of law) and **Michael Polkinghorne** (White & Case) discussed whether summary decisions should be used by arbitral tribunals to render decisions on discrete issues, thus saving time and cost.

Submitted by Małgorzata Surdek-Janicka, ArbitralWomen member, Partner, CMS and ICC Court Vice President, Warsaw, Poland and Olga Hamama, ArbitralWomen member, Founder and Partner of V29 Legal, Frankfurt am Main, Germany in co-operation with Maja Kozłowska, Trainee, CMS, Warsaw, Poland

News you may have missed from the ArbitralWomen News webpage

This section in the ArbitralWomen Newsletter reports on news posted on the ArbitralWomen News webpage regarding events or announcements that occurred during November 2020 that readers may have missed.

Canada Encourages Gender Equality and Diversity in its Modernized FIPA Model

Submitted by ArbitralWomen Member Annie Lespérance
27 May, 2021

On 13 May 2021, Canada announced the introduction of a modernized and inclusive Foreign Investment Promotion and Protection Agreement Model ("2021 Model FIPA"). According to Global Affairs Canada ("**GAC**"), this model will "help provide a stable, rules-based investment environment for Canadian businesses investing abroad and for foreign businesses investing in Canada", while balancing "the interests of all Canadians ... so that the benefits of Canada's investment agreements are shared broadly across society".

The amendments follow on from extensive consultations with various stakeholders launched in 2018 and mark the first comprehensive revision to Canada's model FIPA since 2003-2004. They come on the heels of recent debate surrounding the reform of the ISDS system as well as recent Canadian trade-related developments, including the United States-Mexico-Canada Agreement (USMCA), which came in effect in July 2020, the *Canada-EU Comprehensive Economic and Trade Agreement* ("CETA"), the *Comprehensive and Progressive Trans-Pacific Partnership* ("CPTPP") and the signing of the Canada-UK Trade Continuity Agreement.

Compared with prior iterations, the FIPA Model contains several notable updates to the dispute settlement mechanism and clarifications to investment protections, including from a gender equality and diversity perspective.

Updates to the FIPA model dispute settlement mechanism

Particularly noteworthy, from a gender equality and diversity perspective, is Article 30(1) which provides that "*disputing parties are encouraged to consider greater diversity in arbitrator appointments, including through the appointment of women*". While not an obligation in itself, this provision nevertheless signals the importance of gender diversity on arbitration panels, in keeping with Prime Minister Justin Trudeau's government gender policy in trade agreements and the wider push for gender diversity in arbitration supported by organizations like The Pledge and Arbitral Women. This provision appears to be truly one of its kind: the author is not aware of other investment treaties with a similar provision.

Other updates to the FIPA model dispute settlement mechanism include, as reported on Global Affairs Canada's website:

- strengthened alternatives to resolve an investment dispute without having recourse to ISDS, such as:
  - mandatory consultations prior to submitting a claim;
  - enhanced mediation provisions, which suspend the ISDS process and deadlines at any point to allow the disputing parties to meaningfully engage without being pressed by competing ISDS timelines; and
  - an extension of time-limits for submitting a claim to arbitration when the claimant is actively pursuing remedies under domestic laws;
- obligations for claimants to disclose third-party funding;
- enhanced transparency provisions;
- the explicit ability of tribunals to appoint their own experts on issues such as the rights of Indigenous peoples, scientific matters and other factual issues;
- an arbitrator code of conduct to prevent conflicts of interest and ensure that they have appropriate qualifications;
- a consent-based expedited arbitration mechanism for claims under $10 million; and
- a commitment to consider using a permanent first instance investment tribunal or an appellate mechanism, should it be developed under other institutional arrangements.

Clarifications to the FIPA model investment protections

From a gender equality and diversity perspective, the new FIPA model includes a number of provisions that "aim to help women and other groups benefit more from the agreements, and to ensure that investment protections do not impede policies promoting gender equality".

The FIPA's preamble reaffirms the importance of promoting responsible

Government of Canada | Gouvernement du Canada

business conduct and gender equality amongst others as well as the importance of preserving a contracting state's right to regulate in the public interest.

Such right to regulate to achieve legitimate policy objectives, including gender equality, is then embedded in Article 3 of the model. Article 16 entitled "Responsible Business Conduct" reaffirms that investors and their investments shall comply with the domestic laws and regulations of the host State, including laws and regulations on gender equality amongst others, and reaffirms the importance of internationally recognized standards in this respect, such as the OECD Guidelines for Multinational Enterprises. Such specific reference to internationally recognized standards is a novelty in the updated FIPA model. Article 16 applies directly to the contracting states, not investors.

In effect, the new FIPA model stipulates that the contracting states should encourage enterprises to consider greater diversity in senior management positions, which may include requirements to nominate women, and promote equal opportunities for women in terms of selection, remuneration and promotion.

Clarifications to other investment protections standards were also made in the new FIPA model, notably to the MFN clause and minimum standard of treatment. They are not the object of the present blog post.

Conclusion

It remains to be seen whether Canada will seek to renegotiate its concluded bilateral investment treaties on the basis of its modernized FIPA and whether other states, particularly those which also have model bilateral investment treaties of their own such as the United Kingdom, will adopt and incorporate some of the provisions of Canada' new FIPA in their own treaties. It would be surprising that the standard that Canada is setting with its modernized FIPA model on gender equality and diversity in investment protection and arbitration will be the source of any controversy in this respect.

R.E.A.L. Appoints ArbitralWomen Members as Committee Chairs and Vice-Chairs and Ambassadors

Submitted by ArbitralWomen President and R.E.A.L. Steering Committee Member and Strategic Advisor Dana MacGrath
23 June, 2021

Racial Equality for Arbitration Lawyers (R.E.A.L.) has announced new leadership positions for committee Chairs and Vice-Chairs in addition to Ambassadors, spotlighting several ArbitralWomen members. Three of the six R.E.A.L. committees are led by ArbitralWomen members in addition to ten Ambassadors in the call for racial equality and intersectional diversity. These roles are supported by ten of the R.E.A.L. Steering Committee members who are also ArbitralWomen Members, as are two of the three R.E.A.L. Co-Chairs.

ArbitralWomen member **Scheherazade Dubash** is Vice-Chair of the R.E.A.L. Arbitral Appointments Committee. ArbitralWomen member **Nivvy Venkatraman** is Chair of the R.E.A.L. Newsletter and Blog Committee. ArbitralWomen member **Federica Bocci** is Chair of the R.E.A.L. Conferences & Events Committee.

Additionally, the following ArbitralWomen members have been appointed as R.E.A.L. Ambassadors: **Maria Chedid**, **Gaela Gehring Flores**, **Lucy Greenwood**, **Samaa Haridi**, **IlhamKabbouri**,**AmandaLee**,**AyseLowe**, **Victoria Sahani**, **Claudia Salomon** and **Svenja Wachtel**.

Finally, as announced in January 2021, the following ArbitralWomen members are on the R.E.A.L. Steering Committee: **Funke Adekoya**, **Crina Baltag**, **Chiann Bao**, **Louise Barrington**, **Mélida Hodgson**, **Sara Koleilat-Aranjo**, **Dana MacGrath**, **Mirèze Philippe**, **Rekha Rangachari** and **Nancy Thevenin**. **Crina Baltag** and **Rekha Rangachari** also serve as Co-Chairs of R.E.A.L. together with **Kabir Duggal**.

Congratulations to all for being appointed to the R.E.A.L. leadership and furthering racial diversity in international arbitration.

WHAT WE DO

#letsgetreal
- (who we are, what we do)

#therealdeal
- (member profiles)

#realtalk
- (interviews, honest dialogue) / #real-ly?

#realchoice
- (diversity materials, state of play, shifting norms) / #real-ity

#realopportunity
- (mentorship, scholarships)

#realsuccess
- (member success stories)

#realinclusion
- (intersectionality, diversity defined broadly)

British Virgin Islands International Arbitration Centre's Arbitration Life Features ArbitralWomen Members

23 June, 2021

Arbitration Life with Janette and Hana (www.arbitrationlife.org) is a YouTube interview series by the British Virgin Islands International Arbitration Centre (BVI IAC). Launched on 8 March 2021, International Women's Day, the series features notable guests from the field of arbitration and is co-hosted by ArbitralWomen member **Hana Doumal**.

To date, Arbitration Life has featured ArbitralWomen members **Akima Paul Lambert**, **Shan Greer** and **Sherlin Tung**, Board member **Rekha Rangachari**, and President **Dana MacGrath**. Future episodes will feature ArbitralWomen member **Chiann Bao** and co-founder and Board member **Louise Barrington**.

The discussions engage guests in lively exchanges about career paths, events, trends in the law, and hot topics specific to arbitration. The series will also be launched as a podcast by the fall of 2021. Doumal says, "*Janette and I are delighted to feature leading members of the international arbitration community and are particularly proud to highlight the successful women in this field.*"

Left to right: Hana Doumal and Janette Brin

If you have a topic or guest idea for Arbitration Life, please email co-hosts Hana Doumal and **Janette Brin** at marketing@bviiac.org.

ArbitralWomen Formalizes Cooperation Relationship with the British Virgin Islands International Arbitration Centre!

29 June, 2021

We are pleased to share that ArbitralWomen and the British Virgin Islands International Arbitration Centre (BVI IAC) formalized their on-going relationship of several years by entering into a Cooperation Agreement on 22 June 2021.

The Cooperation Agreement was signed on behalf of ArbitralWomen by **Dana MacGrath**, ArbitralWomen President, and on behalf of the BVI IAC by Hana Doumal, Registrar of the BVI IAC.

The Cooperation Agreement encourages collaboration for the organisation of dispute resolution-related events as well as support and promotion of events, projects, and initiatives.

Left to right: Dana MacGrath (ArbitralWomen President), Rekha Rangachari (ArbitralWomen Director of Cooperation and Global Events), Francois Lasalle (BVI IAC Chief Executive Officer), Hana Doumal (BVI IAC Registrar).

For media enquiries, please contact ArbitralWomen at: contact@arbitralwomen.org, and the BVI IAC at: +1 (284) 393 8000 / info@bviiac.org.

Keep up with ArbitralWomen

Visit our website on your computer or mobile and stay up to date with what is going on. Read the latest News about ArbitralWomen and our Members, check Upcoming Events and download the current and past issues of our Newsletter.

SPEAKING AT AN EVENT?

If you would like ArbitralWomen to share details of a forthcoming external ADR speaking engagement on its website, in its Event Alerts and on social media, please provide the following information to marketing@arbitralwomen.org a minimum of 14 days before the event is due to take place:

- Title of event
- Date and time
- Names of ArbitralWomen members speaking at the event
- Venue or format/platform (virtual, webinar or otherwise)
- How to register / Registration link
- Flyer
- Short summary of the event for advertising purposes

ArbitralWomen thanks all contributors for sharing their stories.

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AW Activities at a Glance: click here

Membership Runs Now Annually from Date of Payment

ArbitralWomen Individual & Corporate Membership

ArbitralWomen's website is the only hub offering a database of female practitioners in any dispute resolution role including arbitrators, mediators, experts, adjudicators, surveyors, facilitators, lawyers, neutrals, ombudswomen and forensic consultants. It is regularly visited by professionals searching for dispute resolution practitioners.

The many benefits of ArbitralWomen membership are namely:

- Searchability under Member Directory and Find Practitioners
- Visibility under your profile and under Publications once you add articles under My Account / My Articles
- Opportunity to contribute to ArbitralWomen's section under Kluwer Arbitration Blog
- Promotion of your dispute resolution speaking engagements on our Events page
- Opportunity to showcase your professional news in ArbitralWomen's periodic news alerts and Newsletter
- Visibility on the News page if you contribute to any dispute resolution related news and ArbitralWomen news
- Visibility on the News about AW Members to announce news about members' promotions and professional developments
- Ability to obtain referrals of dispute resolution practitioners
- Networking with other women practitioners
- Opportunity to participate in ArbitralWomen's various programmes such as our Mentoring Programme

We encourage female practitioners to join us either individually or through their firm. Joining is easy and takes a few minutes: go to 'Apply Now' and complete the application form.

Individual Membership: 150 Euros.

Corporate Membership: ArbitralWomen Corporate Membership entitles firms to a **discount on the cost** of individual memberships. For 650 Euros annually (instead of 750), firms can designate up to five individuals based at any of the firms' offices worldwide, and for each additional member a membership at the rate of 135 Euros (instead of 150).
Over **forty firms** have subscribed a Corporate Membership: click here for the list.

ArbitralWomen is globally recognised as the leading professional organisation forum for advancement of women in dispute resolution. Your continued support will ensure that we can provide you with opportunities to grow your network and your visibility, with all the terrific work we have accomplished to date as reported in our Newsletters.

ArbitralWomen membership has grown to approximately one thousand, from over 40 countries. Forty firms have so far subscribed for corporate membership, sometimes for as many as 40 practitioners from their firms.

Do not hesitate to contact membership@arbitralwomen.org, we would be happy to answer any questions.