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An Active End of Summer 2021 for the International Arbitration and ADR Community!

In this edition, we share a summary of the highlights of a successful second season of **Arbitration Idol**, a charitable initiative launched in 2020 by **Amanda Lee** (Careers in Arbitration), **Svenja Wachel** (Coffee Break in Arbitration), and **Chris Campbell** (Tales from the Tribunal). We also publish your contributions reporting in international alternative dispute resolution events during July, August, and September 2021 and a recap of some highlights of Paris Arbitration Week 2021.

This edition celebrates some hybrid and in person events, after a long stretch of almost entirely virtual events, a happy way to close out Summer 2021!

**Recap and Celebration of
Arbitration Idol 2.0**

**Reports on Events in July,
August, and September 2021**

**Highlights of hybrid Paris
Arbitration Week 2021**

Arbitration Idol Celebrates a Successful Season 2



This summer, Arbitration Idol

was back for season 2! ArbitralWomen was one of the supporting organisations, helping those in need, connecting lucky winners with distinguished members of the international arbitration community and demonstrating the diversity of such community.

ArbitralWomen Board member **Amanda Lee (Careers in Arbitration)**, ArbitralWomen member **Svenja Wachtel (Digital Coffee Break in Arbitration)**, and **Chris Campbell (Tales of the Tribunal)** started the charitable Arbitration Idol initiative in 2020.

The goal was to collect money for UNICEF while offering donors the chance to win a digital coffee with experienced global leaders in the field of international arbitration, at

a time when meeting in person was impossible.

Diversity is at the forefront of each season of Arbitration Idol and reflected in the backgrounds of the 'Arbitration Idols' (a tongue-in-cheek parody of the name of the US singing competition 'American Idol'). Each Idol demonstrated true leadership by donating their time (and in many cases, money too) to this project, sharing their thoughts and advice with the winners.

The biggest thank you goes to the 2021 Arbitration Idols:

ArbitralWomen Board members **Rekha Rangachari**, and **Sara Koleilat-Aranjo**, ArbitralWomen members **Cecilia Azar**, **Chiann Bao**, **Emilia Onyema** and **Maxi Scherer**, as well as **Nayla Comair-Obeid**, **Benjamin**

G. Davis, **Kabir Duggal**, **Babatunde Fagbohunlu**, **Neil Kaplan CBE QC SBS**, **Arthur Ma**, **Claus von Wobeser**, and **Roland Ziadé**.

The initiative raised EUR 2,322 for UNICEF. The procedure was simple: anyone, anywhere in the world, can donate whatever they can afford (minimum donation EUR 1). Every donation bought the donor the chance to win a one-on-one digital coffee break with a leader from the field of international arbitration.

The organisers wish to thank ArbitralWomen for their support, our fabulous Idols for generously donating their time and all those who participated for their generous donations. Every Euro counted and helped tremendously!

Submitted by ArbitralWomen member **Svenja Wachtel**, Counsel at Willkie Farr & Gallagher LLP, **Chris Campbell**, Senior Counsel at Baker Hughes and ArbitralWomen Board member **Amanda Lee**, Consultant at Costigan King

Reports on Events

International Construction Arbitration: A comparative law update from the US, Europe and beyond, on 13 July 2021, by Webinar

On 13 July 2021, **Pinsent Masons** hosted a webinar titled 'International Construction Arbitration: A comparative law update from the US, Europe and beyond', in collaboration with the NYIAC, Chaffetz Lindsey and Galloway Arbitration. The 75-minute session featured three very impressive ArbitralWomen members, including Board member **Rekha Rangachari** (Executive Director, NYIAC) as moderator, **Clea Bigelow-Nuttall** (Senior

Associate, Pinsent Masons) and **Patricia Galloway** (Ch.Arb, Galloway Arbitration), who were joined by **Jason Hambury** (Co-Head of International Arbitration, Pinsent Masons) and **James Hosking** (Founding Partner, Chaffetz Lindsey).

Kickstarting the session, Jason provided an industry perspective of the factors presently affecting the construction sector and the progenitors of disputes being referred to

arbitration. Jason emphasised that whilst some disputes are a function of the terms of agreement between parties, others are caused by the wider legal and technical framework within which those projects are developed. At times, events such as the pandemic occur which have a global impact and derail clients' best laid plans. One of the direct impacts of the pandemic witnessed by Pinsent Masons was a plethora of disputes brought under



Top to bottom, left to right: Rekha Rangachari, Jason Hambury, Patricia Galloway, James Hosking, Clea Bigelow-Nuttall, Scheherazade Dubash

force majeure and change of law provisions to mitigate the impact of the restrictions imposed by governments during the pandemic.

Next was a 'popcorn' round between Jason and James discussing some of the major construction arbitration 'influencers' during 2020 – both before the courts and tribunals in the UK and the US. First up was the landmark decision of the UK Supreme Court in *Enka v. Chubb* that serves as a timely reminder about the importance of addressing the choice of law applicable to the arbitration agreement when drafting the arbitration clause. Rekha invited James to comment on how the US courts have dealt with the question of the law applicable to the arbitration agreement, who in turn highlighted the unique distinction of the US Federal Arbitration Act governing both domestic and international arbitrations and state law. Award challenges were another important topic addressed in an April 2021 decision from the UK Privy Council in *RAV Bahamas v. Therapy Beach Club*. Jason commented on the details of this case and why the decision was noteworthy. The role of non-signatories in the arbitration process has been a recurring curiosity in recent years, particularly in the US, impacting construction disputes. James shed some light on the 2020 US Supreme Court case of *GE v. Outokumpu* and how the ongoing

discussion of non-signatories affected rules revisions at arbitral institutions like the ICDR.

Moving into a brief fireside chat on interim and emergency measures, a key addition to arbitral institutional rules revisions across jurisdictions in the past five years, Jason and James debated the prevalence or lack of emergency arbitrations in construction disputes and assessed the interplay between emergency and interim relief, as well as whether the availability of emergency relief in arbitration precludes a party's ability to obtain interim relief from the courts.

For the third session, Rekha pivoted the dialogue to the evolving nature of investor-State disputes, the treaties that anchor them, and their interplay with the construction sector. Clea gave an overview of the ISDS foundation, reminding the audience that the aim of BITs and MITs was to protect foreign investments by means of dispute resolution clauses often providing for international arbitration. The reason why international construction disputes tend to account for a sizable proportion of treaty cases is due to the highly susceptible nature of construction projects to politics and the actions of the host State where they are located. By way of final key takeaways, Clea addressed the EU/UK investment landscape post-Brexit and claims brought under the ECT.

Turning to the Americas, James noted the entering into force of the USMCA on 1 July 2020, replacing NAFTA, and commented on the role ISDS played for US construction companies engaging in cross-border projects.

For the last and final discussion, Patricia walked the audience through the climate change mitigation process, charting the primary framework issues and risks driving that change, the legal issues likely to arise alongside the role arbitration plays in this process, and the rising risk of climate change related disputes for companies operating in the construction and energy sectors. New climate change-related causes of action have been accepted by the courts, and climate change-related events have the potential to impact existing operations. Jason provided examples of the major climate change strides the UK was making which are likely to impact the construction and energy industry and offered his insights as to how these disputes will be resolved.




A recording of the session is available here.

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

Inaugural Maxwell Conversations: Does a Right to a Physical Hearing Exist in International Arbitration?, on 22 July 2021, by Webinar



Top to bottom, left to right: Lawrence Teh, Lucy Reed, Yasmine Lahlou and Chiann Bao


On 22 July 2021, Maxwell Chambers  held its inaugural Maxwell Conversations virtually, discussing 'Does a Right to a Physical Hearing Exist in International Arbitration?'. The webinar brought together a panel of distinguished practitioners known for their excellence in alternative dispute resolution and was attended by more than 250 participants from over 40 countries.

The panellists included **Lucy Reed**, President of ICCA, **Yasmine Lahlou**, co-editor of the ICCA research project, 'Does a Right to a Physical Hearing Exist in International Arbitration?' and Partner at Chaffetz Lindsey LLP, and **Chiann Bao**, Arbitrator at Arbitration Chambers. The discussion was moderated by **Lawrence Teh**, Senior Partner and Co-Head of the International Arbitration Practice at Dentons Rodyk. Hosting the webinar in a hybrid format, Lawrence and Chiann were present physically at Maxwell Chambers, whilst Lucy and Yasmine dialled in via Zoom.

The webinar's objective was to discuss parties' legal right to a physical hearing in international arbitration. As a consequence of the pandemic, the world of arbitration has had to consider the capabilities of electronic technology in facilitating hearings to substitute

in-person hearings. Hearings have taken place, consensually, in a full or partial electronic environment, with the support of technology to aid presentation and reference to documents.

The session started with a fireside chat between Lawrence and Lucy, where they discussed the history and evolution of the right to a physical hearing in the context of international law and more specifically, international arbitration. Lucy looked back at the 1927 Geneva Convention (Article 2B) and the 1958 New York Convention (Article V.1.B), and how 'the right to be heard, coupled with equal treatment of the parties, are the principles that underlie the very legitimacy of arbitration'.

Yasmine next shared findings from the [ICCA project](#) , based on 77 national survey reports, on whether a right to a physical hearing is expressly provided by or can be inferred from the arbitration law of a jurisdiction.

Chiann then touched on the topic on whether differences in parties' access to technology might put them on an unequal footing and deny them a reasonable opportunity to be heard. She shared data on the wide differences between internet accessibility and speed within Asia. When engaging in a virtual hearing, connectivity and speed are paramount. Even when there is no right to a physical hearing, there is still the right to due and efficient process. One barometer to look at would be the national courts, and international arbitrations are likely to follow the national courts, as Lucy and Yasmine had also mentioned.

The panellists concluded the session by predicting the future of virtual hearings – the emergence of virtual hearing concierges, having evidentiary hearings in the same room as an important equaliser and more.



Click here to access a recording of the webinar.

Submitted by Isabel Ho, Deputy Head, Marketing & Communications, Maxwell Chambers, Singapore



5th International Energy Forum INTERENEF 'EU ENERGY POLICY AND ENERGY DEMOCRACY' on 23 July 2021, in Split, Croatia



Left to right: Konstantin Simonov, Ana Stanič; on screen: Katya Yafimava

The Institute for European and Globalization Studies organised the 5th International Energy Forum (INTERENEF), titled 'EU ENERGY POLICY AND ENERGY DEMOCRACY'. The forum was placed in the context of rethinking the global risk society and the new social paradigm. The Covid-19 pandemic during 2020 generated an economic and energy crisis. Under the influence of the crisis,

countries reacted differently in the field of energy policy. On the eve of the Covid-19 pandemic, energy policy actors pursued their interests and goals. The European Commission has announced a new development policy and a European green plan. Russia and Ukraine have signed a long-awaited agreement on gas transit under new conditions. The United States has imposed sanctions

on companies working on the Nord Stream 2. The Turkish Stream has been put into operation. What all this means for EU countries and citizens was the topic of the 5th International Energy Forum (INTERENEF).

Ana Stanič, Director, E&A Law Limited, London, UK, moderated a third panel on 'Geopolitics and energy. Nord Stream 2 and global players. All against all'. The panel was joined by **Konstantin Simonov**, National Energy Security Fund, Moscow, Dr **Katya Yafimava**, Oxford Institute for Energy Studies, and **Matthias Dornfeldt**, Free University Berlin. They discussed the following topics: the 15 July Decision of the CJEU on Opal exemption and what it may mean for Nord Stream 2, the allegations levelled by the Atlantic Council against Gazprom for market manipulation and the 21 July Joint Statement of the US and Germany on Support for Ukraine, European Energy Security and our Climate Goals.

Submitted by Ana Stanič, ArbitralWomen member, Director of E&A Law Limited, London, UK

ACICA Rules Road Show events, from June to October 2021, hybrid, around Australia

The latest issue of ArbitralWomen newsletter included a report by **Josephine Allen**, Associate, Corrs Chambers Westgarth, on the first Australian Centre for International Commercial Arbitration (ACICA) Rules 2021 Roadshow event, which took place in Brisbane on 24 June 2021.

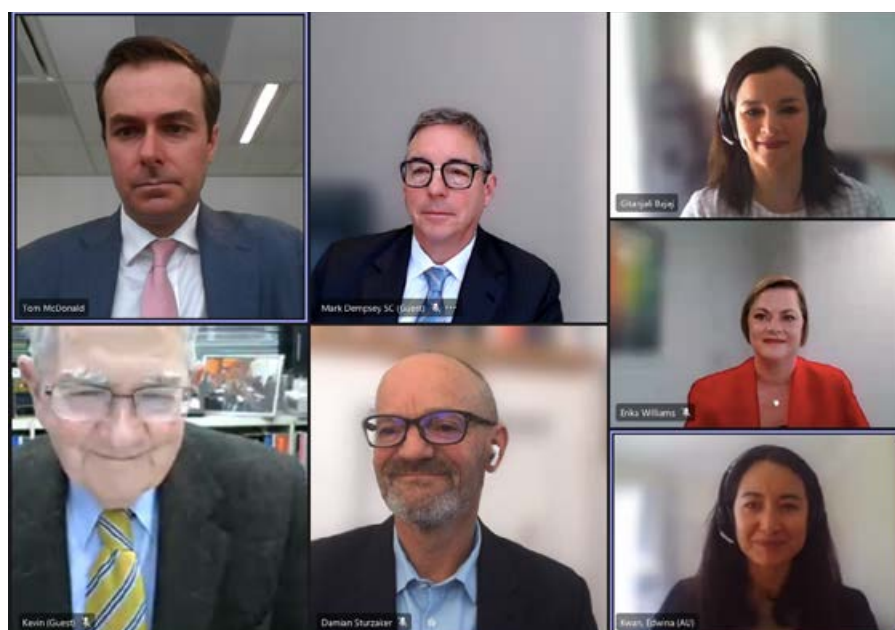
Since the first event, ArbitralWomen Board member **Erika Williams**, Counsel, ACICA and Independent Arbitration Practitioner, Williams Arbitration, has been rolling out the animated enactment of an arbitration proceeding using the



Adelaide: Left to right: Nick Floreani, Julia Dreosti, the Hon. John Mansfield AM QC, Tania Sulan, Ian Nosworthy, Erika Williams (screen)



Melbourne: Top to bottom, left to right: Monique Carroll, Bronwyn Lincoln, Professor the Hon. Clyde Croft AM SC, Siba Dqer, Leah Ratcliff, Chad Catterwell, Erika Williams



Sydney: Top to bottom, left to right: Tom McDonald, Mark Dempsey SC, Gitanjali Bajaj, the Hon. Dr Kevin Lindgren, Damian Sturzaker, Erika Williams, Edwina Kwan



Perth: Left to right: Paul D. Evans, Nathan Landis, Julie Taylor SC, the Hon. Wayne Martin AC QC, Patricia Cahill SC, David Jenaway (standing), Erika Williams (screen)

newly published ACICA Rules ('Rules') in an additional four cities in Australia with a mix of hybrid and virtual events.

To illustrate how the changes to the Rules would operate in practice, the panellists at each event played a role in international arbitration proceedings governed by the ACICA Rules 2021, using a hypothetical scenario involving the termination of a contract for the supply of coal between the claimant, an Australian Steel making company, and the respondents, a Chinese purchaser that acts as an intermediary and on-sells Australian coal and its Chinese parent company, which had provided a guarantee. The purchaser terminated the contract based on misrepresentation of the quality of the coal. The claimant then commenced arbitration against the purchaser under the contract and the parent company under the guarantee.

The second roadshow was held in-person in Perth on 12 August 2021, **David Jenaway**, Allen & Overy, Perth hosted the event, which was moderated by **Paul D. Evans** of Quinn Emmanuel, and included participants **Patricia Cahill SC**, Francis Burt Chambers (acting as claimant's counsel), **Julie Taylor SC**, Francis Burt Chambers (acting as respondents' counsel), the Hon. **Wayne Martin AC QC**, 39 Essex Chambers (acting as arbitrator) and **Nathan Landis**, then of Omni Bridgeway (acting as the third-party funder). Erika Williams appeared virtually on behalf of ACICA.

On 19 August 2021, an in-person roadshow was held in Adelaide. The event was co-hosted by **Andrew Robertson**, Piper Alderman and **Matthew Hawke**, Cowell Clarke. **Ian Nosworthy**, Nosworthy Mediation Services, moderated the event and the participants were **Nick Floreani**, Jeffcott Chambers (acting as claimant's counsel), **Julia Dreosti**, Clifford Chance (acting as respondents' counsel), the Hon. **John Mansfield AM QC** (acting as arbitrator) and **Tania Sulan**, Omni Bridgeway (acting as the third-party funder), with Erika Williams on behalf of ACICA appearing again virtually.

Due to the lockdown, the next roadshow, held in Melbourne on 2 September 2021, was fully virtual. This event was hosted by **Chad Catterwell**, Herbert Smith Freehills, and moderated by **Leah**

Ratcliffe, Jones Day. The participants were **Bronwyn Lincoln**, Corrs Chambers Westgarth, (acting as claimant's counsel), **Monique Carroll**, Cite Legal (acting as respondents' counsel), Professor the Hon. **Clyde Croft AM SC** (acting as arbitrator), **Siba Diger**, LCM Finance (acting as third-party funder) and Erika Williams, on behalf of ACICA. A recording of the webinar is available [here](#).

The last of the series of five events in five months was held virtually during Australian Arbitration Week, on 21 October 2021, with participants primarily based in Sydney. This event was hosted by **Edwina Kwan**, King & Wood Mallesons, and moderated by **Gitanjali Bajaj**, DLA Piper. The participants were **Mark Dempsey SC**, 7 Wentworth Selborne, (acting as claimant's counsel), **Damian Sturzaker**, Marque Lawyers

(acting as respondents' counsel), the Hon. Dr. **Kevin Lindgren AM QC** (acting as arbitrator), **Tom McDonald**, Vannin Capital (acting as third-party funder) and Erika Williams, on behalf of ACICA.

The various panels' interactive approach was successful in demonstrating the practical effect of key amendments to the 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 events focused on improved online practices developed during Covid-19, expanded scope for consolidation and multi-contract arbitrations including the addition of the ability to commence a single 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, the 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.

The overall feedback from the various audiences was that this scenario style event was a fun and entertaining way to demonstrate the amendments to the ACICA Rules.



A recording of the webinar is available [here](#).

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

GAR Connect: Singapore, on 24 August 2021, by Webinar

The annual GAR Connect: Singapore conference took place on 24 August 2021. The virtual event was co-chaired by **Chiann Bao**, Arbitration Chambers and **Wade Coriell**, King & Spalding. This year's programme featured a fireside chat from **Gary Born**, then President, Singapore International Arbitration Centre (SIAC), and four panels discussing; insolvency and international arbitration, developments in the energy sector, the use of arbitration by big tech and pharma companies, and a GAR Connect debate on the IBA Guidelines on Conflict of Interest.

The first session of the day was led by **Kevin Nash**, Singapore International Arbitration Centre, on 'Insolvency and international arbitration' with panellists: **Sam Boyling**, Pinsent Masons, **Yee Leong Chong**, Allen & Gledhill, **Ruth Stackpool-Moore**, OmniBridgeway and **Sarah Thomas**, Morrison & Foerster.

Following this, **Matthew Secomb**, White & Case, moderated 'Hot Topics in the Energy Sector', with panellists **Rodman Bundy**, Squire Patton Boggs, **Nicholas Lingard**, Freshfields

Bruckhaus Deringer and **John Rainbird**, Allen & Overy.

One of the highlights of the morning was Gary Born's Fireside Chat, where he was interviewed by Wade Coriell.

In our third session, **Rachael Kent**, WilmerHale directed panellists on 'The use of arbitration by big tech / pharma companies'. The panel was made up of **Chris Johnston**, Kroll, **Murali Neelakantan**, amicus, **Mahesh Rai**, Drew & Napier, and **Julie Raneda**, Schellenberg Wittmer.

The final session of the day, 'The GAR Connect Debate', featured a lively to-and-fro on the motion: 'Red, Orange, Green, and Grey? The existing

IBA Guidelines on Conflict of Interest are sufficient guidance to navigate the 'grey' list'. Debate judges, **Lawrence Boo**, Arbitration Chambers, **Teresa Giovannini**, LALIVE and **Shaun Leong**, Withers Worldwide, weighed in on the arguments put forth by **Daryl Chew**, Shearman & Sterling, **Nakul Dewan SA**, Twenty Essex, **Swee Yen Koh**, Wong Partnership and **Jelita Pandjaitan**, Linklaters.

Further coverage of the event will be included on the GAR website [here](#).

Submitted by Sheonaid Carlin, Senior Conference Producer, Global Arbitration Review, London, UK



Building a Career in International Arbitration as an African Practitioner: To Practice from your Home Jurisdiction or Abroad?, on 4 September 2021, by Webinar



Left to right: Chizaram Mbah, Ibrahim Shehata, Funke Adekoya, Olayinka Oladeji and Julius Nkafu

On 4 September 2021, Arbitration Podium organised and hosted its first webinar titled 'Building a Career in International Arbitration as an African Practitioner: To Practice from your Home Jurisdiction or Abroad?'. The aim of the webinar was to provide useful guidance to young African arbitration practitioners seeking to develop a career in international arbitration and also as to whether to do this from a foreign jurisdiction or from their home jurisdiction.

The webinar featured four distinguished panellists: **Funke Adekoya**, SAN C.Arb (ArbitralWomen member, Partner & Head of Dispute Resolution Practice Group, AELEX, Lagos, Nigeria), **Julius Nkafu**, FCI Arb (Barrister in England & Wales and Cameroon, Arbitrator and Mediator, London, UK), **Ibrahim Shehata** (Partner, Shehata & Partners, Cairo, Egypt) and **Olayinka Oladeji** (Foreign Associate, Hogan Lovells, Munich, Germany). The event was moderated by **Chizaram Mbah** (Founder, Arbitration Podium).

Funke Adekoya, SAN kicked off the discussion by advocating the unique value of practicing from one's home jurisdiction, noting the 'home court advantage' of being 'the expert' in one's domestic laws. To ensure this, she advised that arbitration practitioners should acquire expertise in specific domestic sectors that engage international commerce, rather than specialise solely in international arbitration which is mainly procedural.

On the benefit of practicing arbitration from a foreign jurisdiction, espe-

cially in cities like London, which are major arbitration hubs, Julius Nkafu, FCI Arb, noted the ample opportunities available to work on high profile cases and gain experience therefrom. In response to a question from the moderator, his view was that a dual qualification was not necessary for a successful arbitration career and young practitioners should focus more on enhancing their knowledge and experience in the field.

Ibrahim Shehata addressed whether having a post graduate degree obtained abroad enhanced one's skills and/or profile when practicing arbitration from one's home country. He noted that while a master's degree could be beneficial, it does not always fulfil one's career expectations. He advised practitioners looking to be based in their home countries to find good mentors and stay active and connected to their arbitration community.

Finally, Olayinka Oladeji highlighted factors she felt should be considered

when planning to relocate to a foreign jurisdiction in order to advance one's career in arbitration. These factors include the immigration policies of the foreign country, the opportunities available, familiarity with the procedural laws of the foreign country and the quality of work one expects to do. She also discussed several career routes a practitioner could follow, such as practicing as a foreign lawyer in a law firm, serving as a tribunal secretary, becoming part of the academia in arbitration, working with an arbitration institution, or becoming an expert on specific issues of domestic law.

The engaging and well attended session concluded with the panellists addressing questions from the audience and a closing remark from the moderator.

Submitted by Funke Adekoya, SAN, ArbitralWomen member, Partner & Head of Dispute Resolution Practice Group, AELEX, Lagos, Nigeria.



ArbitralWomen SpeedNet, on 9 September 2021, in Warsaw, Poland



Some attendees of the ArbitralWomen SpeedNet in Warsaw

ArbitralWomen SpeedNet (Polish edition) took place on 9 September 2021 at the law firm Sołtysiński Kawecki & Szlęzak's patio in Warsaw, Poland.

The event gathered Polish women involved in arbitration – not only lawyers working at law firms, but also in-house and members of the secretariats of the two biggest Polish arbitral institutions, the Court of Arbitration at the Polish Chamber of Commerce and the Court of Arbitration at the LEWIATAN Court of Arbitration.

The event opened with a short introduction by **Anna Tujakowska**

and was then held in a SpeedNet format with 6 blocks of 7 minutes. After the SpeedNet, a networking session followed.

The event was a big success and as agreed by most of the participants,

will continue with a winter session.

Submitted by Anna Tujakowska, ArbitralWomen member, Senior Counsel, Sołtysiński Kawecki & Szlęzak, Warsaw, Poland



International investment arbitration in Latin America: Progress or Inertia?, on 15 September 2021, by Webinar

On 15 September 2021, the **CREDIMI** (Research Centre for International Market and Investment Law) affiliated to the University of Burgundy in France and **CAROLA** (Center for the Advancement of the Rule of Law in the Americas) affiliated to Georgetown University School of Law jointly organised a webinar titled 'International investment arbitration in Latin America: Progress or Inertia?'.

Professor **Alvaro Santos** (Professor

of Law and faculty Director of CAROLA) made the introductory remarks. He gave a historical account of international investment law and arbitration in Latin America noting that [this region is a good lens through which to analyse the status of international investment law and arbitration](#) (ISDS), and proposed three categories to think about changes in this area: re-domestication (making national law govern investment and national courts hear the related

disputes), re-conceptualisation (radically rethinking the international investment regime by including objectives such as development or sustainable development, investors' obligations, State-to-State dispute mechanism or conciliation mechanism) and reform (UNCITRAL Working Group III, interests in more substantive issues), all these projects on which CAROLA is currently working on.

ArbitralWomen member Dr **Pascale Accaoui Lorfing** (Associate Member -

CREDIMI) moderated Panel 1, titled 'Right of State to regulate admission, evolution, evolution' was moderated by **Nathalie Bernasconi** (IISD Europe) gave a brief introduction on the history of States' right to regulate investment, the driving force of its expansion and the trends to safeguard this right, such as the interpretation of the standards of protection (indirect expropriation; fair and equitable treatment (FET)) has been adopted in the most recent US & Canada Model BITs in order to protect the policy space of these States, and a listing approach in investment chapter (European Union approach), a new FET in the [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\)](#) [in relation to customary international law principle](#), the right to regulate in the Preamble of the treaty, of the introduction of exceptions clauses similar to Art. 20 GATT. She encouraged States to develop new language in international investment treaties ('IIAs') in order to protect their right to regulate.

Ximena Herrera (Gaillard Banifatemi Shelbaya Disputes) agreed that States have the power to regulate investment and to expropriate investors' assets for public interest but cautioned about regulations' terms and conditions and the question whether compensation is

due or not in the event of expropriation. States should take these questions into account when signing international investment treaties and express more clearly that they have a certain margin of appreciation as to the method of calculation of the compensation (formulas such as the market value or other form of compensation).

Pascale, taking the place of José Feris (Squire Patton Boggs), who was unfortunately unable to join, noted that there is room for a better understanding of States' right to regulate by a better formulation of the procedural and substantive provisions in IIAs.

Lelia Mooney (CAROLA's Executive Director and Adjunct Professor, Georgetown University Law Center) moderated Panel 2, titled: 'Foreign Investors: From the recognition of rights to the admission of legal obligations'. José Manuel Garcia Represa (Partner at Dechert LLP), filling in for Eduardo Silva Romero, talked about a shift of investors' risk, as is being discussed today in the arena of international investment law. In his view, to add a layer of obligations on investors, will render investment costlier and riskier. Instead, both parties should negotiate on an ad hoc basis for each particular

investment contract. **Mariana Lozza** (Director, Treasury Attorney General's Office, Argentina) spoke about investors' legal obligations from the perspective of a State. She noted that investors have substantial obligations regarding the investment itself that need to be carried out 'in accordance with the law of the State', corporate social responsibility and anti-corruption clauses, as well as international law rules in general, such as human rights treaties, labour law, environmental law, etc. and, at the procedural level, obligations to fit the applicable requirements to be able to bring an investment arbitration. Professor **Laurence Boisson De Chazournes** (University of Geneva) spoke from an academic perspective and raised the issue of 'responsibilisation' of foreign investors in connection with goals and objectives, such as protection of the environment, human rights, anti-corruption, that may be self-defined standards but, when captured in international treaties, the question arises whether these standards become hard law obligations.

Alvaro Galindo (Dean of Las Americas Law School) moderated Panel 3, titled: 'The dispute settlement mechanisms in question: Between the prevention and the management'. **Ana**



Top to bottom, left to right: Alvaro Santos, Lelia Mooney, Alvaro Galindo, Pascale Accaoui-Lorling, Nathalie Bernasconi, Ximena Herrera, Ana Joubin-Bret, Laurence Boisson De Chazournes and Mariana Lozza

Maria Ordoñez Puentes (State's Legal Defence Agency, Colombia) shared Colombia's approach to amicable settlement in international adjudication as a reference for the prevention of ISDS disputes through settlement, and the potential of ISDS awards as a source of prevention. **Alexis Mourre** (Independent Arbitrator, formerly President of the ICC International Court of Arbitration) talked about the rising interest in amicable settlement in ISDS and mediation as a good tool towards a successful settlement. He noted that compulsory mediation or conciliation, although it may be necessary to help parties find a solution, it may also increase procedural objections (e.g., parties' failure

to comply with the requirements in the agreement), and concerns about transparency. **Anna Joubin-Bret** (Secretary, UNCITRAL) focused on the attention given to cross-cutting issues which must be looked at in the procedural reform, such as States' right to regulate and to bring counterclaims. Attention is given also to dispute prevention and litigation: Mediation, Ombudsman, Advisory Centre are all [mechanisms other than arbitration](#) that the UNCITRAL Working Group III is currently discussing.

Professor **Makane Mbengue** (Curatorium of The Hague Academy of International Law; University of Geneva; Sciences Po, Paris), in his concluding remarks, shared the African experience

of international investment law and treaties, ISDS during the pandemic and the comparison between the African Union and its complexity and Latin America's diversity and lessons from the past, conclusion which builds bridges between continents and reveals Africa and Latin America as precursors and sources of inspiration.



A recording of the webinar can be found here.

Submitted by Pascale Accaoui-Lorring, ArbitralWomen member, Associate Member, CREDIMI; Member of the ICC Institute of World Business Law, Paris, France

New World, New Rules, on 23 September 2021, by Webinar



On 23 September 2021, as part of Canadian Arbitration Week, Young Canadian Arbitration Practitioners ('YCAP') hosted a webinar entitled 'New World, New Rules' addressing developments in international arbitration through three main lenses:

- i. Transparency,
- ii. The Taking of Evidence, and
- iii. Canadian Trends and Developments.

The YCAP panel was moderated by **Sarah Firestone** (Associate, Osler, Hoskin & Harcourt LLP), with panellists **Tamryn Jacobson** (Partner, Goodmans LLP), **James Plotkin** (Lawyer, Caza Saikaley LLP), and ArbitralWomen member **Patricia Snell** (Associate, Covington & Burling LLP).

The panellists first discussed changes in institutional rules concerning the disclosure of third-party funding arrangements, in the interests of transparency and avoiding conflicts

of interest. The panel also engaged in a debate as to the merits of greater transparency in arbitration and the development of the law through anonymised publication of procedural orders and arbitration awards. It was noted that procedural decisions would be particularly useful precedents to practitioners, as there is often limited guidance on the application of an institution's rules.

The panel then explored procedural developments in institutional rules, including the increased use of 'early determination' provisions for the early dismissal of claims that manifestly lack legal merit or are outside the tribunal's jurisdiction, including the new Article 22.1(viii) of the LCIA Rules. Other procedural developments, including provisions under the LCIA Rules, ICC Rules, and IBA Rules facilitating virtual hearings, the electronic taking of evidence, and paperless filings, were considered by the panel. The increased risk of cybersecurity threats and the emerging interest among practitioners and clients in greener arbitrations were also discussed in the context of virtual hearings.

Finally, the panel explored developments in international arbitration in

Canada, including the introduction of ADRI's Med-Arb Rules and the TCAS Arbitration Act Reform Report (recommending amendments to the Ontario Arbitration Act, 1991, in respect of commercial arbitration). The panellists also discussed opportunities for young practitioners seeking to obtain their first arbitral appointments, including Arbitration Place's roster of NextGen Arbitrators and CI Arb Canada's New Arbitrator Pilot Program.

Submitted by ArbitralWomen member Patricia Snell, Associate, Covington & Burling LLP, London, UK

Save the Date! – CanArbWeek 2021
September 20 – 24 2021

YCAP is delighted to be a Presenting Organization for [CanArbWeek 2021](#), Monday, September 20 - Friday, September 24. All events will be held virtually.

On Thursday, September 23, 3:30 pm EST, we will be holding the [YCAP Fall Symposium](#). The event is open to everyone.

Topic: "New World, New Rules"

Moderator: Sarah Firestone, Associate, Osler, Hoskin & Harcourt LLP

Panellists:

- Tamryn Jacobson, Partner, Goodmans LLP
- James Plotkin, Lawyer, Caza Saikaley LLP
- Patricia Snell, Associate, Covington & Burling LLP

Small group networking will follow.

Full Program and Registration are available at [CanArbWeek.Org](#)

Other Confirmed Presenting Organizations include ADRI, CI Arb Canada, CPR Institute, ICC Canada, ICDR Canada, TCAS, VancAC and WCCAS.

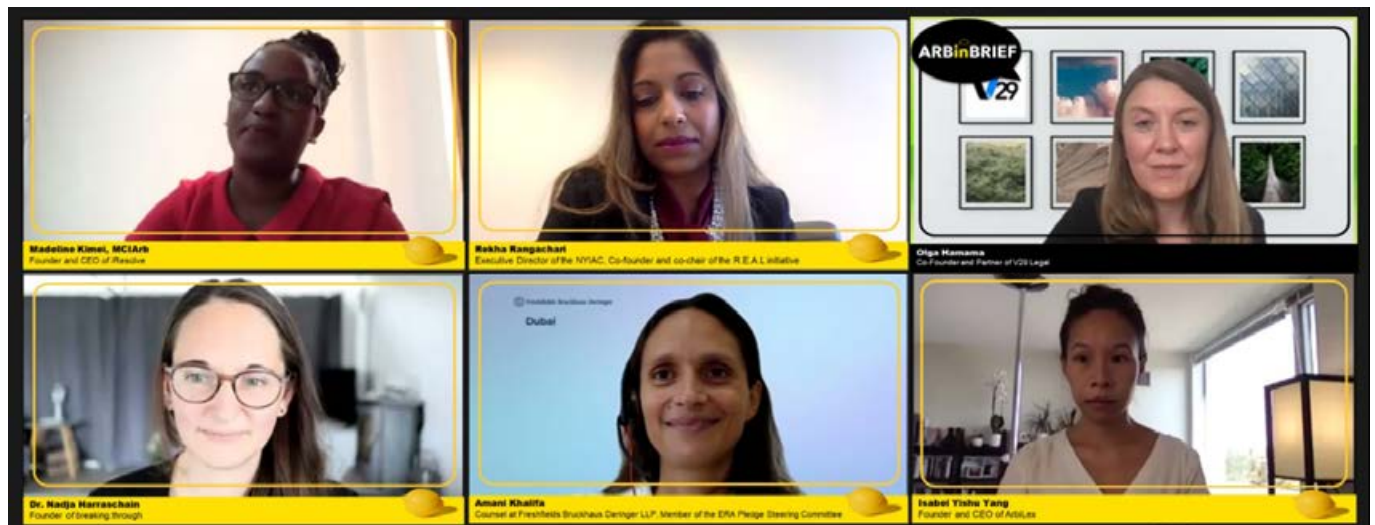
Hosted by:

Supporting Organizations include:

Confirmed Sponsors include:

Event details updated regularly at [www.canarbweek.org](#). For information on participation or sponsorship contact Janet Walker [janet@canarbweek.org](#) and Paul Tschoner [paul@canarbweek.org](#).

Trailblazers: Ambition Meets Extraordinary, on 29 September 2021, by Webinar



Top to bottom, left to right: Madeline Kimei, Rekha Rangachari, Olga Hamama, Nadja Harraschain, Amani Khalifa, Isabel Yishu Yang

ARBinBRIEF

A new initiative, ARBinBRIEF, kicked off with a panel discussion on 29 September 2021, titled 'Trailblazers: Ambition Meets Extraordinary'.

ARBinBRIEF is a practical video guide on handpicked arbitration issues. It aims to provide a concise and informative resource for the arbitration community, and to showcase talented arbitrators. Each episode will be a 15-minute live conversation between two stellar arbitrators. The episodes will be recorded every fortnight and will be made available on the ARBinBRIEF YouTube Channel. Attendees of the live event will also be able to participate in a (non-recorded) Q&A and networking session. The 10 episodes making up each season will follow the arc of an arbitration proceeding, giving members of the arbitration community a key resource to turn to at any phase of an arbitration they find themselves in.

The panel kicking off the initiative was made up of extraordinary individuals who gave inspiring and, in the spirit of the initiative, practical insights into their career paths in which they sought to achieve a purpose going beyond themselves: **Nadja Harraschain** (Founder of [breaking.](#)

[through](#) , Rechtsreferendarin); **Amani Khalifa** (Counsel at Freshfields Bruckhaus Deringer LLP, Member of the ERA Pledge Steering Committee, ArbitralWomen member); **Madeline C. Kimei** (Founder and CEO of iResolve, President of the Tanzania Institute of Arbitrators); **Rekha Rangachari** (Executive Director of the NYIAC, Co-founder and co-chair of R.E.A.L. – Racial Equality for Arbitration Lawyers initiative, ArbitralWomen Board member) and **Isabel Yishu Yang** (Founder and CEO of ArbiLex).

Olga Hamama (Arbitrator and Partner of V29 Legal, ArbitralWomen member) moderated the panel. She deftly brought out the different aspects of the panellists' diverse range of experiences and contributions to the arbitration community. The lively conversation spanned from how the panellists created crucial forums for airing and generating career-related discussions, including by publishing portraits of role models within the legal profession (Nadja Harraschain), to making career switches from professional sport into the legal profession, and then making important transitions within the profession itself (Amani Khalifa). The discussion considered how important issues of diversity could be fostered within the arbitration community (Rekha Rangachari), and also explored forces driving the practice of

arbitration to evolve. The speakers shed light on initiatives that leveraged their passion for both technology and the law to create online dispute resolution platforms (Madeline Kimei), as well as how the crossroads of statistics and technology could be used to create predictive tools for assessing risks in arbitration (Isabel Yang).

The speakers provided useful guidance for any person pursuing a career in international arbitration and beyond. A combination of personal qualities, expertise, and ability to respond to the challenges and everchanging circumstances were just some of the qualities these extraordinary professionals share. For all who missed the event, the recording will be available on the ARBinBRIEF YouTube channel.

The first episode of ARBinBRIEF was recorded on 13 October 2021 at 3pm CEST, featuring Wendy Miles QC of Twenty Essex Chambers and Dr Jennifer Bryant of Noerr. Wendy and Jennifer discussed an important topic that anyone involved in an arbitration faces from the get-go: arbitrator appointments.



Click here to ARBinBRIEF
YouTube channel.

Submitted by Mrinalini Singh, Solicitor,
Plesner Advokatpartnerselskab, Copenhagen, Denmark

Please Follow us to the Case Management Space, on 30 September 2021, by Webinar

Mirèze Philippe moderated the panel titled 'Please follow us to the Case Management Space', which presented two platforms dedicated to arbitration case management, an area with a dire need for technology to manage arbitrations better and more swiftly. She indicated that ODR platforms have been used to resolve all types of disputes online for over two decades. However, only a few of them were built to conduct arbitrations online and some were regrettably discontinued. ODR has not got the attention anticipated for many reasons: lack of business plans, of users' education, of promotion and of proper budgeting and, worst of all, service discontinuance, instead of improvement of it. Therefore, dispute resolution practitioners are under the impression that arbitration platforms are only projects for the future. The panel demonstrated the opposite!

Damian Croker, co-founder of

ODRPlat, a carbon neutral platform, presented his platform, followed by **Venkateshwar Juturu**, Director Project Management of RDO, who presented the latter platform. All those interested in seeing how the platforms work can ask for a demo.

These platforms are fully customisable. They allow users who may be arbitrators in some cases and counsel in others to access their private space and see ongoing and closed cases. Depending on their role, they can upload submissions as counsel or organise hearings as arbitrators. Users may create groups for private conversations. All information about the case, the parties and the arbitrators is available in the platform, together with all documents filed in the arbitration. ODRPlat and RDO offer an integrated virtual hearings space, with the benefit of accessing documents without having to file them on a different platform.

Although platforms seem simple to build, significant work is involved in designing dispute systems, understanding the needs of the stakeholders who must be involved at all times, including people of various profiles and experiences, internal and external to the company, making sure that resources will be dedicated to the system design, the choice of standards that will be applied, and so on.

For more information on technology, ODR, dispute design, artificial intelligence and other related subjects, a useful source of information is available the [National Centre for Technology and Dispute Resolution \(NCTDR\) website](#).

Submitted by Mirèze Philippe, ArbitralWomen Co-founder and Board member, Special Counsel, ICC International Court of Arbitration, Paris, France

Spoiler Alert! ArbitralWomen Has Proudly Supported Multiple Arbitration Weeks in 4Q2021!

ArbitralWomen has provided support and substantive programming for multiple arbitration weeks in the fourth quarter of 2021, including events on the occasion of Australian Arbitration Week (October 2021), Hong Kong Arbitration Week (October 2021), BVI Arbitration Week (November 2021), Dubai Arbitration Week (November 2021), New York Arbitration Week (November 2021) and Washington Arbitration Week (December 2021).

It is an honour for ArbitralWomen to be able to contribute to the arbitration community in this way and we

congratulate the organising committees of these arbitration weeks for their support of diversity and inclusion.

Stay tuned for event reports about the 4Q2021 arbitration week marathon in a future edition of our Newsletter! **We are currently calling for event report contributions for programmes between October and December 2021, so please contact us at newsletter@arbitralwomen.org if you wish to contribute with an event report on any of the arbitration week programmes or other ADR conferences and webinars in the last quarter of 2021!**



Paris Arbitration Week 2021

(5th edition)



The 5th edition of Paris

Arbitration Week (PAW2021), took place between 20 and 24 September 2021.

PAW2021 was a very busy week and more than 30 events featuring more than 35 ArbitralWomen speakers were held remotely, in hybrid format and in person in Paris. PAW is first and foremost a forum to showcase the advantages and strengths of Paris as the world capital of international arbitration and the promotion of the arbitration practitioners that make the reputation of Paris. We are delighted that ArbitralWomen members figure prominently in that group. As a member of ArbitralWomen myself, I am particularly pleased with the unwavering support that ArbitralWomen has shown PAW since its inception.

PAW is committed to diversity and the PAW Board and Organising Committee strive to continue to ensure the representation of diverse panels during PAW.

In the same vein, we have chosen to put the issue of diversity at the heart of PAW as the topic of the transversal, philosophical and hopefully disruptive, keynote given during the virtual PAW kick-off event. This year, the keynote was delivered by Eduardo Silva Romero, Global head of the Dechert international arbitration practice and a recording will be shortly available on the [PAW website](#).

The range of online or hybrid and in-person events organised by PAW2021 partners also showcased

diverse themes and speakers and enabled a maximum participation across the globe.

The scope of events organised by or in which ArbitralWomen members participated in, represent perfectly the variety of the events proposed during the week, including:

- Construction arbitration
- Legal Finance / Third Party Funding
- Witness Evidence
- Issues related to the quantification of damages
- Issues related to non-monetary relief
- Environmental issues
- Trade secrets
- The ECT
- Regional consideration in Europe, Africa and the Middle East
- Judicial review of arbitration awards in France

You will find below a selection of reports from those events. For the exhaustive list of the PAW2021 events, please consult the [PAW website](#).

Submitted by Yasmin Mohammad, ArbitralWomen member, Director at Fortress Investment Group and President of the Paris Arbitration Week Board

Arbitration in the BVI, an up-and-coming hub in the Caribbean, on 20 September 2021, by Webinar

On 20 September 2021, Day 1 of the Paris Arbitration Week (PAW) 2021, the British Virgin Islands International Arbitration Centre (BVI IAC) and Teynier Pic organised a webinar titled 'Arbitration in the BVI, an up-and-coming hub in the Caribbean'.

Olusola Odunsi (Freshfields Bruckhaus Deringer) published an [Article on the Kluwer Arbitration Blog summarising this session](#). This report uses extracts from her article.

The event was moderated by **Raphael Kaminsky** (Vice President, Paris Arbitration Week, and Partner, Teynier Pic) and **Hana Doumal** (Registrar, BVI IAC), who also acted as a speaker, together with **Shan Greer** (Partner, Spencer West LLP), **Angeline Welsh** (Barrister, Essex Court Chambers) and **Nicholas Burkill** (Partner, Ogier).

The session focused on a general overview of the framework for arbitration in the BVI, the creation of the BVI IAC, what advantages the BVI offers as a seat, and a discussion on confidentiality under the BVI Arbitration Act.

Overview of the framework for arbitration in the BVI

The 2013 BVI Arbitration Act, which entered into force in 2014, is the principal legislation on arbitration in the BVI. The Act is based on the UNCITRAL



Top to bottom, left to right: Hana Doumal, Raphael Kaminsky, Shan Greer, Angeline Welsh and Nicholas Burkill

Model Law and establishes the BVI IAC. To ensure the enforcement of awards obtained in proceedings seated in the BVI, the BVI acceded to the New York Convention in May 2014.

The 2016 BVI IAC Rules, which are modern UNCITRAL-based Rules, are the extant arbitration rules in the BVI. The BVI IAC is, however, working to amend the rules and is scheduled to release the updated rules during the BVI IAC Week in November 2021.

The BVI as a seat also enjoys unwavering support from the judiciary.

The BVI IAC

The BVI IAC is an independent not-

for-profit institution established in 2013 by the BVI Arbitration Act to meet the demands of the international business community for a neutral, impartial, efficient and reliable dispute resolution institution in the Caribbean and Latin America. The centre officially opened for hearings in January 2017. It is a well-equipped state of the art centre that benefits from the acknowledged quality of the BVI legal framework and the stable political environment offered by a British Overseas Territory.

What advantages does the BVI offer?

In 2015, the Chartered Institute of Arbitrators introduced the CI Arb London Centenary Principles – 10 principles for an effective, efficient and 'safe' seat for the conduct of international arbitration. The speakers agreed that the BVI meets these criteria and goes beyond them to provide additional advantages.

Confidentiality under the 2013 BVI Arbitration Act

Unlike other jurisdictions including the UK, the BVI Arbitration Act sets out a robust regime for maintaining confidentiality of court proceedings relating to arbi-

20 September 2021 4:30PM CEST

Arbitration in the BVI, an up-and-coming hub in the Caribbean

Nicholas Burkill
Ogier

Shan Greer
Spencer West LLC

Raphael Kaminsky
Teynier Pic

Angeline Welsh
Essex Court Chambers

Hana Doumal
BVI IAC

AT PARISARBITRATIONWEEK

Teynier Pic

WWW.BVIAC.ORG



tration. Specifically, the BVI Arbitration Act prohibits disclosure of information relating to arbitral proceedings and awards, subject to limited exceptions.

Caribbean ADR Initiative (CADRIIn)

CADRIIn is an independent non-profit initiative co-founded by Shan Greer with a vision to establish a mechanism by which regional practitioners, ADR centres and potential users are brought to a discursive platform where international

best practices can be analysed, distilled and appropriately disseminated.

Conclusion

The BVI is certainly an up-and-coming arbitration hub in the Caribbean. Its development is supported by legislation, the judiciary, and institutional infrastructure. The panellists agreed that arbitration practitioners may therefore want to consider the BVI when negotiating their arbitration clauses. On a final

note, Nicholas Burkill, who chairs the BVI Arbitration Group, invited persons with interest in international arbitration to join the BVI Arbitration Group.



The recording of the event is available here.

Submitted by Hana Doumal, ArbitralWomen member, Registrar, BVI International Arbitration Centre, British Virgin Islands

ERA Pledge Networking lunch with Claudia Salomon, on 20 September 2021, In-person



Claudia Salomon



Alison Pearsall

On 20 September 2021, Squire Patton Boggs ('SPB') and the ERA Pledge (represented by Steering Committee members and ArbitralWomen members **Alison Pearsall**, **Maria Beatriz Burghetto** and **Gisèle Stephens-Chu** as well as Young Pledge Steering Committee member **Caroline Croft**) held a networking luncheon with **Claudia Salomon**, newly appointed President of the ICC Court and ArbitralWomen member. After an introduction from SPB's Paris Managing Partner **Carole Sportes** describing the firm's initiatives with respect to diversity, Claudia gave an

inspiring speech on the theme of 'seeing is believing'. She highlighted the importance of diverse role models and sharing some personal reflections and experiences in her own career. This was followed by a presentation of the Pledge from Alison Pearsall, senior group counsel at Veolia and member of the Pledge's French and Corporate Sub-Committees.

Alison provided an overview of the Pledge's history, organisation, achievements and current initiatives. These include the [Corporate Guidelines for Implementation of the Pledge](#) and the [Checklist of Best Practices for](#)

[the Selection of Arbitrators](#), both of which are designed to encourage greater diversity in party appointments, which still lag far behind institutional appointments in diversity statistics. She also described the activities of newly formed Pledge groups, including the Young Practitioners Sub-Committee. The event was very well-attended and kicked off Paris Arbitration Week in style.

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

Harmonization Through Arbitration—The Arbitrators' Role and Function, on 20 September 2021, by Webinar

On 20 September 2021, ArbitralWomen member **Ina C. Popova** (Debevoise & Plimpton LLP) participated in a spirited debate on the harmonization of law through international investment arbitration—and the arbitrators' role and function in achieving harmonisation—as part of a two-part panel series put together by the organisers of Paris Arbitration Week.

The panels were arranged in a pleading-style format, with panellists tasked ahead of time to defend assigned positions: to support or challenge the notion that it is possible, necessary, and inescapable to achieve harmonization by means of arbitration. Panellists were afforded 15 minutes per side for opening remarks and 10 minutes per side for reply and rejoinder.

The first panel, focusing on international commercial arbitration, was moderated by **Constance Castres Saint-Martin** (Sciences Po Law School), with **Marina Matousekova** (CastaldiPartners) and **Stavros Brekoulakis** (Queen Mary University of London) tasked to defend harmonisation and **José Ricardo Feris** (Squire Patton Boggs) and **Eleonora Coelho** (Eleonora Coelho Advogados) to challenge it.

The second panel, focusing on international investment arbitration, was moderated by **Diego P. Fernández Arroyo** (Sciences Po Law School), with **Andrés Jana** (BMAJ) and Ina Popova tasked to defend harmonisation and **Giuditta Cordero-Moss** (University of Oslo) and **Fernando Mantilla** (Latham & Watkins LLP) to challenge it.

Andrés Jana and Ina Popova began their remarks with the etymological meaning of harmonisation: to add different notes to a melody so that, together, they produce a coherent and pleasing sound. Harmonisation therefore

means consistency and complementarity, and not unification—i.e., to make one and the same, such as by implementing a system of binding precedent. They then presented the *problématique*: Should arbitrators seek, in the words of the *Burlington v. Ecuador* majority (**Gabrielle Kaufmann-Kohler** and **Stephen Drymer**) 'to contribute to the harmonious development of investment law' by 'adopt[ing] solutions established in a series of consistent cases?' Or should arbitrators follow the minority view of **Brigitte Stern** and 'decide each case on its own merits, independently of any apparent jurisprudential trend?'

Agreeing with the majority, Ina Popova urged arbitrators to deliberately give due consideration to past decisions in order to develop investment law in a consistent manner and submitted that doing so is not only possible but also required and—indeed—unavoidable. Ina Popova began with the premise that harmonisation is possible because investment tribunals—like the ICJ or any

other body that derives its authority from treaty—have a duty to apply customary international law. In so doing, they are not bound by any formal system of precedent, but through an iterative process have achieved harmonious understandings with respect to perennial questions: the meaning of 'minimum standard of treatment'; the *Chorzów Factory* standard for compensation; and the ICSID annulment standards are but three such examples.

Andrés Jana remarked that harmonisation of investment law is required for the long-term health of ISDS because it helps to ensure certainty, fairness, efficiency, and respect for party expectations. Indeed, the risk of producing unjustifiably inconsistent results is one of the biggest criticisms of ISDS identified by UNCITRAL Working Group III. Parties increasingly expect and demand consistency, and arbitral practice serves as compelling proof of this fact: you will be hard-pressed to find an award or submission that does not have extensive citation to past cases.

Andrés Jana concluded by arguing that harmonisation is unavoidable. Increasingly, we are seeing initiatives to increase transparency, the issuance of binding interpretative treaty statements, the drafting of multilateral and regional investment agreements, and proposals to create appellate review mechanisms (including a standing investment court). While the merits and modalities of these recent developments remain subject to healthy debate, one thing is clear: they all stem from and share the valiant goal of achieving harmonisation.

Submitted by Lisa W. Lachowicz, ArbitralWomen member, Associate, Debevoise & Plimpton LLP, New York, USA



Mining Arbitration in Africa, on 20 September 2021, by Webinar



Top to bottom, left to right: Jackwell Feris, Ana Atallah, Richard Swinburn, Guillaume Aréou, Amani Khalifa, Clément Fouchard, Salimatou Diallo, Justice Fatsah Ouguerouz, Paul-Jean Le Cannu, Habibatu Touré, Karifa Condé, Andrew Tetley and Kimbeng Tah

International arbitration as a method of dispute resolution is increasing in popularity and importance across Africa, as evidenced by the fact that no less than five events on the Paris Arbitration Week calendar focused on this continent. The Francophone Africa region is a particular focus area for Reed Smith, with our strong experience in the region, led by our Paris international arbitration team.

On Monday 20 September 2021, in a virtual event titled 'New trends and future directions of mining arbitration in Africa', we welcomed distinguished guest speakers from Africa and beyond to discuss the post-pandemic outlook for dispute resolution in Africa's mining sector. The event was run in partnership with AfricArb, a non-profit organisation of young practitioners aimed at furthering the development of arbitration as an efficient and accessible method of dispute resolution in Africa.

Our eminent speakers were: **Guillaume Aréou**, Associate, Reed Smith; **Ana Atallah**, Partner, Reed Smith; **Karifa Condé**, Directeur Juridique CBG; **Salimatou Diallo**, Managing and Founding Partner,

ADNA; **Jackwell Feris**, Director, Cliffe Dekker Hofmeyr Inc.; **Amani Khalifa**, Counsel, Freshfields Bruckhaus Deringer; **Paul-Jean Le Cannu**, Senior Counsel and Team Lead, ICSID, co-president of AfricArb; **Richard Swinburn**, Partner, Reed Smith; **Kimbeng Tah**, Principal State Counsel & International Arbitration Lead; **Andrew Tetley**, Partner, Reed Smith; **Habibatou Touré**, Managing Partner at Habibatu Touré Law Office and **Justice Fatsah Ouguerouz**, Independent Arbitrator.

Reed Smith Paris-based international arbitration partner **Clément Fouchard** (a founding member of AfricArb), moderated the session that saw our panellists, representatives for the various stakeholders in mining arbitration in Africa (in-house lawyers, arbitration practitioners, governments, and arbitral institutions), discuss best practices to prevent mining disputes, governance issues from the perspective of the State and the investor, climate change and environmental protection, human rights, and the roles of local communities.

Later, our Oxford Union-style debate addressed two motions:

- i. Whether there should be no limit to a State's right to enact tax and customs regulations in the mining sector; and
- ii. Whether an arbitral tribunal should be able to prevent parallel proceedings before national courts involving the investor.

The discussion served as an excellent forum for academics and practitioners alike to cover well-known (and loved!) issues on investment and natural resources, alongside the newer environmental and human rights dimensions in the mining field.

The event was conducted in English and French and attracted 135 online attendees – a fantastic number given the number of Africa-related events during PAW this year and the fact that our speakers discussed their points in multiple languages.



[Click here to watch a full recording](#)

Submitted by Ana Atallah, ArbitralWomen member, Partner, Reed Smith, Paris, France

Africa Outlook: Arbitration Trends, on 21 September 2021, by Webinar



Top to bottom, left to right: Christopher Moore, Folashade Alli, Olivier Amalaman, Kizito Beyuo, Aurélia Mafongo Kamga, Laurie Achtouk-Spivak, Diamana Diawara, Godwin Omoaka SAN, Madeline Kimei, Naomi Tarawali, Diane Okoko, Fabio Londero, Dr. Ismail Selim, Paulman Chungu, Dr. Rukia Baruti

On 21 September 2021, during Paris Arbitration Week (PAW), Cleary Gottlieb Steen & Hamilton hosted a webinar on the topic 'Africa Outlook: Arbitration Trends'. ArbitralWomen members **Laurie Achtouk-Spivak** (Counsel, Cleary Gottlieb), **Naomi Tarawali** (Associate, Cleary Gottlieb) and **Sarah Schröder** (Associate, Cleary Gottlieb) participated in the organisation of the event, which was structured around 3 panels and brought together 13 panelists, including arbitration practitioners from around a dozen African jurisdictions, client representatives and leading members of arbitral institutions in Africa.

During the first panel, moderated by **Christopher Moore** (Partner, Cleary Gottlieb), speakers **Thierry Olory-Togbe** (Principal Legal Counsel, African Legal Support Facility, Ivory Coast), **Folashade Alli** (Partner, Folashade Alli & Associates, Nigeria), **Kizito Beyuo** (Partner, Beyuo & Co, Ghana), **Aurélia Mafongo Kamga** (Associate, Chazai & Partners, Cameroon) and **Olivier Amalaman** (Partner, KSK Avocats, Ivory Coast) discussed arbitration trends in the West Africa region and in their respective jurisdictions. The panellists addressed a variety of topics such as the involvement of West African governments in arbitrations, recent government policy trends in favor or against

arbitration, the attitude and supporting role of domestic courts, issues regarding enforcement of arbitral awards, efforts made by international organisations and private actors to promote arbitration in the region, and their own recommendations on how to best address recent priorities and concerns.

During the second panel, moderated by Laurie Achtouk-Spivak, speakers **Fabio Londero** (Group General Counsel, Danieli), **Diamana Diawara** (Regional Director for Africa, ICC International Court of Arbitration), **Godwin Omoaka SAN** (Partner, Templars; and board member, Lagos Court of Arbitration) and Dr **Ismail Selim** (Director, The Cairo Regional Centre for International Commercial Arbitration) addressed the work of arbitral institutions in Africa and how they could best reconcile client service and adjudication functions. Following a survey amongst the audience on the topic, the panellists discussed what users expect from an arbitral institution in Africa. The speakers then addressed what tools or services arbitral institutions have developed to best address these expectations, particularly time and cost efficiency. The panellists further discussed which specific challenges regional arbitral institutions in Africa face, and what safeguards these

institutions have put in place to ensure the fair adjudication of disputes, while maintaining trust in the arbitral process.

Finally, during the third panel, moderated by Naomi Tarawali, speakers **Diane Okoko** (Partner, Marcus-Okoko & Co, Nigeria), **Paulman Chungu** (Partner, Ranchhod, Chungu Advocates, Zambia), **Madeline Kimei** (Principal Director, iResolve, Tanzania) and Dr **Rukia Baruti** (Secretary General, African Arbitration Association, Rwanda), participated in a debate on how to foster diversity in arbitration, and whether, in order to increase diversity, we should do away with party appointments for arbitrators. Panellists argued either in favour or against that proposition and discussed how to best achieve diversity in arbitral tribunals. The speakers addressed various issues including what reasons and concerns often guide the parties' choices of arbitrators, the role of arbitral institutions in providing access to information and training to increase diversity in arbitral panels and the importance of maintaining party autonomy to preserve the legitimacy of the arbitral process.

Submitted by Sarah Schröder, ArbitralWomen member, associate, Cleary Gottlieb Steen & Hamilton, Paris, France

Eight Disagreements over how to enhance Witness Evidence Event, on 21 September 2021, by Webinar



Top to bottom, left to right: Michelle Nelson, Peter Rosher, Doug Jones, Kimberley Wade, Yves Derains, Wendy Miles, Stephanie Smatt Pinelli, Steve Ryan, Eun Young Park, José Astigarraga and Kohe Hasan

The role and influence of witness evidence in international arbitration proceedings is a hot topic of debate in the arbitral community. On Tuesday 21 September 2021, as part of the Paris Arbitration Week official programme, Reed Smith welcomed a cast of arbitral stars from near and far to consider and debate some of the contentious issues around this topic. In addition to our two Reed Smith moderators — global chair of Reed Smith's international arbitration practice **José Astigarraga** and international arbitration lawyer and Vice-chair of PAW Organizing Committee **Peter Rosher** — our panel comprised: **Yves Derains** (Founding partner, Derains & Gharavi), **Kohe Hasan** (Partner, Reed Smith), Professor **Doug Jones** AO (Independent Arbitrator), **Wendy Miles** QC

(Twenty Essex Chambers), **Michelle Nelson** (Partner, Reed Smith), **Eun Young Park** (Co-chair, International Arbitration & Cross-Border Litigation, Kim & Chang), **Stephanie Smatt Pinelli** (General Counsel, Litigation, ORANO), **Steve Ryan** (Vice President, Global Litigation, TechnipFMC) and Professor **Kimberley Wade** (Professor of Psychology, University of Warwick).

Following a presentation by Professor Wade on psychological factors affecting witness evidence, José Astigarraga (co-chair of the ICC Commission on Arbitration and ADR's Task force Maximising the Probative Value of Witness Evidence) and Peter Rosher moderated the interactive, dynamic discussion that included live audience polls on each of the seven

points of contention.

The range of views from the panel was particularly interesting and generated much discussion and debate. What was clear, however, is that witness evidence is and remains a very important part of the presentation of a party's case in international arbitration proceedings, in addition to the documentary record, both from the perspective of counsel and tribunal members, and should never be underestimated.

Over one hundred attendees watched as the speakers debated the issues outlined above, with one guest noting: 'I thought it was excellent. Brilliant speakers and really interesting – [the] best one I attended all week'.

To conclude the session, viewers were asked, 'Has today's discussion swayed your views on one or more of the statements?' with an amazing 74% of viewers voting 'Yes'. Clearly, we had some very persuasive panellists!



[Click here to access a video recording.](#)

Submitted by Michelle Nelson, ArbitralWomen member, Partner, Reed Smith, Dubai, United Arab Emirates

Below is a summary of the points of contention under discussion among and the initial audience votes.

Proposition	Audience Poll	
	For	Against
Proposition 1: Save in rare situations, documents should be accorded more probative value than witness testimony.	78%	22%
Proposition 2: Arbitrators would enhance the value of witness evidence if they were to instruct the parties early in the proceedings as to what are the fact issues as to which the arbitrators wish to receive witness evidence and which ones not.	63%	37%
Proposition 3: Generally speaking, witness evidence relating to 'context' should be excluded – witness evidence should be strictly limited to the specific facts in dispute.	24%	76%
Proposition 4: Generally speaking, arbitrators' ability to evaluate witness evidence is not affected by cognitive biases, such as confirmation bias, anchoring, cultural bias, gender bias, language, etc.	16%	84%
Proposition 5: Cross-examination does not enhance the value of witness evidence.	11%	89%
Proposition 6: Tribunal led questioning (before counsel questions) enhances the value of witness evidence.	65%	35%
Proposition 7: Fact witness conferencing enhances the value of witness evidence.	68%	32%

The French courts' review of investment arbitration awards: what's left of Professor Fouchard's teachings?, on 21 September 2021, In-person



Left to right: Pierre Pic, Shaparak Saleh and Jean-Baptiste Racine

The event was a tribute to Professor Philippe Fouchard on the 25th anniversary of the publication of the *Traité de l'Arbitrage Commercial International*, the seminal arbitration text that Professor Fouchard co-authored with Emmanuel Gaillard and Berthold Goldman. During this hybrid event, Teynier Pic welcomed guests in-person at the Maison de l'Amérique Latine and online.

The panel was moderated by ArbitralWomen member **Shaparak Saleh**, a Partner at Teynier Pic. The speakers were **Pierre Pic**, also a Partner at Teynier Pic and Professor **Jean-Baptiste Racine**, Professor at University Panthéon-Assas.

Teynier Pic has been involved in half of all cases considered by the French courts on the issue of jurisdiction in investment arbitration. Further, Professor Jean-Baptiste Racine's PhD on international commercial arbitration and public policy was supervised by Professor Fouchard himself, so the audience was treated to some real insights from global experts in the field.

Shaparak set the scene for the panel discussion while recognising the significance of Professor Fouchard's influence on international arbitration. She reminded the audience that France is one of the most arbitration-friendly seats in the world, largely thanks to

Professor Fouchard. Professor Fouchard was a staunch defender of the substantive rules approach known as the *règles matérielles*, whereby a conflict of law analysis should not be conducted to decide whether an arbitration agreement is validly concluded and that French courts should instead rely on the relevant facts to determine whether the common intent of the parties was to arbitrate. She also emphasised that a main pillar of Professor Fouchard's thinking was that the relationship between domestic courts and arbitral tribunals must be based on complementarity rather than on confrontation.

Shaparak Saleh first asked Pierre Pic whether the *règles matérielles* approach is still used by French courts when it comes to examining a party's consent to investment arbitration. After giving

a comprehensive analysis of the courts' jurisprudence on the issue, Pierre determined that the *règles matérielles* pursuant to which international arbitration agreements are valid and binding if and only if the parties have consented to them, which was so dear to Professor Fouchard, does indeed still apply. Pierre noted that, even though French courts perform an in-depth analysis of bilateral investment treaties, they only do so to determine whether the parties (i.e., the State and the investor) consented to arbitration.

Shaparak then asked Professor Racine to consider whether French courts have gone too far in assessing compliance of investment arbitral awards with international public policy. Professor Racine addressed French courts' approach to assessing compliance in the context of corruption and money laundering. He found that the deeper level of scrutiny that French courts perform on arbitral awards in that context only strengthens Paris's position as a 'clean' and therefore reputable seat, noting that the scrutiny does not go too far.

The presentation was followed by a lively discussion and networking.

Submitted by Shaparak Saleh, ArbitralWomen member, Partner, Teynier Pic, Paris, France



Audience at the event in honour of Professor Philippe Fouchard

Improving Efficiency in Construction Arbitration Proceedings in Eastern Europe: pre-arbitration tools, on 21 September 2021, by Webinar and In-person



On screen, top to bottom, left to right: Michael McIllwrath, Aisha Nadar, Doug Jones AO – Live panel, left to right: Ioana Knoll-Tudor, Malgorzata Surdek-Janicka, Hjordis Birna Hjartardottir

This article is a non-exhaustive summary of a hybrid conference organised during the Paris Arbitration Week 2021 by Jeantet. The panel discussed the available pre-arbitration tools for resolving disputes in the construction sector as a means to enhance efficiency. The panel was composed of **Hjordis Birna Hjartardottir**, Counsel at the International Court of Arbitration of the ICC, **Pr Doug Jones AO**, Independent Arbitrator, Atkin Chambers, **Michael McIllwrath**, MDisputes, Founder, **Aisha Nadar**, Panel of Conciliators, ICSID, Advokatfirman Runeland AB, and **Malgorzata Surdek-Janicka**, CMS, Vice-President International Court of Arbitration of the ICC. The panel was moderated by Dr **Ioana Knoll-Tudor**, Jeantet, Partner.

Pre-arbitration Methods Available to The Parties

Parties may use a range of pre-arbitration methods to iron out differences, such as negotiation or with the assistance of a third-party: the available techniques encompass the use of mediation, adjudication, Dispute Review Boards (DRBs) or Dispute Adjudication Boards (DABs). The ICC

caseload shows that the type of contract is consequential: a standardised contract (such as FIDIC), or the contract used when the project is financed by an international institution, usually contain a multi-tier dispute resolution clause. However, when the parties draft a standalone contract, they tend to opt for a simplified procedure involving at most a two-tiered system, with either negotiation or mediation followed by arbitration. Moreover, there is not a one-size-fits-all solution: the effectiveness of any pre-arbitration tools depends in practice on the particular type of project and the identity of the parties involved.

DABs

One of the most prominent pre-arbitration techniques used by parties are DABs. Their importance is also illustrated by the fact that the FIDIC 2017 Suite explicitly amended Clause 21.7, making it clear that DAB decisions are binding and can be enforced by arbitration even if they have not yet become final because of the issuance of a notice of dissatisfaction.

Notwithstanding, some countries in Eastern Europe, the MENA Region

and South America exclude DABs from their standard forms of contracts. The phenomenon is largely due to fears of corruption accusations levied at officials who may have to account for the reasons why they have not pursued a dispute (be it through arbitration or litigation before courts). In contrast, other administrations such as that of Australia encourage government officials to take responsibility for an outcome and solve problems to make the project succeed.

The ICC caseload shows that an additional factor which increases the efficiency of DABs is the moment of their constitution: where DABs are constituted early, the disputes are significantly narrowed down by the time they reach arbitration, as opposed to ad-hoc DABs, whose decisions are more often resisted.

Recommendations to increase efficiency of ADR

Finally, the speakers recommended that the efficient use of pre-arbitration tools is enhanced by:

- i. making their use mandatory;
- ii. employing people with the right expertise (such as counsel, mediators, DAB members, etc.);
- iii. educating the project participants about their contracts in terms of the pre-arbitration tools available and the way they are used in practice; and
- iv. ensuring that an arbitral tribunal is proactive and engages with the parties early on to understand what is disputed and what evidence needs to be presented.

Submitted by Ioana Knoll-Tudor, ArbitralWomen member, Partner, Jeantet, Paris France

Quantum Leap: Diving into the Quantification of Damages, on 21 September 2021, by Webinar



Top to bottom, left to right: Clara Segurola, Graham Cooper, Erin B. McHugh, Chiraag Shah and Robert Patton

NERA Economic Consulting's (NERA) **International Arbitration** initiative was proud to support Paris Arbitration Week (PAW) 2021, which took place in a hybrid format on 20–24 September 2021. In its fifth edition, PAW brought together the international arbitration community for a week of professional and academic debates with over 35 official events and 1,000 participants from all over the world.

As part of PAW, NERA hosted a webinar titled 'Quantum Leap: Diving into the Quantification of Damages', during which Augusta Ventures Investment Manager **Clara Segurola** moderated a virtual discussion on hot topics in the quantification of damages, along with NERA Associate Director and

ArbitralWomen member **Erin B. McHugh**, NERA Associate Director **Robert Patton**, Volterra Fietta Partner **Graham Coop**, and Morrison & Foerster LLP Partner **Chiraag Shah**.

During this interactive webinar, the panellists discussed whether they had seen 'a quantum leap' in the quantification of damages in international arbitration over the last decade. They agreed that the increased use of professional economists and valuation specialists as quantum experts in international arbitration has resulted in a wider range of quantitative tools being brought to bear, including the use of statistical techniques.

The panellists also discussed the use of event studies to estimate quantum

and the legal and economic considerations in applying country risk adjustments, exploring questions such as:

- What are the advantages of using event studies instead of (or in addition to) more traditional methods such as discounted cash flow analysis?
- What can you do to ensure the tribunal is comfortable relying on the results of an event study in its decision about damages?
- When and why are country risk adjustments applied when measuring quantum?
- What approaches to measuring country risk have tribunals accepted?

The panellists concluded that, as with many issues in arbitration, the specific facts of the case will be relevant to determining which quantitative tools may be appropriate to quantify damages. The full recording of the live session is available [here](#).

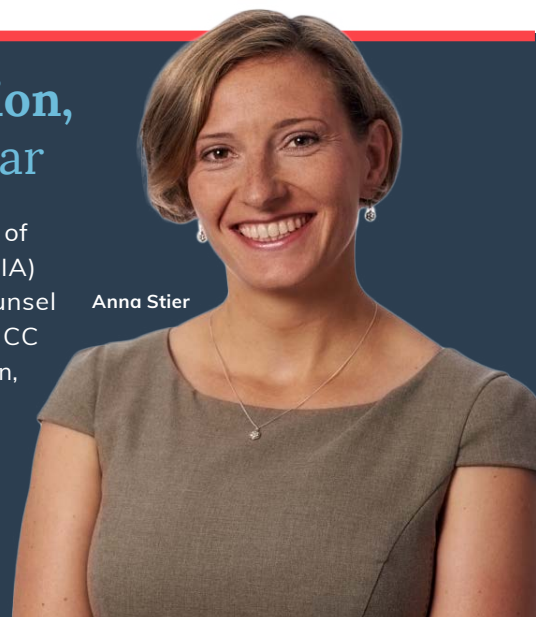
Submitted by Erin B. McHugh, ArbitralWomen member, Associate Director, NERA Economic Consulting, London/New York

Third-Party Funding in Arbitration, on 21 September 2021, by Webinar

On 21 September 2021, during Paris Arbitration Week, Addleshaw Goddard hosted a webinar on current trends and future developments in third-party funding as it relates to arbitration. The firm hosted an all-female panel that included experts from arbitral institutions, as well as third-party funders.

Panellists included **Jackie van Haersolte-van Hof**, Director

General of the London Court of International Arbitration (LCIA) and **Friederike Schäfer**, Counsel at the Secretariat of the ICC International Court of Arbitration, as well as ArbitralWomen members **Yasmin Mohammad**, Global Head of International Arbitration at Vannin Capital, and **Anna Stier**, Senior Legal Counsel at Omni



Anna Stier



Bridgeway. Dr **Felix Dörfelt**, a partner at Addleshaw Goddard's Hamburg office, moderated the discussion.

The Impact of Disclosure

The discussion started with the increasing regulation of third-party funding by arbitral institutions. In 2021, the ICC amended its arbitration rules to establish an obligation by parties to disclose funding arrangements. The LCIA considered, but did not adopt, an explicit disclosure requirement when it updated its rules in October 2020.

The panellists then focused on the need for disclosure and considered the potential consequences for funded parties of additional disclosure regulations, particularly how disclosure rules may affect issues such as security for costs requests, which can be cumbersome and costly for funded parties, even if a request is not granted.

Also debated was whether disclosures may create an imbalance in arbitrations, with claimants disclosing details about their financial backgrounds and potentially revealing the reasons they opted for third-party funding arrangements. Non-funded respondents would not have such an obligation.

Considering Conflicts

Disclosures made regarding the relation between arbitrators and funders was discussed. From the funders' perspective, transparency and regulation are often welcome, because they may take away the uneasiness of arbitrators about potential conflicts of interest. Funders have long run their own conflict checks and voluntarily disclosed connections with arbitrators. In the funders' perspective, this level of disclosure has safeguarded the arbitration process and ensured that awards are enforceable. Derailing arbitrations over conflicts issues would be a worst-case scenario for funders, as it would endanger their investment.

The panel further focused on whether, and if so how, third-party funders should be classified for purposes of conflicts, and particularly whether funders should be labelled as 'parties' or 'counsel' in terms of conflict standards under the IBA Guidelines on Conflicts of Interest.

Capital and Insurance Questions

An audience member asked the panel about remedies a party may have against a funder that is unable

to meet its funding obligations in a pending arbitration. Panellists said parties would be well advised to conduct appropriate due diligence prior to a funding agreement, to ensure the funder has sufficient capital on hand. In the end, the funded party would be in the same situation as any other claimant that is unable to meet its obligations (such as paying advance fees) and would risk having the arbitration discontinued.

The audience also asked about the role of insurers in arbitrations and whether they could be subject to disclosure regulations. The panel discussed the ways in which insurance companies can become a part of an arbitration, through subrogation, as well as via adverse cost insurance or post-award enforcement.

In their final comments, the panellists agreed that regulation of third-party funding is by no means a settled issue. A regulatory regime is still a work in progress, and the legal community will continue to debate and develop precedents and policies for many years to come.

Submitted by Anna Stier, ArbitralWomen member, Senior Legal Counsel, Omni Bridgeway, Amsterdam, The Netherlands

Compensation claims by States and State entities in commercial and investment arbitrations, on 22 September 2021, In-person

On 22 September 2021, during Paris Arbitration Week, FTI hosted an event discussing the current state of play of the counterclaims by States and State entities. Panellists included ArbitralWomen member **Anastasia Davis Bondarenko**, Managing Director at Vannin Capital, ArbitralWomen Board member **Juliette Fortin**, Senior Managing Director at FTI Consulting, **Ben**

Love, Partner at Boies Schiller Flexner, **Ilija Mitrev Penushliski**, Counsel at Three Crowns and **Matthias Cazier-Darmois**, Senior Managing Director at FTI Consulting. **Patrick Hébréard**, Managing Director at FTI Consulting, moderated the discussion.

Despite their relative scarcity, the panel agreed that there is nothing inherently untoward about State coun-

terclaims, noting that Article 46 of the ICSID Convention expressly envisages counterclaims.

The counterclaims were categorised as: 'the good', for unfulfilled obligations or other breaches of applicable law, 'the bad', contrived to hit back at the claimant reflexively rather than to complete or clarify the issues in dispute, and 'the ugly', originating from a tactical urge to



Top to bottom, left to right: Anastasia Davis Bondarenko, Matthias Cazier-Darmois, Juliette Fortin, Ben Love, Ilija Mitrev Penushliski and Patrick Hébréard

discolour the atmosphere of the dispute, even if the counterclaim is outside the scope of arbitral consent.

Article 46 of the ICSID Convention expressly conditions the admissibility of counterclaims on three conditions, one of which is that the instrument of consent to ICSID Convention arbitration – whether that be a treaty or a contract – extends to such counterclaims through the language governing its scope of consent.

But in most treaties, it is not obvious that jurisdiction extends to counterclaims and many investment treaty tribunals have reached that conclusion when denying jurisdiction over such claims by States in treaty cases (e.g., in *Saluka v. Czech Republic* and *Spyridon Roussalis v. Romania* – noting Reisman's strong

dissent-, etc.), while other tribunals have accepted jurisdiction (e.g., in *Aven v. Costa Rica* and *Goetz v. Burundi*, etc.).

The panel went on to discuss another significant difficulty in counterclaims by States and State entities: their valuation. Due to the nature of such counterclaims – which can often relate to environmental damage, depollution costs, delays in economic development, reduced security of supply, or various welfare-related consequences – they may be difficult to assess. Their assessment may require the use of complex economic tools and models that are not yet widely used in arbitration.

Finally, the panel discussed third-party funding of counterclaims by States or State entities. The reasoning

behind financing a State or a State entity can be strategic, ideological (e.g., the Bloomberg Foundation financing Uruguay in *Philip Morris v. Uruguay*), or commercial. The due diligence criteria and standards for assessing whether or not to finance a claim being brought by a State or a State entity are very similar to those applied when considering a private entity's claims. The panel pointed out potential difficulties that might arise from the fact that some States' procurement requirements regarding competition and transparency might be deemed inconsistent with the commercial practices of third-party funders.

Submitted by Patrick Hébréard, Managing Director, FTI Consulting, Paris, France

Shoot first and ask questions later – Enforcement and set-aside of arbitral awards, on 22 September 2021, by Webinar and In-person

On 22 September 2021, Clyde & Co Paris organised a conference titled 'Shoot first and ask questions later – Enforcement and set-aside of

arbitral awards' [🔗](#), offering an interesting comparison of the English and French Courts' approaches on these issues.

The panellists were **Loukas Mistelis**, Professor at Queen Mary University, **Luca de Maria**, Partner at PMG, **Ivan Urzhumov**, Partner at Clyde



Left to right: Ivan Urzhumov, Luca de Maria, Nadia Darwazeh, Loukas Mistelis and Sophie Grémaud

& Co, and **Sophie Grémaud**, Counsel at Clyde & Co. The event was moderated by ArbitralWomen member **Nadia Darwazeh**, Partner at Clyde & Co.

After a brief presentation of the various grounds for setting aside an award in France and in England, the discussion focused on the courts' review under the grounds of jurisdiction and public policy. The panellists illustrated their remarks with recent decisions. Overall, French courts now conduct an in-depth review of the award, going as far as examining new arguments and evidence that were not raised before the arbitral tribunal. Loukas Mistelis, while acknowledging that English courts also review thoroughly the award under those same grounds, stressed that they remain reluctant to go beyond the elements raised before the arbitral tribunal.

The panellists then shared their insights with regard to two areas invoked under the international public policy ground: corruption and international sanctions.

Regarding corruption, the panellists explained the evolving scope of review exercised by French courts, having evolved from a minimalistic approach to an in-depth (or even de novo) review. As an illustration, Luca de Maria discussed a recent French decision in which the Paris Court of

Appeal set aside an award for corrupt conduct because one of the parties had paid for the honeymoon of a public official. Although the payments were unrelated to the contracts, they were made at a time when the contracts were being negotiated by said public official. Loukas Mistelis then considered the English courts' approach which, although proceeding with a de novo review, show more deference to the arbitral tribunal and refuse to examine corruption claims raised for the first time, thus contrasting with French practice.

Sophie Grémaud discussed how international sanctions have been recently used in setting aside proceedings. She mentioned two recent

decisions, explaining that (i) some and not all sanctions should be considered part of the French conception of international public policy and (ii) the court deciding the annulment must assess the conformity of an award with international public policy as at the date of ruling and not as at the dates of the award or of the facts giving rise to the case.

Finally, Ivan Urzhumov shared insights on a case he is involved in that was brought before a Luxembourg judge, which highlighted a different aspect to the issue of international sanctions. The judge examined the sanctions issue as a question of admissibility of the claim rather than of the merits, because the regulation implementing the sanction prohibited the admissibility of any claim made by a person in connection with the contract affected by the sanctions.

Nadia Darwazeh concluded the conference by highlighting the evolving nature of the notion of public policy and questioning whether other fields, such as those of human rights and environmental issues, will eventually also be considered as part of public policy.

Submitted by Nadia Darwazeh, ArbitralWomen member, Partner, Clyde & Co, Paris, France and Sophie Grémaud, Counsel, Clyde & Co, Paris, France



Investment Arbitration and the Green Transition, on 22 September 2021, by Webinar



Top to bottom, left to right: Laurie Achtouk-Spivak, Cameron Murphy, Ana Stanič, Jamie Donovan, Kenneth Grant

As part of Paris Arbitration Week, on 22 September 2021, Cleary Gottlieb hosted a webinar titled 'Investment Arbitration and the Green Transition' [🔗](#). The event started with welcoming remarks by **Christopher Moore**, Partner, Cleary Gottlieb, London, UK, and was divided into two panels.

Cameron Murphy, Counsel, Cleary Gottlieb, London, UK, moderated the first panel focused on incentives and risks of the green transition. The speakers were invited to address how the interaction between the evolving investment environment and the evolving policy framework will play out in investment claims. **Jamie Donovan**, Principal, Monument Economics Group, Boston, USA, addressed recent trends in foreign direct investment, including the increase of investments in renewable sources in contrast with the significant number of recent investments in non-renewable sources and how the energy transition will affect such investments, potentially putting some investments at risk of being 'stranded'. **Ana Stanič**, ArbitralWomen member and Founder, E&A Law, London, UK, noted that the energy policy framework

is evolving rapidly, particularly in the EU, which can be seen as a microcosm of broader global trends. She opined that commitments to net zero and the reduction of emissions will result in considerable costs and that no industry will be risk-free in this rapidly changing panorama, particularly given uncertainty regarding the approach to certain energy sources, such as nuclear energy and gas. **Kenneth Grant**, Managing Director, Berkeley Research Group, Boston, USA, explained that the shift to renewables will present several questions and challenges for quantum experts and tribunals, who will have to deal with new regulatory implications, uncertainty regarding comparable transactions and legitimate expectations.

ArbitralWomen member **Laurie Achtouk-Spivak**, Counsel, Cleary Gottlieb, Paris, France, moderated the second panel that discussed the evolution of treaty protection and arbitration landscape. She asked the panellists to address the consequences of the green transition for investment treaties and, in particular, the Energy Charter Treaty modernization processes. **Annette**

Magnusson, co-Founder, Climate Change Counsel, Stockholm, Sweden, discussed how BITs are slowly starting to include environmental protection in their toolboxes, how those carve-outs are limited in scope and how the legal framework does not incentivise States to take environmental protection actions. It is still not clear how the ECT modernisation process will impact the renewable energy sector. **Jorge Viñuales**, Professor of Law and Environmental Policy, University of Cambridge, UK, explained how the green transition is changing the investment arbitration framework, including due to the fact that while the majority of existing investment treaties fail to mention environment protection, environmental claims already represent a fifth of all investment disputes. He also observed that, in view of the green transition, an investor could no longer claim to not know the risks of a regulatory change that affects an investment.

Submitted by **Laura Reichen**, ArbitralWomen member, International Lawyer, Cleary Gottlieb, Frankfurt, Germany



Business and Human Rights Disputes: Is Arbitration the Effective Remedy that Everyone is Looking For?, on 22 September 2021, by Webinar and In-person



Left to right : Jérémie Fierville, Jean-Baptiste Racine, Ursula Kriebaum, Aurélien Hamelle and Marie-Aude Ziadé

On Wednesday 22 September

2021, during the 5th edition of the *Paris Arbitration Week*, **Marie-Aude Ziadé** and **Jérémie Fierville**, founding Partners of *Fierville Ziadé*, hosted a conference on the question of international arbitration as the possible best remedy to settle business and human rights ('BHR') disputes.

The speakers were Professor **Ursula Kriebaum** (University of Vienna) **Aurélien Hamelle** (General Counsel of TotalEnergies), and Professor **Jean-Baptiste Racine** (University of Paris II – Panthéon Assas).

Fierville Ziadé pointed out the shift, over recent years, from a prevention era – where companies operating on the global market were constrained to take preventive measures to avoid the violation of human rights during their business activities, to a repressive and effective recovery era – where corporates must further offer an effective remedy to the victims in the event of an infringement of their rights, under various international instruments, such as the 2011 [UN Guiding Principles on Business and Human Rights](#), and regional ones, such as the draft [EU Directive on Corporate Due Diligence and Corporate Accountability](#), as well as a growing number of domestic laws (see, for instance, the French *Devoir de Vigilance* law of 27 March 2017, the UK Anti-Slavery law, dated 26 March 2015, or the German HR Due Diligence law, dated 11 June 2021). Given the general

consensus on the various obstacles to the enforcement of human rights obligations through the existing national court system, Marie-Aude Ziadé and Jérémie Fierville wondered whether arbitration could provide an alternative dispute resolution mechanism that would better serve the interests of both the victims and the corporates opposed in such conflicts.

Advantages of Arbitration compared to Court Litigation

Professor Kriebaum, one of the drafters of [The Hague Rules on Business and Human Rights Arbitration](#), published in December 2019 ('The Hague Rules') highlighted that international arbitrators (i) are detached from any State and therefore impartial and resistant to political pressure, (ii) are experienced in international dispute settlement and chosen by the parties based on their specific expertise in human rights disputes and/or the relevant business sector, (iii) have the time to go deep into the facts, (iv) may hear witnesses —through specific protection mechanisms, if needed— and experts that can investigate the issue *in situ*, and (v) render awards which are enforced more easily than court decisions, thanks to the 1958 New York Convention.

Aurélien Hamelle confirmed that arbitration would offer an attractive alternative to court litigation, based on its subject-matter competence, reliability and celerity. He insisted on (i) efficient tools, such as the use of expert and

witness evidence or the possibility for the tribunal to make inspections *in situ*, which are generally crucial in human rights disputes, and (ii) the possibility to obtain final decisions more swiftly (18 months on average for an award, compared to two to seven years for a final judgement). He added that the recourse to arbitration would probably constitute a progress in corporate social responsibility, although in the case of underdeveloped countries, resort to court litigation or arbitration remains burdensome for the victims. He also underlined that every effort should be placed on non-judicial or mediation-like remedies so as to be accessible, truly effective and swift.

Access to Arbitration and risk of a Multiplication of Claims and/or Mass Actions

Professor Kriebaum explained that third-party victims could access BHR arbitration through two avenues: (i) either under an arbitration clause in the company's contracts which would grant them the possibility to go to arbitration in the event of human rights infringements, or (ii) through an arbitration agreement proposed by the company after the dispute occurred (*compromis d'arbitrage*).

According to Professor Racine, the risk of a multiplication of claims or of potential mass actions from third-party victims of alleged human rights violations, is remote due to (i) the delimitation of the categories of third-party victims entitled to enforce said arbitration agreements, coupled with (ii) the possibility for the arbitrators to reject manifestly meritless claims through *prima facie* admissibility mechanisms, such as the one provided for in The Hague Rules, and/or through bifurcation proceedings. Aurélien Hamelle agreed and pointed out that a bespoke arbitration *compromis*, rather than arbitration clauses, may reduce the risk of frivolous claims.

Transparency of the Proceedings

As Professor Kriebaum explained, the drafters of The Hague Rules offered an innovative system providing for (i) transparency of the full debate (including the submissions and evidence produced) by default, assorted with (ii) the possibility for the parties to exceptionally request confidentiality (when, for instance, a full disclosure would endanger a witness, jeopardise the proceedings and/or adversely affect the business secrets of a company).

Aurélien Hamelle found such a system to be balanced. He added that transparency is necessary to have trust in arbitration and suggested that constituting a pool of 'quality BHR arbitrators' approved by all the stakeholders (claimants, NGOs, corporates, etc.) might be a good way to reduce the bias associated with the idea of a private justice to settle these disputes. Rightsholders or their representatives (NGOs) and corporates should be trusted in their ability to appoint expert arbitrators that will decide upon their conflict fairly, transparently and with the use of appropriate and efficient tools.

Professor Racine added that a system based on transparency by default is further a powerful way to objectivise the debate, as both the victims and the corporates will have to express their positions publicly, hence leading to a virtuous circle where frivolous claims would 'naturally' tend to disappear.

Costs of the Arbitration for the Victims

Professor Kriebaum noted that The Hague Rules provide for specific cost saving guidelines, as well as various innovative rules regarding the allocation of costs. According to her, an international arbitration run efficiently over 18-24 months is likely to be less expensive than BHR court litigation, usually of a cross-border nature, which leads to long debates over various procedural issues (such as the jurisdiction of the courts). She added that the costs of arbitration would be worth spending by the victims, if these costs allow them to

obtain the effective enforcement of their rights, which currently the national court systems only seldom achieve in practice.

Professor Racine mentioned some proposals that may help victims to bear the costs of arbitration, such as (i) the encouragement of arbitrators and counsel to work *pro bono* on BHR disputes, or (ii) the creation of an independent international fund that could be funded by the States, independent foundations and/or a pool of anonymised transnational corporations. Aurélien Hamelle commended the idea of a fund, and added that major corporations operating on the global market should be proactive and innovative in this regard, although he recognised that, if they are the source of funding, this would probably constitute a concern in building trust around this process.

Arbitrability of BHR Disputes and Enforcement

Professor Racine noted that the chances that a BHR award is annulled based on the 'non-arbitrability' of the dispute or a 'manifest violation of public policy' are weak, given that, even if they may also raise public interest questions, the BHR disputes that are eligible to arbitration are based on civil claims for damages or other non-monetary reliefs. Professor Kriebaum agreed and added that The Hague Rules, for instance, expressly provide that they exclusively apply to disputes arising out of a commercial relationship, therefore addressing the reserve on the commercial nature of the underlying dispute made by some States to the 1958 New York Convention.

Articulation with Amicable Solutions

Aurélien Hamelle explained that, in practice, amicable dispute resolution mechanisms — such as internal grievance mechanisms involving community liaison officers, and/or independent third-party mediators (including the national contact points of the OECD) —, will certainly continue to be predominantly used to solve BHR disputes, as they are the most accessible and efficient way for rightsholders to deal with their individual

grievances. However, offering a forum composed of neutral international and expert arbitrators to solve a dispute that the parties fail to settle amicably remains a better option than protracted multi-party and multi-country litigation before national judges, which are not adapted for such specific disputes.

Professor Kriebaum added that The Hague Rules expressly provide that initiating an arbitration under the Rules does not prevent the parties from attempting an amicable settlement at any time during the proceedings.

Articulation with other International Tribunals, such as the European Court of Human Rights ('ECHR')

Professor Racine explained that he did not see a risk of 'contradictory decisions' between arbitral tribunals and the ECHR, given that their respective jurisdictions do not overlap: while the ECHR is empowered to rule on claims brought against the States members to the *European Convention on Human Rights*, BHR arbitrators will rule upon claims made against private companies. He added that, precisely because there exists no international court dedicated to BHR disputes to date, international arbitration constitutes the only suitable option for victims seeking for civil remedies against private corporations and who cannot obtain the effective enforcement of their rights before national courts, due to various procedural obstacles.


Professor Kriebaum agreed and noted that BHR arbitrators have indeed the express duty (i) to rule pursuant to applicable rules of law, although they will certainly consider the ECHR's case law, where applicable, and (ii) to issue awards that are 'human rights-compliant', failing which they are most likely to be annulled on the ground of 'manifest violation of international public order'.

Submitted by Marie-Aude Ziadé, ArbitralWomen member, and Jérémie Fierville, both Partners at Fierville Ziadé, Paris, France

Arbitration and Trade Secrets, on 23 September 2021, by Webinar

Silicon Valley Arbitration &

Mediation Center and Paris Arbitration Week partnered together to present a panel titled 'Arbitration and Trade Secrets'. The panel was coordinated by **Alex Blumrosen**, Partner, Polaris Law, and moderated by **Stan Putter** Smallegange Advocaten, with opening remarks from **Les Schiefelbein**, SVAMC CEO. The panellists included **Claire Morel de Westgaver**, Partner, Brian Cave, representing the counsel perspective, **Sana Belaid**, Senior Counsel, Cisco, representing the inhouse-counsel perspective, **Ignacio de Castro** Director, IP Disputes and External Relations Division, WIPO Arbitration and Mediation Center, presenting the institutional perspective, **Sarah Reynolds**, Managing Partner, Goldman Ismail, representing the tribunal perspective, and **Patricia Shaughnessy**, Professor, Stockholm University, representing the confidentiality advisor perspective.

Because of a combination of factors, trade secret disputes are on the rise and playing an increasing role in arbitration, both as central issues in disputes, and as ancillary controversies in discovery. Contributing factors to this trend include an increasingly mobile workforce, the transition to electronic data transfer, and intellectual property laws that make trade secret designations an attractive method to protect information. We are also seeing a broader range of companies developing trade secrets. Beyond technical companies, many commercial companies have manufacturing and other back-end processes that are treated as trade secrets. Arbitration provides parties with more control and opportunities to ensure privacy and confidentiality. Further, arbitral institutions, for example, WIPO, with Article 54 of its [Arbitration Rules](#) ,



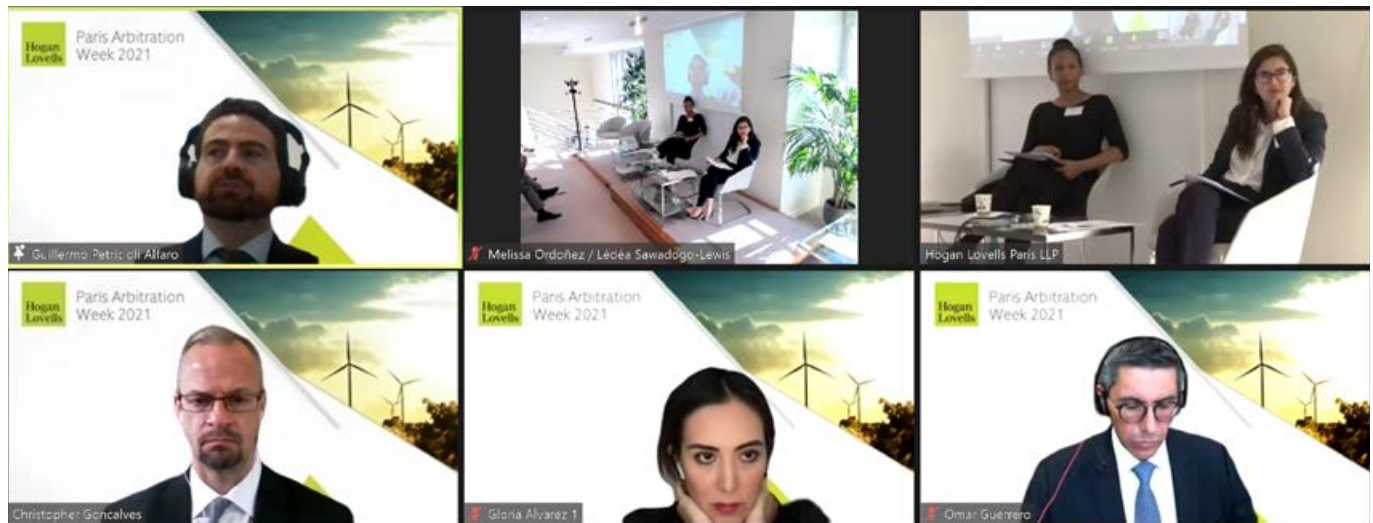
Top to bottom, left to right: Stan Putter, Sana Belaid, Ignacio de Castro, Claire Morel de Westgaver, Sarah Reynolds and Les Schiefelbein

are well equipped to handle disputes involving trade secrets, and in many cases better than domestic courts — especially, where cross-border issues are involved. These positive attributes are magnified where trade secrets and other sensitive proprietary information are involved. Where trade secrets are likely to come into play, the panel recommended that parties consider arbitration or mediation as dispute resolution mechanisms, subject to appropriate protective measures. The panel recommended that tribunals and parties think about protecting sensitive proprietary information throughout the arbitration process,

i.e., even as early as when drafting the arbitration clause and the terms of reference, and further through protective orders and, if necessary, with the help of confidentiality advisors and other available tools.

Submitted by Sarah Reynolds, ArbitralWomen member, Managing Partner, Goldman Ismail Tomaselli Brennan & Baum LLP, Chicago, USA, Patricia Shaughnessy, ArbitralWomen member, Professor, Stockholm University, Stockholm, Sweden and Claire Morel de Westgaver, ArbitralWomen member, Partner, Brian Cave Leighton Paisner, London, UK

Energy reforms in Latin America: an impact for arbitration?, on 23 September 2021, by Webinar and In-person



Top to bottom, left to right: Guillermo Petricioli Alfaro, Lédéa Sawadogo-Lewis, Melissa Ordoñez, Christopher Goncalves and Omar Guerrero

On 23 September 2021, Hogan Lovells' Paris International Arbitration team organised and hosted a hybrid zoom and live conference titled 'Energy reforms in Latin America: an impact for arbitration?', as part of the 2021 edition of Paris Arbitration Week. The conference was introduced by **Lédéa Sawadogo-Lewis**, Business Lawyer, Hogan Lovells, Paris, France, and brought together a distinguished panel of speakers familiar with Latin America in order to discuss the recent developments in the energy market and regulations on that continent, and their potential impact for arbitration.

The moderator for the event was ArbitralWomen member **Melissa Ordoñez**, Counsel and Paris Ambassador for the global LATAM practice of Hogan Lovells. She opened the session by pointing to the shifting landscape in the energy sector brought about recently by climate change and the global transition towards cleaner energy, a key topic for Latin America, a continent well known for its wealth of natural resources.

ArbitralWomen member Dr **Gloria Alvarez**, an international arbitrator and lecturer at the University of Aberdeen, Scotland, UK, and co-editor of the recently released book titled 'International Arbitration in Latin America:

Energy and Natural Resources Disputes' (Wolters Kluwers, 2021) highlighted the current global energy crisis caused by a 'perfect storm' of supply bottlenecks, taking the situation in Brazil and Ecuador as two examples of this crisis. She emphasised the increasing innovation to tackle current problems in the sector, beyond institutional improvements, but also pointed to recurring legal issues witnessed in Latin America's long history of energy arbitration disputes.

Christopher Goncalves, Managing Director of the Berkeley Research Group's Energy & Climate practice, Washington, DC, USA, provided the audience with an overview of past and present energy reforms in Latin America, with a spotlight on policies in Mexico, and shared his insights on implications for disputes, in particular regarding the evaluation of prospective claims.

Omar Guerrero, co-head of international arbitration and litigation and Managing Partner of Hogan Lovells' office in Mexico City, brought a practitioner's perspective to the discussion, and covered Latin America's international investment arbitration landscape, mentioning that business players might sometimes wish to modify their corporate structures in order to enjoy effective protection for their investments. He also

focused on the recent energy reforms in Mexico, emphasising the interplay of domestic (especially constitutional *amparo* proceedings) and international legal remedies available to potential claimants.

Finally, **Guillermo Petricioli Alfaro**, Litigation Legal Manager for TC Energy in Mexico, shared an in-house counsel's view on recent energy reforms in Latin America, noting that companies faced strategic choices in adapting to these regulatory changes. He went on to introduce the audience to the topic of indigenous peoples' consultations in Mexico, an important element of energy projects in the country, and noted that such consultations are set to become more widespread and should be taken into account in the development of future projects.

Fielding questions from Melissa Ordoñez and the audience, the speakers also went on to discuss Latin America's diverse energy mix, and its evolution in light of global clean-energy targets. The conference concluded with a cocktail hosted by Hogan Lovells Paris' office.

Submitted by Melissa Ordoñez, ArbitralWomen member, Counsel in the International Arbitration team and LatAm Ambassador, Hogan Lovells, Paris, France

4th Brazilian Arbitration Forum, on 23 September 2021, by Webinar and In-person

On 23 September 2021, as part of the Paris Arbitration Week 2021, ICC Arbitration, Sciences Po, Comitê Brasileiro de Arbitragem – CBar and Sciences Po Arbitration Society were pleased to host the 4th Brazilian Arbitration Forum. The event was held in a hybrid format and featured over twenty specialists speaking on construction arbitration, the Singapore Convention on Mediation, clashes between common law and civil law and arbitrator immunity and liability. The event was introduced by **Eleonora Coelho** (CAM-CCBC), **André Abbud** (CBar) and Professor **Diego P. Fernández Arroyo** (SPLS) and was composed of 4 different panels.

In the first panel, **Katherine Spyro Spyrides** (Boissésou Arbitration), **Gustavo Scheffer da Silveira** (Mayer Brown – Taui & Chequer Advogados), **Rodrigo Martini** (Barros Martini Advogados) and **Patrick Baeten** (Engie) discussed infrastructure and construction arbitration and focused

on whether such arbitrations were meeting its users' expectations. The panel was moderated by **José Ricardo Feris** (Squire Patton Boggs).

The second panel focused on the Singapore Convention on Mediation, its potential links with arbitration, and whether this instrument will be a game changer. The participants in this panel were **Mônica de Salles Lima** (FSL Advogados Associados), **Filipa Cansado Carvalho** (Independent Arbitrator) and **Isabel Cantidiano** (Cantidiano Advogados), and it was moderated by **Bruno Sousa Rodrigues** (Sciences Po Law School).

The third panel discussed the clash between common law and civil law in international arbitration, including the different approaches to the standard of proof found in different jurisdictions. The participants of this third panel were **Flávia Foz Mange** (Mange & Gabbay – Sociedade de Advogados), **Giovanni Nanni** (Nanni Advogados), **Marie-Isabelle Delleur** (Clifford

Chance) and **Adriana Braghetta** (Adriana Braghetta Advogados). This panel was moderated by **Ana Serra e Moura** (Deputy Secretary General of the ICC Court).

The last panel discussed the challenges of being an arbitrator today in light of recent developments on immunity and liability of arbitrators in Brazil, notably in the event that the arbitral award is annulled. The panel was composed of **Arthur Gonzalez Cronemberger Parente** (Mattos Filho), **Mariana Conti Craveiro** (ContiCraveiro Advogados), **Eduardo Grebler** (Grebler Advogados) and **Selma Lemes** (Selma Lemes Advogados). It was moderated by **Renato Stephan Grion** (Pinheiro Neto Advogados).

The event was a success and the discussions between the panellists led to interesting and thought-provoking debates.

Submitted by Karen Siwek, Associate, Clifford Chance, Paris, France

Non-Monetary Relief in International Arbitration of M&A Disputes, on 23 September 2021, by Webinar and In-person

This article is a non-exhaustive summary of a hybrid conference organised during the Paris Arbitration Week 2021 by Jeantet. The panel discussed international arbitration of M&A Disputes, and in particular the types of non-monetary relief which parties to such transactions may seek. The panel, moderated by Dr **Ioana Knoll-Tudor** (Jeantet, partner) was composed of **Francois de Verdiere's** (The Goodyear Tire & Rubber Company, Associate General Counsel), **Beata Gessel-Kalinowska vel Kalisz** (GESSEL Attorneys at Law, Founder and Senior Partner), **Edward Poulton** (Baker & McKenzie LLP, Man-



Left to right: Sverker Bonde, Ioana Knoll-Tudor, Ali Baydoun, Beata Gessel-Kalinowska vel Kalisz and Edward Poulton

aging Partner), **Sverker Bonde** (Delphi, Partner), **Ali Baydoun** (Jeantet, Counsel).

Circumstances in Which Parties May Want to Seek Non-Monetary Relief

M&A disputes arise when (i) the terms of the deal are ambiguously drafted, (ii) the purchasing company conducted insufficient due diligence of the target company, leading to failed expectations and (iii) extraordinary circumstances occur, such as the Covid-19 pandemic. Monetary damages may not be adequate for all disputes. This is the case, for example, where a party breaches confidentiality, non-compete, non-solicitation or non-poaching engagements. Equally, a buyer may seek an order forcing a reluctant seller to complete the transaction, rather than receiving a sum of money as compensation; not least, because, for example, of the unique nature of a target company (its brand, know-how, employees, IP).

Types of Non-Monetary Relief Available to the Parties to an International M&A Arbitration

Although the ability of arbitral tribunals to grant non-monetary remedies depends on the arbitration law of the seat of the arbitration and the law applicable to the contract, the main types of non-monetary remedies granted by arbitral tribunals are:

1. Specific performance
2. Prohibitory injunctions
3. Restitution
4. Declaratory Relief
5. Rectification

Specific Performance

From a philosophical standpoint, specific performance is a more adequate remedy than damages, since it enables the aggrieved party to an M&A deal to obtain exactly what it contracted for. However, enforcing an order for specific performance may become difficult when:

1. the transaction contains **cross-border elements**, with the target company located in one jurisdiction, while parties, assets, directors or employees are from different jurisdictions;
2. there is a **significant change in position**, for example where a target company divests itself of a chunk of its business, such that performance cannot be the same;
3. there are **barriers outside the parties' control**, such as competition clearances or authorisations from national regulatory bodies.

Declaratory Relief

Declaratory relief is a particularly useful tool in cases where the parties want to preserve their commercial relationship. The famous *Aramco Arbitration* is a case in point, where the parties

invested the tribunal only with the power to grant declaratory relief. A second circumstance is where there is a breach of contract where damage has not yet occurred but is anticipated in the future. The ICC caseload from 2010 to 2012 shows that in slightly over 10% of the cases parties sought such relief.

Regarding the conditions for the grant of such relief, the common law world stands in contrast with its civil law counterpart. As is usually the case, international arbitration bridges this divide, with arbitrators taking the middle way approach, adopting a 'converged interest' approach.

Recommendations from the Panel

Finally, the panel recommended that:

1. arbitration be chosen as the dispute resolution forum for such disputes, primarily because of enforcement aspects and the expertise required by the adjudicator;
2. when drafting, parties do not exclude non-monetary remedies from the type of remedies to be granted by tribunals;
3. dispute teams work closely with transactional teams to ensure clear and accurate drafting, to prevent or better administer disputes when they arise.

Submitted by Ioana Knoll-Tudor, ArbitralWomen member, Partner, Jeantet, Paris, France

From cost center to profit center: corporate portfolio financing, on 23 September 2021, by Webinar and In-person

During the 5th edition of the Paris Arbitration Week, Vannin Capital (now integrated to [Fortress Investment Group LLC](#) ) hosted an event on third party funding, 'From cost center to profit center: Corporate Portfolio Financing' .

The session was moderated by **Yasmin Mohammad**, ArbitralWomen member, Director at Fortress Investment Group and President of the Paris Arbitration Week Board. The panel was composed of **Anastasia Davis Bondarenko**, ArbitralWomen

member, Senior Vice President at Fortress Investment Group, **Patrick Hébréard**, Managing Director at FTI and **Karl Hennessee**, Senior Vice-President and Head of Litigation at Airbus Legal & Compliance.

The debate was focused on the



Left to right: Coralie Tauziat, Anastasia Davis Bondarenko, Yasmin Mohammad, Karl Hennessee and Patrick Hébréard

benefits of third-party funding, its mechanics, and the accounting aspects from the funder's point of view but also from the company's point of view.

The discussion first dealt with the objectives of third-party funding and the definition of a portfolio of cases. Then, the speakers developed the key characteristics and economic benefits of corporate portfolio financing: upfront


cash availability, risk diversification, and pursuing claims that would not have been brought otherwise.

Moreover, from a corporate point of view, the importance of accounting in portfolio financing was highlighted to assess and reach a balance between potential risks and potential gains. The company only has to disclose information that the funder needs. This is

primarily statistical information, as opposed to confidential information that the company would not want to share with an external party.

A debate then ensued on the extent of a portfolio and its evaluation between funders and companies, the notion of a portfolio of portfolios and what it entails.

The final remarks highlighted how corporate portfolio financing now allows companies to view litigation as an asset class rather than a liability.

Thanks to **Emma Ruby** and **Firas AIDI** of [Master 2 Arbitrage et Commerce International \(MACI\)](#) .

Submitted by Inès Nizigama, Project Manager for the PAW Board and Organising Committee

Due process and virtual hearings: Is the marriage going to last after COVID?, on 24 September 2021, In-person

After more than a year of Covid-19 pandemic, it is fair to say that virtual hearings have become a 'hot topic'. On 24 September 2021, as part of the Paris Arbitration Week, CEPANI40 and CFA40 co-hosted an in-person event on this subject in the magnificent courtyard of the Hotel Alfred Sommier.

The conference focused on the impact of virtual hearings on the right to due process, particularly in the post-Covid world now that the borders are reopening and international travel slowly resuming.


The panel was composed of two ArbitralWomen members, **Valentine Chessa** (Partner at Castaldi Partners, Paris) and **Iuliana Iancu** (Partner at Hanotiau & van den Berg, Brussels), as well as **Sebastiano Nessi** (counsel at Schellenberg Wittmer, Geneva), **Giacomo Rojas Elgueta** (Partner at DR Arbitration and Litigation, Rome) and **Aurélien Zuber** (Counsel at the ICC Court Secretaria, Paris). The debate was co-moderated by **Eleonore Caroit**



Left to right: Sebastiano Nessi, Iuliana Iancu, Valentine Chessa, Aurélien Zuber and Giacomo Rojas Elgueta

(CFA40 Co-chair and Partner at Bastions Avocats, Geneva) and ArbitralWomen member **Sophie Goldman** (CEPANI40 co-chair and Partner at Tossens Goldman Gonne, Brussels).

Among the first discussed topics was the question whether there exists a right to a physical hearing in inter-

national arbitration. While Giacomo Rojas Elgueta gave a general overview of the [ICCA Research Project](#)  on the topic, which he co-edited, Iuliana Iancu, Sebastiano Nessi and Valentine Chessa commented more specifically on their own jurisdictions, i.e. Belgium, Switzerland and France.



View of the audience and the venue of the CEPANI40 / CFA40 event

Aurélien Zuber gave the ICC's feedback and perspective on virtual hearings and due process. He explained that the pandemic showed the need to update the ICC arbitration rules and to provide for a new express provision allowing virtual hearings (see Article 26 of 2021 version of the ICC Arbitration Rules). He also stressed the importance of well-thought protocols and procedural orders with

respect to the organisation of virtual hearings in order to avoid various due process issues.

The panellists further discussed whether the impact on due process should be addressed differently depending on whether (i) there are no travel restrictions, (ii) it is a fully remote or semi-remote hearing and (iii) it is an evidentiary hearing or a hearing on legal arguments.

The floor was then opened to the audience for questions and comments. The participants were very keen to share their own personal experiences and to ask the panellists to address various practical considerations, such as the relevance of witnesses' body language or the due process challenges posed by technical difficulties. We also heard different views as to whether a virtual hearing still requires the arbitrators to gather in the same room while counsel are on screen.

Some observed that virtual hearings may prove beneficial in empowering women. The thought was that the distance resulting from the screen enables women to feel on an equal footing with the men participating to the hearing and to operate more easily, including in the context of cross-examination.

After the conference, the participants had the pleasure to pursue the discussion while having a coffee and croissants. It felt good to see each other in person again!

Submitted by Sophie Goldman, ArbitralWomen member, Partner at Tossens Goldman Gonne, CEPANI40 co-chair, Brussels, Belgium

Connecting Europe to the Middle East: The Post-Covid dispute resolution era, on 24 September 2021, In-person

On 24 September 2021, as part of Paris Arbitration Week Obeid & Partners organised and hosted a webinar entitled 'Connecting Europe to the Middle East: The Post Covid dispute resolution era'. The webinar brought together a panel of distinguished practitioners to discuss arbitration as a preferred forum for dispute resolution in the region, highlighting recent developments, sector trends and the implications of the pandemic in further keeping the region connected to Europe.

The moderator, Professor Dr **Nayla Comair-Obeid**, ArbitralWomen

member, Partner, Obeid & Partners, opened the discussion by announcing the rebranding of the firm to Obeid & Partners and the opening of their new Paris office. She then kicked off the discussion by asking the panellists about trends in the region and jurisdictions in MENA we are witnessing as hubs for international arbitration. **Paula Hodges QC**, Head of Global Arbitration Practice, Herbert Smiths Freehills, President of the LCIA, highlighted the UAE as a key centre in the region. She discussed the presence of the LCIA and ICC as experienced institutions

which have played an important role in shaping the culture of arbitration in the region in recent decades. The experience of these institutions alongside the regional expansion of economies and increased cross-border investment have influenced the upward trend of arbitration as a preferred regime for dispute resolution.

Constantine Partasides QC, Partner, Three Crowns, mentioned Bahrain as an up-and-coming centre for arbitration and suggested that the development of the Bahrain Chamber for Dispute Resolution further high-



Left to right: Samaa Haridi, Nayla Comair-Obeid, Constantine Partasides, Paula Hodges and Gerhardt Will

lights the ambition of the region to be an established player in the field of international arbitration.

The discussion then moved on to the issue of localisation and ArbitralWomen member **Samaa Haridi**, Partner and Head of Middle East Regional Practice, Hogan Lovells, discussed the implications of the recent decree in Dubai, [Decree No. \(34\) of 2021 Concerning the Dubai International Arbitration Centre](#). She mentioned concerns over enforceability of awards and how the Decree might impact Dubai as a friendly seat of arbitration giving Abu Dhabi Global Market Arbitration Centre an opportunity to be seen as a more favourable option.

The discussion gave way to the enforceability of arbitral awards and the panellists observed that there has been much speculation on this controversial topic and noted the constant

fluctuation across MENA countries, but they concurred that there has been a shift towards a pro-enforcement attitude.

Professor Dr Nayla broached the importance of certain sectors in arbitration, including oil and gas and construction and the rise of nuclear and renewables cases. Paula emphasised the importance of the oil & gas sector for the region and the need for a stable regime to attract foreign investment. **Gerhardt Will**, Senior Counsel, Obeid & Partners, mentioned the growth of the renewables and nuclear sectors and added that the complexity of these contracts will ensure the need for a trusted method of dispute resolution.

As the session concluded, Professor Dr Nayla highlighted two recent factors that have resulted in increased connectivity between MENA and Europe, i.e., the pandemic and diversity. The speak-

ers agreed that the pandemic has led to increased connectivity, enabling more parties across jurisdictions to participate remotely. This has resulted in more visibility and has allowed for parties to be more open-minded as to where their arbitrators are seated, noted Samaa. Hence, Middle Eastern arbitration practitioners are appearing more readily all over the world. The panellists concluded by highlighting the importance of joining the ERA Pledge and how clients are also driving the trend towards diversity when appointing arbitrators.



Click here for the reording.
Passcode: 6#7qTYhi

Submitted by Prof Dr Nayla Comair-Obeid, ArbitralWomen member, Partner, Obeid & Partners, Dubai, UAE

ECT modernisation – quoi de neuf?, on 24 September 2021, by Webinar and In-person

It is certainly fair to say that the Energy Charter Treaty (ECT) has attracted a great deal of attention recently, not least because of the CJEU's recent judgment in *Moldova v Komstroy*. Negotiations for the ECT's modernisation are, moreover, continuing apace, with the seventh negotiation round having concluded at the beginning of October, and an eighth round scheduled for November. It was therefore timely to ask 'ECT Modernisation – Quoi de Neuf' as part of Paris Arbitration Week (PAW) at an event co-organised by EFILA and



Stephanie Collins

ESSEC Business School and hosted by Quinn Emmanuel.

Two ArbitralWomen members – **Amy Frey** (Partner, King & Spalding, Paris) and **Stephanie Collins** (Associate, Gibson Dunn, London) – both of whom have experience acting in ECT disputes, including a number of the renewables disputes against Spain, led the discussion and were joined on the panel by **Alexander Leventhal** (Of Counsel, Quinn Emmanuel), Professor **Veronika Korom** (ESSEC) and Professor **Nikos Lavranos** (EFILA). The event was a hybrid one and

a number of people submitted questions for discussion, both in-person and virtually.

The panellists first set out the context in which the ECT was initially negotiated, noting that the world has changed: At that time, climate change was not a widely recognised concern and alternative technologies to fossil fuels were prohibitively expensive. The ECT did not (and arguably could not) foresee the enormous change, whether technical, political or societal, since then. Against that backdrop, the speakers focused their discussion on whether the ECT requires modernisation in order to 'green' the treaty and what types of amendments this might involve.

While noting the views of States like Japan, who believe the ECT is adequate as-is, the speakers concentrated, in par-

ticular, on the European Commission's proposals to amend the ECT, since these are both extensive and well publicised. With reference to those proposals, there was some recognition that it might be beneficial for the definitions in the ECT to be expanded to explicitly cover certain new clean energy sources, notwithstanding the fact that the ECT already unquestionably covers clean energy. Other proposals such as amending the Fair and Equitable Treatment provision or changing the definition to indirect expropriation might prove to be a more complex exercise and there were views expressed as to whether this would in reality promote the green agenda.

Panellists also considered proposed amendments, such as whether the State-to-State mechanism in the ECT could be used as a means to enforce

the Paris Agreement; whether, from a dispute resolution perspective, the ECT modernisation process is still relevant in the intra-EU context, in light of Komstroy; and whether, post-Komstroy, there is opportunity for the UK, which has now left the European Union.

Bottom line: Much like the world itself and its global energy markets, the ECT is changing. This is a significant opportunity to advance global clean energy objectives, but Contracting Parties must take care not to undermine those objectives in the process.

Stay tuned for details of the EFILA Annual Conference 2022, which will take place in Amsterdam.

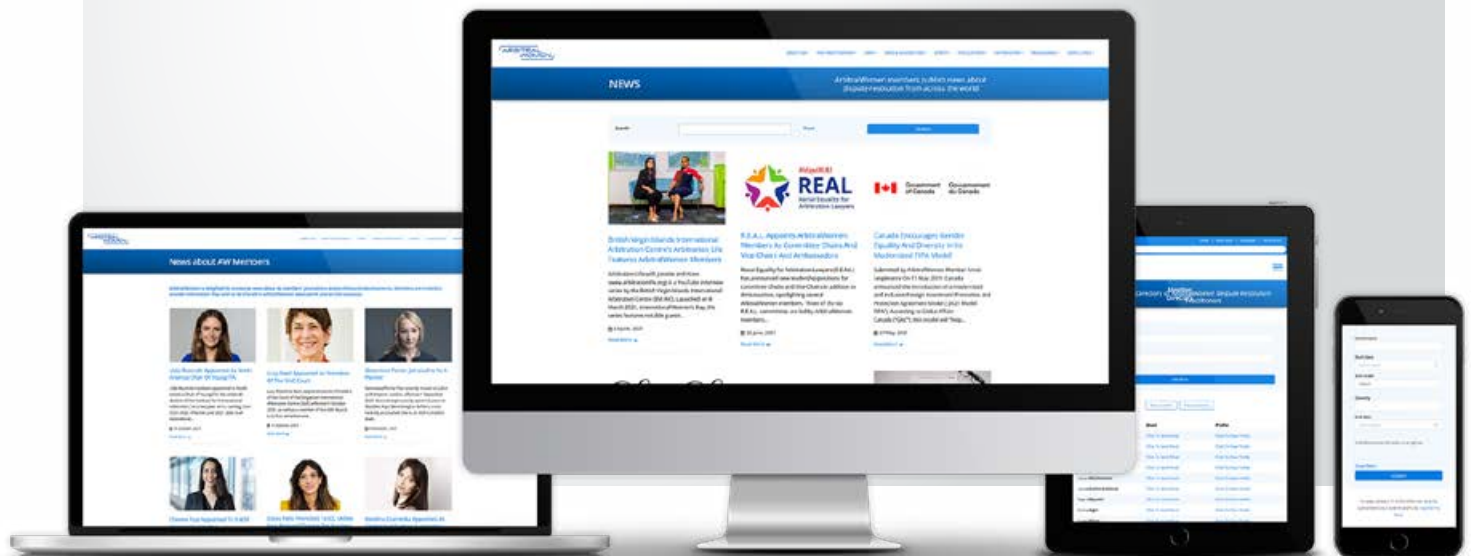
Submitted by Stephanie Collins, ArbitralWomen member, Associate Attorney, Gibson Dunn, London, UK

Snapshots of the inauguration cocktail of PAW 2021



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