ArbitralWomen Newsletter

ARBITRAL WOMEN — Uniting and promoting women in dispute resolution

www.arbitralwomen.org

Issue 53 | December 2022

# Celebrating innovation and diversity in 2022 and beyond!

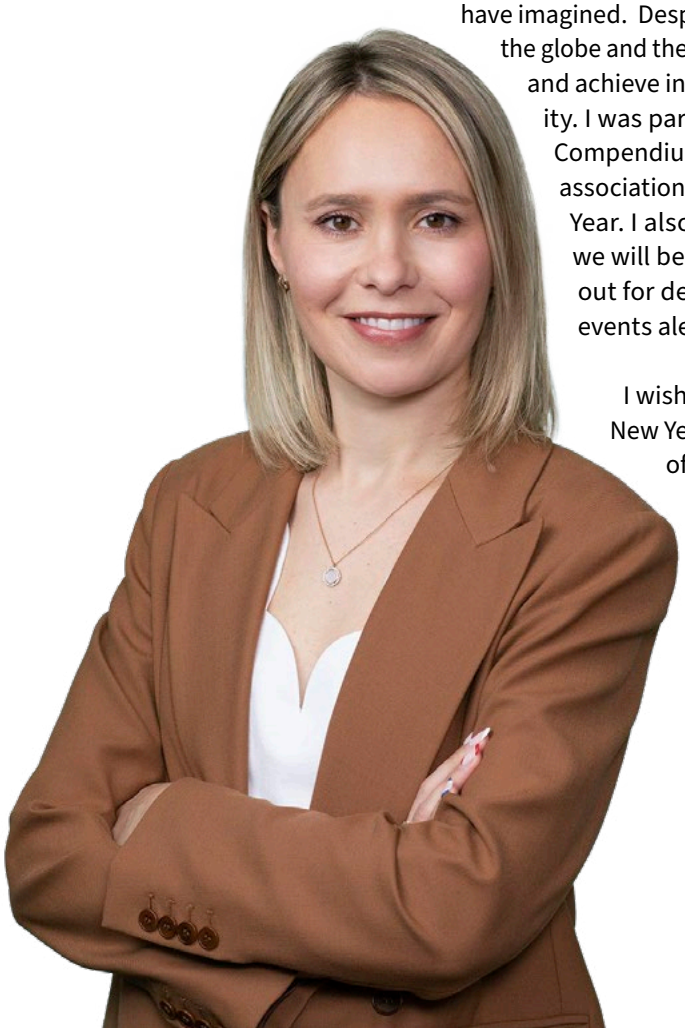
*As 2022 comes to an end, we celebrate this year by showcasing women in dispute resolution's innovations and contributions to the field.*

# President's Column

*"...we will be celebrating ArbitralWomen's 30th year in 2023 – look out for details of our celebrations in upcoming ArbitralWomen events alerts!"*

**As we round off another fantastic year for women in dispute resolution,** and look towards 2023, I am delighted to welcome you all to the new, revamped and streamlined ArbitralWomen newsletter. In this 53rd issue, as part of our Women Leaders in Arbitration series, we interview Marie-Andrée Ngwe, who is widely recognised as a luminary of international arbitration and mediation in Francophone Africa. This is followed by an informative guide to arbitration in the metaverse, penned by ArbitralWomen Board member Elizabeth Chan and ArbitralWomen member Emily Hay. I certainly learnt a thing or two about the metaverse reading this — fascinating stuff!

We also feature a timely article on the impact of Russian sanctions on arbitration by ArbitralWomen member and VIAC Secretary General Niamh Leinwather, who was heavily involved in lobbying EU institutions to exempt arbitral proceedings from sanctions prohibitions. Finally, we report on ArbitralWomen's event on Innovation at ICCA in September, generously hosted by Homburger, and on our recent Diversity Toolkit training session delivered in Singapore by ArbitralWomen Board members Mary Thomson and Louise Barrington.



2022 has been a difficult year for many — far more difficult than many could have imagined. Despite the challenges, women in dispute resolution across the globe and their allies came together to launch new diversity initiatives and achieve incremental progress toward gender parity and inclusivity. I was particularly excited by the launch of Mute Off Thursdays Compendium of Unicorns: A Global Guide to Women Arbitrators in association with Burford Capital and GAR! More on that in the New Year. I also wanted to take a moment to remind members that we will be celebrating ArbitralWomen's 30th year in 2023 – look out for details of our celebrations in upcoming ArbitralWomen events alerts!

I wish you all happy holidays and a safe, happy and healthy New Year in 2023. Best wishes from the ArbitralWomen Board of Directors!

*Louise Woods, Vinson & Elkins*
*ArbitralWomen President*

# Women Leaders in Arbitration

# Marie-Andrée Ngwe

**Marie-Andrée Ngwe is recognised as a luminary of** international arbitration and mediation in Francophone Africa. A native of the French island of La Réunion, she moved to Cameroon over 46 years ago, founding one of the leading business law practices in the region. She became a trusted advisor to countless international firms and corporates, and a mentor to generations of practitioners. Since 2015, she has focused on international dispute resolution, wearing many hats: she sits as arbitrator and mediator, is the current President of the *Centre de Médiation et d'Arbitrage du GICAM* (*CMAG*), one of Cameroon's arbitral institutions, and is a member of the African Development Bank's Sanctions Appeal Board.

**Gisèle Stephens-Chu**, ArbitralWomen Board's Secretary and Newsletter Editor, interviewed Marie-Andrée about her career journey, advice for younger practitioners and perspectives on diversity and international dispute resolution in the African context.

**As a woman and a foreigner, it must have been challenging to build a legal career in Cameroon several decades ago. Can you tell us how you succeeded in breaking into this market?**

I moved to Cameroon in 1976 with my husband and became a member of the Cameroonian bar in 1981. After practising for ten years as an associate in a local firm, I decided to found my own practice in 1986, Cabinet Marie-Andrée Ngwe.

At the time, lawyers in the market were generalists. However, due to the development of international investment in Cameroon, my practice eventually became increasingly focused on all aspects of business law (corporate / M&A, project finance, regulatory and dispute resolution). Over the years, I acted as local or lead counsel on many domestic and international investment projects in Cameroon (including the Tchad-Cameroon pipeline project). I had the opportunity to work in a wide range of sectors, including oil and gas, construction, mining, telecoms and banking. Over time, my firm grew to a team of 30 people, including 11 lawyers, thus becoming one of the largest firms in the market.

When I first began practising as a lawyer, there were not many women in the local market. I had to work twice as hard as my colleagues to establish myself. Early on, while working on international mandates, I realised I was unfamiliar with many issues and international practices, and worked hard to learn and master these. Keeping an open mind and willing to learn continuously is essential for anyone in legal practice. Maintaining an impeccable reputation is also critical for a local practitioner on the international plane. My firm succeeded in attracting an international clientèle because we adapted to international standards and became known for our ethics and professionalism. It was also known for its high proportion of female lawyers, which was described as a "women's battalion"!

*Keeping an open mind and willing to learn continuously is essential for anyone in legal practice.*

**What attracted you to the field of international dispute resolution?**

I had initially studied law because I wanted to become a judge. While my career as counsel was extremely fulfilling, I became increasingly keen to fulfil my original aspiration of resolving disputes. My professional experience had also confirmed that arbitration was the natural forum for international business disputes. In addition, I was attracted to mediation, due to its techniques for improving communication and the flexible solutions it offers parties. In my view, arbitration and mediation do not compete with each other, but rather are complementary tools that allow companies and investors to manage disputes more effectively.

Promoting the understanding and use of arbitration and mediation in Cameroon and beyond has been rewarding: it contributes to enhancing the rule of law and a more peaceful environment for investment and businesses.

**How did you develop your practice in international arbitration and mediation?**

My previous career as counsel on international transactions and disputes provided a natural stepping stone: the profile and international network I had built facilitated my entry in the field. I became a full-time

*(...) the CMAG recently signed the ERA Pledge, and the Permanent Committee (itself composed of an equal number of men and women) is attentive to diversity when making appointments (...)*

arbitrator and mediator in 2015. Before then, I had appeared as counsel in proceedings to enforce and annul arbitral awards. In parallel, I progressively developed my knowledge and profile in the field, through publications, trainings and conferences in Cameroon and internationally. I contributed to the reforms of the Organisation for the Harmonisation of Business Law in Africa (OHADA)'s Uniform Acts on Arbitration and Mediation in 2017, seeking to bring them in line with international standards and best practices. I also became involved in the development of the CMAG, and was appointed Vice-President and later President of the Centre's Permanent Committee in 2015.

In 2014, I gained my first arbitrator appointment, sitting on an ICSID tribunal with William 'Rusty' Park and Karim Hafez. Since then, I have sat as sole arbitrator or President of the tribunal in arbitrations under ICC or CCJA (OHADA's Common Court of Justice and Arbitration, based in Côte d'Ivoire) rules. My previous work as counsel on investment projects across the OHADA region initially created conflicts, or the need to make disclosures. However, with time passing, that has become less of an issue and I am able to take on more appointments. I believe that it is critical, for one's reputation as arbitrator, to take a rigorous view on these issues.

I also act as mediator or conciliator. In addition to mediating commercial disputes, I am designated to the ICSID list of conciliators and have sat in one ICSID conciliation proceeding.

Finally, I also sit on the Sanctions Appeal Board (SAB) of the African Development Bank (ADB). The ADB and other international financial institutions have put in place governance arrangements to oversee companies involved in public projects that they finance, including sanctions, in the event such companies engage in fraudulent and corrupt practices. The Sanctions Appeal Board is an independent body that hears appeals from the companies against these sanctions, and aims to promote best practices among local companies involved in public projects. It gives concrete insights into the economic and commercial issues at stake in these projects, and the ethical concerns arising out of public tenders. I am currently working with my colleagues on the SAB to improve its rules, in particular with respect to ethics and due process.

### Arbitral institutions have blossomed all over the African continent. Can you tell us more about the CMAG, and what sets it apart?

The CMAG is affiliated to one of Cameroon's main business trade associations, the GICAM (*Groupement Interpatronal du Cameroun*). As an arbitral institution, it operates wholly independently from the GICAM. However, its proximity to the local business environment makes it particularly well-suited, in my view, to handling business and commercial disputes in Cameroon. I actively encourage companies present in the market to include our arbitration clauses in their contracts, where appropriate.

As President, I am involved in appointments of arbitrators and mediators, reviewing arbitral awards, promoting the use of the Centre through trainings and events, and generally overseeing its activities. The CMAG's arbitration rules were revised in 2019 to bring them in step with international standards, notably with respect to independence of arbitrators (focusing in particular on the duty to make disclosures) and the inclusion of various deadlines designed to make proceedings more expeditious. The CMAG also acts as an appointing authority for ad hoc arbitrations.


Hosting 6th SOAS Arbitration in Africa Conference in Douala


At UIA conference in Dakar

*At the same time, calls for gender diversity must be handled with sensitivity in the African context.*

We periodically review our panel of arbitrators and mediators, to ensure that this includes experienced international and local practitioners. The panel is not, however, a closed list. We are also focused on the question of diversity: the CMAG recently signed the ERA Pledge, and the Permanent Committee (itself composed of an equal number of men and women) is attentive to diversity when making appointments. We seek out women with appropriate experience and qualifications to apply to join our panel, and otherwise encourage women to attend our trainings. We track our progress through statistics on appointments. While less than a third of the arbitrators on our panel have been women, we are currently updating this and expect the proportion of women to increase significantly.

Aside from administering arbitrations and mediations, the CMAG is very invested in the development of a local arbitration community. For local practitioners to be able to engage in the international arbitration community we believe it is essential for them to develop a domestic arbitration practice and, in parallel, to gain exposure to international practices. To that end, the CMAG organises regular trainings focused on the domestic market and the OHADA region, while also seizing opportunities to host international conferences and events (such as the 6th SOAS Arbitration in Africa conference in 2020).

### How do you think diversity can be improved in the field?

Looking at the legal market in Cameroon, the representation of women has improved dramatically since I began practising: there are many women with successful legal careers, and some lead excellent local firms.

However, it remains challenging for younger African women practitioners to break into the legal market, particularly at the international level, as their technical competence, experience, commitment and ethics may still, unfortunately, be called into question. Being young, female and from the Global South can represent a triple hurdle. In addition, women need to have solid childcare arrangements in place, which come at a significant cost, and a partner that understands their aspirations. They must also refrain from self-censorship.

This is why the work of organisations such as ArbitralWomen is critical to achieving greater diversity, as it helps women to connect, get advice and mentoring, and raise their profile. I say this as someone who has personally benefited from the increasing calls for gender diversity in international arbitration and mediation.

At the same time, calls for gender diversity must be handled with sensitivity in the African context. This is because African practitioners in general, whether male or female, are underrepresented in international dispute resolution. Diversity programmes should not operate to prevent male talent from entering the field. At the same time, gender balance must be kept in mind, to avoid creating a similar problem to that observed in the international arbitration community. The key is experience and expertise, and both women and men should be given equal opportunity to access it.

*(...) established practitioners have a responsibility to younger practitioners, and should therefore look to support them in building their career (...)*

Signing the ERA Pledge on behalf of the CMAG, with Gisèle Stephens-Chu, Sylvie Bebohi Ebongo and Aurélia Kamga

*(...) if in doubt, practitioners should resist the urge to take on an appointment or mandate that could ultimately be fatal to their reputation.*

### What is your advice for younger practitioners seeking to enter the field of international dispute resolution?

Developing a strong practice in domestic litigation and arbitration can help establish the necessary credibility (and financial resources) to enter the international field. The opinion of international firms still counts for a lot, and if you have a good reputation as local counsel you will get recommended more often by international practitioners.

As a starting-point, younger practitioners must seek out appropriate training programmes on arbitration and mediation: unfortunately not all training programmes are equal, and I personally think there is a lack of professional skills-training programmes for the OHADA region (in contrast with Anglophone African practitioners, who can access programmes and accreditations such as those offered by the CIArb). Virtual trainings and events are helpful in increasing access to information, but require investment in resources and equipment that should not be underestimated for African practitioners. That is why the CMAG was pleased to host one of the sessions of the recent SOAS/ALSF skills-training programme in international arbitration [*Ed.: co-organised by ArbitralWomen members Prof.* Emilia Onyema *and* Gisèle Stephens-Chu*, with a training faculty that included ArbitralWomen members* Nagla Nassar*,* Sylvie Bebohi Ebongo *and* Laurie Achtouk-Spivak], which gave local practitioners the opportunity to practice advocacy and other practical skills, and get feedback and advice from international practitioners.

Participating and speaking at arbitration conferences and seminars is important, as well as engaging with the arbitration community through the various local and pan-African arbitrators' associations, such as AfAA, AAA, or APAA. Younger practitioners should seek out tribunal secretary appointments. And when appointed as an arbitrator, it is important to work hard and be engaged and active on the tribunal. In that context, observing international standards and best practices, especially with respect to ethics and conflicts of interest, is critical: if in doubt, practitioners should resist the urge to take on an appointment or mandate that could ultimately be fatal to their reputation.

I also believe that established practitioners have a responsibility to younger practitioners, and should therefore look to support them in building their career: for instance, they should use tribunal secretaries, or ensure that younger co-arbitrators fully participate in deliberations; actively seek out young talent, to recommend them when the opportunity arises; and help younger practitioners gain speaking slots at conferences.

### How do you see arbitration and mediation developing on the African continent?

With respect to the OHADA region (covering 17 Francophone African countries), I believe it is important to promote the recourse to both domestic and regional institutions and mechanisms.

At a regional level, arbitration under the rules of arbitration of the CCJA offers the undeniable advantage of allowing enforcement across all 17 OHADA countries. Moreover, annulment proceedings relating to CCJA awards are brought directly before the CCJA, in contrast with challenges against domestic awards, for which there are two instances (first, the local court of appeal, and then the CCJA).

There is a tendency to view domestic arbitration as competing with CCJA arbitration, but that perspective is incorrect in my view. CCJA arbitration and domestic arbitration can coexist effectively to meet the numerous different needs for dispute resolution. And it is more important to focus on promoting the use of arbitration in general across the OHADA region.

I accept, however, that CCJA arbitration needs to increase in credibility. The rules were modernised in 2017, but there are still structural and practical issues affecting the efficiency of the institution, that are in the process of being addressed.

Mediation and arbitration in combination provide an excellent toolbox for resolving both commercial and investment disputes. In particular, the flexibility of the solutions offered by mediation make it particularly well-suited for the resolution of disputes arising out of the need to legislate for the environment and the promotion of human rights. I recently moderated a discussion on this during the Congress of the Union Internationale des Avocats (UIA) in Dakar, Senegal.

However, the recourse to mediation on the continent remains somewhat limited, with the exception of Burkina Faso. It is therefore important to educate companies about

*It is therefore important to educate companies about mediation, explaining how it differs from negotiation between the parties or through their counsel.*

At the mobile library of charity 'Lire à Douala'

mediation, explaining how it differs from negotiation between the parties or through their counsel. Regarding investment mediation, a different set of rules may need to be adopted than for commercial mediation, given the need for transparency and State decision-making processes.

Finally, I would encourage arbitration and mediation professionals to focus on the African Continental Free Trade Area Agreement (AfCFTA), given its coverage of the entire continent's economies and the original dispute resolution mechanism it puts in place.

### Outside of your professional activities, you also support several charitable and cultural projects. Can you tell us more?

Consistent with my belief in the power of education, I am involved in several educational and cultural projects. I co-founded the charity '*Lire à Douala*' (*Reading in Douala*), that promotes all forms of written expression, creating a forum for readers to meet authors and allow children and young adults (particularly in rural areas) to access books, e.g., through cultural events in schools, writing workshops and a mobile library).

I have supported an orphanage and a charity for street children and, together with my husband, raise funds for various humanitarian assistance projects when the need arises (e.g., renovating a unit for psychiatric patients, and building sanitation for refugees from the Noso region, following the Anglophone Cameroon crisis).

I also work with a local incubator, Jokkolabs Cameroun, to support start-ups developing projects in the field of agriculture and technological innovation.

One of my passions is contemporary African art: I regularly attend exhibitions, such as the Biennale of arts in Dakar, and have a small collection. My current interest focuses on realist artworks that display the poetic, comic and dramatic aspects of daily life in Africa. Another passion is flowers and gardens, drawing on the heritage of my native island of La Réunion.

Finally, for many years, I have been *Conseiller du Commerce Extérieur de la France,* a pro bono activity that is designed to support French investors seeking to enter the Cameroon market.

### What is your most satisfying achievement?

Through my years of practice, I believe I have demonstrated that it was possible for an African law firm to deliver work to international standards, and hope this has paved the way for younger practitioners.

I am also proud of having (at my level) contributed to enhancing legal security and strengthening legal institutions in Cameroon.

# THE HITCHHIKER'S GUIDE TO THE METAVERSE

Lifestylememory - Freepik.com

This is a pun based on Douglas Adams' The Hitchhikers' Guide to the Galaxy. It otherwise has no connection whatsoever to the book. We apologise for the disappointment.

Interested in the metaverse but wondering where to start? Enjoy this *Hitchhikers' Guide to the Metaverse* brought to you by Elizabeth Chan and Emily Hay

## WHAT IS THE METAVERSE?

If the pandemic has taught us anything, it is that we not only can spend a lot of time indoors entertaining ourselves (and others!), but we also *like* to socialise, play and work on our computers.

Think of the metaverse as an extension of the virtual worlds that we already participate in, and indeed, that we carry in our pockets in the form of smartphones.

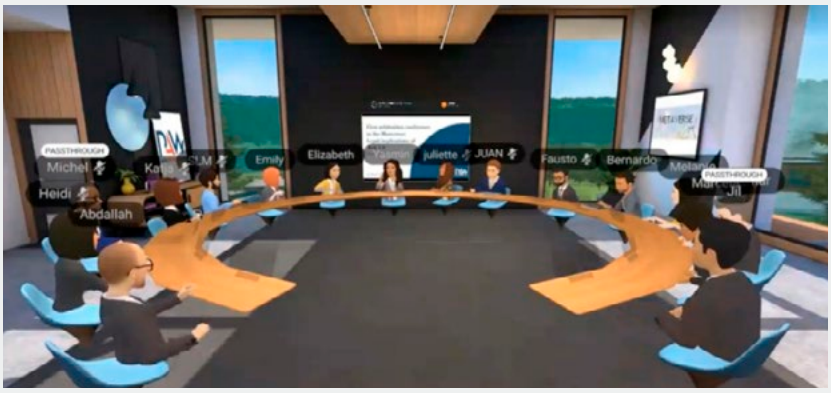
The metaverse is not a novel concept, nor is it a singular concept. In lay terms, imagine it as the Internet in 3D, where you participate in virtual worlds as avatars and where the environment you engage in is brought to life through virtual reality (**VR**) and augmented reality (**AR**) technologies.

There is debate about what exactly is the metaverse and whether it is even here yet. But one thing is for sure: the technology enabling the metaverse is and will keep developing. There will need to be significant investment and development in internet connectivity, computing processing power, hardware, and more to achieve the ambition of the metaverse as a trillion-dollar economy. This is not to mention many of the tricky legal and regulatory issues that will need to be addressed if the metaverse is to be interoperable and truly accessible for all.

## HAVE YOU BEEN TO THE METAVERSE?

Yes (if you consider that the metaverse has already arrived)! We have been exploring different virtual worlds already — and bringing the arbitration community along with us. Take a look at some of our virtual visits below, while wearing our Oculus Quest 2 goggles.

**First-ever Virtual Reality Arbitration Conference, as part of Paris Arbitration Week – 30 May 2022**




Here are 16 of us avatars gathered around a table in Horizon Worlds, with almost 200 more tuning in via video-link.

**First-ever Mute-Off Thursdays session in the Metaverse – 7 April 2022**


Lizzie presented on "The Metaverse, the web 3.0 digital economy and dispute resolution" to a global, online networking group for senior women in arbitration, using Horizon Workrooms.

## WILL THERE BE ANY METAVERSE-RELATED DISPUTES?

What relevance do these virtual adventures have for dispute resolution? As yet, there are few commercial disputes that have arisen directly out of the metaverse. Uses of VR and AR technology and metaverse platforms are still under development and many potential applications remain hypothetical or have not yet been conceived.

However, there have already been many examples of disputes involving digital assets. It is likely that more such disputes will arise in the metaverse context, where digital assets will be a key feature.

We foresee disputes in at least some of the following (non-exhaustive) categories:

- *Users/non-users and metaverse platforms:* potential disputes between users (and non-users) and metaverse platforms are numerous, whether in

**"Meet the Young ICCA Mentoring Programme Mentors" in the Metaverse – 12 June 2022**


Emily co-organised a meeting in Horizon Workrooms with leading arbitration figures, Dana MacGrath (ArbitralWomen's Immediate Past President) and Toby Landau KC.

relation to the value of digital assets, user content, user conduct, intellectual property, rights of third parties, coding errors, technical security, validity of terms, data protection or other regulatory issues;

- *User vs user:* the centralised nature of some metaverse platforms allows users to transact freely among themselves, also leading to potential contractual-style disputes between users on any aspect of a transaction or agreement, such as a sale, license, or services;
- *Commercial disputes with metaverse subject matter:* as commercial parties seek to establish and maintain a presence in the metaverse, they will enter into contractual arrangements for the technical and industry expertise needed to do so.
- *Regulatory actions:* State authorities have begun to address the regulatory implications of digital assets. Regulation in the sphere of the metaverse remains limited, but will inevitably grow.

## WHAT WILL BE THE METHODS FOR RESOLVING THESE DISPUTES?

As with most commercial relationships, there are different options for dispute resolution, and parties can choose their preferred forum to resolve them.

For the resolution of metaverse-related disputes and digital disputes more generally, key options include litigation, international arbitration, and on-chain ADR and other decentralised justice systems.

There are good reasons to believe that arbitration, i.e., a dispute resolution system that results in a binding decision, will be a dispute resolution system of choice for digital disputes. Many metaverse platforms, NFT marketplaces and cryptocurrency exchanges already elect international arbitration in their terms of use for at least some types of disputes. Conventional international arbitration also has the strong appeal of cross-border enforceability under the New York Convention.

In addition to typical arbitration proceedings, an emerging option for the resolution of disputes includes decentralised justice platforms and on-chain ADR, such as Kleros, Jur, and Aragon. These dispute resolution tools are in different stages of development and, as yet, have limited uptake. They often operate as a kind of crowd-sourced justice based on a voting mechanism by anonymous "jurors", with the decision implemented automatically by smart contract.

On-chain ADR is not arbitration, or at least not as we know it. Its potential as an effective dispute resolution tool derives from the ability to resolve

**MetaverseLegal Metaverse Trip via AltspaceVR – 14 April 2022**

As part of a series of monthly visits to the metaverse, a group of us explored Altspace VR and toasted marshmallows by a virtual campfire.

**MetaverseLegal Metaverse Trip via Spatial – 12 October 2022**

A group of us explored Spatial, and visited the Dubai Chambers Penthouse, Spatial Park, Buddhaverse and several Vogue museum spaces.

cross-border and, in particular, simple and low value disputes in a time – and cost-efficient manner. To the extent that significant commerce is transacted within the metaverse itself, either between users or with platforms, on-chain ADR built into the platform is likely to be an attractive option.

## ARE THERE ANY IMPLICATIONS FOR THE ENFORCEMENT OF METAVERSE-RELATED AWARDS UNDER THE NEW YORK CONVENTION?

There might well be. We delve into more details on the implications of enforcement under the New York Convention of awards in metaverse-related disputes, in a forthcoming article in the Contemporary Asia Arbitration Journal. For now, we can preview that these implications include:

- whether the New York Convention is necessary at all, where decisions are self-enforced or the decision-maker is empowered to directly modify the relevant digital assets;
- whether there would be a valid arbitration agreement (especially as smart contracts are not generally legally binding, if they even include/incorporate a dispute resolution clause);
- whether party anonymity would be tolerable under the New York Convention (as it would go to issues of formal and substantive consent, and national enforcing courts currently require disclosure of parties' identities);
- whether failing to choose a legal seat might render an eventual award unenforceable under the New York Convention;
- whether the features of blockchain arbitration (e.g., juror anonymity; economic incentives for voting; the lack of reasoning etc.) cross any due process bottom lines under the New York Convention; and
- whether awards might not be recognised or enforced on public policy grounds.

## WHERE CAN I LEARN MORE ABOUT THE METAVERSE?

There are many resources online to learn about the metaverse and related technologies, but here are a few resources to get you started:

Follow **MetaverseLegal** on LinkedIn and join our Discord community:

MetaverseLegal on LinkedIn

Follow **ArbTech** and join its Slack community:

Follow ArbTech

Read **Matthew Ball's** *The Metaverse and How it will Revolutionise Everything*:

The Metaverse and How it will Revolutionise Everything

Subscribe to **Ben Thompson's** newsletter on all things tech-related:

Ben Thompson's newsletter

Wait for our forthcoming article in the Contemporary Asia Arbitration Journal on enforcement of metaverse-related awards under the New York Convention. Our article will be titled, *Something Borrowed, Something Blue: The Best of Both Worlds in Metaverse-related Disputes*.

Submitted by Elizabeth Chan (ArbitralWomen Board Member; YAWP Director; Senior Registered Foreign Lawyer, Allen & Overy; MetaverseLegal Administrator) and Emily Hay (ArbitralWomen Member; Counsel, Hanotiau and Van Den Berg; MetaverseLegal Administrator)

# Sanctions slapped on Russia simultaneously slapping arbitration?

## Introduction

In these challenging times, international arbitration as a dispute resolution forum has not been on the minds of European legislators when adopting sanction packages. Understandably so, given the global need to act expeditiously to send an unequivocal message to Vladimir Putin. Sanctions packages have been adopted promptly, in a manner that is unprecedented in the history of the European Union (EU). However, the intricacies of arbitration have on occasion been forgotten, resulting in uncertainty within the arbitration community, not to mention within arbitral institutions.

It seems to have fallen on these arbitral institutions such as the Vienna International Arbitral Centre (VIAC) to call for clarification of sanction legislation in order to continue to safeguard the rule of law and ensure access to justice for parties in these particularly difficult times. Upon taking up the role of Secretary General of VIAC in January 2022, I did not anticipate the challenges that VIAC as an institution would face. Thankfully, VIAC was and is not alone on this journey. A number of other European institutions listened to the concerns of the arbitration community and have exhibited collegiality and solidarity in an effort to ensure that the neutral fora for dispute resolution engrained in a well-functioning, safe and efficient system for international trade continue to be available to parties.

Niamh Leinwather

In this short piece, I will first reflect on the *status quo* of compliance regimes in place at VIAC as of February of this year. I will then address uncertainties raised by the sanction packages introduced by the EU, followed by Russia's reaction to these sanction packages, and conclude with a brief outlook.

## The *status quo* in early 2022

National courts have consistently confirmed that arbitral tribunals are competent to decide on the arbitrability of a matter involving economic sanctions, *see* e.g. *Mitsubishi v. Soler* and *Fincantieri v. Ministry of Defense of Iraq*. It follows that arbitral institutions can administer proceedings with sanctioned parties. Since the introduction of the first wave of sanctions by the EU in 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, arbitral institutions such as VIAC introduced thorough sanctions procedures to ensure that proceedings would be administered in accordance with these sanction regimes.

At the outset of any proceeding, VIAC requires parties to provide information in relation to the identity of the parties including nationalities. Parties of all nationalities are treated equally and VIAC is vigilant of its strict confidentiality obligations when conducting such checks. The identity of all Related

Entities in the dispute and potentially additional information regarding the ultimate beneficial ownership of the parties or Related Entities may also be required. The subject matter of a dispute may also be relevant for compliance checks.

During a pending arbitration, sanction checks are conducted when payments are to be made. This includes (but is not limited to) the payment of the (i) registration fee, (ii) advance on costs, (iii) arbitrators' fees, and (iv) the return of any potential leftover advance on costs to the parties. Compliance checks will also be carried out by VIAC if requested by its bank. During an ongoing proceeding, VIAC will expect parties and/or arbitrators to provide it with any new sanction-related information that may be relevant to the pending proceedings.

Should the administration of a case, including a payment, trigger a requirement for VIAC to notify the Austrian authorities under international sanction regulations, VIAC will contact the Österreichische Nationalbank (Austrian National Bank) as the relevant authority in Austria within the range of the EU sanctions regime. The Austrian National Bank is responsible for the freezing or unfreezing of sanctioned parties' funds. If a party's assets have been frozen, the Austrian National Bank can, pursuant to Art. 4 para. 1 b of Regulation Nr. 269/2014, grant exemptions as it deems appropriate, to release certain frozen funds or economic resources, or make certain funds or economic resources available, after having determined that the funds or economic resources concerned are intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services. If formal clearance from the Austrian National Bank is required to receive or make payments, this may result in delays at the relevant stage of the arbitral proceedings.

## The first waves of sanctions in March 2022 and related ambiguities

The numerous sanctions packages that quickly ensued after the outbreak of war in Ukraine, had implications for arbitration that were unparalleled. From an institutional perspective, there was significant ambiguity as to whether arbitral institutions could legally administer disputes with certain listed legal entities/persons.

The provision that caused concern was embedded in the EU's fourth sanctions package (Council Regulation (EU) 2022/428 amending Regulation No 833/2014) issued on 15 March 2022. Article 5aa of Regulation (EU) No 2022/428 ('Article 5aa') foresaw an 'absolute transaction prohibition' (directly or indirectly) with listed legal entities/persons as per Annex XIX. The intention was clear — an absolute prohibition of all business transactions with the legal entities/persons in Annex XIX to the maximum extent possible. However, the term 'transaction' was not defined. Thus, it was unclear if 'any transaction' could also encompass an arbitration procedure with the legal entities/persons listed in Annex XIX. Arbitral institutions faced the dilemma of staying proceedings pending clarification (even though many institutional rules include no provisions allowing for such a stay) and the reactions to proposals to stay proceedings were mixed. In addition, institutions faced the challenge of arbitrators' resignations out of concern about violating sanctions regulations.

VIAC sought clarification of Article 5aa at the national level — the relevant Ministries as well as the Austrian National Bank. In parallel, VIAC reached out to colleagues at other European arbitral institutions. What ensued was a joint effort by VIAC with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Arbitration Institute of Finland Chamber


Photo by FLY:D on Unsplash

of Commerce (FAI), the Milano Chamber of Arbitration (CAM), the German Arbitration Institute (DIS) and the Swiss Arbitration Centre to highlight these concerns to legislators. An initial response from the European Commission provided more ambiguity than clarity. However, the efforts of these six institutions bore fruit on 21 July 2022 — in just four short months! — when the EU adopted its 'maintenance and alignment' package, the seventh package of sanctions that clarified the scope of Article 5aa, in relation to the companies listed in Annex XIX. In particular, Council Regulation (EU) 2022/1269 exempted from the prohibition those transactions which are strictly necessary to ensure access to judicial, administrative, or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitral award rendered in a Member State, if such transactions are consistent with the objectives of the Regulation and Regulation (EU) No 269/2014.

The arbitration community as a whole could breathe a common sigh of relief. The European legislator was praised for its clarity — the exception left no room for interpretation and was clear-cut. Arbitral institutions — in particular those mentioned above — enjoyed a short moment of glory (and issued a Joint Statement). As a result of this development, stayed proceedings could be reinstated and institutions could advise parties and arbitrators with confidence on the above-outlined provisions.

## The saga continues – unenforceable arbitral awards?

However, the above success seems to be the first of many hurdles. There are still ambiguous rules in the sanction packages in force: For example, Article 5(1)(a) of Regulation 269/2014 provides that the national competent authorities (the Austrian National Bank in Austria) may release frozen assets to comply with or enforce a judicial, administrative or arbitral decision. However, the national competent authorities may only authorise such release if the arbitral award was rendered before the assets concerned were frozen. In contrast, the date when a judicial/administrative decision was issued is irrelevant. Regulations are thus 'less favourable' in connection with the enforcement of arbitral awards.

Given that the enforceable arbitral award is the holy grail of international arbitration, ambiguities in this regard cut deep. It will fall upon the shoulders of arbitral institutions to once again highlight these shortcomings to the European legislator. From a practical perspective, the competent national authorities (in many countries, the Ministry of Finance) will require this clarity when faced with the question of whether and when they are permitted to release frozen funds. The present state of affairs is dissatisfactory.

## The flip side of the coin – Russia's reaction to these sanctions – a blow for arbitration?

Unsurprisingly in response to the above, Russia developed a series of countermeasures, quickly releasing a list of "unfriendly States", including all the EU countries, and other countries supporting sanctions against Russia.

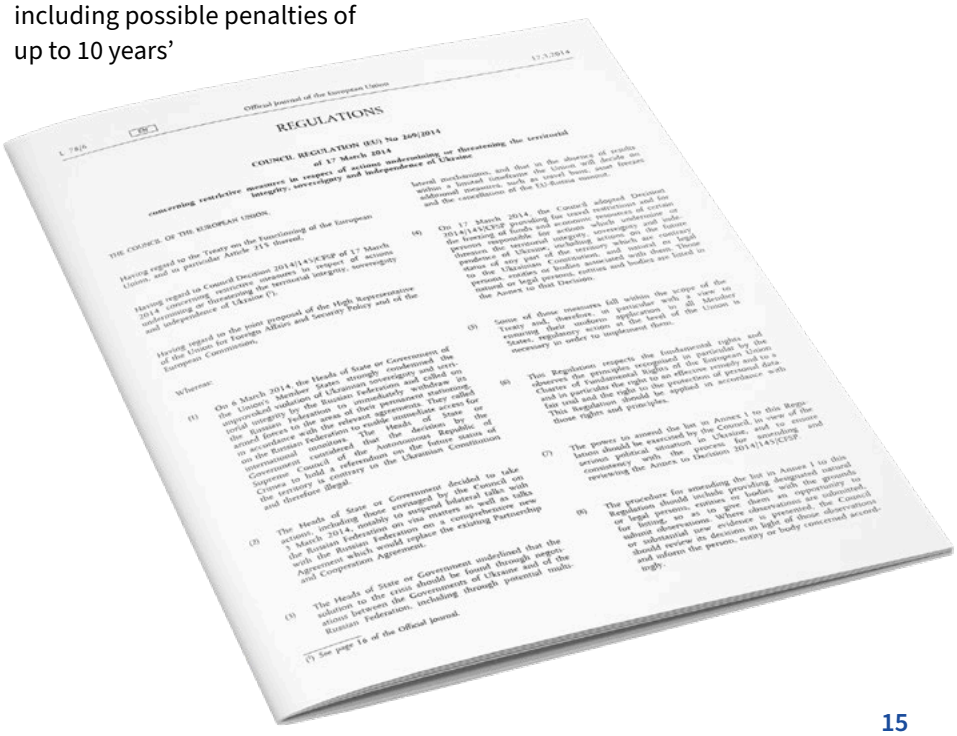
However, 'anti-sanctions legislation' was already in place in 2020. Russia passed a federal law in 2020 provid-

ing for the exclusive jurisdiction of Russia's courts over disputes involving sanctioned Russian parties (*see* Article 248 of the Russian Commercial Code of Procedure of June 2020). Sanctioned parties (including Russian parties or foreign parties that are subjected to sanctions against Russia) may bring a claim at their place of residence or incorporation, if this dispute was not already brought before a foreign court or arbitral tribunal seated outside of Russia, even if the contract contains an arbitration clause or a foreign court dispute resolution clause. In the event arbitral or court proceedings are commenced, parties can apply to Russian courts for an anti-suit injunction against these proceedings. This development made waves within the arbitration community and there was hope that the provisions would be interpreted narrowly.

However, these hopes were dashed upon the subsequent Russian Supreme Court decision (see Ural Transport Machinery Construction Company JSC (Uraltransmash) v. Pojazdy Szynowe PESA Bydgoszcz Spolka Akcyjna (PESA)) in December 2021. The Supreme Court ruled that the mere existence of sanctions against a Russian party sufficed to obtain an injunction to restrain a foreign arbitration. This decision ultimately means that Russian parties may choose where to bring their claim, irrespective of any prior agreement. The overriding concern for negative repercussions for arbitration spurred VIAC to draft an *amicus curiae* letter to the Russian Supreme Court in relation to the latter decision. In those proceedings, *Uraltransmash* and *Uralvagonzavod* (claimants) had requested the Russian courts to issue an injunction against the pending SCC arbitration initiated by *PESA* (respondent). VIAC argued that the mere existence of sanctions does not impair fair arbitration proceedings conducted by an impartial and independent tribunal involving a sanctioned Russian party. Particularly when the proceedings are administered by an arbitration institution with Permanent Arbitration Institution status in Russia such as VIAC, but also by other European institutions such as SCC, which have a long-standing tradition and reputation. VIAC emphasised that it had full confidence that the arbitral tribunal would deliberate and decide the case at hand independently and free of any state influence. However, the Russian Supreme Court evidently took a clear protectionist approach to anti-sanctions laws.

These developments continue to cause concern for the arbitral community as they may have far-reaching consequences if parties are entitled to disregard any dispute resolution clause. Their practical utility might however be limited, due to uncertainties that may arise in connection to the extent to which the New York Convention might prevent the enforcement of such decisions, which are in breach of a valid arbitration agreement, outside of Russia.

Another noteworthy development was a proposed amendment to the Russian Code of Commerce from November 2021 which, if enacted, would have given Russian courts exclusive jurisdiction over claims against parties where it is alleged that the foreign counterparty receives a *de facto* benefit from sanctions, and where the foreign counterparty did not perform its contractual obligations as a result of the sanctions. However, the Russian Government has since withdrawn the bill as the proposed changes were considered unnecessary and excessive. Draft legislation amending the Russian Criminal Code was also under consideration that would impose criminal liability against those complying with European sanctions, including possible penalties of up to 10 years' imprisonment and an up to three years' ban from holding certain positions in a company. This bill has received significant pushback from businesses and the relevant ministries and thus seems to have taken the sidelines for the moment. However, these are unpredictable times.


REGULATIONS

COUNCIL REGULATION (EU) No 269/2014

of 17 March 2014

## Outlook

The sanctions saga continues. The frequency with which sanction packages are being issued will require users of arbitration to continue to pay attention to developments. Counsel will be challenged to consider the correct procedural strategy for their clients. Arbitral institutions will be tasked with considering what provisions need clarification not only to ensure the correct administration of dispute resolution methods but, beyond that, to answer the needs of their users. In my view, arbitral institutions are up to the task, and this has been evidenced already by their efforts this year. Undoubtedly, arbitral institutions play an essential and irreplaceable role in upholding the rule of law, ensuring access to justice, safeguarding the integrity of arbitral proceedings and guaranteeing the impartial and equal treatment of parties.

Submitted by Niamh Leinwather, Secretary General, Vienna International Arbitral Centre, Vienna, Austria

REPORT

# Innovation at 25th ICCA Congress, 18-21 September 2022, in Edinburgh, United Kingdom

Attendees at ArbitralWomen's breakfast meeting

The opening of ICCA's eagerly awaited 25th Congress, after two postponements due to the pandemic, saw the attendance of over 1,300 delegates, the largest of ICCA's Congress. It also saw the launch of the Scottish Arbitration Centre's new arbitration rules and administrative services. With Lord **Angus Glennie**, Arbitrator, Twenty Essex Chambers, successor to the oft kilted **Brandon Malone**, Arbitrator, Brandon Malone & Company, as Chair of the Centre after the Congress, announced two particularly innovative provisions not yet seen in other institutions' arbitration rules.

Article 8 enshrines a commitment to equality and diversity in the selection of arbitrators and adopts the principles of the Equal Representation in Arbitration (ERA) Pledge and the Racial Equality for Arbitration Lawyers (REAL), requiring regard for gender and racial parity in appointment of arbitrators. On sustainability, Article 23 adopts the Green Protocols of the Campaign for Greener Arbitration.

Asked about his reaction to the Centre's two innovative provisions, **Toby Landau** KC, Arbitrator, Duxton Hill Chambers, responded 'Fabulous!'

The Centre also announced the launch of Unicorn, its electronic case management system developed under a partnership with Opus 2. Brandon Malone said that Opus 2 will deliver the Centre's new 'innovative, efficient and first-class' casework management system, enabling the Centre to put cybersecurity and greener arbitration into practice.

Amongst the myriad of interesting events, ArbitralWomen hosted a well-attended and hot ticket breakfast meeting focussed on 'Women in Innovation', at the Sheraton Grand Hotel & Spa. **Gabrielle Nater-Bass**, Partner, Homburger Switzerland, gave the welcome and introductory remarks. The presentations of recent innovations in international arbitration sparked plenty of lively enthusiasm and discussions. **Dilber Devitre**, Associate, Homburger Switzerland, introduced the Swiss Arbitration Association ASA's Arbitration Toolbox, an online and interactive tool that guides users through the various stages of an arbitration. To make arbitration proceedings more efficient, proceedings can – and should – be tailored to the circumstances of a given case and the needs of the users. **Victoria Pernt** , Counsel, Schoenherr Austria, presented MyArbitration by a video series about international arbitration providing valuable insights into the profession and the lives of arbitration practitioners. **Elizabeth Chan**, Registered Foreign Lawyer, Allen & Overy Hong Kong, and **Emily Hay**, Counsel, Hanotiau & van den Berg Taiwan, presented ARBinBRIEF, a practical video guide on handpicked arbitration issues explained by experienced arbitration practitioners.

Our President, **Louise Woods**, Partner, Vinson & Elkins London, was on hand to give the closing remarks and vote of thanks. Format for the event itself was innovative, no seats provided with attendees moving around to the different interactive presentations.

Submitted by Mary Thomson, ArbitralWomen and Scottish Arbitration Centre Board Member, International Arbitrator & Mediator, Pacific Chambers Hong Kong, 36 Stone, London, UK & Singapore

# Diversity Toolkit Goes to Singapore (At Last!), on 8 October 2022, in Singapore

**After a two-and a half year hiatus** due to Covid-19 restrictions on travel and gatherings, ArbitralWomen is thrilled that the Diversity Toolkit is again taking off. Spearheaded by ArbitralWomen **Sapna Jhangiani** KC, International Legal Counsel Attorney General's Chambers Singapore, and **Asya Jamaludin**, Counsel at CMS Holborn LLP, and sponsored by Singapore's branch of the Chartered Institute of Arbitrators, the Toolkit event took place on a Saturday in the boardroom of host firm CMS Holborn LLP. The Toolkit's day-long presentation featured self-assessments, mini-lectures, discussions, slides, videos, and other exercises to identify and deal with diversity issues. About a dozen participants (including one brave and much welcomed gentleman) took part with fantastic energy and enthusiasm as trainers **Louise Barrington**, Arbitrator & Mediator, and **Mary Thomson**, Arbitrator Pacific Chambers and 36 Stone, quizzed them about their own experiences and diversity goals.

Left to right: Jae Hee Suh, Louise Barrington, Alessa Pang, Mary Thomson

Attendees at the Diversity Toolkit presentation in Singapore

While noting that the proportion of women in arbitration lead counsel positions, institutions, and in some arbitration panels, has shifted substantially, the group also realised the precarious nature of our progress, as well as the need for behavioural and systemic change to cement the work done to date.

Diversity alone cannot change behaviour; it takes inclusivity and respect for the contributions of diverse team members to retain them on the team. But the result is worth it – better quality approaches to dispute resolution, creativity, and legitimacy are the rewards for going forward.

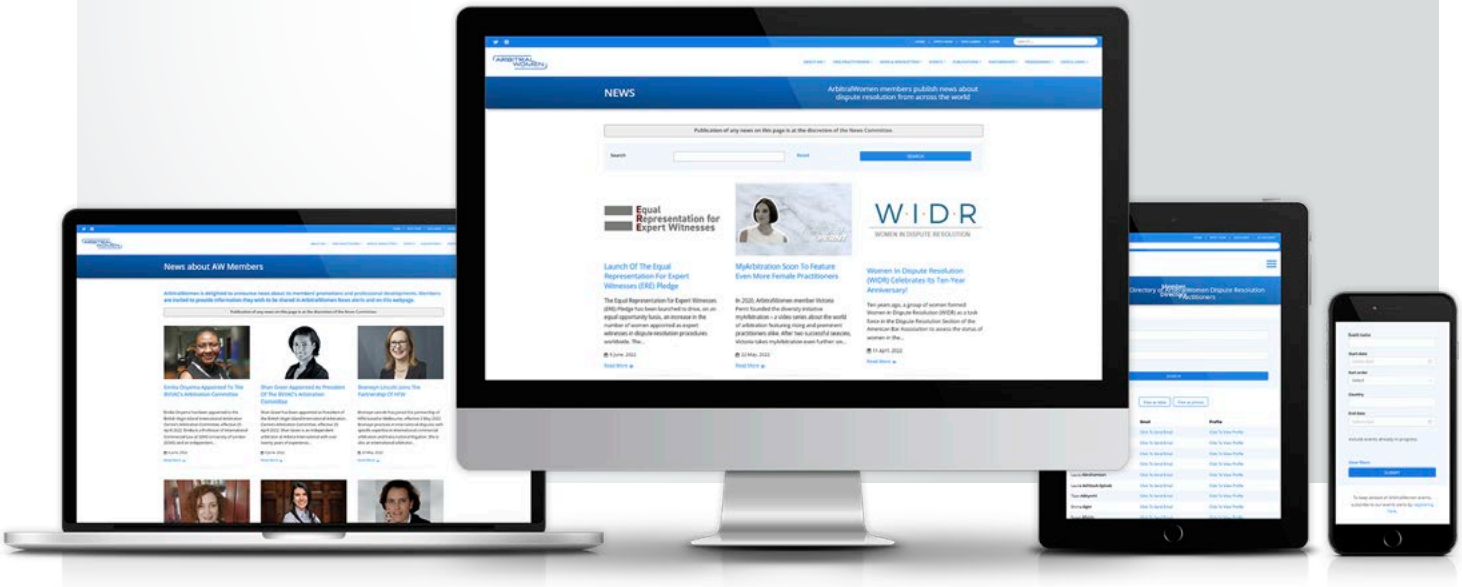
Group discussions yielded comments about current obstacles, as well as lots of ideas of how to deal with them. The day ended with a list of ideas on how to get past one's own unconscious biases and help to foster diversity and inclusion in law offices, corporate legal departments and institutions. Some of the participants indicated their intention to join ArbitralWomen in order to train as Diversity Toolkit presenters so that they can repeat the Toolkit experience to other groups in the region.

On the evening prior to the Diversity Toolkit, ArbitralWoman **Alessa Pang**, Partner of Wong Partnership LLP, arranged for a gathering of many of Singapore's Arbitralwomen members. It was a joyful occasion for us to see old friends after years of isolation, and to meet enthusiastic new members who recognise the value of ArbitralWomen's many programmes.

Submitted by Louise Barrington, ArbitralWomen Co-founder, Head of ArbitralWomen's Diversity Toolkit™ Committee

# Keep up with ArbitralWomen

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




## ArbitralWomen & Kluwer Arbitration Blog

ArbitralWomen has a long-standing collaboration with Kluwer Arbitration Blog, the leading publication of its kind presenting a high-quality examination of hot topics and latest developments in international arbitration, with an impressive global readership of 120,000 views per post.

As part of this collaboration, ArbitralWomen liaises with Kluwer Arbitration Blog to ensure priority publication of articles submitted by its members. Published contributions will also feature on the AW website.

We strongly encourage our members to make use of this great opportunity! Please send your article or idea for a topic to the AW-Kluwer Arbitration Blog Committee, consisting of ArbitralWomen Board Members Katherine Bell and Alina Leoveanu, at kluwer@arbitralwomen.org.

We kindly ask you to take note of the Kluwer Arbitration Blog editorial guidelines.

*We look forward to receiving your ideas and submissions!*

ArbitralWomen thanks all contributors for sharing their stories.

Social Media
Follow us on Twitter @ArbitralWomen and our LinkedIn page:www.linkedin.com/company/arbitralwomen/

Newsletter Editorial Board
Maria Beatriz Burghetto,
Gisèle Stephens-Chu

Newsletter Committee
Katherine Bell,
Mary Thomson & Louise Woods

Graphic Design: Diego Souza Mello
diego@smartfrog.com.br

AW Activities at a Glance: click here

Membership Runs Now Annually from Date of Payment

# ArbitralWomen Individual & Corporate Membership

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

The many benefits of ArbitralWomen membership are namely:

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

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

Individual Membership: 150 Euros.

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

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

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

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