ArbitralWomen Newsletter

ARBITRAL WOMEN — *Uniting and promoting women in dispute resolution*

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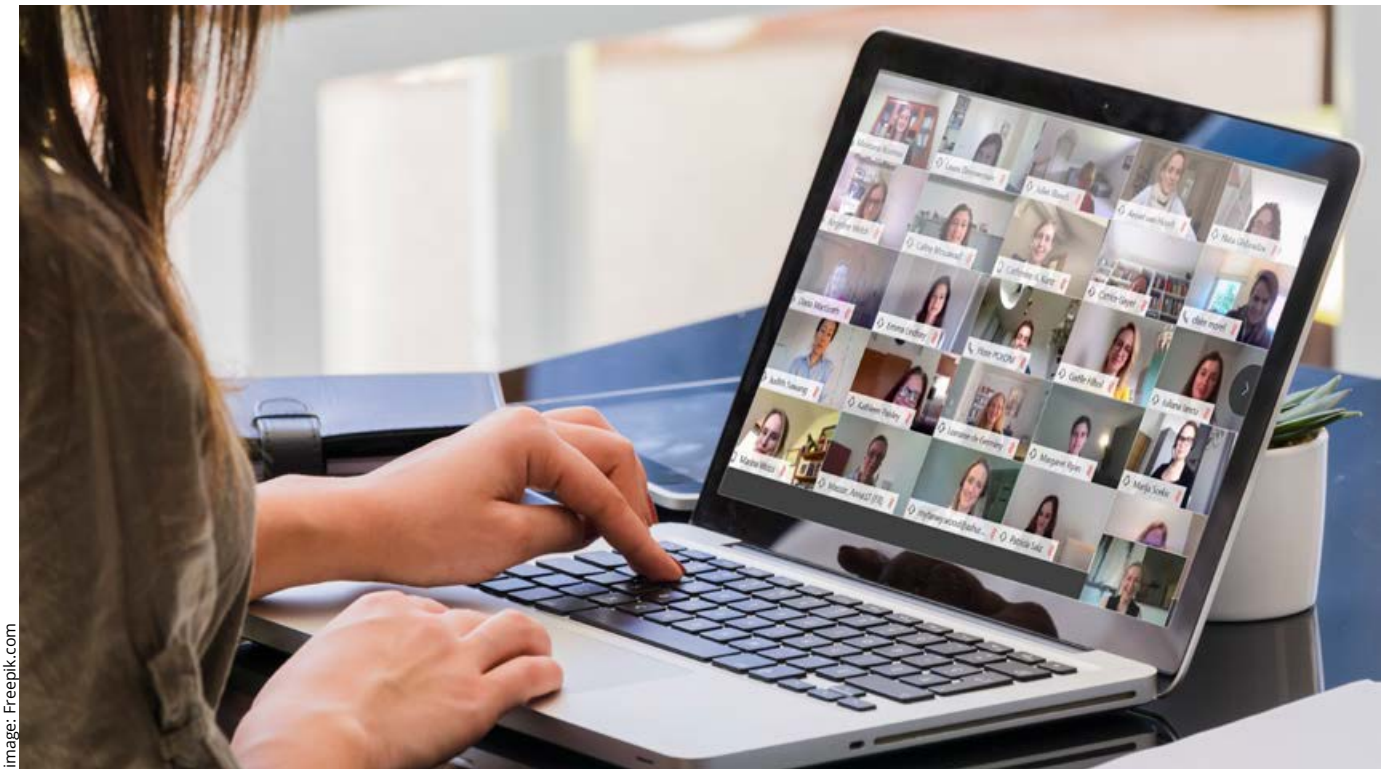

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ArbitralWomen Members are Thriving in a Virtual World

This issue starts with an interview of Dame Elizabeth Gloster DBE, the first woman to be appointed a judge of the Commercial Court in England. We then share a report from Freshfields on its 'Every Day Gender Equality Commitment' (EDGE) as part of our coverage of Women's Initiatives in their Workplace initiative.

The pandemic has not stopped ArbitralWomen members from participating in a broad range of webinars and other substantive virtual events and promoting diversity in dispute resolution. This newsletter shares the reports of our members and friends on many of these interesting online events.

Finally, in case you missed the latest news on our website, we include it in this newsletter for you.

Freshfields Bruckhaus Deringer's – Every Day Gender Equality Commitment (EDGE) Page 08

Planning Past Bias Through the ArbitralWomen Diversity Toolkit™ Page 35

Female Representation in Arbitration in the COVID-19 Era Page 40

President's Column

As we start the back-to-school season, while the COVID-19 pandemic rages on in many parts of the world, we are pleased to be able to share with you some uplifting content in this Newsletter.

First, we have an interview by ArbitralWomen Board member **Amanda Lee** of **Dame Elizabeth Gloster DBE**, the first woman to be appointed a judge of the Commercial Court in England, who advanced from the Chancery Bar to the bench of the Court of Appeal, and now sits as a full-time commercial arbitrator.

Second, as part of our Women's Initiatives in their Workplace, we have a report on Freshfields Bruckhaus Deringer's 'Every Day Gender Equality Commitment' (EDGE) submitted by ArbitralWomen member **Natalie Sheehan**.

Third, we publish a high number of our members' reports on webinars and other virtual events that took place between April and June 2020. These reports cover a diverse array of topics, including an overview of the 'In Conversation with Neil' and 'TagTime' webinar series; progressing arbitrations in the new global reality; anti-suit injunctions; cutting edge issues in commercial arbitration; the ABA's Dispute Resolution Section Virtual Spring Conference; overcoming cultural and language barriers in mediation; how ODR is increasing global access to justice; innovative arbitration trends: a new practice and ethical landscape; a report on diversity: innovative strategies for developing an inclusive mindset; building a career in international arbitration and dispute resolution in the times of COVID-19; frustration of contract / *force majeure* due to the COVID-19 pandemic; the impact of the "Great Lockdown" on construction industry arbitrations; international best practice on virtual hearings in arbitration; the judgment of the German Federal Constitutional Court on the European Central Bank's public sector purchase programme; the art of e-advocacy in virtual hearings; arbitration and state courts in times of economic crisis; coronavirus and exemption of liability; women in dispute resolution: navigating the new normal, adapting career strategies and building resilience after COVID-19, organised by **Young ArbitralWomen Practitioners**; Meet Your Female Arbitrator; party autonomy during COVID-19; virtual and paperless arbitration; effective case management and virtual hearings; parallel proceedings in international arbitration; the ICC's Guidance Note on Virtual Hearings; a virtual debate on virtual hearings; *force majeure* under the CISG; a step forward toward diversity: the launch of a directory of women arbitrators in Peru; and finally, international arbitration, insolvency, third-party funding – the post-pandemic state of affairs.

The breadth of content that the international dispute resolution community has covered via virtual events is a testament to its resilience and the wide engagement of the many participants in this field.

Fourth, we catch you up on news you may have missed that was published on the ArbitralWomen News webpage.

We thank the many contributors to this Newsletter for the opportunity to share details of the numerous activities and virtual events taking place mainly between April and June 2020. These events afforded our international community ways to connect and learn — albeit virtually— while much of the world was still in lockdown or sheltering in place, improving our quality of life during the pandemic as well as expanding our knowledge of the latest developments in dispute resolution.

Dana MacGrath, Omni Bridgeway
ArbitralWomen President

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Women Leaders in Arbitration
Dame Elizabeth Gloster DBE

ArbitralWomen Board member, Amanda Lee, interviewed Dame Elizabeth Gloster DBE, on 18 June 2020 via Zoom video conference for the ArbitralWomen Newsletter.

Amanda Lee: Dame Elizabeth, I had the pleasure of meeting you in your capacity as Patron of the London Branch of the Chartered Institute of Arbitrators. That is just one of the many distinguished roles that you have held during your career to date, which has taken you from the commercial and Chancery bar to the bench of the Court of Appeal. As the first woman to be appointed a judge of the Commercial Court you are also a trail-blazer. You now practise as a full-time commercial arbitrator. I am delighted to have the opportunity to invite you to share your story with our readers.

Before we speak about your judicial career and practice as an arbitrator, can you tell our readers about how your career in international dispute resolution began?

I suppose, in a rather Freudian way, it all began because my father was an international businessman. Some of my earliest memories are of my father entertaining his very diverse clients from all around the world in our home in London. As a small child, I had to pass around the nibbles and engage in polite conversation. My father would send me postcards from places ranging from the confluence of the Blue and White Nile to Havana. The business world seemed very glamorous. So, when I went to university, I wanted to do company and commercial law. Once I came out of university, I thought that the Commercial Bar, and particularly the Chancery Bar, would suit my skills, and then I got into the delights of insolvency and, in particular, insurance and reinsurance insolvency.

You were awarded the rank of Queen's Counsel in 1989 – forty years after Rose Heilbron and Helena Normanton became the first women to achieve this rank in 1949. There remains a significant gender disparity in QC appointments. What challenges do women face in developing a reputation for excellence in a field such as international arbitration?

Well, there obviously are problems, but, in a way, I think the problems are more imagined than real. I might be criticised for saying this, but in Europe, the United States, Canada, and the Middle East, there doesn't seem to be any overt prejudice against women participating in international dispute resolution, whether as counsel or arbitrators. Certainly, I have not come across any prejudice personally. So why is it that we are not seeing enough women coming forward to be lead counsel, whether in commercial litigation or in arbitration disputes? I'm still surprised, when there are so many opportunities for women, that I see too few women taking first chair in arbitrations or acting as lead counsel in commercial litigation. Why is this? My answer is that I think we still have some way to go in convincing clients that women can do just as good, if not a better, job than men in what is inevitably a tough commercial environment.

I think publications like yours, initiatives like the Pledge and the fact that there are so many more women in-house counsel, being part of the decision-making process as to the appointment of counsel and arbitrators, mean that the scene is changing. But it's up to women to go out there and make sure that they're presenting as keen and willing to do contentious work, which, of course, I'm sure most of us are. But there is still, I think, a (mistaken) perception that, if you want a really tough job done in dispute resolution, you should go for an arrogant, aggressive male counsel. But I don't think there is a glass ceiling; I don't think the barriers are there, but I think that, in reality, there is a PR battle which women still have to win.

You enjoyed a successful career as arbitration counsel, representing parties in major international arbitral proceedings in Russia, the US and beyond. How did your experience as counsel help you to develop your practice as an arbitrator?

As counsel, one was very conscious, particularly in what was then, in the 1980s and 1990s, an even more male-dominated professional world, of situations where one irritated the judge or the tribunal, perhaps just because one was a woman and didn't conform to

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his stereotype of the commercial advocate. I learned that the critical aspects of effective advocacy were meticulous preparation and crispness of delivery. That was what it took, in those days at least, to overcome initial hostility from the bench or the tribunal to the fact that, as a woman, one was there at all. These were very good lessons for me because they gave me a very strong idea of what I was looking for when I became a judge.

Now, as an arbitrator, I know how I like my cases presented. I don't like waffle. I like clarity. I like courtesy. I don't like jury points. I don't like bullying as between counsel and a witness, or as between counsel themselves. I certainly won't tolerate overbearing conduct by the tribunal. These were lessons I learned as counsel and then as a judge. I've had some pretty rough trips in front of hostile arbitrators and even more hostile judges, particularly when I was much younger.

The other thing that I look for and that I learned as an advocate was engagement with the tribunal. You've got to shape your advocacy in order to dish up to your particular tribunal the points in which it is interested. That's why it's so much easier to appear in front of a tribunal that is participating and engaging in the debate. That's how you get the most rewarding interchange on the points that matter. If, as I believe, there is a real merit in oral advocacy, it is demonstrated by that vital engagement between the tribunal and counsel. Otherwise, we, the arbitrators, might as well all sit in our rooms reading the lengthy, often over lengthy, written submissions.

After sitting part time as a Deputy High Court Judge of the Commercial Court and the Chancery Division during your career at the bar, in 2004 you accepted an appointment as a High Court Judge, Queen's Bench Division. What made you decide to assume full time judicial office and what challenges did you face at the beginning of your judicial career?

It was quite a difficult decision to go on the judicial bench. I turned it down a couple of times, for financial reasons, such as a mortgage and the huge expense of children. There then came a time when I thought, well, I need to give something back to this wonderful profession. I had come to the view that it is intellectually more exciting to decide things oneself, than just to be paid (albeit well) to put forward an intellectually clever, or perhaps specious, argument in which one may or may not believe. I find that the thrill, the excitement intellectually as a decision maker, is in putting one's own analytic stamp on the series of problems presented.

When I was asked whether I'd like to go and become a commercial judge, I thought this is too good an opportunity to miss. I never regretted it. Being a Commercial Court judge, and then a Court of Appeal judge, was the most enjoyable thing intellectually. From a public duty and responsibility point of view, it was also extremely challenging and rewarding. I would recommend a judicial career to anybody.

Being a judge was terribly hard work. I was doing stuff that I'd never done before, like sitting in crime. Luckily, I didn't have to do very much of that and what I did have to do tended to be white collar crime. But those were the challenges. My fellow judges couldn't have been nicer to me. In the old Commercial Court there had to be a huge redesign of our floor in the building, so as to make available a proper judicial ladies' lavatory. I got teased quite a bit about that. But I never felt in any way that my judicial brothers were treating me differently. There was no bias. If there was subconscious bias against me, I never picked up on it, because they couldn't have been more entertaining and more helpful.

You were the first woman to be appointed a judge of the Commercial Court, ultimately becoming the Judge in Charge of the Commercial Court from 2010-2012. What does it take to be a judicial trailblazer?

One just doesn't appreciate that one is a "trailblazer" (if indeed I ever were) because one is so busy getting on with the job. It was only when I was asked to go and speak at events that I realised for the first time "Hey, people think you're a Trailblazer". I didn't really believe it, but, if it enables people to see where the trail is, that is a good thing. What I would say is that it is incredibly rewarding to be asked to help people and share my experiences with them. When I started my career at the Bar, I didn't find the women who were there at the time,

and there were very few of them, helpful at all. I found male colleagues were much more helpful in the best possible way. I have tried to help young people, both men and women.

Your judicial career went from strength to strength following your appointment to the Court of Appeal in 2013. You became Vice-President of the Civil Division of the Court of Appeal in 2016, a role that you held until you retired from the bench of England and Wales in 2018. What advice would you give to women seeking appointment to senior judicial offices and what do you think states can do to encourage women to join the judiciary?

I'd say go for it! It is extremely rewarding. Make sure that your career is focused on aspiring to a particular specialisation so that you've got something specific to offer. You've got to have transferable skills, and you've got to be able to demonstrate, particularly when you get to appellate level, that you can deal with all kinds of cases. The other advice which I would give to women is don't be afraid of selling yourself and selling yourself well. Women shouldn't be concerned about putting themselves forward. Men don't hold back in this respect. Women on the whole are more reticent, but they're getting better at self-promotion. No doubt my grandchildren's generation will be much better than we were.

The Ministry of Justice could make a judicial career more attractive to women by emphasising that it can be a flexible career choice for a woman, at a certain stage of their professional lives, as compared with the self-employed Bar, or, indeed, life as a solicitor. But there is a tension, given the nature of the workload, as to how far it is realistic for a member of the higher judiciary to enjoy flexible, or shortened, working hours.

Did you have any specific goals that you wanted to achieve during your judicial career and were you able to achieve them?

Well, I didn't get to the Supreme Court and every judge wants to get there. But I'm having a very enjoyable time being an arbitrator and doing a lot of other advisory and consultancy work in the legal arena. So, in retrospect, I don't regret it. One always has goals and I'm sure that it's good for one's immortal soul, and for one's mortal character, not always to achieve them!

Does England have any initiatives in place to support women seeking judicial appointments and address the lack of female judges sitting in the senior courts? Have you seen any evolution in this respect during your career?

There are huge initiatives in place designed to try and address the gender disparity, but I don't approve of positive discrimination. I think there should be real encouragement to women and also to ethnic minority applicants. There should be a message going out saying "It doesn't matter who you are, it's what you are that counts. Don't be discouraged. We want you". It'll improve things if we have more minority groups represented and more women, but I don't think one should diverge from the criterion of merit. One has to stick to that principle. Positive discrimination won't do women any favours at the end of the day. But the position has certainly improved in the last 5-10 years.

You have now returned to One Essex Court to practise as a full-time commercial arbitrator. How has your judicial experience influenced your practise as an arbitrator?

As an arbitrator, one doesn't necessarily always appreciate that one is putting counsel on the spot. I think that sensitivity to the difficulties of presentation of a case was something I learned from being a judge. As a commercial arbitrator you have everything served up to you. But it's important to remember how much work has gone into the presentation and structure of the argument and the evidence. As a judge I developed a greater degree of tolerance than I might have had when I first went on the Bench. I came to appreciate that not every case has money thrown at it and that there can be great disparity in the resources available to one side, as compared with the other. The requirement of procedural fairness is a lesson I learned as a judge. As a high-profile litigator at the Bar, one was merely concerned with winning the case and "killing the enemy" with the maximum efficiency. But when sitting on an arbitral tribunal, one has to be aware of what is (and what is not) procedural fairness, because lack of it can be used as a challenge to an award.

I think the other important lesson I learned as a judge was case management. Managing a case robustly, and driving it forward, but giving the parties a proper opportunity to present their case, was an important skill to learn. You can't just let things drift, and it is up to the tribunal, whether it be judicial or arbitral, to stamp its discipline on the proceedings. I'm not saying that that detracts from party autonomy in any way, but it is very important that cases get managed appropriately. I learned many of those skills from having had the advantage of being a judge.

You have been involved in international arbitration for many years. How has the field changed during that period?

There are many more women, which is a good thing, but I'm still not seeing sufficiently significant numbers of women in lead counsel roles. The nature of international arbitration work doesn't seem to have changed that much, although the figures in dispute are obviously much bigger. There is more

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Dispute resolution is an excellent niche for women. Women have got the skills and the sensitivity to present cases firmly but with appropriate caution.

gas and oil work, and more telecoms disputes, but otherwise the type of disputes do not seem to have changed that much from when I was counsel. In presentation terms, the landscape has been greatly improved by the use of computers and digital technology. The methods of communication have also materially changed and that has speeded things up and enables disputes to be resolved more efficiently. And now, in our video conferencing world, we arbitrators are relishing the delights of virtual hearings – which, speaking for myself, I have warmly welcomed.

What do you see as the future of international dispute resolution?

I can see arbitration continuing to flourish in the way that it does today. I've been surprised since leaving the Bench, how many big disputes are decided in arbitration rather than in commercial litigation. I think that one thing that the pandemic has taught us is that, as arbitrators, we don't need to go to the other end of the world for a day's CMC hearing. We can do it over a video conferencing facility. We've all had to adapt to technological change, and the arbitration community has clearly and speedily done just that. If one is doing an arbitration which is very witness heavy, it may be better to have the witnesses there in real life, in terms of the facility of showing them the documents, interacting as a tribunal with counsel and with the witnesses. But I've done one or two witness hearings via video conferencing and it hasn't made a difference to the ability of the tribunal to assess the reliability of the evidence.

Based on your experience, do you have any advice for women seeking to further their careers in dispute resolution, whether as counsel, as an arbitrator or as a judge?

Dispute resolution is an excellent niche for women. Women have got the skills and the sensitivity to present cases firmly but with appropriate caution. Women shouldn't be afraid to go into what is basically an adversarial situation, thinking "Oh, well, I'm not equipped to do this because I'm a wimp woman". If they've got the brains, the ability and the resolution to put forward their client's case, even though somebody is attacking it and rubbishing it on the other side, they should go for a career in dispute resolution, and, particularly, in arbitration. Why arbitration – because management of time is, in my experience, easier for a party to control in arbitral proceedings, than when a case is subject to the constraints and demands of a judicial timetable. Women shouldn't be worried that it's too tough an environment. Women have an ability to deploy arguments in a skilful and attractive way: they've got talent as persuaders, which they should deploy. Women on the whole, in my experience, are good at "reading" a judge or arbitrator. They shouldn't feel that the field is only open to the aggressive alpha male, and that, as women, they should slip back gracefully into a non-contentious role.

What was/is your most satisfying achievements in your career?

Being appointed a Commercial Court judge. I was really pleased to get the appointment, and, of course, those were the days when one didn't apply for it, one just got tapped on the shoulder. It was a real thrill, actually, because of the responsibility and the fact that I was the first woman to be appointed a Commercial Court judge. It was a recognition of something.

Is there any particular issue or topic that you would like to discuss and share with our readers?

There are quite a lot of women arbitrators and judges, but when it comes to presenting the case in front of the tribunal or in court, why don't we see equal numbers of women and men as lead counsel? Why aren't more women appearing in the lead chair or in the lead row in arbitration or litigation in big, heavy commercial disputes? There are lots of exceptions that prove the rule, but you just have to look at courtrooms and arbitration hearing rooms to appreciate the picture. Is it our own fault? Are women simply not putting themselves forward? I wish I knew what the answer was. Hopefully things will continue to change.

Women's Initiatives in Their Workplace

Freshfields Bruckhaus Deringer's Every Day Gender Equality Commitment (EDGE)

The Every Day Gender Equality Commitment (*EDGE*) was developed by Freshfields' Women's Network, co-chaired by ArbitralWomen member **Natalie Sheehan**, with the aim of promoting gender equality within the firm globally as part of the firm's broader diversity and inclusion work, which is core to Freshfields' culture.

The initiative was borne of a perceived gap between policy and practice, following an internal focus group exercise to understand the experiences of women fee-earners within the firm, and a desire to address the role of unconscious bias in the workplace.

EDGE aims to empower everyone, at all levels and within all roles in the organisation, to take practical steps to drive incremental, tangible change in support of equality and inclusion.

EDGE comprises a framework of 10 concrete actions, which were developed in consultation with colleagues across the firm in 2018 and are designed to bring awareness to, and promote, inclusive behaviours with the aim of ensuring that persons of all genders feel equally able to achieve their potential in the workplace.

The EDGE actions include, for example:

- seeking diverse views, and ensuring that our teams promote diversity of thought;
- ensuring full participation of team members in meetings;
- calling out non-inclusive behaviour;
- planning and attending client, industry and team events and conferences that are gender-inclusive; and
- nurturing diverse talent through mentoring and sponsoring colleagues from different backgrounds.

More than 2,000 people across the Freshfields' global network have signed up to EDGE since its launch 18 months ago, committing to 10 every-

day actions that are creating tangible change. During that period, EDGE has built great momentum and contributed to the ongoing dialogue on diversity and inclusion within the firm and with clients.

EDGE is designed as a 'living' initiative with the flexibility to evolve in line with ongoing dialogue. We have developed ways of implementing and measuring the EDGE actions including, for example, through:

- amendments to work allocation policies to ensure that teams are gender-balanced and that opportunities for leadership, particularly among our women, are evenly distributed;
- tracking the gender ratio of invitees and attendees at client events;
- offering speaking and publication opportunities to women and more junior team members;
- organising networking events for our colleagues to meet female barristers, experts, arbitrators and mediators to ensure that we are widening the pool of those whom we instruct as a firm; and
- speaking with organisers of external conferences and seminars to which we are invited when we see an all-male panel and proposing suitably qualified female candidates in order to raise the profile of women within the profession, or otherwise declining to attend.

In recognition of the innovative, practical nature of the initiative, EDGE was shortlisted for the Law Society's Excellence Award for Diversity and Inclusion in 2019.

EDGE is just one of Freshfields' initiatives around diversity and inclusion, which focus on six intersecting areas of gender, race and ethnicity, LGBT+ and gender identity, social mobility, disability and mental health. The firm is committed to promoting diversity and inclusion across the business and the wider legal profession. Readers of ArbitralWomen's newsletter will also be aware of the Equal Representation in Arbitration Pledge, co-chaired by Freshfields' partner **Sylvia Noury**, which seeks to raise the profile of women within arbitration and increase, on an equal opportunity basis, the number of women appointed as arbitrators.

EDGE | Every Day Gender Equality Commitment

Equal Representation in Arbitration Pledge

Submitted by Natalie Sheehan, ArbitralWomen member, Senior Associate, Freshfields, London, UK

Reports on Events

Opening up, one conversation at a time, April 2020, by Live Webinar - Programme developed by Delos Dispute Resolution (In conversation with Neil and TagTime) -

Among the many benefits of practising international arbitration is the feeling of belonging to a global community that over the years has attracted and retained brilliant legal minds. While there are many circles and layers to this community, it is sometimes also described as a mafia of practitioners located in a handful of global hubs, who meet at expensive conferences in far-flung places to catch up over coffee breaks.

The Covid-19 pandemic, with all of its woes, has created an opportunity for opening up the arbitration community in four key respects: access by the long tail, access to leading practitioners, access through a different medium, and access to diversity. We will briefly review each of these developments before drawing the threads together with the webinar series hosted by Delos Dispute Resolution.

1. **Access by the long tail.** There has been a gradual multiplication of webinars and other virtual events held across most time zones and open to participants from all corners of the world, and not just to those present in the major arbitration hubs and/or with the time and means to travel to the event. Recordings of these events have frequently been made available as well, often to the world at large, rather than only the registered participants.
2. **Access to leading practitioners.** These virtual events typically feature leading practitioners, who may previously have been known only from their publications, reported cases and news articles, rather than as persons.
3. **Access through a different medium.** Pre-pandemic, in the absence of participation in person at conferences, roundtables and such, the default mode of access to current developments and thinking around major issues was through the written medium and/or participation in task forces and research projects. Webinars and their recordings now give practitioners a new mass medium for access to and consumption of knowledge and debates in arbitration.
4. **Access to diversity.** Virtual events, and the emergence of video more generally, have created an opportunity to showcase the diversity of our field in a way that was previously not as tangible.

All four of these features have been integral to the live webinar programme developed by Delos Dispute Resolution across two series: *In conversation with Neil* and *TagTime*. Both started in April 2020 and have been the first of their kind in arbitration.

In the first series, viewers join leading arbitrators **Neil Kaplan CBE QC SBS** in Melbourne and **Chiann Bao** in Hong Kong, virtually, as Neil interviews luminaries in international arbitration and beyond, from around the world, with ArbitralWomen member Chiann acting as the MC for the series. The conversations explore the careers and personal stories of Neil's guests, against the backdrop of some of the most pressing issues of the day in international arbitration, particularly in regard to time and cost efficiency – a core area of concern for Delos.

Over time, the series has also become an informal oral history project, with speakers including past and present Presidents and Chairpersons of the American Society of International Law (ASIL), the International Arbitration Institute (IAI), the International Commercial Council for Arbitration (ICCA), the International Court of Justice (ICJ), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), the UK Supreme Court and, soon, the President of the European Court of Human Rights — in addition to Neil and Chiann's own current and past leadership positions at various arbitration institutions.

In TagTime, viewers join future leaders **Amanda Lee** (ArbitralWomen Board Member) in London and **Dr Kabir Duggal** in New York, virtually, in discussing substantive issues in or related to arbitration with recognised subject-matter experts from the four corners of the world. Speakers conclude their discussions by 'tagging' the next guest to appear in the series, hence its name. Over time, the series has given rise to a budding corpus of arbitration know-how in video format, covering issues ranging from arbitral procedure to ISDS, law and economics, to the New York Convention.

In both series, in addition to the hosts, women leaders have figured prominently as guest speakers, many of whom are members of ArbitralWomen; we name them here for the record: **Funke Adekoya SAN** (report included below in this newsletter), **Cecilia Azar**, **Dr Yas Banifatemi**, **Prof. Diane Desierto**, **Dame Rosalyn Higgins GBE QC**, **Meg Kinnear**, **Loretta Malintoppi**, **Wendy Miles QC** (report included below in this newsletter), **Lucy Reed**, **Prof. Catherine Rogers**, **Prof. Brigitte Stern** and **Prof. Janet Walker**.

Submitted by Hafez Virjee, President, Delos, Paris, France

Progressing Arbitrations in the New Global Reality on 16 April 2020, by Webinar

Ana Sambold, member of the Council of the American Bar Association Dispute Resolution Section and ArbitralWomen member, organised a series of webinars to discuss the new reality of the virtual space. She moderated a panel on 16 April 2020 with **Mohamed Abdel Wahab**, Founding Partner & Head of International Arbitration of Zulficar & Partners**, Michael McIlwrath**, Vice President, Global Litigation, Baker Hughes, and **Mirèze Philippe**, on "Progressing arbitrations in the new global reality."

The new global reality is that for now and the immediate future, disputes cannot be resolved as they have been in the past, by relying on in-person meetings in a physical location, whether to assess cases or to conduct hearings. This is especially so in cross-border dispute resolution, where travel restrictions will likely continue even long after countries may relax lockdowns and social-distancing measures. Does this spell the end of international arbitration, or can this dispute resolution method adapt to meet the needs of users to resolve their disputes? The panellists presented the challenges parties are currently facing in having their disputes timely resolved around the world, and the practical solutions adopted by the ICC International Court of Arbitration (ICC) to address the legal, procedural and technical issues necessary to continue dealing with ICC arbitrations.

The panellists clarified that virtual hearings are not online dispute resolution (ODR). They also indicated that virtual hearings need not replicate online what is being done offline and that practitioners need to consider new methods. For example: are numerous witnesses really necessary? Do hearings need to last weeks, as is often the case in common law countries? Or will fewer days, more often applied in civil law countries, suffice? Does an ability to manage or overcome Covid-19 problems factor into thinking about which arbitrators to nominate at this moment?

They observed that virtual hearings may be a new subject, generated by the pandemic, but that what is not new is the fact that the ICC had already several tools available to assist parties, their representatives and arbitrators in effectively managing arbitrations. The Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 pandemic, issued by the ICC Court on 9 April 2020 only reiterates practical insights that users need to remember. Additionally, the ICC Court was at the forefront of technology since the second half of the 1990s, as it built its own case management system and in 2000, its NetCase platform, that gave access to parties and arbitrators to their arbitrations online 24/7 in a secured space.

Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic

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

Anti-Suit Injunctions: Where are we now? on 7 May 2020, by Webinar

Steven Gee QC and Kristina Lukacova

On 7 May 2020, Kristina Lukacova spoke, with **Steven Gee QC**, at a Monckton Chambers webinar about recent developments in relation to anti-suit injunctions, including issues of key importance in arbitration.

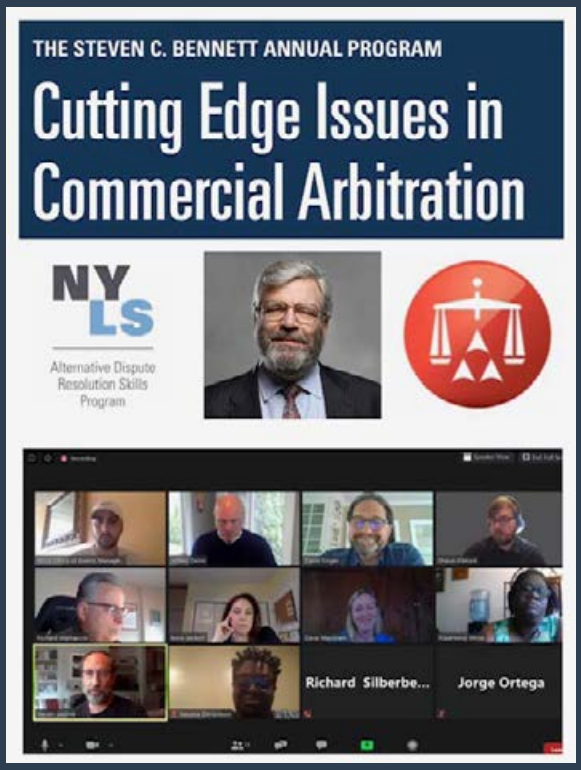
Steven Gee QC discussed, amongst other topics, the recent Court of Appeal decision in *Enka v Chubb* (currently under appeal to the Supreme Court), the significance of the seat of the arbitration, the principle of separability and the powers of the emergency arbitrator.

Kristina Lukacova spoke about recognition and enforcement of judgments given in foreign proceedings brought in breach of a jurisdiction/arbitration agreement, injunctions to restrain a foreign arbitration, and the future of anti-suit injunctions following the UK's departure from the EU.

Submitted by Kristina Lukacova, ArbitralWomen member, Barrister at Monckton Chambers, London, UK

The Steven C. Bennett Annual Programme on Cutting Edge Issues in Commercial Arbitration on 14 May 2020, by Webinar

On 14 May 2020, arbi-tration experts returned for an annual and provocative discussion of some of the most pressing challenges facing arbitrators and mediators. This annual programme recently was dedicated to **Steven C. Bennett**, who had been instrumental in the programme for many years and sadly passed shortly before this year's annual programme. The programme started with a moving tribute to Steven C. Bennett by **Jeffrey Zaino**, moderator and organiser of the programme.



Discussion topics during the webinar included Covid-19 and the conduction of virtual hearings, the new American Law Institute (ALI) Restatement of International Commercial and Treaty Arbitration, the Singapore Convention on Enforcement of Mediated Settlements, privacy and confidentiality issues in commercial arbitration, and the increase in third-party funding due to the current economic climate.

Speakers included ArbitralWomen President **Dana MacGrath** of Omni Bridgeway, **Leslie Berkoff** of Moritt Hock & Hamroff LLP, **Richard Mattiaccio**, **Charles Moxley**, **David C. Singer** and **Steven Skulnik** of Thompson Reuters. The event was moderated by Jeffery Zaino, Vice President of the American Arbitration Association.

The event was attended by more than 200 people in the international arbitration community from around the world.

Submitted by ArbitralWomen President Dana MacGrath, Investment Manager and Legal Counsel at Omni Bridgeway, New York, USA

Wendy Miles QC in conversation with Neil on 14 May 2020, by Webinar

On 14 May 2020, Debevoise & Plimpton partner and ArbitralWomen member **Wendy Miles QC** joined international arbitrators **Neil Kaplan CBE QC SBS** and **Chiann Bao** in a virtual discussion, which is part of a series called "*In Conversation with Neil*" organised by Delos Dispute Resolution. During the "*In Conversation with Neil*" webinars, Neil Kaplan interviews leading figures in international arbitration from around the world on their careers and discusses recent developments in the field.

Wendy first discovered that a career in law "*was a possibility*" through school debating. Born and raised in New Zealand, she moved to the UK and joined WilmerHale (at the time Wilmer, Cutler &



Left to right: Chiann Bao, Wendy Miles QC and Neil Kaplan CBE QC SBS

Pickering) as a senior associate in 1999, where she stayed for 16 years. Despite the partners being men, during her time at the firm, Wendy stated that she "*didn't really notice gender. We were all treated the same.*"

When asked about how she saw the women's movement in the arbitration world, in which she has been very much involved, she noted that "*it has come a long way*" with progress made, and arbitral institutions have done an incredible job on appointment by parties. However, there is a still a general problem as "*women are not at the top leadership positions in the same number as men.*" By referring to the law firm structure, Wendy observed that it still presented an enormous challenge for women.

Neil then addressed the circumstances under which practitioners are now operating while Wendy referred to it as "*a great equalizer*", as working from home "*is genderless*".

When asked about the biggest change that she has seen in her career in the way arbitration is conducted, Wendy referred to the increased volume of submissions, while she underlined that counsel are the ones who should control this practice, by trying to get on top of each case to distill it to the critical issues at an early stage. Arbitrators at the same time should read the materials early on and familiarise themselves with these materials before the case management conference in order to understand the case and how it would be run.

Neil addressed some further procedural issues including costs in arbitration and mock hearings. The issue of party-appointed arbitrators and to what extent they become advocates of their party's case was also raised, while particular emphasis was placed on the role of the chair.

During this session, Neil also mentioned "*due process paranoia*" and the possible concerns regarding virtual hearings, notably with respect to cross-examination. By referring to the current situation, Wendy stressed that: "*this (virtual) process is as good as any and probably more because a lot of the noise is gone; a lot of the theatrics, the noise is just removed.*"

The last part of the discussion mainly focused on climate change. Wendy noticed that she always found surprising how little lawyers were involved in the discussions. When analysing to what extent the environment has benefitted from the economic lockdown, she said "*it's a gift, but we need to decide what we do with the gift.*"

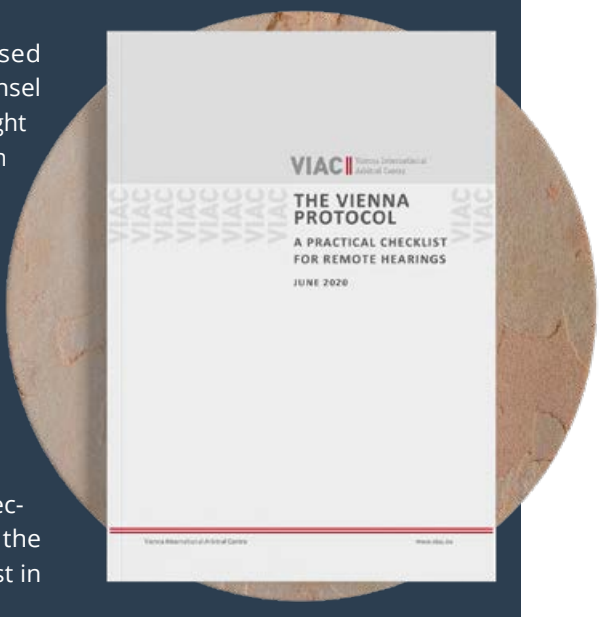
Submitted by Anna Chuwen Dai, ArbitralWomen member, Associate, White & Case LLP, Paris, France

2nd VIAC Interactive Breakfast Webinar on 14 May 2020

On 14 May 2020, the Vienna International Arbitration Centre (VIAC) hosted its 2nd Interactive Breakfast Webinar on the topic "Virtual Hearings – Legal and Practical Challenges and Considerations", which again attracted a wide-ranging audience from Austria and abroad. The event was part of a series of online events hosted by VIAC, which ultimately led to the publication of the "Vienna Protocol – A Practical Checklist for Remote Hearings" in June 2020.

The event was moderated by **Franz Schwarz** and heralded by four short presentations that examined the topic from different perspectives.

Christina Täuber addressed the topic from an in-house counsel perspective, giving first-hand insight into the parties' expectations when it comes to virtual hearings. In this regard, she emphasised the importance of adhering to the principles of equal treatment and the right to be heard. Furthermore, while certain difficulties could arise in particular in construction disputes where expert testimony is paramount and site visits could become necessary, Christina reported that the parties normally have an interest in



ensuring that the proceedings are not substantially delayed.

Thereafter, **Johanna Büstgens** spoke about legal considerations in conducting virtual hearings. She gave an overview of different arbitration rules and national arbitration laws that govern the question of whether an arbitral tribunal can order a virtual hearing against the will of one party. Furthermore, she addressed some key procedural principles, such as equal treatment and the right to be heard, which should further guide the decision on whether and how to conduct a virtual hearing.

Ulrike Gantenberg then presented different practical considerations for the conduct of a virtual hearing. She highlighted the importance of ensuring good communication between the parties and the arbitral tribunal as well as undertaking sufficient testing before the virtual hearing. The implementation of techniques for efficient case management and structuring proceedings becomes all the more important in virtual hearings. She invited the community to think outside of the box and questioned whether hybrid concepts for hearings, i.e., combining virtual and physical elements, could bridge gaps and move proceedings forward.

Finally, **Alice Fremuth-Wolf** addressed the ways in which arbitral institutions can support virtual hearings. At the outset, she reminded the audience that online hearings have also been conducted in the past, but that they often only involved one witness or one party participating remotely. With everyone currently participating from different locations, elaborate planning of virtual hearings has become even more important. Alice therefore gave an overview of different checklists published to aid virtual hearings and ways in which institutions may support them. She also, however, emphasised that the final decision on whether to conduct a virtual hearing must ultimately be taken by the arbitral tribunal.

The short presentations were followed by a lively discussion with the audience.

The Vienna Protocol

Submitted by Johanna Büstgens, ArbitralWomen member, Senior Associate, HANEFELD, Hamburg, Germany

American Bar Association's Dispute Resolution Section (ABA DRS) Virtual Spring Conference, 18-22 May 2020

We feature below reports on

the ABA Virtual Spring Conference held online for the first time: an introduction by the ABA DRS' Chair Joan Stearns Johnsen and ArbitralWomen member, and 4 events reported by ABA and ArbitralWomen members, on mediation, Online Dispute Resolution (ODR), innovation in arbitration and diversity.

Words from the ABA DRS Chair Joan Stearns Johnsen

Congratulations to all within the American Bar Association Section of Dispute Resolution (ABA DRS) for presenting a very successful Virtual Spring Conference. The ABA DRS was among the first of the ABA Sections to hold its conference remotely, from 18 to 22 May 2020.

Originally scheduled for April in New Orleans, the Section was required to quickly pivot in response to the pandemic. The virtual conference was featured using two platforms, one consisting of CLE programming, while the other was a more social interactive platform

presented on Zoom. Both were connected by an app which guided attendees to the offerings. While the CLE offerings were in the more traditional webinar format, the Zoom platform offered the close to 600 attendees an opportunity to approximate the networking aspect of an in-person conference through drop-in sessions, "virtual cocktails," and themed discussion groups. The conference took place over five days, which allowed attendees to select from among the many options. The virtual aspect also allowed the Section to tape much of the content, which will remain available over the next year for ABA members and for non-members who registered to attend the Virtual Spring Conference.

This year's theme, presciently, was "Innovation, Improvisation, and Inspiration" and the event lived up to its theme in ways we never anticipated. From challenges come opportunities. The members of the dispute resolution (DR) community clearly met the challenge. Those fortunate to attend gained new skills, enhanced their competencies and enjoyed a rewarding social experience.

The topics were wide-ranging—covering latest developments in conflict prevention, negotiation, mediation, arbitration, online dispute resolution (ODR), and ombuds, including diversity and unconscious bias, and the impact of cultural differences on dispute resolution. The week also included a Court Symposium which explored latest developments in court-annexed programmes, as well as the Legal Educators Symposium, which brought together DR academics to discuss best practices in DR pedagogy.

The webinars gathered presenters and attendees from all continents, some of whom were ArbitralWomen members, namely: ArbitralWomen co-founders **Louise Barrington** & **Mirèze Philippe**, **Ava Borrasso**, **Linda Fitz-Alan**, **Linda Gerstel**, **Deborah Hylton**, **Rebecca Mosquera**, **Rekha Rangachari**, **Ana Sambold**, **Rebecca Storrow**, and me. Special thanks to all our sponsors, especially the American Arbitration Association, the College of Commercial Arbitrators, and JAMS. Thanks also to ABA members and staff for all the remarkable work.

The year also saw many high points. In addition to our virtual Spring Conference and two sold out Institutes as well as an Ombuds Day that for the first time went international. Among this year's innovations was a series of free member benefit Zoom webinars with wide ranging and diverse content. The Section also presented the first ever Town Hall exploring the concept of conflict prevention. The half-day programme combined presentations by several General Counsel, leaders in the legal profession, and the major ADR providers as well as extended facilitated discussion and brainstorming sessions among the participants. The Town Hall was the culmination of a year-long Task Force which I co-chaired with **Ellen Wahl Parker** of CPR.

As I complete my term as Chair of the ABA DRS Section of Dispute Resolution, I reflect on an experience that I could not have anticipated. This past year brought not only a deadly pandemic and economic devastation for a large segment of our country, it also brought worldwide civil unrest in the wake of the murder of George Floyd. These challenges brought the dispute resolution community together to share and to learn and further highlights the caring nature of this community. Sincere thanks to all my friends in the Section for making my year so special and many thanks to my dear friends in ArbitralWomen for your support throughout this year.

Click here to visit American Bar Association

American Bar Association membership benefits

Submitted by Joan Stearns Johnsen, Chair of the American Bar Association Section of Dispute Resolution, ArbitralWomen member, Arbitrator and Mediator, Florida, USA

Joan Stearns Johnsen

Report on mediation: Overcoming Cultural and Language Barriers in Mediation, on 19 May 2020

On 19 May 2020, ArbitralWomen member **Ana Sambold** and colleague **Doug Witten** collaborated to present at the ABA DRS Spring Conference. As part of the first-ever virtual Spring Conference, Ana and Doug led a live CLE programme, discussing mediation challenges, opportunities, and tips related to cultural and language barriers. The programme was featured as one of the most successful live sessions adapted to the virtual format and was attended by hundreds of conference participants.

Submitted by Ana Sambold, ArbitralWomen member, ABA member, Mediator/Arbitrator, Sambold Law & ADR Services, San Diego, California, U.S.

Left to right: Ana Sambold and Doug Witten

Report on ODR: How ODR Is Increasing Global Access to Justice, on 20 May 2020

Thanks to Joan Stearns Johnsen, Chair of the ABA DRS Section and ArbitralWomen member, and to her team, the week-long virtual event was adapted to the circumstances. It was an interesting and successful experience, albeit frustrating because members could not gather and could not toast colleagues who received awards. New Orleans was hosting the jazz festival during the same week and many of us had planned to enjoy the music.

One of the panels on 20 May, organised by members of the Council of ABA DRS Section, **David Larson**, Professor of Law at the Mitchell Hamline School of Law, and **Mirèze Philippe,** Co-founder of ArbitralWomen and Board Member, Special Counsel, ICC International Court of Arbitration, addressed the topic of "How Online Dispute Resolution (ODR) is increasing global access to justice." The panellists provided an overview of the situation in their respective regions.

Linda Fitz-Alan, Registrar and Chief Executive of Abu Dhabi Global Market (ADGM) courts, indicated that all courts in the UAE have to varying degrees gone online. This has been mandated by Federal and Emirate (state) governments. ADGM courts are fully digitised without any change or interruption to service as a result of Covid-19. In-person hearings were rarely used pre-Covid-19. Digitisation has removed barriers, such as language or financial ones.

Thomas Bech Pettersen, Chief Technology Officer (CTO) of Computas, presented the situation in Norway, where courts have been digital since 2003/2004 for the internal case management and all case types for all courts, although not all prosecutors and judges take that to its full advantage. Elsewhere in Scandinavia, Swedish courts have far less IT support, but they can under certain circumstances accept video-conferencing. The courts of Denmark have a new Internet-based civil case service for law firms and businesses, much like the Norwegian solution.

Graham Ross, lawyer and mediator who has been at the forefront of developments in ODR in the UK, spoke about the online courts in England and Wales, both pre-Covid-19 and in the current crisis, the rushing to Zoom by

mediators and the dangers of hacking. He reported on how SmartsettleONE, an ODR platform, was used in settling a court case.

Michael Fang, law professor at Nanchang University in China, said that Chinese courts use artificial intelligence (AI), cloud computing, big data, blockchain, and other information and communications technology (ICT) as the "fourth party." The three Internet courts in Hangzhou, Beijing and Guangzhou have used judicial blockchain platforms to store and authenticate digital evidence. Judges use electronic files. Thus, one-third of the trial time has been saved.

David Larson reported about the decision process for selecting an ODR platform in New York and the platform chosen, Matterhorn. He contrasted this with what Utah courts did. He also mentioned some of the challenges encountered in New York.

Mirèze Philippe indicated that communications between the judiciary and lawyers are entirely electronic in France, but the country has been lagging behind in ODR platforms. The difficulties lie, among others, in the lack of continuity of projects and in the lack of ODR education from top to bottom. Interestingly, however, a French legaltech provider has developed an ODR technology *(FastArbitre)* and has published it online with free access to the technology source code.

Submitted by Mirèze Philippe, ArbitralWomen Co-founder and Board Member, member of the Council of ABA DRS Section, Special Counsel, ICC International Court of Arbitration, Paris, France

Report on innovation in arbitration: 8 Innovative Arbitration Trends: A New Practice and Ethical Landscape, on 21 May 2020

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OVERVIEW OF U.S. COURT TREATMENT OF INTERIM MEASURES IN SUPPORT OF INTERNATIONAL ARBITRATION

By Ava Borrasso

Ava Borrasso

On 21 May 2020, a panel comprised of arbitrators and industry professionals presented "8 Innovative Arbitration Trends: A New Practice and Ethical Landscape." The panel was organised and moderated by AAA Vice President and ArbitralWomen member **Rebecca Storrow** and included ICDR Vice President **Luis Martinez,** ArbitralWomen member **Ava Borrasso, Julee Milham, Francis Sexton** and **Steven Platau.**

The programme addressed eight topical issues in arbitration, ranging from diversity, education and organisational developments, to technological advances and security issues, as well as an overview of industries with growing and declining numbers of arbitration cases; complex strategies involved in arbitration and developments in various processes utilised in arbitration. For example, interim

measures, emergency proceedings and conflicts issues arising from third-party funding were discussed.

One statistic of particular note to our members is the AAA/ICDR's diverse roster, currently achieving 30% level of gender diverse appointments. Luis Martinez also addressed the timely Covid-19 Resource Center available on the AAA-ICDR website.

The panel extends its true appreciation to Chair of the ABA DRS and ArbitralWomen member **Joan Stearns Johnsen** for her team's quick adaptation of the in-person conference scheduled to take place in New Orleans into this innovative format.

Panel recording.
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Submitted by Ava Borrasso, ArbitralWomen member, Arbitrator & Litigator, Ava J Borrasso, P.A., Miami, Florida, USA

Report on diversity: Innovative Strategies for Developing an Inclusive Mindset, on 21 May 2020

ArbitralWomen member Linda Gerstel, a full time arbitrator and mediator, moderated a panel on 21 May 2020 with ArbitralWomen co-founder **Louise Barrington** and Board Members **Rekha Rangachari** and **Rebeca Mosquera** on *Innovative Strategies for Developing An Inclusive Mindset*. They were joined by **Jeff Zaino**. The panel discussed some of the earliest tools used to increase diversity in ADR and whether they have achieved a measure of success. The panel also discussed some of the latest innovative tools in the past two years, including the ArbitralWomen Diversity Toolkit™ and the New York International Arbitration Center (NYIAC)'s Diversity Corner.

Linda Gerstel and Louise Barrington

Rekha Rangachari and Rebeca Mosquera

During the panel discussion, ArbitralWomen Board Member and NYIAC's Executive Director, Rekha Rangachari, joined by Jeff Zaino, examined whether our mindsets have really been changed when selecting neutrals from the ADR provider perspective. ArbitralWomen co-founder, chartered arbitrator and accredited arbitrator, Louise Barrington, delivered thought-provoking and insightful comments from the neutral's viewpoint, while ArbitralWomen Board Member and international arbitration practitioner at Akerman LLP, Rebeca E. Mosquera, offered an interesting insight from the law firm's and practitioner's perspective. The panel also discussed whether more inclusive mindsets have fared better in the international arena (investment/commercial) vs. the domestic one. The panellists addressed how we build on the tools already in place and possible next steps for expanding upon the ArbitralWomen Diversity Toolkit™. Finally, in light of the circumstances creating the transition to a virtual event, the panel focused on what the impact of Covid-19 will be on diversity and stressed that ADR professionals need to be cognizant of continuing and strengthening mentorship programmes by allowing for shadowing opportunities for new neutrals. Perhaps the move to technology will provide a more active collaboration with younger neutrals to assist in virtual settings. However, the panel also recognised the negative impact that Covid-19 may have on integrating new and diverse arbitrators and mediators, because of the absence of networking events.

The panel concluded with a question to each panellist: If you were in charge of creating one more tool to increase diversity in ADR, what would that be? We should all be devoting some thought to this potential "new tool" and think about how we can expand the collaboration between the ABA and ArbitralWomen's Diversity Toolkit™ to leverage our experience in promoting diversity.

Submitted by Linda Gerstel, ArbitralWomen member, Independent Arbitrator and Mediator, Gerstel ADR, New York City, NY, USA.

Building a Career in International Arbitration and Dispute Resolution in the Times of COVID-19 on 19 May 2020, by Webinar

On 19 May 2020, Winston & Strawn LLP and the Chartered Institute of Arbitrators (CIArb), North America Branch Young Members Group, co-hosted a webinar to explore the new challenges that law students and young practitioners interested in international arbitration and dispute resolution face, particularly in the era of Covid-19. The panel, moderated by **Harout J. Samra**, Associate at DLA Piper, included the following leading practitioners and professionals: **Susan Manch**, Winston & Strawn LLP's Chief Talent Officer; **Amanda Lee**, Consultant at Seymours and Founder of Careers in Arbitration; **Louis Ramos**, Managing Director at Major, Lindsey & Africa and **Joan Stearns Johnsen**, Senior Legal Skills Professor at the University of Florida and Chair of the ABA's Section of Dispute Resolution. Below are the takeaways:

DOs

Be flexible

Susan advised students and young practitioners to avoid fixating on the experiences they are missing out on, but rather focus on new opportunities that have become available. For instance, with no time wasted on a commute to work, take advantage of more one-on-one time with more senior practitioners, which means more time for guidance and meaningful feedback.

All the panellists agreed that getting accustomed to virtual meetings and even virtual interviews, is critical. Be mindful of your space, pay attention to lighting, conduct a test-run of your technology and remember that while formal attire is less preferred these days, it is nevertheless important to appear professional.

Take advantage of opportunities

Amanda urged students and young lawyers to channel any fear they may be experiencing into more productive avenues. For instance, Amanda's number one advice was to *publish*, *publish*, *publish*. Despite the current circumstances, technology permits students and young lawyers to conduct in-depth research and share ideas from within their own homes. Various online research blogs focused on international arbitration and dispute resolution may be willing to publish these pieces.

Find ways to demonstrate your commitment

Joan's advice for students and young lawyers was to be the person others want to work with, while also acknowledging that this may sound easier than it really is. Developing good interpersonal skills and learning how to refine work product is not to be taken for granted. Louis further noted that law firms are looking to hire individuals who demonstrate a ready commitment to the job. Employers are willing to extend employment offers to applicants who consistently demonstrate a willingness to move the ball forward on cases and provide thoughtful work product.

DON'Ts

Don't fixate on what you're missing out on

The panellists unanimously agreed that it is critical not to view the current circumstances in terms of lost opportunities or experiences. Legal organisations, including law firms, are adapting to the circumstances and formulating creative ways for students and young practitioners to network with others in the firm and remain engaged. Not to mention the number of video-conferences being organised worldwide with practitioners in the international arbitration and dispute resolution fields, providing students and young lawyers with the opportunity to engage with international practitioners and gain insight into these practice areas.

Don't view your career with only a short-term lens

Despite the difficulties some may face in finding a job or in advancing their careers while Covid-19 impedes certain professional opportunities, Amanda and Susan both agreed that every student or young lawyer should view their legal career with a long-term perspective. This means that it is critical that students and young lawyers attempt to gain the most experience that they can during this time, even if that means having to seek different opportunities than the ones they had planned for previously.

Refrain from having a controversial online footprint

It is important to think carefully about the type of content a prospective job applicant, or even an employed young lawyer, makes available online. Amanda advised students and young lawyers to shy away from posting controversial content on the Internet, particularly at this early stage in their career. Additionally, for those who do decide to take Amanda's advice and write research articles, any content that is to be published online and posted for others to read should be well thought out and well written.

Submitted by Amanda Jereige, Associate at Winston & Strawn LLP, San Francisco, USA

Frustration of Contract / *Force Majeure* due to Covid-19 Pandemic, on 19 May 2020, by Webinar

On 19 May 2019, GAIA AFRICA hosted a digital workshop on cross-border dispute resolution, at which **Elizabeth Oger-Gross** was the guest speaker & facilitator.

GAIA AFRICA is a private club for women business leaders in Africa. Located in Lagos, Nigeria, the club was launched in 2018 by **Olatowun Candide-Johnson**, a Nigerian lawyer with extensive experience in international companies in the oil & gas sector. Driven by a vision that, in many aspects, resembles that of ArbitralWomen, Olatowun Candide-Johnson established GAIA AFRICA with the aim of providing a safe and progressive third space for women leaders, to network, grow their businesses, expand career possibilities and drive impact, as well as to build up a platform which contributes to solving a key societal and economic challenge. GAIA AFRICA is more than a club for women. It is an organising principle for female leadership which is required as the bedrock for sustainability of any social economy. This African brand is built around the common interests of female leaders in diverse industries including business, politics, the professions, and social enterprise.

GAIA AFRICA organises events and provides a private space for women to hold meetings and establish business networks. GAIA AFRICA also turns into a learning platform for women through the digital workshops it organises on a wide range of topics, such as leadership, board effectiveness, embracing change investment opportunities, angel investing and lifestyle matters, to name a few.

Concurring with GAIA AFRICA founder's idea that "*[w]omen can be supporting infrastructure for each other in business and public life also,*" Elizabeth Oger-Gross took the opportunity to speak at GAIA AFRICA's digital workshop to share her expertise in international arbitration.

She discussed several legal issues arising often during the Covid-19 crisis and provided guidance on the drafting and application of key contract clauses, such as *force majeure* and hardship clauses. Elizabeth's talk aimed at providing the women leaders participating in the event additional knowledge to address cross-border disputes —and, in particular, international arbitrations— arising out of their business activities. She also discussed issues of underrepresentation of women and non-white arbitrators in international arbitration.

Click here to access GAIA AFRICA's website

Click to visit GAIA AFRICA's LinkedIn profile

Submitted by Elizabeth Oger-Gross, ArbitralWomen member, Partner, White & Case, Paris, France

The Impact of the Great Lockdown on Construction Industry Arbitrations, on 19 May 2020, by Webinar

On 19 May 2020, the Inter-national Centre for Dispute Resolution (ICDR) Young and International group held a webinar to discuss the impact of the "Great Lockdown" on construction industry arbitration. The panel consisted of **Anneliese Day QC** (Fountain Court Chambers, London); **Mark Raymont** (Pinsent Masons, Dubai); **Antonia Birt** (Curtis Mallet-Prevost Colt & Mosle, Dubai); **Andrew Kirk** (Petrofac, Dubai) and **Michael Tonkin** (HKA, Dubai), providing perspectives on the topic from an arbitrator, an arbitration counsel, an in-house counsel and an expert, respectively. The webinar was introduced by **Rafael Carlos del Rosal Carmona** (International Case Counsel, ICDR) and **Samantha Lord Hill** (Senior Associate, Freshfields Bruckhaus Deringer), moderated by **Sarah-Jane Fick** (Senior Associate, Freshfields Bruckhaus Deringer) and with closing comments from **Iryna Akulenka** (HKA, Dubai).

The topics discussed included the serious difficulties of the Great Lockdown facing the construction industry; the current appetite

amongst clients for escalating construction disputes to arbitration; opportunities for proactive settlement strategies; innovation in arbitration procedures and the challenges of adopting new arbitration technologies. The panellists emphasised that, whilst the Great Lockdown has presented challenges for construction arbitrations, the response to those challenges has been overwhelmingly positive:

- As a result of cash flow restrictions, clients may become more comfortable with third-party funding;
- 'Virtual' dispute resolution has required parties to embrace technology in presenting claims, resulting in cost, efficiency and time gains;
- Widespread acceptance of virtual hearings could result in more proactive management by tribunals, as bifurcated hearings become less onerous, both financially and in terms of participants' time; and
- Potential opportunities for the appointment of more diverse and younger arbitrators, particularly for lower value claims, when a swift and cost-effective resolution is required.

The panellists concluded by agreeing that many aspects of the shift to virtual arbitrations will remain beyond the Great Lockdown and should be welcomed and supported by clients, arbitrators, experts and lawyers alike.

Submitted by Sarah-Jane Fick, ArbitralWomen member, Senior Associate, Freshfields Bruckhaus Deringer, Dubai, UAE

International Best Practice on Virtual Hearings in Arbitration: Tips for Arbitrators and Counsel, on 27 May 2020, by Webinar

Top to bottom, left to right: Danielle Forrester, Gitanjali Bajaj, Judith Levine, Justin Gleeson SC

On 27 May 2020, the Australian Centre for International Commercial Arbitration (ACICA) hosted a webinar on "International Best Practice on Virtual Hearings in Arbitration: Tips for Arbitrators and Counsel." The panel was chaired by ArbitralWomen member **Judith Levine** (Independent Arbitrator, Levine Arbitration), and featured ArbitralWomen **Gitanjali Bajaj** of DLA Piper, as well as **Danielle Forrester** and **Justin Gleeson SC**, both of Banco Chambers in Sydney. The speakers examined some of the crucial issues that arise with the growing demand for, and use of, online arbitration and the key decisions that parties need to be prepared for. What types of cases are appropriate for an online hearing? What are the considerations for parties in preparing for an arbitration being conducted on an online platform? Where do the technological risks lie? What are the due process concerns and how can parties seek to avoid these issues? The speakers also mentioned recent decisions of Australian courts touching on these issues, as well as features from the recently published ACICA Online Arbitration Guidance Note. The speakers also answered questions from participants tuning in from Australia and around the world.

Click here to view the recording

ACICA Online Arbitration Guidance Note

Submitted by Judith Levine, ArbitralWomen member, Independent Arbitrator, Levine Arbitration, Sydney, Australia

TagTime with Funke Adekoya SAN, on 27 May 2020, by Webinar

On 27 May 2020, Funke Adekoya SAN, a founding partner at Nigerian law firm ÆLEX, joined **Kabir Duggal**, an attorney in Arnold & Porter and **Amanda Lee**, a consultant at Seymours and Board Member of ArbitralWomen, in a virtual presentation on "*Damages and Costs: Can Fair Compensation be Too Much?*" This is one of a series of "TagTime" webinars organised by Delos Dispute Resolution. During the "TagTime" webinars, Kabir Duggal and Amanda Lee host leading individuals of international arbitration and discuss well-known cases and relevant case material. This is then followed by a Q&A with the audience and concludes with the guest speaker tagging the next guest.

In this webinar, Funke opened the session by noting that she would be speaking from the perspective of someone coming from a developing country. Funke started the discussion with damages in commercial disputes, where claimants are looking for a financial recompense, usually because of a breach of a commercial relationship. She then raised the question on how fair compensation can be "*too much*" and stressed that "*compensation can only be unfair if the claimant is awarded what it is not entitled to.*"

Funke further referred to the case of *P&ID v. Nigeria* where an *ad hoc* arbitral tribunal awarded the claimant the "*net present value of the profits*" which it would have earned, amounting to $6,597,000,000, plus interest. The tribunal found that this amount was the net present value of the profits which would have been earned by the claimant if it had been allowed to complete the contract. At the time of enforcement, the amount had reached $9,600,000,000 (including interest). The respondent believes that this compensation is unfair and is currently taking steps to prevent the enforcement of the award.

Turning to investment disputes, Funke noted that damages are the most common remedy, although there have been cases where restitution has been ordered. The general principle is that where restitution is impossible, then a successful claimant would be ordered an amount equivalent to the fair market value of its undertaking. Funke then turned to the issue of proof, where she considered that "*if you can prove your financial loss, no matter how large it is, then it's fair compensation.*" By using the examples of *P&ID* and *Yukos*, she concluded that respondents also have an obligation (especially in investment treaty arbitration) to "*discount and discredit the valuation methodology that the claimant has put forward and to propose alternative methods and alternative values.*"

The next issue that Funke addressed by referring to case law, concerned the different modes for calculation of damages, such as the income approach and the actual investment approach. She then discussed moral and punitive damages and underlined that often there is a very fine line between the two. The last part of the presentation focused on costs. Funke mentioned that "*costs of arbitration is something that the developing world is very concerned about.*" However, since arbitration is a privately funded process, "*you get what you are prepared to pay for.*" Funke also analysed the principles of reasonableness and proportionality.

Funke lastly mentioned that tribunals do not usually take into consideration third-party funding arrangements and examined the issue of shifting costs. With regard to issuing interim cost awards, she noted that she would do so "*if the parties ask for it, if it would ensure that the other party wakes up and behaves and keeps the arbitration on track.*"

Submitted by Anna Chuwen Dai, ArbitralWomen member, Associate, White & Case LLP, Paris, France

Left to right: Kabir Duggal, Amanda Lee

The State of the European Union: The Judgment of the German Federal Constitutional Court on the European Central Bank's Public Sector Purchase Programme, on 4 June 2020, by Webinar

Top to bottom, left to right: Markus Burgstaller, Ana Stanič, Dieter Grimm, Miguel Poiares Maduro

This was a virtual seminar with

Markus Burgstaller (Partner at Hogan Lovells, London), **Dieter Grimm** (former Judge at the German Federal Constitutional Court and Professor emeritus at Humboldt University in Berlin, Germany), **Miguel Poiares Maduro** (former Advocate General at the Court of Justice of the European Union and former Portuguese Minister for Regional Development, Professor at the European University Institute in Florence, Italy) and ArbitralWomen member **Ana Stanič** (Principal at E&A Law) discussed on the implications of the recent German Constitutional Court decision which found the Court of Justice of the EU decision regarding ECB *ultra vires*, its likely ramifications, in particular on the principle of the EU law supremacy and financial assistance to address Covid-19.

Ana argued that the principles according to which (a) effective judicial review of decisions and of acts of public authorities and (b) conferral of powers must be restrictively interpreted are at the core of any legal system based on the rule of law and this must include the EU legal system. She then proceeded through this lens to assess the implications of the CJEU's decision in *Weiss and GCC* response thereto. She emphasised the importance of ensuring that European integration and legal system protects fundamental human rights, the rule of law, ensures separations of powers, and provides for effective judicial review.

Submitted by Ana Stanič, ArbitralWomen member, Director at E&A Law Limited

The Art of e-Advocacy: Persuasion in a World of Virtual Hearings, on 4 June 2020, by Webinar

On 4 June 2020, ArbitralWomen member **Janet Walker** (Independent arbitrator) spoke at a webinar hosted by the International Centre for Dispute Resolution (ICDR) Young and International group (Y&I) on advocacy in virtual hearings.

The event was moderated by **Isabel San Martín**, Associate at King & Spalding. The event explored how to conduct effective advocacy in virtual hearings, from the perspectives of coach, advocate and arbitrator.

John Faulk, of Fireside Coaching, opened the discussion explaining how interactions in a virtual setting require some intentional action to recreate "the room" and to establish a positive and human experience in the virtual setting. To generate a welcoming environment, he recommended using some form of protocol when accepting people into the virtual room; for example, providing guidance on what to expect during the process. Some of his tips to improve delivery included using a professional microphone, getting used to looking at the camera (not the screen) and ensuring that the camera is properly aimed at you. He also highlighted the importance of the voice and recommended focusing upon correct articulation and avoiding "uptalk."

Tom Sprange QC, Partner at King & Spalding, explained how elements of the drama in traditional advocacy can be lost in virtual hearings. He played a classic clip from the movie "A Few Good Men" to illustrate this. Tom pointed out that many of the usual advocacy techniques no longer work in a virtual setting. Instead, it is now more important to be nimble, and to avoid appearing panicked or angry, as this will be more obvious on screen. On a positive note, he described how virtual hearings serve to some extent to level the playing field for young

Top to bottom, left to right: Isabel San Martín, John Faulk, Tom Sprange and Janet Walker

advocates, and he recounted his experience in a case in which a prestigious lawyer unfamiliar with virtual hearings provided a less convincing presentation than a younger lawyer more adept at presenting online.

Finally, **Janet Walker** offered the arbitrator's point of view, and displayed her own setting for virtual hearings. She agreed with Tom that some of the drama is lost in virtual hearings, but she considered that this could lead to an increased relevance of analytic skills in the advocates' presentations. She also explained how in such settings, each participant has a front row seat to the arbitrator, so young advocates should be proactive in seeking the opportunities this affords. Furthermore, she agreed with John on the need for new protocols or etiquette, citing as an example the possibility of raising your hand to intervene instead of interrupting.

The panel provided some interesting tips and suggestions on how to adjust our advocacy skills to this new reality.

Webinar recording at the ICDR Y&I's YouTube page.

Submitted by Isabel San Martín, Associate, King & Spalding, Paris, France

Arbitration and State Courts in Times of Economic Crisis: jurisdictional comparison (Ukraine, Russia, Kazakhstan) on 4 June 2020, by Webinar

Top to bottom, left to right: Oksana Karel, Gregor Postl, Anna Grishchenkova, Markian Malskyy, Artem Timoshenko and Alice Fremuth-Wolf

On 4 June 2020, the webinar

"Arbitration and State Courts in Times of Economic Crisis: jurisdictional comparison (Ukraine, Russia, Kazakhstan" organised by Arzinger law firm in cooperation with the Vienna International Arbitral Centre (VIAC) took place. The webinar was moderated by **Markian Malskyy**, Partner and Co-head of International Litigation and Arbitration at Arzinger (Ukraine).

Gregor Postl, Regional Manager for Eastern Europe and Central Asia at Advantage Austria, shared his view on what post-Covid-19 era will bring to the Eastern European businesses in terms of cooperation with Austrian companies and what role arbitration and litigation may play in improvement of cooperation.

ArbitralWomen member **Alice Fremuth-Wolf** (Secretary General, VIAC) shared VIAC's perspective on CEE-related disputes and talked about issues caused by the Covid-19 lockdown and how VIAC has tackled these challenges, which include service of procedural documents by electronic means, facilitating virtual hearings, awards with secure e-signatures, and what new protocols this institution has developed in response to those issues. In addition, Alice gave an update on VIAC's status as Permanent Arbitration Institute in Russia and the recently received Answer

of the Council to a joint request by VIAC and HKIAC on certain issues of their license.

Oksana Karel (Arzinger, Ukraine), **Anna Grishchenkova** (Korelskiy, Ischuk, Astafiev and Partners, Russia) and **Artem Timoshenko** (Unicase, Kazakhstan) talked about interaction with state courts, interim measures, recognition and enforcement of arbitral awards in Ukraine, Russia and Kazakhstan in times of lockdown, what has changed and which tools are now used to facilitate some processes.

The speakers also discussed the possibility of an increase of disputes in the post-Covid-19 period, due to breach of many contracts and whether such instruments as mediation will become more popular.

Click here to access the webinar recording.

Submitted by Oksana Karel, ArbitralWomen member, Counsel, Co-head of International Litigation and Arbitration, Arzinger, Kyiv, Ukraine and Alice Fremuth-Wolf, ArbitralWomen member, VIAC, Secretary-General, Vienna, Austria

Coronavirus and Exemption of Liability, on 5 June 2020, by Webinar

Top to bottom, left to right: Jean Ho, Nigel Blackaby QC, Chiann Bao, Franco Ferrari and Lucy Reed.

On 5 June 2020, the Singapore International Arbitration Centre (SIAC), the New York University (NYU) School of Law and the New York International Arbitration Center (NYIAC) jointly held a webinar on Covid-19 and the exemption of liability. ArbitralWomen member **Lucy Reed** (Arbitrator, Arbitration Chambers) moderated a distinguished panel comprising another member **Chiann Bao** (ArbitralWomen member, arbitrator, Arbitration Chambers), **Jean Ho** (Assistant Professor Faculty of Law National University of Singapore), **Nigel Blackaby QC** (Partner at Freshfields Bruckhaus Deringer US LLP) and **Franco Ferrari** (Professor of Law and Director of the Center for Transnational Litigation, Arbitration and Commercial Law, New York).

The webinar focussed on the Covid-19 pandemic from a comparative and international law perspective, considering the position of both commercial parties and states.

Nigel Blackaby began by presenting the differences between *force majeure* and hardship. Using New York and English law to illustrate the common law approach, he explained the necessity for a contract to provide explicitly for *force majeure* and/or hardship, as distinguished from French civil law where the Civil Code provides for both defences as a start, and parties can contract out of them if they wish. He recommends that parties be specific about what might trigger a *force majeure* event, e.g. in the context of Covid-19, whether the clause includes pandemics as defined by the World Health Organisation.

Franco Ferrari then discussed exemption of liability under international instruments. With UNIDROIT Principles, he noted that there are clear provisions for *force majeure* and hardship, and that often the Principles are used to corroborate what courts may have already decided on other grounds. He then discussed exemption of liability for *force majeure* under Article 79 of the CISG, observing that there is considerable debate on whether the hardship defence is available.

Chiann Bao presented next on *force majeure* certificates, focussing on China's CCPIT, which has issued more than 7,000 certificates in the last three months covering contracts of a combined value of more than US$98 billion. She also analysed the nexus between the certificates' content and effect: where one provides a generic explanation of Covid-19 and the consequential measures imposed by law, such a document may be less persuasive to a court or tribunal than one issued by an authority requiring

extensive documentation to justify the causal relationship between the effects of Covid-19 and/or governmental measures and the applicant's non-performance.

Finally, Jean Ho discussed the defence of *force majeure* under customary international law pursuant to Article 23 of the Articles on State Responsibility. Citing *Orlandini-Agreda v Bolivia*, Jean Ho gave the example of Bolivia's unsuccessful request under Article 23 for suspension of proceedings or, alternatively, extension of submission deadlines, due to Covid-19. She also considered the situation where there is an international obligation at stake, such as those contained in investment treaties, explaining the five cumulative conditions that a state must fulfil to invoke Article 23 defence and that it is very challenging for one to succeed.

After a brief Q&A session, the panellists concluded that, although Covid-19 may arguably be considered unforeseeable, it would be difficult to take this position in relation to a second or third wave of the pandemic or other new pandemics. Therefore, it is prudent for parties to consider these issues seriously in their contracts, because, unfortunately, the reality is that the occurrence of such pandemics could become increasingly frequent in the future.

Submitted by Krystal Lee, Associate, Stephenson Harwood LLP, London, UK

Women in Dispute Resolution: navigating the new normal, adapting career strategies and building resilience after Covid-19, on 11 June 2020, by Webinar

Young ArbitralWomen Practitioners (YAWP), with excellent support from DLA Piper, organised a webinar on "*Women in Dispute Resolution: navigating the new normal, adapting career strategies, and building resilience after COVID 19*" on 11 June 2020. In the trying times of Covid-19, the webinar was intended to offer a refreshing and much needed perspective on issues such as work-life balance, coping with stress, career strategies and connecting with colleagues and new clients during this period.

Top to bottom, left to right: Kate Brown de Vejar, Katie Hyman, Asoid Garcia-Marquez, Annabelle Möckesch, Montserrat Manzano and Aanchal Basur

The discussion was ably moderated by inaugural YAWP Steering Committee member, **Kate Brown de Vejar** (Partner, DLA Piper, ArbitralWomen member) and members of the YAWP Steering Committee contributed as panel speakers for the event that was aimed at young dispute resolution practitioners across the globe. The webinar focussed on three main aspects: navigating the new normal in the changing times, adopting strategies for addressing career shifts or recruitment, and building resilience, both internally as well as within a team.

Cherine Foty, of Jones Day, Paris, ArbitralWomen Board Member and **Annabelle Möckesch**, of Schellenberg Wittmer, Zurich, led the discussion on maintaining work-life balance during this period, where across the world, practitioners are working from home. Cherine shared some excellent tips on her experience with sensitizing children to work schedules and Annabelle spoke about the importance of marking separate areas in the house for every person working from home to avoid distraction and conflict.

Katie Hyman, of Akin Gump, Washington D.C., tackled the issue of coping with stress in these trying times. Interestingly, she delved on how family-oriented activities like baking, cooking, etc would help in alleviating stress levels and also touched upon various mental and physical well-being activities that are currently being organized by firms and other organisations. **Amanda Lee**, of Seymours, London, director of YAWP and ArbitralWomen Board Member also chipped in to talk about how sharing her to-do lists with family keeps her on track.

Montserrat Manzano, of Von Wobeser Y Sierra, S.C., Mexico City, led the presentation on tips for staying connected with the team at one's organization and engaging with fellow members. She spoke about the importance of connecting with firm partners and team members, having virtual conversations with them, and the fact that it can actually be easier than usual to do this in the current circumstances, because they are more available.

Aanchal Basur, of AB Law, New Delhi, spoke about the use of technology

to ensure continuity and tackling virtual hearings. She addressed the platforms that have been proving to be helpful for tribunals in conducting secure and confidential hearings and also elaborated on the equipment required for successfully participating and arguing before a panel in the virtual setting.

Aanchal, Kate and Montserrat also spoke about technology becoming a great equalizer for young practitioners and women alike in an area primarily dominated by established names.

Annabelle then addressed the aspect of career development and moves in a time of hiring freezes and lay-offs and spoke about strategies that young lawyers could adopt to address these challenges. She discussed the importance of timing and the need to take advantage of the various webinars being offered at no cost during this period. Kate provided some valuable insights on the tenor one should adopt while addressing emails to partners and contacts for recruitment.

The final leg of the webinar addressed the topic of new strategies for business development and client management in the "new normal" and the discussion was led by **Asoid Garcia-Marquez**, of UNESCO, Paris and ArbitralWomen member, and Cherine. The panel stressed the importance of staying in communication with clients and how reaching out to them to check on them, and to understand their needs would go a long way in establishing and maintaining relationships also after Covid-19.

It was great to note that the webinar was attended by practitioners all over the world, from Brussels, Hong Kong, The Hague, all the way to San Jose, Lagos, Nairobi and Bengaluru, among many others. The YAWP Steering Committee is glad that they could discuss the issues that dispute lawyers are tackling on an everyday basis and are highly appreciative of the able and patient technical support staff from DLA Piper that made this webinar possible.

Submitted by Annabelle Möckesch, Senior Associate, Schellenberg Wittmer, Zurich; Katie Hyman, Special Legal Counsel, Akin Gump, Washington D.C. and Aanchal Basur, Partner, AB Law (all members of the YAWP Steering Committee)

Meet Your Female Arbitrator, on 15 June 2020, by Webinar

On 15 June 2020, ArbitralWomen member **Carolyn B. Lamm** spoke at the "Meet Your Female Arbitrator" event hosted by the Italian members of the ERA Pledge Steering Committee. The event was designed to provide lawyers an opportunity to get to know female arbitrators, including their backgrounds, personalities, views on the perspective women bring and thoughts on how to meet the increasing demand for efficiency in international arbitration. Over 100 participants attended this event where Carolyn shared her experience as counsel, arbitrator, and Chair of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings.

Following the event, Carolyn received many positive comments on LinkedIn from the attendees. She would like to thank ArbitralWomen and the ERA Pledge Steering Committee for putting this event together and taking other important actions for achieving a fair representation of women in international arbitration.

"Meet Your Female Arbitrator" provides a platform to highlight female arbitrators. This effort is directly linked to the significant increase in female arbitrator appointees, as demonstrated in the Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings. The Task Force produced the Report to document and published recent statistics on the appointment of female arbitrators, as well as to identify opportunities and best practices to promote the appointment of women to arbitral tribunals. The Report has just been published by ICCA both on its website and on the Kluwer Arbitration website.

Specifically, as shown in the Report, over the past five years approximately a third of institutional appointments have been female (Report, page 20). Overall, the Report demonstrates that institutional commitments to diversify arbitral tribunals have consistently translated into positive, tangible results. Similarly, the data shows that several institutions have seen changes in the appointment of female arbitrators by parties (Report, page 25).

Furthermore, the Report highlights the steps that the ERA Pledge Steering Committee and sub-committee members have taken to further promote gender diversity in arbitrator appointments. For example, the ERA Pledge launched the annual Award in conjunction with Global Arbitration Review aimed at recognising and celebrating initiatives that promote gender diversity in arbitration (*See* Global Arbitration Review, GAR Awards 2020 — the Pledge Award, here). In addition, regional sub-committees organise and implement initiatives tailored to the local market, to achieve maximum impact. As of May 2020, the ERA Pledge has received nearly 4,200 signatures, including around 782 organizations from 113 different countries (see here).

As the Chair of the Task Force on Gender Diversity in Arbitral Appointments and Proceedings, I am happy to report that initiatives such as the ERA Pledge and ArbitralWomen, along with efforts by arbitral institutions, law firms and other organisations to focus on diversity, have led to the appointment of more women as arbitrators.

Cross-Institutional Task Force report

Submitted by Carolyn B. Lamm, ArbitralWomen member, Partner, White & Case LLP, Washington, DC, USA and Madina Lokova, International Attorney at White & Case LLP, Washington, DC, USA

Party autonomy during COVID-19 on 16 June 2020, by Webinar

The Australian Disputes Centre (ADC) hosted a webinar on 16 June 2020 on the topic of "Party Autonomy during COVID-19 – testing the reach of the Tribunal's mandate." The webinar was introduced by **Deborah Lockhart**, CEO of ADC.

Three very distinguished panellists from the Monash Law Faculty "Commercial Disputes Group":

- Professor the Hon **Marilyn Warren AC QC**, former Chief Justice of the Supreme Court of Victoria and current member of Dawson Chambers' Senior Arbitrator Group;
- Professor the Hon **Clyde Croft AM SC**, former judge of the Victorian Supreme Court (and judge in charge of the arbitration list at that Court) and current member of the Dawson Chambers Senior Arbitrator Group; and
- Dr **Drossos Stamboulakis**, former Associate to the then Justice Croft and a consultant at the Hague Conference on International Law.

Top to bottom, left to right: Bronwyn Lincoln, Clyde Croft, Marilyn Warren and Drossos Stamboulakis

shared their views in lively discussion, chaired by **Bronwyn Lincoln**, ArbitralWomen member, partner of Corrs Chambers Westgarth and international arbitrator.

Addressing a series of questions, the panel discussed the response of the arbitration community to Covid-19 restrictions, the flexibility offered by the arbitration process, the immediate and widespread move to virtual hearings, and the power and/or willingness of the tribunal to impose procedural orders accommodating the global restrictions, either with or without the agreement of the parties.

The topics covered during the presentation and discussion included:

- Whether there was a greater role for party autonomy during Covid-19
- How party autonomy intersects with the tribunal's obligation to conduct arbitration efficiently and expeditiously;
- Whether 'efficiency' and 'expedition' have different meanings in different circumstances; for example, during periods of global travel restrictions or when particular jurisdictions declare a state of emergency;
- The power of the tribunal to make

procedural orders, including in relation to the hearing, in the face of opposition from one or all of the parties and, if the tribunal has power to do so, whether it should exercise that power;
- Whether the parties can in fact have 'the last say';
- Sources of the tribunal's power to conduct the proceedings, including the arbitration agreement, procedural law and law of the seat;
- How counsel can advocate more effectively during virtual hearings; and
- The impact of procedural orders made to accommodate restrictions on enforcement of the arbitral award.

All three panellists acknowledged the importance of maintaining the integrity of the arbitration process and ensuring, to the fullest extent, that it resulted in an enforceable award for the parties. They also offered their views as to whether the Covid-19 restrictions might be taken into account by a court during enforcement proceedings when assessing whether a tribunal adhered to procedural fairness requirements. The answer to this question does, however, remain to be seen given awards made during these unprecedented times are unlikely to come before courts until 2021 at the earliest.

Submitted by Bronwyn Lincoln, ArbitralWomen member, partner of Corrs Chambers Westgarth, Melbourne, Australia

Wind of Change – Virtual and Paperless Arbitration on 18 June 2020, by Webinar

The Arbitration Association's Under 40 Section and the Kopaonik School of Natural Law Slobodan Perovic's Under 35 Section jointly organised a webinar on 18 June 2020 entitled: "Wind of change, virtual and paperless arbitration." Opening remarks were made by **Andrea Nikolic**, Teaching Assistant at the University of Belgrade and Consultant at the Ministry of Justice. The moderator, **Leon Kopecky**, Partner, Schoenherr, Vienna, opened the discussion with panellists **Manuel Casas**, Counsel, Wilmer Cutler Pickering Hale and Dorr, London, **Catherine Anne Kunz**, Partner, Lalive, Geneva, ArbitralWomen member and **Mirèze Philippe**.

Mirèze Philippe first explained what digitisation meant; that the use of technology to hold a hearing remotely is meant to connect people, affording them an opportunity to replace the offline place by the online space; that virtual hearings are not online dispute resolution (ODR) and recalled the definition of ODR provided in the UNCITRAL Technical Notes on Online Dispute Resolution; that best practices to conduct arbitrations efficiently and expeditiously exist; and that the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic is a useful tool. Mirèze observed that the 'wind of change' also concerns the fact that lawyers need to think of alternative dispute resolution and not only of arbitration, that multi-tier clauses are not sufficiently used, and that some disputes may be taken online to reduce time and costs.

Manuel Casas addressed issues arising from arbitration rules or legislation requiring physical hearings; whether virtual hearings disproportionately harm certain parties; whether tribunals have inherent/residual powers to call for a virtual hearing despite a lack of agreement between the parties; whether virtual arbitrations foster greater reliance on documentary evidence and reduce the importance of witness testimony; whether there will be divergence of approaches between civil and common law jurisdictions regarding witness testimony and due process; and the impact of virtual hearings on cross-examination.

Catherine Anne Kunz raised the issue of the legality of virtual hearings and the risk of annulment of awards; if a party may be disadvantaged because it does not have the same access to technical equipment; the importance of testing the equipment; whether a party may be disadvantaged because it or one of its witnesses is in a different time zone; how to ensure that the witness is not being coached off-camera; how to efficiently communicate with one's team during cross-examination; and whether it is necessary to agree on a hearing protocol and if so, what it should address.

UNCITRAL Technical Notes on ODR

ICC Guidance Note

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

Effective Case Management & Virtual Hearings on 18 June 2020, by Webinar

The ICC International Court of Arbitration organised a webinar on "Effective case management & virtual hearings," held on 18 June 2020. The webinar featured speakers from various continents. **Julia Dreosti,** Lipman Karas, Adelaide, observed in her opening remarks how attitudes towards arbitration prior to the pandemic has changed and that Covid-19 has been a catalyst for arbitration practitioners to embrace new and innovative technology. She then moderated the panel with **Mohamed Abdel Wahab**, Founding Partner & Head of International Arbitration at Zulficar & Partners, Egypt, **Kevin Kim**, Senior Partner, Peter & Kim, Seoul, and **Mirèze Philippe**.

The panellists presented the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic in detail and explained how existing tools, available for two decades, continue to be used in effective case management, but that they are under-explored. They pointed out that proper organisation of paperless files is as important as paper files and should enable all players to retrieve files easily and quickly. The speakers also reviewed the Seoul Protocol on Video Conferencing in International Arbitration, which deals with several issues mainly related to witness/expert hearings. Finally, the panel discussed the strategic approach to virtual hearings, the parties' rights and obligations, counsel's advice, instruction and approach and the tribunal's analysis and determination.

Click here to access the Seoul Protocol

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

Parallel Proceedings in International Arbitration: How to Avoid or Mitigate the Undesirable Effects on 22 June 2020, by Webinar

On 22 June 2020, the New York State Bar Association organised a webinar discussion on parallel proceedings in international arbitration. The panel members were **Niyati Ahuja** (Diamond McCarthy); **Mélida Hodgson** (Jenner & Block); **John Gaffney** (Al Tamimi & Co.) and **Neil Popović** (Sheppard Mullin).

The webinar focused on issues that arise from parallel proceedings, the motivations that parties have behind initiating these proceedings in different forums and how these issues can be mitigated. The webinar began with a discussion on the first two issues. Neil Popović explained that there could be endless variations of multiple proceedings, for example: two different arbitration proceedings, proceedings before a court and an arbitral tribunal, or two competing mirror image arbitration proceedings. The initiation of these proceedings depends on jurisdiction, contractual provisions, international instruments and strategies chosen by the parties' counsel. Mélida Hodgson shared that in her experience, the most common parallel proceedings had been where there existed contractual as well as investment claims. The panellists discussed legitimate as compared to illegitimate forum shopping. Parties' motivations could include reframing issues, contractual provisions allowing for the dispute to be initiated at a more favorable place to prevent a party from doing something unreasonably difficult or abusive; or even a genuine dispute between the parties as to what the correct forum is. John Gaffney mentioned that initiation of parallel proceedings could be supportive, obstructive or in some cases tactical.

The panellists then discussed how to mitigate or avoid the 'perceived'

Top to bottom, left to right: Neil Popović, Niyati Ahuja, John Gaffney and Mélida Hodgson

ill effects of parallel proceedings. They noted that, since there are no unified rules on parallel proceedings, their regulation is fragmented. John Gaffney discussed Article 2(3) of the New York Convention, the doctrine of *kompetenz-kompetenz* and its positive and negative impacts, antisuit and anti-arbitration injunctions, *lis pendens* in common law jurisdictions and imposing liability for breach of an arbitration agreement. Neil Popović dealt with consolidation of proceedings for mitigation and the existence of different legal structures permitting it, including the domestic law of the relevant state and the contractual provisions or the arbitral rules chosen by the parties.

The panel concluded the webinar by sharing practical tips with the participants, which included giving due consideration to the arbitration agreement at the drafting stage, instead of adopting a boiler-plate provision and recommended that even after the dispute arises, parties should do their due diligence and attempt to analyse whether there is a rational way for a procedural compromise, rather than elongating the proceedings and getting stuck in parallel proceedings.

Submitted by Niyati Ahuja, ArbitralWomen member, Associate, Diamond McCarthy, New York, USA

ICC Guidance Note on Virtual Hearings, on 22 June 2020, by Webinar

The Atlanta International Arbitration Society (AtlAS) held its regularly scheduled plenary meeting on 22 2020. This year's meeting was organised remotely considering the worldwide Covid-19 outbreak and travel restrictions. AtlAS members and non-members were invited to hear a presentation on the "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic" (ICC Guidance Note) by guest speaker **Mirèze Philippe**, Special Counsel at the Secretariat of the ICC International Court of Arbitration and ArbitralWomen Co-founder.

Mirèze Philippe explained that the outbreak that the world has experienced in the recent months has forced everyone to explore other avenues. Many webinars around the world have been organised to examine to what extent virtual meetings and hearings may replace hearings in a physical location, and to consider procedural and technical issues for proceeding online. She indicated that despite the devastating consequences of the outbreak and the lockdown in many countries, this unexpected situation has had some benefits, including bringing to light new practices that we have ignored because the models we had adopted were comfortable and there was no reason for fixing something which was not broken. This situation has certainly increased reliance on technology which was not a primary concern before the lockdown. The disruption caused by the pandemic was the triggering event that compelled us to move online. The business and the dispute resolution communities needed to proceed with their meetings and hearings, without having to travel and meet in the same physical location.

Observing that dispute resolution practitioners needed some guidance on the existing tools that the ICC has offered for many years but which are probably under-utilised, the ICC has entrusted a task force with drafting guidance on useful steps for ICC arbitration and mediation users, but also for the wider dispute resolution community to consider when organising remote meetings and hearings. The ICC Guidance Note, published on 9 April 2020, discusses the many tools that may assist practitioners in finding ways to mitigate any Covid-19-related delays. It also provides guidance for the organisation of virtual hearings as well as a checklist and suggested clauses for cyber-protocols and procedural orders. As the Guidance Note emphasises at the outset, parties and arbitrators have a duty to conduct the arbitration in an expeditious and cost-effective manner and tribunals have the additional duty to proceed within as short a time as possible to establish the facts of the case by all appropriate means. Having given this overview of the Guidance Note, Mirèze Philippe then walked the participants through each section of the Guidance Note and explained the rationale behind each provision.

Click here to view ICC Guidance Note

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

AmCham Business Leaders Club on 23 June 2020 in Ljubljana, Slovenia

As indicated in its website, the AmCham Business Leaders Club is designed for top business leaders of the biggest companies in Slovenia and AmCham Slovenia corporate members.

Meetings are kept in small circles in order to generate top-level networks for the exchange of ideas, know-how, and best practices among eminent leaders. They provide an excellent opportunity for meetings among and with important decision-makers from various fields.

Ana Stanič addressed the AmCham Business Leaders Club on the foreign investment screening law adopted in Slovenia on 1 June 2020. Having prepared for the European Commission, together with Milieu, the Review of national rules for the protection of infrastructure relevant for security of supply in July 2018, Ana was able to explain the background to the foreign investment screening laws being adopted throughout the EU in recent months, comment on their implications for existing and future investments and query their compliance with EU and international law.

Click here to read the Review.

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

A Virtual Debate on Virtual Hearings, on 24 June 2020, Online

On 24 June 2020, ArbitralWomen members **Rainbow Willard** and **Lidia Rezende** of Chaffetz Lindsey LLP participated in a Virtual Debate on Virtual Hearings, along with **Peter Anagnostou** and **Maria Scott** of DLA Piper. The online debate, organised by the Chartered Institute of Arbitrators' (CIArb) Young Members Group and co-sponsored by Chaffetz Lindsey LLP, was moderated by **Rahul Donde** of Lévy Kaufmann-Kohler. A large global audience attended, with individuals joining from Europe, Asia, the Middle East, Africa and North and South America. Chatham House Rules applied so that the debaters could adopt more extreme positions.

The motion that the debaters took on was: "This house believes that virtual hearings should continue to be used by the arbitration community even after public health concerns no longer require them." Lidia Rezende and Maria Scott stressed both practical and theoretical points in their arguments for the motion, while Rainbow Willard and Peter Anagnostou emphasised what is lost in the virtual setting in their opposition.

In particular, Maria noted that most institutional rules expressly permit virtual hearings. Institutions are reporting a significant uptick in virtual hearings, and these hearings reportedly have been carried out without problems. Lidia drew on her experience in one of the first virtual merits hearings held post-Covid-19 to argue that, practically speaking, virtual hearings can save costs and prevent delay. Finally, Lidia and Maria noted that many institutions have developed guidelines to help parties plan virtual hearings and to conduct them securely and efficiently. These guidelines seek to address many of the critiques of virtual hearings.

In response, Rainbow pointed out that virtual hearings had been an option for many years prior to Covid-19, but parties, counsel and arbitrators had chosen not to go fully virtual for merits hearings until necessity required it. This hesitation did not result from a fear of technology, but from the many practical and legal drawbacks to holding a merits hearing virtually, which Rainbow discussed in detail. Rainbow also noted that some parties may be tempted to exploit the virtual context, for example, by coaching witnesses or feigning poor connections or power losses at critical moments. Peter and Rainbow highlighted the ways in which differing access to technology could create inequalities between parties in specific



Left to right: Rahul Donde, Maria Scott and Rainbow Willard

Left to right: Peter Anagnostou and Lidia Rezende

cases and in the practice more generally. In conclusion, they both emphasised the uncertainty surrounding the enforceability of awards issued after a virtual merits hearing, particularly in instances where one party has strenuously opposed holding the hearing virtually.

After the lively debate, Rahul Donde quipped that Lidia and Maria had portrayed virtual hearings as the "next best thing since sliced bread," while Peter and Rainbow suggested that a wholesale adoption of virtual hearings would be tantamount to "jumping off a bridge." Attendees had the opportunity to vote before the debate began, at which point 90% were in favour of the motion. A vote after the debate ended indicated that nearly half the attendees had changed their minds and opposed the motion.

Click here to watch the debate recording.

Submitted by Rainbow Willard, ArbitralWomen member, Counsel, Chaffetz Lindsey LLP, New York, United States

Force Majeure Under CISG, on 24 June 2020, by Webinar

On 24 June 2020, the Jamaica International Arbitration Centre (JAIAC) held its first online conference under the theme: 'Dispute Management in a New World.' It was presented as "*A CISG @40 and Future of Caribbean Development Initiative.*" The conference was supported by many partners, including the United Nations Commission on International Trade Law (UNCITRAL), the Chartered Institute of Arbitrators (CIArb) the Asian Institute of Alternative Dispute Resolution (AIADR), the Jamaican Ministry of Justice, the Jamaica Special Economic Zone Authority and the University of Miami.

Since Covid-19 has forced every institution to conduct their businesses online, **Christopher Malcolm**, JAIAC's Secretary General, decided to take the conference online and limit attendance to 500 participants. However, the event was so successful that within a few days the registration cap of 500 was reached and the Secretary General had to give the other participants the option to have access via livestream on YouTube.

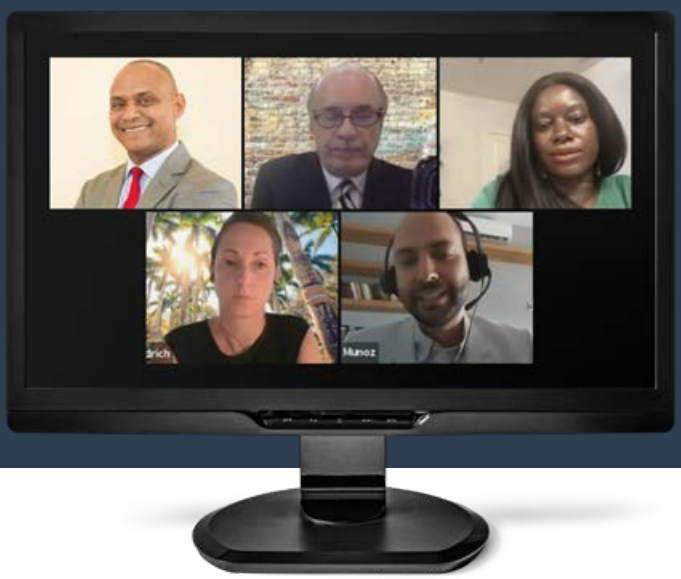
The conference was comprised of six sessions, to wit: Business Continuity and Supply Chain, *Force Majeure* under the CISG, Adjudication of Construction Disputes, Mediation in Commercial Arrangements, Innovation and Going Online, and Should Commercial Parties Jettison the Court? This report will focus on session 2, entitled '*Force Majeure* under the CISG.'

Professor **John Rooney** (University of Miami) moderated the session and the panellists were: Professors **Edgardo Munoz** (Panamericana University), **Sandra Friedman** (University of Miami) and **Rose Rameau** (partner, RAMEAU International Law Firm).

Professor Munoz opened the presentation with an extensive coverage of Article 79 of the CISG, discussing the impediments to performance, including *force majeure* and hardship. He eloquently explained:

"the 1980 UN Convention on the International Sale of Goods (CISG) does not contain a specific provision dealing with questions of hardship. Instead, Article 79 CISG relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control. Therefore, where there is a global or regional pandemic, an earthquake, a flood, a terrorist attack, a sudden increase in import tariffs in one of the production countries, forcing the producer to resort to countries with much higher production costs; import or export bans may hinder the envisaged flow of goods; or price fluctuations that were not foreseeable at the time of the conclusion of the contract may make the performance by the seller unduly burdensome or may devalue the contract performance for the buyer."

Professor Sandra Friedrich discussed the *force majeure* and hardship provisions under the UNIDROIT Principles of International Commercial



Top to bottom, left to right: Christopher P. Malcolm, John Rooney, Rose Rameau, Sandra Friedrich and Edgardo Munoz.

Contracts and their application to cross-border contracts in the current Covid-19 pandemic. In addition, she outlined notable differences between the UNIDROIT provisions and Article 79 of the CISG on impediment, as well as their interplay with contractual *force majeure* or hardship clauses, such as the ICC's *force majeure* clause.

Rose Rameau's presentation dealt with the notion of *force majeure* in France. She reiterated that the *force majeure* doctrine relates to supervening unforeseen events that make performance impossible altogether, or impossible to be implemented as was agreed by the parties. She explained that France, as a civil law system, did not properly define *force majeure* in the French Civil Code until 2016, when the French Legislature finally ended a state of uncertainty by inserting a new Article 1218 in the Civil Code, which contains a precise definition of *force majeure*.

Rose further explained that Article 1218 has two parts: The first part defines *force majeure* and the second part explains the remedies available to the parties.

Rose ended her presentation by discussing the tests of *force majeure* under French law. She highlighted that the force must be external and beyond the control of the party claiming the *force majeure*, and such party must not have assumed the risk. Second, the party seeking to rely on *force majeure* must not have foreseen the consequences of the impediment or they must show that they could not have reasonably avoided it. Last, there must be a direct causation of the external force on its ability to perform. She further noted that Article 1218 provides that where the impediment is temporary, performance of the obligation is suspended unless the delay justifies termination of the contract. Alternatively, if the impediment is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations.

This conference has spawned an online series, 'Dispute Management in a New World,' which will be launched during "Coffee Time @ JAIAC" on 19 August 2020 at 4:00 pm Central Time. The launch programme will be presented under this topic: "Covid-19 and its Dispute Resolution Pandemic Implications." It will be moderated by Christopher Malcolm, and the panellists will be **Francis Xavier**, **Lucy Reed** and **Robert Vaughan**. The programme will also include a musical treat with songbird **Karen Smith**.

Submitted by Rose Rameau, ArbitralWomen Board Member, Partner of the RAMEAU Law Firm, Washington, DC, USA

A Step Forward toward Diversity: A Directory of Women Arbitrators, on 25 June 2020, Online

On 25 June 2020, ArbitralWomen hosted a virtual roundtable organised by the members of ArbitralWomen in Peru. Over 35 practitioners in the field of arbitration joined the event to discuss an initiative created by the members of ArbitralWomen in Peru to promote gender diversity in arbitration consisting of a directory of women arbitrators registered in the main arbitration centres in Peru. The directory includes information such as place of work, area of specialisation and email address. This tool seeks to help parties and law firms get easier access to information about potential arbitrator candidates and to help women get more visibility in the field.

The event included participants such as **Lucy Reed**, ArbitralWomen member, President of the International Council for Commercial Arbitration, **Dana MacGrath,** ArbitralWomen President, Investment Manager and In-House Legal Counsel at Omni Bridgeway, **Lucía Olavarría**, former YAF ICC representative for Latin America, Partner at Quiñones Alayza Abogados, **Marianella Ventura**, Secretary of the Lima Chamber of Commerce and was moderated by **Natalia Mori**, ArbitralWomen member, Senior Associate at Estudio Echecopar, a member firm of Baker & McKenzie.

Some key take-aways of the event were that although there is a considerable number of experienced female arbitrators in Peru (167) registered as arbitrators in the main arbitration centres, this number is still low compared to the number of men registered as arbitrators and the number of men that

are actually being appointed as arbitrators in practice. Parties and counsel involved have the habit of appointing the same group of people who are the most recognised and well-known arbitrators. This habit is natural, as we tend to think of the people we know. The solution is to take a moment to look further and pursue a diverse search that also meets performance expectations.

Acknowledging the fact that there is an experience barrier to being appointed as arbitrator, young practitioners and potential arbitrators need to be patient, develop networking skills, participate at training and mentoring programs such as the Vis Moot, accept small arbitrations, and volunteer, if possible, to act as arbitrators or mediators. Making yourself visible and known in the market is important. Arbitration conferences or meetings offered by various arbitration organisations are an unbeatable opportunity to strengthen the visibility of young and female arbitrators. Having a list of women arbitrators helps them to gain visibility in the market and provides useful information to the users.

Directorio de Árbitros Mujeres en Perú

Submitted by Natalia Mori, ArbitralWomen member, Associate at Estudio Echecopar, member firm of Baker & McKenzie.

Online Panel Discussion on International Arbitration, Insolvency, Third-Party Funding – the Post-Pandemic State of Affairs, on 26 June 2020, by Webinar

Top to bottom, left to right: Dana MacGrath, Liz Snodgrass, Kabir Duggal, and Kiran N. Gore
Christian Campbell, John Rooney, and Ishaan Madaan

On 26 June 2020 ArbitralWomen's President **Dana MacGrath**, along with ArbitralWomen members, **Kiran N. Gore** and **Liz Snodgrass**, participated in an online panel discussion 'International Arbitration, Insolvency, Third-Party Funding – the Post-Pandemic State of Affairs' hosted by the Center for International Legal Studies and organised by Arbinsol. The panel also featured **John Rooney** and **Kabir Duggal**.

The panellists discussed a variety of topical issues arising from the pandemic and its devastating impact on many businesses across the world. These included: defences to claims of contractual non-performance in general, such as *force majeure* and frustration of purpose; the intersection and overlap of tribunals' and courts' jurisdiction in the event of insolvency proceedings against parties to international arbitration agreements, as well as, more generally, the effect of insolvency proceedings on both commercial and investment arbitrations, security for costs, and third-party funding.

The speakers acknowledged the interplay between arbitration and insolvency as an underdeveloped area of law, where the conflicts between the two domains will repeatedly arise, in light of which the need for uniformity in addressing such conflicts by different jurisdictions was also discussed. The panellists also considered how an application for security for costs would play out in the case of an insolvent claimant and the role played by third-party funders in this regard. The discussion noted the need to prevent abuses and hit-and-runs by impecunious claimants on the one hand, and to consider the role of respondents in claimants' financial difficulties and the claimants' right to access to justice on the other hand.

This virtual event brought together the perspectives of counsel, arbitrators, academics and third-party funders, providing the audience with a broad view on the topic. It gathered a diverse and informed audience of over 170 attendees from 44 nations, who raised thought-provoking questions, giving rise to an engaging discussion.

The event was supported by the New York International Arbitration Center (NYIAC) and TDM/OGEMID.

Click here for the event flyer and recording.

Submitted by Ishaan Madaan, Founder, Arbinsol, Miami, Florida, USA.

News you may have missed from the ArbitralWomen News webpage

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

Walk the Talk – The ArbitralWomen Experience

ARBITRAL WOMEN: WALK THE TALK | ANALYTICS

WALK THE TALK!
THE ARBITRAL*WOMEN* EXPERIENCE

Mirèze Philippe
ArbitralWomen co-founder and Board member,
Special Counsel ICC International Court of Arbitration

On the International Women's Day of 8 March 2019 Google displayed an inspiring slider with 14 citations. One of them particularly resonated with the author and co-founder of ArbitralWomen and ties in the efforts undertaken by the co-founders. The citation by the Nigerian novelist Chimamanda Adichie said: "I matter. I matter equally. Not if only, not as long as. I matter. Full stop!". Women matter just like men matter, white people and people of colour matter, young and old generations matter, disabled people matter, every human being matters!

In a world where women nearly equal the number of men and where women are active in all business and legal fields, many female practitioners noticed that they were significantly under-represented mainly in key positions in all fields. A few of us in the dispute resolution field were saddened to see that we were doing the same work as our male counterparts, but that we were kept back-stage. A woman acting as lead counsel, arbitrator, mediator or expert was unheard of thirty years ago. Holding a lead position on any board or speaking on a panel was reserved to men.

Take Action

Women in dispute resolution were a non-issue thirty years ago. No one in the business and the legal communities was concerned about their absence. As Lucy Greenwood puts it, practitioners had become comfortable with the notion that women are a significant minority ("Getting a better balance on international arbitration tribunals", Arbitration International, vol.28, n°4, 2012, p.653).

Many women and sometimes also men have invested a lot of efforts in fighting against inequality. Amazing and inspiring women throughout the world undertook admirable initiatives and also strived for the rights of women in all fields, for example Ruth Bader Ginsburg, the second female justice at the U.S. Supreme Court. A few men have also denounced odd situations, such as Geoffrey Beresford Hartwell, a British engineer and arbitrator, who had the courage to ask Louise Barrington at the beginning of the 1990s to report about women participation in the arbitration field. The result was alarming. It was daring to break the silence about the dearth of women in dispute resolution!

Although change was and remains slow, things are better. It required that some people stand up and say 'this is wrong, it must change'. Those who contributed to change the under-representation of women witnessed an evolution, one of which is the fact that gender equality now matters and can no longer be moot. Discussions about gender parity in the dispute resolution field gained increased popularity around the world. The trend is more successful than anyone could have anticipated, but we now need to see more concrete actions.

March 2020, Nº 2 (17) | 7

3 May, 2020

Do you want to know how

ArbitralWomen was founded and learn about its achievements? Read the inspiring article by ArbitralWomen Co-Founder Mirèze Philippe on "WALK THE TALK" regarding gender diversity issues, why she and Louise Barrington, JD, LLM, FCIArb founded ArbitralWomen (AW) and what AW has achieved in the past 26 years. https://lnkd.in/dEaWiaC

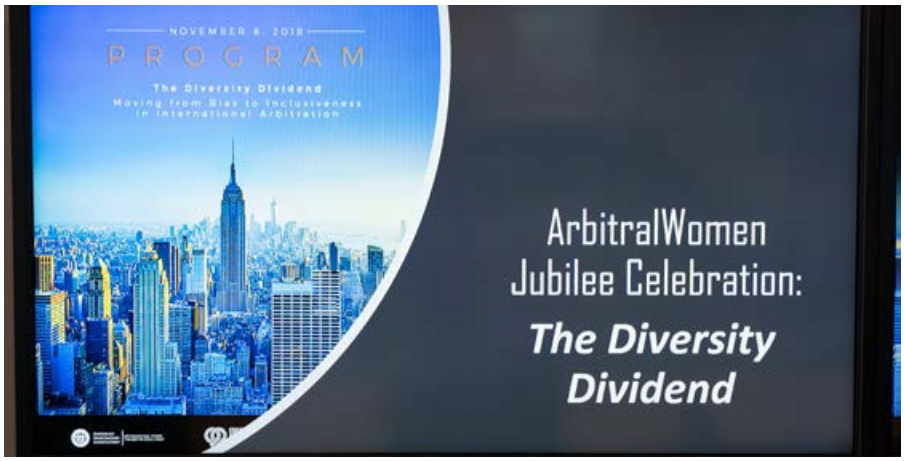
The good work of ArbitralWomen is continuing under the leadership of Dana MacGrath and also thanks to all friends and colleagues who strive for gender parity, said Mirèze. ArbitralWomen succeeded to come so far thanks to the invaluable work of all Board Members who have served on the Board and those who continue serving and all members who started initiatives supported by ArbitralWomen.

Efforts are also required for in-person events as well as on webinars. ArbitralWomen has published a statement on "Diversity is Equally Important for Virtual Events and welcomes all groups and individuals who support diversity to share, post, and/or re-tweet the text of this message in any form you wish!

I hope that efforts by the business and legal communities will soon be significant and visible, said Mirèze.

Necessary Change: Planning Past Bias Through the ArbitralWomen Diversity Toolkit™

By Dana MacGrath, ArbitralWomen President and Investment Manager, Legal Counsel at Omni Bridgeway
6 May, 2020



ArbitralWomen member

Rekha Rangachari, Executive Director of the New York International Arbitration Center (NYIAC), recently published an article titled, "**Necessary Change: Planning Past Bias Through the ArbitralWomen Diversity Toolkit™**" that appeared in the Spring 2020 issue of the NYSBA New York Dispute Resolution Lawyer.

Rekha Rangachari is well-positioned to write about the ArbitralWomen Diversity Toolkit™ given her role on the ArbitralWomen Diversity Toolkit™ Committee and her personal experience in delivering ArbitralWomen Diversity Toolkit™ training programs.

Additionally, she was instrumental in organising and ArbitralWomen's full-day conference in New York titled "**The Diversity Dividend: Moving from Bias to Inclusiveness in International Arbitration**" on 8 November 2018 at which the ArbitralWomen Diversity Toolkit™ was formally launched. This celebratory event was generously hosted by the American Arbitration Association-

International Center for Dispute Resolution (AAA-ICDR) at its midtown New York headquarters. She also led a panel session at the conference.

The ArbitralWomen Diversity Toolkit™ focuses on recognising unconscious biases and how attitudes, experience, and education build these internally in the brain. Time is spent exploring how unconscious biases interfere with rational decision-making, with exercises and focused discussions encouraging participants to step away from their comfort zone and confront such biases live. The ArbitralWomen Diversity Toolkit™ underscores the research-driven data that diverse groups make better decisions, foster creativity and better management, recognised by many as important for any company's financial bottom line.As described in the article by Rekha Rangachari, the ArbitralWomen Diversity Toolkit™ is a full-day training session. ArbitalWomen certified trainers offer a multi-media participatory experience including video clips, mini-lectures, and guided small group sessions. Participants are asked in advance to take at least two implicit association tests from Harvard's "Project Implicit" to better understand how conscious and unconscious biases operate on a personal level, with suggested reading to bring relevant topics, theories, and statistics to the main stage.

Rekha Rangachari

During the live segments of the ArbitralWomen Diversity Toolkit™ training programme, participants dive into the empirical metrics, underscoring that what can be measured can be changed. The training program culminates in brainstorming sessions to create individual strategy lists targeting goals and specific actions to achieve progress.

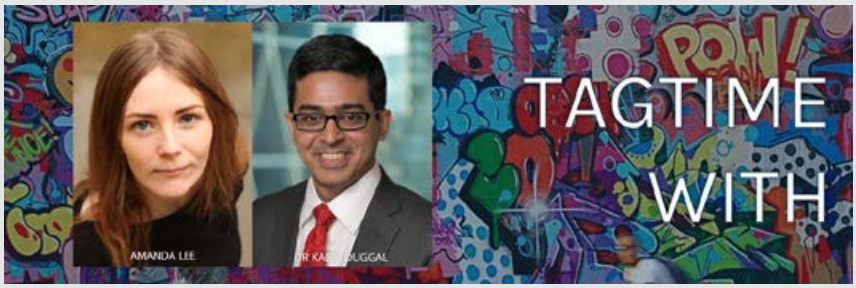
The research and work behind the development of the ArbitralWomen Diversity Toolkit™ was made possible thanks to a generous grant from the AAA-ICDR Foundation, a non-profit organisation chaired by ArbitralWomen member **Edna Sussman**.

More information about the ArbitralWomen Diversity Toolkit™ can be found here.

The article by Rekha Rangachari on the ArbitralWomen Diversity Toolkit™ can be accessed here if you are a NYSBA member.

ArbitralWomen Supports Delos Dispute Resolution Webinar Series

By Amanda Lee, ArbitralWomen Board Member, Consultant Seymours, London
8 May, 2020



ArbitralWomen is delighted to be supporting two new webinar series from **Delos Dispute Resolution** presented by members of ArbitralWomen.

'In Conversation with Neil' invites members to join international arbitrator **Neil Kaplan CBE QC SBS** as he interviews leaders from the world of international arbitration and beyond, with ArbitralWomen member **Chiann Bao** serving as the master of ceremonies. Each conversation provides an insight into the career of Neil's guests. Forthcoming webinars will feature ArbitralWomen members **Wendy Miles QC** and **Lucy Reed**, and **Sir Bernard Rix**. Watch previous episodes and register for your free place at the next 'conversation' here.

'TagTime', hosted by ArbitralWomen Board Member **Amanda Lee** and **Dr Kabir Duggal**, provides a forum for leading figures from the world of international arbitration to discuss substantive topics, including key cases and important procedural materials. Guests include ArbitralWomen member **Janet Walker**, **Meg Kinnear**, **Doug Jones**, Neil Kaplan CBE QC SBS, **Bernard Eder** and **Gourab Banerji SA**. Watch videos of previous episodes and register to attend the next episode here.

Launch of ArbitralWomen Connect: Pilot Programme

By Amanda Lee, ArbitralWomen Board Member, Consultant at Seymours, London
8 May, 2020

Many of our members are adjusting to the new normal of working remotely. Social distancing and travel restrictions have made it more challenging to network and make new connections from around the world.

"ArbitralWomen Connect", a new programme developed by ArbitralWomen member, **Elizabeth Chan** and open to members of ArbitralWomen, seeks to fill this void by matching members of ArbitralWomen with each other on a one-on-one basis. The purpose of the programme is to help our members to build meaningful connections with others in the same field and to help build solidarity in the international arbitration community during what is an

extraordinarily difficult and isolating time. ArbitralWomen Connect is not a mentoring programme; the only commitment required of participants is that they meet with their match at least once – at a time and via a medium of their choice. We encourage participants to use this opportunity to make a new connection and to collaborate with each other on arbitration-related initiatives.

The pilot programme will involve **20 members** and we will endeavour to match you with someone with whom you may have a shared interest.

If you are a member of ArbitralWomen and would like to participate, please complete the application form, available here, by 20 May 2020.

We look forward to hearing from you!

The First Vienna Virtual Vis Moot Report on the 27th Willem C. Vis Moot

By Patrizia Netal, ArbitralWomen Member, KNOETZL, Vis Moot Director
10 May, 2020

In April 2020, the 27th Annual Willem C. Vis International Commercial Arbitration Moot was concluded successfully — an outcome that only weeks before did not seem attainable in the face of the COVID-19 crisis.

Shortly after the necessary cancellation of the in-person oral hearings in Vienna at the end of March 2020, the Vienna Vis Moot Directors took the decision to conduct the oral part of the competition virtually — what at first seemed a "mission impossible" in the short period of time before the start of the competition.

Within only 6 weeks, this year's Vienna Vis Moot became the center stage for putting digitalization and its potential use for virtual oral hearings in arbitration to the test by thousands of users.

Being the first event of its kind and size, the Virtual Vienna Vis Moot exposed not only the organisers to new challenges but also the students, arbitrators, coaches — and IT professionals. Over a period of six days, 560 hearings were conducted remotely, involving more than 3,500 participants from 85 countries. For a couple of days, the Vis Moot turned into what could be referred to as a "*virtual hearing boot camp*" or the largest worldwide "*Virtual Hearing Centre*".

The Virtual Vienna Vis Moot gave the arbitration community the unique opportunity to test virtual hearings, which was for many of the arbitrators a totally new experience. What lessons could be learned? Most importantly, internet connections and bandwidth are differing in quality depending on where you are in the world. There are certainly some countries where the internet connections are not sufficiently reliable to easily replace an in-person hearing. The technical aspects challenged many of the participants. Getting a hearing up and running took more time than one would expect, in particular until everybody is settled and has sufficient audio and visual presence. Being well-acquainted with the communications system and having read the manual was important for smooth operations.

Each hearing was supported by a virtual room manager who was available to troubleshoot and provide guidance to participants on

technical issues during the hearing. Overall, a majority of the hearings went very well with the technical support of the virtual room managers.

Dana MacGrath, ArbitralWomen President and Omni Bridgeway Investment Manager and Legal Counsel commented, "*The hearing in which I served as arbitrator went very smoothly. While there were a few technical glitches at the start due to limited bandwidth of one of the arbitrators, once that was addressed with the assistance of the virtual room manager, the hearing went on without incident. The level of pleading was excellent, and shortly into the hearing I was barely aware that it was a virtual as opposed to in-person pleading. At the close of the hearing, the tribunal was able to deliberate in a private breakout room. Overall, it was very professional.*"

Virtual hearings definitely require more prearrangements and preliminary deliberations of arbitrators and counsel than hearings in person. Simply because spontaneous interactions are limited including communications with colleagues, co-counsel or co-arbitrators. They also require a lot more concentration to monitor the screen with a lot of participants while still handling the substance of the dispute itself.

One of the most important aspects to keep in mind when taking virtual arbitration hearings into the "real world" is to ensure control over the different participants and their environments: With current systems, it is very hard to assess whether someone is getting unauthorized outside support or the hearing is recorded without permission.

The experience in the 27th Virtual Vienna Vis Moot showed that the technical developments are heading in the right direction and that the arbitration community is ready to take the next step toward virtual hearings as a real alternative to hearings in person. There is certainly still room for market improvements, especially in complex and document heavy arbitration, and not all online platforms provide the necessary features that are required for arbitration hearings.

The 27th Virtual Vienna Vis Moot has taken a first step to train thousands of participants in the conduct of virtual hearings and helped students to understand this as an option. What was greeted partly with scepticism and concern turned out to become a wonderful learning experience.

In terms of diversity, the trend of the last years continued and the Moot had a slight majority of 55% of all students that were female. This result fits seamlessly into the line of encouraging results that can be taken out of this exceptional Vienna Vis Moot year.

The Launch of MUTE OFF THURSDAYS – Virtual Networking and Knowledge – Exchange for Women in Arbitration

By Dana MacGrath, ArbitralWomen President and Omni Bridgeway Investment Manager and Legal Counsel
10 May, 2020

Congratulations to ArbitralWomen Board Member **Gaëlle Filhol** (Betto Perben Pradel Filhol) and ArbitralWomen members **Ema Vidak Gojkovic** (King & Spalding), **Catherine Anne Kunz** (LALIVE) and **Claire Morel de Westgaver** (Bryan Cave Leighton Paisner) for the launch of their initiative Mute Off Thursdays, an online initiative designed to bring together on a regular and all-virtual basis a group of women leaders in international arbitration.

In this challenging time of social distancing, **Mute Off Thursdays** comes as a much-needed energising way to help women stay connected, share knowledge, and meet, support and promote one another. Each week on Thursday at the same time, around 120 mid-level to senior women in arbitration from around the globe are invited to join a 30-min networking and knowledge-exchange video conference. At each session, a woman from the group makes a brief presentation about an issue that she encountered in her practice, such as an interesting arbitration procedural tactic, substantive argument, or soft-skills guidance. The presentation is then followed by a group discussion. To encourage an open exchange amongst the participants, the Chatham House rules apply.

Since the first session on 16 March 2020, the initiative has brought together some truly inspiring speakers. These have included ArbitralWomen member **Samaa Haridi** (Hogan Lovells), who spoke about virtual hearings, ArbitralWomen member **Angeline Welsh** (Essex Court), who discussed court orders against third parties in support of arbitration, ArbitralWomen member Claire Morel de Westgaver (Bryan Cave Leighton Paisner) on the duty to disclose WhatsApp and other instant messages, ArbitralWomen member **Anna Masser** (Allen & Overy) about emergency arbitration proceedings, and a coach in leadership, **Montana Rozmus** (CRA Inc.) on how partners and other management level professionals can strive to be an "admired leader" by delivering

Mute Off Thursdays Fourth Session on 7 May 2020

informal constructive performance feedback to associates and team members in a thoughtful and sensitive way to inspire high performance and foster a positive work environment.

Based on the success of the first four sessions, the project is well on its way to fulfil the organisers' ambition to advance the exchange of knowledge and increase the visibility and profile of women.

Looking ahead, the upcoming sessions will include topics such ex parte arbitral interim relief, strategic issues in arbitration funding, women leadership in the virtual era, the practice and impact of tribunal deliberations, a bite-size update on arbitration-related court decision in England and in Switzerland, and using machine learning and game theory to improve predictability in international arbitration.

Due to online platform capacity constraints, for now the program remains invitation-only.

However, in case you wish to participate and satisfy the membership criteria (a woman with at least 7 years of practicing in the field of international arbitration), please feel free to reach out to one of the four organisers.

Congratulations again on this fantastic initiative!

Finding Your Way Among Recent Guidance on Virtual Hearings

Submitted by Mihaela Apostol, ArbitralWomen member, and Hafez Virjee, Delos President
13 May, 2020

image: Freepik.com

Delos has provided an initial collection of the resources available on holding remote or virtual arbitration and mediation hearings, organised into

1. guidance and checklists,
2. protocols,
3. model procedural orders,
4. webinar recordings and
5. other resources.

This collection is being maintained up-to-date by ArbitralWomen member **Mihaela Apostol** and Delos President **Hafez Virjee**.

By way of background, the spread of the COVID-19 virus in the first quarter of 2020 has posed increasing challenges to the careful, advanced planning of in-person hearings in international arbitrations. Potential solutions have included reducing the number of participants, moving the hearing to another location, postponing it, or moving part or all of it online. These online hearings, typically referred to as 'virtual' or 'remote' hearings, have in turn created new challenges for practitioners due to lack of familiarity and experience with the available platforms. Part of the experiential deficit has been addressed through the shift of international arbitration events to the online space, with the substantial increase of webinars. Another trend has been the sharing of know-how online, ranging from written guidance and model procedural orders to panel discussions and practical webinars. While these trends are a healthy display of the international arbitration community's cohesiveness and adaptability, they have also created some confusion due to their sheer volume. Delos has therefore compiled and categorised the relevant resources into a simple table here.

Female Representation in Arbitration in the COVID-19 Era

Submitted by Karima Sauma, Executive Director of the International Center for Conciliation and Arbitration of the Costa Rican-American Chamber of Commerce, and Mirèze Philippe, Special Counsel ICC International Court of Arbitration and ArbitralWomen Co-Founder

14 May, 2020

Since its launch in 2016, the Equal Representation in Arbitration (ERA) Pledge has become a beacon in the pursuit of female representation in arbitration. From its inception, the Pledge has had two main objectives: to improve the profile and representation of women in arbitration, and to encourage the business and dispute resolution communities to appoint women as arbitrators on an equal opportunity basis. The Pledge is guided by a Steering Committee formed of senior arbitration practitioners and users from around the world and currently has over 4,000 signatories, composed of individuals, firms and organisations committed to taking concrete actions to further these objectives.

The under-representation of women in arbitration is nevertheless very much a reality. The lack of visibility of female arbitrators is often cited as a reason for the low number of women on arbitral tribunals, which prompted the ERA Pledge Steering Committee to consider ways to facilitate sharing information about qualified female candidates and contribute to an increase in the visible pool of female arbitrators (see "New female arbitrator search tool launched to promote greater equality in arbitration"). To provide an answer to this problem, an "Arbitrator Search" tool was launched shortly after the Pledge.

The "Arbitrator Search" tool seeks to assist arbitration users in their search of female arbitrators. To this end, a Search Committee was constituted, composed of volunteers from arbitral institutions (excluding individuals from law firms in order to avoid any conflict of interest) to provide names of female arbitrator candidates who may be less well known, but who are considered to have relevant experience. No member of the Search Committee may be proposed as a potential candidate.

Anyone can benefit from the "Arbitrator Search" service by simply completing the form on the Pledge's website. To enable the Search Committee to propose names, it needs to be provided with information about the requirements of the person seeking assistance, who must complete the fields related to the expertise of the prospective arbitrator, relevant information about the dispute, applicable law, languages needed for the case, place of arbitration, an estimation of the amount in dispute if possible, and any nationality that should not be considered for a given dispute. Once the request is received, the Search Committee identifies potential candidates to propose based on the criteria provided in the completed form. Candidates are proposed without any commitment or liability for the ERA Pledge, its Steering Committee or the Search Committee members, as explained on the "Arbitrator Search" tool and in a Kluwer Arbitration Blog post (see "One Step Further after the Launch of the ERA Pledge: A Search Service for Female Arbitrators Appointments"). Information provided by users of the "Arbitrator Search" tool and all work by the Search Committee are kept confidential.

The Pledge's "Arbitrator Search" tool is a timely and valuable resource at a time when more disputes subject to arbitration are likely to arise due to the global Covid-19 pandemic, and when arbitration may play a more important role in this context.

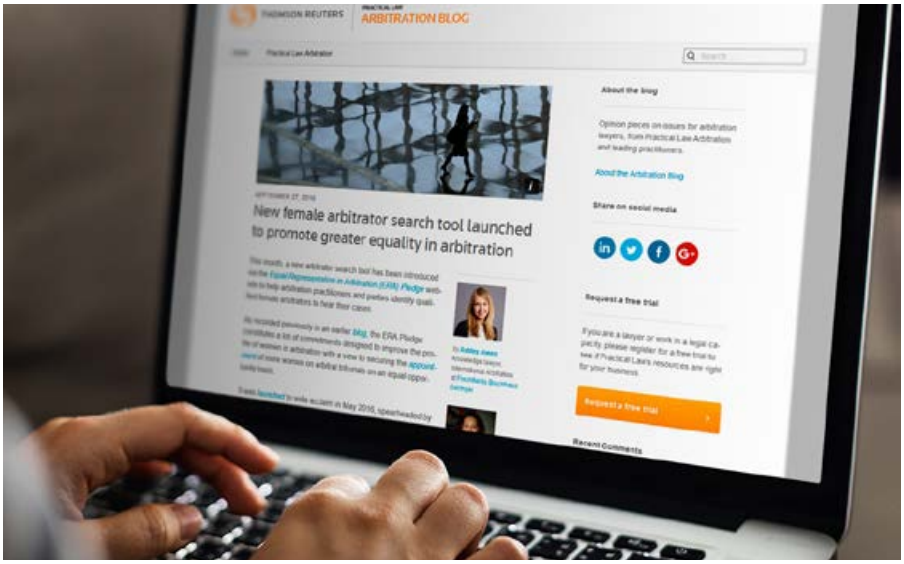
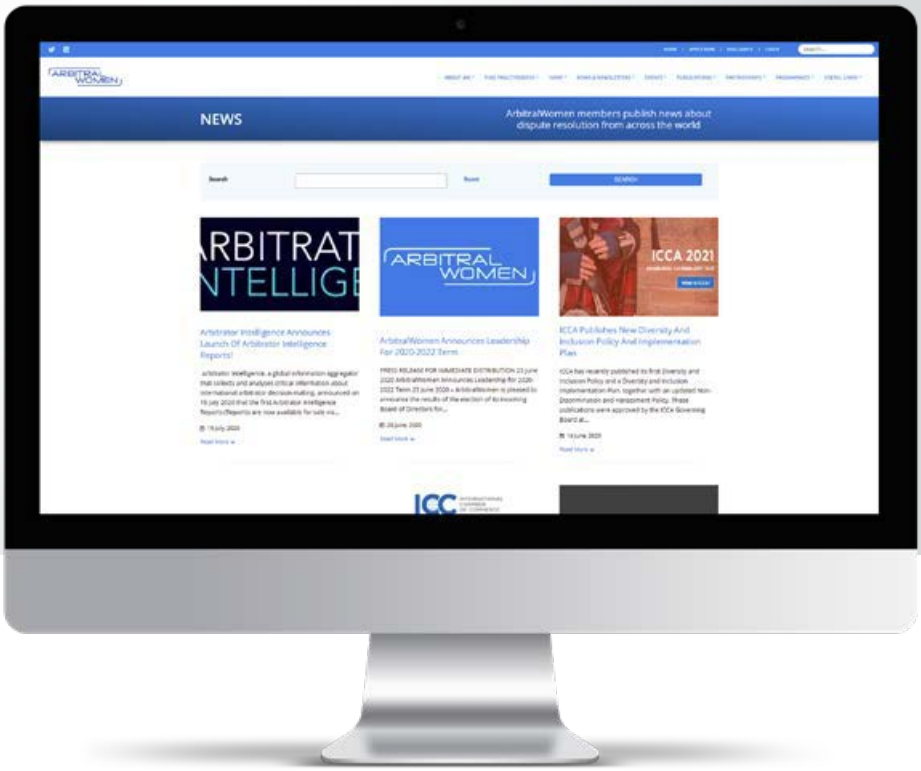


Image: Freepik.com

Keep up with ArbitralWomen

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



SPEAKING AT AN EVENT?

If you or other ArbitralWomen members are speaking at an event related to dispute resolution, please let us know so that we can promote the event on our website and mention it in our upcoming events email alerts!

If you wish to organise an event with ArbitralWomen, please send the following information to events@arbitralwomen.org:

- Title of event or proposed event
- Date and time
- Names of ArbitralWomen members speaking or potential speakers
- Venue
- Flyer or draft flyer for approval by ArbitralWomen Executive Board
- Short summary of the event for advertising purposes
- How to register/registration link

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, Dana MacGrath, Karen Mills, Mirèze Philippe, Erika Williams

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AW Activities at a Glance: click here

Membership Runs Now Annually from Date of Payment

ArbitralWomen Individual & Corporate Membership

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

The many benefits of ArbitralWomen membership are namely:

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

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

Individual Membership: 150 Euros.

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

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

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

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