



photo: ICC

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ICC Court Makes History with Selection of First Female President Claudia Salomon!

In this edition of the Newsletter, we share an interview of Karen Mills, one of the founding members of ArbitralWomen, and event reports on alternative dispute resolution webinars that took place in March and April 2021.

Read also several testimonials from teams that participated in the 29th Vis Moot in April 2021. Congratulations to the Vis East Moot and Vienna Vis Moot organisers on the second year of remote Vis hearings! Additionally, best wishes to Professor Eric E. Bergsten, who was instrumental to the launch of the Vis Moot more than 25 years ago and celebrated his 90th birthday in July 2021!

International Women's Day (IWD) celebrations

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President's Column

As we enter the summer holiday season in many parts of the world, we are excited to share several positive developments in this edition of the Newsletter.

First, congratulations to all who organised events to celebrate International Women's Day, 8 March 2021, many of which are described herein in the report on events section. Most of these IWD2021 events were virtual, but now as we see parts of the world re-opening we look forward to more hybrid and in-person events in the second half of 2021.

In this edition of the Newsletter, we feature an interview by ArbitralWomen Board member **Donna Ross** of former Board member **Karen Mills**, who is a leading arbitration and mediation practitioner based in Jakarta. She is long-time ArbitralWomen Board member who rotated off the Board in 2020 and now serves on ArbitralWomen's Advisory Council.

We follow with reports from our members on the events celebrating International Women's Day 2021.

Next, we share a Report on the 73rd session of UNCITRAL's Working Group II (Arbitration and Conciliation / Dispute Settlement) that took place on 22-26 March 2021, submitted by ArbitralWomen Board members **Patricia Nacimiento** and **Gisèle Stephens-Chu**, together with ArbitralWomen members **Lara Pair**, **Rashel Ann Pomoy** and **Eunice Shang-Simpson**.

Thereafter, we share several testimonials from 2021 Vis Moot teams for whom ArbitralWomen provided financial support to enable them to participate, made possible in part by the support of our partner law firms.

We then have a section dedicated to reports on alternative dispute resolution conferences and webinars during March and April 2021 authored by our members and friends. We close with a recap of some news you may have missed on our news page.



Dana MacGrath, ArbitralWomen President and Independent Arbitrator

Finally, I wish to take this opportunity on behalf of the Board of ArbitralWomen to congratulate the 2021 GAR Award winners many of whom are part of our membership.

Congratulations to the **ICC International Court of Arbitration** for its appointment of ArbitralWomen member **Claudia Salomon** as its first female President winning the **GAR Best Development Award**. In accepting the award, Claudia Salomon quoted US Vice President Kamala Harris: 'I may be the first woman in this office, but I will not be the last, I want every woman to know

she has a place at the table,' and went on to say that diversity will be one of her top priorities and it is 'fundamental to the legitimacy of international arbitration.'

Congratulations also to '**Mute Off Thursdays**', a weekly virtual forum that launched during the pandemic to enable women in arbitration to stay connected and build know-how during this difficult period, for winning the **GAR Pledge Award**. Mute Off Thursdays' co-founders, including ArbitralWomen Board member **Gaëlle Filhol** and ArbitralWomen members **Emma Vidak Gojković**, **Catherine Anne Kunz** and **Claire Morel de Westgaver**, jointly accepted the award. More on Mute Off Thursdays can be found on our News Page [here](#).

Congratulations also to former ArbitralWomen Board member **Loretta Malintoppi** of 39 Essex Chambers for winning the **GAR Award for Best Prepared and Most Responsive Arbitrator**.

Finally, congratulations to the **IBA Toolkit on Insolvency and Arbitration**, co-chaired by ArbitralWomen member **Jennifer Permesly** together with **Felipe Ossa**, along with its academic chair **Manuel Penades**, for winning the **GAR Best Innovation Award**.

We congratulate all organisations, initiatives and individuals who were shortlisted for GAR Awards in 2021 and all the winners of the awards. Collectively, your important contributions have improved alternative international dispute resolution and diversity in international arbitration.

I may be the first woman in this office, but I will not be the last

— ICC President Claudia Salomon,
quoting US Vice President Kamala Harris

Dana MacGrath
ArbitralWomen President

Women Leaders in Arbitration

Karen Mills

ArbitralWomen Board member, Donna Ross interviewed **Karen Mills**, a fellow New Yorker, based in Jakarta, Indonesia, by video conference from Melbourne, Australia.

Karen Mills, J.D., FCI Arb, SI Arb, FHKI Arb, Chartered Arbitrator, a Founding Member of the KarimSyah Law Firm in Jakarta, Indonesia, is universally recognised as one of Asia's leading arbitrators. She sits as arbitrator throughout the region and the US.

Karen Mills has been a Fellow of CI Arb since 1996 and a Chartered Arbitrator from approximately 2000. She established and, for its first ten years chaired, the Indonesian Chapter of CI Arb, and now serves as Advisor. She is also a member of the Main Committee of CI Arb's East Asia Branch and has often tutored all level of CI Arb and other courses both in Indonesia and elsewhere in the region. Karen coaches several teams, and often serves as judge/arbitrator, for the Vis Moot and other moot competitions, and has recently been

Your career has taken you from New York to Los Angeles, throughout the Pacific and Southeast Asia. What made you decide to move to Indonesia?

It was not so much my legal career that took me all over the Pacific islands, but the quest to collect tribal art, the profession of my first husband, whom I met in Australia on the way across, in my hiatus after practicing in a New York firm for some years.

He had been living in the Pacific islands—in Vanuatu mainly—but he travelled all over. He was sort of a self-styled anthropologist. He had been collecting and selling art from there and all the major collectors would buy from him. When we got together, we continued and travelled all over the Pacific islands collecting art (I was told I was the first 'white woman' to walk across the island of Malaita in the Solomons) and then we went to Bali. And we just fell absolutely in love with Bali and the Balinese painting. We got to know the culture and all the fabulous painters who were still alive. I met all the original wonderful painters including the most famous, I Gusti Nyoman Lempad, who lived to 122. My favourite genre is the 1930s, which was really the first secular genre in Bali.

Then we had a show in New York with a primitive art gallery and travelled in a camper all over the states and then had a show in Texas and later another in New York and a couple in London.

We later opened a gallery of Pacific and Southeast Asian tribal and other primitive art with naïve paintings from all over the world, as well as Antiquarian books, in California. It was the Fowler-Mills Galleries of Naïve and Ethnographic Primitive Arts. We ran that gallery together for something like seven years.

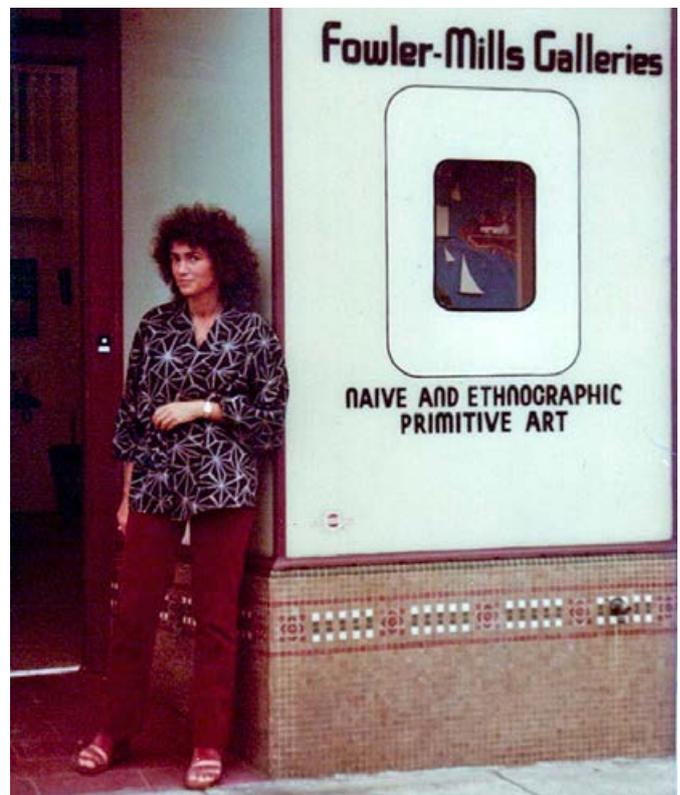
appointed to the Vis East Board, representing EAB.

Karen Mills was one of the original members of ArbitralWomen and served on the Board and Executive Board for the first 26 years of the organisation's existence, having just stepped down last year to join the Advisory Council. She set up and for a number of years chaired both the Mentorship and the Moot Funding Committees.

As counsel, Karen has successfully acted as lead counsel for the Indonesian Government in a number of investor-state disputes, and also represents various state-owned and private multinational companies, in both resolution of disputes and structuring of transactions. She has published over 150 papers in international professional books and journals and sits on the boards of a number of other prestigious, institutions, such as the IMI/IBA Investor-State Mediation Task Force, Appointing Committee of the Chinese European Arbitration Centre and the Editorial Board of the Journal of World Energy Law & Business.

We continued to travel not only to the Pacific islands, but to many of the islands of Indonesia, and later I returned very often to collect as well.

During my visits here, I was asked by friends I had made to assist on some legal problems and ended up working with some lawyers here, from time to time, so I already had some



Karen Mills standing in front of the Fowler-Mills Galleries of Naïve and Ethnographic Primitive Arts, in California

...being a woman has never proved any kind of impediment for me. There are plenty of other firms with female partners and at least two fairly large firms in which all the named partners are women... People deal with me the same as they would with a man, or at least that is my approach. I just go ahead and deal with what needs to be dealt with, and it never occurs to me that my gender might get in the way, or even be a factor in the way other people deal with me, or what I need to do.

connections. I found the work, and particularly the people and the culture, very interesting – challenging, and felt very comfortable here. So, when I decided I needed to get back into the practice of law full time, after a very interesting hiatus indeed, although some people urged me to move to Hong Kong or the Philippines, it was here that I wanted to live and work. And so that's what I did.

And I think the main reason that I chose Indonesia is that I love the people and the culture. Also, the food, which I think, is the best in the world; and the climate is perfect for me as I do not like the cold; and so is the lifestyle.

But mainly, it's full of surprises because the people are so interesting. They can be very creative. Many professionals and entrepreneurs establish entirely different second businesses, rather than expand when the original one achieves success. They do not want to do the same thing over and over again.

You have been working in Indonesia for close to forty years now. What were the challenges you faced when you arrived and as the founding member and a woman at the head of KarimSyah Law Firm?

Getting myself established was indeed a challenge at every turn. To begin with, the administration, the necessary permits, etc., could be very annoying and interfere with my hopes and plans at any point, but I just had to deal with them and adjust sometimes, but I got through it.

At first, I joined a large firm led by probably Indonesia's most famous lawyer ever, the late Adnan Buyung Nasution, but there were problems obtaining a work permit for me since he was at that time vociferously critical of the government. Then I worked with two other firms led by excellent senior lawyers, and after that joined with some other lawyers to set up what is now the current firm, KarimSyah. We were three women and two men originally, but after some changes are now myself and three men.

The firm went through a few metamorphoses, changes of partners, but we have been KarimSyah for almost 20 years now and all get along so well – the firm is like a family.

Being a foreigner had its challenges indeed, but being

a woman has never proved any kind of impediment for me. There are plenty of other firms with female partners and at least two fairly large firms in which all the named partners are women. There are many female judges. In fact, some of the best now retired Supreme Court judges are women – one is now an arbitrator and one a mediator. At least half the doctors in the country must be women, as well as probably half the notaries and entrepreneurs.

It is just not a chauvinistic society. They do not look differently at women and men, which may seem surprising, because it is primarily an Islamic society, or collection of many different societies/cultures. One such culture is matriarchal, where property passes from mother to daughter and the woman asks the man to marry, although it is almost entirely Islamic. While the cultures differ considerably, all are equally accepted, and I have never had the slightest inclination that I or anyone else was being dealt with differently for being a woman.

That is really important for people who may have preconceived notions and it is certainly valuable for our readers for someone who has lived there for so long, to share these views.

Let's talk now about your ADR practice. When and how did you become involved in arbitration and ADR?

My practice here in Indonesia at first was primarily not only maritime work, in which I had specialised in New York, but more often joint ventures and also upstream oil and gas, geothermal and mining, as well as hospitality and tax structures. At one point I was asked to handle an arbitration for a client. I think it was a salvage dispute relating to a yacht that had hit a reef.

From that brief experience, I liked the idea of arbitration and then attended a major maritime arbitration convention



Left to right: Karen Mills and her three law firm partners: Firmansyah; Mirza A. Karim and Iswahjudi A. Karim

in Hong Kong, where a former client (who happened to be the Chief Executive of Hong Kong at the time, CH Tung) and his younger brother, CC, owners of a major shipping line, were involved. Through them I met Neil Kaplan, with whom I immediately became friends and, in a sense, the rest is history. Neil was what one might call the 'mentor' who pushed me into taking the CI Arb courses and moving up to Fellowship and Chartered Arbitrator status, and then passing the knowledge on by teaching all over the region and even setting up the CI Arb Chapter in Indonesia. It was the time that arbitration was just beginning to catch on and I was swept up onto the bandwagon.

There was, at the time, only one arbitral organisation in Indonesia — BANI (Badan Arbitrase Nasional Indonesia). I worked with them and wrote their rules (which they have subsequently changed). And then I set up the CI Arb Chapter. I am generally considered the 'mother of arbitration' in Indonesia. I continued doing oil, gas, mining and energy, and some finance and insurance work, including some of those disputes that also eventually ended up in arbitration.

A bit later I met Louise Barrington, also through Neil, who asked me to get involved first in ArbitralWomen, which she was just setting up with Mirèze Philippe, and then with the Vis East Moot. Meanwhile, Vis Moot teams were forming at the various Universities in Indonesia. So, I started coaching them, as I was already teaching some courses anyway. I have been heavily involved in the Vis Moot, as well as with CI Arb and ArbitralWomen, ever since.

You have a wealth of experience in international and domestic commercial arbitration, particularly in male-dominated fields such as shipping, energy, oil and gas and mining. What was it like working in these fields as a woman and a foreigner?

That's a very good question. I have never really had any difficulty and, as I said, I have never felt I was being marginalised for being a woman. Never in my life actually. I do not know if I have just been very lucky, or if there is something about me that makes men treat me as an equal — perhaps because they do not see me as threatening or something. But I have never felt discriminated against for being a woman. Other than with respect to arbitral appointments, of course, but that's no different here than anywhere else.

People deal with me the same as they would with a man, or at least that is my approach. I just go ahead and deal with what needs to be dealt with, and it never occurs to me that my gender might get in the way, or even be a factor in the way other people deal with me, or what I need to do.

Of course, as a foreigner here there are a host of administrative requirements — licenses and/or permits, etc., as I already mentioned. So, I suppose in that sense I am treated differently for being a foreigner. But the gender makes no difference here.

I am just a pragmatist: I approach each crossroads and decide where I want to go and what are the options to get there and follow the best one — either the most efficient one or the one I think I will enjoy the most.

Can you talk a bit more about how you were able to become lead counsel for the Indonesian Government?

I cannot remember how I got appointed to some of those arbitrations, normally through the Ministry of Finance or the Attorney General's office, I believe. In the most memorable one, the head of the Investment Coordinating Board (a Ministerial level post) had been trying to negotiate with a mining company that was refusing to divest, as required by their contract. He had even gone to the U.S. to try to negotiate with them, but to no avail. Finally, he decided that the government should commence arbitration, and that was taking quite a step, as it is one of the very few cases in the world where a state brought arbitration against an investor.

Somebody suggested my name, and I guess he knew I did some mining and oil and gas work, so he just came to me and asked if I could handle it and I said I would be happy to. He was the best client I have ever had. If we needed something, he would just get it done.

For example, the Governor of the province where the site was located was being very helpful to us. So, the investor formed a fake NGO that accused him of corruption, because he had given money to all of the employees. They had him thrown in jail, probably by paying off the prosecutor or something of the sort, so he could not come to Jakarta to testify. Our client chartered a plane and, taking one of my associates with him, flew to the town where the witness was being held on this other island, and managed to have him released into our client's custody for a week. They brought him and his wife back to Jakarta, put them in a nice hotel suite so that he could testify and have a week's holiday with his wife and then he flew them back. Only Indonesians would think of doing something like that. It was a very interesting case for a lot of reasons, but that was one of the most unique parts.

I had handled two related cases on geothermal energy before that, where the government was the respondent and then a couple more later.

I do find that comparatively rarely are women appointed that I know of. What is the expression — pale, male and stale? Perhaps an even larger dichotomy lies in appointments reflecting cultural/ethnic diversity, which I see as a longer-term problem. ...most institutions very rarely appoint women, or ethnically diverse men even, and I am not sure how to remedy that. ...ArbitralWomen does a lot of diversity training, but I have not yet seen it resulting in anywhere near equal appointments for women.

Over the course of your career, you have held roles with numerous institutions, other than ArbitralWomen, which we will discuss later. You were the first expatriate, and first woman, empanelled with BANI as an arbitrator and former Special Assistant to the Board (1995-2005) and you drafted their 2000 Arbitration Rules. You founded the Chartered Institute of Arbitrators' Indonesia Chapter and chaired it for some ten years and now sit as their Advisor, and also serve on the Main Management Committee of CIARB East Asia Branch, in addition to other such activities. Can you share with us your views on how the region or world has changed over this time? What is the percentage of women in your opinion acting as arbitrators or mediators?

I really have no way to assess the percentage of women serving in these roles. I do not follow statistics. But I would say that whatever the percentage today, it would be a bit higher than it was when I started in the field, but not as great a change as we should be seeing.

It is a very small group and I do find that comparatively rarely are women appointed that I know of. What is the expression – pale, male and stale? Perhaps an even larger dichotomy lies in appointments reflecting cultural/ethnic diversity, which I see as a longer-term problem. Usually, when I am appointed, it is by the other arbitrators as chair, because they know me, and occasionally by the parties. BANI appoints me now and again, as does SIAC and occasionally ICC and ICDR, but most institutions very rarely appoint women, or ethnically diverse men even, and I am not sure how to remedy that.

ArbitralWomen does a lot of diversity training, but I have not yet seen it resulting in anywhere near equal appointments for women.

There are many women counsel, although not as many in major arbitrations. I have been lead counsel in all the arbitrations I have done and there has usually been at least one woman on the other side. (In fact, I first met Louise Woods when she was assisting counsel in a case against us. I thought she was pretty good and I am the one who urged her to join ArbitralWomen).

The Indonesian culture is not contentious. You do not have the courts overrun like you do in India or even Singapore. People do try to settle their disputes amicably, and in fact the national philosophy, known as Pancasila, calls for deliberation to reach a consensus. Even in a board of directors' or shareholders' meeting, they must deliberate to try to reach a consensus; and only if a consensus cannot be reached will a vote be taken.

In other fields of law, I think women are gaining a lot of ground. But even here, far fewer women actually serve as arbitrators, although seemingly more as mediators these days, I would say.

However, this is nothing new, although I suppose the percentage has increased a bit over the years.

You mentioned there are probably more women mediators than arbitrators. Is that in commercial or other types of mediation?

Mediation —at least here— is very common, but it is hard to know. I do know women here who mediate, including a former Supreme Court justice who has a mediation organisation. But I also do not think women get appointed as mediator as often as men here, although I cannot be sure. It is all confidential, of course. In other countries, I gather, the situation is a bit more advanced, and I know a number of women who are leading mediators, such as in Malaysia and Australia.

You have written extensively –over 150 publications on arbitration and ADR, with a number of them focused on Indonesia, including Debunking the Myth– Enforcement of Arbitral Awards in Indonesia and Indonesia's Power Women, and BITs: Indonesia at the Crossroads, to name just a few. How have you seen arbitration and mediation –either domestic or international– develop in Indonesia and are there more women in the field?

Arbitration and mediation have developed differently in Indonesia.

The Indonesian culture is not contentious. You do not have the courts overrun like you do in India or even Singapore. People do try to settle their disputes amicably, and in fact the national philosophy, known as *Pancasila*, calls for deliberation to reach a consensus. Even in a board of directors' or shareholders' meeting, they must deliberate to try to reach a consensus; and only if a consensus cannot be reached will a vote be taken.

In about 2003, with the encouragement and assistance of the Japanese Aid Agency and a team of our Supreme Court Justices and practitioners, among them one of my partners, Indonesia established a court-ordered mediation regime whereby judges may not hear a case until the parties have attempted to mediate the dispute for at least 30 days (now extended to 40). The court provides the mediator and meeting space without charge, although the parties are free to use their own if they prefer. Settlement Agreements from these mediations are endorsed by the court and become enforceable the same as final and binding arbitral awards or court judgements. So, we were way ahead of the Singapore Convention, which is not needed for mediations held in Indonesia to be enforced here.

Each court has its own panel and I am sure there are plenty of women on them. There is also a mediation institution here that trains people, many of whom will then be listed

on the court panels. So, mediation is commonplace and, in many cases, where the initial mediation is not successful the parties will tend to settle some months later, even after they are in litigation.

Arbitration has an entirely different history. It was always provided for in the old Dutch era Code of Civil Procedure ('RV') that had some provisions covering arbitration. We have had arbitration for a long time. Then, in 1999 a new Arbitration Law was passed, more detailed but in the same spirit. The new law covers all arbitrations held in the country as well as enforcement of foreign-rendered awards here, and it is a pretty reasonable law. It is not the UNCITRAL Model Law, but basically just as useful and in some ways better, at least for this jurisdiction, as it completely cuts out the role of the court where the parties have agreed to arbitrate, except for enforcement of the award of course.

The first arbitral institution, BANI, was established in 1977 originally under the local Chamber of Commerce; but at the end of the 1980s it became independent. For some years that was the only and thus the main arbitral institution. Their caseload was primarily domestic cases, but they could handle international cases as well. When I got involved, I appointed many foreign arbitrators to their panel, because they did not have any foreigners. And I drafted new rules based mainly on the UNCITRAL Arbitration Rules.

However, in recent years, the number of institutions in Indonesia has grown exponentially, and I am not even sure how many competing ones there are today. But any kind of arbitration can be held here, whether administered by a local group, or by the ICC, the SIAC or the LCIA or just *ad hoc*. Choices are infinite. And more and more parties are calling for it in their contracts. It is still a bit disorganised, but the arbitration community, at least a part of it, is trying to organise it better, so we can have some optimism for the future.

Are there more women in the field? As counsel, definitely. Indonesia has for many years had almost as many women as men practicing law, including at partnership level, and even many founding partners. So many have got into arbitration. But unfortunately, the number of women that are appointed as arbitrators has not grown very much. Somehow there is still this perception that arbitrators need to be men, even though women often make better arbitrators.

What about enforcement of awards, either against Indonesian parties or parties that have assets in Indonesia?

Enforcement is not a problem substantively, as Indonesia has been a signatory to the New York Convention since 1981. A couple of administrative requirements cause some delay, but only that. One is completely unnecessary — if the arbitration is held outside Indonesia, a certificate stating that Indonesia and the country of the seat are both signatories to the New York Convention needs to be obtained from the Indonesian embassy at the seat. Of course, today it is so easy to check that online in a few seconds. But the embassies do not seem to know that and often have difficulty certifying the obvious

I would say, and would like to think, that ArbitralWomen has made a difference in the field. The very fact of its existence, the fact that there are now over a thousand women all over the world who are ArbitralWomen members, and that it enables women in or interested in the field to work together on so many different aspects of the practice, speak at and organise conferences globally, and support each other in so many ways, has to have encouraged many women to join, or continue in, the field.

fact, with a resultant waste of time and costs. That needs eventually to be changed in the law. But only that, really.

A power of attorney from the arbitrators is also required to register the award. And for execution one must identify the assets to be attached, including the name and account number of any bank accounts. The courts have no way of obtaining this information themselves, due to Indonesian bank secrecy laws. But as long as the assets can be identified, and the award has been registered, the courts will enforce it as a matter of course.

And even some of the grounds for annulment under the New York Convention are not followed here. For example, if the award does not deal with something presented to the tribunal or deals with something not presented to it, that is not a ground for annulment.

You have been involved with ArbitralWomen since its inception 25 years ago, as Executive Editor, Board and Executive Board member, as well as establishing and for some years chairing the Mentorship and Moot Funding Committees. Do you think that ArbitralWomen's work has helped to make a change in our field? Can you also comment on your experience with mooting and teaching in general and how that helps support young women in their career paths?

That is two very different questions and the first one is more difficult to assess.

I would say, and would like to think, that ArbitralWomen has made a difference in the field. The very fact of its existence, the fact that there are now over a thousand women all over the world who are ArbitralWomen members, and that it enables women in or interested in the field to work together on so many different aspects of the practice, speak at and organise conferences globally, and support each other in so many ways, has to have encouraged many women to join, or continue in, the field. It is hard to pinpoint, but it seems almost inevitable that this has helped bring about change. How could it not have, with so many amazing professional women all supporting each other?



Lawyers at KarimSyah Law Firm (2018): Back row associates, left to right: Rizki Karim; Yudi Sugintoro, Firdaus Sofyan, Vita Damayanti, Rien Aryningsi (no longer with the firm), Rita Yuhani, Offy Syofiah, Margaret Rose, Tiwi (Farida Pratiwi), Heri Witono, Mat Faozan.; Othman Karim. Front row, partners, left to right: Firmansyah, Karen Mills, Iswahjudi Karim; Mirza Karim

As for mootng, it is, in my opinion, the very best and most useful experience that law students can have, and I deeply regret that no such thing existed when I was in law school. Analysing difficult problems, drafting submissions, appearing as lead counsel before a tribunal, and actually competing to try to win their cases: this is work that in practice would take the mooters many, many years to attain. I do not think there is anything that law students study or experience that better prepares them for actual practice.

I therefore am willing to devote a great deal of my time to coach, assess and judge. I coach teams from three or four of Indonesia's major law faculties and I have gone to Hong Kong many times to judge and continue to do so virtually now.

Of course, the bonus for me and our firm is that we get to see the performance of so many students and potential associates, and I have recruited associates from the moots for years, many of whom have subsequently opened their own firms, but some of whom are still working with us, much to my satisfaction. One of the best associates I ever had was from a moot team, just about the time that we were commencing work on that case where we were representing the government as claimant. And on her very first day I brought her right into the meeting with the Ministers and she was excellent.

And that is why I wanted to have ArbitralWomen provide moot funding, because I knew that it was so often badly needed. ArbitralWomen will fund a team as long as at least half of the members are female. But you would be surprised: most teams here are at least half if not all women, and the number of women from here participating in all moots is the same, if not greater, than men.

As arbitrator and counsel, you have been involved in investor-state disputes. You are also a member of the International Mediation Institute and the International Bar Association Task Forces on Investor-State Mediation. How do you see the future of ISDS? Do you think that mediation will start to play a greater role? Would the Singapore Convention and/or Covid-19 be factors in this development?

I suspect it is going to be quite some time before states and investors are able, or willing, to try to mediate their disputes in any great numbers. Normally there would have been a lot of negotiation before a case really develops, but once it does, it will be difficult, for states at least, to rationalise seeking mediation.

For one thing, at least in Indonesia, it may arouse suspicion of collusion, or at least that is the perception of most officials. In Indonesia, for example, the Corruption Eradication Commission keeps a watchful eye on all government officials and their decisions, to make sure they have not been improperly influenced. If government officials themselves reach an agreement with the investors, there could be a suspicion of collusion. As a consequence, in any major dispute, government officials are hesitant to agree to negotiated settlements and feel it is safer to allow the arbitrators to make the decision. I understand several other countries have a similar problem. So that is one impediment.

Another impediment, even if you do not have the first one, is getting government officials to understand what mediation is. As you said, some people do not know the difference. (I do a lot of crossword puzzles and I cannot tell

you the number of times I have seen mediation defined as arbitration and vice-versa.) It is then difficult to find and get to the right people in the government to explain it and get them to agree to give it a try. Those are some of the issues we were addressing when we wrote the IBA Rules on Investor-State Mediation and the protocol. The protocol seeks to educate governments on how they should approach these cases. One of the first things that I urged was for governments to appoint one person or one agency to be in charge of these matters. Because, usually, when there is a case against a state, nobody knows what to do. And the states really need to make some decisions pretty quickly if they get hit with a notice of arbitration or mediation.

The absence of such single contact point is a problem that Indonesia and many other countries are likely to encounter because, often, new laws may give rise to investor-state cases. To have already appointed someone in the government to take charge from the outset can avoid delays and their repercussions. (Such as the inability to designate an arbitrator due to lapse of time.)

As for the future of ISDS itself, in particular investor-state arbitration under treaties, we are already seeing an adverse reaction from many states, with some terminating some of their BITs, and many objecting to arbitration clauses being included in some new ones. The reaction is primarily due to the way the current treaty language is often interpreted by tribunals. And it is not surprising, as most of the treaty provisions have just been copied from the original 1968 version, are often a bit ambiguous, and many bear no relation to subsequent events and changes in relationships and laws since. Treaty language needs to be revised to make it more clear and bring it up to date with the 21st century, or the system may well die out.

Out of the many achievements over your lengthy and fascinating career, is there one that stands out or was more satisfying than others?

Aside from my many experiences sitting as arbitrator, each of which has been totally different but equally interesting and satisfying, as that is what I like to do best, I would have to say the other most memorable and satisfying times in my legal career were the five investor-state cases in which I served as lead counsel for the Indonesian government. Working with the government was very challenging, as it is so departmentalised that it was often difficult just to find the necessary documents involved, or even determine who might know where they were or could answer the important questions. This is also because the personnel completely change with each change of President, and they all go off to other jobs, often on other islands of the Archipelago, or elsewhere in the world. But I have met some amazing people, not only in the government but also experts, witnesses, assisting counsel, etc., from all over the world and managed to coordinate everyone and everything, so we were able to present our cases very well and successfully.

Acting as counsel is more challenging and exciting in a way,

but it keeps you up at night. Whereas being an arbitrator does not, because you do not have to structure the arguments, only decide on the issues counsel present. But sitting as arbitrator is what I love to do best. Although, certainly, acting for the government as lead counsel in investor-state cases was the most challenging, and also satisfying thing that I have done.

Last question: Is there any advice you have for women seeking to further their careers in dispute resolution or anything else that you would like to share with our readers?

It is not easy to get to the point where you will be appointed as arbitrator. Particularly these days, with this absurd objection to 'double hatting'. How can anyone expect to become an arbitrator who has not served as counsel?

Also, I am not one to market myself, so it has just been my own performance that has gained me the recognition. I think it is helpful to be visible, but not aggressively. One needs to be true to oneself: maintain high ethical standards and always do what one believes is the right thing to do, which is not always the most advantageous. But respect for oneself, and respect of others for you, seems to me to be more important than fame. I know not everyone sees things that way, but I always have. And I am always able to look at myself in the mirror every morning and feel proud and satisfied with myself.

It is imperative that anyone who wants to serve as arbitrator has experience as counsel first, so the advice is it is best to work with arbitration counsel or a firm that has an active arbitration practice. It is the hands-on experience that is most educative and useful. Other than that, I suppose the advice is to be active, be seen, speak and write, but do not lose who you are and who you really want to be.



International Women's Day (IWD) Celebrations by ArbitralWomen around the World

We include in this section four reports on events that took place, virtually, on IWD 2021, organised from Asian and European locations, including ArbitralWomen's first ever event organised from India, a group of Shearman & Sterling Paris-based colleagues who responded to the invitation to 'Strike the #ChooseToChallenge pose' that we included in Issue N°45, an event co-sponsored by ArbitralWomen together with two Japanese arbitration institutions and a webinar organised by SIAC

SIAC International Women's Day Webinar: Celebrating Women in Arbitration, on 5 March 2021, by Webinar

SIAC commemorated International Women's Day with a webinar celebrating women in arbitration and offering candid advice from five trail-

blazers from across the globe. Held on 5 March 2021 and titled *Celebrating Women in Arbitration*, the webinar featured a fireside chat with **Lucy Reed**, Vice-President of the SIAC Court of Arbitration, and independent arbitrator at Arbitration Chambers, New York; **Shaneen Parikh**, member of the SIAC Court of Arbitration and Partner at Cyril Amarchand Mangaldas, Mumbai; **Claudia Benavides-Galvis**, Global Chair of Dispute Resolution at Baker McKenzie, Bogota; **Bertha Cooper-Rousseau**, Managing-Partner at Rousseau & Cooper, Nassau; and **Yoshimi Ohara**, Partner at Nagashima Ohno & Tsunematsu, Tokyo. The discussion was moderated by the author of this report, **Michele Park Sonen**, Head (North East Asia) at SIAC, and **Adriana Uson**, Head (Americas) at SIAC.

SIAC champions gender diversity and welcomed the opportunity to further the dialogue on diversity in commemoration of International Women's Day. The webinar kicked off with the panelists sharing their personal journeys to becoming leaders in a male-dominated field. Yoshimi Ohara shared that, as a young woman in Japan, she was discouraged from attending law school, and later, from taking the bar exam. The cultural expectations of women were so pervasive that, on her first day of work,



Top to bottom, left to right: Michele Park Sonen, Lucy Reed, Adriana Uson, Bertha Cooper-Rousseau, Shaneen Parikh, Claudia Benavides-Galvis, Yoshimi Ohara and Eugenio Gómez Chico

a senior attorney felt he needed to reassure Yoshimi that she had been hired to serve as a lawyer, not to serve tea.

All of the panellists overcame barriers to become the leaders they are today. Shaneen Parikh reflected on her experience with discrimination as a young lawyer and that she lacked the confidence to challenge being treated unfairly. Confidence does not always come easy to women, she explained, and she was heartened that young women today are more assertive than women of previous generations.

On leadership, the panellists encouraged leading through excellence, inclusivity and supporting others. In candid advice to ambitious lawyers, Lucy Reed

advised that the path to leadership is through first being an excellent lawyer, then by bringing others along with you as you succeed. Claudia Benavides-Galvis emphasised the value of inclusivity in leadership, and Bertha Cooper Rousseau added that women must 'de-weaponise competition' and support each other unapologetically. Lucy also observed that gender disparity at the top often means that female leaders carry the weight of knowing that their actions, from the quality of their work to the way they dress, will be judged by others as representing all women lawyers.

Looking forward, the discussion turned to solutions to advance gender

equality in arbitration. Lucy and Claudia challenged us to take a closer look at the choices we make –from nominating arbitrators, to offering speaking opportunities, to filling leadership positions– and think harder about whether qualified women are being passed over. Yoshimi and Shaneen called on us to acknowledge gender inequality and use whatever tools are available us to challenge it.

 A recording of the event is available here.

Submitted by: [Michele Sonen](#), Head (North East Asia), SIAC, Seoul, Korea

International Women’s Day Celebration in Shearman & Sterling’s Paris Office: Choose to Challenge, on 8 March 2021, by Webinar



Shearman & Sterling Paris office members striking the #ChooseToChallenge pose

For International Women’s Day (IWD) 2021, Shearman & Sterling’s Paris office and Shearman#Elles participated in IWD’s #ChooseToChallenge theme. Members of the Paris office, both women and men,

raised their hand up high to call out gender bias and inequality, question stereotypes, and commit to forge an inclusive world.

This event supports the firm’s diversity and inclusion programme

and was organised by our Paris office’s Shearman#Elles, an award-winning initiative for women empowerment that also includes pro bono legal and policy work to support equality between women and men and to

promote equal opportunities for all. Shearman#Elles was awarded the Grand Prix de l'Egalité Professionnelle by the Paris Bar for its outstanding contribution to the promotion of equality. Shearman#Elles is open to the entire Paris office – lawyers, interns, business professionals and administrative staff, irrespective of gender. It has launched office-wide initiatives, such as a mentoring programme, internal roundtables and talks with guest speakers, as well as external

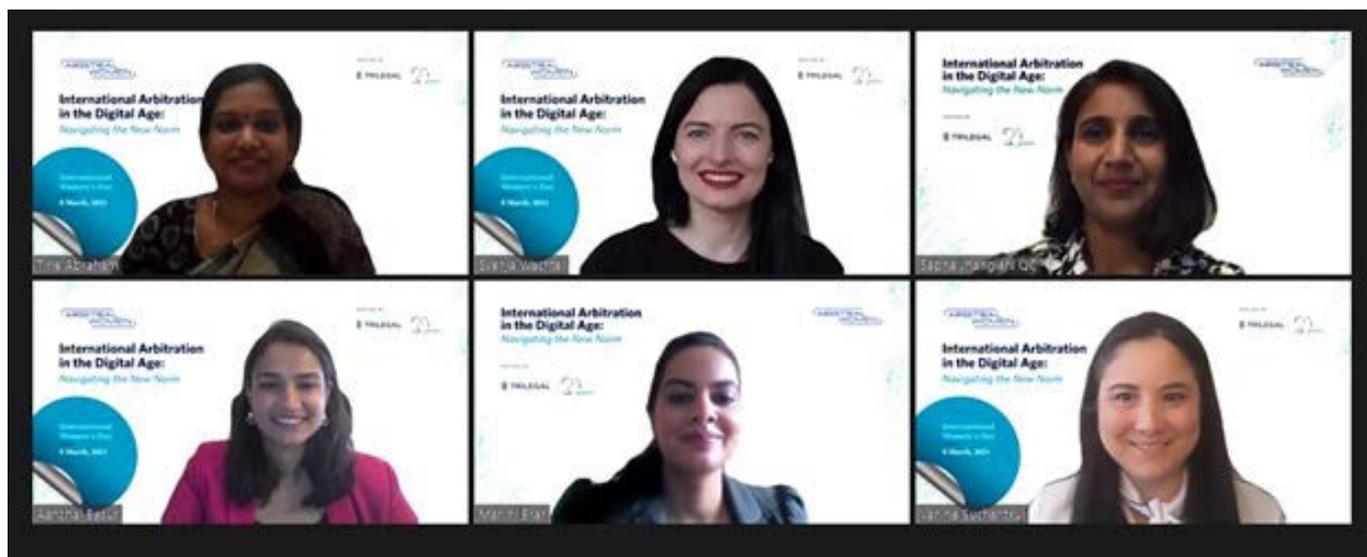
community-related initiatives. For instance, prior to the Covid-19 pandemic, Shearman#Elles raised € 7,500 for Paris-based women empowerment charities, *Du Côté des Femmes* and *Espace Femmes*, and provided one-on-one mentoring to underprivileged girls in Paris. These activities and achievements were featured in the June 2019 issue of the ArbitralWomen newsletter.

The IWD 2021 initiative was led by ArbitralWomen member **Jennifer Younan**, Partner, Shearman

& Sterling (Paris) and supported by ArbitralWomen member **Elise Edson**, Counsel, Shearman & Sterling (Paris), **Chloé Vialard** Associate, Shearman & Sterling (Singapore) and ArbitralWomen member **Trisha Mitra**, Associate, Shearman & Sterling (Paris) and numerous other Shearman & Sterling lawyers and staff.

Submitted by Trisha Mitra, ArbitralWomen member, Associate, Shearman & Sterling, Paris, France.

ArbitralWomen Inaugural India Event: International Arbitration in the Digital Age: Navigating the New Norm, on 8 March 2021, by Webinar



Top to bottom, left to right: Tine Abraham, Svenja Wachtel and Sapna Jhangiani, Aanchal Basur, Manini Brar and Vanina Sucharitkul

On the occasion of International Women's Day, ArbitralWomen held its first ever event in India on 'International Arbitration in the Digital Age: Navigating the New Norm'. The event was also supported by the **Young ArbitralWomen Practitioner's (YAWP)** and was held with organisational support from **Tri-legal**, one of India's leading dispute resolution firms. **Vanina Sucharitkul** delivered the opening remarks and introduced the work of ArbitralWomen and its activities around the globe.

The event was modelled as a panel discussion where panellists spoke about the transformative impact that the dig-

ital age has had on international arbitration. It was moderated by **Aanchal Basur**, YAWP Steering Committee member and Partner at AB Law, who posed questions to the panellists on their experience with dealing with the digital disruption and tips and tricks on innovative ways to propel one's career in this new age. **Tine Abraham**, Partner at Trilegal, New Delhi, spoke about how the new norm has made hearings more efficient and encouraged remote advocacy amongst Indian practitioners and tribunal members, something that was not very popular before the advent of the pandemic. **Svenja Wachtel**, Founder,

Digital Coffee Break in Arbitration, based in Singapore, gave some very helpful tips on networking in the digital age and spoke about ways to tackle 'webinar fatigue' and how to choose the best events to ensure that one can make a lasting impression and forge meaningful bonds.

An important aspect for the digital age remains profile building and remote skills. **Sapna Jhangiani QC**, Partner at Clyde & Co., Singapore, shared her experience of being a faculty for remote accreditation courses and the tips on staying relevant through additions in one's existing skill set. **Manini**

Brar, Consultant, Investment Division, Department of Economic Affairs, Ministry of Finance, Government of India, shared with the panel her advice to not feel overwhelmed by the flurry of activity that seemingly has increased in the digital space. She also shared some useful tips on connecting with practitioners around the world and collaborating with them for projects that increase digital visibility.

The panel members shared some of their personal experiences in tackling the challenges posed by the Digital Age and even gave away some humorous snipets from their encounters with it during the discussion. The evening ended on a highly optimistic note for international arbitration and female practitioners, with a broad consensus that the incoming digital age does hold much promise of not just blurring the lines

of gender bias but also increasing the accessibility of arbitration as a career.

A recording of the event is available here.

Submitted by Aanchal Basur, Young ArbitralWomen Practitioners (YAWP) Steering Committee Member, Partner at AB Law, New Delhi, India

Gender diversity in international arbitration: Trends and developments in Japan and Asia Pacific, on 8 March 2021, by Webinar



Top to bottom, left to right: Vanina Sucharitkul, Yoshimi Ohara, Dr Mariel Dimsey, Anne-Marie Doernenburg, Elizabeth Chan, Yoko Maeda

On the centenary of International Women’s Day, ArbitralWomen and co-sponsors ERA Pledge, Japan Association of Arbitrators (JAA), Japan Commercial Arbitration Association (JCAA) and CIArb Japan Chapter hosted a webinar celebrating advances in female representation in international arbitration and shedding some rare light on the state of gender diversity in Japan and Asia Pacific. The panelists – successful female arbitration specialists based in or with ties to Asia – identified reasons for the existing gender gap or bottleneck, particularly in senior positions, and provided valuable advice to help achieve the right balance.

Following welcoming remarks

by ArbitralWomen Board member **Elisabeth Chan** (associate, Three Crowns, London), the moderator **Anne-Marie Doernenburg** (associate, Nishimura & Asahi, Tokyo) guided the conversation covering

- i. the practice of female arbitrator appointments,
- ii. the situation of female counsel in law firms, and
- iii. the impact of cultural and regional differences.

First, the speakers looked at the trend in arbitrator appointments across institutions including the LCIA, ICC, SIAC, HKIAC, TAI and JCAA. The statistics (e.g.: the [2020 ICCA Report](#)

show an overall increase in female appointments, particularly by arbitral institutions. The LCIA, a pioneer in gender diversity, is in the lead with a record appointment of 48% female arbitrators in 2019. As for the ICC, Nagashima Ohno & Tsunematsu Tokyo partner **Yoshimi Ohara** added that national committees proposing arbitrators for ICC Court appointments should recommend more female candidates. Meanwhile, institutions in Asia still lag behind, primarily due to their lower caseloads and shorter track records.

The number of women in international law firms that drop out at a senior level (senior associates and partners) continues to stand out. While this can often be attributed to career

changes and family reasons, CMS Hong Kong partner Dr **Mariel Dimsey** urged law firms to help young (female) lawyers raise their profiles and provide more opportunities to publish and speak at events. City-Yuwa Partners Tokyo partner **Yoko Maeda** observed that this is particularly true in Asia and Japan, where business development and self-promotion are still relatively uncommon and young associates are often hesitant to engage in such activities. ArbitralWomen Board member and independent arbitrator **Vanina Sucharitkul** stressed the importance for law firms to educate next generation leaders and future arbitrators. She also called on female lawyers to be bolder and noticed that men tend to do better in self-branding and increasing visibility.

Last, the panellists highlighted the impact of cultural and regional differences on female representation in international arbitration. Recognising these is crucial to identifying tailored solutions to each country's peculiarities. For instance, Yoshimi Ohara and Yoko Maeda described the relatively short history of arbitration in Japan and low number of Japanese arbitration

specialists. Traditionally known for their reluctance to litigate and wish to preserve harmony, the Japanese have for centuries practised the art of mediation instead of arbitration. Language barriers are another key issue preventing many Japanese from participating in arbitrations conducted in English. Also, Japan's female lawyers' ratio is rather low (18% as opposed to 30-50% in Europe/the USA). Conversely, Mariel Dimsey noticed that other Asian countries such as Hong Kong and Singapore, where English is an official language and which have an established arbitration and common law tradition, fare better with respect to diversity.

At the end of the webinar, the panel reflected on the goal of gender diversity (i.e., parity vs balance) and closed with anecdotes and advice to young (female) professionals. Yoko Maeda encouraged all female lawyers to connect and help each other more. For Mariel Dimsey, flexibility and willpower are the keys to success. Vanina Sucharitkul emphasised the importance of mentorship, especially from male mentors. Yoshimi Ohara recounted her experience as a mother

of two and stated that women should not be afraid of taking maternity leave and discussing family-compatible work arrangements with employers and colleagues.

Overall, the panellists were positive about the future. The audience's verdict was similarly favourable, as the results of two live polls during the webinar confirmed:

- Almost 50% of the attendees were female lawyers
- The majority were mid-career professionals and based in Asia, including Japan
- Most of the female viewers seldom experienced gender-related obstacles
- A slight majority preferred gender balance rather than simple parity as a goal
- The overwhelming majority felt supported by their law firms, institutions and colleagues.

The outlook is promising.

Submitted by Anne-Marie Doernenburg, Associate at Nishimura & Asahi, Tokyo



Top to bottom, left to right: Affef Ben Mansour, Cherine Foty, Dana MacGrath, Donna Ross, Erika Williams, Gaëlle Filhol, Gisèle Stephens-Chu, Lizzy Chan, Louise Barrington, Maria Beatriz Burghetto, Mirèze Philippe, Rebeca Mosquera, Rekha Rangachari, Rose Rameau and Sara Koleilat-Aranjo

UNCITRAL Working Group II 73rd session, from 22 to 26 March 2021, in Vienna and remotely



Left to right: Eunice Shang-Simpson, Gisèle Stephens-Chu, Lara Pair, Patricia Nacimiento and Rashel Ann Pomoy

The 73rd session of UNCITRAL's Working Group II (Arbitration and Conciliation / Dispute Settlement) took place online and in Vienna from 22 to 26 March 2021. Representatives of states, non-governmental organisations, and intergovernmental organisations were in attendance. ArbitralWomen member delegates

at this session included **Patricia Nacimiento, Lara Pair, Eunice Shang-Simpson, Rashel Ann Pomoy and Gisèle Stephens-Chu**. The work of the session, chaired by Andrés Jana (Chile) with Takashi Takashima (Japan) as rapporteur, focused on draft provisions on Expedited Arbitration and draft texts on International Mediation.

A. Discussions on the draft Expedited Arbitration Rules

Discussions on the draft provisions on Expedited Arbitration by the Working Group had commenced at the [69th session](#) in February 2019. The Working Group had presented drafts that were discussed during the [70th session](#) and the [71st session](#). At the latter, the UNCITRAL Secretariat was requested to prepare a revised draft of the Expedited Arbitration provisions as an appendix to the UNCITRAL Arbitration Rules, as well as an explanation concerning the interaction between the Expedited Arbitration provisions and the ordinary UNCITRAL Arbitration Rules (the 'Ordinary Rules'). During the 73rd session, the Working Group continued its deliberations of the draft provisions on Expedited Arbitration, as presented in document [A/CN.9/WG.II/WP.216](#).

Secondary process with a requirement to maintain consent throughout

One point which had given rise to serious debate at the preparatory meeting for the 71st session, in February 2021, was the proposal to maintain the Expedited Arbitration Rules as an Appendix to the Ordinary Rules, rather than giving them form as separate rules. In order to clarify their distinct character and status, the Working Group decided to augment the Ordinary Rules by the provision: '[t]he Expedited Arbitration Rules in the appendix shall apply to the arbitration where the parties so agree'.

The Expedited Arbitration Rules were also designed to require continued consent to the expedited procedure throughout the entire proceedings, allowing the parties to withdraw from it and switch to the ordinary procedure at any time, in the event that one of the parties no longer consented to the expedited procedure. To stress the voluntary nature for the expedited procedure, the provision setting out the tribunal's duty to give reasons for ending the expedited nature of the proceedings was removed from the draft.

Greater discretion with regards to the conduct of the proceedings

Another aspect discussed by the Working Group concerned the degree of flexibility to be given to arbitrators in the conduct of the proceedings, in particular with respect to the use of technology and the ability to hold consultations and hearings remotely. Some delegates expressed the view that the reference to the use of technology should not be confined to proceedings involving virtual consultations and hearings, and thus suggested deleting the respective reference, while others considered it important to maintain it. To accommodate both views and the need for a broad use of technological means, the draft was amended to make it clear that the reference to the possibility of remote hearings was only an illustration of the use of technology in the conduct of proceedings, by inserting the word 'including' after the word 'appropriate' in draft provision 3, paragraph 3 ('In conducting the proceedings, the arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means

as it considers appropriate **including** to communicate with the parties and to hold consultations and hearings remotely'.)

The arbitral tribunals' discretion concerning the admission of documentary, witness and other evidence, and with respect to document production requests was also discussed. Reflecting the general principle that document production requests could be limited in expedited arbitration, draft provision 15(1) was amended to clarify that, absent party agreement, the tribunal could reject a request to establish a document production procedure. Other parts of draft provision 15 were modified to further clarify the tribunal's discretion with respect to the form of witness or expert evidence and as to which witnesses to hear.

Time limits

At the heart of the draft Expedited Arbitration Rules lies the timing of the proceedings. The Working Group discussed and amended several provisions concerning timing.

The time limits for holding a case management conference and communicating a statement of defence were confirmed as being 15 days after the constitution of the tribunal, with the Working Group agreeing that the provisions of the Ordinary Rules regarding arbitrator challenges should continue to apply. It was however suggested that the Ordinary Rules should potentially have reduced time limits to accommodate the needs of an expedited proceeding.

Draft provision 13 concerning the time limits for amendments of claims and defences in response to counterclaims or setoff claims was discussed in detail. Questions were raised whether parties would have an unqualified right to amend or supplement their claim or defence within the 30-day time limit provided in the Ordinary Rules. The contentious point concerned whether to use different standards for such amendments within and after the 30-day time limit, to disallow any amendment after the time limit altogether, and/or automatically to admit amendments during the time period. Questions were also raised on whether draft provision 13 might limit the right of the claimant to provide a response to a counterclaim made by the respondent in its statement of defence.

In that context, it was clarified that a response to a counterclaim made by the respondent in its statement of defence was addressed in draft provision 14. It was further noted that whether a counterclaim could be made after the submission of a statement of defence was addressed in draft provision 12(2).

After serious discussion, it was generally felt that draft provision 13 should

- i. aim to limit amendments and supplements to a claim or defence in Expedited Arbitration;
- ii. apply equally to claimants and respondents; and
- iii. be structured in a way to provide flexibility in its application to different circumstances'.

This led to a revision of the proposed draft as follows,

which would replace Article 22 of the Ordinary Rules:

'During the course of the arbitral proceedings, a party may not amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to when such an amendment or supplement is requested, prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal'.

Draft provision 16, concerning extensions to the six-month deadline for issuing an award was predictably one of the most hotly discussed provisions during the preparatory hearings and gave rise to equally extensive discussions during the Working Group session.

One proposed approach was to require the arbitral tribunal to state the reasons when extending the time limit for rendering the award, without imposing a maximum time limit for the extension (option A). Another proposed approach was to impose an overall time limit for the proceedings, without requiring the arbitral tribunal to state the reasons for an extension (option B).

The various concerns stated were that:

1. unlimited flexibility for the arbitral tribunal to extend the time period would not respond to the expectations of the parties;
2. an award that was not rendered within the prescribed time limit could result in an unintended termination of the proceedings;
3. an award rendered after the fixed time limit had elapsed might be annulled or refused enforcement; and
4. a fixed time frame could lead to abuse by a party designed to obstruct the timely issuance of the award.

Given the widely divergent and entrenched views of some delegates, various roads to compromise were suggested, such as an addition in the explanatory notes, an addition to a suggested model clause, or the involvement of an institution or the supervisory court to make a determination on the extension.

After lengthy discussions, the Working Group approved draft provision 16 with a change to paragraph 3, providing for an overall extended period not exceeding nine months from the date of the constitution of the arbitral tribunal, unless otherwise agreed by the parties. However, the Secretariat was requested to further improve the language of draft provision 16, as well as the accompanying explanatory note based on the comments that had been received, in particular regarding the consequences of the overall time frame elapsing and the possibility of obstructive party behaviour. The Secretariat was also invited to provide some language in the model arbitration clause opting out from this overall time frame.

Final modifications

Two final modifications to the draft were made during the 73rd session.

Draft provision 17, concerning pleas as to the merits and preliminary rulings was removed, as better suited for the Ordinary Rules, which continue to apply by default.

A suggestion whereby parties could waive the right to withdraw from the expedited procedure in the model arbitration clause did not receive support. During the next session, both the model clause and the explanatory notes should be finalised by the Secretariat so that the Working Group can conclude its work on the Expedited Arbitration Rules.

E. Discussions on International Mediation

At its 53rd session [\[1\]](#), the Commission had requested the Working Group to briefly review the draft texts on international mediation, so as to facilitate the speedy adoption of those texts at its 54th session [\[2\]](#) in 2021. Against this background, the Working Group undertook a review of the following draft documents: the draft UNCITRAL Mediation Rules (A/CN.9/1026 [\[3\]](#)) (the 'Mediation Rules'), the draft UNCITRAL Notes on Mediation (A/CN.9/1027 [\[4\]](#)) (the 'Notes on Mediation') and the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (A/CN.9/1025 [\[5\]](#)) (the 'Draft Guide to Enactment').

As part of the review, a broader understanding was reached that the draft documents should be brought in line with each other, whilst clarifying the details contained in each of the respective documents.

Commencement of Mediation

It was discussed when the 30-day time limit would expire for commencing mediation, in the event a party's written invitation to another party to mediate gets no acceptance, in accordance with Article 2 of the Mediation Rules. In its current form, Article 2 provides that mediation of a dispute is deemed to commence on the day on which the parties to the dispute agree to engage in mediation (or, unless otherwise provided for, through a mediation agreement, instrument, court order or statutory provision). Article 2(2) provides that, where a party is invited to mediate but does not receive an acceptance of that invitation within 30 days from the date on which the invitation was sent (or within such other time period as specified in the invitation), the inviting party may elect to treat this as a rejection of the invitation to mediate.

Appointment of Mediators

It was suggested that Article 3(3) of the Mediation Rules should be simplified so as to not regulate the appointment of mediators in detail. In its current form, Article 3(3) provides that parties may seek the assistance of a selecting authority for the appointment of a mediator, and in particular, a party

may request a selecting authority to recommend suitable candidates, or the parties may agree that an appointment be made directly by the selecting authority.

The Working Group also proposed the removal of the reference to 'expertise in the subject matter' in Article 3(4) (a). This was proposed on the ground that a mediator did not necessarily need to be an expert on the subject matter in order to act as a mediator. Further, it was suggested that the second sentence of Article 3(5) be further clarified, so as to make clear as a criterion of the selecting authority in selecting a mediator, gender and geographical region. In its current form, Article 3(5) includes wording that the 'selecting authority shall respect gender and geographical diversity in the selection process'. Clarification of this would make clear that diversity, beyond just nationality of the mediator, is to be considered.

Conduct, Confidentiality and Evidence in Mediation

The conduct of the mediation was important to the Working Group. Particularly, it was suggested that mediation could take place remotely through the assistance of technological means. It was suggested, therefore, that Article 4 of the Mediation Rules should reflect this position, and that consideration be given to the drafting language of provision 3(3) of the Expedited Arbitration Rules (A/CN.9/WG.II/WP.216).

Confidentiality was also considered by the Working Group. It was suggested that Article 5(3) of the Mediation Rules be amended to use the word 'shall', requiring that mediators keep information that is disclosed to them by a party in the course of a confidential disclosure confidential. This would provide a greater protection to disclosing parties, where they are assured that communications with a mediator, whether jointly or separately (in caucus), remain confidential, where applicable.

Mediators should not cast judgment on the parties' behaviour. As such, it was proposed that

Article 7(5) of the Mediation Rules be deleted, so that mediators are not able to give evidence on whether a party had participated in the mediation in good faith.

The Secretariat's report on the UNCITRAL WGII's 73rd

United Nations Commission on
International Trade Law
Fifty-fourth session
Vienna, 28 June–16 July 2021

Report of Working Group II (Dispute Settlement)
on the work of its seventy-third session
(New York (online), 22–26 March 2021)

session can be found [here](#) [\[6\]](#) (A/CN.9/1049)

Submitted by Patricia Nacimiento, ArbitralWomen Board member, Partner, Herbert Smith Freehills LLP, Frankfurt, Germany; Lara Pair, Pairfact Legal AG, Zürich, Switzerland; Rashel Ann Pomoy, ArbitralWomen member, Partner at Villaraza & Angangco, Manila, Philippines; Eunice Shang-Simpson, ArbitralWomen member, Arbitrator, Accredited Mediator, Director, Shangress Ltd., Canterbury, UK and Gisèle Stephens-Chu, ArbitralWomen Board member, Founder, Stephens Chu Dispute Resolution, Paris, France.

Mooties' testimonials

(29th Vis Moot - 9-14 April 2021)

Damodaram Sanjivayya National Law University, Visakhapatnam, India



We shall always wonder what other experience would ever compare to the one we had doing Vis Moot. The way it had challenged us and yet kept us motivated the entire time, the four of us are still in awe of the entire process. The fact that all it takes to form a moot team is a few interested university mates and a phone call but what unravels post that is the journey of attributing some very important resources into this one competition. The biggest investments into the moot came in the form of time, efforts, managing to stuff a virtual academic year and an esteemed international moot into the schedule, especially as the first team ever from our university. Our association

with ArbitralWomen was more than the help that they provided us with, it also reassured us of our motive and reminded us of why we had participated in the competition in the first place. Nothing was ideal this year, the pandemic has impacted each one of us in some way, and with us living in different cities, the situation would get dreary. When we received the email and got to know of all the help Arbitral Women was providing us, we were ecstatic. This is not just assistance in terms of a moot, it meant being part of a legacy, a movement and we were touched that our cause aligned with that of ArbitralWomen. With all this energy, we charged ahead in the competitions, making our submissions

both written and oral. All of these efforts resulted in our receiving an Honourable Mention for the Fali Nariman Award for Best Memorandum Award. We shall say that none of this would have happened without the help that we received from ArbitralWomen and we are forever indebted. In the world of Alternative Dispute Resolution, the representation of women has great significance due to ArbitralWomens' constant efforts and initiatives. As a team of four girls, it gives us immense pleasure to be a small part of an organisation that resonates with a great cause at a grand level.

Submitted by Swetalana Rout, team member

Federal University of Rio Grande do Sul, Porto Alegre, Rio Grande do Sul, Brazil

The Federal University of Rio Grande do Sul's team has a long history with the Vis Moot. The team was created in 1999 by Prof. Dr. Véra Fradera, an esteemed professor and arbitrator who is recognised as the pioneer in the research and study of the Vienna Convention ('CISG') in Brazil. The team has participated in the Vienna moot

competition annually—whether in person or remotely—starting on its 8th edition, with the support of several sponsors and collaborations each year.

This moot season, we had a record female participation, which enabled us to receive sponsorship from ArbitralWomen. This has not only been crucial to our participation

in the competition but, in addition, it has great importance in promoting the participation of women in the legal community. Unfortunately, we still face unequal participation of women in leadership positions in both law firms and arbitral institutions, as well as underrepresentation of women in arbitral tribunals, which challenges the



Top to bottom from left to right: Lorenzo Galan, Achilles Steinhaus, Lucas Armani, Ana Júlia Schenkel, Catharina Gonzales, Helena Chagas, Giovana Etcheverry, Vitória Werle, Julie Griebler, Lucas Gavronski and Natália Vicente.

new generation to step forward, in light of still existing bias against women. ArbitralWomen is a powerful network for changing the status quo, and we are very thankful for all the help it has offered us and that it offers to all women in the arbitration field worldwide. Moreover, the experience of being a mootie in itself is life changing. For

months we develop research, organisational, teamwork and oratory skills that shape the type of professional we aim to become. It gives us an opportunity to acquire deep knowledge on relevant aspects of both international arbitration and private international law, namely the CISG. Still, the Vis Moot is not merely that. After endless hours,

discussions and sleepless nights, the moot becomes a personal experience.

The team has created an arbitral community in our university. Although we do not have specific subjects on international arbitration or on the CISG in our regular curriculum, for over 20 years alumni have been studying and introducing the subjects to new members and to the university. Thus, the team has a crucial responsibility in promoting these two subjects in southern Brazil.

The Vis Moot journey was an incredible one, and we wish to continue our studies. We also wish that next year we can all meet in person in Vienna and debate over procedural and substantive issues once again!

Submitted by team members Julie Griebler and Lucas Gavronski

Banaras Hindu University (BHU), Varanasi, India



Left to right: Pragya Srivastava, Anshita Pal, Kanchan Dahiya, Shreya Pandey

Participating in the Vis Moot was a learning as well as an emotional experience for all the team members. We are the first team from our college—in its 100 years' history—to participate in this moot.

We spent countless hours and devoted several months for the preparation of our participation in the moot. We wanted to participate in this moot for our love for arbitration, but we had no financial backing or support from our college. Then ArbitralWomen came to our rescue as a knight in shining armour. Participating in the Vis Moot was one of the best experiences we had in our 5 years of law school. It was our first Vis Moot and we regret to miss

the chance to physically participate in Vienna. Nonetheless, the virtual event was successful and a different, rich experience for us.

We also got the chance of pleading in various pre-moots, we did numerous practice sessions with other teams, who were very warm and supportive, and it gave us the guidance we needed. Teamwork is the key to success in this moot. We faced obstacles at every step of our journey, but with each other's strong support, we overcame it all to finally argue at the competition.

The feedback we received from the moot's arbitrators in the preliminary rounds was surreal. It was an honour to present our case in front of them.

We learned so much about the drafting, researching and how to present a case in the real world of arbitration.

Although we could not make it to the elimination rounds, still we are proud of ourselves for working hard on the memoranda and presenting the arguments well, especially in light of the fact that we had no coach to guide us.

Participating in this moot left us with a sense of accomplishment and a lifetime experience we could never forget. It was a chance, a challenge and an experience all at once; and for that, we will forever be grateful to ArbitralWomen.

Submitted by the BHU team

Reports on Events

Symposium on ‘Institutional Arbitration Rules: What is happening? Improvement or Harmonization?, on 4 March 2021, by Webinar



Top to bottom, left to right: Nathalie Voser, Hamish Lal, Sabina Sacco, Daniel Greineder, Kristina Ljungström, Alexandra Johnson, Duncan Speller, Léa Defranchi

On 4 March 2021, Léa Defranchi chaired a virtual Symposium ‘Institutional Arbitration Rules: What is happening? Improvement or Harmonization?’ [📄](#). The Symposium included a number of ArbitralWomen members, drew an international list of attendees and looked forensically at the questions expressed in the title.

The first part of the event was devoted to a panel discussion: Professor Dr **Nathalie Voser** (founding partner of rothorn legal, ArbitralWomen member), Dr **Hamish Lal** (partner at Akin Gump LLP), **Alexandra Johnson** (partner at Bar&Karrer, ArbitralWomen member and former Board member) and **Kristina Ljungström** (partner at Norburg & Scherp) reviewed and critically evaluated the changes in institutional arbitration rules. Hamish Lal opened the discussion with a general question addressed to the panellists: ‘If you had

to pick one specific rule or article that has been introduced by the recent rule revisions, what would it be – and – why?’ Nathalie Voser highlighted that the 2021 ICC Rules expanded the scope of application of the expedited procedure by raising the threshold from USD 2 million to USD 3 million (Article 1 of Appendix VI). She noted that, while it had been discussed to rise this threshold to USD 5 million, it was eventually concluded that arbitrations of that amount could be too complex to be resolved in a timely manner through an expedited arbitration process. Hamish Lal chose Article 26(1) of the 2021 ICC Rules, which has been revised to expressly state that the tribunal itself has the authority to conduct hearings remotely after consulting the parties and explained that this Article shows the importance placed on remote hearings and how the tribunal could ‘override’ the parties’ wishes. Kristina

Ljungström noted that the 2020 LCIA provision on cybersecurity (Article 30A) offers guidance on the hot topic of the protection of confidential documents and data in the digital age. Alexandra Johnson chose the new Article 11(7) of the 2021 ICC Rules on the mandatory disclosure of third-party funding agreements. She also highlighted that the Swiss Chambers’ Arbitration Institution (SCAI) is currently revising its rules. The panellists explained that the institutions are seeking to meet the needs of the users —efficiency and transparency being the main demands— and yet maintain the attractiveness of arbitration. With regards to the clash between party autonomy and procedural efficiency, it was discussed that, while party autonomy is the cornerstone of arbitration proceedings, parties should keep in mind that there must be a balance and a need to conduct proceedings efficiently.

The panellists generally agreed that a harmonisation of institutional arbitration rules would not benefit users of international arbitration, as the institutions should differentiate themselves and continue to offer innovative and distinctive advantages.

The second part of the Symposium was dedicated to presentations on the specific impact of the changes in the institutional rules. **Sabina Sacco** (independent arbitrator, ArbitralWomen member) discussed such impacts on arbitrator appointment and disclosures. She gave an excellent overview of the method of appointment of arbitrators under the 2021 ICC Rules, the 2020 LCIA Rules, the 2020 MIAC Rules and the proposed revision to the ICSID Arbitration Rules, noting that new Article 12(9) of the ICC Rules allows the institution to override party agreement. Sabina Sacco also highlighted the differing objective and subjective tests regarding arbitrators'

disclosure obligations. Finally, she mentioned the new disclosure obligations for parties under the 2021 ICC Rules, the 2020 MIAC Rules and the proposed revisions to the ICSID Rules regarding third-party funding, and the obligation to disclose changes in party representation (already present in the LCIA Rules, and now incorporated into the ICC Rules). **Duncan Speller** (partner, WilmerHale) addressed the impact of the changes in the rules on procedural efficiency. According to him, the new procedural tools prompt arbitrators to take a more active case management stance early in the case (e.g., bifurcating proceedings, limiting the scope of document production, early determination). Duncan gave a practical example of two *ad hoc* arbitrations that had to be dealt with separately, even though parties and legal issues to be decided upon were identical, demonstrating how institutional rules can serve procedural efficiency. Responding

to Léa Defranchi's remark on virtual hearings and how procedural efficiency could threaten due process guarantees, Duncan noted that he had only good experiences with such virtual hearings, as long as there is an open discussion between the tribunal and the parties on the most suitable way to implement them. Dr **Daniel Greineder** (partner, Peter&Kim) analysed the relationship between the changes in institutional rules and soft law. Dr Greineder explained the origin of soft law, its position in international arbitration and how it relates to institutional rules. He highlighted in particular what lessons arbitral institutions can learn from the soft law debate in arbitration but concluded that institutional rules and soft law are good companions.

Submitted by Léa Defranchi, ArbitralWomen member, Associate at Akin Gump Strauss Hauer & Feld, Geneva, Switzerland

International Construction Arbitration: A commercial and investment treaty perspective, on 4 March 2021, by Webinar

On 4 March 2021, senior lawyers from across Pinsent Masons' international offices delivered a webinar on international construction arbitration as part of the firm's annual [Global Infrastructure Law Review of the Year \(GILROY\) series](#). The globally coordinated series was delivered across five virtual 'modules' and 16 individual events, providing an update on the defining moments of 2020 and current issues affecting the infrastructure sector and the construction industry.

ArbitralWomen member **Clea Bigelow-Nuttall** joined a panel together with **Sadie Andrew**, **Jed Savager** and **Mohammed Talib** to review the significant developments that took place in international construction arbitration over the last 12 months and looked at the year ahead in the resolution of international disputes in the construction sector. The

webinar was moderated by **Jason Hambury**.

The webinar was divided into 3 segments and covered an array of topics. Segment 1 discussed the factors currently affecting the construction sector, including challenges to investment treaties, cashflow constraints, the Covid-19 pandemic, and climate change. Although 2020 was marked by disruption to businesses, tribunals and courts as a result of the pandemic, matters nonetheless remained very much business as usual in the English courts' approach to the supervision of arbitral awards. According to data from the [Commercial Court User Group Meeting](#), applicants continue to be deterred from making challenges to arbitral awards by the high hurdle to success set by the courts.

During the case review segment, the audience was taken through key

developments in the construction arbitration space from projects across the world. Perhaps the most significant development in English arbitration law was the Supreme Court's decision in *Enka v Chubb*, which clarified the previously uncertain English choice of law rules for ascertaining the governing law of an arbitration agreement and the role of the court of the seat in granting anti-suit injunctions. The Privy Council's decision in *AG of BVI –v– Global Water Associates* considered the extent to which losses arising under one agreement can be recovered as damages for breach of another, related agreement, highlighting the importance of the inter-relationship between suites of project documents on infrastructure and energy projects and, in particular, the consequences of a breach of one in terms of rights and liabilities under another. Discussion of

the *Sinohydro* LCIA arbitration award highlighted the importance of local community engagement and support as key to the success of energy projects in emerging markets. The state's dual role as 'employer' and 'governor' means it is best placed to resolve and enable local community impact — a factor to adequately reflect in risk allocation in the construction contract.

During Segment 3, Clea Bigelow-Nuttall assessed ongoing changes in ISDS and implications for the construction sector. From a European

perspective, the ramifications of the 2018 *Achmea* judgment on arbitration provisions in intra-EU BITs continue to be felt. Touching on the considerable rise in the number of renewable energy disputes going to arbitration in recent years, the ECT reported last year that disputes concerning renewable energy sources now account for around 60% of all disputes brought under the ECT.

In this respect, it is impossible to ignore the ongoing Covid-19 pandemic. Many states have passed some form of legislation to deal with Covid-19,

affecting construction projects through site closures, lockdowns, temporary requisitions, cancelled bids, restrictions on imports and exports, and raising expectations of potential future ISDS disputes to come.

A video recording of the webinar can be found at Pinsent Masons' website [here](#) .

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

Delos TagTime Series, Session 3, Episode 4: Yoshimi Ohara on 'When Arbitration Meets IP Disputes – Settling Global Patent Disputes in a Single Arbitration', on 4 March 2021, by Webinar



Left to right: Yoshimi Ohara, Amanda Lee, Kabir Duggal

On 4 March 2021, Yoshimi Ohara (Nagashima Ohno & Tsunematsu) discussed the entry of IP disputes in the world of international arbitration ('IA'). This webinar was part of Delos Dispute Resolution's 'TagTime' series, supported by ArbitralWomen and presented by ArbitralWomen Board member **Amanda Lee** and **Kabir Duggal**.

Yoshimi began by highlighting the unique status of the IP community and its disputes in the sphere of international commercial disputes. Historically, patent disputes were litigated, and general commercial disputes were solved using IA. However, the latest trends show IP arbitrations are increasing. According to [WIPO](#) , 'WIPO ADR cases were predominantly based on contract clauses; however, some cases were submitted to

WIPO ADR as a result of a submission agreement concluded after the dispute had arisen'.

Yoshimi defined a patent and identified patentees' objectives: A patent is an exclusive right to exploit patented inventions during the term of the patents. Patentees may seek monetary compensation for unauthorised use of patented inventions. By enforcing patents, patentees may entirely prevent third parties from using patented inventions and/or license patented inventions in return for compensation. Patent disputes include non-contractual and contractual disputes (e.g., licence agreements).

Yoshimi identified the main reasons why litigation was the preferred method of resolving patent disputes, noting that in addition to the lack of arbitration

agreements in respect of patents, the grant of a patent in each jurisdiction is a separate right granted by each patent office. Each jurisdiction has developed a unique and sophisticated patent litigation procedure. National patent offices and/or courts typically have exclusive jurisdiction to invalidate patents, and national courts have coercive power over parties and non-parties to litigation.

Yoshimi highlighted the latest recognition IA received from the patent community. She focused on the main benefits of using IA to resolve patent disputes: the ability to select a patent/industry savvy tribunal; neutrality; party autonomy; the ability of the parties to reach an agreement in respect of confidentiality; enforceability and potential time and cost savings.

Before taking questions from the audience, Yoshimi discussed how the IA community can better attract patent disputes. She identified the lack of communication between IA and the patent community as the biggest challenge. She listed a number of steps that may be taken to make IA a more attractive method for the resolution of patent disputes. These include:

1. Incentivising parties to arbitrate

(WIPO's Good Offices Request, FRAND offer);

2. Providing a flexible yet harmonised and predictable procedure for patent dispute settlement;
3. Developing the IBA Rules on the Taking of Evidence to better suit patent disputes by taking inspiration from the US discovery rules;
4. Enabling parties to agree on the ability of arbitral tribunals to exercise

coercive powers;

5. Tackling concerns surrounding patent invalidity defence; and
6. Highlighting cost benefits.

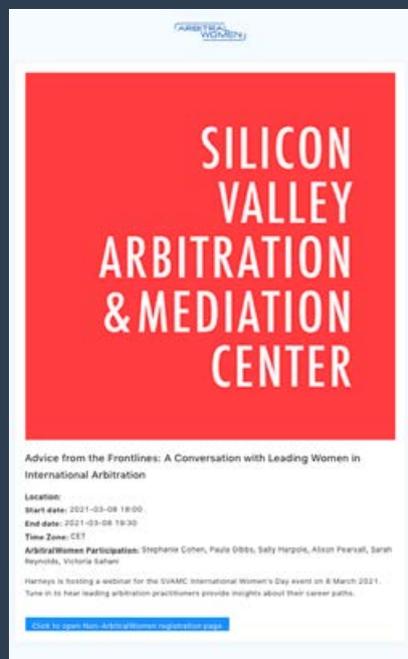
Yoshimi tagged **Andrés Jana** to appear as a guest on a future episode of the series.

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

Advice from the Frontlines – A Conversation with Leading Women in International Arbitration, on 8 March 2021, by Webinar

On 8 March 2021, International Women's Day, Harneys and the Silicon Valley Arbitration and Mediation Centre hosted a panel discussion between senior legal practitioners from different backgrounds, private practice to in-house and academia to independent arbitrator that included: ArbitralWomen member **Sarah Reynolds** (Managing Partner Goldman Ismail), **Sally Harpole** (Independent Arbitrator), ArbitralWomen member **Victoria Sahani** (Associate Dean of Faculty Development at the Sandra Day O'Connor School of Law, Arizona State University), ArbitralWomen Board member **Alison Pearsall** (Senior Legal Counsel Veolia Environment) and ArbitralWomen member **Stephanie Cohen** (Independent Arbitrator). The discussion was moderated by **Paula Gibbs** (Senior Associate, Harneys).

It was a frank and honest conversation about the challenges and opportunities facing women in arbitration with key advice on how to progress and support each other. Sally Harpole highlighted the importance of sponsors. A sponsor is someone who actively promotes you, giving you opportunities to speak at conferences, write articles, lead arguments at hearings, develop client relationships and to be promoted. They may work within or outside your organisation. A sponsor is key to progression, because they will actively push you forward and go in to bat for you. They may open doors



for you that would otherwise not have been opened. Given that most senior roles are still filled by men, a sponsor will often be a man. It is important to think about who your sponsors might be and to cultivate these relationships.

Another key piece of advice was the importance of using and maintaining your peer network. It can be invaluable to be able to bounce a difficult legal case off a peer as a sounding board. Do not underestimate the importance of peers for moral support through the ups and downs of an arbitration career and life itself. Stephanie Cohen mentioned a third key network that can be invaluable, connecting with more senior practitioners

in arbitration from your home country. They can often be a source of advice and support to more junior arbitrators of the same nationality.

Victoria Sahani discussed balancing career and caregiving responsibilities and the key takeaway was — ask for what you want and what you need. You may get what you ask for! If you do not, it may give you clarity on whether your current role is right for you, considering the variety of options that are out there within the arbitration world — think outside the box, arbitration is a sprint not a marathon and there are numerous options open to practitioners throughout their career. Finally, Sarah Reynolds outlined lots of ways that we can lift each other up including mentoring, promoting women internally, sharing wins/articles on social media/LinkedIn, appointing women to speak on panels and encouraging clients to consider appointing a woman arbitrator. Alison Pearsall pointed out that in-house counsel are in a particularly strong position in being able to insist on women on senior positions in outside counsel teams and on appointing women as arbitrators.



Click here to request a copy of the recording.

Submitted by Paula Gibbs, Senior Associate, Harneys, British Virgin Islands

CI Arb International Women's Day Lecture 2021: Boldly Going Towards New Gender Diversity Frontiers, on 8 March 2021, by webinar



Left to right: Ann Ryan Robertson, Amanda Lee, Lucy Greenwood

The Chartered Institute of Arbitrators' (CI Arb) 2021 International Women's Day Lecture was delivered by ArbitralWomen Board member **Amanda J. Lee**, following introductory remarks by ArbitralWomen member and CI Arb President **Ann Ryan Robertson** and former ArbitralWomen Board member and CI Arb Trustee **Lucy Greenwood**. The event was supported by ArbitralWomen.

The creators of Star Trek dared to imagine a future in which gender and race were non-issues — a future in which anyone could take their place on the bridge and reach (for) the stars. Amanda explored the extent to which that future is within our grasp and reflected on hard-won progress made to date.

In recognition of this year's theme 'Choose to Challenge', Amanda identified four challenges and explored potential solutions.

Resist complacency and politely question those who do not

Hard-won progress made to date must not be lost due to complacency. Those involved in event planning, particularly signatories of the Equal Representation in Arbitration Pledge who have committed to take reasonable steps to ensure that conference panels

include a fair representation of women, must remember that diversity is equally important for virtual events. Male allies have an indispensable role to play and can inspire positive change.

Diversify Your Diversity

We are more than our gender identity. When we recruit, shortlist potential arbitrators, select conference speakers and allocate work, affinity bias may come into play. We must embrace and celebrate intersectionality. Our initiatives must include women from across the globe. By celebrating and sharing information about talented, diverse women worldwide we do two things: help to tackle the lack of gender diversity on tribunals by raising awareness of talented arbitrators; and promote role models for the next generation.

Make International Arbitration More Accessible for New Entrants

Expectations of new entrants, heavily weighted in favour of those who come from wealthy backgrounds and developed jurisdictions, include an LLM, international mooting experience and completion of unpaid or poorly paid internships — such internships entrench inequalities. Race, ethnicity and gender are closely intertwined with

socioeconomic factors. Unpaid labour often falls disproportionately on women, who often hold significant caring and housekeeping responsibilities. We can improve accessibility by continuing to offer paid virtual internships, facilitating virtual moot participation post-pandemic, creating new scholarships, and identifying other methods of acquiring knowledge and experience.

Better Support Each Other and Reject Gender Stereotypes

We must better support each other, celebrate achievements, and reject preconceived notions about what women can do and should be. The counsel of today are the arbitrators of tomorrow — we must nurture aspiring female counsel throughout their careers. We can all serve as mentors and sponsors, championing, promoting, challenging and giving new entrants room to grow and develop.

Amanda concluded by recognising that 'resistance is futile' — gender equality is our final frontier and, by working together, we can ensure that all women can reach the stars.

Submitted by Amanda J. Lee, ArbitralWomen Board member, International Arbitrator, UK

Raedas annual Women in Disputes event, on 10 March 2021, by Webinar



Left to right : Felicity Aston, Joana Rego, Polly Wilkins, Ayse Lowe

On 10 March 2021, Raedas hosted their annual Women in Disputes event online. Echoing the challenges from the past twelve months, the theme of this year's event was 'Resilience and Leading in Adversity'.

The audience heard from **Felicity Aston** MBE, the first and only woman to ski solo across Antarctica and the first person to traverse Antarctica on muscle power alone. Felicity shared war stories from her time navigating across Antarctica, and insight into her own lessons of personal resilience, pushing boundaries and 'keeping on, keeping on' in the face of extreme adversity, isolation and unimaginable odds.

We then turned to our panel of industry experts, ArbitralWomen members **Joana Rego** (Co-founder and Partner, Raedas) and **Ayse**

Lowe (Director and Head of European Origination, Bench Walk Advisors), and **Polly Wilkins** (Partner, Kobre & Kim) for their take on the theme.

The panel discussion focused around three core areas, looking beyond the challenges posed by Covid-19:

- Leading ourselves: how to find the strength for long term resilience while allowing ourselves to 'step away' and see the bigger picture.
- Leading our businesses: how to continue delivering excellent client service while managing remote teams, ensuring they are meeting their potential while being sensitive to their own resilience.
- Resilience in our industry: the robustness of disputes in the con-

text of a pandemic, and lessons we can take forward from seeing our industry adapt.

With some 70+ women in attendance globally from the arbitration and litigation community, a wealth of invaluable experiences and lessons were shared among the group through a lively Q&A session.

While this year's event allowed for global attendance, we are looking forward to seeing many of you in person at next year's event.

For more information, please visit Raedas [website](#) or contact enquiries@raedas.com

Submitted by Elizabeth Anscombe, Head of Business Development and Marketing, Raedas, London, UK

Delos TagTime Series, Season 3, Episode 5: Andrés Jana on 'Applying Substantive Law in International Arbitration: Is There a Case for Harmonisation?', on 17 March 2021, by Webinar

On 17 March 2021, Andrés Jana (Bofill Mir & Alvarez Jana) discussed the obscure reality and challenges of harmonising the application of substantive law in international arbitration. This webinar was part of Delos Dispute Resolution's 'TagTime' series, supported by ArbitralWomen and presented by ArbitralWomen Board member **Amanda**

Lee and Kabir Duggal.

Andrés began by highlighting two fundamental values of international arbitration: predictability and certainty, encapsulated by instruments such as the [New York Convention](#) and the [UNCITRAL Model Law](#). He noted that, while procedural harmonisation has reached common ground and is

supported by institutional rules and guidelines, harmonisation of substantive/domestic law remains a distant reality.

Andrés stated that most parties who resort to arbitration choose domestic law as the law applicable to the merits of the dispute. Arguably, the international element of the dispute plays a less explicit role.



Left to right: Kabir Duggal, Amanda Lee, Andrés Jana

In this context, Andrés addressed the question: should an international arbitral tribunal apply domestic law as if it is a national court? Andrés submitted a tribunal should not apply domestic law as a local judge would. He referred to sociological and legal reasons to justify his conclusion. From a sociological standpoint, a tribunal functions in a multinational and heterogeneous environment, and consequently cannot act like a local court. From a legal standpoint, a tribunal is not a court and has ample freedom to apply the law, although such freedom may be restricted when parties choose to apply domestic law. More importantly, the way arbitrators apply the law to the merits is not subject to the control of a court under annulment or enforcement proceedings (see [Article V of the New York Convention](#)). Also, one must not forget that the parties' expectations are paramount. This highlights the tension between the parties' choice of domestic

law and their decision to settle their dispute in an international sphere.

Further, Andrés referred to the concept of transnational public policy and consideration of public interest when discussing the harmonisation of substantive law. When parties do not choose domestic law, arbitrators can apply transnational law, such as the Principles of European Contract Law ([PECL](#)), the Draft Common Frame of Reference (DCFR), the [UNIDROIT Principles of International Commercial Contracts](#), *lex mercatoria*, the Vienna Convention on International Sales of Goods ([CISG](#)), etc. Harmonisation of transnational law can occur in different ways, by

- i. direct application of transnational law (as seen in the *Norsolor* case);
- ii. supplementing domestic law with transnational law;
- iii. corroborating/interpreting domestic law through transnational law; and

iv. excluding or derogating from domestic law.

Andrés subsequently addressed a second question: how should the tribunal apply substantive law? Since there is no magic formula, the tribunal should apply substantive law in the way that best serves the parties' expectations and the specific circumstances of the case.

In conclusion, Andrés does not expect the harmonisation of substantive law to progress significantly, highlighting the tensions between the parties' choice of domestic law and international arbitration, as well as the lack of a centralised case records, which prevents the harmonisation of decisions.

Andrés tagged **Eduardo Damião Gonçalves** to appear on a future episode.

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

ICC Prague Arbitration Day 2021 conference on “How to Effectively Manage Arbitration: Modern and Innovative Approaches to Case Management”, on 18 March 2021, by Webinar

ICC Prague Arbitration Day is an annual, one-day event that focuses on current hot topics in arbitration. This year's conference was the third edition of the event. Four panels of eminent arbitration practitioners discussed innovative approaches to effective case management in arbitration. The event hosted 261 participants from 44 countries.

The first panel, moderated by **Miloš Olík** (ICC Czech Republic), discussed solutions for limiting costs in arbitration. Panellists **Małgorzata Surdek** (CMS; ICC Court Member), **Adelina Prokop** (Clifford Chance) and **Jonathan Barnett** (Nivalion), discussed cost efficiency from the perspective of various actors in an arbitration, respectively: the arbitrator, counsel, and third-party

funder/client. The speakers exchanged reflections on how to strike a balance between two vital aspects of arbitration: effectiveness of the process and the obligation to provide a party with a reasonable opportunity to present its case. The panellists agreed that the fundamental prerequisites for an effective process are cooperation of counsel (with the tribunal and each



Top to bottom, left to right: Jonathan Barnett, Malgorzata Surdek, Miloš Olík and Adelina Prokop

other) and a hands-on approach to the case by the tribunal.

The second panel, moderated by **Martin Magál** (Allen & Overy), looked at the possibility for a tribunal to proactively assist the parties in reaching a settlement. Panellists, **Marek Procházka** (PRK Partners), **Christian Dorda** (DORDA; ICC Austria) and **Theo Paeffgen** (Harbour Litigation Funding), discussed the procedural framework for reaching a settlement within the confines of arbitration and the necessary prerequisites and timing for a tribunal to encourage settlement talks. At the same time, the panellists shared concerns regarding a tribunal's competence for attempting to assist the parties in settling. In particular, it was noted that a tribunal may be unaware

of underlying factors that are crucial to assessing the parties' will to settle, such as the parties' ability to continue to finance a dispute or personal animosities between particular persons working at the respective parties.

The third session concerned the impact of the use of technology on arbitral proceedings and its potential for enhancing the effectiveness. The session was moderated by **Jana Lefranc** (Deloitte). Panellists **Dorothee Schramm** (Sidley Austin), **Karl Hennessee** (Airbus) and **Al Karim Makhani** (TransPerfect) discussed practical solutions for case file management using technology, e.g., through the effective use of the functionalities of Excel. However, they cautioned against an overly enthusi-

astic approach to new technology, the adoption of which should always be preceded by a thorough cost-benefit analysis. The panellists also shared their respective experiences using data platforms for exchanging documents in the course of arbitration, in particular in light of the rising threat of cyber-attacks.

The final session, moderated by **Dušan Sedláček** (Havel & Partners), concerned the unique challenges to efficiency in the case of arbitration proceedings involving state entities, often present in disputes in the region of the Central and Eastern Europe. Panellists **Maria Hauser-Morel** (Hanefeld), **Vít Horáček** (Legalité; ICC Court Member) and **Rostislav Pekař** (Squire Patton Boggs; Chairman of the Arbitration Commission at ICC Czech Republic), discussed the distinct factors that must be taken into account when dealing with state entities as parties in arbitration, including potential delays due to the functioning of certain state entities or complexity due to the application of public law rules.

Submitted by Malgorzata Surdek, ArbitralWomen member, partner, CMS, Warsaw, Poland, Maria Hauser-Morel, ArbitralWomen member, counsel, HANEFELD, Paris, France, with the cooperation with Julia Dyras, Senior Associate, CMS, Warsaw, Poland

Australia's National Sports Tribunal: One Year On, on 18 March 2021, by Webinar

On 18 March 2021, ArbitralWomen member **Judith Levine**, an independent arbitrator based in Sydney, Australia, spoke on a sports arbitration panel organised by the [Australia New Zealand Sports Law Association](#), reflecting on the first 12 months of the National Sports Tribunal (NST) in Australia, including her experience presiding over the Tribunal's first ever appeal on an urgent basis, and comparisons with proceedings at the Court of Arbitration for Sport (CAS). Other speakers included

the Tribunal's CEO **John Boulton**, Professor **Jack Anderson** and former CEO of Baseball Australia **Cam Vale**.

The NST was established by legislation in 2019, as part of a package of reforms aimed at enhancing integrity in Australian sport. The NST began operations on 19 March 2020, with the object of providing 'an effective, efficient, independent transparent and specialist tribunal for the fair hearing and resolution of sporting disputes'.

Historically, arbitration has been the

dispute resolution method of choice for sports-related disputes, since the flexibility in arbitral procedures make it well suited to providing practical justice in an efficient manner. The NST was designed to address a number of shortcomings in the sports arbitration model identified in a [report](#) commissioned by the government. First, the NST has procedural powers to order or compel the gathering of information and evidence from third parties. Second, NST arbitral awards are published (where the parties con-



Top to bottom, left to right: Jack Anderson, Cam Vale, Judith Levine, John Boulton

sent or the tribunal decides they have precedential value). Third, the NST is very low-cost. Its [fees](#) are already relatively modest and were waived for the first year of operation due to financial repercussions of Covid-19 on sports and athletes. Fourth, the NST aims to reduce delays and resolve disputes swiftly. Section 40(1) of the Act provides that NST arbitration 'must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit'. Fifth, to address concerns regarding the independence of decision-making by tribunals established by the sporting body itself, the NST panel is comprised of independent members. The [inaugural panel membership](#) has 21 men and 19 women with expertise in a range of sporting, legal and medical fields.

In order to bring a dispute before the NST, either the parties to the dispute must all agree to submit the dispute to it, or the agreement may already be embedded within a sporting body's

regulations, rules or contract with the other person. As reported by CEO John Boulton during the webinar, the NST has been working hard to have reference of disputes embedded into Sport Integrity Australia's mandated anti-doping policy, which has been adopted by approximately 90 national sporting organisations. Even the six major sports (with their own tribunals) are very likely to adopt the NST for appeals due to the new [WADA Code](#) requiring Appeal Hearing Bodies to be 'institutionally independent' of the bodies involved in the results management process. Rugby Australia has already done so.

In its first year of operation, the NST has fielded a large number of enquiries, resulting in 11 finalised matters with decisions or summaries published on the [NST website](#). These include case appraisal, conciliation, mediation and arbitration. Conciliations have taken an average of 29 days to resolve, mediations, 79 days and arbitrations, 103 days. The first [appeal](#) was resolved on an urgent basis, within 14 days from validation of

the dispute to the issuance of a reasoned determination.

Covid-19 has impacted both the procedure and content of NST proceedings. All proceedings have been held virtually. The pandemic has obviously impacted sports dramatically. It is thus unsurprising that disruptions caused by the pandemic have also given rise to uncertainties in the application of sporting rules and disputes before the NST, including the impact of travel bans on proceeding with and scoring scheduled games in the Australian Baseball League. During the webinar, Cam Vale, CEO Of Baseball Australia, discussed his positive experiences with the NST in two matters to date.

Other arbitrations at the NST have involved allegations of bullying and harassment in equestrian and doping consequences in powerlifting. The other types of proceedings have concerned athlete registration, safety issues and internal disputes between state and national arms of a sporting body. In many cases, parties appeared without legal representation.

There is no doubt that the NST will see many more sports-related disputes coming through its doors needing efficient, just and cost-effective resolution, so as to ensure that athletes are treated fairly while maintaining the high level of integrity in Australian sports.

A recording of the webinar is available here.

Submitted by [Judith Levine](#), [ArbitralWomen](#) member, [Independent Arbitrator](#), [Levine Arbitration](#), Sydney, [Australia](#)

A Special Event for ArbitralWomen Mentors and Mentees, on 23 March 2021, by Webinar

In an event exclusive to our Mentorship Programme participants, on 23 March 2021, two true leaders of the international arbitration community, [ArbitralWomen](#) members [Lucy](#)

[Reed](#), of Arbitration Chambers in London, Hong Kong and New York, and [Wendy Miles QC](#), of Twenty Essex in London, shared their experience as past mentees and mentors,

and some precious tips to improve our trade, after which the participants met in break-out rooms for a thirty-minute networking session.

While Lucy could not stress enough



Left to right: Alison Pearsall, Amanda Lee, Yasmine Lahlou

the importance for professionals of all ages of sharpening our written advocacy skills, she also called on our sense of generosity in our day-to-day professional lives, or as she put it: 'Always give a hand up when you can'. Wendy in turn invited us to focus on our sense of community and told us to 'know the power of your women's networks'.

This event was one of various initiatives of ArbitralWomen's Mentorship Committee designed to create a long-term sense of community among mentors and mentees, who will hopefully stay in touch and support one another in the future. The event began with introductory remarks by

ArbitralWomen Board member and Mentorship Programme Committee lead **Alison Pearsall** and concluded with a note of thanks to the speakers and all those in attendance.

We received extremely positive feedback from the participants and hope this will be one of many such future

events. Members wishing to learn more about the ArbitralWomen Mentorship Programme may do so [here](#)

Submitted by **Yasmine Lahlou** , ArbitralWomen Board member, partner, Chaffetz Lindsey LLP, New York, NY, USA.



Left to right: Lucy Reed, Wendy Miles

International Arbitration in the Netherlands, Book Launch, on 25 March 2021, by Webinar

On 25 March 2021, ArbitralWomen members **Wendy Miles QC** of Twenty Essex chambers and independent arbitrator **Judith Levine** spoke about the unique aspects of international arbitrations seated in the Netherlands as part of a panel discussion for the launch of a new commentary on the topic by **Albert Marsman** of DeBrauw Blackstone Westbroek. Wendy focused on interim measures, and Judith concentrated on defaulting parties. Other speakers included **Garth Schofield** of the Permanent Court of Arbitration (PCA), who discussed challenges to jurisdictional awards, and **Eduardo Silva Romero** of Dechert LLP, who addressed multi-party proceedings. They were joined in the discussion by the author, and his colleague **Matthias Kuscher**, who moderated.

On the topic of default, Judith gave an overview of the procedural challenges that arise when one party decides to stop

participating in an arbitration or not to show up at all.

Due to the consensual nature of arbitration, it is actually quite rare for a party not to participate. However, the phenomenon does occur both in small commercial cases and large high-profile cases. Recently, before the [International Court of Justice](#) , both Kenya and Venezuela had been no-shows in their respective disputes against Somalia and Guyana. Prominent examples at the PCA included the [Arctic Sunrise](#) , [South China Sea](#) , and a spate of Crimea investor-state claims. Occurrences in commercial cases were more anecdotal, but sufficiently frequent to lead the CIArb to produce a useful [guideline](#) on the topic.

In all cases of default, it is important to consider how to forge ahead to achieve a fair and just outcome without compromising principles of due process on the one hand, and efficiency, on the

other. The particular approach will depend on the arbitration agreement, chosen rules, and the law of the place of arbitration. Typically, the rules make clear that absence is no bar to proceeding; the parties must be properly notified and given the opportunity to present their case; and under most regimes (but not in the Netherlands) there is no default judgment in international arbitration — a tribunal must still be satisfied that it has jurisdiction, and that the claimant's claim is made out. Because of this, Tribunals have described non-participation as imposing on them a 'special responsibility'.





Top to bottom, left to right: Garth Schofield, Judith Levine, Albert Marsman, Eduardo Silva Romero, Matthias Kuscher and Wendy Miles

That special responsibility may entail certain steps to protect the non-participating party's rights (such as keeping proof of all communications, inviting comment on procedural steps, granting equal time to respond to pleadings, circulating questions and hearing transcripts, and recording all such steps in the award). The tribunal will also take steps to protect the participating party's rights (avoiding delay, allowing the party to address issues the tribunal considers important, unanswered or discerned from the respondent's stated positions). To satisfy itself with respect to jurisdiction, a tribunal may treat non-formal communications as challenges to jurisdiction and bifurcate proceedings. On satisfying itself of the merits of a claim, usually the tribunal cannot simply rubber stamp the claimant's arguments without testing their propositions, witnesses, and experts. The tribunal might invite comment on sources not in the record, or even appoint independent technical

experts, as was done in *Arctic Sunrise* and *South China Sea*.

It is on this last point that the law in the Netherlands stands apart. As noted in Marsman's book, a respondent that defaults runs the risk that the tribunal accept the claimant's claims under Articles 1043(a) of the Dutch Code of Civil Procedure, which contains a mandatory provision that if a respondent fails to submit a defence without providing a valid reason, the tribunal may 'immediately' render an award in favour of the claimant. This comes close to the power to render a default judgment and is more far-reaching than under many arbitration rules. Nonetheless, certain requirements must be met before the tribunal may make a default award, such as ascertaining that the respondent received notice and had an opportunity to submit a defence. The tribunal must also be satisfied that it has jurisdiction. If these criteria are met, then the tribunal has discretion to decide whether it will

immediately render a default award or proceed in any other manner it determines appropriate.

While the default award power is rarely deployed in practice, for arbitrations seated in the Netherlands, it may serve as a useful incentive to respondents to participate (along with the usual strategic benefits of not missing the opportunities to have claims dismissed at the outset, to appoint an arbitrator, to shape how the dispute is framed, to put the case on the merits, and to keep open possible arguments for set-aside or enforcement proceedings).

This issue, and those addressed by the other speakers at the webinar are explored in the [book](#), published in March 2021 by Wolters Kluwer.

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

DIS40 London: Brexit Spotlight, on 25 March 2021, by Webinar

On 25 March 2021, the DIS40 London Regional Representatives **Nadja Al Kanawati**, Senior Associate, WilmerHale, London, United Kingdom and **Tobias Strecker**, Rechtsanwalt, Bodenheimer, Berlin, Germany and Lecturer at King's College, London,

United Kingdom, organised and hosted a webinar entitled 'DIS40 London: Brexit Spotlight'. The distinguished panellists presented several issues arising in the context of Brexit for arbitration proceedings and practitioners. The moderator, **Anya George**,

Partner, Schellenberg Wittmer, Zurich, Switzerland, opened the well-attended session by giving a brief overview of the Brexit timeline to date. **Christoph Herrmann**, Professor at the University of Passau, Germany and designated arbitrator for disputes arising out of

the EU/UK Withdrawal Agreement, then presented the dispute resolution mechanisms, which govern relations between the EU and the UK post-Brexit. Professor Herrmann explained that, even post-Brexit, the Court of Justice of the European Union (CJEU) retains a dispute settlement role in the EU-UK context, *inter alia*, in cases of referrals from arbitrators under the Withdrawal Agreement where disputes raise questions of European Union law.

In her presentation **Laura Rees-Evans**, Counsel, Fietta, London, United Kingdom, who spent six months at the UK's Foreign & Commonwealth Office advising the British Government on public international law issues arising out of Brexit, explored the protection of investments post-Brexit. Laura explained that the EU-UK Trade and Cooperation Agreement (TCA) offers only limited protection as compared to standard BITs. She highlighted, in particular, that it provides no ISDS mechanism, instead forcing investors to rely only on diplomatic protection.

Laura also addressed the current uncertainty with regard to the status of the UK's eleven former intra-EU BITs in light of *Achmea* and the EU's commencement of infringement proceedings against the UK. Laura suggested that investors may want to explore whether to restructure their investments through other jurisdictions, to benefit from more comprehensive protections than those set out in the TCA, and more predictable protections than those set out in the UK's BITs with EU Member States.

Tom Christopher Pröstler, Partner, CMS Hasche Sigle, Berlin, Germany, gave the audience some practical advice on Brexit's effects on EU lawyers' right to practice law in the UK and vice versa. In addition to changed national registration requirements for lawyers, Tom cautioned that issues of data protection may arise under the GDPR if a permanent agreement is not reached before the expiry of the current transition period. On the one hand, since the UK remains a party to the New York Convention,

Tom believes that London will likely maintain its status as one of the most popular arbitral seats, despite Brexit. On the other hand, Tom explained that Brexit has had a significant impact on the enforceability of UK national court decisions abroad. Post-Brexit, there is no reliable regime for enforcement of such decisions in the EU. This, together with the goodwill lost by the UK due to Brexit, may make London less attractive as an arbitral seat to some parties.

In the moderated Q&A that followed their presentations, the speakers debated a multitude of further issues, ranging from possible disputes in connection with the Northern Ireland Protocol, to whether we are likely to see a more comprehensive investment agreement between the EU and the UK. Only one thing seems certain at this stage: there are still many open questions for EU-UK relations post-Brexit.

Submitted by Nadja Al Kanawati, ArbitralWomen member, Senior Associate, WilmerHale, London

EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes, on 25 March 2021, by Webinar

On 25 March 2021, ArbitralWomen members Dr **Anna Howard** and **Gisèle Stephens-Chu** took part in a virtual event organised by Queen Mary University of London's Centre for Commercial Law Studies, to mark the launch of Anna's book, '[EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes](#)', recently published by Kluwer. Other panellists included **Michael Leathes** (mediator and author, former corporate counsel and director of the International Mediation Institute), **Frauke Nitschke** (Senior Counsel at ICSID), **Charlie Irvine** (Senior Teaching Fellow, University of Strathclyde) and **John Sturrock QC** (Founder and Senior Mediator, Core Solutions).

The event was introduced by Dr **Debbie De Girolamo** (Queen Mary University), who highlighted some of the key contributions of Anna's book to the field of mediation: evaluating end-user perceptions of the process and, in particular, its connection with negotiation, thus challenging its conventional presentation as an alternative to litigation or arbitration.

Anna Howard first explained that, in investigating reasons why the EU's efforts to promote mediation had not been fruitful, she had identified a lack of qualitative research on users' perceptions of the process, leading her to conduct interviews with 21 senior in-house counsel at major corporations, with considerable experience in han-

dling cross-border disputes. Key themes emerging from the interviews were users' overwhelming preference for resolving such disputes through negotiations, and their understanding of mediation as an extension of their own negotiations. This challenged the received wisdom that mediation should be promoted as an alternative to adjudicative processes.

John Sturrock concurred with this assessment, noting that largely lawyer-led efforts to promote mediation have focused on the litigation paradigm, rather than its benefits as an entrepreneurial and problem-solving process. Gisèle Stephens-Chu observed a similar phenomenon in the context of international arbitration: many arbitral institutions have adopted mediation rules



Top to bottom, left to right: Anna Howard, Michael Leathes, Gisèle Stephens-Chu, John Sturrock QC, Frauke Nitschke, Charlie Irvine, Debbie de Girolamo and Stavros Brekoulakis

in recent years, promoting it as a means of saving the time and costs of arbitration, alongside other institutional initiatives to address user's concerns in this regard. As in the litigation context, discussions around mediation focus on the process / mechanics, rather than the ways in which it can help facilitate negotiations. Commenting on the use of mediation in investor-State disputes, Frauke Nitschke observed that the original intent of the drafters of the ICSID Convention had been for such disputes to be resolved primarily through conciliation, using this as a facilitative rather than evaluative process. In practice, however, ICSID dispute resolution has been dominated by arbitration. In recent years, States have been showing an interest in using mediation to facilitate negotiated outcomes, prompting the Energy Charter Treaty Secretariat to adopt its guide on investment mediation, and the ICSID Secretariat to propose the adoption of mediation rules by contracting States.

Another finding highlighted by Anna was users' concerns that resorting to mediation would be viewed by internal management as a failure to do their job properly, given that they had not been able to resolve the dispute through their own negotiation efforts. They were also concerned about the risk of internal criticism, in the event that a mediated settlement was regarded by others as a bad deal for which they would be held responsible, as opposed to an adjudicated outcome for which they could always blame the court or tribunal. One user in particular had noted that it

took a certain type of management style (entrepreneurial) to promote mediation and accept accountability for the outcome. Charlie Irvine noted in this regard that the cultures in certain organisations ('honour cultures') made it important to be seen as a hard bargainer, with the result that mediation could be viewed as a weakness. Frauke Nitschke observed that a similar theme of failure and accountability pervaded investor-State negotiations, as identified in a survey of the Singapore International Dispute Resolution Academy, with State officials fearing accusations of (and potential liability for) negotiating bad deals for their government. Yet, the fact that around 40% of ICSID cases settle highlights the need for a process that properly facilitates such settlements, particularly where disputes concern ongoing projects that contribute to State's development.

Anna further commented that efforts to promote mediation did not properly explain what benefits it could bring to negotiation. Yet, as noted by Charlie Irvine, there is a growing body of evidence that mediation improves rates of compliance with settlement agreements. Michael Leathes, speaking from his experience as former in-house counsel, noted that the process in negotiations was usually part of the problem. Delegating the management of the process to a mediator can help parties focus more effectively on actual negotiation. The presence of a mediator also changes the negotiating dynamic, moving parties from entrenched positions and ensuring better discipline and behaviour than in one-on-

one negotiations. John Sturrock further highlighted the ways in which mediators can help parties air concerns, explore all issues and generate creative solutions.

Gisèle Stephens-Chu noted that rules on privilege and professional secrecy vary from jurisdiction to jurisdiction, making it important, in the context of cross-border disputes, to have a harmonised framework protecting the confidentiality of the mediation process. Institutional mediation rules generally provide quite detailed confidentiality provisions covering all participants. However, she noted that parties may need to refer to the fact of mediation having taken place, for the purposes of establishing the admissibility of the claims, should the dispute proceed to litigation or arbitration. Frauke Nitschke also noted that confidentiality provisions could potentially be overridden by provisions of local laws (e.g., freedom of information and affirmative disclosure requirements).

Regarding enforcement of mediated settlement agreements, Michael Leathes commented that the direct enforcement mechanism provided by the Singapore Convention could help promote the use of mediation, drawing a parallel with enforcement through 'arb/med/arb' mechanisms. However, John Sturrock challenged the value of such a direct enforcement mechanism, opining that it sent the wrong message about what mediation is about: helping people agree terms by building a consensus.

In conclusion, the panellists agreed on the need to understand better the cognitive biases at play among users with respect to using mediation and the need to shift from a prevention focus (avoiding contentious proceedings) to a promotion focus (how mediation can facilitate negotiations and improve their outcomes). Professor **Stavros Brekoulakis** (Queen Mary University) closed the event, noting that the findings of Anna's book offered not only a diagnosis but a clear blueprint for allowing mediation to outgrow its current limitations and further develop as an effective means of resolving disputes.

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

Delos TagTime Series, Season 3, Episode 6: Professor Maxi Scherer on 'An Arbitration Evergreen: What is the Law Governing the Arbitration Agreement', on 7 April 2021, by Webinar



Left to right: Kabir Duggal, Amanda Lee, Maxi Scherer]

On 7 April 2021, Professor Maxi Scherer (WilmerHale) discussed the complexity of determining the law governing the arbitration agreement ('AA'). This webinar was part of Delos Dispute Resolution's 'TagTime' series, supported by ArbitralWomen and presented by ArbitralWomen Board member **Amanda Lee** and **Kabir Duggal**.

Maxi began by highlighting the importance of determining the law governing the AA, given the lack of international harmonised solutions and the recent UK Supreme Court case of *Enka v Chubb*. In that case, the UK Supreme Court clarified the approach to be applied to determine the law governing an AA in the absence of an express or implied choice of law. A majority of 3 to 2 found that English law –the law of the seat– governed the AA and applied the law of the seat as the law most closely connected to the AA. The UK Supreme Court provided three directions:

1. Where the parties specifically chose the law of the AA, the express choice of law applies;
2. where the parties have not chosen the law governing the contract or

the AA, the closest connection approach applies; and

3. where the parties have chosen the seat and law of the contract but not the law of the AA, the law of the main contract governs the AA.

Concerning direction (3), the UK Supreme Court outlined two exceptions:

1. if the law of the contract potentially invalidates the AA, the law of the seat applies (referred to as 'the validation principle'); and
2. if the law of the chosen seat specifies that the AA will be governed by the law of the seat, the presumption that the law governing the main contract should be applied is displaced.

Maxi indicated the approach followed in *Enka v Chubb* can be complex and error prone. She suggested practitioners should state the law governing the AA or choose institutional rules that provide the law governing the AA (see, for example, [LCIA, Article 16.4](#) .

Further, Maxi offered an overview of the approaches adopted by different

jurisdictions to determine the law governing the AA, which include applying

- i. the law of the seat (Mexico, Russia, etc.);
- ii. the law of the main contract (the UK – excluding Scotland, Germany, etc.);
- iii. the validation principle (Spain, Switzerland, etc.); and
- iv. the parties' common intent (France, several African countries, etc.).

She suggested that, on balance, the law of the seat approach was the easiest and most workable solution.

Concluding, Maxi noted that while the [New York Convention, Article V.1\(a\)](#)  assists when determining the law governing the AA, its application is limited to the enforcement stage. Additionally, the wording of the provision does not prevent analysis of the implicit choice of law or the application of different jurisdictional approaches.

Maxi tagged Professor **Julian DM Lew QC** to appear as a guest on a future episode of the series.

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

IBA Rules on the Taking of Evidence in International Arbitration: 2020 Revisions and a View Forward, on 7 April 2021, by Webinar



Left to right: Carmen Martinez Lopez, Wilson Wang, Nadja Al Kanawati

On 7 April 2021, Columbia International Arbitration Association (CIAA) organised and hosted a webinar entitled ‘IBA Rules on the Taking of Evidence in International Arbitration: 2020 Revisions and a View Forward’, attended by almost 200 students and practitioners worldwide. This is the first revision of the IBA Rules in ten years. All panelists were directly involved in the 2020 revision, enabling them to share a behind-the-scenes look at the process in addition to insights on the substantive amendments to the Rules.

The moderator, **Nadja Al Kanawati**, Senior Associate, WilmerHale, London, United Kingdom, opened the webinar with some audience polling questions to gauge the participants’ views on the future of remote hearings post-Covid-19 and cybersecurity issues in international arbitration, both major points of focus in the 2020 revision of the IBA Rules. Thereafter, **Samaa Haridi**, Partner, Hogan Lovells, New York, USA, and Co-Chair of the IBA Arbitration Committee, introduced the topic by giving the audience a helpful overview of the IBA as an organisation in general and the IBA Rules’ history and scope.

Diving into the first set of amendments made in the course of the 2020 revision, **Kabir Duggal**, Lecturer-in-Law at Columbia Law School and Senior International Arbitration Advisor at Arnold & Porter, New York, USA, explained why the IBA Rules now recommend that parties and the arbitral tribunal address issues of cybersecurity and data protection in their early consultations. Kabir, also a member of the IBA Working Group for the 2020 Revision of the IBA Rules, further introduced

the addition of Article 9.3 on illegally obtained evidence, setting out the many challenging questions that a tribunal faces when considering whether or not to admit illegally obtained evidence.

Samantha Rowe, Partner, Debevoise, London, United Kingdom, and Paris, France, and Member of the IBA Working Group for the 2020 Revisions of the IBA Rules, introduced the amendments relating to the Rules’ provisions on documentary and witness evidence. Samantha also shared insights on a topic the revision ultimately did not address, i.e., adverse inferences. While various amendments to Articles 9.6 and 9.7 were considered, the current wording of both provisions was ultimately retained. Addressing the final set of amendments to the IBA Rules, **Carmen Martinez Lopez**, Partner, Three Crowns, London, United Kingdom, and Review Task Force Team Leader for Articles 1, 2 and 9 of the 2020 IBA Rules Revision, walked the audience through the proposals for effective and secure remote hearings contained in the 2020

IBA Rules and the Commentary thereto.

In the moderated Q&A session that followed their presentations, the speakers had the opportunity to further discuss issues that were not addressed in the 2020 revision, such as questions of privilege. Samaa previewed that a separate IBA project exploring different national law approaches to privilege is forthcoming. The panel also had the opportunity to address the Prague Rules, reflecting on the fact that the 2020 revision remained largely uninfluenced by any criticism levied against the IBA Rules from the proponents of the Prague Rules. While the 2020 revision was more of a spot treatment rather than a general overhaul, the panellists (and the audience) are looking forward to seeing how the new IBA Rules play out in practice and what the next revision will bring.

Submitted by Nadja Al Kanawati, ArbitralWomen member, Senior Associate, WilmerHale, London, UK



Top to bottom, left to right: Samaa Haridi, Samantha Rowe, Emily Park, Kabir Duggal

Fourth Annual Enforcement of Arbitration Awards – Ethics in International Arbitration Award Enforcement, on 13 April 2021, by Webinar

JURIS Legal Information and co-moderators **Lawrence W. Newman** (Baker & McKenzie) and **Timothy G. Nelson** (Skadden, Arps, Slate, Meagher & Flom LLP) organised the Fourth Annual Enforcement of Arbitration Awards, titled 'Ethics in International Arbitration Award Enforcement' that featured as faculty ArbitralWomen members **Amal Bouchenaki** (Herbert Smith & Freehills) and **Erika Levin** (Fox Rothchild), ArbitralWomen President **Dana MacGrath** (Omni Bridgeway), **Marcus Green** (Kobre & Kim LLP) and **Daniel Nardello** (Nardello & Co LLP).

The last decade has seen an increasing use of the United States as place for the enforcement of large international arbitration awards, many of which against private corporations, while many others against governments or state-owned entities.

The growth in arbitral award enforcement litigation in American courts raises a myriad of interesting legal issues, including the ethical and professional responsibilities of United States counsel involved in such matters. The award creditor's legal team is typically required to search for and pursue assets of the losing party. The



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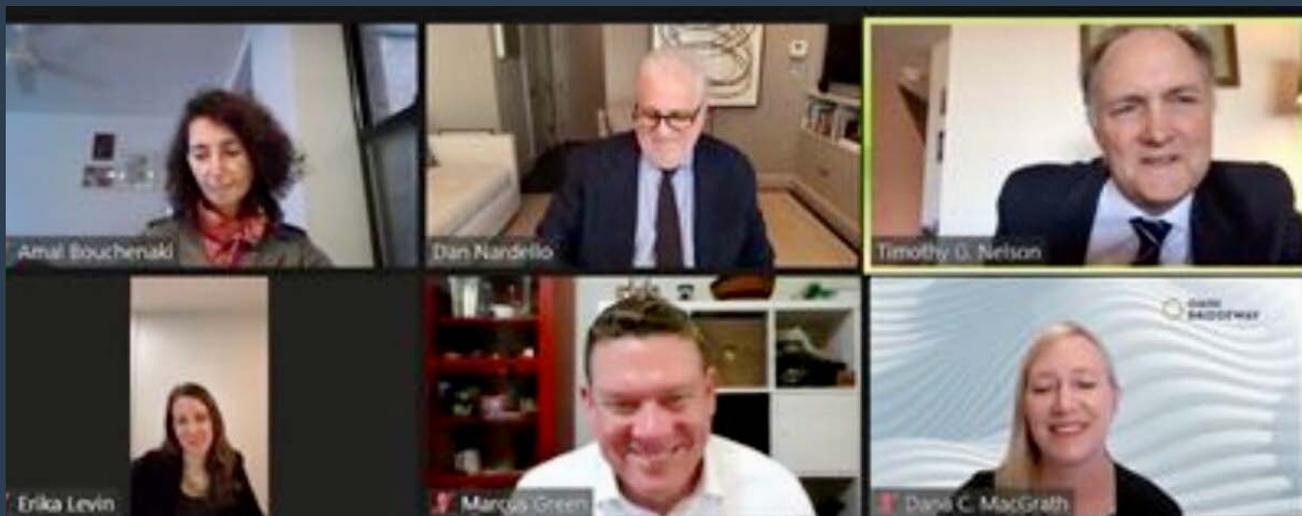
award debtor's legal team often is seeking either to deny recognition to the foreign award (e.g., on the basis it is being challenged in foreign set aside proceedings) or to prevent the award creditor from attaching assets. Each of these positions potentially raises unique and potentially ethical issues for the lawyers involved.

Panellists discussed how far an award creditor's counsel can go in searching for assets of the losing party within applicable ethical and professional responsibilities. Panellists also discussed to what extent counsel have a responsibility to ascertain whether an award or judgement was obtained through corruption or other improper means such as collusion and, conversely, how far an award debtor's counsel can go in attacking the validity

of the foreign award. Panellists also addressed when an enforcement petition is pending before American courts, what duties counsel have in informing American courts about the status of and nature of parallel foreign award enforcement (or challenge) proceedings and what responsibilities American counsel have with respect to related enforcement proceedings outside the United States. Finally, the panel discussed whether there are ethical restrictions on the role a third-party funder can play in aiding enforcement.

You may purchase the recording of the event at: www.ArbitrationLaw.com 

Submitted by Dana MacGrath, ArbitralWomen President, Independent Arbitrator, New York, US



Top to bottom, left to right: Amal Bouchenaki, Daniel Nardello, Timothy G. Nelson, Erika Levin, Marcus Green, Dana MacGrath

Nonparty Discovery in US Arbitrations: The Legal Challenges & Differences from Litigation, on 14 April 2021, by Webinar

On 14 April 2021, the American

Bar Association's Dispute Resolution Section hosted its Spring conference on Agility, Disruption & Reinvention: ADR in the New World, which featured a variety of cutting-edge topics by several distinguished speakers in the alternative dispute resolution space. One of the most interactive panels featured ArbitralWomen member **Janice Sperow** and **Theo Cheng** — both full time arbitrators focusing on commercial, employment, and intellectual property disputes. The panellists displayed the differences between third-party subpoenas in arbitration and litigation through three roleplay vignettes illustrating a case under the Federal Arbitration Act, a case under the California Arbitration Act, and a case under the New York Civil Practice Law and Rules. Janice and Theo acted out case management conferences in a mock bank data breach case and an intellectual property exclusive distributorship contract dispute in which the parties sought discovery from nonparties to the arbitration. At each step, Theo and Janice did a 'freeze frame' where



Janice Sperow and Theo Cheng

they stopped the action and invited the audience to suggest how the tribunal should handle the query. After audience participation, they then resumed the skit to illustrate best practices and the legal options for each jurisdiction. At a couple points, they performed a *Hamilton* style rewind where they backtracked the vignette and re-enacted it as though the parties had responded differently to the tribunal's questions. Afterwards, the panellists recapped the lessons learned from the skits, explained the circuit split in the US courts, highlighted

practical tips and best practices, and entertained the audience's questions. The panellists turned what could have been a dry academic topic into a fun educational experience on an important but misunderstood practice area.

Contact Janice Sperow at janicesperow@sperowadr.com  for a copy of the written materials.

Submitted by ArbitralWomen member Janice Sperow, panellist and moderator, arbitrator, California, USA

Is Mediation Confidentiality an Essential Ingredient in a Successful Mediation?, on 14–17 April 2021, by Webinar

The American Bar Association

Section of Dispute Resolution held its annual Spring Conference virtually from 14–17 April 2021. The theme of the conference was 'Agility, Disruption, and Reinvention: ADR in a New World'. ArbitralWomen member **Ana Sambold** was a presenter at one of the few selected programmes featured by the conference: 'Is Mediation Confidentiality an Essential Ingredient in a Successful Mediation?' Ana and her co-panellists **Jeff Kichaven**, **Debra Berman**, **Homer C. La Rue** and **James Alfini** offered an interesting panel dis-

cussion on issues related to mediation confidentiality, online mediation, conflicts of law, attorneys' and mediators' ethical obligations, enforcement of confidentiality agreements and more.

Some of the takeaways stressed by the panellists were that in online mediations involving parties in multiple states/countries, the choice of which state's confidentiality or privilege law should apply is not that obvious. The risk is that a court adjudicating a confidentiality claim has more discretion to pick and choose the evidence law of a state/

country that allows mediation related evidence to be admitted —regardless of whether the mediator has promised or the participants have agreed to keep that evidence confidential. In consequence, mediators should be aware of this risk and prepare their mediation and confidentiality agreements accordingly.

Submitted by Ana Sambold, ArbitralWomen member, Mediator – Arbitrator – Online ADR Professional, SAMBOLD LAW & ADR SERVICES, San Diego, California, US

The (Virtual) Swiss Chalet Debate!, on 15 April 2021, by Webinar

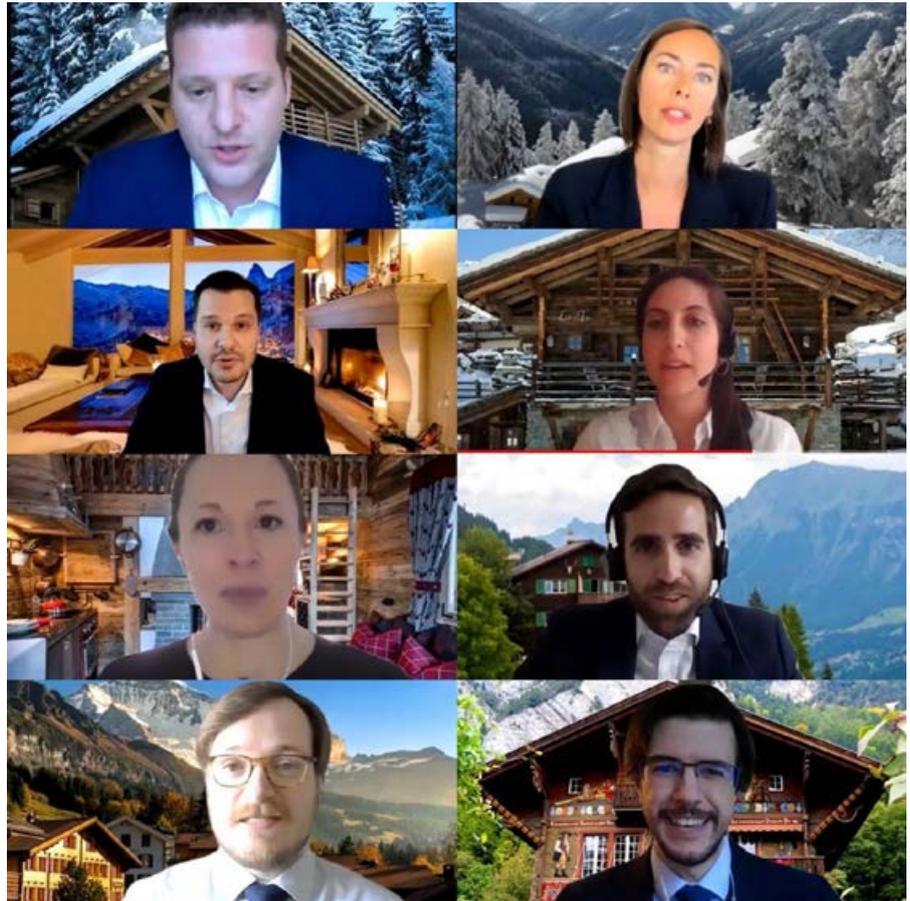
On 15 April 2021, the ICDR Young & International Geneva, acting through ICDR Y&I Global Advisory Board members **Anya Marinkovich** (Senior Associate, Bär & Karrer, Geneva) and **Benjamin Moss** (Senior Associate, Sidley Austin, Geneva) organised and hosted a Virtual Swiss Chalet Debate. The event brought together a panel of distinguished international practitioners based in Geneva, Switzerland, who discussed summary dispositions and document production.

The session was organised as a mock rapid-fire debate where the panellists argued pre-assigned positions on the following issues:

1. Are summary dispositions, as envisaged in Article 23 of the 2021 ICDR Rules, a helpful development in commercial arbitration? And:
2. Should commercial arbitration further restrict the scope of document production?

Rafael Carlos del Rosal Carmona (Director, ICDR) opened the session and gave a brief introduction to the new 2021 ICDR Rules. Thereafter, the moderator, **Tomás Navarro Blakemore** (Senior Associate, Frieriep, Geneva), introduced the two topics of the debate.

First to argue in favour of summary dispositions was **Stephan den Hartog** (Partner, AZHA Avocats, Geneva). He highlighted the benefits of summary disposition, including, in particular, the potential to improve efficiency and procedural economy by narrowing the issues in dispute. He also pointed to the fact that summary dispositions may encourage settlements and reduce the volume of frivolous claims. His opponent, **Nina Lauber-Thommesen** (Counsel, Lévy Kaufmann-Kohler, Geneva), countered that the distinction between, on the one hand, early disposition and, on the other hand, existing powers to bifurcate issues and issue partial awards was not obvious and that the introduction of a new procedural tool could bring with it an increased risk



Top to bottom, left to right: Michail Dekastros, Nina Lauber-Thommesen, Stephan den Hartog, Laura Azaria, Anya Marinkovich, Tomás Navarro Blakemore, Ben Moss, Rafael Carlos del Rosal Carmona

of frivolous procedural motions. She stressed that early disposition phases could be lengthy and, if ultimately not successful, could significantly delay proceedings and have a negative impact on procedural economy.

Arguing in favour of further restricting document production, **Michail Dekastros** (Associate, Sidley Austin, Geneva), explained how the IBA Rules on the Taking of Evidence ('IBA Rules') have shaped international arbitration and introduced unnecessarily extensive disclosure procedures adding to the length and cost of proceedings. He proposed that the more restrictive Prague Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules') were better suited to facilitate fair and efficient resolution of disputes and that arbitration practitioners should promote their wide adoption. His opponent, **Laura Azaria** (Associate, Lalive, Geneva), argued that the Prague Rules go too far in limiting disclosure

and that the restrictions under said rules are not suited to complex arbitration proceedings (such as M&A, construction disputes, etc.). She underscored that document production, when properly conducted, is not the cause of inefficiency in arbitration and that the IBA Rules provide the most flexible and appropriate framework.



Click here to watch a recording of the debate.

From the perspective of the ICDR Young & International, the event was a success to be repeated. Stay tuned and join the next session!

Submitted by Nina Lauber-Thommesen, ArbitralWomen member, Counsel, Lévy Kaufmann-Kohler, Geneva, Switzerland; and Anya Marinkovich, ArbitralWomen member, Senior Associate, Bär & Karrer, Geneva, Switzerland.

AFAS in Conversation with Prof David Luke on the AfCFTA (African Continental Free Trade Area), on 29 April 2021, by Webinar



Eunice Shang-Simpson



David Luke

In March 2021, Arbitration Fund for African Students (AFAS) launched its 'In Conversation' series which aims to have an hour-long interview style discussion on topical issues affecting the African arbitration and ADR community. The series is supported by Aliant International Law Firm, SOAS University of London, and Members of AFAS.

The second "Conversation" in the series took place on 29 April 2021, with **Eunice Shang-Simpson** in conversation with Prof **David Luke** on his career both in Academia and at the United Nations, as well as his expertise in the role of Trade in Development generally and in relation to the African Continental Free Trade Area in particular.

Professor David Luke is the outgoing Coordinator of the UN Economic Commission of Africa's African Trade Policy Centre, and he is the incoming Professor in Practice at the London School of Economics and Political Science, better known as LSE.

Prof Luke's PhD in African Political Economy is from SOAS, and his MSc and BSc are from the London School of Economics. His research and teaching interests are in the areas

of the Role of Trade in Development; in Trade and Inclusion; and in Trade and Sustainability.

The event was well attended by friends of AFAS as well as colleagues from the UK, Europe, Africa, the USA, Canada, and Indonesia, to name a few. It was indeed a truly international audience!

Prof Luke took us on a journey from his education in Sierra Leone, where he was encouraged to aim as high as possible, through to LSE, SOAS and Dalhousie University in Nova Scotia. In addition to his distinguished Academic career, Prof Luke also shared with us his varied roles in the Organization of African Union (now the African Union) when he was the OAU (now AU) technical adviser in Geneva providing support to its member states on WTO issues

and in the United Nations, which took him to various destinations including Geneva, Southern Africa and most recently, to Addis Ababa. Two major take-aways from his extraordinary career were firstly to be prepared to invest in one's own professional development, even at one's own cost, and secondly, do the work it takes to prepare oneself for the next step, so that when opportunity knocks, one is ready to answer the call.

He shared insights into what the thinking was behind the Protocols of the Agreement establishing the African Continental Free Trade Area (AfCFTA) and how important it was for African States to present a united front to the world in line with the ethos of the AfCFTA and not undermine it for short-term gain by entering into agreements with Third Parties that could undermine the AfCFTA. He also encouraged the Arbitration Community to get involved in the discussions presently taking place around the drafting of the AfCFTA Investment Protocol, as our experience could be beneficial to the deliberations.

It was a highly informative and interesting discussion, and we are deeply grateful to Prof Luke for the opportunity to have this Conversation with him.

Submitted by Eunice Shang-Simpson, ArbitralWomen member, Director and Independent Arbitrator, Shangress Limited, Canterbury, United Kingdom



ARBITRATION FUND
FOR AFRICAN STUDENTS

AFAS CONVERSATIONS

Please Follow us to the Case Management Space, on 29 April 2021, by Webinar

ODR EXPO TECH

by  ODR
LATINOAMERICA

RESOLUCIÓN DE CONFLICTOS 5.0 una experiencia sensorial - emotiva

An ODR EXPO TECH  was organised from 26 to 30 April 2021 by **Alberto Elisavetsky**, a Board member of the International Council of Online Dispute Resolution (ICODR ). He is an online dispute resolution (ODR) pioneer who revolutionised the use of ODR to settle many types of disputes in Latin America. The ODR EXPO TECH featured speakers from 5 continents with inspiring talks in Spanish, Portuguese and English, including 20 interactive workshops and 15 demonstrations of cutting-edge technologies for online settlement of disputes.

Mirèze Philippe, also Board member of ICODR, moderated the panel titled 'Please follow us to the Case Management Space' which presented three platforms dedicated to arbitration case management, an area with a dire need for technology to manage arbitrations better and more swiftly. She indicated that ODR platforms have been used to resolve all types of disputes online for over two decades. Only a few were built to conduct arbitrations online and some were regrettably stopped. However, ODR has not yet got the attention anticipated for many reasons: lack of

- i. business plans,
- ii. user training,
- iii. promotion and
- iv. proper budgeting and, worse of all,
- v. interruption—instead of improvement—of the service.

Therefore, dispute resolution practitioners are under the impression that arbitration platforms are projects for

the future. The panel demonstrated the contrary!

Damian Croker, co-founder of ODRPlat , a carbon neutral platform, presented this platform. Then, **Katrine Anna Larsen**, digital project consultant, walked the participants through the eArbitration  platform, followed by **Joe Al-Khayat**, co-founder of RDO  who presented that platform.

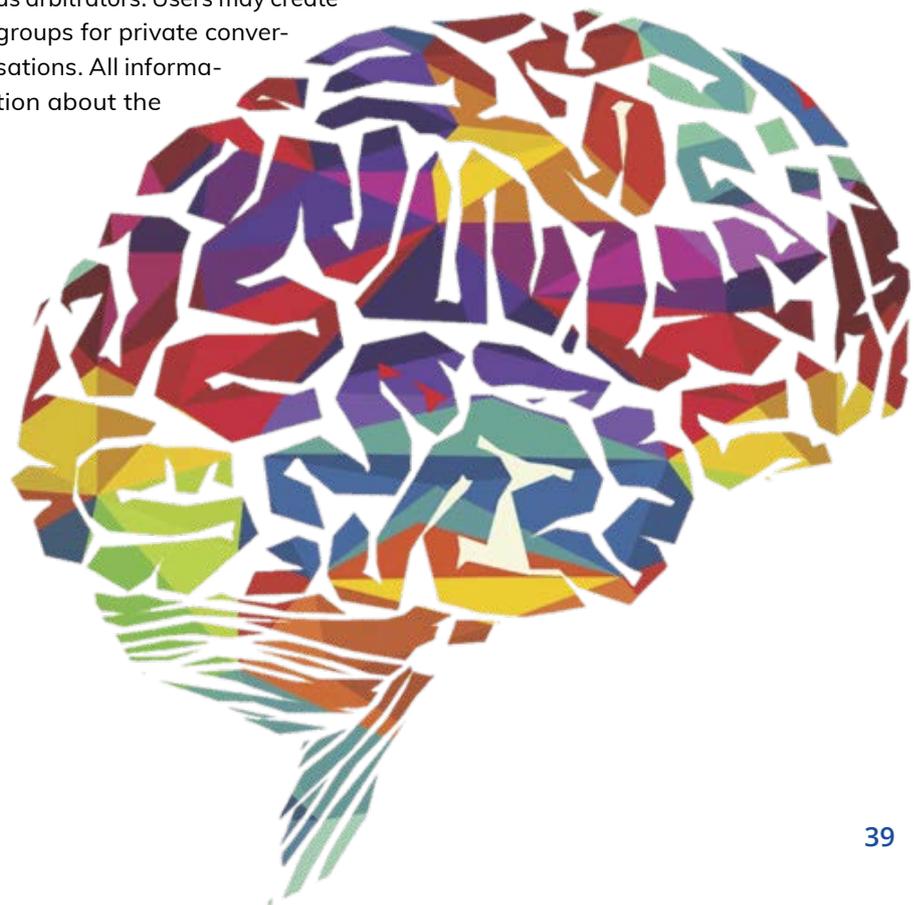
Anyone interested to see how these platforms work can ask them for a demo. The platforms are fully customisable. They allow users – who may be arbitrators in some cases and counsel in others – to access their private space and see ongoing and closed cases. Depending on their role they can upload submissions as counsel or organise hearings as arbitrators. Users may create groups for private conversations. All information about the

case, the parties and the arbitrators are available. All documents filed are likewise available. ODRPlat and RDO offer an integrated virtual hearings space with the benefit of access to documents without filing them on a different platform.

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

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

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



News you may have missed from the ArbitralWomen News webpage

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

International Arbitration Survey on Expert Evidence in International Arbitration

Submitted by Dana MacGrath, ArbitralWomen President and Independent Arbitrator 30 March, 2021

The use of party-appointed

experts in international arbitration has been the subject of debate for years. The primary role of experts is to assist the arbitral tribunal on matters within his or her expertise and that may be outside the expertise of the arbitrators. In practice, the role of experts can be far broader. In some cases, experts are retained to provide advisory and other support to the client and/or arbitration counsel team at an early stage, before becoming a testifying independent expert or in parallel with the work of a separately engaged testifying expert.

Increasingly, women are acting as either advisory or testifying experts in international arbitration after decades of the expert field being male dominated.

The party-appointed testifying expert treads a delicate line with respect to inde-

pendence. On the one hand, the expert is contractually engaged and is paid for their time performing services on the case. Naturally, the expert may want to support the party and potentially receive subsequent engagements. On the other hand, the testifying expert has a duty to remain independent, assist the arbitral tribunal and avoid acting as advocate for the party that appointed the expert.

Recently, there has been concern that party-appointed experts and/or expert reports have become expensive vehicles by which the parties reargue their respective cases. There is also a perception by some that party-appointed experts are essentially advocates in disguise, which has had an adverse impact on the evidentiary weight that some arbitral tribunals give to party-appointed experts' evidence.

The 2021 survey prepared by BCLP's International Arbitration Group focuses on the perceived problems with party-appointed experts. Are there

practical steps that can or should be taken to mitigate the perceived problems with party-appointed testifying experts? If so, who should take the lead in implementing such steps? Are there better alternatives for adducing expert evidence in arbitration? What can be done to preserve the role and usefulness of the party-appointed testifying expert?

This initiative is led by ArbitralWomen member **Claire Morel de Westgaver**, who commented, "Having the views of various stakeholders including arbitration users, arbitrators and expert witnesses themselves will help identify realistic solutions and ultimately continue to shape the future of international arbitration in an ever more complex world where expertise is bound to become increasingly significant."

The expert evidence survey will benefit from input from a diverse cross-section of the international community, including female practitioners, arbitrators, clients and experts.

ArbitralWomen Member Svenja Wachtel Launches "Arbitration Happy Hour" on Clubhouse with Sneha Ashtikar

Submitted by Svenja Wachtel and Sneha Ashtikar 30 March, 2021

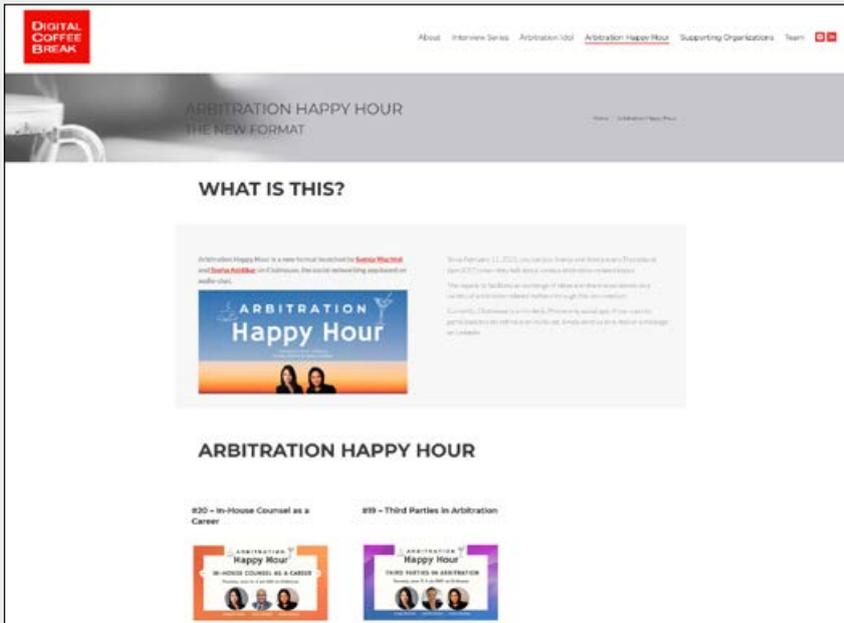
Arbitration Happy Hour is a new format launched by ArbitralWomen member **Svenja Wachtel** and Jus Mundi's **Sneha Ashtikar** on Clubhouse. Clubhouse is a social networking app based on audio-

chat, a mix between talkback radio, conference calls, and Houseparty. Users can listen in to and join various conversations, interviews, and discussions—it is just like tuning in to a podcast and actively participating.

Sneha and Svenja started the "Arbitration Happy Hour" series on 11 February 2021, talking for 30 minutes about Moot Courts. Following this suc-

cessful kick-off event, they decided to turn the "Arbitration Happy Hour" into a regular event. Every Thursday, you can join Svenja and Sneha at 6pm (CET) for discussion about various arbitration-related topics.

The second event focused on "Racial Diversity" and featured ArbitralWomen Board member **Rekha Rangachari**. Rekha spoke



about **Racial Equality for Arbitration Lawyers (R.E.A.L)**. R.E.A.L is a newly launched initiative by a group of global lawyers practicing international arbitration committed to achieving racial equality in arbitration.

“Arbitration Happy Hour” has subsequently featured other fabulous guests, including **Mahnaz Malik** (Twenty Essex) who explored whether arbitrators should be on social media or not, **Lise Alm** (SCC), who discussed the recently published report on

“Diversity in Arbitrator Appointments” and ArbitralWomen President **Dana MacGrath**, who shared her views for International Women’s Week.

Future events will cover topics such as the importance of mental health for lawyers, building a personal brand in arbitration, power of networking, etc.

Together with **Sajid Suleman**, Svenja and Sneha have also created an “International Arbitration” club on Clubhouse, where everyone interested in arbitration is welcome and invited

to host rooms to let the arbitration community grow.

“We hope to facilitate an exchange of ideas and share experiences on a variety of arbitration-related matters through this new medium,” says Svenja.

The goal is to have members of the worldwide international arbitration community tune in and join conversations on various topics to get a diverse perspective on different aspects of international arbitration.

“Arbitration Happy Hour is a fun way to exchange thoughts and meet new people from all around the world through a new digital medium,” explains Sneha.

If you have a topic that should be featured on the “Arbitration Happy Hour”, please contact Svenja (svenja@digital-arbitration.com) and Sneha (s.ashtikar@jsumundi.com).

As Clubhouse is an invitation and iPhone-only social app currently, Sneha and Svenja want to emphasize that they are happy to send invites to everyone interested in participating in the “Arbitration Happy Hour.” Simply send one of them an e-mail or a message on LinkedIn. Clubhouse has plans to open the platform to everyone in due course.

Mute Off Thursdays Celebrates its First Anniversary on 15 April 2021!

Submitted by *Dana MacGrath and Ema Vidak Gojković*
14 April, 2021

In March 2020, as the COVID-19 pandemic was becoming a new reality for Europe and North America, ArbitralWomen member **Ema Vidak Gojković** came across the article *The Pandemic’s Toll on Women: COVID-19 Is Gender-Blind, But Not Gender-Neutral* by **Melinda Gates** suggesting that while we may feel “all in this together”, the consequences of the pandemic will not be the same for everyone: women’s professional lives will suffer more than men’s.

It was easy to see how her con-

clusion could prove true in the field of international arbitration. With the pandemic-created “social distance”, there was a real risk that women —already underrepresented on tribunals or in leadership / partner positions— would become more invisible and therefore fuel unconscious bias. Perhaps even more dangerously, women could lose ways to combat unconscious bias, such as by promoting one another. Losing visibility and solidarity sounded like a formidable blow for the progress achieved by women in international arbitration over the past decades.

In response, four ArbitralWomen members, **Ema Vidak Gojković**, **Gaëlle**

Filhol, **Catherine Anne Kunz** and **Claire Morel de Westgaver** decided to launch **Mute Off Thursdays** —an online forum designed to help mid-level to senior women in arbitration exchange knowledge and remain connected to the arbitration community by hosting a Zoom call for 30 minutes each week, same day, same time (Thursdays at 9am ET), with whoever can join.

Each week, a different woman from the group, including many ArbitralWomen Board members and members, talk about an interesting arbitration topic. Sometimes, external speakers were brought in to provide training about soft skills. To keep control



over the administrative work, the group was made “invitation only” with the aim to accept all women who qualified by experience. Mute Off Thursdays started in April 2020 with 42 women. As of April 15, 2021, on the occasion of its First Anniversary, the number of women participating in Mute Off Thursdays exceeds 500.

The founders of the original Mute Off

Thursdays are immensely proud of the Mute Off community they have helped build and thank the incredible speakers over the past year who made it possible to stay “stronger together” during the pandemic and engaging discussions each Thursday since April 2020:

On Thursday, 15 April 2021, Mute Off Thursdays will celebrate its First

Anniversary by hosting a special session about Imposter Syndrome & How to Overcome It with a star speaker – **Dr. Valerie Young** – an internationally recognized expert on impostor syndrome who regularly lectures on the topic and authored the award-winning book, “The Secret Thoughts of Successful Women”, in which she teaches practical ways to banish the intrusive thoughts that undermine women’s ability to feel—and act—as bright and capable as they truly are.

The workshop on 15 April 2021 is co-organized with **ArbitralWomen**, together with **Bryan Cave Leighton Paisner**, **Betto Perben Pradel Filhol** and **Lalive**. The event is open to members of Mute Off Thursdays, Young Mute Off Thursdays and ArbitralWomen.

As Mute off Thursdays embarks on Year 2, the co-founders look forward to celebrating the power of staying strong together, no matter the circumstances.

See you on Thursdays!

The Mute Off Thursdays full ‘syllabus’ for its first year (April 2020–April 2021) is [here](#).

Millions of capable people around the world secretly worry they're not as bright, talented or qualified as everyone thinks they are. It's called Impostor Syndrome — and Valerie Young has the cure.

If You Lead, Manage, Mentor, or Teach Others Then You Need to Understand Impostor Syndrome

Testimonials

From **Dr. KATHERINE JOYCE**, the award-winning author of the best-selling book *The Secret Thoughts of Successful Women: Why Capable People Suffer from the Impostor Syndrome and How to Thrive in Spite of It* (Cross Business/Business House), now available in six languages.

Her career-related tips have been cited in dozens of popular and business publications and media outlets around the world.

Corporate Clients

As a former strategic marketing manager at a Fortune 200 company, Valerie understands the need for a highly practical, solution-oriented approach to addressing impostor syndrome in the workplace. She's been invited to share her highly reliable advice to tens of thousands of executives, managers, and professionals at those and other companies in the U.S., Canada, and Europe.

Media Outlets: Newsweek, TIME, msn, BBC, RADIO, CNNMoney, The Guardian, Parade, YAHOO!, Psychology Today, Science, Stella, Inc., Kiplinger, redbook, ELLE, The Sydney Morning Herald, VOGUE, Chicago Tribune, The Boston Globe, HIGHER EDUCATION, Southern Independent, MOJO, Women's Health, Glamour, Women's Health, Cosmopolitan, EXAMINE, marie claire, SELF, The Oregonian, GAZIA, Success, EL MERCURIO, GAZIA, OTEMPO fitness, Reuters, Entrepreneur.

Corporate Clients: Allianz, Boeing, B2B, Blizzard Entertainment, Boston Consulting Group, HP, Bristol-Myers Squibb, Capital Group, Career, Centene/energy, Chrysler, Conference Board, Dartmouth Hitchcock, Medical Center, Dell, Deloitte, Emerson, Ernst & Young, Facebook, Google, Kraft, Liberty Mutual, McDonald's (Europe), MetLife, Microsoft, Molson Coors, Modley Food, Northwestern Mutual, PricewaterhouseCoopers (UK), P&G, Rakuten, Raymond James (Canada), Regeneron, BSN, Sabic, Safety, Schneider Trading, Seagate, Thredwite.

Over 500,000 people around the world have attended Valerie's surprisingly upbeat and highly solution-oriented program

Launch of “Ladies and Law” in Australia



Submitted by Dana MacGrath,
ArbitralWomen President and
Independent Arbitrator
28 April, 2021

ArbitralWomen is pleased to share news of the launch of “Ladies and Law” in Australia, a new networking group focused on promoting and empowering women in the legal profession.

Ladies and Law was co-founded by Kathryn Te'o, Special Counsel at GRT Lawyers with more than 10 years' experience specialising in the construction and projects area of law with a more recent focus on construction disputes in the mining sector, and Erika Williams, ArbitralWomen Board Member and Independent Arbitration Practitioner with expe-

rience acting in some of Australia's largest disputes resolved through arbitration and providing consultancy services to in-house counsel and firms involved in arbitration and cross-border litigation.

According to the Mission Statement of Ladies and Law, the group is “committed to supporting, promoting and empowering women in the legal industry to achieve success and reach their full potential.” The organisation strives “to provide opportunities for women to connect with and support each other in order to close the gap and achieve gender equality in the legal industry.”

“Having worked in a heavily male dominated industry and specialty area of construction and projects, what I

would like to achieve through Ladies and Law is to provide a networking group that contributes to the personal and professional development of our female members.”

“We strive to shape the future of women in the legal industry by providing opportunities for development, fostering valuable connections, and facilitating member success through mentoring within a supportive network.”

— Kathryn Te'o, co-founder

“People often say it takes a village to raise children. I believe it also takes a village to strive for equal opportunities for women in law. Through Ladies & Law, we hope to create that village to support women to achieve and excel in our profession.”

— Erika Williams, co-founder

You can follow Ladies and Law on [LinkedIn](#).

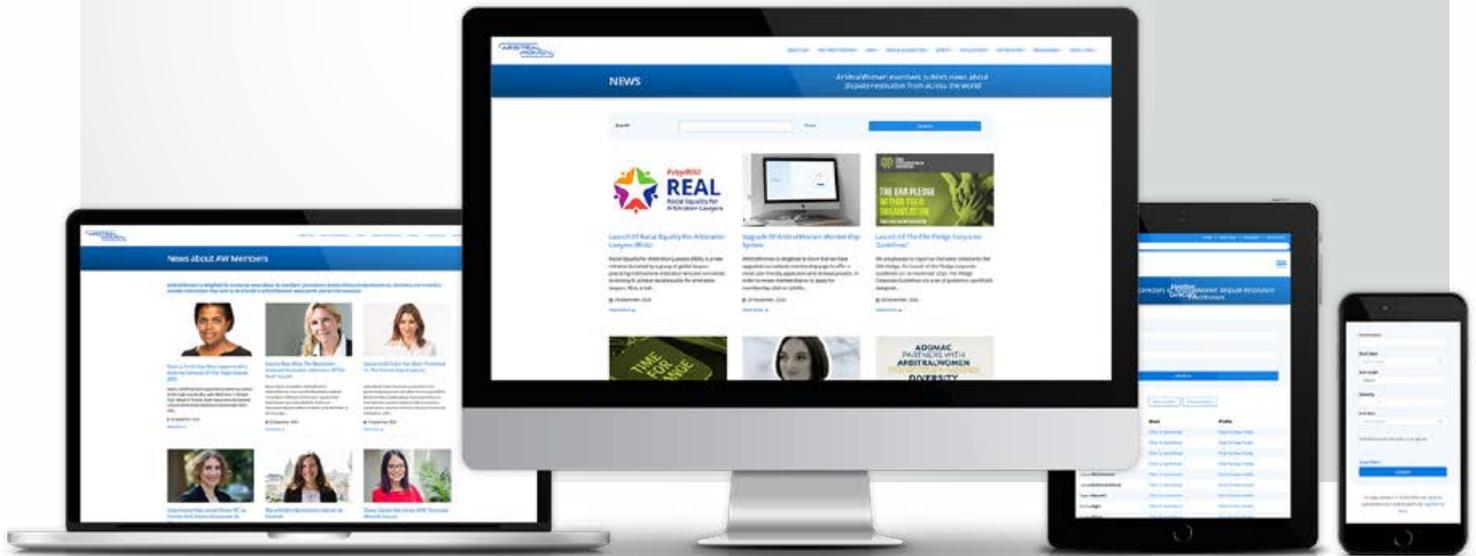
ArbitralWomen congratulates the co-founders of Ladies and Law. We look forward to opportunities to collaborate with Ladies and Law to promote women and diversity in Australia and beyond.



Erika Williams and Kathryn Te'o

Keep up with ArbitralWomen

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



SPEAKING AT AN EVENT?

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

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

ArbitralWomen thanks all contributors for sharing their stories.

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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.