

Civil Commercial and International Law



Webinar's transcript

Isabel Phillips: [00:00:03] Good morning. Good afternoon. Good evening. Welcome to the fourth webinar in the series Civil Commercial and International Law, co-hosted by JAMs and CI Arb. Please note the seminar is being recorded and will be available on YouTube approximately a week to after the webinar. So, what does law mean to you? In my experience, your context, your profession, your life experience will mean that you have very different connections and answers with this question. Even if you're a lawyer. And if you're not, then the field is even wider. I'm therefore going to make a start with three very simple definitions, but hopefully you'll be arguing within your own head by the time I've finished them. So. International law is a body of rules established by custom or by treaty and recognized by nations as binding in their relations with one another. Human rights law is an individual's rights and freedoms which form the basis of relationship between the government and the individual. And it's worth highlighting in that context three broad areas of these rights: civil, political, socioeconomic and collective developmental. Commercial law is the body of law that applies to the rights, relations and conduct of persons and businesses engaged in commerce. So there's an interaction between public law questions and relations between individuals and the state and private law relationships between individuals and institutions.

[00:01:39] So the interactions and domino effect of changes due to the exigencies of war, armed conflict, pandemics, the climate crisis are huge. And people who are not normally directly invested in the commercial context may become more acutely aware of it's public as well as private legal nature. And those normally involved in the civil commercial context may well become more aware of the fallout of public relevance in the commercial context in the way that you didn't previously think about. So crisis situations, in short, need to force changes in legal practice and at times to changes in the law itself in the form of international agreements. The Paris Agreement, for instance, around the climate crisis, legal treaties such as the Singapore Convention relating to mediation and changes in legal practice arising from information and research on dispute resolution processes, such as Frauke Nitschke's ICSID work on investor state mediation. So in this fourth webinar in our series, we're focusing on civil, commercial and international law. We brought together three speakers working in three different regions around the world with very different experiences of interaction of civil, commercial and international law in different

contexts. My name is Isabel Philips. I'm director of ADR Mediation Development at the Chartered Institute of Arbitrators. My practice has straddled the commercial and the political contexts, the conflict specialist and mediator both in commercial, fragile and post-conflict environments.

Isabel Phillips: [00:03:09] And I'm co moderating this webinar together with Niki Borofsky, who I will introduce shortly. The format of our webinar is going to be about an hour and 15 minutes long. This short introduction followed by an introduction from Nikki, thoughts from our three speakers briefly and then discussion and Q&A. So please do start adding questions in our Q&A tool right from the get-go and use the chat function for general discussion and for any technical problems you might have. So onto our speakers and I invite our speakers as I introduce you please do, do come on camera. So I apologize in advance for my pronunciation, my Spanish is not ideal so. Ana Gerdau de Borja is a senior associate at Derains & Gharavi in Paris. Having spent more than 12 years of domestic and international arbitration experience, she currently acts as vice chair of CIArb's Young Members Group Global Steering Committee and as co-chair of the Rising Arbitrators Initiative. She also acts as coordinator of Track Five responsible for the Americas of the ICC Task Force on Corruption in International Arbitration. Welcome Anna. Francis Xavier is a regional head of the Disputes Group of Rajah and Tam, which is the largest regional law firm in Southeast Asia. If I remember rightly, they have 12 branches across Asia, in ten different countries I think was the number

Isabel Phillips: [00:04:44] So he's also a past president of the Chartered Institute of Arbitrators and the Inter Pacific Bar Association. Welcome, Francis. Finally, Victoria Márquez-Mees is a Mexican economist, is the ERBD's First Chief Accountability Officer and responsible for addressing environmental and social conflicts in bank funded projects. The EBRD provides funding in 39 countries in Eastern Europe, North Africa and Central Asia. Prior to working for the EBRD, she held a similar role in the Inter-American Development Bank Group overseeing dispute resolution processes in the region. So the speakers and I are joined by a co moderator just before I introduce her, I'm going to just ask you a quick poll question, and that's going to flash up BS I'd like you to take a moment to answer- so in which the following ADR processes do you have direct experience in any role with a party neutral advisor and so on? So just while you answer that, I'm going to introduce Niki Borofsky, senior global practice manager at Jams Solutions. She's an attorney, mediator, a promoter of creative, thoughtful dispute resolution processes. Prior to her role as senior global practice manager at JAMS, she was a vice president at the CPR Institute. She's worked in-house at Alstom, as well as in the international arbitration practice at Latham, Watkins and Kostka in Paris, France. Welcome, Niki, and over to you.

Niki Borofsky: [00:06:25] Thank you so much, Isabel. As you continue to fill out the poll, I'm just going to launch into my very brief introduction to get everybody up to speed and and to make sure that we're working with the same kind of background. It's really a continuing pleasure to be able to participate in this wonderful series with the Chartered Institute. You know, amongst the three definitions that Isabel started with, JAMs is much more centered on the commercial law portion. But the other two international law and human rights law really do impact our day to day as well. I wanted to just start out with saying acknowledging the the the brain child, this webinar is the brainchild of my former colleague Ransel Howell and thank him for for bringing this series to life as we really do probe into the discussion in our fourth instalment and turn our conversation to the impacts of acute dispute resolution on commercial, civil, commercial and international law. We have a bunch of great speakers, so I'm going to try and be relatively speedy in in my overview just for the context of of where JAMs is coming from with with getting involved

in this kind of a global conversation. And I want to say also, it's great to see all of your chats coming in from all over the world, it makes me feel like I'm hosting a, you know, a fabulous YouTube or Instagram post, and we're all really having the chance to communicate in a really lovely way. But this series really did grow out of our Business Disruption Working Group that we formed at the beginning of COVID.

Niki Borofsky: [00:08:07] And it really is all about for us, anticipating the needs of clients for innovative, cutting edge dispute resolution and options. And and again, the point of this series is about listening, adapting, tailoring and training. So I really encourage you all to participate as much as possible through the Q&A and through the chat. The framework on which this series sits is really a roadmap, an analysis of dispute resolution. In times of conflict, we were guided by questions of what, where, who, why and when. And it's really about recognizing the context that underlies our daily our daily dispute and conflict resolution practices and challenges. In the last webinar, Jane Gunn asked, Are you comfortable? She says, that's a question that she regularly asks her clients, and she said, the proper response these days, and I'm sure you're all feeling it is probably not right now, because we really do find ourselves living and working in a canvas of conflicts, pandemic, geopolitical instability, environmental pressure, social unrest. And so our aim really is to bring together as diverse and experienced a group of speakers and experts to talk about how ADR practitioners can understand and learn in this context. So I'm going to kind of whiz through sessions one, two and three. For those of you who were not able to catch them, they are on YouTube. And you will have the links to to understand, you know, the possibility for for actually watching them after this if you're if you're interested.

Niki Borofsky: [00:09:46] We had Michael McIlrath who highlighted a bunch of things that that occurred post-pandemic and in the context of of rising political conflict and war. And one of the things was the importance of using an enterprise risk management perspective in ADR. We saw the power of of going virtual and hybrid for resolving conflicts, and we saw the effectiveness of this modality. So the need for speed has been there always, and we've proved that it can happen. So this is one of the impacts. Sheila Bates really opened our eyes to the fact that we're living in a continual conflict reality and that there's more shared risk taking. And our new normal really is going to be crisis laid upon, crisis laid upon crisis. So let's get used to it and let's figure out ways to learn from the past and the present to adapt better. Our third panel or our second webinar really had a great discussion with Tim Hardy, Olena Perepelynska and Karolina Jackowicz, and I'm sorry for mispronouncing everybody's names. It's a it's really a global exercise in pronunciation, but talked about the importance of facilitation in the process of dispute resolution, the understandings that we need to have of the psychology and and ways in which the individuals who participate in disputes and are in the midst of conflict are being impacted by the world around us and really an openness to engage with emotional aspects of disputes and the human aspect of being in the midst of crisis.

Niki Borofsky: [00:11:31] Our last webinar, which was number three, brought together Laura Abrahamson, my colleague here at Jams from an arbitrator's perspective and former corporate counsel to talk about the need for speed and the need for choosing pathways that can maximize the capability of enforcement. Jane Gunn, who I referenced earlier from CI Arb, spoke with her mediator's hat on and talked about the the role that stakeholders have in anticipating, analysing and adapting and taking the time to really go through these steps, especially in moments of crisis. And then Molly brought her great research on the potential roles that the private sector could have in in helping to promote peace and conflict resolution. And in particular, she stressed that her research has shown that the public sector can really be useful with

governance gap filling. Being a proponent of peaceful negotiation without having a, you know, an opinion on the on the end result, just supporting the process itself and also helping with implementation. Once an agreement is achieved, it's often costly and difficult to implement it, and that's a role that has been successful for the private sector. So today, our objectives are to offer you practical advice from experience dispute resolvers on the challenges facing international commercial law and dispute resolution coming out of the current situation.

Niki Borofsky: [00:13:09] So at this point, Catriona, I'd love to launch our next our next poll and and ask the participants to just talk a little bit and share a little bit about your own experience with with dispute resolution. And as you fill this out, I'm going to just continue on with multitasking and just reinforce that this webinar series is really about listening, acknowledging, learning and responding. And it's an iterative process and a discussion that we hope goes beyond just today's webinar and even beyond the series. So I really look forward to your participation. You know, I think that we can all agree that there's a lot of things going on. So in this state of confusion, our hope really is to help provide roadmaps, resources for organizations and practitioners around the world so that we can have that big box on the on the picture as as we as we try and put together the puzzle of of what works best in these very challenging times of acute crisis. That is all I have for you right now. And I'm very happy to pass the microphone back to Isabel and get on to our main event here with our fabulous speakers. Thank you so much.

Isabel Phillips: [00:14:31] Thank you, Niki. So, without further ado, I'd like to welcome Ana to start the ball rolling with her brief presentation. Over to you, Ana. I can hear you, but I can't see you.

Ana Gerdau de Borja: [00:14:51] Yes, I cannot activate my video. Okay. Okay. So thank you. Wonderful. Hello. Okay. Good morning. Thank you, Isabel. Thank you. And good morning. Good afternoon. Good evening, depending on where you are in your time zone. Thanks again to to Ms.. Phillips, to Ms. Gallagher and to Mrs. Borofsky for the invitation and thanks to CI Arb and to JAMs for hosting this event. It's a great honour to participate in this webinar alongside such talented colleagues. Today I will discuss with you some repercussions of the war in Ukraine on business transactions and some dispute resolution trends from a European and Latin American perspective. As I come from Brazil, whereas but I am based in Paris, France. We have witnesses, witnessed since February, March this year, a surge in events arising from the war in Ukraine. First, I'll give you a few examples. First, Ukraine's seizure of assets belonging to Russian banks. Second, seizure of foreign owned planes leased to Russian airlines. Third, limitation on the transfer of funds out of Russia and to Russia. Fourth, special procedures instituted by decree number 172 of 31st March 2022. Related to gas sales, contracts, price invoiced and paid in euros or US dollars. Fifth, implications of sanctions for contracts for special clauses, insurance and reinsurance and financing instruments. I'll give you a few examples of concrete acts related to this fifth situation.

Ana Gerdau de Borja: [00:16:43] The EU Council decision of 25th February 2022. Number 3 to 7. Then there is, there are at least two of regulations. The number four, two, two, eight and five, seven, six of margin and the other one of April this year. And now I move to the sixth type of event, the destruction of ports and or closure of ports and implications of skyrocketing prices of commodities such as raw materials for fertilizers, I'll give you- just I have just spoken to a colleague that is based in Brazil, and he was telling me about his experience he does dispute resolution and agribusiness. And he tells me there's been a severe impact on Latin America, especially in Brazil, because Russia and Belarus are together responsible for almost 40% of the world's production of potash. That's potassium chloride. That is a raw material used

in fertilizers. And these- there's been a skyrocketing increase in prices and there's been close to 300% increase. And so it's difficult for especially the agro-industry in Brazil, the farmers that produce soybean and corn, rice in the centre of the country that depend on the on the on the- well, the fertilizers, for instance, the corn producers, they have corn, the three seasons a year and to be able to do this, they need the fertilizers.

Ana Gerdau de Borja: [00:18:31] So I also can give you a few examples. He was telling me- his name is Rodrigo he is based in Curitiba- and that's a state that produces a lot of soybeans, for instance. And they, He tells me that his clients were sending money to pay transactions and the money was stuck in the Swiss banks so they weren't able to pay. So there is a series of non-compliance with the contractual provisions due to the war and also the sailors they were because the port, there's one port in Ukraine that was destroyed and Belarus, they don't have access to the sea. So they used to use this port in the Ukraine or the port in Lithuania, but it's closed because of sanctions. So they can't sell the products they can't ship. So I will now move to something that, having this in mind, I will move to the need for alternative resolution in this context. So as we go by, Yves Derains with whom I have the honour to work at my firm, international dispute resolution requires cultural neutrality in arbitration. For example, the area of my expertise. Arbitrators need to set up a proceeding which is acceptable, acceptable to parties coming from different countries, meaning that they have to free themselves of their own legal system and familiarize themselves with different national procedural laws.

Ana Gerdau de Borja: [00:20:05] For emergency situations, it is true that rules of several arbitrary institutions provide for emergency arbitrator provisions. These will be key in this, in times like this, I know that JAMs international arbitration rules provide for emergency relief procedures. Finally, dispute resolution stakeholders should be aware that at times of crisis like this, they should be aware of the risk of cognitive biases, such as the one called the Maslow's Hammer, also known as the law of the instrument, popularly stated as if all you have is a hammer, listen, if all you have is a hammer, everything looks like a nail. As pointed out by Claudia Salomon, the ICC International Court of Arbitration President. So as you said, conscious of our bias. Like me, I do a lot of arbitration, so I tend to propose both arbitration to my clients. But we have to most deep, dig deep in our toolbox because there are various ADR tools to be used and depending on the situations, these will be best, better or or less good. So, so that we can create procedures that are adapted to the case and there that they should be tailor made, not following standards and models, but mindful of time. I know I am here and thank you for for your attention.

Isabel Phillips: [00:21:37] Thank you Ana. Really, really interesting and I will be handing over to Francis in one second. Just before I do that, I just want to draw attention to the polls that we've had so far. We had an interesting, almost exact split between mediators and arbitrator, mediation and arbitration experience. And we've got people with a whole range of different practical experiences. I'm just going to, in a chat, pop in a question, which is if you wrote 'other' in the poll, in either of the polls, would you write in the chat what additional processes you have experience in? So is that expert determination or early neutral evaluation or something else we'd be interested to know. And I know that a lot of a lot more of you have used ombudsman apparently, or been involved in ombudsman processes. Then we've got ombudsman, ombudsman on the call, but we've got we've got three there. So interesting to see. I'd love to know where the Ombudsman are from. If your ombudsman, if you if you're willing to share that with us. So two questions there. What are the processes? Have you had experience in and if you're an ombudsman, where

did you, where do you come from? So, Francis, may I invite you to pick up the baton at this point from Ana and take forward the conversation? Do we have Francis...

Francis Xavier: [00:23:16] We do.

Isabel Phillips: [00:23:18] Wonderful.

Francis Xavier: [00:23:21] Right? Right now, I think in Asia, what we've seen is two big things that I want to share quickly. And the first is that you talk about pandemic driven disputes, supply chain disruptions. And what we've seen is a huge resort to mediation in those disputes. And I think that's been caused by a number of reasons. Number one, I think there is a sense that the enemy is not across the table, but there is a common enemy in the form of a very tiny virus. And I think in a number of countries, including Singapore, legislative mechanisms, promoting the use of out of court or out of arbitration, settlement or resolution, quick resolution dispute mechanisms in tenancy situations, construction issues, supply chain situations have been implemented. But quite apart from that, I think the pandemic driven disputes, many of the people suffering from the strain have had their cash pipeline disrupted. And frankly, there is a serious realization that if one were to rely on typical concepts across the civil common law like force majeure and frustration, you are really facing a very, very uncertain outcome. So all of that may have caused a huge shift of these disputes, not towards arbitration or litigation, but to mediation. Now, we are also seeing that same trend not only for pandemic driven disputes, but also disputes that were there even before the pandemic. We are seeing that across commercial, international commercial disputes. We are seeing that across investor state dispute resolution. So resort to mediation- there's been a huge shift from what we can say over many, many jurisdictions in Asia.

Francis Xavier: [00:25:16] Part of it, we think the impetus for, for that part of that could also have been the Singapore Mediation Convention, Isabel that you raised some time ago. Currently as at mid-July, we have 55 signatories. But I think beyond that, there has been a sense that mediated settlements are going to be enforced in a big way. And so there has been a huge shift to mediation. What is the lesson, the first pragmatic lesson for all of us here? I think with the rise of straight mediation and hybrid processes like Arb-Med-Arb, even if you are an arbitrator. And I saw in the last poll that about 26% of the participants here have experience in mediation, whereas the large majority have experience in arbitration and other processes. So I think it's very important that all of us become accredited mediators for a start, right? I think that's where the world is moving to. Even if you are an arbitration specialist, you may be called upon to be part of a hybrid process. And if you have arbitration accreditation, but not the mediation, you're just going to be left behind. Now, the second big thing I want to talk about in the little time that I have here is- we've seen how important it is to be nimble as a practitioner, whatever you call yourself. I've seen in the chat that the a number of people describe themselves differently. You've seen how borders are porous with the pandemic we've learned that money and people are no respecter of national boundaries.

Francis Xavier: [00:26:51] So at a time when Singapore and Hong Kong remained closed, we saw a huge outflux or influx of money into the UAE because the Dubai resolutely remained open. Today, when Singapore is open and Hong Kong is not, we are seeing all across Asia disputes cannot be resolved. So the virus, this tiny microscopic virus, has disrupted dispute, the functioning of dispute resolution centres and the modes of dispute resolution themselves. Right. So many of the disputes that typically would be resolved in Hong Kong can't be resolved because people can move in and out. And the reality is when

other jurisdictions are open, people do prefer hybrid processes as opposed to completely virtual processes for various reasons I did not go into many of you would be expert in that. So I think it's very important, for instance, I get asked all the time very frequently, where would we go if we do not wish to go to Singapore? If we, if clients are happy to go to Singapore for whatever reason, that's fine. Right. But if for some reason Singapore is not appropriate, right? They could go to Hong Kong before now and perhaps they don't want to go to Paris. Where could they go to, Thailand? Now it becomes very important for you to understand the different situations in Thailand, for dispute resolution, in Kuala Lumpur, in other parts across the world, so that you are better able to advise clients and be nimble in your approach in the face of crisis. Back to you. Either Niki or Isabel.

Isabel Phillips: [00:28:29] Thank you, Francis. Wonderful. Some really specific suggestions, ideas there. And thank you for picking up some of the poll results as well. I see that we've got conciliation and ombudsman coming out there as two of the key additional processes that have been mentioned. So thank you. Now over to a different context again, Victoria. Can I hand, hand the mic to you virtually?

Victoria Márquez-Mees: [00:29:02] Yes. Thank you so much, Isabel and Niki and everyone. It's a pleasure to be here. From a non-legal perspective, to talk about the DR. And just as you mention, Isabel, the EBRD, as many of the multilateral banks, funds projects seeking to ensure sustainable development in different countries. For the EBRD where operating in 39 countries nowadays in promoting the transition to market economies or to more democratic entities. And in those cases, we usually find that there are environmental and social impacts that cause harm to communities and to address those conflicts that are arising, my office is responsible for going forward with dispute resolution processes to try to address the conflict and with the overall objective of ensuring that the projects are sustainable. So in that sense, it's important- taking into what Ana said and other comments, we're not neutral and we're not impartial. We really have a clear objective where we're going towards. But the thing that is really interesting and I was listening to Francis on the challenges brought in by Covid, is who is one of our parties. The parties are those communities the most vulnerable in every country that we go in who have very limited access to legitimate legal processes that even fear them enormously and that have this imbalance in capacities when having to confront a large company that is building a hydropower plant somewhere or against the bank itself, but that they do not know that they're being harmed. So this brings in, from my perspective, a new view of what dispute resolution works about. For us, definitely, COVID has been the most disastrous phenomenon that has happened in dispute resolution processes because our communities do not have access to virtual mediation or things.

Victoria Márquez-Mees: [00:31:08] They do not trust you either. You're talking to communities that are in the middle of a rural area and you're trying to build on to your own urban-like process. For them, that doesn't work. And then talking to 39 different cultures and way of approaching either if it's culturally or religiously or as regards the openness of their country to voicing concerns. So that brings a new way of how we operate. We also try to strive as much as possible away from legal, legalistic visions of dispute resolution. We're addressing concerns, we're trying to level the playing field for people who it's hard to understand what we are doing, that we're really seeking to address the concerns in very simple ways where the other party never considers that their concerns are legitimate, which is also really interesting. We, as I think Isabel you mentioned early on, well, you have we have the Ukraine war, we have COVID, but we're now seeing challenges in water availability in many countries. My experience in Latin America and the Caribbean, the conflicts on indigenous peoples, on really having access to health. All these different

elements are common to every country. And we're seeing that this is rising in volume. So and also a preference for, yes, dispute resolution processes, but something that moves from just reaching an agreement to really seeing an agreement being effectively implemented within the timeframes that make sense for the livelihoods of people. So I think we're all talking about the same thing, but just very different perspectives and I'll leave it there so that we can go into the questions. Thank you so much for the opportunity.

Isabel Phillips: [00:33:06] Thank you, Victoria. I think in different ways you've all brought out the exactly the way that these sorts of crises shift- how people need to do things in order to keep commerce going and how or what within legal contexts actually becomes more or less important. And there's one question that's come in and the chapter around Force Majeure, which has already been picked up in one of the presentations and the shifts around, well, what's that actually going to lead to in terms of outcome, which links to some of Ana's points, where you've got commodities that have gone up 300% in price, you've got a completely different playing field. And of course, with communities that maybe can bring things to a complete halt in terms of what the commercial body is trying to do, in terms of how to engage with that, which brings again, the importance of these different types of laws. So, there's a couple of reflections for me-Niki.

Niki Borofsky: [00:34:07] Yeah, I think there are a couple of really great themes that I'm seeing weaving through all of our discussions. And one of them I think, is the need to be full, fully able and capable dispute resolvers to not only have the hammer in our toolbox because Ana is right if you're just walking around with one tool, you're going to have the same solution to every problem. And I think that was picked up in, in what Victoria was talking about with the need to, to really understand the kind of conflict and the kind of individuals and the access and the building of trust that's necessary to engage everybody fully, in the context of these very difficult times. And then as, as Francis was saying, the new tools and laws that are on the horizon to empower this kind of versatility- mediation with the Singapore convention, you know, we see a lot of things. One of the kind of interesting historical things about my organisation as a dispute resolution services provider, most of our neutrals are arbitrators and mediators and facilitators. And so we're really keen on building those skills. And I think that the users are asking more and more for different, different entities to to push the diversity and the variety of dispute resolution options. And I think that's one of the things that we can learn from these kinds of discussions is, you know, what can we borrow from the different kinds of practitioners who are resolving conflicts in ways and with fungible skill sets that might be importable into the human rights context or the international law context or the commercial context.

Niki Borofsky: [00:35:52] And I think also the other thing that I wanted to comment on was Francis's question of of the of the way of thinking like, well, if this doesn't happen, what next? If when faced with an impossibility, I think everybody is understanding, with this truly common enemy of of, say, war or or illness, that it doesn't make any sense to bring a million force majeure clauses, especially if all of the, you know, distributors and suppliers are in the same situation. So I think that's pushing dispute resolution and parties and conflict to think a little bit more broadly about innovative and and more diverse options for finding solutions. I'd love to, you know, to hear to hear some of the the panellists experiences with this new kind of flexible world. I mean, I know here at JAMs, we've had we've had, you know, we've been the host when people can't come to to hybrid procedures- where it may be seated in Singapore with parties from, you know, Korea and Brazil and New York and and Italy. And and this just happens to be a

technological platform that we can offer. But, but really, the law allows for flexibility to to to solve the new generation of complexities with with flexibility and and technology. I know, I know, I've put a lot of a lot of stuff out there. And there have been some, some good questions coming in from from the chat. Isabel, do you want to pluck something from the from the-

Isabel Phillips: [00:37:40] One of the things that I just wanted to pick up, which connects to what you've just been saying and I think connects to one or two of the comments, not specifically question or come to that is the issue of hybrid processes and dealing with the complexity that surrounds the, where there might be clear legal principles that could be applied in normal times. But it may be difficult. And certainly one of the things I've experienced in practice is that we all moved entirely online for a good good portion of time and now we're having to do hybrid.

[00:38:16] And Victoria has picked up some of the issues of that in relation to communities. Francis, you've mentioned it, but there's also confusion between when we're talking about hybrid, are we talking about Med-Arb, Arb-Med, or are we talking about partly online, partly face to face? So the one that I'm just curious to get a little bit of of insight to around these contexts, where maybe the the straightforward legal options are not as easy to take, is is the mixing in-person and online interaction, any any ideas or experience that because it might expense. That's more tricky than being all online or all offline. It creates some very different different problems. And any thoughts around managing that?

Ana Gerdau de Borja: [00:39:07] Yes. You know, one of my cases, they ended up that we had the whole hearing held virtually. But there was a moment when we discussed whether it wouldn't be a good idea to- because they were at some point during the pandemic, there were travel restrictions and the travel restrictions were not sort of harmonious across the globe. So some of the parties were in Europe and there were some experts in in the Middle East. So and there were higher, stronger restrictions applying. So we thought, we envisioned at some point the having the experts participating virtually since travel restrictions would be, would not permit them to participate. But then it ended up that we we had the whole hearing virtual. But I know that this has been going on, and I have other colleagues that had the same hybrid- it works well, too. And even before the pandemic, though, sometimes when there was an expert witness or a fact witness even that couldn't participate, couldn't make it to the hearing for various reasons, could be health reasons or unrelated to the pandemic before. And we used to have like someone participating via a video conference, so that of course now it became the norm. And quite often in procedural situations, in our cases, normally we have this, we try to save costs and time. So so it's best for the parties and for counsel. So in the end, we, we, we encourage having discussions virtually. But some of the cases, they are high stake cases and sometimes the parties prefer having in-person. And now that travel restrictions are less important, at least in Europe, it's it's become back, we were going back to physical hearings or hybrid hearings.

Isabel Phillips: [00:41:12] Yes, indeed. And that's that's great. Where it can happen, Victoria, is you said some of the some of the places that you're working in, it's simply not ever possible to get people people online.

Victoria Márquez-Mees: [00:41:26] Yes. And I'm seeing one of the comments there that virtual is more is faster and cost effective. And it's given me really a point that I would want to discuss with you all is it all depends on the context of where are you working, with whom are you working? Because I'm just finishing

one dispute resolution process that we have had to terminate because there was a risk of retaliation given the imbalance of power. But the fact that we were not there to early on establish conditions to really be clear on what was the contextual risk for our complainants really made the complainant decide that it was better to back off and not be, not face the risk of not being... This was a labour dispute and to be expelled from their jobs or to be fearing for their livelihood. So for anything in deciding what works best, I think we have to do a good assessment of the process of the dispute resolution process, of the likelihood of that conflict being able to be addressed in one way or the other, and also seek what's the preference of your of your parties, how comfortable they are on this. For us, for example, we always have to be working on with with interpretation. Is that something that is working well? Is everyone understanding the issues? Is the interpreter really being good enough to to reflect exactly what we're doing and how much trust does your, do your parties have in you that are they're willing to engage in that way? Or do you have to build first trust and then you can go virtual for minor things. So it's, it's not a fit for purpose for everyone. You have to do a bespoke thing, I guess in many times. And sometimes it's good to go in virtual others you can have a mixture of things and sometimes you really have to be there to be able to address it quickly and effectively.

Isabel Phillips: [00:43:36] And also in terms of of how how comfortable people and how people are able to engage. So I'll just give a brief example before I hand to Francis, who I think has also interesting experience in this. Just a banal thing that I'm sure that all of us have done- I've been in a meeting with four people around the table and two people on screen, and the camera is not angled so that the people on the screen are looking at somebody, at the top of somebody's head or a blank wall for the duration of the meeting, and they can't really participate. And if that's happening in our developed context, where we've all got access to webcams and so on, and the difficulty of involving a large number of people or people without stable internet connection. So I think it's it's something that's in some of these contexts is because of the commercial context. And particularly once it's commercial legal context, people aren't or don't always make that jump as to what the experience is like for the people on the other end who are staring at the blank wall in this wonderful virtual process, right. Francis-

Francis Xavier: [00:44:48] Three Lessons from the Pandemic. Isabel. First, we were all surprised at how effective a virtual hearing could be, even when you're cross-examining or hot-tubbing expert witnesses. Second lesson. For the key parts of the case, we all realize that an in-person hearing is still more advantageous because watching a screen, you get screen fatigue, it is not personal you know, you feel detached from the whole process. There are time zone differences. Today we live in a truly global dispute resolution mode, so if you have an arbitrator in South America and Brazil and then you have a counsel in Japan, you have a very small window to operate. Right. And your hearing is likely to start at 8 p.m. and end by 1 a.m. or something like that. It doesn't work. And there is also a greater license for people to try and game the system using other devices, all kinds of signalling that may not be picked up with the cameras. And so I think we are truly in the hybrid world. But the third lesson we've learned is that because virtual is effective, as Victoria has said, horses for courses. If you have a case with 20 witnesses, maybe only eight of them, you really need an in-person hearing. The rest of them are minor. You can increase efficiency and save costs and time by having the minor witnesses do it on a virtual basis because they are really talking about documents and maybe one of them is very far away. So really it has allowed- it has given us a tool to use judiciously to cut costs and time. Back to you Isabel.

Isabel Phillips: [00:46:29] Thank you. And I'm going to pick up now on something which Raja has also picked up on that. We've been talking quite a bit about geopolitics and and so on. And so I want to bring it back a little bit to the to the context of the civil commercial law and international law and just draw attention back in that direction a little bit. In terms of, you know I mentioned it in the introduction, things like the Singapore convention, there's a question around the New York convention but the whole question of enforcement and the shifts in attitude towards some of these state, state based treaties and enforcement of those in in this, this context of of upheaval and maybe some reflections from you on how either the legal practice is changing or the law itself is changing in relation to to that, given the the difficulties of, for instance, getting enforcement in in the context of armed conflict or or war, which is obviously Ukraine has been particularly noticeable and particularly important, shall I say, in Europe and maybe the states. But there are a lot of lot contexts, many people are calling in from various places where armed conflict and or war in various forms have been ongoing and are ongoing. So dealing with something all the time. So maybe, Francis, given your experience in the investor state context, maybe there's something around that that you could pick up.

Francis Xavier: [00:48:16] Well, you know, Isabel, I think enforcement and there was a question also from a number of the participants on enforcement and the difficulties with enforcement. The fact is, even though there are many signatories to the 1958 New York convention or the ICSID convention, the fact is enforcement poses grave difficulties across the globe. Because ultimately you need a national court to do the right thing. Right. And we have different cultures, we have different perspectives, we have different public policy loopholes or different ways we look at it such that there are enough challenges to uniform enforcement across the world. And this was even without taking into account a crisis of the kind Isabel that you're talking about. Now, when you add to that, right, all sorts of crisis that's being discussed, then it really becomes a very rowdy atmosphere, right? Because it adds a complexion where the normal functioning of national courts, the normal functioning of enforcement mechanisms, the normal functioning of state to state cooperation is simply eroded. And so I think- the fact is we live in a very divided world, and conflict upon conflict just makes it all the more difficult for us to pull together in a harmonious trend. So the difficulties in this area we are seeing have just become even more acute. And that's the reality.

Isabel Phillips: [00:49:50] And I'm suppose I suppose that's that's one of the areas, or one of the motivators behind your statement that mediation is is in is increasingly popular or and increasingly the way sort of seen as the way forward. And it raises for me an interesting question in terms of of international law around the Singapore convention, which for me has always been a question, because though the statistics, the data on this is very, very poor across the world. And if anybody on this call is aware of good quality data on this, then please do let me know, I'll be fascinated. But there's very few jurisdictions that have followed and published any information about how many cases that have been mediated, have reached a settlement, have then gone back into court and being taken for enforcement, because the way that in many jurisdictions that's tracked, it's impossible to track it because they simply end up as a settlement that's lodged at the court. And whether it's mediation, one is not clear. So you can't actually see what's the enforcement rate on mediation cases. Anecdotally, mediators tend to say that mediation very rarely has to go for enforcement because it's a consensual agreement. Right. So that raises an interesting question about the Singapore convention, specifically in international legal terms, is, is its strength actually that you can enforce or is that not in a sense, a sort of side-track? Because if parties have come to an agreement, that reason for enforcement is much lesser than in the context where a third party has decided and imposed a solution such as in arbitration. So that's a for me, quite an interesting question

around the function of that international law as opposed to the practical, maybe slightly more pragmatic world of the the civil commercial context. So back to Francis, Niki-

Francis Xavier: [00:51:45] Just a quick response to that Isabel. It's about, just just remember, even as at mid-July, 55 signatories, but only ten countries have ratified the convention. Right. So the convention apparatus infrastructure is only being now being put up. So I think we'll have to wait a while before we get to a concrete example.

Isabel Phillips: [00:52:07] Yeah. And for that to actually be tested could take several years given if the expectation is that actually enforcement is not the biggest problem, it's people getting people actually into mediation. Ana.

Ana Gerdau de Borja: [00:52:23] Thank you. Thank you. Isabel. Yes. I tend to agree that it would be an important thing to have more contracting parties ratifying the Singapore convention. But it might take some years. But it's true that I agree that with mediation already, the parties agree. So I would imagine that they would comply with the solution or they would implement or enforce or not enforce- there would be no need for enforcement, they would simply execute their agreement and comply with it. Whereas in the arbitration, I must also recall that most awards are complied with. So it's not that every time we have to institute enforcement proceedings before a state court. But of course, the one thing that is very difficult and certainly Francis was referring to that, is enforcement against state entities and sovereigns. This is really difficult. But but normally, I think between private parties and dispute resolution, normally parties, I think I'm pretty sure that the majority of parties comply with arbitral awards. But of course, there are some jurisdictions where it could be more complicated, they're more litigious jurisdictions. And I must say that I speak for Brazilians that often apply for a request for interpretation, and then they institute, set aside proceedings. I used to work with a colleague in Sao Paulo for six years, even when at the time I was there for six years working with him, and he used to say, I'm not doing setting aside proceedings. He was really in favour of arbitration and refused the request. He said that he'd go to another firm, but this is like a very special person. And and he was an enthusiastic of alternative dispute resolution. And as you know, in Brazilian courts, state court proceedings may take ten years. So, so you want to be considering that when you decide what to in terms of strategy.

Isabel Phillips: [00:54:27] Absolutely. That sounds very wise. I'm just going to take this opportunity to to ask Catriona to launch our third poll, which just asks you a little bit about what professional background you come from, because obviously you can be a ADR neutral or participating in ADR in various ways, but you may come from all sorts of backgrounds. So really interested to see where you come from. And whilst you're answering that question, I quite like to pick up another element of the issue of international law with Victoria, which is of course the other side of the international legal world is the area of human rights law. And often in the work that certainly that I've done with communities in various contexts suffering from water distress and land use stress and so on. There- that if you talk about law in that context and international law, it's not the commercial context that they're thinking about. It's often the socioeconomic or collective developmental human rights that they're thinking about and are the shifts or changes either in practice or in law in that context that you think are relevant in this these these times of stress.

Victoria Márquez-Mees: [00:55:51] I think. Yeah. Precisely. Have hit the head of the nail on that one because most of the complaints that we receive are very much related and presented as human rights

violations. In the context of a financing contract there is no even mention of abiding by any kind of international convention on Human Rights. And you will have the parties, either the bank or the client most of the time unaware of what these conventions include or say. And some of the countries either have not ratified them or have not transformed them into any regulation that could be clearly spelled out for what the client is supposed to be doing. But what we have seen nowadays is a strong pressure from civil society organisations to ensure that the bank does follow human rights due diligence, making sure that you clearly identify the impacts and establish that the socioeconomic rights of the community are considered. When evaluating a project and determining whether that is being adequately avoided, the impacts addressed or mitigate or compensated in any way. And as we were talking about the enforcement of agreements, I think what we continually see is communities are trying to shy away from courts- first, they don't have the money to file a lawsuit. Second, that even if they have the money, their needs are today, not by the time a court can really get into that.

Victoria Márquez-Mees: [00:57:32] And that's been a big problem everywhere in the world. So they come to us as an administrative function to try to see if redress and remedy can come in an easier approach more directly to the concerns they're raising without all the process of following and either in the public or the private sector, because we have been addressing both, you see different points of pressure that we can accept on the sides of it can be the financing agreement, but also on whether you're willing to continue with a certain client if that client is not really full. It's getting a lot of messy conflicts around and therefore the projects cannot really take off if projects fail because of the lack of understanding of the community and issues that are happening or simply because the reputational risk for the banks is huge, as we and we haven't mentioned this, but I think the whole DR process and the whole conflict situation in the world and the context has changed with the use of social media by those that are feeling the pressures of conflict. So that actually brings in a lot of leverage on you're not abiding by an agreement, then you will be seeing yourself in the next Twitter campaign very soon. And then how does that proceed?

Niki Borofsky: [00:58:57] I just wanted to I wanted to pick up on some of the comments and a little bit picking up on that last comment by Victoria about just just thinking a little bit about the crucible that we're all in and the advancement and developments that have have come to pass with the adaptation and the realization that sometimes technologies work, as Victoria mentioned, sometimes there's too much of a of a lack of access and trust for them to work. But just as a almost a call to action for for us to not lose the creativity and and innovation that the the really tough times have have caused. I think that there were so many people I think in the international context, we've been doing hybrid and virtual things for a long, long time just because we are such a diverse group in many jurisdictions who work together and the and the spreading of that into into more contexts, in the sharing of best practices and the and the advancements with that some of the people in the feed have been talking about ways to ensure, you know, a fair and and good process without cheating and without hacking and without some of the concerns that we face every day. That's been a real boon if you if you want to to think about it, of the of the layers of crisis that are upon us. And there are so many technologies and solutions, even non technological solutions that are out there. As Ana was mentioning, the emergency arbitration procedures, as Francis was mentioning, maybe a, you know, a list of of different hearing venues or hearing locations, maintaining the venue for the legal reasons that you've selected that venue.

Niki Borofsky: [01:00:43] So I just wanted to end with my comment with a little example of, of one instance where I worked with one of our judges on a eviction mediation track. And again, we were dealing

with clients. This is this is the kind of pro-bono part of some of the things that are our neutrals do. We worked with a program in Philadelphia that was completely based on cell phone, telephone. And there was huge scepticism at the beginning that there could be a kind of fair and full discussion just on telephone, since everybody was now used to doing Zoom and video. But actually, the the the the percentage and rates of of facilitated success were very, very high. So I think one of the one of the things that we have to learn as a lesson is open mindedness and and understanding how these these critical situations can push the dispute resolution community at large to both come together and to push and to push ahead. Oh, and I just wanted to address a tiny technical question about the poll results not adding up to 100%. When you have multiple options to tick multiple boxes, it won't add up to 100%. So we're not cooking the numbers. These are these are the actual poll results. And many of you as as with our speakers today are multitalented. And I think that, again, just goes to the to the another underlying theme of having lots of tools in our toolbox for this.

Isabel Phillips: [01:02:27] Yeah. And given the variety of people we've got on the, on the call there and I see we've got quite, we've got a quite a large percentage, in fact one of the largest percentages are people from industry and commerce. And I'd be just curious if any of you from who are in industry and commerce have particular questions or thoughts around the, to our panellists about what you see or want in dispute resolution mechanisms and all your experience around dispute resolution and the law and in the current situation. So please do do keep those questions coming. There's one or two questions which I may be missing. What the actual question is. I think, Ola, yeah, the mediation can provide a way of balancing power with without doubt, I think it's it's not a wholly straightforward at least I would say particularly in my experience of situations of, of a related type to the work that Victoria does and where you're working with communities and multinationals plus government. It's, it's quite an interesting question as to what extent you can, you can balance power and to what extent law, which is often originally sort of conceived as a way of sort of balancing power. Interestingly, because the idea of everybody being equal before, before the law is essentially about that. But how that actually pans out in in reality and how as people involved in dispute resolution, we actually manage that. I don't know if Francis or Victoria, you have any any reflections on your experience of of situations where you've got such diverse parties involved in situations like that and balancing power.

Victoria Márquez-Mees: [01:04:35] I think obviously what you're trying to get with a voluntary process is for parties to be able to engage respectfully and listen to each other, which sometimes is that party that has less power, hasn't had the opportunity to achieve on its own. But but we usually see that the imbalance of power comes on obviously on one side or on, on, on capacities to engage, but also on what is the consideration of the most powerful of really wanting to listen to the other party or thinking that the other party is legitimate. So we work a lot on that part. How to present to both parties what is the area of mutual concern and how they're actually working towards a common goal more than establishing positions of what they want each other, but rather seeing. That's why I said that we're not impartial because we're both wanting to have the project happen in a sustainable way. And therefore try to emphasize less the differences, which are huge in many ways, but rather what's the win-win there for us all on day one?

Isabel Phillips: [01:05:51] Yeah, finding any any area of overlap of that that allows people to be working on something together. It's quite a challenge.

Victoria Márquez-Mees: [01:06:05] And if I can add. Sorry to interrupt you. So you've just said something that's really important and it comes to a point, for example, when you're engaging a community with a government. And I had this case with indigenous people in Peru. The officials have never met indigenous peoples from the Amazon ever in their lives. So our process was the first time when they sat down I started talking to each other as person to person, was Peruvians, let's say at that point and they they found that they had things in common as human beings do. And then the preconception that each one carried us, group against group, started more to go into developing the relationship, which is why I really prefer things in person than virtual. And I've seen some of the comments there because it actually builds on the relationship between one human being and another and less on how do we solve this problem. The same we had with Haiti, with farmers and the bank where I was working. They had never talked to each other. They never thought about each other as families with kids and things, and suddenly they both were having the same problem. We couldn't sit them down because both have kids and the time schedule wasn't working for them. So that sort of thing is what we work a lot into getting that common report. Sorry.

Isabel Phillips: [01:07:27] No, that's really helpful. And I think it's it's I think the context where that I've worked, where where that gulf is so huge, it is very it is very striking. It's very obvious. And it's very, it's it's it begs to be addressed. I think the a context where that sometimes disappears a little bit more and causes problems because it's a little bit less visible is the context of people in who are in government and people who are in leading positions in firms, in commerce or industry. And you've got professionals in both contexts, but their understanding of the world is conditioned by two completely different things. And I imagine that that's something that again, these difference in. What do you see as important when you think about law? You can have a complete, to use the fancy word, incommensurability of the public sector seeing the the public law as being the thing that they have to protect above all. And the commercial party may be seeing the private law issues as being the more important. Francis, Anna. This is this is more-

Ana Gerdau de Borja: [01:08:48] I should add, you were discussing negotiation and mediation, but I should draw your attention to the fact that in Latin America, dispute boards have been used very much in Brazil and now and Peru, for instance, there is a very strong trend and many of very big infrastructure projects involving governments and private stakeholders. They've been adopting these billboards as a step before going to arbitration. And the report I have from colleagues and myself, my own experience is that this has brought people, like the parties, opposite parties that were in the dispute together, and they helped to have them having a better relationship and do and assuring the continuity of the works. And so this is very key. And I think there's a nice trend in the especially in projects financed by international banks. The international development banks require dispute boards.

Isabel Phillips: [01:09:58] Francis, did you want to add something?

Francis Xavier: [01:10:00] Well, I mean, you know, I think the landscape, the reality is that there is an imbalance of power. I mean, if you talk about the ISDS landscape, you have states and you have individual investors who invest in the state. And so the whole mechanism, infrastructure of ISDS is designed to provide an investor, a foreign investor, with recourse against the state, which has real teeth. Right. And in a domestic setting, it's the same thing, right? You have national courts. You have legislation regulating the balance between the state and the rights of the citizens. So this whole processes of dispute resolution, one of the aims and the heart of it is to provide some semblance of equilibrium in allowing the man of the street or the individual investor who gets into a foreign state. You know, a way to seek redress if his rights

are trampled upon. But obviously, you know, it's nice in theory and we've discussed in practice many, many issues crop up. Right. But, you know, we all I think most of us in this room virtually are in the space where we strive to make that equilibrium happen.

Niki Borofsky: [01:11:16] I think that that hearkens back really nicely to one of Ana's opening points about how we all work towards cultural neutrality, or at least supporting a neutral process coming from civil jurisdictions, common law jurisdictions, different languages. We spoke about the challenges of translations and also I think building in some of the questions about, you know, how can we talk even about the Singapore convention when it's so new? All of these things, as Francis said, start out academic and it's just with years of practice and usage and improvement that we're able to kind of build them into more robust and strong mechanisms to help dispute resolution and whatever context it may be.

Isabel Phillips: [01:12:04] Yeah. And I think that we're going to be continuing this conversation and some of these questions. I'm conscious of that we've got a minute before we wrap up. So we're going to have a wrap up of the main part of this series in September. The date is not yet fixed, so I hope that you of all you will allow us to to let you know when that's going to be. And we're going to have one additional seminar on the series at the Chartered Institute's Mediation Symposium that's going to happen on the 5th of October. I put the link in there, so please do sign up for that if you're interested. And we'll be looking at some of these questions around acute disputes and ongoing conflict, but specifically through the mediation lens. So some of the things we've been talking about and some of the things that we will that will be added. So I'd like to say a big thank you to Ana, to Victoria, to Frances and to to Niki. And just to give the closing remark to Niki.

Niki Borofsky: [01:13:27] Thank you. I just I can't be be exuberant enough about how wonderful this experience is to join you from all around the world. And for those of you who might be watching this on on replay, on YouTube to be a part of the conversation, and as Isabel mentioned, this is a continuing effort. And we really hope that those of you who didn't get your questions answered will engage through email and follow up. And thank you again to all of our amazing speakers for sharing your insight and experience. It's truly amazing to be a part of this global community of dispute resolution professionals and activists. Thank you so much. And hopefully we'll see you again on the 5th of October.

Isabel Phillips: [01:14:11] If not before, in September.

Niki Borofsky: [01:14:13] Yes. And for our, for our, for our culminating session for this series in September. Thank you so much.

Isabel Phillips: [01:14:20] Thanks very much, everyone. Good day. Good evening.