

## **ICCA Sydney 2018 PRELIMINARY PROGRAMME**

### **ICCA PROGRAMME COMMITTEE**

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Eduardo Zuleta (Bogota)

### **Sunday, 15 April 2018**

#### **Opening Event**

*(details to come)*

#### **Registration**

### **24<sup>th</sup> ICCA Congress Opening Ceremony**

*Venue: Sydney Opera House*

#### **Opening Cocktail Reception**

#### **After Party**

EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION

**DAY 1 – Monday, 16 April 2018**

***Breakfast***

*(details to come)*

***Morning - Session 1***

Welcome Remarks  
 Programme Overview  
 Keynote Address  
*(details to come)*

***Coffee break***

***Morning - Session 2***

**Plenary: Law-Making in International Arbitration: What Legitimacy Challenges Lie Ahead?**

Law-making in international arbitration differs greatly from the domestic realm. Rather than through centralized legislation, it takes place in a decentralized network in which a variety of actors interact. This network encompasses arbitral tribunals who function as law-makers in private and public international law and in specialized fields, such as sports law. In addition, arbitration institutions, practitioner and professional associations (such as ICCA or the IBA), and international organizations (such as the UN International Law Commission and UNCITRAL) engage in the law-making process through the development of soft law instruments, model laws and rules, protocols, and best practices. These actors together shape both the substance and procedure of international arbitration. This, in turn, raises acute concerns about the authority and legitimacy of law-making processes, particularly as non-disputing parties are increasingly affected. This panel will explore the extent and effect of law-making in international arbitration and will address criteria for its legitimacy.

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### ***Luncheon: Personal Reflections from Leading Arbitrators on Evolution and Adaptation***

Modelled on a TED Talks format and involving a series of informal remarks delivered over the luncheon break, leading arbitrators will offer their personal reflections on the past, present and future of their careers and of arbitration itself. What would they have done differently knowing what they know now? Has arbitration taken the path that they would have predicted? How will arbitration look 10 or 20 years from today? What are the biggest challenges facing arbitration as a dispute resolution mechanism and its stakeholders as a community? Questions and observations from the floor will be encouraged.

### ***Afternoon - Session 1*** **Arbitration Challenged Part I**

This afternoon features a choice of four panels organized around a central theme: that arbitration remains a “living” organism that is capable of adapting to new, substantive and practical challenges. We explore a series of different challenges currently facing the field and its users, and discuss whether further adaptation is needed, and if so in what form.

#### **Arbitration Challenged I: Reforming Substantive Obligations in Investment Treaties and Conditions of Access to Investment Arbitration**

The last decade has witnessed the introduction of new investment instruments and model treaty texts designed to address concerns about the scope and interpretation of substantive and jurisdictional provisions in older-style investment treaties. This panel will assess where things stand, as of April 2018, in the movement to reform the content of treaties and free trade agreements. Has the backlash against older-style treaties resulted in the dramatic changes that critics sought to achieve? What are the broader implications of those changes for both the rule of law and the process of achieving fair and expeditious resolution of disputes? Finally, which way is the pendulum now swinging—and what new initiatives are under way?

#### **Arbitration Challenged I: Reforming Commercial Arbitration in Response to Legitimacy Concerns**

Commercial arbitration is the choice of the parties to the agreement, but those parties are often not the only stakeholders affected by that choice or by resolution of the dispute between them. Recent years have seen concerns raised about the increasing use of arbitration and its potential impact on consumer and employment relationships, the dockets of commercial courts, and the development of common law. This session will explore criticisms of the legitimacy or reach of commercial arbitration and the reform efforts made to address them. How could, or should, commercial arbitration adapt in light of these legitimacy concerns? Equally, how has commercial arbitration been impacted by initiatives adopted in different jurisdictions to address those concerns?

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*Coffee break*

*Afternoon - Session 2*  
**Arbitration Challenged Part II**

**Arbitration Challenged II: Party Autonomy in Choosing Decision-Makers: Advantages and Drawbacks – Should it be Revisited?**

The opportunity to choose the decision-maker has long been one of the leading reasons for choosing arbitration over litigation. Recent developments, however, reflect concerns about the limits and risks of abuse in the party-appointment system: the frequency of challenges for so-called “issue conflicts” or repeat appointments, studies demonstrating the prevalence of dissents by party-appointees in favor of their appointing parties, proposals for standing tribunals and appellate mechanisms, and transparency initiatives, among others. Moreover, new players – who may be less familiar to established counsel guiding party appointments – could benefit from a system that provides greater institutional input or places certain constraints on party choice. Against this backdrop, what importance should be ascribed to the parties’ opportunity to choose the decision-maker over other values, such as accountability and consistency? This panel will explore whether it is time to rethink the parties’ latitude to shape the tribunal, and if so, in what ways.

**Arbitration Challenged II: The Realities of Arbitration Economics: Who Gets to Play, and What are the Implications?**

Arbitration can be an expensive process. This panel will address the implications of how parties fund their claims and defenses, based on recent studies, initiatives and debates. Topics will include (a) a report from the ICCA/Queen Mary Task Force on Third-Party Funding in International Arbitration, (b) developments with respect to cost awards and security for costs (including recent calls for reforms in investment arbitration to protect successful respondents against so-called “judgment-proof” claimants), and (c) the broader question of whether and how significant imbalances in party resources might affect the procedural choices that arbitrators are asked to consider, including the scope of pleadings and document disclosure, the length and venue of hearings, and other issues.

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**DAY 2 – Tuesday, 17 April 2018**

**Breakfast**  
*(details to come)*

**Morning - Sessions 1 and 2**

This morning is devoted to two-part sessions addressing major substantive and practical realities of modern arbitration. One track will explore the implications of the increasing involvement of public bodies and public interests in arbitration, with the attendant relevance of public law issues even in commercial contexts, and a growing focus on issues of confidentiality, transparency and public participation. The second track will focus on practical ways to build better arbitration proceedings, through revisiting conventional wisdom in organizing proceedings and adapting efficiency techniques from commercial courts, specialized arbitration regimes and other dispute resolution frameworks. Participants should feel free to mix and match between the two tracks.

**Arbitrations Involving Public Bodies and Public Interests: Salient Issues (in two-parts)**

**Part 1: The Increasing Participation of Public Entities in International Arbitration**

States and State entities are necessary respondents in investor-State arbitration and frequent disputing parties in international commercial arbitration. A multitude of State privatization processes, infrastructure and public utility projects, sovereign bonds and debt restructuring all potentially give rise to contractual and investment disputes determined by international arbitration. Given the increasing participation of public entities in international arbitration, this session will explore the need for counsel and arbitrators to properly understand private and public international law, as well as national commercial and administrative laws, in order to avoid pitfalls and the attendant risk of delegitimizing the arbitral process in the eyes of States and their citizens.

**Building Better Arbitration Proceedings: Practical Suggestions (in two-parts)**

**Part 1: Revisiting Conventional Wisdom in the Organization of Arbitral Proceedings**

There is great scope for parties and tribunals to adapt arbitral procedures to the needs of particular cases, and tribunals have experimented with new techniques in an attempt to address inefficiencies and to improve the quality of their decision-making. Often, though, force of habit and the very real benefits of predictability can act as a brake on innovation. This panel will focus on proposed innovations in the way fact and expert witnesses give evidence and the way tribunals make decisions. As a practitioner, when is it worth pushing a tribunal to adopt new techniques? As an arbitrator, when should you take the lead? When does predictability in procedure and decision-making properly outweigh the desire to improve cost-effectiveness and the quality of decisions?

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**Coffee break**

**Arbitrations Involving Public Bodies and Public Interests: Salient Issues (continued)**

**Part 2: Confidentiality, Transparency and Public Participation: Too Far or Not Far Enough?**

The debate about the role of civil society in investment arbitration has created significant movement towards greater openness in investment arbitration proceedings, under both newer treaties, the 2006 ICSID Rules amendment, and the new UNCITRAL Rules on Transparency. What is the broader impact of public access, including the potential spillover to non-treaty cases involving State entities or matters of public interest? How has the possibility of public scrutiny impacted pending cases? Are parties, witnesses, counsel and arbitrators playing to different audiences? How does this impact tactical choices, and what are the implications for time and cost? This panel will discuss the dynamic between two models of arbitration, the first as private dispute resolution (regulating fairness only between the parties) and the second as public inquiry (regulating broader norms of fairness). In other words, *“whose arbitration is this, anyway?”*

**Building Better Arbitration Proceedings: Practical Suggestions (continued)**

**Part 2: Efficiency and the Lessons to be Learned from Other Dispute Resolution Frameworks**

The interaction between arbitration and other dispute resolution systems has always been important, and arbitration must continue to learn from these mechanisms in order to ensure that it adapts and improves. This session will explore recent innovations in efficiency and transparency adopted by commercial courts, specialized arbitration regimes, and other dispute resolution frameworks, and the extent to which these innovations could (or should) be applied in arbitration.

**Luncheon**

*(details to come)*

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***Afternoon - Sessions 1 and 2***

The afternoon is devoted to two-part sessions addressing the challenges and opportunities of modernity. One track will explore the moving face of technology, in terms of both its potential to disrupt and its potential to facilitate orderly and efficient arbitral proceedings. The second track will focus on two different aspects of modernity: the hottest topics of 2018 and the voices of the next generation of arbitration leaders. Participants should feel free to mix and match between the two tracks.

<b><i>The Moving Face of Technology (in two-parts)</i></b>	<b><i>Hot Topics and New Voices (in two-parts)</i></b>
<p><b><u>Part 1: Technology as Disruption</u></b></p> <p>Every day, technology serves to facilitate international arbitrations across the world. However, technology also has the capacity to disrupt the practice of arbitrators, practitioners and institutions alike. Should arbitration embrace and incorporate increasingly sophisticated Artificial Intelligence programs? How should arbitration professionals protect against the risk of hacking, and how should cyber-security be maintained and, potentially, sanctioned? In this first of two sessions on technology, the challenges and opportunities posed by disruption will be explored.</p>	<p><b><u>Part 1: Hot Topics</u></b></p> <p>A true “hot topics” panel cannot be planned too far in advance. In this session, we will bring you ICCA’s version of a “rapid response team,” discussing the latest controversies, newest decisions, and boldest proposals of 2018. Congress delegates will be invited in advance to suggest “breaking news” topics for the panel’s consideration.</p>

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### *Coffee break*

#### **Part 2: Technology as Facilitation**

Technology continues to offer new and cost-efficient ways to elide the physical distance posed by geography. Additionally, new technologies may offer solutions to many challenges commonly faced in international arbitration, from the management of voluminous document productions, to the bias-free evaluation of witness testimony, to the facilitation of settlement between entrenched opponents. This second session on technology will explore the potential ways in which technology can facilitate the efficient, fair, and effective conduct of arbitrations.

#### **Part 2: New Voices**

This panel will feature short but provocative presentations by young practitioners, on topics of fresh interest or involving emerging jurisdictions, selected to showcase the energy and talent of the next generation of arbitration leaders. Panelists will be selected following a call for detailed proposals relating to the Congress theme (disseminated through Young ICCA and other channels), and will have the opportunity to contribute final papers to the Congress Book.



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**DAY 3 – Wednesday, 18 April 2018**

***Breakfast***

*(details to come)*

***Theme for the Morning:***

***New Frontiers in International Arbitration (a two-part plenary)***

In this final morning of an ICCA Congress devoted to evolution and adaptation in international arbitration, we focus on new frontiers. In two plenary sessions, we bring you arbitration’s version of the famous Star Trek mission: “to explore strange new worlds, to seek out new life and new civilizations, to boldly go where no [arbitrator] has gone before.” Join us for this mission to the future.

**Plenary Part I (09:00 – 10:15): Potential of Arbitration Involving New Types of Claims**

This plenary will explore potential new types of claims that may lie ahead in international arbitration, arising under international, national and regional laws, or emerging transnational norms.

21<sup>st</sup> Century economic development has brought many benefits, but it has also had an impact on fundamental aspects of the rule of law and the rights of individuals. To retain its legitimacy, international arbitration must be sufficiently robust and flexible in order to accommodate new types of claims. This panel will explore how arbitration in the future might become a forum for resolving disputes under new international and national laws, international policy and emerging norms on corruption, human rights, labour laws, health and safety, protection of indigenous peoples and other affected populations, and environmental and climate change commitments.

***Coffee break***

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**Plenary Part II (10:30 – 11:45): Potential of Arbitration Involving New Stakeholders**

This final plenary will explore the possibility of new participants and stakeholders in international arbitration beyond States, foreign investors and parties to conventional commercial arbitration agreements.

As discussed in earlier panels, one of the challenges to the legitimacy of arbitration is the perceived lack of participation by non-party stakeholders affected by the outcome of the dispute, such as employees, impacted local populations (including but not limited to indigenous peoples) and other affected groups or individuals in civil society. Increased transparency and the use of *amicus* briefs in investor-State arbitration have provided an opportunity for certain affected individuals or populations to be heard, but not to pursue claims or obtain relief. This panel will explore the innovative use of arbitration agreements, such as those used in the Abyei Arbitration and Bangladesh Factory Accord, to provide a mechanism to enforce and protect the rights of all stakeholders affected by the underlying subject matter of the dispute.

***Closing Session:***

Closing Keynote Address

Introduction to 25<sup>th</sup> ICCA Congress to be held in Edinburgh

Closing Remarks

*(details to come)*