BIG QUESTION
Is third-party funding the passcode to justice?

HOW TO...
PRICE ENVIRONMENTAL DAMAGE

CASE NOTE
SOLEYMANI v NIFTY GATEWAY LLC

THE Resolver

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Spring 2023 ciarb.org

Embracing equity for effective dispute resolution

LEADING FEMALE VOICES IN ADR SHARE WHAT EQUITY, THE THEME OF THIS YEAR'S INTERNATIONAL WOMEN'S DAY, MEANS TO THEM

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Changing of the guard

It is my pleasure and singular honour to assume the role of Ciarb President for 2023.

Ciarb is one of the, if not the, oldest ADR organisations in the world.

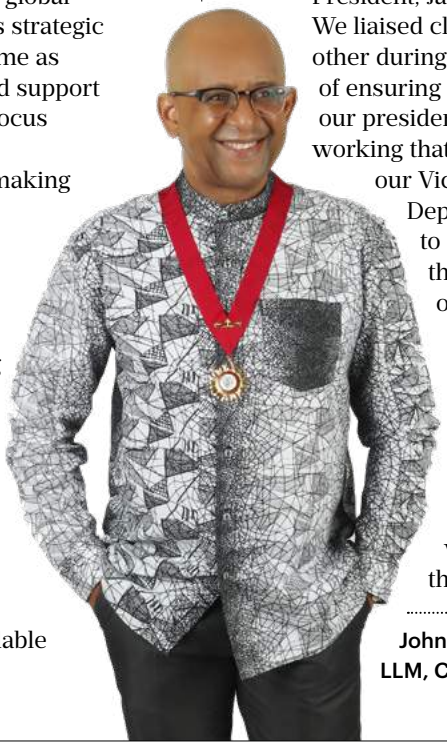
As founding Chair of Ciarb's Caribbean Branch, the Institute holds a special place for me. I am aware of the responsibility that comes with the role of President and pledge to fulfil it to the best of my ability. I am also excited by the opportunities and possibilities ahead for our profession and the Institute.

Ciarb has great potential for growth. I am committed to the Ciarb global family and the organisation's strategic plan and intend to use my time as President to advocate for and support growth. In particular, I will focus on increasing:

- Ciarb's global visibility – making the most of our brand presence and supporting greater awareness of our brand.
- Global unity and coordination – connecting with other organisations with the aim of increasing Ciarb's market share in its core activities.
- Awareness and access – encouraging smaller organisations in smaller jurisdictions to access the support and network available through Ciarb.

I look forward to drawing on my experience and expertise in achieving these aims. My career has, over the past 21 years, led me to practise in the Caribbean, North America, the UK and Africa. In that time, I have practised as a barrister-at-law, attorney-at-law, chartered arbitrator, multi-jurisdictional Supreme Court appointed mediator, Justice of the Peace, trainer in ADR and a management accountant. In addition, I have served on ADR working groups at the UN.

I would like to take this opportunity to give my thanks to our immediate past President, Jane Gunn FCIArb. We liaised closely with each other during 2022 with the aim of ensuring continuity through our presidencies. It is a way of working that I will replicate with our Vice President and Deputy Vice President to ensure we are all on the same page and pool our counsel.



I would like to wish our members, staff and their families a blessed, healthy and prosperous remainder of 2023 and I look forward to working with you over the coming year.

John S. Bassie LLB (Hons), LLM, C.Arb FCIArb, Dip.CIArb

INSIDE THIS ISSUE

What's on

Give your career a boost with this selection of training opportunities

FIND AND BOOK COURSES AT www.ciarb.org/training

SPOTLIGHT ON

Virtual Diploma in International Maritime Arbitration

5 April–28 June 2023 £5,100
Book by 2 April 2023
Course director: George Lambrou FCIArb

The scale, diverse range and complexity of maritime arbitrations, coupled with an increase in arbitral systems, mean that it is essential to have the right knowledge and skills to navigate this field. Ciarb's Virtual Diploma in International Maritime Arbitration provides the in-depth training you need. This Diploma leads to eligibility for Ciarb Member status or Fellowship (subject to peer interview).

Diploma in International Commercial Arbitration

F2F: 8–17 September 2023 £9,000
Virtual: 5–28 May 2023 £5,250
Book by 20 April 2023

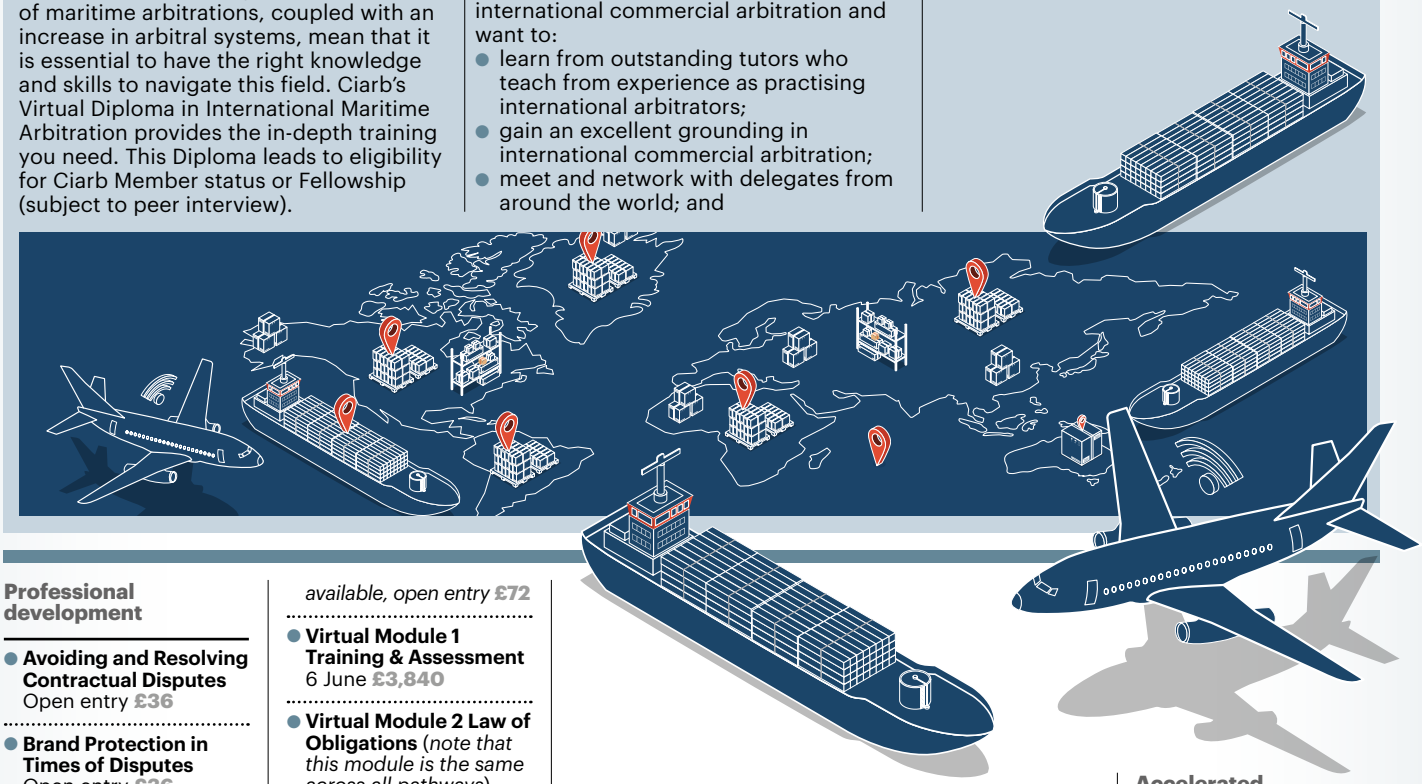
Course director:
Dr Mohamed Abdel Wahab C.Arb FCIArb

If you are serious about a career in international commercial arbitration and want to:

- learn from outstanding tutors who teach from experience as practising international arbitrators;
- gain an excellent grounding in international commercial arbitration;
- meet and network with delegates from around the world; and
- progress towards Ciarb Member status or Fellowship

... then Ciarb's Diploma in International Commercial Arbitration is for you!

Register your interest in these Diplomas by emailing education@ciarb.org



Professional development

- **Avoiding and Resolving Contractual Disputes** Open entry £36
- **Brand Protection in Times of Disputes** Open entry £36
- **A Guide to Arbitration Award Writing** Open entry £150
- **Principles of Project Management Applied to Arbitration** Open entry £15

ADR

- **Online Introduction to ADR** Open entry £27 *Separate assessment available, open entry £72; student course/ assessment bundle £54*

Mediation

- **Online Introduction to Mediation** Open entry £120 *Separate assessment available, open entry £72*
- **Virtual Module 1 Training & Assessment** 6 June £3,840
- **Virtual Module 2 Law of Obligations** *(note that this module is the same across all pathways)* 3 April £1,190 *Assessment 12 October* £342
- **Virtual Module 3 Mediation Theory and Practice** Open entry, price on application

Construction adjudication

- **Virtual Introduction to Construction Adjudication** 13–14 July £265 *Assessment 14 July* £72
- **Virtual Module 1 Law, Practice and Procedure of Construction Adjudication** 14 September £1,190 *Assessment 30 November* £174
- **Virtual Module 2 Law of Obligations** *(see above)*
- **Virtual Module 3 Decision Writing in Construction Adjudication** 17 August £1,190

Domestic arbitration (England and Wales)

- **Virtual Module 1 Law, Practice and Procedure of Domestic Arbitration** 14 September £1,190 *Assessment 30 November* £174
- **Virtual Module 2 Law of Obligations** *(see above)*
- **Virtual Module 3 Domestic Arbitration Award Writing** 17 August £1,190

International arbitration

- **Virtual Introduction to International Arbitration** 6–7 July £265 *Assessment 7 July* £72
- **Virtual Module 1 Law, Practice and Procedure of International Arbitration** 14 September £1,190 *Assessment 30 November* £174
- **Virtual Module 2 Law of Obligations** *(see above)*
- **Virtual Module 3 Award Writing in International Arbitration** 17 August £1,190 *Assessment 1 December* £408

Accelerated programmes

- **Virtual Accelerated Route to Membership: International Arbitration** 11–13 July £1,320
- **Virtual Accelerated Route to Fellowship: International Arbitration** 5–9 June £1,720

Diplomas

- **Diploma in International Commercial Arbitration** **F2F:** 8–17 September £9,000 **Virtual:** 5–28 May £5,250
- **Virtual Diploma in International Maritime Arbitration** 5 April–28 June £5,100

Prices subject to change; all prices correct as at February 2023

The opener

Changes at the top for Young Members Group


Baptiste Rigaudeau MCIArb

Baptiste Rigaudeau MCIArb is the new Chair of the Ciarb Young Members Group (YMG) global steering committee, the body that promotes activities for dispute resolution practitioners under the age of 40.

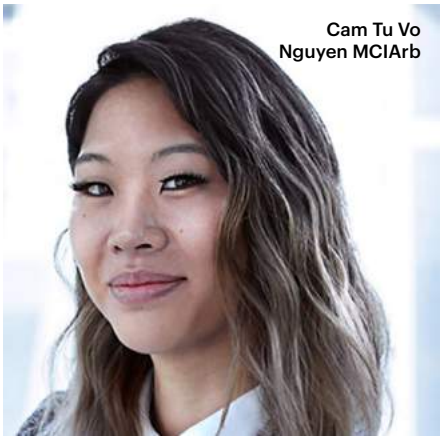
The French dispute resolution lawyer, who succeeds outgoing Chair Noreen Kidunduhu MCIArb, is based in Geneva and has experience representing clients in institutional and ad hoc arbitrations under a wide range of arbitral rules. He co-leads the dispute resolution group of the African Society of International Law and writes and speaks frequently on disputes in the continent. He holds a master's degree in arbitration and international business law from the University of Versailles and an LLM from Cardiff Law School.

Rigaudeau will be working with new Vice-Chair Cam Tu Vo Nguyen MCIArb, a dual-qualified lawyer admitted in Paris and New York who works at the Arbitration Chambers in Singapore as Tribunal Secretary. She has also worked with the ICC International Court of Arbitration in Paris. Vo Nguyen succeeds Ana Gerdau de Borja Mercereau FCIArb in the post.

"We are looking forward to nurturing relationships between Ciarb branches and the YMG committee, which is made up of 16 dispute resolution practitioners in different jurisdictions," she said.

Her words were echoed by Rigaudeau: "Cam Tu and I will be looking to benefit from the diversity of experiences, backgrounds and visions in the YMG to ensure our members have equal access to our 2023 initiatives.

"Our goal is to strengthen the group's ties. Stay tuned and reach out to us with your ideas."


Cam Tu Vo Nguyen MCIArb

Raise a glass: Ciarb and the Pubs Code Adjudicator

Ciarb is delighted to announce the first anniversary of its contract as the sole provider of Arbitration Referral Services to the Pubs Code Adjudicator (PCA) and welcomes four new Pubs Code Confident Arbitrators to its PCA panel.

Pubs Code Adjudicator Fiona Dickie

Pubs Code Adjudicator Fiona Dickie said: "It is great to see the progress Ciarb has made in the first year of the contract. In this time, we have seen a significant reduction in open cases, closer monitoring of the arbitrator standards and an improved published quarterly report. In the PCA's three-year strategy, published in August last year, I restated my commitment to providing a quality arbitration service for pub companies and tied tenants."

The Pubs Code came into effect in 2016 and regulates the relationship between all pub companies owning 500 or more tied pubs in England and Wales and their tied tenants.

The PCA is responsible for enforcing the Code and providing an arbitration service for disputes between pub companies and tied tenants about Code compliance. The PCA can either arbitrate the dispute or appoint another arbitrator to do so. Alternative arbitrators have been appointed in most cases since 2019.

Pubs Code Adjudicator

Ciarb and EWI: better together

The Expert Witness Institute (EWI) and Ciarb have joined forces in a partnership that will benefit both organisations.

"Expert witnesses play a critical role in enabling parties to resolve their dispute effectively and fairly. Providing training and support through the EWI will enable experts to more effectively discharge this important role within the ADR process," said Ciarb Director General Catherine Dixon MCIArb.

Her words were echoed by EWI Chief Executive Simon Berney-Edwards: "The effective use of experts is the factor that will often determine whether a mediation or arbitration will succeed or fail. During their career, as expert witnesses see the impact their contribution can have on dispute resolution, some will consider moving into arbitration alongside their expert witness practice. I am therefore extremely excited to be able to offer our members a clear entry route into the ADR profession through this alliance with Ciarb."

SHUTTERSTOCK

A compelling case for equity

Catherine Dixon MCIArb considers the meaning of equity and the challenges of implementing it at Ciarb

Equity. Seems a simple enough concept, right? But what does 'equity' mean in practice? This year's theme for International Women's Day was equity, and I've been reflecting on what equity really means and, in particular, what it means for Ciarb and our global dispute resolution community.

Equity can be defined as a "situation in which everyone is treated fairly according to their needs".

Sometimes we think that to achieve equity we need to treat everyone the same. However, treating everyone the same without acknowledging and considering diversity and differences does not result in equity.

For example, we would not think it appropriate to arrange a meeting for a wheelchair user in a room they cannot access. To ensure equity we need to take steps for the individual or group to ensure an equal outcome. Therefore, equity is achieved when we consider needs and allocate resources to give people parity with others.

This may sound unfair because it does result in some individuals and groups getting more resources than others. The concept of fairness can be tricky as it is often assumed that being fair means giving everyone the same. However, fairness can only work if we all start out with the same, and we know that we don't.

Enabling everyone to succeed irrespective of their background cannot be achieved by taking a one-size-fits-all approach. We need to consider the barriers some individuals and groups face and take steps to address them, thereby creating a fairer world for all.

Equity and fairness also are intrinsic to the concept of justice. On International Women's Day it is important to recognise the inequalities women face, to acknowledge that gender is also intersectional, and that women, as a group, are truly diverse. Intersectionality is an understanding of how aspects of an individual's identity combine to create different types of discrimination and privilege. Policies that benefit white women may not benefit women of colour due to historic or current inequalities.

Moving from equality to equity acknowledges that there cannot be one approach to achieve diversity. This is what makes implementing equity dynamic, exciting and innovative. Equity is important to Ciarb's members globally and to society, but the Institute still has a long way to go to achieve parity. Although the number of women members has increased, we do not yet have parity with men. We are therefore taking steps to improve the diversity of our appointments and at our events, and to grant fair access to our training. Ciarb is also supporting initiatives that promote greater gender parity and fairness in our sector, including the Equal Representation in Arbitration, Equal Representation of Expert Witnesses and, most recently, the Equal Representation in Adjudication pledges, among others.

On International Women's Day (8 March 2023), our event on embracing equity brought together leading voices in dispute resolution to reflect on what equity means to us and to share experiences of equity in our professional and personal lives. As the year progresses, we will also host discussions on equality, diversity and inclusion as part of our new series *Let's Discuss!* Please do look out for these events and join the conversation to help us generate fresh ideas about how Ciarb can contribute to fostering equity in all areas. To find out more, contact events@ciarb.org.

If you truly believe, as I do, in forging an equal and inclusive world, I would encourage you to make the shift from gender equality to gender equity and together we can create fairness for all.

Let's #embraceequity – together!

ABOUT THE AUTHOR

Catherine Dixon MCIArb is Director General of Ciarb. She is a solicitor and an accredited mediator.

Embracing equity for effective dispute resolution

Leading female voices in dispute resolution gathered at Ciarb's headquarters on 8 March to share what equity, the theme of this year's International Women's Day, means to them and whether it has been embraced in their country.

Below, we hear from three of them.

OLENA PEREPELYNSKA FCIArb
UKRAINE

A few years ago I was at an arbitration conference in Kyiv at which participants were asked to name the top three practitioners in their jurisdiction. Ukraine's shortlist stood out: it was the only one with three female arbitrators.

It was pleasing, but not wholly surprising. Women have long been active in public life and the professions in Ukraine, and the country's ADR sector is no exception. And it's a young community, at around 30 years old.

Indeed, when it comes to mediators in this country, the situation is similar. Statistics released by the International Commercial Arbitration Court (ICAC), the most experienced arbitral institution in the country, which typically administers 250–350 international cases a year, show that parties appoint women arbitrators in nearly half of cases: 44.4% in 2021; 57.4% in 2020; 45.6% in 2019; 45.8% in 2018; and 45% in 2017.

Against this background, the percentage of appointments by the ICAC is slightly less impressive: it sits at around 40%. But it's a good statistic on the world stage, and as an arbitrator in ICAC cases, I can report that I mostly sit with one or two other women and that I also receive appointments as a sole arbitrator from parties and the institution.

It's a similar picture elsewhere. Five of the 13 arbitration lawyers that Who's Who Legal lists for Ukraine are women, and of the seven Ukrainian lawyers in other jurisdictions, five are female. In the round, it's a perfect 50:50 ratio.

Also interesting is that almost all of Ukraine's professional associations for lawyers and ADR practitioners are led by women. These bodies include: the Ukrainian National Bar Association, the Ukrainian Bar Association, the Ukrainian Advocates Association, the Ukrainian Arbitration Association, the ICC Ukraine Arbitration commission, the Ukrainian Mediation Centre and the League of Mediators of Ukraine.

None of this is to say that there is no room for improvement. When it comes to maternity leave, childcare and traditional parental roles, Ukraine is not ahead of the curve. Many talented Ukrainian practitioners derail their legal careers when they become mothers. There is legislative work to be done and public opinion to change: the answer is probably a new generation with a fresh mindset.

But you can say we have achieved magic numbers, and that when it comes to ADR, Ukraine's future is looking bright. ►

ABOUT THE AUTHOR

Olena Perepelynska FCIArb is Partner and Head of Arbitration at Integrites law firm in Kyiv, Ukraine, and President of the Ukrainian Arbitration Association. She has acted as counsel in about 90 international arbitrations under various rules and has served as arbitrator in more than 70 arbitrations seated in Almaty, Bishkek, Kyiv, London, Minsk, Paris, Vienna and Stockholm.

Women have long been active in public life and the professions in Ukraine, and the country's ADR sector is no exception

INK DROP/SHUTTERSTOCK

TOPE ADEYEMI FCIArb
UK

Over the past decade, Britain's ADR community has certainly seen changes for the better in the field of gender equity.

Let's start with the stats. Without them, all you have is opinion, after all.

In its annual casework reports, the London Court of International Arbitration (LCIA) records that, in 2021, 47% of all LCIA court appointments were women, an increase from 33% in 2020 and 24% in 2017. And in the International Council for Commercial Arbitration's (ICCA's) cross-institutional task force's 2022 report on gender diversity in arbitral appointments, it found that the proportion of women appointed had more than doubled. So, in terms of institutional appointments at least, that's real progress.

This progress is largely thanks to ArbitralWomen, the Equal Representation in Arbitration Pledge and, of course, Ciarb, which has done much to foster gender equity simply through the opportunities it offers practitioners to network.

But while appointments are crucial, achieving equity is not only an appointments numbers game. Equity means that women of all ethnic backgrounds can participate in ADR at all levels, including the best-paid positions.

And while finding information about pay in ADR is not easy, the data we can access is sobering. In November 2020, the Bar Council of England and Wales, the representative body for barristers, published the Gender Pay Gap Table. It revealed that of the 664 barristers who declared they were receiving work in the area classified as 'arbitrator, umpire or mediator', 504 were men and they received 89% of the monies earned by the whole group. Also notable was that, of the 160 women working in the area, only 11% of their earnings were from ADR work, suggesting that the little ADR work they did do was not well paid.

ABOUT THE AUTHOR

Tope Adeyemi FCIArb is a barrister and arbitrator practising from 33 Bedford Row Chambers in London. Her practice focuses on regulation and ADR. She is a Ciarb Fellow and a member of its London Branch committee.

There could be a number of reasons for these statistics, but when we also consider a recent report from the Bar Standards Board, it seems there's a problem. The February 2022 study *Income at the Bar – by Gender and Ethnicity* from the regulatory body for barristers looked at the incomes of male and female barristers from minority ethnic backgrounds and found they were likely to earn less than their white counterparts. And in the financial and commercial law sector, the gap was significant, with women with over 15 years of call earning less than half that of their male counterparts.

Since arbitral work is generally associated with commercial practice, the disparity in earnings at the commercial bar is significant. In order for Ciarb and ArbitralWomen's work in gender equity to have the most impact, women need to be put forward for the most complex and lucrative work. This is, after all, how practitioners showcase their skills – and get more complex and lucrative work.

Conclusion? We are on the right track, but there is still work to be done.

Women need to be put forward for the most complex and lucrative work. This is, after all, how practitioners showcase their skills.

FÁTIMA CRISTINA BONASSA FCIArb
BRAZIL

Anecdotally, we know that more and more women are working in ADR in Brazil, a country where national and international commercial arbitration is now a widely accepted method of dispute resolution.

The Brazilian Arbitration Law, inspired by the UNCITRAL Model Law, was published in 1996 and amended in 2015. The major arbitration chambers, which are the paradigms of arbitration management, are found in the South-East and South Regions, and have seen a significant increase in the number of cases: in 2020, 333 new cases were added to the then ongoing 1,047 other cases.

Arbitration is the preferred option not only for commercial, corporate, construction and energy disputes, but also for those occurring in sport and labour. According to a survey presented by one of the major Brazilian chambers, there has been an attendant increase in women making up arbitral tribunals. In 2020, 59.1% of nominations were for women; in 2021, it had increased to 63.35%. But while this is cheering, it's important to note that the figures represent only a few locations. From this data, we can see that more and more women are working in ADR in Brazil; however, it refers to the situation at the arbitration chambers located in São Paulo, Rio de Janeiro and Belo Horizonte – urban centres connected with international developments in arbitration – and does not necessarily reflect what is going on in the rest of the country.

ABOUT THE AUTHOR

Fátima Cristina Bonassa PhD FCIArb is a lawyer and ADR practitioner with a doctorate in international law from the University of São Paulo. She is the Honorary Secretary of the Brazil Branch of Ciarb and a certified mediator for the Centre for Effective Dispute Resolution (CEDR Neutral).

Mediation is also growing rapidly as a form of ADR. The Brazilian Mediation Law, dated 2015, institutionalised the use of mediation both as an autonomous procedure and as the first step in med-arb or med-jud situations. It has been widely adopted in the judiciary before and during the judicial process. Although it is also perceived that women outnumber men in the field, there is no hard data to support such perception. The same lack of information applies to dispute boards, which are increasingly used in public projects.

We can also refer to women in ADR acting as legal counsel. The data doesn't exist, even if there has been an observable increase in the number of women in the field. In short, unlike in general-practice law, where the statistics show that female lawyers account for 57% of practitioners (even if less than 32% are partners), there has been insufficient research about the number of female practitioners in ADR. ■

Unlike in general-practice law, there has been insufficient research about the number of female practitioners in ADR

Third-party funding: the passcode to justice?

By Kateryna Honcharenko MCIArb

When asked to name one of the most fundamental of human rights, a common answer would be things such as the right to life, liberty, security and education; freedom of expression, belief, speech and others. Many hold such things as ensuring the most basic needs of a person in a civilised world, and they are considered inalienable in civic systems around the world. The authors of some of the most enduring legal instruments in history, such as the Magna Carta, the Universal Declaration of Human Rights and other national charters, made sure to include these important rights that form the principle of the right of access to justice, which is the ability to exercise all of a person's other rights and freedoms and to hold those that violate those rights and freedoms accountable.

Lack of funding is one of the highest barriers to access to justice

ABOUT THE AUTHOR
Kateryna Honcharenko MCIArb is Ciarb's Arbitration Professional Practice Manager

Governmental and institutional efforts are aimed at demolishing numerous barriers to access to justice. Lack of funding is one of the highest of those barriers. *"Litigation or arbitration are some of my options but are so expensive. How can I afford this? Where will I find the money to pay a lawyer? How much more could I lose if I do not?"* Such questions have, inevitably, locked many individuals and companies into a stalemate when a dispute arises with others.

SHUTTERSTOCK

ACCESS TO JUSTICE IN ARBITRATION: JUSTICE ACCESSIBLE PER SE?

The definition of arbitration demonstrates the reasons why it has been referred to as an access to justice instrument: "a dispute-resolution process where parties **agree** that their dispute should be **settled by an independent decision-maker who, having given the parties an opportunity to be heard and present their case**, issues a **final and binding award**."

Costs associated with arbitral proceedings, such as filing fees, arbitrators' fees and particularly fees to engage legal counsel, have in many cases rendered the mechanism unaffordable or, for the purposes of this article, inaccessible. There are, however, ways to reduce fees, for instance, by way of heavier reliance on technology, insurance or even fee arrangements, and third-party funding (TPF).

THIRD-PARTY FUNDING

TPF is a rapidly developing global industry that combines legal, financial and business aspects.

Over the years, there has been a shift in perception of TPF that has made the process more standardised

Nowadays TPF is accessible to any type of business, from up-and-coming independent artists whose copyright is being infringed upon to major international corporations. Under certain conditions, funders will agree to pay all the costs for pursuing a legal claim, whether in litigation, arbitration or adjudication, and to cover all or a portion of the costs in exchange for a percentage of the amount awarded to the party. This mechanism helps to create a more balanced dispute resolution environment where the financially less privileged or claimholders without access to funds have a chance to pursue their claim.

Over the years, there has been a shift in perception of TPF that has made the process more standardised and widely acceptable. As a result, this makes justice more accessible to parties receiving funding, both on a substantive and procedural level. Due to existing legislative barriers (for instance, the common-law doctrines of maintenance and champerty) or the absence of internal legal instruments to facilitate the development of TPF, it has taken much longer in some countries to establish the mechanism as credible and fair.

TPF has spread not only geographically, but also in terms of the pool of users and types of cases involved. In some countries, the role of TPF as an efficient access-to-justice mechanism has been recognised on the level of legislative acts (Hong Kong, Singapore, Australia) or court decisions (the UK, India).

SHUTTERSTOCK

THIRD-PARTY FUNDING AND ARBITRATION

There might be varied reasons why a claimholder would resort to TPF beyond a simple lack of funding. High uncertainty of outcomes, management of risks associated with costs of arbitration, guerrilla tactics employed by the other party resulting in unnecessary delay or expense, all lead parties to pursue funding.

In any case seeking funding, due diligence – including a thorough examination of the merits, the parties involved, the likelihood of successful outcome, likely duration of proceedings and the costs involved, as well as the provisions of the arbitration agreement and whether funding is allowed under the chosen law – will be conducted on the part of a funder before deciding whether a case is worth the investment. Once a funding decision has been made, a funding agreement is signed between the funder and the holder of a claim. This agreement includes provisions on the amount and conditions of funding. To mitigate the risks associated with sporadic investments, some funders cooperate with law firms to cover packages of claims with certain characteristics and/or from certain clients. While the funder has no access to the management of the case, it is expected that the funder will be kept apprised of key procedural developments.

TPF: WHAT YOU SHOULD CONSIDER

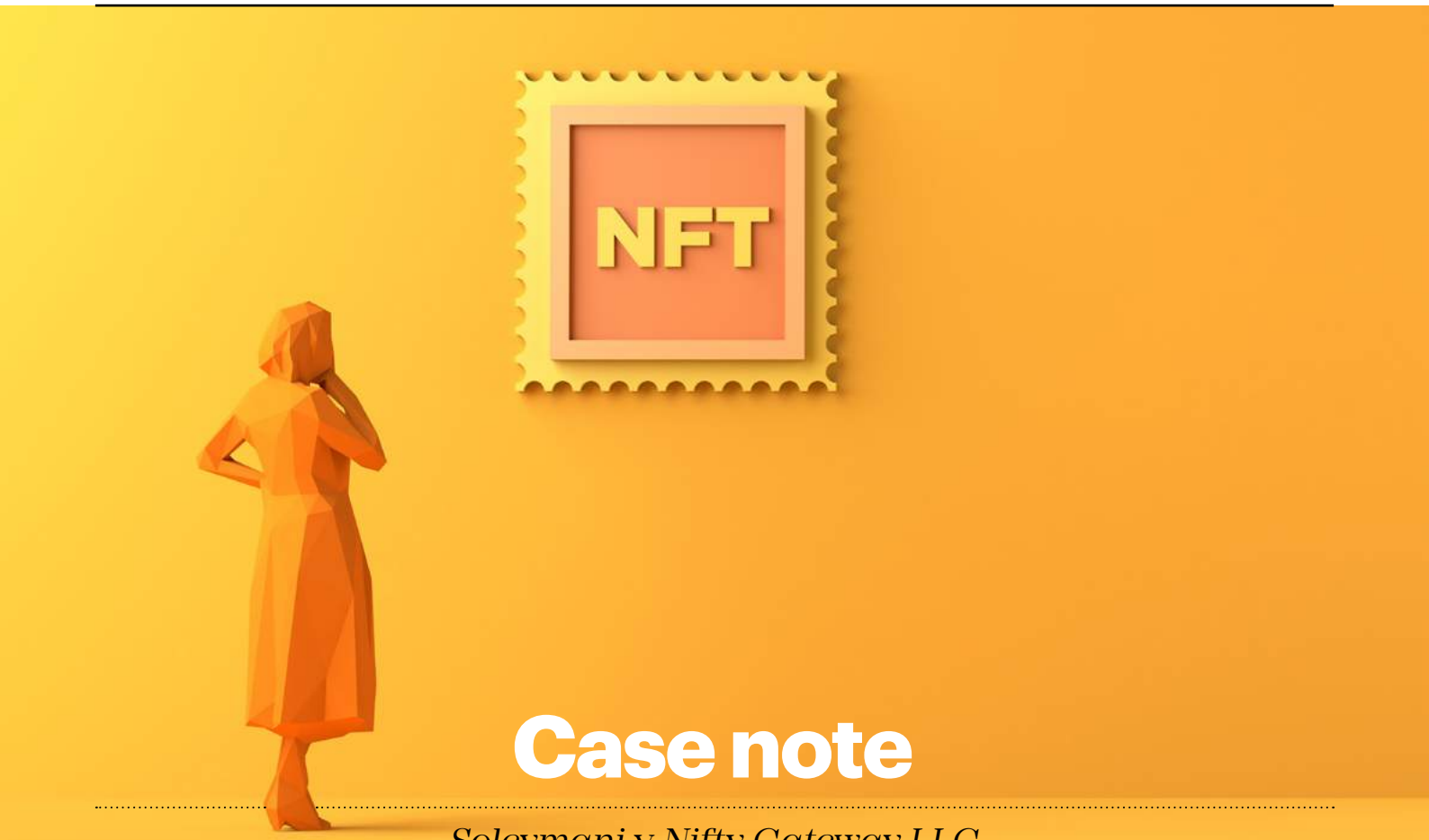
While there are some undeniable advantages to using TPF to pursue a claim, there are certain matters that should be kept in mind when considering TPF. One of the most significant considerations is the potential for conflicts of interest in using a funder that is involved in a high volume of cases, some of which may have elements in common. These elements can include a common arbitrator, legal counsel, party or legal issues. To avoid potential conflicts of interest, a party should disclose if there are funding arrangements associated with its claim. Financial aspects also must be considered as, depending on the conditions of the funding agreement, a significant amount might have to be paid to the funder. Moreover, approaching and arranging a deal with a funder will also incur upfront costs.

To avoid potential conflicts of interest, a party should disclose if there are funding arrangements associated with its claim

TPF: POSSIBLE FURTHER DEVELOPMENTS

Provisions on TPF and its regulation continue to be included in many instruments, apart from national laws and court rulings, such as arbitration rules (e.g. HKIAC, ICC, ICSID) and bilateral investment treaties. A notable recent development is the European Parliament's September 2022 resolution with recommendations to the European Commission on responsible private funding of litigation. The resolution proposes a Directive that would create an independent legislative framework for funding activities. According to the proposed text, the resulting regulation would apply to arbitrations with the seat in an EU member state. The outcome of the initiative remains to be seen.

SHUTTERSTOCK



Case note

Soleymani v *Nifty Gateway LLC*

Enehuwa Adagu ACIArb considers a clash between an arbitration agreement and consumer protection laws

This case is notable for being the first to consider whether English courts can determine if domestic consumer rights law can be used to invalidate an arbitration agreement. It is also the first case to reflect on the hierarchy of the Recast Regulation with respect to arbitration and consumer rights, and it appears to be the first non-fungible token (NFT) case to be heard by the Court of Appeal. The English High Court trial will provide further clarity on the applicability of arbitration agreements on consumer rights.

THE CLAIMANT AND DEFENDANT

The claimant in this case, Mr Soleymani, is a wealthy Liverpool-domiciled individual with substantial cryptocurrency holdings. The defendant, Nifty Gateway ('Nifty') is a company that operates a digital platform which displays, sells and purchases digital art in the form of NFTs.

Nifty's terms of use, specified on its website, included a New York governing law provision and a clause that required all disputes with Nifty to be arbitrated in New York by the ADR provider JAMS.

THE BACKGROUND

Mr Soleymani participated in an auction which was held on Nifty's platform between 30 April and 2 May 2021. He successfully placed a US$650,000 bid on a blockchain NFT that was associated with an artwork by the artist known as Beeple. The auction was a 'ranked' one, whereby the highest 100 bidders were successful and so each obtained NFTs associated with the artwork in question. The successful bidders would receive different editions of the artwork based on the position of their bids, so the highest bid was awarded the first edition, the second-highest bid receiving a second edition, and so on. Mr Soleymani's bid was the third highest, which entitled him to receive the third edition of the NFT artwork. Mr Soleymani contended that he would not have bid the

ABOUT THE AUTHOR
Enehuwa Adagu ACIArb is Ciarb's Policy and External Affairs Officer

Nifty's terms of use included a New York governing law provision and a clause that required all disputes with Nifty to be arbitrated in New York by JAMS

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US$650,000 if he had known that Nifty's auction was a ranked one. He therefore refused to pay for the NFT and Nifty commenced arbitral proceedings in New York under the JAMS rules.

Mr Soleymani challenged the jurisdiction of the arbitrator and commenced proceedings in England against Nifty. Mr Soleymani argued: that the arbitration agreement was unfair and non-binding since he was a UK consumer; that the governing law was also unfair and not binding; and that the contract resulting from his bid was not binding because it was contrary to the Gambling Act 2005.

At first instance, the English High Court held that the court had jurisdiction to hear the governing law claim and Gambling Act claim. However, it found that the court did not have jurisdiction to decide whether the arbitration agreement was valid. The judge ordered a stay of that claim so that it could be determined by the JAMS arbitrator. Mr Soleymani appealed both parts of the judgment.

THE APPEAL

Mr Soleymani advanced his appeal to the English Court of Appeal on three grounds. Namely, that the court had jurisdiction under section 15B of the Civil Jurisdiction and Judgments Act 1982 (the CJJA), since the exception for arbitration under Article 1(2)(d) of the Brussels Recast Regulation did not apply; the judge erred by failing to declare the governing law clause as not binding; and the judge erred by staying proceedings under section 9 of the Arbitration Act 1996 without first deciding the question of fairness or ordering a trial before the English court on the issues.

The Court of Appeal dismissed the first two grounds on the basis that when the CJJA incorporated the Recast Regulation into domestic law, the exclusion of arbitration from the scope of the regulation took precedence over the sections of the regulation which provided for consumer disputes. The court permitted the appeal under the third ground, directing that a trial should take place to establish whether the arbitration agreement was "null and void, inoperative, or incapable of being performed".

The court refused to stay the proceedings to await the outcome of a JAMS arbitration, citing the "public importance" of the case and saying that it was "best decided by a domestic court" rather than by private arbitration.

Read the full judgment here.

The court directed that a trial should take place to establish whether the arbitration agreement was "null and void, inoperative, or incapable of being performed"

How to... price environmental damage

Hanif Virji discusses the growth in climate change litigation and its implications

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Climate change litigation is growing rapidly. In the last eight years, 1,200 cases have been filed, a quarter of them in the last two years. Between 1986 and 2014, there were only 800 cases.

Their target? Governments, fossil fuel companies and the food, agriculture, transport, plastics and finance sectors. In short, any company of a certain size is a potential target: industry requires energy, and producing this energy emits greenhouse gases.

Many cases are brought for strategic reasons rather than compensation – to bring about a change in behaviour or to push certain policy objectives

Many cases are brought for strategic reasons rather than compensation – to bring about a change in behaviour or to push certain policy objectives. And it is effective. Four years ago, in Milieudefensie et al. v Royal Dutch Shell plc, the Hague District Court ordered Shell to reduce its CO_2 emissions by 45% by 2030. The order relates not only to Shell's emissions, but also to the end users of its products. The case is being appealed.

Not all cases have been brought with a view to bringing about positive change for the environment, however. Sometimes, policy changes aimed at lowering emissions are disputed. In RWE and Uniper's ICSID arbitration proceedings against The Netherlands, the claimants alleged that the country's decision to

phase out all coal-fired power plants violated its obligations under the Energy Charter Treaty. This was a climate change case driven by financial interest.

PRICING ENVIRONMENTAL DAMAGE

Nevertheless, Setzer and Higham (2022) believe we can expect many more climate change cases that seek monetary redress. The question is: how do you put a price tag on environmental damage?

Luciano Lliuya v RWE is a case in point: Peruvian farmer Mr Lliuya alleged that RWE, Germany's largest electricity generator, was emitting greenhouse gas that was contributing to the melting of glaciers across the planet, including those of the Cordillera Blanca that provide water for farming and drinking to millions across northern Peru, where Mr Lliuya lives. His livelihood had, he claimed, been directly affected. The court was asked to pay 0.47% of the cost of building flood defences, with RWE's proportion calculated as a proportion of the gases it had ever emitted against the total amount emitted globally since the dawn of industrialisation.

But this was too simple a calculation: when it comes to climate change, there is a complex, causal chain of events. The full science will have to be brought to bear on the analysis. In fact, though it has been successfully appealed and is now progressing, the case was initially dismissed.

Meanwhile, a case in Indonesia gives cause for hope. In Ministry of Environment and Forestry v PT Jatim Jaya Perkasa, the ministry sued palm oil company Perkasa for fires that ravaged 1,000 hectares of land, claiming that the defendant had failed to comply with fire safety regulations. After the fires, Perkasa planted palm trees over a greater area.

In 2018, the court awarded 371.1 billion Indonesian rupiahs in restoration damages. And for climate change damage, the ministry requested, and received, 810 billion Indonesian rupiahs compensation for carbon release (9,000 tonnes) and 283.5 million rupiahs for losses of carbon sinks (3,150 tonnes of CO_2 were reduced). Carbon release and the loss of carbon sinks between the time of the fire and the restoration of the land were valued in relation to the carbon credit markets.

Put another way, the quantum can be calculated in relation to the market value of the greenhouse gases emitted, or not captured as a direct result of the fires.

The methods used to calculate damages will no doubt evolve as compensation cases mount and science throws light on the connections between cause and effect. But it won't be straightforward and, as Mr Lliuya knows, there will be much to weather en route.

The methods used to calculate damages will no doubt evolve as compensation cases mount and science throws light on the connections between cause and effect

ABOUT THE AUTHOR

Hanif Virji is a member of Ciarb's Sustainability Specialist Group and a qualified expert determiner who, following a career in investment banking, acts as an expert in financial services disputes

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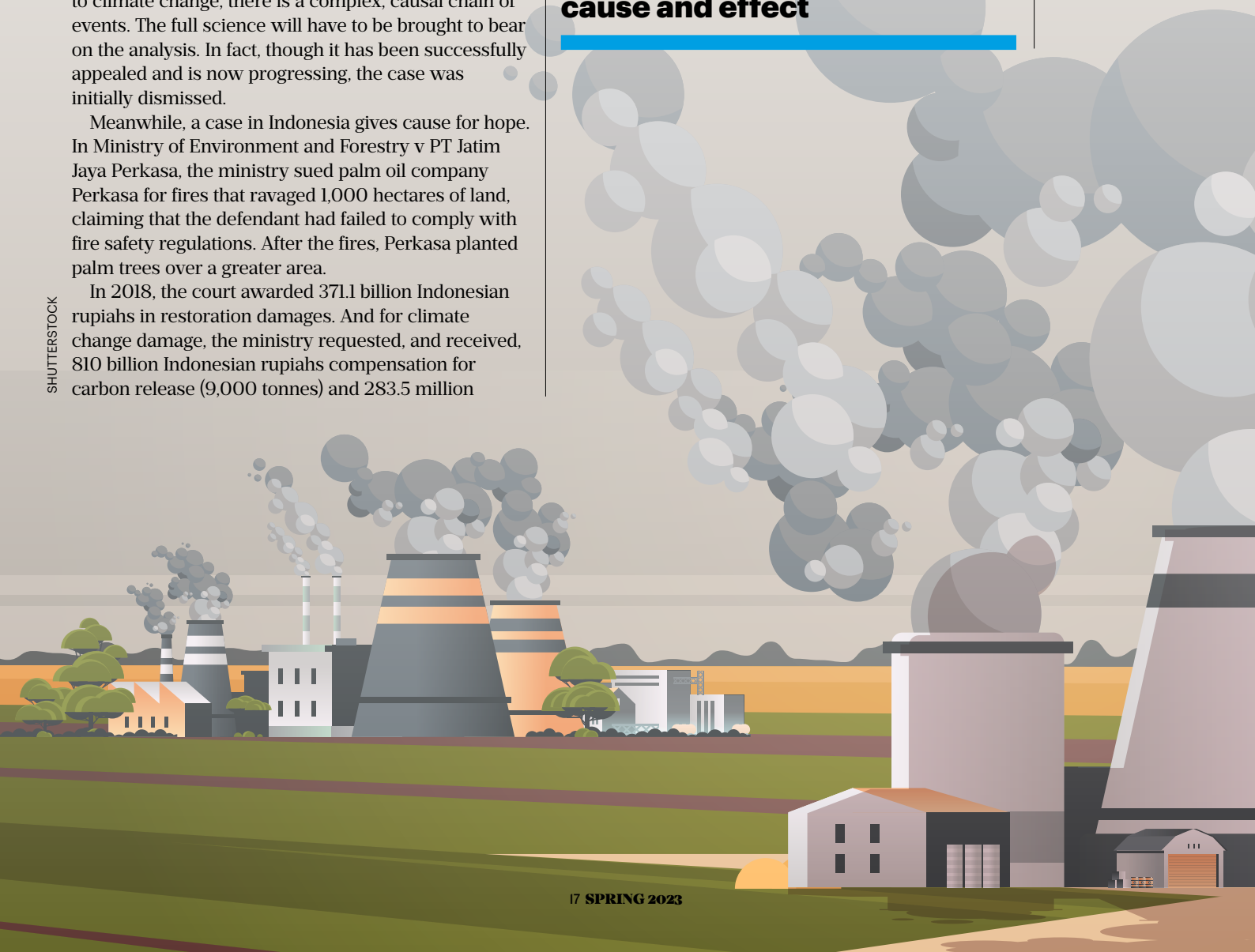

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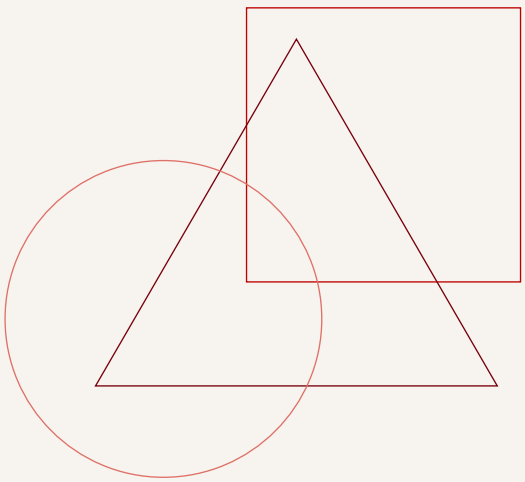

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