

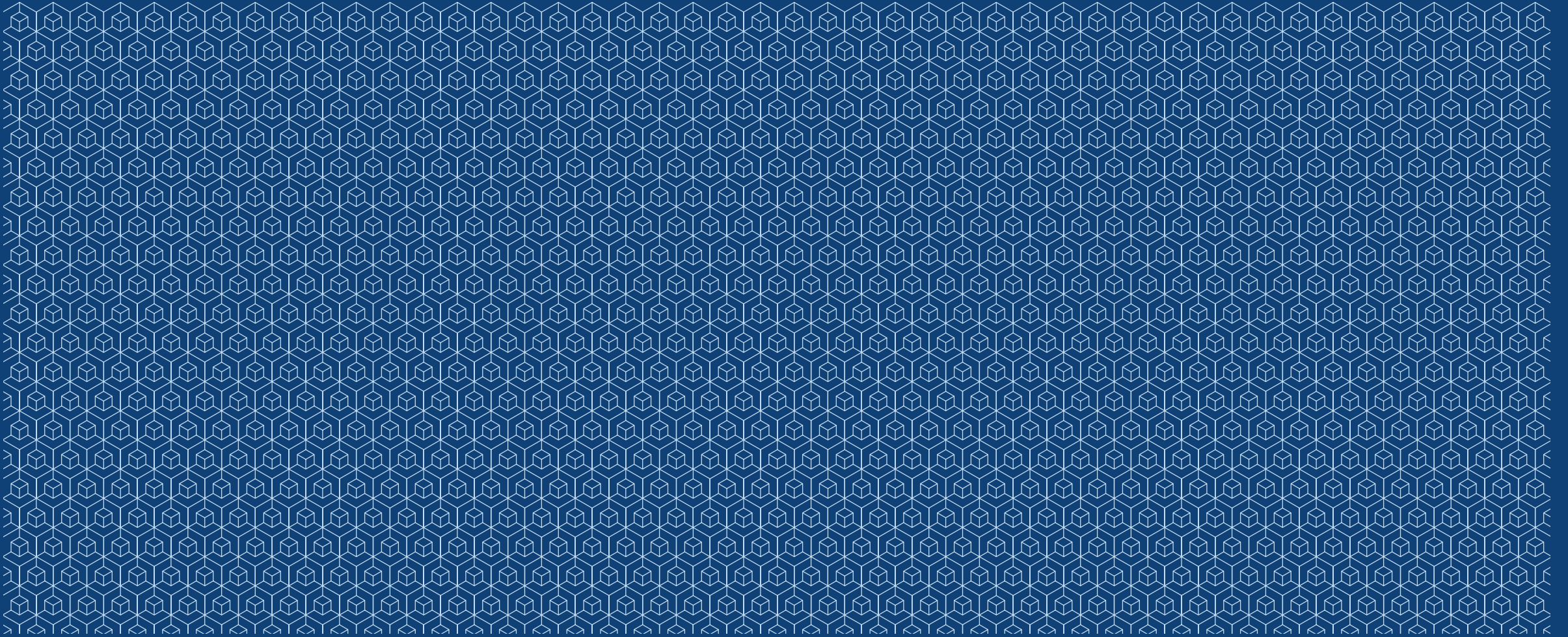
LIPMAN KARAS

A SPECIALIST LEGAL PRACTICE

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MANAGING RISK AND RESOLVING DISPUTES IN THE COMMERCIAL SPACE SECTOR

17 SEPTEMBER 2020 – JULIA DREOSTI & MARK GIDDINGS



Australian Space Sector

- State of Space Report 2019
 - Australian sector grew 15.6 per cent in the three years from July 2016 to June 2019 to employ 13,200 people across 766 space businesses
 - As at June 30 last year, there was a \$2 billion pipeline of capital projects from July 2018 through to June 2028, including 88 projects across all states and territories
- Government and Industry Initiatives
 - Space Infrastructure Fund
 - Expand Capability Grants
 - SmartSat CRC
- Impact of the COVID-19 pandemic?
 - Funding issues
 - Supply chain disruptions

Legal and Regulatory Regime

- Space (Launches and Returns) Act 2018 (Cth)
- Regulatory Agencies
 - Australian Space Agency
 - Defence Exports Controls
 - Australian Communications and Media Authority
 - Civil Aviation Safety Authority
- Commercial law
 - Contract
 - Australian Consumer Law
- Industry standards
 - AS9100
 - AS9110
 - AS9120

Risk factors

- Disparity of bargaining power
- Counter-party risk
- Political / regulatory risk
- Unforeseen events
- Economic risk
- Dispute risk

Contractual considerations

You should check whether your contract:

- Clearly states when title passes and which party bears the risk
- Includes clauses on rights to intellectual property
- Includes quality notes establishing quality requirements
- Gives rights to seek alternative suppliers if a party cannot comply with its obligations
- Includes retention of title clauses
- Includes mechanisms allowing for price adjustments
- Includes force majeure clauses

Dispute clauses

You should check whether your contract:

- Seeks to limit one party's liability
- Includes dispute resolution clauses
- Includes a choice of venue clause
- Includes a choice of law clause
- Addresses costs in the event of a dispute
- Includes an entire contract clause

Overview

- Current commercial and economic factors driving increased risk of disputes.
- Effective drafting of dispute resolution clauses to:
 - Minimise dispute risk; or
 - Maximise enforceability.
- Cross-border considerations

Why the anticipated increase in Space disputes?

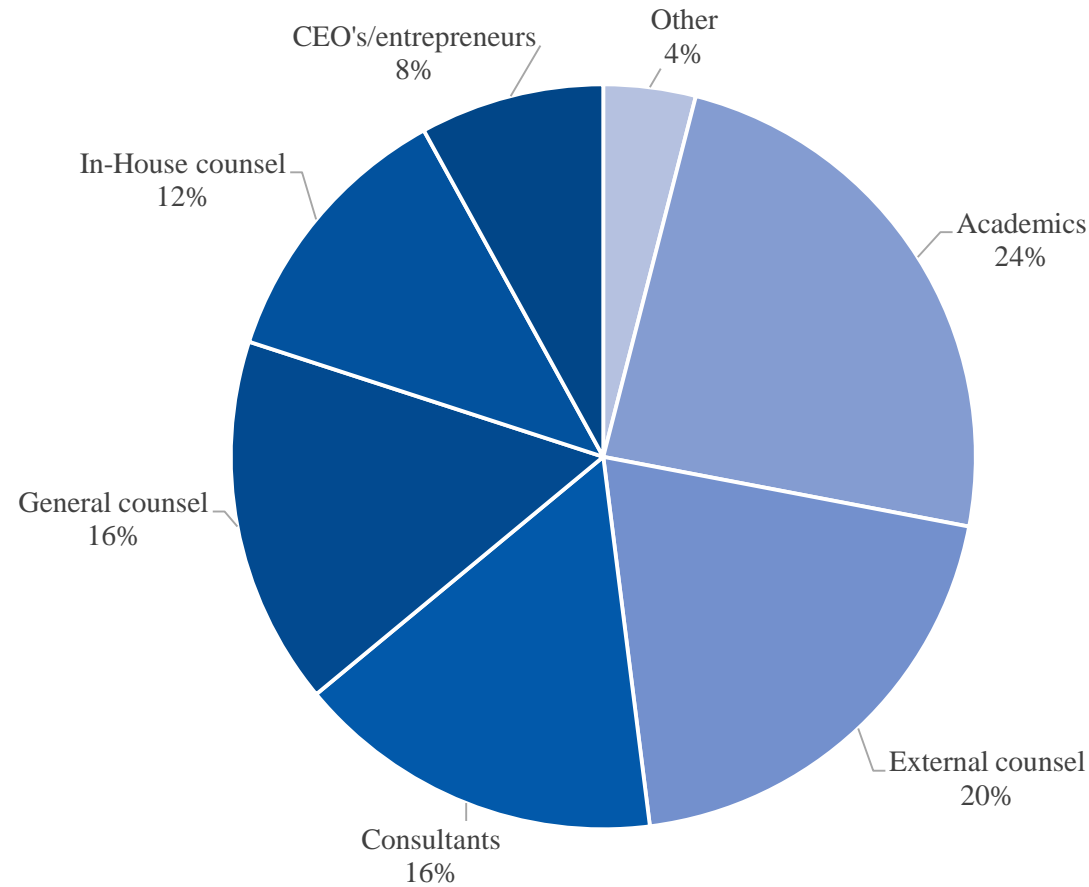
- **More players:** Traditionally small community of big players, but now easier access to Space for all - key objective of the *Space (Launches and Returns) Act 2018* (Cth).
- More players means more variables, differing ability/resources to control risk, different risk appetite = **increased** risk of disputes.
- **Increased commercialisation of space** = congestion and risk of debris in Space.
- **Cross-border industry:** interaction and collaboration across multiple jurisdictions and types of players (govt., IGO's, private sector) through joint ventures and research, shared payloads etc.
- **COVID-19 impact:** 'tightening of belts' on milestone payment delays. Inevitability of increased insolvencies. Butterfly effect upstream and downstream in supply chain.

What is the best process to resolve disputes

- **Avoid** them in the first place with good contract management and communication.
- **Anticipate** that disputes can and do happen and choose dispute resolution process wisely...
 - How to choose? Horses for courses.
 - Litigation – courts
 - Arbitration
 - Confidential
 - Choice of decision-maker
 - Run by arbitral institution: ICC etc
 - Final and binding
 - Enforcement

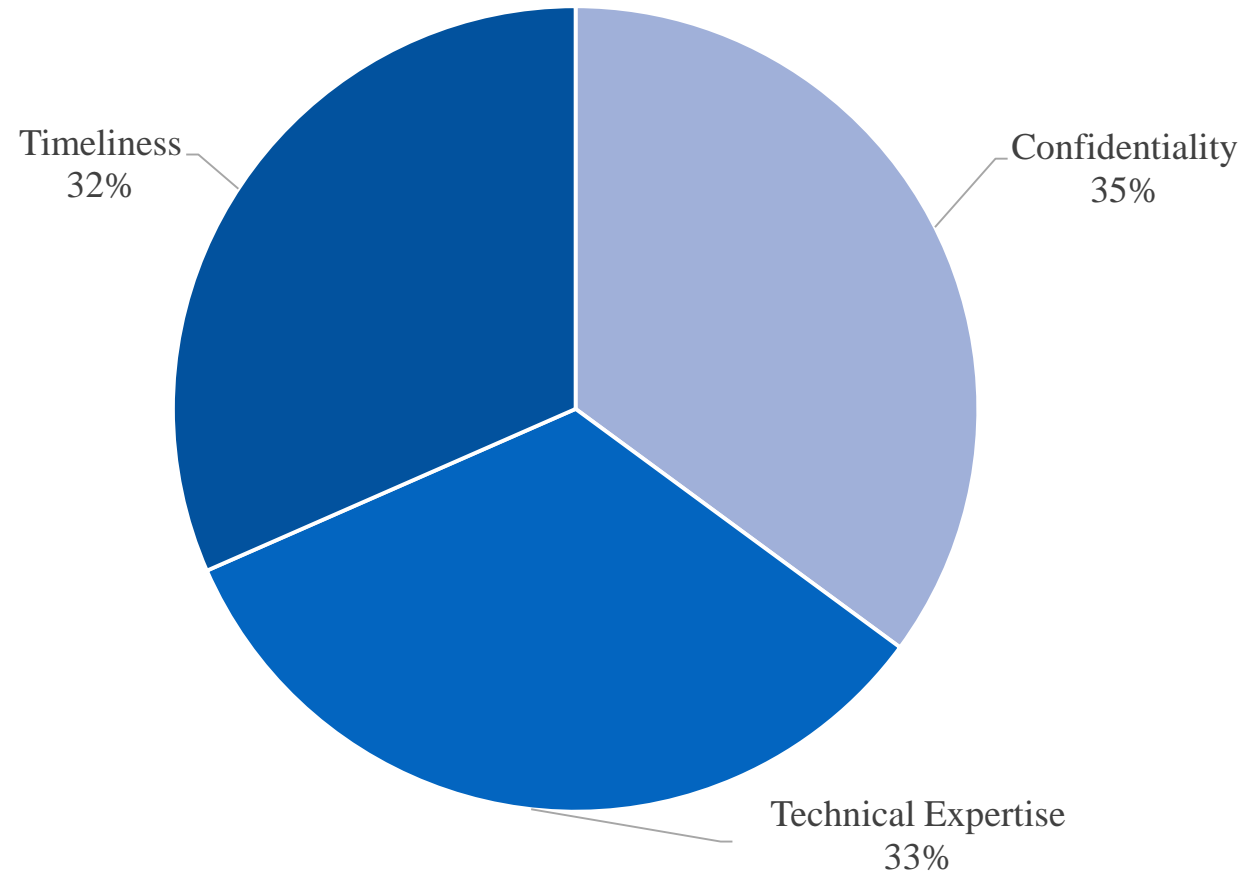
...what dispute resolution processes are other space industry participants choosing?

Arbitration of Space-related Disputes: Survey of Industry Practices and Future Needs (Arbitration Survey) - 2019



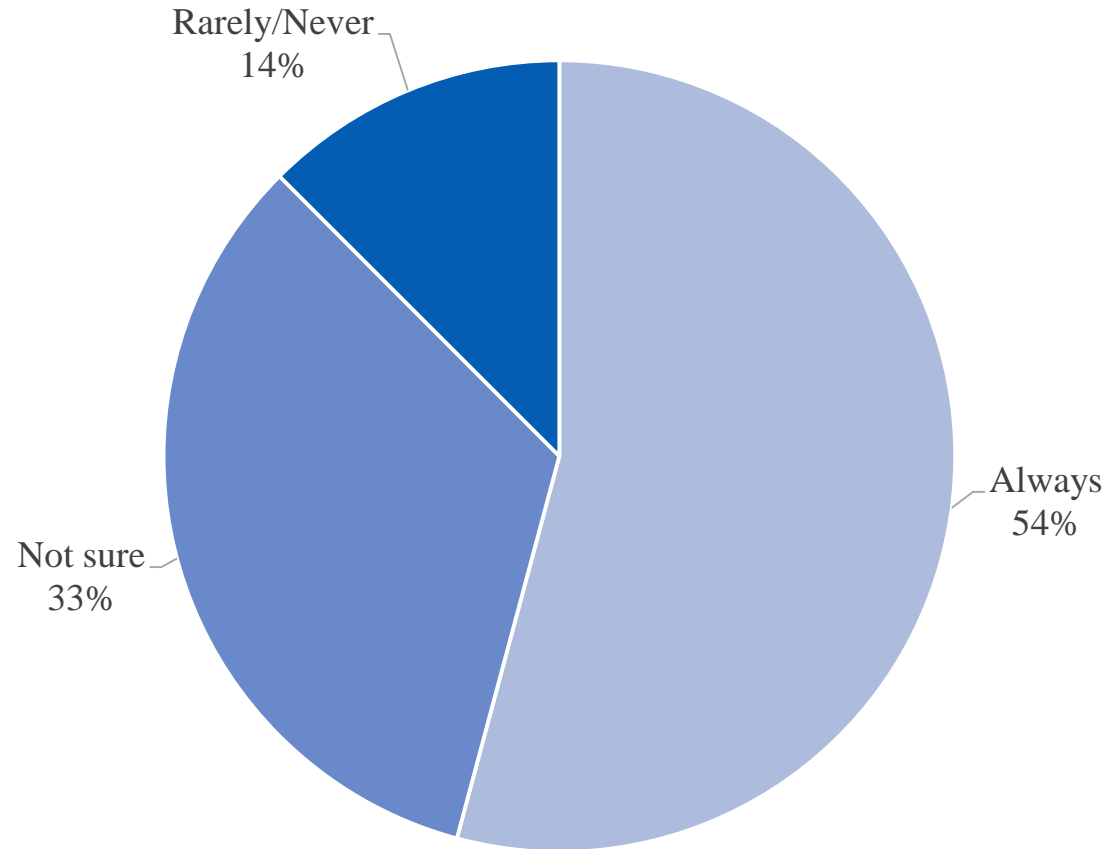
Viva Dadwal and Eytan Tepper, 'Arbitration of Space-related Disputes: A Survey of Industry Practices and Future Needs' (Conference Paper, International Astronautical Congress, 21-25 October 2019).

Arbitration Survey – Dispute Resolution – Top 3 Needs



Viva Dadwal and Eytan Tepper, 'Arbitration of Space-related Disputes: A Survey of Industry Practices and Future Needs' (Conference Paper, International Astronautical Congress, 21-25 October 2019).

Arbitration Survey – Inclusion of Arbitration Clauses?



Viva Dadwal and Eytan Tepper, 'Arbitration of Space-related Disputes: A Survey of Industry Practices and Future Needs' (Conference Paper, International Astronautical Congress, 21-25 October 2019).

DEVAS – Arbitration Case Study

Facts:

- **Contract Parties:** *Agreement for the Lease of Space Segment Capacity on ISRO/ANTRIX S-Band Spacecraft* between:
 - **Antrix** - Indian SOE– commercial arm of the Indian International Space Research Organisation ISRO; and
 - **CC/Devas** - German/Mauritian interests
- **Project:** Hybrid satellite-terrestrial communications system involving both satellite and terrestrial transmission.
- **What was the agreement?** Antrix was to build, launch and operate two satellites and lease S-band capacity on the satellites to Devas for broadband wireless access and audio-video services through India.
- **What went wrong?** Policy decision made to annul the agreement for ‘national needs’, following Indian media criticism of the Government for giving valuable S-band spectrum to Devas.

DEVAS – Case Study (cont)

What did the commercial party, Devas, do next...?

- **Commercial Arbitration:** ICC Arbitration: *Devas Multimedia Private Limited v Antrix Corporation Limited* [ICC Case No 18051/CYK]. Wrongful repudiation. Awarded USD\$562 million plus interest.
- **Investor-State Arbitrations** x 2:
 - *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v The Republic of India*, PCA Case No 2013-09. UNCITRAL Arbitration Rules. (expropriation and failure to accord FET under the Mauritius-India BIT)
 - *Deutsche Telekom AG v The Republic of India*, PCA Case No 2014-10 (failure to accord FET under German-India BIT)

Bespoke procedures for Space disputes

- International Law Association (ILA) *Draft Convention on the Settlement of Space Law Disputes* (80's/90's)
- PCA *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities* (2011) – modified version of the UNCITRAL Arbitration Rules (**PCA Space Arbitration Rules**)
- The PCA Space Arbitration Rules differ in four key ways from the ‘standard’ UNCITRAL Arbitration Rules (2010):
 - State waiver of immunity from jurisdiction;
 - Technical complexity;
 - Confidentiality; and
 - Timeliness.

<https://docs.pca-cpa.org/2016/01/Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-of-Disputes-Relating-to-Outer-Space-Activities.pdf>

Tips + Traps for drafting an enforceable arbitration clause

If in doubt – use a sample clause from an arbitral institution:

Permanent Court of Arbitration (PCA) model clause:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities.

Note – Parties should consider adding:

- (a) The number of arbitrators shall be ... (one, three or five);
- (b) The place of arbitration shall be ... (town and country);
- (c) The language to be used in the arbitral proceedings shall be....

Australian Centre for International Commercial Arbitration (ACICA) sample clause:

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 10 of the ACICA Arbitration Rules].

<https://acica.org.au/acica-model-arbitration-clause/>

Conclusion

Key tips:

- **Go in with your eyes open:** Understand your obligations and risk exposure from the outset of the relationship.
- **To minimise risk of dispute:** Ensure you maintain good channels of communication. Closely follow contractual processes (even if your counterparty tells you it doesn't matter at the time). Keep written records and have a good document management system.
- **To enable resolution of disputes:** Contracts can and do go wrong (frequently). Focus on the drafting of the dispute resolution clause before you sign.
- **Golden rule of dispute resolution clause:** KEEP IT SIMPLE
- **Take a commercial approach to the dispute:** Ask yourself - is it worth it? If you are pursuing or defending the case 'as a matter of principle', it's usually not!

KEY CONTACTS



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Julia Dreosti has extensive experience representing private and public sector clients in commercial disputes involving a range of industries, including infrastructure, construction, defence, energy & resources and financial services. This experience includes representing clients in disputes concerning large-scale infrastructure and government procurement projects and advising clients on risk minimization strategies for projects of this type as well as joint ventures and cross-border acquisitions. Many of her cases have involved actions in multiple jurisdictions before courts and major arbitral institutions, including ACICA, HKIAC, ICC, LCIA, UNCITRAL and SIAC.



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Mark Giddings is experienced in commercial litigation and related investigations, including claims involving breach of contract, directors' duties, professional negligence and issues of public and private international law. His work often has a cross-border aspect and he is familiar with the legal and practical issues that arise in this context.

Mark is active in publishing and presenting on the regulation of the commercial space industry. He provided research input on the University of Adelaide's inaugural Strategic Space Law course and has lectured on dispute resolution as part of it.

ABOUT LIPMAN KARAS

Lipman Karas is an international dispute resolution firm, focusing exclusively on:

- Complex and sensitive commercial litigation
- Commercial and investment arbitration
- Insolvency and asset recovery
- Audit and other professional negligence
- Independent corporate and regulatory investigations and commissions
- Dispute avoidance, risk minimisation and governance advice

Lipman Karas has acted in some of the largest and most complex disputes internationally, including leading successful appeals in the highest courts and tribunals.

AEROSPACE CAPABILITY

Aerospace disputes are a natural extension of our capability in defence, technology and major projects. We leverage our knowledge and expertise in Australian, overseas and international law, as well as our extensive track record with cross-border disputes.

Our team's experience with aerospace disputes includes:

- Advising a major telecommunications provider in relation to a satellite launch issue
- Representing a broadcaster in a contractual dispute with a satellite company
- Acting for the purchaser of a satellite in a dispute with the manufacturer
- Representing an international airline in a dispute concerning the safety of aircraft components

Members of the team are active in publishing and presenting on the legal regulation of the commercial space industry, including lecturing on dispute resolution as part of the University of Adelaide's Strategic Space Law course and writing on civil space programs for the 2019 Space Security Index.

WHERE WE OPERATE

We have resolved or litigated cases on every continent. Many of our projects involve actions across multiple jurisdictions, including throughout Asia, the UK, Continental Europe, the United States, the Middle East and all the major offshore jurisdictions.

We have offices in Australia, Hong Kong and London. With over 40 specialist dispute lawyers in Adelaide, the size of our Australian team and depth of its experience is on par with many of the dispute resolution teams in top tier East coast firms.