LEADING BY EXAMPLE
CIARB'S ENGAGEMENT WITH OTHER ARBITRAL INSTITUTIONS

MYANMAR : FIVE YEARS ON
HOW ITS ARBITRATION PROSPECTS HAVE EVOLVED

CASE NOTE
UNDERSTANDING DAMAGES BASED AGREEMENTS

THE Resolver

ciarb

Autumn 2023 ciarb.org

Is it time to call last orders?

HOW THE PERVASIVE DRINKING CULTURE IN INTERNATIONAL ARBITRATION THREATENS TO UNDERMINE THE CAUSE OF DIVERSITY

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COVER: VERGILIUS/SHUTTERSTOCK

Time for reflection

Welcome to the autumn issue of *The Resolver*, which features articles on a wide range of topics across the private dispute resolution sector. We are all seeing, and many of us are experiencing, an increase in conflict globally. It is important to reflect on the significance of the work we do to resolve disputes effectively and remind ourselves of the need to work ethically and in the best interests of our clients, while being open to adapting and changing to meet their modern-day needs.

The importance of underlying arbitral regimes is put into sharp focus as Robert S Pé FCIArb traces the progress of enforcement of foreign arbitral awards in Myanmar through the lens of a particular case.

Fiona Dickie, Pubs Code Adjudicator, sets out the importance of statutory Pubs Code arbitration in the UK for fair resolution of regulatory compliance disputes. We also hear from Mercy McBrayer FCIArb about how Ciarb's relationships with arbitral institutions across the world are core to supporting best practice, as well as enabling members access to work.

In terms of developments, we hear more about artificial intelligence (AI) through the 60-second interview with Claire Morel de Westgaver, Chair of Ciarb's Technology and ADR Thought Leadership Group. The group is currently drafting a new guidance note on the use of AI in arbitration and other forms of private dispute resolution. Claire highlights some of the considerations facing the profession. There is also detail, in this issue's Case Note, about a decision that could impact the appeal and enforceability of litigation funding agreements.

Two articles, one from Catherine Dixon MCIArb, CEO of Ciarb, and one from Dr Kabir Duggal C.Arb FCIArb and Amanda J. Lee FCIArb, explore equality, diversity and inclusion (EDI) from different perspectives. Catherine outlines what Ciarb is doing to ensure it can take meaningful action to improve EDI for a sustainable profession, highlighting the need for visible role models. Amanda and Kabir look at the drinking culture of international arbitration, providing practical recommendations on how to ensure inclusivity and exploring alternatives to the ubiquitous drinks receptions.

It is important to reflect on the significance of the work we do to resolve disputes effectively and remind ourselves of the need to work ethically

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 Accelerated Route to Fellowship Construction Adjudication

27 November 2023 £1,720
Book by 20 October 2023

Have you got five or more years' practical experience either as a representative or practitioner in construction adjudication? Do you have substantial but unassessed knowledge of construction adjudication? Then you can fast-track your way to Ciarb Fellowship.

The Accelerated Route to Fellowship is an intensive five-day assessment programme. It is designed to assess whether you have the knowledge and skills required to apply the principles and procedure of construction adjudication to write a reasoned and enforceable Decision.

Upon successfully completing the programme, you can apply to become a Ciarb Fellow (FCIArb).

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- **Online Introduction to Mediation** Open entry **£120** *Separate assessment available, open entry* **£72**
- **Virtual Module 2 Law of Obligations** (*note: this module is the same across all pathways*) 2 November **£1,190** *Assessment 12 October* **£342**
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- **Virtual Module 1 Law, Practice and Procedure of Construction Adjudication** *Assessment 30 November* **£174**
- **Virtual Module 2 Law of Obligations** *(see above)*
- **Virtual Module 3 Construction Adjudication Decision Writing** *Assessment 1 December* **£408**

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- **Virtual Module 1 Law, Practice and Procedure of Domestic Arbitration** *Assessment 30 November* **£174**
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- **Virtual Module 3 Domestic Arbitration Award Writing** *Assessment 1 December* **£408**

International arbitration

- **Virtual Module 1 Law, Practice and Procedure of International Arbitration** *Assessment 30 November* **£174**
- **Virtual Module 2 Law of Obligations** *(see above)*
- **Virtual Module 3 International Arbitration Award Writing** *1 December* **£408**

Accelerated programmes

- **Virtual Accelerated Route to Membership: International Arbitration** *28 November* **£1,320**
- **Virtual Accelerated Route to Fellowship: International Arbitration** *27 November* **£1,720**
- **Virtual Accelerated Route to Fellowship: Construction Adjudication** *27 November* **£1,720**

The opener

A record-breaking year for Ciarb

Ciarb Pakistan Branch's inaugural conference. Pictured (L–R): Mr Justice Syed Mansoor Ali Shah, Honourable Judge, Supreme Court of Pakistan; Mr Justice Muhammad Ameer Bhatti, Honourable Chief Justice, Lahore High Court; Catherine Dixon MCIArb, Chief Executive Officer, Ciarb

Ciarb now has 17,398 members, its highest number ever.

The figure, reported in the organisation's *Annual Report 2022*, represents a 3% increase on 2021. Ciarb also reported a 9% income growth and a 10% increase in the number of people trained on our courses.

In 2022, more than 8,000 people attended 27 Ciarb events, at which they were addressed by 200 speakers from 47 countries, 57% of whom were female.

Ciarb's biggest hits in 2022 also included the launch of the Pakistan Branch, the publication of the *Guideline on the Use of Technology in International Arbitration* and the Privy Council's ratification of Chartered Adjudicator status.

"I urge members to read the report, which details the full breadth of activities and results across Ciarb," said Catherine Dixon MCIArb, CEO of Ciarb. "In the next few weeks, we will issue our membership survey to help us understand how we can better support members."

Arbitration Act (mostly) stands the test of time

In its final review of the Arbitration Act 1996, the UK Law Commission has concluded that root-and-branch reform of the legislation is unnecessary.

It does, however, recommend: codification of the statutory duty of disclosure; strengthening of arbitrator immunity around resignation and applications for removal; the introduction of a power to make an arbitral award on a summary basis; an improved framework for challenges to awards under section 67; a new rule on the governing law of an arbitration agreement; and clarification of court powers in support of arbitral proceedings and in support of emergency arbitrators.

Ciarb worked closely with the Law Commission on the review, which also recommends simplifying applications to court on jurisdiction and points of law, repealing unused provisions on domestic arbitration agreements and clarifying time limits for challenging awards.

"It is a sign of the Arbitration Act's strength that only specific changes have been recommended rather than an overhaul," said Catherine Dixon MCIArb, CEO of Ciarb. "As well as underpinning the attractiveness and competitiveness of London as an arbitration seat, the Act forms the basis of legislation in many other jurisdictions, which gives this development a global significance."

The report and accompanying draft Bill will be presented to Government.

SHUTTERSTOCK

60-SECOND INTERVIEW

Claire Morel de Westgaver

Claire Morel de Westgaver is Chair of Ciarb's Technology and ADR Thought Leadership Group, and Partner at Bryan Cave Leighton Paisner

Please tell us a bit about yourself

I practise international arbitration as counsel, advocate and arbitrator, and I am qualified in England and Wales, and New York. I completed my legal education in Belgium and in the US, which means I have a mixed common and civil law background and conduct proceedings in English and French. I specialise in commercial arbitration with a focus on technology, engineering and life sciences disputes.

A lot of my dispute resolution work is around innovation and the use of technology and artificial intelligence (AI). I am also an advocate for the equal representation of women in international arbitration and the legal profession generally. To this end, I co-founded Mute Off Thursdays, a global group of senior female arbitration practitioners, which won a *Global Arbitration Review* Award in 2020. Earlier this year, the group launched the *Compendium of Unicorns: A Global Guide to Women Arbitrators*, a resource for parties and institutions to identify potential arbitrator profiles for appointment.

I am honoured that Ciarb appointed me Chair of its Technology and ADR Thought Leadership Group to lead on drafting a new guidance note on the use of AI in arbitration and other forms of ADR. It is exciting to witness these rapid technological developments while being at the forefront of the governance aspects of AI and law.

AI in arbitral proceedings: is it inevitable?

Yes. Given its benefits in terms of efficiency, practitioners will be using it more and more. The question is: what safeguards need to be put in place to address its associated risks in terms of bias and hallucinations? We must consider too the question of undue impact if AI is used to falsify evidence using deepfakes, for example, and also the question of improper delegation of a personal mandate by arbitrators if it is used to determine the dispute or draft the award. AI may also have an impact on the enforceability of arbitral awards as its use in the administration of justice may be a matter of public policy and therefore a potential ground to oppose enforcement if prohibited in the relevant jurisdiction.

How worried should we be about cybersecurity?

Well, we know breaches happen and that international arbitration is a target because of the nature of the parties involved in arbitral proceedings and the nature of disputes typically submitted to arbitration. Our focus should be on raising the level of cybersecurity across the board to protect the integrity of the arbitral process and confidential information exchanged and generated for the purpose of resolving the dispute. This can be done through raising awareness, training and putting in place administrative and procedural measures aimed at reducing the risk of security being compromised.

"We must consider the question of undue impact if AI is used by witnesses to falsify evidence using deepfakes"

A sustainable profession needs EDI

But where we are currently is not good enough, writes Catherine Dixon MCIArb

"You can't be what you can't see."
Marian Wright Edelman

Edelman, an American activist for civil and children's rights, used this phrase when speaking about inspiring minors by providing visible role models. Her phrase is equally applicable to other contexts, including the private dispute resolution sector.

The focus on equality, diversity and inclusion (EDI) in the sector is intensifying. Recent research lays bare the scale of improvement required. Last year, the Adjudication Society and King's College London found that women accounted for 7.88% of Adjudicator Nominating Bodies' panels. This year, Equal Representation for Expert Witnesses (ERE) and AlixPartners found that women were observed as appointed or testifying as sole expert witnesses in just 10% of cases requiring an expert during 2022. If you'd like to learn more, read our interview with ERE co-founder Kathryn Britten about the survey on the Ciarb website.

Ciarb is committed to improving diversity in the private dispute resolution sector, within its membership and across its staff and volunteers. We acknowledge that there is much to be done to bring about meaningful change. In our recently published *Annual Report 2022* we highlight this commitment and the work we need to do to improve the diversity data we hold. Only by improving our data can we know where to focus our efforts and measure our progress.

Having said that, we aren't starting from scratch. Based on existing data, we know that our female professional membership has increased since 2020 but slowly to 22% in 2022. Our mediation panel too has 22% female representation, but we know that it is lower for our other panels.

To address this, we have revised our eligibility criteria for the adjudication panel. The aim is to enable more applications from our wider membership, from all backgrounds and, in particular, from women. Critically, Ciarb's panel is open for application unlike others.

This is, however, a long-term commitment and programme of work. It is also a joint effort. Diversity in our profession is influenced by multiple factors, including diversity in adjacent professions such as chartered surveying, engineering and the law. That is not to shift responsibility but to highlight the interconnected nature of diversity and the commitment and patience that will be required over the long-term to effect change.

The first step must be to acknowledge that where we currently are is not good enough, identify what needs to be done and to raise awareness of the issue.

In recognition of this, and to signal publicly our commitment, Ciarb is signatory to a number of pledges including the Equal Representation in Arbitration pledge and the Women in Adjudication Pledge. We are also a steering group member for the Equal Representation of Expert Witnesses pledge. We are highlighting women in adjudication to make role models visible to those aspiring to enter the profession. We are also ensuring that all our events are diverse and that we have women, different ethnicities and other underrepresented groups speak on important issues in dispute resolution. In 2022, over 200 speakers from 47 countries took part in Ciarb events, 57% of whom were female.

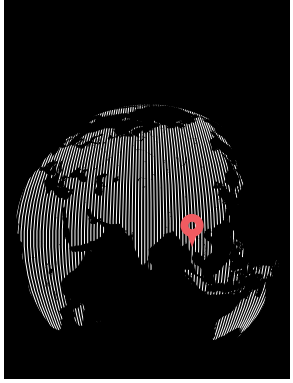
EDI matters, now and for the long-term sustainability and success of the profession. Not just to keep pace with other sectors but also to better understand and meet parties' needs. Also, to widen dispute resolution capacity across the world.

Part of the challenge is inspiring and supporting professionals from underrepresented groups who, in turn, will become the role models for future generations.

After all, you can't be what you can't see.

ABOUT THE AUTHOR

Catherine Dixon MCIArb is Chief Executive Officer of Ciarb. She is a Solicitor and an Accredited Mediator.



Update from Myanmar

In five short years, the country's arbitration prospects have gone from hopeful to bleak

Exactly five years ago, in the autumn 2018 edition of this publication, I wrote a piece about Myanmar's emerging arbitration community. It was entitled 'Myanmar's Arbitration Capacity Expands: An active arbitration community is now being encouraged'.

At the time, Burma, or Myanmar as it is also known, appeared to be taking faltering steps towards democracy: 2018 was in the middle of the country's quasi-liberalisation period, which began in 2011 and ended in 2021. The business environment was opening up and there was an influx of foreign investment.

A CHANGING PICTURE

This was accompanied by positive developments on the arbitration front. The 2012 Foreign Investment Law (later replaced by the 2016 Investment Law) expressly provided that disputes between foreign investors and Myanmar entities could be resolved through international arbitration outside the country. In 2013, Myanmar acceded to the New York Convention on the recognition and enforcement of foreign arbitral awards. In 2016, a new Arbitration Law was enacted, which was based closely on the UNCITRAL Model Law. Several capacity-building workshops were held for Myanmar judges on enforcement of foreign awards under the New York Convention.

R. BOCIAGA/SHUTTERSTOCK

Fast-forward to the present and the picture could not look more different. Myanmar's Military, which continued to hold significant power, launched a coup on 1 February 2021. It detained pro-democracy supporters and embarked on the brutal repression of the population, with reports of many being killed, further undermining the rule of law. Against this background, I will briefly consider a recently concluded ICC arbitration seated in Singapore that involved a Myanmar-related dispute.

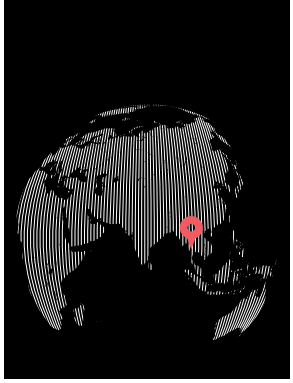
It involved a foreign contractor and a Myanmar sub-contractor and centred on a major construction project in Yangon, formerly Rangoon. The sub-contract contained a clear and unambiguous agreement that any disputes that could not be resolved amicably should be referred to ICC arbitration in Singapore. The foreign contractor commenced such an arbitration and pursued a claim against the Myanmar sub-contractor for delays, disruption and other alleged breaches of contract. The sub-contractor objected to the jurisdiction of the ICC Tribunal and failed to participate in the ICC arbitration, despite being given numerous opportunities to do so.

In the meantime, the Myanmar sub-contractor made criminal complaints against various key employees of the foreign contractor after they had removed the sub-contractor's equipment from the project site

The sub-contractor objected to the jurisdiction of the ICC Tribunal and failed to participate in the arbitration

ABOUT THE AUTHOR

Robert S Pé FCIArb is a member of the ICC Court and of Arbitration Chambers, Hong Kong, London and New York



High Court Building, Yangon

RICHIE CHAN/SHUTTERSTOCK

to prevent interference with the ongoing construction works. In addition, the chairman of the sub-contractor commenced a civil court action against the contractor in the Yangon High Court, which ruled that the dispute should be referred to ICC arbitration. The chairman of the sub-contractor then sought a revision of the Yangon High Court's ruling, insisting that the Myanmar courts were the proper forum for resolving the dispute. The Myanmar Supreme Court dismissed the chairman's application and similarly ruled that the dispute should be referred to ICC arbitration.

FROM ICC TO MAC

Then, the sub-contractor commenced arbitration at the Myanmar Arbitration Centre (MAC), a body newly established by the Union of Myanmar Federation of Chambers of Commerce and Industry. The foreign contractor objected to this on the basis that the arbitration agreement provided for ICC arbitration in Singapore. Notwithstanding the contractor's objections, the MAC proceeded to constitute a three-member tribunal, comprising only Myanmar nationals.

The contractor applied to the ICC Tribunal and obtained an interim injunctive order to restrain the sub-contractor from proceeding with its claims in the MAC arbitration, insofar as the claims arose from the sub-contract. The contractor notified the MAC and the sub-contractor of the interim injunction but the sub-contractor and the MAC Tribunal ignored it and continued with the MAC arbitration.

More than a year after the MAC arbitration had begun, the MAC wrote to the contractor conceding that there was no evidence that the arbitration agreement had provided for a referral to MAC arbitration. Notwithstanding this, the MAC Tribunal proceeded to issue a final arbitral award, in which it ordered the contractor to pay compensation to the sub-contractor. The sub-contractor applied to the Yangon High Court to enforce the final arbitration award in Myanmar. The Yangon High Court rejected the application but also rejected an application by the contractor to set aside the final arbitration award.

FINAL AWARD

Following a substantive hearing in the ICC arbitration at which a factual witness and two expert witnesses gave evidence, the ICC Tribunal issued a reasoned final award, which allowed the majority of the contractor's claims, including those related to the sub-contractor's breaches of the arbitration agreement.

It is unclear what happened subsequently. Anecdotal evidence suggests that some Myanmar judges continue to enforce foreign arbitral awards. Certainly, the Yangon High Court and the Myanmar Supreme Court's aforementioned decisions suggest that the capacity-building workshops were not entirely in vain and that some brave Myanmar judges are still seeking to do the right thing when it comes to international arbitration. A tiny glimmer of hope in the darkness.

Anecdotal evidence suggests that some Myanmar judges continue to enforce foreign arbitral awards

Case note

R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28

This case revolves around whether litigation funding agreements are Damages-Based Agreements for the purposes of Section 58AA(3) of the Courts and Legal Services Act 1990, and therefore subjected to the validity criteria of the latter

THE FACTS

The appeal stems from a dispute between UK Trucks Claim Ltd and Road Haulage Association Ltd ("Respondents 2 and 3") on one side, and PACCAR INC, DAF Trucks N.V. and DAF Trucks Deutschland GmbH ("the Appellants") on the other. Respondents 2 and 3 sought collective proceedings orders in accordance with Section 47B of the Competition Act 1998 to bring collective proceedings for competition law breaches on behalf of people who bought trucks from the Appellants.

The granting of the order is conditional upon applicants' capacity to demonstrate that they have suitable finance mechanisms in place. In this instance, Respondents 2 and 3 relied on their litigation funding agreements ("LFAs"), in which the litigation funders agreed to support the proceedings in exchange for a portion of any damages awarded.

The Appellants claimed that the LFAs were Damages-Based Agreements ("DBAs") in accordance with Section 58AA(3) of the Courts and Legal Services Act 1990 ("the CLSA") and that, as a result, were unenforceable because they did not meet the ensuing regulatory requirements. Since the Competition Appeal Tribunal did not consider the LFAs as DBAs under the CLSA, the request for a collective proceedings order was granted. The decision was subsequently appealed before the Supreme Court.

THE JUDGMENT

It was undisputed that the LFAs in question did not meet the requirements for the validity of DBAs. The question before the Supreme Court was whether the LFAs qualified as DBAs, as argued by the Appellants. In other words, the Court had to establish whether LFAs fall under the definition of "claims management services"

ABOUT THE AUTHOR

Lara Oranli is a Turkish qualified lawyer. She is also an LLM Candidate at King's College London and a Chevening Scholar. She currently works at Ciarb as Arbitration and Policy Professional Practice Intern.

The Court had to establish whether LFAs fall under the definition of "claims management services" pursuant to Section 58AA(3) of the Courts and Legal Services Act 1990

pursuant to Section 58AA(3), defined as "advice or other services in relation to the making of a claim" and "other services", specifically including "the provision of financial services or assistance" in accordance with the Financial Services and Markets Act 2000.

The appeal was allowed by majority and the court concluded that the LFAs in question did qualify as DBAs. The Supreme Court used different base points for interpretation to come to this conclusion, including the wording and the legislative purpose of the provision. Given that the LFAs in question are entered into with the purpose of "providing financial services or assistance", they were considered to fall under the natural meaning of "claims management services" as suggested by the Appellants. Combined with the regulatory purpose of providing the Secretary of State with a broad power to regulate the new services encouraging or facilitating litigation, the Supreme Court considered that a broad term had been used on purpose, and should be interpreted in its natural meaning.

Respondents 2 and 3 further argued that interpreting DBAs as covering LFAs in light of the existence of Section 58B, which specifically regulates litigation funders, would be absurd. The Court found no reason to consider those two provisions to be mutually exclusive and the Respondents' argument failed. Respondents 2 and 3 also tried to rely on post-2006 legislation to conclude that LFAs cannot be deemed as a form of DBA, but the Court refused to take such provisions into account.

It is noteworthy that although the appeal was allowed by the majority, Lady Rose dissented and dismissed it. She adopted the same understanding as the Competition Appeal Tribunal and held that litigation funding did not fall under the regular meaning of "claims management services". Offering financial support might be a component of "claims management services", she said, but this doesn't necessarily imply that all financial aid related claims could fall within this category.

The Supreme Court's decision extends to many LFAs concluded within the UK and risks overshadowing their enforceability. The uncertainty created by this decision is expected to complicate things for claimants who seek funding, as the funders are likely to be more hesitant entering agreements they risk not being able to enforce. This uncertainty might increase incentives to regulate third-party funding within the UK, which is something already being discussed by the EU.

Read the full judgment here.

The uncertainty created by this decision is expected to complicate things for claimants who seek funding

Leading by example

Ciarb's engagement with other arbitral institutions is vital to maintaining its world-class reputation. Mercy McBrayer FCIArb explains why

At Ciarb, we endeavour to ensure that our training and certifications are seen by institutional bodies as a clear sign that an individual applying for membership to a panel is well equipped. Ciarb's ongoing engagement with arbitral institutions is vital in maintaining this reputation. While institutions are careful not to endorse any particular organisation's training over any other, as was observed by Luis Martinez, Vice President of the American Arbitration Association International Centre for Dispute Resolution (AAA-ICDR), at the Ciarb Americas Conference in October 2022, a Ciarb postnominal gives institutions, "a level of comfort knowing that they've been exposed to the sophisticated programs and training... and then we understand that they're coming to us already having a great deal of knowledge that they've obtained during these training programs." At the November 2022 Ciarb Congress, Jamie Harrison, Deputy Director General of the London Court of International Arbitration (LCIA), further noted that they, "would regard membership of the Chartered Institute at any level as a good sign and a commitment to the practice arbitration [and] a standard of ethics... it is a significant comfort to us, but it is not a prerequisite." Indeed, the ethical standards to which Ciarb holds its entire global membership, embodied in our Code of Conduct, is a unique aspect of holding a Ciarb postnominal, which goes beyond the knowledge and skills gained through other organisations' training. This affirmation of ethical standards has been cited by numerous stakeholders as an attractive characteristic of Ciarb members. It is clear that an ability to maintain the highest ethical standards is a feature that institutions in particular value highly for panel membership.

Some institutions have made Ciarb membership and a postnominal at Fellow level a prerequisite of joining their panel

Some institutions have gone so far as to make Ciarb membership and a postnominal at Fellow level a prerequisite of joining their panel. In recent years, newer, smaller, or regional institutions have increasingly required Ciarb membership to be considered for their panels as this is the fastest way to build capacity to handle sophisticated disputes. For example, the London Chamber of Arbitration and Mediation (LCAM) added this prerequisite when they established their arbitral panel in 2019. Since then, the British Virgin Islands International Arbitration Centre (BVI-IAC), Saudi Centre for Commercial Arbitration (SCCA), Oman Arbitration Centre (OAC), and Energy Disputes Arbitration Centre (EDAC) have signed memoranda of understanding with Ciarb on the basis that training and membership are

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preferred characteristics for potential panel members. Larger institutions as well have increasingly shown a preference for Ciarb members. Several, such as JAMS and the Singapore International Arbitration Centre (SIAC), either require or encourage Fellowship with Ciarb to be on their panels. SIAC requires applicants who are not Ciarb members to show that they have achieved the same level of training and certification through other organisations (though the acceptance of the Code of Conduct remains unique to Ciarb members).

By engaging with arbitral institutions on behalf of our members, Ciarb not only creates opportunities for members to join panels of neutrals but also works together with these key industry stakeholders to improve the quality of service to the users of ADR. By working together, Ciarb and administrating institutions promote high standards of global practice and ensure access to legitimate dispute resolution. As we look to 2024 and beyond, Ciarb expects to continue to expand its engagement with institutions on behalf of members as a priority.

Ciarb's strategic aims are to globally promote the constructive resolution of disputes, be a global and inclusive thought leader, and to develop and support an inclusive community of diverse dispute resolvers. Achieving these aims requires interaction with a variety of stakeholders in the industry, including the institutions that administrate disputes. Institutions are significant to private dispute resolution as an industry as they are a frequent nexus where parties, counsel, and neutrals come together to resolve disputes. They play an important role in administrating disputes but also in ensuring the processes used are efficient, effective, and legally compliant.

ABOUT THE AUTHOR
Mercy McBrayer FCIArb is Head of Arbitration Professional Practice at Ciarb

By engaging with arbitral institutions, Ciarb not only creates opportunities for members to join panels of neutrals, but also works together with these key industry stakeholders to improve the quality of service to the users of ADR

Institutions provide many of the opportunities for gaining experience as neutrals that Ciarb members seek and are also a proving ground for our members to exhibit their skills and understanding. Additionally, institutions rely on a stable pipeline of well trained and capable neutrals in order to serve the parties whose disputes they administrate.

Ciarb regularly engages with many arbitral institutions around the world to understand the markets in which they operate and the demands they face. This in turns influences the development of many aspects of what we offer, including training courses, qualification requirements, professional practice standards, continuing education opportunities, and special events. It is through these offerings that members have the opportunity to then take the knowledge and skills gained and build careers as dispute resolvers. For many, this means engaging with institutions by applying to be on their panels of neutrals.

Panel membership can help arbitrators to demonstrate credibility and to draw attention to their unique combination of skills, knowledge and/or qualities. Therefore, whilst for many arbitration panel members many, or even most, of their arbitrations will not be panel appointments, panel membership can be incredibly important.

Panels play a pivotal role for arbitration users, not least in finding the right arbitrator. This means that arbitral institutions have an obligation to the users of dispute resolution to maintain panels of the most capable and qualified neutrals available. Therefore opportunities to fill openings on institutional panels can be highly competitive, not least as institutions generally try ensure the size of their panel is proportionate to user demand for their services. Having too large a panel results in panel members not receiving any appointments whilst too small a panel will mean members are overstretched, or 'the right' arbitrator may not be on the panel. A balance must be therefore be kept and achieving this requires institutions to take the process of building a panel very seriously.

Institutions should also keep in mind the importance of offering their users a diverse panel of neutrals to choose from. Disputes, and the users that bring them, are highly varied. Therefore the neutrals available need to reflect both the diversity of users and of the disputes referred to them. Ensuring a wide variety of technical, legal, cultural, and personal backgrounds increases the likelihood of parties finding a neutral that is well equipped to understand and resolve their dispute. Further, diversity within tribunals helps to ensure that all aspects of the legal arguments made within the dispute are understood and properly considered.

Ultimately, institutions must ensure that the neutrals they provide to users through their panels are equipped to perform the tasks required.

Is it time to call last orders?

There's a big drinking culture in international arbitration. But what if you don't or can't consume alcohol? Dr Kabir Duggal C.Arb FCIArb and Amanda J. Lee FCIArb consider this question

Political pollsters seeking to measure candidate popularity often ask what is known as 'the beer question': with which candidate would you rather have a beer? The answer is regarded as a barometer of likeability, authenticity and collegiality. As such, the beer question continues to be posed in the hiring context.

Alcohol is both a crutch on which the arbitration community leans and the common thread and social lubricant used by many to facilitate the formation of professional connections. In the bar, at the golf course or *après ski*, bonds are frequently forged over beer or cocktails.

And with the exception of breakfast briefings, it is rare to find an arbitration event in the West that is alcohol-free. It is also customary for arbitration weeks to begin with a kick-off cocktail reception.

This emphasis on drinking culture in international arbitration – a field that places a high premium on the importance of networking and visibility – is therefore a potential barrier for those who abstain from alcohol (on which more later).

Meanwhile, two studies suggest that drinking is often embraced by lawyers as a potential solution to mental health challenges. A 1990 study of 1,200 ►

For those who do not drink, every alcohol-fuelled networking event may give rise to awkward questions

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lawyers conducted by Benjamin et al revealed that 18% of those surveyed engaged in problematic drinking. This figure exceeded problematic drinking rates for the wider population, a finding that was mirrored by a 2019 study conducted by the American Bar Association (ABA) with the assistance of the Hazelden Betty Ford Foundation, which concluded that: "attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations".

Of the respondents to the ABA's survey, 22.6% reported problematic use of alcohol or other substances at some stage of their life, with 20.6% achieving scores consistent with problematic drinking. Notably, 36.4% – more than a third – achieved scores consistent with hazardous drinking indicative of possible abuse or dependency. Although research published by the International Bar Association in 2021 indicates that only 10% of lawyers resort to alcohol as a coping mechanism to manage their mental health, that survey acknowledges the role of social desirability bias in such outcome. This statistic is significant when contrasted with previous studies.

Drinking culture versus diversity in arbitration

Alcohol both unites and divides. While there is nothing wrong with the responsible consumption of alcohol per se and the authors do not intend to demonise those who choose to drink, the clear potential for the pervasive nature of drinking culture in international arbitration to undermine the cause of diversity is noteworthy. Mindful of the international nature of the field, it is incumbent on responsible community stakeholders to take pragmatic steps to address the adverse implications of drinking culture in the field.

There are many reasons why members of the arbitration community may choose not to drink. All are valid. Colleagues may temporarily abstain from alcohol consumption due to pregnancy, fertility treatment or while breast-feeding. Those receiving treatment with antibiotics are encouraged to refrain from drinking alcohol to avoid adverse reactions. Whether abstinence is a cause for celebration or sympathy, the decision to disclose any aspect of one's medical history is sensitive and may have significant career implications.

The consumption of medication to facilitate the management of long-term or chronic medical conditions, such as ADHD, angina, anxiety, arthritis, depression, diabetes, epilepsy, high blood pressure, psychosis and other conditions, whether physical or mental, may also preclude drinking. Practitioners who are dealing with mental health challenges or managing conditions brought on by chronic stress may be reluctant to disclose why they are not drinking for fear of stigma. Those in recovery from alcohol-use disorder or with a family history of addiction may choose to responsibly exclude themselves from events at which alcohol is being consumed.

For those who do not drink, every alcohol-fuelled networking event may give rise to awkward questions. By choosing to prioritise health and wellbeing, take steps to properly manage medical conditions or otherwise exercise personal choice, individuals may miss out on potential opportunities to connect with peers, benefit from career advancement and be fully embraced as members of the arbitration community if they do not attend.

Mindful that arbitration is an international field, cultural and religious considerations merit particular attention. The consumption of alcohol is condemned or prohibited by numerous religions, including Buddhism, Islam, Jainism, Mormonism and Sikhism. Those who do not drink alcohol for religious reasons may find themselves marginalised at events, particularly in the West, or effectively excluded from or made to feel uncomfortable at team building, networking or other professional opportunities because of edicts of their faith.

Research has identified a rising tide of sober curiosity. Data collected by Drinkaware in the UK and Gallup in the US is indicative of a shift in attitude by Gen Z and Millennials, with those under the age of 35 statistically less likely to drink alcohol than their older peers. As time passes and the needs and expectations of arbitration practitioners change, arbitration networking ▶

Alcohol is both a crutch on which the arbitration community leans and the common thread and social lubricant used by many to facilitate the formation of professional connections

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culture is likely to evolve, but any such evolution will be slow.

There is accordingly significant potential for the existing emphasis on alcohol-fuelled networking to have a disproportionately negative impact on practitioners who come from numerous underrepresented groups. Alcohol-based networking is unavoidably less inclusive of and attractive to pregnant or nursing practitioners, sober curious younger (or more senior) colleagues, those who are practising members of numerous faiths and those managing certain disabilities and health challenges. And not just because such events are routinely accompanied by a glass of warm orange juice served from a carton.

Best practices for inclusive event planning

Mindful of the key role played by networking in achieving success and visibility in the profession, the arbitration community can and must do a better job of developing inclusive networking practices. As demonstrated by the 'Stress, Drink, Leave' research supported by the California Lawyers Association and the D.C. Bar, permissive attitudes towards alcohol in the workplace are associated with risky drinking. Proactive leadership is accordingly required if attitudes are to change.

Members of the arbitration community wishing to promote inclusive behaviour at arbitration events, and to better support and accommodate non-drinkers, should keep the following in mind:

- Plan a variety of events to better cater for potential delegates. Breakfast seminars, coffee mornings, garden parties, barbecues (with vegetarian and vegan options available), networking walks and hikes, and evening events that offer refreshments, but which are alcohol-free, are welcome and inclusive alternatives to cocktail receptions and wine tastings.
- Prioritise shared experiences. Hold an arbitration-themed quiz to encourage healthy competition, organise a competitive debate to identify talented speakers or arrange speed-networking or mentoring to give delegates an excuse to connect over points of substance rather than a glass of Pinot Grigio.
- Offer appealing non-alcoholic beverages to delegates at all arbitration events. Non-alcoholic cocktails, cordials and non-citrus juices, alongside still and sparkling water, are a welcome alternative to carbonated and caffeinated beverages that are high in sugar, and citrus juices, which may cause stomach problems.
- Make sure that non-alcoholic beverages are as accessible to delegates as alcoholic beverages. Prominence is typically given to alcoholic beverages, which are routinely offered to delegates on trays as they enter event spaces. Do not hide water and non-alcoholic beverages at the back of the room where they may be difficult to reach.
- Be sensitive to non-drinkers. The decision to abstain is a private one and should not be the subject of speculation or interrogation.
- When organising and attending business dinners, do not expect non-drinkers, particularly those who are funding hospitality personally rather than drawing on the deep pockets of Big Law, to take equal financial responsibility for the alcohol consumption of those who choose to drink.
- Cater for different tastes at arbitration events. While no one can reasonably expect every preference to be accommodated, it is important to recognise that beverage and dietary preferences are as diverse as the arbitration community.
- Avoid holding alcohol-themed competitions and giveaways at arbitration events. More inclusive prizes include vouchers, gadgets, books or small gifts other than food or drink.
- Ensure that team networking events, particularly those organised to give aspiring practitioners the opportunity to impress, are not alcohol-based. Provide opportunities to connect and learn from colleagues in alcohol-free environments to avoid excluding or 'othering' team members.

By being more mindful when planning events, the arbitration community can help to ensure that those who do not drink do not have to choose between awkward participation and exclusion from valuable opportunities to build their professional networks, identify mentors and develop professional opportunities.

After all, it is 'the 4am question' that really counts in international arbitration: with which candidate would you rather be stuck in the office at 4am on the day of a filing?

ABOUT THE AUTHORS

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The emphasis on alcohol-fuelled networking has a disproportionately negative impact on practitioners who come from numerous underrepresented groups

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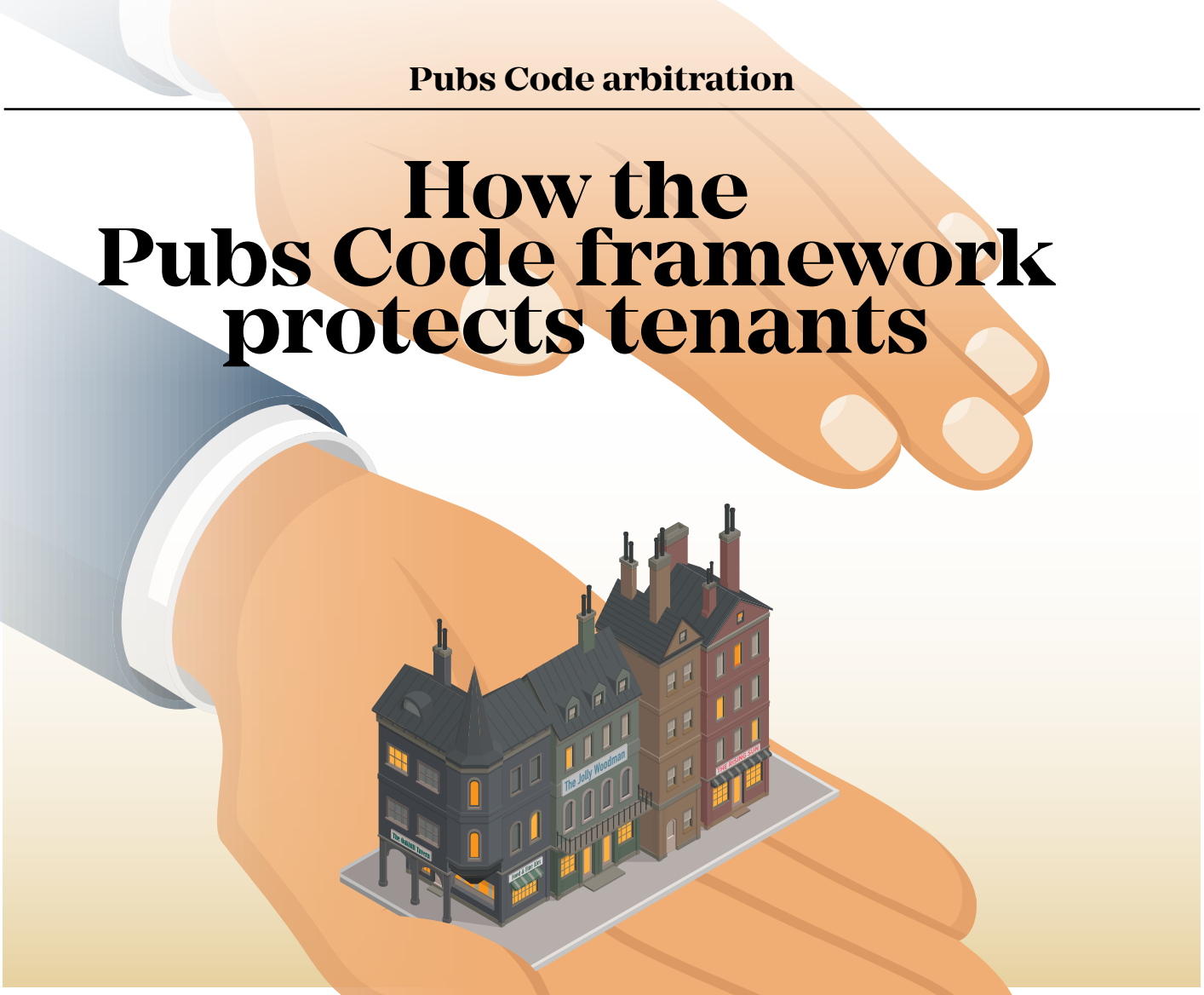
How the Pubs Code framework protects tenants



The statutory provision is a good and rare example of arbitration in practice, ensuring fair resolution of regulatory compliance disputes, says its adjudicator Fiona Dickie

Pubs Code arbitration provides an interesting, and relatively rare, example of statutory arbitration in practice, and fertile ground for resolving issues of interpretation to ensure fair resolution of regulatory compliance disputes.

Since 2016, tied pub tenants of the largest pub companies have enjoyed statutory rights under the Pubs Code. These are tenants who are obliged to purchase their alcohol from their pub company. Their rights include the entitlement to information to help them negotiate their tied rent with their landlords under the Code, and a right to ask for the option to go free of tie when they do. As Pubs Code Adjudicator (PCA), I am responsible for enforcing the Code, and for providing the statutory arbitration service for resolving arbitrable disputes over compliance. Parliament intended that Pubs Code arbitration should be accessible and affordable for tied tenants, and this is important in rebalancing power in the business relationship with their pub company, which regulation was designed to bring.

Parliament intended that Pubs Code arbitration should be accessible and affordable for tied tenants, and this is important in rebalancing power in the business relationship with their pub company

Where a dispute is referred for arbitration, the statute takes the place of an arbitration agreement. The Pubs Code statutory framework is made up of the Small Business, Enterprise and Employment Act 2015 (Part 4), the Pubs Code etc Regulations 2016, and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016.

The PCA must either arbitrate a dispute personally or appoint another arbitrator to do so. The Pubs Code framework provides that an arbitration "must be

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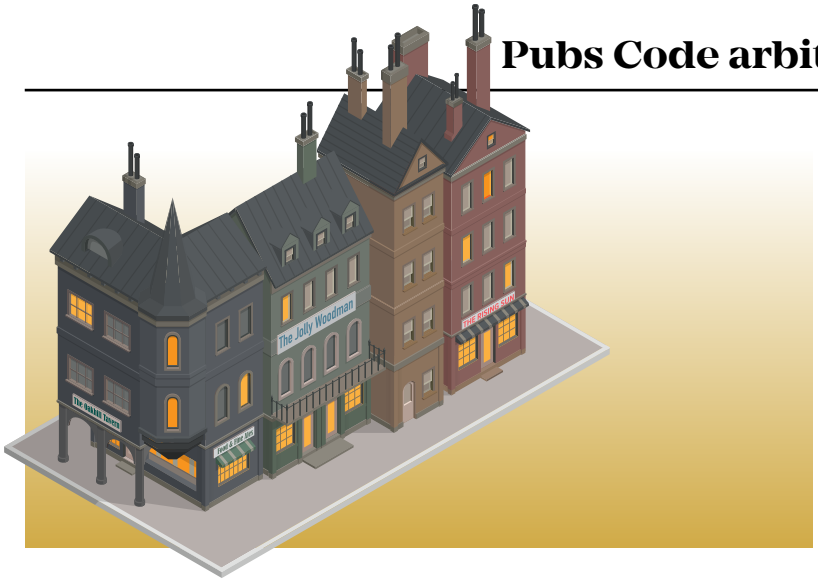

conducted in accordance with" the Ciarb rules, or the rules of another dispute resolution body nominated by the arbitrator.

COSTS PROTECTIONS FOR TENANTS

Accessibility to a dispute resolution mechanism is of course important for tenants, and costs can be an obvious barrier. The statutory framework places liability for the arbitrator's fees and expenses on the pub company, except where a tenant's referral was vexatious. This is obviously an advantage for tenants and has implications for the arbitrator's terms and conditions to ensure they are consistent with the statutory scheme and do not require payment on account of fees from the tenant before the arbitration commences. To do so could simply deter tenants from pursuing reasonable claims through arbitration. It also means the usual practice of an arbitrator exercising a lien over an award pending payment of their fees can be problematic. This is because a pub company could delay Pubs Code procedures by not making prompt payment. I have not seen this happen so far, but as regulator, I am ready to step in should the need arise.

The statutory framework also makes separate provision for costs protection for the tenant, whose liability for the pub company's costs is limited to £2,000 except where their referral was vexatious or their conduct has unreasonably increased the costs of the arbitration. These statutory provisions take precedence over any arbitration rules on costs. Therefore, an order for costs against a losing tenant whose referral is not vexatious should not contain the arbitrator's fee. It would be impermissible to make an order of costs up to £2,000 against a losing tenant whose referral was not vexatious, where that figure included the arbitrator's fee.

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ABOUT THE AUTHOR

Fiona Dickie is Pubs Code Adjudicator, having previously served as Deputy Pubs Code Adjudicator. She was a Vice President of the Valuation Tribunal for England from 2009 until 2020 and is a Judge of the First-tier Tribunal (Property Chamber), having been appointed in 2013.

The statutory framework imposes inflexible deadlines on Code processes and the referral period for arbitration

APPEALS MECHANISM

An appeal to the High Court lies from a Pubs Code arbitration under Section 69 of the Arbitration Act 1996 on a question of law, as well as the mandatory right of appeal under Section 68 on the grounds of serious irregularity affecting the tribunal. This adds expense for the parties and exposes the tied tenant to costs outside the statutory framework.

To date all appeals have been brought by well-resourced pub companies. The costs risk required may discourage a tenant from bringing an appeal, even where grounds exist, or from engaging representation in an appeal brought by the pub company. This may impact on the issues and arguments considered and determined by the court, which may include seeking binding clarification as to the correct interpretation of the law. Following the first statutory review of the Pubs Code (2016–2019) the government said it would explore scope for an alternative to the High Court as the arbitration appeal route to make this a more accessible option for parties.

PUB COMPANY COLLABORATION

Pub companies have, over the life of the Code, shown an improving understanding of the importance of a fair and transparent dispute resolution process. Early in the life of the Pubs Code, confidentiality in arbitrations had a negative impact on the resolution of disputes. A pub company that had been involved in multiple cases on the same or similar issues had an advantage over a tenant who had not, and who was seeking for the first time to understand the process and legal tests and to respond to evidence on very technical considerations. With the cooperation of the pub companies, and with appropriate party consent, from late 2018 the PCA has been publishing awards or anonymised case summaries to help industry understanding and improve transparency of the statutory arbitration process.

The statutory framework imposes inflexible deadlines on Code processes and the referral period for arbitration. During the successive Covid-19 lockdowns, the practicalities faced by both tenants and pub companies made trade and business management all but impossible and threatened tenants' ability to assert their rights through arbitration. I am pleased to say that the pub companies showed a proactive and responsible approach to this problem, cooperating with the PCA in entering into Declarations to pause and protect tenants' rights during those periods. This innovative and novel approach ensured that tenants' arbitration rights under the Code were not lost but respected in a consistent manner by all pub companies.

Although arbitration should be a last resort, it remains a much-needed mechanism for tenants. The PCA continues to raise awareness of tenants' arbitration rights under the Code and to ensure the protections provided by the statutory framework are understood.

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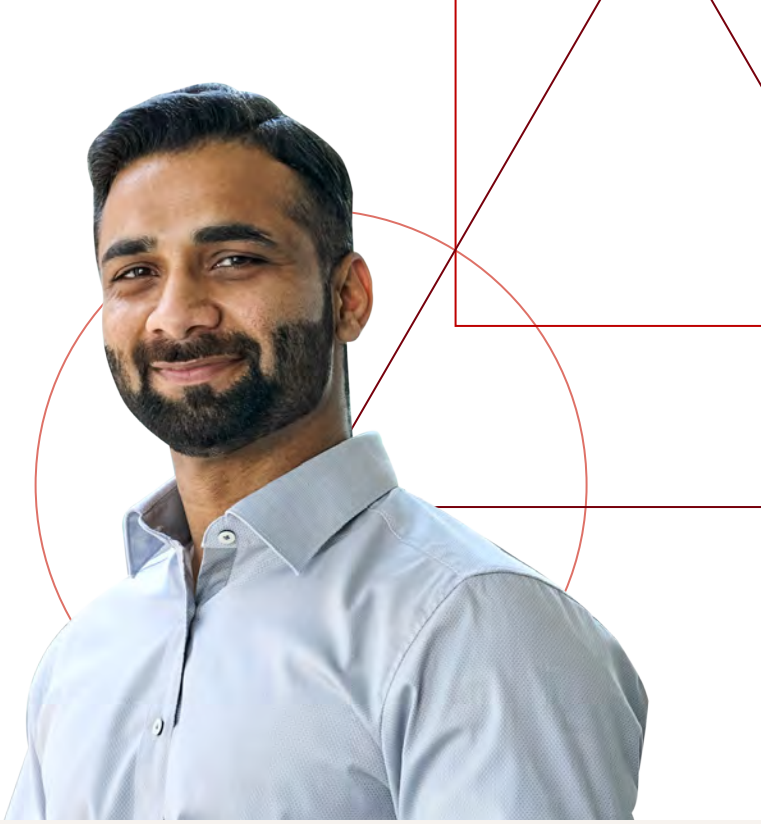

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This course focuses on the impact of disputes on a brand and strategies to consolidate a brand at such times.

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Read at
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25 October 2023

Let's Discuss AI in Practice
14 November 2023

Let's Discuss Technology Disputes
28 November 2023

Alexander Lecture

8 November 2023

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