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THE Resolver

SUMMER 2020 CIARB.ORG

VIRTUAL WORLD

Lessons from the lockdown

The virtual era brings both blessings and risks

The grip of the viral storm is loosening, but its onslaught has severely restricted human movement and the flow of money. The statistics are grim: by late June, 10 million had been infected with the virus worldwide and an estimated 480,000 perished.

The pandemic has radically shifted our perspectives. We are now acutely alive to a number of truths: how meaningful our work is; our need for physical interaction with the ones we work with and those we love; and that, to a great extent, our lives, like our physical spaces, have been cluttered and compromised by the unimportant. We have rediscovered simple joys: a reflective walk, a Zoom call with friends or family, a physical workout or reading a book. In some ways, the pandemic has showered us with blessings.

The practice and business of ADR have been irretrievably impacted and the age of virtual meetings and hearings is upon us. A keen finger needs to be kept on the pulse of data privacy and cybersecurity risks. As virtual platforms are widely adopted, the threat is enhanced.

We are grappling with technology options, from ensuring adequate bandwidth coverage in home and remote settings to selection of an appropriate virtual platform and utilising optimal video/audio aids. Rules are being put in place to prevent abuses such as unlawful recording and dissemination of proceedings, lagging standards of formality and witness coaching and tampering.

The Institute's work is forging ahead. Indefatigable energy and passion has been injected by Catherine Dixon, our new Director General. The vital business of the Boards of Trustees and Management (ably led by Jonathan Wood and Jane Gunn, respectively) and the committees push on in virtual mode.

Much work remains – in embracing best practices, preventing data breaches and evolving protocols that deliver an optimal virtual interface. Each one of us needs to be poised to make the most of this future.

As Hannibal put it as his elephants battled their way across the Alps: *aut viam inveniam aut faciam* ("I shall either find a way or make one").

Francis Xavier SC
C.Arb FCIArb
President, CIArb

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The opener

CIArb launches COVID-19 business dispute service

CIArb has launched an exciting new initiative designed to help businesses faced with COVID-19 related disputes. The Pandemic Business Dispute Resolution Service (PBDRS), in collaboration with the Centre for Effective Dispute Resolution (CEDR), has been designed to offer a faster, more accessible and more affordable alternative to court. The PBDRS provides the options of Facilitated Contract Renegotiation, Fixed-Fee Mediation and Fast-Track Arbitration so businesses can deal with their disputes and get back on track.

Parties can agree to use the mechanisms individually or proceed through a stepped process depending on whether a resolution is found. From CIArb's perspective, the arbitration aspect of this new service operates on the same basis as the existing Business Arbitration Scheme, except for the fact that parties will agree to a higher claim limit of £250,000 under the terms of the new service. Arbitrators will be appointed by the Chair of the applicant's local Branch from a Branch-approved panel. To ensure the process is as smooth as possible, the service is designed to be conducted entirely online, and there is no requirement for the parties to be represented by a lawyer.

For more information, please contact Lewis Johnston ACIArb, Head of Policy and External Affairs, at **ljohnston@ciarb.org**

CIArb DIPLOMA

Virtual delivery for 2020 Diploma

This year's edition of the Diploma in International Commercial Arbitration will be delivered virtually over a four-week period, from 4–27 September 2020. Distinguished arbitrator Professor Dr Mohamed Abdel Wahab MCIArb will be returning to direct this year's Diploma.

The Diploma is normally delivered in the heart of Oxford and provides the opportunity to undertake training and assessments that may lead to Fellowship of the Chartered Institute of Arbitrators (FCIArb), subject to peer interview.

This year, CIArb will use its online platform to provide candidates with all the necessary training materials and virtual classroom experience. Candidates can also take the assessments at home and submit them using CIArb's assessment portal.

For further information, please contact education@ciarb.org or go online to ciarb.org/training/bookings/virtual-diploma-in-international-commercial-arbitration/

Online best practice

An online resource has been launched with the aim of sharing best practice for conducting web-based arbitrations. CIArb is among the five co-founders of Virtual Arbitration (virtualarbitration.info), an expert forum that draws on the knowledge of arbitration specialists. As a hub for cutting-edge news, information-sharing and analysis, Virtual Arbitration offers a 'one-stop shop' for those looking for guidance across the legal, technical and behavioural aspects of ensuring an online arbitration can function effectively. The information it provides can be used not only by practitioners, but also by anyone involved in an arbitration who wants to develop a deeper understanding of how an online arbitration works.

AGM CHAIRS

Branch committee elections

This year Branches held their AGMs via online conference and elected new members to their committees. Go online to see the recent additions at **ciarb.org/our-network**

GAR AWARDS

CIArb's innovation wins accolades

CIArb has been recognised with four awards at the GAR Awards 2020, hosted by the *Global Arbitration Review* in July as an online event.

CIArb as an organisation has won the accolade of Best Innovation for its *Guidelines for Witness Conferencing in International Arbitration*.

The guidelines were launched in Singapore in April 2019. Timothy Cooke FCIArb, Partner at Stephenson Harwood and Vice-Chair of the sub-committee on witness conferencing established by the Singapore Branch of CIArb in 2017, explained at the time: "In devising the guidelines, we were keen to craft a flexible and non-prescriptive document that would assist tribunals and parties to prepare for and conduct conferences in a wide variety of cases."

Professor Stavros Brekoulakis MCIArb, Editor-in-Chief of CIArb's *Arbitration* journal, won the GAR award for Best Lecture or Speech for his Roebuck Lecture in 2019 on 'The Unwavering Policy Favouring Arbitration under English Law'.

Professor Brekoulakis said: "I am truly honoured to have won this year's award for Best Lecture for my Roebuck Lecture on England's long history of support for arbitration. It was dedicated to Professor Roebuck, who was alive when I gave the lecture a year ago, but sadly passed away earlier this year. It is only appropriate to dedicate this award to his memory now."


Professor Stavros Brekoulakis MCIArb


Timothy Cooke FCIArb

Meanwhile, the launch of the Virtual Arbitration platform (virtualarbitration.info), of which CIArb is a founding supporter, was given a special recognition award for its response to the COVID-19 pandemic.

'Best Development' was awarded to the Pledge for Greener Arbitrations, a CIArb-supported initiative led by Lucy Greenwood C.Arb FCIArb, Member of CIArb's Board of Trustees and founder of the Campaign for Greener Arbitrations.

POLICYCAST

ADR podcast launched

CIArb has launched a new podcast, drawing on the pedigree of podcasting within the Institute and addressing the need for interesting and accessible content on the subject of ADR.

The CIArb PolicyCast is aimed at positioning CIArb as an attractive destination for practitioners and non-practitioners alike who seek more information about the Institute's areas of expertise, as well as putting CIArb in a position where the Institute's work can be communicated to a larger audience.

New episodes are expected on a weekly basis. The first episode in the series, which went live on 22 June, features Lucy Greenwood C.Arb in conversation with CIArb's Head of Policy and External Affairs Lewis Johnston ACIArb.

Johnston said: "We are beyond excited to bring you all what we feel is an interesting and exciting take on the promotion of the virtues of ADR."

Find out more at ciarb.org/policy/ciarb-policycast

SAVE THE DATE

Alexander Lecture

One of the most respected events in the ADR calendar, the 46th Alexander Lecture will take place on 12 November 2020, and the speaker will be Professor Richard Susskind OBE (pictured).

DAS Convention

The theme of the eighth Dispute Appointment Service (DAS) Convention is 'Handling disputes in an era of uncertainty' and the event is supported by Addleshaw Goddard, Arbitralis and Accura Consulting. The event will take place online on 25 November 2020.

Mediation Symposium

The 13th Mediation Symposium will draw together presentations, deliberations and debates around 'multidisciplinarity' and the practice of mediation. It is due to take place online on 7 December 2020.

To book, or for more information on upcoming flagship events, go online to ciarb.org/events

60-SECOND INTERVIEW

Amb. (r.) David Huebner C.Arb FCIArb

Amb. (r.) David Huebner C.Arb FCIArb talks about his experiences, life lessons and hopes

What are your ambitions for CIArb?
My core goal is to help create more of a member-focused culture so that members can derive greater value from their annual subscriptions, as I certainly have. I am also focused on strategic planning. I have been a CEO, chair, trustee, director and patron, and I have seen how much progress can be made in a complex institution if it has a single, clear strategy – particularly when it has aspirations to thought leadership. Focusing on diversity is also a critical objective for CIArb.

What key lessons did you learn as an ambassador?
It was the most dynamic, demanding, multifaceted, satisfying position that I have ever held, with each day posing completely different challenges. The most important lesson was that you must relentlessly prepare for every conceivable occurrence so that you can respond confidently and effectively when the inconceivable erupts, which it regularly does.

Is this a good time to be in ADR and, if so, why?
Absolutely. In normal times, arbitration or mediation can resolve disputes faster, at less cost and with far less damage to the parties than court proceedings. We are, however, facing abnormal times as a result of the pandemic. Here in California, for example, the courts will not be hearing cases other than criminal matters until sometime in 2021. Skilled ADR neutrals and advocates will be in increasing demand.

What has been your proudest professional moment so far?
When I left government service, the Smithsonian Institution held a ceremony at which my diplomatic passport and certain other of my papers and artefacts were taken into its permanent collection, because the curators determined that I was the first openly LGBTQ+ person in the history of the Republic knowingly nominated by the President and confirmed by the Senate to high office. My stuff sits in the same collection as items belonging to my heroes Benjamin Franklin and Thomas Jefferson. That feeling is indescribable.

David Huebner C.Arb is an arbitrator and mediator based in Los Angeles. He sits on the CIArb Board of Trustees, representing the Americas Region. As well as being an experienced legal practitioner, he served as US Ambassador to New Zealand and Samoa (2009–2014).

IN BRIEF

ADR thrives on diversity

Racism and bigotry are abhorrent to CIArb in all their forms and have no place in our global community, nor in our wider society. In June 2020, CIArb Director General Catherine Dixon (pictured) reaffirmed the organisation's commitment to proactively tackling inequality and building a world in which everyone is treated with equal dignity, worth and respect.

As a centre of excellence for the resolution of disputes, CIArb wholeheartedly believes in the right to fair and equal justice, and has committed to making a frank and honest appraisal of where the organisation can do more to give practical effect to that commitment.

Essay competition

CIArb's South East Branch and the University of Law are calling for entries to the Student ADR Essay Competition 2020. The winners this year – the second year of the competition – will again be chosen from a shortlist by our judging panel, led by the Rt Hon Lord Neuberger of Abbotsbury, past President of the UK Supreme Court. Note that this is only available to students residing in the UK. For more information and details of how to enter, go online to **ciarb.org/news/ciarb-s-south-east-branch-essay-competition-2020-launch/**

Mediation training

CIArb has adapted its popular Module 1 Mediation training programme for virtual delivery. Running across two half-days a week for seven weeks, the module includes group exercises, role plays and reflective learning. Candidates who successfully complete Module 1 can apply for Membership of the Institute (MCIArb) and CIArb Accredited mediator status, and those who go on to complete Modules 2 and 3 can apply for Fellowship (FCIArb). Please contact **education@ciarb.org** for further information.

OBITUARY

Professor Derek Roebuck

Professor Derek Roebuck MCIArb, one of the leading thinkers in the world of arbitration, passed away on 27 April 2020 at the John Radcliffe Hospital in Oxford at the age of 85.

Professor Roebuck was a lawyer who taught and practised law in England, New Zealand, Australia, Papua New Guinea and Hong Kong. He was also Editor Emeritus of CIArb's *Journal* and a Senior Research Fellow of the Institute of Advanced Legal Studies, University of London. He wrote and edited more than 40 books on law, legal history and language.

In recent years, his research on the history of dispute resolution has produced numerous publications, including: *A Miscellany of Disputes* (2000); *Ancient Greek Arbitration* (2001); *The Charitable Arbitrator: How to Mediate and Arbitrate in Louis XIV's France* (2002); *Roman Arbitration* (2004); *Early English Arbitration* (2008); *Disputes*

and Differences: Comparisons in Law, Language and History (2010); *Mediation and Arbitration in the Middle Ages: England 1154–1558* (2013); *The Golden Age of Arbitration: Dispute Resolution Under Elizabeth I* (2015); *Arbitration in Seventeenth-Century England* (January 2017); *A History of European Women in Arbitration and Mediation* (with Susanna Hoe, May 2018); *English Arbitration and Mediation in the Long Eighteenth Century* (with Francis Boorman and Rhiannon Markless, November 2019).

The Roebuck Lecture, CIArb's annual flagship event, is named after Professor Roebuck and celebrates the very significant contribution that he has made to the Institute over the years.

Tom Cadman ACIArb, Deputy Director General of CIArb, said: "Professor Roebuck was a great friend of the Institute whose contribution to both CIArb and the world of arbitration was invaluable. We were delighted to be able to support his History of Arbitration Project at the Institute of Advanced Legal Studies, which should be a fitting legacy to his work. Our thoughts are with those close to him at this time."

QATAR

Qatar International Court and Dispute Resolution Centre launches mediation service

The Qatar International Court and Dispute Resolution Centre (QICDRC) has launched its mediation service as part of an aim to offer a range of dispute resolution services to users. Mediations are conducted in accordance with the QICDRC Mediation Rules, which are available online at qicdrc.gov.qa

Mediations are initiated in one of three ways:

1. by the Qatar International Court or QFC Regulatory Tribunal (with the agreement of the parties);
2. as a result of a contractual provision to refer the dispute to mediation; or
3. at the voluntary request of one or more parties to a dispute (with the agreement of the other party/parties). Where parties seek to refer a dispute to mediation, the Registrar will suggest a list of mediators from the specially created QICDRC Panel from which the parties can make a selection. If the parties are unable to agree on a particular mediator, the Registrar will make the appointment.

The appointed mediator has complete flexibility to conduct the mediation in such manner as he or she considers appropriate and most likely to be successful, having regard to the nature and circumstances of the dispute.

Ideally, the mediation will result in an amicable settlement agreement that all parties are content with. If settlement cannot be reached, the parties may then consider whether to resort to another form of dispute resolution.

Owing to the current restrictions imposed as a result of the COVID-19 pandemic, all QICDRC mediations will, at the present time, take place virtually.

Learn more by visiting the QICDRC website: qicdrc.gov.qa

People and planet first

Robert Outram reports on this year's Roebuck Lecture by Cherie Blair, covering ISDS, diversity in ADR, the value of a legal career and more

The ADR profession has been given a historic opportunity to ensure that its processes serve the needs of "people and planet". That was the message from Cherie Blair CBE QC MCIArb in her Roebuck Lecture, given on 11 June 2020.

The lecture was the 10th in an annual series commemorating Professor Derek Roebuck, who sadly died in April this year. Because of the COVID-19 restrictions, the event was live-streamed to an audience around the world.

CIArb Director General Catherine Dixon said in her introduction to the lecture: "If anything good is to come out of the COVID-19 pandemic, it's a recognition that we need to come together and that, when we do, we are stronger."

Continuing that theme, Blair said: "The coronavirus, for all its appalling devastation, might just spur positive evolution by forcing us to adjust our processes and priorities... already, we are doing things that before we only spoke about doing. And doing them pretty well."

She went on: "My message is: we should embrace the opportunity to adapt. We should challenge customary processes and received wisdom, we should re-consecrate our principles and we should put integrity at the heart of our ambitions."

The profession has learned that arbitration and mediation processes can work well remotely using technology, that overseas travel can be reduced and that costs can be reduced, she said.

Cherie Blair CBE QC MCIArb delivered this year's lecture, which was online as a result of the COVID-19 pandemic

ISDS: SERVING NARROW INTERESTS?

Now, arbitrators also need to embrace and understand environmental, social and governance (ESG) issues, which are of increasing importance to clients and investors. This is particularly important, she said, with regard to the investor-state dispute settlement (ISDS) process since there is a perception now that ISDS does not sufficiently protect human rights, the environment or the interests of developing countries.

She said: "The ISDS system was not conceived to be one-sided in favour of investors. However, its evolution has been perceived as doing just that: embracing the narrow interests of claimant investors at the expense of people and planet.

"There is a danger that this perception could lead to ISDS being swept aside in the stampede to find an elusive better way."

She argued that, if change is necessary, it is better enacted by those who understand the system.

In a Q&A session after the lecture, chaired by CIArb President Francis Xavier, Blair answered questions from members on a range of topics,

"The ISDS system was not conceived to be one-sided in favour of investors"

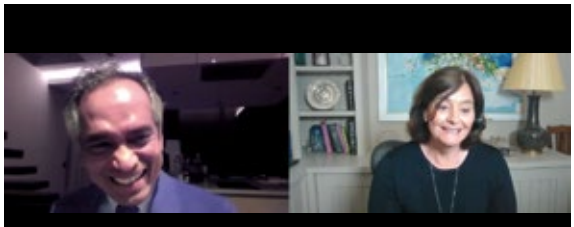
including: whether increased use of technology means that we will need more young arbitrators; how to fix the perception that ISDS is not working; and what arbitrators need to know as ADR evolves.

Blair commented that there are some older "tech-savvy" ADR professionals, but it is important to encourage young talent. On ISDS, she argued that greater transparency will help to make the case for arbitration and how it works. She also stressed that arbitrators need to be more than simply legal experts.

'WE STILL HAVE GLASS CEILINGS'

Speaking with *The Resolver* after the lecture, Blair said that ADR professionals need to take a broad view of business, human rights and environmental issues, as well as procedure. She said: "It's really important that they have a more holistic understanding of their clients' context and objectives, so they don't simply see this through the lens of black letter law." The profession also needs to be more creative about finding "the right levers to pull" to achieve a settlement rather than running up large legal costs, she said.

She also talked further about ISDS and calls for reform, or even abolition, of the process.



CIArb President Francis Xavier chaired the Q&A session

"Has there been as much progress as I had hoped starting out in 1976? Sadly not"

She said: "The one thing everyone agrees on is that the current system needs changing or reforming in some way. Personally, I would prefer to see it reformed by people who know how it works in practice."

Blair also discussed diversity in the legal profession. She said: "Has there been as much progress as I had hoped as a young barrister starting out in 1976? Sadly not. We still have glass ceilings and pay inequity for women – 49% of lawyers in firms are women, but only 33% of partners are – and it's similar for BAME lawyers. And we haven't even talked about disability."

Lack of social mobility, she added, is now even more of a problem than it was in past decades.

Even so, the law is still very much a career worth pursuing, she said: "In our time in Downing Street, my legal career was a huge lifeline because it was something that was mine, that I did in my own right. I'd spent 25 years as a professional, so I did have a track record, which was very precious to me.

"I'm still here, I still love the law and I love the way you can reinvent yourself throughout your legal career."

Read our obituary for Professor Roebuck on page 6.
An in-depth report, audio interview with Cherie Blair and links to the recorded event are available at ciarb.org/resources/media-archive/roebuck-lecture

Just under half of lawyers in firms in the UK are women, but this is not reflected at senior level

SHUTTERSTOCK

Our duty to embrace tech

ADR practitioners find themselves in a new world and must adapt, says **Chiann Bao FCIArb**

Are dispute resolution practitioners duty-bound to 'keep up with the technology Joneses' of the world? This is particularly relevant in light of the COVID-19 pandemic. Whether it is fax, email, Skype, WeChat, Zoom, Webex or Microsoft Teams, we have all had to make decisions on how 'teched up' we should be to best serve our clients.

Long-existing technology is now being reintroduced for remote proceedings. How much should we be educating ourselves to become conversant with this technology? It is a new world for dispute resolution practitioners. A handful have seen this day coming and have prepared accordingly. Most, however, have failed to keep up despite their best intentions. And then there are those who have never engaged, and have instead relied on the trusty pen (or a secretary) to do the hard yards.

The ADR practitioner's duty is to represent their clients as effectively as possible. Given the understandable budgetary limits of many practitioners, there can be no standard parameters as to the necessary technology required to perform one's duties. However, when faced with a proposal to make use of technology for a proceeding, must we skill up and learn the proposed technology? Of course we must. This is especially true where an in-person hearing is impossible or too costly.

Learning new technologies will incur costs. While this may lead to an additional burden, for the party who introduces such technology, to train the opposing side (as well as the arbitrators), who may not be familiar with such technology, there is a duty to ensure not only that the proceedings are efficient, but also that both sides have an opportunity to present their case.

Understandably, resistance to the use of new technologies may sometimes be warranted. A given application is not always the right solution for the particular circumstances. What we are talking about here, however, is remote-hearing technologies that have crossed the threshold from novel to norm within months. This is not sci-fi or state-of-the-art technology. Those who cannot adapt may not face sanctions, but they will simply lose out.

There is a duty to ensure proceedings are efficient and both sides have an opportunity to present their case

ABOUT THE AUTHOR
Chiann Bao FCIArb practises as an arbitrator and mediator and is a member of Arbitration Chambers, practising in Hong Kong, London and New York. She currently serves as a Vice-President of the ICC Court of Arbitration and is the chair of the ICC Commission task force on arbitration and ADR. She is a member of the ICC Belt and Road Initiative Commission.

HOW TO...

Understand the role of the tribunal secretary

Dr Amel Makhlouf MCIArb dispels misconceptions around the support role

The professionalisation of arbitrators and the growing complexity of international arbitration have led to a rise in the appointment of tribunal secretaries. Yet, their appointment remains a matter of controversy which reflects a misconception of their mission.

A tribunal secretary may be described as a player in the arbitral proceeding who is not a member of the arbitral tribunal, but who supports the latter at all stages.

A tribunal secretary can be appointed at any time during an arbitration to assist a three-member arbitral tribunal or a sole arbitrator. Such an appointment – subject to parties' approval and that of co-arbitrators, if any – usually requires disclosing the identity, qualifications, expertise and missions conferred upon the tribunal secretary. Besides, the secretary must satisfy the same requirements of impartiality and independence as an arbitrator.

Upon the tribunal's directions and under its strict supervision, the secretary performs several duties such as managing the tribunal's file, conducting legal research, drafting and reviewing procedural documents, drafting parts of an award, organising procedural meetings and evidentiary hearings, and attending the tribunal's deliberations. Exchanges between the tribunal and its secretary are confidential.

The increasing use of tribunal secretaries reflects a practical need for administrative support in international arbitration. The appointment of a tribunal secretary would reduce the cost and duration of arbitral decision-making – currently a serious issue – and substantially enhance the quality of the proceeding, up to the rendering of the award, if applied and managed properly.

The appointment of tribunal secretaries benefits all parties. To reduce or eliminate all possible doubts as to their legitimacy, some arbitral institutions, such as the HKIAC and the ICC, define the role and duties performed by secretaries.

For instance, the 2018 HKIAC Rules provide in article 13.4 that "the arbitral tribunal may, after consulting with the parties, appoint a secretary". The role of the secretary is further clarified in the *Guidelines on the Use of a Secretary to the Arbitral Tribunal*, effective from June 2014, which may be adopted by parties to arbitration proceedings administered by HKIAC under the HKIAC Rules or the UNCITRAL Arbitration Rules.

While the 2017 ICC Arbitration Rules are silent on the secretary's role, the *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, dated 1 January 2019 (and previous editions), defines the role of a secretary in section XIX and provides practical guidance in terms of appointment, duties, disbursements and remuneration.

No doubt, further regulation of tribunal secretaries based on a uniform standard developed by the arbitration community would enhance transparency and strengthen the legitimacy of the arbitral proceeding.

Appointment of a tribunal secretary reduces the cost of arbitral decision-making

ABOUT THE AUTHOR

Dr Amel Makhlouf MCIArb is a French-qualified lawyer specialising in international arbitration. She has been appointed as tribunal secretary to proceedings in Europe, Asia and the Arab World and Middle East. Dr Makhlouf is also a lecturer at the Sorbonne Law School in Paris and a Research Associate at SOAS, University of London. During her time at CIArb (2019), she was key in organising a series of joint events with the Sorbonne Law School.

SHUTTERSTOCK

The new virtual reality

Robert Outram speaks to ADR practitioners about the impact of the pandemic and asks whether remote hearings will endure beyond the crisis

Coleen Rooney and Rebekah Vardy, both celebrities married to English football stars, have been at odds since 2019, with claims and counter-claims about leaked confidences and reputational damage coming from both sides. In May, they attempted to settle the dispute through mediation via a Zoom meeting, attended also by their legal advisers, which unfortunately failed to settle the matter.

The saga has delighted the tabloid press, but it also provides an illustration of how dispute resolution has been affected by the COVID-19 pandemic and the lockdown measures brought in around the world to contain it. Instead of facing each other in one room, opposing parties now confront each other on screen.

Lucy Greenwood C.Arb FCIArb, an independent arbitrator based in London, says: "COVID-19 has forced a major change in behaviour in international arbitration. As an international arbitrator I am expected to travel frequently to hearings and to speak at conferences. This has completely changed with the pandemic. The arbitration community has had to embrace technology and adapt to the travel restrictions by holding virtual arbitration hearings and switching to webinars."

WAIT AND SEE

In Cairo, Professor Dr Mohamed Abdel Wahab MCIArb identifies four ways that proceedings have been affected. First, some cases have been able to continue with virtual hearings, albeit claims and the parties' cash flow may have been affected by the pandemic. In other cases, the proceedings have continued but the parties have agreed to postpone physical hearings until they can take place in person at the earliest opportunity. In further cases, the proceedings have continued on the basis of a hybrid approach, where certain aspects of hearings have been postponed until it is possible to proceed with physical in-person hearings at the earliest opportunity and certain others aspects of hearings are proceeding virtually, such as opening and closing pleadings as well as cross examination of expert witnesses. Finally, in few cases, the parties have opted for a suspension of the proceedings for a few months to consider their options accordingly.

Foo Joon Liang FCIArb, Chairman of the Malaysia Branch of CIArb, says: "In Malaysia... during the initial period of the lockdown, parties largely took a wait-and-see approach. However, when it was apparent that the lockdown would prolong in some form or another, parties in arbitrations began looking at and implementing virtual meetings and hearings. Having now had the experience of virtual hearings thrust upon us, I suspect most tribunals will see that as a viable, if not the preferred, option."

"The level of planning... required for a full virtual hearing is much more detailed"

Top down: Foo Joon Liang FCIArb, Isaiah Bozimo FCIArb, Lucy Greenwood C.Arb FCIArb, Mohamed Abdel Wahab MCIArb

In Nigeria, the lockdown is now easing (at the time of writing), but ADR proceedings have been affected. Isaiah Bozimo FCIArb, Partner with Broderick Bozimo & Co, reports: "We had four hearings scheduled between March and May – two in Abuja, one in Lagos and one in Nairobi. Each of them has been postponed on account of COVID-19. Many of our colleagues experienced similar delays after the Nigerian government introduced lockdown measures. With that said, arbitral institutions have been quick to adapt. For instance, the Lagos Chamber of Commerce International Arbitration Centre is implementing infrastructure to facilitate the resolution of disputes remotely."

He adds: "Naturally, the level of planning... required for a full virtual hearing is much more detailed. The main variables we encounter are concerned with access to a stable and reliable data connection (usually achieved through a wired connection) and maintaining a constant supply of electricity (with inverters and backup generators)."

MORE TIRING

Vyapak Desai MCIArb of Nishith Desai Associates in Mumbai reports that the lockdown has led to delays, with parties in two arbitration proceedings calling for the process to be extended by eight to 10 weeks.

He adds that, in his experience, virtual hearings have been "100% successful... absolutely no issue when both parties consent".

Even in Singapore, where the lockdown measures have been more limited, some hearings have been postponed and others have been carried out through videoconferencing. Timothy Cooke FCIArb, Partner with Stephenson Harwood LLP in Singapore, says: "On the whole, the hearings have been a success. Hearings involving legal arguments or interim applications are not

SHUTTERSTOCK

too different from having a hearing over the telephone... some have expressed concerns that the process may be less effective because a video camera may not capture the body language and demeanour as effectively as when a witness is appearing in person. My experience so far is that this concern is not borne out."

He advises that a tribunal needs to be comfortable with the platform being used, and recommends a trial run to ensure the technology works, especially if some participants are accessing the proceedings from their own homes. It is also helpful to agree a protocol ahead of the meeting, for example using a 'raise hands' function for interventions.

Cooke adds: "Arguing a case through a screen feels more tiring than in person – I'm not sure why, but other advocates have said the same. Having frequent breaks is therefore important. Also, conferring between members of a legal team and client representatives is not as fluid as in an in-person hearing... counsel need to factor in a little extra time to accommodate these sorts of communications during a hearing."

CIArb has issued guidance for the conduct of remote hearings

NOT 'ONE SIZE FITS ALL'

Prof Abdel Wahab points out a number of challenges that need to be addressed: access to reliable technology, which can be problematic for individuals in some territories; security; and ensuring that participants are ready to move out of their comfort zone and embrace new ways of working.

He predicts: "We will see very innovative applications, boosting the available tools, with bespoke adaptation of existing tools for the dispute resolution world. There is a consensus that we have to adapt to the virtual environment, but it is not 'one size fits all'."

Fortunately, there is advice and guidance on hand on how to conduct remote proceedings in ADR. CIArb's own *Guidance Note on Remote Dispute Resolution Proceedings* was published in May, and guidance has also been issued by, among others, the International Chamber of Commerce and the Africa Arbitration Academy. The Seoul Protocol on Video Conferencing in International Arbitration (2018) also addresses practical issues. There is a range of resources and news updates available online at virtualarbitration.info.

In June, CIArb and the Centre for Effective Dispute Resolution jointly launched the Pandemic Business Dispute Resolution Service. This is a wholly online service operating at fixed costs to resolve business disputes involving claims between £5,000 and £250,000 (see page three for more information).

"Inertia about virtual hearings and insistence on physical hearings... will go away"

ADAPTING IN COMPLEX TIMES

Even though lockdown measures are easing in many countries, there is an expectation that dispute resolution will not simply return to the status quo. Desai argues: "The inertia about virtual hearings and insistence on physical hearings – common in India – will go away, making way for remote hearings, an emphasis on stricter case management, document-only arbitration, more use of mediation and a change in advocacy style."

Edwin Nemesio Alvarez Roman ACIArb is an arbitration specialist and counsel based in Mexico

Whether ADR will ever return to a primarily in-person format is a matter of debate

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"The pandemic has... forced ADR professionals to engage with technology"

City. Due to the COVID-19 lockdown, all tribunals in Mexico, including the Supreme Court of Justice, have been closed. This, he says, has focused attention on arbitration, mediation and conciliation as alternative means to solve legal problems, rather than endless litigation.

He adds: "I am deeply convinced that the characteristics of arbitration, mediation and conciliation, as well as the implementation of IT, will allow them to adapt in these complex times to be a benchmark in the solution of disputes."

Greater use of ADR could help to find additional capacity to relieve the constraints on capacity that have affected some courts during the lockdown period. In London, two members of Twenty Essex Chambers – Gordon Nardell QC FCIArb and Angharad Parry MCIArb – are working on a protocol under which the parties to court proceedings at an advanced stage could agree to 'convert' their impending trial to an arbitral hearing, using the pleadings and evidence already assembled for the litigation and adopting a procedure as close as possible to the trial that would have taken place. The parties would be able to retain their existing legal teams and avoid wasting the huge resources sunk into the pre-trial process.

GREENER ARBITRATION

In a blog for Twenty Essex Chambers, Nardell and Parry write: "It should be possible in principle for the arbitral community – institutions, arbitrators themselves and other practitioners – to step up and rescue parties to litigation who want their trial-ready disputes to be resolved promptly but whose hearings are being squeezed out of the lists by the impact of COVID-19."

Under the protocol, the parties would enter into an arbitration agreement with three key elements:

- providing for the rapid appointment of a tribunal with availability to prepare and hold a hearing in short order;
- prescribing the applicable procedural rules; and
- making agreed provision for the costs of the litigation to date – perhaps the most obvious choice being to empower the tribunal to deal with the costs of the preceding litigation as part of the recoverable party costs of the arbitration.

The same principle could be applied to a range of jurisdictions where a backlog of cases has built up, and could also assist in cases at an earlier stage of the litigation process.

Parry says: "Parties in jurisdictions where the courts have been gridlocked by COVID-19 may begin to consider the possibility of agreement to London-seated arbitration. The English courts, as curial courts, will continue to list arbitration-related applications."

The new normal might include a move towards more 'hybrid' hearings

Looking to the future, Greenwood believes the pandemic has provided valuable lessons. She says: "I am not in favour of wholly remote hearings... but I am in favour of hybrid hearings, where, for example, certain witnesses give evidence by video and even where counsel and arbitrators are participating on screen, as long as they are grouped together. I think that everyone being separated can be problematic."

As founder of the Campaign for Greener Arbitration, she also hopes that proceedings will become far less dependent on international travel and hard-copy bundles, benefitting the environment as well as saving on costs.

As Cooke puts it: "While the pandemic has caused incredible disruption to people across the globe, it has through necessity forced ADR professionals to engage with technology in a way that might otherwise have taken many years. Arbitrators and mediators have reported that holding proceedings remotely can be extremely effective.

"If nothing else, the pandemic has opened our eyes to an alternative means of resolving disputes that is likely to endure after it has subsided."

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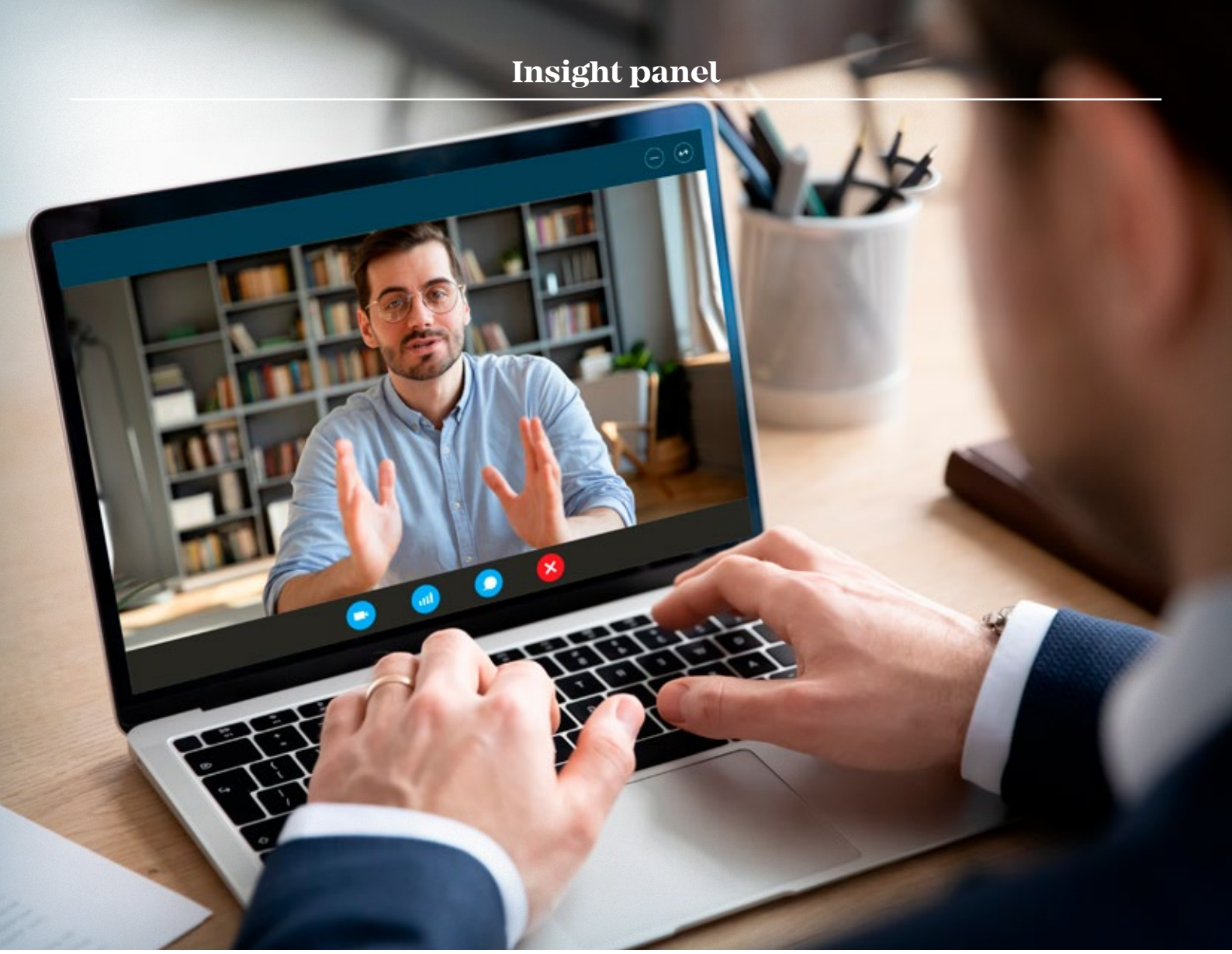

Remote control

Kateryna Honcharenko MCIArb talks to three leading arbitrators about their experiences with remote proceedings during the COVID-19 lockdown

From the moment governments around the world started to impose strict lockdown measures in response to the global pandemic, parties in disputes have sought answers to some key questions, such as: How do we conduct remote hearings? Where should we start? And what about security?

CIArb has been exploring the issues as parties, neutrals and other participants move their dispute resolution proceedings to a virtual setting. I spoke to three CIArb Fellows about their experiences with remote proceedings.

Opinion is split on whether you can get a true sense of a witness on cross-examination via video link

Ann Ryan Robertson C.Arb FCIArb is an International Partner at Locke Lord LLP in Houston, Texas, US, and the current Deputy President of CIArb. Benjamin Hughes FCIArb is an arbitrator with The Arbitration Chambers and an adjunct professor at the National University of Singapore Law School. Cesar Pereira

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FCIArb is a Partner at Justen, Pereira, Oliveira & Talamini in São Paulo, Brazil, and is Chair of CIArb's Brazil Branch. All three have recently been involved in remote hearings as counsels and as arbitrators. Here, they share their views along with some practical tips.

Now that parties in most cases have to resort to remote proceedings, do you think this tendency is here to stay, or will we go back to our 'old normal'?

Ann Ryan Robertson (AR): Remote proceedings are definitely going to be used more frequently than in the past. It has not been unusual to have witnesses testify via videoconference. There are some who feel that it is important to conduct proceedings face-to-face and a split of opinion exists regarding whether you can actually get a true feeling of the witness on cross-examination through videoconferencing. I think this issue is something that is going to be examined more carefully in the future.

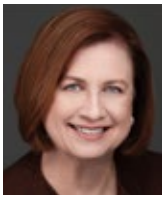
Benjamin Hughes (BH): I think it is here to stay. I just finished a week-long virtual hearing where we were able to combine platforms: one for the videoconference, one for transcript and one for documents. It worked perfectly. One of the witnesses was in the US, the seat of the arbitration was Bangalore and I was sitting in Singapore. While there will still be room for in-person hearings, in many cases it simply will not make sense to spend time and money on making everyone meet in one place. And, of course, the environmental impact will be greatly reduced.

In your experience, what do parties demand in order to proceed with remote hearings?

AR: I have noticed that claimants are pushing to have proceedings done by a video platform, while respondents are a little more reluctant to do so, not necessarily because respondents are trying delay tactics, but because they hope that in the near future life will go back to the 'old normal.'

There is fear on the part of the parties and arbitrators. We have just finished a new protocol for a video ad hoc arbitration and I was struck by how much the tribunal in this particular scenario is going to be the 'conductor of an orchestra'. There is definitely an additional burden on a tribunal.

Cesar Pereira (CP): Over the past couple of months I have seen that parties pay attention to the platform they are using. They are becoming more aware of the difference between various options and choosing specific platforms rather than going with what institutions offer. I have witnessed discussions about the need for connection tests prior to the hearings and reliability of testimony based on the need to make sure that witnesses are not coached, for instance the need to have 360-degree cameras and the reliability of the setting in general.



Top to bottom: Ann Ryan Robertson C.Arb FCIArb, Benjamin Hughes FCIArb, Cesar Pereira FCIArb, Kateryna Honcharenko MCIArb

Parties are becoming more aware of the differences between various platforms

There are obvious concerns parties might have when deciding to resort to remote proceedings. In your opinion, are those concerns overstated? What would you say in favour of remote hearings?

BH: Cross-examination of witnesses is the area where I have heard the most reservations expressed. Parties were afraid that they would not be able to effectively

Technical or legal means to ensure a witness is not being 'helped' from the outside are important

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cross-examine the witness, that the witness might be coached and that possible technical difficulties would make it difficult to follow what is going on.

All of these fears have been proven to be overstated. Many initial concerns surrounded the integrity of the process. For example, who else is going to be in the room with the witness, and how do we know they are not communicating with someone else using text messages? But the way people can observe each other on a screen can be much more detailed than would be natural and comfortable in person.

I think it would have been impossible for a witness to have been coached during our recent hearing. In some cases, we did make sure that the witness was in the room with another lawyer. In other cases that was not possible because of lockdown, so the witnesses were in their homes, but we did ask them to turn off their phones and any messaging services on their computer. I think it would have been very obvious if the witness was trying to read an answer while testifying on the screen. It is also important to have some level of trust, of course.

We not only need to prepare witnesses for the hearing, but also for the use of necessary technology

Technical difficulties can be overcome by testing all technology prior to the hearing

In most cases, the expectations the parties had when starting remote hearings were exceeded. Moreover, personal confrontation, which often exists during in-person hearings, was reduced, questions and answers were more focused and the proceeding itself took less time. Many of these remote cross-examinations went better than those I have seen in in-person hearings.

What are your practical tips on how to prepare for or conduct a remote hearing? Are there any issues you or other participants have encountered during a proceeding?

AR: It is important to find a quiet spot, eliminate as much extraneous noise as possible, try to place your computer at eye level and make sure that you look at the camera and not the screen. In one of my cases where an option to proceed virtually is still being discussed, a witness is not particularly savvy in using technology. This lack of uniformity in using technology is one more interesting issue to be considered. Counsel needs to not only prepare witnesses for the hearing, but also for the use of the necessary technology. And of course, security is a paramount concern.

BH: Prior to the hearing it is essential to conduct a test with every participant to check the reliability of their

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Institutions might have an increased role in conducting hearings in a value-added way

connection, microphones and video. I personally had to prepare, and even had the house rewired: I now have a LAN line and Wi-Fi router on every floor so that the hearing is not affected by family members using the internet during the proceedings. There may be some costs involved, but that is an investment some of us have to make to ensure everything goes well and without interruption. Of course, there will always be technical difficulties that arise from time to time, but this is normal and not unique to a virtual hearing. Technical problems arise during in-person hearings as well.

CP: One of the issues that arose was a severe difficulty in connection; we could not hear what the witness was saying. Asking some of the participants to turn off their video was enough to resolve the problem. What I think is also crucial is the need for arbitrators to be engaged. Long hearings, especially remote ones, are always difficult, so short breaks at more frequent intervals are essential.

What should the tribunal do if one of the parties does not want to proceed with a remote hearing, either because of the very fact of remoteness or because they do not have access to technology?

CP: The tribunal will have to address each case specifically. There may be reasonable grounds for granting additional time for such party to prepare, but the mere lack of access to technology may not be a sufficient ground to avoid remote hearings. Imbalance of access to technology, or other tools, is natural to any conflict. For instance, one side might have access to better lawyers, more bibliography or better experts, but that is not necessarily a due process problem.

Apart from precautions like 360-degree cameras and secure platforms, what should the parties consider to ensure the integrity of the process?

BH: In my opinion a witness should not be alone in the room if possible. The presence of a lawyer who has some ethical obligations under his or her bar association's rules would be helpful. In my experience most witnesses would not deliberately mislead the tribunal, but having a lawyer present in the room would set everyone's mind at ease.

CP: Technical or legal means to ensure that the witness is not being 'helped' from the outside are indeed important. Engagement of the tribunal and questions at the beginning of the proceeding are also ways to make sure everything goes smoothly. Arbitrators should ask witnesses whether they are being coached, whether there is any outside communication with them or whether they are being untruthful, and they should warn that dishonesty might have far-reaching negative consequences.

Secure platforms for document storage and conduct of hearings are essential

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Will the wider use of remote hearings create some new tendencies in the development of international dispute resolution or legal practice in general?

AR: When you are choosing an arbitrator, there is a tendency to have the costs associated with bringing a certain arbitrator to the location of the hearing at the back of your mind. That issue will leave the equation if remote hearings become more prevalent.

BH: Institutions might have an increased role in conducting hearings in a really value-added way. I think they should provide integrated platforms for the exchange of documents, the conduct of remote hearings and other procedural needs for all participants.

CP: Technology may make dispute resolution cheaper, and this might lead to more instances where parties choose alternative means over litigation. This will result in a greater need for decision-makers and a greater diversity in terms of age for arbitrators.

A helping hand

Introducing the robot-mediated facility for concluding arbitration agreements

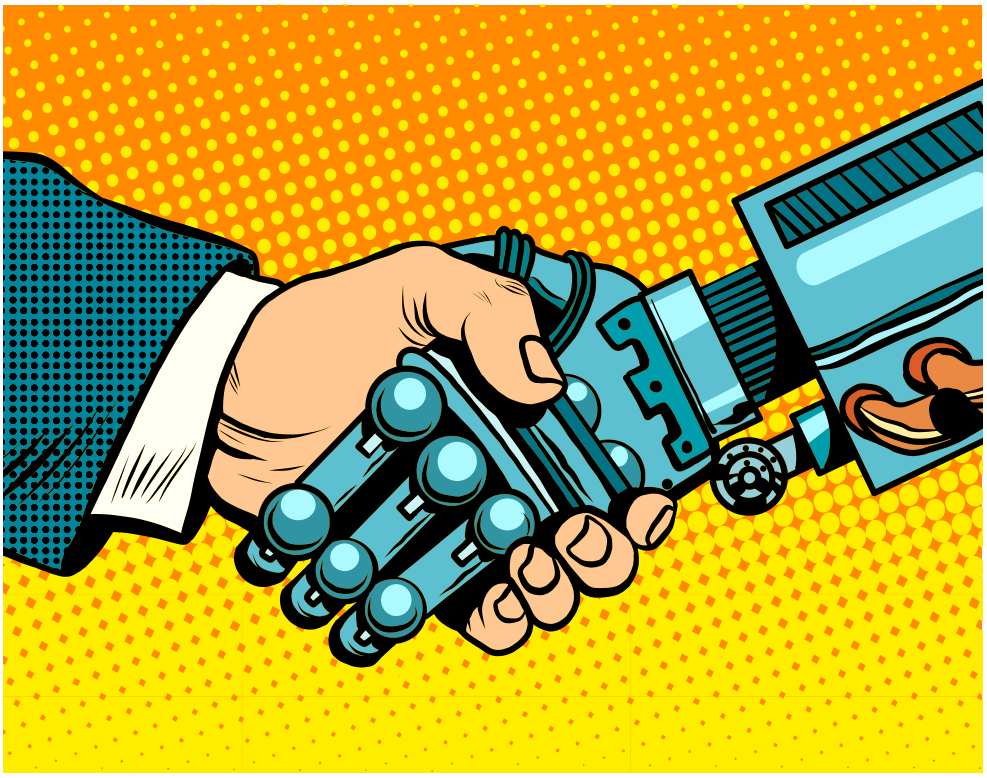
Technology is becoming a second 'discipline', alongside law, animating arbitration proceedings. What is perhaps less acknowledged is that arbitration, unlike litigation, requires prior agreement even to get off the ground. We built a robot to help with that and it lives at s-arb.org. Let me tell you how we came to it.

Reaching an arbitration agreement can be especially challenging for already signed contracts that do not contain an arbitration clause but would otherwise benefit from one, for instance to mitigate regulatory changes to international enforcement regimes. Switching to arbitration in that case requires persuading counterparties to change the status quo, perhaps in mid-performance. This can be disruptive and may be resisted. Crucially, receiving a request to amend a disputes clause in an active contract may ring alarm bells of distrust, pre-empting a cost-benefit analysis.

Concluding an arbitration agreement for an existing contract requires removing distrust so that the parties may be free to consider their best interests. This is something we learned from mediation.

Our second insight was that there is one way to reach agreement, but a thousand ways to derail it. Removing all unnecessary barriers to agreement is key. In the words of behavioural economist Richard Thaler: "If you want people to do something, make it easy."

With those insights in mind, we set out to build an online facility that helps parties safely propose arbitration agreements, with the mediation of an arbitral institution.



To make it easy and scalable, the process deploys state-of-the-art robotic process automation (RPA) from end-to-end. It assembles the agreement, provides information in the name of the mediating institution and collects signatures electronically. This simplifies the hassle of traditional contracting by orders of magnitude.

sArb, or the 'Simplified Arbitration Reference Facility', was customised for the Bucharest International Arbitration Court, a modern arbitral institution acting as a third-party facilitator. Its RPA is powered by global automation pioneer UiPath. The process assembles the document and correspondence, sends out information to parties and 'talks' to the electronic signature provider in a seamless flux that makes it easy to agree and painless to disengage unless all parties are on board.

Last but not least, s-arb.org is a pro bono collaboration, and the cost savings allow us to make it available for free. We hope it will 'nudge' businesses to their own benefit, while keeping them in full control throughout.

Building this has forced us to think hard about legal tech and taught us that it needs to be less about technology and more about humans. To us, a valid legal tech proposal must therefore check the following boxes:

- take human psychology seriously;
- facilitate not complicate; and
- preserve the parties' freedom.

What do you think?

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Legal tech needs to be less about technology and more about humans

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Future focus

Young members should consider the outcomes of the pandemic, say Athina Fouchard-Papaefstratiou MCIArb and Laura West MCIArb

In a matter of weeks, the COVID-19 pandemic changed the way we work. Due to government measures, including against non-essential travel, most arbitration practitioners now work from home, and virtual meetings and hearings are becoming the norm. In parallel, with recession affecting many world economies and several corporates in financial dire straits, many law firms are focusing on cutting costs rather than hiring new talent.

These changes, and uncertainty as to when restrictions will be lifted, make this a worrying time for students, recent graduates and junior practitioners, particularly when so much learning,

A move online may present opportunities for those looking to begin and build a career in arbitration

ABOUT THE AUTHORS

Athina Fouchard-Papaefstratiou MCIArb is a Counsel at Eversheds Sutherland, Paris. She has represented corporates and states for more than 12 years in commercial and investment arbitration proceedings. She is Chair of the CIArb Young Members' Group (YMG) Global Steering Committee.

job hunting and career development has traditionally come from interacting with peers. However, dispute professionals are adaptable. We think that a move online may also present opportunities for those looking to begin and build a career in international arbitration, particularly for those based away from traditional arbitration centres.

We have suggested some steps you can take as a young professional to help progress your career in ADR.

Embrace change and do things differently: International arbitration (just like mediation) was already ahead of most national courts in embracing paperless procedures and online or virtual hearings. Current circumstances have accelerated that move, which allowed corporates to continue resolving their disputes through arbitration during lockdown. Interacting with the tribunal over video and navigating electronic hearing bundles for cross-examining witnesses and experts have become the norm in the past few months. Even at a junior level, you can

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help support this move by keeping on top of the latest technologies and suggesting ways to improve processes to your firm. In that sense, the coronavirus crisis has offered a real opportunity for lawyers who keep up with technological advances to shine.

Take advantage of remote working: The prediction is that, even when the pandemic is over, workplace changes will remain, with employers and staff looking to increase home working. Some city-based law firms in the UK have already announced the closure of central office locations in favour of greater flexibility, while firms in other arbitration centres move towards more limited office space and more working from home. That may open doors to lawyers based outside traditional arbitration hubs, and can provide a better quality of life to arbitration practitioners in general.

Make the most of the move to online knowledge: Traditionally, arbitration seminars are day-long events gravitating to the traditional arbitral centres. Attending such events often involves international travel, at least for the practitioners who are not based in such centres. With restrictions on public gatherings, many arbitral institutions and firms are offering events via webinar. These tend to be shorter in length and free to attend, removing many traditional barriers for students and junior practitioners around cost and time.

Get creative with networking: Building contacts is a key part of progression in any career, but particularly in arbitration, where arbitrator appointments so often still rely on word of mouth. Fostering your network early is important. That is undoubtedly more difficult without being able to meet in person or chat over a coffee during a break in a seminar. At the moment, more work will be required to build rapport – so get creative! If you attend a webinar and there isn't an opportunity for questions, think about following up with the speaker afterwards to suggest a virtual coffee. You never know, taking that extra time might be the start of a long-term professional relationship.

Build a social media presence: With more content moving online, make sure you are harnessing social media to stay on top of developments and to build your profile. All CIArb Young Members' Group (YMG) events are publicised through social media platforms. Also be sure to promote your own content, such as articles you have written or events you are taking part in. Take time to understand how social media algorithms work and use appropriate hashtags, handles and images or videos to get your posts noticed.

Make sure you are harnessing social media to stay on top of developments and to build your profile

Above: Attendees at last year's CIArb YMG annual conference, held in Edinburgh. Below left (L–R): Saadia Bhatty and Athina Fouchard-Papaefstratiou at the event.

Above: YMG Steering Group members chat with speaker Naomi Briercliffe (centre) at the conference. Below: YMG virtual debate with Rahul Donde, Maria Scott, Rainbow Willard, Peter Anagnostou and Lidia Rezende.

ABOUT THE AUTHORS

Laura West MCIArb is a Senior Associate at CMS, Edinburgh. She specialises in construction, engineering and energy disputes, providing both operational and strategic contract advice, as well as representing clients through a range of dispute resolution procedures. She is Vice-Chair of the YMG Global Steering Committee.

Get involved in young members' groups: Finally, and perhaps most importantly, get involved with Young Members' Groups, such as the CIArb YMG. Some of the greatest opportunities we have been offered have come from volunteering to organise and speak at events or through connections made in young members' organisations. Peers and contacts made at an early stage will last throughout your career.

There are lots of opportunities to get involved in the CIArb YMG. Instead of our usual conference in November, this year we will be hosting a series of webinars covering everything from virtual hearings, emergency arbitrators and interim measures to tips on business development. We will also be looking for new committee members in the coming weeks.

If you would like to know more, please contact our Chair (athinafouchard@eversheds-sutherland.com) or Vice-Chair (laura.west@cms-cmno.com)

More than a BIT of confusion

Epaminontas Triantafilou and **Athina Manoli** analyse the implications of the surprise move to scrap intra-EU bilateral investment treaties

On 5 May 2020, 23 EU Member States signed a plurilateral agreement purporting to give effect to the decision of the Court of Justice of the European Union (CJEU) in Slovak Republic v Achmea by terminating all bilateral investment treaties (BITs) concluded between the States-signatories and barring any future claims brought under such BITs. Once ratified and effective, the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union will purport to terminate 130 intra-EU BITs, excluding those concluded by Austria, Finland and Sweden, which did not sign the Agreement. Two other notable exceptions include Ireland, which had no BITs in force, and the UK, which left the EU on 31 January 2020.

The latest Agreement comes as no surprise given the rise in calls for comprehensive reform in the EU

The Agreement is the latest in a series of developments following the CJEU's Achmea decision (March 2018). After Achmea, the European Commission engaged in a sustained effort to convince Member States to end their intra-EU BITs, which resulted in a number of declarations issued by Member States in January 2019 proclaiming their intention to terminate them.

On 24 October 2019, the European Commission announced that the EU Member States had concluded a draft Termination Agreement, whose terms closely resemble the May 2020 Agreement. Although sparking a lot of controversy and concerns about the future of investment arbitration in the EU, the latest Agreement comes as no surprise given the rise in calls for a comprehensive reform of the investor-state dispute settlement system in the EU and the coordinated policy decision among EU Member States to pursue such reforms more actively in recent years.

THE TERMINATION AGREEMENT IN A NUTSHELL

The Agreement provides that intra-EU BITs explicitly listed in Annex A be terminated, including their sunset clauses, which "shall not produce legal effects".

ABOUT THE AUTHORS

Epaminontas Triantafilou is a Partner in the international arbitration group of Quinn Emanuel Urquhart & Sullivan. He has represented individuals, corporate entities and sovereign states in numerous arbitrations around the world under all major arbitration rules. He also sits as arbitrator, including in cases involving sovereign interests.

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The Termination Agreement may encourage 'treaty shopping' by investors looking to use treaties outside the EU

ABOUT THE AUTHORS

Athina Manoli is an intern in the international arbitration group of Quinn Emanuel Urquhart & Sullivan. She is an honours graduate of Georgetown University Law Center, where she obtained an LLM in International Business and Economic Law and a Certificate in International Arbitration. Prior to joining the firm, she worked for the international arbitration group of another international law firm and the World Bank.

Sunset clauses are provisions in investment treaties that afford continued protection to investments made during the lifetime of the treaties for a certain period of time after their termination. Notably, the Agreement purports to cover arbitration proceedings under any set of arbitration rules, including those of ICSID, PCA, SCC, ICC and UNCITRAL, as well as ad hoc arbitration proceedings. However, intra-EU proceedings on the basis of article 26 of the Energy Charter Treaty are excluded from the scope of the Agreement, as it is noted that "the European Union and its Member States will deal with this matter at a later stage".

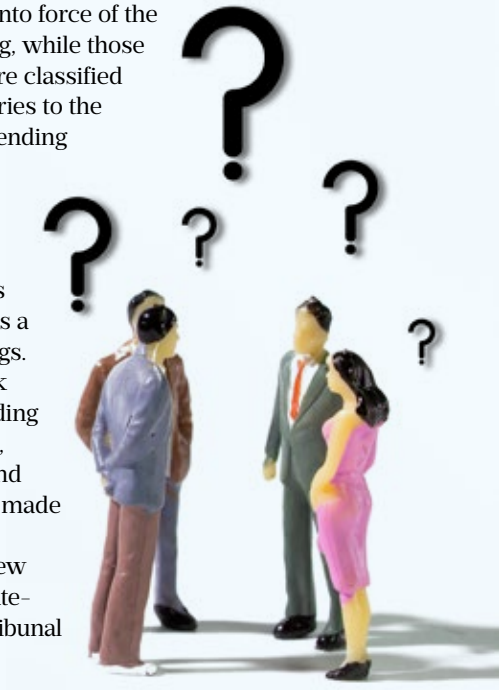
The Agreement states that arbitration clauses contained in the affected intra-EU BITs are "contrary to the EU Treaties and thus inapplicable", so they "cannot serve as a legal basis" for arbitration proceedings as from the date on which the last of the parties to the BIT became an EU Member State. That means that investors who are yet to initiate proceedings are precluded from doing so in the future. With respect to proceedings that have already been initiated, the Agreement draws a distinction between 'concluded', 'pending' and 'new' arbitration proceedings.

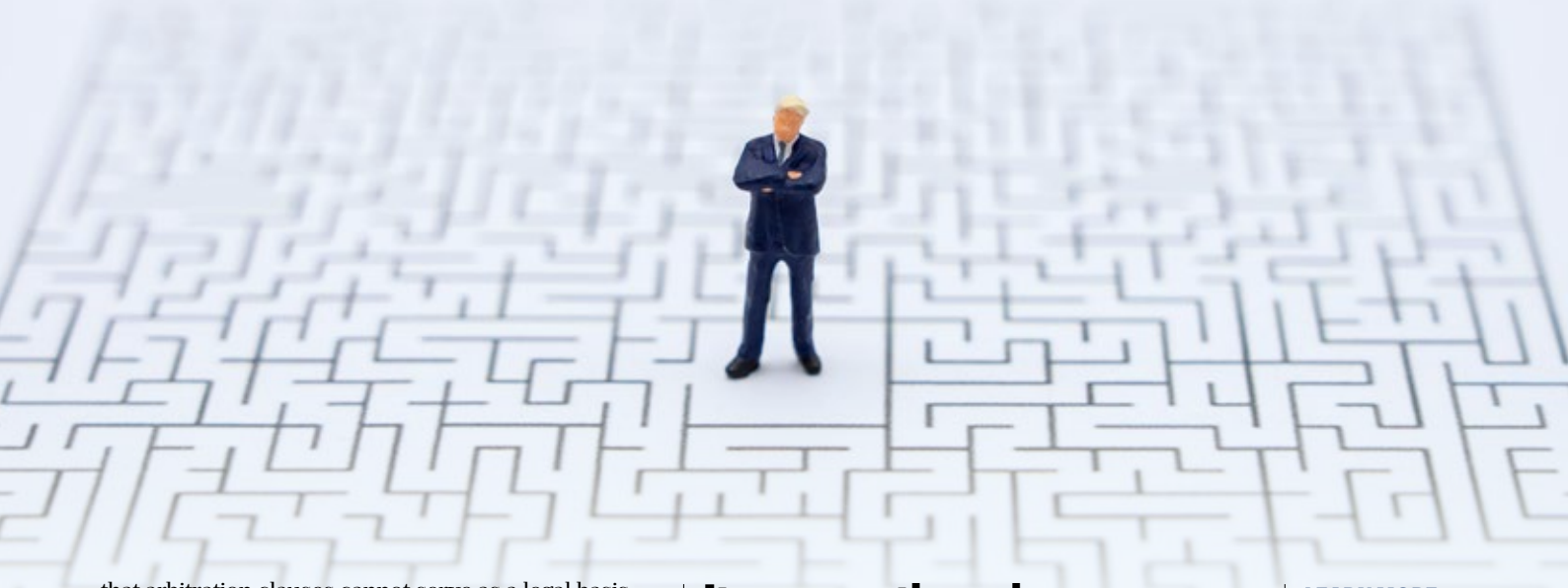
Concluded arbitration proceedings are defined as those which ended with a settlement agreement or a final award issued prior to 6 March 2018 (i.e. the date of the Achmea judgment), provided that (a) the award was duly executed before that date and there was no challenge, or (b) the award was set side or annulled before the entry into force of the Agreement. Concluded proceedings remain unaffected by the Agreement, as do any agreements to settle a dispute amicably by proceedings initiated prior to 6 March 2018.

Under certain conditions, the investor may seek to enter into a 'structured dialogue'

Arbitration proceedings initiated prior to 6 March 2019 and not qualifying as concluded, regardless of their stage on the date of the entry into force of the Agreement, are classified as pending, while those initiated on or after 6 March 2018 are classified as new proceedings. States-signatories to the Agreement which are parties to a pending or new arbitration proceeding have an obligation to inform the arbitral tribunal that arbitration clauses contained in intra-EU BITs are contrary to the EU Treaties and thus inapplicable, so they cannot serve as a legal basis for arbitration proceedings. Further, States-signatories must ask the competent national court, including those of third countries, to set aside, annul or refrain from recognising and enforcing an arbitral award already made in such arbitration proceedings.

The Agreement is silent on how new proceedings are impacted after a State-signatory has informed an arbitral tribunal





that arbitration clauses cannot serve as a legal basis for arbitration proceedings. It does, however, provide a number of transitional measures in the case of pending proceedings, provided that the investor has not challenged the measure before the competent domestic courts.

Specifically, under certain conditions, the investor may seek to enter into a 'structured dialogue' by initiating a settlement procedure with the respondent state and/or pursue judicial remedies under national law. The Termination Agreement does not address a scenario where this settlement process is unsuccessful. Currently, it appears that the only recourse available to investors is to bring a claim before the national courts of Member States, where it is unlikely that they will receive protections equivalent to those provided under the previous international treaty standards. To avail itself of these options, the Agreement requires that the investor withdraw any pending or enforcement proceedings, waive all rights and claims arising under the BIT, and undertake to refrain from instituting any new proceedings.

Interestingly, the transitional measures, including the aforementioned onerous conditions, only apply when an arbitral award is rendered in favour of the investor. If the award is issued in favour of the respondent state on the basis that the disputed measures are outside the scope of the BIT or do not violate a substantive provision of that treaty, the Agreement does not provide for access to judicial remedies or a settlement procedure. The transitional measures are also not available to investors that are parties to new arbitration proceedings.

IMPLICATIONS FOR INVESTMENT PROTECTION

The Agreement is a bold and significant step towards reforming the investment protection framework within the EU, a goal shared and actively pursued in the last few years by the Commission and a number of EU Member States. In this sense, the Agreement also marks a period of transition from the current well-settled and highly developed investor-state dispute settlement system to a new status quo, which has not crystallised fully yet and therefore gives rise to difficult legal and policy questions for investors.

It appears the only recourse available to investors is to bring a claim before the national courts of Member States

The preamble to the Agreement states that it is based on the rules of customary international law as codified in the Vienna Convention on the Law of Treaties (VCLT) and "the necessary consequences from Union law as interpreted in the judgment of the CJEU" in Achmea. The Agreement purports to affect arbitration proceedings commenced prior to, on and after 6 March 2018, while also terminating sunset clauses in intra-EU BITs and precluding them from having any legal effect. From a practical perspective, these provisions create considerable uncertainty for investors who are in the process of arbitrating claims under intra-EU BITs based on otherwise valid arbitration agreements governed by international law.

It is unclear whether the intended effects of the Termination Agreement actually are compatible with the VCLT. Similarly questionable is the compatibility of the Termination Agreement with the jurisprudence of the CJEU.

Finally, the uncertainty introduced by the Termination Agreement will likely encourage 'treaty shopping' by investors seeking to avail themselves of the protections afforded by treaties outside the EU, to the detriment of EU-based investors. Similarly, the Agreement may also encourage 'arbitral institution shopping'. Although the Agreement purports to cover all investor-state arbitration proceedings based on intra-EU BITs, article 25 of the ICSID Convention does not permit a unilateral withdrawal of consent to arbitration by either a contracting state or the investor.

LEARN MORE

Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (5 May 2020) can be found online at ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en

Case note

Tennant Energy, LLC v Government of Canada, PCA Case No. 2018-54

Report by Veronika Pavlovskaya, Associate, Arzinger & Partners, and Student Member, CIArb

In 2017, Michael Hiskey raised a fascinating question: 'Data rules the world, but who rules the data?' (*Forbes*, 16 November 2017). This question also exists in international arbitration: who controls the data in arbitration and which laws should be applicable? In Tennant Energy v Government of Canada, the tribunal had to find a balance between transparency, confidentiality, privacy and security.

IKON IMAGES

FACTS

In 2017, Tennant Energy (the Investor) initiated the dispute against the Government of Canada (Canada) before the PCA, pursuant to Chapter 11 of NAFTA and the 1976 UNCITRAL Arbitration Rules. The dispute arose out of the application of the renewable energy transmission and production programme in Ontario to Skyway 127, a wind farm project wholly owned by the Investor.

The Investor raised an issue of security and data protection in accordance with Regulation (EU) 2016/679 (General Data Protection Regulation, or GDPR) as one of the arbitrators was a resident of the EU. Tennant Energy also suggested that the tribunal issue a data protection protocol covering, *inter alia*, data subject rights, data breaches and cybersecurity.

Later, Canada referred to the Ontario Freedom of Information and Protection of Privacy Act (FIPPA) as a specific ground on which it had redacted certain information in its exhibits related to interim measures (Confidentiality Designations). The Investor argued that the FIPPA was not applicable.

DECISION

The tribunal had to deal with the applicability of both the GDPR and the FIPPA. In particular, the tribunal stated that the GDPR was not applicable, because neither the EU nor its Member States were parties to NAFTA. This answer might be considered as a rather formalistic one: it did not address the extraterritoriality of the GDPR, nor its application to the PCA proceedings in general and to the arbitrator residing in the EU in particular.

However, the tribunal issued the Confidentiality Order, which set the guiding principles with regard to confidentiality, document production, filings and treatment of restricted and confidential information. The Confidentiality Order did not contain reference to the GDPR, but it referred to Canadian domestic law when determining the term 'Confidential Information'.

The FIPPA was explicitly listed among the Canadian domestic laws under which information might be protected from disclosure. The tribunal decided, therefore, that the FIPPA was applicable and that Canadian Confidentiality Designations were justified as they were the only way for Canada to keep the information confidential.

CONFIDENTIALITY MATTERS

Tennant Energy v Government of Canada demonstrates that the issues of data protection and confidentiality may arise at different stages. Tribunals and parties should deal carefully with such issues as early as possible, preferably at the case-management conference. Data protection (confidentiality) protocol may be a helpful tool, though one protocol may be not enough to resolve all practical issues.

This case shows that issues of data protection and confidentiality may arise at different stages

Lessons from Singapore

Lewis Johnston ACIArb looks at what Singapore's experience can tell us about what it takes to build a global disputes hub

The mythical Merlion is the symbol of Singapore

As the COVID-19 crisis has shown all too clearly, we live in a deeply interconnected world. Supply chains, business networks and travel routes are globalised, with the result that consumer choices are increasingly taken at the global level as well. From travel bookings to supplies of critical factory components, individuals and businesses can source goods and services from all over the world. Dispute resolution is no exception.

In many ways, dispute resolution has always been a global profession, with roots in international commercial transactions (particularly maritime disputes). Nevertheless, the process of globalisation over the last few decades has made dispute resolution a truly global product. Well-established centres like London and New York have remained eminent, but now face ever stronger competition from emerging hubs, particularly in East Asia. This dynamic is encapsulated by the experience of Singapore.

Singapore has emerged as one of the leading global disputes hubs

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AN IMPRESSIVE RISE

Singapore has emerged as one of the leading global disputes hubs over the last two decades (which is why the UK All-Party Parliamentary Group for ADR conducted a fact-finding visit there in 2019). Between 2006 and 2019, the number of cases handled annually by the Singapore International Arbitration Centre rose more than five-fold, from 90 to 479, while the 2018 White & Case *International Arbitration Survey* listed Singapore as the third most preferred seat for international arbitration, behind London and Paris.

This impressive rise has not been confined to arbitration; Singapore has also embraced mediation for resolving commercial disputes. In 2013, Chief Justice Sundaresh Menon established a working group to establish Singapore as a hub for international mediation, leading in 2014 to the formation of the Singapore International Mediation Centre. Last year, this culminated in the signing of the Singapore Mediation Convention, which functions both as

ABOUT THE AUTHOR
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a framework for the enforceability of mediated settlements and a broader rallying point for international commercial mediation. The Convention is a global treaty emerging from the UN, but by lending its name, Singapore has signalled its commitment to the development of international dispute resolution.

STEPS TO SUCCESS

There are many reasons behind Singapore's rapid emergence as a leading global disputes hub, and as a wealthy city state, its experience cannot be simplistically compared to that of other jurisdictions. Nevertheless, there are certain key themes in Singapore's success that stand out. First, there is proactive government action (in concert with the profession) to establish and nurture dispute resolution. Second, dispute resolution practice is geared towards commercial needs. Third, there is a forward-thinking approach that embraces (and seeks to shape) new developments.

Consider government policy. As exemplified by the effort to establish Singapore at the frontier of international commercial mediation, the country's rise as a disputes hub has resulted from deliberate, concerted and persistent engagement on the part of policymakers. This has not been an 'accidental' organic process, but a preconceived project pushed forward at the highest levels of decision-making. From Singapore's accession to the New York Convention in 1986, through the passing of the International Arbitration Act (1994) and the Arbitration Act (2001), the government's approach has been based not on isolated initiatives, but on a strategic, forward-looking assessment of where it needs to be positioned. Further, this political will has been accompanied by the resources needed to make a tangible impact. The development of Maxwell Chambers as an integrated ADR centre, achieved with seed capital from the government and the full-throated commitment to mediation demonstrated by the launch of the Singapore Mediation Convention last year are strong examples of this. The holistic approach is also manifested in the establishment of the Singapore International Commercial Court, which was explicitly designed to complement, rather than supplant, international arbitration. At every step the focus has been on widening the suite of options available to resolve disputes.

When it comes to commercial imperatives, the rise of Singaporean dispute resolution is inextricably linked to its position as an international commercial centre. By having a highly developed 'ecosystem' of corporate lawyers, consultants, financial firms and other business support services, Singapore offers a strong context within which a commercial-oriented dispute resolution sector can thrive. It also means policymakers can work closely with the business community when designing and implementing changes to the disputes framework.

There are lessons to be learned from Singapore's approach over the decades

Maxwell Chambers has been developed by the government of Singapore as an integrated ADR centre

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FUTURE FOCUS

Finally, the way in which Singapore conceptualises dispute resolution is fundamentally future-oriented. Maxwell Chambers encapsulates a forward-thinking vision, integrating cutting-edge technologies and methods. In addition, the country's commitment to international commercial mediation comes from a sense that this will be an increasingly prevalent mechanism, and a judgement that a leading global disputes hub will have to embrace this development to retain its position. This mentality is likely to become even more valuable given the current global disruption.

Singapore appears to be firmly established as a global disputes hub. It is only one example of success; other centres have their own unique strengths, and a two-dimensional 'translation' of Singapore's approach to other countries would be neither possible nor desirable. Further, there are changes that Singapore could benefit from, alongside other global disputes hubs – for example, embedding conflict avoidance mechanisms more comprehensively. Nevertheless, there are lessons to be learned from Singapore's approach over the last two to three decades, and the country provides a useful case study of how to build a globally relevant disputes hub, almost from scratch.

Towards a new model of technical education

Technology is changing the way training is delivered, but it must also be reflected in course content, argues Dr Paresh Kathrani

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Professional courses aim to achieve a set of learning outcomes for individuals. These can be categorised in different ways, but three of the main groupings are based on knowledge, skills and professional expertise. Knowledge outcomes set out core material about a particular discipline; skills outcomes relate to how individuals should work with and apply that knowledge; and professional expertise relates to matters such as ethics, conduct and development.

While these form the bedrock of any professional course, they evolve over time as areas of practice change. This is certainly the case as regards the way technology is set to affect the delivery of alternative dispute resolution, and it is important that training programmes respond, in terms of both content and delivery.

The pandemic this year has seen a growth in virtual hearings, especially in arbitration cases, with centres like the International Arbitration Centre in London offering virtual hearing facilities. CIArb has recently published a *Guidance Note on Remote Dispute Resolution Proceedings* and has also joined a new consortium providing resources on virtual arbitrations.

The virtual arbitration space brings an added layer of complexity, however. As such, there is a need to consider whether the skills taught in ADR training programmes should be changed to include those required in the virtual space. Online etiquette is one example, as are ethics and the security considerations when it comes to sharing confidential documents. Should these form part of a general arbitration course, or should there be discrete training in how to conduct virtual hearings?

In future, coding is likely to play an even greater part in ADR. Lawtech, especially in the fields of discovery, research and predictive analytics, has already disrupted litigation; arbitration less so, largely because of confidentiality and data issues. It's likely, however, that the rise in virtual hearings will see an increase in innovation in the 'ADRtech' space, so training courses will need to provide skills training in this area. There is an opportunity here to partner with technology companies in providing individuals with access to an array of new training opportunities. Technology can also benefit access to justice.

In future, coding is likely to play an even greater part in ADR

Business development opportunities will also increase. Technologies such as online dispute resolution and other hybrid forms provide a brand new direction for practitioners, and it is vital that training courses not only concentrate on knowledge and skills domains, but also train individuals on how to develop business in this new environment.

Technology will continue to disrupt the models by which dispute resolution is delivered. We have already seen this with virtual hearings, and there are many more developments coming across the horizon. Technology should affect not only how education is delivered, through new, innovative and exciting forms of pedagogy, but also the content and substance of what is taught. CIArb is looking forward to working on new models of training.

Dr Paresh Kathrani is Director of Education and Training at CIArb. For more information, contact CIArb at education@ciarb.org

What's on

A selection of training opportunities for CIArb members

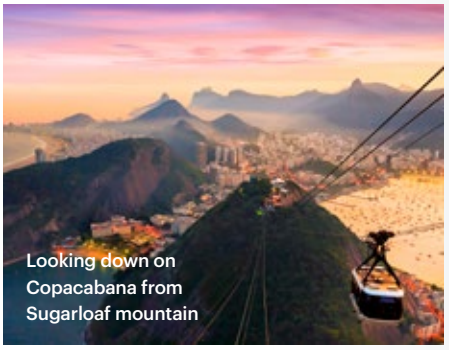
BRANCH FOCUS: BRAZIL

How the Brazil Branch is using tech to build stronger bonds

The intense use of remote communication technology today may lay the foundations for renewed and enhanced personal relationships in the near future. With this thought in mind, the CIArb Brazil Branch has embraced virtual training, webinars and connections with other Branches across the globe to take full advantage of the CIArb multinational network during this period of distress.

The Branch has offered and holds in stock a variety of webinars on topics ranging from contractual disruption to the new international trade standards, from mediation and insolvency to sports. The Branch will hold its first virtual Accelerated Route to Fellowship (ARF) in August, under the CIArb virtual training system, with a combination of international and local faculty. For those interested in joining from other jurisdictions, the ARF workshop hours will be 2–6pm BRT (5–9pm GMT) from 31 August to 4 September.

CIArb's Brazil Branch is using this period to reach out to sectors and regions now brought closer by the widespread use of technology. It is developing capacity-building programmes together with the North America Branch, and working through the CIArb network on partnerships with other BRICS jurisdictions. The Branch Patron, WTO Director General Roberto Azevêdo, spoke from his office as the keynote speaker at a Branch webinar in July. The CIArb Brazil Branch acts on the belief that technology and the global CIArb network give us the tools to build closer bonds and the international solidarity upon which we will rely in the coming years.



Looking down on Copacabana from Sugarloaf mountain

For more information, go online to ciarb.org/our-network/americas/brazil

CIArb TRAINING AUGUST–OCTOBER 2020 (All courses and assessments are online)

KEY
- ADR
- Mediation
- Construction mediation
- Domestic arbitration
- International arbitration
- Module 2 Law of Obligations

These courses and assessments will all be available online only. Details of all courses, including how to book, can be found at www.ciarb.org/training

CIArb is also collecting expressions of interest for mediation courses. Please contact education@ciarb.org

CIArb offers one online introduction course and four one-day, virtually taught introductory courses in different forms of ADR.

- **Introduction to ADR Online**
  Open entry
- **Introduction to ADR Course**
  18 September **£396**
- **Introduction to Construction Adjudication**
  10 September **£396**
- **Introduction to International Arbitration**
  29 October **£396**
- **Introduction to Domestic Arbitration**
  15 October **£396**

The New Pathway courses and assessments have been designed for candidates with no experience of ADR. There are no entry requirements.

- **Module 1 Law Practice and Procedure of Construction Adjudication**
  17 September **£1,320**
- **Module 1 Law Practice and Procedure of Domestic Arbitration**
  17 September **£1,320**
- **Module 1 Law Practice and Procedure of International Arbitration**
  17 September **£1,320**

Modules 2 & 3

- **Module 3 Domestic Arbitration**
  3 September **£1,320**
- **Module 3 International Arbitration**
  3 September **£1,320**
- **Module 3 Construction Adjudication**
  3 September **£1,320**
- **Diploma in International Commercial Arbitration**
  4–27 September **£4,320**
- **Module 2 Law of Obligations**
  27 October **£1,320**

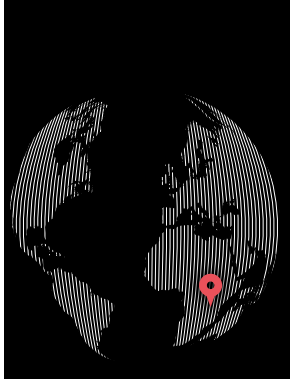
Those people who have experience in ADR have the option to undertake a CIArb Accelerated Assessment Programme to assess if they meet the relevant benchmarks for Membership Accelerated routes to Membership or Fellowship Accelerated routes to Fellowship. To book on the accelerated course, please contact education@ciarb.org or call +44 (0)20 7421 7430.

- **Accelerated Route to Fellowship International Arbitration**
  18 August **£1,920**

Our next centralised assessment dates are as follows:

- **Module 3 International Arbitration**
  20 August **£408**
- **Introduction to Construction Adjudication**
  10 September **£95**
- **Module 2 Law of Obligations**
  17 September **£342**
- **Introduction to ADR**
  18 September **£95**
- **Introduction to Domestic Arbitration**
  15 October **£95**
- **Introduction to International Arbitration**
  29 October **£95**

Land of a Thousand Hills



As **Marcus Cato FCIArb** reports, Rwanda combines an age-old tradition of mediation with international best practice in ADR

The Republic of Rwanda nestles just below the equator. A multifaceted emerald nation, it is part of the six sovereign states of the East African Community, along with Burundi, Kenya, South Sudan, Tanzania and Uganda. Rwanda has been a member of the Commonwealth of Nations since 2009, and is set to host the next Commonwealth Heads of Government Meeting in 2021. The republic's diminutive size of 13 million souls does not diminish its importance as a powerhouse of reform and innovation, with a unique ability to stimulate and embrace change. Rwanda enjoys political stability and an influential position in the African Union; it is the second highest ranked African country for ease of doing business, according to the World Bank, and has zero tolerance of corruption, which is already at a low level (according to the 2019 Corruption Perception Index, Rwanda is the fourth least corrupt country on the continent).

Rwanda has strong exports of cash crops of fine coffees and teas, and wildlife tourism is growing. As Peter Mathuki, Executive Director of the East African Business Council, puts it: "Rwanda is indeed Africa's rising star and driver for economic transformation."

The Kingdom of Rwanda formed as a distinct political organisation and society in the 11th century, and was a recognised autonomous state by the 14th century. It later inherited a colonial Belgian and German civil-law system, but, in 2017, Rwanda became the first country to adopt common law voluntarily for economic and trading expediency. The transition and evolution of this hybrid legal system is managed in a comprehensive programme of law reform, enjoying a strong national influence. This includes 10 key homegrown initiatives, including *Gacaca* (community courts), *Imihigo* (performance contracts) and, most interestingly, *Abunzi* (community mediators).

Virunga National Park, Rwanda

Mediation in Rwanda has been at the heart of the community since the late 14th century

STRONG MEDIATION TRADITION

Mediation in Rwanda is progressive and expansive, and it has been at the heart of the community since the late 14th century. *Abunzi* mediation, in conjunction with *Gacaca* courts, was reintroduced in its current structure based on a desire for reconciliation and healing after the genocide of the 1990s. *Abunzi* mediators are elected registered persons of standing, bound by oath and regulated by legislation, who practice the *Kunga* – meaning to rejoin or reconnect something broken. In 2015/16, 48,000 registered cases were mediated by some 18,000 mediators, of whom 33% were women (since 2006, at least 30% of *Abunzi* mediators must be women).

Chief Justice Dr Faustin Ntezilyayo FCIArb is an avid supporter of "mediation as an

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Marcus Cato MICE CEng FCIArb is Honorary Secretary of the CIArb UK South East Branch, Member of the CIArb Board of Management, Non-executive Member of the Rwandan Branch Committee and Managing Director of McComb Partnership Ltd. He has over 25 years' experience in international construction and engineering disputes resolution in East Africa, South Africa and the UK.

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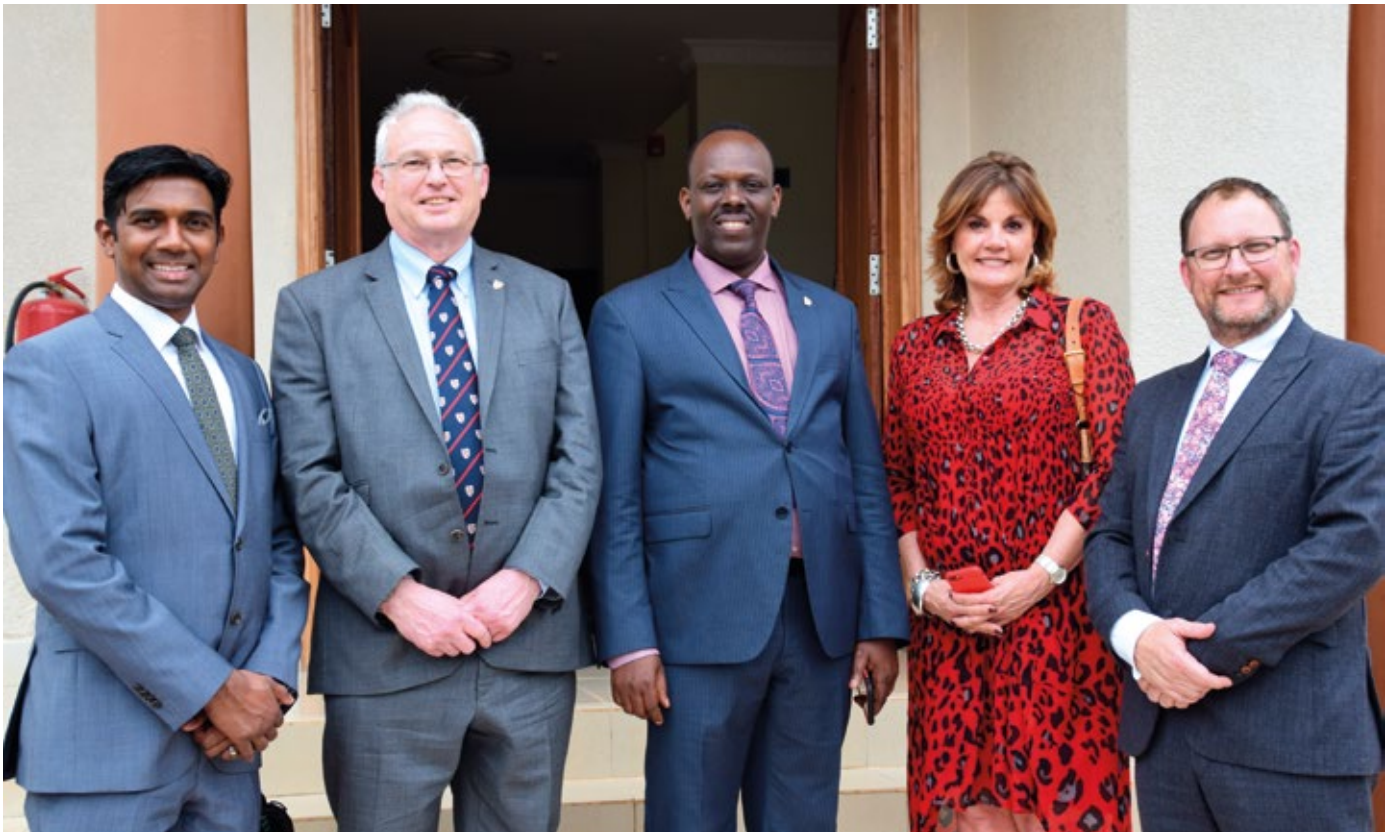

efficient alternative to dispute resolution" and is currently consulting with various stakeholders to set up a Mediation Institute with court-accredited mediators, bound by a code of conduct. Instructions of the President of the Supreme Court govern court mediation in civil, commercial, labour and administrative matters.

CIArb's ROLE IN RWANDA

In February 2020, past CIArb Director General Anthony Abrahams MCIArb, accompanied by June Connolly of HKA (CIArb's training partner) and Trevor Govinder of Pangea, completed a four-day visit to Rwanda at the invitation of the author and the Rwanda CIArb steering committee. The purpose of the trip was to give support to the growing number of CIArb Members and Fellows. Before the visit, Rwanda had 18 Members. This was spectacularly boosted by a further 40 Members in the space of a week, allowing the seeds to be sown for the formation of the first Rwandan Branch, which has now been formally granted Stage 1 approval by the CIArb Board of Trustees. The author and the team have submitted strategic papers and training proposals to the Minister of Justice and Chief Justice to support an ambitious and significant expansion of the existing experienced practitioners and judiciary, with the intent of sharing ideas particularly in the field of mediation, where advancement in Rwanda has been both significant and pioneering.

Rwanda is a signatory to the New York Convention (2008) and more latterly the Singapore Convention on Mediation in January 2020.

Rwanda is a rare gem: ambitious, determined, influential, reformative and self-aware

Kigali International Arbitration Centre is an independent body established by an act of parliament, under the auspices of the Rwanda Private Sector Federation and with the support of the Government of Rwanda, which administers arbitrations under both its own rules and the UNCITRAL Rules.

Rwanda is a rare gem: ambitious, determined, influential, reformative and self-aware. It boasts more than 45 universities, polytechnics and colleges and an impressive infrastructure of hotels, convention centres and centres of commerce. No wonder the republic is being hailed as the Singapore of Africa!

Top (pictured outside KIAC HQ in Kigali, from left): Trevor Govinder, Anthony Abrahams MCIArb, Dr Fidèle Masengo FCIArb (KIAC Secretary General), June Connolly and Marcus Cato FCIArb. Above (from left): Dr Didas Kayihura MCIArb (Rector ILPD), Marcus Cato FCIArb, Dr Fidèle Masengo FCIArb, Anthony Abrahams MCIArb