COMPULSORY ADR
MoJ calls for evidence

DEBATE: WHAT MOTIVATES DESIRE FOR DISCLOSURE?

ADJUDICATION IN CONSTRUCTION: 25 YEARS ON

CIArb
evolving to resolve

THE Resolver

SUMMER 2021 CIARB.ORG

LET ETHICS BE YOUR GUIDE

Is arbitration structurally biased?

CONTACTS

CIArb
evolving to resolve

Chartered Institute of Arbitrators
12 Bloomsbury Square,
London WC1A 2LP, UK
T: +44 (0)20 7421 7444
E: info@ciarb.org W: ciarb.org
Membership
T: +44 (0)20 7421 7447
E: memberservices@ciarb.org
Marketing and Communications
T: +44 (0)20 7421 7481
E: marketing@ciarb.org
Education and Training
T: +44 (0)20 7421 7439
E: education@ciarb.org
Events
T: +44 (0)20 7421 7427
E: events@ciarb.org
Venue and Facilities
T: +44 (0)20 7421 7423
E: 12bsq@ciarb.org
Governance and Legal Services
T: +44 (0)20 7421 7438
E: legal@ciarb.org
Dispute Appointment Service
T: +44 (0)20 7421 7444
E: das@ciarb.org

THINK

Editor
Sarah Campbell
Managing Editor
Mike Hine
Designers
George Walker, Amanda Richardson
Client Engagement Director
Kieran Paul
kieran.paul@thinkpublishing.co.uk
Executive Director
John Innes
john.innes@thinkpublishing.co.uk

I'm inspired by how members come together to support each other

The dog days of summer have just concluded – in the northern hemisphere at least – so it is appropriate to begin with the CIArb summer flagship event, the Roebuck Lecture. This year, the Institute was honoured to have Hon Lady Justice Joyce Alouch EBS CBS MCIArb deliver a speech entitled 'The Impact of the Singapore Convention, Both on Mediation and Arbitration'. Although the Singapore Convention is in its infancy, it strengthens mediation as a recognised and employable dispute resolution technique in the international arena. More than 680 people from across time zones joined us for the lecture, demonstrating that interest in mediation to resolve disputes is high. And, in that regard, mark your calendars for 7 October 2021, when CIArb will host its Mediation Symposium (see page 19).

Although summer is often described as 'the lazy days', CIArb has been anything but lazy. In addition to the Roebuck Lecture, throughout the summer the Institute introduced initiatives including unveiling the Member Insight Panel. The Panel's purpose is to gather member feedback in a number of areas, including new education and training projects, website ideas and diversity and inclusion. Some 1,100 of you have volunteered to provide valuable insight.

CIArb also launched its Mentoring Programme. Using an online platform, mentees pair with mentors and begin a relationship based on their particular needs. This programme is being run as a pilot in the first instance, is open to ACIArb and MCIArb members and is specifically intended for younger and less-represented members.

Finally, thousands of you from around the world, acting as coaches and arbitrators, made the Vis Moot and Vis Moot East a reality. As a former Vis Moot coach, it was my singular honour and privilege to be a member of the final tribunal at the Vis Moot in Vienna. The students' presentations were polished, professional and profound. Based on the performances I observed, this next generation will be ready to meet the challenges ahead and will play a significant role in CIArb's 'evolving to resolve'. To all of our members who participated, thank you for investing in the future of ADR and CIArb.

Ann Ryan Robertson C.Arb FCIArb
President, CIArb
arobertson@lockelord.com

INSIDE THIS ISSUE

The opener

Expedited arbitration rules close to unveiling

An expedited arbitration procedure designed to be used with the regular UNCITRAL Commercial Arbitration Rules is one step closer to official standing, after the UNCITRAL Commission approved a proposed procedure developed by UNCITRAL Working Group II. At its 73rd session in March the group completed its mandate to develop the procedure. This was a significant milestone, as it had taken three years to achieve. In July, the UNCITRAL Commission approved the Working Group's proposals.

The official unveiling of the UNCITRAL Expedited Arbitration Rules is expected to take place in September 2021, subject to the completion of a silence procedure by the states. This is the first text that UNCITRAL Working Group II approved while conducting remote sessions due to the pandemic. Mercy McBrayer FCIArb, Research and Academic Affairs Manager at CIArb, said: "The fact that the work has continued and been completed within the original timeframe, despite the disruptions, is a testament to the dedication and cooperation of this group."

Working Group II during a virtual session

60-SECOND INTERVIEW

Marcus Cato MICE CEng FCIArb FRSA

… on why mediators should seek to learn from other jurisdictions

Why is it important to be open to other ways of mediating?
There's so much we can learn from each other, because each region and jurisdiction has its own culture of resolution developed over many years. It would be great if mediation in the UK were a common term that everybody recognised from an early age as a powerful way of resolving disputes. If mediation were known to be the first formal step to resolving disputes, we would see a huge momentum shift. In the UK particularly, I am not sure we want it to be seen as the preserve of a small band of professionals. If we can get to the point where we are giving more access to and drawing from a much wider base of excellent, qualified, effective mediators from different backgrounds and experience, who are appropriate to the communities and disciplines that they work in, mediation could flourish and become – as the CJC put it – "the most important and dominant technique in ADR".

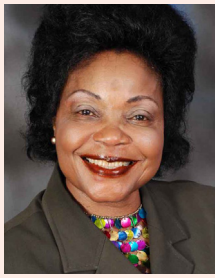
You've been working with business partners in Rwanda for the past six years. What has struck you about practice there?
In the UK, we tend to think in silos and that resolution of disputes in the community and in the commercial world should be separate. In Rwanda, they are comfortable with blending those because it is at the heart of their society. *Abunzi* mediation, a traditional community mediation system, deals with community and small commercial disputes. Of course, there may be larger, more complex disputes, and these can then be referred to court and their list of court-registered mediators. So their mediation is very much a community-based structure, but also integrated into their legislative framework.

What's the advantage of that?
The mix of community and legislation in mediation has allowed the introduction of mediator minimum standards of training, but also a minimum number of women mediators. Interestingly, Rwandans are encouraged to mediate in public, so people have a window into the whole process. They can see how arguments are presented, what is taken into consideration by the mediators, how arguments are resolved and how they balance. Rwandan colleagues are struck by our propensity in the West to 'subcontract out' our disputes to third-party processes in courts, arbitration and adjudications. In Rwanda, however, the parties remain as part of the solution – but also own the outcome. Resolving the dispute is important, but getting satisfaction and true resolution for both parties seems to be more important. Rwandans place a lot of value in healing the rift and moving on with the relationship intact. This is something that we could learn a lot from. Ownership of the solution is key – and for that, the parties need to not distance themselves from the dispute.

Marcus Cato will be presenting on 'Mediation as a Structured National Dispute Resolution Framework' at the CIArb Mediation Symposium on 7 October. He is a Co-Chair of the CIArb Board of Management and Honorary Secretary of the South East Committee of CIArb.

'The Singapore Convention could not have come at a better time'

The Hon Lady Justice Joyce Aluoch EBS CBS MCIArb, (Rtd) Judge, gave a challenging and fascinating (online) Roebuck Lecture on the intricacies of the Singapore Mediation Convention



The Hon Lady Justice Joyce Aluoch EBS CBS MCIArb

The Singapore Mediation Convention (SMC) could open the door for the more widespread use of mediation in different jurisdictions, according to Lady Justice Aluoch. The immediate past First Vice-President of the International Criminal Court at The Hague used the 2021 Roebuck Lecture to consider in detail the implications of the Convention.

"The Convention could not have come at a better time, as it came into force at the same time as the disruption of the global pandemic," she said.

"One important distinction is that, unlike judgements or arbitral awards, settlement agreements under the SMC [do] not have a nationality. Under the SMC, a member state's obligation to enforce mediated settlement agreements is not limited to agreements that emanate from another Convention member state – that is, from the location of the mediation or the signing of the agreement."

Lady Justice Aluoch also discussed the refusal of enforcement based on serious breach by the mediator, what is implied by serious breach as well as how it is measured – seeing that there is no explanation of the term in the Convention text. Asked whether the Convention is capable of streamlining the process in countries that have ratified the Convention and those that have not, Lady Justice Aluoch pointed to the fact that the Convention might in fact open the door for the more widespread use of mediation in different jurisdictions. She also mentioned that specific legal training is rarely required by the parties, unlike specific knowledge of the subject matter of the dispute at hand.

Statutory adjudication in the construction sector: 25 years on

It has been 25 years since the Housing Grants, Construction and Regeneration Act 1996. To mark this, CIArb held an event to discuss how adjudication can continue to meet the needs of the construction sector.

Speakers Matthew Drake FCIArb, Kim Franklin QC C.Arb FCIArb, Nicholas Gould FCIArb, Matt Molloy C.Arb FCIArb and Tom Hawkins FCIArb shared their knowledge and experience on the context of the adoption of the Act, the purpose it intended to achieve, and how it was adopted and received by experts in the field.

They discussed the development of the Act in circumstances where adjudication was rarely viewed as a reliable and efficient dispute resolution mechanism, shared their ideas on how adjudication has evolved since the introduction of the

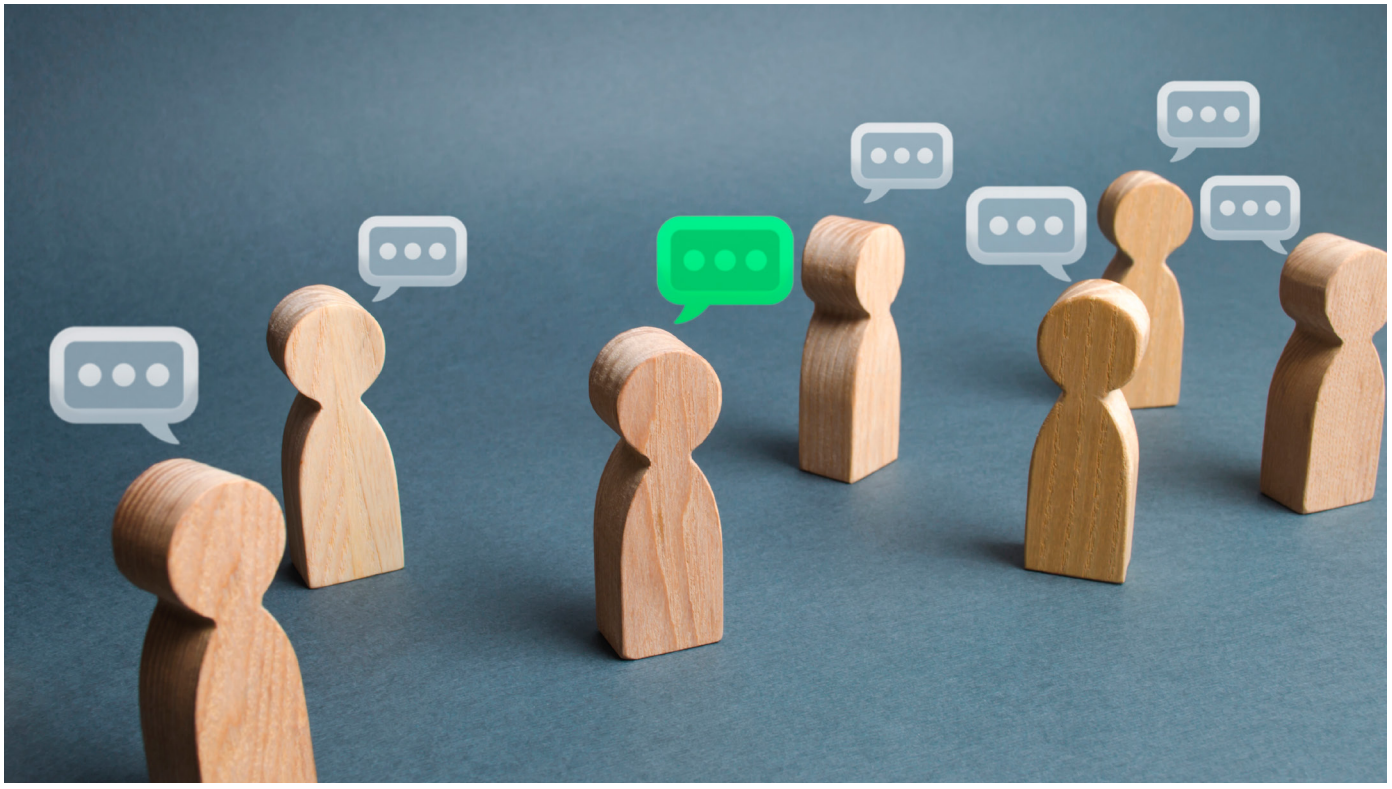
Act and expressed their views on how it can continue to address the needs of the construction sector.

Part of the event was dedicated to the evolution of adjudication, and necessary changes that might need to be introduced to make adjudication meet the needs of the construction industry. The speakers reflected on whether adjudication has achieved what it was designed to achieve in 1996 and whether it is true that this ADR mechanism has become more complex and expensive over the years.

Click here to access the recording and other information.

Routes to resolution

The MoJ's call for evidence on dispute resolution could trigger a major shake-up of the justice system. Isabel Phillips reports.



Carrie Menkel-Meadow, one of the best-known US ADR scholars, wrote in 1996: "If late 20th century learning has taught us anything, it is that truth is illusive, partial, interpretable, dependent on the characteristics of the knowers as well as the known, and, most importantly, complex. In short, there may be more than just two sides to every story."

It seems that this learning is still sinking in 25 years later. The recently released call for evidence from the UK Ministry of Justice, following on from the Civil Justice Council (CJC) report on compulsory ADR, highlights that for many types of dispute, complex, time-consuming and adversarial court processes do not necessarily lead to high-quality, timely, cost-effective, proportionate and enforceable outcomes. As ADR practitioners, we all know this. However, the importance and relevance of this call for evidence should not be overlooked. If it results in change, it could represent a seismic shift in how the justice system in the UK and its users interact (including the government) and what 'access to justice' really means in practice.

COMPULSION

The legal case Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002 established, for the jurisdiction of England and Wales, that while the court may strongly encourage parties to engage in ADR (including imposing costs sanctions for unreasonable refusal to mediate), this power stops short of compelling unwilling parties to do so. The CJC report brings together the considerable accumulated evidence, including relevant ECHR decisions, that has been amassed since Halsey. It highlights the inconsistencies of trying to simultaneously maintain that parties cannot be compelled to attempt, or at least seriously consider, mediation (and other forms of ADR) while also having a range of

SHUTTERSTOCK

The opportunity to enable access to justice, as well as to improve the quality of party outcomes, is hugely exciting

quasi-mandatory schemes and costs penalties for not engaging in mediation (and other forms of ADR). The report concludes: "Above all, as long as [no-cost, or minimal cost, ADR processes] leave the parties free to return to the court if they wish to seek adjudicative justice (as at present they do) then we think that the greater use of compulsion is justified and should be considered."

The CJC report alone can neither overturn Halsey nor resolve the issues surrounding access to justice, which can only be solved with appropriate levels of investment in the justice system, including, in CIArb's view, systemic integration of the full range of ADR processes. However, taken together with the call for evidence, it has created a real opportunity for CIArb and all interested parties to contribute to what could be the biggest change to the justice system in a generation if there is a willingness to fully embrace the principles of ADR. If done well, the opportunity to enable access to justice, as well as to improve the quality of party outcomes, is hugely exciting. A sound legal system underpinned by the rule of law is profoundly important to a functioning democracy and to social cohesion.

CIArb will be drawing on its worldwide membership to contribute to our submission on how to embed mediation and other forms of ADR more effectively into the justice system. We will also work with other ADR-focused organisations on the question of how to develop and embed effective safeguards that give users and providers the confidence and assurance that using mediation and other forms of ADR is safe and a quality-assured route to resolution.

ADVERSARIALISM

Whatever side of whichever debate you are on, it is hard not to feel that Menkel-Meadow's words of 25 years ago have become more, rather than less, pertinent.

> *"A culture of adversarialism, based on our legal system, has infected a wide variety of social institutions... consider how debate, argument, and adversarialism have, in recent years, dominated journalism, both print and electronic media, political campaigns, educational discourse, race relations, gender relations, and labor and management relations, to name only a few examples... Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies."*
> Carrie Menkel-Meadow; 38 Wm. & Mary L. Rev. 5-44, 1996

CIArb is preparing a response to the call for evidence drawing on the expertise of our members around the world. If you would like to contribute, please read the questions in the call for evidence and email ljohnston@ciarb.org with your comments before 15 September. We will aim to incorporate feedback into our response.

Doing what's right

Being an ethical practitioner is about much more than adhering to minimum standards, says **Catherine Dixon**

As Director General of CIArb, and as a lawyer and mediator, I am mindful of the many roles a professional body is expected to perform, from the provision of world-class training and accreditation, cutting-edge practice guidelines and innovative thought leadership, through to influencing global ADR policy. Ultimately, the goal is to raise the profile of ADR and thereby increase its use, as well as inspiring confidence in ADR procedures and practitioners. Confidence is crucial if ADR users are to view arbitration and ADR as viable options, and if the integrity of dispute resolution processes is to remain robust. In turn, clear professional standards and ethics are fundamental to market confidence, and CIArb has a unique role to play in setting and upholding ethical standards.

Former US Supreme Court Justice Potter Stewart once defined ethics as "knowing the difference between what you have a right to do and what is right to do". This is an important distinction; all arbitration and ADR practitioners have a duty to adhere to any and all laws and regulations that apply to them, but the point of an ethical framework is to establish principles and expectations that raise standards beyond the minimum legal requirements. The establishment of such an ethical framework is central to CIArb's identity as a professional body, and it's how CIArb members differentiate themselves from other dispute resolvers.

The CIArb Code of Professional and Ethical Conduct sets out the key principles which all CIArb members must adhere to in the course of their activities. The principles cover a wide range of issues, from conflicts of interest to the levying of fees, and set these principles as "the minimum standards of conduct that members should observe".

They are not advisory, nor are they behaviours for which members should receive 'bonus credits'. Instead, they are the minimum threshold that all CIArb members must meet. Significant breaches of the code amount to professional misconduct, and CIArb members can be sanctioned, up to and including expulsion for serious infractions.

This issue of *The Resolver* takes an in-depth look at the meaning of ethics and how ethics are applied to the dispute resolution profession. Important questions arise about the relationship between the unchanging principles that must be the bedrock of any credible ethical framework, and the application of those principles in a professional environment that is changing at an ever-accelerating rate. The principles must be unbending; the application must be innovative and always evolving.

Over the past 18 months, the way CIArb members operate has changed at an astonishing rate, with remote hearings and the use of technology now essential elements of the dispute resolver's toolkit. This has given rise to questions about how members should conduct themselves in these new environments. CIArb has been at the forefront of addressing these questions, and throughout, our Code of Ethics has served as a vital guide.

As we look ahead, CIArb and its members will continue to uphold the highest professional standards. CIArb will support members with a framework for navigating a complex world, with ethical integrity at the heart of their practice.

ABOUT THE AUTHOR
Catherine Dixon is Director General of CIArb. She is a solicitor and accredited mediator.

Ethical practice is a cornerstone of CIArb membership

Desire for disclosure: legitimate or merely tactical?

In the first of a new series of *Resolver* debates, Duncan Bagshaw and Samar Abbas Kazmi square up over the matter of the motivations for parties' concerns about conflicts of interest and desire for disclosure

LEGITIMATE

Samar Abbas Kazmi
ATKIN CHAMBERS

Few things are surer to rile up a legal practitioner – whether an advocate or an arbitrator – than an allegation of a lack of candour or of acting without due regard to a possibility of a conflict of interest.

This sensitivity is understandable: we take pride in our individual and collective integrity as professionals and don't take kindly to suggestions that our conduct may be less forthright, or our conflict checks less rigorous, than should reasonably be expected. More often than not, our professional friends and colleagues agree with our self-perception (and we agree with theirs).

It is easy, therefore, to see why any challenges to our actions might be seen as tactical or even cynical.

However, the fact that we and our professional colleagues hold ourselves and each other in such high esteem should not take away from the fact that parties who choose arbitration – often operating in industries far less 'collegiate' (read: clubby) than the law – may well have genuine reservations about our closeness with, and reliance on, each other or on other parties to the arbitration.

Disclosure acts as a pressure valve, and helps in defusing situations that could otherwise take on a life of their own

ABOUT THE AUTHOR
Samar Abbas Kazmi is a Barrister at Atkin Chambers

It is in this context that one must see the question of parties' concerns about conflicts of interest and their desire for disclosure. The disconnect between an arbitrator's self-perception of their conflicts of interest arising out of a particular arrangement and a party's perception of the same arrangement is often vast and may well be unbridgeable on occasion. Early and full disclosure acts as a pressure valve, and helps in defusing situations that could otherwise take on a life of their own – to the detriment of all concerned.

I would, in fact, go a step further: the premise that parties deploy such arguments tactically and without legitimate reasons proceeds on a misunderstanding of why the average user of international arbitration chooses this form of dispute resolution. Parties who sign up for arbitration are actively choosing a course of dispute resolution which minimises satellite litigation, and the delays and costs associated with it.

Consider the example of the recent UK Supreme Court decision on which much ink has been spilled (including by myself). Parties who chose to refer the disputes arising out of the Deepwater Horizon tragedy in 2010 cannot be presumed to have started off by signing up to a course of action that would culminate in a precedent-setting UKSC judgment in November 2020. Parties don't go to arbitration to make case law on arbitrators' duties; if they end up in that position, it is not the result of a masterful deployment of tactics by a party but the result of it having found itself in a position where it considered that its legitimate interests were best protected by turning to the courts. Had there been early and full disclosure in that case, the parties' tactical efforts may well have been spent elsewhere.

In fact, those who are minded to bemoan what they consider to be the tactical deployment of such arguments should invite and encourage early and full disclosure of conflicts of interest: taking the long view, it is the best shield against tactical or cynical challenges.

TACTICAL

Duncan Bagshaw
HOWARD KENNEDY LLP

Why do parties choose arbitration? One of the primary reasons is because they can influence the choice of tribunal. As Paul Friedland has said: "The objective of any party facing the selection of a party-appointed arbitrator is to maximise its chances of winning."

It should not be a stretch to accept that parties are in arbitration to give themselves the maximum chance of winning. Lawyers and academics may have some philosophical attachment to the 'right' answer or the most intellectually pleasing analysis. But for a business protecting its bottom line, or an investor seeking to recover its expropriated assets, those concerns are for the birds.

Applying that attitude to the arbitrators whom the party has not had the freedom to select, the contrary is likely to apply. Your opponent's first choice of arbitrator is likely to be one who, they believe, will give them the best chance of winning. Removing that arbitrator will therefore be attractive as part of a strategy to try to tip the balance in tight cases.

In other cases, it will become apparent during the case that an arbitrator is inclined against one party's position or case theory. It is fair to say that a party's interest in the arbitrator's disclosures and grounds for challenge is likely to be heightened.

Parties are not in the business of seeking an entirely neutral tribunal at the expense of their own prospects of winning. This is easily demonstrated: imagine if an arbitrator revealed, among their disclosures, something about themselves which tended to indicate that the arbitrator might favour the interests of a party. Would that party identify the issue and ask the arbitrator to step down, if the other party failed to notice or appreciate the significance of the disclosure?

Yes, perhaps, if the party thought that an arbitral award rendered by a tribunal including that arbitrator could too easily be set aside. But would such a party identify the issue and challenge the arbitrator only to ensure that the tribunal was entirely free from apparent bias and as neutral as possible? Surely not.

Parties in high-stakes disputes will always behave tactically, and their attitudes to arbitrator disclosure are shaped accordingly

ABOUT THE AUTHOR
Duncan Bagshaw is a Partner at Howard Kennedy LLP

What if (as in one real-life case – P v Q [2017] EWHC 194 (Comm)) the exhaustive researches of the diligent lawyers acting for a party revealed a statement made by an arbitrator at a conference which indicated that that arbitrator took a particular view on an issue which arose in the arbitration?

It is a stretch to suggest that many parties in such a situation would instruct their lawyers to reveal the comments or to seek to remove the arbitrator, if the comments at the conference indicated a view which would be favourable to that party's case. Tactical advantage outweighs altruistic commitment to neutrality.

This is not to say that parties' desire for disclosure and concern about conflicts is evil, dishonest or blameworthy. Parties involved in international arbitration can be expected to strive to win, within the rules and limitations of ethical conduct. If that means seeking to remove an arbitrator, it is natural that parties will want the maximum possible disclosure, so as to maximise the chance of identifying something which will undermine that arbitrator's position.

Largely, English law relating to arbitrator challenges mitigates this inherent self-interest and tactical focus of parties to arbitrations. The focus of the tests for removal of an arbitrator on the grounds of apparent bias is on objectively reasonable grounds for doubting the impartiality of the arbitrator. Decisions such as the recent Supreme Court judgment in Halliburton v Chubb (Halliburton Company v Chubb Bermuda Insurance [2020] UKSC 48) illustrate that the Courts will be astute to avoid removal of arbitrators – upsetting arbitral awards and causing huge delay and uncertainty – even where there are real grounds for the impression that an arbitrator has failed to disclose a relevant matter.

In conclusion, don't despair: parties in high-stakes disputes will always behave tactically, and their attitudes to arbitrator disclosure are shaped accordingly. But there is nothing so illegitimate about that.

These contributions are written to entertain and provoke and should not be taken to reflect the views of the authors.

What do you think?
Do you have a differing viewpoint or a debate to suggest? Email the editor at sarah.campbell@thinkpublishing.co.uk

SHUTTERSTOCK

At odds?

Is arbitration's procedural design structurally biased? And if so, where does that leave us ethically? Mercy McBrayer and Stavros Brekoulakis examine the issues

The ongoing discussions surrounding the criticisms that some commentators have recently levied against the arbitration-based investor–state dispute settlement (ISDS) system have paved the way for numerous projects exploring ways to improve public perceptions of the neutrality of ISDS arbitration. Many of these criticisms are largely procedural and so carry implications for commercial arbitration where the critics adopt a stance that is distrusting or critical of the procedures used in ISDS disputes. One such project where this has become increasingly apparent is the move by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on ISDS, where CIArb has official Observer status, and the International Centre for Settlement of Investment Disputes (ICSID) to create a code of conduct for neutrals who hear disputes involving states.

A first draft of the document, called the Code of Conduct for Adjudicators, was released in May 2020

As parties only have one opportunity to present the their claim or defence, it is in their interests to select the most capable person

and sparked significant debate among practitioners, academics and state officials. As a result of feedback received in consultation sessions throughout 2020 and 2021, a second draft was released in April 2021. The discourse surrounding the proposed code, specifically within the past year, has reopened discussions about the issues surrounding the perceived neutrality of international arbitration, which are often portrayed as ethical issues with the system.

The most recent criticisms of arbitration have centred on the notion that a system where privately appointed dispute resolvers hear cases and issue awards that have binding legal effect is more open to ethical abuses than the public court system, where professional judges hear and decide cases. This idea goes far beyond the debate surrounding the Code of Conduct for Adjudicators and speaks to the heart of the private dispute resolution practice itself. Is a minimally regulated private system of dispute resolution sitting separate from, but concurrently within, the public justice system ethically exceptional?

AN IMPORTANT DISTINCTION

Against the backdrop of these discussions, we take the opportunity to revisit these important issues of the foundational ethics of the international arbitration system. At the outset, a distinction should be drawn between ethical considerations of the conduct of arbitrators and perceptions of ISDS's lack of neutrality as a system of adjudication, which are often conflated in current debates. The former is associated with the question of bias of individual arbitrators and is addressed in detail by a plethora of arbitration laws, institutional rules and codes of ethics, including the draft Code of Conduct for Adjudicators. Incidents of biased, or indeed unethical, conduct by individual adjudicators are bound to occur in every system of legal adjudication, including national judiciaries. The latter is associated with the broader question of whether the procedural design of arbitration is structurally biased. It is this question that this article focuses on. Criticism of the procedural design of arbitration covers a range of processes, including the evidentiary process, confidentiality and the lack of *stare decisis*, to name a few. While an extensive examination of this question goes beyond the scope of this article, we have chosen to focus on the most potent current criticisms, namely lack of appeal and unilateral appointment of arbitrators.

ABOUT THE AUTHORS

Mercy McBrayer FCIArb JD (SMU) LLM (QMUL) is CIArb's Research and Academic Affairs Manager. She is an attorney and member of the State Bar of Texas. She represented parties in commercial dispute resolution prior to joining CIArb.

Stavros Brekoulakis is a Professor in International Arbitration Law and Director of the School of International Arbitration at Queen Mary University of London. He is also a barrister at 3 Verulam Buildings (Gray's Inn) and is Editor in Chief of CIArb's academic journal Arbitration: The Journal of Arbitration, Mediation, and Dispute Management.

The first area of recent criticism has centred around the concept of due process in legal systems. State judiciaries are typically structured in such a way that parties who lose disputes have the right to appeal the findings. This means that claims can undergo many layers of substantive scrutiny by a variety of jurists before becoming binding on the parties to the dispute. In arbitration, the substantive findings of the arbitrator are binding on the parties and not subject to further review. Additionally, the proceedings are often confidential, and arbitrators are required only to issue a 'reasoned' award, which may contain a minimal explanation of the findings (although, in ISDS disputes, awards are usually extensively detailed). Thus, if an arbitrator's substantive findings are contrary to the law relevant to the dispute, there may be limited remedies available to the parties adversely affected.

But this lack of appellate mechanism in arbitration is balanced by one of the most fundamental characteristics of arbitration: parties' ability to choose their dispute resolvers. As parties only have one opportunity to present the merits of their claim or defence, it is in their interests to select the most capable and knowledgeable person possible as the ultimate decision-maker. It is this unilateral system of appointment that forms the deepest roots underlying arbitration. The party appointment system is regarded as a key value for, and indeed the foundation of the legitimacy of, international arbitration, which in turn leads to respect for the arbitral award, whether favourable or not.

SHUTTERSTOCK

However, this opens the door to another criticism that some state governments have of arbitration, which is a unilaterally appointed arbitrator's ability to 'correctly' interpret the law. This is the idea that there are limited interpretations of law that are 'correct' and that professional judges are more likely to apply those than private individuals. However, and leaving aside the broader debate about the indeterminacy of legal rules, in many judiciaries around the world, judges are not put in office as a product of their legal expertise and proven ability to get the law 'correct'. Instead, they are appointed or elected based on a wide variety of considerations. This means they need not have any specialised expertise in any area of law or be legally trained at all. In state judicial systems, the level of relevant specialised expertise of the person hearing the dispute can be a roll of the dice.

In many judiciaries around the world, judges are not put in office as a product of their legal expertise and proven ability to get the law 'correct'

This in turn feeds back to the topic of due process and the availability of appeal. In such a setting, it is only prudent to allow layers of additional scrutiny of the outcome. If, however, parties have the ability to choose their judge, then the outcome is a product of that choice and not simply a feature of a randomised system. It is in the parties' interests to ensure that someone whose competence they are confident in is appointed to hear their dispute. This would suggest that the potential for the dispute resolver to misapply the law in a private appointment process could be much lower than in a state judiciary.

Another aspect of unilateral appointment that stirs debate in some corners is that anyone can be appointed an arbitrator at the will of the parties. An arbitrator may be of any profession, and most often they are lawyers. This would seem logical since parties want to ensure the person deciding their case has expertise in understanding the law. This also means that individual arbitrators might not sit as neutrals on an exclusive and full-time basis, as many judges do in state court systems. Instead, most arbitrators continue to work as party counsel in addition to accepting appointments, a situation that has come to be known colloquially as 'double hatting'. To some, the ability of a judge to also serve as counsel creates an ethical dilemma. However, in state court systems it is often the case that many magistrates or judges in courts of

SHUTTERSTOCK

Some commentators have begun to take the view that only full-time professional dispute resolvers should be allowed to hear cases where states or public entities are parties

first instance sit in office on a part-time basis. So, why would this create an ethical dilemma in arbitration greater than in state courts?

UNDERMINING DIVERSITY

The area where this has received the greatest criticism is in ISDS arbitration where one of the parties is a state government or public entity. Some commentators have begun to take the view that only full-time professional dispute resolvers should be allowed to hear cases where states or public entities are parties. The argument for this is based on the idea that sitting as an arbitrator and serving as counsel to parties in arbitrations or as an expert witness creates too many opportunities for conflicts of interest to arise. For example, a party may decide to appoint an arbitrator who is a lawyer in a firm that once represented them in another dispute or one who has testified as an expert advocating a position that favours their case, believing that these things will increase the likelihood of the arbitrator finding in their favour. Some of the limited means parties have to overturn arbitration awards against them are by showing that the arbitrator was biased towards or against one of the parties or had predetermined the issues before hearing the evidence and so such conflicts are indeed serious.

However, while there are examples of awards that have been annulled due to such conflicts, the problem is not seen as pervasive or widespread. Eliminating the possibility of double hatting in ISDS disputes may entail that only a limited number of individuals who were financially able to spend years at a time sitting as an arbitrator in a single case with no other work would be able to accept appointments. This may undermine the diversity of the pool of practising arbitrators in these high-value and high-visibility disputes to an unprecedented degree and counter any advances made by the industry in terms of encouraging parties to appoint younger, female and culturally diverse neutrals.

NOT MADE IN A VACUUM

Therefore, identifying specific situations where a double hatting conflict would be most likely to occur and allowing parties the opportunity to ask arbitrators to limit the other activities they undertake during their appointment would seem a fair and balanced solution. It must also be remembered that the modern international arbitration process was established in law by states via the most successful international treaty in history. With 168 contracting states to the New York Convention and more joining regularly, it is hard to argue that a system created, and so vigorously endorsed, by so many states is not sufficiently neutral or is incompatible with state judicial systems. While debates on the ethical compatibility of private dispute resolution with public judicial systems seem to have been long settled, debates about the system's neutrality remain. On the one hand, this is an appropriate debate to have specifically where public policies and funds are at stake. On the other hand, the debates should also consider that private dispute resolution, especially in commercial disputes, has been a long-standing supporting companion to public judiciaries.

The practice of wearing multiple 'hats' has come under fire in ISDS arbitration

SHUTTERSTOCK

Firm foundations

Matt Molloy reflects on the past 25 years of adjudication in the UK

This year marks the 25th anniversary of the Housing, Grants Construction and Regeneration Act 1996 (the Construction Act) receiving Royal Assent, although it didn't come into effect until 1 May 1998. With it came the introduction of statutory adjudication into the UK construction industry. How has this affected the sector? And what does the future hold?

WHERE HAVE WE COME FROM?

The call for adjudication from certain sections of the construction industry came as a result of dissatisfaction with how disputes were dealt with in the UK. Litigation was a lengthy and expensive process and arbitration was perceived as the same, ie 'litigation in suits'. Those players with deeper pockets could postpone payment for years after completion and engage in a drawn-out process where only those with sufficient funds were able to last the course. Thus, in some way, adjudication was seen as a means of redressing the balance with the rubric of 'pay now, argue later'.

At the time, the reception from the legal community was frosty. The titles of some of the papers published at the time give some clues:

- 'Contemporary Issues in Construction Law – Volume II Construction Contract Reform: A plea for sanity', edited by John Uff QC (a collection of papers in opposition to the 1995–1997 reform proposals).
- 'HGRA adjudication: swarms of wannabes?' by Ian Norman Duncan Wallace (*Construction Law Journal*, 1997).

The latter paper gives a characteristically strong and colourful account of the perceived shortcomings of 'industry' arbitrators or adjudicators and their seeming bias against the client or 'paymaster parties'.

ABOUT THE AUTHOR

Matt Molloy is a Chartered Surveyor, Barrister and Chartered Arbitrator. He acts as a full-time adjudicator, arbitrator and mediator in the UK and internationally. He is a Director of MCMS Limited and the current Chair of the CIC ADR Management Board.

The call for adjudication came as a result of dissatisfaction with how disputes were dealt with in the UK

WHERE ARE WE NOW?

It is fair to say that adjudication is now an embedded and integral part of the UK construction industry dispute resolution landscape. A key factor in this is the support and guidance the process has received from the Courts, most notably the Technology and Construction Court, its alumni in the Court of Appeal and further endorsement in the Supreme Court. Lord Justice Coulson's parting gift before his elevation to the Court of Appeal in S&T (UK) Limited v Grove Developments Limited [2018] EWHC 123 (TCC) and his subsequent leading judgment in Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited and Cannon Corporate Limited v Primus Build Limited [2019] EWCA Civ 27 (Bresco) give a flavour of the rise in status of the process. Lord Briggs' opinion in the UK Supreme Court in Bresco ([2020] UKSC 25) added even greater weight.

However, one aspect of the increase in status is the increase in complexity of the process. Allied with this is the effect it has on the cost of the process. Thankfully, there has been some progress

SHUTTERSTOCK

One concern among those who have invested in the training is the difficulty of developing a practice as an adjudicator

in this regard, with the advent of low-value dispute schemes, such as the CIC LVD Model Adjudication Procedure and the TeCSA LVD Scheme.

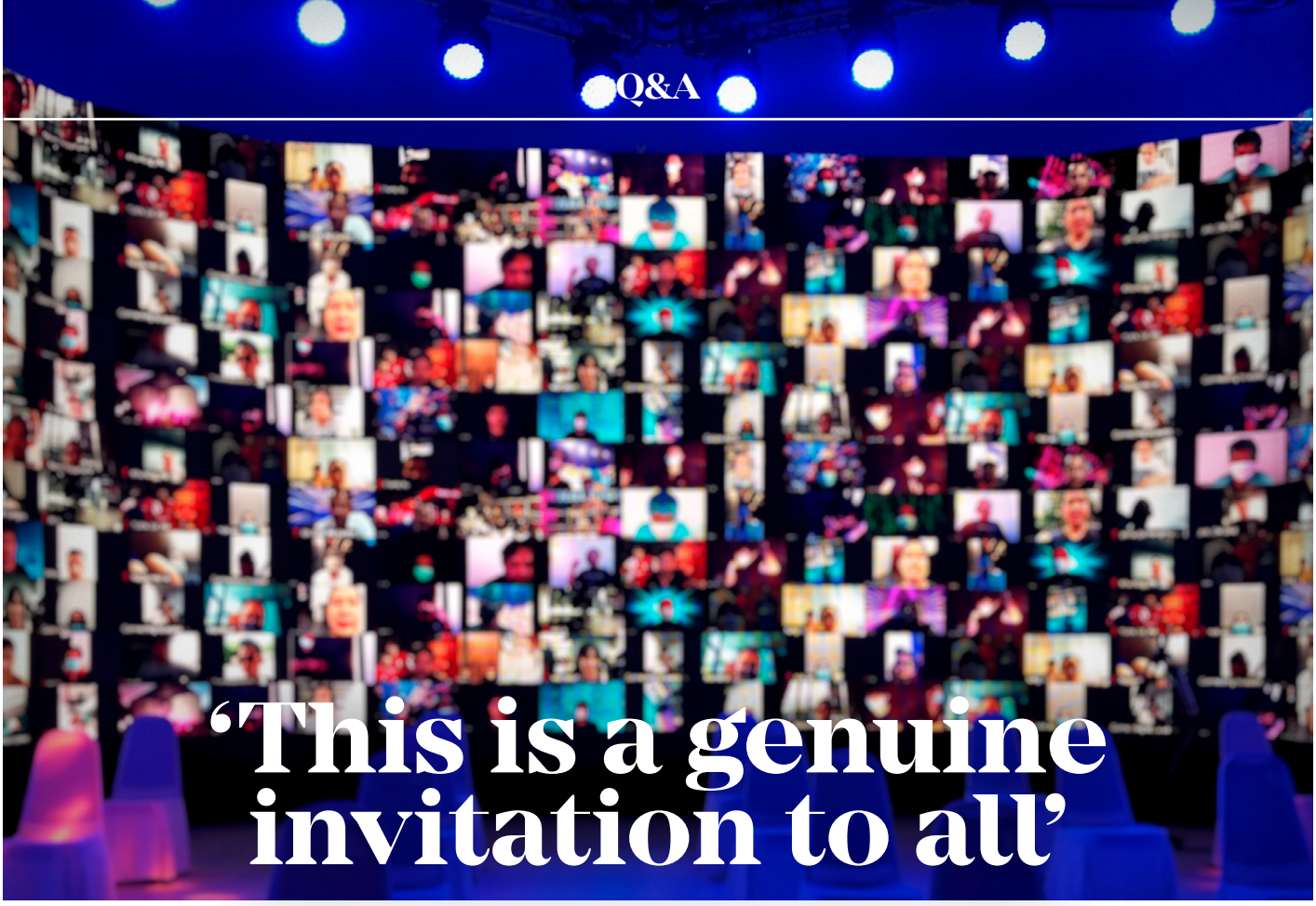
WHERE ARE WE GOING?

Oscar Wilde is quoted as saying that "imitation is the sincerest form of flattery that mediocrity can pay to greatness". Hence, we can see adjudication being adopted in other industries – for example, the Professional Negligence Bar Association and Society of Computers and Law have introduced adjudication schemes. There has also been an increased uptake of adjudication internationally. Perhaps predictably, this has been confined to common law and/or Commonwealth countries, but there are predictions that this may not always be the case. Germany, for instance – a civil law jurisdiction – has been considering the process. The International Federation of Consulting Engineers is also currently looking to cater for an increased demand for adjudicators on projects where its contracts are used.

Although training and qualification of adjudicators has developed in line with the increase in complexity, one concern among those who have invested in the training is the difficulty of developing a practice as an adjudicator. The situation is arguably similar to mediation and arbitration. However, the difference is that, historically, newly trained or qualified arbitrators or mediators were able to act as pupils or observers in order to get hands-on experience and receive guidance from experienced practitioners which they could then use in support of getting onto panels and getting their first appointment. My view is that there is a real need for adjudication to follow suit in this respect.

FINAL THOUGHTS

Adjudication is now a mature, complex and highly legal process. With this comes expense and an increased need for quality and accountability. Recent moves to make adjudication more accessible to SMEs in order to resolve low-value disputes are welcome. However, low value does not necessarily equate with simplicity or an absence of complexity. Thus, the training requirements, case management and decision-making skills are as, if not more, demanding for these types of disputes as for high-value, complex disputes with sophisticated and experienced representatives. This provides a challenge. It also provides an opportunity.



‘This is a genuine invitation to all’

This year’s Mediation Symposium is taking the concept of inclusion and diversity back to first principles, with an open call for abstracts. The organiser, CIArb’s head of mediation development, Dr Isabel Phillips FRSA, explains the thinking behind this approach

What’s the aim of this year’s Mediation Symposium?
To enable an exchange of learning and experience in the global dispute resolution community about how to proactively address inclusion and exclusion at a global and local level.

CIArb is a global organisation with a highly active and incredibly diverse membership across 150 jurisdictions. Diversity comes with opportunities and challenges. We have the opportunity to learn and grow by “creating a truly diverse community of dispute resolvers where all can succeed irrespective of their background” (wording from our Equality, Diversity and Inclusion Strategy). The challenge is to actively listen to and support conversations which enable learning and understanding, even when we disagree.

This year there has been an open call for abstracts for the symposium for the first time. Why?
An open call is an invitation to our 17,700 professional members and 9,300 active student members, as well as to those who have not yet joined us, to participate in the global conversation on ADR and mediation and to share their ideas, knowledge and experience.

We want to explore the issues that are important to you and to ensure your voices are heard. This is your opportunity to help shape the future of the ADR profession through shared learning, experience and engagement.

Dr Isabel Phillips FRSA is Head of Mediation Development at CIArb. She is a conflict specialist and mediator in commercial and violent conflict, with extensive consultancy experience with commercial organisations, UN agencies, NGOs and UK-based organisations, including CEDR and the University of Westminster Law School.

What has been the result of the open call?
We have received contributions from practitioners in 14 countries across four continents. Many of these contributions come from emerging economies, which shows that challenging exclusion and supporting inclusion are a worldwide priority. The contributions have been on traditional and customary mediation; using technology and online tools; and different modes of mediation to address issues of access and power imbalances in private/public sector disputes. I hope this breadth of contributions encourages others to participate in the future.

Why do you think the open call attracted more abstracts from some parts of the world and fewer from others?
The Centre for Effective Dispute Resolution’s Mediation Audit 2021 offers a concerning view of a small, socio-economically homogenous group of mediators operating in a market which could be considered closed to others.

While CIArb can support access to training and education for underrepresented groups, it is crucial

SHUTTERSTOCK

What to look forward to

A SAMPLE OF THE SESSIONS ON OFFER:

Technology and mediation: Tools for inclusion?

- How is technology contributing to facilitate inclusion within mgediation, and in accessing mediation services?
- Contributions from Poland, China and the US

Access to justice and public/private disputes: Global issue, local solutions

- What solutions are being implemented to address exclusion and power imbalance between citizens and government?
- Contributions from the UK, Ukraine and India

Hybrid processes and customary dispute resolution in emerging economies

- How are customary and traditional justice systems providing models for mediation practice in the 21st century?
- Contributions from South Africa, Rwanda and Kenya

What are you going to do next?

- Interactive session on taking action on inclusion with future CIArb president, experienced mediator and public speaker Jane Gunn FCIArb
- Contributions from the UK

to bear in mind that the primary bottleneck for mediators is post-qualification access to the practical experience, not pre-qualification access to training.

Many of us want to help others to succeed irrespective of their backgrounds by gaining the experience they need. However, it's not always clear how best to offer support or, indeed, how to be an effective ally. We are therefore taking the opportunity at the symposium to exchange ideas on how to effectively challenge exclusion.

What are the challenges of organising a global event focusing on equality and diversity?

Equality, diversity and inclusion – EDI (or, in the US, DEI) – is a framing of well-recognised issues in 'advanced' economies. It tends to be associated with the campaign for human and equal rights for all.

However, EDI means different things to different people around the world. The key point is that every country has its own hierarchical structure, which can result in certain groups being consistently included in decision-making processes while others are routinely excluded.

There are, of course, some consistent patterns of exclusion. For example, we regularly discuss exclusion on the basis of gender. However, in a global context, exclusion can vary from country to country.

What are you most looking forward to about this event?

The brilliant, diverse group of people attending, their contributions, and what will come out of those interactions. Mediation can motivate people to try and remake the world as it should be, rather than to settle for it as it is.

We are also collating a bank of full-length presentations that attendees can access and watch in their own time. We are hoping that we will be able to provide at least some of these in more than one language for the first time.

Mediation Symposium 2021

'Inclusion and exclusion in mediation: Choosing to challenge?' – 7 October 2021, online

To see the full line-up and to register, visit **www.ciarb.org/events/mediation-symposium-2021**
Email: **events@ciarb.org**
Book by 9 September for early-bird rates. CIArb members save up to 30%.

SHUTTERSTOCK

How to... apply for security for costs

A guide to using CIArb's Applications for Security for Costs in International Arbitration guideline

Released in 2016, CIArb's Professional Practice Guideline on Applications for Security for Costs (Guideline 5) offers assistance to arbitrators and parties to international arbitration proceedings where one of the parties requests or is considering requesting the tribunal to provide an interim measure in the form of security for costs, in order to ensure the party from whom the security is requested can pay an adverse costs order or honour an award made against it.

BACKGROUND

Even though the power to grant interim measures is provided for by most institutional and ad hoc arbitral rules, arbitrators are often reluctant to grant requests for security for costs. Notably, there are only two known examples out of the entire body of law in investment arbitration where security for costs was awarded. This reluctance may be due to limited availability of detailed, comprehensive guidance either for arbitrators or parties on the extent of such power and how tribunals should exercise it. There is no clear standard test for security for costs applications in international arbitration. Consequently, Guideline 5 has proven itself to be a source of efficient, reliable recommendations for both arbitrators and counsel. It can also be read in conjunction with CIArb's Professional Practice Guideline on Applications for Interim Measures (Guideline 4), as most of its provisions are applicable to security for costs applications as well.

WHAT'S IN THE GUIDELINE?

Guideline 5 consists of six articles that cover best practices in international arbitration regarding making an application for security for costs. In

Arbitrators are often reluctant to grant requests for security for costs

SHUTTERSTOCK

particular, it offers guidance in situations which are relevant to the consideration of applications for security for costs, such as dealing with applications where there is a counterclaim or where there is a question of a claimant's ability to satisfy an adverse costs award. It also addresses the process for granting and releasing security for costs.

USING IT IN PRACTICE

Uliana Cooke, Partner at PCB Byrne in London, shared her experience of using Guideline 5 in a successful application for a security for costs award in one of her prominent cases:

"The purpose of CIArb's Guidelines is to serve the best interests of international dispute resolution and to formulate certain universally applicable principles, in particular on security for costs application, and I am glad I have been able to learn this from personal experience. I used the Guideline a couple of years ago in one of my commercial arbitration cases at the LCIA. The Guideline was incredibly helpful in formulating the arguments on the position in the case. It also helped the tribunal to determine whether the application for security for costs should be successful or not and to weigh out the factors in considering the application. In our case, the tribunal also relied on the provisions in Article 2 of the Guideline regarding taking great care not to prejudge or predetermine the merits of the case itself, and, in my opinion, that was very important for the tribunal to make a final, informed decision. I recommend using the Guideline as a set of useful principles and as the first step when considering whether the application for security for costs should be made, and not shying away from expressly referring to the Guideline, as I think it is a universal reflection of the common practice on security for costs in international arbitration."

"I recommend using the Guideline as a set of useful principles"

WHERE TO FIND IT

Guideline 5 is available at **www.ciarb.org/resources/guidelines-ethics/international-arbitration**

Case note

UralTransMash v Pojazdy Szynowe PESA Bydgoszcz SA (A60-36897/2020), Supreme Court of the Russian Federation

Report by Kateryna Honcharenko MCIArb, Research Executive at CIArb

"The two most powerful warriors are patience and time," wrote Leo Tolstoy in *War and Peace*. This does not refer to international commercial arbitration, or any other area of law for that matter. However, to make a practical analysis of the effects of a newly adopted legislation, it is in some cases important to wait for its interpretation or application by the courts.

FACTS

In June 2020 the President of the Russian Federation signed a new law (No.171-FZ), introducing what seemed to many at first sight alarmingly peculiar amendments to the Russian Arbitrazh (Commercial) Procedure Code (APC Amendments).

In accordance with the APC Amendments (and subject to certain conditions), Russian commercial courts would, among other things, have exclusive jurisdiction over disputes involving Russian nationals or legal persons against which foreign sanctions (referred to in the APC Amendments as restrictive measures) have been imposed. The APC Amendments do not specify any criteria to determine which sanctions may fall under the definition of restrictive measures.

President Putin's new law allowed Russian courts to have exclusive jurisdiction over disputes where Russian nationals had sanctions imposed

The new provisions allow a party to disregard the jurisdiction of a foreign court or arbitration seated abroad if, due to restrictive measures, their dispute resolution clause cannot be enforced. Restrictive measures might include visa restrictions, quotas, tariffs and other administrative or criminal restrictions. A sanctioned party may also be able to apply to Russian courts for an anti-suit injunction

Restrictive measures might include visa restrictions, quotas and tariffs

The contract between UTM and PESA involved the supply of low-floor trams

against pending proceedings in foreign courts or commercial arbitrations seated abroad.

Enforcement would only be possible where a party subject to sanctions initiated a proceeding in a foreign court or arbitration seated outside of Russia, did not object to such actions of the other party or waived its right to apply for an anti-suit injunction.

DECISION

UralTransMash v Pojazdy Szynowe PESA Bydgoszcz SA (A60-36897/2020) is the most recent and prominent example of how Russian courts might interpret these new provisions. In 2013, Russian enterprise UralTransMash (UTM) and Polish railway manufacturer Pojazdy Szynowe PESA Bydgoszcz SA (PESA) entered into a contract of supply of low-floor trams. Article 11 of the contract contains a dispute resolution clause referring all disputes to the Stockholm Chamber of Commerce (SCC).

In 2018, as UTM had failed to carry out its obligation under the contract, PESA filed a request for arbitration with the SCC. In response, UTM asked the Sverdlovsk Arbitrazh Court to halt the arbitral proceeding by issuing an anti-suit injunction and by ordering PESA to pay the claim amount (EUR56 million) should it fail to comply. According to public records, UTM became subject to sanctions and other restrictive measures imposed by the EU, Liechtenstein, the US, Switzerland and Ukraine. UTM relied on the new APC Amendments in making its request, arguing that Russian courts had exclusive jurisdiction over the dispute since sanctions imposed against it restricted its ability to participate in the SCC proceeding and therefore created obstacles to its access to justice right.

On 28 May 2021, the Supreme Court of the Russian Federation held that unless the restrictive measures make the arbitration agreement unenforceable by restricting the party's access to justice, there are no grounds for the Russian courts' exclusive jurisdiction. The Court upheld the refusal of the request to grant the injunction established by the court of first instance as, in accordance with the facts of the case, UTM had been able to fully enjoy its right to participate in other SCC proceedings and was solvent enough to hire well-known Russian and Polish legal representatives, appoint prominent arbitrators, submit counterclaims, etc. The Courts also did not accept other UTM arguments on its purported inability to make bank transfers to European banks and on difficulties created by EU travel restrictions.

IMPLICATIONS

Interestingly, even before the adoption of the APC Amendments, the issue had already been raised in another Russian case that reached the Supreme Court. In Instar Logistics v Nabors Drilling International Ltd (A40-149566/2019), the claimant brought a claim to replace the International Chamber of Commerce (ICC) dispute resolution clause in its contract with Nabors Drilling (US branch company) with a provision that Russian courts shall have exclusive jurisdiction. The Moscow Arbitrazh Court held that the clause could not be enforced owing to sanctions imposed by the US, including bank transfer restrictions, and that a future award would be unenforceable. The decision was upheld by the Court of Appeal and the Supreme Court.

It remains to be seen how further cases affected by the law will be resolved, and more clarity on its interpretation and application is needed and expected. However, the new legislation means that businesses dealing or planning to deal with Russian companies may have to consider the possibility of sanctions, their effect on contractual obligations, including the enforceability of arbitration clauses, and the necessity to renegotiate them.

Businesses dealing or planning to deal with Russian companies may have to consider the possibility of sanctions

What's on

Give your career a boost with this selection of training opportunities...

CIArb TRAINING AUTUMN/WINTER 2021 (courses and assessments are online unless otherwise stated)

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

- **Online Intro to ADR**
  Open entry **£24**
- **Online Intro to Mediation**
  Open entry **£109**
- **Student: Intro to ADR Online Course & Assessment**
  Open entry, available until 31 December **£25**
- **Virtual Introduction to International Arbitration 2021**
  29 October **£240**

For more experienced practitioners
Those who have experience in ADR can undertake a CIArb Accelerated Assessment Programme to assess if they meet the relevant benchmarks for Membership or Fellowship.

- **Virtual Accelerated Route to Membership: Domestic Arbitration**
  30 November–2 December
- **Virtual Accelerated Route to Membership: International Arbitration**
  30 November–2 December
- **Virtual Accelerated Route to Fellowship: Construction Adjudication**
  6–10 December
- **Virtual Accelerated Route to Fellowship: Domestic Arbitration**
  6–10 December
- **Virtual Accelerated Route to Fellowship: International Arbitration**
  6–10 December

Assessments
The following assessments are completed via LearnADR, CIArb's e-learning platform.

- **Online Introduction to ADR Assessment**
  Open entry **£72**
- **Online Introduction to Mediation Assessment**
  Open entry **£72**
- **Introduction to Construction Adjudication Assessment 2021**
  10 September **£72**
- **Module 2 Law of Obligations Assessment**
  16 September **£342**
- **Introduction to ADR Assessment 2021**
  17 September **£72**
- **Introduction to International Arbitration Assessment 2021**
  29 October **£72**
- **Module 1 Law Practice and Procedure of Domestic Arbitration Assessment 2021**
  2 December **£174**
- **Module 3 Award Writing Domestic Arbitration Assessment**
  10 December **£408**

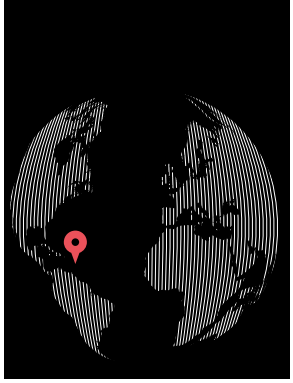
Ongoing skills development
Professional Development Courses – these are open-entry courses and may be started at any time during 2021.

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

Prices stated do not include VAT. For more details, go online to ciarb.org/training. Alternatively, contact CIArb at education@ciarb.org or call 020 7421 7430.

Branch-led training
The following courses are available to members around the world. Dates indicate start of course. Contact the relevant branch for further information.

- **Module 1: International Arbitration**
  Cyprus 1 September; UAE 2 September; Europe, Kenya (face-to-face) 6 September; East Asia, Qatar 16 September
- **Module 1: Construction Arbitration**
  Kenya (F2F) 2 September
- **Module 3: International Arbitration**
  Australia, Caribbean (F2F), East Asia, Malaysia, UAE (F2F) 2 September; Europe 8 September; Singapore 9 September
- **Intro to International Arbitration**
  India 15 September and 10 November; Europe, UAE 18 September; Singapore-Maldives 22 September; Cyprus 29 September; Caribbean (F2F), East Asia (F2F), Nigeria – ICAMA Abuja, Singapore 29 October; Nigeria 2 December
- **Module 1: Domestic Arbitration**
  Kenya (F2F) 3 September
- **ARM: Domestic Arbitration**
  Kenya (F2F) 10 September; Nigeria – Abuja (F2F), Nigeria – Ibadan (F2F), Nigeria – Lagos (F2F) 1 December
- **Module 3: Construction Adjudication**
  Zambia 18 September
- **Module 3: Domestic Arbitration**
  Zambia 25 September
- **Intro to Mediation**
  Caribbean (F2F) 1 October
- **ARF: International Arbitration**
  Brazil 4 October; India 15 November; Caribbean (F2F), East Asia (F2F), Nigeria – Abuja (F2F), Nigeria – Lagos (F2F) 8 December
- **Intro to Domestic Arbitration**
  Zambia 4 October; Nigeria 14 October; Nigeria – ICAMA Abuja 15 October and 13 December
- **Module 2 Law of Obligations**
  East Asia, Qatar 26 October
- **ARM: International Arbitration**
  India 15 November; East Asia (F2F), Nigeria – Abuja (F2F), Nigeria – Jos (F2F), Nigeria – Lagos (F2F) 1 December
- **ARF: Domestic Arbitration**
  Nigeria – Abuja 6 Dec; Nigeria – Lagos (F2F) 8 Dec



The turning of the tide

The Caribbean aspires to be a venue of choice for international arbitration. **Shan Greer** describes how it is nearing that aim

The Caribbean islands are most noted for their multicultural vibrancy and stunning scenery, making them an idyllic destination for vacationers. While there is no doubt that these are excellent selling points, the region has much more to offer than cocktails on beautiful beaches.

The Caribbean enjoys and has substantially benefited from strong regional and international trade relationships across multiple industries. This led to the creation of multiple trade blocs, most notably the Caribbean Community and Common Market (CARICOM), whose objective is to support a unified Caribbean Community that is economically resilient and competitive. CARICOM has long recognised the importance of effective dispute resolution to regional and international trade, as evidenced by Article 223 of the Revised Treaty of Chaguaramas, which obligates member states to encourage and facilitate the use of arbitration and other forms of alternative dispute resolution "to the maximum extent possible".

Sadly, arbitration legislation across the Caribbean does not reflect this commitment, with the vast majority of CARICOM member states deriving their arbitration statutes from the outdated English Acts of 1889 and 1950. These outdated acts do not create a conducive environment for arbitration and are out of step with the UNCITRAL Model Law, which reflects international best practice. Thankfully, due in part to the work of the Caribbean Branch of the Chartered Institute of Arbitrators, there has been a move towards recognising and promoting the use of arbitration in the Caribbean Community.

Castries Harbour, St Lucia

CLOSER HARMONY

Several CARICOM member states, including the British Virgin Islands (BVI), Barbados and Jamaica, have implemented Model Law-compliant arbitration acts. These changes have improved the local use of arbitration and facilitated the creation of multiple international arbitration centres such as the BVI International Arbitration Centre and the Arbitration and Mediation Court of the Caribbean. These developments have been important to the Caribbean in terms of earning recognition among the international arbitration community as well as foreign investors and regional businesses. However, without a harmonised approach to legislative reform, the Caribbean Community will struggle to improve the ease of conducting trade in the region or establish itself as a venue of choice for international arbitration.

Thankfully, the tide is turning. At the 29th meeting of the Legal Affairs Committee of CARICOM on 11 June 2021, the regional attorneys general moved the Caribbean Community one step closer to modernising and harmonising the arbitration laws of CARICOM member states by endorsing the Caribbean (Impact Justice) Project's Model Arbitration Bill. The proposed Bill was produced by a committee appointed by Impact Justice and accepted by UNCITRAL as Model Law-compliant. This commitment is a welcoming sign and will likely result in the adoption of the Bill into law across the Caribbean Community, which will only serve to improve the arbitration landscape in the region.

There has been a move towards recognising and promoting the use of arbitration in the Caribbean Community

KIRK ELLIOTT

ABOUT THE AUTHOR

Shan Greer is an international lawyer qualified to practice as a barrister and solicitor in England, St Lucia, St Vincent and Belize. With over 20 years' experience, she has successfully handled commercial transactions and disputes across multiple jurisdictions in the Caribbean, Europe and North America. Over the past 12 years her practice has been Caribbean focused, with her clients benefiting from her regional knowledge and international expertise. Shan acts as an arbitrator, adjudicator and mediator in disputes in civil and common law jurisdictions. She is named to the roster of the International Institute for Conflict Prevention and Resolution in the US, BVI International Arbitration Centre in the BVI, Dispute Resolution Centre in Trinidad and Tobago, Dispute Resolution Association in St Lucia and the Jamaica International Arbitration Centre. St Lucia nominated Shan for inclusion in the CARICOM Secretariat's List of Arbitrators and Conciliators established pursuant to the Revised Treaty of Chaguaramas.

Ready when you are

CIArb
evolving to resolve

Deepen your knowledge and skills through our range of convenient on-demand courses. Choose from:

- Avoiding and Resolving Contractual Disputes
- Brand Protection in the Times of Dispute
- A Guide to Arbitration Award Writing

Find out more

Virtual Diploma in International Maritime Arbitration

CIArb
evolving to resolve

Starts 17 November 2021

The scale, diverse range and complexity of maritime arbitrations, coupled with an increase in arbitral systems, means that it is essential to have the right knowledge and skills to navigate this field. This Diploma provides the in-depth training you need.

Leads to DipCIArb and MCIArb or FCIArb.

Places are limited. Book your place today **here**.