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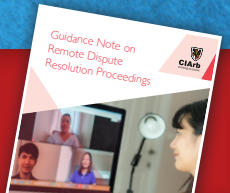
THE WAY AHEAD

Five key trends for ADR

COVID-19: GUIDANCE ON REMOTE DISPUTE RESOLUTION ISSUED – PAGE 8



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CIArb is proud to partner with educational institutions around the world in the delivery of ADR techniques through its 'UniADR programme'.

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Time to reform the ISDS framework

Bold changes must address ISDS efficiency and decision-making

This issue of *The Resolver* deals with the challenges faced at the frontiers of ADR. This dovetails with a key pillar of our work – global thought leadership.

Take, for instance, the investor-state dispute resolution arena. This is a source of widespread dissatisfaction among users and a number of states. Arbitration is ideally suited as a private dispute resolution mechanism. It is ill-suited to disputes involving sovereign states and the constituents they represent. We have a plethora of ad hoc tribunals, effectively sitting in secret and producing inconsistent, unpredictable decisions.

The time has come, at the multilateral level, for serious, comprehensive reform of the ISDS framework. This will need to involve bold changes that address the critical areas of ISDS efficiency, the consistency of decisions and the integrity of the arbitrator selection process. UNCITRAL Working Group III is deliberating on how such changes can be implemented, with CIArb taking a leading and proactive role in the discussion.

I also intend to explore with the leadership whether we should embark on two more initiatives. The first concerns the lack of an overarching regime of ethical duties and observances governing arbitrators, counsel and users. This constitutes a serious lacuna in the international arbitration framework. A possible way forward (involving considerable effort and commitment) would be to promulgate a standard that could be adopted by the major arbitral institutions.

Secondly, 'smart contracts' – enabled by blockchain technology – are proliferating on many industry platforms. They are defined as a computer protocol intended to digitally facilitate, verify or enforce the negotiation or performance of a contract. Smart contracts are self-executing, allowing the performance of credible transactions without the intervention of third parties. They also offer a high degree of assurance. There is a pressing need for a dispute resolution platform that is uniquely tailored to smart contracts; call it a code of crypto-arbitration or ADR, if you will.

If you have a keen interest in being involved in one of the above projects or if you have ideas for any other worthwhile initiatives that CIArb should be working on, please do reach out to me.

Meanwhile, as the reign of the virus continues unabated, stay strong and safe!

Francis Xavier SC
C.Arb FCIArb
President, CIArb

INSIDE THIS ISSUE

The opener

CIArb launches online #virtualadrlearning

CIArb has embarked on a plan of expanding its online training, with a new member of staff appointed to manage curriculum development, and new online initiatives being rolled out under the heading of #virtualadrlearning.

The Institute is proud to train hundreds of alternative dispute practitioners each year in numerous disciplines, including international arbitration, construction adjudication and mediation, a large number of whom go on to become members of CIArb.

The new offerings include CIArb's first audiobook *Resolving Disputes Today* and an e-module on dispute avoidance and resolution. Meanwhile, the dedicated Professional Courses Curriculum Development Manager will accelerate further online training.

CIArb has launched campaigns offering virtual training to students and businesses. The Institute will be working closely with individual members, universities, corporate members and others on these courses.

For further information, please contact education@ciarb.org

ICCA Congress postponed

Edinburgh International Conference Centre

The 2020 ICCA Congress, due to be held in Edinburgh on 10-13 May, has been postponed to 1-4 February 2021 as a result of the COVID-19 outbreak. The postponement also means that the CIArb Scotland Branch event, due to be held on 9 May, will also not take place.

Registrations already confirmed will be automatically transferred to the rescheduled Congress. Those who are not able to participate in the rescheduled Congress, can transfer the registration to a friend or colleague free of charge or cancel and receive a refund.

Services update

Key CIArb services are continuing to operate during measures to contain the COVID-19 virus, with staff working remotely.

Dispute Appointment Service (DAS): DAS applicants should submit their application forms to das@ciarb.org. Make any payments via bank transfer, using the details provided on the DAS webpage. Applicants can access the full range of DAS services online at www.ciarb.org/disputes.

Training: the popular virtual classroom software, BigBlueButton, has now been fully integrated in CIArb's virtual learning environment, LearnADR. Through this, tutors and candidates can connect via their webcams and also use teaching tools such as screen sharing, polls, chat and break-out rooms to facilitate effective teaching and learning.

Assessments: These can now be taken from home through BigBlueButton and LearnADR.

Please check **www.ciarb.org** for the latest regarding events, courses and services. See page 8 for guidance on managing ADR remotely.

Catherine Dixon named as new DG

Catherine Dixon has been appointed as CIArb's Director General with effect from 1 May 2020, as successor to Anthony Abrahams who has retired after eight years in post.

Dixon joins CIArb having just completed a record-breaking circumnavigation of the world on a tandem. Prior to her expedition she spent time in chief executive roles at the Law Society of England and Wales, Askham Bryan College and NHS Resolution. She has also held senior leadership roles at the NSPCC and BUPA and has served as a trustee and non-executive director on a number of boards, including the Centre for Effective Dispute Resolution, and she is currently a trustee of Stonewall. She is a non-practising solicitor and accredited mediator.

Catherine Dixon

Jonathan Wood MCIArb, Chair of CIArb's Board of Trustees, said: "Catherine brings to CIArb a wealth of experience and understanding of the alternative dispute resolution world, and the Board looks forward to working closely with her."

Dixon said: "I am honoured to have been appointed to this prestigious role and to lead the continued growth of CIArb, which I know to be at the forefront of thought-leadership, training, standards and ethics in alternative dispute resolution."

CIArb YOUNG MEMBERS

YMG welcomes new appointments

CIArb's Young Members Group (YMG) has appointed a new Chair and Vice-Chair. Athina Fouchard Papaefstratiou MCIArb, Counsel at Eversheds Sutherland, Paris, has been named as Chair, succeeding Ronan O'Reilly MCIArb, while Laura West MCIArb, an Associate with CMS based in Edinburgh, is the new Vice-Chair.

Fouchard Papaefstratiou has represented corporates and States for more than 12 years in commercial and investment arbitration proceedings (notably Africa-related), and is also acting as arbitrator. West 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 including arbitration, litigation, adjudication and mediation.

Athina Fouchard Papaefstratiou

Laura West

The Young Members Group brings together dispute resolution practitioners below the age of 40, and students interested in building their careers in ADR.

SAVE THE DATE

CIArb AGM

The CIArb Annual General Meeting will take place on 11 June 2020. The annual accounts and other AGM papers will be available to view online at www.ciarb.org not less than 21 days before the meeting.

For any queries please contact the Governance Secretary at governance@ciarb.org

The Global Conference heads to Singapore

Global Conference

The first CIArb Global Conference will take place on 18-19 November 2021 in Singapore, with the theme of 'Alternative dispute resolution – evolution through innovation'.

See www.ciarb.org/ciarbglobalconference2021 or search #ciarbglobalconference

Diploma in International Commercial Arbitration

CIArb's flagship Diploma in International Commercial Arbitration will take place from 5-13 September at Christ Church, Oxford University. Practitioners with substantial knowledge of international arbitration can undertake this nine-day course with distinguished tutors.

Places are limited. For more information or to book, contact education@ciarb.org

DID YOU KNOW?

CIArb student membership soars

CIArb's free student membership has now attracted 6,800 student members around the globe.

60-SECOND INTERVIEW
Anthony Abrahams

Outgoing Director General Anthony Abrahams MCIArb reflects on his time in post and CIArb's future

How have you approached recent changes at CIArb?
We needed to identify what we wanted to do, who we wanted to provide services for and then the 'how' could follow from that logically. We realised that we were training people to become neutrals, but the number of neutrals is quite limited, while the number of people who need to understand about dispute avoidance, dispute management and dispute resolution is substantial.

How will the business transformation project change CIArb?
It is aimed at making delivery much more efficient. We want to get a clear line for the person who wants a service, from their wanting it to identifying what they actually need, and then delivering it.

All of that comes out of the CRM [customer relationship management] project. We've also got to look at our internal mechanisms; on the financial side we're much more efficient, and now we have to look at the outward-facing side, to deliver all those services that we've now identified.

What are the key attributes of a successful leader?
A leader doesn't have to be the best at everything. What they demand is respect. If you've got respect, and people listen to you and follow you, that's what you're after as a leader.

What has been your most significant professional achievement?
Probably, defining the difference between 'governance' and 'management'. They were very confused when I came in. Reforming the Executive has been a big job as well – putting all those together, it's been quite interesting!

Anthony Abrahams MCIArb has stepped down at the end of April, following eight years in the position of CIArb Director General. He sits as Deputy District Judge. Qualified as a solicitor and specialising in civil litigation, he also attained the rank of Colonel in the Territorial Army and has worked in Iraq to develop the Rule of Law and deal with human rights issues. For an extended version of this interview, go online to youtu.be/N_IFRaWiMWY

IN BRIEF

New Trustee for Americas Region

Amb. (r.) David Huebner C.Arb FCIArb, an arbitrator and mediator based in Los Angeles, has been appointed as Trustee for the Americas Region of CIArb. He has joined the CIArb Board of Trustees and in this case the term of office will expire on 31 December 2020.

Pre-Moot winner

The University of Cambridge mooting team was crowned winner at the fifth Fox Williams Pre-Moot, held in London from 29 February to 1 March in association with CIArb. Runner-up was the National Research University, Higher School of Economics, Moscow team, with third place going to the University of Ljubljana and the Aix-Marseille University. The Pre-Moot was a precursor to the Willem C Vis International Commercial Arbitration Moot, due to be held in Vienna but moved online due to global health restrictions. Over 200 teams took part, and West Bengal National University of Juridical Science prevailed as 2020 grand champions.

Impacts of COVID-19 on construction projects

Save the date for this topical online event on 'Impacts of COVID-19 on construction projects'. Taking place on Wednesday 20 May 2020, this event is organised by CIArb and Accura Consulting. Go online to ciarb.org/events for more details.

SHUTTERSTOCK

Vinayak Pradhan

Tributes have been paid to CIArb Past President Vinayak Pradhan C.Arb FCIArb, who sadly passed away on 8 March 2020. Mr Pradhan served as CIArb President in 2013.

Fiercely proud of Malaysia and the Rule of Law, Mr Pradhan was a leader for CIArb in that country, being the first Chairman of the Branch. As a Chartered Arbitrator and to the international arbitration community at large, his record was exceptional. In 2013 he was elected as the first Asian man to become President of CIArb. He actively supported the development of the next generation of arbitrators and generously shared his wealth of knowledge with the Young Members.

Vinayak's illustrious career was further recognised by the CIArb Malaysia Branch in 2016 when he received the very first Arbitrator of the Year award.

Anthony Abrahams MCIArb, CIArb Director General, said: "On a personal note, he was charming with a self-depreciating sense of humour. His description of himself as the young Malaysian student in Scotland with only a cardigan was entertaining and probably explains his love of whisky."

TALKING POINT

Alexander Lecture

The Honourable Ms Teresa Cheng GBS SC JP, Secretary for Justice of the Hong Kong Special Administrative Region of the People's Republic of China and a Past President of CIArb, delivered CIArb's 45th annual Alexander Lecture on 16 January 2020 in Hong Kong.

The theme of the lecture was 'The Search for Order within Chaos in the Evolution of ISDS'. Cheng identified three major concerns and criticisms over ISDS and proposed a 'double helix' solution. This involved two strands: first, a study of the standalone ISDS Appellate Mechanism as a structural reform option for investment arbitration and second,

Hong Kong Justice Secretary Teresa Cheng

promoting the use of Investment Mediation to give ISDS a new life and new look.

For more details go online to www.ciarb.org/news and search for 'Alexander Lecture'

NEWS ROUND-UP

From left: Lucy Greenwood C.Arb FCIArb, Simon Richardson and Alexander Armstrong

Sustainability Award

Womble Bond Dickinson (WBD) was the winner of the CIArb-sponsored Sustainability Award at the LexisNexis Legal Awards, held in London on 11 March. The award was presented by Lucy Greenwood C.Arb FCIArb, a member of the CIArb Board of Trustees (pictured above with WBD's Simon Richardson and host Alexander Armstrong).

New York Essay winner named

Lim Siyang Lucas is the winner of the CIArb New York Branch 2019/20 International Arbitration Writing Competition. Lim, an LLM student at New York University School of Law, was awarded a $5,000 prize for his article, 'Rules of Procedure and the Blurred Lines of the 1958 New York Convention'.

C.Arb WELCOME

Congratulations to Karori Kamau FCIArb (Kenya Branch), John Mwau FCIArb (Kenya Branch) and Liam Beng Tan FCIArb (Singapore Branch), who have achieved Chartered Arbitrator status.

Guidance on remote ADR

Kateryna Honcharenko introduces guidance on managing proceedings remotely

The current dispute between humanity and the invisible danger posed by COVID-19 is developing at a high speed. But what should people do when this is not the only dispute they face?

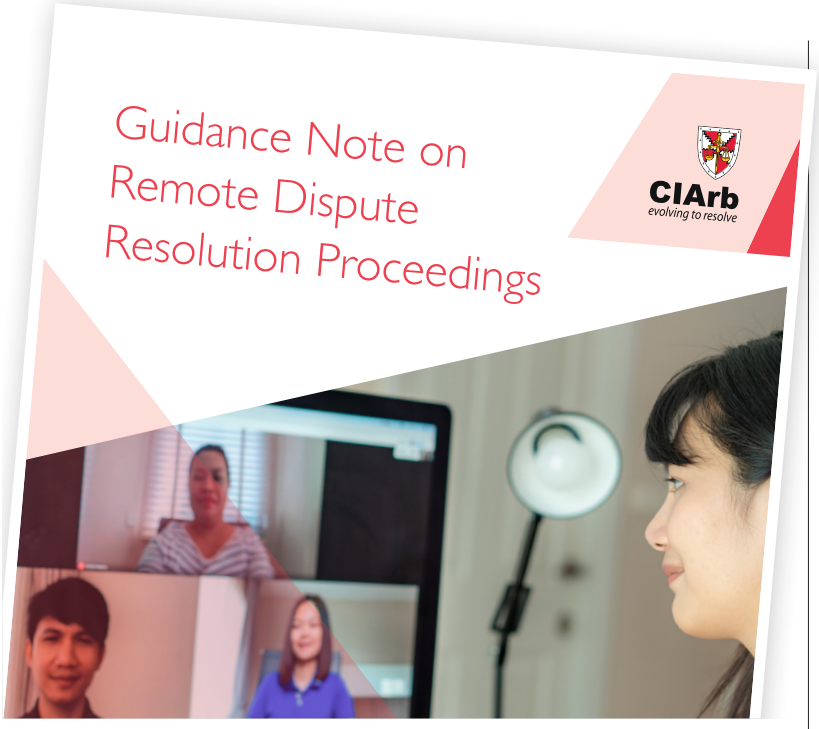
Most commercial dealings are now being stagnated, force majeure clauses invoked and dispute resolution proceedings will often be necessitated. Restrictive – but essential – social distancing policies present a challenge, but our team at CIArb has produced a new *Guidance Note on Remote Dispute Resolution Proceedings* to help address it.

The Guidance Note will assist parties in resolving their disputes by remote means, for example via video or audio conferences. It can be applied to arbitration, mediation, adjudication, negotiation and any other type of ADR.

The Note guides the reader through a range of technical, logistical and legal matters to be taken into account while arranging remote proceedings and to ensure that all participants feel comfortable and the necessary confidentiality and security rules are followed.

For example, it advises that all participants of the proceeding agree on all meetings, hearings, as well as high-quality software and equipment in advance, while technical assistance should be provided at all stages of the proceeding. This will allow parties to avoid possible technical or connection failures. Throughout the document, matters similar to this one interknit with important legal maxims like party autonomy and due process.

CIArb's Head of Policy and External Affairs Lewis Johnston states: "As a centre of excellence for the management and resolution of disputes, CIArb offers advice and expertise at the cutting edge of the profession. The coronavirus social distancing measures are a huge challenge, and we're proud to unveil the *Guidance Note on Remote Dispute Resolution Proceedings* to allow neutrals and parties to operate as effectively as possible under these circumstances. Disputes professionals are by nature adaptive and agile, and I have full confidence that our members will rise to this challenge. Furthermore, the ad hoc procedures and rules we offer are ideally suited to allow for the kind of flexibility that will be invaluable at this time."



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, adds: "CIArb's *Guidance Note on Remote Dispute Resolution Proceedings* offers concise, practical advice to parties and neutrals considering remote hearings... it is an indispensable point of reference that will be of practical benefit for those planning a remote hearing."

While greatly detailed, the Note provides broad advice on organising remote proceedings and is not a definitive work. As we are all finding during this crisis, speed is of the essence and we have taken a pragmatic approach to turn this around quickly. The situation is constantly evolving and there is still a lot to learn on the way. We therefore welcome feedback and comments from our members and colleagues around the world.

Speed is of the essence and we have taken a pragmatic approach to turn this around quickly

ABOUT THE AUTHOR
Kateryna Honcharenko MCIArb is a Research Executive with CIArb

LEARN MORE
Guidance Note on Remote Dispute Resolution Proceedings is available to download at **bit.ly/3b7BTcf**

Will a robot take my job?

New technology will inevitably play a role in arbitration in the future

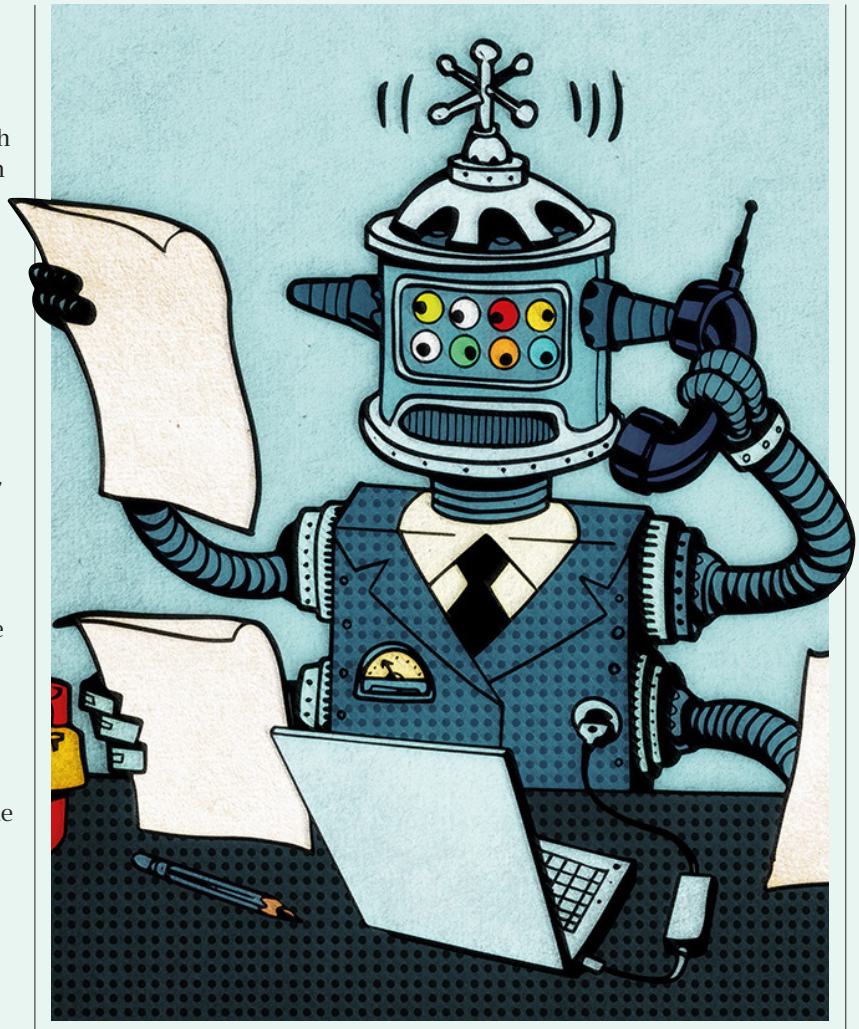
Could I be replaced by a machine? In a word, no. Probably.

Predicting the future is fraught with difficulty, but there's no indication that the people working in arbitration will all be replaced by artificial intelligence (AI) within the foreseeable future.

There are a number of reasons for this. First, it's not clear that parties would trust an AI arbitration system. How could they be sure that it has been programmed properly? Secondly, the framework for AI arbitration still needs to be worked out. Can an AI program be an arbitrator under current procedural laws? Thirdly, and most importantly, the technology for such a 'general' AI that can address every aspect of an arbitration doesn't yet exist.

That's not to say, however, that AI isn't already important in arbitration, or that it won't become increasingly important. By this I mean AI in the 'narrow' sense, focused on specific tasks, and drawing on the available data in order to augment the work of humans. Technology-assisted review of documents has been around for a few years. Increasingly, AI is being used in legal research, in identifying suitable arbitrators, and in trying to predict outcomes in order to guide strategic decision-making. If AI doesn't take your job, it may well change it.

Arbitration does not exist in isolation. It may well be used to resolve disputes arising out of the use of AI – addressing the legal consequences of traffic accidents involving driverless cars, for example. AI may also change the practice of law as a whole. Joanna Goodman, the author of *Robots in Law*, has referred to "driverless law", drawing an analogy with the incremental process by which we are seeing the use of driverless cars emerging: AI may gradually take over many of the elements of legal practice. And as AI becomes more prevalent in law and in society as a whole, so will arbitration users become more open to the wider use of AI in arbitration. By the time general AI is possible (if that ever happens), parties may be comfortable with the idea of AI arbitration because they are already accustomed to AI in their daily lives.



Finally, AI technology may develop in surprising ways. Elon Musk's Neuralink Corporation is currently investigating brain-machine interfaces. Rather than AI replacing the people in arbitration, the people in arbitration will perhaps, some day, combine with the AI.

Parties may be comfortable with the idea of AI arbitration because they are accustomed to AI in their lives

ABOUT THE AUTHOR
Ben Giaretta C.Arb FCIArb is a Partner with Mishcon de Reya LLP and Honorary Secretary of the CIArb London Branch.

LEARN MORE
This topic was the focus of a CIArb London Branch seminar in January – AI, Technology and International Arbitration. A report of the seminar is available online at www.ciarb.org/resources/features/ciarb-london-branch-seminar-23-january-2020-ai-technology-and-international-arbitration

The road ahead

Mercy McBrayer discusses five key ways in which the practice of ADR is set to change over the 2020s

Nothing stands still in the world of Alternative Dispute Resolution (ADR), and the 2020s are likely to see further change. This article suggests five ways in which the practice of ADR and the rules around it are likely to develop over the current decade.

INTERNATIONAL COMMERCIAL MEDIATION

The Singapore Mediation Convention in 2019 showed that there is increasing support, on the part of the world's governments, for settling international commercial disputes through mediation. The use of mediation in domestic commercial disputes has seen marked growth in the past few decades as parties seek to find efficient, cost-effective, confidential alternatives to drawn-out, costly, contentious resolution processes such as arbitration and litigation. In some jurisdictions, such as the UK, mediation of domestic commercial disputes is increasingly becoming the norm. In many US states, for example, an attempt at mediation in commercial disputes is a statutory pre-litigation requirement.

While mediation of domestic commercial disputes is more popular now, there has been a lag in the transfer of that popularity to international disputes. Parties have had no assurance that mediated settlements would be recognised and enforced across borders. Any mediations between parties from differing jurisdictions have relied on the goodwill of the parties or the favourable view of mediation in the jurisdiction where the settlement is to be enforced. This led to a high level of risk and uncertainty when using mediation to settle international commercial disputes, which hampered its use.

The Singapore Mediation Convention marks a concerted change in tone by the governments of some of the world's most active economies to support the use of mediation in international commercial disputes. With a legal framework in place to underpin the recognition and enforcement of mediated commercial settlements between parties of differing jurisdictions, or of mediated settlements that require enforcement in multiple jurisdictions, the sense of risk and uncertainty may diminish.

Some argue that having a court-based enforcement mechanism undermines confidentiality, a fundamental element in mediation. The Convention seeks, however, to strike a balance on confidentiality concerns while setting the stage for mediated settlements to be given a much greater degree of legal effect. It remains only to be seen if parties will now make use of this new framework. Given the domestic success of mediation as a tool for private, efficient, cost-effective dispute settlement, it is expected that many will.

Global warming – and the impact of our actions – has become a defining issue

ABOUT THE AUTHOR

Mercy McBrayer, MCIArb, 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.

The practice and rules of ADR are likely to develop over the 2020s

EXPEDITED ARBITRATION

The 2010s saw the development, and widespread incorporation, of emergency procedures in international commercial arbitral rules and regimes. Now that these have become well established in arbitral practice, the focus has shifted to the development of expedited procedures. This is in response to growing concerns and criticisms over the length and cost of commercial arbitration, which can often surpass that of traditional litigation. Some institutions have sought to address this by creating truncated procedures targeted at smaller-value claims. These procedures are limited to a single arbitrator and give tight time limits for evidentiary hearings and award drafting. The idea is that the time and costs in presenting a claim should not exceed the value of the claim itself.

Currently, UNCITRAL is examining the incorporation of an expedited rule regime into its regular commercial rules. There are challenges to developing a widely useable procedure, however.

These include how to resolve challenges to arbitrator appointments, whether to make the rules opt in or opt out, and whether to set an absolute monetary value to claims where the rules would automatically apply.

A few arbitral institutions and organisations such as the ICC, SIAC and CIArb have already undergone such exercises and developed expedited rules.

ICSID as well has developed a proposed expedited procedure for investor-state dispute settlement (ISDS) arbitrations. Once the UNCITRAL procedure has been determined, this may become the norm in ad hoc settings and a model for arbitral institutions to take up. The trend among the institutions in developing

expedited rules is clear and expected to continue. What is less clear is the degree to which parties will use these procedures, and whether they will have the desired effect on time and costs. This will only become apparent as we move into the next decade in international commercial arbitration practice.

ISDS 2.0

One of the hottest topics in the dispute resolution world in the last decade has been ISDS. An all-out attack on the legitimacy of the system has been vocally and energetically led by the European Union, underpinned by some creative jurisprudence by supranational European courts. This has bolstered public campaigns by human rights and environmental groups, who have long asserted that the ISDS system facilitates commercial violators of international standards and unduly restricts the powers of sovereign states. The latter is often described as "regulatory chill" under which the obligation to pay compensation for regulatory changes may make it difficult for host states to regulate in socially desirable areas.

Also, many developing nations that have long been on the losing end of expensive ISDS awards have found a new platform to voice their concerns over the inequity of a system seemingly controlled by, and favouring, a small number of developed nations. As these three disparate groups have come together, the criticisms have grown louder.

It is now recognised by almost every element of international investment arbitration practice, and almost every national government, that change in ISDS is needed. The form of that change has, however, been the subject of serious contentious debate.

Critics have suggested that the legitimacy of the system is so questionable that it should be

National governments recognise that change in ISDS is needed

The Convention seeks to strike a balance on confidentiality concerns

eliminated completely and replaced with a single standing international court body. While this has its enthusiastic supporters, many see this as an extreme measure.

Instead, many powerful countries along with experienced jurists and practitioners have noted that very little proof has been put forward that the system is illegitimate. They have noted that ISDS is highly successful in terms of legal validity and compliance by the parties in disputes, but acknowledge concerns over "regulatory chill", environmental and human rights issues, procedural concerns and some fundamental inequities in the process.

It is expected that, within the next couple of years, the EU and a coalition of a few developing nations will use UNCITRAL as a forum to create a multilateral treaty establishing an international investment court.

This treaty will likely require signatory countries to disavow their current investment and trade treaties' dispute resolution regimes. It is not expected, however, that more than a handful of countries will choose to sign it. If most nations refuse to join such a regime, many of the existing 3,000-plus investment and trade agreements that create the ISDS system will likely remain in force.

ISDS may not be eliminated, but it is set to change. Proposed reforms include increasing the diversity and number of available arbitrators; providing assistance to developing countries in defending claims; allowing for limited appeal mechanisms; raising standards for eliminating potential conflicts of interest in tribunals; and overhauling investment treaty drafting and substantive investment protection language. It is difficult to predict which of these will be taken up by the international community, but some degree of shift to an 'ISDS 2.0' should be expected in the coming decade.

With sustainability being a hot topic in recent years, CIArb is committed to reducing its impact on the environment

SUSTAINABILITY

Global warming – and the impact each of our actions has on the Earth's climate – has become a defining issue of our age. All industries have had to examine the role they play, and the ADR field is no different. In some ways, ADR is at the forefront of environmental law in areas like ISDS claims, environmental insurance disputes, and multinational mediations and negotiations over transboundary environmental harm to states and individuals.

From a practical position, international ADR also has an impact simply in how it conducts business. A great deal of travel, including long-haul air travel, is involved. Forests of paper are needed to conduct a single hearing or settlement negotiation. Both the substantive impact of the development of international environmental law, and the practical impact of the way ADR is conducted day to day, are rising in importance in many practitioners' minds.

These issues raise other questions. For example, in order to eliminate travel and paper, practitioners would have to rely heavily on technology for remote conferencing and sharing information. This raises the spectre of significant personal data and information security vulnerability, in a process that requires complete confidentiality. Others would point out that, on substantive issues, ADR practitioners should not choose to lean in favour of environmental conservation in legal interpretations, as this would undermine their perceived neutrality.

We can agree that ADR has an impact, but what practical steps can be taken towards sustainability? In 2020, we at CIArb committed to reducing our environmental footprint by going digital with our publications, assessing the need for travel versus online meetings or events, and we are exploring the development of practice guidelines on these topics. Other organisations have done the same. Finding a sustainable balance between conducting business and safeguarding a world climate that we know is under threat is set to become an issue of ever-increasing visibility and priority in the coming years.

ADR has an impact, but what practical steps can be taken towards sustainability?

THE RISE OF TECHNOLOGY

Related to sustainability is the continuing increase in the use of technology in ADR. This has been a trend for quite some time as the industry has seen developments like online dispute resolution, the global information aggregator Arbitrator Intelligence, and the use of digital platforms for case management that several institutions now use. With the issue of sustainability gaining momentum and new issues arising, such as how to conduct business in the midst of a global health crisis, it is inevitable that we will continue to look to technology for answers on how to do things better, more efficiently, more sustainably, and in a safer way. ADR-specific technological responses to other issues will, no doubt, continue to emerge. We are also likely to see continuing disputes around the use of technology. The rise of technology, along with its use in and impact on ADR, is another trend that will undoubtedly continue into the next decade and beyond.

See also Opinion, page 9: Will a robot take my job?

Technology will play an increasing part in ADR in the years to come

CIArb Flagship Events 2020

CIArb
evolving to resolve

Roebuck Lecture 2020

11 June 2020 | London

The Roebuck Lecture, now in its 10th year, is named after Professor Derek Roebuck MCIArb and celebrates the very significant contribution that he has made to the Institute over the years, principally as Editor of Arbitration – The International Journal of Arbitration, Mediation and Dispute Management. This year's lecture is going to be delivered by Cherie Blair CBE QC MCIArb.

More information:
www.ciarb.org/events/roebuck-lecture-2020/

Join the conversation: #roebucklecture

Alexander Lecture 2020

12 November 2020 | London

The Alexander Lecture was founded in recognition of the contribution of John Russell Willis Alexander to the Chartered Institute of Arbitrators who served for 40 years as a member of Council and was elected President of the Institute of Arbitrators, as it was named at the time (1952 - 1955). This meeting is considered one of the most respected events in the Alternative Dispute Resolution (ADR) calendar.

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Case note

Kabab-Ji SAL v Kout Food Group

Report by Kateryna Honcharenko MCIArb, Research Executive, CIArb

Ancient Egyptians believed that a person departs life twice: when their soul leaves their body and when the last person who pronounced their name dies.

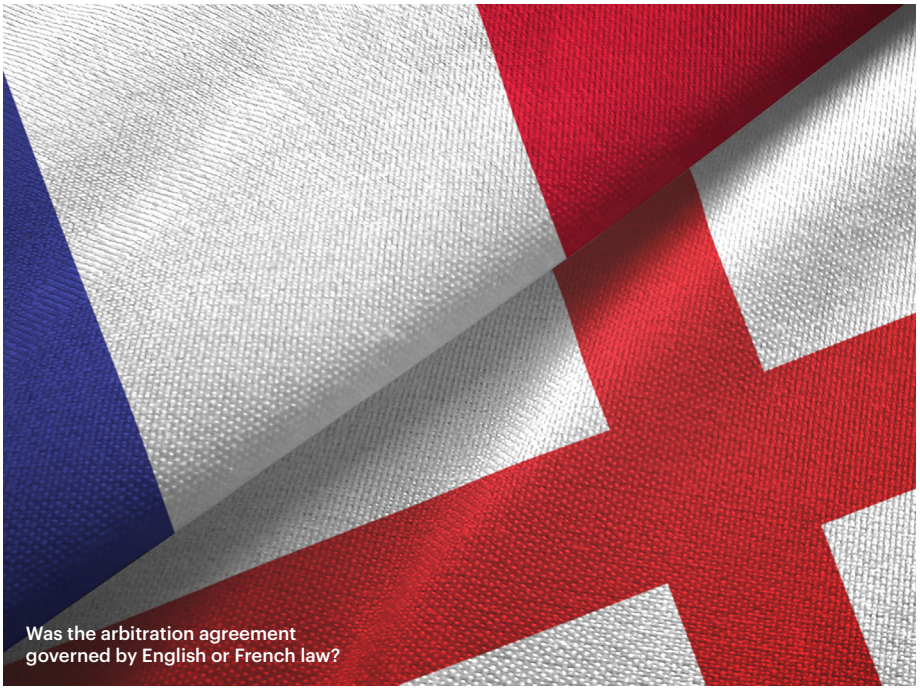
Likewise, the recent Kabab-Ji SAL v Kout Food Group has, a decade later, reignited the heated debate over determination of the law governing the arbitration agreement covered in the landmark Dallah v Pakistan.

Kabab-Ji and Al Homaizi Food Company, which later became a subsidiary of the Respondent (Kout), entered into a Franchise Development Agreement (FDA), governed by English law, with the *lex arbitri* in Paris.

Echoes of Dallah are present in the two main issues reviewed by the English Commercial and Appellate Courts: whether the arbitration agreement is governed by English or French law and, accordingly, whether Kout was a party to such an agreement. In their award, B Leurent and MSA Wahab (K Reichert SC dissented) concluded that under French law, which applied to this issue, Kout was a party to the arbitration agreement. English law, however, applied to whether contractual rights were reassigned to Kout.

A MATTER OF CHOICE

Enforcement proceedings brought the parties to the English Commercial Court, where Sir Michael Burton held, relying on Channel Tunnel, BCY v BCZ and Sulamerica in particular, that there had been an express choice of English law to govern the arbitration agreement. He found that the law of the underlying contract is an abundant sign of the parties' will, while the choice of the seat is not enough to undermine it. Sir Michael Burton adjourned the proceeding without making a final determination regarding whether Kout had become a party to the agreement.



Was the arbitration agreement governed by English or French law?

Both issues were reviewed by the English Court of Appeal, before which the Claimant argued that the choice of *lex arbitri* surpassed the choice of English law to govern the FDA. Additionally, the Claimant stated that, in the determination of the issue as to whether Kout had become a party to the contract, Sir Michael Burton should have relied on UNIDROIT principles (ia Article 2.1.18) since, according to Article 14 (3) of the FDA, "arbitrators shall also apply principles of law generally recognised in international transactions..."

The Court of Appeal found that such application, however, would be in contravention of the No Oral Modification Clause in the FDA, which states that "under no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement". Flaux LJ supported the lower court's view as to the application of English law to the arbitration agreement.

With reference to the second issue, Flaux LJ stated that determination of the applicability and efficiency of the No Oral Modification Clauses might be assessed in accordance with the estoppel test established by Lord Sumption SCJ in MWB v Rock Advertising. The judge concluded that the test had not been satisfied and thus the strict wording of the FDA as well as No Oral Modification Clauses cannot be ignored in the case at hand, and dismissed the Claimant's appeal.

RAISING SPECULATION

The French court has not yet expressed its view, so it is not foreseeable whether the contradiction between jurisdictions provoked by Dallah could materialise again. The striking similarity of the issues raised in this case provoke speculation about whether a uniform and straightforward approach to the determination of the law governing an arbitration agreement can be established. It is also unclear whether this would facilitate or decelerate active development of interpretation of arbitration and a revolutionary view on established legal analysis.

It was held that there had been an express choice of English law to govern the arbitration agreement

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A question of nationality

Dr Dang Xuan Hop and Duong Bao Trung discuss how Vietnam can adapt its practices to attract more parties to arbitrate in the country

In Vietnam, it is becoming more common to have an arbitration tribunal constituted under the rules of a foreign arbitration institution (such as the International Chamber of Commerce or *ICC*) but with the seat in Vietnam. Such a tribunal will conduct the proceeding in Vietnam under the Vietnamese Commercial Arbitration Law (*CAL*). However, when such a tribunal renders an award, Vietnamese courts have on a number of occasions viewed this as a foreign award to be recognised and enforced under the New York Convention and the Vietnamese Civil Procedures Code (*CPC*).[1] This article suggests that this award should be viewed as a domestic one, to avoid an anomaly and to bring Vietnam closer to the spirit of the New York Convention and international practices, making it more attractive for parties to arbitrate in Vietnam.

Few would expect that an award... would not be able to be set aside by any court

The view that this is a foreign award seems to draw support from Article 424.3 of the CPC and Article 3.12 of the CAL, which define "*award of foreign arbitration*" as "*an award rendered by a foreign arbitration...*". The term "*foreign arbitration*" is defined in Article 3.11 of the CAL as an "*arbitration formed under provisions of foreign law on arbitration...*". Particularly, Chapter XII of the CAL on "*Organisation and operation of foreign arbitration in Vietnam*" contains detailed provisions regulating the presence and operations of foreign arbitral institutions in Vietnam, such as the ICC. This has led to the view that the term "foreign arbitration" defined in the CAL and the CPC refers to "foreign arbitral institutions" and, therefore, an award rendered by an arbitral tribunal acting under the rules of a foreign arbitral institution such as the ICC is a foreign award, notwithstanding that the seat of the arbitration is in Vietnam. As a result, this award has to be recognised and enforced by Vietnamese courts under the New York Convention regime.

Once Vietnamese courts regard this as a foreign award, it naturally follows that they will decline the jurisdiction to set it aside (where a relevant ground

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ABOUT THE AUTHOR

Duong Bao Trung worked as a dispute resolution associate of Baker McKenzie before joining one of the largest multi-industry conglomerates of Vietnam as Legal Counsel. He obtained his LLB from Hanoi Law University (*summa cum laude*) and LLM from Harvard Law School. Mr Duong is a qualified lawyer in Vietnam and passed the New York Bar exam in 2017.

exists). However, as the seat of the arbitration is in Vietnam and the proceeding is conducted under Vietnamese law, it will be difficult for the courts of any country, other than Vietnam, to assume the setting-aside jurisdiction over this award. Consequently, awards of this nature will form an unusual category which cannot be set aside by any court, potentially making it disadvantageous for some parties involved and discouraging them from using this form of arbitration in Vietnam. This is an anomaly. While the rules of arbitral institutions commonly contemplate a proceeding with a seat outside the home country of the institution, few would expect that an award in such a proceeding would not be able to be set aside by any court, like the current situation in Vietnam.

AWARDS DESIGNATION

To avoid such an anomalous situation, in our view, these awards should be regarded as domestic awards. When Vietnamese law defines foreign awards as those "*...rendered by foreign arbitration*", it should be understood as referring to awards rendered by foreign arbitral *tribunals*, not arbitral institutions. Arbitral institutions do not 'render' awards. Only tribunals do. Also, when the CAL defines "foreign arbitration" as "*arbitration formed under provisions of foreign law on arbitration...*", it should be interpreted as referring to arbitral tribunals because in most jurisdictions, unlike Vietnam, only arbitral tribunals are set up under the law on arbitration, while arbitration institutions often operate under the law on companies or associations. Therefore, "*awards of foreign arbitration*" should refer to those rendered by arbitral tribunals constituted in a foreign seat and hence subject to a foreign law on arbitration, regardless of the nationality of the institution which administers the case. Accordingly, an ICC award rendered by a tribunal seated in Vietnam and operating under Vietnamese law should be regarded as a domestic award, not a foreign one, even where the arbitration is administered by the ICC. This would be a more logical position under the CAL, more consistent with the New York Convention. Under the latter, whether an award is a foreign one or not depends primarily on where it is "*made*" (the seat), rather than on which institution administers the proceeding. Chapter XII of the CAL, notwithstanding its title referring to "foreign arbitration", should be construed as a mere administrative section regulating how foreign arbitral institutions (not tribunals) are set up in Vietnam.

The above suggestion finds support in a draft Resolution on recognition and enforcement of arbitral awards of foreign arbitrations (*Draft Resolution*) issued by the Vietnamese Supreme Court on 18 July 2019. Article 2.1(c) of this Draft Resolution provides that for an "award of foreign arbitration" to be subject to the CPC's recognition and enforcement procedure, the place of arbitration must be in a New York Convention Member State other than Vietnam, and the law governing the proceeding must be that of the place of arbitration. This would mean that an award rendered in an arbitration seated in Vietnam is not a foreign one even if it is administered by a foreign arbitral institution. If this position in the Draft Resolution is adopted, it will be a positive development, bringing Vietnamese arbitration law in line with international practices and encouraging more parties to choose Vietnam as the seat of the arbitration to avoid the time-consuming recognition and enforcement process applicable to foreign arbitral awards.

In our view, these awards should be regarded as domestic awards

FOOTNOTE

[1] See, for instance, Judgment No. 05/2017/KDTM-ST dated 21 July 2017 of Hanoi People's Court, and Judgment No. 84/2017/KDTM-PT dated 30 March 2017 of the High Court in Hanoi. See also Conares Metal Supply (administered by the ICC with seat in Vietnam in 2004) which is reported in Dr Do Van Dai, 'Thẩm quyền của Tòa án Việt Nam khi trọng tài nước ngoài giải quyết tranh chấp tại Việt Nam' (English: 'Vietnamese Court's Jurisdiction When A Foreign Arbitration Resolves Disputes in Vietnam'), 22 Jan 2013, published on Hanoi Procuracy University's website. (Available at: http://tks.edu.vn/ebThongTinKhoaHoc/Detail/129?idMenu=81).

HOW TO...

IKON IMAGES

Smooth the process of evidence taking

Timothy Cooke provides an overview of CIArb's Guidelines for Witness Conferencing in International Arbitration

The CIArb Guidelines for Witness Conferencing in International Arbitration were launched in Singapore in April 2019. Despite the growing popularity of concurrent evidence in international arbitration, surprisingly little had been written about the topic. The Guidelines were intended to fill that gap and provide guidance for arbitrators, practitioners or expert witnesses on how to assess whether it would be appropriate to take concurrent evidence in a particular case and, if so, how such a conference should be organised.

CIArb's Guidelines will prove indispensable when deciding on whether witness conferencing is needed in a case

Witness conferencing – or 'hot-tubbing' as it is sometimes known – can be described as any evidence-taking process whereby two or more witnesses give evidence concurrently before a tribunal. It is usually adopted when taking opinion evidence from expert witnesses. It is not a single defined procedure but a flexible process that can be

HOW TO...

adapted to suit the nature of the dispute, the types of issues involved and even the witnesses themselves.

The Guidelines are intended to help tribunals, parties and experts achieve an effective and efficient witness conference. They recognise the diversity of approaches that can be adopted when holding a witness conference without seeking to restrict the ability and imagination of tribunals and parties to shape the process to suit any given dispute. They can serve as an aide-memoire for those experienced in witness conferencing. For those with less experience, the Guidelines provide a framework for navigating the process with confidence.

The Guidelines consist of three parts. The first is a checklist of matters to consider when determining the possibility of holding a witness conference. It covers two broad lines of enquiry. The first is whether witness conferencing would be an appropriate means of taking evidence. Some of the factors set out in the checklist will militate in favour of a conference, whereas others may detract. Other items on the checklist assume that a conference will take place and are to be considered in determining what form the conference should take. Not all of the items in the checklist will be relevant in all cases. It is envisaged that a tribunal and the parties would consider the checklist items at an early stage of the proceedings.

The second part of the Guidelines provides possible sets of directions to be included in procedural orders. The first set of directions is referred to as the 'Standard Directions' and provide a general framework for witness conferencing to be incorporated as part of an initial procedural order issued by a tribunal for the conduct of the arbitration. The Standard Directions provide a set of applicable principles in the event the tribunal subsequently orders some of the witness evidence to be taken concurrently. However, by including the Standard Directions into a procedural order, the parties are not taken to have dispensed with the taking of consecutive evidence.

ABOUT THE AUTHOR

Timothy Cooke FCIArb is Vice Chair, Sub-Committee on Witness Conferencing in International Arbitration of the Singapore Branch of CIArb. He is a Partner and Head of International Arbitration for Asia at Stephenson & Harwood LLP.

The Guidelines have received overwhelmingly positive feedback

The second part of the Guidelines also provides for 'Specific Directions' to be issued once the tribunal and the parties have decided to hold a witness conference. Three possible procedural frameworks are offered for a conference, depending on whether it is to be conducted primarily by the tribunal, the witnesses or counsel for the parties. In some cases, a combination of the three approaches may be adopted. The tribunal may draw on different directions from among the three frameworks or may incorporate other directions to arrive at an appropriate procedural order. Which parts of the three sets of specific directions will be most suitable as a starting point for crafting an appropriate order will depend on the needs of the case at hand.

The third part of the Guidelines consists of the explanatory notes which provide detailed discussion of the checklist items and the various sets of procedural directions. They provide examples and illustrations that are intended for practical application.

Since their launch last year, the Guidelines have received overwhelmingly positive feedback from arbitrators, counsel and expert witnesses, and were shortlisted in the GAR Awards for the 'best innovation by an individual or organisation' category. To our knowledge, the Guidelines are being referenced in international arbitration proceedings around the world.

GUIDELINES FOR WITNESS CONFERENCING IN INTERNATIONAL ARBITRATION

The Guidelines aim to assist tribunals, parties and experts to achieve an effective and efficient witness conference and to minimise the risks of the process going awry. They recognise that different factors will come to bear on the decision whether or not to hold a witness conference, and on the format of such a conference.

The Guidelines comprise a checklist, a set of Standard Directions and a set of Specific Directions, with accompanying explanatory notes.

The checklist provides arbitrators and advisers with a convenient list of matters to consider when determining the possibility of holding a witness conference.

The Standard Directions provide a general framework for witness conferencing to be incorporated as part of an initial procedural order issued by a tribunal for the conduct of the arbitration. The Specific Directions are to be issued once the tribunal and the parties have determined to hold a witness conference.

The Specific Directions provide three procedural frameworks for a conference, depending on whether it is to be conducted by the tribunal, the witnesses (usually experts), or counsel for the parties. In some cases, the tribunal and the parties will use a combination of the three approaches reflected in the procedural options.

Supporting members better than ever before

The new Department of Professional Services means CIArb is better placed than ever to help members, says Dr Paresh Kathrani, Director of Professional Services

CIArb is proud to advance alternative dispute resolution (ADR), especially as a means for promoting a harmonious society. As a professional body, we endorse the highest standards, particularly through its training programmes, as well as providing our members with a number of developmental opportunities to continue their engagement with ADR, and benefits to help their businesses and careers too. There is a strong connection between all of these, and we are delighted to announce that they will all be integrated into a single professional offering through our new, integrated Department of Professional Services.

Upholding values and ethics is central to the work of CIArb. The use of special postnominal letters for Associate (ACIArb), Member (MCIArb), Fellow (FCIArb) and Chartered status (C.Arb) show that a person is committed to the use of ADR, and the new department will continue to promote the routes to membership, including the Experienced Practitioner Route (EPR) and CIArb's 19 membership training programmes.

Working closely with other CIArb departments and services, the department will help members access a variety of different resources to keep them apprised of what is happening in ADR. CIArb has embarked on a programme to grow eModules, audiobooks and video training, and members will now have electronic access to the online journal *Arbitration*, this magazine (*The Resolver*) and ADR reports. CIArb and its 41 branches organise many front-line ADR events around the world and members are invited to attend these. Members can also join dedicated ADR interest groups, such as CIArb's Young Members Group, which organises many events.

CIArb is keen to assist all members with their work in ADR. We offer practical ADR resources such as templates, forms, rules, recommended clauses, guidelines and ethics resources, and the department will work with other CIArb departments in helping members access these and other services and resources.

The Department of Professional Services will also offer a student member service, a bespoke ADR training service to organisations that want customised in-house training and provide opportunities to non-members. We will be running a Corporate Membership scheme, under which organisations can become affiliated to CIArb.

Access to professional services and support will be at the heart of CIArb's new department.

CIArb will continue to help its members advance in their careers

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Dr Paresh Kathrani is Director of Professional Services at CIArb. For more information, contact CIArb at education@ciarb.org

A variety of resources will keep members apprised of what is happening in ADR

What's on

A selection of training opportunities for CIArb members

BRANCH FOCUS: APAC REGION

ADR training in the Asia-Pacific region receives a boost

CIArb Branches in the APAC (Asia-Pacific) region had a record year in 2019 with Singapore achieving the highest overall candidate numbers, recording nearly 200, *writes Camilla Godman FCIArb, Director, CIArb APAC Regional Office*. The region grew its membership base by more than 10%. These figures reflect the appetite for ADR training in the region and the recognition of what CIArb Membership can do for one's professional career. The Introduction to International Arbitration and the Accelerated Route to Fellowship course continue to be the most popular courses in the region, as well as CIArb's flagship Diploma.

For 2020, CIArb is monitoring the Covid-19 situation carefully, both in APAC and globally. Some courses, such as the 2020 Diploma, have been postponed until later in the year. For others, videoconferencing has been made available. CIArb's suite of online courses are also proving popular while many are working from home.

This year, CIArb has partnered with the Maldives International Arbitration Centre to deliver training to over 120 participants in the Maldives, which is making great progress as an arbitration jurisdiction. We also continue to run courses in APAC countries committed to growing the number of arbitrators, such as Sri Lanka, Vietnam, Myanmar and Indonesia.

Diversifying into non-member courses, CIArb's new Expert Witness course will shortly be run in APAC, in partnership with PwC.

Training is being delivered in the Maldives

CIArb is planning to run a Mediation Module 1 course in Singapore in the week of 14 September 2020 (to become a CIArb Accredited Mediator).

Please email expressions of interest to stavabalan@ciarb.org

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- **Introduction to ADR online**
  Open entry **£36**
- **Introduction to ADR**
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  14 May **£396**
- **Introduction to International Arbitration**
  18 June **£396**

The new Pathway courses and assessments have been designed for candidates who do not have any experience of ADR. There are no entry requirements and they run as follows:

- **Module 1 Mediation Training and Assessment**
  16, 17, 18, 19, 22 & 23 June **£3,960**

People with experience in ADR can undertake a CIArb Accelerated Route assessment programme to assess if they meet the relevant standards for Membership and Fellowship. If you would like to enrol on any of these accelerated courses, please contact education@ciarb.org or 020 7421 7430.

- **Accelerated Route to Membership: Domestic Arbitration**
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  8-9 July **£1,500**

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- **Introduction to ADR Online Assessment**
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- **Introduction to ADR Assessment**
  7 May **£95**
- **Introduction to Construction Adjudication Assessment**
  14 May **£95**
- **Introduction to International Arbitration**
  18 June **£95**
- **Module 1 Law, Practice and Procedure of Construction Adjudication Assessment**
  9 July **£174**
- **Module 1 Law, Practice and Procedure of Domestic Arbitration Assessment**
  14 July **£174**
- **Module 1 Law, Practice and Procedure of International Arbitration Assessment**
  14 July **£174**
- **Module 2 Law of Obligations Assessment**
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  19 May **£408**
- **Module 3 Decision Writing Construction Adjudication**
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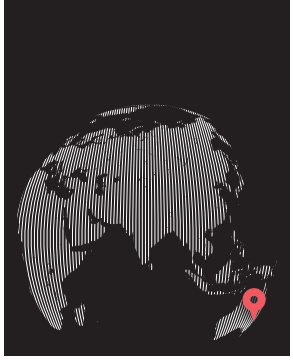
Online Learning: CIArb has now integrated **full online classroom software** to enable all its membership training and assessments to be delivered online. For further information, please contact education@ciarb.org or 020 7421 7430.

Leading the way



Australia is ready to take its place as a renowned arbitration hub

Australia is a highly developed arbitration-friendly jurisdiction in which to conduct arbitrations. International arbitrations are administered by the Australian Centre For International Commercial Arbitration (ACICA), which was established in Melbourne in 1985, but is now headquartered in Sydney. ACICA is the sole default appointing authority under Australia's International Arbitration Act 2010. The legislation enacts the UNCITRAL Model Law, contains many additional provisions and reflects best practice in international commercial arbitration. For example, the Act includes an extensive confidentiality regime, which applies by default, with the option to 'opt out'. These statutory provisions reverse the decision of the High Court of Australia in *Esso Australia Resources v Plowman and Others* (128 ALR 291), which found confidentiality was not an essential feature of commercial arbitration.

Stunning Sydney is home to the headquarters of ACICA

Second to none

Arbitration in Australia is supported by a strong, independent, corruption-free judiciary and a well-educated and experienced legal profession. Consistent with the New York Convention, the judiciary favours enforcement of agreements to arbitrate and enforcement of arbitral awards. The judiciary is also non-interventionist. Legal qualifications from Australian universities are second to none, with a number of universities, including my alma mater, the University of Melbourne, ranked in the top 15 universities of the world.

Apart from the above, there are many other reasons to favour Australia as a seat for international arbitration. All Australian capital cities have first-rate facilities to conduct arbitrations – from well-equipped hearing rooms to support staff and facilities – as well as superb restaurants, hotels, transport and other amenities that would be expected in an economically developed and sophisticated nation. Australian cities are peaceful, clean, safe and easy to access, as well as beautiful. While Sydney is known worldwide for the Sydney Harbour Bridge and the Opera House, Melbourne is renowned for its restaurants, gardens and trams, with other capital cities also having unique attractions.

Regional hub

The Australian Government supports international arbitration and ACICA and appreciates the opportunities open to Australia to take its place as a leading arbitration hub in the APAC region. While distance has often been referred to as the reason Australia has not developed at the same pace as Hong Kong and Singapore, air travel is improving with Qantas introducing flights direct from Perth to London and considering direct flights to New York once air travel returns to normal. The many attributes of Australia as an arbitration seat will soon outweigh the inconvenience of a little extra time on the plane!

All Australian capital cities have first-rate facilities to conduct arbitrations – from hearing rooms to support staff

ABOUT THE AUTHOR

Caroline Kenny QC C.Arb FCIArb is President of the Australia Branch of CIArb. She has more than 35 years' experience in commercial disputes, including as Queen's Counsel for 14 years, as an accredited mediator and as an international arbitrator. She maintains chambers at Owen Dixon Chambers West in Melbourne, Australia, and at 4-5 Gray's Inn Square, London.

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