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Still evolving in difficult times

CIArb is more than ready for the challenges of 2021

When CIArb adopted the tagline 'Evolving to Resolve', it could not have foreseen how quickly it would have to evolve in 2020. Last year, the Institute rose to the challenge of the pandemic, migrating events and courses swiftly to an online format and delivering training to more than 3,000 candidates.

Flagship events were reinvented as online experiences, such as the Diploma in International Arbitration course, the Dispute Appointments Service Convention, held in November with more than 250 attending online, and the Mediation Symposium.

The biennial CIArb Congress also took place online, with a second day devoted to presentations, panel discussions and Q&A sessions with members. More than 2,000 members logged on.

The Institute's new Director General, Catherine Dixon, seamlessly assumed the role despite the fact that she and the staff at Bloomsbury Square were working remotely. Catherine has reaffirmed the Institute's commitment to diversity in ADR and to proactively tackling inequality. CIArb's goal is to continue to evolve into an ADR community in which everyone is treated with equal dignity, worth and respect.

This year, the Institute will be focusing not only on diversity and inclusion, but also on the evolving arbitration frontiers of climate change and alternative energy. With the enactment of the Singapore Convention, mediation also takes on renewed importance.

In January, the CIArb Young Members Group (YMG) ADR World Tour began. This initiative is an international regional series of weekly webinars and in-person conferences organised by the YMG. Please join our young members as CIArb traverses the globe.

In closing, I wish to state again that I am deeply honoured to have been chosen as President for 2021. It is an ambassadorial role and I am looking forward not only to communicating CIArb's messages to members and the wider world, but also to relaying your views back to CIArb. I would be pleased to hear from you.

Ann Ryan Robertson C.Arb FCIArb
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INSIDE THIS ISSUE

3 **THE OPENER** News, updates and events

8 **OPINION** Mediators and multi-skilling

9 **FROM THE DIRECTOR GENERAL** CIArb's three-year strategy

10 **TRAINING** The virtual mediation course

12 **COVER STORY** CIArb members and the US elections

15 **DIVERSITY** Faith in the workplace

16 **PROFILE** Meet CIArb's new President

18 **ARBITRATION** Dealing with objections to online proceedings

20 **LAW** The arbitrator's duty of disclosure

23 **TECHNOLOGY** Tools for the dispute resolution professional

24 **MEDIATION** 'Legal design thinking' and ADR

26 **PROFESSIONAL DEVELOPMENT** Virtual training opportunities

28 **WORLD VIEW** Mexico as an arbitration seat

30 **HOW TO...** write an award

The opener

New presidential team starts term of office

Ann Ryan Robertson C.Arb FCIArb started her term as CIArb President on 1 January. She is an international partner with Locke Lord, based in Houston, Texas, and was elected in 2018 at the CIArb Congress in Atlanta. CIArb's presidential elections for 2022 were held at CIArb's Congress on 10 November 2020, which took place online.

Jane Gunn FCIArb, a former City solicitor and now full-time mediator with 20 years' experience of mediating commercial cases, and a member of the CIArb Thames Valley Branch, is Deputy President. John Bassie C.Arb FCIArb, a member of the General Legal Council of Jamaica and the CIArb Caribbean Branch, is Vice President for 2021.

The new CIArb Trustees starting in 2021 are: Caroline Kenny QC C.Arb FCIArb (Australasia); Theophile Margellos MCIArb (Europe); Arran Dowling-Hussey FCIArb (Ireland); Richard Barnes FCIArb and Marion Smith QC FCIArb (Great Britain); and Amb. (Ret.) David Huebner C.Arb FCIArb (Americas).

The Trustees' term of office lasts for four years, running from 1 January 2021 to 31 December 2024. The Board of 12 Trustees is elected by the membership in the region they represent. They are responsible for all monies as well as the strategic direction of CIArb. Farewell and thanks to outgoing Trustees Anthony Marks FCIArb, Dr Axel Reeg MCIArb and John Wakefield FCIArb.

See Profile, page 16.

Ann Ryan Robertson C.Arb FCIArb

Jane Gunn FCIArb

John Bassie C.Arb FCIArb

CIArb and BARBRI collaborate on training

CIArb is partnering with global legal education provider BARBRI to support legal professionals and other individuals on their respective courses. The collaboration will support students qualifying through the Solicitors Qualifying Exam or US bar exam, and those seeking CIArb's training and membership of CIArb.

The two organisations have agreed an exclusive discounted rate for CIArb members and BARBRI alumni, from January, to support pathways into practice.

Both organisations will also collaborate on new ADR training courses, including the SQE Prep course.

Catherine Dixon, Director General of CIArb, commented: "At CIArb, our mission is to support dispute resolution practitioners in 149 countries around the world, from research, training, professional standards and ethics to academic thought. This is why we're excited to collaborate with an industry-leading education partner like BARBRI to provide professional training, guidance and support to our members and aspiring dispute resolvers around the world."

ENHANCED EXPERIENCE

Chris Jorgenson, Director of Institutional Partnerships for BARBRI, said: "We're delighted to be collaborating with CIArb to enhance the student experience, support pathways into practice and enhance employability opportunities. We're increasingly seeing legal disputes being resolved through alternative dispute resolution methods including arbitration and mediation. Forming a collaboration with CIArb presents our students and alumni with additional career development opportunities that can help them get ahead in an exciting area of practice. At BARBRI, we've helped over 1.3 million students prepare to pass a US bar exam and, as the SQE is officially introduced in 2021, we look forward to helping many more aspiring legal professionals move forward in their careers."

For more information, visit www.barbri.com or www.ciarb.org

EVENTS

Congress Conference reaches over 2,000

The November 2020 CIArb Congress was supplemented by the Congress Conference, consisting of panel discussions, presentations from the CIArb leadership and Q&A sessions. The online event reached over 2,000 people across the course of the day.

It opened with a 'Meet the Leaders' session with Marion Smith QC FCIArb (Deputy Chair, Board of Trustees), Jonathan Wood FCIArb (Chair, Board of Trustees), Catherine Dixon (Director-General) and Francis Xavier SC PBM C.Arb FCIArb (President). The leadership team provided a recap of an extraordinary year and celebrated some of CIArb's major successes. CIArb's membership has recently surpassed 17,500, training courses have been moved online and CIArb played a pivotal role in delivering the Virtual Arbitrations initiative in May. CIArb has also continued to develop best practice guidance for ADR professionals.

Dixon also referred to three new strategic aims currently being finalised: to promote the constructive resolution of disputes globally, to be an inclusive thought leader, and to develop and support an inclusive global community of diverse dispute resolvers.

Clockwise from top left: Catherine Dixon, Francis Xavier, Jonathan Wood and Marion Smith

Following breakout sessions, the Congress Conference closed with a panel on how better to promote diversity and inclusion in the ADR profession. Chair Lewis Johnston ACIArb (CIArb Head of Policy and External Affairs) was joined by Ania Farren MCIArb (Omnia Strategy), Caroline Croft (Squire Patton Boggs), Mahnaz Malik (Twenty Essex) and Nasir Khan FCIArb (Currie & Brown).

MEDIATION

Marrying disciplines

CIArb's 13th Mediation Symposium, held online on 7 December 2020, focused on the theme of 'multidisciplinarity'.

The keynote address was delivered by George Lim SC, Senior Counsel and Chairman of Singapore International Mediation Centre, and workshops held online covered: 'The "evolving mediator" – Cognitive biases and their impact on mediation' (Paul Sills FCIArb, international arbitrator, mediator and barrister); 'Mediation and legal design thinking' (Dr Pierangelo Bonanno MCIArb, mediator and ADR trainer); 'The mediator's toolkit – How to use tech in mediation' (Karolina Jackowicz FCIArb, mediator and Founder of KJADR); 'Redesigning the mediation curriculum' (Vassiliki Koumpli MCIArb, mediator and mediation trainer); 'Crossing intra-disciplinary boundaries between civil and commercial and workplace mediation' (Sharon Crooks MCIArb, Founder of Peacewell); and 'Technology and mediation' (Tony Guise, Director of DisputesEfiling.com Limited).

The event finished with a plenary discussion and closing remarks from Catherine Dixon, CIArb Director General.

TRAINING

CIArb and Omnia Strategy join forces

CIArb and international law firm Omnia Strategy have collaborated to deliver international arbitration training to state advocates from across the globe.

The training course, which took place on 6–8 January 2021 in CIArb's virtual classroom, focused on international arbitration and how to use the process effectively to promote sovereign interests. It also considered the core skills required to manage an arbitration successfully, including case planning, strategy and analysis, evidential and advocacy skills.

The course was led by Ania Farren MCIArb and Ana Paula Montans, international arbitration experts from Omnia Strategy, and Professor Dr Mohamed Abdel Wahab MCIArb, Trustee and Course Director of CIArb's Diploma in International Commercial Arbitration. The programme continues both organisations' commitment to ADR training and was delivered to 36 state advocates from 12 jurisdictions.

The training course fits into CIArb's aim to promote better ADR globally

C.Arb WELCOME

Congratulations to the newest Chartered Arbitrators of 2020: Lindy Patterson FCIArb, UK; Jackie Oyuyo Githinji, Kenya; James Ochieng Oduol FCIArb, Kenya; and Kenneth Mutuma FCIArb, Kenya.

60-SECOND INTERVIEW
Dr Isabel Phillips FCIArb

Dr Isabel Phillips shares her experiences as a conflict mediator

How did you come to specialise in conflict resolution and mediation?
I became fascinated by conflict and mediation during my teens. I also spent time living in a multicultural centre where the conflicts of the Asia-Pacific region during the Cold War were replicated between individuals. This extended my fascination to international conflict.

There was no specific mediator career route at the time, and I pursued an academic career in history and international relations, followed by vocational qualifications in peace building and conflict transformation in Germany and subsequent CEDR mediator accreditation in 2003. From 2000 to the present day, I have crossed and re-crossed the boundary between international conflict and mediation.

What would you say to someone considering a career in mediation?
Patience, creativity and persistence are required not just to mediate, but also to become a mediator. Few academic contexts are currently able to equip you with the necessary practical skills, so do also research skills-based, practical training.

In many jurisdictions, being a lawyer is the obvious route to become a mediator. However, even as a lawyer, in most jurisdictions, only the most senior professionals will get the (usually) small number of well-paid cases. Therefore, whether or not you are a lawyer, work on your personal USP and think laterally. From commercial practice in new areas to community and family, restorative justice and stakeholder dialogue, there are many areas ripe for development.

What are you most proud of in your career so far?
The moments when I see that some intervention I have made has enabled someone (or some people) to use conflict skills positively to make a difference to their own and other people's lives.

To give a recent example, I have been working with the Oromia Pastoralist Organisation in Ethiopia, observing/mentoring local colleagues who were expertly facilitating women from three different communities working on conflict de-escalation processes.

I had to leave Ethiopia due to COVID-19, but I did so with the confidence that local attitudes to the participation of women in dialogue had changed, and that there is more chance of women's voices being heard because of the opportunity to demonstrate competence and insight in the dialogue process so far.

Dr Isabel Phillips 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.

IN BRIEF

Professor Dr Mohamed S Abdel Wahab

Flagship Diploma moves online

The Diploma in International Commercial Arbitration is CIArb's flagship training programme. For more than two decades it has normally been delivered as a residential event in Oxford. Of course, 2020 was not a normal year and, in light of the COVID-19 pandemic, it was clear that the Diploma could not be delivered in its usual format.

Instead, the decision was taken to run the programme as an online event under the direction of Professor Dr Mohamed S Abdel Wahab MCIArb.

He says: "I had a degree of scepticism at first, but it was a major success."

Professor Abdel Wahab, working with CIArb, including Dr Paresh Kathrani, Director of Education and Training, put together an 'A list' of leading academics and practitioners as tutors and speakers.

COMPETITIVE APPLICATION PROCESS

The keynote speaker was Professor Lucy Reed, President of the International Council for Commercial Arbitration.

The programme was delivered through the Big Blue Button application, also used for CIArb's online training, after being tested in a dry run prior to the event.

In a competitive application process, 34 participants were selected representing 23 nationalities from five continents.

Professor Abdel Wahab says that, although some informal aspects of the residential course could not be fully reproduced online, there are also advantages: "In the virtual format, it's easier for people to be available, so we have greater access to a diverse faculty."

Feedback from participants was positive, and CIArb will be running the Diploma as a virtual event again this year, starting on 5 March. Booking is open until 17 February at **ciarb.org/training/bookings**

YOUNG MEMBERS GROUP

YMG elections

CIArb's Young Members Group (YMG) has announced the appointment of its Chair and Vice-Chair on the Global Steering Committee.

Laura West MCIArb (pictured below) has been appointed Chair, and Sebastiano Nessi FCIArb has been appointed Vice-Chair.

Laura is a Senior Associate at CMS, based in Edinburgh. She specialises in construction, engineering and energy disputes. She says: "I am delighted to be appointed Chair of the Committee and look forward to all the exciting initiatives and events we have planned for the forthcoming year."

Sebastiano is a Counsel at Schellenberg Wittmer, based in Geneva. Swiss-qualified and with a degree from Columbia Law School, he has advised and represented clients including states for more than 10 years in commercial and investor-state arbitrations.

He says: "Despite the challenging times, I am really excited and honoured to work with Laura and the rest of the Committee on the many projects we have planned for 2021."

Clockwise from top left: Catherine Dixon; Kim Franklin QC C.Arb FCIArb; Lewis Johnston ACIArb; and Sarah Vasani FCIArb

DAS CONVENTION

Handling change

The CIArb Dispute Appointment Service (DAS) Convention is one of the flagship events in ADR. The theme of the 2020 event, held online on 25 November, was 'Handling disputes in an era of uncertainty'.

The Convention kicked off with a keynote address by Professor Dr Mohamed S Abdel Wahab MCIArb on how dispute resolution is handling change and, in particular, the role of technology.

CIArb, he noted, has led the way in responding to meet the needs of users during the pandemic. Dispute resolution professionals need to embrace technology and see it as a "fourth party" in disputes, he said. "We need to take a leap of faith. The future is already here and the choice is ours as to which way we will go."

The address was followed by three panel sessions. The first (Lucy Greenwood C.Arb FCIArb, Funke Adekoya C.Arb FCIArb, Michael Lee MCIArb, chaired by Lewis Johnston ACIArb) discussed how we should look at rapidly developing dispute resolution practice and embrace its revolutionary nature.

The second (Wolf von Kumberg FCIArb, Gill Mansfield FCIArb, James South, chaired by Jane Gunn FCIArb) looked at how can we broaden our understanding of mediation and meet the challenges and opportunities ahead.

Lewis Johnston ACIArb opened the third panel session on how dispute resolution professionals can continually adapt to the needs of business. The speakers were Catherine Dixon, Director General of CIArb; Sarah Vasani FCIArb, Partner and Head of Investor-State Disputes at Addleshaw Goddard LLP; and Kim Franklin QC C.Arb FCIArb, Chartered Arbitrator and Adjudicator at Crown Office Chambers. They addressed issues including how ADR can play a unique role in preparing for uncertainty; the value of 'hitting the reset button' during the pandemic; and how to best offer a holistic service to clients.

CIArb is most grateful to DAS Convention 2020 sponsors Arbitralis (Gold Sponsor) and Accura Consulting (Silver Sponsor).

We want to hear from you

CIArb is embarking on an important listening exercise, **Mark Scott** explains

SHUTTERSTOCK

Our exciting new three-year strategy places our members at the heart of what we do.

We want to ensure that we continue to be relevant and engage with our members and supporters in a way that works for them and gives them what they want from CIArb.

With this in mind, we have commissioned research designed to provide us with insight about our membership and supporters. We want to know more about what our members want, what they value and how they want to engage with CIArb.

From this insight we will develop a deeper understanding of our audiences and evolve the way we engage and communicate with members. We'll use this information to review our member offer, including ensuring that we support members at different stages of their career, and that our communication, including the channels and content, is useful and timely.

We want to be able to target our products, services and communications to ensure that what people receive is relevant to them and they experience a greater level of support from, and engagement with, CIArb. Our research will use qualitative and quantitative methods to ensure that we get the level of insight and validation that we require to provide us with the information that will be a building block to delivering our new strategy.

From early 2021, the Member Panel will be a community of about 150 members

ABOUT THE AUTHOR

Mark Scott is Director of Marketing and Communications at CIArb

We want CIArb members to feel part of the organisation and of a diverse and global community of dispute resolvers.

As part of our commitment to reach out and engage more with our members, we are excited to establish a Member Panel. Launching in early 2021, the Member Panel will be a community of about 150 members from across the world and will provide an opportunity for panel members to input into the future of CIArb. We will share proposals for new projects and initiatives with the Member Panel to get views and feedback on them while they are at the development stage. For example, new training courses and our plans for our website. We will then use the feedback to make sure we deliver what members want and value.

We will create a virtual community for our Member Panel, and if you would like to get involved, please email your name and membership number to memberpanel@ciarb.org – but be quick! Places are limited to 150.

For more on CIArb's new strategy, see 'From the Director General', page 9

Redesigning the mediation curriculum

Vassiliki Koumpli MCIArb makes the case for multidisciplinarity

The theme of the 2020 CIArb Mediation Symposium, held on 7 December, was 'Mediation as a multidisciplinary practice'. Throughout the event, speakers and participants explored the variety of skills a mediator should ideally have and which disciplines are best placed to provide those skills. The workshop 'Redesigning the mediation curriculum' examined how the mediation curriculum relates, and may contribute, to multidisciplinarity in mediation.

Mediators engage with people's thoughts, emotions, projections, biases and prejudices, attempting to shed light on the root causes of the conflict. A mediator, therefore, should ideally possess a variety of skills requiring the combination of multiple disciplines. How can mediators acquire such skills and how can this be attested?

Over the past few decades there has been a significant growth in institutional schemes for mediator training and accreditation, provided by either legislation or soft law. Such schemes set uniform standards and training requirements for the formal recognition of professional mediators, preparing them to mediate interpersonal disputes effectively in a variety of settings.

The vast majority of the mediation curricula cover not only mediation concepts, principles and law, but also basic skills and techniques (e.g. conflict analysis and management skills, negotiation strategies, effective communication, emotions management, the importance of cultural differences, etc.), seeking insight from the areas of study that deal with human behaviour. These include psychology, decision sciences, political science, economics, anthropology and neuroscience.

The increasing amount of online mediation training during the COVID-19 pandemic has added an additional element to the mediation curriculum: the technical and interpersonal skills necessary for the conduct of online mediations.

The multidisciplinarity of the mediation curriculum, while undeniable, has not removed the close connection of the mediation practice with the legal profession. A background in law, as a student or practising lawyer, provides a mediator with a thorough understanding of the legal aspects of a case. Also, for the time being, mediation in most jurisdictions remains – as a matter of law or perception – interconnected with the legal resolution of the dispute, associated with traditional litigation and arbitration. This adequately justifies the predominance of legal mediators worldwide.

To change this, a new culture is needed where mediation is properly applied as a real alternative to legal processes. In pursuit of this goal, the role of the lawyer remains of paramount importance.

The evolution of mediation advocacy skills, through either experience or formalised and institutionalised mediation advocacy training for lawyers, will be a key factor in creating the multidisciplinary mediation practice of tomorrow for the benefit of both its users and society.

A new culture is needed where mediation is properly applied as a real alternative to legal processes

ABOUT THE AUTHOR
Vassiliki Koumpli MCIArb is a Supreme Court Lawyer and Mediator MCIArb at V Koumpli Law & ADR, Coordinator of Mediation Training Activities and Mediation Trainer at Panteion University of Social and Political Sciences, Senior Legal Expert at the Hellenic Institute of International and Foreign Law, and Board Member (Treasurer) of the Hellenic Union of Mediators. Vassiliki participated in the CIArb Mediation Symposium 2020, leading the workshop 'Redesigning the mediation curriculum'.

Forward together

Catherine Dixon sets out CIArb's renewed strategic aims

At CIArb, we have taken the opportunity to review our strategy and have developed clear aims that place our members at the heart of what we do.

Our vision is of a world where disputes are resolved promptly, effectively and creatively. To help make this a reality, we have committed to delivering our new strategy over the next three years. Following consultation with our members, branches, board, committees and staff, we have developed three strategic aims:

1. Globally promote the constructive resolution of disputes – this will enable us to promote the benefits of effective dispute resolution; differentiate our members based on their expertise, training and compliance with professional standards and ethics; engage with and train non-members to understand the benefits of effective dispute resolution; and work collaboratively with partners.
2. Be a global, inclusive thought leader – we will be recognised as a thought leader on all forms of dispute resolution, raise awareness of dispute resolution's role, highlight innovation and technology, and identify trends in dispute resolution.
3. Develop and support an inclusive global community of diverse dispute resolvers – we will provide accessible, relevant, and high-quality training and development to support career progression. Our global ambition will support our membership to grow around the world through our branches and networks. We will highlight the significant contribution CIArb members make and actively encourage and support equality, diversity and inclusion.

WHAT WE'RE AIMING TO DO

Our priorities for this year include improving our communication and engagement with members through our branches, publications and website, and through the creation of a member insight group.

We will develop our member offering, including ensuring that we can support members at different stages of their career.

We will improve two-way communication with branches and, where we can, engage regional relationship managers to work directly with members.

We will improve our training and pathways and give our faculty greater autonomy by introducing a competence framework which will maintain high standards but enable flexibility of delivery. We will develop shorter micro-courses and work with partners to deliver greater benefits and diversity within our training.

Everything we do will be underpinned by equality, diversity and inclusion and we will develop a mentoring service and other initiatives aimed at supporting those from underrepresented groups.

We will develop our thought leadership and policy input around the world by creating specialist groups to inform policy and best practice.

We are committed to supporting members through a period of uncertainty, enabling them to continue to deliver for their clients and develop their practices.

Our full strategy and the strategy summary can be viewed at **www.ciarb.org**

If you would like to get in touch, please email memberservices@ciarb.org

ABOUT THE AUTHOR

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

Delivering training virtually

Wolf von Kumberg FCIArb highlights a new initiative from CIArb

CIArb is committed to increasing the understanding of mediation for all parties

With the coming into force of the Singapore Mediation Convention on 12 September 2020, mediation has been given new credibility as an international process for the resolution of disputes, and it is relevant that CIArb will be embarking on a number of mediation initiatives this year, including the delivery of virtual mediation training.

Having been an in-house lawyer involved in many cross-border disputes for several international companies over more than 25 years, I regard the Singapore Mediation Convention as a decisive moment. We attempted to include mediation in our disputes clause for our cross-border contracts, but often found it difficult to convince parties in some regions as to its benefit. Many felt that, given it was not part of an enforceable legal framework, it was not a process that they accepted. What the Convention has done is to give mediation credibility and legitimacy globally, while providing a means to enforce cross-border mediated settlements.

Most legal claims that are brought in England will at some point be mediated

RESPONDING TO GLOBAL CHALLENGES

Mediation has now been used in the resolution of commercial disputes for many decades. In certain jurisdictions, such as the UK, it has become a natural part of the dispute resolution landscape. Most legal claims that are brought in England will at some point be mediated, not only because of potential adverse cost consequences if refused, but because it is becoming part of the dispute resolution culture. That is precisely the mindset that has to take root if mediation is to become mainstream for cross-border disputes. This means that users and their counsel have to understand what mediation is, the role of the mediator and the benefits that mediation, as a non-adversarial process, can bring.

CIArb has recognised the need to ensure that not only its members, but all potential beneficiaries of mediation, have a good understanding of the process. Not only to become potential mediators in both the physical and new virtual spaces, but as advocates to achieve more effective results for their clients and as users to reach better mediated settlements. Mediation has for many years been included as one of CIArb's ADR cornerstones. The Institute has traditionally provided a comprehensive face-to-face mediation course leading

ABOUT THE AUTHOR

Wolf von Kumberg FCIArb is a dual-qualified lawyer (Canada and England), mediator, arbitrator and dispute board member who has spent his 30-year career as a senior legal executive in industry. He has now established his own international consulting firm, Global Resolution Services Limited, aimed at providing solutions for the regulatory, compliance, governance, CSR and conflict risk scenarios faced by companies wishing to engage in the global market. He is also a member of Int-Arb Chambers in London and Washington DC, where he sits as a mediator, arbitrator and dispute board member. Wolf is a member of the CIArb Faculty, helping to deliver both the live and virtual Module 1 Mediation Training Programme.

SHUTTERSTOCK

to CIArb Accredited Mediator status and, last year, supplemented this with an effective virtual mediation course leading to the same designation, which has received very positive reviews.

In response to the challenges posed by the global pandemic, it was recognised that a new virtual mediation course had to be developed. With the leadership provided by CIArb's Dr Paresh Kathrani, Margherita Blandini, Andrea Khan ACIArb and my fellow FCIArb Members Corrado Mora FCIArb and Leonora Riesenburg FCIArb, the traditional mediation course was revised as a virtual offering. The basis for the course continues to be the excellent *Mediation Handbook* originally written by the late David Richbell FCIArb, but with the following adaptations:

- The course is now provided over an eight-week period, recognising that a virtual course should not exceed four hours per day.
- Each week is divided into two sessions, the first being a 'Knowledge Day' in which instruction on mediation essentials out of the Handbook is provided, together with practical group exercises; and the second being a 'Skills Day' in which the participants get to apply what they have learned through role-play scenarios.
- The participants are provided with dedicated, one-to-one opportunities to speak to designated tutors on mediation-related topics each week during tutor appointments.
- Finally, there is an assessment week where the participants are assessed during two role-plays with actors playing the part of the parties.
- Successful candidates can then apply for Membership of the Institute (MCIArb) and obtain CIArb Accredited Mediator status.

Participants are provided with opportunities to speak to designated tutors

CIArb has found that virtual training can achieve the same benefits as face-to-face

MEETING DEMAND

The virtual mediation course captures the training and outcomes expected from a traditional, face-to-face course, but delivered virtually. The pilot course was run during September and October 2020, with Corrado Mora, Leonora Riesenburg and me as the tutors. Interestingly, the course attracted participants from across the globe, making it truly international in scope and reflecting the make-up of CIArb's membership.

CIArb's virtual course is being offered again in the first quarter of 2021 and is also being rolled out to the branches for regional courses to be run. CIArb intends on meeting the demand for cross-border mediation spurred by the Singapore Mediation Convention and promoting mediation across the globe as an effective means of dispute resolution.

In for the count

Robert Outram talks to two CIArb members about the role of ADR in the US elections

The four-yearly presidential election in the US is one of the world's largest exercises in democracy. The 2020 election saw a record turnout, unprecedented numbers of mail-in ballots and allegations from the incumbent, even before election day, that it would be subject to fraud.

The US election process is, of course, subject to legal scrutiny after the event, but it also relies on adjudication. There are always issues with some ballots, such as the signatures on mail-in ballots, voter eligibility or even ballots that have been damaged in the scanning process. The details vary from state to state, but normally these are settled by an adjudication panel, typically

IKON IMAGES

including representation from both parties plus at least one independent. As with any adjudication process, fairness and timeliness are essential.

An election also depends on volunteers to watch over the process. Some of these are impartial observers from civic or academic organisations, but many are members of the two main parties.

STAND IN A CORNER AND WATCH

Given that it is important to understand election regulations, these volunteers include individuals from the legal profession and ADR. *The Resolver* spoke to two of them, Amb. (r) David Huebner C.Arb FCIArb and Deborah Hylton FCIArb, both of whom acted as volunteer observers in Wisconsin and North Carolina respectively.

David Huebner is an international arbitrator, a Chartered Arbitrator and a former US Ambassador to New Zealand. He sits on the CIArb Board of Trustees, representing the Americas Region. He was a poll watcher in 2016 and, for the most recent election, opted to observe for the Democrats in Wisconsin, which was shaping up to be one of the swing states that could decide the national result.

He and his fellow volunteers had three training sessions ahead of election day, with briefings on the rules of the election and guidance on how observers should behave. The rules are different depending on which part of the process is being observed. Those who are observing inside polling places, or watching the processing and counting, must not take an active role. If something untoward is going on, they should report it rather than intervene directly.

As Huebner puts it: "Your role is to stand in a corner and watch."

Observers stationed outside the polling places can be more proactive. Huebner explains: "You can advise the voter. Quite a few people were turned away from my polling place – we would ask them what happened and try to help them. Wisconsin has fairly complex ID laws and even with my legal experience I had to read up on the regulations."

There was also a 'boiler room', staffed by volunteer lawyers, to provide detailed advice on the phone if required.

Observers commit to a long day. Huebner says: "I arrived at 6.30am and left at 9.30pm."

Despite the divisive nature of the campaign, the voting process "went very smoothly", Huebner recalls. He says: "The main difference this time was the turnout. At the polling place I was attending, it would have been typical to see as few as 40 voters, and this time we had around 300."

"It's a very energising experience and that was more prevalent this year than ever"

Regulations and fine print surrounding voting practices vary by state

From top: Amb. (r) David Huebner C.Arb FCIArb and Deborah Hylton FCIArb

A LOT OF FINE PRINT

Deborah Hylton is an arbitrator, mediator and conflict engagement specialist based in Durham, North Carolina. She has 22 years' experience as a transactional lawyer and sits on three corporate boards.

As well as "voter protection" work – helping citizens to ensure their right to vote is not unfairly curtailed – she volunteered as a poll observer in the 2020 election.

In North Carolina, voters were able to vote early in person as well as by mail. Hylton says: "There was a tremendous turnout at the weekends in the first weeks. By 3 November [election day] 60–70 per cent of registered voters had already voted."

She adds: "On every shift, there were people who needed help. For example, there was a young man who had already voted in the primary [the public votes that select the candidates for each party] but could not find his registration for the election. In his case, it was because of confusion over a hyphenated name.

"The Democratic Party had a system so we could submit information to a team who could look up the regulations and come up with an answer."

Mail-in ballots present their own particular challenges. For example, North Carolina requires a witness signature to certify that the ballot has been placed in the envelope. Officials, therefore, need to look at the envelope to see whether it has been witnessed.

Hylton says: "There is a lot of fine print in the instructions for voters, so there are a lot of errors. Our voter protection team put together panels to check that officials were applying the rules correctly."

Volunteering is a big commitment, but well worth it, Hylton says: "I get more out of it than I give! It's a very energising experience and that was more prevalent this year than ever. I was even high-fived by voters as they came out from the polls, and families took pictures of themselves having just voted together."

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ACCUSATIONS AND LAWSUITS

In 2020, the election was followed not by the usual concession from the losing candidate, but by a series of accusations and lawsuits alleging widespread malpractice. With no hard evidence to back these up, a series of challenges in state courts and the US Supreme Court have come to nothing, and even senior Republican office-holders have been clear that the electoral process was fair and square.

Has the experience of 2020 strengthened the volunteers' faith in their country's legal and political institutions, or does it leave them with concerns?

Hylton says: "To give a lawyer's answer, it's both. Institutions are rising up to protect democracy, as I thought they would; these are people who believe in democracy. At the same time, we have a president and team of lawyers who have been making baseless claims and stirring up anger. We need healing and unity."

Huebner comments: "Institutions are simply groups of people. Many of our institutions stayed strong and worked well – for example, in Georgia and Arizona, Republican-held states, the votes were counted. Other institutions have not held up so well. For example, the party of the incumbent has not challenged the lie [that the election was fixed]. Democracy is fragile everywhere, because it is a messy, difficult form of government. You have to work at it."

In a divisive election fraught with claims of malpractice from the incumbent, democratic institutions' resolve has been tested more than ever

"Democracy is fragile everywhere... it is a messy, difficult form of government"

On a positive note, he adds: "This election, we saw a massive turnout among the young and minorities – people who had never participated before. Now people have had a taste of democracy!"

There are a number of parallels between a functioning democracy and dispute resolution. In both cases, there are parties with conflicting aims, and sometimes the disagreement can become bitter. However, it is important that all parties accept the rules by which the dispute is to be resolved, and that there is clarity and transparency throughout the process.

The skills and principles exemplified by the ADR practitioner are also important in ensuring that democracy works, in the US and around the world.

In good faith

Robert Outram talks to **Nasir Khan MBE FCIArb**, co-founder of Muslims in Rail

Diversity in ADR was a key topic at the CIArb Congress, held online on 11 November, with a panel discussion devoted to 'Diversity: Beyond the Mission Statement'.

One of the speakers was Nasir Khan FCIArb, who was awarded an MBE in the 2020 Queen's Birthday Honours for services to equality, diversity and inclusion in the UK rail industry.

Khan is a co-founder of Muslims in Rail, a not-for-profit enterprise which seeks to connect, grow and inspire Muslims working, or seeking a career, in the rail industry. Muslims in Rail organises social networking events, outreach programmes, awareness raising and education support to inspire the next generation of professionals.

The initiative started in 2017, when Khan was working with Network Rail, which runs the UK's rail infrastructure. He is now a Director with consultants Currie & Brown, with responsibility for contracts and dispute resolution.

Khan came to the UK from Pakistan at the age of 23 to study for a master's in project management. He says: "I'm a first generation immigrant... that probably enabled me to challenge things."

In his first job after qualifying, he was asked to attend a weekly team meeting on Fridays at 1pm – a time which clashed, for a Muslim, with Friday prayers. He raised the issue and got the time of the meeting changed to 2pm – a small but significant victory.

Khan says: "For me, my faith comes before everything else."

He argues that respecting different religious beliefs is an important part of diversity, alongside other equality issues, adding: "Faith is an uncomfortable subject for many people. Some people say faith is private, or it doesn't matter in the workplace."

Raising awareness is central to the mission of Muslims in Rail, whether that involves encouraging young people to think about a career in rail; helping managers to understand issues like unconscious bias; campaigning against Islamophobia; or simply providing a network for Muslim colleagues. It also includes raising awareness among the public – for example, Khan obtained permission from King's Cross Station, London, to put up a display of banners with messages from different faiths to inspire dialogue with station users.

Some people say faith is private, or it doesn't matter in the workplace

He says: "I had some lovely discussions with people. And that is what diversity is all about. Everyone comes up with a different perspective."

RESPECT OVER TOLERANCE

Khan became interested in ADR as part of his role, and studied to become an FCIArb. He stresses that there are strong connections between the modern practice of ADR and the traditions of his own culture.

He also believes that ADR itself still has a way to go in embracing diversity: "There is a lot we need to do. We need positive action to improve the position of people who are not represented in our industry."

He would like to see the profession publish data on the representation of minorities in its own ranks, for example.

And in society as a whole, his message is one of 'respect', not just 'tolerance'. As Khan puts it: "If I said to you, 'I tolerate you', how would you feel? As human beings we prefer respect over tolerance."

Above: For Inter Faith Week 2018, Khan obtained permission from King's Cross to put up banners representing different faiths

Meet the President

Introducing CIArb President **Ann Ryan Robertson C.Arb FCIArb**

On 1 January 2021, Ann Ryan Robertson C.Arb FCIArb took up her post as President of CIArb. Only the fourth woman to hold this post, she is a former Chair of CIArb's North America Branch and a former Trustee of the Institute.

Robertson is an International Partner with US law firm Locke Lord LLP, based in its Houston, Texas, office. She has been named in *Global Arbitration Review*'s 'Who's Who Legal: Arbitration' since 2015 and is a recognised expert in international arbitration, serving as both arbitrator and counsel in international and domestic arbitrations. She has been repeatedly recognised by *The Best Lawyers in America*, and in 2014 and 2017 received the distinction of Lawyer of the Year, International Arbitration – Governmental (Houston). In 2020, the US government named her as one of 10 US panellists who will decide state-to-state disputes under the US-Mexico-Canada Agreement. She is a member of the panel of neutrals of numerous arbitral institutions and a founding member of ArbitralWomen.

I think what you're going to see is that arbitration will be conducted using a hybrid approach

Ann Ryan Robertson C.Arb FCIArb takes up her post with a wealth of experience as a practitioner and as an active member of the Institute

A FASCINATING PROCESS

Unsurprisingly, given her location, Robertson has an in-depth knowledge of the oil and gas business. She is also experienced in a wide range of commercial issues, including disputes governed by the UN Convention on Contracts for the International Sale of Goods. Her interest in ADR arose following the settlement of an extremely large case in which she had been one of the lead counsel. A dispute arose between the client and the excess insurance carrier regarding the reasonableness of the settlement. The client and the insurance company agreed to settle the dispute by arbitration and entered into a submission agreement, with the seat of the arbitration being London.

She says: "We had a superb barrister, the late Johnny Veeder, and an excellent panel. I found the entire process from the selection of the arbitrators, to the

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preparation of the witness statements, to the hearing itself, to be fascinating."

After that, she became more involved with ADR, joined CIArb and obtained an LLM in international economic law. She eventually became more actively engaged with CIArb, becoming a course tutor and a member of the North America Branch's executive committee. She was elected Chair of the committee and, following her tenure, stood for Trustee from the Americas, serving two four-year terms, with the second shortened when she assumed the post of Deputy President.

In 2018, she stood for CIArb President and was elected – out of a field of eight – at the Institute's Biennial Congress, held in Atlanta, Georgia. She served as Deputy President during 2020.

EMBRACING TECHNOLOGY

It will not be a normal presidential year for Robertson. For at least the first half of 2021, the COVID-19 pandemic will curtail travel, and the official events at which she will be representing the Institute will take place online.

Robertson sees a bright side, however: "I want to use this pandemic as an opportunity to reach out to members and branches that might not in the past have seen or interacted with the President in person."

Robertson encourages all CIArb members to become more involved with their chapter and branch: "One of the many benefits of CIArb is the educational opportunities. Many branches hold local meetings – online now – on cutting-edge topics. And, of course, CIArb's various guidelines are unparalleled. Another benefit is networking opportunities.

"CIArb has demonstrated that it can embrace technology. The present challenges for ADR right now are, first, the use of Zoom and other platforms, and second, continuing to resolve disputes while addressing the health and safety concerns COVID-19 has presented. The ADR community has embraced online working much more quickly than the courts."

Robertson believes ADR professionals have learned much from the experiences of 2020: "I think what you're ultimately going to see is that arbitration will be conducted using a hybrid approach. More witnesses, for instance, will be testifying by Zoom. That said, it is my belief that having all the tribunal in one room together, with the ability to interact in person, is important. I know counsel would prefer to appear in person before the tribunal. As for mediation, the general belief appears to be that in-person mediation is preferable, but the continued use of online platforms will permit persons, especially senior executives, to take a more active role in the process. Zoom flattens distance, but it cannot flatten time. With online ADR, you have people who are working outside their normal business hours, and that can be a disadvantage to one or more parties."

I am extremely proud to be a Chartered Arbitrator and would urge more members to strive for the designation

For someone just starting out in ADR, Robertson has two pieces of advice. The first is to write: "One of the best ways to obtain recognition is to write on current ADR topics. With the ability to post online, it's very easy to self-publish." The second is to make use of CIArb's excellent training: "There is worldwide recognition of CIArb's qualification. I am extremely proud to be a Chartered Arbitrator and would urge more members to strive for the designation."

She stresses that ADR must be seen as a professional path in its own right: "Arbitration is very different from litigation. How one approaches the issues, frames the case, addresses and persuades the tribunal, and the procedures one employs, differ from litigation. Mediation is far more than the parties simply exploring settlement. A skilled mediator is a godsend."

Outside her professional role, Robertson loves to travel – something that, in recent months, she has managed only vicariously through online meetings, international film and TV and her renewed interest in cooking international cuisine. Hopefully, for at least part of her presidential year, she will have the opportunity to travel again and embark on new adventures.

The shift to online platforms has altered the ADR landscape

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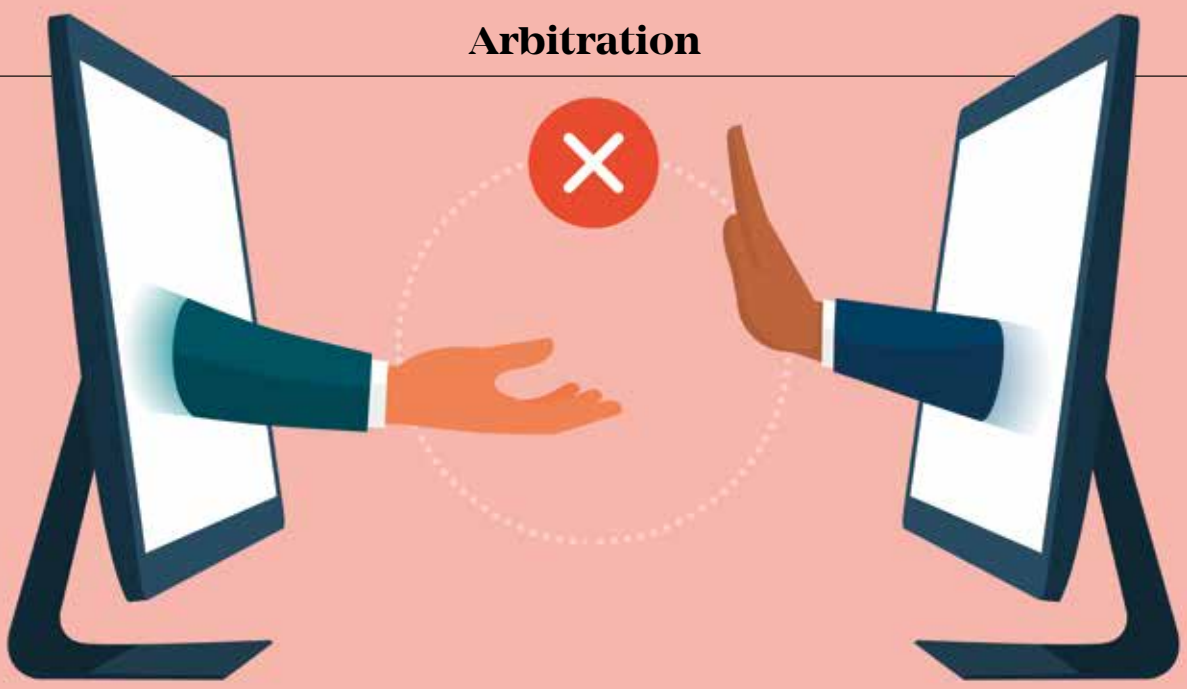

Pandemic pathway

Professor Dr Mohamed S Abdel Wahab MCIArb addresses what happens when one party is reluctant to conduct a hearing online

Lockdown measures brought in to contain COVID-19 have made it near impossible to conduct in-person arbitration tribunals. In many cases, parties have agreed that the proceedings can go ahead safely online.

But what happens when one party is reluctant to participate in a virtual hearing? That was the conundrum addressed by Professor Dr Mohamed S Abdel Wahab MCIArb, Partner at Zulficar & Partners in Cairo. In response, he developed a six-point pathway, reproduced below. It has been translated into other languages, including Arabic and Chinese, and has been used by parties, tribunals and counsel in many cases.

Information and communication technology have taken on more importance than ever in light of the ongoing pandemic

THE PANDEMIC PATHWAY

1. If the applicable law (*lex loci arbitri*) or the governing procedural rules (including any institutional rules): (i) expressly refer to "in person" hearings on the merits and (ii) if "in person" (under these rules/ laws) is synonymous with "physical appearance", then arbitral tribunals will not be able to take a decision to go virtual without the parties' consent. If the arbitral tribunal so proceeds, the risk of the award being set aside would be high.

2. If the *lex loci arbitri* or the governing procedural rules (including any institutional rules) expressly refer to the possible use of technology or virtual hearings, then there is no issue and the arbitral tribunal can proceed after careful consideration of the circumstances and the ability of the parties to reasonably present their cases. No consent is needed. There will always be a risk that the award arising from the arbitration will be challenged, though the risk of a challenge on the grounds that the case was heard virtually is minimal in this instance.

3. If the *lex loci arbitri* or the governing procedural rules (including any institutional rules) are silent on the issue of virtual hearings and no direct inference can be made, then there exist two possible approaches: (i) the absence of a permissive provision to proceed virtually means that the arbitral tribunal cannot proceed with a virtual hearing without the parties' consent; or (ii) the absence of a prohibitive provision to proceed virtually means that the arbitral tribunal has the discretion to consider the matter and proceed with a virtual hearing without the parties' consent, if it deems it appropriate.

My take is that the arbitral tribunal's power to proceed with a virtual hearing (or not) is dependent on: (a) whether the applicable law/rules include an express provision giving the arbitral tribunal the

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power to manage and determine the procedural path of the proceeding as it deems appropriate;

(b) whether the applicable law/rules refer to the parties' "full" or "reasonable" opportunity to present their case;

(c) whether the applicable legal principle under the *lex loci arbitri* is that "absent a prohibition, the matter is permissible" or "permissibility requires an express provision". Most legal systems consider that a matter is permissible unless prohibited.

(d) whether the applicable law or rules consider hearings a mandatory requirement (or a must if requested by a party), or whether arbitral tribunals have the authority to proceed on the basis of documents only (even if the parties requested a hearing) – if the latter, then a virtual hearing, even if objected to by a party, will not present a major risk, assuming that the arbitral tribunal establishes the basis on which it is preferred to proceed virtually and that this does not affect due process and the objecting party's right to present its case;

(e) whether both (or all) parties object to the virtual hearing– in which case, the arbitral tribunal cannot proceed with a virtual hearing, because the risk of challenge would be high;

(f) whether practice direction No.1 or any terms of reference were agreed and included constraints on the arbitral tribunal's power to proceed in certain matters without the parties' consent – if so, the arbitral tribunal will unlikely be able to proceed virtually with the objection of a party;

(g) whether the proceedings are subject to strict time limits, such that the arbitral tribunal's jurisdiction *ratione temporis* will expire soon (and cannot be extended) if the hearing is postponed and a hearing must take place – if so, the only option could be to proceed virtually with a risk, because if the time limit to render the award expires, there is no doubt the award will be set aside;

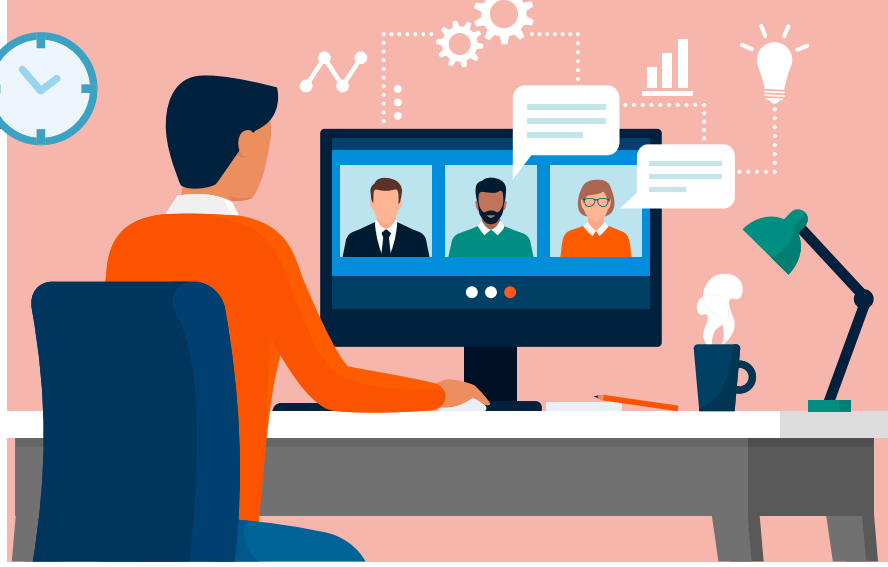
(h) whether the laws of evidence or civil procedures in the seat of arbitration recognise information and communication technology and give it legal weight;

(i) whether the circumstances of the case make it appropriate (e.g. the participants' access to reliable technology, the nature and volume of the evidence and the lack of any serious risk of prejudice).

4. If the *lex loci arbitri* is inconsistent with the governing procedural rules (including any institutional rules) on this matter, then the way forward will depend on whether the rule under the *lex loci arbitri* is a mandatory or non-mandatory rule.

5. It is also worth considering the International Law Association Resolution of 2016 on international commercial arbitration, which deals with arbitral tribunals' inherent, implied and discretionary powers. It may be useful to review this, as it may qualify as a soft law instrument in international arbitration.

6. Many new laws and rules now make express reference to information and communication technology and the arbitral tribunals' powers in this respect. See, for example, the UAE Federal Arbitration Law No.6 of 2018, which expressly refers to the use of new technologies.



The decision to proceed with a remote hearing will rest on the tribunal's authority under the applicable law

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Many new laws and rules now make express reference to communication technology

Duty to disclose

In the second of our series on CIArb's recent Supreme Court interventions, Mercy McBrayer MCIArb, CIArb Research and Academic Affairs Manager, reports on the ground-breaking UK case of Halliburton v. Chubb

On 27 November 2020, the UK Supreme Court released its long-awaited judgment in the case of Halliburton v. Chubb. The main issues in this case centre around an arbitrator's duty of disclosure under UK law and thus have potentially wide-ranging implications for CIArb members and the practice of international commercial arbitration. Accordingly, CIArb applied to the UK Supreme Court for leave to intervene at the time the case was brought from the Court of Appeal. CIArb was granted that right, along with the LCIA, ICC, LMAA and GAFTA.

This case involves the numerous insurance and re-insurance arbitrations that arose in the aftermath of the Deepwater Horizon oil platform disaster that took place in the Gulf of Mexico in 2010. In the underlying 2015 UK-seated arbitration that is the subject of the appeal, the Halliburton Company sought indemnification under an insurance policy it had with Chubb Bermuda Insurance, Ltd. for its court apportioned liability for damage to the destroyed oil platform.

The issue arose when Mr Rokison did not disclose that he was subsequently appointed again by Chubb

The Deepwater Horizon disaster is considered to be the worst oil spill in history

The arbitrators appointed in the matter by Halliburton and Chubb could not agree as to a tribunal chair. The English Commercial Court stepped in as appointing authority under the EAA 1996 and appointed an arbitrator referred to in court filings only as 'M', but identified in the Supreme Court as Ken Rokison QC C.Arb FCIArb. At the time of his appointment, Halliburton objected unsuccessfully to Mr Rokison's appointment on the grounds that he had disclosed that he had been appointed by Chubb in other arbitrations. However, the issue now before the courts arose when Mr Rokison did not disclose that

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during the arbitration he was subsequently appointed by Chubb in additional arbitrations related to the Deepwater Horizon disaster, many of which involved the same factual circumstances and legal questions. In those disputes, he accepted appointments acting as Chubb's party-appointed arbitrator against another party, Transocean.

When the fact of these appointments became known, Halliburton again raised its concerns regarding Mr Rokison's impartiality and asked him to resign. Mr Rokison declined to resign without Chubb's consent, which Chubb refused to give, and proceeded with the dispute. Halliburton then sought to have Mr Rokison removed from the arbitration by appealing his appointment under EAA 1996, s.24, which allows for removal if "circumstances exist that give rise to justifiable doubts as to [an arbitrator's] impartiality".

At the court of first instance, Popplewell J found that there was nothing that gave rise to an appearance of bias. He noted that experienced arbitrators are trained to ignore facts and arguments presented in other cases, even related ones. Halliburton appealed the decision to the Court of Appeal, which upheld the ruling. It found that while Mr Rokison should have disclosed the subsequent appointments, the fact of the appointments was not sufficient to create "justifiable doubts".

In its intervention to the UK Supreme Court, CIArb argued that adopting the reasoning by the courts of first instance and appeal would create a situation that blurs what is understood to be an arbitrator's duty to disclose under the EAA. This could put the UK out of step with uniform international practice in international arbitration. CIArb argued that the issue of greatest potential impact to its members was the standard which the courts applied to Mr Rokison's failure to disclose his appointments.

A sign in front of a home in Grand Isle, Louisiana, June 2010. The Deepwater Horizon spill resulted in oil washing up on the shores of the state's beaches.

A LINE THAT CANNOT BE CROSSED

While his failure may have been innocent, according to the evidence, Mr Rokison stated that he had evaluated whether he needed to disclose the subsequent appointments. CIArb argued that the fact that the arbitrator had to make such an evaluation shows that he knew the possibility of apparent bias existed. Thus, the appointments should have been disclosed. While the choice not to disclose may have been made in good faith, he chose wrongly, and such a mistake by an arbitrator cannot be classed as a mere oversight. Even if the arbitrator genuinely believed he had the ability to proceed with his appointment without being influenced by the subsequent cases, the standard is an objective one. In an industry where ethical standards are self-enforced, there must be a line that cannot be crossed when interpreting one's obligations under the law:

"CIArb is strongly of the view that its member arbitrators worldwide are under a legal and professional duty to disclose any facts or circumstances that might give rise to justifiable doubts as to the arbitrator's impartiality, regardless as to whether they are (or are to be) appointed under CIArb's (or any other institution's) rules, which invariably include such a disclosure obligation expressly in the relevant form of appointment" [para 30 of CIArb's written submission].

APPEAL DISMISSED

In its judgment, the UK Supreme Court agreed with CIArb's position on the standard for disclosure. But while the Court agreed with CIArb that the test is an objective one, it found that the factual circumstances of the case were not sufficient to support a finding of apparent bias. In the end, it dismissed the appeal since Halliburton had claimed apparent bias (as opposed to actual bias). Notably though, it stated that in its view Mr Rokison had breached his legal duty of disclosure under the EAA.

In its judgment, the UK Supreme Court seemed to agree with CIArb's position

Halliburton sought to have Mr Rokison removed from the arbitration by appealing his appointment under s.24 of the English Arbitration Act 1996

A FAIR-MINDED AND INFORMED OBSERVER

The Court clarified that, as the assessment of possible bias under the EEA is objective, it should be applied from the point of view of a "fair-minded and informed observer". In doing so, the realities of international arbitration, as well as the custom and practice in the relevant field of arbitration, should be considered. In this case, the relevant field is insurance and re-insurance arbitration, where situations such as the one at hand are uncommon. However, in other industries, such as shipping or commodities arbitration, where pools of available arbitrators are more limited, the situation may be common or even expected by the parties. When taking the custom and practice in insurance and re-insurance arbitration into account, the Court found that Mr Rokison's appointment in the second and third arbitrations should have been disclosed to Halliburton, and his failure to do so was a breach of his legal duty.

This means that a "fair-minded and informed observer" may reasonably conclude that there was a real possibility of bias. However, the Court went a step further and examined the timing of the duty under the EEA. It found that the duty should be examined as it stands at the time the application for removal reaches the courts, rather than at the time the arbitrator failed to make the disclosure. In this case, by the time the request reached the court, Halliburton had confronted Mr Rokison who had offered an explanation of his failure to disclose and had stated his opinion to them that he did not believe the secondary appointment was relevant. Halliburton seemed to accept this explanation at the time and moved forward, thereby removing the objective appearance of bias.

By the time the request reached the court, Halliburton had confronted Mr Rokison

The ruling that Mr Rokison indeed breached his legal duty of disclosure may not sit well with the outcome of the case in the minds of many who expect such a breach to naturally result in an unenforceable award. But the Court also recognised the need to balance the duty to disclose with an arbitrator's duty of confidentiality to the parties. Combined with the circumstances of the disclosure of the secondary appointments and the timing of the application for removal, the outcome is the most just and fair, said the Court.

While the ruling may be controversial to some, at its heart, it provides the clarity which CIArb sought in its intervention. Under UK law, an arbitrator has a legal duty to disclose when they accept appointments in cases concerning the same or overlapping facts or subject matter with a party in common. Failing to do so can give rise to an appearance of bias, but this should be first examined objectively depending on the custom and practice in the relevant field of arbitration.

Upgrade your tech toolkit

Mediators need to embrace what technology has to offer, argues Karolina Jackowicz FCIArb

COVID-19 has accelerated the pace of technology adoption among mediators. Some industry leaders estimate that the pandemic has fast-tracked the process of mediation digitalisation by about five years. What had been unpopular and deemed unsuitable a few months before has now become the daily reality. For lack of alternatives, most mediators have become 'online mediators'. However, it is arguable whether this shift can be hailed as transformative.

Are we merely updating – at long last catching up with the modern habits and expectations of dispute resolution stakeholders – or are we truly upgrading? Are we fully utilising the potential of technology to improve mediation's user experience? Are those changes deep enough for mediation to not only survive, but thrive in the 21st century?

While the 'AI-Robomediator' may still be some years off (if it ever arrives), there are many tech solutions, beyond Zoom, worth incorporating into our daily practice today. The core process of mediating is certainly ripe for some digital tweaks, especially in the virtual setting.

Online, stripped of important in-person session attributes (such as body language cues or bonding with eye contact) and with remote-specific challenges (from patchy internet connections to encroachments on home space), we need to work harder to keep the parties engaged. The mediator's classic tools may not be enough. We need 'upgraded' tools.

A great example of the qualitative difference between 'going online' and 'going digital' is a flipchart. As an indispensable element in every mediation, it is replicated with a whiteboard function on most online communication platforms. Surely, this serves the purpose of writing stuff down, such as an agenda. But are such whiteboards the most appropriate way to keep our online brains focused and responsive? No.

With shorter attention spans and the need for a more visual presentation of information – cognitive and behavioural changes brought about by technologisation – we can and should adjust accordingly. Instead of a whiteboard, propose to your parties creating diagrams, timelines and mind maps using popular collaborative visual communication and mind mapping platforms such as Lucidchart, Mindmeister or even Canva, an all-purpose graphic design app. You could also try using the platforms' decision-tree features, optimising the option generation and assessment phase of mediation. With input from users, the software organises and compares options, identifying the preferred one. These platforms work equally well in an offline as in an online setting.

The above example is only one of the many ways we can go beyond adjusting and updating – how we can upgrade and proactively transform to provide the best mediation experience, fit for the digital economy and society. Although the COVID-19 pandemic has accelerated the pace of change for mediators, we must not conflate 'online' with 'tech'. Nor should we simply replicate familiar offline practices in the new online setting.

We must remember that technology offers many benefits beyond remote meetings and so create new mediation toolkits. The future of mediation largely depends on mediators' capacity to leverage tech and be creative. And the future starts now.

Although the pandemic has accelerated the pace of change, we must not conflate 'online' with 'tech'

ABOUT THE AUTHOR

Karolina Jackowicz FCIArb is a mediator focused on helping entrepreneurs (especially start-ups and SMEs) resolve business disputes conveniently, effectively and affordably. She is a digital industry entrepreneur and CEO of a legal tech start-up. A CEDR-credited mediator, her mediation career started in 2013 when she won the ICC's global international commercial mediation competition.

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Mediation by design

Legal design thinking offers a new vision of mediation, writes **Pierangelo Bonanno MCIArb**

Mediation can be one of the solutions to the international economic and social crisis in which we find ourselves. A multidisciplinary approach is essential for objective, neutral evaluation and is, therefore, an integral part of mediation. There is a powerful synergy between 'legal design thinking' and mediation.

Legal design thinking is the application of human-centred design to the world of law to make legal systems and services more usable and satisfying. Legal design is a way of assessing and creating legal services, with a focus on how usable, useful and engaging these services are. It is an approach with three main sets of resources – process, mindsets, and mechanics – for legal professionals to use.

These three resources can help us conceive, build and test better ways of doing things in law, which will engage and empower both laypeople and legal professionals. Legal design thinking is a cross-discipline incorporating:

- legal thinking,
- design thinking,
- visual thinking, and
- user experience (UX) design.

Legal design is a holistic method approach that combines the expertise of lawyers and designers by transferring patterns of thought and procedural models from designers to legal questions. Such a transfer is relatively new for this traditional market, but almost all other industries have for a long time been highly successful in using a similar

Legal design is a holistic method approach that combines the expertise of lawyers and designers

IKON IMAGES

procedure. In the last year, legal design has grown at an international level, especially in the field of the simplification of commercial contracts.

A traditional 'visual contract' is a binding legal document, offering a better user experience and understanding, helping people to make more autonomous decisions. A visual contract empowers people legally because it is easier to understand, and it increases trust because communication is transparent.

Lawyers write traditional contracts for lawyers. Visual contracts are still the most common versions of contract, and the legal language used in those contracts might give users more comfort. It is still the most commonly used type of content, and can help to focus on results of collaboration or relationship and prevent the cost of conflict.

USER-CENTRIC SOLUTIONS AND INNOVATIONS

Design thinking is one of the most successful innovation methods of our time. The primary goal of design thinking is always to develop user-centric solutions and innovations that serve a real need – whether analogue or digital. Legal design thinking offers a new frame of thought which is built on an 'ecosystemic' approach, putting the user of a service, product or technical solution at the centre.

The benefits of using legal design thinking methods are numerous. It puts the user at the centre of the solution; leads to multidisciplinary collaboration; means prototypes of ideas are more easily developed and quickly tested; and gives feedback on whether an idea meets the needs of the user or needs to be re-adapted.

The task of legal designers is to find a balance between the legally necessary and the design-immanent creative freedom of legal content and assignments. The implementation of a legal design project is correspondingly complex and ideally requires multidisciplinary cooperation. The fundamental problem is that there is no training in this area. This makes reform of legal education not only desirable, but also urgent.

The success of mediation, in the commercial field, depends on a set of factors that are different and often unpredictable. If mediation is not voluntary but mandatory, the degree of mistrust will be even higher, so communicating this information with transparency and empathy will be even more critical.

Also, if lawyers are present, the views of the parties will be conditioned by the opinions of their respective legal advisers. The latter will be able to either support or ruin the attempt at conciliation and undermine the commitment of the mediator.

Over the course of last year, due to the global health emergency, online mediation became the daily practice, introducing other new variables into the conciliatory procedure. These include, for example, difficulties related to the use of technology, which in some cases appear challenging to manage for mediators, or platforms that are not always adapted to our needs. There are also difficulties linked to the lack of face-to-face physical and verbal communication, which is often a key to finding solutions that respect the interests of all.

ABOUT THE AUTHOR

Pierangelo Bonanno MCIArb is a mediator and trainer in Italy. He also supports foreign partners as a negotiator in seeking alternative solutions to their disputes in the regions of southern Europe. He has worked as an ombudsman and has experience in public, civil and commercial mediation.

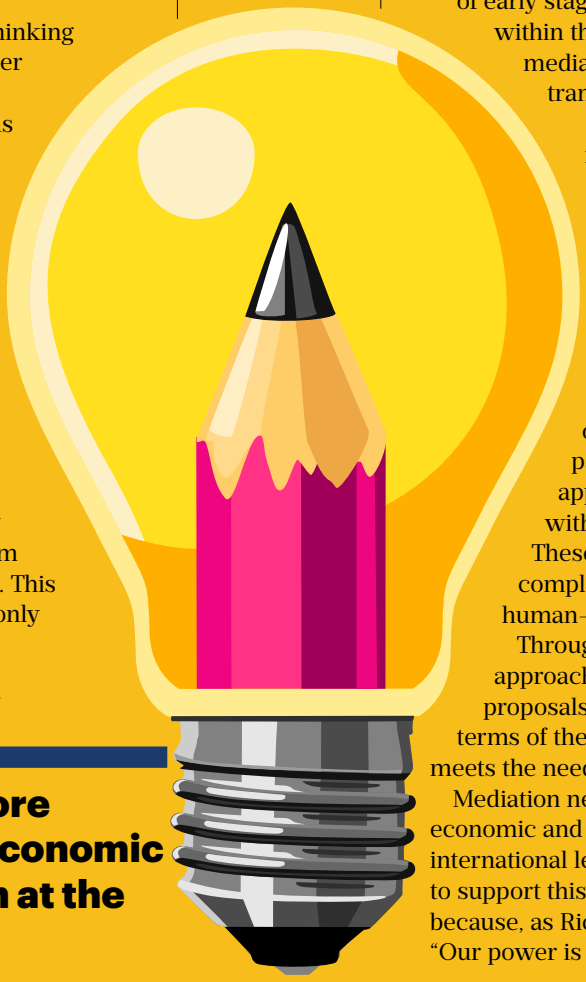
HUMAN-CENTRED COMMUNICATION TOOLS

Specific issues for online mediation can be addressed using mediation by design. Andrew Miller QC FCIArb, writing in the autumn 2020 edition of *The Resolver*, listed the many advantages of early stage mediation, which – inserted within the mediation process alongside mediation by design – can promote transparency and clarity.

The new approach makes it possible to make the best use of the different stages of the mediation process, for example by explaining not only verbally to the parties concerned the implications of the conciliation procedure, the role of the mediator, the rights of the parties and the obligation of confidentiality for all parties involved, but also through appropriate presentations, designed with transparency and clarity in mind. These should not be confused with complex modules, but must be used as human-centred communication tools.

Through the mediation by design approach, it will be possible to formulate proposals, solutions and clarification of the terms of the agreement in a flexible way that meets the needs of the parties.

Mediation needs a more significant cultural, economic and social affirmation at the international level. It is up to us, as mediators, to support this with strength and decisiveness because, as Richard Buckminster Fuller put it: "Our power is in our ability to decide."



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Mediation needs a more significant cultural, economic and social affirmation at the international level

Training and innovation

CIArb is building on the successes of 2020, **Dr Paresh Kathrani** reports

Virtual training provides us with an excellent opportunity to train individuals who want to learn about dispute resolution. Following lockdown, CIArb implemented virtual training and online assessments for all its training. A virtual classroom was built into our learning management system, 'LearnADR', so that candidates could access both their training materials and virtual classroom from the same space. This virtual classroom offers a range of different tools to enhance the learning and teaching experience. In a further development, candidates can now submit their assessments from home.

Apart from offering virtual training, which involves a tutor delivering a course remotely, CIArb has also expanded its online learning. The popular Online Introduction to ADR, leading to Associate Membership of the Institute (ACIArb), was discounted for student members and others following lockdown, and a couple of specific online training courses leading to ACIArb in International Arbitration and Mediation are launching very soon.

Three new skills-based eModules were launched in 2020: 'Avoiding and Resolving Contractual Disputes', 'Brand Protection in Times of Dispute' and 'A Guide to Award Writing'. An audiobook, *Resolving Disputes Today*, was launched in January 2020.

It was also pleasing to adapt the Diploma programmes in 2020 for virtual delivery. The Diploma in International Commercial Arbitration, which normally takes place in Oxford each autumn, was changed for virtual delivery under the course directorship of Professor Dr Mohamed Abdel Wahab in September 2020, with 34 candidates from 11 jurisdictions attending. This Diploma will be running virtually again, under Professor Dr Abdel Wahab, in March 2021.

The Diploma in International Maritime Arbitration, which was run for the first time in 2020, was also delivered virtually under the course directorship of George Lambrou FCIArb, and it will be delivered again in 2021. The virtual Module 1 in Mediation was launched in August 2020 and will be run again in February 2021.

2020 enabled us to take education and training in different directions

CIArb is passionate about ADR and is committed to expanding its training, especially through new modes of delivery and content. Virtual training is here to stay and will be complemented with further programmes in 2021. The Education and Training Department will continue to work closely with others to spot new trends within the ADR space, so that all members and others continue to receive the training that they need. For example, there are already plans to work on new LawTech opportunities in 2021, and the department will also be looking at new mediation and construction adjudication courses too.

Innovation and development are at the core of the Education and Training Department. The experiences of 2020 enabled it to take education and training in different directions, particularly with virtual and online training courses. Further opportunities will be developed in 2021.

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

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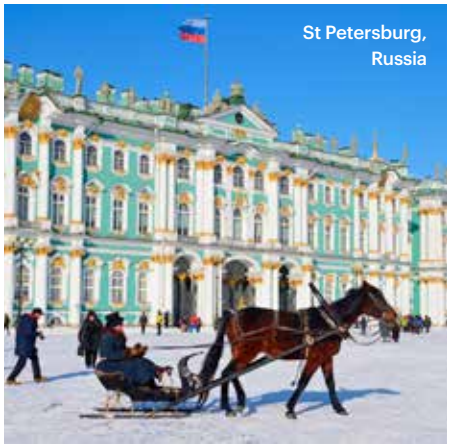
What's on

A selection of training opportunities for CIArb members

BRANCH FOCUS: EUROPE

European Branch expands its tutor roster and supports new chapter

CIArb's European Branch has made an extra effort to assist and support experienced and highly regarded arbitration practitioners within the branch to join the CIArb Approved Faculty List. As a consequence, the branch has significantly expanded its list of tutors available to teach CIArb courses. This has increased the diversity of tutors within the branch, which is particularly important given that it covers so many countries with rich and diverse legal traditions. For example, newly approved tutors come from the jurisdictions of Russia, Ukraine, Lithuania, Greece, Germany and Georgia. These tutors are able to draw on their own experiences of arbitration internationally and within their jurisdictions, assisting



St Petersburg, Russia

candidates to join the international arbitration community while drawing on the legal traditions of those very different countries.

To that end, the European Branch has been proud to support the newly created Russian Chapter, which has hit the ground running. In December 2020, within weeks of its creation, the Russian Chapter began to offer training with two courses organised with the Russian Institute of Modern Arbitration. These were Introduction to International Arbitration and Module 1 Law, Practice and Procedure of International Arbitration, taught by George Lambrou FCIArb and Andrey Panov FCIArb.

In spring, the European Branch is organising both virtual arbitration and mediation training in Modules 1 and 3. As with all of its training, the branch will draw from the expertise of European tutors who are leaders in their field.

CIArb TRAINING MARCH–APRIL 2021 (Courses and assessments are online unless otherwise stated)

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

- **Online Introduction to Alternative Dispute Resolution (ADR)**
  Open entry **£24**
- **Online Introduction to ADR Assessment**
  Open entry, 28 days **£72**
- **Virtual Introduction to ADR**
  7 May, 1 day **£240**

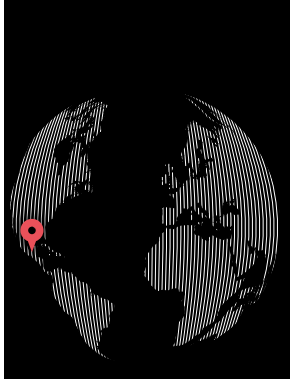
The New Pathway courses and assessments have been designed for candidates who do not have any experience of ADR. There are no entry requirements and they run as follows:

- **Virtual Module 1 Law, Practice and Procedure of Adjudication**
  1 April, 3 months **£1,080**
- **Virtual Module 1 Law, Practice and Procedure of Domestic Arbitration**
  1 April, 3 months **£1,080**
- **Virtual Introduction to International Arbitration**
  5 March, 1 day **£240**
- **Virtual Module 1 Law, Practice and Procedure of International Arbitration**
  1 April, 3 months **£1,080**
- **Virtual Diploma in International Commercial Arbitration**
  4 March, 4 weeks **£4,800**
- **Introduction to International Arbitration Assessment**
  28 days from 5 March **£72**
- **Module 1 Law, Practice and Procedure of Construction Adjudication**
  18 March **£174**
- **Module 1 Law, Practice and Procedure of Domestic Arbitration**
  18 March **£174**
- **Module 1 Law, Practice and Procedure of International Arbitration**
  18 March **£174**

Those people who have experience in ADR have the option to undertake a CIArb Accelerated Assessment Programme to assess if they meet the relevant benchmarks for Membership or Fellowship:

- **Virtual Accelerated Route to Membership, Domestic Arbitration**
  16–18 March **£1,200**
- **Virtual Accelerated Route to Membership. International Arbitration**
  16-18 March **£1,200**
- **Virtual Accelerated Route to Fellowship, Domestic Arbitration**
  1–5 March **£1,560**
- **Virtual Accelerated Route to Fellowship, International Arbitration**
  1–5 March **£1,560**

Prices stated do not include VAT. For more details, go online to ciarb.org/training/acceleratedassessments. To book on the accelerated course, please contact education@ciarb.org or call 020 7421 7430.



Wave of arbitration

Dr Reynaldo Urtiaga MCIArb explores the rise of Mexico, in particular its capital Mexico City, on the global arbitration stage

As one of the world's major capitals, Mexico City attracts most of the arbitral seat designations within Mexico

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The adoption in 1993 of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) is widely perceived as a turning point in the legislative history of arbitration in Mexico. The Model Law, as embodied in the Federal Commercial Code, has been fine-tuned in the intervening years to streamline court proceedings aimed to enforce arbitral awards. Mexico is a party to the New York and Panama Conventions on the Recognition and Enforcement of Foreign Arbitral Awards. As a result, it is generally easier to enforce a foreign arbitral award in Mexico, as compared to a foreign court judgment.

The North American Free Trade Agreement (NAFTA), which came into force on 1 January 1994, was also significant, triggering the enactment of statutes that clarified the arbitrability of disputes arising from certain subject matters (industrial property, copyright, public procurement, commercial aviation, public-private partnerships, financial services and consumer protection).

The US-Mexico-Canada Agreement (USMCA), which replaced NAFTA as of 1 July 2020, calls for ADR mechanisms to apply should disputes arise between contracting states, and between a contracting state and a national of another contracting state over dumping and subsidies, investment, labour compliance and interpretation of the USMCA. The USMCA also promotes the use of arbitration, mediation and online dispute resolution between private parties in the free trade area.

Mediation, in turn, has seen formidable growth in most of the 32 Mexican states, and its use is permitted by a number of federal statutes. Mediation and conciliation mechanisms have proven to be highly effective in practice for law branches like insolvency, tax, family, labour, criminal (white collar), civil, commercial, medical malpractice and copyright. A Uniform ADR Mechanisms Bill is being considered at the time of writing.

ARBITRAL INSTITUTIONS, SEATS AND COURTS

Two arbitral institutions are noteworthy: Mexico's Arbitration Center (CAM) and Mexico's National Chamber of Commerce in Mexico City (CANACO).

CAM, founded over 20 years ago, has a solid reputation in the Mexican legal market and its rules, management and services are first-rate. CAM awards, which are scrutinised and approved by CAM's General

Mediation, in turn, has seen formidable growth in most of the 32 Mexican states

World view: Mexico

Council, are regularly upheld by Mexican courts.

CANACO has a Cooperative Agreement with the ICDR, and provides arbitral hearing rooms at affordable rates. CANACO's fast-track and low-cost arbitration schemes have been extremely popular among litigants, particularly during the COVID-19 pandemic.

Mexican state and federal courts are generally supportive of arbitration. Notably, a 2016 Supreme Court decision opined that arbitration implies the exercise of a constitutionally protected freedom, and hence, the Mexican courts should uphold arbitration agreements, especially when the arbitrating parties' will was clearly and unmistakably expressed. It also held that the public policy ground for setting aside an arbitral award should be construed narrowly by the reviewing courts.

Most recently, the Supreme Court handed down another opinion favouring arbitration by rejecting a lower court's interpretation that arbitral awards required authentication of the arbitrators' signatures by a Notary Public or otherwise, even if the arbitral award was presented to the court in original or certified copy for the purpose of its recognition and enforcement.

As a major world capital, Mexico City attracts most of the arbitral seat designations in Mexico. Arbitral case law originating from the first judicial district, large law firms and seasoned arbitration counsel, a large international airport, and a robust hospitality industry all help to make the city a convenient and popular seat for domestic and international arbitration.

Other cities like Guadalajara, Monterrey and Tijuana are also well suited to host arbitration proceedings. CIArb's Mexico Chapter members are based in all the aforementioned cities, where they have local expertise in arbitration and other ADR processes.

Parque la Mexicana, Mexico City

LEGAL PROFESSION

The Mexican legal profession has become more sophisticated as a result of multilateral trade, transnational dealings and disputes, foreign postgraduate legal education, work experience abroad and more. Mexican universities and law schools have contributed by adding new subjects to their syllabuses, including ADR law. University teams have competed for years in the world's largest moot court competitions, namely the Willem C. Vis, and the Philip C. Jessup. ADR moot court competitions have also become common in Mexico, frequently attracting university teams from Latin America and the US. CIArb's Mexico Chapter members participate pro bono as arbitrators, coaches or tutors in Mexican and international arbitration competitions.

Over the years, I have seen colleagues leave large law firms to set up their own arbitration practices, just as it occurs in major international arbitration hubs. These career moves signal that the Mexican arbitration market continues to expand and mature. By the same token, Mexican legal scholars and law professors are frequently appointed to arbitral tribunals, or are retained as consultants or expert witnesses in domestic and international arbitrations.

A welcome development is that the number of female arbitrators and female arbitration counsel, including highly experienced ones, is growing apace.

Lastly, the federal government's lawyers have honed their advocacy skills in large commercial and investment arbitration proceedings. For instance, in 2020, the Ministry of Economy announced the rendition of arbitral awards favourable to Mexico in two separate, long-running, multimillion-dollar arbitrations brought by US investors under NAFTA. The arbitration tribunals in those cases not only dismissed the investors' claims in their entirety, but also awarded arbitration costs to Mexico.

COROLLARY

Mexico is an arbitration-friendly country that has enacted modern arbitration legislation and has a robust body of court precedents interpreting said legislation in a manner consistent with the intent of the Model Law drafters. Mexico has also signed numerous trade and investment deals allowing for arbitration. Foreign investors coming into Mexico, and foreign companies willing to partner with Mexican corporations or merchants, are well advised to seek legal counsel from the beginning of the investment or business transaction. This is to make sure that the corporate structure or contract chosen falls within the scope of protection of the relevant FTA or BIT, and maximise the ADR options in case disputes arise.

ABOUT THE AUTHOR

Dr Reynaldo Urtiaga MCIArb heads the Arbitration Practice at Bryan, Gonzalez Vargas y Gonzalez Baz in Mexico City and is a Law Professor at the National Autonomous University of Mexico. He chairs the Mexico Chapter of CIArb's North American Branch. He regularly sits as arbitrator and represents foreign companies doing business in Mexico in their business transactions, arbitrations and domestic court proceedings. He can be contacted at rurtiaga@bryanlex.com

HOW TO...

Write an arbitral award

Dr Karen Akinci FCIArb explains the three-stage drafting process

For the novice, writing an award for the first time can be daunting. Here, I aim to give some non-exhaustive pointers.

An award can be drafted in three stages: the Technical, Analytical and Final Drafts. The Technical Draft should be in writing (UNCITRAL Model Law, Article 31(1)), well formatted and visually uncomplicated with numbered paragraphs. The header page confirms that it is a 'Matter of an Arbitration' under the applicable Arbitration Law and Rules; and correctly names the claimant and respondent, and the type of award. All headings are written in at this stage, including the Introduction, Procedural History, Applicable Laws, Issues in Dispute, Award and Financial Summary. The arbitrator begins by drafting an uncontentious introduction establishing the full identities and addresses of the parties (NYC Article V(a)), the terms of the contract with its date and consideration, the arbitration clause (Article II), the context of the dispute and the circumstances leading to the Notice of Arbitration.

Next comes the Analytical Draft. The first requirement is a full procedural history, including the full circumstances of the arbitrator's appointment (NYC Articles V(b) and V(d)). The arbitrator must normally give reasons for the award (ML Article 31(2)) by pulling out the main issues in dispute and analysing each in turn, coming to a conclusion on liability, quantum and any interest/cost implication. Distilling 'issues' out of reams of material and evidence is a key skill for an arbitrator, and parties are often encouraged to agree on the issues.

Failing party agreement, the arbitrator may use the 'agreed-disputed method', which involves listing out the agreed and disputed facts of the dispute and distilling the latter into a short list of issues. These, when resolved, must cover all matters in the claims and must not stray from the scope of the arbitration clause (NYC Article V(c)). Another key skill is to write a reasoned decision for each Issue. The 'FLAC method' (facts, law, analysis, conclusion) is an analysis tool where a paragraph or more is devoted in turn to the facts specific to the issue, the law specific to the issue, an analysis applying the law to the facts and a conclusion. This helps to avoid errors, omissions and ambiguities.

A compliance date for payment of the award and non-compliance interest encourages early settlement

THE FINAL DRAFT

The Final Draft pulls everything together. The operative part is written with a full summary of findings for each issue, including declarations, monetary awards or other relief. The Interest and Costs sections should refer to the applicable law and rules for the power to award, conclude as to quantum and be calculated as far as possible. A compliance date for payment of the award and non-compliance interest encourages early settlement. The award should conclude with a final statement taking into account the set off, clearly expressing who should pay what to whom and when, together with the consequences of non-compliance.

The award is finished off by stating the seat of arbitration, and signing and dating it (ML Article 31(3)) ready to publish to the Institute or parties (ML Article 31(4)). This publication terminates the proceedings (ML Article 32), subject to any post-award corrections process (ML Article 33). And then the arbitrator's job is done.

In 2020, CIArb announced a new e-module course, 'A Guide to Arbitration Award Writing'. For details, see bit.ly/2Wq5zLW

ABOUT THE AUTHOR

Dr Karen Akinci FCIArb is Founding Partner at Akinci Law, an international law office based in Istanbul. Akinci Law provides specialised legal services to prominent local firms, as well as to well-known corporations around the world. Akinci Law is listed as one of the recommended law firms in the field of dispute resolution by Legal 500. Dr Akinci is also a CIArb Tutor in Domestic and International Arbitration, and leads CIArb's new e-module course, 'A Guide to Arbitration Award Writing'.

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