MEDIATION
A new approach is needed

DEALING WITH THE AFTERMATH OF BEIRUT'S BLAST

INTERNATIONAL ARBITRATION SURVEY

CIArb
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THE Resolver

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ANCHOR IN THE STORM

How ADR can help a world in crisis

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Progress despite the challenges of 2020

CIArb continues to lead the profession in difficult times

We approach the end of a dramatic and extraordinary year.

The pandemic and the measures taken to mitigate it have forced us to change the way we live and work. CIArb's leadership and members have shown incredible resilience and innovation in the face of these challenges, and the ability to evolve and adapt to change is one of the key themes of this issue of *The Resolver*.

A clear instance is the introduction of the Pandemic Business Dispute Resolution Service (PBDRS), a collaboration between CIArb and the Centre for Effective Dispute Resolution. The PBDRS offers a low-cost, constructive path to resolution that prioritises speed, affordability and effectiveness.

CIArb also continues to provide thought leadership. In this issue, you can read about the updated adjudication guidelines developed for England, Wales and Scotland and launched in July.

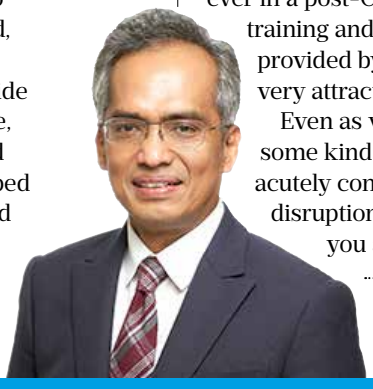
In response to the pandemic and lockdown restrictions, CIArb issued the timely *Guidance Note on Remote Dispute Resolution Proceedings* to help practitioners and disputants manage ADR under the new conditions.

We will shortly be publishing new sustainability guidelines aimed at ensuring that dispute resolution does not – quite literally – cost the Earth. We're also developing a new equality, diversity and inclusion policy.

And although in-person events have been severely curtailed, the CIArb calendar is still packed. On 25 November, for example, the Dispute Appointment Service Convention will take place as an online event, with the theme 'Handling disputes in an era of uncertainty'.

ADR will be more relevant than ever in a post-COVID world, and the training and professional cachet provided by CIArb makes ADR a very attractive career option.

Even as we take baby steps towards some kind of normalcy, we are acutely conscious that widespread disruption still prevails. Stay well as you adapt to the 'new normal'!



Francis Xavier SC C.Arb FCIArb, President, CIArb

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The opener

Due process paranoia and the risk to integrity

Excessive concern over due process at the expense of efficiency is threatening the legitimacy of international arbitration. That was the message from The Honourable The Chief Justice of The Supreme Court of Singapore Sundaresh Menon, former CIArb Patron, speaking at the CIArb Australia Annual Lecture on 13 October 2020.

This year's lecture, which took place online, was delivered as part of the 2020 Australian Arbitration Week. The Chief Justice's lecture was titled 'Dispelling due process paranoia: Fairness, efficiency and the rule of law'.

His Honour said that the phenomenon of due process paranoia is a real and growing problem in international arbitration, potentially exacerbating the trend of rising costs and delays, undermining the significance of due process and reinforcing the erroneous conception that the goals of due process and efficiency are opposed.

His Honour views due process paranoia as compounding the problems of the rapidly growing complexity of disputes and the inertia that has slowed the reform of long-standing procedures that arbitration users neither require nor desire. In these ways, the Chief Justice argued, due process paranoia threatens the legitimacy of international arbitration.

EQUALLY ESSENTIAL

The fundamental right of due process in arbitration enshrined in Article 18 of the Model Law that "each party shall be given a full opportunity of presenting his case" is not an absolute and unqualified right, but is carefully circumscribed so as to prevent abuse and promote speed and efficiency in the conduct of proceedings.

Likewise, the broad discretion for the arbitral tribunal to "conduct the arbitration in such a manner as it considers appropriate" (Article 19(2) of the Model Law) is to be exercised in such a manner as to enable the tribunal to discharge its duties, including its duty to conduct the proceedings in as efficient a manner as is reasonably possible. Paranoia over process, his Honour stated, overlooks the fact that the concept of due process in international arbitration has been carefully calibrated so that it refrains from absolutism and contains a window through which considerations of efficiency can properly feature.

Australia Arbitration Week featured both virtual and in-person events

His Honour is of the view that the rule of law values of due process and efficiency are equally essential to arbitration's pursuit of legitimacy, as well as the promotion of sound and accurate outcomes in the resolution of disputes, and are therefore, in principle, aligned rather than opposed. The Chief Justice concluded that due process paranoia, which is inimical to the versatile and adaptable nature of arbitration as a method of dispute resolution, should not be allowed to erode arbitration's agility. This would not only rob arbitration of one its greatest virtues, but also its ability to respond to the complexity problem.

AUSTRALIA ARBITRATION WEEK

The 2020 Australia Arbitration Week, which took place on 12–16 October, opened with the annual CIArb/ACICA International Arbitration Conference, 'Bridging the Distance: Arbitration in the New Normal'. The conference, which this year was held 'virtually', was introduced by the Hon Chief Justice Thomas Bathurst AC of the Supreme Court of New South Wales, with a keynote by High Court Judge the Hon Justice Stephen Gageler AC. A line-up of eminent international speakers covered topics including advocacy in a virtual environment, the role of third-party funders in arbitration, the future of investor-state dispute settlement and how to enhance efficiency in the arbitral process. A podcast of the sessions will be available on the CIArb Australia website.

Australia Arbitration Week featured a wide variety of events presented virtually and in person, hosted by leading law firms and arbitral institutions. The Australia CIArb Young Members Group presented 'Pulp Jurisdiction', a story about a hypothetical international arbitration case disrupted by COVID-19.

Chief Justice Sundaresh Menon

Find out more at ciarb.net.au. Chief Justice Sundaresh Menon's full lecture will be published by CIArb Australia in May 2021.

PUBLICATIONS

Adjudication guidance

Construction disputes are among the topics covered in the updated Guidance Notes

CIArb and the Adjudication Society have jointly published four updated Guidance Notes for adjudication in England, Wales and Scotland.

The four updated Guidance Notes are:

- *The Scheme for Construction Contracts*;
- *Construction Contracts and Construction Operations*;
- *Natural Justice*; and
- *Adjudicator's Liens*.

CIArb and the Adjudication Society started producing Guidance Notes in 2010. Their purpose is to assist not only adjudicators, but also parties and party representatives, in respect of the key issues that they might encounter when dealing with adjudication under the Housing Grant, Construction and Regeneration Act 1996 and the subsequent Local Democracy Economic Development and Construction Act 2009.

On Wednesday 8 July 2020, CIArb hosted an online panel discussion to mark the release of the updated Guidance Notes.

Moderated by Lewis Johnston ACIArb (Head of Policy, CIArb), the panel included Ciarán Fahy C.Arb FCIArb (Chair, Adjudication Sub-Committee), Jeremy Glover (Partner, Fenwick Elliott), Matt Molloy C.Arb FCIArb (Director, MCMS), Susan Francombe FCIArb (Barrister, Arbitrator and Adjudicator, Adjudication Society) and Kim Franklin QC C.Arb FCIArb (Barrister, Chartered Arbitrator and Construction Adjudicator, Crown Chambers).

To access a report of the launch and a link to a video of the panel discussion, go online to **ciarb.org/news/ciarb-and-adjudication-society-launch-updated-adjudication-guidance**.

The updated Guidance Notes are available online at **ciarb.org/resources/guidelines-ethics/adjudication**.

For more information on the updated Guidance Notes, see the article by Ciarán Fahy C.Arb FCIArb on page 23

POLICYCAST

Check out our podcast series

Digitalisation for mediation processes, the role of third-party funding and the geopolitics of investor-state dispute settlement are among the topics covered so far in the *CIArb Policycast* podcast series.

Launched earlier this year, *Policycast* delivers interesting and accessible content in the sphere of ADR, for practitioners and non-practitioners alike. As well as keeping CIArb's membership of ADR professionals informed, the podcast series is helping to establish a wider audience beyond the profession.

The first episode went live on 22 June. The podcasts are hosted by senior CIArb staff and feature international guests, including lawyer, barrister and arbitrator Mahnaz Malik of Twenty Essex; Singapore-based lawyer and arbitrator George Lim; Anette Magnusson, Secretary General at the Arbitration Institute of the Stockholm Chamber of Commerce; and UK legislator John Howell MP ACIArb.

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

SAVE THE DATE

CIArb's first ever Virtual Congress conference is open to all

CIArb is organising a conference on Wednesday 11 November, which will follow our first ever fully online Virtual Congress on 10 November.

Across a full day of online events, both CIArb members and the wider public will have the chance to hear directly from CIArb's leadership and focus on those subjects that are of particular interest to them.

From mediation and adjudication to third-party funding, we will be examining specific questions facing the profession, alongside wider questions on equality and diversity, building a career in ADR and how the CIArb leadership is developing a strategy to meet the world of 2021 and beyond.

On registration, participants will be able to select from a choice of online workshops, which will be held during the event. The conference will be followed by online networking sessions.

Date: 11 November 2020
Time: 10.30–16.00 GMT
Format: Online

Please mark your calendar – for more information and to book, please visit our website at www.ciarb.org/events/virtual-congress-conference-2020

60-SECOND INTERVIEW
Felisa Baena Aramburo FCIArb

Felisa Baena Aramburo FCIArb shares her experiences working in ADR in Colombia

What led you to specialise in ADR?
Arbitration brings together two things that I have always been very passionate about: commercial law and dispute resolution. I truly enjoy learning new substantive and procedural matters every day and contributing towards a more efficient way of administering justice in my country.

What is the biggest challenge that female practitioners face in ADR?
Despite collective efforts to provide equal opportunities for women, arbitration is still a male-dominated profession in Latin America because, unfortunately, there is still a wide misconception among Colombian attorneys that female practitioners lack the leadership and fortitude necessary for the job.

It has always been my personal challenge to encourage young female lawyers to specialise in litigation and arbitration, and for women to feel empowered and support each other.

How has the COVID-19 pandemic affected working life for you?
The pandemic has caused two complicated issues that affect the legal profession: economic uncertainty and an increase in contractual disputes. This new scenario makes me wake up every day knowing that, as a litigation and arbitration practitioner, I have a duty to help rebuild our economy by ensuring that our clients and the parties to arbitration proceedings solve their disputes in a highly efficient way.

And the most satisfying?
The most satisfying thing as an arbitration attorney and practitioner is to know, at the end of a case, that justice has been done.

What advice do you wish you had received at the beginning of your career?
First: never lose your faith in justice. Second, learn to recover from mistakes. Third, always prepare and over-prepare your cases. And, finally, there's no such thing as good writing, only good re-writing.

Felisa Baena Aramburo FCIArb is a Senior Associate with Moreno Quijano Abogados, based in Colombia. She is an arbitrator at the Medellin Chamber of Commerce and she lectures at EAFIT University, Medellin. Her article on investment arbitration appears in the autumn 2020 issue of *Arbitration: The Journal of International Arbitration, Mediation, and Dispute Management*.

IN BRIEF

YMG essay judging under way

This year's CIArb Young Members Group (YMG) Essay Competition invited participants – any CIArb member aged 40 years and under – to prepare a procedural order and explanatory note in relation to virtual hearings. Entries have now been received and the competition will be judged by an Editorial Jury (Alexander G. Leventhal ACIArb, Mercy Okiro MCIArb, João Marçal Martins ACIArb, Elizabeth Rainbow Willard ACIArb and Dharam Jumani FCIArb) and an Honorary Jury (Olufunke Adekoya FCIArb, Professor Mohamed Abdel Wahab MCIArb and Michael Mcilwrath).

The winner will be invited to speak at the CIArb YMG virtual seminar held in November 2020 and will also be profiled in the CIArb YMG newsletter. The five finalist submissions will be published on the CIArb website.

East Anglia student contest

CIArb's East Anglia Branch has invited university students and graduates with an interest in arbitration, up to the age of 27, to enter an essay competition (minimum 3,500 words) focused on the role of ADR. Candidates may decide their own subject area on any ADR topic. Prizes, including the top prize of £1,200, will be presented by Sir Rupert Jackson QC MCIArb at an award event (or virtually). The deadline for submissions is 7 January 2021.

For more information, contact Dr Al Jarratt FCIArb, Branch Chairman, at **al.jarrett@btinternet.com** or go online to **ciarb.org/events/essay-competition-practical-results-cannot-be-achieved-simply-by-making-laws**

C.Arb WELCOME

Congratulations to Ann Robertson FCIArb (North America Branch), Olufunmilayo Roberts FCIArb (Nigeria Branch), Calvin Hamilton FCIArb (Barbados Branch) and Gary Benton FCIArb (North America Branch), who have achieved Chartered Arbitrator status.

MEET THE LEADERS

In conversation with CIArb's team

On 3 September 2020, an online event offered attendees a unique opportunity to hear from the CIArb leadership team. Attendees were able to pose questions to Francis Xavier SC PBM C.Arb FCIArb (2020 CIArb President), Catherine Dixon (CIArb Director General) and Jonathan Wood MCIArb (Chair of CIArb's Board of Trustees), who joined moderator Marion Smith QC FCIArb (Deputy Chair of CIArb's Board of Trustees) to explore the issues in conversation.

Catherine gave an update on CIArb's work in 2020 and explained the organisation's three key strategic goals – global promotion, thought leadership and inclusiveness – as well as developing and supporting the global community of dispute resolvers.

Francis talked about his career and what CIArb has meant to him. He said:

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

"With fellowship comes recognition, and with that comes the proverbial foot in the door of the arbitration community... CIArb is the perfect gateway to get to know the community. You get out what you put in."

A full report and video recording of the event can be found online at ciarb.org/news/meet-the-ciarb-leaders

RESEARCH

International Dispute Resolution Survey

Enforceability is the key factor in selecting a seat for international arbitration, according to a survey of legal professionals and clients carried out by the Singapore International Dispute Resolution Academy and PwC South East Asia Consulting. The *International Dispute Resolution Survey 2020 Final Report* also found that, for clients, the most important factor in international arbitrations is neutrality/impartiality. For both legal users and clients, cost and speed are important aspects of the arbitration process, but not the most crucial. The survey included responses from over 300 individuals in 46 countries and was published in July. Read more on page 18.

Dispute Appointment Service (DAS) Convention 2020: Handling disputes in an era of uncertainty

Keynote address by
Professor Dr Mohamed S. Abdel Wahab MCIArb

25 November 2020 | 1.00pm - 5.30pm GMT | Online event

In its eighth year, this flagship event aims to provide ADR practitioners and businesses with a forum to address and discuss practical issues associated with the role performed by dispute resolution professionals.

Cost(s): CIArb members – free of charge
Non-members – £10 (including VAT)

Registration: ciarb.org/events/das-convention-2020/

Join the conversation: **#dasconvention**

Alexander Lecture 2020: The future of dispute resolution

delivered by
Professor Richard Susskind OBE

12 November 2020 | 6.00pm - 7.30pm GMT | Online event

Don't miss the chance to attend this flagship event, now in its 46th year, broadcasted online for the first time.

Cost(s): Free of charge but pre-registration is a must.

Registration: ciarb.org/events/alexander-lecture-2020/

Join the conversation: **#alexanderlecture**

Dispute resolution is set to enter a new world

The change ushered in by COVID-19 is just the start, argues **Richard Susskind**

In March this year, alternative ways of resolving disputes were rapidly introduced around the globe. This was not a mere blip. The COVID-19 crisis is precipitating irreversible and pervasive change in the worlds of arbitration and litigation. This change is not only technological, starting with the widespread use of video hearings, but it is cultural too. Minds have been opened and changed. Assumptions have been swept aside.

In November last year I published a book, *Online Courts and the Future of Justice*, in which I discussed many of the questions that are now preoccupying legal commentators, scholars and practitioners. Is a court a service or a place? Do we always need to congregate in person to resolve our legal differences? What is lost and what is gained when proceedings are conducted online? Can evidence and arguments be presented adequately without appearing in a hearing room? Will the quality of decision-making be prejudiced?

These questions may have appeared as inquiries for some distant future. Today, they raise immediate practical and policy issues. The main focus so far has been on video hearings: on the technological options, on procedures and protocols, on the quality and reliability of internet connection, on how to argue and bring evidence effectively, and on whether clients were satisfied with this remote alternative.

Many lawyers seem to think that the digital revolution in dispute resolution is all but concluded. This is wrong-headed. In truth, we are at the foothills. What we have seen so far has largely been what I call automation – the application of technology to streamline, improve and deliver pre-existing practices. In short, we've dropped hearing rooms into Zoom. The first 60 years of legal technology have been dominated by automation. Far more potent, though, will be the use of technology to bring about transformation, enabling us to resolve disputes in radically different ways.

Asynchronous online hearings are transformative. Arguments and evidence are submitted to adjudicators in electronic form and, in the crudest of terms, there follows an exchange between the parties akin to an exchange of emails. The adjudicator's decision is also delivered in electronic form. There is no oral evidence, nor physical hearings. The adjudicators and parties do not need to be available at the same time to contribute (this is the asynchronous element). For low-value disputes, this could be quicker, more convenient and less costly.

Looking further ahead, in ways that seem as improbable to lawyers today as email did in the mid-1990s, I can see dispute resolution processes being transformed by more advanced technologies, hosted perhaps in a wide range of virtual realities with some decision-making by AI. But we should get through the virus first.

Online hearings could be quicker, more convenient and less costly

Professor Susskind will be delivering CIArb's 2020 Alexander Lecture ('The future of dispute resolution') online on Thursday 12 November. For more details or to register, head to ciarb.org/events/alexander-lecture-2020

ABOUT THE AUTHOR
Professor Richard Susskind OBE is President of the Society for Computers and Law, Chair of the Advisory Board of the Oxford Internet Institute, and, since 1998, has been Technology Adviser to the Lord Chief Justice of England and Wales. The founder of Remote Courts Worldwide (remotecourts.org), he chaired the Online Dispute Resolution Advisory Group of the Civil Justice Council in England and Wales (2014–2015), whose proposals on online courts have been adopted as judicial and government policy.

Vision for the future

Catherine Dixon, CIArb's new Director General, reveals her career story, her plans for the Institute and how she broke a world record

From very early in my career, when I was in practice as a commercial litigator, I've been passionate about ADR and the opportunity it can provide to clients to effectively resolve their conflicts and disputes.

Reflecting on my career to date, I realise that ADR has always been a recurring theme. As such, being appointed as Director General of CIArb enables me to realise a personal ambition to promote the benefits and use of ADR around the world.

I hope that, in the months to come, I can meet with many of CIArb's members. In the meantime, I'd like to take this opportunity to introduce myself and tell you a bit about my career.

Reflecting on my career, I realise that ADR has always been a recurring theme

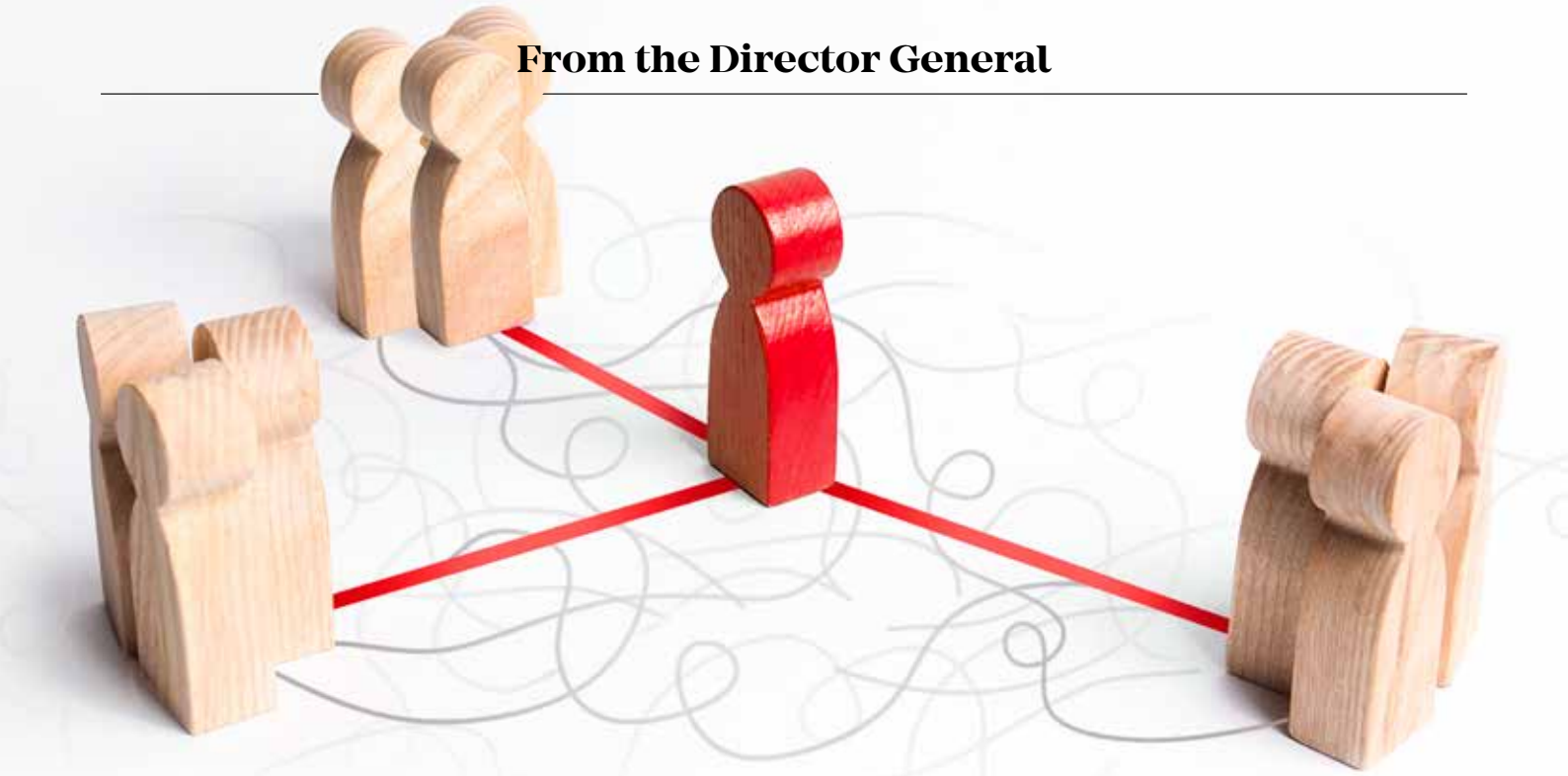
Catherine wants CIArb to promote equality, diversity and social mobility within the profession

MY EARLY CAREER JOURNEY

I was born in the North of England into a family that had not been to university. I left school at 16 in search of work and soon realised that I needed an education if I was going to succeed. I studied law and worked with the British Army as an officer in the Royal Corps of Signals to fund myself through my studies.

I qualified as a solicitor in England and Wales and worked in private practice as a commercial litigator. I regularly used mediation as a way of helping clients to resolve their disputes; I observed that even if the mediation did not result in an immediate settlement, it always enabled the parties have a better understanding of each other's concerns, and often settlement would follow shortly thereafter.

As I enjoyed working with businesses, I moved in-house and became Commercial Director (and Legal Director) at BUPA (a private health provider and insurer). Again, I used ADR, including



mediation, to help resolve disputes, particularly with patients who wanted to be heard and to receive an apology.

I found myself on the executive board of BUPA in my early 30s and took the opportunity to study for an MBA. I've always liked adventure, and I moved to Canada to live and work for nearly four years, including a role as an Outward Bound instructor working with women who were survivors of abuse, and indigenous children.

I returned to the UK to work as General Counsel and Company Secretary of the National Society for the Prevention of Cruelty to Children (NSPCC), and again used ADR techniques.

I took my first CEO role in the NHS and ran NHS Resolution, the organisation that indemnifies the NHS in England. The NHS spends more than £1bn per year on resolving claims and has balance sheet provisions of around £56bn. NHS Resolution spent around £0.5bn per annum on legal costs and had at any one time around 16,000 claims ongoing. Although compensation when things go wrong is necessary for many patients, for others mediation was an effective tool. I was therefore proud to become an accredited mediator and establish mediation within the NHS.

REPRESENTING MY PROFESSION

The opportunity to become CEO of the Law Society of England and Wales arose and I had the privilege of being a leader of my profession. In the role, I was keen to develop training and support professional standards, promote the rule of law and enable access to justice.

ABOUT THE AUTHOR

Catherine Dixon is Director General, CIArb. She has previously held Chief Executive roles at the Law Society of England and Wales, Askham Bryan College and NHS Resolution. Catherine has also held senior leadership roles at the NSPCC and BUPA. She has served as a trustee and non-executive director on a number of boards, including the Centre for Effective Dispute Resolution, and she is currently a trustee of Stonewall. Catherine is a solicitor and accredited mediator.

With challenge comes opportunity and the need to come together

It always struck me that ADR provides an opportunity to support access to justice, particularly at times when, as has been the case this year, accessibility to courts is restricted.

The Law Society of England and Wales also promotes equality and diversity, including social mobility, encouraging the best to join the solicitor profession irrespective of their background.

I also felt passionate about ensuring that the Law Society reflected the diverse profession it represented. This is something that I am keen to continue to develop within CIArb, and equality and diversity are integral in our new corporate strategy.

BREAKING A WORLD RECORD

I spent time running a college specialising in further and higher education before realising one of my other personal ambitions to break the world record for cycling around the globe. I returned to the UK just before the coronavirus lockdown having broken the world record for circumnavigating the globe on a tandem and took up the post as Director General of CIArb in May.

Although I'm joining CIArb at a challenging time, with challenge comes opportunity and the need to come together to work ever more collaboratively. I'm working on a revised strategy for CIArb with a focus on globally promoting the constructive resolution of disputes, establishing CIArb as the global inclusive thought leader, and developing and supporting an inclusive global community of diverse dispute resolvers.

I'm looking forward to working with you to realise CIArb's vision of a world where disputes are resolved promptly, effectively and creatively.

CDixon@ciarb.org

SHUTTERSTOCK

HOW TO...

Communicate in remote meetings

Paul Stevens explains why there's more to effective online communication than just changing out of your pyjamas

At their best, remote meetings can be a wonderfully cost-effective, convenient, flexible and time-saving mode of communication. But at their worst they can be frustratingly impersonal, confusing and ineffective.

While there are plenty of similarities with face-to-face (F2F) meetings, remote (online) meetings present very different challenges and require a very different approach. Effective remote meetings require more time (slower speech, more checking, more clarifying, more confirming) and more prescriptive ground rules and procedures.

Perhaps the most important point of all is that you should, whenever possible, use video for your online meetings. Video humanises the room. Without video, you'll never know if the silence is because somebody is checking their emails, rolling their eyes in disdain or nodding their head in agreement.

NON-VERBAL COMMUNICATION

Between 70% and 93% of all communication is non-verbal. Imagine a colleague storms into the office, slamming the door. You ask, "Are you all right?" They snap back in an angry tone, "I'm fine!"

Which message do you believe: the non-verbal signals (behaviour, voice and tone), or the verbal one (the words alone)? Most likely, you'll believe the non-verbal message. We need to be able to pick up on certain non-verbal cues and mannerisms for effective communication.

Video certainly does not solve all of these issues, but it certainly helps a lot.

Between 70% and 93% of all communication is non-verbal. We need to be able to pick up on those cues and mannerisms

ABOUT THE AUTHOR

Paul Stevens is CEO of Mayflower College, Plymouth, UK. He has been involved in English language training and testing for the past 30 years, specialising in Aviation English, Maritime English, Academic English and Business English. His latest projects include: Can You Hear Me? – a training programme to promote better communication during remote meetings; and SayWhatEnglish.com – a training programme to show native English speakers how to filter and simplify their English when communicating with non-native English speakers.

SHUTTERSTOCK

HOW TO...

BEFORE THE MEETING

Make sure everyone receives an advance copy of the 'framework' of the meeting, including:

- Key talking points;
- The meeting's structure;
- Who will participate;
- What each participant is responsible for bringing to the meeting; and
- Any relevant documents, files or research that participants are expected to consult before or during the meeting.

Establish the ground rules. Who is the leader/facilitator of the meeting? How will you ensure that everyone's opinion is heard and that the loudest voice does not dominate? Will there be 'free speech' or will the leader/facilitator invite participants to talk? How will you know when someone has finished speaking?

In F2F meetings, we generally don't need to tell people in advance not to walk around during the meeting, not to take calls or check their emails.

Zoom, Skype and Microsoft Teams have been essential in recent months

For online meetings to work well, we need to slow down and over-communicate

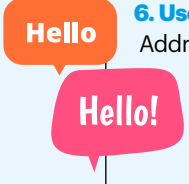
In remote meetings, though, we do need to establish the etiquette. Decide what language the meeting will be held in, and think about whether any of the participants are non-native speakers of that language. Set out that respect, honesty and politeness are essential.

Online meetings give us an opportunity to communicate in ways we could only have dreamed of 20 years ago. But it is a mistake to think that they can be conducted in the same way we conduct F2F meetings. For them to work well, we need to slow down, over-communicate, be much more deliberate and take a more prescriptive approach to the way participants conduct themselves.

15 TIPS FOR EFFECTIVE REMOTE MEETINGS

1. Slow down: In the same way that we usually speak more slowly when giving a presentation to a large number of people, we must also slow down our speech during remote meetings. Audio/visual delays and less obvious non-verbal communication cues demand that we are more precise and concise with our speech and give people more time to process what we're saying.

2. Involve everyone: One of the key roles of the leader/facilitator is to involve all the participants. Invite people to introduce themselves/their work, allocate tasks or ask questions to others. That way, they are more likely to pay attention and resist the temptation to multi-task.



3. Maintain focus: Discourage side chats and distractions.

4. Silence is golden: People need time to process information. It can be helpful to build breaks into the meeting to allow them to do this.

5. Use linguistic markers: Phrases such as 'I have something I'd like to mention here...' can help to get people's attention before you make your point.

6. Use people's names: Address questions to people by name and thank them for their input by name. In some situations (especially voice-only meetings), it can be useful to add your own name when speaking too.

7. Don't guess: if communication becomes intermittent/broken, don't try to fill in the gaps by guessing.

8. Summarise: You need to recap and check for understanding/agreement more frequently than you would in a F2F meeting.

9. Consider the need to socialise: For meetings with colleagues and customers, it can be helpful to set up a virtual 'water cooler' where participants can hang out for a few minutes before and after the meeting to 'catch up'.

10. Be aware of your own body language: Webcams can make your movements/gestures appear much more exaggerated. When talking, look at the camera, not your computer.

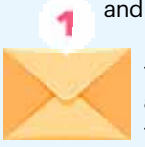
11. Use screenshare: This can greatly improve participants' engagement.

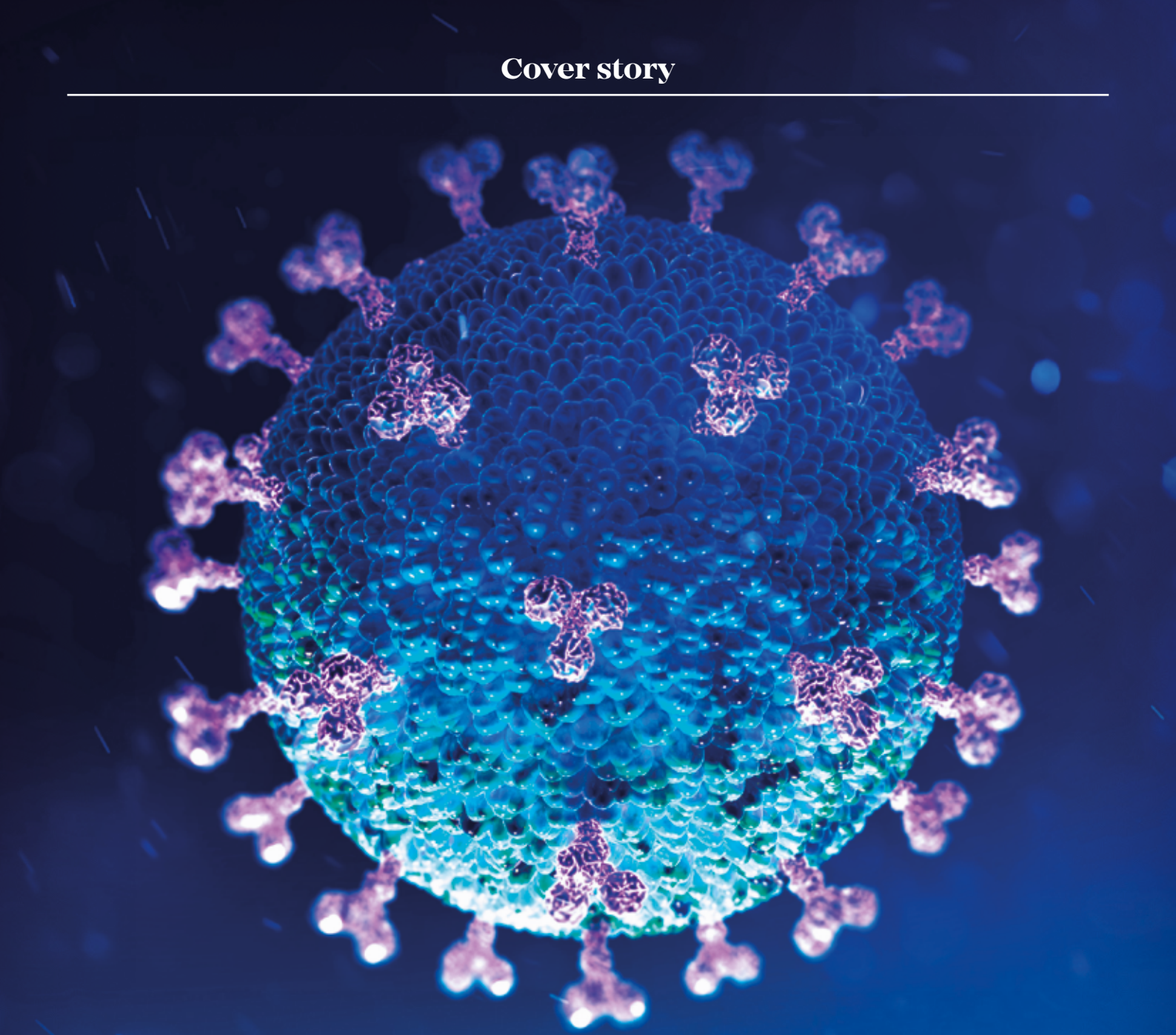
12. Use mute carefully: Keeping microphones on can reduce the risk of someone multi-tasking in the background. In larger meetings, however, encouraging people to mute themselves can save bandwidth and prevent distracting sounds.

13. Limit the number of participants: If you want a high level of interaction, a meeting with four people is easier to manage than one with 10.

14. Keep the meeting short: Maintaining focus and concentration in an online environment is challenging after about 20 minutes.

15. Follow up: Use various media (emails and recordings of the meeting, for example) to consolidate and continue the conversation.





Lessons from the pandemic

Robert Outram looks at how the profession adapted to COVID-19 and how it might change as a result

The empty streets of Vienna, where the Vis Moot was due to take place

It is far too early to say, at the time of writing, that the crisis around the pandemic is over, or even that the beginning of the end is in sight. It is possible, however, to evaluate how the world of ADR coped with the initial challenges posed by the virus and what we may have already learned.

Jonathan Wood MCIArb is Head of International Arbitration with RPC, based in London, and Chair of the CIArb Board of Trustees. In the English system, he says, the commercial side of the legal world "has managed to cope exceptionally well".

What, though, of arbitration? Wood argues that for many in the profession, an important breakthrough came with Vis Moot and Vis Moot East, the international debating events that had been due to take place in Vienna and Hong Kong respectively.

It was decided these would have to be virtual events. Wood says: "For many of us that first day [at the moot] was a revelation. There were teething problems, we were jumping from the platforms to Skype on our smartphones, and we weren't quite sure how it was working. It was a great shock to us... By day two you had a whole legion of arbitrators and students running hearings with people from Brazil, England, Russia, France, Iran – teams from all over the world.

"All of a sudden, people were saying, 'Hang on, this system works!' And very quickly it caught on."

An important breakthrough came with Vis Moot and Vis Moot East

Top down: Jonathan Wood MCIArb, Professor Doug Jones AO, Jane Gunn FCIArb

As he puts it: "We have been propelled into the use of technology in a way that I don't think would have happened for some time."

Professor Doug Jones AO is a leading independent international commercial and investor-state arbitrator based in London, Toronto and Sydney. He is also an International Judge of the Singapore International Commercial Court.

Professor Jones says that ADR professionals have faced challenges on two fronts: personal (such as the need to work in the home environment, or the limitations of internet connectivity and hardware, not to mention tension and uncertainty) and systemic (such as changing systems as take-up of virtual platforms shifts, coping with international time zones or the need to acquire new presentation and adjudication skills for online proceedings).

MEDIATION

Jane Gunn FCIArb is a mediator and Chair of the CIArb Management Board. She says: "At the beginning, everyone was focused on how we were going to adjust to lockdown ... Face-to-face mediations had to stop immediately. The challenge has been: is doing a mediation online with Zoom and other technology adequate? Does it offer the same kind of benefits to the clients and are there even perhaps ways in which it enhances that?"

Mediation by video link presents an even bigger challenge than other forms of ADR, she argues: "It is all about communication; listening and problem-solving are at the core of it."

Not long after the UK lockdown started, Gunn led two mediation processes, one of which involved parties in different countries. She advises that

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preparation is very important and it is crucial to set the ground rules ahead of a mediation process.

Gunn adds: "The parties have got to feel comfortable with the technology. It's all very well me feeling confident with Zoom, but they have to be too. We also had a practice session [prior to the mediation itself] to check that we could all connect."

Online mediations do come with some advantages, Gunn points out. As she puts it: "One of the benefits for the parties is that they are where they have chosen to be, in their office or at home. They haven't dressed up in a suit to come to a lawyer's office in London... You are in your own space."

Gunn refers to herself as a "barefoot mediator", and that is a good illustration of the relative informality that can come with online processes. Another advantage, she points out, is that for some people it can be less stressful not to have to confront the opposing party in person.

In other ways, though, Gunn feels there are challenges for online mediation, not least the fact that it is much harder to read body language on screen. As she puts it: "There's an energy in the room and, online, that's missing."

CIArb'S RESPONSE

CIArb itself was quick to react to the lockdown in the UK and elsewhere in the world. Training courses and public speaking events were transferred to online platforms, and events such as the Alexander Lecture with Cherie Blair QC went out to a worldwide audience.

As Wood notes, online training not only addresses the challenges of the coronavirus lockdown, but also

For some people it can be less stressful not to have to confront the opposing party in person

makes training more accessible for individuals in more remote locations, reducing the difficulty and cost of attending, and increasing diversity within the ADR profession.

The CIArb team was also aware of remotecourts.org, an information-sharing initiative hosted by the Society for Computers and Law, funded by the UK LawTech Delivery Panel and supported by Her Majesty's Courts & Tribunals Service.

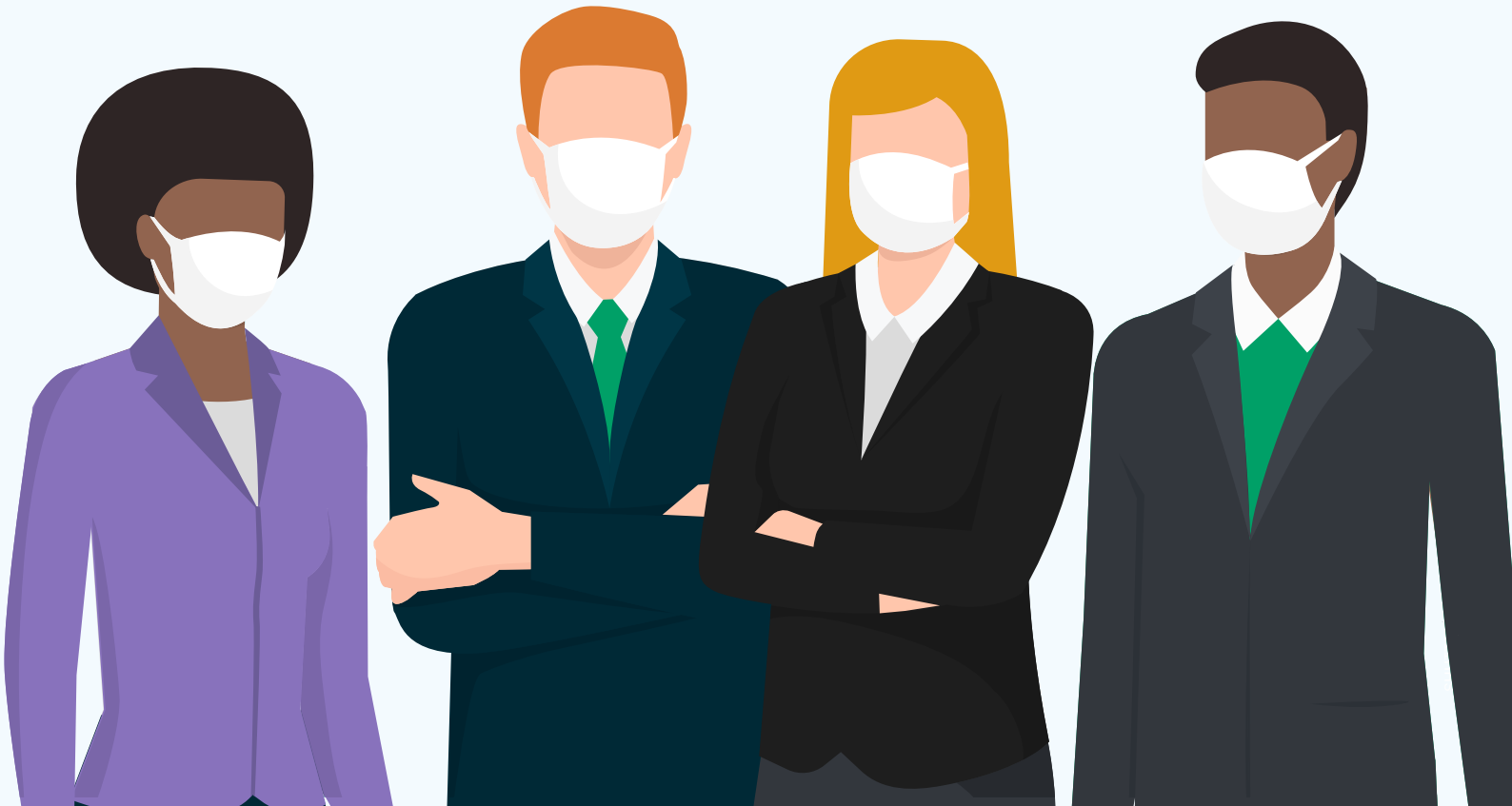
Wood says: "We decided we should do this for the ADR world, and within about two weeks we had virtualarbitration.info up and running."

The Virtual Arbitration website was set up with funding from CIArb, the DIFC-LCIA in Dubai, the International Dispute resolution Centre, the London Court of International Arbitration and legal technology specialist Opus 2.

The site is a repository for news and shared experiences in virtual arbitration worldwide. As Wood puts it: "The stories that have come out show that these hearings can be run very successfully, even with evidential hearings and live witnesses."

CIArb also teamed up with the Centre for Effective Dispute Resolution to create a new service aimed at supporting businesses facing disputes (or potential disputes) resulting from the pandemic.

The Pandemic Business Dispute Resolution Service



Not physically having to attend law offices is a benefit for some parties

(PBDRS) offers three options to forestall or resolve a dispute:

- facilitated contract negotiation to agree a change in the relationship between the parties concerned and hopefully prevent a dispute;
- mediation to address an existing dispute; or
- fast-track arbitration leading to a final and binding award decided by a single arbitrator.

CIArb hopes that the PBDRS will help avoid too much of a backlog in the courts and save parties time and money. But can ADR in general help to address the challenges facing legal processes around the world?

Professor Jones comments: "There has most certainly been an opportunity for arbitration and mediation, at least in the early stages of the pandemic as state courts struggled to adjust. In many places they have now put in place effective ways to avoid backlogs and adopted virtual processes, which have served to enhance their efficiency. Nevertheless, opportunities remain for ADR to 'pick up the slack' and contribute to solving in a cooperative way the adjustment of commercial interests adversely impacted by the pandemic."

It is important to remember, however – as Wood stresses – that successful arbitration and mediation rely on a consensual approach to resolving disputes. An alternative to the courts can, therefore, be offered but not easily mandated.

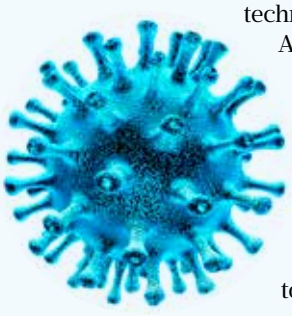
Looking forward, if the various global initiatives to create a vaccine are ultimately successful and society returns to something akin to normal, what will that look like for ADR?

Although lockdown has eased, many habits developed in the pandemic are here to stay

"I don't think it will be 'back to normal'... we have now opened up the possibility of choice"

Professor Jones says: "I think that there will be a 'new normal' in a lot of areas. It has been demonstrated that virtual communication makes extensive international (and national) travel unnecessary in many instances. Videoconferencing will continue after things settle down. It will continue to replace voice-only communications. Reliance on soft copies will... replace the need for hard copies – a trend already under way before the pandemic, but substantially accelerated by it."

He adds that CIArb has a key role to play in ensuring that ADR professionals have the skills to operate in this new world: "The days of skills based on performance in face-to-face hearings are numbered, and the tolerance of practitioners with limited technological skills and resources is now lower. A whole range of new skills need to be honed. Many CIArb members will need assistance [with this]."



Gunn agrees that some things will have changed as a result of COVID-19: "I don't think it will be 'back to normal' because we have now opened up the possibility of choice. However, I for one will be very happy to get out from behind my desk!"

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Take control of your path

Now is the time to focus on your career, advises **Peter Anagnostou MCIarb**

COVID-19 and its aftermath will have a lasting impact on the legal industry. Working from home and virtual meetings with clients has become the new norm. Attending physical hearings is now a novelty and it is still unclear how the workplace will look when we all return to 'normal'. One thing, however, has remained a constant – business has continued to operate and clients have continued to require the services of lawyers.

While many feel that their careers are stagnating or that they are unable to progress with their career due to a number of external factors, others are looking at ways to take control of their own careers by identifying new career paths and building on their own personal brand. In this article, we will look at why ADR is becoming a specialised career, focusing on the key steps that young lawyers should follow in order to take control of their legal careers in these uncertain times.

Long before the pandemic, ADR had been growing in popularity among clients and lawyers alike

WHY ADR?

ADR has long been a niche area of the law, sitting in the shadows of traditional court litigation. ADR professionals are appointed as third parties to assist in the amicable resolution of disputes. They employ a number of tools to advise, facilitate and resolve disputes. Long before the pandemic, however, ADR had been growing in popularity among clients and lawyers alike as an alternative to traditional court litigation, and even – in the case of mediation – as an alternative to arbitration.

Construction contracts, for example, will typically require the parties to undertake a number of steps prior to court or arbitration. These include the respective parties attending meetings in an effort to resolve the dispute amicably, failing which, they may then be required to refer the matter to a dispute adjudication board (DAB), mediation or expert determination. This demonstrates the increasingly important role that ADR has in construction disputes alone.

With the temporary closure of courts in some jurisdictions and the move by many more to online hearings, clients seeking swift access to justice may require alternatives to waiting for courts to reopen or competing with the many postponed hearings in order to secure an online hearing date with a judge

ABOUT THE AUTHOR

Peter Anagnostou MCIarb is a Senior Construction Lawyer at DLA Piper based in Dubai, UAE. He advises a variety of clients on construction and engineering disputes arising out of major projects, infrastructure and residential developments, with experience acting in international and domestic arbitration, commercial litigation, adjudications and mediation. He is a member of the CIArb UAE Branch Committee, Chair of the CIArb Young Members Group (YMG), member of the YMG Global Steering Committee and the UAE Representative on the International Bar Association Young Lawyers Committee. He is an active member of the Chartered Institute of Building and the Australian Business Council Dubai, and is listed as a Rising Star by Expert Guides.

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Opportunities to rise to the top of your field are still prevalent – so long as you recognise the potential of smart tools

or arbitrator. Alternatives such as mediation or party-agreed adjudication/expert determination are ready to meet that demand.

YOUNG LAWYERS AND ADR

Young lawyers should seek practical experience working on all aspects of litigation, arbitration, adjudication and mediation. This experience will form the backbone of your career, which should be supplemented by specialised training. This training should cover the modules set out by CIArb, but can also expand to cover other skills that are becoming increasingly relevant to lawyers in the time of COVID-19 – such as legaltech (legal technology solutions).

The adoption of legaltech has been accelerated by the pandemic, and it has been embraced by the legal community as a vital tool for judges, mediators and arbitrators. Mastering this technology will greatly benefit younger practitioners as a means of demonstrating their ability to adapt and support clients through any circumstance. Finding new ways to be of service by offering legaltech skills that complement the skills of more senior practitioners will also prove your value to the firm and the client.

For young mediators and arbitrators, legaltech offers an opportunity to step out from the shadows of more senior practitioners. A combination of experience and the skills related to your understanding of legaltech, and the ability to facilitate and manage an online hearing, could greatly improve your prospects for an appointment. Dispute management is also a vital skill for any ADR professional in order to ensure that disputes are identified, and managed, early and effectively.

Legaltech offers an opportunity to step out from the shadows of more senior practitioners

NEXT STEPS

2020 can be a year of opportunity for ambitious young lawyers determined to take control of their own careers. ADR is an exciting specialisation to pursue and an effective complement to litigation and arbitration. As the pandemic continues to disrupt our way of life, young lawyers should be seeking opportunities to grow and develop their own practice and profile.

This can be achieved by bringing yourself to market through powerful networking over LinkedIn, Zoom, phone and in person with former colleagues, professors, clients and contacts who are in senior roles – not limited to your own level – to demonstrate your skills and what you can offer in the future.

I would also advise that you demonstrate thought leadership through writing for industry publications such as CIArb's *Arbitration: The Journal of International Arbitration, Meditation, and Dispute Management*, participating in webinars as either a speaker or an audience member, and engaging with the legal community through social media platforms.

ADR can offer unique solutions to the problems we are currently facing, and now is the time to demonstrate what you can bring to the table.

The big picture on dispute resolution

A landmark survey from SIDRA lifts the lid on how businesses and their legal representatives view the resolution of cross-border disputes

Enforceability, neutrality/impartiality and cost are the three most important factors in the choice of a dispute resolution mechanism, according to a new international survey of legal advisers and their clients.

The *International Dispute Resolution Survey* is the first international study exploring how businesses and their legal representatives make decisions about resolving cross-border disputes and their choice of dispute resolution mechanism. It was carried out by the Singapore International Dispute Resolution Academy (SIDRA) with PwC South East Asia Consulting and based on a poll of 304 respondents from 46 countries, including legal and client users (64% and 36%, respectively) of dispute resolution processes.

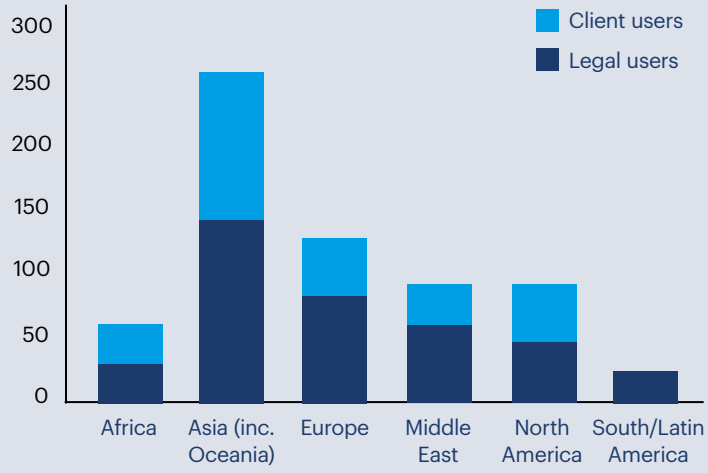
CIArb's Director of Membership, Camilla Godman FCIArb, spoke on a panel at a webinar to launch the survey on 3 July. The panel was moderated by Michael Peer FCIArb, Head of Disputes Advisory at PwC South East Asia Consulting. The other panellists were Justice Anselmo Reyes FCIArb (International Judge of the Singapore International Arbitration Centre) and George Lim SC (Senior Counsel and Chair of the Singapore International Mediation Centre).

The study found that arbitration is a more popular route for legal users than client users, with 87% of the former having used arbitration, compared with 52% of client users. The key factor for legal users was enforceability, while for client users it was neutrality/impartiality.

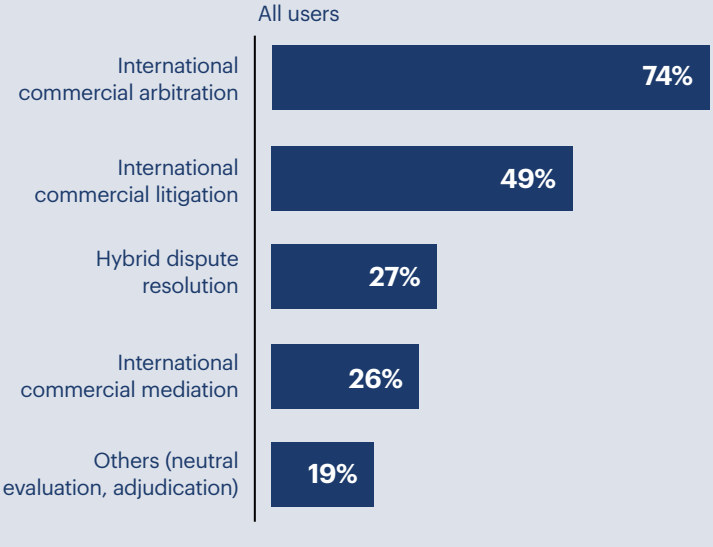
Arbitration was also the dispute settlement mechanism of choice for investor-state dispute settlement (ISDS), with a majority of users opting for institutional or ad hoc arbitration to resolve investor-state disputes. Users selected enforceability, political sensitivity and impartiality as the top three factors

The study found that arbitration is a more popular route for legal users than client users

Proportion of respondents by region of principal operations



Choice of dispute resolution mechanism



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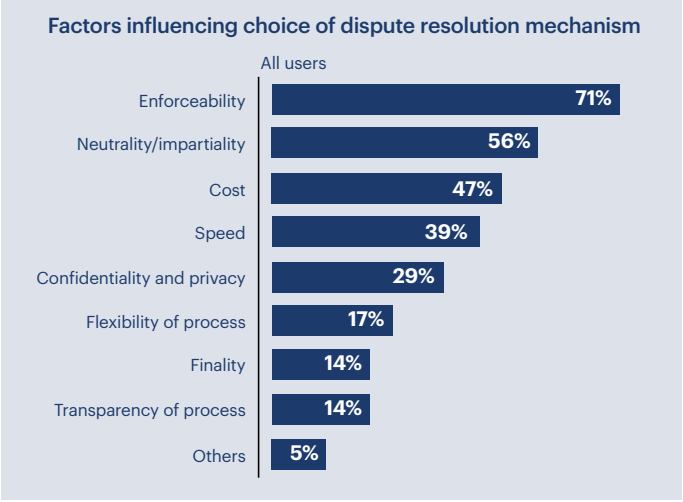
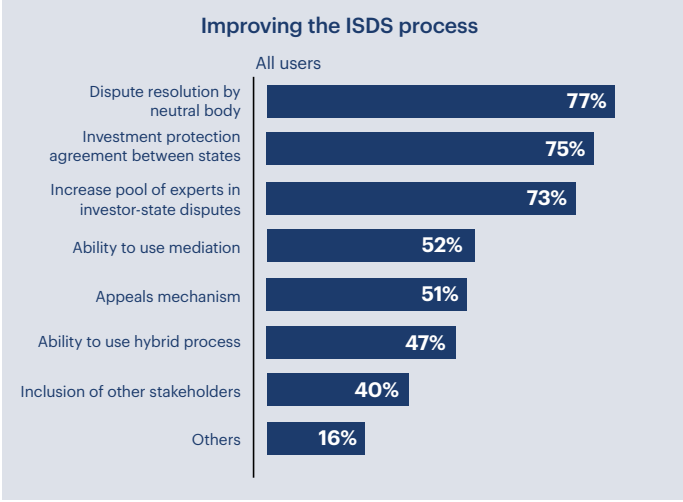




influencing their choice of mechanism in ISDS. Despite the dominance of arbitration, users indicated an openness to selecting other approaches in investor–state matters, such as litigation and mediation.

Responses suggest a need for reform in ISDS, the study finds. The three most favoured options for reform were as follows (percentages refer to the respondents who said developments were 'extremely useful' and 'useful'):

- dispute resolution by a neutral body (77%);
- investment protection agreement between states (75%); and
- increasing the pool of experts in investor–state disputes (73%).

The SIDRA report notes that the EU proposed a two-level 'investment court' to arbitrate in ISDS disputes, but the issue of what would work best continues to be a point of debate.

Client users were more likely to be satisfied with mediation than legal users

Factors influencing choice of dispute resolution mechanism (above, left): Data refers to the respondents who ranked the factor as one of their top three considerations.

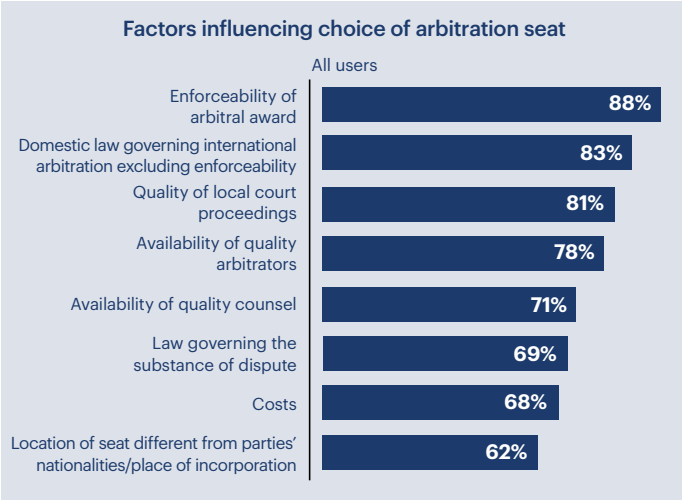
Improving the ISDS process (above, right): Percentages refer to respondents describing developments as 'extremely useful' or 'useful'.

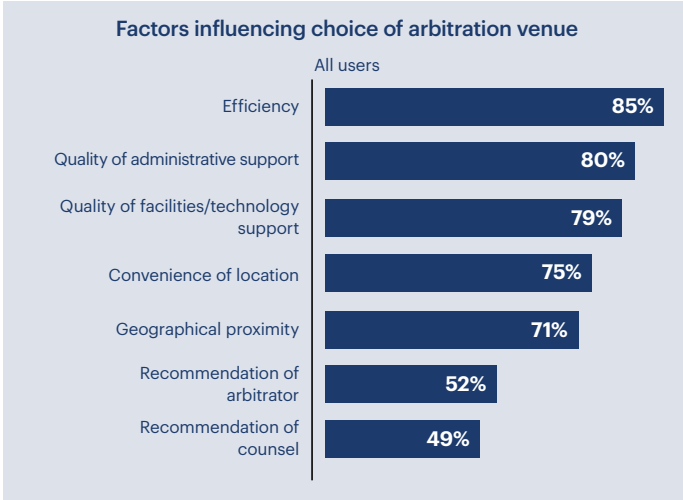
For mediation in international commercial disputes, key factors for those responding were impartiality/neutrality, speed and confidentiality. Client users were more likely to be satisfied with mediation than legal users. SIDRA notes that enforceability for mediation is likely to be strengthened following the adoption last year of the Singapore Convention.

Hybrid mechanisms have the potential to reduce the perceived disadvantages of stand-alone arbitration or mediation, the study finds. Where preservation of parties' business relationships, efficiency and cost are important factors, users chose hybrid mechanisms as opposed to stand-alone arbitration.

Perhaps not surprisingly for a study in which Asia-based users were strongly represented, the seats most used for arbitration by respondents were – in descending order – Singapore, London and Paris. The single most important factor in choosing an arbitration seat was enforceability, while the most important factor for a venue was efficiency.

Read and download the full paper, *International Dispute Resolution Survey: 2020 Final Report*, at sidra.smu.edu.sg





Percentage of respondents who indicated factors were 'absolutely crucial' and 'important'

Are we asking the right questions?

Andrew Miller QC says the dominance of lawyers in mediation is linked to how it is used in dispute resolution

The theme for this year's CIArb Mediation Symposium – to be held online on 7 December 2020 – is 'Mediation as a multidisciplinary practice'. The aim is to explore the variety of skills a mediator should ideally have and which disciplines are best placed to provide those skills. This one question raises so many more in respect of the nature of those skills and the practice of mediation in general.

As someone who practised as a barrister for over 25 years before becoming a full-time mediator, I am often asked whether it is necessary for a mediator to have been a lawyer. My response is always an unequivocal 'no'. Of course, having been a lawyer should provide a mediator with knowledge and understanding of the legal dispute resolution process. But in my view that alone is not enough to make any lawyer a good or great mediator, it is simply one skill that a mediator can draw on to perform effectively. There are many outstanding non-legal mediators.

The usual follow-up question is: "Well, if that is the case, why is it that most mediators are either lawyers or ex-lawyers?"

The reason why mediation is dominated by legal mediators is because of how it is utilised

It is a valid question and its premise is factually correct. But the reason why mediation is dominated by legal mediators is because of how it is currently utilised in the UK and indeed in many parts of the world.

AN ADJUNCT TO LITIGATION

Mediation, as we know, is described as being an ADR process. But so is arbitration. I have always found it strange that both mediation and arbitration are put into the same ADR basket. Arbitration is a genuine ADR process. Parties have agreed, usually by contract, that in the event of a dispute the matter will not be referred to litigation via the courts but will be resolved by arbitration. Mediation, however, has never been able to stand alone from either litigation or arbitration. Mediation, in the majority of cases, is attached to another dispute resolution process, either arbitration or, more commonly, traditional litigation.

Mediation may be the first or an early step in a contractual dispute resolution mechanism. Its greatest use or uptake, however, is within the litigation or court process and, as such, mediation is probably better described as an adjunct to the litigation process, as opposed to being an alternative. The fact of mediation primarily being an adjunct to the litigation process explains why such a substantial number of mediators have a legal background. When

ABOUT THE AUTHOR

Andrew Miller QC FCIArb is a mediator and arbitrator and Trustee of CIArb. He is based at 2 Temple Gardens, London.

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Trust between parties and the mediator is a prerequisite for positive outcomes

litigation is at the forefront of most disputes, many of those involved in the dispute (especially the lawyers) perhaps feel more comfortable with having a lawyer as mediator. Also, more often than not, mediation takes place when the parties are some way into the litigation process.

SO, WHAT DOES THIS MEAN IN REALITY?

It means that in many disputes the parties find themselves entrenched in the litigation process. The litigation process has effectively taken over as being the driver of the dispute, with the subject matter of that dispute almost taking a back seat. By the time the parties get to mediation (if they do), the dispute has moved from being an argument between two or more parties over – for example – payment for work done, the quality of goods purchased or how much time a contractor is entitled to for additional works, to being one made up of legal arguments and legal rights. The parties, guided by their lawyers, will have become positional in their approach, with their arguments being firmly based on who is right and who is wrong.

None of this is surprising. The parties will have been proceeding in what I call a determinative mode. Everything, from the pleadings to witness statements to experts' reports, has been prepared on the basis of the parties' arguments being determined by someone else – the judge or arbitrator(s). It is therefore not surprising that positions become polarised, and become even more polarised the longer the dispute continues. And I still have not even mentioned the issue of the legal costs, which often become the main stumbling block to any settlement and can often be the most painful part of any litigated or arbitrated dispute.

In many disputes... the litigation process has effectively taken over as being the driver of the dispute

IT DOES NOT HAVE TO BE LIKE THIS

How do we create a culture where mediation is allowed to be a proper alternative to both litigation and arbitration? I believe that this will require a change of ethos on the part of mediation users and specifically a change on the part of lawyers who in most cases remain the gatekeepers to the mediation process.

The first step is the encouragement of Early Stage Mediation (ESM). This is not a new or different type of mediation: it is simply bringing about a culture where the use of mediation happens sooner rather than later. The effect of this is that the parties are better placed to consider the nature of the dispute itself. They will not have become bogged down with entrenched positions. The earlier the mediation takes place, the better chance parties have of remembering what got them to be in dispute and what it was like before the dispute; and they may have a clearer view of where they could be if they can bring their dispute to an end.

Additionally, the huge benefit of ESM is that it does not necessarily have to follow the usual 'one size fits all' of the one-day mediation. The COVID-19 pandemic has shown us the versatility of remote mediation and the ability to mediate over a period of time, as opposed to simply one day. Remote mediation is something that can be utilised to great effect in the ESM process.

The earlier a dispute is able to find its way to mediation, the more likely the parties are to avoid any litigation or arbitration process. A mediation will not, therefore, be connected to the litigation or arbitration process. Although it will always be a necessity to have a skilled mediator, reliance on a mediator with legal expertise may no longer be so important.

THE IMPORTANCE OF TRUST

So, let's go back to the original question. I would counter with another question as to what skill or attribute a mediator should bring into the mediation. There is, of course, no one answer to this.

I would urge any newly qualified or aspiring mediator to find that skill or ability within them that can make a difference in a mediation setting, to facilitate two or more parties to reach a settlement. What that skill is will depend on the background of the mediator and the type of dispute. It may be a sociological or psychological skill, an ability to show compassion and empathy or expertise in a specialist area. A mediation may require a mediator with knowledge of, for example, quantum physics, forensic accountancy, how a drug company brings a new drug to market, the interaction of employers and employees in large corporations, how a construction project is developed, designed and built, or international trade and how governments deal with each other in cross-border disputes. It is clear that these skills go far beyond those of a lawyer.

But there is something else. Whether you have been a lawyer or quantum physicist, your knowledge and specialism will come to nothing unless you are able to communicate with others. Communication, whether by listening or speaking or both, is the vital skill needed by any mediator. The key discipline – one that any good mediator has in their toolbox – is the ability that allows a party's position to be heard and causes a party to alter its perception of the dispute.

Your knowledge and specialism will come to nothing unless you are able to communicate with others

Is there a name for that discipline? Probably not. But I will try to give a name to the element that lies behind that discipline, and that is trust. It is not so much a skill as something that has to be earned by the mediator in any mediation. Without gaining the trust of the parties in the process, the mediation is unlikely to succeed.

Given the success of past CIArb Mediation Symposiums, it may be that we have an alternative name for this discipline or element by the end of the day on 7 December 2020.

It all depends on the attendees asking the right question.

LEARN MORE

The 13th Mediation Symposium will take place online on Monday 7 December 2020. The day will draw together presentations, deliberations and debates around 'multidisciplinarity' and the skills and practice of mediation. Although targeted at practitioners, this flagship event will also be of interest to academics, lawyers, politicians and the judiciary, as well as business leaders with an interest in the developing world of mediation. To register, or for more details, visit ciarb.org/events/mediation-symposium-2020/

Mediation Symposium 2020: Mediation as a multidisciplinary practice

Keynote address by
George Lim SC

7 December 2020 | 9.35am - 4.35pm GMT | Online event

The 13th Mediation Symposium will draw together presentations and deliberations around 'multidisciplinarity' and the skills and practice of mediation.

Cost(s): CIArb members – free of charge

Non-members – £25 (including VAT)

Registration: ciarb.org/events/mediation-symposium-2020/

Join the conversation: **#mediationsymposium**

Guidance fit for 2020

Ciarán Fahy C.Arb FCIArb details revisions to four adjudication Guidance Notes published by CIArb, partnering with the Adjudication Society

On 8 July 2020, CIArb formally launched four adjudication Guidance Notes published in conjunction with the Adjudication Society. These were revised and updated by the Adjudication Sub-Committee of the Practice and Standards Committee (PSC) and replace similar Guidance Notes published in 2013. The PSC is one of three standing committees of CIArb.

The four Guidance Notes are as follows:

- *Construction Contracts and Construction Operations*;
- *The Scheme for Construction Contracts*;
- *Natural Justice*; and
- *Adjudicator's Liens*.

As part of a general update, the PSC decided to revise the 2013 adjudication Guidance Notes and allocated this task to the Adjudication Sub-Committee, which concluded that a root-and-branch redrafting was unnecessary. Instead, the sub-committee decided to carry out a general review and update to the four documents to reflect the changes in practice and law since 2013. As part of the review, the four documents were redrafted to be gender-neutral.

The four Guidance Notes are provided to assist adjudicators and parties involved in adjudication in England, Wales and Scotland, and to cover key issues likely to be encountered in adjudications under the Housing Grants, Construction and Regeneration Act 1996 (the Act) and the subsequent Local Democracy, Economic Development & Construction Act 2009. The Guidance Notes are intended to represent current best practice and to set out a sensible and practical approach to questions likely to arise during adjudication.

ABOUT THE AUTHOR

Ciarán Fahy C.Arb FCIArb is a Chartered Engineer, a Fellow of Engineers Ireland and a Registered Consulting Engineer with the Association of Consulting Engineers of Ireland. He has been in private practice since 1985. He is a Chartered Arbitrator and an Accredited Mediator, and currently serves as Chair of the CIArb Adjudication Sub-Committee.

CONSTRUCTION CONTRACTS AND CONSTRUCTION OPERATIONS

This Guidance Note deals with the scope of the Act in England, Wales and Scotland. The application of the Act is limited to construction contracts, as defined in the Act, which broadly means the carrying out of construction operations, also defined in the Act and covered in the Guidance Note, or the provision of professional advice/services.

The sub-committee concluded that a root-and-branch redrafting was unnecessary

SHUTTERSTOCK

The main changes in the 2020 Guidance Note are:

- Attention is drawn to the 2011 amendments to the Act, involving the deletion of section 107, which means that oral and partly oral contracts are now subject to the Act.
- Further clarification is provided in relation to the distinction between the application of the Act to offshore and onshore work.
- Further comment is provided in relation to sections 105(1) and 105(2) of the Act by reference to definition of the site.
- The section dealing with matters excluded from the Act has been further expanded.
- Some additional case law references have been included.

THE SCHEME FOR CONSTRUCTION CONTRACTS

This Guidance Note deals with the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) and the equivalent Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687) as subsequently amended in 2011 Regulations for England, Wales and Scotland separately. Taken together, these Regulations are referred to as the Scheme.

The Scheme itself is set out in two parts, the first of which provides provisions for adjudication that come into effect where a construction contract does not include all of the relevant adjudication provisions from the Construction Act. Part 2 of the Scheme deals with payment practice and provides terms that come into effect where, and to the extent that, construction contracts fail to comply with the relevant sections of the Construction Act. This particular Guidance Note is limited to part 1 of the Scheme, in other words the adjudication provisions. Again, the changes are relatively minor, with the main ones being as follows:

- The introduction of a slip rule in paragraph 22(a) of the Scheme is dealt with.
- The section dealing with differences in procedure between England, Wales and Scotland has been significantly redrafted.
- A number of new paragraphs have been added to part 3 of the Guidance Note dealing with the appointment of the adjudicator.
- A number of new paragraphs have been added to part 7 dealing with the adjudicator's powers.
- Some new material has been added to section 8 dealing with the matters in dispute.

During the revision process, consideration was given to extending this Guidance Note significantly to cover part 2, in other words the payment provisions of the Scheme. On balance, it was felt that this was beyond the scope of this Guidance Note.

The Guidance Note refers to recent case law in relation to the perception of bias

The impact of the pandemic on construction projects could cause a growth in the popularity of adjudication

NATURAL JUSTICE

This Guidance Note deals with the requirement of an adjudicator to comply with the rules of natural justice and sets out what that means, how it is likely to be interpreted and how an adjudicator should behave through initial appointment, conduct of the adjudication and, finally, the making of the decision.

In dealing with the initial appointment, the Guidance Note refers to some recent case law in relation to the perception of bias and suggests the factors that a potential adjudicator should weigh up, as well as information to be disclosed to the parties. There are a number of new sections in relation to the conduct of the adjudication dealing with unrepresented parties, employing third parties and assistants, and making use of the adjudicator's own experience. Finally, there is a new postscript.

ADJUDICATOR'S LIENS

This Guidance Note deals with the question of adjudicator's fees and, in particular, whether it is possible to exercise a lien on a decision until the adjudicator's fees have been paid. This is permissible, and widely practised, in arbitration. There is no significant change to this Guidance Note from the earlier version, although a number of paragraphs have been reworked and there is further consideration of the relevant case law.

The revision of these four Guidance Notes by CIArb, in conjunction with the Adjudication Society, is indicative of the support by the two bodies for adjudication not only in England, Scotland and Wales, but also further afield where adjudication is increasingly used as the dispute resolution method of choice. The popularity of adjudication, and indeed the need for it, is likely to grow even further due to the impact of COVID-19 on construction projects.

THE ADJUDICATION SUB-COMMITTEE
Ciarán Fahy (Chair)
Philip Fidler
Susan Francombe
Jeremy Glover
Rob Horne
Matt Molloy
John Riches

Rebuilding Beirut

Professor Dr Nayla Comair-Obeid C.Arb FCIArb reflects on the devastating blast that hit Lebanon's capital in August

On 4 August, a huge explosion ripped through the port of Beirut, Lebanon's capital. The blast appears to have been the result of a warehouse fire which ignited a reported 2,700 tonnes of ammonium nitrate, killing at least 135 people, injuring around 5,000 and devastating a large area of the city centre.

My colleagues and I were in our office, not far from the epicentre of the blast. Glass and aluminium were everywhere, and the office and common areas of the building were severely damaged. By a miracle, thankfully, none of us was badly hurt.

Lebanese people are resilient, and the next day we started to repair the premises and prepare to reopen. I had already twice experienced my house being bombed, in the civil war. But then, as now, I was determined to remain in Lebanon and help my country to recover.

Destroyed properties in Beirut's Mar Mikhaël neighbourhood

CHALLENGING TIMES FOR LEBANON

The explosion at the port has caused a huge amount of damage, estimated at $3bn or more. Many buildings will need extensive repair and others will need to be rebuilt completely.

The blast is almost certain to trigger another explosion – this time, in disputes, especially regarding insurance claims. At the time of writing, we are waiting for the results of a judicial investigation to determine how the incident should be characterised – for example, as force majeure or as an accident. For many insurance policies, this will determine whether a claim will stand, depending on the wording of the policy.

This is only the latest in a series of challenges for Lebanon, following political instability, a banking crisis that has made it very difficult for deposit holders to withdraw funds or make cross-border transfers, and, of course, the COVID-19 pandemic.

Since the courts have faced a backlog of cases due to the pandemic, arbitration and mediation offer a chance to help resolve disputes. In many cases, arbitration will also be built into the insurance contract. Arbitrators will therefore be playing an important role in resolving these claims and helping Beirut to get back on its feet.

Lebanon will require international help to tackle the challenges it faces

SHUTTERSTOCK

THE NEED FOR JUSTICE

Lebanon has some of the most respected ADR professionals in the Middle East, thanks in large part to investment in training and education over the past few decades. CIArb's Lebanon Branch was established in 2004 and currently offers a range of courses in mediation and domestic and international arbitration. This expertise, I believe, will be invaluable.

Meanwhile, Lebanon will require international help to tackle the challenges it faces, but this help can only be unlocked if our partners have trust in our system of government and the individuals leading it. We need to build a new Lebanon, and not just physically. Corruption must be overcome. The Lebanese people have strong values; they love their country, they are hard workers and they are well educated. They are fighting to live in dignity, but if we lose justice, we lose hope; and that is why we need justice in Lebanon.

ABOUT THE AUTHOR

Professor Dr Nayla Comair-Obeid C.Arb FCIArb is the founder of Obeid Law Firm, based in Beirut. She specialises in international business law and Middle Eastern legislation, and was the founding Chair of CIArb's Lebanon Branch. She is Professor of International Commercial Arbitration at the Lebanese University and Professor of Alternative Dispute Resolution at the Lebanese Judicial Institute. She was President of CIArb in 2017 and is currently Companion of CIArb. She is also an Associate Member of 3 Verulam Buildings.

Case note

International Air Transport Association v Instrubel, NV, 2019 SCC 61

Report by Mercy McBrayer, CIArb Research and Academic Affairs Manager

CIArb has recently appeared as *amicus* in international arbitration cases before the highest courts in the UK, the USA and Canada. These cases raised issues of the domestic application and interpretation of international commercial arbitration law. CIArb and its local branches believe the outcome of these cases could affect the wider practice of international arbitration in these jurisdictions and that acting as *amicus* in such cases is an important step to take in upholding the consistent application of law in international arbitration practice globally. Judgments in the cases in Canada and the USA have recently been issued while the UK case is still pending. The first of these judgments was in the Instrubel case from the Supreme Court of Canada (SCC), where CIArb's Canada Branch intervened as *amicus* on behalf of CIArb.

20 YEARS OF NON-PAYMENT

The Instrubel case looked at the issue of whether the Québec courts had jurisdiction to order garnishment of funds held in a Swiss bank account by a Québec-domiciled entity to satisfy an award in international arbitration. The question was one of civil law, as Québec is a civil-law jurisdiction within Canada. This case arose in an award enforcement proceeding from an underlying international arbitration of a commercial contract dispute between a Dutch manufacturer of thermal imaging technology, Instrubel, and the Republic of Iraq. In 2003, an arbitral tribunal issued an award against Iraq, ordering it to pay Instrubel $32m, plus interest. The International Air Traffic Association (IATA) was not involved in the underlying arbitration in any way.

Instrubel sought to have the award enforced in Canada against IATA

After 20 years of non-payment of the award, Instrubel sought to have the award enforced in Canada against IATA, whose corporate offices are in Montreal. IATA collects fees from airlines on behalf of various states for the use of the airspace over those states. Iraq is one of IATA's client states. Instrubel asked

The appellate court overturned the first-instance decision

SHUTTERSTOCK

The case hinged on a Québec court's enforcement of an arbitral award against Iraq

IATA to turn over the fees it collected and held on behalf of Iraq in satisfaction of the award, since award was a legitimate debt and the fees were an asset of Iraq held in Canada. Instrubel was able to show the court that IATA held $166m in Iraqi funds in a Swiss account, but IATA argued that it did not have any of Iraq's money or property in Canada. IATA also said that it did not hold the money as a creditor, so the Canadian courts had no jurisdiction.

FIRST-INSTANCE DECISION

The judge of the court of first instance agreed with IATA that the money could not be seized and used to satisfy the arbitral award as the money was outside of Canada. The court relied on the application of an analysis of foreign judgments in its finding and did not acknowledge any differences between foreign judgments and international arbitral awards. Instrubel appealed and the Court of Appeal of Québec reversed the decision, saying that the money legally existed on the records at the IATA headquarters, regardless of where the bank account was located, and that the Canadian courts had jurisdiction over the funds. It ordered IATA to pay Instrubel the outstanding award. IATA appealed this finding to the SCC.

ARBITRATION-FRIENDLY JURISDICTION

In its *amicus* brief to the SCC, CIArb's Canada Branch argued that international arbitral awards and foreign judgments are not equivalent and so different principles should apply to their enforcement. The voluntary nature of arbitration agreements justifies a liberal approach to enforcing arbitral awards. The SCC ruled eight to one in favour of Instrubel, upholding the analysis of the appellate court and finding that the international arbitral award was a legitimate debt. It also agreed with the appellate court that the money held by IATA in the Swiss account was subject to the enforcement of the award as a debt and that the funds held by IATA could be used to pay the original Instrubel/Iraq award in arbitration. Though neither the majority opinion nor the dissenting opinion commented on the international arbitral context specifically, the ruling and analysis was consistent with the approach that CIArb Canada had asked the SCC to endorse in its *amicus* brief. CIArb's Canada Branch was represented in this case by McCarthy Tetrault LLP, which noted in an announcement on the firm's website: "By dismissing the appeal... the Supreme Court of Canada has helped to ensure that Canada remains an arbitration-friendly jurisdiction, including with respect to the enforcement of international arbitral awards."

The SCC ruled eight to one in favour of Instrubel, upholding the analysis of the appellate court

IATA was ordered to pay Instrubel the award

Pathways to progress

Dr Paresh Kathrani explains the route through Career Development as a CIArb member

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At CIArb, we are passionate about enabling people to learn about the skills involved in the different disciplines of alternative dispute resolution (ADR). Individuals can progress to Fellowship through our Pathways and learn about the different proficiencies that are required in the delivery of ADR.

There are Pathways in domestic arbitration, international arbitration, construction adjudication and mediation, and each Pathway consists of three modules. Module 1 in domestic arbitration, international arbitration and construction adjudication covers the law, practice and procedure of these disciplines and, upon successful completion of the assessments, enables individuals to apply for Membership of the Institute and use the internationally recognised post-nominals MCIArb. Module 1 in mediation is similarly practice-based. Individuals complete workshops and role plays and can also qualify as Members and accredited mediators upon successful completion of the module.

For those who would like to progress to Fellowship of the Institute, Modules 2 and 3 on each of the Pathways provide the opportunity to do so by building on the skills of Module 1 with knowledge of the law of obligations, as well as an in-depth and practical look at these disciplines. The FCIArb post-nominal is respected internationally in the global ADR community.

It is not just through these courses that members and others can develop and progress. Apart from the professional benefits that CIArb provides, including thought-leadership, standards and guidelines, publications, and networking through centre and branch events, CIArb is also working on building a catalogue of development courses, focusing on skills such as advocacy and case management. These will add to our new courses such as the Diploma in International Maritime Arbitration.

Individuals can now take any of our courses using our virtual classroom

We are committed to providing a series of training routes for members hoping to progress their ADR careers. We already deliver online courses, such as our Online Introduction to ADR, leading to Associate Membership of CIArb (ACIArb), and we have an audiobook on ADR too. Individuals can now take any of our membership courses virtually using our virtual classroom, and over the coming months we will be adding to our learning management system to incorporate new and dynamic ways of learning and teaching. We recognise the importance of career development and progression. A series of workshops on career development will be added soon as well.

Innovation and member development are central to our work, and we look forward to working with members on education and training going forward.

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

What's on

A selection of training opportunities for CIArb members

BRANCH FOCUS: QATAR

Virtual classroom environment BBB proves a hit with CIArb's Qatar Branch

The Qatar Branch of CIArb is relatively new, only being formed in December 2017 through the assistance of the Qatar International Court and Dispute Resolution Centre (QICDRC). This has allowed CIArb to be at the forefront of training in respect of international arbitration within the State of Qatar. The Branch has since progressed to providing courses such as Introduction to International Arbitration, and Modules 1 and 2 International Arbitration. This has seen us forging links with the European Branch, notably our colleagues in Turkey.

The Qatar Branch is also in the meantime looking to create its own panel of 'home-grown' tutors and now has an approved faculty member for Module 1 International Arbitration, soon to be joined by Introduction to International Arbitration.

The Branch was part of the pilot scheme for Big Blue Button (BBB), the virtual classroom for delivery of face-to-face tutorials. BBB was used to deliver the final part of Module 2 International Arbitration, with all candidates passing, and to deliver Module 1 International Arbitration and Introduction to International Arbitration. Feedback from course participants has been positive. The Branch was also the first in the world to use BBB to conduct its AGM online, paving the way for other branches to use BBB to get around the problems posed by COVID-19.

The Doha skyline

CIArb TRAINING DECEMBER 2020 – FEBRUARY 2021 (All courses and assessments are online)

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

- **Online Introduction to ADR**
  Open entry **£24**
- **Virtual Introduction to Mediation**
  26 February **£240**

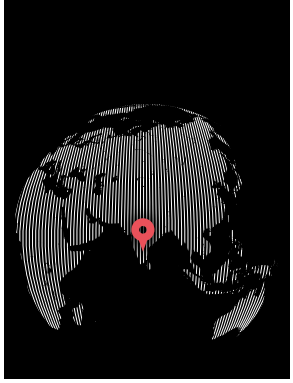
The New Pathway courses and assessments have been designed for candidates who do not have any experience of ADR. There are no entry requirements and they run as follows:

- **Virtual Module 1 Mediation Training & Assessment**
  8 weeks starting from 2 February **£3,600**
- **Virtual Module 2 Law of Obligations**
  16 February **£1,080**
- **Module 3 Mediation Theory and Practice**
  Open Entry **£660**
- **Virtual Module 3 Construction Adjudication Decision Writing**
  4 February **£1,080**
- **Virtual Module 3 International Arbitration Award Writing**
  4 February **£1,080**

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

- **Accelerated Route to Membership Domestic Arbitration**
  8–10 December **£1,500**
- **Accelerated Route to Membership International Arbitration**
  8–10 December **£1,500**
- **Accelerated Route to Fellowship Construction Adjudication**
  11 & 14–17 December **£1,920**
- **Accelerated Route to Fellowship Domestic Arbitration**
  14–18 December **£1,920**
- **Accelerated Route to Fellowship International Arbitration**
  14–18 December **£1,920**

For more details, go online to ciarb.org/training/accelerated-assessments. To book on the accelerated course, please contact education@ciarb.org or call 020 7421 7430



A new ADR superpower

Dr Lalit Bhasin FCIArb and **Nusrat Hassan FCIArb** report on how a fresh focus on ADR is helping to unlock India's vast potential

India is one of the fastest-growing economies in the world, with a robust democracy, an independent judiciary and a large pool of sophisticated lawyers. The country has a rich history of practice – assemblies of wise men called 'panchayats' once resolved disputes – and modern India recognises the importance of alternative dispute resolution in a flourishing and stable society. In recent times, the Government has taken various bold initiatives to strengthen access to justice through various forms of ADR.

A CHANGE OF FOCUS

The Indian Arbitration and Conciliation Act 1996 is modelled on the UNCITRAL Model Law. The Act, which underwent amendments in 2015 and 2019, has had a far-reaching effect on the way arbitration is conducted in India. The amendments provide, *inter alia*, for strict timelines in domestic arbitration, requiring parties to complete the pleadings in six months and pass an award in 12 months, upon completion of pleadings. An extension is possible after obtaining an order from the court. These strict timelines, though not applicable, have also been recommended for international commercial arbitration. The changing ADR landscape is further reflected in Indian courts' pro-arbitration judgments in support of the enforcement of awards.

India's Supreme Court, New Delhi

COVID-19 has brought renewed focus to other forms of ADR. The courts in India, which are clogged with a large volume of cases, are laying more and more emphasis on ADR. For example, in *Salem Advocates Bar Association*, at the request of the Supreme Court, the Law Commission had framed the Draft Mediation Rules 2003, making many states in India enact the rules of mediation. In the case of *Afcons Infrastructure Ltd*, the Supreme Court recommended various changes to the Civil Procedure Code to make ADR more effective. In *K. Srinivas Rao*, it has gone as far as stating that the courts should direct parties to mediation, even in penal provisions dealing with matrimonial disputes, where the offence is not compoundable. Mediation is thus emerging as a favoured forum, thanks to its cost-effectiveness, accessibility and its successful track record.

NEW INSTITUTIONS

More recently, the Government has approved the New Delhi International Arbitration Centre Bill 2019, which will establish a flagship institution for conducting and promoting institutional arbitration and ADR. This will further strengthen and promote ADR alongside the existing infrastructure of institutions such as the Mumbai Centre for International Arbitration, the Federation of Indian Chambers of Commerce & Industry, the Indian Commerce Association and the Nani Palkhivala Arbitration Centre, to name a few. These developments have caught the attention of the international community and are helping India become a hub for international arbitration.

The courts in India, which are clogged with a large volume of cases, are laying more and more emphasis on ADR

SHUTTERSTOCK

ABOUT THE AUTHORS

Dr Lalit Bhasin FCIArb is the Chairman of CIArb India and has been practising law for 58 years. He has held many senior positions in the profession, including President of the Bar Association of India, President of the Society of Indian Law Firms and Chairman of the Delhi Bar Council.

Nusrat Hassan FCIArb is a Co-Managing Partner of Link Legal India Law Services and a Fellow of CIArb and Secretary of CIArb India Branch. He is a Chevening scholar and is dual qualified and admitted to practice in India and England and Wales.