BIG QUESTION
What does 'mandatory' mean?

CHANGES TO SOLICITORS' QUALIFICATIONS

OBJECTIVITY AND THE ADR 'NEUTRALITY TRAP'

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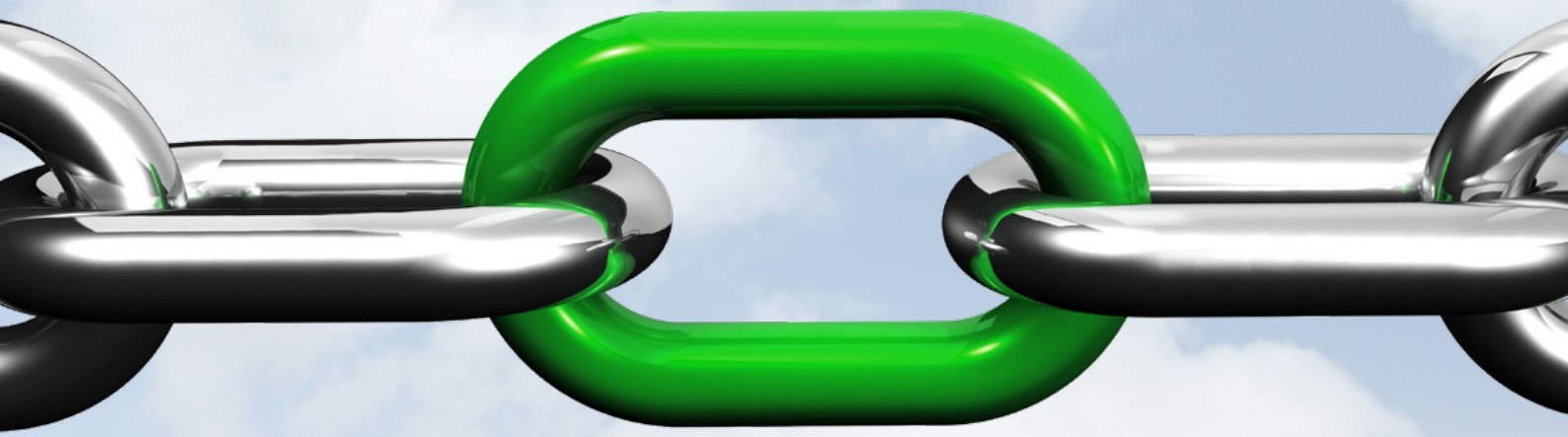
THE Resolver

AUTUMN 2021 CIARB.ORG

GREEN LINKS



How ADR is facilitating the transition to net zero

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Hello and goodbye

Two topics with a deleterious effect on our society have continued to dominate the headlines throughout 2021: the unrelenting Covid-19 pandemic and the spectre of climate change.

In my previous leader articles, I have shared how CIArb met Covid-posed challenges with the immediate development of its *Guidance Note on Remote Dispute Resolution Proceedings*, and by transferring its training courses to an online platform and broadcasting its webinars across the globe.

In this, my last 'Welcome' as President, I would like to share how CIArb is joining with others to address climate change. CIArb believes in the unique and crucial role ADR can play in facilitating the transition to a zero-carbon economy. From dealing efficiently with climate-related disputes to de-risking investment in large-scale green infrastructure projects, arbitration and ADR can be a catalyst for change.

On 11 November 2021, Wendy Miles QC FCIArb delivered our flagship Alexander Lecture, now in its 47th year, entitled 'International Arbitration and Sustainable Investment: Facilitator or Foe?' Transmitted online, with Wendy speaking from the UN Climate Change Conference (COP26), she explored the link between international arbitration and sustainable investment and what we, as an ADR community, can do to meet the challenge. On 26 October 2021, CIArb and IDR Group hosted a joint webinar on these issues, and I was delighted to co-moderate. More events on climate change and ADR are planned for 2022.

When I was elected in 2018 to be the 2021 President of CIArb, no one envisioned that I would be a 'virtual' President. This past year, I have travelled over 290,000 virtual miles. I have spoken 'in' Hong Kong, Singapore, India, Austria, Malaysia, Mexico, Kenya, the Bahamas, Jamaica, Peru, Argentina and multiple times in England and Brazil. I have delivered keynote speeches, moderated panels, participated as a panel member, addressed branches and arbitrated the final round of two international arbitration moots. These activities often occurred at 3am Houston time (the internet has the power to flatten distances but not time). Two positive outgrowths of the virtual world bear mentioning: CIArb has been able not only to interact with a greater number of its members, but also to collaborate frequently and effectively with other ADR organisations. Despite the pandemic, 2021 was an exciting, eventful and fulfilling presidential year.

I thank all who assisted me with my presidency, with a special thanks to Director General Catherine Dixon and Assistant Director of Policy and External Affair Lewis Johnston and his indefatigable team. My successor is Jane Gunn FCIArb, and her presidency marks the first time in CIArb history that there will be back-to-back female presidents. I wish her well and hope that physical travel will once more be available in 2022, so that she may personally meet our members.

In conclusion, please allow me to say, "'bye y'all, hope to see ya soon."

Ann Ryan Robertson C.Arb FCIArb
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INSIDE THIS ISSUE

The opener

UK dispute resolution consultation ends

CIArb has submitted a comprehensive response to the UK Ministry of Justice's Call for Evidence on Dispute Resolution. The consultation was issued amid intense discussion on the merits and potential viability of mandatory mediation following a report of the Civil Justice Council in July, which found compulsory mediation can be legal and, in certain cases, desirable. The stated aim of the exercise was to ascertain how alternative methods of dispute resolution could be fully integrated into the justice system and divert more cases away from costly, lengthy litigation.

Our submission drew on evidence from a range of jurisdictions, including India, Israel, Texas, Italy, Ecuador, Singapore and Greece. Each example encapsulates a different model for embedding mediation in the justice system, and we sought to draw out instructive lessons to inform the government's next steps in this area.

CIArb strongly believes in the power of mediation and all forms of ADR to create better outcomes than litigation, and that governments around the world can improve their legal systems through better integration of ADR. Properly funded ADR, delivered by suitably qualified professionals, can help preserve commercial relationships, provide economic certainty and underpin prosperity by promoting economic growth.

Our submission made a strong case for using ADR more widely. The question is how it can be implemented effectively, and CIArb will continue to work with policymakers to ensure that this is achieved.

CIArb throws weight behind lawyers' climate change body

CIArb has become a formal supporter of the Net Zero Lawyers Alliance (NZLA), as it seeks to use its influence to help drive the shift to net-zero emissions by 2050. The NZLA was formed to mobilise lawyers committed to accelerating the transition to net zero. ADR professionals will be indispensable facilitators of this shift, from the interpretation of sophisticated deal structures to deliver green energy infrastructure, to understanding the dynamics of regulatory change in climate-sensitive disputes.

CIArb Director General Catherine Dixon

CIArb Director General Catherine Dixon said: "Our support for the NZLA demonstrates our commitment to supporting the ADR community to tackle net zero, not only through how we operate, but as a strategic enabler to facilitating sustainable investment and making green infrastructure projects possible."

18,000

The number of members of CIArb as of September

Webinar helps strengthen link between ADR and sustainability

Green arbitration and global energy were on the agenda at a recent CIArb webinar, held in partnership with the IDR Group. The webinar, entitled 'Climate Change, Global Energy and Environmental Disputes', was overseen by Anthony Connerty and CIArb President Ann Ryan Robertson C.Arb FCIArb.

The presenters covered a range of areas, including the low-carbon energy transition in China, framing the global energy agenda, green arbitration and how ADR can facilitate the net-zero carbon transition.

CIArb is committed to strengthening the link between ADR and sustainability, in terms of both how practitioners can minimise their impact on the climate in their operations and their wider strategic role in enabling sustainable investment by de-risking major green infrastructure projects and interpreting climate-related legislation and regulations.

60-SECOND INTERVIEW

Bernie Mayer PhD

Your latest book is called *The Neutrality Trap* – and it's a subject you've written about before. What is your fascination with neutrality?

People mean very different things by it. It could mean anything from, like in a car, when you're in neutral you're not going anywhere. It can mean that you don't care, that you're not going to get involved or take sides, or that you have no emotional involvement. And all of those things, I think, are not what people really want or need in conflict resolution.

What is needed?

The trap of neutrality and objectivity is that we try to carry out our work without putting ourselves really into play – and we have to put ourselves into play. Because when we bring people together from a neutral stance without a commitment to certain values of fairness and of empowering people, we are in fact empowering the status quo; we are empowering the more powerful person in the room.

What to you is an ideal negotiation?

First we need to make sure that the table we're setting is the right table. I often use this example from American history: the mediator's nightmare is to be sent down to Montgomery, Alabama, in 1956, right after Rosa Parks refused to move seats on the bus. Because what needed to happen was something very different. There needed to be a social movement. So instead, there was a year where people successfully boycotted the bus company, organised rides, walked for miles every day. A movement was built, and that's when Martin Luther King Jr first came to prominence. And then, after a year, there was a sort of mediation, a coming together, facilitated by the churches of Montgomery, and they reached a resolution. So that's an example of the way in which the decisions we make about when and how we intervene are tremendously important for issues of power.

Some mediators might argue that this is all very well in an ideal world, but the real world of mediation doesn't work like that.

I've been a practitioner all my working life; I know how it works. It's how you create your business model. I'm not against professionalism in the sense of becoming really good at what we do, having accountability structures and lifelong learning, but I think sometimes professional structures are used to prevent competition and create a privileged space for ourselves, rather than to really serve the public.

We have to look way beyond automatically thinking, 'We're a third party bringing people together', and think about being allies. Dialogue is extremely important, but it has to be connected with an understanding of the system's issues and power inequalities and the need for social movements to disrupt.

Bernie Mayer is Professor Emeritus of Conflict Studies at Creighton University, US, and a Founding Partner of CDR Associates, a conflict intervention firm. His newest book, co-authored with Jacqueline N. Font-Guzmán of Eastern Mennonite University, US, is *The Neutrality Trap: From constructive engagement to strategic disruption in social conflict* and will be available in early 2022. Earlier books include *The Dynamics of Conflict*, *Beyond Neutrality*, *Staying With Conflict* and *The Conflict Paradox*.

IN BRIEF

Adjudication beyond construction

Lewis Johnston, Assistant Director for Policy and External Affairs, CIArb

CIArb is exploring the viability of a new set of rules for adjudication for non-construction sectors after a webinar panel agreed that many different categories of dispute would benefit from the availability of a rapid, adjudication-based mechanism.

The webinar was the third in CIArb's series of adjudication webinars, this time focusing on 'Adjudication Beyond Construction'. In a debate chaired by Lewis Johnston, CIArb's Assistant Director for Policy and External Affairs, the distinguished panel explored the potential for deploying the adjudication mechanism for other types of dispute beyond construction.

New Expedited Arbitration Rules explained

The UNCITRAL Working Group II has finalised its explanatory note to the newly adopted Expedited Arbitration Rules.

The Working Group, which met at the end of September and to which CIArb is an official observer, reviewed topics covered in the explanatory note. These supplement and elaborate on the provisions of the Expedited Arbitration Rules, in particular, designating and appointing authorities, appointment of the arbitrator and the period of time for making the award. The group then discussed early dismissal and preliminary determinations.

ANALYSIS

What do changes in the qualification process for solicitors in England and Wales mean for me?

One legal profession in a part of one small island is changing its qualification process: so what? Well, it's worth understanding, because it might create new opportunities for CIArb members and their colleagues, says Jane Ching

Broadly speaking, there are two approaches to qualifying as a lawyer, globally. One relies on a law degree followed by a bar examination administered by the state or by the local professional regulator. The other involves a mandatory and often postgraduate practice-oriented course whose assessments may be set by the course provider, the professional body, or a combination of the two. Work experience is embedded in the practice-oriented course or required as a separate component.

Solicitors, the largest of the eight regulated legal professions in England and Wales, are moving from the latter approach to the former, but retaining a two-year work experience component, which is dear to the hearts of the profession in the UK. This began in September, although there are substantial transitional provisions. Here, I consider two aspects of the new regime of the Solicitors Regulation Authority (SRA): the examination and the work experience requirements.

The Solicitors Qualification Examination (SQE)

The examination will be in two parts. SQE1 is a closed-book, multiple-choice test on areas of law and practice that have been, historically, covered in the initial law degree (the LLB) or its equivalent and in the existing practice-oriented legal practice course (the LPC). It includes knowledge of "arbitration, mediation and litigation as an appropriate mechanism to resolve a dispute". Procedural knowledge is, as in the mandatory components of the existing LPC, confined to civil litigation, excluding ADR.

SQE2 then assesses client interviewing (sometimes known as counselling), advocacy, case analysis, legal research, writing and drafting through case files and role-plays. It does so in the contexts of criminal and civil dispute resolution, property (land), wills and probate and business law. Ethics pervades both examinations.

Anyone who has taken the Qualifying Lawyers Transfer Scheme assessments for re-qualifying foreign lawyers will recognise the design. What is important, I think, is to acknowledge the scope and limitations of this design in particular. No assessment in simulation can replicate a real workplace, and it is fair to say that the SRA has not claimed that the SQE will do so. The assessment is intended as a floor, therefore, rather than a ceiling. Initially, the SQE was to be applied universally, but it is now apparent that exemptions will be made for some members of some British and foreign legal professions and possibly for individuals on a case-by-case basis.

The SQE purports, however, to be an assessment of the content and level of the SRA's competence statement for the point of qualification. While it goes further than most bar examinations in attempting to assess practice, the idea that it assesses in detail each individual component of the competence statement is illusory. There are, for example, competences relating to ongoing activities, such as "Keeping colleagues informed of progress of work, including any risks or problems", which cannot be judged in a one-off assessment. Negotiation is assessed in SQE2, not by engaging in actual negotiation (or mediation), but "in either interview and attendance note/legal analysis and/or case and matter analysis and/or legal writing". (Negotiation appeared in the LPC when it began in 1993, but was subsequently removed.)

As the competence statement is pegged to the point of qualification, one might expect that SQE2 would be taken at, or near the end of, the two-year work experience period (of which more below). For those taking the apprenticeship route,

that is the case, because that is how UK apprenticeships are constructed. For those taking the more conventional route beginning with an LLB or law conversion course, however, the only rule is that SQE2 cannot be taken before SQE1 has been passed. There is already evidence that many employers will require both assessments to be taken or passed prior to the two years' work experience. This may be to avoid the business interruption of candidates requiring day release for preparatory courses; or the risk of employing someone for two years

who then fails the assessment. Clearly, therefore, the level of competence measured by an early SQE assessment may have degraded – although of course it might have improved – during those two years.

This flexibility of timing therefore brings into question the purpose of the two-year period of work experience. The SRA says that using the period to prepare for SQE2 might reduce the time and expense of preparatory courses. As the ambit of SQE2 is considerably wider than the current requirements for the period of work experience, it seems unlikely that work experience alone will be enough to prepare candidates adequately for the SQE. Most will probably rely on the developing competitive marketplace in preparatory courses. The challenge, particularly for those with limited financial capital, will be making the cost/benefit analysis when choosing courses.

Qualifying work experience (QWE)

Most legal professions, globally, require some work experience prior to qualification. In recent history, the work experience requirement for Anglo-Welsh solicitors has been constrained to 'training contracts' in authorised organisations, providing experience in at least three areas of law and in both contentious and non-contentious work. Although creative methods have been used to achieve this, including secondments and simulations, the fact remains that there are more people wishing to become solicitors than there are training contracts, and this can prejudice the less portable and those from disadvantaged or minority backgrounds. The model is also susceptible to exploitation, with aspiring solicitors employed, possibly for years, as paralegals, with the offer of a formal training contract dangled but in practice out of reach. The Chartered Institute of Legal Executives has developed a route into the legal executive profession for those trapped in such 'paralegal purgatory'.

It is not always clear what the basis is for the British attachment to a mandatory requirement for learning in the workplace. Is it a learning environment, a place for socialisation or a period of humble servitude that must be endured for the sake of joining the profession? Clearly, a positive workplace with good

It is not yet known how the SQE will act as a filter or the effect it will have on the diversity of the profession

mentoring and support is a strong learning environment. A poor experience in a toxic workplace, on the other hand, is damaging to the individual and to the profession as a whole. Authorisation of organisations might be thought to guard against the worst excesses of the latter, but it cannot monitor the experience of thousands of trainees each year.

The new model does away with regulatory prescription and monitoring in order to widen the range of employers (and voluntary positions) that satisfy the regulatory requirement. As long as the role involves the provision of legal services and allows the trainee to develop "all or some of the competences" (even if they have already taken the SQE) it is acceptable. There will no longer be a need to be seconded to capture a third area of law or contentious work. There is no need for the period, taken in its aggregate, to cover all of the competence statement. There must be an Anglo-Welsh solicitor within reach to sign the work experience off, but the sign-off only signifies that the candidate has served the relevant time and has behaved themselves. There is no assessment of what is learned, as that has been delegated for regulatory purposes to the SQE.

The widening of the ambit, however, opens up the possibility of QWE being acquired by CIArb members in in-house environments, in government and quasi-governmental organisations and in other professional firms where legal advice is given, provided a solicitor can be found inside or outside the organisation to monitor and sign off.

Conclusion

All legal profession qualification routes have bottlenecks. These may be in accessing university or a vocational course, passing a bar examination or, as here, obtaining the requisite work experience. It is not yet known how the SQE will act as a filter or the effect it will have on the diversity of the profession.

QWE loosens up the current bottleneck in obtaining work experience, but may well result in an oversupply of qualified solicitors. Setting up in independent practice at the point of qualification is now possible, but entails a temptation to cut corners to acquire clients and service educational debt. Because of the oversupply, there is already a buyer's market for paralegals. There have been examples for some time of solicitors removing their names from the roll in order to be employed as paralegals (otherwise they must have and pay for the annual practising certificate) and there seems no reason why this should not increase in the new regime. Talk of the new model as creating a 'two-tier' profession reflects this fear but is disingenuous, as there are already multiple ways of satisfying the existing requirements, and the status of a university or training organisation and other aspects of social and cultural capital are already facets of the competitive job market.

In the professional press, comment by solicitors on the new proposals has often referred to the importance of learning in the workplace, or to solicitors' examinations of the past. I have considered methods of legal qualification in a number of countries in my career as an educator. Each is, of course, distinct to its local culture. None is perfect and neither is the SQE and QWE model. Indeed, the SQE is, in including skills assessments, unusually ambitious for a terminal bar examination, and that carries risks. Conceptually, however, the shift is from one model of legal professional qualification to another. What is important is that we recognise where it opens up opportunities for developing and supporting young lawyers, acknowledge – and if necessary remedy – its lacunae, and monitor it for its effect on the overall diversity of the profession.

Jane Ching is Professor of Professional Legal Education at Nottingham Law School, Nottingham Trent University, UK. She is a member of the CIArb Education and Membership Committee.

Read a longer version of this article at www.ciarb.org/SQE

Achieving a net-zero world: what is the role of ADR?

CIArb has a mission to enable and support access to justice, both through and within ADR, says Catherine Dixon

It isn't hyperbole to say that climate change is one of the defining challenges of our era. It is beyond reasonable doubt that global heating is happening and that human activity – principally in the form of carbon emissions – is playing a central role in that process. Furthermore, it is clear that climate change is well underway and that even limiting its extent will require an unprecedented economic and social transformation. As Director General of CIArb, the question on my mind is this: how can we ensure ADR professionals are properly equipped to play their full part in facilitating that transformation?

The Intergovernmental Panel on Climate Change is unequivocal about the scale of the challenge. To limit global warming to 1.5°C, net global carbon emissions must be reduced by 50% by 2030 and by 100% by 2050 – in other words, we must formulate a net-zero economy in the next 30 years. Given our current reliance on fossil fuels and the speed with which the transition must take place, this is a monumental challenge. To meet it, it is vital that disputes are resolved efficiently, constructively and intelligently. This in turn makes important demands on our profession.

From de-risking multibillion-dollar green infrastructure investments to navigating the complex array of regulations and policy changes necessary to achieve net zero, ADR is uniquely placed to ensure the net-zero transformation can be achieved. Innovations like Dispute Avoidance Boards can help intricate projects avoid being derailed by changing circumstances or miscommunications on the expectations of the contract. Robust arbitration clauses will give parties certainty that disputes can be resolved quickly without resorting to litigation, and commercial mediation offers a mechanism to reach imaginative, constructive solutions in a complex and rapidly changing environment. Underpinning all of this is the need to grow the community of dispute resolvers with high-level expertise in sustainability and climate change, and for practitioners themselves to reduce their carbon footprint in the course of their work.

This issue examines all of these factors to give some indication of where the profession must develop. Nasir Khan has written on the responsibility of practitioners to reduce their own environmental impact.

It is fundamental to CIArb's role as a global professional body that we champion the proper role of the profession in meeting the important challenges of our time. As Director General, I have put the promotion of construction dispute resolution, effective thought leadership and developing a global community of dispute resolvers at the heart of our strategy, and all of these areas apply to ensuring ADR is used to its full potential in achieving a net-zero world. We will take the lead in convening this conversation, building practical coalitions with other organisations and equipping practitioners with the expertise they need.

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

ADR is uniquely placed to ensure the net-zero transformation can be achieved

Mediation's big problem

Dr Isabel Phillips FRSA argues that the ADR profession is shying away from its biggest, most difficult question

Mandatory mediation around the world

I have been involved in the mediation field since the mid-1990s. In some ways, the world of mediation has changed radically. Nonetheless, I sometimes feel like I am stuck in a temporal-stasis field. The mediation community has always proclaimed that mediation is 'special', but are we still answering the question we are *not* being asked – why should you use mediation? – and avoiding the difficult question we *are* being asked: why don't people want to use mediation, even when they know about it?

This question has been brought home to me again by the Ministry of Justice's (MoJ's) Call for Evidence on Dispute Resolution.

To be clear, if people don't know about mediation, then education is needed. According to recent statistics from the Federation of Small Businesses (FSB), 30% of small businesses cited lack of awareness as a reason for not using non-binding ADR. That is an argument for information and awareness raising.

But if you read the FSB statistic in a different way, it tells us something different. Seventy per cent of respondents knew about mediation, so basic knowledge was not the reason they didn't use it. They are not the only ones: I have spoken with too many mediators who don't take their own disputes to mediation (whether community, family, commercial or even as legal representative to parties) either because 'I don't need it' or ' the only situations I have been involved in weren't suitable for mediation'.

Telling ourselves that people don't engage in mediation because they don't know about it is simply not true of the now large group of people who do know about it, but don't turn to mediation when they are in dispute. This is not one homogenous group of people, and we need to take this choice in ourselves and in others seriously if we are actually going to address it effectively.

Part of the obstacle is focusing on the wrong question. Another part is the failure to enable high-quality research through demanding decent data collection and analysis; in other words, we suffer from empirical research poverty. Mediation confidentiality is still used as a catch-all excuse, but given the amount of research done in highly sensitive confidential environments such as medicine, sociology and psychology, seems to be rather tenuous.

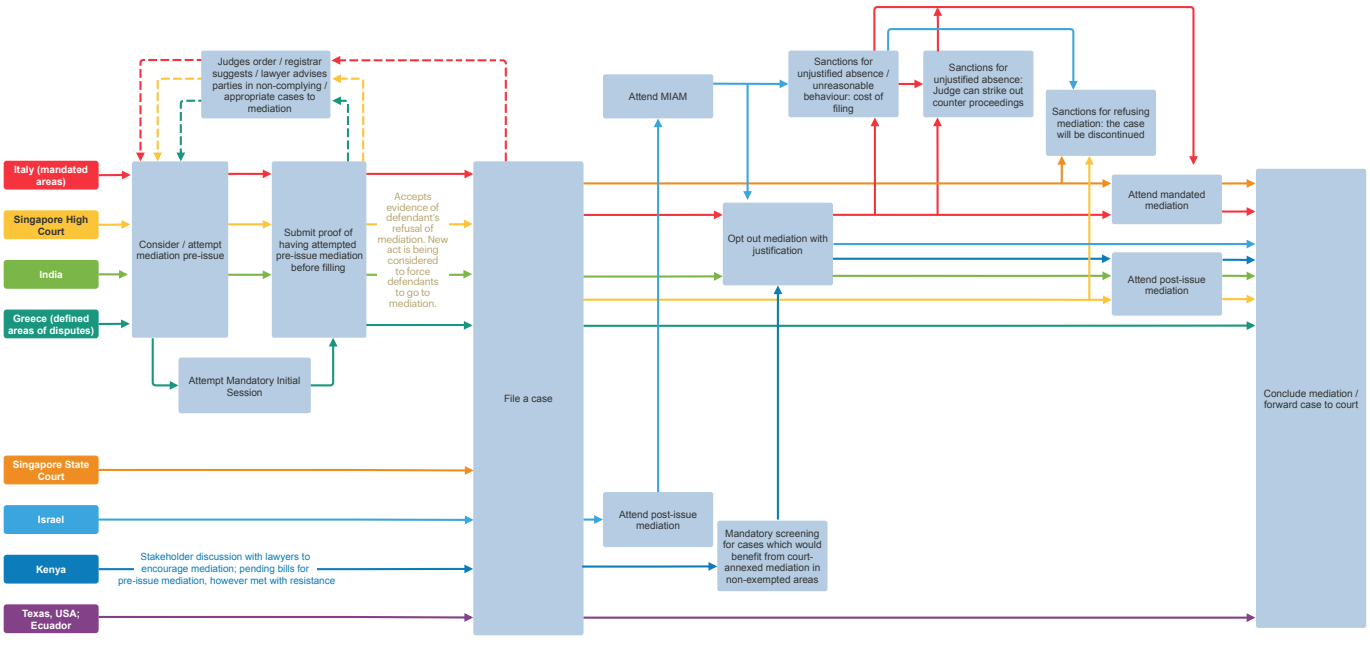
We need to gather and analyse data relating to the entire mediation process, from engagement, entry and exit to long-term follow-up. We need to have good empirical data, rather than anecdotal evidence, on what the enforcement rates actually *are* in cases, and how they vary across mediation types and contexts. We need to understand both what parties do and don't do (and want) at key points, and we need to understand what actually *happens* when different variables change. Where this type of data is already being gathered, we need it to be made publicly available for research purposes, and where it isn't, we need to start demanding that those (such as courts/legal systems) who can gather this data both do so and make it available in useable form.

Of course, this will require time, international cooperation, and seeking and receiving consent from parties, providers and courts to gather, analyse and share information on a scale that is currently unusual, but not unheard of. This is particularly true at the government level. The possibilities have been

ABOUT THE AUTHOR

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

MANDATORY MEDIATION GLOBALLY – FIRST ITERATION (DRAFT)



SHUTTERSTOCK

Hiding behind the term 'mandatory mediation' is a wide variety of practices and systems

admirably demonstrated by the Italian Ministry of Justice, which has published a great dataset on the implementation of mandatory mediation.

We need to understand the different ways that jurisdictions have gone about addressing the basic issue: the fact that parties are clearly reluctant to enter mediation. The tendency has been to assume that, in the face of failure to engage in mediation (whatever the reason for the failure), the logical 'solution' is to find ways to compel engagement. However, the diversity of the ways that this is developing across the world raises some interesting questions.

With the prompt of the MoJ's Call for Evidence, which came hard on the heels of the Civil Justice Council's report on mandatory mediation, at CIArb we decided to look at the issue of mandatory mediation from an international perspective.

INFORMATION GATHERING

Drawing on our international membership and collaboration partners, we have been able to gather sufficient information to begin to map the level of diversity around the measures that are referred to as 'mandatory mediation' around the world. Contributors from Ecuador, Greece, Italy, India, Israel, Kenya, Singapore, Texas (US) and the UK filled out a set of questions and provided links to the relevant legislation. The first draft of the mapping process and the interrelation of the different journeys through mediation and court process can be found on the previous page. It is a work in progress, and you will see updated versions as it develops.

There are systems that 'mandate' through a fundamental societal expectation that mediation is tried in all, or almost all, disputes. These traditional systems are often reliant on respected third parties selected by the community, who are informally supported, rather than formally trained and paid. The best example of this in our graphic is the indigenous dispute resolution process in Ecuador. Here, the 'mandation' is the result of social expectation, rather than legal sanction.

In other contexts, such as the MTDC in Nigeria, cases are screened and funnelled in different directions accordingly, so while there is no actual compulsion (though a law is currently in the works), the effect is far stronger, because each case is actively directed, and cases going forward to a judge are sent back to mediation if they are found to be suitable after all.

Then there is a wide range of versions of 'mandation through sanction'; in other words, where parties are expected to consider mediation, and if they decide it is unsuitable or mediation is unsuccessful, judges have the power to order mediation and/or identify and sanction 'unreasonable refusal/behaviour'. The UK system is a good example of where sanctions for 'unreasonable refusal to mediate' exist, theoretically making refusal to mediate a risky option, in practice a tolerable game of roulette for many because of the inconsistency of views among the judiciary.

A range of jurisdictions combine the expectation to consider mediation pre- or post-issue with the compulsion that parties attend some version of what has become known as a MIAM (mediation information and assessment meeting). These meetings are usually run by mediators, so that if parties elect to engage in mediation, the MIAM turns into mediation proper. This type of system has been applied in Greece, Italy, India and most recently in Israel.

Finally, there are 'mandated' processes where almost all cases are funnelled into mediation, with blanket *legal* compulsion to mediate (minimal exemptions often include issues such as GBV and child abuse), such as in Kenya, Israel or the compulsory judge-led mediation system in Singapore.

As with the previous category, exactly how these systems function varies wildly; Kenya relies on registering mediators who meet certain criteria with the courts.

CONCLUSION

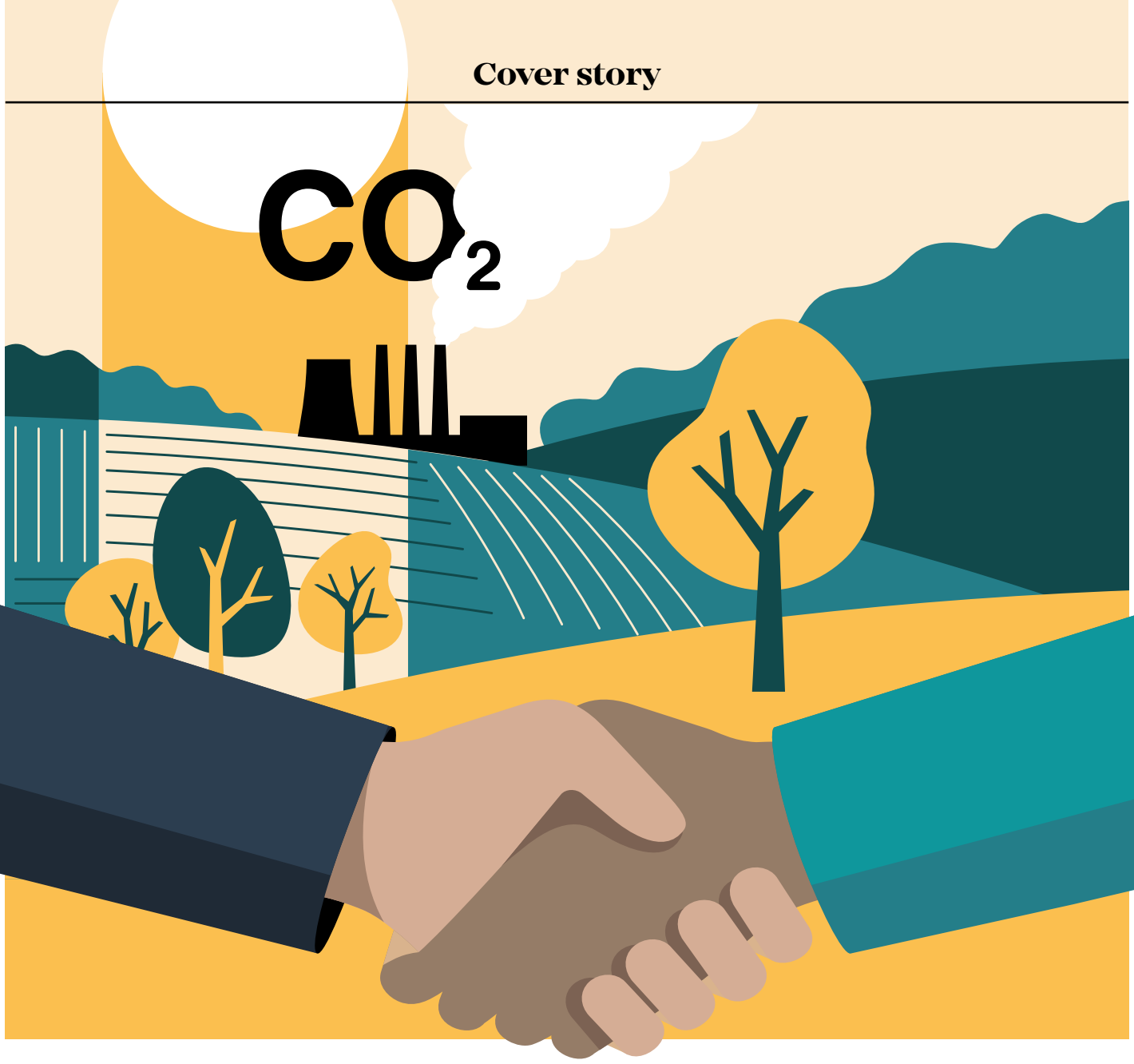
There is obviously a good deal of further work to be done on this. But there are some interesting interim findings and conclusions. The first and most striking finding is that the term 'mandatory mediation' hides a wide variety of practices and systems. The variety is such that the statement 'this system is mandatory' may say more about the speaker than the system.

The UK system is a good example of where sanctions for 'unreasonable refusal to mediate' exist

Systems range globally from a cultural expectation to engage in 'mediation' that is so strong that it is referred to as 'mandatory', despite there being no formal legal compulsion to engage, to court systems with one fixed point for initial mediation meetings with a wide variety of sanctions for unreasonable behaviour and/or non-settlement.

Even basic modelling (such as the draft included with this article) indicates that the diverse systems give the lie to the idea that there is one correct 'contingent' point to push parties to mediation. And if there is, we definitively lack even the most basic data and data sharing to be able to evaluate the impact on the blunt tools of settlement and enforcement rates of mediated versus judgement in these systems, let alone more finessed qualitative data. In other words the sort of comparative analysis that would really allow evaluation of impact on whether these systems are convincing parties, through usage, that mediation is a tool which they will willingly use voluntarily; the only real way of relieving the courts and of parties reaping the rewards of mediated outcomes long term.

Which brings us back to the core questions: Why don't I personally use mediation even though I know about it? What would need to change to get me to actively seek it out?



At what cost?

Resolving disputes can be costly – and not just financially... Nasir Khan FCIArb looks at the economic, social and environmental toll of ADR and suggests some ways the profession can contribute to a more sustainable future

Commercial activity, whether it is related to construction, shipping, supply or services, is a significant contributor to the global economy. It has many procedural complexities, attracts claims and disputes, and in major construction projects it is considered unavoidable to complete without disputes.

Litigation and arbitration create considerable and unnecessary amounts of physical paperwork and printing. Paper is energy intensive and has a significant carbon and water footprint. The Covid-19 pandemic has contributed to a significant shift, but air travel to attend hearings generates a considerable carbon footprint.

But aside from these obvious and avoidable environmental outlays, ADR comes at a cost in other ways – notably socially and economically. Globally, in 2020, the average value of contract disputes and length of resolutions in the construction and engineering sectors decreased slightly from 2019. However, consensus was that the overall number of disputes

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The Covid-19 pandemic has contributed to a significant shift, but air travel to attend hearings generates a considerable carbon footprint

increased. Based on an industry report, the global average in 2020 for disputes was US$30.7m, and the global average length was 15 months.

The method of dispute resolution chosen by the parties is based on the nature and circumstances of their dispute and contracts. I don't intend to compare the costs for ADR versus litigation here. However, it is imperative that the costs involved in arbitration are discussed due to the nature of quasi-judicial procedure.

Recently, a study was undertaken to produce Pakistan's first construction dispute report, and it matched global trends with a multi-tier approach to dispute resolution. The global norm indicates that the most cost-effective way is negotiation (party to party), although it is also dependent on whether it is with or without the support of claims specialists and/or legal services. Mediation has taken a strong turn and currently ranks second globally, while arbitration comes third.

In 2015, the London Court of International Arbitration released the first costs and duration analysis conducted by a leading arbitral institution. The analysis was released to promote transparency, to ensure that discussions regarding costs and duration were conducted using actual data rather than

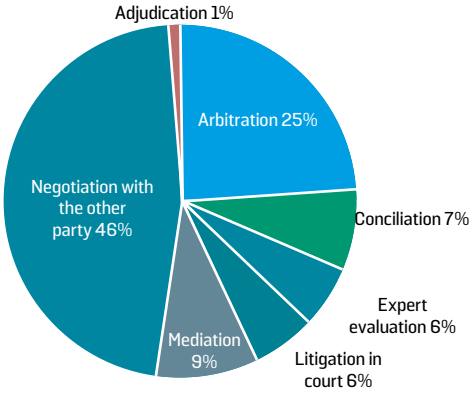

Figure 1: Pakistan Construction Dispute Report, dispute resolution methods

impressions, and ultimately to allow users to make informed choices.

Article 2(i) states that the arbitral tribunal fees will be calculated by reference to work done by its members in connection with the arbitration and will be charged at rates appropriate to the particular

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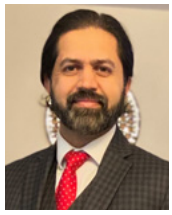
ABOUT THE AUTHOR



Nasir Khan MBE FCIArb is Head of Contract Solutions at Currie & Brown, a global consultancy, where he leads procurement advisory, claims, dispute avoidance, management and resolution. He is an engineer, chartered QS, chartered procurement professional and legally qualified. He regularly advises major programmes on procurement routes and conflict avoidance strategies. He has led large and complex claims on quantum, delay and engineering issues. He has fellowship of various institutions and acts as an expert, mediator, adjudicator and arbitrator. Nasir is on the CIArb Approved Faculty List and is a founding member of the CIArb Pakistan Branch. For his work on inter-faith relations and raising equality, diversity and inclusion awareness, he was awarded an MBE in Her Majesty's Birthday 2020 Honours for services to Muslims and BAME communities in the UK.

REQUESTED ESTIMATION	
Amount in dispute	$35,000,000
Number of arbitrators	3
Year (scale)	2021
FEES PER ARBITRATOR	
Min	$54,917
Avg	$150,959
Max	$247,000
ADVANCE ON COSTS (without arbitrator expenses)	
Average fees multiplied by number of arbitrators	$452,877
Administrative expenses	$82,015
Total	$534,892

Figure 2: ICC arbitration cost calculator

circumstances of the case, including its complexity and any requirements as to special qualifications of the arbitrators. Although the fee is stated to not exceed £500 per hour, this may increase subject to several other provisions.

The International Chamber of Commerce (ICC) cost calculator (see Figure 2) enables parties to produce

Climate change: the human effect

The Earth's climate is ever-changing. In the past, it has changed many times in response to a variety of natural causes. However, the 2007 Fourth Assessment Report of the Intergovernmental Panel on Climate Change concluded with more than 90% probability that most of the studied global warming since the mid-20th century is associated to human activity. Our influence on the global climate is the emission of greenhouse gases, particularly carbon dioxide (CO_2) from the burning of fossil fuels, but also methane (CH_4), F-gases and nitrous oxide (N_2O). As these gases build up in the atmosphere, they strengthen the greenhouse effect, which leads to global warming.

Our radical actions to reduce greenhouse gas emissions provide a reasonably good chance that we can limit average global temperature rises to 2°C above 1900 levels. This won't stop climate change, as global warming is already happening, but it could limit the effects and allow humanity to adapt to and manage the changes.

If we act now:

- We will avoid burdening future generations with greater impacts and costs.
- Economies will be able to cope better by mitigating environmental risks and improving energy efficiency.
- There will be wider benefits to health, energy security and biodiversity.

Carbon neutral or net zero?

Carbon neutral means balancing greenhouse gas (GHG) emissions by offsetting an equivalent amount of carbon for the amount produced by buying 'carbon credits' – in essence, permission to emit GHG in exchange for offsetting the effects of those emissions – and/or by supporting GHG-reduction initiatives such as renewable energy projects.

Net-zero carbon means reducing GHG emissions *and* offsetting the remaining emissions.

Example: if people in a business take 10 flights per year, the business could achieve carbon neutrality for those 10 flights by buying carbon credits and/or by supporting renewable energy projects to offset the emissions. To achieve net-zero carbon, the company would need to *reduce* the number of flights and invest in projects that remove from the atmosphere the carbon dioxide produced by emissions from the remaining flights.

an estimate of the likely costs of an ICC Arbitration according to the scales in Appendix III to the Rules.

HOW COMMITTED ARE WE TO REDUCING THE COST OF ADR?

Arbitral tribunals are aware of the social, economic and environmental impact caused by proceedings and costs in dispute resolution. Are we really committed to reducing these costs?

Arbitration proceedings consume substantial amounts of resources, especially paper. Moreover, parties in international arbitration tend to have sizeable teams of lawyers, experts, witnesses and other professionals whose air travel to attend hearings would add up to considerable carbon emissions.

The consideration of complex sustainability and climate obligations within the already challenging environment of infrastructure delivery demands effective mechanisms for dispute resolution. Conflict avoidance is a necessity. The financial cost of disputes is measured in billions of pounds and causes immeasurable harm to business relationships and brand reputations. An increasing number of major infrastructure bodies are driving a sea change and embedding conflict-avoidance mechanisms. Considerations for effective project delivery include less adversarial contracting methodologies where risk is more effectively shared.

In terms of reducing the environmental cost with respect to climate change, when engaging in arbitrations, care is needed in addressing decarbonisation, and the arbitration process should also be viewed through the lens of addressing emissions and sustainable development outcomes.

In response to the need to raise awareness of the sustainability impact that procedures can have, a campaign was launched asking practitioners and organisations to sign The Green Pledge for considering sustainability in the dispute resolution process.

Ben Giaretta wrote in a blog post about the dispute resolution profession and the archaic practices of hard copies and in-person hearings. The pandemic has shown us that the divisions within arbitration could become even greater. The biggest cases might use less technology (or use technology less well) than smaller disputes, and, with some exceptions, the leading arbitration lawyers may be marked out by their continuation of older practices. We may find that the elite band of arbitrators becomes even more highly prized: they are the ones who will fly around the world to conduct hearings in person while the less renowned remain behind their computer screens.

We have immense power to help protect our environment through the introduction of environmentally friendly clauses and practices; after all, small actions, performed often and by many, yield big results. For example, the vision of The Chancery Lane Project is a world where "every contract and law enables solutions to climate change".

Proceedings may be effectively conducted via virtual hearings using digital documents, as recently evidenced during lockdowns across the world. In fact, the use of digital documents as opposed to paper offers numerous advantages, such as quick navigation using search tools and bespoke mark-up of documents, while reduced travel to attend hearings would save considerable time for parties and their teams to focus on other matters.

We have immense power to help protect our environment through the introduction of environmentally friendly clauses and practices

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WHAT NEXT?

The Science-based Targets Initiative (SBTi) provides a methodology and process for aligning organisational emissions reduction targets to the 1.5°C trajectory enshrined in the Paris Agreement – indicating the degree and speed with which organisations need to reduce their greenhouse gas emissions to prevent the worst effects of climate change. Many organisations across several sectors have successfully set science-based targets, including in the real estate, utilities, transportation and other professional services sectors. The arbitration and dispute resolution community needs to develop its own SBTi and start making a difference.

A clear set of common principles across investment and dispute resolution would support the rapid action being called for by global climate agreements at a time when urgency must be the priority. Providing shared targets for climate action and sustainable development can enable consistent outcomes to be embedded within contracts and dispute resolution procedures, specifically arbitration.

To bring about meaningful change, our global dispute resolution community must speak with one voice – sending a clear signal in support of decarbonisation. We need to agree on a common set of principles that address the major challenges within global commercial disputes.

- Avoidance of disputes should be our priority.
- ADR and arbitration mechanisms need to be cost-effective, paying cognisance to the climate emergency.
- There needs to be a commitment to decarbonisation that aligns with science and the trajectory of carbon emissions reductions by 2050.
- We need to create a shared advocacy agenda for dispute resolution, working with policymakers to identify approaches to conflict avoidance and resolution that embed the principles of decarbonisation, resilience, health and the circular economy.
- A key aspect of transforming the dispute resolution sector is to recognise and leverage the position of CIArb and its membership.

Questions for CIArb members

- **What do you think about climate change?**
  - Climate change is a global emergency
  - Governments should do something about climate change
  - Dispute resolvers should take some responsibility
- **Choose all sources you think produce emissions that contribute to climate change**
  - Transport
  - Air travel
  - Household waste
  - Agriculture
  - Gas central heating
- **What actions would people consider taking to reduce their carbon emissions?**
  - Cutting red meat and dairy intake
  - Flying less often in the year ahead (if you flew last year)
  - Switching to an electric car in the next year
  - Switching to low-carbon heating
- **Which actions have people taken already?**
  - Recycling everything
  - Reducing use of single-use plastic
  - Reducing red meat consumption (even if it was for health rather than climate reasons)
  - Driving a hybrid or battery-powered electric vehicle
  - Switched to a low-carbon heating system

The below guiding principles should be considered by litigation and arbitration practitioners wherever possible ahead of a dispute and during proceedings to help combat climate change and support net-zero targets.

- Generally, to conduct the proceedings in the most environmentally conscious manner available.
- To reduce the use of paper-based documentation and correspondence where efficient electronic versions offer a viable alternative.
- To reduce travel and conduct meetings and hearings remotely, where practicable.
- To request that all third parties engaged during the course of the proceedings be mindful of these guiding principles and the protocols to which the parties have subscribed.
- To recycle all materials used where possible.
- The protocol has been drafted to be broad so that it applies to a range of dispute types. Further, it is designed not to be too prescriptive so that parties can implement it in a way that best suits them and the dispute.

There are offset options for parties not able to adhere to the protocol(s) but who still want to do something positive.

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Case note

Perenco Ecuador Limited v The Republic of Ecuador

Report by Kateryna Honcharenko MCIArb, Research Executive at CIArb

In May 2021, after 11 years, one more procedural step was made in the history of one of the largest, most complex investment arbitrations: Perenco v Ecuador. The Tribunal in the case applied innovative tools including the appointment of an independent expert. It also awarded environmental compensation for the first time in the history of ISDS.

FACTS

In 2008, Perenco Ecuador Limited brought an ICSID claim against Ecuador under the 1994 Bilateral Investment Treaty between France (Perenco is controlled by French nationals) and Ecuador and two participation contracts. In accordance with the contracts and the legislation of Ecuador, which recognised such a contract model, Perenco would be entitled to conduct hydrocarbon exploration works and participate in oil production from two oil blocks (7 and 21) in the Amazon rainforest region.

Perenco, an international oil and gas giant, entered into two participation contracts with Petroecuador, Ecuador's national oil company, under which

The Government of Ecuador... increased the windfall profit tax rate on oil production revenue to 99%

Perenco was entitled to have a share in the oil production revenue. Shortly after, oil prices began to rise worldwide and the Government of Ecuador adopted legislation which, in particular, increased the windfall profit tax rate on oil production revenue to 99%.

Since the tax was introduced as a response to the dramatic oil price increase, and even though the new regime was not in accordance with that provided for in the production contracts entered into by Perenco, the latter paid the new tax for some time after the legislation had been introduced, while trying to negotiate new contracts with Petroecuador. Those efforts were, however, in vain, as all existing participation contracts were later

The Trans-Andean Oil Pipeline links oil fields in the Amazon with a refinery on the Pacific coast

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terminated by Ecuador. Perenco thus lost the right to operate both oil blocks and was sued by the Government of Ecuador for failing to further pay taxes as per the newly introduced scheme.

In 2008, Perenco filed an ICSID arbitration request claiming that Ecuador breached fair and equitable treatment under the BIT and expropriated Perenco's investments.

Three years after, in 2011, Ecuador responded with a counterclaim arguing environmental damage resulting from pollution of the Amazon region allegedly caused by Perenco. Interestingly enough, despite the absence of express consent of the parties to arbitrate counterclaims, the Tribunal upheld jurisdiction over both Perenco's claim and the counterclaim. The Tribunal also accepted Perenco's request for provisional measures and recommended that Ecuador, *inter alia*, refrain from pursuing judicial actions against Perenco, as well as any action to amend, rescind, terminate or repudiate the participation contracts.

Carondelet Palace, the seat of the Government of the Republic of Ecuador

DECISION

In 2014, the Tribunal issued its *Decision on Remaining Issues of Jurisdiction and on Liability*, which upheld both the claim and the counterclaim. The latter was confirmed in its subsequent decision from 2015, where it was held that Perenco breached the local environmental legislation and was therefore liable for damages claimed by Ecuador. Damages claimed by both parties were fully addressed in the Tribunal's award, issued in 2019: Perenco and Ecuador were awarded US$449m and US$54m respectively.

It is important to highlight the delicate approach taken by the Tribunal with reference to damages. Notably, the Tribunal took into account environmental damages awarded in an associated case, Burlington Resources v Ecuador, where the claimant was found liable for an environmental breach and ordered to pay Ecuador US$39m. To avoid double recovery, the Tribunal deducted the sum from the US$93m Perenco was initially supposed to pay for remediation. It also made sure Perenco is liable only for the environmental harm caused by its activity and not by other operators.

In awarding damages sought by Perenco, the Tribunal applied a so-called 'layering approach': it did not agree with Perenco's view that the valuation date shall be single. Since breaches caused by Ecuador took place at different points in time, with almost a three-year gap, it concluded that the damages shall be evaluated separately, at the time of each breach.

IMPLICATIONS

When dealing with damages caused by the environmental breach, the Tribunal applied a slightly unconventional though widely known approach: even though this practice has not been often applied in international investment arbitration proceedings, to establish damages to be awarded to Ecuador, the Tribunal, upon consultation with the parties, resorted to an independent expert's determination, as it "found that it was not prepared to accept the findings of either side's principal environmental experts and ordered an independent report by the Tribunal's Independent Expert".

In May 2021, the Tribunal issued a decision on annulment of the award sought by Ecuador, alleging, in particular, that there was a serious departure from a fundamental rule of procedure and that the Tribunal manifestly exceeded its powers. The Tribunal rejected Ecuador's attempt to annul the award in its entirety; however, it did confirm that the award contained certain unsubstantiated damages-related findings and reduced the amount of damages awarded to Perenco to US$412m. The rest of the award was not affected.

The groundbreaking procedural mechanisms applied by the Tribunal in Perenco v Ecuador are capable of paving the way for more efficient and mutually beneficial resolution of similar cases in the future. It remains to be seen whether and how the arbitration world will accept and make use of this remarkable practical example.

The groundbreaking procedural mechanisms applied by the Tribunal in Perenco v Ecuador are capable of paving the way for more efficient and mutually beneficial resolution of similar cases in the future

How to... use mediation in arbitration

A guide to using the *CIArb Professional Practice Guideline on the Use of Mediation in Arbitration*

On 7 October 2021, CIArb launched its most recently updated Professional Practice Guideline in International Commercial Arbitration. The *CIArb Professional Practice Guideline on the Use of Mediation in Arbitration* (the Guideline) both updates and replaces the previous guideline, *ADR Procedures in Arbitration*.

The Guideline focuses on using mediation as a process for efficient dispute resolution within the context of a dispute in arbitration, often called 'hybrid' proceedings. However, the Guideline changes the focus from previous approaches to this topic in some notable ways.

Jargon can be off-putting and confusing, particularly for parties

The Guideline focuses on using mediation as a process... within the context of a dispute in arbitration

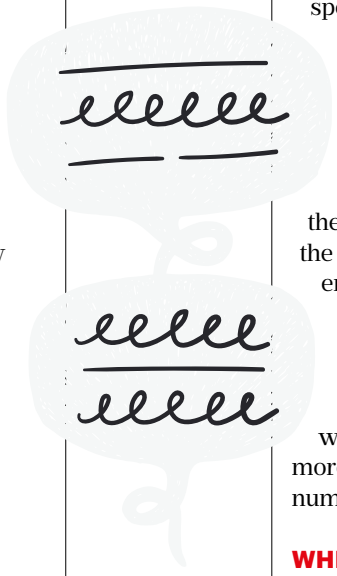
XXXXXX

The updated Guideline also addresses notably controversial variations of hybrid procedures

WHAT HAS CHANGED?

In the past, much emphasis has been put on defining terminologies that indicate the various hybrid procedures available. For example, 'med-arb', 'arb-med' and 'med-arb-med' have often been employed to indicate the various structures of hybrid proceedings. However, this peppering of terms has become a sort of industry jargon that can be confusing and off-putting, especially to parties. Instead, the Guideline shifts the focus away from terminologies and adopts a more flexible approach that uses the life cycle of a dispute in arbitration as the framework.

The Guideline presents the relevant considerations that should be taken into account based on the point in the arbitration where the parties wish to use mediation. It is hoped that, in doing so, the Guideline will provide practitioners with a comprehensible means of discussing the options with parties that focuses on the potential benefits, necessary considerations and long-term implications of adding mediation at any point in an arbitration timeline.



The Guideline provides a comprehensible means of discussing the options

BACK TO ARBITRATION BASICS

The updated Guideline also addresses notably controversial variations of hybrid procedures, such as an arbitrator acting as mediator in the same arbitration. It emphasises a return to the fundamentals of arbitration when considering any option for using mediation within arbitration, specifically party autonomy and enforceability of final awards. Rather than taking a strict approach either advocating or excluding any particular option, the Guideline encourages arbitrators to consider any agreements between the parties, relevant cultural and legal practices, and the jurisdictional requirements of the seat of the arbitration and the place of likely award enforcement when they are presented with such requests. In this way, the Guideline is designed to be adaptable and usable globally across legal traditions. It is intended that, in turn, the approach used in the Guideline will make using mediation in arbitration more accessible to increasingly diverse and numerous users.

WHERE TO FIND IT

The *CIArb Professional Practice Guideline on the Use of Mediation in Arbitration* is available to download at www.ciarb.org/media/16823/ciarb-professional-practice-guideline-on-the-use-of-mediation-in-arbitration-2021.pdf

International maritime arbitration: how to get those skills ship-shape

Maritime arbitrations are on the increase, so how can arbitrators prepare themselves to navigate this complex field? George Lambrou, international dispute resolution specialist and course director of CIArb's Virtual Diploma in International Maritime Arbitration, gives his view

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1. Why is international maritime arbitration the most popular choice of dispute resolution in the shipping industry?

Arbitration has been the dispute resolution forum of choice in the shipping industry since some of the earliest recorded contracts in Ancient Greece. Today, arbitration clauses are standard in most maritime contracts because parties often prefer to choose a specialist maritime arbitrator to resolve disputes and an arbitration award can be enforced in many more jurisdictions than any judgment made by a national court.

The global pandemic... has led to instability and therefore a higher risk of disputes

2. We've seen increasing coverage in mainstream media about maritime disputes in the past year. Why is this?

The Organisation for Economic Co-operation and Development estimates that 90% of traded goods are carried by sea. The global pandemic created disruption to supplies and shifts in consumer demand. This has led to instability and therefore a higher risk of disputes.

ABOUT THE AUTHOR

George Lambrou FCIArb is regularly engaged in international maritime arbitrations as counsel, co-arbitrator, sole arbitrator and chairman and has wide-ranging experience under the ICC, LCIA, LMAA, SCC, ISTAC and ICSID rules sitting in London, Athens, Geneva, Istanbul, Stockholm and Washington DC. He is a Supporting Member of the LMAA and is currently on the panel of the Emirates Maritime Arbitration Center and the Shanghai International Arbitration Center. George is a solicitor advocate of England and Wales, and was for many years a partner in a leading London-based shipping law firm. He is a faculty member of CIArb and the Institute of Chartered Shipbrokers. George works in both Russian and Greek.

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3. What skills and knowledge do arbitrators need to handle maritime disputes?

Maritime arbitrators come from diverse and specialist backgrounds and are equally as likely to be lawyers as not. It is critical that all maritime arbitrators, no matter what their background, produce awards that are drafted to meet the standard requirements for enforceability around the world. That also requires arbitrators to be aware of the necessary procedures and legal requirements when drafting an award and conducting proceedings and, at the same time, to do so in a cost-efficient manner.

4. Who would benefit from taking the Diploma in International Maritime Arbitration?

The Diploma is designed for individuals who are practising, or wish to practise, maritime arbitration either as a party representative or as a member of a tribunal. It gives realistic advice, guidance and information on how maritime arbitration is actually practised today, and how to improve your skills as a party representative or arbitrator. The course is well suited to those who are currently working in the maritime sector and who wish to develop their career in maritime claims and arbitration.

Arbitration will continue to be the number-one choice for resolution of maritime disputes around the world

5. Do you have any tips for practising and potential arbitrators on how they can build a maritime arbitration practice?

The number-one tip I can recommend is to obtain an internationally recognised qualification in arbitration, and in my opinion that is Fellowship of CIArb (FCIArb). Candidates can apply for this if they complete parts 1–3 of the Diploma.

6. What do you think the future holds for international maritime arbitration?

There is no doubt that arbitration will continue to be the number-one choice for resolution of maritime disputes around the world. However, like so many aspects of life today, I believe the future of maritime arbitration will involve wide use of online platforms. For example, the London Maritime Arbitrators Association was very early off the mark in introducing its Guidelines for Conduct of Virtual and Semi-Virtual Hearings, which has been very well received in the industry.

Read a longer interview with George Lambrou at ciarb.org/maritime-arbitration-skills

What's on

Give your career a boost with this selection of training opportunities

CIArb TRAINING WINTER/SPRING 2021/22 (courses and assessments are online unless otherwise stated)

Professional development

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

ADR

- **Online Introduction to ADR** Open entry £24 (*Separate assessment available, open entry £72; student course/ assessment bundle £48*)
- **Virtual Introduction to ADR** 5 & 6 May £240 (*Assessment from 6 May £72*)

Mediation

- **Online Introduction to Mediation** Open entry £109 (*Separate assessment available, open entry £72*)
- **Virtual Introduction to Mediation** 24 & 25 March £240 (*Assessment from 25 March £72*)
- **Virtual Module 1 Training & Assessment** 2 June £3,600
- **Virtual Module 2 Law of Obligations** (*note that this module is the same across all pathways*) 8 April £1,080 (*Assessment 13 October £342; separate assessment available 15 March £342*)
- **Module 3 Mediation Theory and Practice** Open entry £1,140

Construction adjudication

- **Virtual Introduction to Construction Adjudication** 3 & 4 March £240 (*Assessment from 4 March £72*)
- **Virtual Module 1 Law, Practice and Procedure of Construction Adjudication** 31 March £1,080 (*Assessment 7 July £174; separate assessment available 17 March £174*)
- **Virtual Module 2 Law of Obligations** (see above)
- **Virtual Module 3 Construction Adjudication Decision Writing** 3 March £1,080 (*Assessment 10 June £408*)

Domestic arbitration (England and Wales)

- **Virtual Module 1 Law, Practice and Procedure of Domestic Arbitration** (*Assessment only 17 March £174*)
- **Virtual Module 2 Law of Obligations** (*see above*)
- **Virtual Module 3 Domestic Arbitration Award Writing** (*Assessment only 4 March* and 10 June £408)

International arbitration

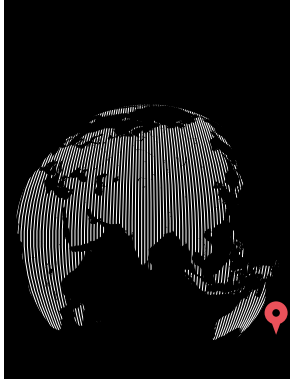
- **Virtual Introduction to International Arbitration** 3 & 4 March £240 (*Assessment from 4 March £72*)
- **Virtual Module 1 Law, Practice and Procedure of International Arbitration** 31 March £1,080 (*Assessment from 14 July £174; separate assessment available 17 March £174*)
- **Virtual Module 2 Law of Obligations** (*see above*)
- **Virtual Module 3 International Arbitration Award Writing** 3 March £1,080 (*Assessment 10 June £408; separate assessment available 4 March and 19 August £408*)

Accelerated programmes

- **Virtual Accelerated Route to Membership: International Arbitration** 15–17 March £1,200
- **Virtual Accelerated Route to Fellowship: International Arbitration** 28 February–4 March £1,560
- **Virtual Accelerated Route to Fellowship: Construction Adjudication – Part 3 only** 10 June £408
- **Virtual Accelerated Route to Fellowship: International Arbitration – Part 3 only** 10 June £408

Diplomas

- **Virtual Diploma in International Maritime Arbitration** (*Assessment only 3 March £408*)
- **Virtual Diploma in International Commercial Arbitration** 6 May £4,800 (*Assessment 19 August £408*)
- **Virtual Diploma in International Maritime Arbitration** 11 May £4,550 (*Assessment 9 December £408*)



Distance is no object

Nicole Smith FCIArb on how New Zealand ADR is closing rifts at home and increasing engagement with the rest of the world

New Zealand has embraced mediation, arbitration and non-court dispute resolution processes to resolve disputes. Mediation is mandated for most parenting disputes and is commonly used in commercial disputes. Arbitration is supported by the courts and the legislature. A modern Arbitration Act, based on the UNCITRAL Model Law, was enacted in 1996. There have been a number of amendments to the Act, including the addition of a detailed confidentiality regime and an update to incorporate the 2006 Model Law amendments relating to interim measures and preliminary orders. New Zealand is one of only a few countries to have incorporated the 2006 Model Law amendments into its arbitration legislation.

The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) is the leading dispute resolution membership organisation in New Zealand. It has a valued and special relationship with the Institute (it was formerly a branch of CIArb). AMINZ members have reciprocal rights of membership with CIArb; those who have attained the status of Fellows can apply for reciprocal Fellowship status with CIArb and vice versa.

KEY DEVELOPMENTS

One of the challenges facing arbitration and mediation practitioners in New Zealand is how to adapt dispute resolution practices to encompass *tikanga*: the law, customs and usages of Māori (the first peoples of New Zealand). *Tikanga Māori* is a *taonga* (treasure) protected in the Treaty of Waitangi signed between the British Crown and Māori chiefs in 1840. AMINZ is working with leading Māori lawyers and advisers to develop processes that appropriately respect *Tikanga Māori*.

Cable car, Wellington

The Covid-19 pandemic has affected dispute resolution in New Zealand, as it has in other jurisdictions, with many proceedings moving online. There are likely to be additional disputes to be resolved due to the impacts of the pandemic and associated lockdowns and also due to supply issues (particularly given the large reduction in air freight to New Zealand). The New Zealand government has proposed legislation requiring a reduction in rent where a commercial tenant is unable to access part of their leased premises, due to a lockdown. The legislation provides that where a rent reduction cannot be agreed, it must be referred to arbitration.

NEW ZEALAND'S INTERNATIONAL ARBITRATION COMMUNITY

There are many New Zealanders working in the field of international arbitration in New Zealand and even more spread around the world. In the past, it was often said that New Zealand had to overcome the 'tyranny of distance' in its engagement with the rest of the world. However, due to the pandemic moving many proceedings online, it seems that we are now more connected than ever. New Zealand practitioners have continued to act as counsel and to sit as arbitrators in international arbitrations, even while travel restrictions remain in place. There have also been more opportunities to attend (and present at) online conferences. However, an online seminar is no replacement for meeting up *kanohi ki te kanohi* (face-to-face) and we hope to see our international colleagues in person in the near future.

Due to the pandemic moving many proceedings online, it seems that we are now more connected than ever

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ABOUT THE AUTHORS

Nicole Smith FCIArb is an experienced arbitrator and adjudicator with experience in the resolution of a wide range of disputes, both domestic and international. She has a particular focus on telecommunications, energy and natural resources, asset management and construction issues. She is based in New Zealand and is the Vice-President of AMINZ, the New Zealand affiliate of CIArb. She is admitted to practice in the UK and New Zealand.