AI GUIDELINES
LATEST FROM THE TECHNOLOGY THOUGHT LEADERSHIP GROUP

THE ALEXANDER LECTURE
TOBY LANDAU KC'S THOUGHT-PROVOKING ADDRESS ON ISDS

CASE NOTE
CHURCHILL JUDGMENT: A MILESTONE FOR MEDIATION

THE Resolver

ciarb

Spring 2024 ciarb.org

Here come the adjudicators

CIARB IS THE FIRST ORGANISATION IN THE WORLD WITH THE POWER TO AWARD CHARTERED ADJUDICATOR STATUS

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IMAGEFLOW/SHUTTERSTOCK

Brave new AI world

When I started my career in, gulp, 1975, the most sophisticated piece of technology on the market was telex. Communication was short, sweet and succinct, and I didn't struggle with any aspect of it.

Fast forward half a century, and we are confronted with technology that can understand language and answer endless questions. I speak, of course, about ChatGPT, which launched in November 2022, and the other large language models that have followed in its wake.

I'll be honest, I find the speed of this technological advance of artificial intelligence (AI) almost incomprehensible. When I hear from colleagues that we are typically seeing significant AI developments twice a month, and that it is foolhardy to make predictions in this field beyond 12 months, I feel close to overwhelmed. My brain is not moving at that speed!

Equally, I understand that I must engage with this brave new world, for there is no doubt that AI impacts on almost everything we do in law and arbitration, both of which involve large numbers of documents, the very business of large language models. Put another way, even if I have no understanding of this technology that can understand language, sound and images, I can be sure that counsel or someone on the tribunal does: those who do not have an appreciation of its capabilities will simply be left behind.

AI impacts on almost everything we do in law and arbitration, both of which involve large amounts of documents, the very business of large language models

So I am glad to see that this issue of *Resolver* looks at the Guideline on AI in Arbitration that Ciarb's Technology Thought Leadership Group is helping to develop. I would just reiterate their caveat that "the horizon moves away as we approach it." In other words, while we need guidance on these predictive machines that spit out results more quickly than we can say "large language models", they almost certainly also have an inbuilt obsolescence. I mean, even in the time it took you to read this, something new may have been created!

Jonathan Wood FCIArb, President, Ciarb

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What's on

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SPOTLIGHT ON

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Virtual: 1 October 2023 **£3,960**
Book by: 16 September 2024

"The tutors were incredibly helpful, incredibly knowledgeable, and certainly accessible as well. They were able to give lots of positive feedback, so it helps with your self-reflection."
Helen Hale, United Kingdom, 2021 course student

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Professional development

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  Open entry **£36**
- **Brand Protection in Times of Disputes**
  Open entry **£15**
- **A Guide to Arbitration Award Writing**
  Open entry **£150**
- **Principles of Project Management Applied to Arbitration**
  Open entry **£15**

ADR

- **Online Introduction to ADR**
  Open entry **£28**
  Separate assessment available, open entry **£72**; *student course/ assessment bundle* **£56**

Mediation

- **Online Introduction to Mediation**
  Open entry **£125**
  Separate assessment available, open entry **£72**
- **Virtual Module 2 Law of Obligations (note that this module is the same across all pathways)**
  29 October **£1,230**
  Assessment 15 May 2025 **£342**
- **In-person Introduction to Mediation**
  11 July **£345**
  Assessment 12 July **£72**
- **Module 3 Mediation Theory and Practice**
  Open entry **Price on application**

Construction adjudication

- **In-person Introduction to Construction Adjudication**
  11 July **£345**
  Assessment 12 July **£72**
- **Virtual Module 1 Law, Practice and Procedure of Construction Adjudication**
  12 September **£1,230**
  Assessment 21 November **£174**
- **Virtual Module 2 Law of Obligations (see above)**
- **Virtual Module 3 Decision Writing in Construction Adjudication**
  22 August **£1,230**
  Assessment 6 December **£408**

International arbitration

- **Virtual Introduction to International Arbitration**
  11 July **£275**
  Assessment 12 July **£72**
- **Virtual Module 1 Law, Practice and Procedure of International Arbitration**
  12 September **£1,230**
  Assessment 21 November **£174**
- **Virtual Module 2 Law of Obligations (see above)**
- **Virtual Module 3 Award Writing in International Arbitration**
  22 August **£1,230**
  Assessment 6 December **£408**
- **Global Diploma in International Commercial Arbitration (Oxford)**
  6–13 September **£9,750**

Accelerated programmes

- **Virtual Accelerated Route to Membership: International Arbitration**
  9 July **£1,360**
- **Virtual Accelerated Route to Fellowship: International Arbitration**
  10 June **£1,875**
- **Virtual Accelerated Route to Fellowship: Construction Adjudication**
  2 December **£1,800**

The opener

The growth of mediation in UAE

Ciarb's United Arab Emirates (UAE) Branch, which represents the seven emirates of the UAE, is growing on the international stage, thanks to the region's booming construction industry.

In turn, this has led to a series of interventions in the UAE in recent years including, in 2021, the UAE-implemented Federal Law No 6, also known as Mediation Law, to establish a robust mediation framework in Dubai. One of the most significant changes it has brought about is the protection of 'without prejudice communications' during mediation, which means any concessions made during the mediation process cannot be used in court.

In addition, under Mediation Law, parties are now by mutual agreement free to bring disputes to the Dubai International Arbitration Centre (DIAC), the Gulf's largest alternative dispute resolution centre. However, there are still some matters that remain outside its remit, including urgent lawsuits and disputes in which the government is party.

In addition, the existence of Sharia law (religious law based on the scriptures of Islam) in the UAE means that divorce, inheritance and child custody are also off limits for the DIAC.

SHUTTERLK/SHUTTERSTOCK

Parties are now by mutual agreement free to bring disputes to the Dubai International Arbitration Centre

SEAN PAVONE/SHUTTERSTOCK

ADR in Iberia on the rise

The Centro Internacional de Arbitraje de Madrid (CIAM) is mirroring the trajectory of the DIAC. The result of the merger of four arbitral institutions in 2020, CIAM is now equipped to handle a broad range of domestic and international disputes in Iberia and Latin America.

Moreover, the bridge CIAM provides between Europe and Spanish- and Portuguese-speaking countries in South America means it is poised to attract more foreign investors in the coming years.

Meanwhile, Spain, one of the countries covered by Ciarb's Iberian Chapter, has been vigorously pursuing the use of mediation as a means of resolving disputes through the Law on Procedural Efficiency Measures for the Public Justice Service.

60-SECOND INTERVIEW

Shehara Varia FCIArb

Shehara Varia FCIArb is Attorney at Law of the Supreme Court of Sri Lanka; accredited mediator at the London School of Mediation and Singapore International Mediation Centre; Deputy Chair and Treasurer of Ciarb's Sri Lanka Branch; Director of the ICLP and IADRC Sri Lanka; and Partner at F J & G de Saram

Tell us a bit about yourself

As a young lawyer, I joined the newly established institutional arbitration centre set up by the Institute for the Development of Commercial Law and Practice (ICLP). The founder of the centre was the then Precedent Partner of F J & G de Saram – the firm I worked at and where I now head the M&A and Employment practice. I continue to work with the ICLP, which is one of the firm's *pro bono* projects, and with International ADR Centre, a joint venture set up with the Ceylon Chamber of Commerce that aims to strengthen the ADR regime in Sri Lanka.

You've worked closely on the regional ADR Centre network. What has it achieved since its launch in 2022?

If we are to make our region a go-to location for ADR in the world, it is important that all centres are equipped with resources of international standard. We are not in competition with each other, as each venue has unique advantages. Parties in the region often look for neutral venues and therefore it is important that we are able to use each other's centres when required.

We were able to make this a reality with the assistance of the Commercial Law Development Program (CLDP) of the US Department of Commerce. Centres from Bangladesh, Hong Kong, India, the Maldives, Pakistan and Uzbekistan, together with the Singapore International Mediation Centre, met in Colombo in November 2022. They met again, welcoming Malaysia to the network, in Tashkent in 2023.

The objects of the collective and what we have been able to achieve is the ability to network, deepen cooperation among stakeholders, share developments in our respective countries and our centres, discuss international best practices and so on. The intention is to meet annually and rotate the venue so that we can see the facilities that each of the centres has to offer.

The International ADR Council (IADRC) has signed an agreement with the Hong Kong International Arbitration Centre and a few others are in the pipeline. We also create informal networking opportunities. For example, Sri Lanka and the Maldives received Ciarb training in both Malé and Kuala Lumpur, where over 24 professionals qualified as members. We also had virtual Ciarb mediation training, which resulted in accredited mediators. The Maldives and Sri Lanka had mediation training in Singapore, and 11 Sri Lankan professionals have received accreditation. Networking between these professionals during the programmes has been immensely useful.

We held a symposium on mediation in Colombo in 2023, which was a resounding success – the Maldives and Malaysia attended and shared their experiences.

What's in the network's pipeline?

The IADRC has introduced commercial mediation in Sri Lanka and has facilitated drafting the requisite legislation for the ratification of the Singapore Convention and this was passed early this year. A civil and commercial law on mediation is also in the pipeline for domestic disputes.

We hope to have an ADR symposium on both arbitration and mediation supported by the CLDP in May this year, and plan to have technical sessions with all the regional centres in the collective. We also intend to connect frequently online so we can continue to collaborate.

We hope Ciarb can also be involved in the training aspect of the network as a world-renowned organisation for ADR training. This will also aid in expanding the membership in the regions, which will be beneficial to the Branches in our respective countries.

If we are to make our region a go-to location for ADR in the world, it is important that all centres are equipped with resources of international standard

MEHANIQ/SHUTTERSTOCK

Why inclusion matters on International Women's Day – and every other

We can create ADR processes that are fair, effective and truly representative, says Catherine Dixon MCIArb

Every year on 8 March, we celebrate International Women's Day to honour the achievements of women and to promote gender equality around the world. A specific theme is chosen to highlight different aspects of women's empowerment and this year's is "Inspiring Inclusion", which focuses on the importance of inclusivity and diversity across society. It's a theme that holds great significance in the field of alternative dispute resolution (ADR), also known as private or effective dispute resolution.

Inclusion means creating an environment where everyone feels valued and respected, regardless of their gender, race, ethnicity or any other characteristic. It means ensuring that everyone's voice is heard and considered when resolving disputes.

In the context of ADR and Ciarb's global role in training and supporting dispute resolvers, inspiring inclusion means promoting diversity among mediators, arbitrators and adjudicators. It means encouraging the participation of women in private dispute resolution processes, and providing them with equal opportunities to contribute and to lead. By including women in ADR, we can tap into their unique experiences, insights and problem-solving skills, which can greatly enhance the effectiveness of the process. What's more, research shows that having diverse teams and perspectives leads to better outcomes in conflict resolution.

Inspiring inclusion in effective dispute resolution also means addressing the barriers and biases that may exist within the field. Historically, ADR has been dominated by men, and the lack of representation of women can create both a perception of bias and hinder the trust and confidence that parties have in the process. By actively working towards inclusivity, dispute resolution practitioners can ensure that all parties are heard, understood and treated fairly.

ABOUT THE AUTHOR

Catherine Dixon MCIArb is Chief Executive Officer of Ciarb. She is a Solicitor and an Accredited Mediator.

Inspiring inclusion in ADR also requires a commitment to education and awareness. It is essential to provide training and resources that promote gender equality and diversity in conflict resolution. Ciarb has put this into practice by embedding the requirement to demonstrate competence in equality, diversity and inclusion (EDI) in its competence frameworks, which set out, for its various member grades, the minimum levels of competence (the skills, knowledge and aptitude) required to be an effective neutral. Neutrals are required to demonstrate cultural sensitivity and understanding of EDI issues, and to take steps to promote EDI through proceedings and/or within the wider dispute resolution sector. Examples of how competence can be demonstrated include neutrals:

- Being aware of the implications of diverse needs and circumstances, and acting and adapting their own behaviour accordingly.
- Acting as a role model for others in handling diversity and cultural issues in professional (and non-professional) contexts.
- Confronting discrimination and prejudice when observed in others.
- Taking action to promote diversity and equality of opportunity within the ADR community or wider dispute resolution sector more broadly.

By equipping dispute resolution professionals with the tools, knowledge and skills to address these issues, we can create a more inclusive and effective process for everyone.

International Women's Day and its theme of inspiring inclusion is a reminder for the ADR community to continue striving for gender equality and diversity. By embracing inclusivity, we can create ADR processes that are fair, effective and truly representative of all parties. Let us celebrate the achievements of women in ADR and work together to inspire inclusion in every aspect of what we do.

"It means ensuring that everyone's voice is heard and considered when resolving disputes"

NADIA GRAPES/SHUTTERSTOCK

Here come the adjudicators

In February 2023, Ciarb became the first organisation in the world with the power to award Chartered Adjudicator status. **Nina Fletcher** and **Isabel Phillips MCIArb** report

IMAGEFLOW/SHUTTERSTOCK

When the Privy Council approved changes to Ciarb's Royal Charter and Bye-laws in February 2023, Ciarb became the first and only professional body with the power to award Chartered Adjudicator status. Ciarb is due to receive the first applications for Chartered Adjudicator status (C.Adj) in April and the world's first Chartered Adjudicators will be announced at the end of the evaluation process.

Ciarb's Chief Executive Officer, Catherine Dixon, proposed a raft of changes to the Charter and Bye-laws soon after assuming the role, and these were supported and approved by the Ciarb Board of Trustees and by Ciarb members at an EGM in September 2022.

The changes improve Ciarb's agility in the changing global landscape of dispute resolution, thereby enhancing the organisation's ability to deliver value to members. The changes included seeking approval to award C.Adj status in order to enable experienced adjudicators to convey their experience and expertise in the same way as Ciarb's arbitrator members can through the award of C.Arb status.

There is no question that C.Adj status will benefit parties, lawyers and adjudicators. It enables experienced adjudicator members to stand out in the dispute resolution market at a time when the use of statutory and contractual adjudication is on the rise globally. In the UK, it has become the 'go to' for the resolution of construction disputes. "Ensuring the quality of the appointed adjudicator is therefore paramount," says Janey Milligan FCIArb, a practitioner involved in the development of the C.Adj requirement.

Her words are echoed by Matt Molloy C.Arb FCIArb, who worked alongside her. "The fact that the institute has secured Privy Council agreement for the creation of this is testimony to the success of construction industry adjudication," he says.

And users – be they professionals from industries such as construction, or lawyers – will also benefit from a kitemark that signifies excellence in adjudication practice and the ability to handle the most complex and difficult cases. "It will give them increased confidence in the ability of a Chartered Adjudicator to manage the process effectively and reach a soundly reasoned decision," says Molloy.

IMAGEFLOW/SHUTTERSTOCK

COMPETENCE FRAMEWORK

The launch of Chartered Adjudicator status takes place in the wider context of Ciarb's education and training reform programme. The reforms bring Ciarb's qualification courses and assessments into line with the vanguard of adult education and training by adopting a competence-based approach to professional standards. This will ensure that Ciarb qualifications remain relevant in the global market and will continue to be recognised as providing the gold standard in dispute resolution practices.

Ciarb's competence framework[1], was developed through a process of research

1 For more on the framework, see the article at ciarb.org/membership/competence-frameworks

"The fact that the institute has secured Privy Council agreement for the creation of this is testimony to the success of construction industry adjudication"

and consultation with a broad range of Ciarb members from across the world. Chartered institutes across various professions use such frameworks as a means of defining and assessing the skills, knowledge and behaviours required for individuals to perform effectively in their roles.

Frameworks also make the practical competence level explicit to service users, making it clear what can be expected of the qualification holder and inspiring trust and confidence in the process. They also, of course, manage users' expectations of what can be reasonably expected.

Ciarb's competence framework is innovative in that it builds on the concept of complementarity, a term that captures the way disputing parties and their lawyers will often use a series of different processes to deal with various issues and/or different points of escalation in the life of a particular dispute. In addition, many dispute resolution professionals operate professionally in a range of roles and are appointed in different disciplines. Finally, arbitration, mediation and adjudication all take place globally within a context that often requires dispute resolution professionals and users to apply 'mixed methods', and the framework explicitly recognises that global context.

An overarching Ciarb ADR framework identifies the core skill sets required by third-party neutrals intervening in disputes, whether adjudicative or non-adjudicative, thus providing a holistic, integrated model of ADR competence. The underpinning ADR framework is complemented by discipline-specific frameworks for arbitration, adjudication and mediation, each of which sets out competences for the different membership grades within the specific discipline.

The starting point of Ciarb's competence framework is a set of statements that articulate the *minimum level* of performance that can be expected by users of dispute resolution services, and others, from each Ciarb membership grade. These are (tailored to adjudication) as follows:

- A Chartered Adjudicator (C.Adj) is a Ciarb Fellow who has demonstrated the consistent application of the knowledge, skills and attributes required by the competence framework in their ongoing practice as an adjudicator to a standard of excellence.
- A Fellow (FCIArb) has the knowledge, skills and attributes required in all areas of the framework as an adjudicator to run the adjudication process independently.
- A Member (MCIArb) has the knowledge required in all areas of the adjudication framework to support the adjudicator.
- An Associate (ACIArb) has basic knowledge of all areas of the common ADR framework.

"The criteria for achieving Chartered Adjudicator status is demanding, but understandably so," says Molloy.

CELEBRATING EXCELLENCE

In many other chartered institutes, chartered status signifies competence to practise, with the term 'Fellow' reserved for members demonstrating excellence or outstanding contributions to the profession. Ciarb therefore has an unusual, possibly unique, hierarchy with chartered status at its apex. However, distinguishing and recognising excellence is ubiquitous amongst the chartered institutes and so setting the standard of C.Adj ►

IMAGEFLOW/SHUTTERSTOCK

The starting point of Ciarb's competence framework is a set of statements that articulate the *minimum level* of performance that can be expected by users of dispute resolution services, and others, from each Ciarb membership level

IMAGEFLOW/SHUTTERSTOCK

as excellence brings Ciarb into line with common practice.

So what is excellence in this arena? It has been defined through a set of threshold requirements that must be met in order to apply for C.Adj status and with input from leading adjudicators including, but not limited to, members of Ciarb's Adjudication Thought Leadership Group. In addition, a new chartered evaluation process has been designed to support robust and consistent selection of chartered Ciarb members.

Excellence in adjudication will be assessed by a panel of experienced practitioners (the Chartered Selection Group) against the Chartered Adjudicator Excellence Framework. The Excellence Framework seeks to differentiate between excellent and competent practices by way of indicators of practice considered to be beyond standard Fellow-level practice. The Excellence Framework and evaluation process place greater emphasis than is the case for Fellow-level competence on approaches to equality, diversity and inclusion, and professional conduct and standards. Finally, the threshold requirements also seek to support the identification of excellence.

HOW TO APPLY

To apply for C.Adj, candidates must be existing Ciarb Fellows who have completed[2] at least 25 difficult and complex cases in the last 10 years as an adjudicator, and must be able to demonstrate a diverse range of experience across different types of adjudication cases.

If you would like to be in the first cohort of Chartered Adjudicators, please apply during the application window, which is between 1 and 30 April (click here for more information). If you have any queries about how to apply, please contact us at chartered@ciarb.org

According to Chartered Arbitrator and adjudicator Kim Franklin KC, who worked on developing the C.Adj requirements, the market needs you. "Whilst most disputes are for less than £500,000, a significant proportion are for more than £1 million, and, increasingly, the parties seek declarations on particular issues as part of their dispute resolution strategy.

"This badge of excellence is essential to identify adjudicators with the requisite qualifications and expertise to manage and decide them," she says.

2. A completed adjudication is defined as one that was concluded by a reasoned decision.

Ciarb has an unusual, possibly unique, hierarchy with chartered status at its apex. However, distinguishing and recognising excellence is ubiquitous amongst the chartered institutes and so setting the standard of C.Adj as excellence brings Ciarb into line with common practice

ABOUT THE AUTHORS

Dr Nina Fletcher is responsible for the strategic oversight of professional standards with overall responsibility for Ciarb's education and training operation and reform programme, member offer development, data and insight policy, and professional practice and events.

Nina started as a legal academic before moving into applied sociolegal research, and then into operations leadership and strategy development in professional bodies. She is a qualified leadership coach.

Dr Isabel Phillips MCIArb FRSA is a conflict specialist and mediator with over 20 years of experience. She joined the full-time staff of Ciarb at the start of 2021. She brings global experience of the complementary application of different forms of ADR, and the development of the skills and knowledge of those working in and with conflict and disputes.

The future is here

Ciarb Arbitration Professional Practice Manager **Kateryna Honcharenko MCIArb** and **Claire Morel de Westgaver** report on a group set up to analyse and anticipate the benefits and risks of artificial intelligence

The new opportunities and frontiers brought about by artificial intelligence (AI), most notably the launch of ChatGPT in November 2022, are right on the horizon, but as we approach the horizon it also slides out of view.

What's more, technological advancement is likely to continue developing more rapidly than we expect. The question is how can dispute resolution lawyers, keen as they are to integrate it into their practice, harness AI's advantages while being cognisant of its inherent weak spots.

As a global and inclusive thought leader, Ciarb is perfectly placed to lead the way in raising awareness of these benefits and risks.

In fact, having sought views from its members and experts with the relevant experience, Ciarb established the Technology Thought Leadership Group. It is chaired by Claire Morel de Westgaver, a partner in Bryan Cave Leighton Paisner's ►

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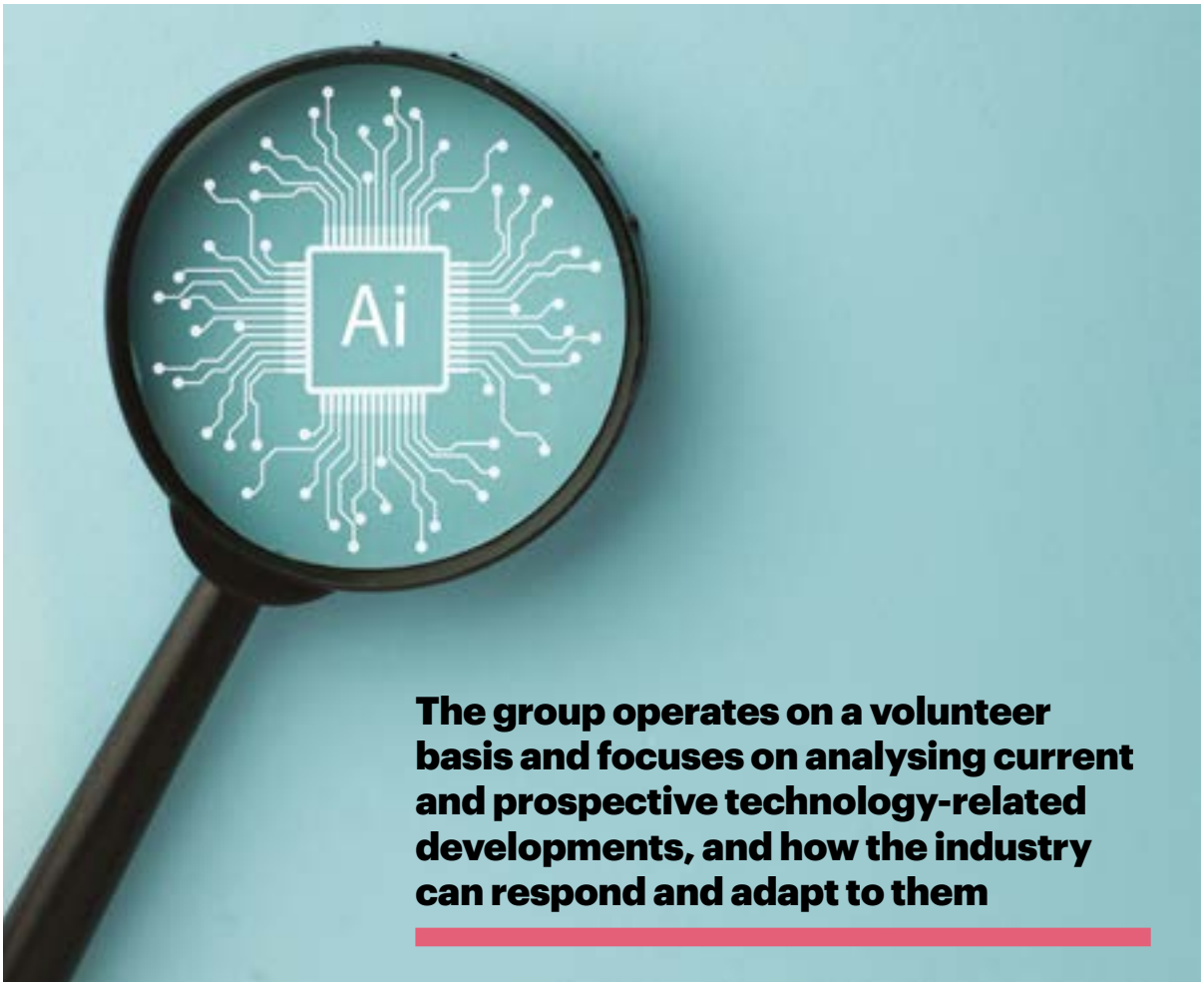


The group operates on a volunteer basis and focuses on analysing current and prospective technology-related developments, and how the industry can respond and adapt to them

ABOUT THE AUTHORS

Kateryna Honcharenko MCIArb is Ciarb's Arbitration Professional Practice Manager

Claire Morel de Westgaver is Chair of Ciarb's Technology and ADR Thought Leadership Group, and Partner at Bryan Cave Leighton Paisner

International Arbitration Group, and led by Kateryna Honcharenko, Ciarb's Arbitration Professional Practice Manager. In five, four other groups focus on arbitration, adjudication, mediation, third-party funding and sustainability.

TECHNOLOGICALLY NIMBLE

Comprising 10 members (Peter Neumann FCIArb, Fabio Solimene, Karolina Jackowic FCIArb, Carlos Carvalho MCIArb, Harry Borovick, Amy Endicott, Matthew Lavy KC, Meriam Nazih Al-Rashid, Annabelle Onyefulu ACIArb and Maud Piers), the group is an advisory body that operates on a volunteer basis and focuses on analysing current and prospective technology-related developments. The group explores how the industry can respond and adapt to technology, while keeping in mind matters of security and confidentiality, equal access, financial and business value, ethical implications and procedural efficiency.

This initiative is a natural progression of Ciarb's active technology-focused endeavours and is supported by the group's collective expertise and knowledge of legal technology

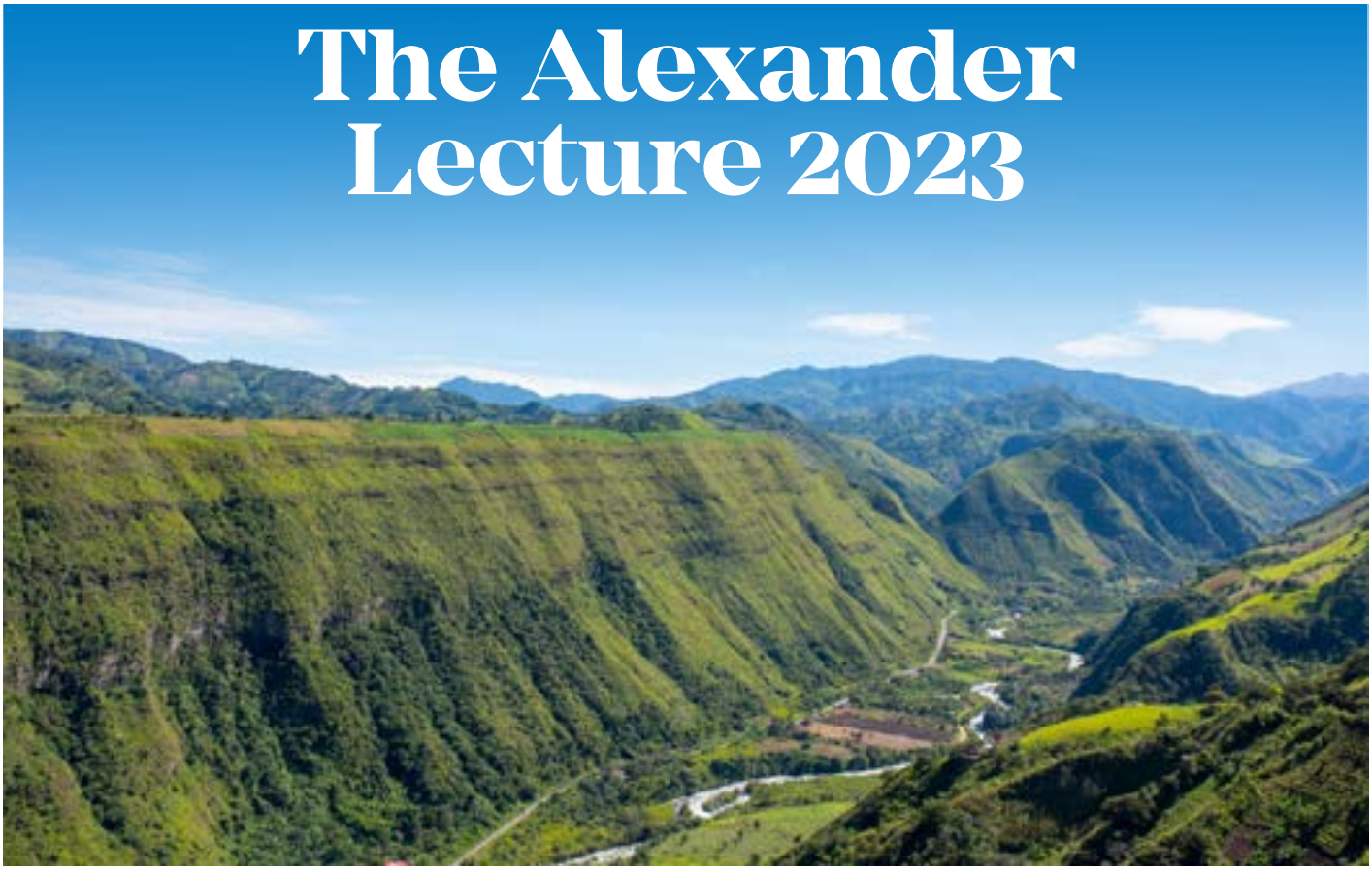
Membership of the group is limited to a period of two years, followed by a rotation and review of its overarching objectives and tasks.

The deliverables of the group are not set in stone and will be tailored to specific needs of the ADR market and its participants as they arise, but the group's primary objective is to develop a professional practice guideline on the use of AI in arbitration and ADR. Ciarb has always aimed to guide its members and a wider audience by means of, for example, its numerous guidelines. This initiative is therefore a natural progression of Ciarb's active technology-focused endeavours and is supported by the group's collective expertise and knowledge of legal technology.

The purposes and membership of the group were reassessed in July 2023 when it was agreed that acknowledging rapidly evolving AI in the legal market required an active response. Since then, the group's deliberations have progressed beyond substantive discussions on the framework presented by the guideline and has entered the drafting stage. The guideline's release is expected imminently.

TOEY ANDANTE/SHUTTERSTOCK

The Alexander Lecture 2023



BENEDICT KRAUS/SHUTTERSTOCK

In his lecture last November, Toby Landau KC C.Arb FCIArb examined the role of depoliticisation in the genesis, development and justification of international investment arbitration. Ciarb President Jonathan Wood FCIArb was impressed

It could be the opening of a book by nature writer Robert Macfarlane, known for his books on landscape and place, or the scene-setter for a novel of high drama.

But it is neither. The words below are those Toby Landau KC C.Arb FCIArb used to open last November's Alexander Lecture. The title of the lecture was 'International Investment Arbitration and the Search for Depoliticisation' and his opening remarks referred to the investor-state dispute settlement (ISDS) case of *Copper Mesa v Ecuador*, a case about a mining project in one of the most biodiverse areas of the world.

'The Intag valley is a remote mountainous region in the High Andes in Northern Ecuador. It is an area of exquisite natural beauty, commanding mountains, lush verdant valleys, rushing streams, a sea of flowers and fauna, pure mountain air, no sounds but nature's own symphony'

Canadian company Copper Mesa acquired concession rights for an open-pit copper mine. Contrary to law, there was no consultation with the local Intag community nor was an environmental impact study obtained in support of the application for the concession.

The project met with heated resistance from local communities. They in turn were met with aggression on the part of the company, which deployed men who fired guns and sprayed mace at civilians in what was a premeditated, covert and well-funded plan to take the law into its own hands.

In the event, the concession was terminated and suit was brought by Copper Mesa under the Canadian Ecuadorian bilateral investment treaty (BIT) resulting in an award of USD$19 million against Ecuador. As a result of the behaviour of the company, the tribunal reduced the award by 30 per cent.

The point of the lecture was not to comment on the merits of the decision, but to illustrate how in an ▶

increasing number of cases the process of ISDS has led to a sense of deep injustice in those affected by the awards.

Time constraints meant Landau was only able to give limited details of other cases that have had a similar impact. Examples cited include *Tethyan Copper v Pakistan*, the impact of which has been so great that the case is talked about by every rickshaw driver in Landau's home town of Lahore.

In his address, he also referred us to the documentary *The Tribunal* by Michael Rogge, which can be found on the Columbia Center on Sustainable Investment website (ccsi.columbia.edu/thetribunal) and which records the reaction of the local community to the tribunal's award. I recommend this to anyone interested in ISDS.

DEPOLITICISING OBJECTIVES

Landau explained the original intent of ISDS: to depoliticise foreign investment disputes from the realms of diplomacy between governments to a rules-based objective process containing the issues in dispute between the individual investor and the host state, and adopting the adversarial approach deployed in commercial arbitration where the issues are narrowly defined. While this probably worked for infrastructure projects, it has been less successful in other cases.

The scope of what is embraced by BITs has expanded: tribunals are now dealing with issues that go much further into sovereign discretion over policy relating to, for example, climate change, public health, nuclear power and human rights. Tribunals are not necessarily equipped to adjudicate in such matters, as lawyers do not present the full picture to the tribunal, but only those elements that will help win the case.

ABOUT THE AUTHOR

Jonathan Wood FCIArb is President of Ciarb. He is a full-time arbitrator with 40 years' experience in international dispute resolution, arbitration and mediation acting for government departments, insurers, banks and traders. He sits as an arbitrator for ad hoc, ICC, LCIA, LCAM and other institutions.

Tribunals are now dealing with issues that go much further into sovereign discretion over policy relating to, for example, climate change, public health, nuclear power and human rights

CONFIDENCE CRISIS

If this gives rise to bad feelings, we are in trouble, claimed Landau, for it will lead to lack of confidence in the rule of public international law and the arbitral process. And it means that tribunals are, in effect, moving back into the political arena, rather than depoliticising the way in which investor-state disputes are resolved.

How then to resolve the problem, asked Landau, for our approach to ISDS in relation to these political and socioeconomic issues needs to change. When lawyers pack up and move on, they leave behind a sense of bewilderment, which has an adverse effect on the lives of ordinary people.

While he is sure that resolution is possible, Landau feels that the mindset of a conservative profession is certainly an obstacle, not least when change might affect the fees that can be commanded by these disputes.

We were, in short, treated to a lecture of extraordinarily high intellectual calibre – and also high drama. The video is available on Ciarb's YouTube channel here.

Case note

James Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416

The *Churchill* judgment handed down by the Court of Appeal in November 2023, and in which Ciarb intervened, has profound implications for the use of ADR and all non-court dispute resolution processes, including mediation. Ciarb's Director of Policy and ADR Development Dr Isabel Phillips MCIArb gives an overview of the case and considers the judgment's far-reaching implications for the use of ADR

In 2020, Mr James Churchill ("Churchill") complained to Merthyr Tydfil County Borough Council ("the Council") that since 2016 knotweed had encroached on his land causing damage and a loss of value and enjoyment.

The Council queried why Churchill had not used its corporate complaints procedure (CCP) and said it would request a stay if Churchill launched proceedings prior to using the CCP.

Churchill went ahead in 2021 and lodged a claim in nuisance[1] against the Council, without engaging with the CCP. In 2022, the Council issued an application for a stay of proceedings.

In his judgment, Deputy District Judge Kempton Rees believed he was bound to follow Lord Justice Dyson's statement in the case of *Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002* ("*Halsey*") that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court" and refused to grant the stay. He also criticised Churchill's conduct for being contrary to the spirit and letter of the pre-action protocol[2] through his refusal to engage with the CCP.

Court of Appeal HH Judge Harrison gave the Council permission to appeal due both to the point of principle and practice it raised, and due to there being many similar cases.

1. Nuisance = legal term for substantial interference with the right to use and enjoy land.
2. Pre-Action Practice Direction does expect the parties to try to settle without proceedings and to consider ADR to assist with settlement.

The case summary focused on the legal procedural history of the case. The issues of knotweed ... were not relevant in the appeal

HXDYL/SHUTTERSTOCK

As a result, the appeal of *Churchill and Merthyr Tydfil County Borough Council; Appeal No: CA-2022-001778* focused on issues of principle and procedure, with emphasis on the impact of *Halsey* on the law relating to pre- and post-action behaviour. This meant the detail of the case summary focused on the legal procedural history of the case. The issues of knotweed, resulting problems and remedies were not relevant in the appeal.

Hearing the appeal were: Lady Chief Justice Sue Carr ("LCJ"), the Master of the Rolls Sir Geoffrey Voss ("MoR") and Lord Justice Birss ("Birss LJ"). The Court of Appeal has the power to permit third-party interventions to assist the Court with their deliberations through information that would not, or could not, be supplied by the parties to the case.

Ciarb intervened on behalf of its mediator membership and worked together with the Centre for Effective Dispute Resolution (CEDR) and the Civil Mediation Council (CMC) for the first time to represent the voice of the mediation community in England and Wales. The focus agreed by all three organisations was to address the suggestion in the *Halsey* judgment that ordering parties to mediate would breach article 6 of the European Convention on Human Rights (ECHR). Other intervenors representing a range of views and interests were: the Bar Council, the Law Society of England and Wales, the Housing Law Practitioners Association and the Social Housing Law Association.

The unanimous judgment, written in accessible language, was drafted by the MoR. It captures four core questions, and provides comprehensive evaluation of the evidence and discussion, before providing clear answers. In brief:

i. WAS THE JUDGE (KEMPTON REES DDJ) RIGHT TO THINK *HALSEY* BOUND HIM TO DISMISS THE COUNCIL'S APPLICATION FOR A STAY?

The MoR identifies four elements in the *Halsey* judgment which the MoR reasons mean that Kempton Rees DJ was not bound to dismiss the Council's stay application. These are:

1. The core question of *Halsey* was cost sanctions, not mediation orders.
2. The title of the quoted section was "General encouragement of the use of ADR".
3. The issue of compelling parties to mediate had only been raised in oral argument.
4. Dyson LJ believed he was providing guidance on dealing with costs issues, not on whether the court had the power to mandate ADR.

THINK A/SHUTTERSTOCK

ii. IF NOT, CAN A COURT LAWFULLY STAY PROCEEDINGS FOR AN NCDR?

In the longest section of the judgment, the MoR deals in detail with the Civil Procedure Rules (CPR) provisions, case law from the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) and domestic case law. As a result of this analysis, he concludes unambiguously:

"The Court can lawfully stay proceedings, or order the parties to engage in a non-court dispute resolution process, including mediation, provided that the order made did not impair the very essence of the claimant's right to proceed to a judicial hearing, and was proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost."

The analysis in this section will be of great interest in future. Particularly as it looks in detail at the CPR provisions, specifically CPR 1.4, 3.1 and 26.5, and unpicks the fundamental misunderstanding of *Deweer v Belgium (1980) 2 EHRR 439* on which Dyson LJ expressly relied in *Halsey*. The MoR then reviews and deals with other ECtHR, CJEU and domestic judgments to conclude that the case law does not provide support to the contention that to order participation is *per se* (by itself) a breach of article 6 of the ECHR.

ABOUT THE AUTHOR

Dr Isabel Phillips MCIArb FRSA is a conflict specialist and mediator with over 20 years of experience. She joined the full-time staff of Ciarb at the start of 2021. She brings global experience of the complementary application of different forms of ADR, and the development of the skills and knowledge of those working in and with conflict and disputes.

The focus agreed by all three organisations was to address the suggestion in the Halsey judgment that ordering parties to mediate would breach article 6 of the ECHR

Ciarb, the CMC and CEDR had provided evidence and compelling argument that this section was obiter and that ordering parties to mediate would not breach article 6 of the ECHR – the right to a fair trial – and that they were not part of the essential reasoning in that case and did not bind the judge in this case to dismiss the Council's application for a stay of these proceedings.

This part of the judgment is of particular interest and importance to the ADR community at large as it removes a fundamental misperception of what participation in mediation means for the parties.

iii. IF SO, HOW SHOULD A COURT DECIDE WHETHER TO DO THIS?

The MoR explicitly rejects the call for the court to lay down fixed principles, a checklist or scoresheet, when determining whether a matter should be stayed or an order made to engage in a non-court dispute resolution (NCDR) process, instead opting to reaffirm the authority of the judge in each case to evaluate the situation "for the purpose of achieving the important objective of bringing fair, speedy and cost-effective solution to the dispute and proceedings". The elements he mentions are:

1. The form of ADR being considered.
2. Whether the parties were legally advised or represented.
3. Whether ADR was likely to be effective or appropriate without such advice or representation.
4. Whether it was made clear to the parties that if they did not settle they were free to pursue their claim or defence.
5. The urgency of the case and the reasonableness of the delay caused by ADR.
6. Whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue.
7. The costs of ADR, both in absolute terms and relative to the parties' resources and the value of the claim.
8. Whether there is any realistic prospect of the claim being resolved through ADR.
9. Whether there is a significant imbalance in the parties' levels of resources, bargaining power, or sophistication.
10. The reasons given by a party for not wishing to mediate. For example, if there had already been a recent unsuccessful attempt at ADR.
11. The reasonableness and proportionality of the sanction in the event that a party declined ADR in the face of an order of the Court.

THINK A/SHUTTERSTOCK

This comprehensive and interlocking list highlights the complexity of the decision-making on this issue and affirms the discretion of judges to consider whether to order a stay or the parties to undertake an NCDR process, in each case.

This section also includes statements about ADR that will be of interest to the mediation community at large: "We heard some argument about whether an internal complaints procedure ... is properly to be regarded as ... ADR at all. The definitional issue seems to me to be academic. The court can stay proceedings for ... any ... process that has a prospect of allowing the parties to resolve their dispute. The merits and demerits of the process suggested will need to be considered by the course in each case."

iv. SHOULD THE JUDGE HAVE ACCEDED TO THE COUNCIL'S APPLICATION?

Of relevance to the use of ADR in the future is a section of paragraph 72 of the judgment which states: "Whilst it is obvious that the judge would have stayed the claim back in May 2022, had he been able to see this judgment, things have moved on".

The MoR explicitly rejects the call for the court to lay down fixed principles, a checklist or scoresheet, when determining whether a matter should be stayed or an order made to engage in an NCDR process

Therefore, 'what happens next' will be a matter for the District Judge unless, of course, the parties settle the matter.

CONCLUSIONS, UNRESOLVED ISSUES AND QUESTIONS FOR THE FUTURE

This judgment raises several questions. Four of them are worth highlighting as issues of interest to Ciarb's global membership:

The reaction of parties and their lawyers to case management

After the landmark judgment *Dunnett v Railtrack [2002] 2 All ER 850*, there was a rapid increase in voluntary and directed referrals to mediation. After *Halsey* this slowed. As a result of *Churchill*, it is likely that parties and lawyers will be more proactive in their use of mediation, rather than waiting to be ordered.

The reaction of judges and the use of their discretion

Given the caseload of the courts, and the improved level of knowledge and experience due to judicial training in comparison to the same point in 2004, it seems likely that the removal of the barrier to using mediation (and other NCDR processes) created by *Halsey* will lead to more proactive use of ADR orders by judges.

However, the experience and knowledge of mediation and other ADR processes by the judiciary will condition the application of judicial discretion. Judicial training has included ADR for many years now, which is encouraging.

Anecdotal evidence suggests promising, concerning, and unsurprising events:

- New district court mediation schemes to refer cases at the allocation stage are starting to appear.
- Some judges have not yet heard of the *Churchill* judgment and continue to avoid ordering stays/parties to participate in ADR.
- Lawyers arguing that the *Churchill* judgment only applies to internal complaints procedures, not to other forms of ADR.

The justice system in England and Wales

There is clear interest in the promotion of early dispute resolution and concern about the overloaded justice system.

The UK Ministry of Justice has been consulting over the last two years on ADR and the integration of mediation and other processes into the civil and family justice systems. This judgment is likely to reinforce and support this work.

There is increased cooperation and collaboration in the mediation sector as a consequence of the *Churchill* intervention, MoJ roundtables and consultation. This is not just the case in relation to mediation, but also digital justice, arbitration and adjudication.

THINK A/SHUTTERSTOCK

International implications

Jurisprudence relating to the integration of mediation and other forms of private dispute resolution into court systems is developing rapidly around the world.

This judgment will enable and encourage the use of mediation and other forms of ADR by removing the power of precedent from a key element of the *Halsey* case in England and Wales, and as 'persuasive precedent'[3] in Scotland, Northern Ireland and a range of other common law based jurisdictions.

It should also be noted that *all* the UK jurisdictions have much to learn from the experience of other justice systems around the world; many jurisdictions have Ciarb members supporting, developing and integrating mediation into civil justice to deliver access to justice.

3. In this case, 'precedent' means in practice, binding on courts below the level of the Court of Appeal; 'persuasive precedent' means the judgement will influence, but not be binding, in and on associated jurisdictions.

This judgment will enable and encourage the use of mediation and other forms of ADR by removing the power of precedent from a key element of the Halsey case in England and Wales

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Over 17,500 members are connected through 44 Branches across 150 jurisdictions.

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Interested in meeting your peers and staying up-to-date with the hot topics in alternative dispute resolution? We offer a range of thought-provoking and engaging events and networking opportunities – both in person and virtually.

AI and ADR: Theory and Practice series

New technology has become an integral part of the legal profession over recent years. However, when it comes to artificial intelligence (AI), it has also become a stumbling block. AI tools are capable of significantly increasing our professional efficiency, but unconditional reliance on AI may also adversely affect the procedural efficiency of all forms of private dispute resolution. AI and ADR: Theory and Practice is a series of webinars and Let's Discuss networking events hosted by Ciarb with its partners TrialView and Jus Mundi.

Each webinar focuses on a particular theme, giving you the opportunity to learn from experts in the field. You can then discuss the theme further with expert moderators and peers at a subsequent Let's Discuss networking event.

AI in ADR: Fundamentals
11 April 2024 | 12:00 – 13.30 GMT+1 | Virtual

We focus on the current legal technology market and the available AI tools in the first webinar of the series. The speakers will take a critical look at the benefits and risks of relying on AI in ADR and explore relevant practical cases.

Let's Discuss AI Fundamentals in ADR
9 May 2024 | 12:00 – 13.30 GMT+1 | Virtual

In this online networking session, we'll discuss how AI can be utilised in a safe manner, and what parties, counsel and tribunals should consider before using AI tools.

Roebuck Lecture 2024
Access to Arbitral Justice for Local Communities
26 June 2024 | In-person and Virtual

This year, our prestigious Roebuck Lecture will be given by the eminent **Professor Emilia Onyema FCIArb LLB LLM PhD**, Professor of International Commercial Law at SOAS University of London. Her lecture will focus on mitigating the cost of corruption in commerce and empowering everyday citizens through access to justice. It will look at those who are most impacted by corruption and discuss why arbitration and national courts should be made available to victims (and activists) as tools of access to and the delivery of justice.

Visit ciarb.org/events for more details.

Event recordings

Couldn't make it? Not to worry – many of our events are available to watch on our YouTube channel. Some of our past events include the 2023 Alexander Lecture delivered by Toby Landau KC C.Arb FCIArb, the 2023 Roebuck Lecture delivered by Dr Kabir Duggal C.Arb FCIArb, as well as Branch events.

Watch at YouTube.com/ciarb

Career development

Qualifications

In-Person Introduction to Mediation
11 July 2024 | London, UK

Interested in learning more about mediation?

This one-day in-person workshop covers the process and procedure of mediation and help you put mediation in the context of other forms of dispute resolution.

Once you have successfully completed the accompanying assessment (available to book separately), you are eligible to apply for Associate membership of Ciarb.

In-Person Introduction to Construction Adjudication
11 July 2024 | London, UK

Adjudication is the preferred form of dispute resolution in the construction industry, so if you're interested in developing a career in this field – this course is for you.

The one-day in-person workshop will give you a clear understanding of the legal framework of construction adjudication. Upon successful completion of the accompanying assessment (available separately), you are eligible to apply for Associate membership of Ciarb.

Virtual Accelerated Route to Fellowship International Arbitration
10 June 2024 | Virtual

The Accelerated Route to Fellowship is an intensive five-day assessment programme. It is designed to assess whether you have the knowledge and skills required to apply the principles and procedure of international arbitration using arbitration legislation based on the UNCITRAL Model Law and Arbitration Rules, and write a reasoned and enforceable Arbitration Award. Upon successfully completing the programme, you can apply to become a Ciarb Fellow.

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The Learning Lab 2024
Arbitrator Skills Development Series
15 May – 19 June

This six-part series of workshops is designed to develop your arbitration management skills, equipping you with the knowledge and confidence to handle every stage of arbitral proceedings. It is suitable for seasoned arbitrators and arbitration practitioners who plan to start sitting as arbitrators in the future.

15 May	First Impressions: Personal Branding and Terms of Appointment
22 May	The Ethical Arbitrator: Conflict Conundrums and Tricky Challenges
29 May	Show and Tell: Making Robust Disclosures and Handling Arbitrator Interviews
5 May	Starting Strong: Case and Time Management Tips for Arbitrators
12 June	The Show Must Go On: Managing Document Production, Evidence and Hearings
19 June	The Active Arbitrator: Combatting Guerrilla Tactics and Adopting Proactive Case Management Practices

For more information on continuous development, visit ciarb.org/events

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There's lots going on at Ciarb, and we don't want you to miss out. Our monthly newsletter, eSolver, is sent to members mid-month. Full of our events, training, opportunities, news and announcements, it's not to be missed.

Haven't received eSolver? Email us at marketing@ciarb.org
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