BIG QUESTION
Can ADR resolve international conflict?

MEET THE PRESIDENT: JANE GUNN FCIArb

UKRAINE: "OUR ARBITRATORS WANT TO WORK"

CIArb
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THE Resolver

SUMMER 2022 CIARB.ORG

Dispute and conflict

Finding stability in uncertain times

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President's welcome

What is ADR's role in times of international conflict? That's a question we explore in this issue of *The Resolver* – and one which I imagine many of you grapple with on an unfortunately regular basis.

There is a distinct difference between conflict and dispute, but a close relationship. We strive to be a deeply ethical profession (for more on this, read Director General Catherine Dixon's column on page five), and few of us would act in ways that discourage peace – but, as David Huebner suggests on page seven, perhaps our regular ADR skills aren't up to the job of resolving international conflict. Should they be? It's a question that is worth reflecting on for all of us. While you do that, I would strongly suggest that you read the interview with Ukrainian arbitrator Olena Perepelynska on page 13. Her efforts to keep the Ukrainian arbitration system not only running but thriving through intensely difficult circumstances is quite remarkable.

In this issue, I've also had the privilege of being able to set out my stall for my presidential year (page nine). I strongly believe that dispute resolution should not be seen as only a profession, but as a life skill that can help us in all kinds of disputes and conflict. Please tell me your thoughts via the Big Conversations project – you'll find more details in the article.

Jane Gunn FCIArb FRSA FPSA is President of CIArb. She is CEDR accredited, CMC registered and an IMI Certified International Mediator.
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INSIDE THIS ISSUE

The opener

Sir Geoffrey Vos makes the case for a digital justice system

The Master of the Rolls, Sir Geoffrey Vos, delivered the first hybrid Roebuck Lecture to an in-person and online audience in June.

'Mandating Mediation: The Digital Solution' set out a vision of a future digital justice system in England and Wales in which ADR is an "essential part of the court-based dispute resolution process". Under the term "smart system", there would be a focus on identifying the real issues that divide the parties, in addition to attempts to resolve the issues at "the earliest possible stage in the dispute".

Sir Geoffrey Vos, the Master of the Rolls

Sir Geoffrey gave a few reasons why the topic of mandatory mediation has been so controversial. He said that in Europe there is a "lack of confidence in the neutrals who offer mediation services". In countries like the UK, he implied that delaying court proceedings to allow parties to mediate "might be regarded as a breach of Article 6 of the ECHR", namely, an individual's right to a fair trial. He also said that enforcing mediation could serve to entrench parties' positions.

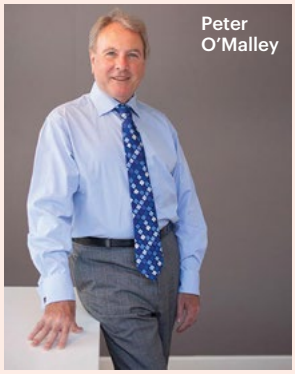
A digital system could offer a solution to these issues. For example, currently, mediators promote offers and counter-offers and, once these offers are rejected, parties reach a stalemate. In a digital environment, this would not occur as issues are identified by asking questions, rather than through the use of adversarial statements of case.

Parties would of course still be able to obtain judicial resolution if they are unable to settle their dispute within the digital space.

Watch the lecture on CIArb's YouTube channel

Book preserves Ireland Branch's history

A project by the CIArb Ireland Branch that started as an archive initiative has turned into a full, published book celebrating the branch's 40th anniversary.


Peter O'Malley

Vice Chair Peter O'Malley, the book's author, undertook the 21-month project following concerns that records were being lost, especially after a few relocations of the branch. He said: "The primary challenge was sourcing the record material. I initially contacted all the surviving past chairs, where many had destroyed their own personal records believing copies were retained elsewhere."

He eventually made contact with past chair Bill McLaughlin, who was living in the UK and had a considerable archive of records up to 1992, which he passed to Peter. "These records form the basis of the book supplemented by further research and material from other past chairs," Peter said.

Peter encouraged other branches not to lose sight of their history amid the bustle of day-to-day activity. "All the branch records from this early period have now been boxed and fully catalogued and they are now archived in controlled conditions at the Irish Architectural Archive in Dublin to ensure their continued existence, security and accessibility into the future. Now with the benefit of hindsight, I realise how tenuous the sourcing of records was; they could have all been so easily lost for ever. I do think that branches can and should continue to learn where reference to the past is an important part of this learning and appreciation of heritage," he added.

The Irish Branch of the Chartered Institute of Arbitrators – The early years 1981-1993 **by Peter O'Malley is available to order at www.peteromalley.ie**

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60-SECOND INTERVIEW

Molly Melin

Molly Melin is the author of *The Building and Breaking of Peace: Corporate Activities in Civil War Prevention and Resolution*

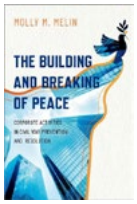
Tell us a bit about yourself.
I did my PhD at the University of California, Davis and my dissertation was on conflict management mechanisms. I wanted to understand why states would get involved through various conflict management activities in other states' conflicts. I looked at state interests and the timing of mediation, economic sanctions and diplomacy. I'm curious about the peace process as it engages outsiders.

I wanted to expand this picture to include the private sector's role in conflict prevention and resolution. I went on a family vacation to Colombia, and while I was there, if you bought a beer it would say on the bottle top, "I am capable of believing". This was a kind of marketing campaign by the Colombia Chamber of Commerce for a peaceful Colombia. I thought: "This is really happening, I'm going to prove it."

Why do you think the corporate sector hasn't really been taken into account much in the past when studying peace-building efforts?
In political science we're focused on understanding states and state behaviours. We have experts who study the UN and different international organisations, but we focus on the role of the state. Studying the private sector kind of requires you to go out on a limb, to learn from research in another field and expand your way of thinking.

What are companies' motives for promoting peace?
Partly it's matching up with their corporate social responsibility pledges, partly for the publicity. Sometimes it's for their own benefit, to be able to continue operating. I would argue that it doesn't really matter. It's the outcomes that matter.

What kind of peace-building activities have you observed among private businesses?
In Colombia, the private sector was actually sitting at the table during negotiations in Havana. In Northern Ireland, business was really pushing the idea of peace, and the CBI put out a peace dividends paper. And I think what we're observing in Ukraine is really interesting, because we're not seeing neutrality, we're seeing a lot of action against Russia for being the aggressor. And so businesses are pulling out of Russia. That adds an interesting dynamic: some of the people I've talked to that are in that world have said board members have put pressure on businesses saying we can't just be neutral proponents of peace – we have to take a stand.



The Building and Breaking of Peace: Corporate Activities in Civil War Prevention and Resolution **by Molly Melin is published by Oxford University Press.**

"In political science we're focused on understanding states... Studying the private sector requires you to go out on a limb"

IN BRIEF

Pakistan Branch puts ADR one step closer to widespread adoption countrywide

A positive step on the journey towards embedding ADR in Pakistan was made at the inaugural conference of the newly launched CIArb Pakistan Branch with the ratification of the Lahore Arbitration Declaration.

The declaration includes nine points, including "To set up ADR centers and Commercial Courts in all provinces and autonomous areas of Pakistan in order to strengthen investor trust" and "To conduct capacity-building programs with assistance from CIArb for lawyers, arbitrators and practitioners of arbitration".

The conference attracted more than 800 delegates. Sessions covered topics including the role of ADR centres and commercial courts in increasing foreign investors' confidence; energy and power arbitration in Pakistan; standardisation in arbitration practice, procedure and process; and dispute resolution from a client's perspective. The conference also launched Pakistan's first construction disputes report co-authored by the Chair and Vice Chair of the branch.

27 May 2022: The newly launched CIArb Pakistan Branch holds its inaugural Conference

Ethical practice and the rule of law

Catherine Dixon explains why ethical practice standards remain at the forefront of CIArb's work

Witnessing the actions taken by Russia in Ukraine is a poignant reminder of the importance of the rule of law and what happens when it fails.

The Russian invasion and other ongoing conflicts globally, as well as reminding us of the importance of the rule of law, raise the issue of ethics and prompt us to consider morality and its place in society. While the rule of law requires us to consider the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of law, separation of powers, legal certainty and procedural and legal transparency, ethics explores the idea of morality and our ability and willingness to do the 'right thing', as the law cannot make people honest, caring or fair.

Ethics in ADR is not something new to CIArb. In 2018, the Roebuck Lecture delivered by Dame Elizabeth Gloster highlighted her experience of ethics within the ADR profession and her professional experience as a judge. In 2021, the Brazil Branch held a meeting on 'Arbitrators' Ethics, Challenges and *Vacatur*: International experience'. And in 2022, the Iberian Chapter of the European Branch held a meeting entitled 'Ethics in Arbitration: A priority for practitioners or simply a duty rising from disclosure obligations?'.

CIArb prides itself on the ongoing support it has given to its Fellows, Members and Associates around the world on the subject of ethical practice. All CIArb members sign up to the Code of Professional and Ethical Conduct for Members, which differentiates them from other practitioners. In addition, we provide best practice guidelines to our members.

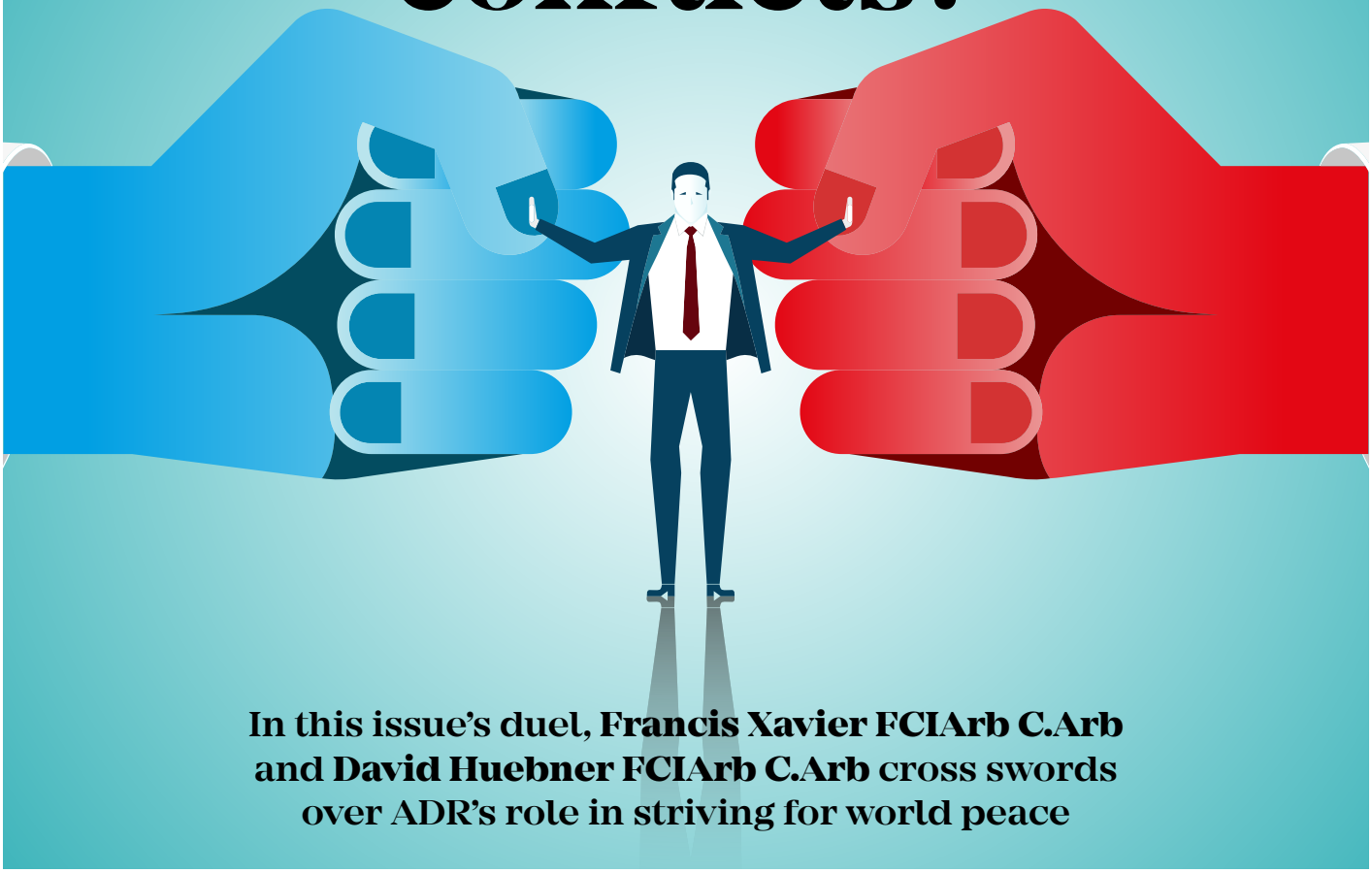
CIArb also responds to changes in practice by issuing guidance on, for example, the use of technology in international arbitration. We are currently finalising guidelines on multi-party arbitration; mediation; third-party funding and monetisation of awards; sustainability and environmental disputes; and investor-state mediation, all of which will support best and ethical practice. The spring 2022 edition of *The Resolver* focused on ADR and sustainability, and building on this, we are exploring ethics within business, through the focus of ESG (environmental, social and governance).

We must continue to consider ethics holistically and as the bedrock of our sector. Examples include how CIArb uses it observer status to influence best and ethical practice at UNCITRAL Working Group III on Investor-State Dispute Settlement, which is currently considering the Code of Conduct for Adjudicators. On 28 April 2022, it was noted that the Working Group "remains committed to finalizing the Code of Conduct for Adjudicators and the associated Commentary for presentation to and consideration by the Commission at its 56th Session in 2023". CIArb is looking forward to attending these important sessions and supporting the Working Group where possible.

As Director General, I remain committed to ensuring that ethical practice standards are at the forefront of what we do. We remain committed to ensuring that our members receive guidance on ethical standards for the ADR profession, whether that be arbitration, adjudication or mediation. We will continue to consider ethics as ADR practice evolves, innovates and changes as a result of technology, geopolitical changes, sustainability and the environment or otherwise. CIArb's commitment is to ensure that the ADR profession is and remains ethical and can be trusted to act honestly, fairly and morally.

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

Is it ADR's business to resolve international conflicts?



In this issue's duel, Francis Xavier FCIArb C.Arb and David Huebner FCIArb C.Arb cross swords over ADR's role in striving for world peace

YES

FRANCIS XAVIER
RAJAH & TANN

"The answer my friend, Is blowin' in the wind. The answer is blowin' in the wind"

International conflicts invariably are grounded in ethnic, religious, ideological, territorial, governmental or economic differences. ADR in this context would seek to resolve international conflicts by mediation and arbitration, without recourse not only to formal conflict resolution (under the auspices of the International Court of Justice for instance) but also any form of hostility – be it economic, political or military.

Armed conflicts are particularly crippling. The current global political and economic terrain is putty in the unseen hands of the

SHUTTERSTOCK

military-industrial complex. The pervasive influence of the military-industrial complex results in increased military spending by national governments, the intensification of the arms race and the inevitable proliferation of armed conflict.

Article 33 of the United Nations Charter itself mandates that parties to any dispute likely to endanger the maintenance of international peace and security:

> *"... shall, first of all, seek a solution by negotiation, mediation, conciliation, arbitration, or other peaceful means of their own choice".*

However, the success of the apparatus of the UN, including the UN Security Council (the organ with the primary responsibility for maintaining international peace and security), has been patchy at best.

It is axiomatic that international trade itself is the lifeblood of the world economy, as it provides goods and services traded across borders to bring wealth and prosperity to nations. Wars – be they trade wars or armed wars – disrupt and cripple this lifeblood.

ADR has a proven track record in resolving commercial disputes. There is every reason to believe that ADR will be equally effective in international conflicts. Even as far back as 1872, the Alabama Claims arbitration between the UK and the US demonstrated the effectiveness of arbitration in settling international conflicts. Numerous further examples testify to this – the US mediation to facilitate bilateral talks between India and Pakistan on the issue of the bifurcation of Kashmir; the mediation of the UN and the Arab League in the Syrian conflict; Algeria mediating the dispute between the US and Iran regarding the release of US hostages in Tehran (1981); and the EU being mediator in the Orange Revolution in Ukraine (2004). Historically, there has been widespread recourse to mediation as a peaceful method of armed conflict resolution. Mediation is particularly effective when non-state actors, such as ethnic groups, rebel military or paramilitary organisations, terrorist groups or mercenary units, are involved.

The modern proliferation of treaties having recourse to arbitration for the settlement of specified classes of inter-state disputes therefore comes as no surprise.

Now, more than ever, the international community needs to lend its unwavering support to recourse to ADR in international conflicts. The time has perhaps come for the UN itself to birth a permanently constituted inter-governmental body specifically designed to deliver ADR services for both inter- and intra-governmental conflicts. In this context, the Permanent Court of Arbitration (which began operation in 1902) does not have a permanently constituted tribunal.

Yes, there will be challenges. But we must persevere.

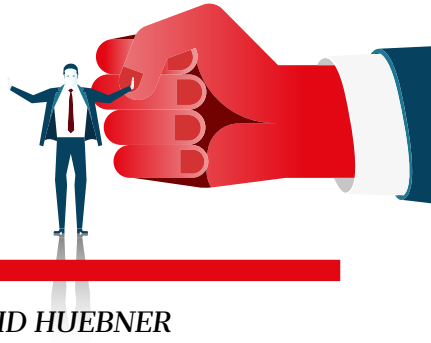
ABOUT THE AUTHORS

Francis Xavier S.C. PBM FCIArb C.Arb is Regional Head, Dispute Resolution, Commercial Litigation, Investment Treaty and International Commercial Arbitration, at Rajah & Tann.

Amb. (Ret.) David Huebner FCIArb C.Arb FCollArb has more than 30 years' experience as an arbitrator and advocate in international, investment and complex commercial arbitrations, and is a trustee of CIArb.

"And how many ears must one man have,
Before he can hear people cry?
Yes, and how many deaths will it take till he knows,
That too many people have died?

Bob Dylan, 'Blowin' in the Wind' (1962)



NO

Amb. (Ret.) DAVID HUEBNER

"Someday I'll wish upon a star,
And wake up where the clouds
are far behind me,
Where troubles melt like
lemon drops,
Away above the chimney
tops..."

I would never presume to disagree with my learned and, more importantly, worldly friend Francis Xavier. So I won't. Rather, I'd like to make three minor observations about the topic at hand.

First, based on our own training and experience, we sometimes limit our conception of ADR to the current forms of arbitration and mediation marketed by the ADR-industrial complex in contrast to judicial proceedings. ADR, however, has been with us in diverse forms since our earliest ancestors first worked out deals rather than beat each other with clubs. Diplomacy and

the pervasive negotiations and accommodations that infuse modern life at all levels are examples of ADR.

Second, modern international arbitration is dependent for its success on largely guaranteed enforcement by relevant courts. Thus, it is 'alternative' only to the point where a party declines to participate. Then there is coercion by entities external to the arbitration. Nations have agreed in advance to such coercion in commercial, financial and certain investment matters through the treaties and conventions they have signed. The UN's dispute resolution record is patchy beyond those realms in part because it has no effective means of coercion and enforcement, and is unlikely to develop one.

Aspirations for a larger role for ADR are wholly dependent on sovereign agreements to participate and a mechanism for coercion/enforcement if necessary. I query what that mechanism would be if a state invades another sovereign state and lays waste to cities and food supplies in an attempt to terminate the target's existence. Or if a state establishes an extensive gulag for the purposes of cultural cleansing and ethnic and religious oppression. Or if a state refuses seriously to address climate change because its population is addicted to the unsustainable affluence that profligate carbon promiscuity produces.

Third, with great respect, I suggest that perhaps few current-day ADR practitioners are perceived as well positioned to determine disputes about scorched-earth war, industrial-scale human rights abuses or looming planetary cataclysm. In considering expanded roles for ADR, we must consider how ADR is currently perceived by governments, users and non-users, and not just by those of us who practise the existing trade.

I suggest that any aspirations to expand ADR going forward could be more effectively pursued if one were to fall backward to a ruthless blank-sheet analysis

If I am remembering correctly, all five members of the Alabama Claims tribunal were noted diplomats and politicians. One of them was most notable as a historian and the grandson of an American president. (To be fair, I note that three members also had experience as jurists in national courts.) From my own modest experience as a diplomat, I would suggest that political experience, strategic savvy and government connectivity are at least as important as legal skills in successfully resolving certain kinds of disputes.

So, while I continue to agree with Francis on all counts, I suggest that any aspirations to expand ADR going forward could be more effectively pursued if one were to fall backward to a ruthless blank-sheet analysis rather than jump forward to build on ADR as we know it. Reimaging rather than remodelling would allow for more effective strategic thinking as well as more diversity of input and participation.

To return where I started, since I greatly admire my friend Francis' framing...

"Somewhere over the rainbow,
Skies are blue,
And the dreams that you dare to dream,
Really do come true

"[If you evaluate current realities ruthlessly, conceive a mechanism fit for purpose, develop a political implementation strategy, and persuade the largest national stakeholders]."

Dorothy from Kansas (mostly)

These contributions are written to entertain and provoke and should not be taken to reflect the views of the authors.

What do you think?

Do you have a differing viewpoint or a debate to suggest? Email the editor at sarah.campbell@thinkpublishing.co.uk

Skills for the greater good

CIArb President Jane Gunn FCIArb wants to promote the skills and methods of mediation in all aspects of life, not just dispute resolution

"How can we reach out beyond the Chartered Institute to bring others into embracing what we stand for?"

Jane Gunn is happy for her presidential focus to feel a little different from those of her predecessors.

"I want to light the blue touch paper, light the imagination and help people to think: 'I'm a conflict resolver, but actually what difference could I, as an individual, make? How can I help others?'"

In the official language of CIArb, her focus is this: "How can we integrate the essential

"Conflict comes from a conversation that didn't happen and we speak least about the things that matter most"

skills and values of conflict management beyond dispute resolution, so that they may be accepted, understood and practised by businesses and organisations as well as by individuals of all ages and backgrounds?"

"CIArb is about having routes to fellowship and that kind of thing, but I'm also saying it's about talent, not title," she says. The skills of ADR professionals can contribute to the greater good and make a real difference to civil society, especially in times of uncertainty and conflict. "And we should collaborate more," she adds.

The CIArb presidential term runs for one year. Given that Gunn was laid low at the beginning of it with Covid-19, she feels that she lost some time but is now making up for it – with increasing momentum. She's also already thinking of succession. "I've spoken to the next President to say: 'There are some things that I think will span our presidencies, some projects that are too big for me to finish,'" she says.

One of these is her personal mission to speak to branches about the big issues that affect us all: climate change, race, equality and opportunity, terrorism, politics, environmental disaster, environmental, social and governance responsibilities, and Covid-19.

This is producing some fascinating responses and ideas, going as it does beyond traditional dispute resolution topics. Gunn also believes that this gives the ADR profession a safe space to discuss some of those issues that have become so polarised by social media that sensible debate is no longer possible there.

"I think there are some important conversations that people need to understand how to initiate without provoking the sense that they need to be outlawed and cancelled," she says. "So it's helping people have some of these challenging conversations in challenging times in ways that don't seem to be provocative and black-and-white."

Mediation is the skill of the 21st century, says Gunn. "Conflict comes from a conversation that didn't happen and we speak least about the things that matter most. It seems ridiculous in the times we're in that people have to murder each other, basically, to make a point. But that's where we are, we are still at that level.

Jane Gunn is an expert in the field of conflict resolution, a trained mediator and facilitator, known to her clients as The Barefoot Mediator. She is the former Chair of the Board of Management, current President of CIArb, and a former Director and board member of the Civil Mediation Council of England and Wales. She started out as a solicitor. She is author of two popular books, *How to Beat Bedlam in the Boardroom and Boredom in the Bedroom* and *The Authority Guide to Conflict Resolution*.

Visit Jane Gunn's LinkedIn page, where she blogs almost daily, and listen to podcasts with her at www.janegunn.co.uk/category/podcasts

In society, people are not able to apply mediation principles, particularly when you get to larger political and international disputes. And that's primarily because we don't promote these as life skills."

Mediation skills are fundamental skills that all humans need to thrive, she says. "It doesn't matter whether you're at home with your children, whether you're at work with your colleagues, or whether you're in an international war zone, it's the same principles at work. Where we start as dispute resolvers is looking at the needs and interests: what are people trying to achieve, what is it they think they need? But it's also the interaction between individuals: why has that broken down? Why can they not sit down at a table and resolve it?"

As her presidential year continues, Gunn will be having more of these conversations, provoking debate at conferences and via her LinkedIn blog (see above). Her ultimate goal? "A more harmonious and peaceful world." But for now, bringing the principles of mediation into our everyday interactions is a good start.

Finding stability in uncertain times

In the context of conflict in Europe, a CIArb webinar explored the causes of dispute, how to identify them and what might need to change in order to resolve them quickly

As we witness and live through the first interstate armed conflict in Europe since the Second World War, the two worlds of conflict resolution and ADR have been thrown into relief.

Conflict is unfortunately a fact of life in many parts of the world, but the sudden geopolitical and supply chain disruption arising from Russia's invasion of Ukraine has European and global ramifications which must be dealt with rapidly in the context of the profound challenges of our era: the climate crisis and sustainability; the public health crisis, highlighted by Covid-19 around the world; and the issue of diversity and inclusion.

In this context, CIArb has launched a webinar series, *Commercial stability in a world of conflict: Effective dispute management in uncertain times*, co-hosted with JAMS, allowing discussion of how dispute resolution needs to be conducted and possibly to change, especially in situations arising from international conflict. In a recent session, the speakers considered techniques that businesses and ADR professionals can consider for anticipating the disruption caused by conflict, and how this will translate into disputes.

Sheila Bates, a conflict coach specialising in human rights and labour law, pointed out that the current conflict in Europe is putting a lot of pressure on supply chains (or 'supply webs' as she prefers to think of them) and so disputes are likely at every level of commerce, from customer service to contracts.

"Supply chain delivery issues mean that there are lots of unhappy clients, and very often you find that the workers are neither empowered nor trained to handle those situations," she said. "And then of course governments and policymakers are slow to act and policies are slow – do you have adequate room to manoeuvre in this fast-changing marketplace?"

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"There are always disputes with all complex projects but now it's going to be speed that will be [a stressor]; there will also be the problem of supply chain uncertainties"

She also spoke about corporate ethics and values, and how well these will stand up under pressure. "We've seen it already with respect to Ukraine and Russia: how able are businesses to take a principled stand in the face of conflicts and behaviours which they find distasteful?"

Businesses are already no doubt taking a look at their risk across their operations, including mitigation of disputes, and it's clear that "in-built and dynamic preventative mechanisms" will be needed in future, said Bates.

Michael McIlwrath, Chair of the International Chamber of Commerce's governing body for dispute resolution services, continued the theme, going so far as to suggest that governments and dispute institutions should "think about what more can be done in order for disputes to be part of the enabling aspect" for urgent projects triggered by conflict disruption. Drawing on his experience in the energy sector, he described how the disturbance in energy supply caused by the war in Ukraine is likely to lead to new energy projects as countries scrabble to ensure a reliable supply. This could lead to a "crunch period" of contract disputes about a year from now.

"What are the disputes likely to be? Well, they're going to be in energy project execution and there's going to be lots of causes. There are always disputes with all complex projects but now it's going to be speed that will be [a stressor]; there will also be the problem of supply chain uncertainties," McIlwrath said.

"Let's think of dispute resolution that also points to a degree of collaboration," he added. "Not just mediation and finding amicable solutions, but let's think about emergency arbitration, let's think about dispute boards. If we're in the courts, let's think about accessing expedited procedures. If we worry about doing things on a traditional timeline where it takes two to three years to build a project, but they can get held up for one or two years, with disputes that's not going to work for the emergencies that we're facing today. It's time to think about how disputes can [be resolved] fast so that you don't delay projects' implementation."

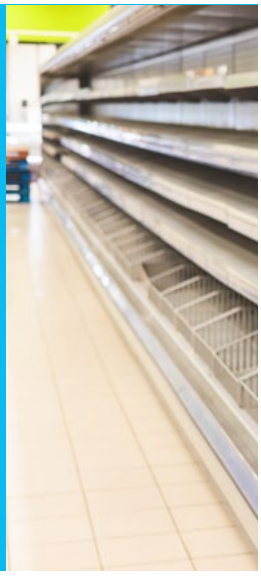
This could put pressure on the ADR profession in terms of resources and skills. The skills emphasis may well move from understanding how to conduct a dispute towards a softer, problem-solving approach. Bates said: "Many mediators and others involved dispute resolution would say that 'soft' skills are actually hard, that they're the really tough ones. So training people in those skills is really important – that's what I think we've learned from the Covid situation over the last couple of years."

View episodes from the webinar series on YouTube

A framework for analysing the commercial effect of conflict

- What is the event or conflict and what are the immediate effects?
- Where is it located? Is it regional, national or international? This will have an impact on the stakeholders you might want to include.
- Who are the parties involved? Are they individuals, institutions or governments?
- Why do you need to do something about it now?
- When do you want to intervene, and will it be a short-term or long-term intervention?

Courtesy of Ranse Howell, co-mediator of the webinar and Director of International Operations at JAMS



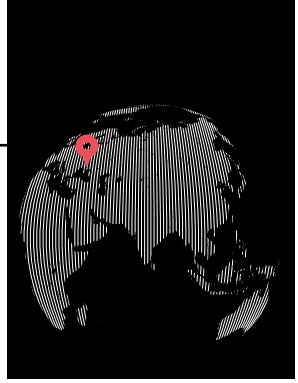
ABOUT THE SPEAKERS

Sheila Bates
Conflict coach and facilitator with a background in FTSE and Fortune-quoted companies; has particular interests and expertise in international disputes relating to human rights law, labour law and facilitating dialogue in supply chain management.

Michael McIlwrath
Formerly held in-house litigation roles for the General Electric oil and gas division and was VP for litigation for Baker Hughes. Now has own company and is Chair of the International Chamber of Commerce's governing body for dispute resolution services. He is Adjunct Professor for the Bocconi law school in Milan.

Ranse Howell
Director of International Operations at JAMS ADR; expert in negotiation and dispute resolution consultancy; previously worked with CEDR. He holds a PhD, a JD and is an Adjunct Professor at Pepperdine and Westminster universities.

Dr Isabel Phillips FRSA
Director of ADR and Mediation Development at CIArb.



"Ukrainian arbitrators can and want to work"

Olena Perepelynska, President of the Ukrainian Arbitration Association, describes how the Ukrainian ADR profession is gearing up to deal with the fall-out from the war

Early on the morning of 24 February, Olena Perepelynska, President of the Ukrainian Arbitration Association and Head of Arbitration at INTEGRITES law firm, was woken by the sound of explosions near her home in the Kyiv region. As the situation worsened, she and her family took the decision to flee, and since then they have been staying with friends in the Chernivtsi region, close to the Romanian border. She has been working intensively throughout the conflict, supporting not only clients facing unprecedented losses and disruption, but also her fellow professionals via the work of the Ukrainian Arbitration Association.

When *The Resolver* speaks to her on a video call, she is still at her friends' house but is preparing to return home, her thoughts turned to the future despite the ongoing turmoil. "Our government gave a very strong message that Ukrainian business should try to continue because otherwise our economy will simply collapse," she says. "What we're seeing now is that business is reopening, and even big brands are now considering reopening. Businesses still have contracts and if they are not somehow frozen or suspended here [they] still have obligations so [they] need to somehow sort out what to do. This could be a trigger to continue working. I think business will learn to work in the new reality."

The Independence Monument, Kyiv

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"What we're seeing now is that business is reopening, and even big brands are now considering reopening"

A NEW LEGAL FRONT

Once the war is over, she says, there will be a huge amount of projects that will need legal support, not only in dispute resolution, but also in rebuilding the economy, investment and financial aid. She points out that many Ukrainian lawyers are currently seconded to foreign law firms – often as a gesture of help, but Perepelynska believes the lawyers will also gain valuable experience – but "I'm sure we will need all those lawyers back".

In the meantime, her own workload is intense. "As a firm, we are involved in some working groups, communication with foreign lawyers, with some state authorities trying to push changes on different fronts," she says. Some

ABOUT OLENA

Olena Perepelynska is President of the Ukrainian Arbitration Association and Partner at INTEGRITES

The remnants of a Kyiv shopping centre destroyed by shelling

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of the changes she is referring to are to do with compensation.

"This is a very, very complicated topic here. The Ukrainian state promised to give some compensation in the future but this is not yet regulated properly. And the businesses would prefer to get that compensation not from the Ukrainian state, but from Russia. We are following to see whether some countries would change their legislation to allow that. We know that some states are considering changing their emergency legislation in order to allow confiscation of frozen Russian assets and some kind of distribution or transfer of those assets to the victims of the war. This could open a new legal front or flow of disputes to a particular jurisdiction because there is a high demand from Ukrainian business."

She is also dealing with numerous force majeure and contract disruption queries, and supporting clients through the destruction of assets. "Some companies cannot function in a normal way – for instance, imagine that a plant has been totally destroyed and there is simply no physical place to work in, but legally as a company is still an employer. The problems are even worse if assets are located in the occupied territories," she says.

"I found out about a totally wrong perception that it's too risky to appoint a Ukrainian arbitrator"

WE WANT TO WORK

On top of that, the Ukrainian Arbitration Association, which until the war started was focusing on collecting data for a research project about court practice and arbitration, has pivoted to offering webinars on subjects such as fixing damages. It also launched a social media campaign, #appointukrainianarbitrator, encouraging colleagues across the world to at least consider Ukrainian arbitration practitioners in a long list.

"I found out about a totally wrong perception that it's too risky to appoint a Ukrainian arbitrator because of the war, because this would disrupt the case," she says. "I strongly disagree with that. I wouldn't say that the risks are any higher than in Covid time. We now could have some troubles, but we learned to live in a new regime. An arbitration practitioner needs only a laptop to work in any part of the world. Many Ukrainian arbitrators can and want to work – it would be very positive for them to distract them but also to have some experience. I know Ukrainian arbitration practitioners who are available, talented and experienced and would be a good candidate for any potential list. They should not be disqualified just for being Ukrainian."

Search LinkedIn for #AppointUkrainianArbitrator

International claims commissions: back to the future or back to the drawing board?

Kateryna Honcharenko MCIArb, Arbitration Professional Practice Manager at CIArb, considers lessons from the history of international claims commissions

Despite the turmoil, devastation and casualties of both world wars, and the pledges taken and reaffirmed in the UN Charter and other documents of universal effect and importance, we have still not been able to find an efficient, non-violent way to prevent armed conflicts. Regrettably, their significant consequences continue to haunt us. In the decades since, the international community has attempted to create amicable, conciliatory ways to address and remediate the harm caused by armed conflicts by way of numerous international public law instruments, institutions, judicial bodies and claims commissions.

The procedures these permanent judicial bodies offer are not always flexible enough to provide post-conflict settlements to cover matters related to hostages and displaced persons, and financial, environmental, property and other losses; and to grant direct relief to the civilian population. Such factually and legally complex, and mostly interrelated, matters require ad hoc arrangements and a delicate, de-politicised and diplomatic approach, which has been provided by international claims commissions.

History has witnessed frequent cases of such commissions being established to settle disputes inflicted by armed conflicts. Some striking (and successful) examples are commissions established under the Jay Treaty, the Treaty of Versailles and the unprecedented United Nations Compensation Commission (UNCC).

Such factually and legally complex, and mostly interrelated, matters require ad hoc arrangements

The latter is, to date, the most famous example of such a post-conflict dispute resolution mechanism: a fact-finding body that allowed mass claims was established in 1991 as a subsidiary of the UN Security Council to grant compensation for various damages resulting from Iraq's unlawful invasion and occupation of Kuwait in 1990.

The purpose of the UNCC was to establish whether damages claimed by Kuwait were, in fact, a result of such invasion. This was a critical step since one of the most important characteristics of claims commissions is that, in the proceedings, a state party has a solely

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administrative function and claims can be filed by natural persons. If the commission is satisfied, compensation is granted to claimants directly, not states.

Millions of claims, of which hundreds of thousands were filed by individuals, including environmental, housing, property and health damage, were addressed, with more than half being successful, and billions of US dollars were awarded. The UNCC's work concluded after three decades, with the last payment being made in January 2022.

Many claims filed under the UNCC, especially the environmental ones stemming from the military actions of Iraq, which brought about an environmental catastrophe when millions of barrels of oil were spilt into the Persian Gulf, were technically and legally complex, and often scientifically unique.

With the current landscape of ongoing conflict, the question arises as to whether a claims commission model could offer solutions to future post-conflict dispute resolution. However, there are certain matters that have to be considered before another such post-conflict dispute resolution mechanism is established.

The ad hoc nature of claims commissions creates numerous procedural and practical hurdles, in particular:

1. Funding

One of the biggest advantages of claims commissions is the opportunity for restitution and compensation to be granted directly to claimants, especially when such claimants are civilians.

The biggest disadvantage, however, is the highly possible unavailability of funds. In the case of Iraq, this matter had a two-fold resolution: severe international sanctions on one side and the Oil-for-Food Programme, which let the country generate some revenue (the percentage of such revenue transferred to successful UNCC claimants was significantly reduced after Iraq had been invaded). Iraq was unable to use any of such revenue to ensure decent representation in the UNCC proceedings.

A 2019 UN Security Council meeting in New York City

2. Consent

A state must consent to accept liability in order to participate. It remains to be seen how this matter may be approached in the absence of a state's acceptance of liability. Under the UNCC process, Iraq accepted the provisions of Security Council Resolution 687, under which it was declared liable for losses resulting from the invasion.

3. Evidence

The task of gathering evidence in war-torn countries is enormously problematic. Numerous questions arise with regard to this matter: who can collect evidence? What can be done if there is no cease-fire or where millions of people are displaced and unable to record and collect evidence themselves? Does it have to be a third-party body? What is the standard of proof under armed conflict circumstances?

It is important to emphasise that the UNCC was not a court or an arbitral tribunal, although procedurally claims commissions tend to resemble arbitration.

The variety of issues that need to be addressed, including financing and property, together with matters related to the environment, acts of warfare, war prisoners, diplomatic premises, access to healthcare, sexual violence etc., makes claims commissions an exceptional recourse, even if they are the only efficient means available. Such efficiency, as may be seen from the above example, greatly depends on three important factors – international legal backing; the political, legal and economic support of the international community; and the availability of funds – to compensate for and, where possible, restore what has been taken away by the most inhumane crime a state can commit towards another state.

Therefore, in light of numerous humanitarian crises we are facing today and what the history of claims commissions has taught us, it is essential to look at how these mechanisms' efficiency can be leveraged and, possibly, tweaked for more effective resolutions as the world considers the post-conflict resolution processes of the future.

In light of... what the history of claims commissions has taught us, it is essential to look at how these mechanisms' efficiency can be leveraged and, possibly, tweaked for more effective resolutions

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Policy

Arbitration Act of England & Wales: Law Commission Review

The Chartered Institute of Arbitrators continues to work closely with the Law Commission as it reviews the Arbitration Act (1996). CIArb's position is that the Act has provided an incredibly strong and well-regarded framework within which arbitration has flourished, and that now – 25 years since it was introduced – is a good time to consider where iterative, targeted amendments might be beneficial. A public consultation is expected later this Autumn. In the meantime, please feel free to share your views and insights with our Policy team.

Contact: Alex Braby
Email: **abraby@ciarb.org**

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Meet your peers and hear the latest thinking on ADR from around the world at CIArb's global events. Make sure you save the date for:

Mediation Symposium 2022
4 to 6 October 2022
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Alexander Lecture 2022
9 November 2022*

*Date to be confirmed.

For more information, visit **www.ciarb.org/events**

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CIArb is working in partnership with the Law Society of Scotland (LSS) to promote the use of arbitration and other forms of alternative dispute resolution (ADR). Between us, we provide a range of training, qualifications and accreditations ranging from entry level learning opportunities through to CIArb Diplomas and on to specialist accreditation by the LSS. For more information, visit **www.ciarb.org/news**

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How to... understand third-party funding

As the third-party funding market matures – and CIArb develops a guideline for ADR practitioners on the subject – we ask Camilla Godman FCIArb from litigation funder Omni Bridgeway about the history and evolution of this sometimes misunderstood source of dispute finance

FOR CONTEXT, PLEASE GIVE US A DEFINITION OF THIRD-PARTY FUNDING

Third-party funding (TPF, also referred to as dispute finance or litigation funding) is a non-recourse source of funding, which can be used by any business or entity with a potential legal claim that it is looking to pursue, at any stage of a matter. When a matter is funded, a third-party funder takes on the cost and risk of the legal dispute. Non-recourse means the claimant pays nothing if the claim is unsuccessful. The funder only recovers the expenses and a return on what it has invested in the claim if the claim succeeds.

In addition to the legal spend over the course of the case, a third-party funder usually bears the risk of an adverse costs order in the event that a matter is unsuccessful.

WHAT IS THE HISTORY OF TPF?

TPF developed first in Europe in the late 1980s on the back of the pursuit and recovery of international claims and insurance subrogation rights by early litigation funders such as Omni Bridgeway, and in the 90s in countries like Germany where more domestic litigation funding started to develop as an extension of the legal aid insurance industry. In these civil-law jurisdictions, the funding practice has evolved through the application of the general norms of equality of arms, good faith and obligations to act reasonably. In common-law jurisdictions more ancient doctrines, based on maintenance and champerty, have historically dampened TPF by discouraging third-party interference in litigation, subject to limited exceptions. Litigation funding in those jurisdictions developed first in Australia and spread to the UK and the US in the early 2000s. During the last five years, funding of international arbitration has come into greater focus in East Asia, namely in Singapore and Hong Kong, which have been the first jurisdictions to pass express legislation to facilitate the funding of international arbitration.

In common-law jurisdictions more ancient doctrines... have historically dampened third-party funding

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It is now widely accepted that TPF is a genuine tool for access to justice, especially in arbitration circles

Shifting attitudes to those common-law doctrines of maintenance and champerty have been key to the expansion of TPF. The doctrines have been recognised in recent years as a barrier to those seeking access to justice, particularly when they face opponents with substantial financial resources. In many jurisdictions, officials have realised that a third-party funder can help balance the scales, providing a path for highly meritorious claims that may have withered without financial assistance. Over time, TPF has evolved into a sophisticated and accepted corporate finance and risk management tool.

In the UK, the acceptance of funding has occurred primarily via case law and changes to court procedures. In 2011, the Association of Litigation Funders of England and Wales was established, which administers self-regulation through the Code of Conduct for Litigation Funders (published by the Civil Justice Council).

Another jurisdiction with a plan for self-regulation of the funding industry is India. There is still a lack of legislation or regulations supporting funding in India, but the recent establishment of the Indian Association of Litigation Funders will help to develop TPF in that region.

IS IT A FORCE FOR GOOD, GENERALLY?

It is now widely accepted that TPF is a genuine tool for access to justice, especially in arbitration circles, as well as corporate risk management and finance. One of the overarching benefits of TPF is that claimants who are unable to bear the financial risks associated with bringing disputes can pursue claims that otherwise would be left with no recourse. TPF can create a more level playing field for parties in dispute. Undoubtedly, it is necessary to help deal with the increasing costs and complexities that arise in commercial disputes.

The perception of funding is evolving. It may first have been viewed with trepidation in some circles, especially in common-law jurisdictions, but that view is now dwindling. The market now has a better understanding of what funders do and the concerns raised in the early days of the industry – that frivolous claims would be brought by funders and/or that funders would take control over a claimant's dispute – haven't come to pass in practice. At Omni Bridgeway, for instance, we subject claims to a rigorous due diligence process on our side before making a funding decision. We only fund claims with good prospects of success that are economically viable and have realistic routes to success.

ABOUT THE AUTHOR

Camilla Godman FCIArb is an Investment Manager at Omni Bridgeway responsible for originating, assessing and managing funded cases internationally, with a focus on EMEA and the UK. She has over 18 years of international arbitration and dispute resolution experience. She has held the title of Director at CIArb Asia. Camilla has been involved in a large number of varied disputes throughout Asia-Pacific, Europe and the Middle East. Her experience spans joint-venture disputes, class actions, energy, construction and infrastructure disputes, international trade and competition-related disputes.

WHAT PITFALLS SHOULD ADR PROFESSIONALS BE AWARE OF?

A few issues can arise during the funding process. First, for arbitrators, it may not always be apparent that a case is being funded – and where you have another party with a direct interest in the outcome of the award, there is potential for conflicts. There will inevitably be differing views on whether in fact a conflict is likely to arise. A lot of institutional arbitration rules now require a party to disclose the involvement of a funder (or an insurer with a direct interest in the outcome of a case).

We are seeing a lot of arbitrators, irrespective of the rules, ordering or asking the party to make such a disclosure to show whether they are backed by a funder or insurer. Given an arbitrator's obligation to protect the integrity of the award, this is most probably the appropriate and conservative approach arbitrators should be adopting.

A second area where issues can arise is costs. It is important for tribunals not to think that because a case is being funded then there is less incentive to award costs if that party is successful. Funded claimants should not be unfairly penalised. Cost recovery is an important part of the overall recovery for the claimant, especially an impecunious claimant whose impecuniosity is due to the actions of the respondent. Under most domestic legislation and arbitration rules, the arbitrators have broad discretion to make costs orders and are even increasingly awarding claimants their costs of TPF (i.e. the funders' commission).

As for counsel who are seeking funding for their clients, one piece of advice is not to oversell the case and gloss over the legal, evidential or other risks by advocating for the case when presenting it for funding. There is never a risk-free dispute. Counsel should fairly address the issues and explain how they think those issues can be mitigated or dealt with so that funders can make an informed investment decision. This approach is much more likely to achieve a faster and fairer funding result.

CIArb's forthcoming TPF guideline

Arbitration practitioners are increasingly being required to explore funding options on behalf of their clients (in the case of counsel) or being faced with a funded party in an arbitration (in the case of arbitrators), so CIArb is creating a guideline on third-party funding. If you wish to be involved in its development, please contact Mercy McBrayer **(mmcbrayer@ciarb.org)**

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Helen Hale, 2021 course student, UK

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