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Winter 2024 ciarb.org

How Indigenous rights intersect with arbitration

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Going global

I became your President at the end of October 2023, and I got off to a rip-roaring start by moderating the Alexander Lecture given by Toby Landau KC C.Arb FCIArb and, as I write, I have just had the privilege of moderating this year's lecture delivered by ICC International Court of Arbitration President Claudia Salomon FCIArb.

Earlier in 2024, I had the pleasure of speaking at the Roebuck Lecture delivered by Professor Emilia Onyema PhD FCIArb. If there is such a thing as an arbitration personality, these three luminaries certainly qualify for the description and if I was forced to list three highlights from what has been a highly rewarding term of office, it would be moderating their lectures.

'Forced' being the operative word, for the rest of my tenure reads like a Thomas Cook itinerary. From Kenya to the Kingdom of Saudi Arabia, from Trinidad to Toronto, I have, on average, boarded a plane to foreign parts every other week in 2024. And every time I have touched down in countries to attend conferences and lectures, to give speeches and meet our existing and prospective members, I have been taken aback by the warmth of the reception I have received. The love for Ciarb in diverse jurisdictions has been palpable, the sense of international community really rather stirring. In fact, it has been such an exhilarating whirlwind that when I hand over my medal to my successor, Professor Dr Mohamed Abdel Wahab C.Arb FCIArb, there will be something of a void in my life. Thank goodness I am on the organising committee of the Ciarb Global Conference 2025 in Doha. And my advice to Mohamed? Be prepared to show stamina, affability and patience – qualities he has in spades – and dust off your passport. Oh, and expect to have your photograph taken – a lot. Lots of people want a selfie with the Ciarb President, believe me. There are now hundreds featuring yours truly in circulation in the arbitration community.

Jonathan Wood FCIArb, President, Ciarb

The love for Ciarb in diverse jurisdictions has been palpable, the sense of international community really rather stirring

INSIDE THIS ISSUE

SINHARA N S/SHUTTERSTOCK

What's on in 2025

Give your career a boost with this selection of training opportunities

FIND AND BOOK COURSES AT www.ciarb.org/courses

SPOTLIGHT ON

Global Diploma in International Commercial Arbitration

In-person: 7–15 September 2025
Worcester College, Oxford, UK
Full fee £9,945, but early bird offers available
Book by: 30 May 2025

The Diploma is an immersive course taught over eight days in the heart of historic Oxford. You will explore the legal and practical framework of international commercial arbitration, and gain the knowledge needed to write an arbitral award that is compliant with the legal and procedural requirements for an enforceable award. Highlights include:

- The opportunity to learn from Course Director Dr Crina Baltag FCIArb, who brings a wealth of expertise to the role.
- Intensive and interactive training on the law, practice and procedure of international commercial arbitration.
- Highly experienced and distinguished faculty comprising international arbitration experts.
- Networking and social opportunities, helping you to build your professional network.
- Successful completion leads to eligibility for Ciarb Fellowship (FCIArb).

For more information, visit ciarb.org/courses/global-diploma-in-international-commercial-arbitration-september

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FREE for Ciarb professional members through MyCiarb (go to 'Member Resources' then 'Free Courses').

- **Online Introduction to ADR**
  On-demand **£29**
  Separate assessment available, on-demand **£72**
  Student course/ assessment bundle **£56**

Mediation

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  Assessment, on-demand **£72**
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  Available upon request for group bookings of over 12 people
- **Virtual Module 1 Training and Assessment**
  Available upon request for group bookings of over 12 people.
  Assessment fee is included in the course fee unless candidates are taking the assessment only
- **Virtual Module 2 Law of Obligations (note that this module is the same across all pathways)**
  10 April and 25 September **£1,255**
  Separate assessment available (15 May); assessment 11 September and 26 March 2026 **£342**
- **Module 3 Mediation Theory and Practice**
  On-demand **£1,140**

Construction adjudication

- **Virtual Introduction to Construction Adjudication**
  10–11 July **£280**
  Assessment **£72**
- **Virtual Module 1 Law, Practice and Procedure in Construction Adjudication Assessment**
  6 March and 11 September **£1,255**
  Separate assessment available (13 March, 15 May and 20 November) **£174**
- **Virtual Module 2 Law of Obligations**
  See above
- **Virtual Module 3 Construction Adjudication Decision Writing**
  20 March and 18 September **£1,255**
  Assessment 20 June and 5 December **£408**

International arbitration

- **Virtual Introduction to International Arbitration**
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  Assessment **£72**
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  6 March and 11 September **£1,255**
  Separate assessment available (13 March); assessment 15 May and 20 November **£174**
- **Virtual Module 2 Law of Obligations**
  See above
- **Virtual Module 3 International Arbitration Award Writing**
  20 March and 18 September **£1,255**
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- **Virtual Accelerated Route to Membership: International Arbitration**
  11–13 March, 13–15 May, 18–20 November **£1,388**
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  16–20 June and 1–5 December **£1,912**
- **Virtual Accelerated Route to Fellowship International Arbitration – Part 3 only**
  14 March, 20 June, 15 August and 5 December **£408**

Diplomas

- **Virtual Diploma in International Commercial Arbitration**
  2 May **£5,600**
- **Global Diploma in International Commercial Arbitration**
  (face to face)
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- **Virtual Diploma in International Commercial Arbitration – Part 3 assessment only (resits)**
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- **Virtual Diploma in International Maritime Arbitration**
  Part 1 assessment only (resits) *13 March and 20 November* **£174**; **Part 3 assessment only** *14 March, 15 August and 5 December* **£408**

The opener

Professor Dr Mohamed Abdel Wahab will take the reins as the next Ciarb President

Professor Dr Mohamed Abdel Wahab C.Arb FCIArb to take the helm

Ciarb welcomes Professor Dr Mohamed Abdel Wahab C.Arb FCIArb – known affectionately in the arbitration community as 'the prof' – as its President for 2025.

Professor Wahab began his Ciarb career as a member of the Egypt Branch. He rose steadily through its ranks, becoming a committee member, followed by Vice-Chair after which he was elected a member of the Board of Trustees representing the Middle East and North Africa (MENA)/Indian Subcontinent region.

"I have spent half my life with Ciarb," said the Founding Partner and Head of International Arbitration, Construction and Energy at Zulficar & Partners in Egypt and Professor of International Arbitration, Private International Law and English Contract Law at Cairo University.

During his presidency, which begins on 1 January 2025, he hopes to build on Ciarb's "open-door policy" and welcome "many more dispute resolvers from Africa. The world has opened up from when I started my career and there is always room for more qualified integrous professionals".

He said Ciarb's new Saudi Arabia Branch was emblematic of this brave new world. "Dispute resolution is being enriched by more and more diverse professionals – people from countries that were not previously on the arbitration map. Combined with global expertise and cutting-edge technology, these professionals can transform dispute resolution practices worldwide."

Professor Wahab, who has extensive experience in international investment and commercial arbitration, and Islamic Shari'a, said he saw his presidency as "an immense opportunity to contribute to thought leadership".

Described by outgoing President Jonathan Wood FCIArb as "astonishingly hard-working and energetic", Professor Wahab added that he particularly loves teaching. "I am passionate about it and have a strong bond with those I teach." ■

"Dispute resolution is being enriched by more and more diverse professionals"

The opener


Amb. (r) David Heubner C.Arb FCIArb


Caroline Kenny KC C.Arb FCIArb


Anna Stylianou C.Arb FCIArb


Peter O'Malley FCIArb

Ciarb reveals ADR luminaries elected to its Board of Trustees

The Board of Trustees announces two newly elected and two re-elected Trustees for a four-year term starting in January 2025

Anna Stylianou C.Arb FCIArb and Peter O'Malley FCIArb have been newly elected for Europe and Ireland respectively. Amb. (r) David Huebner C.Arb FCIArb and Caroline Kenny KC C.Arb FCIArb have been re-elected to serve the Americas and Australasia. All four begin their term on 1 January 2025.

Stylianou is an independent dispute resolver specialising in international construction arbitration for the past 20 years. A chartered surveyor and CEDR-accredited mediator, she is a former Chair of the Cyprus Branch and was involved in writing arbitration rules for the Technical Chamber of Cyprus. She is also a Ciarb course director and examiner.

A qualified architect, O'Malley has worked as an arbitrator, adjudicator and mediator in Europe, the Middle East, West Africa, the Caribbean, the Far East and Australia. He has served as Chair of the Ireland Branch and is an accredited Ciarb examiner in construction and adjudication under UK and Irish legislation. He also sits on the Ireland National Committee of the Nominations Commission of the International Chamber of Commerce.

Huebner has more than 30 years' experience as an arbitrator and advocate in investment, investor-state and complex commercial arbitrations in a range of industry sectors across the world. His name appears on numerous practitioner lists, including SVAMC's Tech List of the world's most accomplished technology neutrals. In addition to practising law as a partner in firms in the Am Law 100, he has served as US Ambassador to New Zealand.

A former President of the Australian Branch, Kenny is an international arbitrator specialising in commercial and investment disputes. With more than 35 years' experience, including 15-plus years as King's Counsel, she is admitted to practise in Australia (where she is the only female Chartered Arbitrator), the UK and New York.

Ciarb CEO Catherine Dixon MCIArb said: "I am delighted that David and Caroline have been re-elected to Ciarb's Board of Trustees, and welcome Anna and Peter as newly elected Trustees. The Ciarb Board members play a significant role in the success of Ciarb and I am grateful for the Trustees' contributions and commitment. I would like to thank all those who put themselves forward for election and wish them every success in the future. ■

News in brief

SAVE THE DATE

Ciarb is thrilled to invite you to its Ciarb Global Conference 2025, which will be held on 30 October, 2025 in Doha, Qatar. Co-hosted with the Ciarb Qatar Branch, the conference is open to members and non-members. For more details, visit ciarb.org/events/ciarb-global-conference-2025

THE INTERVIEW

Diana Bayzakova

Diana Bayzakova is director of the Tashkent International Arbitration Centre, Uzbekistan

What was your journey into ADR?
It began with the Frankfurt Investment Arbitration Moot Court, where I had the privilege of representing my university, thanks to the late Thomas Wälde and the academic team at the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee.

Transitioning into the professional world promptly after graduation, during the turbulence of the 2008 financial crisis, exposed me to a highly contentious environment and a range of complex and high-stakes disputes. I was also fortunate to be appointed by the Dubai International Arbitration Centre (DIAC) as a co-arbitrator at the age of 27 and a sole arbitrator at the age of 28. During this time I met a lot of wonderful people, including Dr Hussam Talhuni, a prominent arbitrator in the Middle East, who invited me to steer the executive committee of the Arab and International Arbitrators (AIA) network, together with John McGowan and Jamal Chaykhouni.

What kind of arbitrations do you specialise in?
Had you asked me this question a few years ago, I would have referred to my experience as counsel in telecom, construction and infrastructure disputes.

Wearing my Tashkent International Arbitration Centre (TIAC) hat, I now say that I specialise in institutional arbitration, focusing on fostering innovation in arbitration, and collaborative frameworks between arbitral institutions, and promoting new methods to enhance efficiency and effectiveness in dispute resolution. We aim to push the innovations in arbitration toward technological breakthroughs that will hopefully redefine the landscape of dispute resolution.

One example is our TIAC-HKIAC Cross-Institutional Rules of Arbitration, which were nominated by *Global Arbitration Review* earlier this year for Best Innovation Award. It is indeed a unique institutional arrangement, under which two independent institutions have set out a clear framework for joint administration of the arbitral proceedings.

And there are more exciting initiatives in the pipeline: stay tuned for updates on our social media!

Tell us about the arbitration landscape in Uzbekistan.
It is fair to say the country has made significant strides in positioning itself as an arbitration-friendly jurisdiction. The reforms in international arbitration within Uzbekistan are fundamentally built upon three complementary and mutually reinforcing pillars: first, the establishment of a state-of-the-art legislative framework modelled after UNCITRAL law on international commercial arbitration; second, the creation of TIAC; and, third, the reinforcement of its status as an arbitration-friendly jurisdiction through a supportive judiciary.

Notably, in the history of Uzbekistan, there hasn't been a single court case, in which a foreign arbitral award was refused enforcement on public policy grounds. And I must say that attempts ►

It is fair to say that Uzbekistan has made significant strides in positioning itself as an arbitration-friendly jurisdiction

Tashkent, the capital city of Uzbekistan

MARINA RICH/SHUTTERSTOCK

to set aside the awards on those public policy grounds were many. Those of you who follow news from *Global Arbitration Review* would also recall the coverage of the recent judgment issued by the Supreme Court of Uzbekistan, which enforced a foreign arbitral award against a state-owned entity in Uzbekistan, despite certain public policy arguments raised during the proceedings. There are also a number of other publicly available court judgments that enforced foreign arbitral awards against a number of other state-owned entities, reinforcing the status of Uzbekistan as an arbitration-friendly jurisdiction.

TIAC was set up in 2018. What are its key achievements to date?
We've been pretty busy, but our highlights are:

- In 2024, we witnessed a **threefold increase** in the number of Requests for Arbitration (RfAs) registered compared with 2023 (the first half of the year compared with the same period last year), with the total number approaching 80 RfAs.

- The rise in caseload with no involvement of Uzbek parties and involvement of **state-owned entities from third jurisdictions** (not Uzbekistan) as parties to TIAC-administered arbitrations.

- The launch of the **Uzbek Arbitration Week**, an annual September event that serves as an excellent platform to promote dialogue among legal professionals, and share the best practices in arbitration and the latest developments in the region.

- Establishing the **TIAC Roster of Tribunal Secretaries and of Shadow Arbitrators** to help us promote diversity in arbitration and to enable talented underrepresented practitioners to get their first (and sometimes second) appointment.

- The launch of the **TIAC online platform with built-in hearing and transcription facility** to automate and facilitate case management.
- The launch of the TIAC sports arbitration wing, which resulted in the registration of the first sports arbitration case in May 2021 and in **TIAC's exclusive mandate to resolve sports disputes at Tashkent International Marathon World Athletics Label Road Race**.

- The launch of the ***TIAC Journal of International Dispute Settlement,*** a peer-reviewed journal with a world-class editorial board led by Dr Nasiruddeen Muhammad to promote research and innovative developments in the field of ADR in the region and beyond.

How does TIAC support arbitrators with their first appointment?
Inspired by Amanda Lee FCIArb, we have launched the initiative to form the Roster of Shadow Arbitrators. While this initiative is primarily targeting low-value disputes, it nevertheless provides underrepresented practitioners with invaluable opportunities to gain experience within the field. For this to happen, TIAC actively engages with the parties and the appointed tribunal to obtain their consent for a shadow arbitrator to participate and observe the arbitral proceedings 'from the other side of the table'.

What has TIAC done to make arbitral appointments more transparent?
We are trying to be strategic in this area, and one significant step has been our partnership with the leading legal information platform, Jus Mundi. Through this collaboration, we publish non-confidential information related to TIAC-administered arbitrations, including the names of the appointed arbitrators. We believe making this information publicly accessible gives our users real insights into the arbitration process and the individuals involved.

TIAC also participates in various conferences and events where we discuss the arbitral appointment process and the exclusive powers of our TIAC Court of Arbitration in these procedures. These regular speaking engagements provide us with an opportunity to share best practices and explain the criteria used in making appointments. By engaging with the broader legal community, we aim to encourage a dialogue around transparency and fairness in arbitration, as well as solicit ideas and suggestions on what we can do better.

By engaging with the broader legal community, we aim to encourage a dialogue around transparency and fairness in arbitration


Sunset in Tashkent

What are TIAC's plans for the future?
We are on a mission to become one of the most innovative institutions in the world!

What do you enjoy the most about your job?
This is also easy to answer! The opportunity to contribute to the development of the arbitration landscape in Uzbekistan. ■

L_B_PHOTOGRAPHY/SHUTTERSTOCK

Guardian, gatekeeper and guide

To adapt to the ever-growing dispute resolution landscape, Ciarb must ensure its policy focuses on its members' needs while being mindful of the implications for the broader ADR community

The realm of arbitration and dispute resolution is often perceived as a simple series of transactions – cases are opened, deliberated and resolved. However, much of the critical work undertaken by arbitral institutions in facilitating this smooth process goes unnoticed.

Claudia Salomon FCIArb delivered Ciarb's Alexander Lecture this year on the role of arbitral institutions in protecting the integrity of the arbitral process, promoting the rule of law and providing access to justice.

Over the past few decades, we have seen a significant increase in the number of arbitral institutions. As the number of such institutions grows, Salomon asked whether they are providing parties with the best services and meeting the expectations of clients. In answering that question, she considered the role arbitral institutions should play when parties entrust them with resolving their disputes and whether institutions are, in addition to administering the arbitral process, guardians, gatekeepers and/or guides.

ABOUT THE AUTHOR

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

Salomon concluded that arbitral institutions are, to an extent, all three. In other words, if an arbitral institution is going to provide true value, its case management team needs to be accessible, knowledgeable and responsive to the parties, their counsel and the arbitrators. And, critically, it should not lose focus on supporting and enabling the resolution of disputes. Watch the recording on Ciarb's YouTube channel.

Similarly, Ciarb's approach to policy and alternative dispute resolution (ADR) development is informed by the diverse needs of its members and the ADR sector, and in that regard Ciarb also acts as a guardian, gatekeeper and guide. As a result, Ciarb focuses on ensuring that the needs of its members are met while also considering the broader implications for the arbitration and ADR community. This strategic foresight is essential for fostering a robust and responsive ADR framework that can adapt to the evolving landscape of dispute resolution.

Ciarb's approach to policy and alternative dispute resolution (ADR) development is informed by the diverse needs of its members and the ADR sector

A key aspect of Ciarb's effectiveness lies in its commitment to member input. The value of incorporating diverse experiences, skills and expertise cannot be overstated. By encouraging members to share their experiences, Ciarb is able to craft policies, and develop guidelines and training that are reflective of the realities faced by practitioners in the field. This diversity of perspective enriches discussions and enables Ciarb to advocate for meaningful changes, where such are necessary, that genuinely address the needs of its members.

Ciarb's global position further enhances its ability to tackle complex issues. With members spread across numerous jurisdictions (about 150 at last count), Ciarb brings a unique perspective to the challenges faced in the ADR sector. This global outlook enables Ciarb to identify trends and share best practices that transcend borders, ultimately contributing to the harmonisation of ADR practices worldwide.

A recent example of this is the collaborative approach Ciarb took to its intervention in the *Churchill* case. Our intervention subsequently led to a consultation that changed the Civil Procedure Rules (CPR) in England and Wales to include ADR as one of the overriding objectives for civil justice. A change that is likely to have some influence in other common law jurisdictions.

Ciarb collaborated with the Centre for Effective Dispute Resolution (CEDR) and the Civil Mediation Council (CMC) on the intervention, exemplifying how Ciarb harnesses collective action and decision-making for the benefit of our members across all ADR disciplines.

Ciarb is also actively engaged in several other pivotal developments, which will shape the future of ADR and arbitration globally. These include the Arbitration Bill (which will replace the Arbitration Act 1996 in England, Wales and Northern Ireland), which was named in the King's Speech as a priority for the new UK Government. The Bill has been scrutinised by the Lords and is *en route* to the House of Commons, to be approved prior to enactment.

Its global outlook enables Ciarb to identify trends and share best practices that transcend borders, contributing to the harmonisation of ADR practices worldwide

Other global initiatives include:

- Encouraging signatories to the Singapore Convention on Mediation.
- The Nigeria Branch and Nigerian Ciarb members' excellent work to update and change the law of arbitration and mediation in Nigeria. The result was the new Arbitration and Mediation Act 2023, which established a legal framework supporting the enforceability of arbitral awards and mediation settlements.
- The Mediation Act 2023 in India, again supported by Ciarb, which includes a provision enabling the parties to mediate any commercial or civil dispute before proceedings are issued.
- The new draft Pakistan Arbitration Act 2024, supported by Ciarb following the launch of our Pakistan Branch, which aims to create a framework to support investment and economic growth.

The list goes on, with Ciarb's intervention in Brazil led by Ciarb's Brazil Branch to support the use of arbitration in the country, further illustrating our commitment to fostering best practice globally.

We are also supporting capacity-building initiatives including delivering training at the recent Cameroon Arbitration Week.

By investing time and resources into ADR development, as well as providing globally recognised training and credentials, Ciarb ensures that the future of ADR will be shaped and informed by a comprehensive understanding of the global developments, strategic collaborations and, of course, by the incredible expertise of its members. As a result, Ciarb can help to ensure that the ADR sector remains responsive to ADR users, and serves to support global investment and economic prosperity. ■

Making the case for Indigenous rights in arbitration

Veranika Buracheuskaya on the intersection of Indigenous peoples' rights and arbitration

"I was always fascinated by the idea of peaceful dispute resolution," explains Veranika Buracheuskaya, whose international background and passion for foreign languages sparked an interest in international dispute resolution. Attending a foreign direct investment moot court in California as a law student proved to be a pivotal moment for her, as it first introduced her to international arbitration. She went on to work in law firms on challenging but rewarding disputes in energy, oil and gas, and construction, which led her to think about the ethical questions arising from them.

"Sometimes we forget how unique international arbitration is as a tool," she says. "To imagine that at some point businesses decided not to pursue their claims with force and power, and decided instead to resolve disputes in a civilised manner. I honestly believe international arbitration is one of humanity's best inventions and I think we should appreciate it while trying to improve it."

When she was a lawyer, Buracheuskaya began to consider how international arbitration can reflect social change. "How international investment agreements affect public policy and *vice versa*, and whether justice ends with the delivery of the award between investor and the state. Can we say that justice has been delivered when you have an award issued between state and investor? What about local communities and Indigenous peoples? That's where I started to think about how we can improve international arbitration as a system without losing its core characteristics."

THE ARBITRATION COMMUNITY

Buracheuskaya is continuing her arbitration journey as a researcher, looking at the intersection of public policy and international arbitration. She is currently pursuing a PhD in public policy (health policy) and international arbitration under the supervision of Professor Wolfgang Alschner at the University of Ottawa, participating in the 'Health-IIAs' project – an international research collaboration for healthier international investment agreements. She also ►

DAZOKA.COM/SHUTTERSTOCK

Offshore drilling for oil in Namibia poses a threat for local communities

R. BOCIAGA/SHUTTERSTOCK

works on a research project that focuses on Indigenous peoples' rights in international arbitration led by Professor Céline Lévesque.

"Indigenous peoples' rights have started to be acknowledged in international arbitration relatively recently even though the fight for them has a long history. We're only just starting to engage more deeply with the topic of Indigenous peoples' rights in international arbitration," she says. Citing Ciarb's "encouraging" Alexander Lecture in 2023 by Toby Landau KC C.Arb FCIArb, which examined several controversial investor-state cases including *Copper Mesa v Ecuador*, *von Pezold v Zimbabwe* and *Tethyan v Pakistan*, she says: "I thought I was among the few interested in this topic! The global arbitration community is now beginning a more comprehensive and thorough discussion of the ethical implications of investor-state arbitration, particularly in regard to Indigenous peoples' rights."

Buracheuskaya notes that international instruments establish the so-called minimum standard for the survival, dignity and wellbeing of the Indigenous peoples. The United Nations Declarations on the Rights of Indigenous Peoples was adopted in 2007 after decades of negotiating between state governments and the representatives of Indigenous communities. It addresses both individual and collective rights of Indigenous peoples, and mentions, among others, the right to autonomy or self-government, cultural rights, and rights related to education and their languages. "The core principle is reflected in article 3, which revolves around a central concept for Indigenous people: the right to self-determination. Another important concept is free prior, informed consent: states should consult and cooperate in good faith with Indigenous communities before adopting and implementing legislative or administrative measures that may affect them," explains Buracheuskaya.

Indigenous rights are particularly important because of an almost axiomatic power imbalance, she notes. While the level of legal protection they are afforded may vary from country to country, when it comes to the international level, Indigenous people often face big, powerful businesses.

"Many Indigenous communities have their own protocols and culturally appropriate traditions that need to be respected"

INVESTOR-STATE DISPUTE SETTLEMENT

"Researchers unanimously agree that there are many issues within investor-state dispute settlement [ISDS]," explains Buracheuskaya. "Whenever an investment project starts, it often involves the land of Indigenous peoples or their culture heritage. Some issues may arise before the dispute, even before there is any conflict between government and investor. These relate mostly to due diligence; how investors engage with Indigenous communities and whether they take into account the interests of Indigenous peoples and correctly identify the area of impact. Sometimes it's not only about the land where Indigenous people live, but also about the land that they consider their cultural heritage or where their livestock dwell. It's also important to consider whether the Indigenous community is nomadic or not."

There is also the question of prior informed consent: has it been given and, if so, was engagement conducted appropriately? "Many Indigenous communities have their own protocols and culturally appropriate traditions that need to be respected," explains Buracheuskaya. For example, investors want written consent, while the community may have oral tradition of how to transfer information.

These issues may arise in the initial stages, before government approval of project implementation. Buracheuskaya notes there are issues that may arise after the dispute has crystallised, but before arbitral proceedings are initiated. "For example, should Indigenous people participate in the pre-arbitration negotiations between investor and state that take place within the "cooling-off period" under bilateral investment treaties (BITs)?" During arbitral proceedings, it is also vital that there are effective tools for Indigenous communities to participate in them. ►

Silver mine in Bolivia – the country attempted to revoke a UK company's mining concessions due to it sparking civil unrest in Indigenous communities

SL-PHOTOGRAPHY/SHUTTERSTOCK

"The most visible way for Indigenous communities to do so is through *amicus curiae* briefs," she explains. However, many researchers will point out that it's optional for a tribunal to accept *amicus curiae* briefs. Then there are issues even outside the arbitral proceedings that relate to Indigenous peoples. For example, the question of whether Indigenous peoples should participate in settlement negotiations that can take place in parallel to arbitral proceedings.

"It's about their land and their cultural heritage, and they have almost no tools to say something during the proceedings," says Buracheuskaya, who points out that Indigenous peoples' rights are a recognised part of human rights. "The question is closely related to the broader discussion of whether the tribunal should consider human rights during their arbitration or not. Another important question is the acceleration of the problem and aggravation of the conflict between Indigenous peoples and governments, because when we don't consider these issues, we can cause more damage. The damage continues to the Indigenous communities and will sometimes lead to civil unrest."

She points to an example of *South American Silver v Bolivia*, where a UK company's mining project sparked protests and social unrest within the Indigenous communities in the mining area, prompting Bolivia to revoke the mining concessions held by the investor. In the arbitral proceedings, Bolivia specifically argued that it revoked the concessions in the public interest, in particular to pacify the conflict, avoid escalation and protect Indigenous communities' rights. However, the tribunal held Bolivia liable for unlawful expropriation. More recent examples include recurring unrests and clashes between protesters and authorities in relation to Las Bambas copper mining project in Peru, which began in 2015, as well as massive protests related to exploitation of lithium in the high Andean wetlands of Jujuy, Argentina.

If the Indigenous community isn't included at the beginning of the process, it can cause problems down the line. "It just exaggerates the conflict and can cause even greater damage to the Indigenous communities. Including Indigenous peoples at inception is a preventive measure," she explains. Increasing numbers of states are trying to give better protection for Indigenous rights so if a tribunal does not consider them, the omission can conflict with a state's policies. It would be wonderful to align the measures taken at the international level with state level: to finally recognise and give sufficient protection of Indigenous peoples' rights in arbitration tribunals' decisions."

"I feel there is a space for arbitration institutions to promote better participation of Indigenous peoples through their guidelines"

REFORM REQUIRED

Almost everyone agrees that the reform is needed, explains Buracheuskaya. "Researchers unanimously agree that the current ISDS system does not adequately protect and accommodate the rights of Indigenous communities. However, when it comes to the specific measures, researchers have different opinions. Some argue that we must give Indigenous peoples better access to arbitral proceedings, while others call for more drastic measures, such as carving out disputes involving Indigenous peoples from the system.

There are several directions that the reform could take to protect substantive rights of Indigenous peoples and integrate them in the investment arbitration system. Some countries have started to include provisions referring to Indigenous peoples' rights in their investment treaties – for example, the right to regulate – and adopt measures to protect Indigenous peoples.

Other provisions relate to corporate social responsibility and employ soft language – that the state should make the best efforts to encourage the business to follow those guidelines and consider Indigenous peoples' rights when it comes to the procedural side, ►

including allowing them full access to the arbitration proceedings.

Other recommendations may include providing certain procedural rights for Indigenous people, such as witness statements to submit evidence in investment arbitration. It can also be important to provide access to case materials and consider how to approach the issues related to the confidentiality of certain documents in the proceedings. "Indigenous people might not even have access to the dispute's underlying documents," says Buracheuskaya.

INTERSECTION WITH ESG

Environmental, social and governance (ESG) and Indigenous communities' rights intersect in several ways, she argues. "First, protection of Indigenous peoples' rights aligns with the general aims and objectives of ESG, responsible business conduct and corporate social responsibility," she says, noting that there are several ESG documents that reference Indigenous peoples' rights, including the UN Guiding Principles on Business and Human Rights.

Buracheuskaya points out that the Organisation for Economic Co-operation and Development (OECD) has developed guidelines for multinational enterprises on responsible business. However, they are only guidelines on how businesses should conduct due diligence and approach Indigenous peoples, considering engagement protocols and consent in the context of historical discrimination.

"There are many things at the due diligence stage that businesses could implement in their practices that would hopefully promote better protection of Indigenous rights. The problem is that there is no consistent opinion, at least in academia, about the effectiveness of these instruments. While they provide a better understanding and a better guidance for businesses, some researchers think that they can aggravate the problem. Instead of mandatory regulation, they leave certain issues to the discretion of businesses, which means the business may, or may not, decide to follow them."

ARBITRAL INSTITUTIONS

While states are arguably the main driver of reform, there are other actors in investment arbitration with a role to play. "Most arbitration institutes have rules that it's at the tribunal's discretion whether to accept *amicus curiae* briefs or not, for example. So even if the parties and investor agree that *amicus curiae* briefs from the Indigenous community should be considered by tribunal, it's still not clear whether that will be in conflict with the arbitration institute's rules and whether the parties' agreement will override," she says. "I feel there is a space for arbitration institutions to promote better participation of Indigenous people through their guidelines."

DR MORLEY READ/SHUTTERSTOCK

The pristine Napo River basin in the Ecuadorian Amazon, where Indigenous people opposed the exploration and exploitation of two oil field blocks

The private sector could also be a major driver, she argues. "The contract into which the investor enters with the state is an amazing tool that we forget at our peril. Many issues could be regulated between investor and state in the investment contract." The UNIDROIT-ICC Working Group on International Investment Contracts that drafts guiding principles on international investment contract is a case in point.

Another good example is the draft Protocol to the Agreement Establishing the African Continental Free Trade Area, which was finalised in 2023. "While only a draft version of text is publicly available, it still provides a good example of a comprehensive agreement where Indigenous peoples' rights are taken into account. It has mandatory language and it provides not only for states' obligation to respect and comply with Indigenous peoples' rights, but also investors," Buracheuskaya explains. It states that investors should respect the right of Indigenous people to prior, informed consent and participate in the benefit of the investment project. Additionally, it should make impact assessments available and accessible to Indigenous peoples.

"The contract into which the investor enters with the state is an amazing tool that we forget at our peril. Many issues could be regulated between investor and state in the investment contract"

The controversial Trans-Alaska Pipeline, between Alaska and the US

RENA SCHILD/SHUTTERSTOCK

One example she cites is *Burlington Resources Inc v Republic of Ecuador*. "Burlington, a US oil and gas company, signed a production-sharing contract with Ecuador for exploration and exploitation of two oil field blocks located in the Napo River basin, considered one of the most biodiverse regions in the world. Several Indigenous communities resided in one of the blocks, including 14 Kichwa and three Huaorani communities. It also overlaps with biosphere reserves. The project was significantly opposed by the Indigenous community," she explains. Even though the tribunal rules that Burlington was liable for certain environmental damage to the area, it left almost unaddressed the question of protection of Indigenous people's rights.

TC Energy Corporate and TransCanada Pipelines Limited v United States of America is another investment dispute that relates to the Keystone XL Pipeline, which was designed to deliver gas from Alberta to Oklahoma and Texas, and was supposed to go through Indigenous lands. "It's a great example of a successful Indigenous people's case because, in the end, the Government decided not to continue with the project. The decision triggered the investor's claims against the state, but they were dismissed on jurisdictional grounds," says Buracheuskaya.

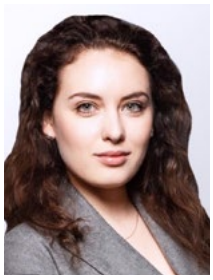
FUTURE TRENDS

It is difficult to predict future trends, but it is noteworthy that states have begun to include Indigenous rights in conjunction with other rights, such as environmental ones, says Buracheuskaya. "Hopefully this will lead to arbitral tribunals not feeling too threatened to establish their jurisdiction or to at least consider those issues within the proceedings."

Tribunals still do not take a comprehensive approach to Indigenous rights. One example is *Glamis Gold v USA* in 2009, which related to gold mining on a site that was considered sacred for the Indigenous community, the Quechan, and other Native American tribes. At some point, federal government and the state of California started to take measures, *inter alia,* to protect the site, but that led to the investors initiating claims against the state. The Indigenous community wanted to submit *amicus curiae* briefs within the arbitration because they considered that their rights were not adequately considered by both sides. The tribunal, although it accepted the filings, never considered the *amicus curiae* briefs in the final award. This situation, explains Buracheuskaya, once again exemplifies the challenges surrounding Indigenous peoples' access to arbitration through *amicus curiae* briefs.

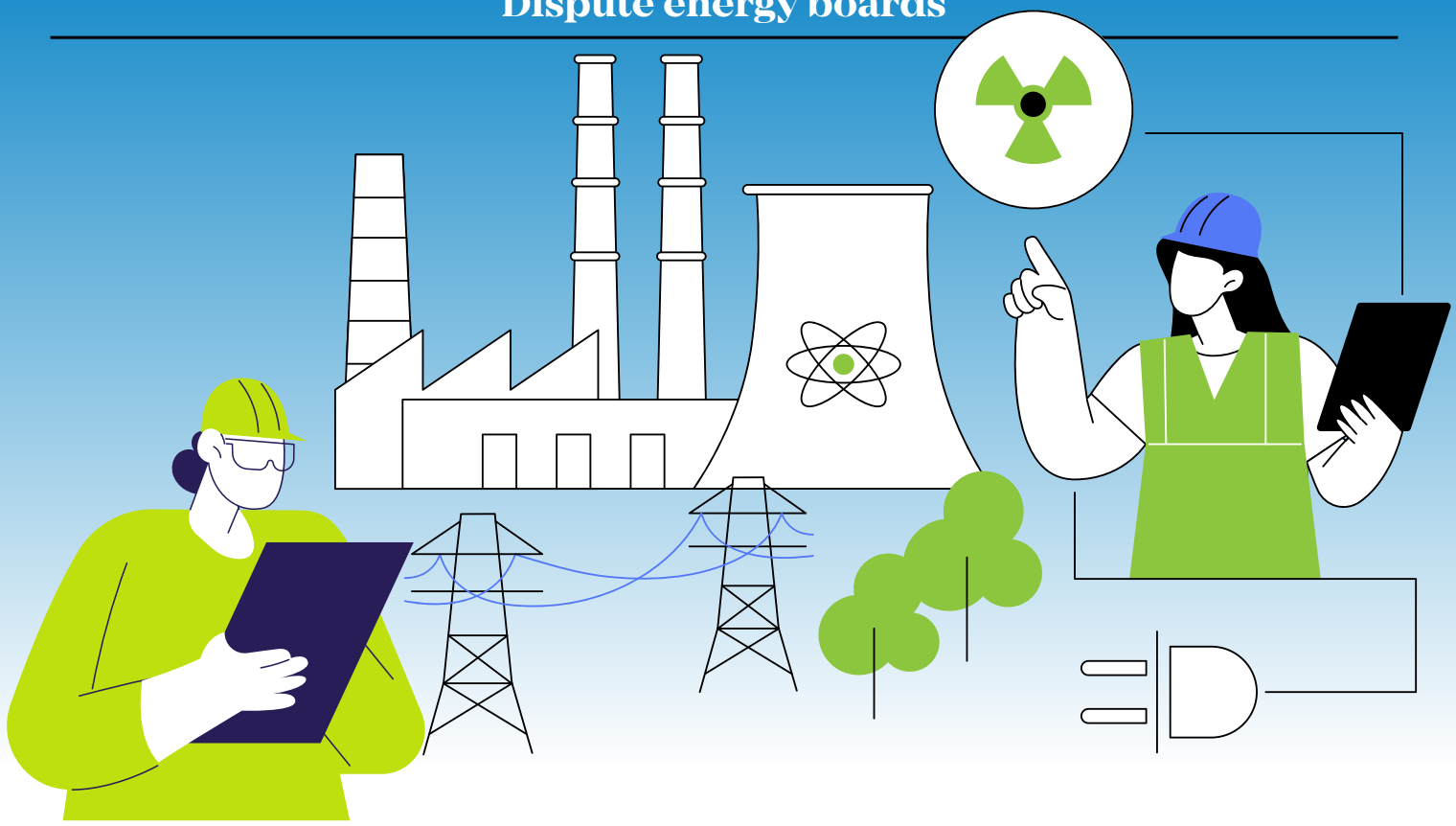
Another case in Zimbabwe from 2015, *Bernhard von Pezold v Republic of Zimbabwe*, is also a significant dispute involving four Indigenous communities who asked for the tribunal's permission to file their *amicus curiae* submissions. "Even though the tribunal refused to accept *amicus curiae* briefs on several grounds, it specifically stated that a submission by Indigenous peoples on their rights under international human rights law is a matter outside of the scope of the dispute". This is another example of tribunal's resistance to consider rights of Indigenous peoples when it comes to investor-state disputes."

However, there are reasons to be optimistic, concludes Buracheuskaya. States are trying to promote Indigenous peoples' protections in their investment treaties and this aspiration will hopefully influence the practice of tribunals. ■



ABOUT VERANIKA BURACHEUSKAYA

Veranika is an international arbitration lawyer and researcher. Her research areas include investment and commercial arbitration, public policy, public health issues in international arbitration, and access of Indigenous Peoples and local communities to arbitration. Veranika practiced law across multiple jurisdictions, representing energy companies and states in commercial and investor-state arbitrations. Her experience includes disputes over a production-sharing agreement in one of the biggest Pacific oil & gas projects, state succession to a bilateral investment treaty, assignment of treaty claims, gas pipeline and offshore platform construction, and expropriation of a transportation company. Currently, Veranika is conducting Ph.D. research at the University of Ottawa, Canada, focusing on international arbitration and public policy (public health). She is a part of an international multidisciplinary research project on Public Health and International Investment Agreements, as well as a research project on Indigenous Peoples' Rights in International Arbitration.



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CABs' crucial role in energy transition

Avoiding conflict rather than resolving disputes is the best way to work towards a carbon net-zero economy, says **Wolf von Kumberg FCIArb**

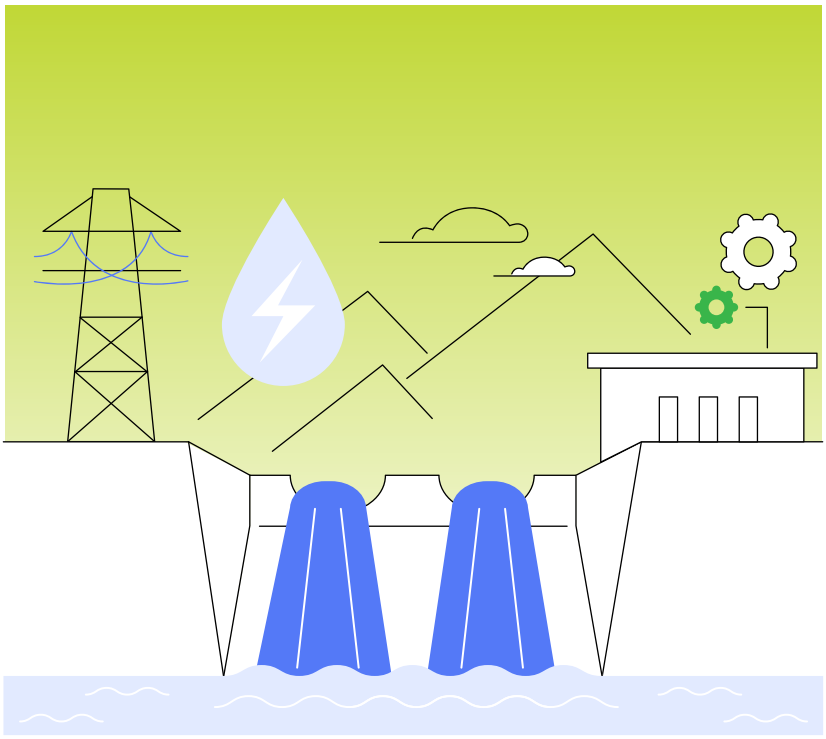
What does the energy transition mean? It is the shift from traditional fossil fuels and a carbon-based economy to a more sustainable model that addresses environmental challenges and works towards a carbon net-zero economy.

Green projects – schemes that are environmentally friendly by virtue of their ability to reduce pollution and fossil fuel consumption and, thereby, carbon footprint – are part of this shift. Accordingly, they represent a seismic shift for economies and a way of thinking that has been with us since the Industrial Revolution. And given that states, companies, financial institutions, insurers and civil society at large have committed to green projects and, in the main, aim to achieve them between 2030 and 2050, it is imperative that lengthy disputes do not disrupt their progress.

To make progress in this area, we require a process that emphasises collaboration and compromise to find lasting solutions

However, traditional methods of dispute resolution, such as litigation, are not the answer to preventing or managing disputes that can disrupt their progress. Dispute boards or, as I shall refer to them hereon, conflict avoidance boards (CABs), offer a better option, and governments, companies, funders and Ciarb can help encourage their use.

In 2014, Ciarb launched a set of what were then novel dispute board rules; novel because ►



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they emphasised conflict avoidance over dispute resolution. In particular, the rules provide for the provision of informal advice in article 12:

> *"The true mission of a Dispute Board [DB] is not judicial; rather it is to prevent formal Disputes. The Parties may at any time jointly refer a matter or Dispute to the DB for it to give an informal advisory opinion as a means of Dispute avoidance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. The DB may provide the requested advisory opinion during a conversation with the Parties, during any meeting or site visit in the presence of both Parties or in a written note to the Parties, or, with the prior agreement of the Parties, provide informal assistance to resolve a disagreement in any other form."*

But to make real progress in this area, we require a process that emphasises collaboration and compromise to find lasting solutions. Achieving environmental sustainability goals in the time that remains requires a rethink of current dispute resolution methods. Hearing the individual voices of stakeholders is a vital part of the new methodology.

To manage disputes in this green revolution, the following is proposed:

1. A collaborative, non-adversarial mechanism.
2. For dispute avoidance to be prioritised over dispute resolution.
3. A system that encourages the wide participation of affected stakeholders, including government, corporations communities and civil society at large.
4. An accessible and unrestrictive process, particularly financially.
5. The scope to explore a wide range of possible options.
6. The participation of neutral facilitators rather than decision-makers to facilitate negotiations, thereby allowing parties to develop realistic options to deal with issues arising on projects and to meet broader commitments.
7. A platform that provides for the exchange of a wide variety of views to be heard and expert opinions to be considered.
8. Facilitators who are seen as credible and unbiased.
9. Facilitators who come from a variety of backgrounds, with a range of experience and expertise that is respected by the parties.
10. Facilitators who are trained in dispute avoidance and mediation skills.

CABS

With their origins in dispute resolution boards (DRBs) and disputes adjudication boards (DABs), CABs provide the basic structure to meet these requirements and, when modified to include the techniques offered by mediation, can offer the basis for both avoiding and managing conflict.

They can be *ad hoc* (convening to hear specific disputes) or standing (run for the duration of a project). Originating as they do from the standing DB mode, CABs are formed at the outset of a project and remain in place until the project's end.

In fact, the importance of conflict avoidance was found to be so integral to the role of the board that in May 2021 the Joint Contracts Tribunal (JCT) adopted the Ciarb Dispute Board Rules, stating: ►

The importance of conflict avoidance was found to be so integral to the role of the board that in May 2021 the JCT adopted the Ciarb Dispute Board Rules

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ABOUT THE AUTHOR

Independent mediator and arbitrator **Wolf von Kumberg FCIArb** is the Chief Executive Officer of Global Resolution Services and a member of Arbitra, a specialised ADR service with offices in London, Washington, DC, and Abu Dhabi. He spent more than 25 years as General Counsel for several global technology companies and served as Chair of the Board of Management of Ciarb when its Dispute Board Rules were launched in 2014. He specialises in managing technology, infostructure, energy and investment disputes.

"The DAB fulfils its avoidance function by providing informal advice under article 9 of the JCT DAB Rules. The parties can request an informal advisory opinion at any time. This could be done during a site visit or in a written note to the parties. The parties are not bound by it, and the DAB may on its own initiative raise an issue with the parties in order to promote dialogue."

CABs are therefore an improvement on the older DB model in that they seek not only to resolve conflicts, but to prevent them from occurring in the first place. In fact, by being embedded in a project from the get-go and by employing mechanisms such as horizon scanning and early issue spotting, and using panel members' expertise, they bring matters to the attention of the participating parties at a stage when options for resolving disagreement are still feasible and when parties are motivated to find solutions to deliver the project on schedule and on budget.

When it comes to green projects, some additional measures not traditionally used by DBs will have to be considered including bringing in additional stakeholders such as community groups, non-governmental organisations and other climate actors into a project's contract review process. This might be accomplished through use of stakeholder engagement set out in the Conflict Management Committee (CMC) Rules of the OHADAC (CARO) Regional Arbitration Centre.

Such groups will have to form part of the original contractual mandate between the CAB and the parties (given that implementation of a CAB is a contractual process), with the understanding that at least hearing from these groups as the project progresses will be to its benefit.

For example, on a wind farm project where environmentalists are concerned about the impact on wildlife, parameters to measure impact might be agreed by all parties at the project's inception and then monitored during its duration, with a CAB providing a platform for monitoring. Any discrepancies would be discussed by the CAB with the parties and the environmental group, and potential workaround options reviewed and agreed.

In short, as Governments look to addressing energy transition through large infrastructure projects, CABs are ideal for delivering green projects' climate change commitments in a timely and cost-effective manner, while reducing costly and damaging disputes. ■

By being embedded in a project from the get-go, CABs bring matters to the attention of the participating parties at a stage when options for resolving disagreement are still feasible

Churchill revisited

EAMESBOT/SHUTTERSTOCK

Changes to the Civil Procedure Rules (CPR) in England and Wales have come into force as a consequence of the *Churchill* judgment. Catherine Dixon MCIArb asks where we go from here

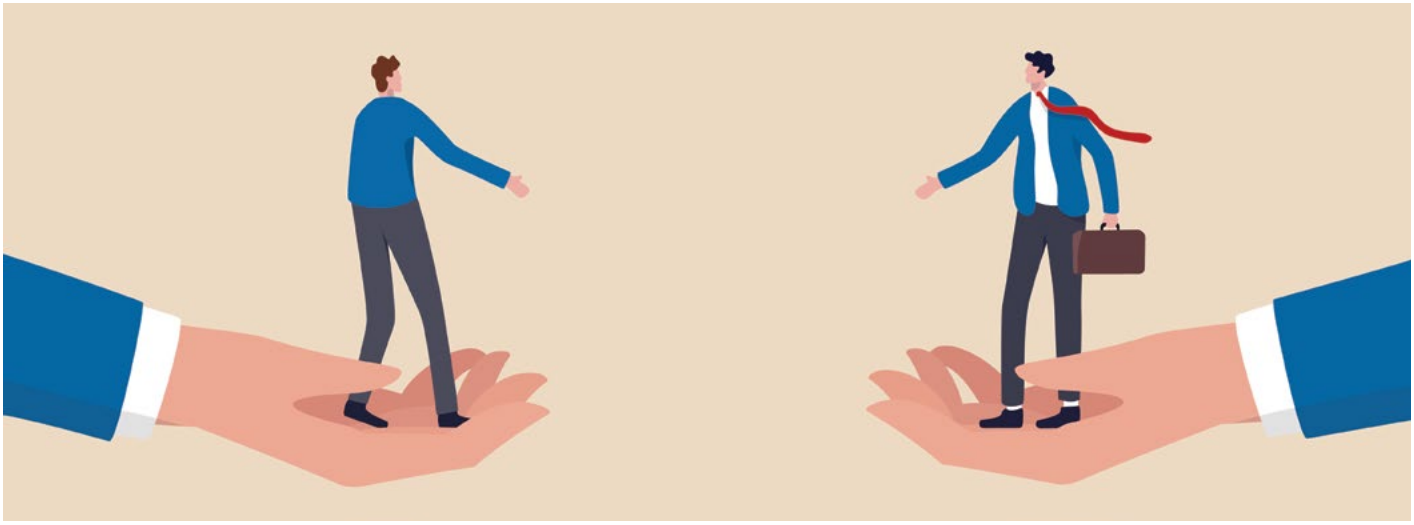
It is just over a year since the Court of Appeal handed down its *Churchill* judgment which overturned the case of *Halsey v Milton Keynes NHS Trust [2004]* (*"Halsey"*), thereby enabling courts in England and Wales, to order parties to undertake non-court based resolution or to order a stay of proceedings, pending non-court based dispute resolution.

To remind readers, Ciarb joined forces with the Civil Mediation Council (CMC) and the Centre for Effective Dispute Resolution (CEDR) to successfully intervene in *Churchill v Merthyr Tydfil Borough Council (*"*Churchill*"*)*. In its judgment, the Court of Appeal held that a court could lawfully stay proceedings or order parties to engage in non-court-based dispute provided that the order does not impair the very essence of the claimant's right to proceed to a judicial hearing and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at a reasonable cost.

Halsey was viewed by many as a thorn in the side of mediation. And the Court of Appeal in _Churchill_ concurred

In short, the *Churchill* case gave the Court of Appeal the opportunity to overturn what was confirmed by the judgment to be the obiter findings of Lord Justice Dyson in the case of *Halsey*. The now overridden *Halsey* judgment stated that ordering parties to mediate would breach article 6 of the European Convention on Human Rights: the right to a fair trial. Many commentators thought *Halsey* was wrong because even if parties are ordered to mediate, they are not ordered to settle and, provided it is agreed, they still have access to the courts.

Halsey was viewed by many as a thorn in the side of mediation. And the Court of Appeal in *Churchill* concurred. As a result, the Civil Procedure Rules (CPR) Committee consulted on the CPR suggesting changes to take the *Churchill* judgment into account, and concluded that changes to the CPR were necessary to bring them in line with the judgment. ▶



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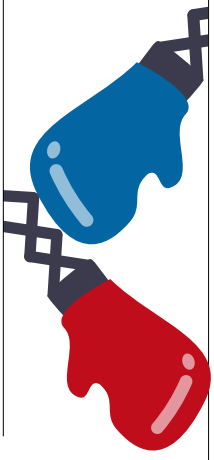
These changes to the CPR came into force on 1 October 2024:

- Most notably CPR Rule 1 – which enshrines the overriding objective of civil justice and is often used to measure the exercise of judicial discretion – is expanded to include, when enabling the court to deal with cases justly and at a proportionate cost, the use and promotion of ADR. In other words, ADR is now an objective of achieving civil justice, which can include ordering the parties to use an ADR procedure if the court considers it appropriate.

- The next set of amendments relate to clarifying the court's management powers over ADR, which include the ability to order parties to participate in ADR, or stay proceedings pending participation and take other steps, including for example, using early neutral evaluation with the aim of helping the parties to settle.

- In terms of case management in multitrack cases, (litigation of value and complexity), when giving directions, the court must consider whether to order (or encourage) the parties to participate in ADR.

- The final amendments relate to cost provisions and the way litigation is conducted is identified as the possible basis of sanctioning unreasonable behaviour. The court can now consider whether a party failed to comply with an order for ADR or failed to engage in ADR proposed by the other party. The response to the consultation by Ciarb, CMC and CEDR did result in a change from the original wording in the consultation of 'participate' to 'engage'



For mediation to become embedded and second nature to those advising parties in litigation, the courts will need to exercise their new powers

So what's next for ADR in England and Wales as a consequence of *Churchill* and the changes to the CPR.

There is no doubt the CPR changes herald a change in how mediation and private dispute resolution are viewed in the civil justice system in England and Wales, and that they have enabled, and will continue to enable, faster and more cost-effective resolution of disputes. But are there other implications?

As the *Churchill* case progressed, Ciarb, the CMC, CEDR and the Royal Institution of Chartered Surveyors (RICS) were in simultaneous discussion with the Ministry of Justice about how mediation might be successfully integrated into the civil justice system. That is to say, how it could be ensured that prospective mediators are trained to an appropriate and agreed standard.

It is no overstatement to say *Churchill* opened the door to amendments to the CPR, which has given England and Wales the opportunity to make systematic long-term changes relating to the use of non-court-based dispute resolution.

However, for mediation and other ADR processes to become embedded and second nature to those advising parties in litigation, the courts will need to exercise their new powers if parties fail to consider and where appropriate use such processes.

What remains unclear is whether and/or how mediation will be integrated into the civil justice system.

In conclusion, the *Churchill* judgment could have a significant impact on the future of litigation culture in England and Wales if judges exercise their discretion to order non-court based dispute resolution. If these new powers are widely exercised, ADR mechanisms may cease to be viewed as an alternative process and could become an integral mechanism in the delivery of civil justice. ■

Case note

UniCredit Bank GmbH v RusChemAlliance LLC

This case is a landmark ruling on arbitration agreements and geopolitical challenges. It reinforces the commitment of English courts to uphold party autonomy and enforce arbitration agreements

RESUME: In a pivotal decision, the UK Supreme Court reaffirmed the principle of party autonomy in the enforcement of arbitration agreements, even amidst complex geopolitical tensions. The case of *UniCredit Bank GmbH v RusChemAlliance LLC* is one of many arising from disputes tied to EU sanctions imposed on Russia following its invasion of Ukraine ("EU Sanctions"). The key issue was whether the English courts could uphold an arbitration agreement governed by English law when faced with parallel proceedings in Russian courts, which claimed exclusive jurisdiction under local legislation. The Supreme Court's ruling in favour of UniCredit highlights the commitment of English courts to uphold arbitration clauses, ensuring that commercial parties' contractual choices are respected, even when foreign legal systems and political pressures come into play. The decision highlights the importance of precise arbitration agreements for maintaining legal certainty in cross-border contracts.

KEY FACT: The dispute involved €10 billion contracts for gas processing plants in Russia, with €2 billion in advance payments. Governed by English law, the contracts specified arbitration in Paris under rules of the International Chamber of Commerce ("ICC"). Following EU Sanctions, RusChem sought repayment, but UniCredit refused payment, citing the sanctions as well.

RusChem filed a lawsuit in Russian courts, relying on local laws granting jurisdiction over sanction-related disputes. UniCredit sought an anti-suit injunction in the UK, arguing that the arbitration agreement governed by English law should prevail. The UK Supreme Court upheld this, affirming that English law applied to the arbitration ▶

The decision highlights the importance of arbitration agreements for maintaining legal certainty in cross-border contracts

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clauses despite the Paris seat, thereby ensuring the arbitration agreement's enforceability.

JUDGMENT: The UK Supreme Court's judgment is noteworthy given its emphasis on the principle of party autonomy in cross-border commercial contracts, ensuring that arbitration agreements governed by English law remain enforceable despite the interference of foreign legal systems and sanctions.

The dispute related to two contracts, valued at approximately €10 billion, which included advance payments of €2 billion, for the construction of liquefied natural gas and gas processing plants in Russia, where RusChem was acting as the employer. Contractor companies' performance obligations were guaranteed by bonds payable on demand, seven of which were issued by UniCredit. The bonds were governed by English law and any disputes in relation thereto were to be settled by arbitration under ICC rules with a seat in Paris.

In 2022, when EU Sanctions impacted the contractor's ability to fulfil its obligations, RusChem terminated the contracts and sought a return of its payments under the bonds. Nonetheless, UniCredit refused payment, citing the EU Sanctions as well. RusChem then pursued legal action in Russia, relying on article 248.1 of Russia's Arbitrazh Procedural Code, which gave exclusive jurisdiction to Russian courts for disputes involving foreign sanctions. In response, UniCredit applied for an anti-suit injunction in UK courts to stop RusChem from continuing the Russian proceedings seeking to enforce the arbitration agreements. The core legal issue concerned the jurisdiction of English courts to enforce these arbitration clauses, governed by English law, against RusChem's actions in Russia.

In this context, the case reached the UK courts, and following the grant of an interim injunction by the Commercial Court of London, RusChem challenged jurisdiction of the English court. The High Court judge held that the English court lacked jurisdiction to hear UniCredit's claim by continuing the interim relief until exhaustion of the appeal process. However, the judgment was then overturned by the Court of Appeal and UniCredit was granted a final anti-suit injunction, requiring RusChem to halt its Russian proceedings. The Court of Appeal reasoned that English law governed the arbitration agreements and England was the proper forum for resolving the issue.

Upon appeal, the UK Supreme Court upheld this decision, focusing on the enforceability of arbitration agreements in cross-border disputes, even when foreign laws conflict with arbitration. The Supreme Court referenced the principles

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The court held that the chosen governing law of the contract, English law, extended to the arbitration agreements unless explicitly stated otherwise

established in prior cases, notably *Enka v Chubb* and *Kabab-Ji SAL v Kout Food Group*. The court also reviewed the *Carpatsky* case, where the absence of a governing law clause led to the law of the seat prevailing.

Throughout the proceedings, RusChem contended that French law should govern the arbitration agreements due to Paris being the arbitration seat. However, the court, following the precedent set in *Enka v Chubb*, held that the chosen governing law of the contract, English law, extended to the arbitration agreements unless explicitly stated otherwise. The court concluded that no such exclusion was made.

The court highlighted that the governing law clause in the bond contracts, which specified English law, applied to all provisions, including the arbitration agreements. Accordingly, despite Paris being the seat of arbitration, the court determined that English law governed the arbitration agreements.

When addressing the proper forum for UniCredit's anti-suit injunction, the court concluded that France was not suitable, as the French courts lacked the authority to issue such injunctions. Furthermore, the court determined that arbitration would not provide an effective remedy, as any award would be unenforceable in Russia due to local legal restrictions.

RusChem's argument that France was a more appropriate forum was dismissed. The court reaffirmed that the arbitration agreement, governed by English law, must be upheld, even in the face of potential parallel proceedings. ▶

The principle of *pacta sunt servanda* was emphasised, with the court affirming that the English courts had jurisdiction to enforce the arbitration agreement governed by English law. The location of the arbitration seat in Paris did not undermine the English courts' authority to uphold the contractual obligations.

Citing cases such as *Airbus Industrie GIE v Patel* and *IPOC International Growth Fund Ltd v OAO CT-Mobile*, the court reinforced that English courts could issue anti-suit injunctions even when the arbitration seat was outside England.

The court further concluded that seeking an anti-suit injunction in the English courts was fully compatible with the arbitration agreement, as it served to prevent breaches and protect the integrity of the arbitral process.

Ultimately, the court upheld the Court of Appeal's decision, granting UniCredit final relief, including a mandatory injunction requiring RusChem to discontinue its Russian proceedings. The English courts were confirmed as the appropriate forum to enforce the arbitration agreements governed by English law.

This case is a critical examination of the tensions between international arbitration and national interests, specifically within the context of sanctions and enforcement of arbitration agreements. The ruling is emblematic of the English courts' commitment to upholding arbitration clauses, reinforcing the broader pro-arbitration principles that have defined its jurisdiction.

A key aspect of the case is the interpretation of arbitration agreements when there is a conflict between the law governing the contract and the law of the arbitration seat. The court's analysis leaned heavily on the precedent set in *Enka v Chubb*, reaffirming that a general choice of English law to govern the contract will typically extend to the arbitration agreement unless there is clear evidence that the parties intended otherwise. This approach reflects a pragmatic preference for consistency in interpretation, avoiding the complexities and uncertainties that arise when different laws might apply to various parts of the same contract.

The ruling also underscored the importance of enforcing parties' agreements to arbitrate, even when other jurisdictions – such as the Russian courts in this case – seek to assert their own authority. By upholding the anti-suit injunction against RusChem, the UK Supreme Court affirmed that English courts will not shy away from intervening when a party to a contract attempts to circumvent an agreed arbitration process through local courts. This decision underscores the strength of anti-injunctions as tools to ensure adherence to arbitration agreements, thereby supporting the integrity of international arbitration.

This decision is particularly significant in the context of cross-border transactions where sanctions or political considerations may impact contractual performance

Furthermore, the Court's reasoning highlights the evolving role of international sanctions in arbitration disputes. The invocation of EU sanctions by both the contractor and UniCredit added a layer of complexity to the dispute, illustrating how such measures can be strategically leveraged to impact contractual obligations. The case brings into sharp relief the challenges faced by arbitral tribunals and national courts in balancing the enforcement of international sanctions with the principle of party autonomy in arbitration.

This decision is particularly significant in the context of cross-border transactions where sanctions or political considerations may impact contractual performance. It reinforces that, while national legislation like Russia's article 248.1 can impact local proceedings, it does not alter the validity of arbitration agreements governed by foreign laws. English courts' willingness to maintain jurisdiction over arbitration disputes even when parallel proceedings occur abroad sends a strong message about the importance of honouring arbitration clauses, no matter the geopolitical context.

The *UniCredit Bank GmbH v RusChemAlliance LLC* decision is a significant precedent for arbitration practitioners, reinforcing the commitment of English courts to uphold party autonomy and the enforceability of arbitration agreements, even in challenging geopolitical contexts. It sends a clear message that courts will intervene to ensure adherence to arbitration clauses, thereby safeguarding the integrity of international arbitration. For legal professionals, this case emphasises the critical importance of precise contract drafting, especially when sanctions or political considerations could impact performance. Clarity in governing law provisions and arbitration clauses can prevent jurisdictional disputes, providing a stable legal framework for cross-border transactions in volatile environments.

As the geopolitical landscape remains volatile, this ruling serves as a critical guide for future arbitration practices both in terms of parties' and national courts' approach to the issue and for contract drafting in sanctions-sensitive environments. ■

ABOUT THE AUTHORS

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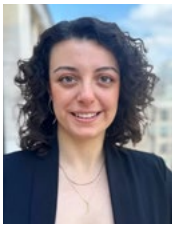

Serap Müftüoğlu ACIArb qualified as a lawyer in Turkey. Her principal practice areas are contracts law, commercial law, and international dispute resolution with a specific focus on arbitration and investment arbitration. An associate at Müftüoğlu Law Office, she holds a Master in Laws in International Dispute Resolution (LLM). She is an Associate member of Ciarb and is on Ciarb's Young Members Group Global Steering Committee.

An Arbitrator's Improbable Journey or: How I Learned to Stop Worrying and Embrace the Scenic Route

NATHAN CHICHEPORTICHE

How **Rodolfo C Rivas FCIArb** ended up with a career that far exceeded his youthful expectations

As a professional, I wear many hats: law professor, podcaster, Chief of Staff, legal counsel and arbitrator. I would not have imagined such a diverse career when I began law school. Back then, the only constant I clearly envisioned being a substantive part of my profession, perhaps a misplaced hubris of youth, was becoming an arbitrator.

The main reason for its appeal was that it appeared to be the most sensible way for a lawyer to have an international career, which in my mind meant living and working abroad, dealing with cross-border matters, learning from different legal traditions, meeting people from all over the world and acquiring and hopefully perfecting new skills beyond the law. My professional career, within the realm of arbitration, has delivered all of these and then some, lest not in the way I imagined. Despite the challenges, the fulfilment I've found in this diverse career path has far exceeded my expectations. This journey has taught me the importance of lifelong learning, adapting to changes and how all experiences can make you a better professional.

FIRST STEPS

The first time I came into contact with arbitration was in labour law. This was also my first professional experience in the legal field. One of my professors, who is still a good friend, invited me to work with him at his law firm. I was splitting my time between studying and working, which was an enriching experience since I would see in real time what we were learning in law school. Back then, the authority in charge of settling labour disputes was the 'Juntas de Concialiación y Arbitraje' (roughly translating to Conciliation and Arbitration Board). Although it had arbitration in the name, likely because its primary objective was to impart justice while promoting and ensuring social peace and harmony in labour relations, it was not a typical arbitration body.

Nevertheless, it significantly influenced my early understanding of dispute resolution. In addition, perhaps more importantly, they were autonomous from the Mexican judicial branch, which could explain why they were labelled arbitration.

As a labour law trainee, I unexpectedly found myself advising a local football team on labour matters and it fascinated me. Around the same time, I stumbled upon the Court of Arbitration for Sport (CAS), an international body based in Lausanne, Switzerland, established to settle sports-related disputes through arbitration. This discovery opened up a potential path as an international arbitrator, even if I didn't know precisely how. Despite having a clear direction for my career, I found myself taking the scenic route, but as Aerosmith's Steven Tyler once sang: "Life is a journey, not a destination."

I thought it would be a good idea for me to contact domestic arbitration service providers for guidance and ways to be more involved. Their unanimous advice was for me to gain more experience and academic specialisation. That would be my next step, but I vowed to integrate my enduring passion for film into my professional life if I pursued specialisation. My way of doing this was through studies in intellectual property and art law, with the idea of covering a larger swath of the sports and entertainment dispute settlement arena. This led me to Alicante, Spain, where I earned the Magister Lvcentinvs title on intellectual property and began my international journey. Throughout my studies, I maintained contact with the domestic arbitration service providers and whenever I was in Mexico, I made it a point to visit them. This dedication eventually led to my first experience as an arbitrator in domestic arbitrations.

WIPO TURNING POINT

My recruitment by the World Intellectual Property Organization's (WIPO) Arbitration and Mediation Center was a turning point in my career. It enabled me to delve deeper into intellectual property arbitration and make significant personal and professional connections that remain a vital part of my life. I focused primarily on domain name disputes, a rapidly growing area of dispute resolution, and gained first-hand experience in international intellectual property arbitrations. Years later, because of this experience, I was appointed as a domain name panellist for almost all the approved domain name dispute resolution service providers. Serving as an adjudicator of domain name disputes, I honed my skills with a steady diet of cases with various levels of complexity.

The headquarters of the World Trade Organization (WTO), located in Centre William Rappard along Lake Geneva, Switzerland

EQROY/SHUTTERSTOCK

As Aerosmith's Steven Tyler once sang: "Life is a journey, not a destination"

During my time at the WIPO, I witnessed first hand many international arbitrations, and I quickly learned that I would need to complement my civil law background with solid common law credentials to get my foot in the door as an arbitrator. This led me to Stanford Law School, where I studied various subjects, including intellectual property, art law and mediation, and where I also polished my drafting skills.

After this, my professional career took a detour – or so I thought, as I got neck deep into international trade law and the World Trade Organization (WTO). The WTO, an international organisation dealing with the rules of trade between nations, provided a unique opportunity to work on several disputes, sharpen my abilities in ADR, and broaden my skills in diplomacy, negotiation and policy advice. My tenure at the WTO's Appellate Body Secretariat was a period of real opportunity. I administered disputes and later became part of the teams representing two different states in various disputes. These experiences are amongst the proudest of my career. I had the privilege to represent my country and later the country of my employer. At the Appellate Body, I also had the chance to work with the most professional and knowledgeable team of which I have ever been a part.

I now serve as Chief of Staff at the Mission of Israel to the WTO. Alongside my day-to-day responsibilities, I have been steadily developing my practice as an arbitrator, just as I envisioned starting my career. I have been included in the selective list of WTO panellists to hear disputes; I've adjudicated over 250 domain names; I've taught international ▶

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dispute settlement at my *alma mater*, Universidad Panamericana in Mexico; I've been included in the CAS Pro Bono Counsel list; and I've served as an arbitrator when requested.

THE CIARB EFFECT

Even after this, various experienced arbitrators kept recommending that I get involved with Ciarb and, if possible, become a Fellow (FCIArb). They described it as a valuable community that would provide opportunities to keep up to date with the latest developments, perfect skills, meet and network with practitioners, and provide a valuable industry qualification that could open doors. I acted on their advice and after a few years, I became a Fellow – and they were 100% right.

In parallel, I obtained an MBA postgrad degree, which I would recommend in a heartbeat to all lawyers, as it provided valuable lessons on managing my career and exemplified my holistic learning approach. The MBA has been instrumental in shaping my career and reinforcing the importance of continuous learning. Through all these experiences, I am constantly seeking to develop my skills further and work towards becoming a CAS arbitrator.

One of the latest projects in my day-to-day work is reviewing the dispute settlement mechanism at the WTO. This review addresses the ongoing stalemate in the appointments of Appellate Body members. Our aim is to ensure a more accessible, effective and efficient dispute settlement mechanism. All the lawyers representing their respective states are putting their skills and experience to the test in the service of the multilateral trading system. I am hopeful that our collective efforts will soon lead to a successful outcome that will significantly impact the field of international law and trade through an improved mechanism for resolving complex disputes. In the process, we are developing and implementing best practices at one of the most important bodies in international dispute settlement.

My career as an arbitrator has been a fascinating journey that has taken me around the world, allowed me to work on impactful matters and challenged me daily. If you had told me in law school that this was where my career would lead, I would have found it hard to believe. Yet, if you were to talk to 100,000 arbitrators, you would likely hear 100,000 different paths. Taking the scenic route, with its unexpected turns and surprising destinations, is the only way for an arbitrator. As Apple Inc founder Steve Jobs said: "You have to trust that the dots will somehow connect in your future." Embracing the unexpected is not just a part of the journey, it's a necessity for success in this field. It's about being prepared, resilient and open-minded in the face of the unknown, and it's a lesson that I've learned and embraced throughout my career. ■

ABOUT THE AUTHOR

Rodolfo C Rivas FCIArb is an arbitrator and domain name panellist expert in legal advice, negotiation, public policy and government relations with more than 20 years of international experience in the private and public sectors. He is an associate professor of law on international economic law and a regular speaker on IP, policy, trade and dispute settlement.

Rivas is a top 10% SSRN author with 48 articles and 17,800 downloads, and the creator, producer and host of *The Rodolfo Rivas Project* podcast, ranked in the top 10% worldwide and currently in its sixth season with over 560,000 downloads.

Rivas holds an LLB degree from Universidad Panamericana in Mexico, an LLM from Universitat d'Alacant, an LLM from Stanford Law School and an MBA from the University of London.

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