BIG QUESTION
Is mandatory mediation the only way forward?

CHARTERED STATUS
ADJUDICATORS: YOUR MOMENT HAS ARRIVED

CASE NOTE
PBO v DONPRO AND OTHERS

THE Resolver

ciarb

Winter 2022 ciarb.org

How to find work in ADR

Securing appointments can be difficult for neutrals, so our experts share tips on getting on the first rung of the arbitration ladder and then climbing it

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President's welcome

In years gone by, the tenure of a Ciarb President would involve a heavy travel schedule, visiting the Institute's branches across the globe. But when I assumed office, no plane tickets were booked for foreign parts. The post-lockdown world had begun to open up, but there was still uncertainty regarding travel.

One year later, and with my presidency now drawing to a close, we can jet off anywhere. Just yesterday, in fact, an invitation to Kenya landed in my inbox. My diary is particularly full right now, but even if it were not, I would hesitate. Is it really right in these hybrid times for the President of Ciarb to take a long-haul flight? We are a global organisation committed to ensuring our work is as green as possible, and meeting and working with colleagues remotely is one way of keeping that commitment.

That is certainly how I and the new Ciarb President John Bassie, who founded our Jamaica branch, have communicated these past 12 months. During our regular conversations – which I hope herald the beginning of a more collaborative relationship between outgoing and incoming presidents – we discovered that John went to school with my brother-in-law in London. It was a lovely moment of connection, and one that reminded me how my day job as a mediator is all about the power of human relationships. A good mediator looks beyond legal facts and hard data and discovers parties' needs and fears, finding what makes them tick. People won't reveal that kind of personal information if they don't like and trust you.

If you read my CV, you'll see that I have spoken at the White House, been to the UN and appeared in the Legal 500 Hall of Fame. It has been lovely to receive these honours, but I know they aren't the reasons people hire me. They do that because they feel they can relate to me.

It has been an honour to serve as Ciarb President and my message has remained constant throughout my tenure: let us put the principles of dispute resolution at the heart of all that we do. Part of my job as President has involved reading CVs from members put forward for presidential appointments, and it always amazes me when people report their A-level grades. I say, tell me who you are, not what you are.

Yes, I'm something of a maverick. But I have been one in all the decades of my association with the Institute, and it hasn't hindered me or you.

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

What's on

Give your career a boost with this selection of training opportunities

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

SPOTLIGHT ON

Virtual Diploma in International Maritime Arbitration

5 April–28 June 2023 £4,550*

Course director: George Lambrou FCIArb

The scale, diverse range and complexity of maritime arbitrations, coupled with an increase in arbitral systems, mean that it is essential to have the right knowledge and skills to navigate this field. Ciarb's Virtual Diploma in International Maritime Arbitration provides the in-depth training you need. This Diploma leads to eligibility for Ciarb Member status or Fellowship (subject to peer interview).

Diploma in International Commercial Arbitration

F2F: 8–17 September 2023
£7,500* for Ciarb members
£8,500* for non-members
Virtual: 5–28 May 2023 **£4,800***

Course director:
Dr Mohamed Abdel Wahab C.Arb FCIArb

If you are serious about a career in international commercial arbitration and want to:

- learn from outstanding tutors who teach from experience as practising international arbitrators;
- gain an excellent grounding in international commercial arbitration;
- meet and network with delegates from around the world; and
- progress towards Ciarb Member status or Fellowship...

... then Ciarb's Diploma in International Commercial Arbitration is for you!

To register your interest in these Diplomas, email education@ciarb.org

**Prices quoted are for delegates registered and accepted by 16 December 2022.*

Professional development

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

ADR

- **Online Introduction to ADR** Open entry **£24** *Separate assessment available, open entry* **£72**; *student course/ assessment bundle* **£48**

Mediation

- **Online Introduction to Mediation** Open entry **£109** *Separate assessment available, open entry* **£72**
- **Virtual Introduction to Mediation** 16–17 March **£265** *Separate assessment available, 17 March* **£72**
- **Virtual Module 1 Training & Assessment** 6 June **£3,840**
- **Virtual Module 2 Law of Obligations** (*note that this module is the same across all pathways*) 3 April **£1,190** *Assessment 16 March* **£342**

Construction adjudication

- **Virtual Introduction to Construction Adjudication** 16–17 March **£265** *Assessment 17 March* **£72**
- **Virtual Module 1 Law, Practice and Procedure of Construction Adjudication** 30 March **£1,190** *Assessment 16 March* **£174**
- **Virtual Module 2 Law of Obligations** *(see above)*
- **Virtual Module 3 Construction Adjudication Decision Writing** 2 March **£1,190** *Assessment 9 June*

Domestic arbitration (England and Wales)

- **Virtual Module 1 Law, Practice and Procedure of Domestic Arbitration** 14 September **£1,190** *Assessment only 16 March* **£174**
- **Virtual Module 2 Law of Obligations** *(see above)*
- **Virtual Module 3 Domestic Arbitration Award Writing** 17 August **£1,190** *Assessment 16 March*

International arbitration

- **Virtual Introduction to International Arbitration** 16–17 March **£265** *Assessment 17 March* **£72**
- **Virtual Module 1 Law, Practice and Procedure of International Arbitration** 30 March **£1,190** *Assessment only from 16 March* **£174**
- **Virtual Module 2 Law of Obligations** *(see above)*
- **Virtual Module 3 International Arbitration Award Writing** 2 March **£1,190** *Assessment only from 16 March* **£408**

Accelerated programmes

- **Virtual Accelerated Route to Membership: International Arbitration** 14–16 March **£1,320**
- **Virtual Accelerated Route to Fellowship: International Arbitration** 5–9 June **£1,720**

Diplomas

- **Diploma in International Commercial Arbitration F2F:** 8–17 September **£7,500* for Ciarb members; £8,500* for non-members** **Virtual:** 5–28 May **£4,800***
- **Virtual Diploma in International Maritime Arbitration** 5 April–28 June **£4,550***

**Prices quoted are for delegates registered and accepted by 16 December 2022.*

Prices subject to change; all prices correct as at December 2022

The opener

Women take the helm in first for Thailand branch

Dr Vanina Sucharitkul FCIArb and Noppramart Thammateeradaycho made history as the first female Chair and Vice Chair, respectively, of the Institute's Thailand branch. Admitted to the Californian Bar, Dr Sucharitkul is a Senior Lecturer at Paris Descartes University and serves as arbitrator and counsel on wide-ranging commercial litigation and cross-border disputes. A Thai national, she is the country's former representative on the ICC Court of Arbitration and is fluent in Thai, French and English. Ms Thammateeradaycho has more than 20 years' experience of trial and appellate advocacy in the Thai courts and serves on the panel of arbitrators for the Thailand Arbitration Centre, the Shanghai Arbitration Commission, the Shenzhen Court of International Arbitration and the ICC. Also a Thai national, she represents Thailand on the ICC Court of Arbitration. Both are members of ArbitralWomen.

Dr. Vanina Sucharitkul FCIArb

Noppramart Thammateeradaycho

Brazil programme in a nutshell

The Institute's Brazil and North America branches and the University of Miami's law school joined forces to provide an arbitration programme in parts of Brazil where ADR is relatively unknown.

More than 1,330 people took part in the Capacity Sharing Programme, which travelled to Manaus in the north of the country, Goiânia in the mid-west and João Pessoa in the north-east.

The two-day programme was delivered in English and Spanish and covered a range of topics related to arbitration, including applicable law, arbitral institutions and the advantages of this form of ADR.

Manaus, Brazil

SHUTTERSTOCK

60-SECOND INTERVIEW

Jonathan Wood FCIArb

In November, Jonathan Wood stepped down as Chair of Ciarb's Board and was voted in as the 2024 President

SADIK GULEC/SHUTTERSTOCK

The aftermath of one of a series of devastating earthquakes that struck Turkey in 1999

Tell us a bit about yourself

I am a Manchester-born boy who has been a dispute resolver for 45 years. I began my working life as a criminal defence and civil liberties lawyer and then went into maritime and insurance law. I have been an advisor to the British government's export credit agency for 30 years and now sit as an independent arbitrator in international trade.

In 2003, I conducted a five-day mediation for the Turkish government after the horrific 12 November 1999 earthquake, but the overwhelming part of my work has been in arbitration and litigation. However, my passion is human rights, where I have worked pro bono throughout my career for, among other organisations, the Foreign Office and in places including Dar es Salaam. My other big mission is promoting English law and the English legal system. They bring certainty and value to international business. That's why I co-founded and am a Director of LegalUK.

What are your proudest achievements during your five-year term as Board Chair?

Installing Catherine Dixon as Director General during Covid. Under her guidance, the Institute's financial management has been transformed and, subject to Privy Council approval, our governance will be in proper accordance with Charity Commission rules. When I assumed office, the Board mainly comprised lawyers. Now, we also have experts in marketing, HR and IT. I'm also pleased to have overseen Ciarb's brand renewal. It has been an intense five years!

And your top three goals for your presidency?

First, I want to spread the word about our services: to let people know Ciarb's members provide a cost-effective and expedient alternative to the courts.

Second, I want to promote genuine diversity among our members. And by that I mean including people from across the social spectrum. When people use the word diversity, they often refer to gender and ethnicity alone.

Third? Leave office unscathed!

"I want to let people know Ciarb's members provide a cost-effective and expedient alternative to the courts"

Ciarb to extend training in Saudi Arabia

Ciarb and the Saudi Arabia Centre for Commercial Arbitration (SCCA) are to extend their collaboration for ADR training.

Hundreds of practitioners have already benefited from the Institute's training in the kingdom, which the SCCA has delivered in English and Arabic.

The new agreement is aimed at deepening their knowledge and also training aspiring practitioners. Arbitrators who achieve Ciarb Fellowship will be able to apply for admission to the SCCA's Roster of Arbitrators.

Ciarb Director General Catherine Dixon said she was delighted "so many candidates have chosen to take Ciarb training in the Kingdom of Saudi Arabia. This new agreement paves the way for more ADR professionals to be trained to Ciarb's high technical and ethical standards, thereby supporting access to justice, which is our purpose."

SCCA CEO Dr Hamed Bin Hassan Merah said: "This agreement enables the SCCA to play its role in enhancing the practice of ADR locally and regionally."

He added that over the past three years, 956 people have enrolled on the International Fellowship in Commercial Arbitration course that the SCCA launched in July 2019, and that this was thanks to its partnership with Ciarb.

SHUTTERSTOCK

Why Ciarb accreditation matters

The Institute's ethical framework helps members secure appointments, writes Catherine Dixon

In our self-regulating industry, the ethical obligations of individual practitioners can vary widely depending on where you are licensed, where you trained, where you work and the industry in which you specialise.

In such an environment, consistent standards are difficult to achieve. And even when industry-specific professional standards regimes do exist – the IBA Guidelines on Conflicts of Interest, for example – it is rare for them to include enforcement mechanisms or proportional repercussions for violations. This is why a supranational system has been a cause for concern both historically and in recent years, with state governments expressing concern over the lack of enforceable ethical obligations on neutrals in discussions on investor-state arbitration reform.

It is true that participating states at UNCITRAL WG III are preparing to introduce a Code of Conduct for Adjudicators, which is expected to come into force by the end of 2023 and which could be applied to both commercial and ISDS disputes. But even with the collective will of state governments behind it, it is unclear who will have the authority to determine if a breach has occurred or what, if any, consequences will exist for neutrals who violate the code.

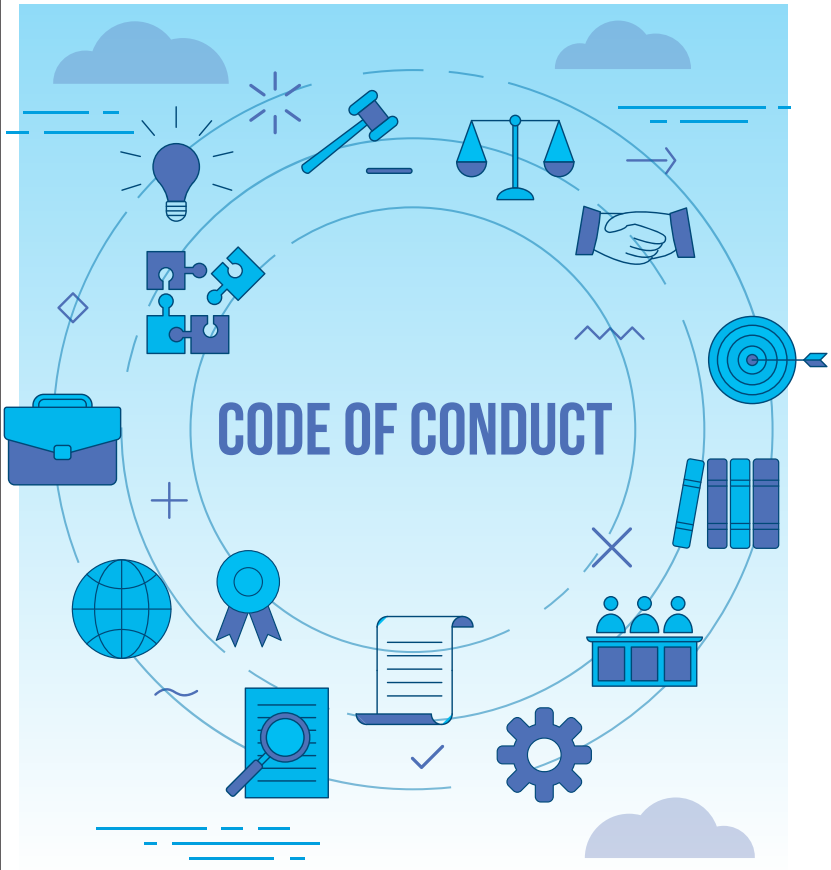
Ciarb's ethical framework alone stands as the industry model. A Ciarb post-nominal certifies that a member has achieved the defined level of competence in arbitration, mediation or adjudication. But it is also assurance that they have agreed to the highest levels of integrity, since by accepting the post-nominal they are obliged to adopt the Ciarb Code of Professional and Ethical Conduct. It hardly needs stating that this gives confidence to parties and institutions appointing a Ciarb member as a neutral in a dispute.

And if a member is found to be in violation of the Code of Conduct, they can no longer use a Ciarb post-nominal and their membership is revoked. The findings of the independent disciplinary tribunal formed to examine the complaint may also be made public. Thus, to be a member with a post-nominal at an advanced level, maintained over many years, is a means of publicly affirming ethical integrity and a voluntary willingness to be held to a standard.

Ciarb certification of training can give a member an edge in securing appointments, but it is the Institute's professional values that place our members firmly at the top of any list of desirable neutrals.

It is the Institute's professional values that place our members firmly at the top of any list of desirable neutrals

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



How to find work in ADR

Securing appointments can be difficult for neutrals at any career stage. **Erika Williams FCIArb** explains how to get on the first rung of the arbitration ladder, and **Gary Hickinbottom** shares how to keep climbing it.

Young practitioners often liken finding their first arbitrator appointment to the 'chicken and egg' scenario. Most parties and institutions look to appoint arbitrators with experience of writing awards, but new arbitrators need to be appointed so that they can write one.

GET QUALIFIED

For me, a first step to becoming an arbitrator after practising in the field is to qualify for Ciarb accreditation. There are other options, but Ciarb Fellowship is the most universally recognised.

I completed the Ciarb Diploma in International Commercial Arbitration in Malaysia early in my career, two years after I qualified as a lawyer.

INK DROP/SHUTTERSTOCK

Even if you do not qualify to be formally listed... contact your regional arbitration institutions to let them know you are open to accepting arbitrator work

Not only does the course set you up with foundational knowledge, it's also an exceptional networking opportunity. I've kept in touch with the arbitration practitioners I met there ever since.

Five years after taking the Diploma, I then completed the Ciarb Award Writing course. I found it highly practical and still refer to the course material when I write awards. Once you have successfully completed the course and have participated in a peer interview, you are eligible to apply for Ciarb Fellowship.

GET TO KNOW THE INSTITUTIONS

After obtaining Ciarb Fellow credentials, you can be listed on Ciarb's publicly available panel of arbitrators. The listing should be the first of many panels administered by arbitral institutions for which you apply.

The Rising Arbitrator's Initiative, although not an institution, is a helpful initiative offering free membership to practitioners under the age of 45 who have either already received their first appointment as arbitrator or have at least seven years' professional experience in the practice of international arbitration. Its member profiles are on its website for parties and institutions to consider when looking to appoint an up-and-coming arbitrator.

Different arbitral institutions have different requirements to join their list of arbitrators. Some also have 'reserve' panels for less experienced arbitrators. Even if you do not qualify to be formally listed, do not hesitate to contact

INK DROP/SHUTTERSTOCK

ABOUT THE AUTHOR

Erika Williams FCIArb is an Independent Arbitration Practitioner at Williams Arbitration. She is also a national Councillor for the Ciarb Australia Branch and Convener of the Queensland State Committee of Ciarb.

Women's work?

In September, the International Council for Commercial Arbitration updated its *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings*. Here are the key findings:

- Since 2015, the number of women appointed as arbitrators has risen from 12.6% to 26% (in 2021).
- One-third of sole arbitrators and emergency arbitrators appointed in 2020 and 2021 were women.
- A quarter of tribunal chairs in 2021 were women.
- Single-gender, three-person tribunals accounted for roughly half of the tribunals in 2021 – but all-women tribunals constituted only 2.5% of them.
- The vast majority of first arbitrator appointments come from institutions.
- First-time arbitral appointments went to men in five of the six institutions surveyed in the report.

Dazzling diversity

Groups that promote heterogeneity in the arbitration community:

- ICC Task Force on Disabilities Inclusion
- R.E.A.L. – Racial Equality for Arbitration Lawyers
- the African Promise
- the ICC's LGBTQIA network
- Equal Representation for Expert Witnesses Pledge

your regional arbitration institutions to let them know you are open to accepting arbitrator work. Institutions are likely to consider less experienced arbitrators for lower-value disputes and are more likely to appoint first-time arbitrators than parties are.

Whether or not you are accepted on the institutional panel of arbitrators, be actively involved with the institutions most relevant to you. This might involve volunteering to be on a committee or offering to organise and host a webinar or seminar. Being involved means you are more likely to be someone the institution thinks of when they need to make an arbitrator appointment.

BECOME A TRIBUNAL SECRETARY

Many young arbitrators take on tribunal secretary work as a stepping stone to sitting as an arbitrator, and it's a smart move. It means you observe arbitration from a neutral perspective and get first-hand experience of a tribunal's deliberations.

In fact, I sat as tribunal secretary to the partner with whom I worked at my previous firm. And when I started my solo career, I was soon appointed as tribunal secretary to a three-member panel followed by an appointment to work with a sole arbitrator. It has led to tribunal members recommending me for arbitrator work.

To begin working as a tribunal secretary, solicitors might approach a partner who sits as arbitrator at their firm and ask to sit as tribunal secretary for them. And young barristers often approach more senior barristers who sit as arbitrators to let them know they'd like to be considered for the secretary role.

Institutions such as the Australian Centre for International Commercial Arbitration (ACICA) and the Hong Kong International Arbitration Centre offer tribunal secretary training. ACICA goes one step further and publishes a Tribunal Secretary Panel as a resource for tribunals and parties undertaking arbitration in Australia and the region. Practitioners wanting to be listed as tribunal secretaries can apply.

NETWORK

Networking is a crucial part of a lawyer's job. Being known as a specialist in your field is how you get work referrals in the legal community. Publishing, attending seminars and speaking at conferences and events all count as networking.

INK DROP/SHUTTERSTOCK

Starter support

Some of the initiatives set up to support emerging and newly established arbitrators:

- **ARBinBRIEF** is a video-guide series of 15-minute conversations between two women arbitrators on a range of industry issues. As such, it's a good resource for parties, counsel and institutions looking for female arbitrators, including new ones. Follow on LinkedIn here.
- **Equal Representation in Arbitration Pledge Young Practitioners Subcommittee** has run a popular series of webinars called Push for Parity. Packed with advice for emerging arbitrators, a recent highlight was a webinar focused on people who have recently decided to set up as independent arbitrators. See recordings and event summaries here.
- **Rising Arbitrators Initiative (RAI)** aims to support emerging arbitrators around the world through a support network that encourages best practice. Apply to join RAI here.
- **Arbitration Lunch Match** connects women across the world for a 'blind date' lunch. Follow #arbitrationlunchmatch on LinkedIn to find out more.

Additional research by **Elizabeth Chan**, Senior Registered Foreign Lawyer at Allen & Overy, and **Maguelonne de Brugiere**, a former Senior Associate at Herbert Smith Freehills

Being known as a specialist in your field is how you get work referrals in the legal community

It is also important to become an active member of the arbitration community. Join groups such as the ICC Young Arbitrators Forum and the Ciarb Young Members Group and participate. Many arbitral institutions also have young members groups and they are usually free. By being a member, you will be first to hear about upcoming events, and participation at a junior level is often a pathway to organisations' more senior echelons.

THINK CAREFULLY ABOUT YOUR FEE

As we have established, less experienced or first-time arbitrators are likely to be approached for appointment in low-value disputes. Do bear that in mind when setting your fees and terms of appointment. It may be worthwhile offering a lower rate than your normal hourly fee or offering a capped fee approach for a dispute that is particularly small. If it is an international arbitration and travel is involved, waiving your travel and accommodation fees will be an attractive offer to parties looking to appoint an arbitrator in a small dispute.

BE PATIENT

Finally, be patient. Continue to network and ensure the arbitration community knows that you are open to arbitrator work.

One day, you will get that call. ►

For many, acting as an ADR resolver is a second career. For me, it is a third. After 15 years as a partner in a City law firm, I became a full-time judge in 2000, sitting in a variety of courts and tribunals until retiring from the Court of Appeal a couple of years ago.

When I was a solicitor, I acted in arbitrations and mediations: in the mid-1990s I became a registered mediator and I was also a mediator in the first court-supported mediation programme.

When I became a judge I was effectively proscribed from private dispute resolution work, but since I retired from the Bench that has changed and I have acted as a dispute resolver and been involved in public and private investigations and inquiries.

One major difference between the two areas of work is that a judge doesn't have to seek work, it simply keeps on coming through the door. Not so for an ADR practitioner. However, you can select areas of work and individual cases that are interesting to you and which are also, hopefully, remunerative.

SIMILARITIES IN PRACTICE

Being a former judge means my skill set is readily transferable to some forms of ADR. Arbitration, for example, involves the analysis of evidence, fact finding, the application of the relevant law and the drawing of conclusions in an award that is often similar in form to a court judgment. Similarly, to a large extent, early neutral evaluation. Meanwhile, mediation can involve some counter-intuitive thinking. It involves the analysis of evidence and assessment of the strength of the parties' respective cases, but it doesn't involve adjudicating upon them. Nevertheless, and particularly where both parties to a mediation are seeking firm guidance from the mediator as to the strengths and weakness of their case, I have found the conceptual difference can belie similarities in practice.

Furthermore, judges like me who have substantial experience in sitting on public law cases are used to coming to decisions – and drafting reasons – quickly. That is a substantial benefit in some types of arbitration such as sport, where I have had a significant number of appointments. Where a dispute involves money, important as that may be, it often lacks the urgency of a safeguarding matter or an arbitration involving disciplinary penalties. Sometimes, a potential appointee is contacted with a view to being instructed that day, having a hearing within a few days and issuing a decision within, say, 24 hours.

For example, I dealt with a case involving the very late cancellation of a Premiership Rugby match, the issue being the league points each team should be awarded under the relevant regulations: an issue that had to be determined within that same week, when the next round of matches were taking place. With two arbitral wing members, I held a two-day hearing and issued a decision within that time frame. Being available at very short notice is often a feature of my work. So, I have tried to maintain flexibility in my timetable so I can deliver urgent decisions at speed.

AN INTERESTING DIET OF WORK

To develop a practice, at any stage of your career, it is of course necessary to identify areas in which there is going to be work. For me, having an interesting diet of work is also important, which is why I like sports ADR with its broad range of work, including commercial disputes, regulatory and disciplinary tribunals, and safeguarding hearings. This last year, my work has focused on safeguarding issues in sport and education in forms that include investigations and the hearing of disciplinary charges as private arbitrations.

Sport is one area where it is essential to be on panels from which arbitrators are selected. I am on the Sports Resolutions Arbitration Panel and National Safeguarding Panel, the Paralympic Categorisation Panel and the FA Safeguarding Review Panel. Such panels are generally accessible through regular open competitions.

BE SEEN AND KNOWN

Other areas in which I am involved require a different approach. For example, while there are, of course, panels of international commercial arbitrators – upon which it is helpful, and sometimes essential, to be – to obtain work in the area, it is often just as important to be seen and known on the international arbitration circuit where appointments are often made by the legal representatives of parties and other arbitrators. And it is also important to attend relevant conferences such as the biennial International Council for Commercial Arbitration event, not only for their educative value, but also so you can talk to delegates and the many appointing institutions who attend. They are hard work, but certainly worth the effort.

ABOUT THE AUTHOR

Retired High Court Judge Gary Hickinbottom practises as an arbitrator and mediator out of 39 Essex Chambers

Being available at very short notice is often a feature of my work. So, I have tried to maintain flexibility in my timetable so I can deliver urgent decisions at speed.

The view from Bermuda...

John Wasty FCIArb explains how lawyers on the island in the North Atlantic Ocean find work in ADR

INK DROP/SHUTTERSTOCK

Unlike traditional litigation where court proceedings are open to the public and written judgments are published as soon as they are handed down, arbitrations and arbitral awards are generally confidential. This means it can be difficult for legal practitioners seeking to enter this area of ADR to attract work.

However, as a practitioner who has been involved in multiple international commercial arbitrations in both Bermuda and other jurisdictions, I can say that getting work as an arbitrator has less to do with visibility in the field of arbitration, and more to do with making a name for oneself in the field of dispute resolution generally. And although arbitration operates independently from the traditional court system, establishing oneself as a respected practitioner before the national courts of one's jurisdiction is a necessary first step.

Lawyers who wish to gain exposure to international commercial arbitrations should also aim to get experience in practice areas that involve industries where arbitration is a commonly used mode of dispute resolution, such as reinsurance, finance and shipping. The same applies to gaining practical experience in litigation that involves areas of law which overlap with arbitration, or which often arise in arbitral disputes, including conflict of laws and local enforcement of international treaties dealing with civil procedure generally. The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters being a case in point.

It is also worth noting that arbitrators are typically appointed by either the parties to a dispute or, failing agreement, by a designated appointing authority. To this end, would-be arbitrators should consider both sources of potential appointments in order to secure work.

PARTY APPOINTMENTS

Potential arbitrators will generally be recommended to parties by their legal representatives. Accordingly, an important source of instructions will often be one's colleagues and opposing litigation counsel at other firms. For this reason, those seeking to enter the arbitral space should always conduct themselves with collegiality, goodwill and diplomacy – no matter how acrimonious a dispute becomes.

It is also a good idea to join professional networks in industries where arbitration is the norm. In Bermuda, this includes reinsurance networks and networks of restructuring professionals. Becoming involved with clients in these contexts is an effective way to meet and interact with other professionals who may, at some point in the future, find your name on their desks as a recommended potential arbitrator.

APPOINTING AUTHORITIES

It is common for parties to designate an appointing authority in an arbitration agreement who may be called upon to appoint arbitrators where parties are unable to agree on a particular candidate. Arbitral institutions or legal professional associations are regularly named as the appointing authority in arbitral clauses. The Bermuda branch of Ciarb, set up in 1996, is regularly designated in this role.

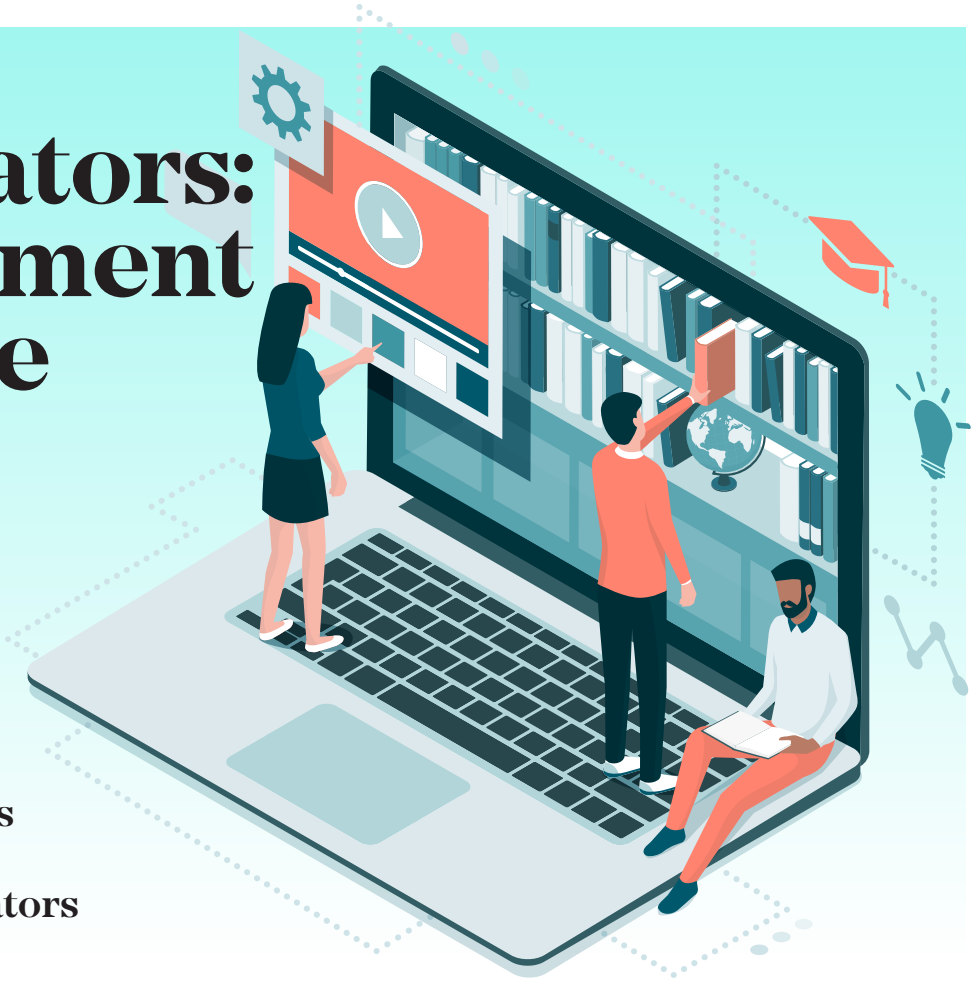
On this basis, it is crucial to establish links with the local chapter of international commercial arbitral institutions by securing membership and attending networking events. The same applies to legal professional associations, such as the Bar Council or an equivalent professional body in one's jurisdiction of practice. This is particularly so in Bermuda, where the Bermuda Bar Association, together with CIArb, coordinates the appointment of dispute resolvers locally.

Finally, I always recommend practitioners keep abreast of industry developments such as revisions to arbitral organisations' rules of procedure, applicable legislation (the UK Law Commission's recently published review of the Arbitration Act 1996, for example) and recent judgments. Finally, don't forget to publicise your knowledge by writing articles in arbitral publications like this one.

ABOUT THE AUTHOR

John Wasty FCIArb is Chair of Ciarb's Bermuda branch and head of Appleby's dispute resolution practice in Bermuda. He specialises in commercial litigation, restructuring, insolvency litigation, funds litigation and regulatory matters and has represented clients in Bermuda, Europe, Asia and America.

Adjudicators: your moment has come



Tom Hawkins explores what chartered status will mean for adjudicators

In September 2022, members voted in favour of Chartered Adjudicator (C.Adj) status at the Institute's AGM and EGM, making Ciarb the first professional body to award the accreditation.

While it will likely only be awarded to those with demonstrable experience in drafting and issuing quality adjudication awards, the significance of the vote, subject to Privy Council approval, should not be underestimated. Ciarb's globally recognised standards mean that, for those who appoint adjudicators, C.Adj status will demonstrate an individual's competence and accreditation.

Moreover, as the popularity of adjudication as a form of ADR grows across the globe, having good quality awards is vital. Of course, many jurisdictions have their own adjudicator-nominating bodies (ANBs) and training programmes. Here in Canada, for example, statutory construction adjudication was recently introduced in some provinces, including Ontario, where Ontario Dispute Adjudication for Construction Contracts is the only authorised nominating authority. By contrast, in England and Wales, Ciarb is one of many ANBs.

For those who appoint adjudicators, C.Adj status will demonstrate an individual's competence and accreditation

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Tom Hawkins BSc MSc FCIArb AMAE MCIOB is a chartered construction manager and quantity surveyor who provides quantum expert witness and dispute resolution services for FTI Consulting. He is listed as an arbitrator in the Ciarb Business Arbitration Scheme.

But whatever your jurisdiction, for adjudicators looking to develop their careers, the benefits of obtaining training and qualifications from a good provider cannot be stressed enough. Sometimes, an ANB can even make specific courses mandatory. When selecting a provider for your training, be honest about your current level of knowledge and requirements. You need to develop and maintain a well-rounded skill set.

Alongside formal training, you should also attend CPD events that offer practical support for adjudicators. These might include workshops on adjudication award writing skills; managing parties during the process; and how to conduct party meetings.

Ciarb's internationally acclaimed standards and training programmes mean its new C.Adj status will strengthen relationships with other adjudication organisations, thereby increasing opportunities for adjudicators across the globe. New and experienced adjudicators should keep an eye out for further developments. Exciting times lie ahead.

SHUTTERSTOCK

Why mandating mediation is the only way forward

Lawyers act as mediation's gatekeepers and this must end, writes Andrew Miller KC

From symposiums and workshops to scholarly articles and informal discussions, two words abound in the mediation fraternity these days: mandatory mediation. Should it happen and, if it should, how can it be implemented?

I say 'these days', but actually the subject of compulsory mediation isn't really new. But this past year or so the conversation has been turbocharged and that is principally thanks to the judiciary. In the UK, the current Master of the Rolls, Lord Justice Geoffrey Vos, has been making the case for mandatory mediation and, on the back of this, the UK Ministry of Justice put out a consultation in July seeking views from 'interested parties' on proposals to increase its use in the civil justice system.

Clients are the true users of mediation and it is they who should truly own and control the process

The UK government's proposal is to mandate mediation for most cases valued under £10,000. The ensuing debate has been far-ranging, including at select committee level, with the All-Party Parliamentary Group on ADR holding two sessions on the subject, both of which I was privileged to attend.

Full disclosure: I believe in and am an advocate for compulsory mediation. Some of you may have seen me articulate my position at the 2022 Ciarb Mediation Symposium. I see it as a step forward, not merely for the mediation fraternity but more importantly for those who find themselves in the dispute resolution process, whether in litigation or arbitration.

Some biography: I practised as a commercial barrister for almost 30 years, and I now practise as a full-time commercial mediator. It is within this context that I write this article and set out my own very personal opinions, even as I recognise and have respect for the competing arguments of others.

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Mediation must become known, understood and accepted as the norm

It is my strongly held belief that mediation or, at the very least, a greater use of mediation has become a necessity. Put another way, it is no longer a question of choice. If litigation and arbitration are to remain the healthy and viable processes we wish them to be, mediation must become an integral part of dispute resolution for the end users, the clients. They are the true users of mediation and it is they who should truly own and control the process.

And while mediation is already used in commercial dispute resolution, the number of mediated cases in England and Wales remains small, certainly under 10%. Meanwhile, more than 90% of litigated commercial disputes settle, which rather begs the question: is there a need for mediation in this sector at all?

Yes, there is. In my experience, those cases that do find their way to mediation are, by the time they get there, invariably a long way into the litigation or arbitration process. Indeed, a high percentage of my mediations are very close to trial by the time they get to mediation. Many have travelled for several years and at great expense. When they do find themselves at mediation, around three-quarters are successfully resolved within a short period of time and, in most instances, on the actual mediation day. Of course, I hope I play a part in this speedy resolution, but the point is that disputes settle because the parties are more than ready to settle them.

Which begs another question: why have they taken so long to get to mediation? For me, it is the most important thing to ask.

The answer, I believe, is that most clients know very little about the mediation process until they actually find themselves in one. In fact, it is a source of continual surprise to me that the sophisticated business people who end up in my mediations often only learn of its benefits through first-hand experience. And these are not, I must stress, individuals or corporations that have avoided the process: they simply haven't been offered the opportunity to embark on a mediation until very late in the day.

And when they are in the midst of the mediation process, the commercial reality of the dispute quickly comes to the forefront. As lawyers, it is easy to forget that commercial people are in the business of making money, and not in the dispute resolution business. That is the world we lawyers inhabit. This is why mediation is able to provide a solution to a hitherto protracted dispute, resolution that had previously eluded the parties. Mediation might not lead to both sides having absolutely everything they want, but it does provide them with the opportunity to get what they need. For most commercial disputes, that is both a financial settlement and the means to end their dispute.

So why is the message of mediation not filtering down? I'm afraid I think it's principally because lawyers have historically acted, and continue to act, as mediation's gatekeepers. I say the users of the dispute resolution process deserve to know more about mediation: they should be in a position to choose when and how they use this method of ADR.

This, for me, is where the question of mandatory mediation lands, and what I think lies at the heart of the government's proposals. By proposing mandatory mediation for cases under £10,000 it is starting at the low end, but the intent is, surely, an incremental increase until all commercial litigation is subject to this method of dispute resolution.

As ever, the devil will be in the detail. However, the aim, and the hope, must be that in creating a situation where litigants are expected to attempt mediation, the method becomes known, understood and accepted as the norm.

Then, one day, we will hopefully arrive at a situation where the question of mandating this method of ADR will become irrelevant because its users, understanding its advantages, will simply choose it. For them, it will become a choiceless choice.

ABOUT THE AUTHOR

Andrew Miller KC is a commercial barrister of more than 30 years' standing who now practises as an arbitrator and mediator. He has experience of more than 200 mediations, has acted as lead mediator in commercial disputes valued at between £10,000 to £150m, and in 2020 he won the title of NMA Civil and Commercial Mediator of the Year.

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Policy

UK Law Commission preliminary findings on Arbitration Act 1996

Following input from stakeholders, the Law Commission has made a provisional assessment that major reform is not necessary. However, it has proposed that specific areas be examined in greater detail. Ciarb has made significant contributions to the review since it was launched last year and will continue to work closely with the Law Commission while it conducts this review.

We encourage all interested members to submit their own responses to the consultation or liaise with their local Branch to respond collectively to the consultation, which closes on **Thursday 15 December 2022**.

There's so much more we'd like to include here but there just isn't the space! Ensure you don't miss out on the opportunities available to you as a member of Ciarb:

- Visit our website at www.ciarb.org to get the latest information

- Ensure you're receiving your monthly eSolver email newsletter* which is sent on or around the 15th of each month.

*Haven't received eSolver? Please check your spam or junk folder for the emails. If they are not there, please email us at marketing@ciarb.org and we'll be happy to investigate further.

Section 68: what's on?

Report by Kateryna Honcharenko MCIArb

The High Court ruling in PBO v (1) DONPRO and others [2021] EWHC 1951 (Comm) is one of the most recent examples of successful challenges under Section 68 of the English Arbitration Act 1996. Section 68 allows an applicant to challenge an arbitral award "on the grounds of serious irregularity" if it has caused or will cause substantial injustice. Successful Section 68 challenges are rare, making this particular case very interesting.

THE BACKGROUND

The dispute between the parties arose out of a series of contracts for the sale of cocoa beans. The contracts contained arbitration agreements which provided for English law as the governing law and for arbitration to be conducted under the rules of the Federation of Cocoa Commerce Contract Rules for Cocoa Beans (FCC Rules).

THE DISPUTE

DONPRO initiated arbitration alleging unfulfilled contractual obligations on the part of PBO and other respondents. In 2019, the Tribunal, appointed in accordance with the rules, found in favour of the respondents but rejected a counterclaim where BPO tried to explain its inability to make payments as "due to a tax investigation and frozen bank accounts".

BPO challenged the award and the case went to appeal. In 2020, the Appeal Board not only upheld the award, but also found that "PBO had displayed an intention not to perform within the meaning of Rule 19.5 of the FCC Rules". It also found it lacked the jurisdiction to consider the amended statement of case which PBO's new legal team attempted to submit.

PBO challenged the finding of the Appeal Board to the High Court on the grounds of serious irregularity and substantial injustice under Section 68 of the Act. Among other things, PBO argued that it was deprived of a reasonable opportunity to present its case as to the arbitral tribunal's finding on Article 19.5 of the FCC Rules. This rule was not relied on by either party in the original arbitration and, therefore, PBO was unable to make any arguments on it. PBO also asserted that the Appellate Board wrongly found that it did not have jurisdiction over newly submitted amendments since no challenge to jurisdiction had been made.

THE DECISION

The High Court upheld all Section 68 grounds submitted by PBO. In its decision, it cited Popplewell J in Terna Bahrain Holding Co. YJJ v Bin 8 Kamel Al Shamzi (2013) and Reliance Industries Ltd and another v The Union of India (2018): "There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point."

In commenting on the Appellate Board's refusal to take PBO's newly submitted amendments into account, the High Court also highlighted the high threshold of Section 68 challenges by emphasising that "... this is one of those rare cases where the tribunal has failed to apply the applicable principles, failed to grapple with the merits of the application, and reached a decision that no reasonable tribunal would have reached" and that "... the refusal to grant the amendment was so unfair as to amount to a serious irregularity in the arbitration".

The High Court did not set the award aside in its entirety, however, as it deemed that would be "unnecessary". It ordered the award to be remanded to the Appellate Board.

ABOUT THE AUTHOR
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"This is one of those rare cases where the tribunal has failed to apply the applicable principles... and reached a decision no reasonable tribunal would have reached"

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