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READY TO HOST
ICCA 2020**

**REINVENTING AN
ADR TRADITION IN
TODAY'S NIGERIA**



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evolving to resolve

THE Resolver

WINTER 2020 CIARB.ORG



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IN THE BALANCE

Arbitration and the climate crisis

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We must forge global thought leadership

CI Arb is moving from strength to strength

CI Arb has come a long way. Remarkably, its story began in March 1915. It was born at a time when Europe was engulfed by the raging hostilities of World War I.

The founders' vision was not in the least blurred by the crucible of war.

Today, CI Arb boasts a presence in 149 countries, supported by an international network of 41 branches, with a membership strength of over 21,500, including students (and rising rapidly). It counts among its ranks leading ADR experts in every major city and centre across the globe. Its engine room principally consists of its vast membership, who serve as volunteers in a myriad of training, development and outreach programmes.

It is vital for CI Arb to continually forge its presence as the leading global ADR organisation. One key step in this direction – CI Arb will host its first-ever biennial global conference in Singapore on 18–19 November 2021. Please note that date in your diary.

The theme of the conference is 'ADR – Evolution through Innovation'. The conference host

committee has earnestly commenced work. I am indeed grateful to the initial members who have volunteered to serve in the working teams that have been formed. Do get in touch with us should you wish to contribute in some way or if you have any suggestions as to the programme content for the conference.

During the course of the year, we will be working to expand the envelope of worldwide CI Arb training in selected jurisdictions, including Russia, Sri Lanka, Indochina and the Maldives. We are also currently looking into parts of the world where our services are most needed and yet our effective footprint is missing. It would be helpful if you could let us know if you have any thoughts in this regard.

Please do bear in mind that the Presidency is essentially a representative role. Should you wish me to look into any particular area of concern, do get in touch. I look forward to working with CI Arb's leadership and membership to advance its worthy causes.

Wishing you every success in the year ahead!

Francis Xavier C.Arb
FCI Arb SC
President, CI Arb



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The opener

Events in Dubai, Australia and New York celebrate arbitration



CIArb branches in Dubai, Australia and New York marked their Arbitration Weeks with a series of events and forums during November.

In **Dubai**, CIArb UAE Branch held a number of events, including 'Behind the Scenes: Arbitration Proceedings', a joint event with LexisNexis and Sol International Ltd; the

Branch's Annual Seminar and Reception; and the third annual Young MENA Groups Debate Series. Kroll, a division of Duff & Phelps, CRS Law and CIArb held a joint event, 'Challenges Faced by Expert Witnesses in Arbitrations'.

In **Brisbane**, Australia, arbitration practitioners from around the world convened

for the 2019 International Arbitration Conference, organised by the Australian Centre for International Commercial Arbitration and CIArb Australia. The Hon Justice Keane AC delivered the keynote speech, and other speakers included Paula Hodges QC, President of the London Court of International Arbitration;

Matthew Gearing QC, Chair of the Hong Kong International Arbitration Centre; Chan Leng Sun SC, Deputy Chairman of the Singapore International Arbitration Centre; and Dr Fuyong Chen, the Deputy Chair of the Beijing International Arbitration Centre.

New York's inaugural Arbitration Week, jointly hosted by the New York International Arbitration Centre and CIArb New York, brought together arbitration advocates, neutrals and academics from the international community. It featured an in-depth programme on the newly released Restatement of the US Law of International Commercial and Investor-State Arbitration; the Fordham Law School Conference on International Arbitration and Mediation; and a number of social and networking events.

2020 Diploma dates

CIArb's flagship course, the Diploma in International Commercial Arbitration at the University of Oxford, will take place on 4–12 September 2020 under the directorship of world-renowned arbitrator Professor Dr Mohamed S Abdel Wahab MCIArb.

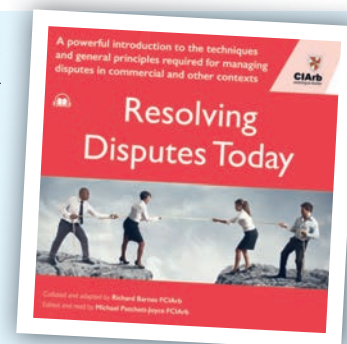
The Diploma is a chance for those practitioners with a substantial knowledge of

international arbitration to undertake a comprehensive, full-time, nine-day course with a range of distinguished tutors. On successful completion of assessments and a peer interview, participants can apply to convert their experience into Fellowship of CIArb (FCIArb).

For more information, visit ciarb.org

Audiobook launch

CIArb is expanding its non-membership training across online and other platforms to enable members and non-members to learn about discrete forms of ADR. The first offering for 2020 is an audiobook, *Resolving Disputes Today*, collated and adapted by



Richard Barnes FCIArb and edited and read by Michael Patchett-Joyce FCIArb. For more information, contact education@ciarb.org

GET INVOLVED

Pre-Moot: call for volunteers

The 2020 edition of the Fox Williams/CIArb Vis Pre-Moot will be held on 28 February–1 March in London, UK. The Pre-Moot will see 16 teams from UK, European and international universities test their arguments over the course of four general rounds. The four best teams will proceed to the final elimination rounds, where the winner will be decided.

The general rounds will be held on 29 February at the CIArb offices in Bloomsbury Square, followed by a

reception and awards for the best oralists. The elimination rounds will take place on the morning of Sunday 1 March at Fox Williams, followed by the team awards ceremony, where the overall winner will be announced.

Many volunteer arbitrators are needed to make the event a success. To volunteer to arbitrate, please send an email of interest with a single-page CV to premoot@ciarb.org

YMG ANNUAL CONFERENCE 2019

On 7–8 November 2019, the CIArb Young Members Group Global Steering Committee held its annual conference in Edinburgh with the theme ‘How to Make Arbitration Better’. Speakers included Lindy Patterson QC FCIArb and Thomas D Halket C.Arb FCIArb, outgoing President of CIArb, who spoke on ‘Meeting Today’s Challenges to Prepare for the Future’.



NEWS ROUND-UP

CIArb welcomes new Deputy Director General

Tom Cadman is the new Deputy Director General of CIArb. In addition to his current responsibilities as Director of Governance and Legal Services, he will also lead on the establishment and management of CIArb’s new Regional Offices, scheduled to be opened over the course of 2020, and will be responsible for coordinating the Regional Branch Chairs Forums.



Second annual Manchester Lecture

The second annual Manchester Lecture took place on 23 January at the Emirates Old Trafford. Kindly hosted by The Vinden Partnership Ltd and Decipher Group, the event was organised jointly by the Chartered Institution of Civil Engineering Surveyors and CIArb’s North West Branch and featured a panel of inspirational speakers.



Malaysia Diploma 2020

The residential course for the Diploma in International Commercial Arbitration in the Asia-Pacific region will take place on 28 March–5 April in Kuala Lumpur, Malaysia.

To book or for more information, visit ciarb.org/training/bookings/diploma-in-international-commercial-arbitration-asia

IFLA's courses offer help in resolving family issues

Dates announced for 2020 IFLA courses

CIArb as a supporting organisation is delighted to announce dates for the 2020 Institute of Family Law Arbitrators (IFLA) training courses for those wishing to qualify as family arbitrators:

- Children arbitrators, 21 and 22 March 2020; and
- Finance arbitrators, 4 and 5 April 2020.

IFLA is a not-for-profit organisation created by CIArb, the Family Law Bar Association and the family lawyers’ group Resolution, in association with the Centre for Child and Family Law Reform. Courses are held at CIArb, Bloomsbury Square, London.

For more information, visit the IFLA website, ifla.org.uk



60-SECOND INTERVIEW

Ahmed Elkordy FCIArb

Ahmed Elkordy FCIArb explains why the Middle East needs a process to deal with international disputes over water

Why is a new waterway dispute resolution mechanism needed in the Middle East, and what would it look like?

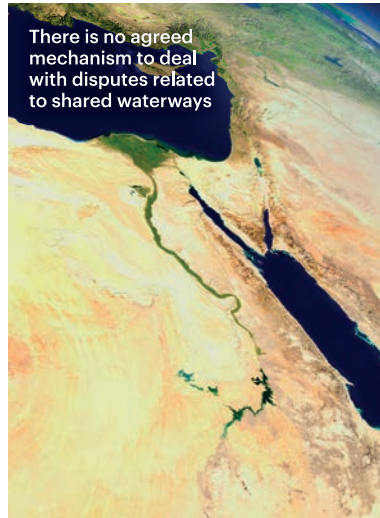
Shared waterways – particularly the Nile, the Jordan and the Tigris-Euphrates – are crucial resources for the region, but there is no existing agreed mechanism to deal with related disputes. Any such mechanism would need to address local factors and cultural values, which traditionally respect the role of conciliation and an independent mediator. We compared different approaches – mediation, conciliation, arbitration, negotiation and the hybrid ‘med-arb’ model – and concluded that the latter would work best.

Why did you favour med-arb?

It combines the advantages of mediation and arbitration. The key is that the parties must agree and be bound by the decision of an appointed individual, who, if the parties cannot reach a mediated settlement, will be empowered to act as an arbitrator and make a final and binding decision.

What would be needed to make this work?

The appointed neutral must be seen to be independent throughout the process. A suitable procedural framework must be agreed by the states concerned and a suitable panel



of appropriately trained professionals will need to be established. States would need to agree on the enforceability of decisions through their judiciary.

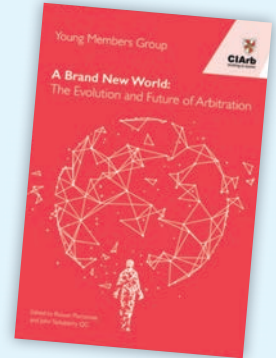
Ahmed Elkordy FCIArb is a mechanical engineer and construction planner. He acts as a delay expert witness in formal proceedings. He holds an MSc in construction law and dispute resolution from King's College London. He is co-author, with Amanda Lee FCIArb and Harald Sippel FCIArb, of the ‘Waterway Disputes’ chapter in *A Brand New World: The Evolution and Future of Arbitration* (see right for details).



NEW PUBLICATION

Arbitration over the next century

A Brand New World: The Evolution and Future of Arbitration was commissioned by the CIArb Young Members Group to celebrate the centenary of CIArb. But, as editors Rowan Planterose C.Arb FCIArb and John Tackaberry QC C.Arb FCIArb explain, this



book is more about the future than the past. As they put it: “This book looks forward to the next hundred years and bravely seeks to predict the ways in which disputes in a variety of fields, mostly new, will come to be resolved by arbitration.”

The chapters, written by various authors, address a range of topics, including legislative and procedural issues, such as the need to review the Arbitration Act 1996; the question of third-party funding in arbitration; and the possibility that future trade treaties will include provision for a more formal process for resolving investor-state disputes.

A Brand New World will be available for limited sale via Amazon at £50 (hard copy) and as an e-book downloadable from ciarb.org (£15)



DON'T MISS

CIArb International Arbitration Conference 2020

Post-Conflict Infrastructure Development in the MENA Region, June, Cairo, Egypt

For more information and to book, visit ciarb.org/events/egypt-2020

Giving green groups a voice in disputes

Professor Dr Nikos Lavranos LLM argues that the amicus curiae route is underused

Access and intervention by third parties in investment arbitration disputes is becoming increasingly accepted and encouraged. Recent investment treaties, such as NAFTA and CETA, and arbitration rules such as the ICSID Rules and the UNCITRAL Transparency Rules provide for the possibility for third parties such as NGOs or contracting parties to investment treaties to represent their views to arbitral tribunals on specific issues.

At the same time, modern investment treaties increasingly include provisions for the protection of the environment and sustainable investments.

In short, there is an increasing interaction – or, some would say, tension – between investment arbitration and environmental protection. This is also reflected in recent cases, such as *Urbaser v Argentina* and *Infinito Gold v Costa Rica*.

Indeed, coupled with the rising activism of NGOs that set out to protect, for example, the environment or the rights of indigenous people, one would expect that amicus curiae briefs could potentially be submitted in virtually every dispute.

However, recent research by Nicolette Butler of the University of Manchester shows that amicus curiae briefs were accepted by the tribunals in only 16 out of 309



ICSID cases since 2005, and their impact remains rather invisible.

The situation is slightly more positive for non-disputing treaty party interventions, in particular in NAFTA cases such as *Lone Pine v Canada* and *Chemtura v Canada*.

Nonetheless, the low rate of successful amicus curiae briefs is an unfortunate situation. Research shows that many such submissions fail to meet the necessary requirements. In order to increase the present success rate, I would argue that:

- Submissions must bring a new perspective to the table and avoid repeating points that were previously made by the parties.
- Interveners must be fully independent – financially, politically and organisationally –

from any of the parties to the dispute.

- Submissions must focus on specific matters of the dispute and strictly comply with deadlines, length requirements and so on.

Finally, it is advisable that amicus curiae submissions are not solely focused against the claimant but are also directed against the respondent state, where appropriate, for failing to implement international or domestic environmental obligations, as illustrated by the *Peter Allard v Barbados* case.

Similarly, non-disputing treaty parties could more often use their submissions to condemn the failures of the other treaty parties to implement and enforce their environmental obligations.

In sum, if properly crafted, third-party submissions can develop into powerful tools for the protection of the environment in the context of investor-state dispute settlement disputes.



ABOUT THE AUTHOR

Professor Dr Nikos Lavranos LLM is Secretary General of the European Federation for Investment Law and Arbitration

LEARN MORE

Visit ciarb.org to find out more about the role of the amicus curiae

There is an increasing interaction between investment arbitration and environmental protection



ADR flowers in Scotland

Brandon Malone FCIArb talks to Robert Outram about why ICCA 2020 is a perfect chance to showcase Scotland's ADR offering

As Congress Chair for ICCA 2020, Brandon Malone FCIArb is looking forward to hosting the world's largest and most prestigious gathering of arbitration professionals in Edinburgh this May. As well as the honour of holding the event itself, he says, the XXVth Congress of ICCA – the International Council for Commercial Arbitration – also provides the ideal opportunity to highlight the progress that Scotland has made in the field of arbitration in recent years.

Edinburgh won the right to host ICCA 2020 in 2016, against stiff competition from six other cities: Copenhagen, Mexico City, St Petersburg, Stockholm, Vancouver and Vienna. Malone says: "We were delighted to win. It's not just about bringing people here – it's also given us a platform to talk about Scotland."



Brandon Malone FCIArb is a solicitor advocate, arbitrator and adjudicator with over 25 years of experience in dispute resolution

Scotland has for a long time had a number of advantages in terms of hosting international ADR: being an English-speaking country helps, and so does the reputation of Scotland's courts for robust independence. It can also be an advantage, in some cases, that Scotland's legal system is historically separate from that of England and Wales and so offers a neutral ground for resolving issues between parties from different jurisdictions. Scotland's legal regime is a mixed system, including both common-law and civil-law elements.

As Malone puts it: "Behind our arbitration system sits a court system that is fiercely independent, incorruptible and there to protect parties' rights and enforce the rule of law."

Scotland has also had some hurdles to contend with, however. There is still a tendency for many large arbitration cases to be settled in London rather than

“You can travel the world and tell people, but there’s nothing like bringing people here”

north of the border. Many contracts for large-scale deals are written under English law – even in the UK oil and gas industry, which in operational terms is largely Scotland-based. Also, as Scotland is a distinct legal jurisdiction but not a sovereign state, it is not a centre for treaty arbitration.

Also, until recently, Scotland’s arbitration regime was not ideal, Malone says. Some cases took far too long to resolve, and in construction, a sector in which arbitration was once a common route, many disputes are now dealt with through adjudication.

What has made the difference in recent years has been the Arbitration (Scotland) Act 2010, which brought Scotland’s ADR regime into the 21st century. As Malone puts it: “It’s a good, modern arbitration system and it provides a great framework.”

As well as helping to resolve disputes within Scotland itself, one of the Scottish Government’s explicit aims in bringing in the new legislation was to establish the country as a centre for international dispute resolution.

The 2010 Act was soon followed by the creation of the Scottish Arbitration Centre (SAC), whose board Malone chairs. Established in 2011, the SAC promotes Scottish arbitration and Scotland as a place to conduct international arbitration. It is a non-profit company limited by guarantee, made up of the Law Society of Scotland, CIArb, the Royal Institution of Chartered Surveyors and the Scottish Government.

The SAC actively engages with lawyers and other professionals involved in dispute resolution within the UK and internationally. Alongside its promotional and lobbying work, it also provides modern facilities for arbitration hearings, mediations and training events at its premises on Princes Street in Edinburgh, where parties can also enjoy views of Edinburgh Castle.



Edinburgh International Conference Centre will play host to ICCA 2020

Since 2010, Malone says, arbitration has been on the increase again in Scotland, and the ICCA Congress will provide the perfect opportunity to showcase what has been achieved. As he puts it: “You can travel the world and tell people about what you can offer, but there’s nothing like bringing people here.”

The Congress itself takes place on 10–13 May, with an opening event in Edinburgh’s Usher Hall and a Gala Dinner – sponsored by CIArb – at the National Museum of Scotland. Broadcaster Kirsty Wark will be master of ceremonies, and programme topics include digital frontiers in arbitration; arbitration in regions of the world; state responsibility; and investment arbitration.

The Young ICCA Congress takes place after the main conference, along with several fringe events. The London Court of International Arbitration will also be holding its annual ‘Tynney’ conference – usually held at Tynney Hall, Hampshire – at the Gleneagles Hotel in Perthshire.

A huge amount of work has gone into making ICCA 2020 a memorable event – there is now even a registered ICCA tartan! – and it certainly looks like a date every international arbitration professional should mark in their calendar.

SAVE THE DATE: The CIArb Scotland Branch’s fringe event to ICCA 2020 will take place on 9 May aboard the Royal Yacht *Britannia*, Edinburgh. For more information, visit ciarb.org/events

ICCA XXVth CONGRESS, EDINBURGH

ICCA President Dr Gabrielle Kaufmann-Kohler says: “All members of the international arbitration community are invited to join the 2020 ICCA Congress in Edinburgh. Entitled ‘Arbitration’s Age of Enlightenment?’, the Congress will be a time to take stock of

achievements, explore ideas to adapt to a fast-changing environment and shape the future of international arbitration together.”

Venue: Edinburgh International Conference Centre, Edinburgh, Scotland, UK

Date: 10–13 May 2020

To register or for further information: icca2020.scot
For programme information: icca2020.scot/programme

CIArb proudly supports the ICCA Congress once again and exclusively sponsors the ICCA Congress Gala Dinner.



Legislators of the world

Wendy Miles QC FCI Arb reports from an international symposium on the role of law and lawyers in helping to combat and adapt to climate change

The law is a crucial element in delivering the Paris Agreement's goal of decarbonising the economy, and lawyers are the agents of necessary legal innovation and change.

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement are international law instruments. The Member State commitments therein are implemented through national laws and regulation, which are enforced against private parties through contractual, regulatory and other private dispute resolution processes.

More than 160 of 188 countries included express plans for legal and institutional reform in their intended nationally determined contributions (NDCs) when they ratified the Paris Agreement. States are increasingly integrating climate change commitments into national laws, the laws that govern contractual relations. More than 1,800 new national climate laws and policies have stemmed from the UNFCCC, and this has only accelerated since the Paris Agreement.

CLIMATE AMBITION

Recognising the central role of law and lawyers to the Paris Agreement's goals, on Friday 6 December 2019, on Spain's historic National Constitution Day (*Día de la Constitución*), more than 300 participants from across the world gathered at the Faculty of Law at Universidad Autónoma de Madrid for the fifth annual Climate Law & Governance Day (CLGD) symposium, held alongside the 25th United Nations Climate Change Conference (COP25). It was the biggest such event since 2015's inaugural CLGD in Paris, alongside COP21. The event, accredited by the COP25 Presidency, was led by the Climate Law & Governance Initiative (CLGI) consortium of over 120 partners and hosted by leading climate law experts from Universidad Autónoma de Madrid, the University of Chile, the University of Cambridge and the Centre for International Sustainable Development Law (CISDL).



ABOUT THE AUTHOR

Wendy Miles QC FCI Arb is a Partner at Debevoise & Plimpton and a member of the firm's International Dispute Resolution Group

Across a full day of 14 intensive expert panel and roundtable sessions and high-level plenaries, judges, legal practitioners, academics, university deans, researchers, students and professors shared knowledge and charted key trends and insights on strengthening legal foundations for climate ambition and compliance. The event focused on legal innovations and solutions in three key areas:

- Advancing Paris Agreement innovations: new rules for transparency, markets and non-market instruments, finance, loss and damage, compliance and safeguards.
- Scaling up national and regional climate legal frameworks for action: effective climate governance, ecosystems-based and human rights responses, human mobility and climate justice litigation.
- Local and global interlinkage and engagement: climate change and the regimes covering oceans, biodiversity, ozone, civil aviation, trade, investment and peace and security.

The sessions were hosted by more than 30 leading institutions, including national and local government agencies, UN and international organisations, law faculties, law firms and associations, and NGOs. Session topics included: scaling up Paris Agreement implementation through climate legislation; exploring the effects of transparency in multiple-level climate governance; advancing ambition and compliance on climate change through law and governance innovations for sustainable investment and resilient oceans; advances in climate litigation; and prospects for a global climate constitution. ▶

“Law is the most important tool for translating science and policy into action”



Cover story

The day culminated in two high-level plenaries focusing on advancing Paris Agreement implementation through legal practice and negotiation, and enhancing climate change responses through legal research and teaching. Professor Marie-Claire Cordonier Segger, Executive Secretary of the CLGI and Leverhulme Visiting Professor (designate) at the University of Cambridge, emphasised the potential contributions of law and governance innovation in implementing Paris Agreement objectives: “Climate change is the justice challenge of our time. To hold warming within 1.5 degrees worldwide calls for scaled-up ambition and action across all professions and sectors of our economy and our society right now.”

Professor Christina Voigt of the University of Oslo, Chair of the IUCN World Commission on Environmental Law Climate Change Specialist Group, agreed and noted: “Implementation of, and compliance with, the core provisions is crucial for the effectiveness of the Paris Agreement. We need compliance with [both] international and national legal obligations to address the climate challenge. Law is the most important tool for translating science and policy into action.”

In a special briefing at the UNFCCC Pavilion, outcomes and findings from CLGD 2019 were shared with members of COP25 delegations, with welcoming remarks provided by Hafida Lahiouel, Director of the UNFCCC Secretariat Legal Office.

At the briefing, Adv. Ayman Cherkaoui, CISDL Lead Counsel and coordinator of the Mohammed VI Foundation for Environmental Protection, said: “Law has a key role to play both in terms of implementing the current NDCs as well as unlocking, for 2020, areas of enhancement and ambition aligned with the goals of the Paris Agreement and the 2030 Agenda. Coherence and cohesion in legal frameworks at the local, national, regional and international levels is of paramount importance for the national adaptation plans and so that no one is left behind, in particular the most vulnerable.”

STRATEGIC SUPPORT

While this event focused on the role of the law in the transition to a decarbonised future, law and lawyers remain curiously absent from the COP participation by business and industry, which – together with the youth movement – has underscored much of the activity surrounding the Member State UNFCCC negotiations.

As the private sector presses forward to mobilise the innovation, technology and finance needed to transform the economy for a decarbonised future, lawyers in private practice and in-house must

“Coherence and cohesion in legal frameworks is of paramount importance”



The post-Paris Agreement era brings with it a transformative agenda not seen since the end of World War II

increasingly provide the necessary legal strategic advice, innovation and support. Investment in the emerging decarbonised economy requires new financial instruments to accelerate private finance, from blended fund structures to providing multiplier effects.

Investment in ‘greenfield’ technology, new renewable-related mining, higher-efficiency municipal structures, transportation systems and residential infrastructure presents challenges associated with traditional emerging-market risk. Legal tools are required to manage and allocate that risk in order for private funders and investors to reach the level of investment comfort necessary to deploy or otherwise proceed.

Contractual terms, including New York Convention arbitration provisions, and investment laws and treaties all provide additional risk management and securitisation for investors and help mobilise the necessary private finance. Lawyers understand how to offer that additional legal securitisation in uncertain investment conditions and should be at the forefront of climate financing for that reason.

The global economic transformation and reconstruction required at the end of World War II resulted in global legal structural innovation, leading to multilateral development banks, international institutions and investment protection fundamentals, including the New York Convention and ICSID. The UNFCCC and Paris Agreement commitments signal an equally transformative era. They will require mobilisation of global trade and investment protections on a similar scale to the post-World War II era, and mediation and arbitration will have an important part to play in meeting that challenge.

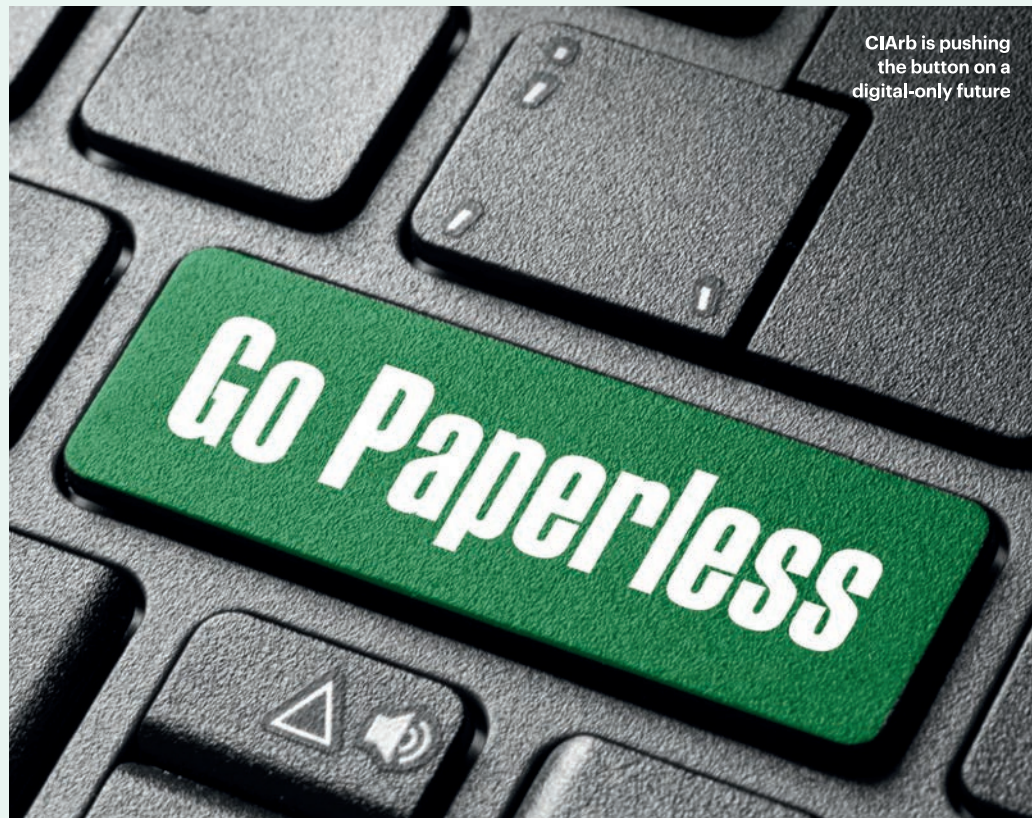
The Resolver goes digital

This edition of your quarterly CI Arb members' magazine will be the final in hard copy

After more than a decade in print, this will be the last issue of *The Resolver* to appear in hard-copy format. Both this magazine and *The International Journal of Arbitration, Mediation and Dispute Management*, also published by CI Arb, will from now on appear in a digital-only format that we will send out to members directly.

Why the change? Moving to a digital-only format saves on costs – freeing up resources for other priorities – but, even more importantly, it is part of CI Arb's commitment to a greener future. We have already made progress in this regard – for example, by cutting out plastic and introducing other environmental initiatives. Going digital with our two main publications represents another big step forward.

The crucial role that trees play in absorbing CO₂ and maintaining balance in the earth's atmosphere is well known, but did you also know that the paper-manufacturing industry itself contributes



CI Arb is pushing the button on a digital-only future

to the global level of carbon emissions? Making one tonne of paper requires four trees and emits more than 1.5 tonnes of CO₂e (carbon dioxide equivalent), in addition to consuming other resources, according to the American Forest & Paper Association.

Moving to a paperless version of *The Resolver* means no more wasted copies when magazines are returned because the member has moved. As well as helping us to play our part in combating climate change, it also sends an important signal to the profession that we are serious about reducing our carbon footprint.

WHAT YOU CAN DO

We urge our members to join us in green initiatives and to become more conscious of the environment in their own practices. Here are some things you can do in 2020 to make your workplace greener:

- switch to a renewable energy provider;
- go as paperless as possible;
- switch off appliances at the

We urge our members to join us in green initiatives

- end of the day and unplug phone chargers;
- replace business travel with videoconferencing where possible;
- offset with tree planting; and
- review your energy efficiency.

Turn the page to read Lucy Greenwood's article on greener arbitration. There are also more good ideas in *Eco-Friendly Initiatives in our Workplace: Advice and Guidance*, available from CI Arb. Contact marketing@ciarb.org for more details.



Stacks of returned, undelivered magazines will be a thing of the past

SHUTTERSTOCK



Make arbitration greener

Lucy Greenwood C.Arb FCI Arb on how we can tackle our carbon problem

As an arbitration community, we have talked a lot about how we might arbitrate climate change issues. We have not spent the same amount of time talking about how we, as a global dispute resolution community, can proactively address climate change, not just at the policy level, but also at the personal level. We can contribute our expertise to developing legal principles suitable for climate change issues, accelerating policy change and establishing appropriate forums in which

Reducing the number of flights taken is the best way to lessen arbitration's carbon footprint

to resolve climate change disputes. As human beings, we can ensure that we manage our practices to limit the impact on the environment of every arbitration.

The Pledge for Greener Arbitrations (see box) was launched in November 2019 to assess the carbon impact of international arbitrations and to encourage arbitration practitioners to consider the environment. The first step in this initiative was to conduct an environmental assessment. Members of the Pledge for Greener Arbitration Steering Committee, supported by Dechert LLP, recently assessed a 'standard'

A medium-sized arbitration required just under 20,000 trees to offset emissions

international arbitration in order to determine its impact in terms of carbon footprint and presented the results at a recent arbitration conference in London.

INTERNATIONAL ARBITRATIONS ARE NOT GREEN

Although we are not the automotive or energy industry, international arbitration practices have a significant carbon footprint. There are conferences all over the world to attend, witnesses to interview in far-flung places, vast quantities of documents to review and numerous drafts and redrafts of submissions. The Green Pledge team suspected that the results of their environmental impact assessment would not be encouraging, but they were stunned by what they found.

In undertaking the assessment, a number of assumptions had to be made, but these were deliberately conservative. For example, in calculating the number of printed sheets generated in the 'standard' arbitration, the Green Pledge team only included an estimate of the printed pages actually submitted to the tribunal and disregarded all internal printing and the generation of drafts. The team based the 'standard' arbitration on a recent medium-to-large international arbitration they had been involved in and also considered the financial impact of the various steps in the arbitration. The team was then able to calculate the number of trees required to offset the carbon impact of each component of the 'standard' arbitration. The staggering result was that a medium-sized arbitration required just under 20,000 trees to offset the carbon emissions created – equivalent to four times the number of trees in Hyde Park or all the trees in Central Park.

The team then determined that the total caseload for 2018, at nine of the major institutions, amounted to 6,189 cases, which would require approximately 120 million trees to offset the carbon footprint generated.

HOW TO ACHIEVE A GREENER ARBITRATION

There are two main ways to reduce the carbon footprint of an international arbitration. First, reducing travel by one long-distance flight at each stage of every arbitration would result in a saving of more than 12 million trees in one year. Second, eliminating all paper usage for filings, and relying on technological solutions to submit filings, would create a saving of just under two million trees.

Technology is also key. Videoconferencing and screen-sharing technology can reduce the need to meet witnesses face to face to prepare them for

cases. Similarly, viewing documents on screen during hearings can eliminate the need for printed bundles.

There is significant enthusiasm for better use of technology generally. The majority of respondents to the 2018 *Queen Mary International Arbitration Survey* favoured the greater use in the future of 'virtual hearing room technologies', cloud-based storage, videoconferencing and artificial intelligence. Green arbitration does not require new technology, but simply a willingness to use the technology that we all have.

There are clearly synergies between greener and more efficient arbitrations. Embracing technology can reduce costs significantly. The Green Pledge team found that amounts spent on travel, printing, couriers and hotel stays could be reduced significantly if a green approach were adopted. More than half of respondents to the 2018 Queen Mary survey thought that "increased efficiency, including through technology" was the factor that is most likely to have a significant impact on the future evolution of international arbitration.

The biggest impact we can have is to reduce the number of flights we take. The Green Pledge team found that 93% of emissions generated by a 'standard' arbitration were as a result of air travel. As arbitrators, we can ask the parties whether the witnesses really need to attend in person or whether their evidence can just as easily be taken by video. If we, as arbitrators, take the lead in suggesting this to both sides, then it will make it much easier for parties to agree to minimise travel in this regard. Similarly, it should be the norm for any follow-up deliberations to be conducted through video link using screen-sharing technology to discuss evidence.

In the words of Greta Thunberg: "All we have to do is wake up and change." Make 2020 the year we wake up to greener arbitrations.



ABOUT THE AUTHOR

Lucy Greenwood C.Arb FCI Arb is an independent international arbitrator based in the UK. She is dual-qualified in the US (Texas) and England and Wales, and is a Chartered Arbitrator, a Fellow of CI Arb and a member of the Board of Trustees of CI Arb.

THE GREEN PLEDGE

As a practitioner committed to ensuring that I minimise the impact on the environment of every arbitration I am involved in, I will ensure that, wherever possible:

- At all times during the arbitration I will consider and question the need to fly.

- I will not request hard copies of documents to be provided to me.

- I will strongly discourage the use of hard-copy bundles in hearing rooms.

- I will suggest, where appropriate, that witnesses give evidence through video link, rather than by attending hearings in person.

- I will review the level of air conditioning in hearing rooms.
- I will not travel unnecessarily to deliberate with my co-arbitrators, and will use screen-sharing/video technology instead.
- I will offset the carbon emissions of any flights I take to arbitration hearings.

Take the pledge! Sign up at greenwoodarbitration.com/greenpledge

Case note

David Aven v The Republic of Costa Rica UNCT/15/3

Report by Kateryna Honcharenko MCIArb, Research Assistant, CIARB

► In recent years, some states have tightened their environmental policies. This has given rise to claims by investors where the new policies undercut the profitability of their investments or violate the terms of investment contracts, bilateral investment treaties or other international trade agreements.

One of these cases, *David Aven v The Republic of Costa Rica*, is notable because it is only the second time a host state has introduced a counterclaim against an investor which was subsequently admitted by the tribunal, and it is also the first final award given in such a case.

FACTS

In the 2000s Aven and others (the Claimants) purchased land on the Pacific coast of Costa Rica (the Respondent) with a view to developing a tourist site. According to the Claimants, state authorities provided all permits and approvals necessary to commence construction. In 2009 an official complaint was filed against the project, contending that the Claimants' activities threatened wetlands on the site.

Several inspections and official reports on the matter followed. However, these did not conclusively establish the existence of the alleged wetlands. In 2011 three temporary injunctions on the works were issued by the local authorities, one of which was revoked a few months later after two conflicting reports, first denying and then confirming the existence of wetlands, had been presented.

The Claimants stated that, under provisions of the Dominican Republic–Central America Free Trade Agreement (DR–CAFTA), Costa Rica had violated the fair and equitable treatment standard, the right to due process and transparency and, indirectly, expropriated their right “to the value of their investment without compensation”.



It was claimed that wetlands were threatened by the Claimants' activities

In its counterclaim, the Respondent argued that the Claimants' activities had an adverse impact on the environment and thus violated environmental law.

DECISION

The tribunal found that the admissibility of such a counterclaim was grounded on the text of DR–CAFTA, which does not prohibit such a possibility and even implies it. It also found the counterclaim admissible for procedural economy and efficiency reasons.

After successfully invoking the articles of DR–CAFTA, the Respondent summarised its position: while being aware of the ecological nature of the site, the Claimants disregarded their legal responsibility to preserve it and continued harmful activity by conducting filling and drainage works. The Respondent also argued that it is the responsibility of the investor to prove absence of environmental harm.

The Claimants challenged the tribunal's jurisdiction over the counterclaim but were unsuccessful. Further, the tribunal

found that its jurisdiction was supported by Articles 20 and 21 of the UNCITRAL Arbitration Rules.

This could indeed have been a groundbreaking decision, but after finding it admissible, the tribunal concluded that the counterclaim as stated by the Respondent failed to meet the requirements of the UNCITRAL Rules. Due to a vague statement of facts, the absence of sufficient evidence to prove environmental damage and late submissions, which deprived the Claimants of their procedural rights, the tribunal dismissed the counterclaim.

STABILITY UNDERMINED

Both parties' positions are understandable. By showing that the tribunal had jurisdiction over the counterclaim, the Respondent seemed to be ready to provide more conclusive evidence of the Claimants' environmental harms. The inconsistency of the information submitted by the Respondent's governmental bodies, however, seems to have undermined the stability of the claim. This case illustrates that more open-minded interpretation of agreements might allow new environmental claims to appear in future and thus inspire further development of international arbitration on such issues.

The inconsistency of the information submitted seems to have undermined the stability of the claim

What's on

A selection of learning opportunities for CI Arb members

SPOTLIGHT ON TRAINING

CI Arb's training courses from 1 January 2020

People decide to undertake ADR training for several reasons. An introduction to ADR is one reason. Some may be contemplating a career change and may want to learn about the skills they need to practice. Others may have the experience and may just want to be assessed for CI Arb membership.

CI Arb offers different courses and its new, three-module Pathway model was fully rolled out on 1 January 2020. In terms of training, CI Arb's introduction courses will continue to provide people with a starter on various ADR disciplines, such as international arbitration and mediation.

The new, three-module Pathways have been designed so that people with no ADR background can learn about the practical skills they require. CI Arb's Diploma programmes cater for those with relevant experience who may wish to learn about international commercial arbitration or maritime arbitration. If a person already has experience, they can take an assessment course (the Accelerated Routes). All of these training and assessment courses lead to CI Arb membership.

From 1 January 2020, the new Pathway-based courses were implemented across the globe and they will be augmented with different non-membership bearing courses in 2020 too.

Find out more about learning opportunities at ciarb.org/training



CI Arb new "Professional Services" team

BRANCH FOCUS: EUROPE

CI Arb's European Branch organised a number of training programmes in various southern and eastern European cities throughout 2019.

These included well-attended Module 1 and Introduction to International Arbitration courses in Kiev, Istanbul, Moscow and Athens. Training courses in Moscow are provided

Training in Moscow will continue throughout 2020



in conjunction with the Russian Arbitration Center at its new facilities overlooking

the Kremlin and are set to continue on a regular basis throughout 2020.

CI Arb TRAINING FEB-MAY 2020 (Location is London unless specified)

KEY

- ADR
- Mediation
- Construction adjudication
- Domestic arbitration
- International arbitration
- Module 2 Law of Obligations

CI Arb offers one online introduction course and five one-day, face-to-face introductory courses in different forms of ADR:

● **Introduction to ADR Online**
Open entry **£36**

● **Introduction to Mediation**
28 Feb **£396**

● **Introduction to Construction Adjudication**
14 May **£396**

● **Introduction to Domestic Arbitration**
23 Apr **£396**

● **Introduction to International Arbitration**
3 Mar **£396**

The new Pathway courses have been designed for candidates who do not have

any experience of ADR. There are no entry requirements and they run for approximately one year:

● **Module 2 Law of Obligations**
18 Feb **£1,320**

● **Module 1 Law Practice and Procedure of Adjudication**
2 Apr **£1,320**

● **Module 3 Decision Writing Construction Adjudication**
4 Feb **£1,320**

● **Module 1 Law Practice and Procedure of Domestic Arbitration**
2 Apr **£1,320**

● **Module 3 Award Writing Domestic Arbitration**
8 Apr **£1,320**

● **Module 1 Law Practice and Procedure of International Arbitration**

2 Apr **£1,320**

● **Module 3 Award Writing International Arbitration**
5 Feb **£1,320**

Those with ADR experience can undertake a CI Arb Accelerated Assessment Programme.

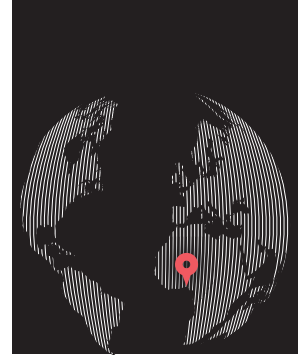
● **Accelerated Route to Membership Domestic Arbitration**
18-19 Mar **£1,500**

● **Accelerated Route to Membership International Arbitration**
18-19 Mar **£1,500**

● **Accelerated Route to Fellowship Domestic Arbitration**
3-5 Mar **£1,920**

● **Accelerated Route to Fellowship International Arbitration**
3-5 Mar **£1,920**

Quoted costs include VAT.



A renewed tradition

Nigeria has reinvented its ADR culture for today's needs

Alternative dispute resolution (ADR) is nothing strange in the context of Nigerian jurisprudence. From time immemorial, different ethnic groups in Nigeria have used some form of ADR to settle their disputes. To this day, it would not be unusual to see what is now known as arbitration, mediation, conciliation or negotiation being used to settle disputes at the palace of a traditional ruler or in other traditional settings.

With the advent of colonialism, the introduction of the English system of laws and the adoption of formal courts, our traditional means of settling disputes was slowly relegated to the background. However, with the growth of ADR in recent years, it appears Nigeria is going full circle and we are finally returning to our roots.

In Nigeria, attempts are being made to institutionalise the use of ADR. For instance, the Lagos State High Court, under its rules of court, requires parties to show that they have explored settlement (ADR) before an action can be commenced in the Court.

The courts are also more supportive of ADR now than they have ever been. In 2017, the Chief Justice of Nigeria issued Practice Directions on the Enforcement of Arbitration Clauses in Commercial Contracts, which directs judges to insist on the enforcement of an arbitration clause by declining jurisdiction and awarding substantial costs against parties



who try to circumvent a valid arbitration agreement.

The arbitration law, the Arbitration and Conciliation Act (ACA), is being amended to ensure that it aligns with international best practice. The Bill to amend the ACA is currently before the National Assembly of the Federal Republic of Nigeria. Once passed, the amended ACA will contain provisions for an Award Review Tribunal, the appointment of emergency arbitrators, joinder (allowing two or more issues to be heard together) and consolidation of disputes, among other innovative provisions.

Nigeria recently became a signatory to the Singapore

Convention on Mediation. This convention provides an international framework for the enforcement of settlement agreements reached through mediation.

Meanwhile, Nigeria's status as a suitable venue for ADR continues to improve. The security situation in the country is better and there are a number of ADR centres, such as the Lagos Court of Arbitration, the CIArb Secretariat, the International Centre for Arbitration and Mediation Abuja and a myriad of other centres and hotels where proceedings may be held.

Certainly, Nigeria is striving towards being the ADR hub of the continent, and institutions such as CIArb Nigeria are doing all they can to improve the capacity of ADR practitioners and upgrade the status of the country as an attractive destination for the settlement of disputes using ADR. The future of ADR in Nigeria is brighter than it has ever been.



ABOUT THE AUTHOR

Folake Sadiq FCIArb is the Company Secretary and the head of the legal department at Lagos Bus Services Ltd. She is also the Chair of the Young Members Group of CIArb Nigeria Branch.

Institutions such as CIArb Nigeria are doing all they can to improve the capacity of ADR practitioners

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