SUPPORTING SMEs
With a new DAS scheme

SANCTIONS: ARE YOU AWARE OF THEIR IMPACT?

HOW TO MAKE THE MOST OF MED-ARB

CIArb
evolving to resolve

THE Resolver

AUTUMN 2019 CIARB.ORG

MILESTONE MOMENT

Singapore Convention signatories give mediation new momentum

CONTACTS

CIArb
evolving to resolve

Chartered Institute of Arbitrators
12 Bloomsbury Square,
London WC1A 2LP, UK
T: +44 (0)20 7421 7444
E: info@ciarb.org W: ciarb.org
Membership
T: +44 (0)20 7421 7447
E: memberservices@ciarb.org
Marketing and Communications
T: +44 (0)20 7421 7481
E: marketing@ciarb.org
Education and Training
T: +44 (0)20 7421 7439
E: education@ciarb.org
Events
T: +44 (0)20 7421 7427
E: events@ciarb.org
Venue and Facilities
T: +44 (0)20 7421 7423
E: 12bsq@ciarb.org
Governance and Legal Services
T: +44 (0)20 7421 7438
E: legal@ciarb.org
Dispute Appointment Service
T: +44 (0)20 7421 7444
E: das@ciarb.org

© THE RESOLVER is published on behalf of the Chartered Institute of Arbitrators (CIArb) by Think, 8th Floor, Capital House, 25 Chapel Street, London NW1 5DH
+44 (0)20 3771 7200
thinkpublishing.co.uk

Think

Editor
Caitlin Mackesy Davies
Managing Editor
Mike Hine
Designer
Amanda Richardson
Sales Director
Tom Fountain
tom.fountain@thinkpublishing.co.uk
Group Account Director
John Innes
john.innes@thinkpublishing.co.uk

This magazine aims to include a broad range of opinion and professional issues, and articles do not necessarily reflect the views of CIArb, nor should such opinions be relied upon as statements of fact. All rights reserved. This publication may not be reproduced, transmitted or stored in any print or electronic format, including but not limited to any online service, any database or any part of the internet, or in any other format in whole or in part in any media whatsoever, without the prior written permission of the publisher. While all due care is taken in writing and producing this magazine, neither CIArb nor Think accept any liability for the accuracy of the contents or any opinions expressed herein.

DISCLAIMER: The contents of this publication are not intended to be a substitute for either general or specific legal advice on individual matters, and readers are strongly encouraged to seek competent legal advice.

Registered Charity No. 803725

Warning signs mean there is more work to do

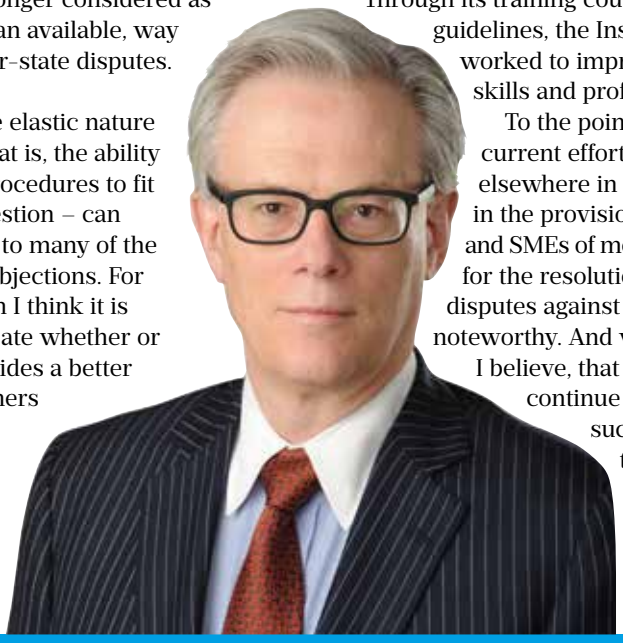
Efforts to bolster arbitration acceptance will remain essential

Continuing my Presidential year theme, the topic I will consider in this *Resolver* is perhaps the most fundamental of all challenges we face today, namely that it is not a given that arbitration will continue to enjoy the acceptance that it has in the past.

Certainly, the warnings of this are all around us. In my own country, the United States, concerns pertaining to consumer and employee arbitrations are uncritically applied to all commercial arbitration. In the European Union and other places, arbitration is no longer considered as the only, or even an available, way to resolve investor-state disputes. And so on.

Fortunately, the elastic nature of arbitration – that is, the ability to craft arbitral procedures to fit the dispute in question – can provide solutions to many of the process-related objections. For example, although I think it is open to some debate whether or not litigation provides a better forum for consumers and employees than arbitration generally, that assessment can be substantially improved in arbitration's favour through the adoption of rules or protocols that level the playing field between the parties to an adhesion contract. Such procedures as requiring the dominant party to pay the arbitral fees, providing that the location of the arbitration be convenient to all parties, and even allowing the consumer or employee the right to, post-dispute, choose mediation, arbitration or in-court litigation, can address fairness concerns.

We, the members of CIArb, can be proud that the Institute has often taken the labouring oar in efforts to increase arbitration's availability and acceptance. Through its training courses and guidelines, the Institute has long worked to improve arbitrators' skills and professionalism.



To the point of this note, its current efforts, as described elsewhere in this issue, to aid in the provision to individuals and SMEs of meaningful avenues for the resolution of their disputes against larger banks are noteworthy. And we can all trust, I believe, that the Institute will continue with endeavours such as these in the future.

Thomas D Halket
C.Arb FCIArb
President, CIArb

INSIDE THIS ISSUE

The opener

Event discusses crisis contours

In late September, CIArb's 12th Mediation Symposium looked at 'Mediation in Times of Crises' and attracted participants from across the globe. This annual event featured presentations and debates on the shifting contours of crises and how mediation can alleviate and resolve the disputes they cause. The 2019 symposium venue sponsor was Grant Thornton LLP.

Read more about the event at ciarb.org/news

Jane Gunn FCIArb (top left) and Amb (r.) David Huebner C.Arb FCIArb (top right) were among the distinguished speakers at the event

Brazil is our 41st Branch

CIArb's 41st Branch has just been launched in São Paulo, Brazil, led by Branch President Cesar Pereira FCIArb. Its Patron is Roberto Azevêdo, Director General of the World Trade Organization.

Brazil is one of the most pro-arbitration jurisdictions in the world. International arbitration has made considerable advances in the country in the past few years, the number of cases has increased and Brazilian courts have become consistently supportive of arbitration. These factors make Brazil a natural choice for CIArb to establish its presence in this region to drive its mission of promoting ADR on a global scale.


São Paulo

Learn about our full network at ciarb.org/our-network

YOUNG MEMBERS' GROUP

2019 essay winner

Meg Cochrane has won the 2019 CIArb Young Members' Group essay competition. Her essay on 'Analysing the Overlap between Arbitration and Human Rights' will be published in CIArb's *Journal*.

NEW PUBLICATION

CIArb book tackles ADR hot topics

CIArb will launch its book *A Brand New World: The evolution and future of arbitration* at University College London on 19 November.

The publication provides comprehensive coverage of the hottest topics in international dispute resolution, including:

- confidentiality;
- transparency;
- third-party funding;
- space-related disputes in arbitration; and
- arbitration and robotics.

Among the 30 participating authors are solicitors, barristers, lecturers, and members and Fellows of CIArb from jurisdictions including Australia, Belgium, France, Italy, India, South Africa, Turkey and the UK.

The book covers diverse and under-researched topics, as well as providing a number of international perspectives.

Register for our launch event at ciarb.org/events/book-launch

EDUCATION & TRAINING

Above: Students of the 2019 Diploma in International Commercial Arbitration, including some of their tutors and guests, during the Gala Dinner at Balliol College, University of Oxford, in September. The diploma course is designed to provide a thorough understanding of the law, practice and procedure of international commercial arbitration. This year's flagship diploma was under the directorship of world-renowned Arbitrator Professor Dr Mohamed S Abdel Wahab MCIArb.

DON'T MISS THESE!

CIArb's 45th Alexander Lecture, 14 November

The 45th Alexander Lecture, to be held in London, will be delivered by the Hon Ms Teresa Cheng GBS SC JP FICE FCIArb, a former President of CIArb and Secretary for Justice of Hong Kong.

Book by 11 November at ciarb.org/events/alexander-lecture-2019

'Building Bridges' conference, Brisbane, 18 November

This one-day conference on resolving disputes through international arbitration will launch the 2019 Australian Arbitration Week. Members of CIArb receive discounted registration.

Book by 13 November at bit.ly/AU19_Brisbane

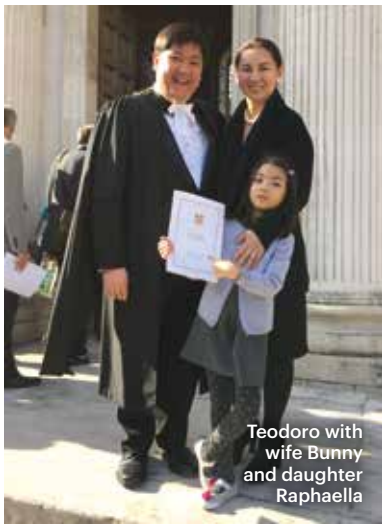
Manchester Lecture 2020, 23 January

A joint event organised by CIArb's North West Branch and the Chartered Institution of Civil Engineering Surveyors will address 'Current Commercial and Legal Topics – Fact, fiction and collaboration'. The day promises to cover a range of commercial and legal topics.

Find out more at bit.ly/AU19_CICES

60-SECOND INTERVIEW
Teodoro Kalaw C.Arb FCIArb

As the first Filipino to be installed as a C.Arb, Teodoro Kalaw offers insights into his move into mediation


Teodoro with wife Bunny and daughter Raphaella

With an established career in international arbitration, what was your motivation to develop and specialise in mediation?
As a family business governance counsellor for the Institute of Corporate Directors, I began to get offers to mediate intra-corporate disputes involving families in business. While mediation was and continues to be an easier sell than arbitration, because the parties often prioritise preserving relationships in such contexts, engaging professional mediators voluntarily is almost unheard of among such families. Ironically, being better known as an arbitrator has led to almost all my mediation assignments, as no one else engaged in corporate governance in the Philippines is doing what I do.

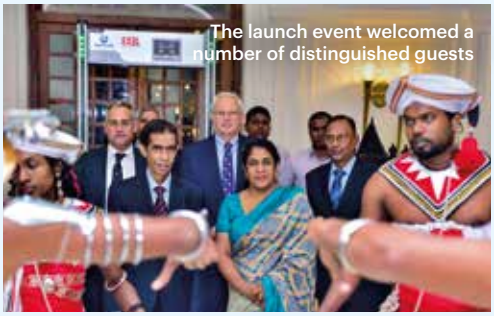
What do you consider to be the most important skills for a commercial mediator?
The ability to listen; openness and tenacity in exploring interests and options; and the ability to keep confidences. Listening skills are the foundation for getting parties to build and eventually find their own solutions.

What would you recommend to someone considering a career in mediation?
For those in my country, I always say the best way to get mediation engagements is to start early. It can be a long and winding road, as professional mediation has yet to really take off here. You can then create your own practice niche by offering your mediation skills to complement your primary professional roles.

What do you consider to be your biggest achievement in the field of ADR so far?
Becoming the first Filipino to be installed as a Chartered Arbitrator in 2015. While it was quite a long process, climaxing with one of the toughest peer panel interviews I have been through, I would do it all again without hesitation.

For a longer version of this Q&A, visit ciarb.org/membership/member-profiles

APAC


The launch event welcomed a number of distinguished guests

Successful launch for Sri Lanka Branch

John Wilson, Hon Secretary and a Director of CIArb, Sri Lanka, was pleased to welcome CIArb Director General Anthony Abrahams and more than 150 guests to the official launch of CIArb's Sri Lanka Branch in Colombo in July. As the 40th CIArb Branch, it will support 114 members.

The launch was the culmination of a long process that started in February 2018, when the idea of a branch was first proposed.


CIArb Director General Anthony Abrahams (far left) joined the delegation

CIArb leads APPG Singapore delegation

In August, CIArb led a delegation of MPs from the UK All-Party Parliamentary Group (APPG) for Alternative Dispute Resolution to Singapore as part of a fact-finding visit aimed at getting to the heart of how the island city state has established itself as a global disputes hub in recent years and gathering lessons for UK policymakers looking to further enhance the UK's status as a world leader in disputes. The full APPG report and detailed policy proposals are expected in January 2020.

OUR LATEST C.Arbs
Congratulations to **Dr Rouven Bodenheimer**, **Mr Erlend Haaskjold** and **Mr Nigel Puddicombe**, who have achieved Chartered Arbitrator status.

It's a mad, MAD world

Tom Cadman ACIArb is preparing for Mutually Assured Destruction

The close of the Cold War saw monetary pressure trump military force to become the preferred foreign policy tool for governments to employ to coerce change in a regime's policies and practices. Financial sanctions, such as freezing state assets or those of specific industries, entities and individuals, are making headlines due to diplomatic tensions over nuclear weapon proliferation, the drugs trade, human-rights violations and terrorism-related activities.

In managing its own services and ADR cases, CIArb treats all parties alike, regardless of nationality. Where parties are subject to sanctions, however, CIArb will need to take this into account. This means parties must arm themselves with knowledge of any regulatory requirements.

STRATEGIC PREPARATION

While the fact that a party is subject to sanctions may not prevent CIArb from offering services, the Institute must be informed in advance and before payment is made in order to provide suitable advice. Parties and practitioners are encouraged to consider the information in our updated compliance note and to check the consolidated list maintained by HM Treasury's Office of Financial Sanctions Implementation (OFSI). If sanctions do affect the claim, it is crucial that the arbitrator obtains an OFSI licence to resolve the dispute. Parties must consider the law of the seat and contract, as this can have an impact on how sanctions are regulated. When parties select London as their seat of arbitration or English law to govern the contract, EU sanctions are also applicable until the terms of Brexit are clarified.

DUCK AND COVER

To ensure compliance, where one of the parties or a related entity is included in a sanctions regime, or the subject matter of the case is included in a sanctions regime, if any of the parties wish to nominate an arbitrator who is subject to sanctions or from a country subject to sanctions, CIArb may seek further information on ultimate beneficial ownership. Due diligence is crucial when contracting with foreseeably sanctioned parties, as is vigilance throughout proceedings – English courts are unlikely to award damages on grounds of frustration or *force majeure*.

Sanctions also often influence the ability for arbitral awards to be enforced, as capital may not be able to flow to or from the targeted state, entity or individual until sanctions are lifted. Therefore, CIArb's banker, HSBC, must also comply with sanctions regimes.

In summary, there is no iron curtain in international ADR and parties are expected to be aware of the need to comply with regulatory requirements. As sanctions affect the available pool of international arbitrators and counsel to a dispute, as well as the applicable law and the modes of compliance, due diligence is crucial to ensuring enforceability.

There is no iron curtain in ADR and parties are expected to be aware of regulatory requirements

ABOUT THE AUTHOR
Tom Cadman ACIArb is Director of Governance and Legal Services at CIArb

LEARN MORE
See ciarb.org/disputes for additional guidance. The OFSI list of targets is available at bit.ly/AU19_OFSI

IKON IMAGES

Lending our support

Olena Gulyanytska FCIArb explains how a new DAS service aims to help level the playing field between SMEs and high-street banks

More than a decade after the financial crisis left tens of thousands of UK businesses with claims, a new service from CIArb will offer SMEs long-awaited access to justice.

CIArb has been collaborating with the All-Party Parliamentary Group (APPG) on Fair Business Banking to explore how best to design a specialised dispute resolution service – the Financial Tribunal Service (FTS) – for SMEs and their high-street lenders.

The barriers faced by SMEs and individuals in bringing claims against banks, observed in scandals such as interest rate swaps mis-selling, provided a catalyst for the project. It prompted the APPG to issue a report in 2018 to recommend the establishment of a financial services tribunal modelled on employment tribunals. Since then, the idea of a financial tribunal has been endorsed by MPs from all the major parties, several Law Lords, the Treasury Select Committee and the Financial Conduct Authority.

Unfortunately, the difficulties in passing legislation in the current Parliament have impeded the APPG's ability to realise this aim. Incidentally, the number of cases awaiting allocation to an investigator at the Financial Ombudsman Service stands at 30,000, and the average duration of these cases is six months, with many exceeding one year. The scheme is nonetheless expected to begin in the new year to give the owners of insolvent businesses the freedom to be awarded damages. Stewart Hosie, Scottish National Party MP for Dundee East and a member of the Treasury Select Committee, has emphasised that "Brexit must not crowd out other critical elements of policy".

ABOUT THE AUTHOR

Olena Gulyanytska FCIArb is Head of the Dispute Appointment Service at CIArb. Olena would like to thank Ned Beale FCIArb for his assistance

The scheme aims to ameliorate the conduct and culture of dispute resolution for SMEs and high-street banks to reinforce the significance of the public-interest mandate. As Shadow City Minister Jonathan Reynolds MP wrote in *The Times* in January, what's needed is "a watertight system to prevent businesses from ever being subjected to exploitation like this again".

Also commenting in *The Times*, Ned Beale FCIArb, Litigation Partner at Trowers & Hamlins LLP, proposed combining the ombudsman with a fresh arbitration scheme. As CIArb's Dispute Appointment Service (DAS) presented the ideal ally with which to push the idea ahead, together they conceived the idea of a financial arbitration service.

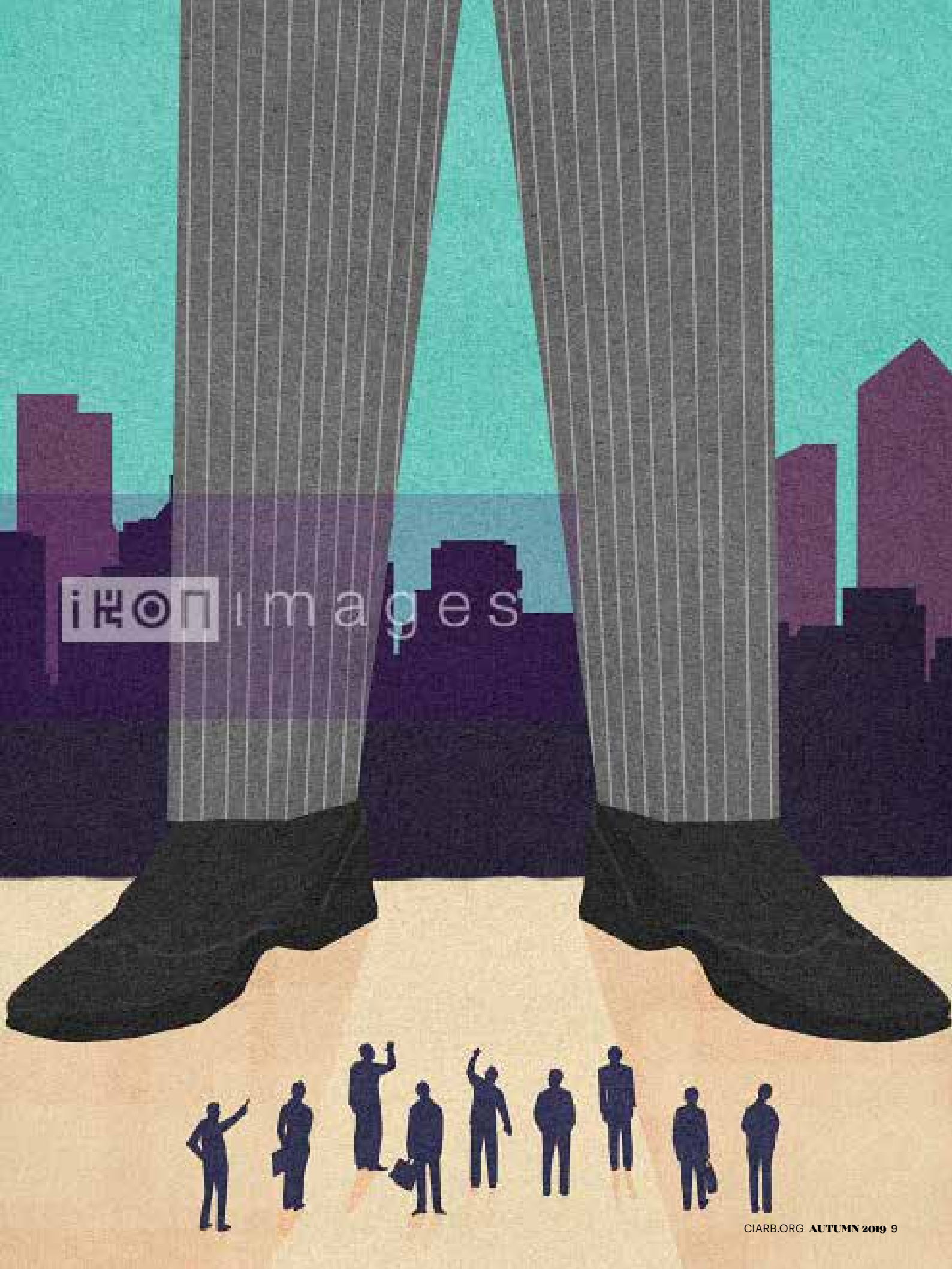
"Banking scandals such as RBS's Global Restructuring Group have shown that business owners face a justice gap where claims are too big for the Financial Ombudsman Service, but too small to be effectively litigated in the High Court," says Beale. "The arbitration scheme being discussed by CIArb and the APPG is ideally positioned to fill that gap."

Nevertheless, the implementation of the FTS depends on the banking industry's participation. This is being examined on behalf of the industry by a dispute resolution implementation steering group organised by UK Finance. The debate hinges on whether independent arbitration or an expansion of the remit of the Financial Ombudsman Service will deliver the best solution for both sides.

Currently, the ombudsman provides a vehicle to settle any individual dispute between consumers and businesses that provide financial services. The FTS is projected to constitute an alternative for larger, older and more complicated claims,

The scheme aims to ameliorate the conduct and culture of dispute resolution for SMEs and banks

IKON IMAGES


iHON images

It is statutory arbitration that distinguishes the FTS from the DAS's alternative services

particularly consequential loss, insolvency, higher-value and older disputes. Arbitration offers the benefits of party autonomy, an impartial and independent arbitrator, and greater finality to the decision. For this reason of certainty, the FTS will look to avoid claims that lack supporting evidence, heads of terms, banking contracts and statements of costs. Judgments will accordingly be final and will serve to swiftly resolve the unfortunate disputes arising from the financial crisis.

CONSISTENCY IS CRITICAL

A criticism of the ombudsman has been a lack of consistency in decision-making. Consistency is central to certainty, which is why the FTS seeks to introduce a method for ensuring like results for like claims. An interesting suggestion to ensure consistency is the use of forums, such as the Centre for Effective Dispute Resolution. However, this has been dismissed as inappropriate in the context of financial services disputes. The alternative of a platform to publish insights as regards awards has been proposed to avoid issues of liability.

One of the main attractions of commercial arbitration as a method of ADR is its confidentiality. However, as the FTS will be resolved through statutory arbitration and the cases are both older and retrospective, the arguments against transparency diminish. The FTS, like the existing Pubs Code Adjudicator (PCA) scheme – which seeks to resolve the claims of tied tenants at pubs through arbitration – should make the awards public through publication online. This will allow for greater consistency and transparency without the danger of upsetting any parties involved.

As the rules for the FTS would be based on the CIArb Arbitration Rules 2015, there are two potential avenues to follow. One would be to amend the rules directly, the other to provide the necessary information in a guidance note. The notable advantage of creating a guidance note, rather than supplying additional information within the Rules, is that amendments will facilitate understanding and preserve the integrity of the Rules. Moreover, the main need for changing the Rules for the FTS scheme would be to introduce an insolvency clause to assist claimants in distinguishing where to resolve disputes.

As a statutory arbitration scheme, the FTS will resemble the PCA scheme. The significance of statutory arbitration lies in the way the arbitrations follow statutes and are less malleable to the flexibility inherent in commercial arbitration. This is the best fit for the scheme, as it will allow for greater consistency and transparency.

It is this statutory arbitration that distinguishes the FTS from the DAS's alternative services, such as the Business Arbitration Scheme, which offers simple, cost-effective and timely resolution of disputes of low to medium monetary value by a sole arbitrator.

Furthermore, given the agenda of the FTS to resolve long-standing and retrospective disputes, which are estimated to number between 10,000 and 35,000, a tailored service will allow for the most efficient and effective execution.

Along with the need for consistency, transparency and a guidance note, there may perhaps be further hurdles that the DAS and the APPG need to overcome. To realise the FTS's full potential, the DAS and Trowers & Hamlins LLP hosted a discussion event in early October. By inviting all stakeholders to the roundtable, including MPs and members of the banking industry, this event provided a suitable platform through which to launch the scheme.

We are pleased to be working on this project, which sits naturally alongside CIArb's other statutory arbitration schemes. The expertise and experience of our pool of arbitrators could make an important contribution to resolving the large volume of historic banking disputes.

DAS SUCCESS

The success of the Pubs Code Adjudicator and Business Arbitration schemes saw the DAS exceed 2018's yearly number of total appointments by June 2019. The DAS continues to develop new schemes and services.

BE PART OF BAS

CIArb would like to expand the list of eligible arbitrators on our Business Arbitration Scheme (BAS) and invites CIArb Fellows to apply to join the BAS panel – a unique opportunity to gain practical experience of sitting as an arbitrator. Register your interest at das@ciarb.org

SHADOWING SCHEME: CAN YOU HELP?

Chartered Arbitrator John Redmond answered the call made at the DAS Convention in 2018 for practitioners to come forward with shadowing opportunities for newly qualified members. Philip Digby FCIArb gratefully seized the opportunity, having recently attained Fellowship level.

Philip shadowed John on a construction dispute, which gave him the opportunity to refresh his surveying background and gain first-hand and new experiences of real-time arbitration hearings, drafting orders, management of hearings and procedure, and, of course, tips and hints from an experienced practitioner.

Could you also support a newly qualified member by providing a shadowing opportunity?

If so, please contact the Dispute Appointment Service at das@ciarb.org

HOW TO...

Make the most of med-arb

Combining mediation and arbitration can help to keep the process fast and flexible

The hybrid process known as med-arb – which typically involves one neutral party serving as mediator and then as arbitrator should mediation fail – is increasingly used to capture the potential advantages of ADR and to serve in place of adversarial litigation. However, there are some challenges to address if the process is to be most effective. These include: the transitional nature of the neutral role; concerns about candour, impartiality and confidentiality; and the absence of a universally accepted code of ethical conduct or procedures. Here are some ideas for overcoming these:

SHUTTERSTOCK

PUT A SIG ON IT

To capture med-arb's advantages while addressing concerns, parties and their representatives should sign tailor-made agreements containing clear and robust provisions for the process. Among the key points to include are: time limits for the mediation and arbitration phases; whether the parties are required to make complete presentations of evidence based on strict observance of evidentiary rules or 'sufficient' cases in the arbitration phase; and which mediation communications, if any, can be considered for the arbitration award.

DUAL ROLE DEFINED

Agree the role of the neutral party serving as the mediator-arbitrator and ensure they have the requisite training, experience and understanding of the med-arb process and mindset. The parties must be able to trust them to conduct an effective proceeding.

ISSUES OF ETHICS

It is crucial to confirm whether the neutral party subscribes to or is bound by a specific code of ethics or standard of conduct and is capable of properly shifting with competence and integrity from the role of mediator to that of arbitrator. In addition, signed agreements should consider whether and to what extent statutory/regulatory provisions apply to the proceeding, and whether procedural variations on the standard model should be adopted to permit greater efficiency and flexibility with more, albeit imperfect, ethical protection.

KEEPING IT CONFIDENTIAL

Agreements should set out the level of confidentiality to be given to mediation statements. Details can include whether confidentiality is waived regarding statements made in caucus and/or the joint mediation sessions, as well as whether private caucusing is allowed and, if so, what rules apply to the use of information obtained during it.

ATTITUDE ADJUSTMENT

To maximise the chance of success, stakeholders should also change their attitudes and working assumptions regarding resolving disputes. This should include a more intense focus on risk analysis and creative outcomes, rather than on the legal strengths and weaknesses of each party's position and settlement amounts.

RELATIONSHIP SAVER

While med-arb is not the correct answer in all cases, it is an extremely attractive option where the parties want to preserve a personal or professional relationship and where a speedy, cost-effective, flexible and final resolution is important. Therefore, med-arb's tremendous potential should be routinely explored by thoughtful, well-informed parties, their representatives and ADR professionals and institutions.

Stakeholders should change their attitudes and working assumptions

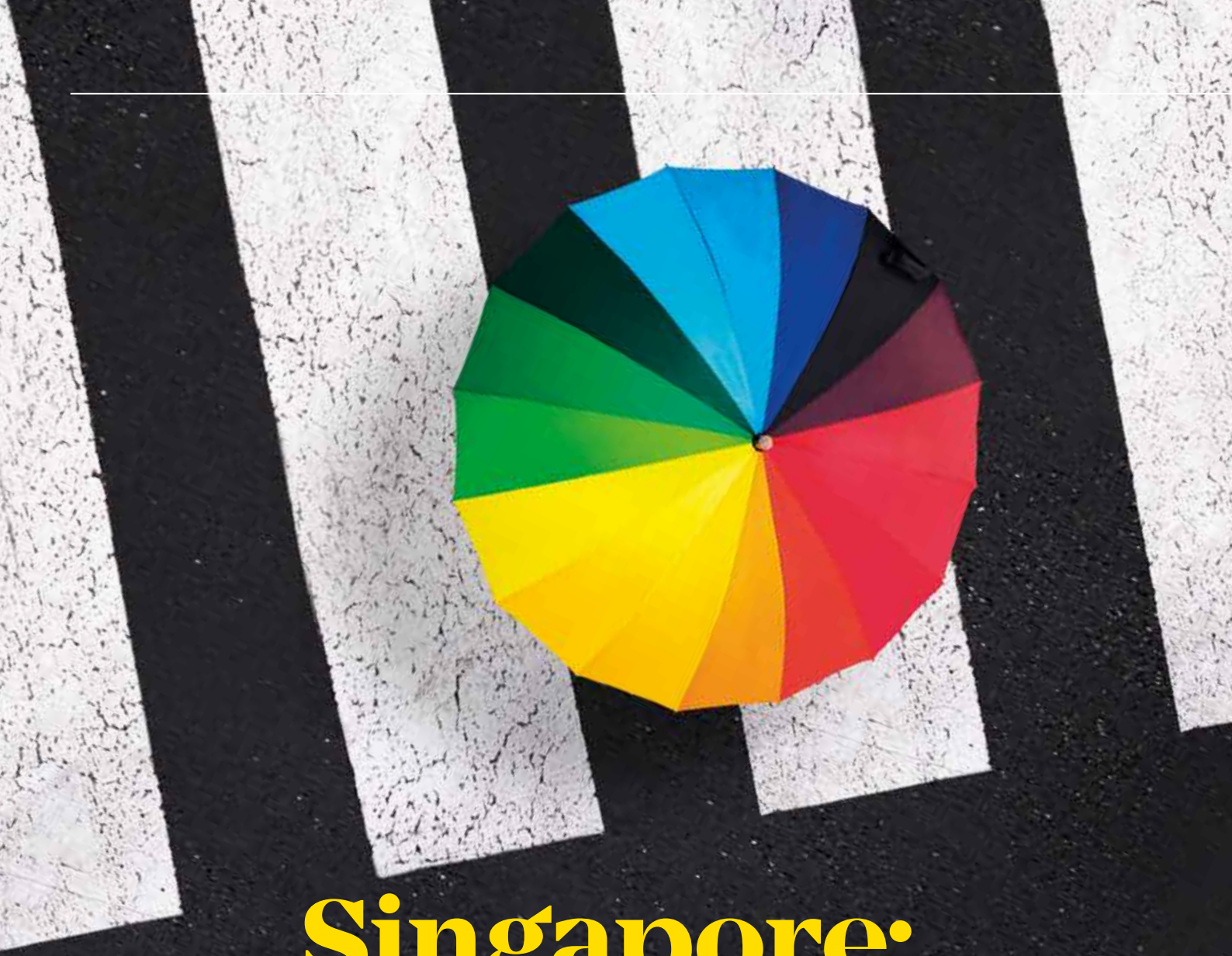
ABOUT THE AUTHOR

Marvin J Huberman, LLM (ADR) C.Arb is President of the ADR Institute of Ontario

LEARN MORE

The ADR Institute of Canada has drafted a cutting-edge protocol for med-arb processes, which will be implemented in 2020. For full details, visit adric.ca

CIArb has produced a professional practice guideline on the use of ADR procedures in arbitration. Go to bit.ly/AU19_IAPG



Singapore: Mediation's milestone moment

Kateryna Honcharenko MCIArb sees a bright future ahead thanks to a landmark agreement

Have you ever been caught in the rain, having been assured the weather would be dry? Most of us would answer: "Yes, and not just once!", and agree that it's better to be safe than sorry and carry an umbrella.

A similar sentiment might apply to the UN Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Convention on Mediation, which was signed by 46 states, including the US, China and India, on 7 August 2019.

Hundreds of delegates from a number of countries gathered to witness the successful outcome of several years of work by 85 states and 35 international governmental and non-governmental organisations within the framework of the United Nations Commission on International Trade Law (UNCITRAL) Working Group II, chaired by Singapore.

By signing the Convention, the states have expressed their support for creating a special regime for the promotion and facilitation of international mediation. Their aim in doing so is also to safeguard enforcement of international settlement agreements resulting from mediation, and to make the process for doing so more efficient. In other words, the Convention is an assurance that mediated settlements will be recognised across borders – providing a figurative umbrella in the event of an international commercial dispute.

The Convention has been touted as having the potential to have the same impact on international mediation that the New York Convention has had on arbitration. However, the two agreements deal with proceedings that are very different in their purpose.

Dissatisfaction with a result and an attempt to avoid compliance are frequent occurrences in arbitration, hence an enforcement mechanism is required. Where there is a mutual agreement between the two parties reached by consensus with the help of a mediator, rather than on the instruction of a neutral, why would parties need to secure enforcement of such an agreement, especially if they believe in a 'cloudless' cooperation in the future?

As Andrew Miller QC, mediator and arbitrator at 2 Temple Gardens, has commented: "Parties who have committed to mediation are seeking a resolution and settlement that brings their dispute and conflict to an end. That primary aim can only be assured if the settlement reached is honoured by the paying party. Parties who have successfully mediated their dispute usually have an ongoing interest in ensuring the implementation of the settlement agreed between them."[1]

EARLIER EFFORTS

In fact, enforcement of international settlement agreements is not an innovation. Parties to cross-border mediations have previously enforced settlement agreement as contracts, resorting to court judgments that the contract has been breached in the event one party failed to comply. Thus, a litigation was required only if such a method was recognised by the jurisdiction involved.

The Convention could impact international mediation in the same way as the New York Convention has arbitration

However, a small but crucial possibility of non-enforcement has long been a stumbling block of international mediation's promotion. The drafters of the Convention attempt to make enforcement of settlement agreements less problematic.

Similar discussions took place several decades ago and resulted in the UNCITRAL Model Law on International Commercial Conciliation (2002), which was updated and improved in 2018. According to that document, mediated agreements shall be enforceable internationally, in accordance with national rules of states in which enforcement is sought. This might be seen as an ancillary instrument to the Convention, as it defines the term 'commercial', on which the Convention is silent.

In 2008, the EU issued Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, which provided that an agreement "may be made enforceable by a court or other competent authority in a judgement or decision or in authentic instrument". States thus usually enforced settlement agreements in a form of notarial deeds (the Czech Republic and the Netherlands) or judicial settlements (Germany, Italy and the UK).

Lack of efficiency in the processes mentioned provoked the first UNCITRAL Working Group II discussion about the new Convention, which took place in New York in 2015. Since then, differences between conciliation and mediation, as well as the nature of international mediation, have been discussed and various drafts of the instrument proposed. The final drafts were approved at the 51st session of the Working Group in 2018.

PROVISIONS OF INTEREST

So what has been agreed in this final Convention? Here are some of the key provisions.

Applicable agreements

The Convention applies to commercial settlement agreements concluded in writing due to mediation. It does not cover agreements enforceable as judgments or arbitral awards, or those concluded with a view to settling personal, family or household matters or relating to family, inheritance or employment law.

SHUTTERSTOCK

ABOUT THE AUTHOR

Kateryna Honcharenko MCIArb is Research Executive at CIArb

Rules of engagement

The Convention does not give any specific rules on enforcement procedure. State parties are expected to enforce agreements in accordance with their rules of procedure. Parties can apply for enforcement under the Convention where there is a signed settlement agreement and "evidence that the settlement resulted from mediation". Article 4 provides for a number of requirements of such evidence, such as a settlement agreement signed by a mediator or a document signed by the mediator indicating that the mediation was carried out.

Grounds for relief refusal

Article 5 contains grounds for refusing to enforce a settlement under the Convention (such as incapacity of either of the parties). The Convention also specifies that granting of relief might be refused in the case of the failure of a mediator to disclose issues that might cause justifiable doubts as to their independence or impartiality, if such "failure had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement".

Reservations

It is noteworthy that, unlike the New York Convention, Article 8 of the Convention in question allows parties to it to formulate some reservations in accordance with the Vienna Convention on the Law of Treaties 1969. For instance, a state might declare that the Convention shall not apply to settlement agreements to which it is a party. This provision might initiate active debates as to whether the Convention would apply to investor–state dispute settlement disputes as well.

IMPACT AND OPPORTUNITIES

The Convention enables parties to avoid routes to enforcement of mediated settlements through litigation in national courts, which often involves lengthy, expensive and inefficient procedures. Instead, parties will be able to apply for enforcement directly. Moreover, evidence required for enforcement under the Convention would make it more efficient for the parties to resort to institutional mediation.

Singapore's involvement in promotion of an international settlement enforcement instrument initiative might reasonably be expected to help it become a regional ADR centre. The Singapore International Arbitration Centre and the Singapore International Mediation Centre also recently introduced the new Arb–Med–Arb regime to demonstrate that, even if parties are willing to secure their possible dispute resolution by arbitration, they might still want to try mediation as a 'no winners, no losers' approach. The 2017 Mediation Act also strengthens Singapore's position in this respect.

According to some sources, the Convention will invigorate the use of cross–border mediation. The inability to easily enforce a settlement that has been reached mutually and in good faith is a negative commercial experience and might cause misconceptions in parties' future dealings. In this case, the Convention might be a good incentive for compliance. However, the question of whether this would also encourage active use of mediation by jurisdictions that have been reluctant to do it remains open.

Nonetheless, Kenneth Cloke, founding President of Mediators Beyond Borders, has commented that: "The Singapore Convention on Mediation is a significant step forward for mediation. We live increasingly global lives, with problems and players that make even national and regional solutions ineffective. While our conflicts are more and more transnational, mediation and interest–based resolution processes have lagged behind, leaving only destructive, adversarial, power–based options or lengthy, ineffective, rights–based

Singapore's promotion of this initiative might reasonably be expected to help it become a regional ADR centre

In assuring that mediated settlements will be recognised across borders, the Convention provides a figurative umbrella in the event of an international commercial dispute

SHUTTERSTOCK

enforcement procedures. Much more is needed to strengthen international mediation, but the Convention shows us the way forward."

State parties willing to incorporate the Convention into their national legislation systems might need to, depending on their constitutional orders, adopt supplementing laws on mediation. This will not only streamline the enforcement processes on their territories, but might also create a more promising national mediation environment in general. Whether the Convention would then apply to states as parties in commercial disputes, such as investment disputes, is still unclear.

SHADOW OF DOUBT

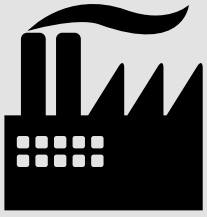
Ultimately, the significant number of signatures has demonstrated that states are willing to take international mediation to a new level. However, a number of jurisdictions contributed to negotiation and adoption of the Convention – the first hard law instrument on enforcement of settlement agreements in history – and yet did not sign. And it remains to be seen whether those who have signed will follow the path offered by it. Only by ratification will states truly make it a part of their national legislation. This is a small shadow of doubt in an otherwise sunny sky.

Nonetheless, the Convention is now there to facilitate mediation in international commercial disputes, come rain or shine.

Open for business:

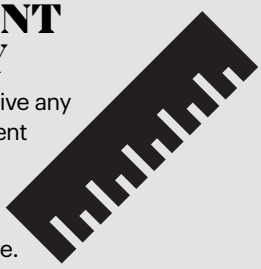
Singapore Convention key provisions

COMMERCIAL FOCUS



The Convention applies to commercial settlement agreements concluded in writing as a result of mediation. It does not cover agreements enforceable as judgments or arbitral awards related to personal, family or household matters, or to family, inheritance or employment law.

ENFORCEMENT FLEXIBILITY



The Convention does not give any specific rules on enforcement procedure. State parties are expected to enforce agreements in accordance with their rules of procedure.

GROUNDS FOR REFUSAL

The Convention includes grounds for refusing to enforce a settlement, including provision for cases where a mediator fails to disclose issues that might cause justifiable doubts as to their independence or impartiality.

RESERVATIONS OPTION

The Convention allows parties to it to formulate some reservations in accordance with the Vienna Convention on the Law of Treaties 1969 (ie a state might declare that the Convention shall not apply to settlement agreements to which it is a party).

READ THE FULL TEXT AT BIT.LY/AU19_SC

1. *UK Mediation Journal*, Issue No. 9, July 2019

Case note

JW v Canada (Attorney General) 2019 SCC 20

Report by Russell Q Gregory BA LLB ACIArb, Gregory Law Office, Saskatchewan, Canada

The Canadian Government and its peoples are still coming to terms with the history and effect of residential schools. First Nations, Inuit and Métis children were removed from their homes and sent to such schools, which were administered by the government and churches, and where many students were subjected to physical, sexual and psychological abuse. The stated purpose of the schools was to strip the children of their cultural identity and essentially assimilate them into Canadian society.

A class-action lawsuit by the survivors of residential schools resulted in the Indian Residential Schools Settlement Agreement in 2006. That agreement included a mechanism for compensation through an Independent Assessment Process (IAP) conducted by an adjudicator.

Canada is still coming to terms with its historical treatment of indigenous peoples

FACTS

In JW v Canada (Attorney General) 2019 SCC 20, the Appellant had gone to an IAP adjudication to review his case for compensation, following an allegation that he had been inappropriately touched by a nun at a school and suffered harm. The Adjudicator denied his case, basing the dismissal on an interpretation of the agreement which required that the perpetrator must have acted with a sexual purpose and ruling that the facts did not support that allegation. After two levels of internal review, the Appellant sought a Request for Directions from a judge, who found errors in the decision. The matter was referred back to adjudication and compensation was granted. The Federal Government appealed and the Court of Appeal overturned the decision on the grounds that the judge had no basis to intervene on the procedure established in the Settlement Agreement. In other words, the agreed adjudication procedure did not provide for an appeal, which was a gap in the agreement.

DECISION

The Supreme Court of Canada ruled that the appeal should be allowed and reinstated the compensation to the Appellant. The decision noted that judicial interference in adjudication matters should be limited to "very exceptional circumstances", and a gap in the Settlement Agreement could constitute such a circumstance. The Court noted that the Adjudicator's decision had incorrectly required a sexual purpose as a necessary element of the abuse, and that the interpretation represented a modification of the Settlement Agreement. The agreement that was entered into did not have a procedure to deal with the review of this case due to the way the case unfolded. That was a gap in the Settlement Agreement. The Court's supervision was found necessary to "ensure the benefits promised were delivered". The majority court stated that compensation was available as: "[I]t was the only tenable conclusion in light of the factual findings." The C$12,270 award to the Appellant was upheld.

UNIQUE DILEMMA

The giving up of the right to sue and instead be bound by the procedure of the Settlement Agreement was clearly a dominant feature noted by the Supreme Court. The unique dilemma appeared to be a gap in the agreement procedurally and a clear entitlement substantively. The willingness of the Court to see justice done overrode any deference to the incorrect interpretation or untenable conclusion of the first Adjudicator or to the adjudication procedure agreed to by the parties. An unusual case of interference by the Court, it will be rare to find unique circumstances like these in future.

The adjudication procedure did not provide for an appeal, which was a gap in the agreement

Read the case report at bit.ly/AU19_Case

SHUTTERSTOCK

What's on

A selection of learning opportunities for CIArb members

SPOTLIGHT ON STUDENTS

Free ADR course on offer to students

CIArb promotes the benefits of ADR to diverse audiences. This includes those studying for undergraduate and postgraduate courses. As disputes can arise in all contexts, ADR is relevant to all disciplines. That is why CIArb is committed to helping students learn about ADR. One of the ways in which CIArb does this is through our student membership scheme. Those studying for undergraduate and postgraduate courses can apply for CIArb student membership free of charge and access many CIArb benefits.

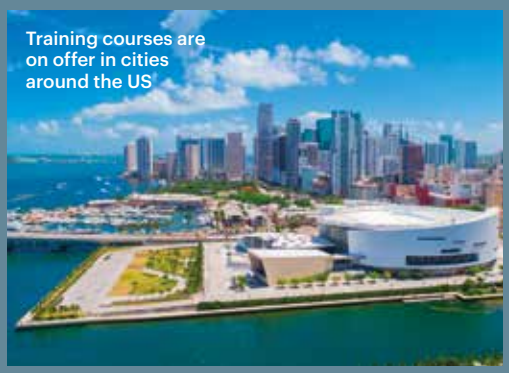
A key benefit that CIArb is proud to provide to students is free access to the online Introduction to ADR course and a concessionary rate for the online multiple-choice test assessment. Rather than paying £95 for the assessment, undergraduate and postgraduate student members pay only £10. Successful candidates can then apply for Associate membership of CIArb (ACIArb). This is valuable for universities, branches and students – it allows universities and branches to forge close ties that can lead to further collaboration, while students can learn about ADR and use CIArb post-nominals.

Learn more about CIArb student membership at ciarb.org/membership

A range of benefits is on offer to CIArb student members

BRANCH FOCUS: NORTH AMERICA

CIArb's North America Branch offers a number of training programmes in various cities across the US. In 2019, this has already included Accelerated Route to Fellowship training in Houston, Miami, Detroit and Los Angeles, and Accelerated Route to Membership and Introduction to International Arbitration courses in Miami. Further Accelerated Route to Fellowship training is being organised in San Diego and other US cities in November and December. Visit **ciarb.org/our-network/americas/north-america** for details.



Training courses are on offer in cities around the US

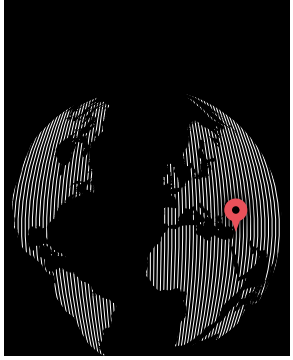
CIArb TRAINING NOV 2019–JAN 2020 (Location is London unless specified)

KEY
- ADR
- Mediation
- Construction adjudication
- Domestic arbitration
- International arbitration
- Centralised assessment

- **Introduction to ADR Online** Open entry; 1 day **£36**
- **Introduction to ADR** 14 Nov **£396**
- **Module 1 Mediation Assessment** 5 Nov **£1,560**
- **Module 3 Mediation Theory and Practice** Open entry; 6 months **£660**
- **Introduction to ADR Online** Open entry **£95**
- **Introduction to ADR** 14 Nov **£95**
- **Module 1 Law Practice and Procedure Domestic Arbitration** 12 Dec **£174**
- **Module 1 Law Practice and Procedure International Arbitration** 12 Dec **£174**
- **Module 1 Law Practice and Procedure Construction Adjudication** 13 Dec **£174**
- **Module 3 Award Writing Domestic Arbitration** 20 Dec **£408**
- **Module 3 Award Writing International Arbitration** 20 Dec **£408**
- **Module 3 Decision Writing Construction Adjudication** 19 Dec **£408**
- **Diploma in International Commercial Arbitration (Module 1)** 12 Dec **£174**
- **Diploma in International Commercial Arbitration (Module 3)** 20 Dec **£408**
- **Accelerated Route to Membership Domestic Arbitration** 11–12 Dec **£1,500**
- **Accelerated Route to Membership International Arbitration** 11–12 Dec **£1,500**
- **Accelerated Route to Fellowship Construction Adjudication** 17–19 Dec **£1,920**
- **Accelerated Route to Fellowship Domestic Arbitration** 18–20 Dec **£1,920**
- **Accelerated Route to Fellowship International Arbitration** 18–20 Dec **£1,920**

Quoted costs include VAT. For information and booking, visit ciarb.org/training

Making waves in MENA



Lebanon is looking to revive its historical influence

Beirut has historically been hailed as the 'mother of all laws', because it hosted the famous law school of Berytus and was therefore a centre for the study of Roman law during classical antiquity. Beirut now aspires to become a leading arbitration hub in the modern Middle East.

The country boasts an arbitration-friendly jurisdiction, with its legislation reflecting contemporary practice and embracing well-established principles of international arbitration. The Code of Civil Procedure in Lebanon devotes an entire chapter to arbitration and notably distinguishes between domestic and international arbitration. As a country previously under French mandate, legislation in Lebanon is based on French arbitration law (Decree No. 80-354 of 14 May 1980 and No. 81-500 of 12 May 1981).

In addition, the Lebanese judiciary is generally supportive of the arbitral process and respectful of the parties' choice of arbitration as their method for settling disputes. Awards are typically enforced and rarely annulled.

Lebanon is a signatory to the New York Convention, with a reciprocity reservation that it will only enforce awards made with another signatory country. It has also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. What's more, Lebanon has signed more than 50 bilateral investment treaties that provide for investor-state arbitration.

Beirut: the mother of all laws

The upsurge of foreign investment will, in all likelihood, lead to an increase in arbitral disputes

Recently, Lebanon has witnessed an increase in foreign investment, which is gradually shifting from capital-intensive to knowledge-intensive projects. Lebanon's Capital Investment Programme, reviewed by the World Bank, includes approximately $17bn worth of developments and focuses on financing the extensive redevelopment of the Lebanese energy, water, oil and gas, waste management, telecommunications and tourism industries. The anticipated rise of infrastructure projects and the upsurge of foreign investment will, in all likelihood, lead to an increase in arbitral disputes.

CIArb Lebanon is committed to becoming one of the top educational arbitration centres in the Middle East. The Branch, established in 2004, is working towards this through a number of initiatives, including encouraging youth development in ADR. The Branch is also preparing for a flagship conference in 2020 (see below), cementing Lebanon's position as a legitimate seat of arbitration in the region.

ABOUT THE AUTHOR
Dr Zeina Obeid MCIArb is a Senior Associate at Obeid Law Firm, Lebanon, and qualified in Beirut and Paris

BE WITH US IN BEIRUT: JUNE 2020

CIArb is pleased to invite you to the flagship CIArb International Arbitration Conference, to be held in Lebanon on 4–5 June 2020. The event will welcome global ADR professionals to discuss 'Post-conflict Infrastructure Development in the MENA region'. The conference will bring together:

- government-level input to identify major infrastructure projects;
- construction industry representatives to provide input on the execution of projects;
- financial industry representatives (in particular PPP experts) to discuss funding;
- legal professionals to consider contracts and dispute avoidance, management and resolution; and
- arbitral institutions to examine specific support in international contractual and construction disputes.

More information is available at ciarb.org/events/lebanon-2020

SHUTTERSTOCK