

# ***Looking Back - Moving Forward***

CI Arb Centennial Lecture (7 May 2015)

Professor Doug Jones AO, CArb<sup>1</sup>

## **Introduction**

It is a great honour to have been asked to give this lecture. The Centenary of the Chartered Institute of Arbitrators is a historic milestone for both the CI Arb and international commercial dispute resolution.

We gather here today in what was an outpost of Empire at the time of formation of the Institute. It is now a thriving independent country and a leading centre for international dispute resolution in a region dominating the trade flows of the world. That it is thought appropriate to celebrate the centenary of the Institute here, in the presence of its (local) President Elect, is a testament to the truly global reach of the Chartered Institute, and I am delighted to see many familiar faces and distinguished guests, joining us here today.

An important opening question is: How do we identify the CI Arb and what does it stand for today? I will quote a former chair of the CI Arb, Alan Davson, who gave a succinct statement of the fundamental purpose of the Chartered Institute, back in 1931, which rings true today. He stated that, *"the object of the Institute of Arbitrators, is to provide a means of justice which is prompt, inexpensive, and also efficient, by offering to the business community the services of a body of men, skilled in various technical branches of industry and commerce, who are also acquainted with the legal incidents of arbitration; and by insisting upon the prompt determination of disputes, under the simplest rules of procedure, involving small expense"*<sup>2</sup>. It is from this core objective that the Institute's role as an educator, an accreditor and an international professional network has developed over the past century, culminating in the worldwide organisation of which we are so proud today.

I would like to take you all on a journey through the history of the Chartered Institute, beginning with its inception in 1915 and navigating its history through the expansion of the Institute's branches, its activities, its objectives, and in particular, its migration into the Asia-Pacific region, and its role in stimulating legislative, institutional and political developments in surrounding localities.

Condensing a century of the history of such a dynamic global organisation to a short presentation is no easy task and I would not wish to have you believe that my account is complete. Let me say, however,

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<sup>1</sup> International Arbitrator, CI Arb Past President (2011), Past Chair Board of Management (2006 - 2009), Chair Centenary Celebrations ([www.dougjones.info](http://www.dougjones.info)). The author gratefully acknowledges the assistance provided in the preparation of this address by Amy Jee and William Stefanidis, my legal assistants, and the valuable comment on drafts by Anthony Abrahams, Professor Datuk Sundra Rajoo, and Professor Janet Walker.

<sup>2</sup> Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James Publishers Ltd, 2015) 96.

that a History of the CI Arb was published just over a month ago, which, apart from providing a most comprehensive narrative of the history of the CI Arb, proves to be a refreshing read.

I will then complete the talk with a discussion of the current state of international arbitration and recent trends and developments, which are advancing in the field of private dispute resolution. Within this context, I will conclude by considering the future of international arbitration and the continuing leadership of the CI Arb in the field.

### **Some History**

Our journey begins on 1 March in 1915 when a small group of professionals led by H. C. Emery, a London solicitor, established the Institute as an unincorporated association with a view *"to raise the status of Arbitration to the dignity of a distinct and recognised position as one of the learned professions"*<sup>3</sup>. The Institute in its infant state bore little resemblance to the global network that it is today, although its core underlying objective, to promote arbitration as a profession, was established from day one. As a small organisation in its early years, the Institute's activities were directed towards encouraging the practice of settling disputes by resolution rather than litigation, promoting the study of the law and practice relating to arbitration and, where necessary, supporting its reform.<sup>4</sup>

Membership was selective and candidates were tested through examination before being admitted amongst the Institute's ranks. Members' professional focus was primarily on domestic construction disputes, and membership was a combination of lawyers, architects and engineers.

There are two aspects of the Institute to examine during this period, namely, the Institute's activities in the arena of arbitral professional practice, and its initiatives in providing education and training for practitioners and the business community at large.

The Institute began appointing arbitrators from within its own ranks during the 1920s and regulations for the Appointment of Arbitrators were issued in 1925, based on the rules adopted by the London Court of Arbitration and the Society of Architects. An Arbitration Committee was established and it compiled lists of appropriately qualified members who were willing to act as arbitrators. In this way, the Institute from a very early stage in its life began to assemble a pool of qualified and experienced arbitrators to offer to the commercial community. This pool has grown in size and expertise over time and today proudly consists of a select consortium of chartered arbitrators, from an array of jurisdictions and areas of specialty around the world.

At the same time, the Institute committed itself to a range of educational initiatives. On one hand, the CI Arb began training arbitration practitioners and on the other, it made efforts to educate the business and legal communities about the advantages of arbitration, for example, its capacity to achieve the more expedited resolution of disputes than was possible in curial courts at the time. These objectives were

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<sup>3</sup> Ibid 35.

<sup>4</sup> Ibid 35-37.

pursued from the CI Arb's inception with the publishing of its Journal, "Arbitration", which disseminated information on arbitration issues and challenges and continues to do so today. The Journal was, and remains, a channel through which the Institute communicates its ideas, encourages dialogue on the issues facing the arbitral process and discusses avenues for reform to overcome these obstacles.

The Institute's efforts at facilitating dialogue amongst its members included organising meetings to discuss learned papers and developing a small library. Mock arbitrations were first held in 1926 to give members the opportunity to practice their skills in managing arbitration cases. These were popular for many years and were soon supplemented by an annual arbitration team competition. Such activities fostered a collaborative climate and an enthusiasm amongst the Institute's members for developing their skills and knowledge as a professional association. Indeed early initiatives such as these paved the way for many of the opportunities for practice and training that we enjoy today, such as the Annual Willem C. Vis Commercial Arbitration Moot in Vienna and the CI Arb International Arbitration Moot held in Sydney.

The Institute's educational work progressed steadily during the late 1920s and throughout the 1930s. This progress can be attributed largely to a member by the name of Alan Davson. In 1927, he pointed out how the American Arbitration Association, formed only the year before, was already collaborating with US law schools and universities and carrying out special studies in conjunction with other bodies. Noting how research had become the driving force behind the American Arbitration Association, Davson believed the time had come for the Institute to forge ahead with direct services and educational programmes. He played a key role in setting up the Institute's first lecture series that year, establishing an Education Committee, and arranging regular lunches with guest speakers covering topics in arbitration.

Momentum slowed in subsequent decades due to the turbulent global economy into which it was born, the First World War, the Great Depression, and later the Second World War. Despite these challenges, the Institute made a number of notable developments during this period in raising its profile as an organisation and the profile of arbitration as a dispute resolution process. It was incorporated as a company limited by guarantee in 1925 and it established its first international branch in Sydney in 1927 marking the first step in the creation of a global network of branches.

The period between the world wars may be characterised to a large extent by the redirection of the Institute's focus towards the international arena under the presidency of Lord Askwith. During his presidency between 1933 and 1942, Lord Askwith became one of the CI Arb's renowned pioneers by contributing to a number of landmark developments. Under his leadership, the Institute played a major role in securing the passage of the long-awaited 1934 Arbitration Act, to succeed the previous enactments dating back to 1889; and it collaborated actively with other bodies including the London Court of Arbitration and the American Arbitration Association. Towards the end of the 1930s, judicial support for arbitration was increasing as courts began to stay proceedings and refrain from setting aside awards. Indeed the Institute was making advancements on a number of fronts during this important period in its history.

The tragedy that beset the world with the onset of the second world war had a devastating impact on the global economy. In its aftermath, Institute's steady progress ground to a halt. Amidst a stagnant atmosphere in international trade and in the absence of any concerted effort to pursue the CI Arb's international vision, the Institute floundered. Activities in the area of professional education and the articulation of new ideas also ebbed, in the decades which followed.

Thankfully, in the 1960s, the tide turned and with renewed determination on the part of the Institute's members and leadership the Institute was re-energised and refocused on promoting the benefits of arbitration on a global scale. The Journal, which was the circulatory system for the themes and ideas of the Institute took up this cause in earnest and encouraged members to look beyond the confines of the United Kingdom, towards the promotion of arbitration and the Institute around the world.

Bill James took the reins in 1970 with an unrivalled ambition and fervour for the Institute's educational activities. During his presidency, the focus of the Institute's training was expanded to encompass the study of an array of important arbitration issues, such as the role of the expert witness, and the Institute's examinations were re-introduced.

Bill foresaw that an increase in the membership and scope of the Institute's activities would enhance the CI Arb's influence and potential. He pursued links with consumer bodies interested in devising their own consumer arbitration schemes, and promoted arbitration on the widest scale, beyond the confines of the construction realm in which most English domestic arbitrators had comfortably settled. The significance of Bill's efforts in this respect cannot be overstated. The use of international arbitration in other areas of commercial law, ranging from intellectual property to shareholder disputes, demonstrated the flexibility and reliability of arbitration as a dispute resolution process for the needs of the global business community.

The 1970s were characterised by the rapid transformation of the Institute from an association into a dedicated professional organisation. This was achieved by the appointment of a full-time Secretary, the substantial expansion of the organisation's membership and by developing close ties with the London Court of Arbitration. The CI Arb looked beyond the confines of the construction industry and devised initiatives in other areas of commerce. The Education Committee was re-constituted and evening lectures and discussion meetings were revived.

This decade of activity raised the Institute's public and professional profile leading to the grant of a Royal Charter in 1979. The Royal Charter described the CI Arb's vision of promoting arbitration and equipping practitioners to meet the demands of international commerce, as follows: *"the promotion and dissemination as a learned society, of a wider knowledge of private dispute resolution by means of meetings, conferences, seminars and lectures and by the publication of relevant materials, including a journal and other literature"*.<sup>5</sup>

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<sup>5</sup> Ibid 22.

Further developments were made on the education and training front under Chairman Gordon Hickmott. A new method of assessment was devised which involved solving practical procedural problems that occur in arbitration, and a greater emphasis was placed on written questions. This mode of assessment laid the foundations for the currently used scenarios and questions in the International and Domestic Accelerated Route to Fellowship Courses. The program that was offered globally was part of a scheme to ensure that candidates for Fellowship of the Institute were assessed in any part of the world in the same format and on the same standards. As a result of the consistent standard of accreditation of fellows and arbitrators worldwide, the Institute is today acknowledged as providing "Gold Standard" training and accreditation. This is a unique achievement of the Institute, which continues to impress us today, and sets the Institute apart from other arbitration and dispute resolution bodies around the world.

It is also important to note the contribution of Cedric Barclay (a giant of International Arbitration in London), president of the Institute in 1969, who raised geographical expansion to the top of the agenda. Barclay encouraged members to attend international conferences and himself arranged a visit to the Third International Arbitration Conference in Venice, and the Fourth Conference in Moscow. His efforts culminated in the establishment of an International Committee in 1973, whose objective was to venture into previously uncharted territories. The geographical expansion of the Institute was supremely important, given the capacity of commercial arbitration to resolve international disputes and the need to have a global presence in order to take advantage of this capacity. Due credit must be given to Barclay for his role in inspiring such an expansion.

The chapter of the CI Arb's history from 1970 onwards is characterised by its rapid advancement towards its goal of achieving a global presence.

The East Asia Branch of the Institute was established in 1972, when the Institute had 2,200 predominantly English members. At the forefront of the developments in the global economy were rapid advancement by Asian economies, particularly in China, and increasing international interest in oil and gas exploration. During this time, the membership of the Hong Kong chapter flourished and for a time, greatly exceeded the membership in neighbouring Asian chapters, such as in Singapore and Malaysia.

The dawning of the 80s saw Ray Turner appointed as Chairman and in the same spirit as his predecessors, he set up a working party dedicated to the pursuit of geographical expansion of the CI Arb's presence and activities. This fruitful initiative led to the founding of branches in Ireland, Kenya and New Zealand. Meanwhile, the East Asia branch, based in Hong Kong, continued to grow, cementing its position as a hub for arbitration in Asia. Amongst other benefits, Hong Kong enacted new arbitration legislative provisions in 1982, which were aligned with their English roots but embraced the Chinese tradition of conciliation, which was widely employed by the local business community. In this way arbitration in Hong Kong catered for both its local and foreign partners.

The significant landmark of the late 20th century was, in my view, the ratification of the UNCITRAL Model Law on International Commercial Arbitration in 1985, and any discussion of the past century that omits this milestone would be incomplete. The Model Law sought to draw together the range of legal traditions

around the world at a time when the existing frameworks and rules for arbitration were skewed heavily in favour of European legal procedure and jurisprudence. For arbitration to achieve a truly global reach and presence, it was essential to offer a process that accounted also for the legal traditions of countries, developing and otherwise, with civil law legal systems outside Europe that lacked a tradition of International Arbitration.

A notable achievement by the CI Arb in the 90s was the renovation of its system of governance to promote efficiency in decision-making and broader representation of the Institute's multicultural membership in the Council. These advancements were instigated first by Sir Michael Kerr and later pursued by subsequent presidents including Ronald Bernstein and Kenneth Severn.

Pursuant to this theme of global representation in governance, regional representatives were elected to the council. Foreign branches were given increased autonomy and the two new offices of overseas vice-presidents were created in 1994 and 1996 to give greater standing to its international members in governance. Finally, the CI Arb established a 10-person executive board accountable to the Council.

In addition, the Institute was registered as a not-for-profit charity in 1990. This is a core element of the Institute's character and attests to the commitment of its members to the service of the business and legal communities. The Institute's members and leaders have long been driven by a sense of service rather than self-interest, and this has preserved the integrity of the CI Arb and will continue to do so in the years to come.

Further developments in the CI Arb's governance were fostered in 1999 as the position of president was transformed from an honorary position to an elected role. In the performance of their ambassadorial role Presidents from this point onwards could expect to have a high level of involvement in all areas of the Institute's activities.

The Institute remained a dynamic organisation, which has continued to grow in the 21st century. Notably, on 28 February 2005, the Royal Charter was revised to implement a number of fundamental changes. Importantly, the Council was replaced by a fully elected board of trustees numbering 12 members, half of whom represented regions of the world outside of the UK, the status of Chartered Arbitrator was introduced, and the office of Honorary President was replaced by the honorary office of Patron. The revision of the Royal Charter was one of the final steps in internationalising the CI Arb and securing global representation in its governance.

The CI Arb has expanded tremendously throughout Asia, not to mention Africa, Continental Europe, and North America, with branches now rooted in East Asia and Southeast Asia, including Malaysia, mainland China, Hong Kong, Taiwan, Indonesia, Japan, North Korea, the Philippines, Singapore, South Korea, Thailand and Vietnam. Let me now take a moment to highlight some of the milestones in Asian arbitration in recent decades.

First, I would like to take this opportunity to discuss the development of arbitration in Malaysia. In recent years, Kuala Lumpur has emerged as a leading venue for arbitration in the Asia-Pacific region.

In furtherance of the CIArb's global mission, in 1989, Maurice Pleasance travelled to Malaysia to encourage its members to form the Malaysian Branch. Conferences were still a major part of the Institute's strategy for disseminating information on arbitration and other methods of dispute resolution. Notable conferences include the Alternative Dispute Resolution (ADR) conference organised by the Malaysia branch in 2008, when the keynote address was given by the country's prime minister, and the Asia-Pacific Conference held in Sydney in 2011. The Malaysian branch has been at the forefront of ADR and has actively promoted Malaysia as a venue and the CIArb as a global brand in ADR. The Malaysian government's recognition of the CIArb as a key player in reforming the ADR landscape is reflected by the invitation by the Malaysia Attorney General's office for the CIArb to assist in drafting the Arbitration Act 2005. Further developments worth mentioning include the Institute's continuous collaboration with the International Islamic University Malaysia (IIUM). Indeed, the CIArb has positioned itself as a prominent driver of arbitration in Malaysia.

The KLRCA was one of the earliest regional arbitration institutions in the Asia-Pacific region, established in 1978. Although its development was more gradual than some of its Asian counterparts, active growth in recent years has seen the KLRCA rocket towards all-round success and distinguish itself from other arbitration institutes, most notably, through the recent launch of the KLRCA i-Arbitration Rules. The KLRCA received international recognition for these rules, the pinnacle of which lay in its receipt of the prestigious Global Arbitration Review Award for 'Innovation by An Individual or Organisation in 2012' at the 3rd Annual GAR Awards in Bogota, Colombia. The Rules facilitate arbitration that is premised on Islamic principles but which is suitable for international commercial transactions and recognised and enforced internationally. The i-Arbitration Rules are perhaps the most recent innovation towards further internationalising commercial arbitration, and venturing into the previously uncharted waters of Islamic finance and Shariah based commercial transactions.

Other remarkable achievements include the KLRCA's amendment of the KLRCA Fast Track Arbitration Rules as well as its commitment to maintaining a high standard of ethics, having signed a Corporate Integrity Pledge in 2013 and incorporated anti-corruption provisions into its Code of Conduct last year. These accomplishments are factors in the KLRCA's success and a testament to the KLRCA's leadership by example in the field of international arbitration, in recent years.

The Hong Kong International Arbitration Centre was opened in 1985 and the Singapore International Arbitration Centre was opened in 1991. Both institutes are highly desirable arbitration venues for disputing parties. One of the key markers of SIAC's growing importance in the region has been the sizeable increase in its caseload and the introduction of revised Arbitration Rules, which came into force in April 2013.

Hong Kong has long been referred to as the bridge into Asia and is a desirable venue for disputing parties from both common law and civil law backgrounds. Its unique position has fuelled a sharp increase in filings in the Hong Kong International Arbitration Centre. The position of the HKIAC has been further boosted by its "Administered Arbitration Rules" revised most recently in November 2013. Some of the key

amendments include new provisions for the appointment of an emergency arbitrator, expedited arbitration procedures, the ability to consolidate multiple HKIAC arbitrations into a single arbitration, and provisions for claims under multiple contracts in a single arbitration.<sup>6</sup>

The Indian branch of the CIArb is also progressing, notwithstanding some of the differences in approach taken by the courts in arbitration matters. India has strengthened its pro-arbitration culture through reforms to the arbitration regime, which limit the grounds for judicial intervention. India's enforcement regime of arbitral awards has long been problematic, despite being a signatory to the New York Convention, as the Indian Arbitration and Conciliation Act 1996 recognises only awards made in a Convention country that has also been added to the Indian Official Gazette to which the Convention applies.<sup>7</sup> Although the Gazette currently contains around one-third of the New York Convention signatories, it was promising to see China and Hong Kong 'gazetted' in March 2012, making awards rendered in those two countries capable of being recognised and enforced in India.

Arbitration in China has boomed in the past decade and there are now over 160 arbitration commissions throughout China. Since the enactment of the Arbitration Law in 1994, key amendments have been introduced to strengthen the Chinese arbitration regime in two important respects; first, the statutory grounds upon which the Chinese courts can refuse enforcement of domestic arbitration awards have been narrowed, and secondly, parties to an arbitration may apply to Chinese courts for interim relief prior to the commencement of arbitration proceedings. Admittedly there has been some volatility in recent years, marked in particular by the change in structure of the China International Economic and Trade Arbitration Commission (CIETAC).

The Beijing Arbitration Commission continues to enjoy a great reputation among the business and legal community in China and has been growing rapidly in recent years. In 2013, BAC circulated the new Draft BAC Arbitration Rules for public comment aiming at revising its existing Rules published in 2008. The draft includes a number of improvements to the existing rules, and efforts were made to align the rules with the latest developments of arbitration rules of other renowned arbitration bodies in the world such as the ICC International Court of Arbitration. Proposed changes relate to: the written agreement requirement, consolidation of arbitrations, and emergency arbitral tribunals. Other leading Chinese institutions, including CIETAC and the China Maritime Arbitration Commission (CMAC) continue to offer first rate institutional support to disputing parties in this region.

The South Korean Chapter of the CIArb was opened in May 2012 and has enjoyed a large degree of support and activity. A high level of interest among students, lawyers and Korean companies has helped progress toward the establishment of a local branch, as well as support from the Korean government. Following the opening of the Seoul International Dispute Resolution Centre in May 2013, Seoul offers the business community another alternative to existing arbitration venues. Korea's recent entrance into a number of free-trade agreements with the US and Europe has begun stimulating the growth of arbitration

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<sup>6</sup> see HKIAC Administered Arbitration Rules 2013, Articles 28, 29, 41 and Schedule 4.

<sup>7</sup> see Part II, Chapter I, Arbitration and Conciliation Act, 1996.



in Korea. As these important economic arrangements promote international trade with Korean companies, there is little doubt that the Seoul International Dispute Resolution Centre will play a vital role in administering international disputes in the future.

Australia's major entrance onto the international arbitration scene was recent. Following the CIArb's Australian branch initiatives to garner government and judicial support, the UNCITRAL Model Law was adopted fully in Australia's International Arbitration legislation and since then, Australia has developed a sturdy pro-arbitration culture. In 1995, the Australian Centre for International Commercial Arbitration (ACICA) and the Australian International Commercial Disputes Centre (AIDC), joined in a co-operation agreement with the CIArb, to carry out statutory functions as the sole appointing authority for the purposes of the International Arbitration Act.<sup>8</sup> Since then, ACICA has played a leading role in promoting arbitration throughout Asia and raising the profile of the Australian arbitration. The use of the Model Law for both international and domestic commercial arbitration legislation has ensured that arbitration in Australia is in line with best practice and the highest international standards. Collectively these characteristics make Australia yet another highly desirable and reliable option for disputing parties in the Asia-Pacific region.

This history brings us to the present and to an age wherein arbitration enjoys supremacy as the dispute resolution process of choice for cross-border commercial disputes. Looking back at the history of the CIArb, we celebrate the diligence and innovation of the Institute's leaders and its members. These stories of the past serve to instruct us and to inspire us to move forward. In exploring the coming century for the CIArb we must ask: What challenges lie ahead and what trends can be predicted in international commercial dispute resolution?

## **Challenges Ahead**

### ***Arbitration and Mediation***

Let me start with mediation, which should be watched keenly in the coming decades. Mediation continues to increase in popularity and use as an independent process and in conjunction with litigation and arbitration. The rise of mediation is due in no small part to the increasing demands placed on the limited resources of courts and tribunals. This rings true in common law jurisdictions, where a flood of court filings has led, in many places, to mandatory court-referred mediation. This process was approached by counsel with scepticism in its early years, but its effectiveness in resolving disputes and the high levels of party satisfaction associated with the outcomes has led to a willingness amongst counsel to respect the integrity of the process and to consider mediated outcomes wherever possible. Court-referred mediation has been adopted in the US<sup>9</sup> and in Canada,<sup>10</sup> amongst other countries. The implementation of mediation in these countries has had a positive impact on their domestic jurisprudence, and a departure from the historic adversarial mindsets of the past in favour of collaborative processes of the present and future.

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<sup>8</sup> International Arbitration Regulations 2011 (Cth).

<sup>9</sup> See for example section 1775, California Code of Civil Procedure.

<sup>10</sup> See for example section 24.1, Ontario Rules of Civil Procedure (R.R.O. 1990, Reg. 194).

The increase in the number of voluntary mediations since the scheme's introduction in Australia serves to illustrate this point.

One important characteristic of mediation is its capacity to resolve disputes whilst maintaining positive business relationships between the parties. The adverse impact of protracted litigation or arbitration is no mystery. Where disputes arise between commercial partners, a collaborative as opposed to an adversarial approach to resolving them is more conducive to the maintenance of strong commercial relations. Mediation is also conducive to reaching innovative solutions and remedies, which encompass an infinitely broader array of options than those remedies available to parties in arbitration or litigation.

I do not however wish to paint a wholly idealistic picture of mediation. Its non-adjudicative character and the reliance on good faith and trust between the parties can lead to justifiable limitations on, and criticism of the process.

The differences between mediation and arbitration are fundamental. One has a consensual outcome, the other an imposed one. The skill sets deployed by third party neutrals in the two processes are distinct. Many neutrals practice as one or the other and not both. The combination of the processes, at least by the same neutrals, is controversial but one which deserves exploration when looking ahead.

Mediation in conjunction with arbitration known as med-arb or arb-med is widely used in China. These processes raise conflict of interest issues, which have long been debated by international commentators. These innovative hybrid dispute resolution models are deserving of recognition and have proven successful in many cases. The view that an arbitrator who was present in mediation proceedings is best placed to determine arbitration proceedings between the parties is worthy of further exploration.

Such processes are not unknown in common law jurisdictions. In the state of New South Wales, Australia, the hybrid 'med-arb' process has been used successfully under a statutory scheme for workers' compensation.<sup>11</sup>

Developments in mediation and conciliation have also taken place at the international level, with the UNCITRAL Model Law of Conciliation being promulgated in 2002. One of the main obstacles for international mediation remains the enforceability of a mediated settlement, in contrast with the enforceability of arbitral awards under the New York Convention. The Convention's ratification worldwide has been critical to the success of international arbitration. Mediation's success and advancement as a complement to international arbitration will depend upon initiatives to develop a solid international framework for the conduct of mediation in international disputes and for cross-border enforcement of the settlements reached therein.

The UNCITRAL Working Group on Arbitration and Conciliation met earlier this year and continues in its endeavours to develop a Convention on the international enforcement of commercial settlements. At its meeting in New York in February, the Working Group considered the legal and practical issues

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<sup>11</sup> see Workplace Injury Management and Workers Compensation Act 1998 (NSW).

associated with developing such an instrument.<sup>12</sup> The Group considered that the New York Convention could provide a useful basis in doing this, although it was recognised that there are distinct issues raised by the enforcement of settlements, which will need to be addressed. The Group identified a number of issues including the lack of domestic legislation for enforcing settlement agreements in many nations worldwide.

It can be predicted with confidence that mediation will play an important part in international commercial dispute resolution in the years to come. Its effective combination with both arbitration and other forms of international dispute resolution such as dispute boards, will be one of the significant challenges for the future.

### ***Domestic Commercial Courts***

Another trend which has made great headway in recent decades has been the birth of national courts specialising in commercial, construction and technological matters, around the world, such as the English Technology and Construction Court, the Singapore International Commercial Court and the Dubai International Financial Centre Courts. Specialised courts are increasingly demonstrating their capacity to resolve complex disputes expeditiously, so as to rival the efficiency that arbitration has long claimed to offer. Judges in specialised courts have developed the technical expertise in specialty areas of the law that is necessary to deal with complex and highly technical factual disputes. They rival the once distinct industry expertise that was the province of arbitrators alone.

Not only are specialised courts able to compete with the benefits that arbitration has long claimed to distinguish it, but they carry the advantages of the sovereign powers they wield, and the freedom from many of the constraints for arbitral tribunals as creatures of contract. Among the foremost of these is the difficulties faced by arbitral tribunals in conducting multi-party arbitration. Difficulties of this sort arise frequently in string contracts, which often feature arbitration clauses in some and not all of the contracts. The limited ability to consolidate proceedings and to join additional parties has long been a hurdle for arbitration, but not for courts with their compulsive powers of joinder and consolidation. The challenges of string contracts are particularly prominent in the construction industry; and the English Technology and Construction Court is an example of a specialised court easily able to overcome these challenges in contrast with arbitral tribunals, which are confined to the ambit of the arbitration agreements under which they are constituted.

The success of specialised Courts and their increasing viability for resolving international disputes raises the question of whether the monopoly that arbitration holds over international enforceability, by virtue of the New York Convention,<sup>13</sup> will enable it to remain the preferred international commercial dispute resolution process in the future. The enforcement of foreign judgments among common law countries is relatively straightforward and increasingly liberal among close trading partners. Elsewhere, regional arrangements are growing apace, and The Hague Conference is considering a renewed effort to

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<sup>12</sup> see UNCITRAL Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015).

<sup>13</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

establish a multilateral judgments convention, following the promulgation in 2005 of a Convention for judgments issued in business disputes in which the parties had included exclusive jurisdiction agreements in their contracts.<sup>14</sup> Designed as a counterpart to the New York Convention for court judgments, the Choice of Court Convention has yet to be ratified by enough nations to be implemented, but its implementation would be a major step towards securing an instrument for the international enforcement of selected court judgments.

The parallel initiatives of the DIFC Courts and the Singapore International Commercial Court to seek enforceability of their judgements aims at entering into reciprocal memoranda of understanding with courts of other jurisdictions thus creating a network of jurisdictions in which their judgements will be enforceable with relative ease.

The New York Convention has given international commercial arbitration a monopoly on the resolution of cross border disputes but as the issues with the enforceability of the judgements of these commercial courts fade, arbitration will need to find ways to remain competitive.

### ***Investor-state dispute settlement***

Investor-state dispute settlement is another feature of the international arbitration landscape which has grown in prominence in recent decades, mainly due to the inclusion of arbitration clauses in modern bilateral and multilateral investment treaties. The rationale for investor-state arbitration is the protection of investors from the regulatory opportunism of governments, for example, in circumstances where a foreign investor is persuaded to invest with promises of a stable and favourable economic and legal framework, only to have that framework altered to its disadvantage. The primary administering institution of investor state arbitration is, of course, the International Centre for Settlement of Investment Disputes (ICSID). However, the rapid increase in its use, and the public sensitivity of the issues it addresses, has generated a range of controversies – from forum shopping, inconsistency in decisions, and a strident political backlash. I will briefly touch on some of these issues and the challenges they present for us today.

The increasing globalisation of production and investment has stimulated the formation of a large number of Investment Treaties and as a result, investors who are seeking to pursue claims for damages often have a choice of fora. The availability of choice has encouraged parties to bring their claims in the fora considered most advantageous in the circumstances. Forum shopping increases the likelihood of the same facts being brought before parallel and multiple proceedings in different tribunals. Parallel proceedings litigated in different fora not only multiply costs and waste dispute settlement resources but also carry the risk of rendering conflicting decisions and awards, resulting in international business disputes becoming more unpredictable.

A single crisis can give rise to a multitude of claims by investors. An unfortunate consequence of the proliferation of separate arbitrations is that tribunals can reach starkly different conclusions on similar or

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<sup>14</sup> Hague Convention on Choice of Court Agreements concluded at the Hague Conference on Private International Law, 2005.

even identical issues. Arbitration's roots in private commercial disputes has not readily supported a foundation for a hierarchy of tribunals or a tradition of stare decisis that would promote order in plethora of inconsistent results.

A useful illustration of this problem arises from the Argentine economic crisis between 1992 and 2002. As a result of that particular event, over 47 ICSID claims were brought against Argentina to determine whether the crisis constituted a State of necessity. The result was two different arbitrations brought against Argentina, in which the two tribunals reached opposite conclusions on the availability of the necessity defence despite almost identical facts and pleadings.<sup>15</sup>

This clash of decisions undermines the certainty of the outcomes in investor-state arbitration and calls into question the quality of justice rendered by arbitral tribunals. This problem is amplified in times of crisis where multiple claims on the same facts are commonplace. Without an accepted principle of stare decisis in investor-state arbitration, tribunals are not bound to follow decisions of earlier tribunals where the present facts and issues are similar or identical. And the laudable publicity of the results of these tribunals provokes public concern over the legitimacy of arbitration as a means of deciding these controversies. If the inconsistency of awards causes parties and the wider public to lose faith in the Investor-State Dispute Settlement System, the system's utility will be significantly reduced.

One possible solution lies in creating provisions for the consolidation of multiple proceedings into a single arbitration. This would eliminate potential for inconsistent decisions and the inefficiencies inherent in holding multiple arbitrations on the same facts and issues. Neither the ICSID Convention or ICSID Arbitration Rules contain any clear guidance on the formal consolidation of parallel arbitral proceedings. Without amending the ICSID Convention, which would be extremely difficult from a political standpoint, facilities for consolidation could be achieved through provisions in individual investment treaties. This has been an emerging trend in the drafting of Bilateral Investment Treaties and Free Trade Agreements. For example, Article 1126 of the North American Free Trade Agreement (NAFTA) provides for the consolidation of proceedings where a tribunal that has been constituted to determine the question, is satisfied that other claims that have been submitted to arbitration that have common questions of law or fact.

Alternatively, replacement of the current appeals mechanism with a more robust and formalised mechanism for annulling awards on various grounds has been suggested. Inconsistency with another decision is not currently a valid ground for annulment of an award, but such a ground could serve to promote the uniformity of investor-state arbitration decisions.

Although it is unclear what the future holds for investor-state dispute settlement, the resolution adopted on 6 April 2011 by the European Parliament based on a report by the Committee on International Trade gives a strong indication of the European position on the current model.<sup>16</sup> The report shows a clear

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<sup>15</sup> *CMS Gas Transmission Company v. The Argentine Republic* (2005) ICSID Case No. ARB/01/8; and *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (2007) ICSID Case No. ARB/02/1.

<sup>16</sup> EU Resolution 2010/2203(INI).

inclination towards weaker investment protection in future European investment treaties. Instead, the resolution emphasises the need to strengthen host States' power to regulate and implement their policy choices in sensitive areas without the hindrance of treaty-based standards of investor protection. In particular, the EU Parliament has called for a clearer definition of the protected investments and investors, with the view that 'speculative' forms of investment shall not be protected and that 'abusive practices' should be abolished. The resolution seeks to frame National Treatment and Most-Favoured Nation clauses more precisely so as to focus on circumstances in which foreign and national investors must operate. It also aims to reduce Fair and Equitable Treatment to the minimum customary international law standard and to modify the provisions protecting against direct and indirect expropriation in order to establish 'a clear and fair balance between public welfare objectives and private interests'.

Indeed there is a wide range of proposed modifications to the current Investor-State Arbitration model and potential solutions to the challenges at hand. Although the future is uncertain, it is clear that innovation will be critical to develop and implement effective solutions to these challenges.

In the midst of the debate there is in my view a very real risk that the fundamental distinction between Investor-State Arbitration and commercial arbitration will be lost and commercial arbitration will suffer as a consequence. This would be most undesirable.

### **CIArb - The Future**

Given these challenges, what role should the CIArb play in shaping the way forward? As I stated earlier, mediation is a process which has attracted a surge of interest in the last decade. The CIArb has endorsed mediation in its capacity as an alternative and as a complement to arbitration. The Institute is renowned as an accreditor of mediators and it provides courses and modules in mediation around the world. In this regard, the Institute's horizons have expanded toward the promotion of mediation as a form of private dispute resolution that offers distinct benefits. The role of mediation along with arbitration will no doubt be furthered in coming years, and it is my belief that this will be championed by the Institute through its activities and by arbitrators themselves who are beginning to experiment increasingly within their mandate. In the same vein, the legal community will look to hybrid dispute resolution processes and explore the benefits that these options can offer to disputing parties.

In light of this, it is my view that the grand landscape of international dispute resolution is set to expand in future years, as new options and features continue to emerge and take their place within it. The CIArb will bear great responsibility for maintaining the high regard around the world for international commercial arbitration, which is essential to its survival in a competitive environment in which new players and rival institutions have begun to emerge.

To pursue this, the Institute must continue to innovate in its educational offerings to the legal profession and it must update and maintain the highest standards for its assessment of candidates for accreditation. Its activities in this arena must ensure that accredited arbitrators are highly competent, reliable and

trusted by the commercial community. A well-rounded profession with a high level of knowledge and expertise is achieved not only by delivering courses and modules but also by holding conferences and networking opportunities all year round. Continued advancement by the CI Arb in this direction is essential for the long-term growth and perhaps even the survival of international arbitration as a leading method of private dispute resolution. The publishing of practice notes and guidelines has contributed and continues to contribute to the maintenance of standards in international arbitration, and the Institute's activities in this respect should also be pursued further.

Looking ahead, the Institute must not be a static organisation confined to its present activities and objectives. It needs to continue to demonstrate the innovation upon which its past success was founded. A recent initiative by the ICC in establishing the Young Arbitrators Forum should be applauded as it recognises the need to promote arbitration amongst younger practitioners. I recently attended a dinner in Hong Kong for young practitioners and students hosted by HK45, a body under the HKIAC, and a spirited discussion was had about a range of arbitration issues. Initiatives such as these provide young practitioners with the opportunity to establish professional networks, equip themselves with the knowledge and skills necessary for practice, and to ventilate new concepts and ideas and subject these to critique and discussion. Initiatives directed at younger practitioners are an emerging trend around the world and this trend presents an opportunity upon which the CI Arb should capitalise.

The CI Arb is an international ADR learned society and an accrediting body. Uniquely so. Concentrating on and strengthening this should enable the CI Arb to play a key role in the century to come.

But how will this be accomplished?

### ***Membership***

Over the years, the CI Arb has sought to confer membership on those seeking to be arbitrators and mediators. Hence Alan Davson's succinct statement quoted at the commencement of this address. It is suggested that this ignores the fact that the domestic and international ADR community is a large field including many active contributors who do not immediately, or ever, aspire to be arbitrators or mediators. I have in mind counsel, young lawyers seeking to establish a career, students, commercial managers, experts, and in-house counsel to name a few. Many such people will not seek to become third party neutrals but will play important roles in the process of resolving disputes. For the Institute to encourage them to seek to be educated and accredited as third party neutrals will raise unrealistic hopes, and will fail to foster in them the capacity to serve well in other roles.

The issue is not just about finding more members for the CI Arb, useful though that may be. It is about achieving two quite important objectives. The first is providing relevant training and accreditation to as many members of the ADR community as possible. The second is including within the Institute's membership perspectives on arbitration broader than those of arbitrators and mediators thus enriching all of the CI Arb's activities, including its CI Arb's standards; and adding significantly to its credible outreach.

Beyond this, by taking the lead in expanding the scope of education beyond counsel and arbitrators the CI Arb will contribute to more effective international commercial dispute resolution.

### ***Education and Accreditation***

The CI Arb has established a series of pathways to membership. It is suggested that the time has come to revise them with the objective of providing opportunities for meaningful membership of the CI Arb to members of the ADR community who do not seek accreditation as third party neutrals. The design of such courses and the establishment of appropriate accreditation upon successful completion will be a significant challenge but if grasped and pursued with determination, it has the potential to move the CI Arb to a new level.

Moving into this area raises immediately the heavy involvement of universities in ADR training. Post-graduate courses in international dispute resolution abound around the world. To a degree, the CI Arb is both a competitor of, and collaborator with, these institutions. Some of the Institute's courses (such as its Diploma in International Commercial Arbitration) compete with the diplomas and degrees offered by universities.

The key to the Institute's success will be its capacity to have its membership "qualification" recognised as desirable and credible. In this regard it will be important to keep in mind a critical distinction between the CI Arb membership qualification and a university degree. The membership qualification entails an ongoing commitment to the Institute, including the payment of membership dues and an ongoing responsibility to maintaining the standards of the CI Arb and contributing to its work, not just an entitlement to membership benefits. The linking of the membership qualification to continuing professional development will be critical to distinguishing it from an institutional degree. The CI Arb will need to find ways to promote and facilitate this.

### ***Thinking Globally Acting Locally***

The Institute has come a long way from its roots in the UK construction industry. Its unique strength lies in its global outreach. Looking forward, it is apposite to ask whether its financial structure and its administrative base in London should be assumed to be appropriate for the decades ahead.

There is little doubt that its Chartered status provides an international recognition of considerable value. And all international organisations need a base, not just for administration -- "home" if you will. Of concern though is the inevitable tension between "head office" and the branches, and the imperative for the CI Arb to extend its relevance beyond its English-speaking base to other legal traditions and cultures. That the Institute's next two Presidents will be from Asia and the Middle East (and that one will be the leader of a prominent arbitral institution, and the other a woman highly respected in arbitration) is an eloquent expression of the strides that the CI Arb has made to internationalise. It would be easy however to be lulled into complacency by this quite remarkable circumstance.

Questions needing careful consideration include:



- Should more of the CI Arb administration be decentralised?
- How can the sometimes unhelpful impression of Bloomsbury Square bureaucracy be overcome?
- How to maintain the consistency of international standards of accreditation?
- Can the enthusiasm of the branches be harnessed and deployed to global advantage within the existing financial and management structure?

### ***Learned Society***

For a number of years when I first became a member, my main encouragement to remain a member was the Journal. It remains a strong statement of the CI Arb's commitment to its mandate as a learned society. There is, however, much more that can be done to further this aspect of its activities.

As part of its leadership role in the field of international ADR, are the Guidelines and Protocols published by the CI Arb. These guidelines set standards and create opportunities for innovation in the practice of ADR around the world. The establishment of standards that are widely accepted and adopted demonstrates real intellectual leadership. Whatever may be said about "soft law", it can be an important force for coherence in international practice.

Much more can and should be done to modernise and extend the reach of the Institute's body of standards and in doing so, engage with the international community.

Pursuing research and leadership in the debate on key issues within the practising community and governments should be fostered. As a learned society whose focus is on alternative dispute resolution, the CI Arb could contribute much to important international debates such as that on ISDS (particularly in maintaining the difference between that and commercial arbitration) through the dissemination of information and the support of lively discussion among the global business, legal and political communities. Through collaboration with the European Parliament, the International Chamber of Commerce and domestic law reform bodies, the CI Arb will contribute its learned views, based on empirical studies and scholarly debate, towards formulating solutions to the challenges of today. With over 13,000 members in over 120 countries, the CI Arb is in an optimal position to inspire and effect change on a global scale.

### ***An International Regulator?***

There has been a recent debate about the regulation of standards and conduct in international commercial arbitration.<sup>17</sup> This has occurred in the context of the publication of the IBA Guidelines on Party Representation in International Arbitration in 2013 and the recent amendments to the LCIA Rules.

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<sup>17</sup> ASA Board, Comments and Recommendations by the Board of the Swiss Arbitration Association on IBA Guidelines, 4 April 2014; Sundaresh Menon, Some Cautionary Notes for an Age of Opportunity, 2013; and Sundaresh Menon, Keynote Address to 2012 ICCA Singapore Congress, International Arbitration: The Coming of a New Age?, *ICCA Congress Series (Kluwer Law International 2013)*.

The CIArb has a credible, well-established system for the regulation of the conduct of its members and a disciplinary process that is rigorous and transparent. As a membership organization, this makes it unique among ADR bodies around the world in assuring the standards of conduct of its members. Additionally its global reach is unmatched.

This demonstrated competency could qualify it to serve the larger community in such a role with the endorsement of other leading arbitral organizations, whose mandates may not be consistent with doing so, and professional bodies with limited geographical authority.

## **Conclusion**

There can be no assured future resting upon past success. There is a however a strong foundation upon which the CIArb can build. The opportunities are plentiful, indeed challengingly so. In this address I have sought to move from the past to the future and to sketch some streams of potential development for the Institute in the context of today's international ADR challenges.

For all of us who find the organisation one in which we consider it worthwhile investing, I trust sharing these thoughts will be of value.