The CIArbbean News

QUARTERLY NEWSLETTER

of the Caribbean Branch of the Chartered Institute of Arbitrators

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BRANCH CHAIR SEEKS IMPROVED COMMUNICATION

Dear Reader,

On behalf of Ms. Shan Greer, the Chair of the Caribbean Branch Committee of the Chartered Institute of Arbitrators (CIArb), it is my pleasure, as the Chairman of the Newsletter and LinkedIn Sub-committee, to welcome you to the first edition of The CIArbbean News. This quarterly newsletter is aimed at keeping you informed on the activities of the Caribbean Branch and its Chapters and on the development of arbitration and ADR in the Caribbean.

In her letter to the members of the Caribbean Branch, circulated in August 2017 and outlining the 2017 – 2018 Branch Plan, Ms. Greer acknowledged the exponential growth of the Caribbean Branch and the progress made in executing its mandate to promote and represent CIArb, its services, arbitration and alternative dispute resolution (ADR) throughout the Caribbean area and to arrange, promote and conduct technical activities, training courses and sensitisation programmes on behalf of CIArb.

However, Ms. Greer also recognised that the mandate to provide the existing Branch members with networking opportunities is one of the areas which requires some work and she wrote:

"*To this end, the Branch will be implementing various initiatives that will seek to improve communication between the Committee and members as well as provide avenues for greater participation. The Branch will issue a quarterly newsletter and will also seek to encourage dialogue and interaction with its members on its LinkedIn page.*"

The Branch Plan she outlined, in addition to seeking to improve networking and information sharing opportunities, also seeks to achieve an increase in the diversity of professions represented within the membership of the Branch by working with the Chapters to offer training which is not limited to persons of the legal profession.

I thank the sub-committee members and the contributors for making this first edition possible. I hope each reader will enjoy reading it and future editions, be informed by the news and articles published, be motivated to share views and comments on the articles published and be inspired to submit articles and papers for future publication for the benefit and knowledge of fellow readers.

Yours faithfully,

Miles F Weekes

Chairman of the Newsletter & LinkedIn Sub-Committee

EVENTS DIARY

- 4 – 6 October 2017
CIArb International Arbitration Workshop - Accelerated Route to Membership Training Programme – The Lloyd Erskine Sandiford Centre, St. Michael, BARBADOS.

- 6 – 8 October 2017
CIArb International Arbitration Workshop - Accelerated Route to Fellowship Training Programme – The Lloyd Erskine Sandiford Centre, St. Michael, BARBADOS.

- January 2018
CIArb International Arbitration Workshop – GRENADA.

HAVE YOUR SAY

Readers are encouraged to share their views and comments on the newsletter and its content, and to promote and sustain its growth, by submitting original papers, views, opinions or information on related items of interest for publication in future editions.

The newsletter will be published on a quarterly basis on the first day of January, April, July and October and submissions, views and comments should be sent by e-mail to barbadoschapter@gmail.com

It may be necessary to edit lengthy submissions before publication in the newsletter and, in such cases, the full submission will be published on the Caribbean Branch's LinkedIn Group webpage.

KEEP IN TOUCH

The Caribbean Branch maintains a LinkedIn Group to promote inter-action and dialogue between the members. Please keep in touch by joining LinkedIn and the Group at http://www.linkedin.com/groups/8201202

WORK PERMIT EXEMPTIONS IN BVI

The BVI International Arbitration Centre (BVI IAC) has announced that the Government of the British Virgin Islands has passed the Labour Code (Work Permit Exemption) Order under which persons coming into the territory to undertake select classes of business will be exempted from the requirement of a work permit.

One class of business captured by this exemption is persons coming into the territory to participate in international arbitrations.

In the exercise of the power conferred under section 172(d) of the Labour Code, 2010 (No. 4 of 2010), the Government made the Order that Part X of the Labour Code, 2010, henceforth, will not apply to per- sons conducting, participating in (whether as legal counsel or representative of a party or as a witness or expert witness) or providing support services for the conduct of arbitration or mediation.

This means that arbitrators, mediators, legal counsel, parties, parties' representatives, witnesses (whether at the request of one of the parties or summoned to appear), translators, interpreters, stenographers, transcript writers, tribunal secretaries, tribunal and party-nominated experts, arbitral institutions' representatives and all other associated persons will be exempted from having to seek a work permit for a period of sixty (60) days in the first instance with extensions based on requests for extension.

The Government of the British Virgin Islands has been instrumental in the development of the BVI IAC and continues to play a very supportive role.

This latest pledge of support will ease the regulatory requirements of persons coming into the territory to participate in arbitrations thereby further enhancing the territory's international arbitration product.

This exemption to the Labour Code 2010 will ease the Immigration and Labour red-tape involved with coming into the territory to engage in the resolution of disputes for the above category of persons, thereby further positioning the BVI as a destination of choice for the resolution of international commercial disputes.

This is considered a momentous achievement, which will put the BVI IAC one step closer to achieving its vision of becoming the institution of choice for International arbitration and all other forms of dispute resolution in the Caribbean, Latin America and beyond.

The BVI International Arbitration Centre (BVI IAC) is an independent not-for-profit institution and was established to meet the demands of the international business community for a neutral, impartial, efficient and reliable dispute resolution institution in the Caribbean and Latin America.

A well run and well equipped 'state of the art' centre, together with the acknowledged quality of the BVI legal framework and the stable political environment offered by a British Overseas Territory, should enable the BVI to rapidly become a leading arbitration hub in Latin America, the Caribbean and beyond.

For additional information on the BVI International Arbitration Centre, visit www.bviiac.org

Submitted by Kate Mullan
British Virgin Islands

THE USE OF ADR IN JCT AND FIDIC BUILDING CONTRACTS

The following is an extract taken from a presentation made by Miles Weekes, the Chairman of the Barbados Chapter of the Caribbean Branch of CIArb*, at a Continuing Professional Development (CPD) lecture arranged by the Barbados Chapter of the Royal Institution of Chartered Surveyors (RICS) at the Barbados Hilton on 17 July 2017.*

This presentation will focus on the use of alternative dispute resolution (ADR) methods, particularly those methods used in the standard forms of building contracts issued by the Joint Contracts Tribunal (JCT) and by the International Federation of Consulting Engineers, known by its French acronym FIDIC. These two suites of standard forms are, in my experience, the two most popular forms used in the local industry.

The current 2016 edition of the JCT contract is issued in a minor works form (MW 2016), an intermediate form (IC 2016) and a standard form (SBC 2016), amongst others.

The current 1999 edition of the FIDIC contract is issued in a short form, sometimes called the Green Book, and a standard form, sometimes called the Red Book, amongst others.

The nature and composition of the JCT and FIDIC standard forms of building contracts are such that claims will arise; but the submission of a claim by a contractor or an employer, does not mean that a dispute has arisen. Claims submitted by one party to the contract must be addressed by the other party to the contract who will almost always be relying on the contract administrator, either the Architect or the Supervising Officer under JCT or the Engineer under FIDIC, to analyse and assess the validity of the claims and to make considered decisions.

It is when those decisions are made or delayed, or not considered, or not made at all, that a dispute can arise because a point of difference emerges between the parties, or as is said "a dispute crystallises", and this can lead to conflict and the need for dispute resolution.

In general, in contracts of all types, it is well understood that if there is a dispute then the party who alleges injury can sue the other party causing the alleged injury and seek damages as compensation for the alleged injury through the national court system by a process called litigation.

Litigation as a form of dispute resolution is well established but it is not as easy to implement as it may seem and particularly so in jurisdictions like Barbados where the court system appears to be clogged and inordinately slow.

In building contracting, where contractors and employers are dealing with and managing capital intensive projects, businesses and investments, the parties have often found the slow progress of litigation to be unsatisfactory, unless it is part of their deliberate strategy not to resolve disputes swiftly.

The need for different methods of dispute resolution therefore became a necessity and both JCT and FIDIC have responded to that need in their standard forms of contract by allowing for tiered or stepped alternative dispute resolution mechanisms.

These mechanisms are called 'alternative' because they are alternatives to litigation through the court system not because they are alternatives to dispute resolution. They are in fact very effective dispute resolution processes and do achieve effective results.

I have referred to them as 'tiered' or 'stepped' because both JCT and FIDIC, while allowing the parties access to more than one type of mechanism, sometimes makes the use of one mechanism a pre-condition to implementing a second mechanism, thus creating tiers or steps rising to the final binding resolution of the dispute.

Construction disputes invariably need to be resolved rapidly as a means of keeping construction projects moving forward and this need to resolve construction disputes quickly, even if only on a temporary basis, has led to the development of the intermediary tiers – some mandatory, some optional.

JCT in Section 7 of the Minor Works Form and in Section 9 of the Intermediate and Standard Forms allows for a three-tiered approach of optional mediation, optional adjudication and the mandatory final and binding choice of either arbitration or litigation.

FIDIC in Section 15 of the Short Form and in Section 20 of the Standard Form allows for a three-tiered approach of mandatory adjudication, optional mediation or negotiation and the mandatory final and binding arbitration.

The full text of this presentation can be read on the Caribbean Branch's LinkedIn Group webpage.

Submitted by Miles Weekes
Barbados

DISCOVERY AND CIVIL LAW SYSTEMS

A version of this article first appeared as a commentary on Discovery and Civil Law Systems, in the October 2006 issue of Mealey's International Arbitration Report. The subject matter is just as relevant today as it was in 2006

Section 1. Aim of the Article

This article seeks to examine the purpose and use of discovery in dispute resolution proceedings in general, and in particular in international arbitrations, where the use of discovery has rapidly gained in popularity.

A further area singled out for examination will be the use of discovery in international arbitration, in juxtaposition to its limited use in litigation in the ordinary law courts of non-Common Law systems.

Attention will also be drawn to the way in which discovery has come to us from the English-speaking world, chiefly from systems that apply Common Law. In countries with the Civil Law system, in contrast, this institution is almost completely unknown. The scope of application of discovery will therefore be compared from the standpoints of both Common and Civil Law.

Similarly, a review will be conducted of Spain's, a civil law jurisdiction, legal provisions governing certain institutions that possibly display similar features to discovery, such as certain aspects of advanced examination of evidence and witnesses in special circumstances or other procedures, such as pre-trial evidentiary proceedings.

The difficulties of applying these discovery techniques to areas other than those in which they originated and have since been developed to the full, will also be targeted for discussion.

So let us embark upon an examination of the topics outlined above and a comparison between these Common-Law-derived mechanisms and their reduced or limited impact on a chosen Civil Law System; Spain.

Section 2. Concept of Discovery.

Discovery may be defined as a formal investigation lying at the core of judicial proceedings, conducted prior to trial to ascertain facts pertaining to the case. By virtue of this device, one party compels the other to produce certain documents or furnish any other physical evidence.

One major purpose of discovery is to assess the strength or weakness of an opponent's case, with the idea of opening settlement talks. Another is to gather information to use at trial.

The theory of broad rights of discovery implies that all the parties will come to the trial with all possible knowledge of the case and that, save for the Constitutional right not to incriminate oneself, no party will be allowed to keep information secret.

It can truly be said that, in any judicial proceeding, the fiercest phase of the battle usually takes place at the discovery stage, before the actual trial itself.

In the United States, the use of discovery has assumed crucial importance. Within US jurisdictions, where this mechanism has enjoyed extensive development, the rules embodying permissible methods of discovery have been laid down by Congress (for Federal courts) and State legislatures (for State courts).

Common forms of discovery are:

• Depositions, which involve an in-person session at which one party to a lawsuit has the opportunity to ask oral questions of the other party or its witnesses under oath, while a written transcript is made by a court reporter.

• Interrogatories, consisting of written questions the other party must answer truthfully under penalty of perjury.

• Request for production of documents, consisting of a request by one party to the other that it hand over certain documents.

• Request for inspection, consisting of a request by one of the parties that certain tangible items in the possession or under the control of the other party be examined. Examples of items to be inspected include houses, cars, appliances and any other tangible item.

• Subpoena, which consists of an order instructing a witness to appear in court or at a deposition. Subpoenas are issued by the court, and failure by the witness to comply will be deemed to constitute contempt of court.

This article will be continued in the next edition of this newsletter.

Submitted by Calvin Hamilton
Barbados