The CIArbbean News

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THE RESULTS OF THE 2020 ELECTIONS APPROVED

The **CIArb** Caribbean Branch held its Annual General Meeting (AGM) on 29 April 2020 and the members present approved the election and appointment of the members to serve on the Branch Committee for the next year. Later, the Branch Committee met and elected and appointed the officers, as follows:

- Mr. Miles Weekes (Barbados) – Chairman
- Ms. Shan Greer (St. Lucia) – Immediate Past Chair
- Justice Anthony Gafoor (Trinidad & Tobago) – Vice Chairman, Honorary Secretary & Chapter Chair
- Mr. Andrew Pullinger (Cayman Islands) – Vice Chairman
- Mr. Mandish Singh (St. Lucia) – Honorary Treasurer
- Mr. Patterson Cheltenham (Barbados) – Education and Training Officer
- Mr. Ebrahim Lakhi (Barbados) – Webmaster
- Ms. Jodi-Ann Stephenson (St. Lucia) – Member
- Ms. Caroline Hay (Jamaica) – Member
- Mr. Calvin Hamilton (Barbados) – Chapter Chair
- Ms. Tameka Davis (British Virgin Islands) – Chapter Chair
- Ms. Kit-Juelle Frank-Amoroso (St. Lucia) – Chapter Chair
- Ambassador(r) David Huebner (USA) – Regional Trustee

Also at the AGM, the members approved the election of Mr. John Bassie of Jamaica (*pictured below*), who was nominated unopposed, as the Branch's candidate for election to the office of President of **CIArb**.

John is a **CIArb** Fellow, a chartered arbitrator and a founder member of the Caribbean Branch in Jamaica. He served with distinction as its first Chairman and during his tenure, he established Branch Chapters across the Caribbean, thus expanding the area of the Branch's reach, its influence and its membership. John is an experienced mediator and is the Chairman of the Dispute Resolution Foundation of Jamaica.

The **CIArb** Presidential Election will take place during the next biennial Congress which is scheduled to be held in November. The winner of the election will become the Deputy President in 2021 and the President in 2022. The runner-up will become the Vice President in 2021, the Deputy President in 2022 and the President in 2023.

COLLABORATION IN THE REGION

The **CIArb** Branch Chairs from the Americas Region – Paul Tichauer (Canada), Sandra Jeskie (North America), Richard Mattiaccio (New York), Ben Adamson (Bermuda), Michael Diggiss (Bahamas), Cesar Pereira (Brazil) and Miles Weekes (Caribbean) – have agreed with the proposal, by the Regional Trustee David Huebner, to share with each other information about online events which any regional Branch is organising and which its Branch Chair considers would be of interest to the other members in the region. Caribbean Branch members will be notified of the relevant events by email from the Honorary Secretary or the Administrative Assistant, but members can keep up to date by visiting the Major Events tab of the website www.ciarbamericas.com, which has been created to assist with sharing the information and to highlight the reach and diversity of **CIArb** in the region. This website will also provide visitors with a link to the global and regional Branch websites, including the Caribbean Branch's www.ciarbcaribbean.org.

CHANGING THE PARADIGM OF DISPUTE RESOLUTION

This article reviews a recent webinar hosted by the **CIArb** *Barbados Chapter to discuss how dispute resolution may change in the wake of the COVID-19 pandemic. The webinar was held in association with the Arbitration and Mediation Court of the Caribbean (AMCC) and funded by the Compete Caribbean Partnership Facility.*

The Barbados Chapter Chairman, Calvin Hamilton, opened discussion by outlining the challenges for persons in determining whether the effects of the COVID-19 pandemic are solid grounds for avoiding their contractual obligations.

He noted that this subject cannot be viewed in the abstract and there must be a search for a valid basis to cease contractual obligations. He put forward the possibility that the parties, rather than relying on the force majeure and arbitration or litigation clauses in their contracts, might consider whether a better outcome could not be achieved by the parties managing a process which would fashion a different contractual arrangement in light of the new circumstances triggered by the pandemic.

Force Majeure and Frustration

The Barbados Chapter Vice-Chair, Tanya Goddard, who is also the Secretary-General of the AMCC, followed by explaining the legal origins of force majeure clauses and the doctrine of frustration.

She discussed how these could apply, and what might be the main constraints to be considered when relying on them, to excuse a party from its contractual obligations when that party was unable to meet the obligations due to an unforeseeable event or one that was not within the party's control, such as the COVID-19 pandemic.

Citing the high thresholds of proof and the limited applications, Tanya stated that in order to trigger a force majeure clause, if one existed, there is a need to consider the definition of force majeure within the contract; the proof of impossibility of performance; the requirement for mitigation of the effects of the event; and the requirement to submit adequate and timely notice.

Similarly, in order to make a claim of frustration there is a need to consider the non-existence of a force majeure clause in the contract, or, if one existed, that it is inapplicable; the proof of impossibility of performance; and whether the event was unforeseeable and the effects not self-induced.

She gave examples of frustration events within a Caribbean context and noted that there appeared to be little certainty of outcome based on how courts have determined these matters in the past. In that context, she asked what would be the options available to parties.

The Option of Mediation

The Caribbean Branch Chairman, Miles Weekes, then suggested the option of mediation, broadening its application to include the resolution of pre-COVID-19 disputes, which may have been simmering or utilising another form of dispute resolution process, but which might now become urgent for resolution. He defined mediation and explained the process, including the benefits of the Singapore Convention.

While relating that mediation was the quickest and least expensive method of assisted dispute resolution, he cautioned that in the Barbados context there was no statute to legitimise the private mediation process and outcome, as happens with arbitration.

He explained that in mediation, the outcome is treated as a contract agreement; but that parties should not be dissuaded by this, since historically the majority of mediated settlement agreements are recognised and honoured by the parties.

Miles posited that the uncertainty and instability caused by the COVID-19 pandemic will bring into play many of the factors that make mediation a viable option, including speed of resolution; confidentiality of the process; the maintenance of legal rights; the maintenance of business relationships; the need for compromise; and the need for parties to fashion an outcome that may be non-monetary and not possible using other methods of dispute resolution, citing, by way of example, the renegotiation of terms and conditions of contract that can now be met within the new constraints of the post COVID-19 era.

He closed by looking at how it was possible to convert the mediation settlement agreement into a binding award, using an existing arbitration clause, a submission clause or a hybrid process, to achieve stricter compliance and easier enforcement.

The Mediation/Arbitration Hybrid

Past Caribbean Branch Chair, Shan Greer, then examined the interplay between mediation and arbitration. She defined arbitration and made reference to the UNCITRAL Model Law and Arbitration Rules.

She noted that while the UNCITRAL Arbitration Rules allow sufficient flexibility for arbitrators to encourage mediation, arbitrators must ensure that they do not lose their impartiality when conducting a hybrid process such as the med/arb process.

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Shan also referenced the AMCC Arbitration Rules which allows the Registrar, at the appropriate time, the power to invite the parties to mediate their dispute, thus bringing mediation into the process without compromising the ongoing arbitration.

She agreed with Miles that, despite the past good compliance rates of mediation settlement agreements, the uncertainties of the immediate post COVID-19 era may influence parties to demand the conversion of a mediation settlement into an arbitration award in order for it to become more binding.

She detailed how this could be achieved using an award by consent or the med/arb process, but again emphasised that there is a risk associated with the latter, if the mediator, acting as the arbitrator, breaches due process in the way how he or she uses the confidential information acquired in mediation.

This challenge she suggested could be overcome by either using a separate arbitrator and mediator or by using the hybrid arb/med process, where the arbitrator first makes a 'sealed' award before mediating the dispute. If mediation provides no settlement agreement, the award is 'unsealed' and stands, otherwise the settlement agreed stands. The risk with the arb/med process is a higher likelihood of no settlement being reached in mediation due to doubts the parties may have about the inputs being made by a mediator who has already arbitrated the dispute.

Calvin then closed the webinar by considering with the others on the panel whether the pandemic was foreseeable and the situation where 'pandemic' is carved out but where the governmental action of lock-down compromised performance.

Submitted by Miles Weekes
Barbados

WIND UP PETITION NOT ARBITRABLE

In a significant judgment delivered on 23 April 2020, the Cayman Islands Court of Appeal (the CICA) allowed an appeal against a 2019 decision of the Grand Court to stay a 'just and equitable' winding up petition on the grounds that the subject-matter of the dispute must be referred to arbitration. The CICA judgment, which concerns China CVS (Cayman Islands) Holding Corp. (CVS), addresses the tension between arbitration agreements and the Court's exclusive jurisdiction to determine winding up petitions.

In summary, the CICA held that since the threshold question of whether to wind up a company is to be determined by the Court alone, the subject-matter of such a petition is not capable of being determined by arbitration. The position would have been different if the underlying contract had contained a no-petition clause, which clauses are valid and enforceable pursuant to section 95(2) of the Companies Law.

The judgment swims against the tide in modern times in favour of enforcing arbitration agreements, even when the ultimate relief sought can only be granted by the Court (consequent upon the arbitration award). The decision is an important development for insolvency practitioners and other users of the Cayman courts, particularly in light of the ever-increasing prevalence of arbitration agreements.

Background

CVS was a Cayman Islands holding company for nine subsidiaries operating some 2,400 convenience stores in China. CVS had two shareholders; Ting Chuan (Cayman Islands) Holding Corporation, the majority shareholder (Ting Chuan), and FamilyMart China Holding Co. Ltd., the minority shareholder (FMCH). The company had seven directors; four appointed by Ting Chuan and three by FMCH.

In May 2011, Ting Chuan and FMCH entered into a Shareholders' Agreement which contained an entire agreement clause and an arbitration agreement pursuant to which any and all disputes were to be referred to arbitration. The shareholders operated CVS as a joint venture, whereby Ting Chuan and FMCH and their respective affiliates each brought different skills and expertise to the enterprise. According to a winding up petition brought by FMCH in October 2018 (the Petition), the shareholders also entered into other contracts dating back to 2003, including a sub-license of the FamilyMart trademark, and developed an "agreed understanding" for the expansion of the company's business.

According to the Petition, the terms of the agreed understanding were satisfied between 2004 and 2012, but this changed in April 2012 such that FMCH was excluded from the operation of the business and no longer received full financial reporting. The Petition alleged that the shareholders lost trust and confidence in each other, including on account of alleged (i) failures by the company to honour royalty payments due to FMCH for the use of the FamilyMart trademark and (ii) diversion of profits to Ting Chuan and/or its affiliates.

The Petition sought the winding up of CVS on the 'just and equitable' ground pursuant to section 92(e) of the Companies Law (2018 Revision), on two distinct bases: firstly, that

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WIND UP PETITION NOT ARBITRABLE - THE CVS CASE

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FMCH had a justifiable lack of confidence arising from a lack of probity in the conduct of the company's affairs and, secondly, that there had been a breakdown in the fundamental relationship between the shareholders and a breach of the understanding which governed that relationship. The Petition sought alternative relief in the form of an order for Ting Chuan to sell its shares in CVS to FMCH. However, as a matter of Cayman Islands law (unlike the unfair prejudice provisions of English law), such alternative relief is only available if the threshold test for a winding up is satisfied.

Ting Chuan sought to strike-out the Petition on the grounds it was an abuse of the process of the Court. Alternatively, Ting Chuan sought an order that the Petition be dismissed or stayed, pursuant to (i) section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the FAAEL); (ii) section 95(1) of the Companies Law, which provides that upon the hearing of a winding up petition the Court may dismiss or adjourn the petition, make a provisional order, or make any other order that it thinks fit; and/or (iii) the inherent jurisdiction of the Court.

Section 4 of the FAAEL provides that any party to an arbitration agreement may apply to the Court to stay any Court proceedings brought by another party to that agreement in respect of any matter agreed to be referred to arbitration, and that the Court shall make an order staying those proceedings "unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred" to arbitration.

Grand Court decision

In a judgment delivered in February 2019 [2019 (1) CILR 266], Kawaley J refused to strike out the entire Petition, holding that it did not constitute an abuse of process, although he struck out certain parts of the Petition on the grounds that the subject-matter did not disclose any reasonable cause of action, and granted leave for some parts of the Petition to be amended.

The judge also granted a stay of the Petition under section 4 of the FAAEL, since it was *"…clear beyond sensible argument that the allegations raised in the petition related to the subject-matter of the shareholders' agreement, which had a broadly drafted mandatory arbitration clause…, the petition includes matters which, shorn of their thinly veiled drafting disguise, clearly constitute claims falling within the arbitration agreement. They can properly be "hived off" for determination by the arbitral tribunal, and the present proceedings can be stayed. Should the petitioner succeed and need to seek relief which only this court can grant, it can apply to lift the stay and rely upon the findings reflected in the award."*

This decision meant it was unnecessary for the judge to decide whether a stay should be granted on other grounds.

In granting a stay, the judge rejected FMCH's submission that the subject-matter of the Petition was not arbitrable because only the Court could grant the relevant statutory relief (*i.e.* a winding up order). Citing a leading English Court of Appeal authority, *Fulham Football Club (1987) Ltd v Richards*, the judge held that *"… there is a fundamental distinction between the question of whether the underlying disputes are arbitrable and the question of whether only the court can grant the statutory relief or, inter alia, winding up… In these circumstances it is quite straightforward to conclude that the arbitral tribunal can decide the relevant contractual disputes and that, if the petitioner's complaints are vindicated, the petition could (if appropriate) seek to lift the stay of the Petition and/or enforce any arbitral award."*

Explaining his decision by reference to public policy, the judge remarked that *"The purpose of the mandatory stay provisions of the FAAEL is to give effect to the strong legal policy that where parties to a contract have agreed to exclusively refer a suite of disputes to arbitration, they should be held to their contractual bargain."*

The first instance judgment was appealed by FMCH and cross-appealed by Ting Chuan, which renewed its attempt to strike-out the entire Petition.

Submitted by
Andrew Pullinger and Shaun Tracey
Cayman Islands

In the next edition of this newsletter, the authors will review the details of the CICA appeal decision.