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Caribbean Branch

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RIGHT TIME FOR COURT-FACILITATED ARBITRATION

Even before the COVID-19 pandemic forced courts to curtail operations and then to move their limited proceedings to virtual hearings, there have been significant, and many would say unacceptable, backlogs in the processing and determination of civil disputes in courts in the Caribbean and many other parts of the world. In this article, ***Hon. Barry Leon****, a former presiding judge of the British Virgin Islands Commercial Court and a Fellow of the Chartered Institute of Arbitrators, examines a solution to how this issue may be addressed in the Caribbean and* ***Hon. Mr. Justice Adrian Saunders****, the President of the Caribbean Court of Justice, provides the foreword to the article.*

FOREWORD

by Hon. Mr. Justice Adrian Saunders

Barry Leon's article in this edition of **The CIArbbean News** raises the issue of judges encouraging litigants to have resort to arbitration in lieu of litigating their disputes through the courts. I thought it was a useful reminder that, under the Civil Procedure Rules, this is a power that judges have but is seldom exercised.

Too few judges appreciate that encouraging resort to arbitration can lighten their dockets; better address knotty issues that call for specialised knowledge on the part of the hearing tribunal; and in no way undermines the judicial function. If anything, it demonstrates a measure of sophistication in administrative skills that a judge should have the perspicacity and confidence to refer all or part of a matter when arbitration is clearly the more appropriate method of resolving the dispute.

I also welcomed the fact that the writer alluded to the issue of including in the reference the possibility of an appeal to the Court of Appeal. The finality of arbitral decisions often disconcerts some parties who might prefer to see in any such reference provision made for a second bite at the cherry before an appellate court if they were dissatisfied with the arbitrator's ruling.

Having read this article, I thought that more can be done by judicial training bodies to promote arbitration as a useful adjunct to litigation.

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RIGHT TIME FOR COURT-FACILITATED ARBITRATIONS IN THE CARIBBEAN

Litigants, both businesses and individuals, should not have to wait the lengths of time which currently they must wait for an adjudication of their disputes … and they need not do so.

Periodically there have been articles and social media posts pointing out the advantages of parties moving all or part of their court proceedings to arbitration. Yet, so far as I am aware, it has not been happening to any material extent.

Now more than ever, Caribbean courts should encourage and assist disputing parties to move appropriate cases, or parts of them, from court to arbitration.

The advantages of arbitration are reasonably well known. Commercial arbitration has been growing in many parts of the Caribbean, as in many other jurisdictions. Litigation lawyers are becoming increasingly familiar and comfortable with it.

Yet, even when parties in court litigation see that there will be lengthy delays, not just in getting to trial but even in having procedural and other motions determined along the way, they and their litigation counsel appear to consider arbitration only rarely.

Is the Problem the Defendants?

Are defendants the reason disputes are not being moved to arbitration? Overall, I do not believe that is the case. Of course, there are those disputes in which the defendant is working under the belief that 'justice delayed is justice'. Delaying the process of getting to trial is perceived to have some advantage, usually, simply by putting off the day of reckoning, whether by judgement or a settlement on the court's steps.

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However, not all defendants have that mindset, and many do not. Some defendants, and plaintiffs, realize that each time their lawyer must pick up the file again and 'get back into it', legal expenses increase.

Other defendants, and many plaintiffs, would prefer not to have their dispute hanging over their heads, distracting them from their businesses and even their lives, and being a constant nagging worry in the back of their minds.

Importantly, many defendants believe that they have a good defence.

So why not get the dispute tried and obtain a favourable result, and likely obtain at least a partial recovery of legal expenses from the other side?

Is the Problem an Inability to Communicate?

It is not uncommon during any dispute that if one side suggests something - for example, discussing settlement, mediation, a procedural agreement, or moving all or part of the dispute to arbitration - that the other side immediately thinks that the party making the suggestion has something 'up his or her or its sleeve' and is trying to secure some advantage.

Often the reaction goes something like this: "The other side has suggested moving all or part of our dispute to arbitration. The other side must see an advantage for himself or herself or itself in doing that. I cannot see what the advantage would be but there must be one; so I am not going to agree the suggestion or even engage in the discussion."

Hence, 'Court-Facilitated Arbitration'

The critical challenge is to get the parties to consider moving their dispute, or part of it, to arbitration. Courts need an effective and efficient mechanism to encourage and assist parties in litigation to consider seriously moving to arbitration.

Without healthy and thoughtful encouragement by judges, disputes will languish because one party worries a suggested move to arbitration is to secure a tactical or other advantage and, possibly, does not understand or appreciate the benefits of arbitration.

Often parties embroiled in court litigation would benefit from independent encouragement and assistance to consider moving their dispute to arbitration. Through 'court-facilitated arbitration', courts can get parties to consider arbitration's advantages, and, if they agree to move to arbitration, to assist them to plan their arbitration and implement the move.

How Does 'Court-Facilitated Arbitration' Work?

While the decision to arbitrate must be voluntary, the process to get parties to consider arbitration need not be entirely voluntary. 'Court-facilitated arbitration' does not offend party autonomy, one of the hallmarks of arbitration, nor any fundamental aspects of arbitration. Arbitration occurs only if the parties agree.

Courts can identify potentially suitable cases and invite the parties and their counsel to a case management conference to consider moving all or part of the dispute to arbitration.

The case management conference would need to be conducted by an experienced judge who understands arbitration, has good facilitation skills, and is committed to make 'court-facilitated arbitration' work.

When parties are receptive after the initial discussions, the judge then assists counsel to develop a protocol for the move, the conduct of the arbitration, and various consequential matters. If the parties want certain – or even all – features of court litigation, those features can be preserved in arbitration. Topics to be considered and agreed would include:

Privacy and confidentiality:
Ordinarily, arbitration is private and confidential. If desired by the parties, the arbitration can be open, just as the court proceedings would have been.

Judgement versus award:
If parties want a court judgement, depending on the applicable court rules, it may be possible for the arbitration to be conducted as a reference from the court, with the referee's report going back to the court to become a judgement if confirmed. (For example, see the Eastern Caribbean Supreme Court CPR, Part 40 – Appointment of Referee to Inquire and Report.) Otherwise, parties may prefer an arbitral award, which will be more readily enforceable worldwide under the New York Convention.

Precedent:
If parties want a publicly available precedent, for their own purposes or to help develop the law, the protocol can provide for it. The reference mechanism mentioned previously can achieve this, and other mechanisms may be possible.

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Procedural and evidentiary rules:
If parties are wedded to using court procedural and evidentiary rules, they can do so in arbitration. However, before deciding on that, the judge, in the case management conference, can assist the parties in appreciating the benefits of a more customized and efficient approach.

Costs:
The case's costs through to the move to arbitration could be left to the arbitral tribunal. Further, parties could agree that the tribunal will apply the court's approach to costs (including settlement offers.) or they may prefer approaches more commonly taken in arbitration.

Arbitral tribunal:
Parties would decide whether to engage one or three arbitrators, and a process to select the tribunal. Commonly used processes to appoint an arbitral tribunal would be considered, including that, in the absence of agreement, the judge would serve as the appointing authority to select the tribunal, following the parties' submissions.

Appeals:
If parties wish to preserve appeal rights as they would exist following a trial, the reference mechanism mentioned previously could achieve that objective, or parties could choose an appeal by way of an appellate arbitration for which rules already exist.

Other topics:
Nothing would preclude the parties in the case management conference from considering other matters, including the use of mediation and other forms of ADR, to take place before or during the arbitration.

Recent Examples from India

The Indian Supreme Court appears to have found logic to 'court-facilitated arbitration'. Recently, the National Company Law Tribunal of the Supreme Court of India referred to arbitration, with the consent of the parties, a 13-year-old dispute involving six cases. The dispute is among the Sanghi brothers relating to the Sanghi group of industries. The Tribunal considered that the prolonged battle would affect the industry adversely in the long run.

Also, in December 2021, the Indian Supreme Court encouraged the parties in the Modi family dispute to consider mediation or arbitration in India. The Court considered the property dispute between Lalit Modi, the president and managing director of Modi Enterprises and the former chairman of the India Premier League, and his mother, Bina Modi, to be ultimately a dispute between family members better resolved by mediation and the parties agreed.

Other Court Arbitration Schemes

There have been arbitration schemes developed whereby a court itself provides arbitration services. That is not what I am advocating when I speak of 'court-facilitated arbitration', although those court-connected arbitration schemes, whether voluntary or mandatory, provide some of the same adjudicative dispute resolution benefits as 'regular arbitration'.

Subject to such schemes being appropriately designed to enable the benefits of arbitration to be achieved, conceptually, I support their implementation as well.

Unlike 'court-facilitated arbitration', court-connected arbitration schemes require some form of statutory or other enabling authorization, they limit party autonomy in various ways, and they contemplate the court maintaining ongoing involvements with the arbitration. These schemes have the benefit of providing litigants with a court-administered arbitration option.

Belize

Such a scheme was developed in Belize called court connected arbitration (CCA).

The CCA concept is that the litigants can elect to have their case determined under CCA rules by a trained arbitrator of their choosing from an approved list of arbitrators, or if they cannot agree, an arbitrator from the list appointed by the court.

The award is returned to the court for final disposal by order of the court as if the case had been tried by a judge and, with the permission of the court, is subject to enforcement procedures, also as if the case had been tried by a judge.

Jamaica

While Jamaica has not formally implemented court-connected arbitration, I understand that a proposal for it (the details of which I do not know) is being considered and may be implemented soon.

United States

In the United States, court-ordered arbitration schemes have been developed whereby there is a mandatory referral to arbitration of a particular class of civil suits, typically for claims under a statutorily defined monetary limit.

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The court manages the arbitration process, but arbitration hearings may take place in a variety of settings, including the courthouse, a special public facility designed for the programme or the offices of attorneys or private arbitrators.

Arbitrators are typically volunteer lawyers or retired judges whom the court appoints and pays a modest honorarium, and they may sit singly or in panels of two or three.

Beginning Now!

Caribbean courts should begin now to implement 'court-facilitated arbitration' procedures, even if as pilot projects. 'Court-facilitated arbitration' should be able to be implemented under most existing court rules and practices.

The main cost of implementation would be some judicial time devoted to cases that otherwise will have lengthy waits for trial and ultimately consume many days, if not weeks, of court time and resources. To succeed 'court-facilitated arbitration' will need appropriate judicial awareness and commitment. Also, it will need litigation lawyers to consider seriously the advantages that can accrue to their clients and to explain those advantages to their clients. Let us begin now!

Submitted by Hon. Barry Leon, FCIArb
British Virgin Islands

BRANCH AGM PLANNED

The Notice and Agenda have been issued for the 2022 Annual General Meeting (AGM) of the **CIArb** Caribbean Branch, due to take place virtually on Tuesday, 26th April 2022, starting at 5:00pm Eastern Caribbean time. The President of **CIArb**, Ms. Jane Gunn, will be attending the AGM and will give opening remarks.

The ordinary business of the AGM is to receive the Report of the Chairman and the Financial Statement of the Branch for 2021 and to approve the election of members and the appointment of ex-officio members of the Branch Committee for 2022-23.

Since the number of candidates nominated to serve on the Branch Committee did not exceed the maximum number of vacancies existing, a postal vote will not be necessary.

Any member who has not received the Notice and Agenda should contact the Honorary Secretary.

TRAINING DIARY 2022

The following training courses will be offered by the Branch this year.

22 June – Virtual Introduction to International Arbitration – US$300

Candidates will receive reading materials on the start date and attend two half-day webinars on 6 and 7 July before taking an online multiple-choice assessment on 8 July. This course is for persons who are new to international arbitration or who wish to become Associate members of **CIArb**.

1 September – Virtual Module 1 Law Practice and Procedure of International Arbitration – US$800

Candidates will receive reading materials on the start date and attend weekly half-day webinars starting 17 September before taking a written 48-hour assessment on 1 December. This course is for persons who are interested in a detailed knowledge of international arbitration or who wish to become Members of **CIArb**.

CORRUPTION WEBINAR

The Barbados Chapter of the **CIArb** Caribbean Branch, in association with the Arbitration and Mediation Court of the Caribbean (AMCC), Arbitra and the International Dispute Resolution Centre (IDRC), held a webinar on 16 February 2022 titled '*Corruption In Arbitration: The Arbitral Tribunal's Dilemma*'. Moderated by Chair of the Chapter, Mr. Calvin Hamilton, the panel, comprising Ms. Akima Paul Lambert, Ms. Alexandra Johnson, Mr. Cesar Pereira and Mr. Tunde Ogunseitan, explored the implications for arbitrators when issues of corruption become manifest or are suspected in arbitral proceedings.

A video recording of the webinar is available for viewing on the Events page of the Chapter's website at www.barbados.ciarbcaribbean.org

HAVE YOUR SAY

Readers are encouraged to submit original papers, opinions and information on items of interest for future publication, and to share views and comments, by email.

Submissions, views and comments should be sent by e-mail to info@ciarbcaribbean.org