The CIArbbean News

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YOUNG MEMBER RECOMMENDS DIVERSIFICATION

In December 2017, at the CIArb *International Conference in Paris, France, Ms. Jodi-Ann Stephenson, a young member of the Branch, delivered a paper entitled '*Access as an Impediment to Diversification: The Caribbean Young Professional Experience*'. The* CIArbbean News *shares with its readers an extract from that paper:*

Diversity in international arbitration is vital to the efficacy, sustainability and legitimacy of the process. The Inclusion of perspectives emanating from different legal traditions, experience levels, nationalities, cultures and regions enhances the quality of a tribunal's reasoning and decision-making process and will diminish criticisms regarding lack of impartiality.

Creating diversity involves implementing initiatives that change the gender composition of arbitration tribunals, as well as taking meaningful steps which narrow age, race and cultural disparities. The lack of diversity in international arbitration is not limited to underrepresentation of Caribbean nationals on tribunals, but extends to the paucity of Caribbean international arbitration advocates, in particular young practitioners.

From the perspective of a young female professional living in St. Lucia, this presentation aims to explore the challenges faced by young Caribbean practitioners who seek to enter the international arbitration field; highlight some of the strides that have been made in the region and suggest further steps to build on these achievements, so as to enable young Caribbean nationals to take a greater role in improving diversity in arbitration.

Some of the challenges faced by young Caribbean professionals include overcoming a number of prevailing misconceptions such as the fear of encroachment into litigation by non-nationals, the view that the process is overcomplicated and the same as court and that there will be a reduction of work to be done by the legal fraternity. Another challenge is the underutilisation of arbitration due to limited public education programmes.

Other challenges faced include a lack of experience due to the small scale of regional arbitral disputes, limited access to lists of Caribbean arbitrators, a paucity of trained Caribbean arbitration specialists resulting in a dearth of mentorship opportunities and a lack of effective policy support from most governments.

However, some initiatives have been implemented which assist in making the region 'diversification ready'. Significant among these are programmes which foster increased awareness as to the benefits of international arbitration, such as the training and awareness programmes executed by the CIArb Caribbean Branch in over nine countries since its inception in 2006, the advent of the court-annexed arbitration in Belize, the creation of new arbitral institutions in BVI, Jamaica, St. Lucia, Guadeloupe and Barbados and the work of IMPACT Justice in improving, modernising and harmonising the enabling structure of arbitration.

There has also been support from international agencies, such as ICC, LCIA, ICSID and the Kuala Lumpur Regional Centre for Arbitration, by way of hosting and sponsoring of conferences, seeking out trained arbitrators of the region to serve on their panels and exploring areas of cooperation with the regional arbitral bodies.

However, despite the aforementioned progress, this has not resulted in a major increase in work for Caribbean arbitrators and the region has not seen significant buy-in from the private sector, the public sector and the attorneys, as there remains a great deal of misconceptions regarding arbitration. An approach to ADR strengthening and reform that is comprehensive, all-inclusive and reinforcing, with the necessary infrastructural and policy support, is required in order to achieve sustainable results.

The full text of this paper can be read on the new CIArb *Caribbean Branch website at www.ciarbcaribbean.org*

Submitted by Jodi-Ann Stephenson
St. Lucia

EVENTS DIARY

● 23 – 25 April 2018
CIArb Caribbean Branch TRAINING WORKSHOPS, Georgetown GUYANA

23 April - 1 day Training Workshop Introduction to International Arbitration

23 April - 2½ day Training Workshop Accelerated Route to Membership International Arbitration

24 April - 1 day Training Workshop Introduction to Commercial Mediation

● 24 April 2018
CIArb Caribbean Branch ANNUAL GENERAL MEETING at Duke Lodge Hotel, Georgetown, GUYANA

● 25 – 28 April 2018
CIArb Caribbean Branch THIRD INTERNATIONAL ABITRATION CONFERENCE "On the Road to Success – Arbitration as a Tool for Economic Development in Guyana" Georgetown, GUYANA

25 April - 1 day ICC sponsored International Commercial Arbitration Conference

26 April - 2 day ICSID sponsored International Arbitration Conference

28 April - 1 day Excursion to Kaieteur Falls

For details refer to The CIArbbean News SUPPLEMENT NO. 1

● 21 – 25 June 2018
JAIAC / AIAC / UWI TRAINING PROGRAMME, Kingston, JAMAICA

21 June - 4 day Certificate in Sports Arbitration Training Workshop

● 24 – 30 June 2018
JAIAC ARBITRATION WEEK 2018 "Arbitration on the Move – Framework, Industries and Economic Development", Kingston, JAMAICA

BVI IAC OVERCOMES TOUGH YEAR

In February 2018, the CEO of the British Virgin Islands International Arbitration Centre (BVI IAC), Mr. Francois Lassalle, addressed the members of the Barbados Chapter of CIArb *at their 3rd Annual General Meeting on the challenges of the Centre's first year of operation*.

The BVI IAC is the product of several years of focus group planning which culminated in the adoption of the Arbitration Act in 2013 establishing the BVI IAC; in the BVI acceding to the 1958 New York Convention in 2014; in Cabinet appointing the inaugural Board of the BVI IAC In 2015, in the Board appointing a CEO in 2016 with responsibility for the overall set-up, growth, management and operations of the Centre and in the start of operations on 1st January 2017 in a built-for-purpose, multi-function, high-tech facility.

The Centre's main functions are to administer arbitrations under its own rules and to offer users of 'ad hoc' or other institutional arbitration premises and support services in a jurisdiction with a high reputation for the quality of its commercial and appellate courts and for political stability.

While parties will always be free to nominate arbitrators of their choice, the BVI IAC maintains a roster which includes over 190 highly regarded international arbitrators and other dispute resolution practitioners, drawn from both common law and civil law jurisdictions, who will be able to conduct arbitrations in English and a number of other languages.

The first year was a busy and challenging one, during which the BVI IAC hosted its 2nd International Arbitration Conference and a flurry of arbitration seminars as well as other income-generating events.

From an arbitral stand point, the Centre was appointed as substitute Appointing Authority by the PCA and received four notices of arbitrations, one of which is an ongoing case.

In September 2017, Hurricane Irma passed through the BVI and inflicted widespread damage, to be followed two weeks later by Hurricane Maria causing further damage. These two events created a red line on the calendar of many in the BVI and almost nothing on the two sides of the red line was the same.

The BVI IAC has been very fortunate throughout both hurricanes, having sustained only minor damage. As one of a few fully operational facilities in the territory after the hurricanes, the BVI IAC made temporary space available for critical government offices, including the Premier, the Governor and the Judiciary, whose buildings and resources had been severely damaged. It also provided space for offices and meetings with NGOs and disaster recovery bodies.

Operations have now returned to normal and BVI IAC is focusing on ensuring 2018 sees an increase in the number of cases received and an improvement of its brand awareness, by participating in a large number of conferences this year in order to regain momentum.

Finally, the BVI IAC strongly believes that collaboration with CIArb can be mutually beneficial and welcomes any manner of collaboration between the two institutions to promote and enhance knowledge of arbitration in the Caribbean region. Any CIArb member is welcome to visit the Centre, so please do contact us on info@bviiac.org

Submitted by Francois Lassalle
British Virgin Islands

ADR IN THE CARIBBEAN COMMUNITY

In October 2017, while delivering the keynote address at the launch of the Arbitration and Mediation Court of the Caribbean (AMCC), the Rt. Hon. Sir Dennis Byron, President of the Caribbean Court of Justice and Patron of the CIArb *Caribbean Branch set the legal framework for Alternative Dispute Resolution in the Caribbean Community.*

The Revised Treaty of Chaguaramas

The promulgation of Alternative Dispute Resolution (ADR) within the Caribbean Community is supported by the very underpinnings of our institutional framework.

The Revised Treaty of Chaguaramus (RTC), establishing the Caribbean Community – CARICOM, including the CARICOM Single Market and Economy (CSME), embraces a robust dispute resolution frame-work. In its Preamble, the Treaty recounts the affirmation of States Parties that "the employment of internationally accepted modes of disputes settlement in the Community will facilitate achievement of the objectives of the Treaty".

It also expresses their collective consideration that "an efficient, transparent and authoritative system of disputes settlement in the Community will enhance the economic, social and other forms of activity in the CSME leading to confidence in the investment climate and further economic growth and development in the CSME".

These policy positions are given flesh in the text of the Treaty and reflect an integrated approach to dispute resolution as concerns the interaction between alternative modes of dispute settlement and litigation.

Article 188(1) of the RTC prescribes modes of dispute settlement for disputes concerning the interpretation and application of the Treaty. Specifically, good offices, mediation, consultations, conciliation, arbitration and adjudication (dealt with in Articles 191 to 222) are designed to be exercised without prejudice or contradiction to the exclusive and compulsory jurisdiction of the Caribbean Court of Justice (CCJ) (see Article 188(4)).

The Treaty also makes provision for the use of ADR in disputes not concerning the interpretation and application of the Treaty. Of note, Article 223, for example, requires Member States "… … to the maximum extent possible, [to] encourage and facilitate the use of arbitration and other modes of alternative disputes settlement for the settlement of private commercial disputes among Community nationals as well as among Community nationals and nationals of third States."

It should be noted here that not only is there a focused commitment to the use of arbitration and other ADR tools, but also an emphasis on private commercial disputes. The latter, no doubt, weighed heavily on the framers of our regional 'Constitution' in light of the fact that the CSME was intended to deepen economic integration and to foster economic development within States.

Article 223 also imposes an obligation on States to ensure that their legislative procedures make appropriate provision for the observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards (see Article 223(2)).

States which have implemented the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) are deemed to be compliant with that obligation (see Article 223(3)). There is also the obligation on Member States to harmonise their laws and administrative practices as they relate to commercial arbitration (see Article 74(2)).

Civil Procedure Rules: Court Connected Mediation & Arbitration

Many of the Civil Procedure Rules (CPR) across the region embrace an integrated approach to dispute resolution by making provision for and/or accommodating ADR tools, including mediation and arbitration.

Some, like Barbados and the OECS, permit courts in the exercise of their case management powers in furtherance of the overriding objective, to encourage "the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate, and [facilitate] the use of such procedures".

Some, like Belize, have pioneered new frontiers in law by the recent establishment of Court-connected Arbitration, guided by the newly added Arbitration Rules under Part 74 of the Belize CPR. The Belize Model epitomises the commitment of our judiciaries to the provision of responsive dispute settlement options to users, using an integrated approach and demonstrates the ingenuity of the region's people and our ability to craft responsive solutions to suit our specific needs.

The full text of this presentation can be read on www.ciarbcaribbean.org

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. In Sections 1 to 4 of the article, previously published in this newsletter, the concept and forms of discovery and the approach taken towards discovery in international arbitration were explored.

Section 5. The Arbitration Approach

Discovery issues which typically confront arbitrators are: what degree of discovery ought to be allowed between the parties; what forms of discovery can be used, whether traditional mechanisms such as production of documents, interrogatories, depositions, exchange of documents, witness lists and production of experts' reports, or something more limited; and whether the obligation of discovery affects third parties not bound by the arbitration clause.

Arbitrators will normally attempt to enforce any agreement that the parties have reached, but in the absence of such an agreement, the scope of discovery will depend on the monetary sum in dispute, the complexity of the matters under debate, and the burden entailed by the production of documents compared to the importance of the information likely to be obtained. The arbitrators will be guided by the principle that discovery ought to give prior access to sufficient information to enable the parties to present a cogent and complete case

The arbitrators will also bear in mind that most of the parties who opt for arbitration wish to avoid the charges and costs traditionally associated with the sweeping type of discovery that could be set in motion in court proceedings. In default of agreement by the parties, many arbitrators thus tend to lean towards the low costs, swiftness and effectiveness of limited discovery.

In important cases, experienced arbitrators often give leave for fairly wide-ranging discovery procedures. Even in these cases, however, it is normal for the arbitrators to impose limits on the amount or duration of the discovery procedures, and rarely will they consent to as wide a scope of interrogatory or deposition as that typically associated with court proceedings.

What arbitrators usually tend to do is to heed the terms agreed by the parties as regards implementation of interrogatories or depositions. In default of agreement, they tend to be fairly cautious and prudent, so as to avoid being overly permissive insofar as the rules on discovery are concerned.

In general, both the nature and the scope of discovery available in international arbitrations tend to vary widely from one case to another, depending on the terms of the agreement between the parties, the identity of the parties and/or the arbitrators, the arbitration rules, and the seat at which the arbitration is scheduled to take place.

Section 6. Provisions Governing Discovery In The Arbitration Rules of the Leading Arbitral Institutions.

The Rules of the International Chamber of Commerce (ICC) contain no provisions whatsoever as to discovery, save the stipulation that the parties must produce to the tribunal and to the opposing side those documents on which they base their claim or defence. There are two provisions, however, that might be relevant for the purposes of discovery, viz., Article 25(1) and (5) which vest the arbitrators with the power to "establish the facts of the case by all appropriate means" and "summon any party to provide additional evidence," respectively.

The Rules of the AAA's International Center for Dispute Resolution (ICDR) provide that "At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate" (Article 20(4)).

The Rules of the London Court of International Arbitration (LCIA) envisage that, unless the parties have agreed otherwise, the tribunal shall have the power "to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the ... … other party" and "to order any party to produce … … documents or copies of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant" (Article 22(1)(iv) and (v)).

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

Submitted by Calvin Hamilton
Barbados

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Submissions, views and comments should be sent by e-mail to barbadoschapter@gmail.com
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