The CIArbbean News

QUARTERLY NEWSLETTER

of the Caribbean Branch of the Chartered Institute of Arbitrators

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WELL DESERVED HONOUR FOR MAURICE STOPPI

One of the highlights of Arbitration Week 2018, hosted in Jamaica by the Jamaica International Arbitration Centre (JAIAC), was a Lecture and Reception at which Mr. Maurice Stoppi, CD, FCIArb., FRICS, FJIQS was honoured by the Royal Institution of Chartered Surveyors (RICS), JAIAC and CIArb.

Maurice Stoppi was born in London in 1930 during a period when the ashes of World War I had not quite settled and the whispers of further looming danger were being heard creating a sense of unease.

Orphaned as a result of World War II, the individual that the then teenaged Maurice has since become is traceable to his early years and the life lessons learnt then. For many persons, a disturbed period of youth becomes a millstone around the neck and a constant, and self-repressing even, justification for unfulfilled potential. For Maurice, it became a note to self and a constant reminder that he should in every situation maximise potential, value time and people, avoid harping on what was or could have been and focus on what can be.

At a time when indecision, dislocation and mayhem surrounded him, he still found in himself the capacity to focus his energies on personal development and goal achievement. He attended Willesden Technical College and Regent Street Polytechnic, completing his education and professional exams in quantity surveying in 1955.

As a young man, his inquisitive and adventurous spirit led him to Jamaica in 1958, an island with which he fell in love and a country which he has called home ever since. There he found a group of like-minded professionals who had come to Jamaica with a passion for service above self.

With them, in 1959, Maurice formed the Jamaica Institute of Quantity Surveyors (JIQS) so as to further the development of the construction industry in Jamaica. In 1959 also, he became a founding member, and later chairman, of the Construction Industry Council of Jamaica which is still today the voice of the industry.

Maurice formed the partnership of Stoppi Cairney Bloomfield in 1960, a firm that has become one of the premier quantity surveying practices in Jamaica, and in which he has been tireless in his work and is still active.

Maurice is the godfather of arbitration in the Caribbean with an unbroken membership in CIArb for over fifty-five years and in RICS for over sixty years. He is a construction adjudication professional who still practices as a quantity surveyor. He has been a leader in promoting arbitration as a means of settling disputes in the local construction industry and his work as an arbitrator has been recognised in several landmark decisions.

If that was not enough, Maurice has made significant industry contributions to literature in the fields of arbitration, mediation, adjudication and construction in general. His contribution to literature and by extension capacity development has been constant and will soon be added to with the publication of 'Arbitral Travels – Reminiscences of a Peripatetic Jamaican Arbitrator'.

Maurice has been honoured by Jamaica with the Order of Distinction – Commander Class and by the Vatican with the Order of the Holy Cross and The CIArbbean News joins in saluting him for his service to arbitration.

Submitted by Christopher Malcolm
Jamaica

EVENTS DIARY

● 3 – 5 December 2018
CIArb Caribbean Branch TRAINING WORKSHOP, Georgetown, GUYANA

3 December - 2½ day Training Workshop - Accelerated Route to Fellowship - International Arbitration

HAVE YOUR SAY

Readers are encouraged to share their views and comments on the newsletter and its content, and to submit original papers, opinions and information on items of interest for future publication.

The CIArbbean News is 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

Past copies of the newsletter and unabridged articles can be found on the Caribbean Branch's webpage at www.ciarbcaribbean.org

KEEP IN TOUCH

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

YOUNG MEMBERS

Members aged 40 years and under are reminded that the Caribbean Branch is establishing a Young Members Group (YMG). Persons interested in assisting in the development of the YMG should contact the interim Group Chair, Ms. Jodi-Ann Stephenson via email at kajstephenson@gmail.com

BRANCH TO SIGN MOU ON OHADAC

The Caribbean Branch Committee has agreed that the Branch will sign a Memorandum of Understanding (MOU) for the implementation of the OHADAC Project. The ultimate goals of the OHADAC Project is the introduction of a harmonized business law system within the Caribbean region and the creation of a regional centre for arbitration and mediation. The project will be carried out by the ACP Legal Association with whom the Branch will sign the MOU.

OHADAC is the French acronym for the Organization for the Harmonization of Business Law in the Caribbean and the ambition of the project is to replicate the success of the OHADA Project in Western Africa, where the harmonization of business law and the promotion of arbitration have been lauded for making economic growth and development possible.

The ACP Legal Association (ACP) is a not-for-profit entity based in Guadeloupe and, through its network of legal practitioners, it hopes to implement the OHADAC Project in thirty-three states in the region, including all of the Caribbean's island states as well as the coastal states bordering the Caribbean Sea.

ACP recognises that it will require the participation of qualified regional personnel to successfully execute the project. ACP also recognises that CIArb, through its Caribbean Branch, provides education and training for arbitrators and mediators and supports academics, policy makers and practitioners who promote recourse by public and private entities in the region to alternative dispute resolution (ADR) methods for the settlement of private commercial disputes.

The MOU will formalise the synergies between ACP and the Caribbean Branch and provide a broad framework for collaboration between the two parties for the furtherance of the objectives of both the OHADAC Project and CIArb in the Caribbean region.

The parties will strive to promote initiatives aimed at:

(i) developing arbitration and mediation mechanisms in the Caribbean region

(ii) training arbitrators and mediators and

(iii) increasing the use of ADR by the key players in Caribbean economies.

These initiatives will be achieved through the organisation of events, the exchange of best practices garnered from the legal, procedural and other experiences of the parties, the dissemination of information about the activities of both organisations and the identification of suitable recipients for scholarships and other educational opportunities.

The Caribbean Branch's commitment to the OHADAC Project will principally be that of an in-kind voluntary contribution during the period 2019 – 2022 and will consist of participation in the training sessions and conferences that are organized in the course of the project's implementation.

The OHADAC Project has already established cooperation partnerships with other regional entities such as the Caribbean Court of Justice, the Cuban Arbitration Court, the Chamber of Commerce and Arbitration of Haiti and the Constitutional Tribunal of the Dominican Republic, among others.

THE RIGHT TO ARBITRATE IS AN ASSET

In a recent case in Barbados, the High Court granted an injunction to preserve the status quo between two parties until the rights of the parties were eventually determined by arbitration, by confirming that the right to arbitrate disputes is a contractual right and as such is an asset to be preserved by injunction.

The dispute concerned a lease between a landlord and a tenant, in which was contained a dispute resolution clause allowing for the mediation of certain disputes and, failing that, the referral of the same disputes to arbitration under the laws of Barbados.

The tenant had been occupying the premises for several years and had renewed the lease four times, when the landlord gave notice to vacate the premises two years before the last renewal was due to expire. The tenant, not wishing to vacate the premises early, invoked the dispute resolution clause and sought the landlord's agreement to maintain the *status quo* pending resolution of the dispute.

The landlord refused to comply, being of the view that the dispute was not amenable to mediation, and, on expiry of the notice to vacate, locked the tenant out of the premises and warned that any intrusion or interference in the landlord's exercise of its right as owner to secure control of its premises would be met with immediate civil and/or criminal proceedings.

The tenant applied to the High Court for an interim injunction against the actions of the landlord until the dispute was resolved. The matter came before and was heard by the Acting High Court Judge, Hon. Justice Alrick Scott, QC.

In his review of the facts, Scott J agreed that the circumstance under which the landlord was seeking to terminate the lease and re-enter the premises was not one of the certain types of disputes excluded by the dispute resolution clause, but that the mediation component of the clause was not binding since it lacked sufficient definition of the mediation process to allow the Court to compel mediation. However, he was not persuaded by the argument that the validity of the arbitration component of the clause was contingent on the validity of the mediation component and he proceeded on the basis of there being a valid arbitration agreement.

In making his decision, Scott J stated that the Arbitration Act, Cap 110 of the Laws of Barbados, makes provision for the consensual resolution of disputes and the Court is given a role to support and protect arbitration, but with minimal curial intervention in the arbitral process. Such support and protection comes by way of staying civil proceedings, insisting that parties abide by their agreement to arbitrate disputes and granting of interim injunctions.

He further stated that arbitration relies upon the Court for its effectiveness and this is no more evident than in a case where one of the parties to an arbitration agreement is being uncooperative or is unwilling to engage in arbitration. He noted that while the power, given to the Court under the Arbitration Act, to make an interim injunction rests on the ability of the arbitral tribunal to act, in this case, the tribunal could not act since it had not been constituted and so the Court's power to grant an interim injunction to assist and protect the arbitral process was necessary, acceptable and justified.

Scott J stated that the Arbitration Act provides the Court with the same power of making orders in respect of injunctions in relation to an arbitration reference as it does in relation to a Court action, and citing *American Cyanamid Co. v Ethicon Ltd* [1975] A.C. 396, he expressed satisfaction that, in granting an injunction, the applicable principles were the same; that is, requiring the applicant to show the requirements of a serious issue to be tried and that the balance of justice favours the granting of the injunction.

Scott J, citing *Cetelem SA v Roust Holdings Limited* [2005] EWCA Civ 618, concluded that contractual rights are assets to be preserved by an injunction and thus it must follow that the contractual right to arbitrate disputes can be protected by an injunction under the Arbitration Act, and summarised that the power to grant an injunction under section 14(5)(h) of the Arbitration Act must be done within the context of:

1. The Court when exercising its discretion should have in mind that its function is to assist and support the arbitration, where arbitration is on foot or contemplated, and that there should be minimal curial intervention in the arbitral process.

2. The Court should not seek to usurp the functions and powers of the arbitral tribunal.

3. The Court should have in mind too that the order which it seeks to make should generally not be dispositive of the matters in dispute but facilitative of the arbitration.

4. The Court should seek to give effect to the consensual arrangement of the parties to arbitrate and respect party autonomy in their choice to arbitrate their disputes.

Submitted by Patterson Cheltenham QC
Barbados

DISCOVERY AND CIVIL LAW SYSTEMS

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

Sections 1 to 7 of the article, which were published in earlier editions of this newsletter, explored the concept and forms of discovery, the approach taken towards discovery in international arbitration and the provisions for discovery within some rules of arbitration.

Section 8. Discovery Under Civil Law and Common Law Systems, Difficulties of Application.

A wide gap exists between the concepts of discovery in the context of Common Law and Civil Law. Despite the growing globalization now at work in international legal practice, it is nonetheless still possible to detect a wide range of matters where the purported convergence is not yet in evidence, or where the points in common are more apparent than real.

One such matter is discovery. The approach typical of Common Law, founded on the premise of allowing ample leeway in the obtaining of evidence in advance of the trial, stands in sharp contrast to the limited scope of pre-trial discovery envisaged by the Civil Law tradition.

For most countries that trace their legal heritage to the Civil Law tradition, discovery is inconceivable and often construed as being an intrusive, unnecessary and unjust device.

In international arbitration, which shares procedural aspects with both Civil and Common Law traditions, discovery is not countenanced to a degree comparable to what is seen as commonplace in legal practice in USA.

For attorneys from a legal background in which discovery is widely used and permitted, it can be something of a nightmare to find themselves immersed in a legal setting where discovery might be refused or where its application is hampered by every possible type of constraint and obstacle. For their part, however, attorneys from a Civil Law context will tend to view the use of discovery tactics as a dangerous tool vis-à-vis the rights of the parties and the smooth working of commerce and business concerns.

The philosophy of common law discovery is that, prior to the trial, any party to a civil action is entitled to request that the other produce all relevant information in possession of any person, unless such information be confidential.

The US Supreme Court has stated that the deposition-discovery process plays ". . . a vital role in the preparation for trial. The various instruments of discovery now serve as a device to narrow and clarify the basic issues between the parties, and as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues." Such a description is extraordinarily wide by reason of the guiding principles underlying civil proceedings in USA.

In the USA, civil proceedings are guided by the principles of full disclosure, equality of information between the parties, and the avoidance of surprises at the time of the trial. In contrast, Civil Law systems lay emphasis on the principle that each party has the burden of proving his or her own case and that the other party cannot be compelled to incriminate him or herself.

Indeed, the insurmountable difficulties lying in the way of uniform application of discovery methods lead to the conclusion that one of the most important practical problems confronting parties in international arbitration is the obtaining of the necessary documentary evidence for establishing the grounds on which to argue the case.

Arbitration Rules are generally silent on the point, or leave it to the discretion of the arbitrators to decide upon the degree to which recourse may be had to discovery in order to compel parties to disclose information or produce documents involuntarily. The agreed or adopted use of the IBA Rules of Evidence can be a useful tool for filling this gap.

Outside the confines of arbitral proceedings, there are diverse procedures in the various Civil Law jurisdictions which permit documents to be obtained from the other side and from third persons who are not a party to the lawsuit.

The entire article, including a look at discovery under Spanish law, can be found on ciarbcaribbean.org.

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