



The CIArbbean News

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of the Caribbean Branch of the Chartered Institute of Arbitrators

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ADAPTING ARBITRATION TO A CHANGING WORLD

The Queen Mary University of London, in association with White & Case LLP, recently conducted its twelfth survey of International Arbitration. The 2021 survey, titled 'Adapting Arbitration to a Changing World', attracted just over 1200 respondents with about 10% of them coming from the Caribbean and Latin America region.

Norah Gallagher, the Deputy Director of the University's School of International Arbitration said "the results reflect an interesting snapshot of change in arbitral practice during a time of global upheaval, to which the arbitration community had to adapt quickly, and some of these changes will remain after the pandemic recedes."

CI Arb, in preparing a briefing on the survey results for its members, identified as two key takeaways that (1) the UNCITRAL Arbitration Rules are the most utilized rules for ad hoc arbitrations and (2) the ICC International Court of Arbitration is the most preferred arbitral institution.

Survey respondents, when asked to select as their top choice an adaptation that would make other sets of arbitration rules or other arbitral institutions more attractive, chose administrative and logistical support for virtual hearings, followed by a commitment to a more diverse pool of arbitrators.

Emerging trends identified in the survey were that arbitration users would be willing to do without unlimited length of written submissions, oral hearings on procedural matters and document production, if these would make arbitrations cheaper or faster; and that technology continues to be widely used in international arbitration, in particular video-conferencing and hearing room technologies, but that greater use of artificial intelligence, such as data analytics, still lags behind.

Survey respondents identified the most attractive features in a rising arbitral centre as being:

- (i) greater support for arbitration by local courts and judiciary
- (ii) increased neutrality and impartiality of the local legal system
- (iii) a better track record in enforcing agreements to arbitrate and arbitral awards
- (iv) the ability to enforce the decisions of emergency arbitrators or interim measures ordered by arbitral tribunals
- (v) the ability of local courts to deal remotely with arbitration-related matters
- (vi) political stability of the jurisdiction
- (vii) allowing awards to be signed electronically, and
- (viii) third party funding being permissible in the jurisdiction.

Resorting to the Use of Technology in International Arbitration

The arbitration community has demonstrated willingness and readiness to resort to technology, with video-conferencing and hearing room technologies being the most commonly used forms of technology. Even though the use of virtual hearing rooms was not unknown in 2018, when compared to the results of the same enquiry in the 2018 survey, there appears to have been an explosion in the use of virtual hearing rooms.

The most highly ranked concerns with technology included the difficulty of accommodating multiple or disparate time zones, the impression that it is harder for counsel teams and clients to confer during hearing sessions and more difficult to control witnesses and assess their credibility, unreliability of service and the phenomenon of screen fatigue.

In a post-pandemic world, survey respondents saw a hybrid mix of in-person and virtual settings being the most popular option for almost all types of interactions. There appears to be an expectation that virtual hearings will become the default option for procedural hearings but that physical hearings will prevail particularly for cases with complex factual backgrounds.

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Encouraging Diversity in Arbitral Appointments

Over half of the survey respondents agreed that some progress had been made in relation to gender diversity in arbitral appointments, but over one third disagreed or strongly disagreed that similar progress had been made in relation to ethnic, geographical, age and cultural diversity. This data mirrors the 2018 survey indicating that despite the increased amount of focus on, and awareness of, diversity issues and initiatives since 2018, these have not as yet translated into actual or sufficient positive change.

Survey respondents identified ways to encourage diversity as being:

- (i) the role played by appointing authorities and arbitral institutions in promoting diversity (59%),
- (ii) the role played by counsel in suggesting diverse lists of arbitrators to their clients (50%),
- (iii) education and promotion of arbitration in jurisdictions with less developed international arbitration networks (38%),
- (iv) more mentorship programs for less experienced arbitration practitioners (36%), and
- (v) speaking opportunities at conferences for less experienced and more diverse members of the arbitration community (25%).

The promotion of dedicated policy texts and pledges did not rate highly (11%) as a tangible contributor.

*The above article is an extract from the **CIArb** Members' Briefing and further information and details of the original survey can be found at <https://www.whitecase.com/publications/insight/2021-international-arbitration-survey>*

SUBSCRIPTIONS

Members with outstanding subscriptions for 2021 are reminded to make payment as soon as possible. Enquiries regarding membership subscriptions should be directed to memberservices@ciarb.org

PROFILE UPDATE

Members are reminded to update their profiles on the **CIArb** main website www.ciarb.org.

To do so, log in to MyCIArb, choose "My Profile" and fill in the personal information section with an image, a summary of your credentials, your areas of expertise, your company details and links to your preferred social media. To publish your profile, ensure that the 'Make Profile Public' toggle is selected and that you have clicked the Update Profile button at the top of the page. A green toggle means your profile is capable of being viewed in the members' directory, filtered by name, specialism or country of residence. A grey toggle means your profile is hidden.

All **CIArb** members of the Caribbean Branch are listed on the Branch's website www.ciarbcaribbean.org. The list is limited to your name, country of residence and grade of membership. Members can have their listing removed, corrected or expanded to show more information such as an image, contact details and a brief bio. To do so, please contact info@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>

TRAINING DIARY

The **CIArb** Caribbean Branch offers the following Online Training Course

- 27 and 28 October 2021

INTRODUCTION TO INTERNATIONAL ARBITRATION –

Two half-day lectures. No pre-requisites needed – FEE: US\$300.00

Full details on the above course including course content, entry requirements, registration forms, fee payment and course materials can be obtained from the Course Administrator, Ms. Theresa Williams at info@ciarbcaribbean.org.

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 CIArb 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 info@ciarbcaribbean.org.

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

YOUNG MEMBERS

Members aged 40 years and under are reminded that the Caribbean Branch has established a Young Members Group (YMG) to support and provide activities for young professionals in ADR.

Persons requiring more information, or with an interest in assisting in the development of the YMG, should contact the Young Members Group Chair, Ms. Jodi-Ann Stephenson by email at kajstephenson@gmail.com

IMPACT JUSTICE MODEL BILL ENDORSED BY CARICOM

The Improved Access to Justice in the Caribbean Project (IMPACT Justice) reported on its website that at the June 2021 meeting of the Legal Affairs Committee of the Caribbean Community (CARICOM), regional Attorneys-General endorsed the IMPACT Justice Model Arbitration Bill (IMPACT Justice Model) and approved it as the CARICOM Model Arbitration Bill (CARICOM Model).

The IMPACT Justice Model was proposed to modernise and harmonise the arbitration laws in the Caribbean region. It is based, for the most part, on the Model Law on International Commercial Arbitration as adopted in 1985 by the United Nations Commission on International Trade Law and as amended in 2006 (UNCITRAL Model)

The layout and arrangement of the IMPACT Justice Model, comprising 11 Parts and 70 Sections, is similar to the layout and arrangement of the UNCITRAL Model, comprising 8 Chapters and 36 Articles. The IMPACT Justice Model is accepted by the UN Commission as being compliant with the UNCITRAL Model, but there are differences between the two Models, including unique modifications and additions.

What are the Differences?

Other than the differences arising from the use of varying drafting styles, the other differences are:

Section 2(2) of the IMPACT Justice Model expands application of the Model to domestic arbitrations whereas Article 1(1) of the UNCITRAL Model is specific it applies to international commercial arbitrations.

Section 3(1) of the IMPACT Justice Model expands the list of definitions to include ones unique to the Model.

Section 8 of the IMPACT Justice Model adopts only Option I of Article 7 of the UNCITRAL Model as it relates to the definition and form of a written arbitration agreement and does not adopt Option II whereby arbitration agreements do not have to be in any form of writing.

Section 32(1) of the IMPACT Justice Model, while giving the parties freedom to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings as Article 19(1) of the UNCITRAL Model, encourages the use of the UNCITRAL Arbitration Rules 2013, if the parties agree, and incorporates the Rules in Schedule 1 of the Model.

Section 38(2) of the IMPACT Justice Model limits the parties from referencing, with their statements of claim and defence, documents or other evidence that they will submit as permitted by Article 23(1) of the UNCITRAL Model.

Section 43(2) of the IMPACT Justice Model states that where the parties have not designated the law of contract, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected, whereas Article 28(2) of the UNCITRAL Model requires the tribunal to apply the law determined by the conflict of laws rules which it considers applicable.

The Modifications and Additions

There are unique Sections in the IMPACT Justice Model which provide modifications and additions to the Articles of UNCITRAL Model.

Section 1 and Section 2(1) set out a short title, provision for a date of commencement and the objects of the Model Act, which include giving effect to the UNCITRAL Model and facilitating States in becoming an

integral part of a regional approach to the resolution of disputes by arbitration.

Section 2(4) permits a court in the State of either party's place of business or habitual residence to perform certain court functions where the place of arbitration has not yet been determined.

Section 12(5) addresses the appointment of the arbitrator in a multi-party arbitration where the parties are unable to agree on an arbitrator.

Sections 18 and 19 deal with the use of mediation in arbitral proceedings. They address, where provided for in the arbitration agreement, the appointment of a mediator, the circumstances where the mediator may act as arbitrator and, where the parties agree, the circumstances where the arbitrator may act as mediator.

Section 32(4) confirms that attorneys-at-law may act as representatives of the parties.

Section 35 addresses the application of the State's Limitation Act to arbitration proceedings in the same way as it applies to court proceedings.

Section 36 addresses the consolidation of arbitrations where there are common questions of law, rights to relief claimed arising out of the same transaction or series of transactions or any other reasons for which consolidation may be desirable.

Section 42(3) entitles arbitrators to participate in any judicial taking of evidence and to ask questions.

Section 46(5) confirms that an award has the same effect between the parties as a final and binding court judgment.

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IMPACT JUSTICE MODEL BILL ENDORSED BY CARICOM

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Section 47 permits the parties the freedom to agree what costs of the arbitration proceedings are recoverable and stipulates that if there is no such agreement that Articles 40(1) and (2) of the UNCITRAL Arbitration Rules shall apply. It also stipulates that no additional fees shall be charged by the tribunal in clarifying, correcting or completing an award.

Section 48 gives any party the right to have the fees and expenses of the arbitrators assessed in accordance with Article 41 of the UNCITRAL Arbitration Rules unless the fees and expenses were fixed by written agreement or, in such agreement, were to be determined by a person or institution agreed to by the parties.

Sections 49 and 50 stipulate that Articles 42 and 43 of the UNCITRAL Arbitration Rules shall apply for the purposes of allocation of, and deposits for, costs.

Sections 51 and 52 address the award of interest and the costs of aborted arbitrations.

Section 58 defines what is meant by a conflict with public policy as it relates to the grounds for setting aside and or refusing to recognise and enforce an award.

Sections 59 and 60 address the use of foreign representatives in arbitrations.

Section 61 deals with the establishment of a regulatory body in the State to oversee and regulate the practice of domestic and international arbitrators.

Section 62 deals with the immunity of arbitrators from civil liability and their competency to testify and produce records in judicial or similar proceedings.

Sections 63, 64 and 65 address the privacy and confidentiality of arbitral proceedings, including court proceedings under the Act and the restrictions on the reporting of court proceedings heard other than in open court.

Sections 66 and 67 deal with issues related to the death and insolvency of a party to an arbitration agreement.

Sections 68, 69 and 70 address the making of Ministerial rules and regulations to give effect to the Act and in respect of the establishment, procedures, powers and functions of an arbitral tribunal, the review of the Act should the UNCITRAL Model Law be amended and the treatment of arbitral and related court proceedings commenced, and awards made, prior to the transition to the Model Act.

The CARICOM Model

The CARICOM Model, comprised of 11 Parts and 72 Sections, closely follows the IMPACT Justice Model in layout and arrangement but there are some modifications made.

One such modification is that the CARICOM Model does not incorporate the procedures of the UNCITRAL Arbitration Rules 2013 into the Model by reference to the specific articles of the Rules. Instead, the Model provides text which is consistent with the specific articles of the Rules.

For example, when dealing with the allocation of the costs of the arbitration, the IMPACT Justice Model states at Section 49 that 'Article 42 of the Model Rules [meaning the UNCITRAL Arbitration Rules 2013] shall apply for the purpose of the allocation of costs arising in arbitral proceedings.'

The CARICOM Model when dealing with the same issue at Section 50 incorporates text that closely mimics the text of Article 42 of the UNCITRAL Arbitration Rules, rather than refer the reader to the actual Rules.

Another modification is the optional Section 49 which permits the parties to specify a Reviewing Authority to carry out the functions of determining the schedule or the particular method for determining the fees and expenses of the arbitrators to be applied, reviewing the reasonableness of the arbitral tribunal's proposal for fees and expenses, if requested by a party, and reviewing the arbitral tribunal's determination of its fees and expenses to ensure consistency with the tribunal's proposal.

These functions are ascribed in the IMPACT Justice Model, by reference to Article 41 of the UNCITRAL Arbitration Rules, to an Appointing Authority.

*Article submitted by Miles Weekes
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In the next edition of this newsletter the author will review the provisions of the CARICOM Model and where they vary from the IMPACT Justice Model.

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

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