



The CI Arbbean News

QUARTERLY NEWSLETTER

of the Caribbean Branch of the Chartered Institute of Arbitrators

VOL. 1 NO. 18

1 JANUARY 2022

SIX THINGS TO PREVENT AND RESOLVE DISPUTES

The Trinidad and Tobago Chapter of the Caribbean Branch of **CI Arb** held a webinar on 22 November 2021 titled *Six Things Every Caribbean Business Should Do Now to Prevent and Resolve Disputes*. The purpose of the webinar was to identify six practical steps that businesspeople and their lawyers should take to prevent business disputes at the front-end and during the life of a contract, to manage potential and emerging disputes effectively, thus reducing business disruption, and to reduce the risks of unsatisfactory, expensive or unexpected outcomes.

The panel, comprising Hon. Barry Leon, an arbitrator and mediator with 33 Bedford Row, Arbitration Place and Caribbean Arbitrators, Michael Mcilwrath, CEO of MDisputes, and MDisputes' international disputes counsel Chiara Tondini, offered these steps:

1. Play an Active Role Throughout

Businesspersons should see this as feasible – not as being too difficult or time-consuming – and not see preventing and resolving disputes as 'something for the lawyers'.

They should establish a working protocol with their lawyers about what should be communicated to them and what input they want to provide. They should accept their lawyers' guidance on the manner of dealing with the other parties and the court or other adjudicators and on all procedural matters.

Lawyers should recognise that their business clients will often be pleased with such guidance and accept that client involvement and understanding will assist in making their roles easier, resulting in better outcomes and client satisfaction.

2. Focus on Interests

Reflecting on what the commercial relationship underlying the dispute represents for your business and for the other party helps you to figure out what you want to obtain and to set clear objectives with priorities. Winning a dispute is not a business objective, so think creatively about the objectives you want and establish reasonable ones at the earliest opportunity, even before a settlement opportunity arises.

In business, disputes are business problems, so separate them from the people and handle them in a business-like manner with reasoned strategies and tactics; not with emotions and personalities, or with the intent to punish or teach a lesson to the other side. Litigation can sometimes be the appropriate option, but it must be considered as a means to get results and not as a goal to win the case.

Encouraging and incentivising those persons supporting the case to give honest assessments is important and those persons should be realistic and not be overly optimistic or pessimistic in testing the case.

3. Plan for Disputes

In the pre-contract phase, when drafting the dispute resolution clause, consider all options and the use of an escalation or step clause with one or more non-adjudicative processes, such as negotiation and mediation, followed by an adjudicative process, such as arbitration or court litigation.

These non-adjudicative dispute resolution options are not mutually exclusive with a binding adjudicative dispute resolution option and they need not be done sequentially. They can be done in parallel and the non-adjudicative processes can be tried more than once if the parties consider such to be most fitting to their interests. Proposing the use of negotiation or mediation is not to be treated as a sign of weakness.

Dispute resolution clauses should be kept realistic, both in terms of timing and expectation. Model clauses are preferred because they are easy to find, have been drafted by experts, thus avoiding the legal cost of drafting, have been tested in the courts and minimize the risk of interpretation issues, with consequent cost and time savings.

4. Get the Right External Support

Obtain external resource support based on expertise and not because of a long-standing relationship. The most appropriate lawyer for the dispute is one who will provide an

(Continued on the next page)

(Continued from the previous page)
objective assessment of not just the strengths but also the weaknesses of the case and one who will work with you to develop strategy and tactics to achieve your dispute resolution objectives, while being reasonably familiar with the type of dispute and the resolution process in order to deliver the results.

A honest and reliable assessment of the case at the outset that outlines the best, worst and most likely outcome is important, and will need to be reassessed and updated when new information comes to light and business or other circumstances change.

5. Prepare and Be Ready to Settle

Winning means getting a good result, not necessarily winning the court litigation or arbitration. Being prepared to settle by negotiation or mediation means being ready by knowing your opening offer, your goal and your points of resistance.

Assuming that you have determined realistic objectives at the beginning of the dispute, then keep true to those objectives but be agile and know when to pivot, such as when new information or circumstances should change your objectives.

For budget purposes, expenditure on the dispute should be in proportion to the amount in issue and the importance of the dispute to the business. If it is a big dispute, consider third party funding and financing options. Trying to recover sunk costs is not a valid business objective in a dispute but the risk of adverse costs being awarded in the jurisdiction and in some dispute resolution processes should be included in cost calculations. Also consider your non-monetary costs as they can be significant, especially in any dispute involving the time of senior executives and management which takes them away from their

main objectives of growing the business.

6. Align Communications with Interests

Written communications have a long shelf-life, so before writing and sending, make sure you might not regret it in the future.

Communicate clearly with the other party, with your lawyer and among team members and, whether written or oral, align those communications with your objectives for that dispute.

The above takeaways are six steps to prevent and resolve disputes now. Of course, there are other things you should do but if you do these six things you will be much further ahead on preventing and resolving disputes.

*Article submitted by Hon. Barry Leon
British Virgin Islands*

*An unabridged copy of the above article, including social media links to recordings of the webinar and the contact details of the panellists, can be accessed on the **CIArb** Caribbean Branch website www.ciarbcaribbean.org by selecting the 'See more newsletters and articles' tab on the homepage.*

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 quarterly in January, April, July and October. 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 **CIArb** Caribbean Branch's webpage www.ciarbcaribbean.org.

PROFILE UPDATE

Members are reminded to update their profiles on the **CIArb** main website www.ciarb.org by logging in to MyCIArb, choosing "My Profile" and filling 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

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.

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

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>

IMPACT JUSTICE MODEL BILL ENDORSED BY CARICOM

In an article bearing the same title, published in the October edition of this newsletter, the author reviewed the differences between the Improved Access to Justice in the Caribbean Project Model Arbitration Bill 2017 (IMPACT Justice Model) and 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)

That article noted, as reported on the IMPACT Justice website, that regional Attorneys-General, at the June 2021 meeting of the Legal Affairs Committee of the Caribbean Community (CARICOM), endorsed the IMPACT Justice Model and approved it as the CARICOM Model Arbitration Bill (CARICOM Model).

The CARICOM Model, comprising 11 parts and 72 sections, closely follows the layout and arrangement of parts and sections in the IMPACT Justice Model, which has 11 parts and 70 sections, but there are some differences, including unique additions, omissions and other modifications.

General Differences

Other than the differences in phrasing arising from the use of different drafting styles, and the differences in numbering arising of necessity from the inclusion and exclusion of some sections and subsections, the general differences are:

The CARICOM Model requires the name of the State to be entered in the sections and subsections which reference the State, whereas the IMPACT Justice Model only requires the name of the State to be entered once in the definition of 'State' in subsection 3(1).

Similarly, the CARICOM Model requires the name of the court or other authority, who are to perform certain functions of arbitration assistance and supervision, to be entered in section 7 and repeated in the subsections and sub-subsections which reference the court or other authority, whereas the IMPACT Justice Model only requires the name of the court or other authority to be entered once in section 7.

As mentioned in the previous article the CARICOM Model does not incorporate the provisions of the UNCITRAL Arbitration Rules 2013 into the Model by reference to the specific articles of the Rules by number, as is done in the IMPACT Justice Model. Instead, the CARICOM Model provides text within its sections and subsections which is consistent with the specific articles of the Rules that it wishes to incorporate. For this reason, the definition of 'Model Rules' included in the IMPACT Justice Model has been excluded from the CARICOM Model.

Part 1 – Preliminary

The CARICOM Model at subsection 2(1) excludes two of the objects cited in the IMPACT Justice Model. These are to 'give effect to the Model Law' (meaning the UNCITRAL Model) and to 'facilitate the State in becoming an integral part of a regional approach to the resolution of disputes by arbitration'.

The CARICOM Model at subsection 3(1) includes definitions for the terms 'CARICOM', 'day', 'reviewing authority' and 'Secretary-General of the PCA' and at subsection 3(5) includes a method of calculating a period of time which is consistent with article 2.6 of the UNCITRAL Arbitration Rules.

Part 3 – Composition of Arbitral Tribunal

The CARICOM Model includes in both subsections 13(1) and (2) an option to require the recusal of an arbitrator when circumstances are disclosed by the arbitrator, both before and after appointment, that are likely to give rise to justifiable doubts as to the arbitrator's impartiality and independence.

Part 7 – Conduct of Arbitral Proceedings

As mentioned before, the CARICOM Model does not give effect to the discretionary use of the UNCITRAL Arbitration Rules and therefore, at subsection 32(1), does not include the phrase seen in the IMPACT Justice Model which states that parties 'if they agree, may follow the procedure of the UNCITRAL Model Arbitration Rules as set out in Schedule 1.'

Part 8 – Making of Award and Termination of Proceedings

By not incorporating any reference to the UNCITRAL Arbitration Rules, when dealing with the costs of arbitration, the CARICOM Model at sub-section 47(2) removes any reference to articles 40.1 and .2 of the Rules, as is found in the IMPACT Justice Model. Instead, the CARICOM Model adds subsections 47(4) and (5), which include text consistent with articles 40.1 and .2 of the Rules. However, the CARICOM Model excludes from the term 'costs' any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA and includes an option that the term 'costs' may include any fees and expenses of the reviewing authority as well as the fees and expenses of the Secretary-General of the PCA.

(Continued on the next page)

IMPACT JUSTICE MODEL BILL ENDORSED BY CARICOM

(Continued from the previous page)

In a similar vein, by not incorporating any reference to the UNCITRAL Arbitration Rules, when dealing with the fees and expenses of arbitrators, the CARICOM Model at subsection 48(3) removes any reference to article 41 of the Rules, as is found in the IMPACT Justice Model. Instead, the CARICOM Model adds subsections to section 48 to include text consistent with articles 6 and 41 of the Rules.

Subsection 48(2) of the CARICOM Model introduces the concept of a reviewing authority – an entity not envisaged in the IMPACT Justice Model – whose functions and appointment or designation are covered in an optional section 49.

The optional section 49 permits the parties to specify and agree a reviewing authority, or have it designated by the Secretary-General of the PCA, 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 in international cases only or in local and international cases, and, if requested by a party, reviewing the reasonableness of the arbitral tribunal's proposal for fees and expenses, and later, the arbitral tribunal's determination of its fees and expenses to ensure consistency with the tribunal's proposal.

In the IMPACT Justice Model, the above functions are assigned to an appointing authority or, if none is agreed, to the Secretary-General of the PCA by reference to article 41 of the UNCITRAL Arbitration Rules.

Subsections 48(9) to (12) of the CARICOM Model are optional, so matters relating to the reviewing authority's refusal to act or failure to make a determination on the reasonableness of an arbitral tribunal's fee proposal, as well as a party's right to have the arbitral tribunal's determination of its fees reviewed by the reviewing authority or the Secretary-General of the PCA may not be adopted when the State passes its national law based on the CARICOM Model.

In addition, subsections 48(15) and (16) are also optional, so matters relating to the ability of the reviewing authority and the Secretary-General, in the exercise of their functions under the section, to request information from the parties and the arbitrators and to give them the opportunity to present their views, as well as ensuring that all communications to and from the reviewing authority and the Secretary-General under subsection 48(15) are provided by the sender to all other parties, may not be adopted when the State passes its national law based on the CARICOM Model.

When dealing with the matter of allocation of costs and deposits of costs, the CARICOM Model, by not incorporating any reference to the UNCITRAL Arbitration Rules, at sections 50 and 51, remove any reference to articles 42 and 43 of the Rules respectively, as is found in the IMPACT Justice Model. Instead, the CARICOM Model adds subsections to sections 50 and 51 to include text consistent with articles 42 and 43 of the Rules.

Part 11 – General Provisions

The CARICOM Model makes section 59 optional explaining in a footnote that provisions determining what makes an award in conflict with public policy should not be limited by the Model but instead should be determined by the State adopting the Model.

The CARICOM Model deleted the provisions that were included in the IMPACT Justice Model at section 61 which related to the establishment of a regulatory body in the State to oversee the practice of arbitrators and to regulate the practice.

The CARICOM Model added provisions at section 71 dealing with the repeal of any previous Act and at section 72 dealing with the Act binding the State.

That concludes the two-part comparative review of the provisions of the UNCITRAL Model Law on International Commercial Arbitration, the IMPACT Justice Project Model Arbitration Bill and the CARICOM Model Arbitration Bill.

*Article submitted by Miles Weekes
Barbados*

IN THE NEXT EDITION

Upcoming in the April 2022 edition of **The CIArbbean News**, Hon. Barry Leon will present an article on court-facilitated arbitration, examining whether the time is right for such schemes in the Caribbean. Also look out for the **CIArb** Caribbean Branch 2022 Training Diary and news of the Annual General Meeting due by the end of April. Until then, stay safe!

DISCLAIMER: The articles published in this newsletter are for general information purposes only and do not reflect the views of The Chartered Institute of Arbitrators. Their inclusion in the newsletter does not imply any endorsement by the Institute of their content, accuracy or authenticity.

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

Copyright © 2022 Caribbean Branch of the Chartered Institute of Arbitrators. All rights reserved.