The CIArbbean News

QUARTERLY NEWSLETTER

of the Caribbean Branch of the Chartered Institute of Arbitrators

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TWO CHAPTERS ELECT MANAGEMENT COMMITTEES

During the past year, the members of the CIArb Caribbean Branch in Trinidad and Tobago formed an interim committee to reinvigorate and relaunch their Chapter. This effort culminated in the election of a new Chapter Committee which comprises:

- **Chair** - Anthony Gafoor, FCIArb
- **Vice Chair** - Ria Mankee-Sookram, MCIArb
- **Secretary** - Mark Hood, MCIArb
- **Treasurer** - Homida Mohammed, MCIArb, and
- **Education and Training Officer** - Nalini Sharma, FCIArb

The Trinidad and Tobago Chapter was formed in 2010 and has about 60 members. The newly elected Chapter Committee is currently compiling a directory of members as one of its key projects. This is to ensure that there can be some linkage between members and the potential opportunities through which they can be engaged professionally, after the Committee sets about actively liaising with the various individuals and corporate entities perceived as likely to have some interest in engaging the range of services offered by the members.

Another key project identified by the Chapter Committee is support for ongoing initiatives to modernize the existing domestic arbitration legislation of Trinidad and Tobago, which dates as far back as 1939. The principal intent of such support is to encourage the implementation of the UNCITRAL Model Law and/or Rules, which will assist in attracting foreign investment opportunities to the jurisdiction.

Chairman Gafoor has remarked that while the current objective of the Chapter Committee is to focus on certain areas which are in demand, particularly in relation to maritime, construction and commercial arbitration, among the future objectives will be to promote related areas of dispute resolution so as to offer maximum flexibility to those who may wish to engage the services of the Chapter members.

Meanwhile, in Barbados, the members of the CIArb Caribbean Branch there elected a new Chapter Committee at the Chapter's Annual General Meeting (AGM) held at the end of May. The new Chapter Committee comprises:

- **Chair** - Calvin Hamilton, FCIArb
- **Vice Chair** - Tanya Goddard, FCIArb
- **Secretary/Treasurer** - George Holder, ACIArb, and
- **Member** - Nicola Berry, FCIArb

The Barbados Chapter was formed in 2010 and has 44 members. In the past four years, its focus was mainly on education and training, so as to increase its overall membership and improve its grades of membership. With the larger capacity, the newly elected Barbados Chapter Committee will now be seeking to improve the awareness and use of arbitration in Barbados by continuing with two key initiatives; namely, the modernizing of the domestic arbitration legislation and assisting in the establishment of a court-annexed arbitration scheme.

BRANCH AGM ELECTIONS

The Notice and Agenda for the CIArb Caribbean Branch AGM, to be held online on 7 August 2019, have been issued to the members along with nomination forms for the proposal of members to serve on the Branch Committee. The Branch Rules permit the election of up to fifteen members to serve on the Branch Committee. All nomination forms are to be returned to the Secretary by 24 July 2019.

UPDATE YOUR PROFILE

Members are reminded to activate their online member profiles on the upgraded CIArb website. To do so, go to https://www.ciarb.org/log-in and log in to your MyCIArb account. Click on the red arrow next to your name on the top right-hand corner of your account page and choose 'Edit Profile' from the pop-up menu. You can then upload a photograph, fill in your professional details and make your profile public for others to view in the Members Directory.

CARIBBEAN CODE OF GOOD ARBITRATION PRACTICE

As we discuss and promote arbitration in the Caribbean, it is becoming increasingly evident that arbitral institutions, arbitrators and counsel (arbitration practitioners or practitioners) need to adhere to exigencies of good practices in international arbitration. In order to properly serve the parties and the process, practitioners must observe high standards of ethical conduct. Codes of good practices or guidelines are construed to advance these objectives.

Existing international codes of good practices set forth generally accepted standards of ethical conduct for the guidance of arbitration practitioners in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration. Significantly, adherence to high ethical standards serve to preserve the enforceability of the award, which is the objective of the parties' decision to go to arbitration.

International codes of good practices incorporate internationally accepted arbitration practices, principles, ethics, procedures and rules, which can be adopted by the various practitioners. Such guidelines are needed in a region where the practitioners are still not fully equipped to handle international arbitrations. In order for the Caribbean, in time, to surface as a seat for international arbitrations, especially those involving disputes between or among Asian, US, European and/or Latin American parties, the international arbitration community must appreciate that the high standards found in modern international arbitration practice, are also adhered to by practitioners in the region.

Acceptance of a code of good practices by the Caribbean arbitration community would serve to underscore the region's adherence to good practices. It should be noted that although the guidelines do not impose any obligation on the parties, they potentially contribute to harmonizing arbitration practice.

What is a Code of Good Arbitration Practice?

The arbitral process should be transparent, dependable and akin to the principles of equality, due process, and confidentiality. With this in mind and comparing existing international arbitration practice to the procedures present in the Caribbean, there exists a definite deficit in the sphere of uniform arbitration guidelines for the region.

Furthermore, international arbitration practitioners, unless customs and practices change in the Caribbean, will be frustrated by the outdated and narrowly tailored arbitration habitudes of some Caribbean institutions. A key example in this instance is the international norm of requiring arbitrators to submit statements of impartiality and independence when being considered for appointment. This practice has not become uniform in the Caribbean.

In order to promote confidence in international arbitration in the region, there is a need for the establishment of a set of guidelines consisting of a list of recommendations and practices, most of which are commonly used in international practice, that can be adopted by the various arbitration institutions established in the region as a uniform and consolidated set of rules and recommendations for Caribbean arbitral institutions.

I would recommend that the Guidelines be divided into four sections: Section 1, geared solely towards arbitration institutions, listing recommendations concerning the duties of arbitral institutions; Section 2, geared towards conduct of counsel in international arbitrations; Section 3 would recommend best practices for arbitrators in international arbitration and Section 4 would consist of a model set of rules which reflect prominent international arbitration trends.

It is to be noted that the recommendations are not exhaustive and that most, if not all, of the recommendations are also applicable to domestic arbitrations.

The Guidelines would stress their contractual nature and primarily apply only if the parties agree. Yet, arbitrators should be able to apply the Guidelines - even if they are not contractually agreed upon - if they consider themselves authorized to rule on matters of party representation and to ensure the integrity and fairness of arbitration proceedings. Further, the Guidelines will not displace applicable mandatory law, professional rules, and arbitration rules.

In formulating these Guidelines, we have the benefit of a wealth of international sources, including but not limited to, the ABA Rules of Professional Conduct, CIArb and IBA Guidelines on Ethics, the Spanish Arbitration Club's Code of Good Arbitration Practices and the Swiss Chamber´s Code of Ethics of Arbitrators.

The details of each of the Guidelines Sections will be examined in the next edition of this newsletter.

Submitted by Calvin Hamilton
Barbados

SPORTS ARBITRATION IN TRINIDAD AND TOBAGO

This article, first published in the September 2014 edition of the Global Sports Law and Taxation Reports, has been updated for current publication. In the first three sections, published in the April 2019 edition of this newsletter, the author explained how arbitration has evolved to settle sports disputes but observed the trends of curial intervention in setting aside awards.

Section 4. The Rationale for Setting Aside the Jairam Award

In July 2010, the non-resolution of a dispute between the West Indies Cricket Board (WICB) and the West Indies Players' Association (WIPA), led to an arbitral process before a sole Arbitrator, pursuant to the arbitration clause in the parties' Collective Bargaining Agreement (CBA) and under the Arbitration Act of Trinidad and Tobago.

In December 2011, the Arbitrator, Seenath Jairam, S.C., made an award in favour of the WIPA and the WICB applied to the High Court citing eight grounds upon which the award should be set aside or remitted to the Arbitrator. Justice Andre Des Vignes heard the matter and in March 2014 set aside the arbitrator's award.

At the heart of the order to set aside the Jairam Award were the errors of law identified by Justice Des Vignes. The possibility of setting aside was contemplated by the parties in the CBA, yet this preliminary point still had to be ventilated as the WIPA questioned whether the court had the jurisdiction to determine the matter. The resolution would come by construing Article XI 4(b) of the CBA, which stated that: "*Except on a point of law, the decision of the arbitration tribunal shall be final and binding on both parties.*"

The judge expeditiously disposed of the issue noting that the language of the Article was "clear and unambiguous" and that "provided that the issues raised by the WICB concern the Arbitrator's interpretation of points of law, this court is sufficient[ly] vested with authority to review the decision of the Arbitrator."

It is in this regard that relatively recent developments in Australia and England, in particular, are worthy of mention. Lord Steyn, in *Lesotho Highlands v Impregilo* [2005] 3 All E.R. 789, alluded to the "right of appeal 'on a question of law'" as articulated in section 69 of the UK Arbitration Act 1996; the question of law referring specifically to "a question of the law of England" as defined in Section 82(1) of the 1996 Act.

Julian Sher, writing in the April 2014 edition, Vol. 80 No. 2, of the International Journal of Arbitration, Mediation and Dispute Management, notes though, that traditionally it has been a feature of English arbitration to restrict judicial intervention.

Sher adds that by "enacting the Arbitration Act 1996, (the English Arbitration Act) the UK Parliament adopted the [UNCITRAL] Model Law, but went much further, by severely restricting the possibility of setting aside in particular." This approach, he observes, confirms the practice of the English courts to confine "setting aside to only the most egregious and reprehensible of cases."

The position in England, then, is that arbitral awards will be respected as final and binding, with setting aside occurring only in the most extreme circumstances.

Further, Sher contrasts the Australian statutory ethos, stating that, if the making of an arbitral award was contrary to public policy, it could trigger recourse against the award, including setting aside. Within recent years, Commercial Arbitration Acts have been enacted in Australia at the State level, complementing the adoption of the International Arbitration Act into federal law.

A useful question has consequently been asked in the Australian context: "What is the test for remittal rather than setting aside?" This query is apposite in the Trinidad and Tobago setting as well, in the light of the court's response to the Jairam Award. Justice Des Vignes was satisfied that errors of law warranted a setting aside and not an 'order for remission.' An Australian judge would probably concur, with his English counterpart likely to dissent.

Notably, both England and Australia currently have access to the expertise of sports-specific dispute resolution bodies, respectively, Sport Resolutions UK and the Oceania Registry of the Court of Arbitration for Sport (CAS).

In *Australia Sports Anti-Doping Agency v Bannister* Ref. A1/2013 emanating from the CAS Sydney Registry, the sole arbitrator made the significant point that he "would arbitrate on the dispute and render an Award in conformity with the agreement between the parties to submit their dispute for arbitration before the CAS".

It appears, then, that his safeguard from having a challenge lodged against his award would be to comply with the terms of the arbitration agreement. In any event, appeals against CAS awards are rare.

SPORTS ARBITRATION (continued)

It is conceivable that the Des Vignes ruling could be a catalyst in shaping sports-related arbitration law in Trinidad and Tobago and, perhaps, even the wider Caribbean. Yet, the decision may also have indirectly endorsed the wisdom of the well-established practice of using subject matter experts in ADR generally.

This analysis is offered in view of the fact that, although arbitrator Jairam identified the relevant principles of contract interpretation, the judge's appraisal was that Jairam "failed to apply these principles". Des Vignes J. added that the Arbitrator's construction of the CBA "flouted business common sense".

The latter observation is reminiscent of the message of Lord Mustill in *The Chrysalis* [1983] 2 All E.R. 658; a message which Tweeddale succinctly summarized, in the April 2014 edition, Vol. 80 No. 2, of the International Journal of Arbitration, Mediation and Dispute Management, writing as follows: "…Mustill J. recognised that a court might be less willing to substitute its own judgment for that of the arbitrator if the issue concerned an area of industry in which the arbitrator had extensive practical experience."

Where the CAS excels, the Trinidad and Tobago and, by extension, the Caribbean sports ADR mechanism, under-achieves. The reality is that there is a dearth of arbitrators in the region with a strong history of practical experience in sports-related disputes, thus putting the Jairam Award into some context.

The judge's comment that the arbitrator's decision flouted business common sense was not an indictment on his competence but rather may have reflected a possible lack of familiarity with the overlap between the commercial-isation and juridification of inter-national cricket in the 21st century.

Conversely, arbitrator Ian Mill, Q.C., although not from the Caribbean, had a different narrative in his award in the 2006 FIFA World Cup case in Trinidad and Tobago.

The Ian Mill Award will be examined in the next edition of this newsletter

Submitted by J. Tyrone Marcus
Trinidad and Tobago

HAVE YOUR SAY

The CIArbbean News is published on a quarterly basis, on the first day of January, April, July and October.

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

Past copies of the newsletter, unabridged articles and more information about the Caribbean Branch, its Chapters and the Branch Committee can be found on the Caribbean Branch's website at www.ciarbcaribbean.org and on the Branch's LinkedIn Group page at http://www.linkedin.com/groups/8201202.

EVENTS DIARY

- CIArb **Caribbean Branch Annual General Meeting**
  * ONLINE 7 August 2019

- **International Arbitration Module 1 - Law, Practice and Procedure**
  An 18-week private study Course with face-to-face and online Tutorials and a three-hour written Exam
  * Bridgetown, **BARBADOS**
  2 August – 12 December 2019

- **Introduction to International Arbitration**
  A one-day Seminar with an Online Assessment
  * Kingston, **JAMAICA**
  9 September 2019

- **International Arbitration Accelerated Route to Membership**
  A two-day Workshop with a written Assignment and a three-hour written Exam
  * Kingston, **JAMAICA**
  10 – 12 September 2019

- **Introduction to International Arbitration**
  A one-day Seminar with an Online Assessment
  * Road Town, **TORTOLA, BVI**
  18 November 2019

- **International Arbitration Accelerated Route to Fellowship**
  A two-day Workshop with a written Assignment and a four-hour written Exam
  * Road Town, **TORTOLA, BVI**
  16 – 18 November 2019

Please note that course dates are preliminary and subject to change. For further details and information, please contact the Course Adminis-trator at info@ciarbcaribbean.org.