The CIArbbean News

QUARTERLY NEWSLETTER
of the Caribbean Branch of the Chartered Institute of Arbitrators

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CHAIR DEEMS GUYANA CONFERENCE A SUCCESS

The Chair of the CIArb Caribbean Branch, Ms. Shan Greer, recently reported on the Branch's hosting of its Third International Arbitration Conference and Training Workshop in Georgetown, Guyana from 23rd to 27th April 2018. She declared, "Judging from the comments of those who attended, the Conference and Workshop were very successful and an excellent starting point for the work that must be done to promote and improve the use of arbitration in Guyana."

Silver Sponsor for the Conference was property and construction development consultants, BCQS International; while the British Virgin Islands International Arbitration Centre (BVI IAC), Foley Hoag LLP, Debevoise & Plimpton LLP, Demerara Bank Limited and Mid-Atlantic Oil & Gas Inc., were the Bronze Sponsors. In collaboration with the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the Caribbean Community (CARICOM), the University of Guyana and the Trinidad-based Dispute Resolution Centre, the Caribbean Branch conducted CIArb training courses in international arbitration and mediation, for lawyers and non-lawyers alike, over the first two days and presented two separate conferences over the final three days of the week-long event.

The one-day conference addressed the fundamental workings of commercial arbitration proceedings and aimed to contribute to the development of domestic and international commercial arbitration in Guyana. The two-day conference guided participants through each stage of an ICSID arbitration and updated participants on the latest developments in ICSID, as well as best practices before ICSID tribunals by reference to the most recent cases.

In total, about 70 persons from 16 countries gave their time and resources to attend or participate in the conferences and workshops, 38 of whom benefitted from the training courses on offer, which were the 'Introduction to Mediation', the 'Introduction to International Arbitration' and the 'Accelerated Route to Membership in International Arbitration' courses.

Ms. Greer commented, "Our diverse and dynamic group of speakers, moderators and trainers provided in-depth insight, as well as actionable and practical tools for managing the arbitration process in international arbitration. I take this opportunity, on behalf of the Branch, to thank the sponsors, collaborators and those who attended and supported the conference. Without the overwhelming assistance received, both within and outside of Guyana, the Conference and Workshop would not have been possible and the Branch looks forward to returning to Guyana with further training courses soon."

The new CIArb Caribbean Branch Committee for 2018 – 2019 has been established and comprises

Chair
Ms. Shan Greer, FCIArb.
(*St. Lucia*)

Vice Chair
and
Honorary Secretary
Justice Anthony Gafoor, FCIArb.
(*Trinidad & Tobago*)

Vice Chair
and
Education & Training Officer
Mr. Patterson Cheltenham, FCIArb.
(*Barbados*)

Honorary Treasurer
Mr. Mandish Singh, FCIArb.
(*St. Lucia*)

Elected Members
Mr. Ebrahim Lakhi, MCIArb.
(*Barbados*)

Ms. Jodi-Ann Stephenson, MCIArb.
(*St. Lucia*)

Elected Chapter Chairs
Mr. Miles Weekes, MCIArb.
(*Barbados*)

Ms. Arabella Di Iorio, FCIArb.
(*British Virgin Islands*)

Mr. Ronald Gardner, FCIArb.
(*St. Lucia*)

Ms. Rene Baptiste, ACIArb.
(*St. Vincent & The Grenadines*)

EVENTS DIARY

● 11 – 13 September 2018
CIArb Caribbean Branch TRAINING WORKSHOPS, Basseterre, ST. KITTS

11 September - 1 day Training Workshop - Introduction to International Arbitration

11 September - 2½ day Training Workshop - Accelerated Route to Membership - International Arbitration

● 3 – 5 October 2018
CIArb Caribbean Branch TRAINING WORKSHOPS, St. John's, ANTIGUA

3 October - 1 day Training Workshop - Introduction to International Arbitration

4 October - 1 day Training Workshop - Introduction to Mediation

3 October - 2½ day Training Workshop - Accelerated Route to Membership - International Arbitration

● 7 – 9 November 2018
CIArb Caribbean Branch TRAINING WORKSHOP, Georgetown, GUYANA

7 November - 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

YOUNG MEMBERS GROUP FORMED

The Caribbean Branch Committee has agreed on the establishment of a Young Members Group and has appointed Ms. Jodi-Ann Stephenson as the interim Group Chair. In introducing the formation and purpose of the Young Members Group, Ms. Stephenson issued the following statement.

The Young Members Group (YMG) offers a platform for young members to develop their knowledge and professional experience in Alternative Dispute Resolution, as well as provides invaluable relationship-building and networking opportunities.

The global Young Members Group currently comprises over 3,000 members, aged 40 and under, in over 90 countries. These individuals hail from various professional backgrounds, including engineering, quantity surveying, construction, law and arbitration.

The global YMG hosts an annual conference and I was invited to participate, as a speaker, at the Paris Conference in December 2017. In my presentation, entitled "*Access as an Impediment to Diversification: the Caribbean Young Professional Experience*", I examined the challenges faced by young Caribbean practitioners who seek to enter the field of international arbitration.

I highlighted some of the strides that have been made in the Caribbean region in the field of arbitration, especially through the assistance of the CIArb Caribbean Branch; and I suggested further steps to build on these achievements, so as to enable young Caribbean nationals to take a greater role in the arbitration community and thereby improve diversity in international arbitration.

My presentation sparked a lively discussion on the issue of diversity and of the Caribbean's under-representation on arbitral tribunals and as arbitration counsel, as well as the steps that can be taken towards improvement.

The Caribbean Branch has now established a Caribbean YMG and I invite the Branch's vibrant, youthful members to become a part of this new and exciting group, which looks forward to:

● broadening our members' knowledge through online seminars and YMG sessions at CIArb Caribbean conferences;

● developing interpersonal skills and leadership abilities of young members through networking and communication workshops;

● boosting student membership through recruitment drives at tertiary institutions;

● establishing strategic links with other professional institutes in order to enhance the YMG's network; and

● establishing ties with key stakeholders, such as legal and commercial firms and companies, in order to promote alternative dispute resolution and introduce them to the resources and services offered by CIArb.

If you are aged 40 and under and interested in joining the Caribbean Branch's YMG, please contact me, Ms. Jodi-Ann Stephenson via email at kajstephenson@gmail.com.

For further details and information on CIArb global YMG network, please visit the website: http://www.ciarb.org/branches/young-members/about-us

Submitted by Jodi-Ann Stephenson
St. Lucia

MEDIATING CONSTRUCTION DISPUTES

*In February 2018, during delivery in Barbados of a presentation entitled "*On the Cutting Edge of Dispute Resolution*", Dr. John Fletcher, the ADR Product Group Director of The Royal Institution of Chartered Surveyors (RICS) spoke of the rise in the use of evaluative mediation in resolving construction disputes. The below article by Mr. Martin Burns, the RICS Head of ADR Research and Development explores the issue.*

Should Mediators Appointed To Resolve Construction Disputes Be Experts in Construction Matters?

Conventional mediator training maintains that once you are skilled in the techniques of mediation, you can mediate any type of dispute. It maintains that the mediator is responsible for managing a process which enables the parties to negotiate a settlement and therefore, it is not necessary for the mediator to have substantial expertise in the subject matter of the dispute.

The argument continues that in a dispute about construction, it is the parties, not the mediator, who need to understand the technical issues. The parties will know the facts better than the mediator and, since the mediator must avoid giving technical advice to the parties, having a mediator with construction expertise is of little value to the parties in the case.

The alternative view is that while, in theory, subject matter expertise may not always be necessary, in practice, it is almost always of benefit to the parties. This pragmatic view also seems to ratify a transformation of mediation in the construction sector from the hands-off facilitative model into the evaluative model where mediators give settlement recommendations.

The recent experience of RICS indicates that most parties want a mediator who has technical expertise and can understand the precise nature of the dispute. They do not want to spend valuable time teaching the mediator about matters they see as elementary.

If the mediator's role is to liaise between the parties and communicate in an effective and incisive way, it follows that he or she must have significant technical expertise relating to the subject matter in dispute.

A survey in 2012 by the Centre for Effective Dispute Resolution (CEDR) revealed a great deal about a change in expectations in the UK relating to the expertise mediators have in the subject area in dispute, and the approach they take to help parties find viable solutions.

Mediators surveyed reported that one of the most significant factors in determining their appointments was knowledge of the subject area in dispute. Lawyers representing parties in disputes rated a similar factor as crucial when selecting mediators, although they also cited that having plenty of mediation experience was also important.

It is apparent that, more and more, parties want their mediators to be able to really understand the issues in dispute, and to adopt a role of more than simply managing an exchange of information. They see their mediators assisting them to make informed decisions.

Mediators with technical knowledge and experience can rely upon their familiarity with the subject matter to ask questions which may help the parties to consider properly the benefits and drawbacks of settlement options.

Expertise in the substantive area in dispute allows a mediator to focus quickly on the issues in dispute. A mediator who is familiar with the pertinent technical aspects can swiftly grasp the really important facts and help narrow the issues to those that really matter.

There are a number of challenges facing subject expert mediators which can be addressed through training in evaluative mediation procedures. The main challenge is to avoid making hasty conclusions and offering opinions too early. Subject expert mediators should exercise restraint and remain active listeners, learning as much as they can about the parties' relative positions and expectations. They should guide and help parties to engage in constructive negotiations without being dominant simply to demonstrate their own expertise.

The survey concluded that ignorance in the subject matter seldom added value and there is a growing preference for subject expert mediators who can grasp the issues quickly and proceed to move the parties towards informed solutions. This attitude is driving policy with some prominent mediation providers who are now offering bespoke expert mediation services aimed at specific sectors, like the built environment.

Part of the mediation process is that parties have the freedom to choose the mediator that suits them best. Despite the theoretically "pure" view still pervading much mediation training, the reality, internationally, is that parties and their lawyers are choosing subject expert mediators.

The major mediation service providers are following suit to provide subject expert mediators and to allow the mediation process to provide well-reasoned, informed and satisfactory settlements for all.

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.

Sections 1 to 6 of the article, previously published in this newsletter, explored the concept and forms of discovery, the approach taken towards discovery in international arbitration and the provisions for discovery within some of the leading rules of arbitration.

Section 7. Provisions Governing Discovery In The Arbitration Rules of Other Arbitral Institutions.

As outlined previously, with reference to the Arbitration Rules of the International Chamber of Commerce (ICC), the International Center for Dispute Resolution (ICDR) and the London Court of International Arbitration (LCIA), the rules vary as regards discovery.

Article 27(3) of the Rules of the United Nations Commission on International Trade Law (UNCITRAL), which are widely used in ad hoc arbitrations, provides that, "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence . . . ."

The Rules of the International Centre for Settlement of Investment Disputes (ICSID), which settles disputes between governments and private investors, provides in Article 34(2) that "The Tribunal may . . . : (a) call upon the parties to produce documents, witnesses and experts; and (b) visit any place connected with the dispute or conduct inquiries there."

In 2010, the International Bar Association adopted revised Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules), which envisage the exchange of documents before the arbitral hearing. These rules are being increasingly used in international cases by agreement between the parties, either prior to or at the time of the preliminary hearing, and permit the parties to make application for "a narrow and specific requested category of documents that are reasonably believed to exist." (Article 3.3(a) (i)).

Even where there is no agreement by the parties to apply the IBA Rules, when one party makes a reasonable request for production of certain documents or classes of documents material to the settlement of the dispute, it is unlikely that the tribunal will deny it, or that the other party will be able to refuse to comply with the requested production, for fear that the arbitrators might construe such refusal as elusive and suspicious, hinting at concealment of information prejudicial to the said party's interests.

Whatever the case, when it comes to weighing up such evidence the nationality of the arbitrators may play a relevant role and the wisest course for parties who submit to international arbitration would be to make express inclusion or exclusion of the possibility of discovery in their arbitration clauses.

Agreements can expressly provide that there is to be no exchange of information whatsoever or, alternatively, that recourse may be had to the existing wide range of possibilities of discovery, e.g., in the U.S. Federal Rules of Civil Procedure. Similarly, parties can opt for an intermediate mechanism, such as exchange of only those documents that prove relevant, as provided for by the IBA Rules.

The typical case is that parties in international arbitrations are not unduly interested in recourse being had to far-reaching possibilities of discovery. In turn, arbitrators who do not come from jurisdictions where discovery enjoys popularity tend to be wary of a policy of extensive application of discovery.

A party from the USA, for example, who agrees to submit to arbitration with a foreign-based body in a Civil Law jurisdiction, where the arbitral tribunal is likely to be presided over by an arbitrator with a Civil Law background, ought to give careful consideration to the advisability of having or not having certain stipulations regarding discovery included in the arbitration clause.

A party's benefit from, or prejudice by, the use of discovery depends on the type and nature of the contract and the particular claims or defence pleas submitted in the arbitration.

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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