The CIArbbean News

QUARTERLY NEWSLETTER

of the Caribbean Branch of the Chartered Institute of Arbitrators

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OFFICIAL LAUNCH OF THE YOUNG MEMBERS GROUP

The Young Members Group of the Caribbean Branch of the Chartered Institute of Arbitrators (YMG Caribbean) was officially launched on 1st March 2019 at an event held at the Faculty of Law, the University of the West Indies (UWI), Cave Hill Campus in Barbados. It was attended by law students of the University and members and young ADR professionals of the Branch.

Chair of the Caribbean Branch, Ms. Shan Greer (r) and Young Member Ms. Lanasia Nicholas (second from right) in a photo op with UWI students after the YMG Caribbean Launch.

The Chair of the Caribbean Branch, Ms. Shan Greer, in welcoming the guests and members, provided them with general information about the Institute and an overview of the work and activities of the Caribbean Branch since its establishment in 2006. Following Ms. Greer's cordial welcome, Mr. Patterson Cheltenham, Vice Chair of the Caribbean Branch provided information on the different levels of CIArb membership and on the training courses offered by the Caribbean Branch.

YMG Caribbean Chair, Ms. Jodi-Ann Stephenson, then shared the vision of YMG Caribbean, which is to promote the use of alternative dispute resolution (ADR) by exposing young professionals and students in the Caribbean to the practice of various ADR techniques.

Ms. Stephenson highlighted the many benefits of YMG Caribbean membership, in particular, mentorship and professional networking opportunities, exposure to ADR activities, as well as free student membership of CIArb.

Following a refreshment and networking break, the attendees were then engaged by an animated video presentation which introduced them to the concept of ADR, dispute avoidance techniques, different ADR mechanisms and their suitability for various disputes. The attendees then participated in drafting dispute resolution clauses for a contract scenario provided and they enthusiastically discussed their different choices. The official launch was concluded by the Chair of the Barbados Chapter, Mr. Miles Weekes, who gave a vote of thanks.

In commenting after the launch, Ms. Stephenson expressed the view that the creation of YMG Caribbean is a momentous milestone, as it is the first international ADR group in the Caribbean that is geared specifically towards promoting the awareness and use of ADR among young professionals and students, and that she would welcome hearing of members' views at kajstephenson@gmail.com.

Chair of YMG Caribbean, Ms. Jodi-Ann Stephenson (r) and Young Member Ms. Richel Bowen (second from right) in a photo op with UWI students after the YMG Caribbean Launch.

EVENTS DIARY

CIArb Caribbean Branch 2019
TRAINING COURSES CALENDAR

- Introduction to International Arbitration
A one-day Seminar
with an Online Assessment
* Port-of-Spain, TRINIDAD
1 July 2019
* Kingston, JAMAICA
9 September 2019
* Road Town, TORTOLA, BVI
18 November 2019

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

- Commercial Mediation
Module 1 - Training and Assessment
A five-day Workshop
with a one-day Assessment
* Bridgetown, BARBADOS
8 – 14 July 2019

- International Arbitration
Accelerated Route to Membership A two-day Workshop
with a written Assignment and a three-hour written Exam
* Port-of-Spain, TRINIDAD
2 – 4 July 2019
* Kingston, JAMAICA
10 – 12 September 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

Course dates are subject to change. For details and information please contact the Course Administrator at info@ciarbcaribbean.org.

TUTOR TRAINING PROGRAMME

The Chair and Regional Pathway Leader of the Caribbean Branch, Ms. Shan Greer, has expressed satisfaction with the outcome of the first of the Golden Thread Train-the-Trainer workshops, which was conducted in Barbados at the beginning of March 2019.

The main objective behind the training workshop was to prepare the participants for delivering training under the new Pathways Programme. The workshop was designed primarily for members who are already tutors on the Approved Faculty List (AFL), but it also allowed for members who are seeking to qualify as tutors on the AFL to gain valuable training as well.

The workshop was attended by two of the existing AFL tutors from Barbados and by seven prospective AFL tutors from Barbados, St. Lucia and Trinidad. The attendance by this number of prospective tutors was welcomed by Ms. Greer, who saw the response as helpful in building a larger cadre of qualified tutors to train across the Caribbean region and to relieve the burden on the existing small number of tutors.

A larger pool of qualified AFL tutors from the Caribbean Branch will also assist in making the cost of training courses more affordable, as it reduces the need for engaging extra-regional trainers to bolster the existing small pool and eliminates the associated costs of air travel and hotel accommodation required for such extra-regional assistance.

Participants at the Train-the-Trainer workshop were briefed on the objectives of new Golden Thread training of CIArb and on the syllabuses and learning outcomes of the various modules under the new Pathways programmes.

In addition, participants were exposed to suggested new approaches to tutoring and to giving feedback. To reinforce application of the knowledge imparted, the majority of the participants were engaged in presenting elements of the Introduction to International Arbitration workshop which was held in Barbados on the day after the Train-the-Trainer workshop.

Further Train-the-Trainer workshops are planned for Trinidad at the end of June and for Jamaica at the beginning of September. As in Barbados, attendance will be primarily for tutors on the existing AFL but members who are desirous of qualifying as tutors will be permitted to apply to attend. Such persons must be Fellows or be Members who would qualify for the Peer Interview for Fellowship.

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 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

KEEP IN TOUCH

Keep in touch by joining LinkedIn and our Group at http://www.linkedin.com/groups/8201202.

DISPUTE MANAGEMENT IN FOCUS

The practice of law is at the core a discipline in dispute management. As a dispute management professional, it is then for me to develop and utilize a range of management tools to secure dispute avoidance and to assist the resolution of disputes when they arise. I must also maximise my understanding of effective dispute management tools and be able to leverage them for sustainable economic development, peace in communities and good governance.

My involvement in the legal sphere is intricately linked to a story of economic development in the western world where corporate and commercial advances have been supported by creative law-based technologies. Up to the early 1890s, for example, business activity was solo in nature and condemned to the parochial with no real prospect of harnessing broad-based investor input or for going global.

Then came the House of Lords decision in *Salomon v Salomon* on 16 November 1897, after which the scope of the possible was changed forever. There, the Court, and not the Legislature, decided that the company was distinct from its owners and that it had capacity to absorb liability without direct negative implications for them.

There are, as should be imagined, exceptions to the general rule of separate and apart. However, the principle is now firmly entrenched in the common law and is the foundation on which domestic as well as multinational corporations are built. These corporations are now able to harness broad-based investor support and have been the catapulting foundation of every successful western economy.

For all the advances that have been enabled by the law, its nature has remained constant. However fanciful the analysis of law and its varied dimensions may be, at core it is no more and no less than a mechanism designed to support the effective management of disputes.

The Constitution, for example, is designed to regulate the conduct of the State and how it relates to the governed. Here, the rules and conventions, as with any other area of law, become most important where there is an expressed or implied divergence of views as to meaning in the Constitution itself or in how some other law or process relates to it. At this point, conflict is manifest and resolution requires effective management under the law and by reference to its established processes.

The Constitution is the foundational basis for democracy and governance in many countries. It establishes that there are three branches of government – Executive, Legislative and Judicial. The Constitution has, in addition to many other features, carved out that litigation in national courts is the method by which disputes of a legal character are to be settled.

While it is true that litigation is a favoured default and true also that its value is well-established, in the area of commercial activity litigation is not so favoured that it cannot be avoided. In fact, there are areas in which commercial parties deliberately avoid the use of litigation and instead resort to other contractually provided-for methods of dispute settlement. Insofar as international trade and investment is concerned, arbitration is the primary mechanism for resolving disputes.

Like with litigation, the decision made in arbitration is final and binding. In litigation there is a judgement, and in arbitration there is an award. Both have *res judicata* effect and can therefore be relied upon to defend against subsequent action in any forum on the issues that have been determined.

Since arbitration arises under contract, the parties are able to determine the scope of the arbitration and any other aspect of how it is to proceed. They can choose who their arbitrator will be, the period within which a decision must be made, the venue for hearings, the language(s) of the arbitration and other features that suit their needs.

This level of autonomy or choice is not possible with litigation, yet the arbitral award is as enforceable and capable of being enforced in the same way as a judgement. Unlike a judgment, however, an arbitral award delivered in a country such as Jamaica, which has implemented the New York Convention on the Recognition and Enforcement of Arbitral Awards, 1958, is not limited to Jamaica but is instead substantively capable of being enforced without re-hearing in other Convention countries. With this and other benefits in mind, why should an international trade and investment party choose litigation in a national court over arbitration?

Submitted by Dr. Christopher Malcolm
Jamaica

ARBITRATION STUDY

The Commonwealth Secretariat is conducting a study on the use of international commercial arbitration in resolving disputes across the Commonwealth. You can participate by completing the questionnaire at http://thecommonwealth.org/arbitration-study The deadline for the study is 30 April 2019.

SPORTS ARBITRATION IN TRINIDAD AND TOBAGO

This article was first published in the Global Sports Law and Taxation Reports of September 2014 and is updated for current publication.

Section 1. Introduction

Arbitration is a creature of contract and has been defined as '*a private system of adjudication*' by Margaret Moses in her book 'The Principles and Practice of International Commercial Arbitration'.

Jan Paulsson, writing on the arbitration of international sports disputes in the book 'The Court of Arbitration for Sport 1984-2004', stated that '*There is however a more credible line of reasoning in support of exclusive extrajudicial authority to settle sports disputes. This is the concept that the exclusive disciplinary jurisdiction of sports officials has been granted by the parties to the dispute on a consensual basis; the ordinary courts are thus ousted by virtue of the familiar contractual mechanisms of prorogation.*'

Paulsson's allusion above to the consensual basis upon which sports arbitral tribunals have been given exclusive dispute resolution jurisdiction reflects both the fact and the fiction of the process. Fact: because judicial intervention is generally discouraged and sporting federations' autonomy encouraged. Fiction: because the threat of exclusion from sport's mega events militates against true and genuine consent to arbitration by athletes.

The issue of consent apart, current trends in international arbitration suggest that the question of setting aside an arbitrator's award is gaining prominence and giving rise to new jurisprudential developments both inside and outside of the sports arena. The March 2014 judgment of High Court Judge Andre Des Vignes in Trinidad and Tobago is a case in point and will receive due consideration later.

Section 2. Fast, Frugal, Fair & Final

Julian Sher, writing in Vol. 80 No. 2 of the 'International Journal of Arbitration, Mediation and Dispute Management' in April 2014, stated that '*The new regime for domestic commercial arbitration reflects how far Australia has come in creating a substantively distinct jurisdiction for commercial dispute resolution as an alternative to the courts'* and also that *'An avowed desire to avoid the replication of processes through the courts motivated the authors of the UNCITRAL Model Law on International Commercial Arbitration. Their aim was to restrict drastically the scope for curial intervention in order to achieve speedy, cost-effective, fair and final resolution of disputes.'*

The four goals articulated above by Sher mirror the objectives of most organisations involved in alternative dispute resolution (ADR).

Predictably, each target is experiencing its own level of success, with speed and cost varying from country to country and industry to industry. As far as fairness is concerned, sport arbitrations underwent some scrutiny with the 1992 challenge in the case of *Elmar Gundel v FEI (The International Equestrian Federation)* Arising from *Gundel*, the International Council of Arbitration for Sport was born, with a view to producing clearer separation between the International Olympic Committee (IOC) and the Court of Arbitration for Sport (CAS), a body conceived by the IOC in 1984.

The Swiss Federal Tribunal in *Gundel* endorsed the impartiality of CAS, cautioning that an '*arbitral tribunal which is an organ of an association appearing as a party to the dispute does not ensure a sufficient degree of independence*.'

The fourth objective, the finality of arbitration, is the focus of this article.

Section 3. Setting Aside the Arbitration Award

In July 2010, the non-resolution of a dispute between the governing body of West Indies cricket, the West Indies Cricket Board (WICB), and the players' union, the West Indies Players' Association (WIPA), led to an arbitral process, pursuant to the Arbitration Act Chap. 5:01 of Trinidad and Tobago, before the sole Arbitrator, Seenath Jairam, S.C.

The Arbitrator 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. Des Vignes J. heard the matter and set aside the arbitrator's award.

In the next edition of this newsletter, this article will continue, examining the rationale for the setting aside.

Submitted by J. Tyrone Marcus
Trinidad and Tobago

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