



# The CI Arb News

## QUARTERLY NEWSLETTER

*of the Caribbean Branch of the Chartered Institute of Arbitrators*

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## COMMONWEALTH ARBITRATION STUDY PUBLISHED

In the April 2019 edition of this newsletter, readers were asked to participate in a major study of international commercial arbitration in the Commonwealth by completing an online questionnaire.

The Commonwealth is a voluntary association of 53 independent sovereign states, including states of the Caribbean region in which the members of the **CI Arb** Caribbean Branch reside.

The report on the study, which was commissioned at a meeting of the Commonwealth Law Ministries in 2018 and developed by the Commonwealth Secretariat's Office of Civil and Criminal Justice Reform, has been published.

The study identifies one of the barriers to cross-border trade as uncertainty over dispute resolution. It sees international commercial arbitration as an effective tool available to businesses but identifies ten challenges hindering its use as a dispute resolution mechanism. One challenge is that 58 per cent of Commonwealth countries do not have structures that reflect modern best practice in international commercial arbitration and a few countries do not have a legislative framework for arbitration at all. Other challenges include rising costs, regulatory issues and lack of understanding, expertise and diversity.

The study sets out seven solutions including calls to action for all countries to become party to the New York Convention and to adopt modern arbitration laws based on the UNCITRAL Model Law. Other recommendations include building capacity, promoting the teaching of international commercial arbitration, collecting, analysing and making available arbitration data on an ongoing basis and removing legal barriers to accessing international commercial arbitration.

## TRAINING COURSES GO ONLINE

Due to the extraordinary circumstances caused by the COVID-19 pandemic, **CI Arb** and its Branches have started offering their training courses in alternative dispute resolution via online platforms in lieu of the face-to-face classroom setting.

The Caribbean Branch advertised four such online courses during September. Registrations for the Introduction to Mediation and the Module 1 Law, Practice and Procedure of International Arbitration have closed and those courses have commenced.

Registrations for the Introduction to International Arbitration and the Module 2 Law of Obligations are still open and forms can be submitted to the Course Administrator at [info@ciarbcaribbean.org](mailto:info@ciarbcaribbean.org)

The report includes an annex of commercial arbitration in every Commonwealth country, listing past and current arbitral legislation, international instruments, relevant case law, the arbitration landscape and funding for legal claims. The report on the study is considered a valuable resource for arbitrators, governments, traders and investors and it can be downloaded from <https://library.commonwealth.int/Library/Catalogues/Controls/Download.aspx?id=8023>

As the Caribbean Branch seeks to grow its course offerings in mediation, it has taken note that **CI Arb** has developed a new virtual Module 1 Mediation course, which will run for two half-days per week for 7 weeks. This new virtual course is being piloted at the moment and on completion, the **CI Arb** Education and Training Department will run a 'Train the Trainer' session for mediation faculty in October.

Any member of the Caribbean Branch's approved mediation faculty who wishes to participate in the 'Train the Trainer' session and any member who is not an approved faculty member but wishes to be considered for training as a tutor in mediation, should contact the Regional Pathway Leader, Ms. Shan Greer, or the Course Administrator.

# WINDING-UP PETITION NOT ARBITRABLE IN CVS CASE

In the July 2020 edition of this newsletter, the authors introduced readers to the CVS case where, in October 2018, FamilyMart China Holding Co. Ltd. (FMCH), the minority share-holder of China CVS (Cayman Islands) Holding Corp. (CVS), brought a petition before the Cayman Islands court seeking the 'just and equitable' winding up of CVS. Ting Chuan (Cayman Islands) Holdings Corporation (Ting Chuan), the majority shareholder, sought to strike-out the petition, or to have it dismissed or stayed. The Grand Court granted a stay in February 2019 on the ground that the subject-matter of the petition must be referred to arbitration, but this judgement was appealed by FMCH and cross-appealed by Ting Chuan, who renewed its attempt to strike out the entire petition. The authors now review the appeal judgement and decision of the Cayman Islands Court of Appeal (the CICA).

## The CICA Judgment

In April 2020, the CICA allowed FMCH's appeal and overturned the first instance judgment, holding that the petition should not have been stayed on account of the arbitration agreement. In a lengthy judgment delivered by Moses JA, with whom Martin JA and Rix JA concurred, the CICA provided a detailed rationale for its decision, including the following key points.

Firstly, the subject-matter of the petition is not arbitrable. In reaching this conclusion, the starting point was the Court's consideration of whether it is just and equitable that a company should be wound up is a *threshold* question, rather than a question of *relief*. It is only if the Court decides that it is just and equitable to wind up the company that it may then determine whether a winding up order should be made,

or whether one of the alternative available remedies should be granted. This feature distinguishes Cayman law from English law, which permits stand-alone alternative remedies where a petitioner can establish unfair prejudice under section 994 of the UK Companies Act 2006. It follows that *Fulham* (cited in the first judgement) was distinguishable since, in that case, there had been no need to establish grounds for winding up.

Secondly, a petitioner has a statutory right to petition for a winding up, as confirmed by the CICA in *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd*. [2019 (1) CILR 481]

In the judgment of Moses JA in CVS: *"This right can only be taken away in circumstances where it is plain at an early stage that the petition will fail because there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue... Thus FMCH's statutory right persists like that of Tianrui, despite the fact that under the statutory scheme, if FMCH establishes that the Company should be wound up, alternative remedies to winding up will be available... FMCH has a statutory right to invoke the exclusive power of the court to wind up the Company..."*

Thirdly, the judge erred in being heavily influenced by a perceived need to find contractual causes of action contained within the petition, and to regard such causes of action as being "foundational" matters that had to be established at the outset. Rather, in order to determine the threshold question as to whether there are sufficient grounds to justify a winding up on just and equitable grounds, the Court must evaluate all of the circumstances of the case.

In the judgment of Moses JA: *"The factual questions which the court have to determine are not mere questions of primary fact but require evaluation, both in relation to the gravity and significance of those facts and where responsibility for any breaches of duty or a breakdown of the relationship between the parties lies... All the primary and secondary facts... go to resolution of the statutory threshold question whether it is just and equitable that the Company should be wound up. That being the width of the Court's determination, it is difficult... to see how discrete issues may be "hived off" to arbitration."*

Fourthly, any reference of such matters to arbitration would create duplication and a risk of inconsistent decisions between the arbitral tribunal and the Court. Further, any findings of the arbitral tribunal would not bind third parties to the arbitration.

In the judgement of Moses JA: *"Absent any agreement to be bound by findings of fact which go to that issue, the Court would be entitled, in the exercise of its exclusive jurisdiction to form a fresh and, if necessary, wholly contrary view of the evidence."*

Fifthly, these concerns about duplication and possible inconsistency of findings could only be avoided where the parties have agreed that the matters which go to the question of any winding up on just and equitable grounds should be arbitrated because they have agreed not to present a petition. Such agreements are valid and enforceable pursuant to section 95(2) of the Companies Law, however, in the CICA's judgment, the mere existence of an arbitration agreement does not amount to an implied agreement not to petition.

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Sixthly, a mandatory stay of the petition was not available under section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) since the relevant arbitration agreement would be “*inoperable*” insofar as it concerned the matters pleaded in the petition, which were not arbitrable.

Finally, although the Court had a discretionary power to grant a stay, the CICA declined to do so since FMCH had not agreed not to present a petition.

### **Conclusion**

The first instance judgment of Kawaley J and the CICA judgment, each given in emphatic terms, reached opposite conclusions about how to resolve the tension between arbitration agreements and the Court’s exclusive jurisdiction to determine winding up petitions. By its judgment, the CICA has resolved this tension in a clear ruling, such that companies, investors, insolvency practitioners and their advisors will be better placed to assess whether a winding up petition is a viable option despite the existence of an arbitration agreement. The case also highlights the importance of including a no-petition clause within such contracts, if it is the parties’ intention to preclude a petition ever being brought.

More broadly, though, the Cayman Islands remain a pro-arbitration jurisdiction that upholds and enforces arbitration agreements save where, as here, they are found to be in conflict with the exclusive jurisdiction of the Court.

*Submitted by  
Andrew Pullinger and Shaun Tracey  
Cayman Islands*

The full unedited article and the CICA judgement may be found on the **CIArb** Caribbean Branch’s website: [www.ciarbcaribbean.org](http://www.ciarbcaribbean.org)

## **MEMBERS’ NEWS**

The current membership of the **CIArb** Caribbean Branch is 227, comprising 70 Fellows, 105 Members, 47 Associates and 5 Student members. The Members Directory tab on the Branch’s website, [www.ciarbcaribbean.org](http://www.ciarbcaribbean.org), includes a list of the members stating each member’s title, first name, last name, country of residence and membership grade.

The default display arranges the members’ data in a tabular format of 25 persons per page, sorted first by country of residence in alphabetical order, then by grade of membership from highest to lowest, then by surname in alphabetical order and then by first name in alphabetical order. Users can change the default order by clicking on the desired heading into which the user desires the data sorted and can change the number of persons displayed per page by clicking the number at the bottom of the page.

Provision is made for members to expand, on request, their personal data to include an email address and a telephone number, which will be displayed on the table, and a website domain name, an image and a short bio, which will be displayed by clicking the search icon next to the person’s name.

Any member who wishes his or her data removed, corrected or expanded and any member whose data is missing from the directory should contact the Branch by email at [info@ciarbcaribbean.org](mailto:info@ciarbcaribbean.org).

Members are reminded that outstanding subscriptions for 2020 should be paid by the end of October 2020. Any member whose membership has lapsed due to non-payment of subscription fees should contact the Institute by email at [memberservices@ciarb.org](mailto:memberservices@ciarb.org).

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Ms. Goddard also discussed the appropriate number of arbitrators and factors to consider when choosing the arbitrators, including the complexity of the case, the merits of the case, the duration of arbitration, and their expertise based on the nature of the subject matter of the arbitration. She then wrapped up her presentation with a discussion on the role of an appointing authority and the importance of the applicable law.

Mrs. Berry returned to discuss standard arbitration clauses, issues arising when drafting arbitration clauses and stay of court proceedings. During her presentation, she provided examples of standard arbitration clauses from various international arbitral institutions and the AMCC. Mrs. Berry stressed the importance of parties being clear in their intentions when using a standard arbitration clause, expressly opting out of any provisions that they do not wish to apply to their proceedings.

When examining faulty arbitration clauses, Mrs. Berry noted that some common mistakes made in drafting arbitration clauses were using ambiguous language, improperly addressing the institution in charge of administering the arbitration process or naming one that had ceased its service, and excluding essential or necessary elements.

Mrs. Berry concluded with a discussion on stay of court proceedings and, by way of examining two court decisions from Barbados, contrasted the court’s relatively conservative approach to granting a stay in a domestic arbitration to the more liberal approach in an international arbitration.

*Submitted by  
Lanasia Nicholas  
Young Members Group, Barbados*

# THE DRAFTING OF EFFECTIVE ARBITRATION CLAUSES

*This article reviews a recent webinar hosted by the CIArb Barbados Chapter to discuss how to draft an effective arbitration clause. The webinar was held in partnership with the Barbados Bar Association and the Arbitration and Mediation Court of the Caribbean (AMCC) and was funded by the Compete Caribbean Partnership Facility.*

Mrs. Nicola Berry, Committee Member of the Barbados Chapter, commenced the webinar by providing an introductory overview of the legal framework in Barbados in respect of arbitrations and noted the Arbitration Act, Cap. 110 of the laws of Barbados in respect of domestic arbitrations and the International Commercial Arbitration Act, 2007 in respect of international arbitrations.

Mr. Miles Weekes, Chair of the Caribbean Branch, segued into a discussion on the reasons for arbitration, opening with a definition of 'arbitration', and continuing with the role of arbitrators and the benefits of arbitration. These benefits included the limited grounds of appeal against arbitration awards and the recognition and enforcement of arbitration awards in 163 countries, including Barbados, pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly called the New York Convention.

He highlighted the importance of having a valid and legal arbitration agreement and stated that a critical feature was that the arbitration agreement must be 'in writing'.

The definition of 'in writing' is wide and includes an arbitration clause in a contract, unsigned documents and the mere reference to an arbitration clause.

Mr. Weekes stressed on the importance of the arbitration agreement using broad and inclusive language since this is the source of the power of the arbitrator, but he noted that the key component of an arbitration clause is that it establishes that the parties intend to have any and all disputes finally resolved by arbitration. He closed with a discussion on the seat of arbitration.

Ms. Shan Greer, Past Chair of the Caribbean Branch, then followed with a discussion on how an effective arbitration clause facilitates the arbitration process in a manner that requires "the least court intervention as possible and delivers an enforceable award in a timely and cost effective manner." She highly recommended that the parties outline in their arbitration agreement the type of arbitration, whether an ad hoc or institutional arbitration, and the applicable rules they wish to govern their arbitration.

Ms. Greer discussed the advantages and disadvantages of ad hoc and institutional arbitrations. She noted that some of the benefits of ad hoc arbitrations are that these types of arbitration are more cost effective than an institutional arbitration, and provide flexibility to the parties enabling them to decide the dispute resolution procedure themselves along with the arbitrator.

Ad hoc arbitrations however rely heavily on the active participation of the parties, whereas, institutional arbitrations benefit from pre-established rules, administrative and experienced personnel and administrative assistance from the institution, which encourage reluctant parties to participate. In addition to some of the administrative fees associated with institutional arbitrations, other downsides include bureaucracy that may lead to delays and additional costs.

The importance of choosing the applicable rules governing arbitrations was also examined and in this regard, Ms. Greer highlighted that the factors to consider when choosing applicable rules included: (1) the degree of administration; (2) fee structure; (3) expedited and summary procedures; and (4) specialist arbitration institutions.

Ms. Tanya Goddard, Secretary General of the AMCC, then joined the discussion and examined other critical aspects to consider in drafting an effective arbitration clause, such as language, number of arbitrators, appointing authority and applicable law.

She stressed the importance of the parties' prior agreement on the appropriate language to be used in arbitration and, in this regard, noted that important factors to consider were: (1) the consistency of documentation (for example, the transaction documents, technical documents, correspondence, invoices, etc.) and (2) the choice of language of the proceedings.

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Submissions, views and comments should be sent by e-mail to [barbadoschapter@gmail.com](mailto:barbadoschapter@gmail.com)

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