



The CI Arbbean News

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of the Caribbean Branch of the Chartered Institute of Arbitrators

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FOURTH TRIENNIAL CONFERENCE 2021 IN REVIEW

The **CI Arb** Caribbean Branch held its Fourth Triennial Conference 2021 on 27 and 28 May. With a theme of IMPROVING THE ADR LANDSCAPE IN THE CARIBBEAN, the Conference examined how the United Nations (UN) Conventions, Model Laws and other international instruments on arbitration and mediation support the use of ADR in the effective settlement of commercial disputes in the Caribbean.

The online Conference received good support from the members of the Branch and others in the wider ADR community, attracting 340 registrants and 33 presenters, coming from 35 countries.

The Conference was organised in association with the British Virgin Islands International Arbitration Centre (BVIAC) who provided use of their digital platforms for the registration and videoconferencing, along with other logistical, marketing and promotional support.

Additional promotional support was provided by the other Conference Partners – **CI Arb** Bahamas Branch, **CI Arb** Brazil Branch and the regional arbitral institutions, ACP Legal for the OHADAC Project, ADR Services Ltd., the Arbitration and Mediation Court of the Caribbean, Caribbean ADR Initiative, Dialogue Solutions Ltd., the Dispute Resolution Foundation and the Jamaica International Arbitration Centre.



Above: Screenshot from the Opening Session of the Fourth Triennial Conference 2021

The Conference commenced with welcome and opening remarks by Mr. Miles Weekes, Chair of the Branch, **CI Arb** President Ms. Ann Ryan Robertson, **CI Arb** Vice-President Mr. John Bassie, and Sir Dennis Byron, Patron of the Branch, (all pictured above) and these were followed by Keynote Speeches and Panel Discussions by invited ADR practitioners and open forum discussions by the attendees.

The first Keynote Speech focussed on the United Nations Commission on International Trade Law (UNCITRAL) and was delivered by Mr. Jae Sung Lee, Legal Officer in the International Trade Law Division of the UN Office of Legal Affairs, which functions as the Secretariat for UNCITRAL. Speaking from Austria, he began by reflecting on the establishment of UNCITRAL,

outlining its structure and mandate.

'In 1966, the United Nations General Assembly established the Commission on International Trade Law in response to the calls and the need for the United Nations to play a more active role in removing and reducing the legal obstacles to the flow of international trade that are to be achieved by the progressive harmonisation and unification of the laws of international trade.'

UNCITRAL is an inter-governmental body composed of 60 member States of the United Nations gathered to formulate rules on international trade. To facilitate inclusive discussions of these legal standards, other UN member States and international inter-governmental and non-governmental organisations, like the Chartered Institute of Arbitrators, participate in our discussions.'

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Mr. Lee then spoke of the influence and achievements of UNCITRAL, asserting that international arbitration is grounded on a number of UNCITRAL texts, including the 63-year old New York Convention which provides the mechanism to enforce arbitral awards across borders and which is now signed by 168 States.

‘So while the New York Convention precedes the establishment of UNCITRAL by eight years, the Secretariat of UNCITRAL continues to function as its guardian, promoting its adoption and ensuring universal application.

Another UNCITRAL text which is being examined at this Conference is the UNCITRAL Model Law on International Commercial Arbitration, which has influenced arbitration laws around the globe including some in the Caribbean – Barbados, Costa Rica, Dominican Republic, Jamaica and the British Virgin Islands, to name a few.

Then in commercial contracts you often find reference to the UNCITRAL Arbitration Rules – a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings which, to my understanding, has found its way into the Jamaica law as well.

Arbitration is not the only area of dispute resolution that UNCITRAL works on. In parallel with arbitration, UNCITRAL has worked towards establishing an international legal framework for commercial mediation. In fact, I am pleased to inform you that the Singapore Convention on Mediation, which was adopted in 2018 and provides a cross-border enforcement mechanism for mediation settlement agreements, entered into force last year; only one year after the Convention opened for signature – with Grenada, Haiti and Jamaica joining as three of the first signatories.



Above: Mr. Jae Sung Lee, UNCITRAL

Along with the Convention, the Model Law on International Commercial Mediation was updated in 2018 and in two months’ time, during the annual Commission Session, it is expected that the revised Mediation Rules, along with the Notes on Mediation, as well as the Guide to Enactment of the Model Law, will finally be adopted by the Commission.

So in the coming July, UNCITRAL would have prepared the necessary legal standards that provide the international framework for both international arbitration and commercial mediation.’

Mr. Lee then spoke on the current circumstances brought on by the COVID-19 pandemic, noting that last July the Commission looked at the measures taken by arbitral institutions from across the world in response to the crisis and which, in his opinion, accelerated changes that would have taken years to develop otherwise. The Commission also examined how international dispute resolution would likely evolve as a result of the responses.

In terms of other current work being undertaken by UNCITRAL, Mr. Lee informed the Conference about the new provisions for expedited arbitrations which, in March, have been finalised by Working Group II on Dispute Settlement, for approval by the Commission in July.

‘The so-called UNCITRAL Expedited Arbitration Rules, which will be presented as an Appendix to the UNCITRAL Arbitration Rules, are aimed at simplifying and streamlining arbitral proceedings to save costs and time. Some of the key features are: a simplified process for designating an appointing authority; a default of a sole arbitrator; mandatory consultations with the parties at an early stage of the proceedings; short time frames including for the rendering of the award six months after the constitution of the tribunal; the possibility to not hold hearings; limitations on counter-claims and additional claims; and a general rule that evidence be in writing.’

In terms of future work, Mr. Lee advised that in addition to work on adjudication, emergency arbitration and early dismissal, there seems to be a growing interest in dispute resolution in the digital economy and the Secretariat has produced proposals for work in that area.

One proposal will address the issues arising from technology-related disputes by preparing protocols on confidentiality of information, taking of digital evidence, the involvement of experts, and safeguarding due process. A second proposal relates to the use of online platforms for dispute resolution and will further elaborate the Technical Notes on Online Dispute Resolution, prepared in 2016, to take into account the wide range and different degrees of technologies being used in the platforms. A third proposal is to collect and compare information on the latest trends regarding international dispute resolution, such as technologies to maximise efficiency, legislative responses and case law.

Following an update on what is happening at UNCITRAL with regard to investment disputes, Mr. Lee closed his Keynote Speech with his

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observations on arbitration reform for the Caribbean to improve the ADR landscape by cultivating an effective culture of arbitration.

'I note that there is growing interest and enthusiasm in the Caribbean region for the modernisation of arbitration law. The legal framework is the cornerstone for promoting arbitration as an effective mechanism to resolve commercial disputes and more efforts may be needed to modernise the laws, which are often based on outdated versions of the UK Arbitration Act. However, what I would like to stress is that the enactment of the law is merely a starting point for reforms. There are certain stages that need to follow.

First, arbitration practice has to develop based on the arbitration law. There have to be cases where parties resolve their disputes with the assistance of an arbitrator and there have to be examples where parties are able to retain business relations with the other party and at the same time resolve their disputes in a cost and time efficient manner. However, there is a lack of cases being reported from the Caribbean. The point is that efforts to compile data about the use of arbitration and case law would need to be part of the arbitration reform. These cases can then be shared more broadly by using the UNCITRAL platforms thus allowing foreign parties to better understand how arbitration is conducted and perceived in the region.

Second, for the arbitration practice to develop there has to be adequate hard infrastructure. This includes facilities for hearings and meetings, arbitral centres, logistics for parties and tribunals, adequate connectivity, and safety and security for the parties as well as for the tribunal. However, of more importance is the build-up of the soft infrastructure. If there are no trained arbitrators to conduct proceedings, the law is meaningless.

If there are no arbitration institutions to administer and assist the process, the parties and the tribunal would find it difficult to proceed with arbitration. And of the utmost importance is raising the awareness of the businesses that they can choose to arbitrate their disputes.

What this calls for is continued training of legal practitioners, potential arbitrators – both legal and non-legal, academia and the law students, as well as potential users, so as to reach a critical mass with a certain level of understanding about arbitration. Developing soft infrastructure would take time and resources and therefore we suggest close coordination among relevant government ministries, arbitration institutions and associations, chambers of commerce, the Bar and other professional associations, as well as law schools, to continue to build up this infrastructure.

Lastly, arbitration reform cannot be complete without adequate involvement of the judiciary. Despite the irony, as arbitration is being suggested as an alternative to judicial proceedings, there is room for improving the judiciary's part of the process. Just as a simple example, an arbitral award may need to be recognised and enforced by a court. If that procedure is long and costly, the efficient manner of arbitration is lost. Thus it is suggested that courts provide for an expedited and streamlined process for supporting arbitration to ensure the effectiveness of arbitration. The judiciary plays an important role in fostering an arbitration-friendly environment and this requires training of judges to better understand the arbitration process and their expressive role in the process. This would be the final piece of the arbitration reform.

When such efforts gain the trust and the confidence of the users that arbitration is truly an efficient means

of resolving commercial disputes, it can be said that reforms for cultivating a culture of arbitration have been successful.'

The second Keynote Speech was on the Singapore Convention, its features and its value to the use of mediation in the settlement of international commercial disputes. The Speech was delivered by Mr. Danny McFadden, Regional Director of CEDR Asia Pacific who, being an experienced mediator, was able to accentuate his presentation with real life accounts of incidents and issues. Speaking from Hong Kong, he began by outlining the Convention's aims.

'It came into force on 12 September in 2020 and its aims are to create a harmonised framework for the cost effective and prompt enforcement of international mediation settlement agreements and to make mediation potentially more efficient and attractive, especially to the global legal community, thus presenting it as an alternative to arbitration and litigation.'

He noted that previously the lack of an enforcement framework for international mediation settlement agreements dissuaded some parties from using mediation, which may explain the high expectations at the signing ceremony, where some saw the Convention as a 'game changer' and as 'giving teeth' to mediation. He then sought to analyse what problems the Singapore Convention was trying to solve.

'For instance, in the UK, Australia and the US where I have mediated, generally enforcement is just simply not a problem and many international mediators I know say the same thing. It is that the parties have reached a negotiated settlement, they have crafted it, they feel ownership for it, it is not exactly what they wanted but

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they own it, it is not given to them by the mediator and they feel they can live with it. It is not ideal, but it is better than arbitration and litigation and the risks those can involve the parties in. So that has been my experience in basically common law countries and in Hong Kong. But what about outside of that?

From the very earliest time that I have been giving talks or doing training in Asia about modern commercial mediation, hands will always go up and say “Danny, what about enforcement?” So it must be accepted that definitely enforcement is more complex for cross-border settlement in other jurisdictions.

One problem is that the parties may agree to mediate and may have proceedings in one jurisdiction but the mediation settlement agreement may need to be enforced in another country where, for example, the assets are located. This is quite common in many of my cases. So in the absence of an universally recognized enforcement mechanism, the settlement usually agreed is not internationally binding.

Another problem is that in countries where parties experience or fear non-compliance with mediation settlement agreements, there is very little faith in an agreement that can only be enforced as a contract. No matter how many times I have tried to explain to judges and lawyers over the years in China that it is generally not a problem, they don't trust me that it will transpire in their jurisdictions and, in fact, they think that mediation unfortunately may well be used as a delaying tactic and something to add more costs by the other party.

So in places like Japan, China and Korea, I do believe that judicial confirmation of the enforceability of the mediation settlement agreement is likely to be highly valued. Some commentators believe actually that

this is one of the Convention's great strengths and I quote one person that I know who wrote “just the existence of a global enforcement regime will go a long way to reassuring parties less familiar with the process that it is a reliable dispute resolution option.”



Mr. McFadden (pictured above) then took his audience through some of the things he liked about the Convention, noting that it was incredibly flexible, broad and wide-ranging. He liked the simplicity of its definition of mediation as just a process whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties' dispute. This he felt was so broad as to make it real easy for jurisdictions which have different names for the process and different names for the mediator. However, he had some doubt about the use of the word 'amicable' to describe all settlements.

He also liked the fact that the mode of enforcement was flexible and not prescribed, while noting that it remains to be seen how national courts will respond to applications for enforcement if the settlement agreements are inconsistent with domestic practices in the enforcement states.

‘For any country, it is not enough simply to sign the Convention, a signing State would require a supporting legal platform to implement it. However, to assist States in the situation where they do not have a domestic legal framework, UNCITRAL's Working Group II, simultaneously with drafting the Convention, also revised UNCITRAL's Model Law on Mediation. I see this Model Law potentially as an off-the-shelf document that can be used as the basis for different jurisdictions that do not have a domestic legal platform to support enforcement.’

Mr. McFadden then played 'devil's advocate' by highlighting some of the things in the Convention about which one could have misgivings, such as the requirement that part of the evidence that the settlement agreement resulted from mediation might be the mediator's signature on the mediation settlement agreement – a requirement which he described as 'alien territory' for most commercial mediators in the US, UK and Hong Kong.

Another potential misgiving could be the refusal to grant relief if the mediation settlement agreement was not final or binding according to its terms or if it had been modified. These he noted were not unusual occurrences and were often necessary in commercial mediation.

He also saw a potential misgiving about the refusal to grant relief if the mediator committed a serious breach of the standards applicable to the mediator. He felt that since there was no globally accepted set of mediator's standards this could be misused by one party to renege on the settlement agreement, particularly in ad hoc mediations.

Finally, Mr. McFadden closed his Keynote Speech by summarising the world's response to the Convention.

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'In conclusion, overall the response to the Singapore Convention has been very positive and I believe, like many, that potentially it will have an impact on all areas of dispute resolution. The ultimate success of the Convention will of course depend on the extent to which it is accepted and ratified by States and that is a work in progress. Expectations will have to be managed, for while some mediators jumped up and down a bit about it at first, CEDR and JAMS have cautioned that it should lead to only a gradual increase in international cases.'

The third and final Keynote Speech was delivered by Ms. Karen Gough, a Past President of **CIArb**. From her location in London, she spoke on the New York Convention and its value in the settlement of international commercial disputes by arbitration. Ms. Gough has kindly prepared the following abstract of her paper for this Review.

Today's subject is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. It is called the New York Convention because it was signed in New York on 10 June 1958 after a long debate. Representatives from 45 UN member states attended the Conference at the UN headquarters in New York between 20 May and 10 June 1958, other states and inter-governmental organisations attended as observers.

At the conclusion of the Conference representatives from 24 member states signed the final text of the Convention. After accession by the requisite 3 member states, it came into force on 7 June 1959.

Today, the New York Convention has been adopted in 168 states around the world, (according to UNCITRAL that is 165 of the 193 United Nations member states, plus the Cook Islands, the Holy See, and the State of Palestine).



Above: Ms. Karen Gough, **CIArb**

The Caribbean position is that of the 13 UN listed Caribbean nation states, only three are not parties to the Convention, namely, St Lucia, St Kitts and Nevis and Grenada. The first to adopt the Convention was Trinidad and Tobago in 1966, and the most recent was The Bahamas in 2006.

If you include Belize, Guyana and Suriname, as part of the Caribbean region, notwithstanding they are geographically located on the Central American and South American mainland, Belize was the most recent state to accede to the Convention just in March 2021, and Suriname has not adopted the Convention.

The New York Convention has two key objectives. First, and an essential objective, was to introduce a regime which, recognizing the autonomy of parties to commercial agreements to submit those agreements to arbitration for resolution, makes provision for the enforcement of those arbitration agreements by such parties.

That is achieved by Article II of the Convention, whereby Contracting States are required to recognize agreements in writing by which parties agree to submit their disputes to arbitration. The Convention requires, that the Court of a Contracting State, when seized of an action in respect of a matter that is the subject of an arbitration agree-

ment, shall at the request of one of the parties, stay the action and refer the matter and the parties to arbitration. The Court is obliged to do so unless it finds that the agreement is "null and void, inoperative or incapable of being performed".

The second objective is, where a party had obtained an international commercial arbitration award, the Convention provided rules for the recognition and enforcement of the award that were equal to or better than those [rules] which enabled recognition and enforcement of state to state judgments of national courts.

Article III of the Convention stipulates that each Contracting State shall recognize arbitral awards as binding and that it will enforce them in accordance with the rules for procedure of the territory where the award is relied on, that is, where it is to be enforced. This obligation is not without limitations. In addition Contracting States may make declarations limiting the extent to which they will recognize and enforce awards by taking what are known as the reciprocity and/or commercial reservations.

The paper looks at the history of the Convention and the nature and extent of changes impacting on its provisions and efficacy more than 60 years after its introduction, including risks to recognition and enforcement consequent on the COVID-19 pandemic.

The paper also considers a number of issues arising from the Convention and poses questions about whether it is still fit for purpose or should be revised, and if so in what respects, or replaced with a modern treaty. These questions formed an introduction to the panel discussion which followed the delivery of the Speech.

The full text of Ms. Gough's Speech can be found in the Newsletter tab of the CIArb Caribbean Branch's website at www.ciarbcaribbean.org.

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The Keynote Speeches provided the thought leadership for the select discussion panels on (a) the current trends and the future paths for alternative dispute resolution in the Caribbean and in particular for commercial mediation and international arbitration; (b) how the national legal frameworks in the Caribbean can be improved and harmonised utilising Model Law legislation; and (c) what are the obligations of Contracting States to the New York and Singapore Conventions in recognising and enforcing arbitration agreements, arbitration awards and mediation settlement agreements.

A highlight of the Conference was a spirited Breakfast Chat featuring Hon. Delroy Chuck, Minister of Justice in the Government of Jamaica and Dr. Petra Butler, the Director of the Institute of Small and Micro States, from New Zealand.

Minister Chuck passionately shared his experience of Jamaica's journey towards embracing ADR, driven by the burden of the backlog of cases in litigation and by a desire to see Jamaica develop as a hub for ADR, not only in arbitration and mediation but in other methods suited to community-based disputes.

Dr. Butler gave insight into lessons she learned from co-authoring the Commonwealth Study of International Commercial Arbitration, particularly in the use of ADR as an engine for promoting cross-border trade among small and medium sized enterprises and for serving as an attraction of foreign investment to small and micro states.

Another well received feature of the Conference was the Young Members Group Discussion Panel on 'Careers in ADR' which explored how young and newly qualified ADR practitioners can develop their careers and establish viable ADR practices in the Caribbean.

The Conference concluded with an open session where attendees were informed on the **CIArb** training programmes by Regional Pathway Leader, Ms. Shan Greer and a vote of thanks was given by Mr. Anthony Gafoor, Vice Chair of the Branch.

NEW COMMITTEE

The **CIArb** Caribbean Branch Committee for 2021-22 comprises the following members:

ELECTED OFFICERS:

- Mr. Miles Weekes (Chair)
- Justice Anthony Gafoor (Vice Chair, Honorary Secretary and Trinidad & Tobago Chapter Chair)
- Mr. Andrew Pullinger (Vice Chair and Cayman Islands Chapter Chair)
- Mr. Mandish Singh (Honorary Treasurer)

ELECTED MEMBERS:

- Hon. Sir Patterson Cheltenham
- Mr. Ebrahim Lakhi
- Ms. Jodi-Ann Stephenson
- Ms. Caroline Hay
- Mr. Jorge Molina Mendoza

APPOINTED MEMBERS:

- Ms. Shan Greer (Immediate Past Chair)
- Mr. Calvin Hamilton (Barbados Chapter Chair)
- Ms. Tameka Davis (British Virgin Islands Chapter Chair)

CO-OPTED MEMBER:

- Mr. Andrew Gibson

The **CIArb** Caribbean Branch is extremely grateful to everyone who gave of their valuable time and expertise to make a success of the Fourth Triennial Conference, with special mention of the UNCITRAL Secretariat and Dr. Petra Butler for their inputs at the planning stage.

Video recordings of the Conference can be viewed in the Resources tab of the **CIArb** Caribbean Branch's website at www.ciarbcaribbean.org

*This Conference Review was prepared for the **The CIArb News** by Miles Weekes, Chair of the Conference Planning Committee*

TRAINING DIARY

The **CIArb** Caribbean Branch offers the following Online Training Courses and Assessments:

- 1 September to 9 December 2021
MODULE 3 – INTERNATIONAL ARBITRATION: Evidence and Award Writing – Weekly half-day lectures and training workshops. Pre-requisites apply – FEE: US\$1,350
- 29 and 30 September 2021
INTRODUCTION TO MEDIATION – Two half-day lectures. No pre-requisites apply – FEE: US\$300.00
- 27 and 28 October 2021
INTRODUCTION TO INTERNATIONAL ARBITRATION – Two half-day lectures. No pre-requisites apply – FEE: US\$300.00

Full details on the above courses including course content, entry requirements, registration forms, fee payment and course materials can be obtained from the Course Administrator, Ms. Theresa Williams at info@ciarbcaribbean.org

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

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