

## NEWSLETTER REFLECTS NEW AND REFRESHED BRANDING

This edition of **The Ciaribbean News** features new colours and fonts and reflects the refreshed **Ciarb** branding.

■ The refreshed brand narrative describes **Ciarb** (the Chartered Institute of Arbitrators) as an independent, charitable membership organisation committed to supporting the effective resolution of disputes, championing all aspects of constructive resolution across mediation, adjudication and arbitration, raising the profile of alternative dispute resolution (ADR) across the world and empowering best practice.

The narrative points out that as a professional body, **Ciarb** sets robust ethical standards for ADR and supports its members and ADR practitioners globally by offering learning and networking opportunities, qualifications and mentorship, and by delivering research and resources, events, and best practice guidance.

This new brand narrative easily and simply translates into **Effective resolution for a better world**, a memorable, aspirational brand shorthand that captures the centre of gravity at the heart of the brand narrative.

The brand values are the principles that drive the behaviours of everyone in the organisation and provide a consistent standard that can be expected from the organisation towards its members and stakeholders.

The values are represented in themes such as 'Confident and Inspiring', 'Thoughtful and Future-focused', and 'Inclusive and Human'. The values reflect **Ciarb** as being authoritative in knowledge, dynamic in practice, positive in promotion, balanced in view, global in outlook and inclusive and diverse in action, while leveraging technology and innovation, engendering trust and being approachable, respectful and welcoming to all.



Three simple shapes – the square, the circle and the triangle – have been crafted into the new logo to represent the collective expertise and diverse perspectives of arbitrators, mediators and adjudicators. Red remains the colour at the heart of the brand and the new brand font is Poppins.▲

## TRAINING COURSES

■ The **Ciarb** Caribbean Branch is offering the courses listed below. Registration forms and course sheets are available for download on the Branch's website at [www.ciarbcaribbean.org](http://www.ciarbcaribbean.org)

- Mid-April to mid-July 2023: Virtual **Module 1 – Law, Practice and Procedure of International Arbitration**. Cost US\$800. Register by 31 March 2023
- 4 and 6 July 2023: Virtual **Introduction to International Arbitration**. Cost US\$300. Register by 19 June 2023
- 10 and 11 July 2023: Cayman Is. (In Person) **Accelerated Route to Membership – International Arbitration**. Cost KY\$1,500. Register by 23 June 2023
- September to mid-November 2023: Virtual **Module 3 – Award Writing in International Arbitration**. Cost US\$1,200. Register by 18 August 2023
- 21 to 29 November 2023: Virtual **Accelerated Route to Membership – International Arbitration**. Cost US\$1,000. Register by 6 November 2023
- 12 and 14 March 2024: Virtual **Introduction to Mediation**. Cost US\$300. Register by 26 February 2024.▲

# MEDIATION IN INTERNATIONAL COMMERCIAL CONTRACTS

Last September, the Barbados-based Arbitration and Mediation Court of the Caribbean (AMCC) hosted a Lunch and Lecture at which Mr. Robert Rhodes, KC FCI Arb (*pictured at right*), a well-known barrister, arbitrator and mediator, spoke on the topic 'The Advantages of Mediation in Disputes arising from International Commercial Contracts'. **The Caribbean News** is pleased to bring its readers a summary of Mr. Rhodes' Lecture.

■ If an international businessperson has a dispute, why should he or she mediate and not litigate or arbitrate?

There are advantages to litigating but there are also considerable disadvantages:

- It is hugely expensive and time consuming; it can take years rather than months.
- Even if one wins, one is unlikely to recover more than about 60% of one's costs.
- It is one thing getting a judgment, but it can be quite another enforcing it; many losing litigants hide their assets, and it can take years (as well as considerable further expense) to enforce the judgment.
- The courts are open to the public, which can cause litigants embarrassment, if, for example, the other side's lawyer, or the judge, calls them liars, or if competitors hear details of their businesses which they would rather keep private.
- Most judges are competent, fair and hardworking; but since one cannot choose one's judge,

there is always the risk of getting the occasional unfair, incompetent or lazy judge.



But there are alternatives to litigating if one has a commercial dispute. The best known are arbitration, which is a dispute resolution mechanism, and mediation, which is a dispute settlement mechanism.

Arbitration has advantages compared to litigation. It is confidential and the parties have a choice of who their arbitrator(s) will be, or if they cannot agree, of who will make the choice for them. The procedures are based on the parties' agreement and the courts can only intervene in very limited circumstances. Arbitral awards can be enforced in any of the nearly 170 countries in the world which are parties to the New York Convention of 1958.

But arbitration has disadvantages, the three most significant of which are:

- Although it is supposed to be cheaper than litigation, often it is not.
- If one has a panel of three arbitrators, there might be cultural differences and misunderstandings between them, which can make for difficulties in agreeing an award.
- Sometimes, the arbitrator or arbitrators might be so busy that they take a year or longer before making their award. This is unsatisfactory for the parties because they want to know where they stand. If there is a substantial sum in dispute, delay can make a difference to the parties' business plans, for example, concerning investment or expansion.

## Mediation

The most common form of mediation is when two or more parties with an apparently unresolvable dispute agree to appoint an independent third party as mediator to try to reach a settlement between them. The overwhelming majority of business disputes are suitable for mediation, no matter how wide apart the parties appear to be. A skilled mediator can help most parties find an acceptable solution to their problem.

The fundamental point to bear in mind is that in mediation it is not a question of who is right and who is wrong, nor is it a matter of simply splitting the difference (although this can be the solution).

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# MEDIATION IN INTERNATIONAL COMMERCIAL CONTRACTS

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Each party has to ask him or herself whether he or she can live with a negotiated settlement. If they cannot, they should continue with litigation or arbitration. But before they do, they should consider some particular points:

## ● Cost and speed

Mediation is much cheaper and quicker than litigation or arbitration. In one or two days one settles the problem and will be able to get on with growing one's business rather than having the distraction of litigation or arbitration.

## ● Practicality

If one loses their case in litigation, one will almost certainly have to pay a high percentage of the opponent's costs, as well as one's own. In addition, even if one wins, the opponent might appeal, which will cause further substantial cost and delay.

## ● Importance of relationship

If one wishes to continue the relationship with one's opponent, for example, buying from or selling to each other, it will be much easier to do so if the parties mediate the dispute rather than have lawyers on either side calling the other a liar.

## ● Confidentiality

Litigation is open to the public and can be reported in the press. Mediation is confidential, which means that, generally speaking, nothing that happens at the mediation can be used in court in the future, including the admissions made by the parties. The mediator cannot be called as a witness. One's competitors will not be able to view one's commercial disputes.

## ● Enforceability of agreement

If a mediation results in a signed agreement, that agreement can be enforced in the country where it is made. It used to be

difficult, time-consuming and expensive to enforce mediation agreements abroad, but when the Singapore Convention on Mediation is ratified by sufficient countries, such agreements will be as easily enforced as arbitration awards are under the New York Convention.

## Disadvantages of mediation:

The disadvantages of mediation are that one may not be getting what one believes is due to him or her, nor will one have one's day in court to say why the opponent is a bad person taking unfair advantage of the other. But most sensible people will realise that the advantages of mediation far outweigh any disadvantages. If a settlement is not reached the parties can proceed to arbitration or litigation.▲

*This article was prepared by Robert Rhodes and submitted by Tanya Goddard, Sec. Gen. of AMCC*

# ENFORCING FOREIGN AWARDS IN BRITISH VIRGIN ISLANDS

The July 2022 edition of **The Caribbean News** reviewed the enforcement of foreign arbitral awards in the Cayman Islands. This article reviews the situation in the British Virgin Islands (BVI).

■ The enforcement of foreign arbitral awards in the BVI is governed by the Arbitration Act, 2013 (the BVI Arbitration Act), which provides a modern statutory framework incorporating the UNCITRAL Model Law and New York Convention into domestic legislation, subject to statutory modifications.

Part X of the BVI Arbitration Act deals with the recognition and enforcement of arbitral awards, with a distinction between a Convention award and a non-Convention award (i.e. an award not made in a Convention contracting state). However, any arbitral award can *prima facie* be enforced, provided there is no outstanding challenge to the arbitration.

## Convention awards

Convention awards can be enforced in the BVI either by commencing an action in the

BVI High Court suing on the arbitral award; or by filing an Originating Application in the BVI High Court and applying for leave to enforce the award. The application may be made to the Court on an *ex parte* basis at which point there must be filed with the Court the authenticated original or a certified copy of the award and the arbitration agreement, with certified translations if the award or agreement is in a language other than English.

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# ENFORCING FOREIGN AWARDS IN BRITISH VIRGIN ISLANDS

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Prior to any enforcement action being taken pursuant to the Court order, the order will have to be served on the party against whom enforcement is sought. There will be different steps depending upon whether service needs to be effected inside or outside the jurisdiction.

The Court may only refuse to enforce a Convention award on specific grounds as set out in the BVI Arbitration Act, namely: (a) incapacity of a party; (b) invalidity of the arbitration agreement; (c) lack of proper notice of the arbitration or appointment of the arbitrator, or where a party was unable to present their case; (d) the arbitration was not in accordance with the agreement of the parties or the law of the relevant country; or (e) where the award is not yet binding on the parties, or it has been set aside or suspended in the jurisdiction in which it was made. Enforcement may also be refused if the Court finds that the subject matter of the award is not capable of settlement by arbitration under BVI law or if the award contravenes BVI public policy.

The burden of proof is on the party against whom the award has been made to prove that one of the aforementioned circumstances applies.

The scope for challenging a Convention award is much narrower than is available to the Court dealing with an application to enforce a non-Convention award. Indeed, there is no scope to refuse a Convention award outside of the specified grounds.

## **Non-Convention awards**

When seeking to enforce a non-Convention award, a party does not have the option, unlike when seeking to enforce Convention awards, to commence an action in the BVI High Court suing on the award. To enforce a non-Convention award, a party must apply for leave to enforce the award and produce the documents referred to before concerning Convention awards.

The enacted provisions that apply to Convention awards, also apply to non-Convention awards. However, the Court is also able to refuse to enforce a non-Convention award if it determines that it would be “*just to do so*”. This is a wide ground for refusal not available in relation to Convention awards.

Whilst the BVI Arbitration Act outlines the law regarding enforcement, the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (as amended) govern the procedural requirements to facilitate

enforcement, which apply to the enforcement of both Convention and non-Convention arbitral awards. Parties seeking to enforce awards, whether or not made in a Convention contracting state, should be mindful of service requirements.

## **Defences to enforcement**

In addition to the above specific grounds upon which the Court may refuse to enforce an arbitral award, a party seeking to resist the enforcement of an award may deploy additional strategies.

There is provision under the BVI Arbitration Act to set aside Convention and non-Convention awards. A party may, by way of application to a “*competent authority*” in the jurisdiction in which the award was made, apply for the award to be set aside. In the event of such an application, the BVI Court may adjourn enforcement proceedings and may, on application, order the party against whom enforcement is invoked to give security. A decision to adjourn or order the provision of security is not appealable. In addition, a party may seek to set aside leave to enforce granted by the BVI Court. ▲

*This article was submitted by  
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Submissions, views and comments should be sent by e-mail to [info@ciarbcaribbean.org](mailto:info@ciarbcaribbean.org)

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