ARBITRATION - THE WAY FORWARD

131

In 1988 immediately after the United States Congress agreed to provide funding for the Caribbean Law Institute through the United States Agency for International Development "arbitration" was identified as a subject for study.

It arose out of a suggestion made by Sir William Douglas the Ambassador of Barbados to the United States and that suggestion was well received as it afforded an opportunity to harmonize and reform the law and practice of Arbitration applicable in the English speaking Caribbean.

To this end a panel of distinguished persons was assembled as an Advisory Committee aided by two Research Assistants to the Project.

A formidable body of material and information drawn from all over the world, mainly the United States, Canada, United Kingdom, Australia, Hong Kong, New Zealand and Bermuda and of course the English speaking Caribbean was assembled; immediately it was disclosed that with the exception of Bermuda most of the Arbitration Legislation in the Caribbean was based on the U.K. Arbitration Acts of 1889 and 1950.

It is distressing to know that our Arbitration Act is patterned on the U.K. Arbitration Act of 1889 whereas that U.K. Act has been overtaken/ extended by U.K. Arbitration Act of 1934, 1950, 1975, 1979

The need therefore for the Reform in Jamaica cannot be overstated.

In recognising the importance of developing arbitration as an alternative process to that of resorting to the Court by way of litigation for the settlement of civil disputes especially between commercial men, the Advisory Committee recognised that one of the principal critisims against its effectiveness and widespread use lay in the area of delay. Because of delays the object of invoking and utilising the arbitration process to provide a speedy determination of issues between mainly commercial men was often not realized.

I refer to Emile Elias & Company Limited v. Alfred Galy, a decision of the Court of Appeal of Trinidad and Tobago (C.A. No. 98 of 1979) in which judgment was delivered on 31st May 1989.

> ".... In January of 1968, however, it was mutually agreed to call in an arbitrator, in the person of Mr. Bernard Broadbridge, whose report was to be

..2/

> legally binding on both parties.
> Broadbridge submitted his report dated
> 6th February, 1968."

Sharma J.A. stated at the beginning of his judgment:

> "This case is unique. It has undoubtedly created
> a category of its own, not because of any
> jurisprudential value but because of its long
> and chequered history. So far it has taken
> twenty-one and one half years - and is yet to
> be concluded."

The Advisory Committee took the decision that there should be two separate statutes, one dealing with 'Domestic Arbitration' and the other with 'International Arbitration'.

Bearing in mind that a reference to arbitration is primarily consensual and voluntary arising usually out of contractual situations the Courts in those circumstances had no jurisdiction, inherent or otherwise, to dismiss a claim in an arbitration for want of prosecution or to grant an injunction restraining the claimant from proceeding with an arbitration if he has been guilty of inordinate and inexcusable delay causing prejudice to the respondent or giving rise to a risk that a fair arbitration would no longer be possible. (See Bremer Vulkan Schiffbau Und Maschinenfabrik vs. South India Shipping Corporation (1981) 1 AER per Lord Diplock.

Section 37 (2) of the proposed Domestic Arbitration Act which finds a place in most modern Arbitration Acts is of interest and worthy of quotation-

> "Where there has been undue delay by the claimant
> in instituting or prosecuting the claim pursuant
> to an arbitration agreement then on the application
> of any party to the arbitration proceedings the
> Court may make an order terminating the arbitration
> proceeding and prohibiting the claimant from
> commencing further arbitration proceedings in respect
> of any matter which was the subject of the terminated
> proceedings."

To this wide and important power safeguards have been introduced obliging the Court not to make such an order unless among other things the delay is intentional and contumacious or is such as to give rise to a substantial risk that it is not possible to have a fair trial or is such as to have caused serious prejudice to the other party.

The proposed legislation recognises that arbitration still remains within the realm of private law, but offers the ready assistance of the Courts to reinforce the process and promote its effectiveness by making available the Court's coercive powers while at the same time recognising as it does in the proviso to Section 17 "that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator of making orders in respect of any of the matter" referred to therein.

Section 30 makes provisions empowering the Court to make Interlocuroty Orders and subsection 3 provides that the said Orders do "not derogate from any powers conferred on an arbitrator whether by an arbitration agreement or otherwise", thereby affirming and indeed confirming that the conduct and direction of the proceedings always remain with the arbitrator.

The Act also introduces the modern concept of conciliation which if successful would terminate the dispute thereby saving costs and rendering arbitration unnecessary. It usefully makes provision in section 4 (4) that "no objection shall be taken to the conduct of arbitration proceedings by an arbitrator solely on the ground that he had acted previously as a conciliator in accordance with this Section."

The proposed Act maintains to a very marked degree the right of the parties to exclude the intervention of the Courts by way of Judicial Review by making provision in section 29 for "Exclusion Agreements" to that effect thereby underscoring the Private Consensual nature of arbitration.

Still further the legislation has been drafted to give effect to the recommendaiton of the Advisory Committee "that those Member States of the Caribbean Community which are not parties to the New York Convention 1958 should take the necessary steps to become parties", and deals effectively in section 46-51 with enforcement provisions particularly the enforcement of Convention Awards.

In summary this Act will certainly introduce fundamental, far reaching and welcome reforms designed to promote and ensure the effectiveness of arbitration as an alternative method for the settling of disputes especially among commercial men. If properly applied it will speed the conduct of the proceedings and avoid delays, (the principal ground of complaint against arbitration) and promote it as a desirable method of settling disputes because

it has created the procedures which will ensure sustained progress towards securing early awards. It gives the parties the right, if they so desire of having Judicial Review on questions of law by the Court or indeed of excluding same at will and, additionally it provides, if the parties so desire, that the arbitrator shall give reasons for his award.

The enacting by the Commonwealth Caribbean of this proposed legislation will bring the Caribbean squarely within the forefront with those countries which provide an effective alternative system to ensure the settlement of disputes among commercial men by way of arbitration.

## HOW MAY DELAYS BE OVERCOME AND FINALITY ACHIEVED

1. At the 9th Commonwealth Law Conference held in Auckland, New Zealand in April 1990 it emerged that apart from the usual procedures employed in Civil ligation like Pleadings, Memorandum of Law, Agreed bundle of Documents discovery and inspection and all interlocutory procedures would take place before the hearing.

It was common practice for the Arbitrator to require evidence in chief to be by way of affidavit. All the witnesses for Plaintiff(s) and Respondent(s) would depone in full with such documents upon which they wished to rely exhibited thereto. These affidavits would be exchanged and upon attendance cross-examination and re-examination would take place. Closing submissions would also be required to be in writing.

In this manner with timely compliance, expedition would be assured.

Can we adopt?

2. Should Arbitrators be required to give reasons for their decisions?

I think not.

Great care must be taken in the selection and appointment of a competent individual of undoubted integrity. Once done there should be no necessity for reasons to be given. If reasons are required, then resort should be had to the Courts, where the appeal procedures which almost always result in delays can be invoked.

3. Should the award be final and binding and not open to appeal?

This is the ideal to ensure expedition. Do we possess a sufficiently high level of confidence to invoke such a provision. If we do, certainty and finality are assured.

...5/

INTERNATIONAL ARBITRATION ACT

The method employed by the Advisory Committee in the drafting of the International Arbitration Act is by way of Referential Legislation, this is to say, the incorporation of the provisions of the Model Law on International Trade on June 21st 1985 and commonly known as the Uncitral Model Law on International Commercial Arbitration.

In like manner provision has been made therein incorporating and giving effect to the Uncitral Arbitration Rules in the event that the parties themselves, who under the provision of the Unicitral Model Law are free to agree the procedure to be followed by the Arbitral Tribunal in conducting the proceedings, have not so agreed.

The Act also makes provision in interpreting the Model Law for recourse to be had to:

(a) The report on the United Nations Commission on International Trade on the work of its 18th Session held from June 3rd to 21st 1985 and to

(b) The Analytical Commentary on Draft Text of the Model Law on International Commercial Arbitration contained in the Report of the Secretary-General of the United Nations dated 25th March 1985 to the 18th Session of the United Nations Commission on International Trade Law.

Acceptance of this Model Law and Rules by the English speaking Caribbean Community as the basis for the settlement of Commerical Disputes among Member States and persons from these states and indeed from the wider International Community is assured having regard to the fact that the Law and the Rules are trans-national in character and are designed to ensure that International Commercial Disputes wherever they are arbitrated will be arbitrated pursuant to the provisions of the same law and Procedural Rules.

In substantiation of this, it is enough to refer briefly to Resolution 31/98 adopted by the General Assembly on the 15th of December 1976 when the rules were adopted.

It bears repeating and I quote briefly therefrom; "The General Assembly, RECOGNIZING the value of arbitration as a method of settling disputes arising in the context of InternationalCommercial relations,

...6/

BEING CONVINCED that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

BEARING IN MIND that the Arbitration Rules of the United Nations Commission on International Trade Law have been prepared after extensive consultation with Arbitral Institutions and centres of international commercial arbitration,

NOTING that the arbitration Rules were adopted by the United Nations Commission on International Trade Law at its ninth (9) session after due deliberation,

1. RECOMMENDS the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of International Commercial Relations particularly by reference to the Arbitration Rules in commercial contracts,

2. REQUESTS the Secretary-General to arrange for the widest possible distribution of the Arbitration Rules.

Accordingly, both the Caribbean Commercial Community and indeed the International Commercial Community can feel confident that the Law and Procedure for the Settlement of Commerical Disputes by way of Arbitration has had the benefit of world wide study and hopefully increasing acceptance and adoption.

Indeed, the Uncitral Model Law has been acclaimed in several jurisdictions and has met with substantial general acceptance in most and has been actually adopted in Canada, Australia, Scotland, Hong Kong, Cyprus and some states of the United States of America.

By enacting this International Arbitration Act the English speaking Caribbean will have been brought immediately into the main stram of dispute resolution by arbitration and is well poised for the 21st century.

Arising out of paper presented by Dr. K.O. Rattray, Solicitor General of Jamaica on the Feasibility of Establishing a Caribbean Arbitration Centre within the English speaking Caribbean, the Advisory Committee decided that consideration should be given to the same and to this end a questionnaire assembled and formulated by Ms. Velma Newton, Assistant Executive Director Caribbean Law Institute (CLI) has been distributed to the legal and commercial

...7/

and governmental sections throughout the English speaking Caribbean to ascertain, inter alia, their views on the need for the Establishment for such a Centre and the functions it should discharge. I have not had the benefit of the findings.

However, the author perceived a need for such a Centre noting the increase in the diversity and complexity of modern International Commercial transactions both intra-Caribbean as well as extra-regional, recognized that the judicial system may not be wholly adequate to deal expeditiously with those matters and underscored the desirability of having experienced and competent persons in the field of Law, Commerce, Industry, Finance and Engineering so as to ensure the speedy resolution of multi-faceted disputes having regard to the inordinate length of time it takes before commercial litigation can be brought to trial.

On these premises a Caribbean Arbitration Centre would provide an alternate forum for settlement of certain types of commercial transactions among Caribbean people and would simultaneously considerably relieve the Courts of some matters which presently contribute to the laws delays.

A most persuasive argument for the establishment of an Arbitration Centre in the English speaking Caribbean is a necessity to provide a neutral forum and to eliminate the perceptions of "home town" decisions, thereby promoting confidence and consequentially encouraging outside investments in the region.

It is commonly recognized, that where the nationality of the parties to arbitration are different, neither party is generally willing to submit disputes to the jurisdiction of the national courts of the other.

In the beginning it is perceived and indeed planned and projected that the arbitration centre will serve the needs of the English speaking Caribbean but it cannot be discounted that with the Free Trade now existing between Canada, the United States and Mexico that the Caribbean as a neutral site may well prove an attraction for disputants of different nationalities in the Free Trade area.

But a new and urgent opportunity has arisen with the entry into effect of the United Nations Convention on the Law of the Sea and the opening of the Headquarters of the International Seabed Authority here in Kingston

on the 16th November 1994.

Jamaica has now become an International Centre and the knowledgable predict increasing activity with all kinds of "spin offs". The stage is therefore set for the establishment now of the Caribbean Arbitration Centre here in Jamaica.

I have received the kind permission of Dr. Rattray to append his paper written in April 1989 and I do so for the fullness thereof.

I have not addressed the question of availability of personnel because fortunately there is nothing to abolish in order to endeavour to establish a Caribbean Arbitration Centre.

I hope I have written enough to initiate discussion and provoke criticism and dissent.

D.M. MUIRHEAD Q.C.
November 1994