CLA Conference 2023 Goa, India

Commonwealth Lawyers – Common challenges in uncommon times.

Wednesday March 8, 2023

Thank you for inviting me to the 23rd Commonwealth Law Conference.

" Commonwealth Lawyers – Common challenges in uncommon times. "

It is my honour to be invited to give this presentation today.

My name is John Bassie, and I am the President of the Chartered Institute of Arbitrators – Ciarb.

Ciarb is a global membership and professional body that is dedicated to promoting effective dispute resolution through a global network of over 17,600 members.

Ciarb's vision is a world where disputes are resolved promptly, effectively and creatively

And our mission is to be an inclusive global thought leader on dispute resolution, promoting and facilitating the creative and effective resolution of disputes, supporting equality diversity and inclusion and ensuring practitioners are highly trained and comply with professional standards and ethical rules.

Our mission sets out our commitment to supporting equality, diversity, and inclusion – enabling the best to join us and the ADR profession, irrespective of the background, the rule of law and enabling access to justice globally.

We also have 43 branches – which are run by members for members undertaking activities such as networking, webinars, thought leadership, training and professional development, mentoring, career experience and support.

Ciarb's India branch is full of extremely experienced practitioners many of which you will hear from today.

Ciarb has been pleased to play an active role in promoting arbitration in India and ensuring a policy environment that allows arbitration to flourish.

We have worked closely with the UK Ministry of Justice and the Indian Law Ministry to help shape the revised Arbitration and Reconciliation Act.

Beyond arbitration, India has also been a pioneer in promoting the use of mediation.

There have been clear steps taken towards mandating the referral of cases to mediation before court proceedings can commence, as stated in the 2018 Section 12A amendment to the Commercial Courts Act and supported by subsequent decisions of the Supreme Court.

In addition, India was one of the first signatories to the Singapore Mediation Convention. Beyond the practical impact of the Convention on the enforceability of mediated settlements, it also acts as a rallying cry for commercial mediation around the world and could play a role in promoting the use of mediation as a standard mechanism for resolving disputes.

We are pleased that India has signed up to this and we are encouraging other governments around the world to join the convention.

I wanted to also briefly mention the development of mediation and the new Mediation Act which could pave the way to mediation being delivered across the country in a way that few countries have experienced – I watch this development with interest.

All this said, it is an exciting and fascinating time for arbitration, mediation and ADR in India and I feel honoured to be part of it.

Ciarb's India Branch members are working closely with the Indian Law Ministry to help shape the revised Arbitration and Reconciliation Act such as requesting clarification on the Eighth Schedule of the Act, highlighting our concern that it was at odds with the principle of party autonomy by restricting the freedom to choose of foreign arbitrators, which we were pleased to see was omitted from the Act in 2020.

We were also pleased with the Indian Supreme Court decision in 2022 in *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*.

Taking into account these developments, there is so much opportunity for ADR and for ADR practitioners in India.

This conference coincides with International Women's Day, the theme this year is Embrace Equity. Which encourages all to imagine a world where there is gender equality – free of bias, stereotypes, and discrimination. I hope that each and every one of us can embrace equity so that true gender equality may become a reality.

Institutional vs Ad Hoc

When agreeing to arbitrate in the event of any dispute, parties have a choice between institutional arbitration and ad hoc arbitration.

With institutional arbitration a specialised institution has the role of administering the arbitration process. Such institutions have their own set of rules which provides a framework for the arbitral process.

Ad hoc arbitration is not administered by an arbitral institution, rather parties are able to determine all aspects of the arbitration themselves. Parties decide on the number of arbitrators, the applicable law, and procedure which will be used for the arbitration.

Both forms of arbitration have advantages and disadvantages, the most suitable form of arbitration will usually be dependent on the party's circumstances.

Institutional arbitration: can be advantageous due to the availability of established rules and procedures, meaning that arbitration can progress in a timely manner. Also, the institution will provide administrative assistance throughout the arbitration.

Parties will also have a list of qualified arbitrators to choose from, which the institution maintains. These institutions can provide a diverse roster of arbitrators, who are of different genders, nationalities, and ages.

However, sometimes institutional arbitration can be costly, once administrative fees and the use of institutional facilities are factored in. Occasionally, these costs may amount to more than the value of the actual dispute.

The bureaucratic approach of the institution may cause delays and additional costs. In some situations, parties might view the expected time frames to respond to the institution as unrealistic.

On this International Women's Day, it should be noted that arbitral institutions have increasingly leveraged their role to work towards promoting diversity of arbitrators, particularly in the area of gender. This is because when institutions make arbitral appointments or offer parties lists to choose from, they select as a priority appropriately qualified candidates who are female or, when appropriate, may have less experience sitting as arbitrator. It has been shown repeatedly that when parties make appointments, they choose from a much smaller pool of possible candidates and tend to focus on candidates who have been appointed many times before and thus have high levels of perceived experience. When institutions make appointments, they work diligently to offer parties a much broader pool of candidates and work to include diverse candidates wherever possible. As an example, the London Court of International Arbitration (LCIA)'s statistics show that they appoint women and men at equal rates when the institution makes the appointments, while parties only appoint women only around 10% of the time when doing their own appointments.

Ad hoc arbitration, on the other hand, is characterised by flexibility and confidentiality. Parties have much greater flexibility to work with their arbitrator and the opposing party to exercise party autonomy were doing so would save time and cost.

When using ad hoc arbitration parties have the benefit of tailoring the arbitration to suit their specific needs and in ensuring the highest level of confidentiality in the proceedings.

Ad hoc arbitration can be more affordable than institutional arbitration, as parties need only pay the fees of the arbitrator and their lawyers. Therefore, it is quite useful for smaller claims and it is more appropriate for parties with less funds. It is also ideal for highly experienced parties or parties that have regular disputes over the course of numerous commercial relationships. Such experience and expertise from parties, counsel, and arbitrators allows parties to leverage ad hoc procedures in the most efficient way.

Parties also have the option of expedited ad hoc procedures such as those offered by the Ciarb Cost Controlled Expedited Rules and the newly offered UNCITRAL Expedited Arbitration Rules. Such timeframes are more practicable

in an ad hoc setting since the administrative requirements are eliminated. Ciarb's Regular Arbitration Rules and Cost Controlled Expedited Arbitration Rules are designed for use in both domestic and international ad hoc arbitrations. They include optional additional clauses to provide parties with more choice to tailor proceedings to their own needs. Significantly, the Ciarb Rules include the use of Ciarb as an appointing authority and allow Ciarb to decide challenges to arbitrators and to introduce provisions to enhance efficiency and to aid parties seeking emergency relief.

Parties using any ad hoc arbitration procedures can opt to use an appointing authority to find an experienced arbitrator, such as Ciarb's Dispute Appointment Service, or any arbitral institution that acts as appointing authority, without incurring the need for full administration of a dispute. Using an appointing authority allows parties to access a more diverse pool of candidates for arbitrator while incurring minimal cost.

However, parties should be mindful of the risk that they may fail to agree on the applicable ad hoc arbitration procedure and arbitrator – particularly, if a dispute has already arisen.

Discussions on the fees of the arbitrator may prove uncomfortable. Arbitrators in ad hoc settings may set their own fees which will be negotiated directly with parties. Many institutions have fee schedules and set ranges for arbitrator charges which eliminates the need for such negotiations.

When advising clients, a practitioner must ensure that they provide their client with details on the advantages and disadvantages of both institutional and ad hoc arbitration.

Such advice enables the client to make an informed decision about which form of arbitration to utilise when drafting an arbitration agreement or what procedures to agree to with the other party or parties to a dispute once a dispute arises post-contract.

Subsequently, when a dispute arises it is also vital to ensure that clients are aware of their options. For example, if ad hoc arbitration was specified in the arbitration agreement, practitioners can advise their clients when to engage an institutional provider to administer the arbitration with the agreement of the opposing party if it becomes apparent that the specific dispute that has arisen would be better resolved via institutional arbitration, and vice versa.

Also, lawyers should discuss with their client that due to the lack of oversight, it is vital in ad hoc proceedings that a very experienced arbitrator is used so that they can ensure a resulting award will be enforceable. Thus, counsel and parties can make an informed decision based on their logistical and budgetary requirements. They will also be aware that they must take proactive steps to ensure that they can select from a diverse pool of arbitrators and are also aware that ad hoc proceedings are unlikely to be good opportunities for newer arbitrators entering the field.

Benefits of English law and alternatives

In terms of the governing law of arbitration, parties have many choices to choose from.

English law certainly has its benefits. English law does exactly what it is intended to do, this provides parties with a level of contractual certainty.

They can place reliance on the terms of the contract, as opposed to being subject to additional terms and provisions which may be incorporated into the contract in other jurisdictions.

The English court system, the Commercial Court in particular, are viewed with high regard and the judges are considered incorruptible.

So, from an enforcement perspective – if English courts are used, parties can be confident that the matter will be dealt with objectively.

Many of the world's leading international law firms are in London. Parties will have access to high quality solicitors, barristers, arbitrators, mediators, experts and legal practitioners, available throughout the UK.

Additionally, many Commonwealth courts have access to English Law and the Privy Council as their court of last instance.

Alternatively, in New York the courts deal with a high value of arbitration related matters, consequently New York judges who determine arbitration-related questions are frequently specialists who are well informed and knowledgeable.

New York has globally recognised universities and institutions, parties will have a wide range of experts to choose from if such expertise is required in their case.

Modern hearing facilities and arbitration friendly laws are also available to parties in New York.

The Commonwealth State of Singapore is also a potential alternative. The Singapore International Arbitration Act provides a good statutory framework for arbitration in the State.

The Singaporean courts have a reputation for integrity, strongly supporting arbitration, and impartiality.

Singapore's strategic geographical location means that there is good connectivity to other countries in Southeast Asia and the Asia-Pacific region. This makes Singapore suitable for disputes which arise within the Asia-Pacific.

Singapore has a business forward environment, its position as a global hub for businesses can provide benefits for parties.

Recent legislative changes have increased interest in India as a seat of arbitration. In India, arbitration is beneficial because it can be faster than conventional dispute resolution methods and parties are able to choose the procedure they wish to use when settling their disputes.

Paris is the most preferred seat among civil law jurisdictions. It is a good alternative for parties who are from civil legal backgrounds and who wish for the arbitral proceedings to reflect this. The applicable law to the arbitration will also be codified and the interpreted by the local courts in a manner more familiar to parties from civil jurisdictions than it would be in a common law jurisdiction.

The legal framework for arbitration in France was updated in 2011. It sought to strengthen France's arbitration law by incorporating contributions from French case law from the last thirty years and clarifying and simplifying parts of the law that were open to interpretation. Notably, the new law removed the requirement for formal arbitration agreements, and it reaffirmed the stance of minimal court intervention.

Commonwealth courts

To mark the 100th anniversary of the Chartered Institute of Arbitrators, the London Centenary Conference launched in 2015 and debated a draft set of principles for an effective and efficient seat in international arbitration.

Ciarb's London Centenary Principles identify the key characteristics which make a particular place an appropriate and effective arena in which to conduct international arbitration.

Firstly, a clear, effective, modern International Arbitration law which recognises and respects the parties' choice of arbitration as the mechanism for settling their disputes by:

a) providing the necessary framework which facilitates fair and just resolution of disputes through the arbitration process.
b) limiting court intervention in disputes that parties have agreed to resolve by arbitration.
c) striking an appropriate balance between confidentiality and transparency.

A judiciary that is independent, competent and has expertise in international arbitration.

A competent, independent legal profession with the requisite expertise in International Arbitration and International Dispute Resolution.

The commitment to educate counsel, arbitrators, the judiciary, experts, users and students on the character and autonomy of International Arbitration and the furtherance of developing learning in the field of arbitration.

The assurance that parties have the right to be represented at arbitration by party representatives of their choice whether from inside or outside the Seat.

The seat is easily accessible, free from unreasonable constraints on entry, work and exit of parties, witnesses, and counsel in International Arbitration. With **adequate safety** and protection of the participants.

Functional facilities are available to conduct international arbitration and **ethical considerations** which embrace diversity and govern the behaviour of counsel and arbitrators.

The adherence to international treaties and agreements governing and impacting the recognition and **enforcement of foreign arbitration** agreements, orders, and awards.

A clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith.

As above, Singapore has adopted these principles and is now considered an attractive seat of arbitration.

Toronto, Vancouver and British Colombia are all growing in popularity in Canada. Furthermore, more African parties are choosing Mauritius as their seat of arbitration.

Many Commonwealth countries have been working to adopt the principles highlighted above. As a result, many of them are quickly gaining traction as attractive seats for arbitration. Although, many Commonwealth courts have access to English law and the Privy Council, it is not a requirement for them to use it. Commonwealth nations can be effective seats in their own right, should they choose to adopt our Centenary Principles.

The more Commonwealth countries continue to implement Ciarb's Centenary Principles, the more parties will be attracted to using them as a seat for arbitration. Such development is welcome and provides parties with a wealth of choice in choosing their seat of arbitration.

We look forward to seeing such developments happen.

Once again, thank you for inviting me to speak at this conference, and thanks to everyone involved in the organisation of the event.

I hope you enjoy the rest of the conference. If you haven't joined Ciarb and become part of our diverse community of dispute resolvers, I do hope that you will do so.

John S. Bassie - Global President of the Chartered Institute of Arbitrators

Vice President of the Jamaican Bar Association