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Fostering A Culture of Arbitration in the Caribbean – The Story So Far[1]

The Hon. Justice C Dennis Morrison

Justice sectors throughout the region are notoriously under-resourced, overburdened and subject to what most well-thinking persons regard as unacceptable delays. Despite the fact that – with absolute justification – we tend to be highly critical of ourselves for this reason, it is probably well to remember that this is not a peculiarly West Indian phenomenon. For, although countries in the developed and developing world naturally tend to be up and down the line from each other in this regard, the truth is that litigation delays have at one time or another been an undesirable feature of most legal systems. So, for example, the Woolf reforms in the United Kingdom, which gave rise to the modern civil procedure codes to which we all now adhere, were a direct response to the crippling effects of delay and overly technical complexity which had virtually strangled the process of civil litigation in that country.

Against this background, there has been a general consensus going back many generations as to the potential benefits to our societies and our economies of a well-developed arbitration process. As a result, there is no shortage of statements on the advantages of arbitration over litigation and the other more common forms of dispute resolution in the modern world. And what better place to start than with Maurice Stoppi's seminal work on commercial arbitration in the Caribbean[2]:

- In arbitration, there is less formality than in the courts.
- The arbitration award is final. There is no appeal (except in exceptional cases) as there is in the courts, always provided no special case is to be stated.
- The time and place of the hearing can be fixed to suit the convenience of the parties.
- Disputes are settled by experienced technical people of integrity, who understand the complexity of the problems presented to them for adjudication.
- Arbitration is quicker than the current legal process of litigation.
- Arbitration may be less expensive.
- It is private.

Further, adding an international dimension, the editors of Russell on Arbitration remind us:

> … in the modern world of cross-border transactions and collaborations, arbitration can provide elements of neutrality as regards location, governing law and constitution of the tribunal, which make

[1] The first Maurice Stoppi Lecture, organised by the Jamaican International Arbitration Centre, Kingston, Jamaica, 27 June 2018.

[2] Stoppi, M.J. 2001. *Commercial Arbitration in the Caribbean: A Practical Guide*, Kingston: University of the West Indies Press. page *xvii*

> it a very attractive proposition in international commerce. [3]

But, despite these well-known advantages, most jurisdictions in the region have, up until very recently, failed dismally to support the arbitral process with the legislative underpinnings which are generally accepted as necessary to promote an effective arbitral process. As Mr Stoppi noted in 2001, the vast majority of the Arbitration Statutes in the region were explicitly derived from (in many cases directly copied from) the English Arbitration Act of 1950, which consolidated without substantial amendment earlier English Acts of 1889-1934. It has long been generally accepted that these Acts, which were devised for the purposes of an age in which today's world would be completely unrecognisable, are in most respects quite out of touch with our modern realities.

Principal among the various deficiencies were the limited powers of arbitrators. This reflected what one commentator described as, "The somewhat patronising 'Big Brother' approach of the courts towards arbitration"[4]. This attitude would persist in the United Kingdom right up to the end of the 1970s, when the Arbitration Act 1979 was passed. Thus, in 1922, Lord Justice Scrutton, arguably the most accomplished commercial lawyer of his generation, said the following:

> Arbitrators, unless expressly otherwise authorized, have to apply the laws of England. When they are persons untrained in law, and especially when as in this case they allow persons trained in law to address them on legal points, there is every probability of their going wrong, and for that reason Parliament has provided in the Arbitration Act that, not only may they ask the Courts for guidance and the solution of their legal problems in special cases stated at their own instance, but that the Courts may require them, even if unwilling, to state cases for the opinion of the Court on the application of a party to the arbitration if the Courts think it proper. This is done in order that the Courts may insure the proper administration of the law by inferior tribunals. In my view to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. [5]

This is the attitude which informed the 1950 English Act and still pervades the majority of the regional arbitration statutes. This same lack of confidence in the arbitral process in turn fostered what is now accepted to have been an imperfect appreciation of the notion of party autonomy and arbitral independence, particularly as regards the role of the courts vis-à-vis arbitration.

In addition to the issues of party autonomy and arbitral independence, concerns have from time to time arisen in relation to the enforceability of arbitral awards, particularly so in respect of arbitrations with an international dimension. An example of this is the limited take-up of the New York Convention and similar instruments designed to facilitate cross-border enforcement of awards.

Happily, the impetus towards reform of the legal framework, though initially slow and often halting, has begun to intensify steadily over the years. By far the most influential development was the adoption in 1985 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Model Law, as is now well known, was designed to assist States in reforming and modernising their laws on arbitral procedure, so as to take into account the particular features and needs of international commercial arbitration. Covering all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention, through to the recognition and enforcement of the arbitral award, the Model Law is said to reflect "worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world"[6].

In 1992, no doubt spurred on by these developments on

[3] Russell on Arbitration, 23rd edn, Sweet & Maxwell Ltd, December 2007, para 1-027
[4] Lord Neuberger, then President of the Supreme Court, giving the Keynote Speech at the Chartered Institute of Arbitrators London Centenary Conference, July 2015
[5] In Czarnikow v Roth, Schmidt and Company [1922] 2 KB 478, 487-488
[6] See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

the international level, the Caribbean Law Institute[7], then an emanation of the Faculty of Law of the University of the West Indies, produced two drafts of model arbitration legislation for the Commonwealth Caribbean. But, for reasons which it is not now necessary to explore, that initiative foundered and the status quo remained unchanged for several years.

The enactment in the United Kingdom of the Arbitration Act 1996, which was the most far-reaching revision of arbitration legislation in that country for over a century, would provide a further spur. Notably, the updated Bahamian Arbitration Act 2009 was based largely on the UK 1996 Act. Perhaps as a footnote to this, I should add that The Bahamian Government recently tabled an International Commercial Arbitration Bill, which reproduces almost verbatim the UNCITRAL Model Law.[8] That Bill also foreshadows the establishment of an arbitration centre.

Here in Jamaica, some considerable time was next spent in a debate over what form of modernised arbitration legislation should be adopted: whether we should go for the 1996 UK Arbitration Act or for the UNCITRAL Model Law, which by that time had begun to achieve considerable buy-in across the world. It was a debate in which the Faculty of Law, this time at Mona, the Jamaican Bar Association, the Private Sector Organisation of Jamaica and others were integrally involved.

As the debate raged, a draft Bill was prepared for discussion. But this too was eventually discarded for want of unity as to its adequacy amongst stakeholders. At the heart of the dispute, I think, were the genuine concerns on both sides as to how best to ensure the finality and enforceability of arbitral awards; the nature of the procedure to be adopted; and, in some quarters, the relationship between the arbitral process and other ADR options (such as mediation and conciliation).

Then in 2013, the British Virgin Islands (BVI) Arbitration Act was passed. Interestingly, despite the status of the BVI as a British Overseas Territory, the Act is based heavily on the UNCITRAL Model Law on International Commercial Arbitration, modified slightly where necessary to accord with BVI law. In a far-reaching move, the Act also provided for the creation of a new statutory body called the BVI International Arbitration Centre. The following year, the BVI became a party to the New York Convention and, in November 2016, the British Virgin Islands International Arbitration Centre (BVI IAC) was launched.

In 2015, in the midst of – or perhaps because of - this renewed flurry of activity, the idea of a model arbitration law for CARICOM member states resurfaced. It was more fully explored at a broad-based consultation meeting held in Port-of-Spain, under the auspices of the Impact Justice Project, led by the distinguished Professor Velma Newton of Barbados. No doubt inspired by the BVI example, much of the meeting also focused on the possibility of establishing an arbitration centre for the region. The aim, it was said, was to make the Caribbean a "go to" location for international arbitration. At the end of this meeting, there was a general consensus that (i) it was full time for modernisation of arbitration legislation throughout the region; and (ii) steps should be taken to move towards the preparation of instructions for the drafting of the model legislation.

The product of this seminal consultation is the Impact Justice Model Arbitration Bill, 2017. Produced by a select committee appointed by Impact Justice, the draft Bill is for the most part based on the UNCITRAL Model Law and has since been accepted by UNCITRAL as such. The happy consequence of this is that any CARICOM State which enacts the Bill into law will be considered as a State having legislation that is UNCITRAL Model Law compliant. Professor Newton has now advised me that the Bill will be presented to the Legal Affairs Committee of CARICOM in the next few weeks[9].

And now, finally, there is the Arbitration Act 2017 of Jamaica. The 2017 Act, which was signed by the Governor-General on 21 June 2017, came into operation on 7 July 2017 [10]. Explicitly based on the UNCITRAL Model Law, the 2017 Act seeks "to facilitate domestic and international

[7] Under the guidance of the late and still much lamented Professor Ralph Carnegie.
[8] Email from Dr. Peter Maynard to me, 27 June 2018
[9] Email from Professor Newton to me, 27 June 2018
[10] See Jamaica Gazette Supplement, Proclamations, Rules and Regulations, 7 July 2017, Legal Notice No. 120/2017.

trade and commerce by encouraging the use of arbitration as a method of resolving disputes; [and] to repeal the Arbitration Act, 1900". We have surely come a long way, at last.

In an excellent article published in the latest edition of the Jambar Journal[11], the learned authors summarise the journey in this way:

> Jamaica's new *Arbitration Act* … leaves behind a badly outdated law. As UNCITRAL explains, legislation left over from the early twentieth century is no longer fit for purpose. Outdated enactments like the previous Jamaican law typically 'contain fragmentary provisions that fail to address all relevant substantive law issues,' and frequently 'equate the arbitral process with court litigation.' Nations who have adopted the UNCITRAL Model Law, on the other hand, have arbitration laws that are designed to cater to the needs of the modern global economy and modern international commercial dispute resolution.
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> Moreover, the old Jamaican law was enacted in a wholly different era. When it was passed in 1900, Jamaica was still a colony, and a largely agrarian society that focused on sugar, banana, rum, and coffee. Today, Jamaica has an open economy with industries such as tourism, shipping, mining, business processing outsourcing, construction and infrastructure development, and information technology that are dependent on cross-border flows of people, capital, and other resources. As a result, the nature and features of the potential legal disputes arising from this commercial activity have fundamentally changed.
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> The enactment's promulgation is thus a welcome sign of much needed legal reform. It will bring Jamaica in line both with international best practices and several other jurisdictions in the Caribbean. Across the region, various governments have already started to update their antiquated arbitration legislation, which were often times based on British laws themselves long abandoned and replaced in the United Kingdom, and instead follow the UNCITRAL Model.

In this short and necessarily selective survey, I have principally been discussing the legal and institutional structures that support the arbitration process in the Caribbean. But, of course, the shape of any culture is as much – perhaps even more so -- a function of people, as it is of institutions. So, to the extent that we are able to lay claim to even a fledgling culture of arbitration in Jamaica and the Caribbean, I can confidently assert that we owe a mountain of debt to the untiring efforts of persons like Maurice Stoppi and others of his ilk. Despite the many limitations, they gained for themselves well-earned reputations throughout the region as arbitrators of rare quality. It has been a truly extraordinary achievement.

A study of the history of the Chartered Institute of Arbitrators (CIArb) will reveal that, at its inception in 1915, its principal aim was "to raise the status of a professional arbitrator to a distinct and recognised position among the learned professions"[12]. While Maurice Stoppi more than succeeded in achieving this enhanced status in his time the challenge as we go forward into this new dispensation is to ensure that those who will carry it into effect are equally well equipped to do so.

In this regard, it is our great good fortune that over the last few years the CIArb has, through the untiring efforts of John Bassie, Shan Greer, Anthony Gafoor, Chris Malcolm and others, taken an active role in the training of a cadre of arbitrators. Between 2007 and 2014, the Jamaican Chapter and then the Caribbean Branch held several Associate and Members Courses in Jamaica (3 each); and, in 2013, two accelerated Fellowship Courses, one in Jamaica, and a second in Trinidad and Tobago. I am sure that it will come as no surprise to you to learn that Maurice Stoppi was deeply involved in all of the peer interviews for the Jamaicans who successfully completed the Fellowship Course in 2013.

The CIArb Caribbean Branch has also benefitted tremendously from Maurice's expertise and willingness to share.

[11] Natalie L. Reid, Conway Blake and Adam Moss, 'Jamaica's New Arbitration Act - Promises and Challenges', Jambar Journal, VoL. 30, No. 2, January to April 2018, pages 16-18, at page 17.

[12] Julio Cesar Betancourt, The Chartered Institute of Arbitrators (1915-2015): The First 100 Years (2015) 81 Arbitration, Issue 4, page 375

Established in 2006, there are now approximately 191 members working across the region, including lawyers, engineers and chartered surveyors, among others. Under the leadership of the Caribbean Branch, individual chapters have also been established in Trinidad and Tobago (2010); Barbados (2010); St. Lucia (2011), BVI (2011) and (2014). Alongside these developments, the Branch has successfully hosted three international conferences on arbitration, the most recent being held in Guyana in April, 2018.

It therefore appears that the future is in secure hands. But the history I have attempted to describe demonstrates clearly the ever-present dangers of delay, indecision and, ultimately, fragmentation of effort. It is full time, I venture to suggest, that, as a region, we put all of that behind us. More than ever now, we need more rather than less collaboration if we are to build the Caribbean culture of arbitration of which we are surely capable. Maurice's achievements as a pioneering Caribbean man of arbitration have shown us the way. So come, let us walk with him now: let's see if we can get it together at last.

C Dennis Morrison was educated at the University of the West Indies and was the Jamaica Rhodes Scholar 1975. He was in private practice for over 30 years before his appointment, directly from the Bar, as a Judge of the Court of Appeal of Jamaica in 2008. He was appointed President of the Court of Appeal in January 2016. Mr Justice Morrison has been continuously involved in the teaching programme at the Norman Manley Law School since 1977. Among other things, he has variously served as:

- *President of the Jamaican Bar Association (1996-1999);*
- *Chairman of the Council of Legal Education (1998-2005);*
- *Commonwealth Foundation Fellow (1991);*
- *Member of the Commonwealth Expert Group on the reform of the law of evidence (2001);*
- *Leo Goodwin Memorial Fellow at Nova Southeastern University, Florida (2004);*
- *Judge of the Court of Appeal of Belize (2004-2015);*
- *Chairman, Continuing Legal Professional Development Committee, Jamaica (2015-present);*
- *Judge of the Court of Appeal of the Cayman Islands (2015 - present).*

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