



4TH DR. J.S. ARCHIBALD QC MEMORIAL LECTURE

THEME: “The Rise of BVI Arbitration – Has Litigation Met Its Match?”

Good evening.

It was the renowned psychologist Abraham Maslow who said that ‘if your only tool is a hammer, you tend to see every problem as a nail’. From time immemorial, all that parties to legal disputes wanted was their day in court. Litigation was the proverbial hammer in one’s toolbox for obtaining reprieve or justice and every dispute, regardless of its nature or complexity, a nail. Alternative dispute resolution mechanisms subsequently developed to provide attractive and varied means of dispute resolution outside of the courtroom, where it was possible to do so. Among these alternative dispute resolution mechanisms, arbitration emerged as a standout on the global stage and the Virgin Islands is positioning itself centre-stage.

It is a great privilege and indeed a pleasure to have been invited to deliver this 4th Dr. J.S. Archibald QC Memorial Lecture. Events like this no doubt require hours of planning and hard work. I therefore express my gratitude to our facilitators for bringing us together for another BVI Arbitration Week. I also bid a special welcome to our attendees joining us both in person and from across the Caribbean and beyond. While I would have enjoyed being home in the Virgin



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

Islands during this week and joining you in person for this important occasion, I no doubt speak for us all when I say that we are extremely delighted that the team at the BVI International Arbitration Centre, led by its Chief Executive Officer Mr. Francois Lassalle, managed to organise a lecture this year amidst the ongoing pandemic. I commend them for bringing plans for this year's BVI Arbitration Week and this lecture to fruition.

This lecture is personally significant for two reasons. First, as a BVI islander, it gives me a great sense of pride to know that the Virgin Islands has made such great strides in the development of a modern and world-class arbitration framework, which is frequently chosen by persons and entities operating in far parts of the globe, for resolving high-value disputes. Second, this lecture is held in memory of a renowned legal giant— Dr. Joseph Archibald QC who was my senior when I entered private practice in his chambers in 1985. I revered Dr. Archibald QC as a great advocate and an excellent teacher. He had a passion for the law and thoroughly enjoyed teaching its finer points. I credit many of my accomplishments in law to the time spent under his wing.

The most recent Dr. J.S. Archibald QC Memorial Lecture was delivered in 2019 by Ms. Wendy Miles QC under the theme 'BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes'. This theme is even more resonant now given the extreme weather patterns experienced over this year alone and as



world leaders gather for COP26 and indeed yesterday's discussions on the greening of arbitration and courts. I propose however, to approach this lecture from a different angle and consider the rise of the modern arbitration regime in the BVI and thereafter pose the question - has litigation finally met its match? To begin this journey, we must first take a collective step back into the past.

THE VIRGIN ISLANDS BEFORE ITS OFFSHORE ACCLAIM

I distinctly remember when I entered the legal profession. In 1981, the commercial law landscape in the Virgin Islands was narrow with a slow pace of growth. A few years later in 1989, the financial services sector gathered significant momentum. Company incorporations began to soar in the Virgin Islands. As a legal practitioner at the time, it was felt that it would be just a matter of time before one would see commercial disputes involving international business companies or even high net worth individuals taking place here. That came in the early 1990s when the first large multinational commercial dispute landed on the doorstep of the High Court. It was an exciting time – the seeds for the Virgin Islands blossoming into a global offshore financial centre were sown.

Fast forward to the mid-1990s - arbitration began picking up the pace in the BVI. Legal practitioners then jumped at the opportunity to engage in this speedier dispute resolution mechanism and many expanded their practices to include arbitration. This was under the old Arbitration Ordinance of 1976. I



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

ividly recall my very first involvement in an arbitration during that time. It concerned a building contract dispute. I can say that two things remained with me from that experience – the first is that one of the arbitrators with his sharp wit reminded me of then Senator, now President of the United States Joe Biden and second, looking back at how things were then, that the arbitration regime in the BVI is quite different today. The old Ordinance had a number of limitations, not the least of which was recognition and enforceability of BVI awards extra- territorially. And so, reform was needed.

THE DEVELOPMENT OF A MODERN ARBITRATION REGIME IN THE BVI

Over the years, the arbitration regime in the BVI has developed into what I consider to be the ‘brainchild’ of Dr. Archibald QC. In the latter years of his career, the Financial Services Commission appointed Dr. Archibald QC as the Chair of the International Arbitration Focus Group. This Focus Group was charged with reviewing the local arbitration regime with a view to modernising it and providing recommendations on how the BVI could become a centre for international arbitration. The efforts of the Focus Group were critical to the introduction of a new legislative framework - the **Arbitration Act, 2013**¹ (hereinafter referred to as “the Act”).

¹ Act No. 13 of 2013.



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

Among the key features of the Act is the application of the provisions of the UNCITRAL Model Law (“the Model Law”), subject to certain modifications. The incorporation of the Model Law into the Act enshrines well-established principles of international commercial arbitration. These include the notions that the parties are free to choose the terms of the arbitration clause and the parties are at liberty to appoint their preferred number of arbitrators. The incorporation of the Model Law also means that several matters codified therein apply to BVI arbitrations. These range from the parties’ ability to challenge the appointment of or to remove an arbitrator to the power of the arbitral tribunal to grant interim measures and order interest and costs where appropriate. Another key feature of the Act is that unless the parties agree otherwise, information related to BVI arbitral proceedings or a BVI arbitral award cannot be published, disclosed, or communicated to third parties, adding a dimension of confidentiality to BVI arbitrations.

Additionally, since 2014, the UK Government has extended application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) to the BVI. This means that BVI arbitral awards will be readily enforceable in the 168 countries which have acceded to the New York Convention. This is, for reasons which are obvious, of great import.



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

Quite interestingly, the Act itself also makes provision for the very building in which some of us are gathered at this very moment – the BVI International Arbitration Centre. In 2016, the Arbitration Centre was established to meet the demands of the international business community for an impartial, efficient and reliable dispute resolution institution in the region. As you may have gleaned, it is a well-equipped state of the art centre, operating within the modern legal framework for arbitration in the BVI. These features when pulled together have undoubtedly made the BVI an even more attractive destination for arbitration – with the sun, sea and sand of the islands being merely an added bonus.

With these developments in mind, it cannot be overstated that during the last five years, the Virgin Islands has become an increasingly popular arbitral seat. Simply put, parties are no longer flocking in droves to our shores merely to litigate, but also to arbitrate. In a short space of time, the Virgin Islands has earned the reputation of being a world-class arbitral seat, frequently chosen by high net-worth companies and individuals across the globe.

ARBITRATION IN THE BVI – WHAT SAY THE COURT?

Another significant feature of the BVI arbitration regime is that it has for a long time had the support of the BVI court. Indeed, arbitration has garnered tremendous support from courts across the region. One merely needs to read but a few decisions to appreciate this perspective. In this regard, I echo the



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

sentiments of Professor Winston Anderson, Judge of the Caribbean Court of Justice in **Belize Natural Energy Ltd. v Maranco Ltd.**² where he stated:

“This court recognises that arbitration is an increasingly preferred method of resolving complex commercial disputes and that it rests on the key principle of party autonomy. Parties to an arbitration agreement make the conscious decision to prefer the prompt expedient and final settlement of their disputes through the arbitral process rather than the often protracted process of court adjudication. As it is sometimes put, they choose finality over legality. Conflict resolution by arbitral means assists and encourages modern commercial activity...”

Justice Anderson’s sentiments are what I consider to be an apt characterisation of the arbitration landscape not only in the Virgin Islands but across the region. Much closer to home, Farara J [Ag.] (as he then was) in **L Capital KDT Limited et al v Retribution Limited et al**³ commented that:

“The BVI has now moved into that international arena boldly, as a new and emerging centre for international arbitration. The role of the courts to decide disputes caught by an arbitration agreement, have proportionately been diminished and limited. In my view, it behoves the courts, including this Commercial Court, to support this process and to not hinder, in any way, its development and concretization, except in the [clearest] of circumstances...”

² [2015] CCJ 2 (AJ) at para. 17.

³ BVIHC(COM) 2015/0089 (delivered 26th January 2016, unreported) at para. 66.



As recently as November 2020, Jack J in a decision of the Commercial Court in **Rangecroft Ltd v Lenox International Holdings Ltd**⁴ expressed that:

“It is a tribute to the strength and resilience of the arbitration community in this Territory that the parties were able very quickly to arrange an arbitration before an experienced arbitrator able to sit in Tortola, notwithstanding the difficulties caused by the Covid-19 pandemic.”

HAS LITIGATION MET ITS MATCH?

With its numerous advantages and the limited role of the court in extant arbitrations, the question arises - has litigation finally met its match? In my view, the answer is no - or perhaps not yet. There remain clear circumstances where parties have no choice but to resort to the courts for certain relief. These circumstances range from where there is some incapacity on the part of one or more parties to the arbitration agreement to non-arbitrability of the subject-matter under BVI law or public policy. And, I am sure many legal practitioners tuning in will agree with me when I say - there also remains a clear need to run to the doorsteps of the court when one is seeking recognition and enforcement of arbitral awards. Additionally, the **Arbitration Act** itself leaves some room for the Court to play a role in arbitration. For instance, although under the Act arbitral awards are final and unappealable unless the parties agree otherwise,

⁴ BVIHC(COM) No. 37 of 2020 (delivered 19th November 2020, unreported) at para. 4.



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

parties may choose to opt-in to certain provisions that permit the court to exercise additional supervisory jurisdiction over the conduct of an arbitration.

The simple truth to be extracted from all of this is that some key tools for resolving disputes in respect of the arbitration process itself remain, so far, within the sole purview of the court. I can recall a number of decisions emanating from the Eastern Caribbean Supreme Court which demonstrate that arbitration is simply not a ‘one-stop shop’ for dispute resolution and there remains the need to resort to litigation in a myriad of situations. In **Cukurova Holding A.S. V Sonera Holding B.V.**⁵ the Court of Appeal confirmed the court’s jurisdiction to grant anti-arbitration injunctions in the BVI notwithstanding section 3(2)(b) of the Act which provides that ‘the Court shall not interfere in the arbitration of a dispute, save as expressly provided’ in the Act. The facts of the case are quite interesting. The respondent, Sonera, had been successful in an arbitration against Cukurova brought pursuant to an agreement to arbitrate found in a letter agreement, although the arbitration related to a distinct share purchase agreement. Sonera then successfully applied to the High Court to enforce its arbitral award in the BVI.

⁵ BVIHC VAP2012/0029 (delivered 9th May 2013, unreported).



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

Cukurova then commenced a second arbitration under the arbitration agreement in the share purchase agreement. In that arbitration Cukurova sought, amongst other things, an award against Sonera in equal amount to the award granted in favour of Sonera in the first arbitration. The second arbitral tribunal found that it was not bound to recognise those parts of the first award which trespassed on matters falling to be determined under the share purchase agreement. It concluded that Cukurova's arbitration under the share purchase agreement could proceed on the merits. However, it later became apparent to Sonera that Cukurova was seeking to prevent Sonera from relying on the BVI court's order enforcing the first award and on a subsequent charging order issued by the BVI Court. As a result, Sonera issued proceedings in the BVI for an injunction preventing Cukurova from seeking this relief. The Commercial Court found that section 3(2)(b) of the Act prevented the court from granting this injunction. However, on appeal, the Court of Appeal disagreed. The Court of Appeal found that the Act could not and did not oust the court's very wide jurisdiction to grant injunctions pursuant to the **Eastern Caribbean Supreme Court (Virgin Islands) Act** (the "Supreme Court Act") without clear language.

The Court also reasoned that the second arbitration amounted to an indirect attack on the order enforcing the first arbitration in the BVI and would be subversive of the court's judgment and processes. The Court therefore concluded that it ought to be restrained by an injunction. While the Court of



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

Appeal underscored that this type of relief should only be granted in exceptional circumstances, the **Cukurova** decision truly demonstrates that the arbitration regime in the BVI has not and perhaps cannot go as far as to render the court's processes otiose.

This point is also canvassed in the recent decision of **Hector Finance Group Limited v Caldicott Worldwide Limited**⁶ which concerned the issue of whether the Court of Appeal has jurisdiction to hear an appeal from an injunction order granted under section 43(10) of the Act. In this decision, the Court held that it did not have jurisdiction to entertain an appeal from the lower court's decision to grant an interim remedy relating to arbitration proceedings under section 43(10) of the Act. The Court, however, observed that had the injunction been granted by the judge of the Commercial Court under the Supreme Court Act instead of section 43(10) of the Act, the Court of Appeal would then have jurisdiction hear an appeal from that decision. This decision no doubt supports the proposition of law expounded in **Cukurova**.

Another important point to note is that resort must be had to the courts where one is seeking interim relief in support of foreign arbitration proceedings. This was made clear in the 2019 Court of Appeal decision in **Koshigi Limited and**

⁶ BVIHCVP2020/0012 (delivered 1st June 2021, unreported).



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

Anor v Donna Union Foundation⁷ and in the earlier decision of the Commercial Court in **PT Ventures SGPS SA v Vidatel Ltd.**⁸ The Court of Appeal in **Koshigi** approving **Vidatel** found that the court's jurisdiction to grant interim relief in support of foreign arbitral proceedings is clear on the wording of section 43 of the Act. As this relief has become increasingly popular due to the rise in multi-national commercial disputes, it seems to me that some measure of litigation is likely to occur even in certain circumstances where arbitration has already been engaged.

Furthermore, notwithstanding the existence of an arbitration agreement, a party may bring a claim in court either challenging the arbitration agreement or alleging that the particular dispute falls outside its scope. Where this occurs and the opposing party then applies to the court for a stay of those proceedings in favour of arbitration, the court still has a role to undertake. It must be satisfied that the dispute is one which is caught by the arbitration agreement and ought to be referred to arbitration. This has been recognised in several decisions of the Court of Appeal such as **Canisby Limited v Flat Point Development Limited**⁹ and **Ocean Conversion Limited v Attorney General of the Virgin Islands**.¹⁰ The key point to note is that courts do retain some

⁷ BVIHCMAPP2018/0043 and 0050 (delivered 17th January 2019, unreported).

⁸ BVIHC(COM)2015/0117 (delivered 8th February 2016, unreported).

⁹ ANUHCVAP2016/0005 (delivered 13th February 2017, unreported).

¹⁰ BVIHCVAP2007/0330 (delivered 12th January 2009, unreported).



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

power to determine whether an arbitration can properly take place within the terms of the arbitration agreement but once it so decides, the court must retract its tentacles and give effect to the agreement by staying its proceedings in favour of arbitration. Therefore, in certain circumstances, it seems that where there is a debate between parties on whether to arbitrate or not to arbitrate, it is often the court which has the final say.

Of course, there are many more decisions which illustrate the role of the courts in an arbitration. However, as I touched on earlier, the court may also retain some power to determine disputes which have been referred to arbitration by virtue of the express terms of the arbitration agreement. For instance, under section 89 and Schedule 2 of the Act, parties may reserve the right to appeal the final award to the Court of Appeal on a question of law. In this regard, the Act expressly contemplates the possibility of parties pursuing litigation in certain circumstances.

The import of litigation becomes more apparent and assumes greater significance when a party to arbitration receives an arbitral award and seeks to have it recognised and enforced. Why is this significant? The answer is simply that the ultimate efficacy of any arbitral award depends on the assistance of the courts. Arbitral tribunals cannot engage the coercive powers of the judicial branch of the state with respect to enforcement. Just take a moment to imagine an arbitral



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

award that is final and binding but cannot be enforced – that award would be nothing more than a pyrrhic victory for the successful party unless the losing party throws in the towel at that stage and honours the award. However, the cases show that it is at this stage that many battles are vigorously fought deploying various Convention defences. Critically, it is at this juncture that the dispute resolution mechanisms of litigation and arbitration seamlessly intersect. Recourse to the courts at this stage therefore becomes not merely an option but a necessity.

CONCLUSION

As I now come to a close, I must express that I am immensely proud of the development of arbitration in the Virgin Islands. I think Dr. Archibald QC would be quite pleased to know that despite its geographical size, the BVI has become a significant player on the global arbitration scene - rivalling the arbitration centres of New York, London, Paris and Singapore.

While I do not consider that litigation has in all respects met its match through the rise of arbitration in the BVI, I do think that litigation and arbitration are happily wed. It is the intersection of the powers of the court and the arbitration regime that facilitates their peaceful co-existence. In fact, it seems to me to be quite likely that parties to even the most straightforward arbitration will engage the court's processes at some stage in the resolution of a dispute. And therefore,



EASTERN CARIBBEAN SUPREME COURT

FIAT JUSTITIA

P.O. Box 1093, Castries
Saint Lucia, West Indies
Telephone: (758) 457-3600
Fax: (758) 457-3601

the courts, at least superior courts - exercising as they do unlimited jurisdiction will always have a role to play. Nonetheless, I believe that the more tools in one's toolkit for resolving disputes the better - not every nail needs a hammer. The courts will therefore continue to fully support and promote alternative dispute resolution mechanisms such as arbitration. With its many benefits, it takes a load off the courts. Do we welcome that? - Absolutely. It is therefore my hope that arbitration in the BVI will continue to thrive and that the BVI will firmly position itself at the forefront of the arbitration world as Dr. Archibald QC had imagined.

I wish you all a fruitful and enjoyable BVI Arbitration Week 2021.

Thank you.

Dame Janice M. Pereira, DBE, LL.D.
Chief Justice