

CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER – ATTORNEYS-AT-LAW



ABOUT



Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.

INTRODUCTION

The July issue of the Newsletter features articles from our Commercial and Property Departments and includes a contribution from one of the firm's interns.

Our first article focuses on the principal alternative dispute resolution ("ADR") mechanisms available to parties for inclusion in their contracts for the purpose of facilitating the timely settlement of their commercial disputes. This article is particularly timely in the advent of increased calls for the use of ADR mechanisms in order to circumvent delays in dispute resolution which may result if the dispute had to be resolved in a court of law.

Our second article seeks to inform prospective borrowers (and to remind existing borrowers) of the responsibilities and obligations that come with creating a legal mortgage over real property and will also explore the remedies available to a lender against a defaulting borrower. This article discusses issues such as "What is a legal mortgage?", "Why is this arrangement attractive to Lenders?", the contents of the mortgage deed and default and enforcement provisions under the mortgage.

Our final article discusses the impact of Fintech on financial organisations within the Caribbean including its impact on current banking norms and the process of putting regulations in place to deal with issues relating to Fintech.

~ We hope you enjoy! ~

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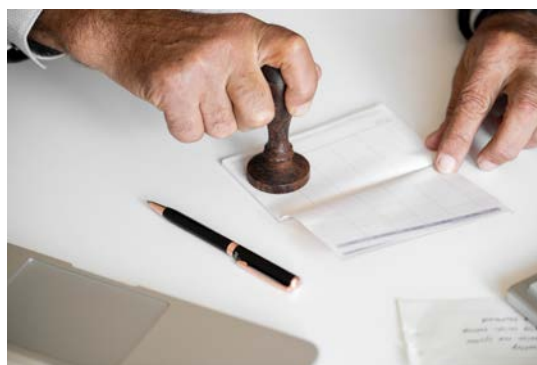
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Ms. Sabrina L. Maynard

Alternative Methods for the Resolution of Commercial Disputes: Considerations for the Business Community

By Ms. Sabrina L. Maynard, Senior Associate

Introduction

Inevitably, disputes are likely to arise in any relationship. Within a commercial relationship it is critical for disputes to be settled in timely and innovative manner in order to minimize disruption to business operations and the associated costs. Increasingly, there has been a cry from the business community in Barbados, and the public at large, concerning the slow pace of the courts of law ("**Courts**") with respect to hearing matters and giving decisions. For businesses, time is money. Therefore, in many cases, the inability of the Courts to give a timely judgment with respect to a commercial dispute often results in lost opportunities and revenue for the businesses involved. In this article, we will explore the principal alternative dispute resolution ("**ADR**") mechanisms available to parties for inclusion in their contracts for the purpose of facilitating the timely settlement of their commercial disputes.

Mediation

Mediation is a voluntary, flexible, confidential, consensual and "without prejudice" process of dispute resolution which allows the parties to a dispute to craft, among and for themselves, a mutually satisfactory and enforceable solution to their issues with the assistance of a mediator outside of the court environment.

The role of the mediator is not to impose a solution on the parties; rather, the mediator, an independent and neutral third party, "assists the conflict participants in starting from their mutual interests to arrive within a short time at a jointly supported solution to their conflict that is considered desirable or acceptable to each of them"¹.

Research has shown that parties are more likely to abide by the terms of an agreement reached through mediation due to their consensual involvement in the process. The agreement of the parties to a mediated solution, however, is not binding on the parties until it is reduced to writing and signed by each party, at which time it becomes a binding settlement agreement which is enforceable in the Courts.

In light of the above, a mediation clause may be included in a contract to provide the parties to the contract with a process for reaching a resolution to a dispute without the involvement of the Courts. This may be especially useful where the parties to the contract consider the relationship to be mutually beneficial and wish to preserve the relationship and the confidential nature of the matters involved.



As previously mentioned, mediation is a voluntary process. The parties involved in mediation are entitled to walk away from the mediation process at any time, if they so desire. Consequently, where a mediation clause is included in a contract it is customary for the contract to require the parties to mediate in good faith *before* they can proceed to the settlement and determination of the dispute through arbitration pursuant to the *Arbitration Act*, Cap. 110 of the laws of Barbados (the "**Arbitration Act**") or by recourse to the Courts.

¹ Machteld Pel, *Referral to Mediation: A Practical Guide to a Mediation Proposal*, Sdu Uitgevers (2008)

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By Ms. Sabrina L. Maynard, Senior Associate

Conciliation

Conciliation is similar to mediation in that it is a voluntary, flexible, confidential and "without prejudice" approach to dispute resolution which allows parties to a dispute who have become deadlocked to reach an amicable resolution of the dispute with the assistance of a conciliator who acts as a neutral third party. Like mediation, the parties to conciliation are free to determine their conciliator based on whatever criteria the parties consider to be desirable including experience, expertise, or even familiarity with the subject matter of the dispute.

While a conciliator may be asked by the parties to a dispute to make a proposal for consideration by the parties with respect to the settlement of the dispute, the parties to the dispute ultimately have to agree to any proposal made by a conciliator for the settlement of the dispute. The ability of the conciliator to make a proposal to the parties to a dispute with respect to the settlement of the dispute is one of the key distinctions between mediation and conciliation.



Conciliation, like mediation, may be used as part of a tiered system for the resolution of disputes. As such, in an effort to reach a resolution of a dispute in a timely and most cost-effective manner, a contract may provide for a dispute to be determined by a series of ADR mechanisms which may commence with mediation, which if not successful, may be followed by conciliation, expert determination and/or ultimately arbitration.

As is the case with the inclusion of a mediation clause in a contract, the inclusion of a conciliation clause in a contract which is governed by Barbados law would not usually preclude the parties to the contract from seeking traditional redress through the Courts, should the conciliation process be unsuccessful.

Expert Determination

Expert determination is an ADR mechanism which allows for the settlement of disputes in a private forum by an independent and neutral expert who has technical and specialist knowledge relevant to the issues in dispute.

The inclusion of a clause in a contract which provides for the expert determination of disputes is useful in circumstances across a range of sectors where the issues that are likely to arise for dispute may be technical, rather than legal, in nature. For example, in construction or building contracts, and where time is likely to be of the essence in evaluating the issues and making appropriate decisions with respect to relevant matters, an expert who has a technical understanding of the issues involved and the likely implications of the various outcomes of certain actions may be better placed to make a determination with respect to the issues involved than an arbitrator who does not possess the specialist knowledge or a judge within a Court setting.

The use of expert determination clauses for dispute resolution in contracts may be flexible. As such, the inclusion of an expert determination clause in a contract would not necessarily preclude the rights of the parties to a contract to access to the Courts or to another dispute resolution mechanism, such as arbitration (discussed below), in respect of the matter unless the parties specifically provide for such in the contract.

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Further, the parties to a contract are free to agree in their contract for a dispute regarding a specific issue to be determined exclusively by way of expert determination while leaving other matters that may be the subject of a dispute to be determined by another mechanism, possibly arbitration or the Courts. It is important to note that the decision of the expert is binding, unless it is agreed by the parties at the outset that the determination of the expert will not be binding.

Arbitration

Of all the ADR mechanisms, arbitration correlates most closely with the court system of dispute resolution since the determination of the issues (both in law and in fact) are left to an arbitrator, a panel of arbitrators or an arbitral tribunal (the "**Arbitrator**") and the outcome of the process is a legally binding and enforceable decision with *res judicata* effect which means that the issues which form the subject to the relevant dispute cannot be pursued any further by the parties to the dispute.

Despite the binding nature of arbitration proceedings, there are several areas in which arbitration proceedings differ from the Court system of dispute settlement. Some of the salient areas are outlined below.

Confidentiality

Litigation is generally a public affair whereby the documents filed by the parties to a dispute and the judgment of the Courts with respect to the dispute are available for public inspection (save where an application is made by the parties for, and an order made by the Courts in respect of, the sealing of certain documents). In arbitral proceedings, on the other hand, the documents filed by the parties and the award of the arbitrator are private as between the parties and the Arbitrator, subject to certain confidentiality constraints such as where the parties to the dispute have a legal obligation to disclose a matter relating to the dispute or where disclosure is necessary in connection with enforcement proceedings of an arbitral award.

Parties' Choice in the Selection of an Arbitrator

In litigation, the parties to a dispute generally do not have the opportunity to select the judge who will preside over their matter and therefore do not have the ability to assess and make a determination with respect to whether a particular judge should be assigned to a matter based on the technical competencies of the judge. In arbitration proceedings, however, the parties select the Arbitrator and can therefore decide on a person or persons who the parties believe have the relevant skills, knowledge and technical competencies to determine the dispute in question.

Enforceability of judgments

Unlike court judgments, which are enforced through the coercive powers of the state granted by applicable laws, arbitration awards, although legally binding, do not have any automatic powers of enforcement attached to them. Consequently, an award by an Arbitrator must be voluntarily complied with by the losing party. In circumstances where a party does not voluntarily comply with an arbitral award, enforcement must be pursued through the court system.

Speed and finality

Arguably, one of the most attractive features of arbitration over litigation is the speed at which the matter can be disposed of. An arbitral award is final and generally subject to appeal on limited grounds. Those grounds are usually where there has been a procedural irregularity or an appeal is desirable in the interest of public policy. In contrast, litigation can be lengthy and judgments of a court are subject to appeal on the merits. Consequently, a judgment only becomes final within the Court system when the matter is no longer capable of being appealed. In the context of Barbados, that is when the matter is disposed of by the Caribbean Court of Justice as the final appellate court of Barbados.

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By Ms. Sabrina L. Maynard, Senior Associate

Costs

The cost of arbitration to the parties to a dispute may be higher than if the matter was settled via the Courts. This is due to the parties to arbitration proceedings being responsible for covering, in addition to their separate legal and expert witnesses' costs, the fees of the Arbitrator and the administrative costs associated with the arbitration facilities and the general conduct of the arbitration.

Where the parties to a contract agree to the inclusion of an arbitration clause in the contract, the Courts will generally recognise the validity of the provision and give effect to it by denying or declining to exercise jurisdiction over the particular matter in dispute. In this regard, the Arbitration Act provides that the Court may stay proceedings in a matter where there is an agreement between the parties to submit the matter to arbitration and the applicant for the stay of proceedings, at the time when the proceedings were commenced, and at the time of the application for the stay of the proceedings, was ready and willing to do all things necessary for the proper conduct of the arbitration.² Consequently, the parties to a contract which provides for the settlement of disputes by arbitration will generally not be permitted by the Courts in Barbados to ignore the arbitration clause in the contract and resort to the Courts for the settlement of their dispute.

Further, where an Arbitrator makes an award pursuant to an arbitration agreement, the award will be binding on the parties to the arbitration unless the arbitration agreement provides otherwise. With respect to this matter, the Arbitration Act³ provides that unless a contrary intention is expressed in an arbitration agreement, every arbitration agreement shall be deemed to contain a provision that the award to be made by the Arbitrator shall be final and binding on the parties and the persons claiming under them respectively.



Notwithstanding the foregoing, the Arbitration Act provides that the Courts may intervene in a matter which is subject to arbitration in order to set aside an award where the Arbitrator has misconducted himself in the proceedings or an arbitration award was improperly procured.⁴

Conclusion

The limited availability of ADR centres and access to trained ADR professionals has traditionally been seen as one of the hindrances to persons exploring the possibility of ADR mechanisms for the settlement of commercial disputes. The recently established Arbitration and Mediation Court of the Caribbean in Barbados (the "AMCC"), now offers a complete framework for disputing parties including prescribed costs, international and non-international rules of arbitration, mediation rules, and model contract clauses. It is hoped that the AMCC will be embraced by legal practitioners and the business community in general, and will demonstrate that ADR, in the right circumstances, will afford more cost-effective, timely and creative solutions to the resolution of commercial disputes than what is currently available through our court system.

² Section 6 of the Arbitration Act, Cap. 110 of the Laws of Barbados (the "Arbitration Act").

³ Section 19 of the Arbitration Act.

⁴ Section 26 of the Arbitration Act.



Mr. Ralph A. M. Edghill

Legal Mortgages: Borrower's Obligations and Lender's Powers

By Mr. Ralph A. M. Edghill, Associate

Introduction

In today's economic landscape, buying a property can become an unreachable goal unless some form of loan financing is available. The usual lender will be a commercial lending institution, which will usually require a charge over the property being purchased, as security for the loan. Even if a buyer has cash, financing the purchase means his own cash is not all tied up in the property, and he can leverage that cash to better advantage elsewhere.

This article seeks to inform prospective borrowers (and to remind existing borrowers) of the responsibilities and obligations that come with creating a legal mortgage over real property and will also explore the remedies available to a lender against a defaulting borrower.

What is a legal mortgage?

Historically, a legal mortgage was effected by a transfer of the legal title in property to a lender as security for the performance of the borrower's obligations, and on the express or implied condition that the asset would be transferred back to the borrower once his obligations were discharged.

Nowadays, creating a legal mortgage now operates as a charge over the land¹, which means that there is no actual transfer of the legal title to the lender. Even though the form and effect of a legal mortgage has changed, the charge still operates to give the lender certain rights in relation to the property.

Why is this arrangement attractive to lenders?

If a lender is willing to rely solely on the borrower's personal credit for the fulfilment of the borrower's contractual obligations (i.e. to give an unsecured loan), the lender's recourse, if the borrower defaults, is to sue for a breach of contract. If the suit is successful, the lender may be granted a judgment against the

borrower for the amount owed, but it will then have to take further steps to recover the damages awarded under the judgment. If the borrower becomes insolvent, the lender will rank *pari pasu* (on equal footing) with all other unsecured creditors of the borrower and after any secured creditors. This is no comfort to an unsecured lender who may recover nothing (or less than it was owed) at the end of the day.



A prudent lender (especially of large sums of money), will therefore require more than a mere contractual remedy against a defaulting borrower. This can be achieved by taking security over an asset. Once the security is properly registered and perfected, the lender will (subject to any rules of priority) be protected on the borrower's insolvency to the extent of the value of the secure asset(s) and may be repaid ahead of the junior or unsecured creditors.

Getting and securing a loan

Once a prospective borrower can satisfy a lender that he is a "good bet", the lender will issue a facility letter setting out details of the loan transaction, including: (a) loan amount; (b) interest rate; (c) total repayment period; d) amount and frequency of periodic payments; (e) principal security required; and (f) collateral security required (e.g. guarantees or assignments). Once the borrower signs the facility letter, accepting the loan terms, a binding agreement is formed between the lender and the borrower.

¹ Section 96 of the Property Act Cap. 236 of the Laws of Barbados

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By Mr. Ralph A. M. Edghill, Associate

The principal security is likely to be a legal mortgage of real property, either the property being purchased or some other property owned by the borrower or a guarantor. The mortgage is created by a deed of charge by way of legal mortgage. The typical mortgage does not contain the level of detail about the loan terms that is found in the facility letter, but is worded sufficiently broadly that it can secure a wide range of loan facilities from time to time.

Contents of the Mortgage Deed

Generally, a mortgage will contain, at least the following:

Charging/mortgaging clause

The borrower expressly charges his property to the lender as security for the repayment of all moneys, obligations and liabilities whatsoever (including interest and applicable costs) which become due by the borrower to the lender ("the Secured Liabilities").

The mortgage will usually be of a continuing nature, so that repayment of the initial sum borrowed does not prevent the lender from making further advances of funds on the security of the mortgage, so long as the principal amount due does not exceed the amount for which the mortgage is stamped to cover under the Stamp Duty Act.² The charge remains in force until it is formally released by the lender.

Description of the property

The mortgage deed should contain the legal description of the mortgaged property so that there can be no doubt as to the property that is subject to the lender's charge. A faulty description may negatively affect the quality of the lender's security and hinder the enforcement process, should it get to that stage.

The Covenant to Pay and other Borrower's Covenants

The borrower covenants with the lender to repay the Secured Liabilities on the dates due. This clause will

usually specify that in the absence of an agreed or specified due date, the Secured Liabilities will be payable immediately on demand by the Lender.

Aside from the covenant to pay, a mortgage deed may contain borrower's covenants which must be observed throughout the life of the mortgage. Even in the absence of any express covenants on the part of the borrower, the Property Act³ implies certain covenants by the borrower to the lender (subject to express provisions to the contrary). These implied covenants include, but are not limited to covenants:

- a) to pay the mortgage money on the agreed dates and to pay interest at the agreed rate on the mortgage money so long as it remains unpaid;
- b) to pay rates, taxes and other outgoings in respect of the mortgaged property;
- c) to repair and keep in repair all buildings and other improvements on the mortgaged land and to permit the lender or its agent to enter at all reasonable times and inspect the state of such building or improvement;
- d) to insure the property for its full value against loss or damage by fire, hurricane or earthquake;
- e) Not to lease the mortgaged land or any part of it for any period longer than one year without the prior consent of the lender; and
- f) not to transfer the mortgaged land or any part of it without the prior consent in writing of the lender.

These implied covenants are usually expressly included in the mortgage deed and are often expanded

² Stamp Duty Act CAP 91 of the Laws of Barbados

³ Section 97 Property Act CAP 236 of the Laws of Barbados

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upon and added to. Examples of additional covenants include covenants which:

- a) restrict the borrower from making any material changes to the property (except in the ordinary course or maintenance and repair) without the lender's prior consent;
- b) restrict the borrower from taking out any further mortgage over the property which would rank equally or in priority to the lender's charge, without the lender's prior consent; and
- c) restrict the borrower's statutory power to grant leases of the mortgaged property for periods of less than one year.



Lender's powers

On the other hand, the Property Act⁴ provides the lender with important statutory powers which include but are not limited to:

- a) power, when the mortgage money becomes due, to sell or to concur with any other person in selling the mortgaged property;
- b) power, at any time after the date of the mortgage deed, to insure the buildings and any insurable property and effects and to keep them insured against loss or damage by fire, hurricane or earthquake;
- c) power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property or any part of it; and

- d) power to grant leases in respect of the mortgaged property.

Most mortgage deeds will contain express provisions that modify and/or extend the lender's statutory powers, and will usually include:

- a) express power to sell the secured asset and use the proceeds to pay off the Secured Liabilities;
- b) power to appoint a receiver - the receiver's powers will usually include powers to: (i) take possession of, deal with and sell the secured assets; (ii) carry on the borrower's business; (iii) protect the secured asset (e.g. arranging repairs or insurance) and; (iv) generally do all things the owner of the secured assets could do;
- c) power to take physical possession of the mortgaged property - except where the borrower consents or the property has been abandoned, the lender must first obtain an order of the High Court before taking over possession. A mortgagee taking possession has a strict duty to attend to the maintenance and upkeep of the property, and must account to the borrower for any income and profit actually received, or income which the mortgagee ought to have been receiving. (e.g. if the property was earning income prior to being taken over). For these reasons, this remedy is rarely used.
- d) power to grant leases of the mortgaged property without having to adhere to the restrictions imposed by the Property Act;
- e) power to sign any document, execute any deed and do all other acts which are necessary to exercise any of the lender's powers and to realise the lender's security.

⁴ Section 110 and 109 of the Property Act Cap. 236 of the Laws of Barbados

Legal Mortgages: Borrower's Obligations and Lender's Powers, Cont'd...

By Mr. Ralph A. M. Edghill, Associate

Events of default

Most modern mortgage deeds will specify certain instances, called events of default, where the Secured Liabilities will become immediately due and payable on demand.

Failure to repay the Secured Liabilities in accordance with the terms of the mortgage deed or facility letter (i.e. breaches the covenant to repay) or breaches of any of the borrower's covenants, will constitute events of default. Other events of default commonly included in mortgage deeds are:

- a) death, mental incapacity, bankruptcy or winding up of the borrower;
- b) if an encumbrancer takes or attempts to exercise any power of sale over the mortgaged property; or
- c) if a judgment is entered in the High Court against the borrower and a charging order is levied against the borrower's property.

Default and Enforcement

Unfortunately, sometimes a "good bet" turns out to be a "bad bet" and the borrower cannot meet his obligations, triggering an event of default.

Enforcement of the security requires that the Lender first send the borrower a notice of his default and request that it be remedied. Whether the default is breach of the covenant to pay, or a breach of some other implied or express covenant, the lender must demand payment of the arrears or rectification of the other breach within not less than one month⁵ before enforcing the mortgage. If the borrower does not comply with the first demand to make amends, then a second demand may be made for the full amount due. After that, the lender may exercise its power of sale or of appointment of a receiver of the property.

For a more expansive explanation as the steps to be taken by a lender seeking to realise its security over property, we encourage our readers to re-visit our January 2013 newsletter article titled "An Outline of Mortgage Enforcement in Barbados".

Lender's Remedies

The lender's remedies for the recovery of the debt can be either against the borrower personally (under the contract / facility letter or the covenant to pay), or by enforcement of the security (power to take possession, sell the property or appoint a receiver).

The lender may employ more than one remedy in order to realise the full amount owed. For example, if the lender exercises its power of sale to sell the secured asset and this sale does not realise enough to satisfy the entire debt, the lender may still sue the borrower in his personal capacity based on the breach of the covenant to repay to recover the remainder.



Conclusion

Secured lending is mutually beneficial to borrowers and lenders. It gives borrowers a means of financing the purchase of property which they may not otherwise be able to afford and it gives lenders a way to recover their money if the borrower does not repay the borrowed funds. Borrowers should ensure that they clearly understand their obligations to the lender and to the secured asset itself, as well as the lender's rights against both the borrower and the secured assets.

⁵ Section 111 of the Property Act Cap. 236 of the Laws of Barbados

Fintech: A Primer for Caribbean Financial Revolution

By Ms. Danielle M. Benjamin - Student Intern

Introduction

The loss of Corresponding Banking Relationships ("CBRs") or the process of de-risking in the Caribbean appears to be one of the reasons regional financial institutions are exploring financial technology ("Fintech") in the form of blockchain and digital currency. De-risking has occurred as a result of adherence by financial institutions to anti-money laundering ("AML") and counter-financing of terrorism ("CFT") international regulations. It has disproportionately affected the Caribbean¹ region, as opposed to the rest of the world, and is beginning to revolutionize the way in which regional financial systems operate. Thus, financial organizations, such as the Eastern Caribbean Central Bank, through their Memorandum of Understanding ("MOU") with the Barbadian Company BITT, have begun to re-organize their methods of doing business by investigating the benefits of Fintech.

Impact of Current Banking Norms

Large international banks, those mainly responsible for the severing of CBRs which service the region, now operate within a sphere of increased regulation and oversight. For example, prior to the de-risking phenomenon, the global ING Bank N.V. was fined \$ 619 million (USD) by the United States' Department of Treasury's Office of Foreign Assets Control just for potential liability in 2012.² New regulatory impositions require banks to conduct detailed risk assessments of their customers and products via regulations such as section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("PATRIOT") United States Act of 2001 which is implemented by the Customer Identification Program ("CIP") administrative rule. Recent U.S. regulatory agency implementation of such rules include the Financial Crimes Enforcement Network's (FinCEN) May 2018 ruling (FIN-2018-R002) which provides guidance on the CIP definition of an account as being "each time a loan is renewed or a

certificate of deposit is rolled over, the bank establishes another formal banking relationship and a new account is created"³. These regulations require a detailed level of specificity from the banks not only in relation to their customer accounts but that of their subsidiaries and vice versa, thereby creating a large liability target on the back of any banking relationship formed by a bank.

More recently, in the United Kingdom, the Financial Conduct Authority⁴ ("FCA") 2019 imposed a sanction of £102,163,200 on Standard Chartered Bank for AML/CFT breaches by virtue of its corresponding banking relationships and branches in the United Arab Emirates. The resultant fine, per the FCA, for Standard's failure to maintain proper customer due diligence controls led to the second largest such fine in FCA history. Therefore, the end result is that a number of banks have conducted a cost-benefit analysis where some have concluded that the benefit of doing business in small jurisdictions such as the Caribbean does not outweigh the risk of sanction and reputational costs.



¹. Financial Stability Board, "FSB Corresponding Banking Report", March 2018.

². Delisle Worrell, et. al, *De-risking in the Caribbean: The Unintended Consequences of International Financial Reform*, Central Bank of Barbados, CBB Working Paper No. WP/16/10 at 17 (October 27, 2016).

³. Financial Crimes Enforcement Network, U.S. Department of the Treasury, "Beneficial Ownership Requirements for Legal Entity Customers of Certain Financial Products and Services with Automatic Rollovers or Renewals", Ruling FIN-2018-R002 at 1.

⁴. Financial Conduct Authority, "FCA fines Standard Chartered Bank £102.2 million for poor AML controls", Official Press Release, April 9, 2019.

Fintech: A Primer for Caribbean Financial Revolution, Cont'd...

By Ms. Danielle M. Benjamin- Student Intern

Incubating & Legislating for a New Norm

The Caribbean's loss of CBRs means the loss of access to the international financial market, trade, foreign direct investments and the settlement of cross-border payments (e.g. tourist credit card transactions). Enters Fintech. Companies such as BITT in Barbados and P08 in the Bahamas have emerged with various Fintech solutions. BITT has developed digital currencies (via the region's central banks) to supplant physical dollars facilitated by blockchain technology thereby eschewing the need for regular, formal cross-border banking relationships. P08 has developed a project involving the tying of the value of newly discovered cultural artifacts to a representational cryptocurrency value in order to raise capital for continued heritage preservation, all the while preserving said artifacts in museums for public consumption. The promise of Fintech is endless and, in fact revolutionary, thereby making necessary the need for regulatory controls.

Regulation of cryptocurrencies, arising from blockchain technology, is still a developing field itself. The developing regulations include Bermuda's implementation of the Digital Asset Business Act (2018) governing the control of businesses dealing in cryptocurrency and Canada's Budget Implement Act, 2018, No.1 giving their financial institutions flexibility to engage in Fintech activities, as well as the U.S. governments' struggle to define these assets in order to bring them within the gamut of the existing regulatory model.⁵ In Barbados, the Financial Services Commission recently approved the Special Listing Facility for Digital Assets by the Barbados Stock Exchange and established the related rules and guidelines.⁶ Therefore, with the breach of the old financial norm, the challenge remains to continue the crafting and implementation of a viable regulatory environment for the new digital financial norm.⁷



⁵ The United States of America Securities and Exchange Commission ("SEC") treats virtual/digital currencies as securities for their regulatory purposes whereas the Internal Revenue Service ("IRS") treats it as property whose gains or losses must be tracked and quantified for taxing purposes. See, e.g., SEC v. Trendon T. Shavers and Bitcoin Savings Trust, Civil Action No. 4:13-CV-416 and IRS Guidance on Virtual Currency, Notice 2014-21 (2014).

⁶ Barbados Stock Exchange, "Barbados Stock Exchange Receives Regulatory Approval of its Special Listing Facility for Digital Assets", Official Press Release, July 5, 2019. The Special Listing Facility for Digital Assets will be under the BSE's International Securities Market ("ISM").

⁷ See, e.g., various bills being put forth by state legislatures in the United States of America such as: 1. Hawaii's Senate Bill 1364 which would allow for a money transmitter license to hold virtual currencies as investments; 2. Idaho's Senate Bill 1464 which defines "virtual currency" as a digital representation of value used as a medium of exchange while still being cabined from official use as legal tender; and/or 3. Indiana's House Bill 1683 which would allow for the payment of taxes using virtual currencies.

ATTORNEY PROFILE

Mrs. Olivia N. D. Burnett, Senior Associate

In this issue we continue our series of profiles of the firm's associates and turn our focus on Mrs. Olivia N. D. Burnett, a Senior Associate in our Commercial Department.



Olivia practices in areas such as mergers and acquisitions, blockchain, securities law, sports law and both international and domestic capital markets for debt financing. She joined the firm in 2013, having been admitted to the Bar in Barbados the same year.

Olivia graduated from the University of the West Indies, Cave Hill Campus, with an LL.B (Hons.) in 2011. In 2013, she obtained her Legal Education Certificate of Merit from the Hugh Wooding Law School in Trinidad & Tobago. While at Hugh Wooding, she was included on the Principal's Roll of Honour and received several academic awards including the Council of Legal Education Prize for Most Outstanding Year I Student and the Chairman's Prize. In 2013 she was also awarded the Barbados Bar Association Prize for Best Performance by a student from Barbados.

Since then, Olivia has delivered papers on merger control and regulation in Barbados. This year Olivia also acted in the first appeal by a Barbadian professional athlete to the Court of Arbitration for Sport, Luusanne, Switzerland, which was partially upheld.

Away from the desk, Olivia is a dancer and writer/songwriter. This Crop Over season, you can hear Olivia's calypso songs being performed in the only Christian, family-oriented calypso tent on the island - the Ultimate Calypso Tent.

CGF NEWS

Seminars and Conferences

Mrs. Rosalind Smith Millar, Q.C. attended the Annual Meeting of the International Trademark Association in Boston, Mass., USA from 18 - 22 May 2019. The INTA Annual Meeting is the premier event in the legal calendar of trademark owners and professionals across the globe. This year's meeting attracted some 11,343 registrants, and provided unmatched opportunities for learning, client meetings and networking. The Annual Meeting culminated with an evening at the Boston Museum of Science.

Mr. Dario Welch co-presented at the Bar Association's Lunch time seminar on Thursday, May 9th 2019 under the title "Oh no my client has no title documents, what do I do?". The seminar sought to provide attorneys with the tools to assess what steps need to be taken to best help clients who wish to engage in a real estate transactions, but have either lost the original title deeds or certificate of title to the property in question, or are now seeking a declaration of ownership to land.

Miss Joanna Austin formed part of a panel discussing "The New Administrative Framework and processes. How does it work: Challenges and Resolutions" at the International Business Update Seminar held by BIBA on June 25th 2019. The Seminar was to discuss issues arising from the changes of Barbados' international business legislative regime effective Jan 1, 2019 resulting from the OECD requirements.

The Barbados Bar Association's Inaugural Law Conference was held from June 7th to 9th, 2019 in Barbados where our Mrs. Nicola Berry, Mr. Michael Koeiman and Mr. Omari Drakes moderated segments of the conference. Also in attendance was our Mrs. Rosalind Smith Millar, Q.C., Mrs. Savitri St. John, Mrs. Richelle Nichols, Mrs. Anya Harrison, Mr. Dario Welch, Mr. Matthew Goodin, Mr. Corey Greenidge and Mr. Ralph Edghill.

Mrs. Nicola Berry, a fellow of the Chartered Institute of Arbitrators and an accredited Arbitrator, presented at the

Jamaica International Arbitration Centre's (JAIAC) Conference June 27-28 2019 as a member of the Maritime Claims panel - held at the Spanish Court Hotel, Kingston, Jamaica. Her presentation focussed on the viability of maritime arbitration in the Caribbean region.

Mrs. Berry also attended the blockchain conference, Consensus 2019 between May 13-15 2019 held at the NY Hilton Midtown.

Caribbean Commercial Law Conference

From July 21st to 23rd 2019, legal practitioners, academics and other professionals from across the region came together at the Melia Cohiba, Habana, Cuba for this year's Caribbean Commercial Law Workshop (the "Workshop"). The Workshop was held under the auspices of the Faculty of Law of the University of the West Indies, Cave Hill Campus in partnership with the Norman Girvan Chair for Caribbean Studies, University of Havana. The theme for this year's Workshop was "Public Debt Restructuring and Its Impact on the Caribbean". Clarke Gittens Farmer was represented at the conference by Ms. Debbie Fraser, Partner and Head of the Commercial Department, Miss. Sabrina Maynard, Senior Associate in the Commercial Department and Mr. Corey Greenidge, Associate in the Corporate Department. Ms. Fraser presented a paper on "The Response of the Barbados Capital Market to Debt Restructuring" and also moderated a panel discussion on Reflections on the Impact of Sovereign Debt Restructuring. Additionally, Mr. Greenidge presented a paper on "Legal Innovations in the Public Debt Restructuring Process in the Caribbean".



Pictured: Ms. Debbie A. Fraser, Mr. Corey C. Greenidge and Miss Sabrina L. Maynard

CGF NEWS Cont'd...

Training

Our Miss. Sabrina Maynard, Senior Associate in the Commercial Department also participated in the Chartered Institute of Arbitrators, Caribbean Branch Commercial Mediation Training Course which was held at the Faculty of Law, University of the West Indies, Cave Hill Campus from July 8, 2019 to July 12, 2019.

Interns

On June 1, 2019, CGF welcomed seven Summer Interns who are pursuing studies at the regional Law Schools leading to attainment of their professional qualification as Attorneys-at-Law, the Certificate of Legal Education. During the 10 week internship, the students rotate through the firm's practice departments; participate in seminars organised in-house on various topics including legal professional ethics, law as a business, conveyancing, estates and anti-money laundering compliance; visit the various Registries; attend Court; and gain practical insight into the world of Attorneys-at-Law.



Pictured left to right (Back Row):- Miss Danielle Nurse, Mr. Chad Skinner, Mr. Daquane Nedd, Mr. Jeriah Rock
Left to Right (Front Row):- Miss Danielle Bullen, Miss Danielle Benjamin, Mrs. Rosalind Smith Millar, QC (Partner), Miss Daniella Bharath and Mr. Lewis St. John

Congratulations!

The Annual General Meeting of the Barbados Bar Association ("Bar Association") took place on Friday 12th of July 2019 where the elections for the Bar Association's Council for 2019-2020 and for the Disciplinary Committee for 2019-2021 were held.

Our Mrs. Rosalind K. Smith Millar QC emerged victorious and was elected to be the new President of the Bar Association. Several attorneys from the firm were also successful in their nominations for the Bar Council for the 2019-2020 year as follows:-

- Hon. Secretary – Mr. Michael J. Koeiman
- Queen's Counsel – Mr. Ramon O. Alleyne QC
- Member Under 10 years – Mr. Corey C. Greenidge

Additionally, our Mr. Dario A. Welch was elected to be a member of on the Disciplinary Committee for the period 2019-2021.

A hearty congratulations to our Attorneys!

CGF POINT OF LAW

CGF POINT OF LAW published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

Contact: Website: www.clarkegittensfarmer.com; Address: Clarke Gittens Farmer, 'Parker House', Wildey Business Park, Wildey Road, St. Michael, Barbados. Telephone: (246) 436-6287; Telefax: (246) 436-9812.

Partners: Managing Partner: Mr. Ramon O. Alleyne Q.C., Senior Partner: Mr. T. David Gittens, Q.C. Other Partners: Mr. Stephen W. Farmer, Q.C., Ms. Gillian M. H. Clarke, Mrs. Savitri C. B. C. St. John, Ms. Debbie A. P. Fraser, Mrs. Rosalind K. Smith Millar Q.C., Mr. Kevin J. Boyce and Mrs. Nicola A. Berry.

Newsletter Team: Supervising Partner: Mrs. Nicola A. Berry. E-Newsletter Committee: Miss Annette Y. Linton (Chair), Miss Sabrina L. Maynard (Deputy Chair), Mrs. Olivia N. D. Burnett, Mr. Dario A. Welch, Miss Ruth J. Henry, Miss Jaina O. Colucci, Mrs. Anya J. Harrison and Miss Lanasia Nicholas. **Technical and Administrative Support:** Miss Stephanie V. Blenman, Mr. John B. Newton and Ms. Erith S. Small.

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