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

Happy New Year to all and welcome to the first issue of our e-Newsletter for 2018. We hope that you will enjoy our offerings this year and we welcome your feedback.

More and more, people are opting to use arbitration as an alternative to instituting court proceedings to resolve disputes. In our first article we explore some of the essential considerations that must be addressed when drafting international arbitration agreements or clauses to ensure that there is a valid and enforceable agreement between the relevant parties to submit disputes to arbitration.

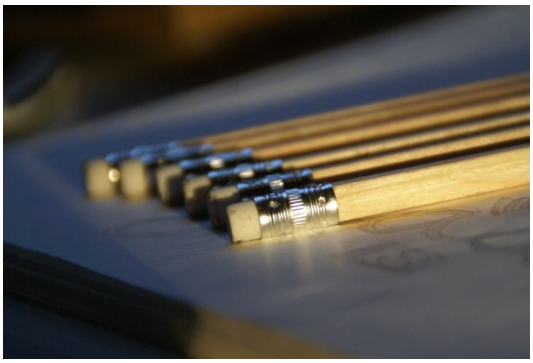
In our second article we change focus to examine some of the different types of grants of administration that may be obtained for an estate. In particular, we take a look at the grants that are limited in time, purpose or to specific property and the circumstances in which these limited grants may be issued.

In our final article, we take a look at some of the client due diligence that Attorneys-at-Law in Barbados are required to undertake to stay compliant with the *Money Laundering and Financing of Terrorism (Prevention and Control) Act, 2011-2* of the Laws of Barbados.

We hope you enjoy!

~ The e-Newsletter Committee~

In This Issue



Planning for Success in International Arbitration - What You Should Know About Drafting International Arbitration Clauses

By Mrs. Nicola A. Berry, Partner and Member of the Chartered Institute of Arbitrators

Mrs. Nicola A. Berry

International arbitration is a dynamic and binding private mechanism for dispute resolution. It is conducted before an impartial tribunal and is attractive to parties because it is created solely by their agreement. Unlike national courts which are empowered by the state, an arbitral tribunal derives power from the consent of the parties as found in the arbitration agreement. It is therefore important that the arbitration agreement or the arbitration clause in any contract be drafted with care. If the arbitration clause fails to establish a binding agreement to arbitrate, a party may be left with no choice but to initiate court proceedings when its intention was to use arbitration to resolve contractual disputes. It is therefore not just a contractual nicety to have an arbitration clause in your contract.

Valid and Enforceable Agreement to Arbitrate

So, what are the criteria of a valid and enforceable agreement to arbitrate? A starting point which is often used to determine this question is that which would be applied by a state court that is asked to recognise the agreement to arbitrate under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**"). The criteria which must be satisfied for the arbitration agreement to be recognized as enforceable under the New York Convention are as follows:

1. Agreement in writing

An arbitration agreement must be evidenced in writing. The New York Convention defines "agreement in writing" to include an arbitral clause in a contract or an arbitration agreement signed by the parties. "Writing" however has a broad definition in international arbitration and may also include an electronic document. The parties should take care to ensure that satisfactory evidence of their agreement to arbitrate can be easily established.

2. Clear agreement to submit present or future disputes to arbitration

Parties have the discretion to refer all or only particular matters or types of disputes to arbitration. Generally clauses are drafted broadly to capture all disputes which may arise between the parties. Where however the parties seek to limit the types of disputes that are submitted to arbitration, difficulties may arise where drafters seek to carve out certain types of matters for resolution through a different mechanism. Clear drafting is therefore essential.

3. Subject matter must be capable of being arbitrated

The question which must also be considered is, can the dispute be resolved by arbitration? As a matter of public interest some disputes might not be arbitrable. Many countries have taken the view, for example, that anti-trust/competition or bribery or corruption disputes should not be resolved before an arbitral tribunal.

4. Capacity

The parties must have the capacity to contract. If one of the parties is a governmental entity, such an entity may need to obtain parliamentary approval before executing an arbitration agreement. The authority of the signatories to the arbitration should therefore be checked.

5. Validity of the agreement under the governing law

The agreement to submit a dispute to arbitration must be valid under the governing law of the contract.

Planning for Success in International Arbitration - What You Should Know About Drafting International Arbitration Clauses, Cont'd...

By Mrs. Nicola A. Berry, Partner

Specific Drafting Issues

In addition to the above criteria, when drafting the arbitration clause, the following key areas should be addressed:

1. Seat of arbitration

The seat is the legal location of the arbitration and may also be referred to as the place of arbitration. The seat does not necessarily have to be the venue for the hearings however the seat provides the necessary legal framework for the proceedings. It regulates, for example, the powers of the tribunal and the supervisory powers of the courts over the arbitration. As a further example, if Barbados was designated the seat of an international arbitration the *International Commercial Arbitration Act, 2007-45* of the Laws of Barbados would be applicable.

When selecting the seat, it is important to consider the effect it may have on the conduct of the arbitration and the potential enforceability of the ultimate award. The procedural law of the seat in some of the more arbitration "friendly" centres of the world tend to have fewer mandatory procedural provisions and keep the role of the courts at a minimum.

The seat of the arbitration is also critical for enforcement. By selecting a country which is a party to the New York Convention as the seat of the arbitration, the parties establish a good basis for their awards to be enforceable.

2. Type of arbitration: ad hoc or institutional

Broadly speaking, an arbitration can generally be an "institutional arbitration" or an "ad hoc arbitration". An institutional arbitration is where an arbitration institution administers and supervises the arbitration process and the arbitration follows the rules of that institution. An ad hoc arbitration is one in which there is no institution to administer the process but instead the arbitration is run by the parties and the arbitrators.

There are a number of institutions around the world that administer international arbitrations. Some of the most well-known ones include the following:

- LCIA: London Court of International Arbitration;
- ICC: International Centre for Settlement of Investment Disputes;
- CIArb: Chartered Institute of Arbitrators;
- ICDR: International Centre for Dispute Resolution/American Arbitration Association (AAA);
- ACICA: Australian Centre for International Commercial Arbitration;
- HKIAC: Hong Kong International Arbitration Centre;
- SIAC: Singapore International Arbitration Centre;
- CIETAC: China International Economic and Trade Arbitration Commission;
- DIAC: Dubai International Arbitration Centre; and
- PCA: Permanent Court of Arbitration.

Planning for Success in International Arbitration - What You Should Know About Drafting International Arbitration Clauses, Cont'd...

By Mrs. Nicola A. Berry, Partner

Within the Caribbean, the following international centres have also been established or launched:

- British Virgin Islands: British Virgin Islands International Arbitration Centre (BVI IAC);
- Jamaica: Jamaica International Arbitration Centre Ltd. (JAIAC) and Mona International Centre for Arbitration and Mediation (MICAM); and
- Barbados: The Arbitration and Mediation Court of the Caribbean (AMCC).

These institutions are available to administer the arbitration process for local and international persons.

3. Rules governing the arbitration process

Most institutional arbitrations would generally be based on the rules of the institution which are mostly based on the United Nations Commission on International Trade Law ("**UNCITRAL**") Arbitration Rules. There are however differences between the various rules which should be considered. Many parties use the UNCITRAL Arbitration Rules for ad hoc arbitrations.

4. Number of arbitrators

In most cases, the arbitral tribunal consists of either one or three arbitrators. It is more expensive to appoint three arbitrators than a sole arbitrator; however, the selection of a tribunal of three allows for each party to nominate a member of the tribunal.

5. Language of arbitration

The language of the arbitration should be expressly stated in the arbitration agreement. This is especially important where the parties and witnesses speak different languages.

6. Governing law of the arbitration agreement

The governing law of the contract should be stated in the arbitration agreement, unless stated elsewhere. If there is a separate governing law clause provided in the contract, it is important to check that it does not contain a submission to courts which would be inconsistent with the arbitration agreement. Where the seat of the arbitration is different from the governing law of the contract, the law of the agreement to arbitrate should be expressly stated.

5. Confidentiality

Although arbitrations are generally private, the extent to which the confidentiality of the arbitration is protected varies depending on the applicable law or rule. The parties may wish to make an expressed provision that the proceedings will be confidential.

So, an arbitration clause is more than just a contractual nicety. Although the drafting should be kept fairly simple, if you are planning for success in international arbitration, there are essential details which should be considered and provided for in the arbitration clause or agreement.

Miss Annette Y. Linton

Limited Grants of Representation for an Estate

By Miss Annette Y. Linton, Senior Associate

When people think about obtaining a grant of representation for an estate, they think only of general grants of probate or general grants of administration. The three types of grant most commonly issued by the Court are:

1. Grant of Probate (Letters Testamentary): issued to the person(s) named as executor(s) under the deceased's will;

2. Grant of Letters of Administration with Will Annexed (Administration cum testamento annexo): issued if the deceased left a valid will but did not name an executor or if the executor named is unwilling or unable to act; usually issued to the person with the largest beneficial interest under the will.

3. Grant of Letters of Administration: issued if the deceased died intestate i.e. leaving no valid will; usually issued to the deceased's closest surviving next-of kin.

The grants issued are usually full grants that empower the duly appointed Executor/Administrator to call in and deal with all of the deceased's assets and generally do all acts necessary to distribute and wind up the estate. However, *the Succession Act, Cap. 249* of the Laws of Barbados ("**the Succession Act**") gives the Court in Barbados ("**the Court**") the authority to issue grants of administration limited in any way the Court thinks fit. There are in fact a number of special or limited grants of administration that can be obtained. In this article we take a look at some of these grants and the circumstances in which they may be issued by the Court.

Grant for the use and benefit of a minor

A minor cannot apply for a grant of probate/administration. However, circumstances may arise where a minor is the sole person entitled to apply for the grant. In such instances an adult may apply for a grant of administration "for the minor's use and benefit".

Under the Succession Act, where a minor is the sole executor of a will or the sole person entitled to administration, the Court has the power to issue a limited grant of administration to the minor's surviving parent(s) or guardian or such other person as the Court may think fit. This grant when issued will be limited until the minor attains the age of majority and applies for and obtains a grant in his/her name.

Grants for the use and benefit of a mentally incapacitated person

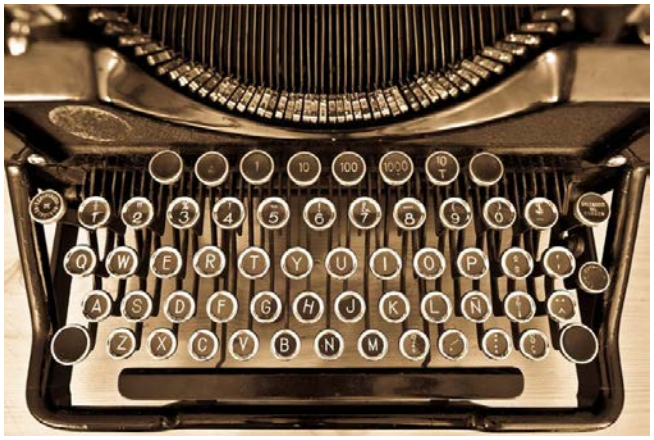
If a person is entitled to a grant of representation but lacks mental capacity (i.e. he is of unsound mind or is, through mental infirmity, incapable of managing his affairs), he cannot apply for a grant. In such circumstances, similar to the case of a minor, a grant may be issued to someone for the use and benefit of the mentally incapacitated person. The Court has discretion as to whom such a grant will be issued, however in practice priority would normally be given to the person appointed by the Court to manage the property and affairs of the mentally incapacitated person under the *Mental Health Act, Cap. 45* of the Laws of Barbados provided that appointment includes the authority to apply for a grant. The grant would be limited for the duration of the person's incapacity.

Limited Grants of Representation for an Estate, Cont'd...

By Miss Annette Y. Linton, Senior Associate

Grants ad colligenda bona

"Ad colligenda bona" means "to collect the goods". This type of grant may be issued by the Court in circumstances where an estate may be endangered if there is a delay in issuing a full grant of representation (for example if there is a dispute regarding the validity of a will, or if none of the persons entitled to a full grant can be found) and there are some urgent steps that need to be taken to preserve the estate. The powers of the administrator are limited to preserving and managing the estate until a full grant can be issued to the person so entitled. The administrator cannot distribute any of the estate's assets and this type of grant will cease when a full grant of representation is obtained.



Grants pendente lite

This is a grant of administration that is issued by the Court when litigation is pending. Section 19(5) of the Succession Act provides that where any legal proceedings are pending touching the validity of the Will of a deceased person or for obtaining, revoking or recalling any grant, the Court may grant administration of the estate of the deceased to an administrator who shall have all the rights and powers of a general administrator other than the right of distributing the estate of the deceased. Every person to whom such administration is granted is subject to the immediate control of the Court and must act under its direction.

Similar to a grant ad colligenda bona, the powers of the administrator pendente lite are limited to preserving and managing the estate during the pending litigation and he cannot distribute any assets. The power of an administrator pendente lite will cease once the relevant pending litigation has been resolved. At which time the person entitled to a full grant should apply for same.

Grants ad litem

"Ad litem" is Latin for "for this action". This type of grant may be issued to a person to either prosecute or defend the estate in proceedings before the Court. Where the persons entitled to a full grant are either unable or unwilling to apply for the full grant and there is an immediate need for a representative of the deceased to be made a party to an action before the Court, an application can be made for a grant of administration ad litem limited to representing the deceased's estate in the specific action before the Court.

Grants durante absentia

Section 23 (1) of the Succession Act provides that, if at the expiration of 12 months from the death of a person, any personal representative of the deceased person to whom a grant has been made is residing out of the jurisdiction of the Court, the Court may, on the application of any creditor or person interested in the estate of the deceased person, grant to him in such form as the Court thinks fit special administration of the estate of the deceased person.

Such grants may be limited in time, to a portion of the estate, to certain acts or in any manner the Court determines.

Limited Grants of Representation for an Estate, Cont'd...

By Miss Annette Y. Linton, Senior Associate

Grants limited to specific property

In addition to being limited in time or in purpose, grants of administration can also be issued in relation to specific property only.

Section 20 (1) of the Succession Act provides that representation may be granted either separately in respect of real estate and in respect of personal estate, or in respect of real estate together with personal estate, and may be granted in respect of real estate although there is no personal estate, or in respect of personal estate although there is no real estate.

Restrictions on obtaining limited administration

Although the Court has a wide discretion to issue limited grants, they are not regularly granted. Limited grants are usually only issued in circumstances where the persons entitled to a full grant are unable or unwilling to obtain the grant and there is a need to appoint someone either to act on their behalf or to preserve the estate.

Rule 27 of the *Non-Contentious Probate Rules,* 1959 of Barbados ("**NCPR**") provides that limited administrations are not to be granted, except under the direction of the Court, unless every person entitled to the full grant has either consented to the issuance of the limited grant, renounced all of their rights to obtain a full grant, or has been cited (i.e. formally directed by the court to either apply for the full grant or renounce their entitlement to same) and failed to appear. Rule 28 of the NCPR further states that no person entitled to a general grant in respect of the estate of a deceased person will be permitted to take a limited grant except under the direction of the Court.

Mrs. Sharmila Williams-Nascimento

"Get this business out of the way, so that we can get down to business!" - Complying with Customer Due Diligence Requirements

By Mrs. Sharmila Williams-Nascimento, Associate

Barbados has long been known as the financial hub of the Caribbean region because of its well established international financial services sector and has attracted many highly respected international and global companies to its shores. Barbados' attraction may however also draw the attention of undesirable persons who may attempt to hide the proceeds of crime by seeking to conduct business here. Barbados has enacted the *Money Laundering and Financing of Terrorism (Prevention and Control) Act, 2011-2* of the Laws of Barbados (the "**Act**") in order to reform its law in respect of the prevention and control of money laundering and the financing of terrorism.

Attorneys-at-law are classified under the Act within the category of non-financial business entities and professionals[1] (the **"NFBPs"**). NFBPs are required by the Act to establish and follow a due diligence compliance plan in order to prevent money laundering and the financing of terrorism.

Before our firm can accept new clients we are guided by the Act to conduct certain due diligence investigations in order to determine the level of risk we are exposed to in relation to a particular transaction or matter. We must be satisfied as to the identity of the clients for whom we do business.

The Anti-Money Laundering/Combatting Terrorist Financing Guidelines for Attorneys-at-Law and Accountants[2] (the "**Guidelines**") further guides Attorneys in the enquiries to be made and information and documentation to be obtained from prospective clients.

Based on the Act and the Guidelines a good policy and practice to follow when obtaining information and documentation from potential customers or clients should include the following:

<u>Individuals</u>

In order to establish and verify an individual's identity, there should be proof of the following:

- full name;
- date and place of birth;
- nationality;
- current permanent residential address including postal code (this may be ascertained for example, from the individual's residential address, as it appears on a current utility bill);
- occupation;
- source of wealth;
- two forms of proof of identification such as a current valid passport, national identification card or driver's licence which bear a photograph, each certified as a true copy by a notary public, senior public servant, member of the judiciary, magistrate, attorney-at-law, accountant who is a member of a national professional association, senior banking official, or a senior officer of a consulate/embassy/high commissioner of the country issuing the document. The identification document must detail the identification number and country of issuance, issue date, expiry date and the signature of the person;
- bank reference letter from the individual's personal banker with whom he or she has had a business relationship for a period of not less than 5 years; and a
- business reference letter from an attorney at law or accountant with whom the individual has had a business relationship for a period of not less than 5 years.

---

[1] Particularly when engaged in the purchase, sale or other disposal of real property; the management of the money, securities or other assets of a customer; the management of bank savings or securities accounts; the organisation of contributions for the creation, operation or management of bodies corporate; the creation, operation or management of legal persons or arrangements; or the purchase or sale of business entities.

[2] Issued by the Anti-Money Laundering Authority.

"Get this business out of the way, so that we can get down to business!" - Complying with Customer Due Diligence Requirements, Cont'd...

By Mrs. Sharmila Williams-Nascimento, Associate

Corporate Entities

A potential corporate client should be asked to provide documents which evidence the:

- full name of the corporate entity;
- identity of the beneficial owners of the entity; A beneficial owner is a person who owns and ultimately controls the corporate entity. However (i) if the corporate entity is publicly listed on a recognised stock exchange and not subject to effective control by a small group of individuals, information on the identity of each of the shareholders may not be required; and (ii) if the corporate entity is privately owned, the information on the identity of persons with a minimum of 10% shareholding should be provided;
- full names and residential addresses of directors/managers/officers of the corporate entity and/or information on the identity of the directors/managers/officers who exercise effective control over the corporate entity;
- nature of the business engaged in by the corporate entity;
- creation of the corporate entity e.g. a certified copy of the certificate of incorporation, organisation, registration or continuance, or any other relevant certificate authenticated by a notary public where the body corporate is created in another jurisdiction;
- corporate structure chart;
- certificate of status or good standing;
- recent financial information or audited financial statements;
- an original letter of reference from the corporate entity's bankers including statements as to the duration of the relationship, which should be for a period of at least 5 years, and the nature of the accounts held; and
- an original letter of reference from the entity's legal and/or tax advisor also including statements as to the duration of the relationship which should be for a period of at least 5 years, and the nature of that representation.

Where client's funds are being held on trust, the source of those funds should be verified, for example, by way of a lender's facility letter, or by obtaining proof of an inheritance.

Partnerships and unincorporated associations

Similar documentation should be required for each partner, member and authorised signatory of a partnership or association, whether individual or corporate.

All documentation requested as part of the due diligence enquiry, that may be in a language other than English must be accompanied by a notarially certified translation. These documents comprise part of the business transaction records which are referred to in the Act.

Attorneys are obligated under section 18 of the Act to maintain business transaction records for at least 5 years. Failure to maintain such records constitutes an offence, which carries a conviction on indictment to a fine of BDS $100,000.00.

A failure to comply with other obligations under the Act carries a penalty of a conviction on indictment to a fine of BDS $1,500,000.00 or 25 years imprisonment or both. Attorneys, therefore, may be well advised to refuse briefs from clients unless they provide the necessary, requested due diligence documentation.

Clients should stand ready, especially with time sensitive matters, to provide the requested documentation as quickly as possible so that their attorneys may get on with their client's substantive matters. "Let's get this business out of the way, so that we can get down to business."

ATTORNEY PROFILE

Ms. Sabrina L. Maynard, Senior Associate

In this issue we continue our series of profiles of the firm's associates. We profile Ms. Sabrina Maynard, a senior associate in the Commercial Department.

Sabrina's practice involves advising local and international clients on a diverse range of matters including reorganisations, capital market transactions, securitisation transactions, mergers, acquisitions, bankruptcy and insolvency, taxation and pensions.

Sabrina joined the firm in 2009 after obtaining her Legal Education Certificate from the Hugh Wooding Law School in Trinidad and Tobago and being admitted to the Bar in Barbados.

Prior to embarking on a legal career, Sabrina was an auditor with the accountancy firm of PricewaterhouseCoopers in Barbados. She later joined the accountancy firm of Deloitte in Barbados as a consultant and has worked extensively with entities in a wide cross section of sectors, including the financial services, international business, tourism and hospitality sectors.

In addition to being an Attorney-at-Law and chartered accountant (FCCA), Sabrina is a qualified chartered secretary (ICSA) and a trust and estate practitioner (TEP). She also serves as a member of the Legislation Committee and By-Law Committee of the Institute of Chartered Accountants of Barbados.

CGF NEWS

Correction and Update

On October 31, 2017 in Issue 4 Volume 5 of CGF Point of Law we published an article entitled "Sexual Harassment in the Workplace" which examined the proposed *Sexual Harassment (Prevention) Bill, 2017* (the "**Bill**") which was then still before the Barbados Parliament for debate. In that article we set out the definition of sexual harassment as proposed in section 3 of the Bill, however due to an editing error paragraph 3(g) of the Bill was mistakenly omitted from the article. The full definition of sexual harassment under section 3 of the Bill would have read as follows:

(a) the use of sexually suggestive words, comments, jokes, gestures or actions that annoy, alarm or abuse a person;

(b) the initiation of uninvited physical contact with a person;

(c) the initiation of unwelcome sexual advances or the requests of sexual favours from a person;

(d) asking a person intrusive questions that are of a sexual nature that pertain to that person's private life;

(e) transmitting sexually offensive writing or material of any kind;

(f) making sexually offensive telephone calls to a person; or

(g) any other sexually suggestive conduct of an offensive nature in circumstances where a reasonable person would consider the conduct to be offensive.

UPDATE: Since the publication of our article on "Sexual Harassment in the Workplace", the Bill has now been proclaimed. With the proclamation of the *Sexual Harassment (Prevention) Act, 2017* (the "**Act**") on December 15, 2017, sexual harassment in the work place is currently now governed by statute, though guidance may still be taken from common law principles authorities. Employers must now ensure that they take the necessary steps to ensure compliance with the Act. A failure to do so could result in fines or imprisonment. We invite you to take a look back at our article; the corrected version may be viewed on our firm's website at www.clarkegittensfarmer.com/resources/

Seminars and Appointments

Mrs. Rosalind Smith Millar, the Partner in charge of our Intellectual Property Department, attended the Leadership Meeting of the International Trademark Association ("**INTA**") that was held in November 2017 in Washington DC. She has also been appointed for a further two (2) year term, 2018-19, to the Latin America/Caribbean Sub-Committee of the Trademark Office Practices Committee of INTA.

Community Outreach

At the end of 2017, the partners and staff of Clarke Gittens Farmer continued their support for the Salvation Army by making a monetary donation to this organisation.

Our Staff Activities Committee once again worked diligently to gather donations from the partners and staff to assemble and provide Christmas hampers to families in need. On December 14, 2017 our Mrs. Lisa Sealy-Lewis, Mrs. Laverne Ochoa-Clarke, Miss Renee Gay and Miss Latoya Kinch presented the hampers to the St. Michael South East Constituency Council for distribution to families within the community.

Pictured: Miss Latoya Kinch

Congratulations

Clarke Gittens Farmer extends warmest congratulations to Dame Sandra Mason, GCMG, DA, QC who was installed as the 8th Governor General of Barbados on January 9, 2018 and to Donna Babb-Agard Q.C, who has been appointed Director of Public Prosecutions for Barbados.

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.

CLARKE GITTENS FARMER ATTORNEYS AT LAW

Member LexMundi World Ready

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.