



Caribbean Treaties, Laws. Regional Courts and International Commercial Arbitration

The Honourable Mr Justice Winston
Anderson, Judge of the Caribbean Court
of Justice

Fourth High Level Meeting on the Role of the Juidciary in International Commercial Arbitration

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The Judicial Education Institute of the Eastern Caribbean Supreme Court was launched in 1997, as a committee of the Chief Justice's office, shortly after Chief Justice Sir Dennis Byron and Justice of Appeal Albert Matthew returned from attending a Judicial Education Intensive Study Programme, organized by the Commonwealth Judicial Education Institute (CJEI) in Halifax, Canada. The CJEI has actually played a seminal role in training OECS judicial educators, and that body and the JEI have maintained a mutually enriching and productive relationship over the years.

Remarks

By

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice,

on the occasion of

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1. INTRODUCTION

Caribbean regional rules on international commercial arbitrations are extremely sparse. Those which do exist are either ancillary to the enforcement process or are relevant by their incorporation of global rules rather than themselves being creative of substantive arbitration law. As an example of regional rules ancillary to the enforcement process, Exhibit A is probably the Eastern Caribbean Supreme Court Civil Procedure Rules 2000. Rule 7.3 was amended in 2014 to support the arbitral process and Rule 7.3(5) now provides:

“Enforcement

(5) A claim form may be served out of the jurisdiction if a claim is made to enforce any judgment or arbitral award which was made by a foreign court or tribunal and is amenable to be enforced at common law.”

More specific mention is made of the regime of international commercial arbitration in the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (“RTC”), and its companion pact, The Agreement Establishing the Caribbean Court of Justice (“CCJ Agreement”). The most significant of these provisions import, by reference,¹ general global treaty rules and standards. The RTC, which was adopted on July 5, 2001, entered into force on January 1, 2006, and has been ratified by all fifteen Member States of the Caribbean Community.²³ All Members of CARICOM participating in the CSME are parties to the CCJ Agreement which was concluded on February 14, 2001 and which entered into force on 23rd July, 2003.

The provisions on international commercial arbitration are virtually identical in the two agreements except that the RTC is more comprehensive mainly in that it refers to specific global treaties and rules whereas the CCJ Agreement does not. Article 223 of the RTC provides as follows:

“Alternative Dispute Settlement

1. The Member States shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other modes of alternative disputes settlement for the settlement of private commercial disputes among Community nationals as well as among Community nationals and nationals of third States.

¹ A technique made famous by the United Nations Law of the Sea Convention 1982.

² Date of Ratification of the RTC: Antigua & Barbuda (July 24, 2003); Bahamas (February 10, 2006); Barbados (July 6, 2004); Belize (February 17, 2005); Dominica (April 8, 2003); Grenada (July 1, 2003); Guyana (July 2, 2003); Haiti (February 8, 2008); Jamaica (September 3, 2003); Montserrat (January 29, 2006) St. Kitts and Nevis (August 12, 2004); St. Lucia (May 28, 2003); St. Vincent & the Grenadines (August 12, 2002); Suriname (June 9,

³); Trinidad & Tobago (July 3, 2003). Associate Members: Anguilla (July 4, 1999); Bermuda (July 2, 2003); British Virgin Islands (July 2, 1991); Cayman Islands (May 15, 2002); Turks and Caicos Islands (July 2, 1991) Sources: http://www.caricom.org/jsp/community/member_states.jsp?menu=community, CARICOM Secretariat Matrix of Legal Documents and David Berry, Caribbean Integration Law p. 52-3 (Oxford University Press 2014).

2. Each Member State shall provide appropriate procedures in its legislation to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.

3. A Member State which has implemented the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Arbitration Rules of the United Nations Commission on International Trade Law shall be deemed to be in compliance with the provisions of paragraph 2 of this Article.”

This provision provides a neat entrée into a discussion of a number of important and interesting issues affecting the arbitral settlement of disputes.

2. RELATIONSHIP WITH INTER-STATE ARBITRATION

The RTC provisions on international commercial arbitration must be contextualized with other provisions in that treaty relating to inter-state arbitrations. Chapter 9 establishes a comprehensive vision for the settlement of inter-state disputes which includes recourse to the modes of good offices, mediation, consultations, conciliation, and arbitration.⁴ A similar framework is provided in the Revised Treaty of Basseterre Establishing the Organization of Eastern Caribbean States Economic Union⁵ but the Basseterre Treaty does not go on to deal with private commercial arbitration.

This inter-state regime is concerned with inter-state disputes relating to the interpretation and application of the regional integration treaty.⁶ Arbitration between States is, of course,

⁴ Article 188(1).

⁵ Annex on Settlement of Disputes.

⁶ See e.g., Article 187, RTC; Article 210 RTC emphasizing only inter-state disputes as costs borne equally by disputing States.

fundamentally different from commercial disputes but it is not outside the realm of possibility for a dispute between two Member States to be transmuted into a private commercial dispute. This possibility is heightened given the tenor of Article 222 of the RTC which provides that where one Member State omits or declines to espouse a claim or expressly agrees, an individual of that State may have *locus standi* to move the CCJ against the other Member State allegedly in breach of the treaty right or benefit enuring to the individual. Admittedly, the dispute between the national and a Member State will concern the interpretation and application of the RTC but there seems little reason not to regard such disputes as “commercial”; thus, for example, in *Revere Jamaica Alumina v Attorney General*⁷ a wide meaning was given to “commercial disputes” with Smith CJ holding that the investment agreement between the Government and the foreign investor could be characterized as “ordinary commercial contract capable of subsisting between private citizens.”⁷

3. NATURE OF OBLIGATION TO ENCOURAGE AND FACILITATE ARBITRATION

Paragraph 1 of Article 223 appears to be written in the language of ‘soft law’ given that the obligation is only to ‘encourage and facilitate’ arbitration and even then only to the ‘maximum extent possible’. However, very specific benchmarks are set forth in Paragraphs 2 and 3.

Member States “shall” provide appropriate legislative procedures to fulfill this obligation and as an illustration, implementation of the New York Convention or the UNCITRAL Arbitration Rules is specified as being sufficient to discharge this responsibility.

⁷ (1977) 26 WIR 486. See also, *BCB Holdings Ltd and Belize Bank Ltd v Attorney General* discussed below. ⁷ Ibid, *Revere Jamaica Alumina*, at p. 491.

The specificity of Paragraphs 2 and 3 brings into play the general undertaking on implementation enshrined in Article 9 of the RTC. This foundational provision requires Member States to take all appropriate measures to ensure the carrying out of obligations arising out of the Treaty. Member States shall facilitate the achievement of the objectives of the Community and shall abstain from any measures which could jeopardise the attainment of those objectives. In two recent cases, *Rudisa Beverages & Juices N.V. v. Guyana*⁸ and *Hummingbird Rice Mills v Suriname and the Caribbean Community*,⁹ the CCJ emphasized that the principle of *pacta sunt servanda* underlies the general undertaking in Article 9. In *Hummingbird*, the court observed:

“There is no doubt that Suriname came under a legal obligation scrupulously to observe all its treaty obligations from 1st January 2006, the date of the entry into force of the Revised Treaty. From that date forward, the rule of *pacta sunt servanda*, enshrined in Article 26 of the Vienna Convention on the Law of Treaties 1969, became operative: “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. The State of Suriname was simultaneously bound by Article 9 of the Revised Treaty to take all appropriate measures to ensure the carrying out of its treaty obligations.”¹⁰

4. LEGISLATIVE ACCEPTANCE OF ARBITRATION TREATIES

⁸ [2014] CCJ 1 (AJ).

⁹ [2012] CCJ 1 (OJ), 79 WIR 448.

¹⁰ *Ibid* at [17].

There has been controversy in a number of Caribbean cases as to whether a global arbitration treaty had been accepted by the CARICOM State, or had been enacted properly by the domestic legislature. An issue in *BCB Holdings Ltd and Belize Bank Ltd v Attorney General*¹¹ was whether to decline enforcement of a London Court of International Arbitration award under the preIndependence Arbitration Act 1980 of Belize on the ground that the Act was unconstitutional. The Act had been passed by Parliament to give effect to the New York Convention but that enactment had preceded acceptance of the said Convention by the Crown in respect of the then colony of Belize.

The CCJ considered the Appellants' contention that the Act was constitutional as a valid exercise of legislative power. The Respondents objecting had argued that the 1980 Act was unconstitutional in that it violated the separation of powers doctrine. Overturning the decision of the Court of Appeal, the CCJ accepted the argument by the Appellants that the 1980 Ordinance dealt with the internal affairs of Belize, that is, the recognition and enforcement of arbitration agreements and arbitral awards by the courts of Belize within the territory of Belize. It did not purport to regulate or govern external affairs or the external relationships between the State and other States. Upholding the view of Mendes JA, the dissenter in the Court of Appeal, we reasoned that by enacting the law the legislature was not engaged in the negotiation, signature or ratification of the New York Convention; matters which we acknowledged belonged to the prerogative powers of the Crown. We also considered that the 1980 Act was within the broad powers of the Belize legislature, "to make laws for the peace, order and good government of the Territory." Citing

¹¹ [2013] CCJ 5 (AJ), [2014] 2 LRC 81.

*Ibralebbe v The Queen*¹² and *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)*¹³ we essayed the view that these words were apt to connote the “widest plenary law-making powers” appropriate to a sovereign. We therefore held that the Act was valid and constitutional, although we eventually decided that that the London award could not be enforced in Belize as it was contrary to both domestic and international public policy.¹⁴

The decision in *BCB Holding* may be usefully compared with the very recent *Richard Vento v Keithley Lake*¹⁵ handed down less than five months ago in the Anguilla Circuit of the Eastern Caribbean Supreme Court. The arbitration had taken place in the British Virgin Islands but, as stipulated by the parties, the arbitral tribunal had applied the law of the US Virgin Islands (USVI). An application to register and enforce the arbitral award in the sum of over US\$7m in Anguilla was based upon sections 66 and 101 of the Arbitration Act 1996 of the UK which applied in Anguilla by virtue of the Arbitration Act of Anguilla.¹⁶ The trial judge held that section 66 was inapplicable as that section was concerned with enforcement of domestic awards whereas the foreign governing law made the award in this case a foreign award. However, section 101 dealing with foreign awards pursuant to the New York Convention was also not applicable because whilst the USVI was party to the Convention, Anguilla was not. Although the UK was a party to the Convention, the Convention had not been extended to Anguilla as a British territory.

¹² [1964] AC 900 at 923 (PC).

¹³ [2009] 1 AC 453 at 486.

¹⁴ Saunders JCCJ delivered the judgment of the court on the public policy point at [18] – [61]. Saunders JCCJ held that the Court could not adopt a parochial approach in determining the scope of public policy. Guided by the definition formulated by the International Law Association, the learned Judge concluded that “the public policy contravened in this case falls within the definition of international public policy.”

¹⁵ Claim No AXAHCV2013/0102 (unreported, decision of the Eastern Caribbean Supreme Court Anguilla Circuit, delivered on June 4, 2014).

¹⁶ The Anguilla Arbitration Act CAP 105 of the Revised Laws of Anguilla 2000 provides in section 1:

“The Arbitration Act (14 Geo 6 c 27) (UK) as amended from time to time shall be, and the same is hereby declared to be henceforth, in force in Anguilla, and all the provisions of the Act, so far as the same are applicable, shall mutatis mutandis apply to all proceedings relating to arbitration within Anguilla.”

The Judge was of the view that the enactment of section 100 of the UK Arbitration Act of 1996 provided in the UK, the statutory basis for the recognition of a Convention award in the UK but held that those provisions had not been extended to Anguilla. The Court agreed to the Applicant's contention that the New York Convention could have been adopted by Anguilla by other means and considered the case of *IPOC International Growth Fund Limited v LV Finance Group Limited*¹⁷ in which Eastern Caribbean Court of Appeal had held that the British Virgin Islands (BVI) had adopted the Convention into its statutory laws by its Arbitration Ordinance 1976 even though the BVI was not, at that time, a party to the Convention. The 1976 Ordinance provided for the enforcement of awards under the NYC and the whole of the Convention had been set out in a schedule to the BVI Act prompting the Court of Appeal to conclude that: "The scheme of the Act, which accords with the intention of the NYC, is to facilitate the recognition and enforcement of Convention Awards."¹⁸

The Court in *Richard Vento* contrasted the wholesale adoption of the Convention in the BVI with situation in Anguilla where there was no domestic legislation addressing the Convention and refused to accept that the mere statutory incorporation of section 100 of the UK Act together with the fact that the UK was a party to the Convention sufficed to render foreign arbitral award enforceable under the Conventional regime. There was no indication from the judgment that the applicant had sought, as an alternative, the enforcement of the award at common law. Admittedly this is a more cumbersome process, involving suing on the debt created by the award, and is subject to important limitations but the case-law and literature suggests that this is a possible route for

¹⁷ ECSC (BVI Circuit) Civil Appeal No. 30 of 2006 (unreported, decision of the Eastern Caribbean Court of Appeal British Virgin Islands, delivered on June 18, 2007).

¹⁸ *Ibid*, per Rawlins JA at [9] – [10].

enforcement outside of the Conventional regime.¹⁹ And as we have seen, Rule 7.3(5) of the CPR in the Eastern Caribbean Supreme Court appears to support such enforcement.

5. LEGISLATIVE IMPLEMENTATION OF 1958 NYC OR UNCITRAL RULES

The RTC is not so much concerned with the acceptance of the specified international treaties and rules on arbitration but rather with their implementation. It is the implementation of the New York Convention or the UNCITRAL Arbitration Rules which satisfies the obligation in Article 223(2) to provide “appropriate procedures in [domestic] legislation” for arbitration. Nonetheless, influenced by the dualist tradition followed by most Members of CARICOM, acceptance of the international treaty or rules is a usual pre-requisite for implementing legislation.²⁰ The notable exceptions would be Suriname and Haiti, civil law countries which holds fast to the monist tradition. Empirical research suggests that only 9 of the 15 CARICOM Members have accepted the international instruments²¹ and fewer still have the implementing legislation.

Furthermore, even with countries that have legislation implementing the NYC, Parliament may enact further legislation to restrict or to clarify the extent of operation of the NYC in their jurisdictions. For example, the *Belize Supreme Court of Judicature (Amendment) Act 2010* specifically vests in the Supreme Court the power to issue an injunction restraining international arbitral proceedings, and to refuse to enforce arbitral judgments obtained in violation of such an injunction. Section 106A (8) provides:

“(8) Without prejudice to the generality of the foregoing

¹⁹ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, (OUP, 2005). Chap. 30, esp. at pp. 879-880

²⁰ This rule of practice was attempted to be raised to the status of a rule of law by the CA in *BCB Holdings*; an attempt struck down by the CCJ (above).

²¹ Antigua and Barbuda, The Bahamas, Barbados, Dominica, Guyana, Haiti, Jamaica, St. Vincent and the Grenadines, and Trinidad and Tobago.

provisions, the Court shall have jurisdiction –

...to issue an injunction against a party or arbitrators (or both) restraining them from commencing or continuing any arbitral proceedings (whether sited in Belize or abroad), or an injunction against a party restraining it from commencing or continuing any proceedings for enforcement of an arbitral award (whether in Belize or abroad), where it is shown (in either case) that such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process...”

Some countries have gone beyond the strict requirement for implementing the relevant international instrument. Haiti²² had acceded to the New York Convention from as early as 1983, but, in October 2007, as part of its global thrust to market Haiti as an attractive candidate for foreign direct investment the Conciliation and Arbitration Court of Haiti (Chambre de *Conciliation et d'Arbitrage d'Haiti*) was established by the Haitian Chamber of Commerce and Industry²³ (CCIH), in partnership with the Haitian government and with funding from the European Union. The CCIH provides services for conciliation and arbitration in cases of private commercial disputes. In October 2009, Haiti ratified the 1965 International Convention on the Settlement of Investment Disputes between states and nationals of other states (ICSID).

Barbados enacted the International Commercial Arbitration Act 2007²³ in order to: “(a) establish in Barbados a comprehensive, modern and internationally recognized framework for international commercial arbitration by adopting the UNCITRAL Model Law on International commercial

²² Source: <http://www.state.gov/e/eb/rls/othr/ics/2013/204654.htm>

²³ -45 which came into operation on January 19, 2009 after being proclaimed Proclamation of January 17, 2009 (SI 2009/2).

Arbitration; and (b) provide the foundation for the establishment in Barbados of an internationally recognized centre for international commercial arbitration.”²⁴ In The Bahamas, the Arbitration Act 2009²⁵ was enacted to restate and improve the law relating to arbitration pursuant to an arbitration agreement, and transforms the UNCITRAL Model Law 1985 and its 2006 Amendments into domestic law.

The newly minted *Arbitration Act 2013* of the British Virgin Islands which entered into force on October 1, 2014 is also modelled on the UNCITRAL Model Law²⁶ and establishes the BVI International Arbitration Centre as a body to administer arbitrations seated in the BVI. This followed finalization of the necessary arrangements for the New York Convention to be fully extended to the British Virgin Islands from 25 May 2014. This development was preceded by the *International Conciliation and Arbitration Act 1993* of Bermuda which wholly adopted the UNCITRAL Model Law. The Cayman Islands have also followed this trajectory by the enactment of the *Arbitration Act 2012* which entered into force on July 2, 2012 and is a compendium of the UNCITRAL Model Law and the Arbitration Act 1996 (UK).

Legislative efforts to create national centres for international commercial arbitration are ongoing and intensifying and will require rationalization, preferably sooner rather than later.

6. THE ENFORCEMENT IRONY

²⁴ Sect. 4.

²⁵ Act No. 4/2009, entered into force on May 20, 2010.

²⁶ The UNCITRAL Model Law 2006 also serves as the basis for legislation in Australia, Azerbaijan, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran, Ireland, Jordan, Kenya, Lithuania, Macao Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Republic of Korea, the Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine, Zambia and Zimbabwe.

Finally, it may be an unfortunate irony of our times that whilst many CARICOM countries are modernizing their arbitration regimes and most have taken the necessary steps to enact domestic legislation giving effect to the New York Convention and thus expressly provided for enforcement of arbitral awards, the same has not been done the same in relation to enforcement of CCJ judgments in the original jurisdiction. Article XXVI of the CCJ Agreement requires contracting parties to take all necessary steps (including enactment of legislation) to ensure among other things that judgments of the Court are enforced by all courts and authorities in its jurisdiction. All CARICOM Member States have accepted this treaty obligation but most legislatures have simply repeated the words of the provisions in their legislation. The research suggests that currently, only five Member States have enacted the necessary legislation or passed the constitutional amendment to give specific and unambiguous effect to their treaty obligations.²⁷

The existence of proper legislative enforcement arrangements for CCJ judgments is inherently important but could also be significant for international commercial arbitration since recognition of an award by the regional court could lead, potentially, to the automatic enforcement in any of the 15 Member States of the Community. It therefore remains a crucial question as to whether the legislation in the majority of CARICOM States may be judicially construed as having the same effect as the legislation in five explicitly compliant Member States. This is a matter that may yet come before the courts and I await the arguments on both sides of the issue with interest.

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²⁷ Barbados, Grenada, Dominica, Jamaica, and St. Vincent and the Grenadines.