International and Regional Commercial Arbitration Hubs: Atlantic Tigers or Caribbean Basin Pussycats?

by

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These are exciting times for international commercial arbitration. Austerity might suggest a drop in the number of arbitration cases. Complaints of the disease of "legislitis"[2] have also emerged as a possible obstacle, with the appearance of so many laws, treaties, guidelines, protocols and codes. Moreover, among the Fortune 1000 companies, a survey[3] suggested that US companies have increasing concerns about the cost and risk of arbitration. This was a "shot across the bow" for arbitration practitioners. Unless those concerns are dealt with proactively and innovatively, the growth trend of international commercial arbitration may not be sustainable. The time and cost efficiency concerns probably could be addressed by improved drafting of the relevant arbitration clauses, notably to impose time limits for the completion of the arbitration, and by effective arbitrators and counsel who make full use of proactive case management to ensure that arbitration's promise of time and cost efficiency is actually fulfilled.

This article focuses on countries, notably those in the Caribbean, considering the possibility of developing either a seat or a centre for international commercial arbitration. Because of the wide range of material on the topic and the obvious

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[2] See, e.g., Gerhard Wegen and Stephen Wilske, Introduction, Arbitration in 55 Jurisdictions Worldwide, 2011 (London: Law Business Research, 2011), p.3, accessed through www.international-arbitration-attorney.com on 18 August 2013.

[3] Surveys were conducted by Cornell University's Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolutionin 1997, 2011, and May 2013, showing growing concerns about the cost and risk of arbitration by large companies. They were less likely to engage in binding arbitration. See, e.g., Thomas Stipanowich, "What Does the Fortune 1,000 Survey on Mediation, Arbitration and Conflict Management Portend for International Arbitration?"kluwerarbitrationblog.com/blog/2013/03/14/what-does-the-fortune-1000-survey-on-mediation-arbitration-and-conflict-management-portend-for-international-arbitration/ accessed on 17 August 2013.

space limitations of this article, it is impractical to develop issues in great detail. Therefore, the article is intended to be a succinct *tour d'horizon* divided into the following parts: (A) the impact of the global financial crisis, (B) the jurisdictions that are the "tigers" of international arbitration, (C) the arbitration clause as a point of departure, (D) the elements of an attractive arbitration seat or centre, (E) The Bahamas, (F) Barbados, (G) the Dominican Republic, (H) Jamaica, (I) Trinidad and Tobago, and, in conclusion, (J) the way forward.

Not a great deal has been published on international commercial arbitration with specific reference to the Caribbean.[4]This article will touch primarily on the above five countries: Bahamas, Barbados, Dominican Republic, Jamaica, Trinidad and Tobago. This limit is not intended to overlook the widespread interest in arbitration in other countries throughout the region.[5]Only a limited number of cases are

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[4]For example, Robert Lubic surveyed seventeen territories in "The Present Status of International Commercial Arbitration in the English Speaking Caribbean" twenty years ago in the Revista Juridica de la Unversidad de Puerto Rico. Then, very few of these jurisdictions were parties to the 1958 New York Convention and even fewer had considered adopting the UNCITRAL Model Law. However, an arbitration project was started under the auspices of the Caribbean Law Institute, and the advisory committee on the subject met for the first time in December 1988, to consider harmonization of arbitral laws across the region. Several additional meetings were held, supported by reports prepared by Wendy Straker, through 1991. Two draft model laws, respectively for domestic and international commercial arbitration, were prepared and approved. But, consideration of the matter came to a halt, notably because of perceptions that arbitration was too slow, that there would be judicial interference in the arbitral process, that the initial focus should be on domestic arbitration, and that there were higher governmental priorities to be dealt with other than arbitration. Therefore, Lubic concluded that "the reason for the apparent failure of the Project was that it was too ambitious." 63 Rev Jur UPR 117(1994) at 125.

[5] For example, the ABC islands (Aruba, Bonaire and Curacao) are said to be interested in attracting more arbitral cases. By 2012, the British Virgin Islands prepared a draft arbitration bill (not yet published at time of writing), giving effect to the New York Convention and the UNCITRAL Model Law, and establishing an international arbitration centre (BVI IAC). Section 93 and Schedule 4 of the bill set up the BVI IAC, as a body corporate with perpetual succession and provided for its administration and proceedings. It was to be headed by a Chief Executive appointed by the Board with the approval of the Minister of Finance, or by the Minister of Finance after consulting with the Financial Services Commission. However, the BVI faced a problem. The bill permitting the enforceability of foreign awards within the BVI under the New York Convention, but the reverse was not true. As the BVI was not a party to the New York Convention, awards made in the BVI were not enforceable in Convention states. Therefore, the Convention had to be extended to the BVI, and this was to be arranged by the Governor and the Foreign and Commonwealth Office. Finally, in BCB Holdings v AG of Belize, Belize appeared to be arbitration unfriendly by claiming that the enforcement of the award was contrary to public policy. Note that recently the Caribbean Court of Justice

discussed, relating to the country in question but not usually seated or taking place within that country. Not many commercial awards made in the region are available in the public domain. The arbitral process is confidential. Awards may only be published with the consent of the parties.[6]That feature is even more pronounced regarding ad hoc arbitrations, where, unlike some institutional examples, there is no specific or generic reporting of the existence, magnitude or frequency of the cases. If the a party takes a point relating to the arbitration to the high court, then naturally that proceeding enters the public domain and may be widely reported.

If there are two lessons emerging from this article, the first is that many of the jurisdictions are quite similar in the comparative advantages they offer; and secondly, that the first three jurisdictions – The Bahamas, Barbados, and the Dominican Republic –appear to have the political will to particularly differentiate themselves from the rest of the competition notably by accepting the New York Convention and introducing modern, widely recognized and accepted laws based on the UNCITRAL Model. Other jurisdictions in the region, that have not yet done so, would do well to emulate them.

A. Global Financial Crisis

The global financial crisis had negative effects on many countries, rich and poor. The international community faces not only the perennial kinds of problems that have deepened in severity, but also austerity and a downward spiral that still has not bottomed out.[7] These circumstances provoke behaviour change. Some jurisdictions have explored new possibilities and options, notably in the area of dispute resolution.

It appears that, in spite of fluctuations in the case numbers of ad hoc and institutional arbitrations, the numbers have continued to increase every year and exceed the pre-2008 financial crisis levels.[8]Indeed, the financial crisis may have provoked more disputes, and may stimulated a greater use of arbitration to settle cross-border commercial disputes. Compared to the higher risk and cost of hardball litigation, alternative dispute resolution (ADR) techniques, notably mediation, are increasingly attractive, and indeed many arbitration agreements are

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(CCJ) ruled against Belize in two cases. But, Belize did not adopt the UNCITRAL Model Law, and, although the NYC was extended to it prior to independence, disputed whether it was a party. BCB Holdings Ltd, The Belize Bank Ltd v the AG of Belize [2013] CCJ 5; and British Caribbean Bank Ltd. v the AG of Belize [2013] CCJ 4 (AJ) which, accessed on 15 August 2013, can both be found at www.caribbeancourtofjustice.org/judgments-proceedings/appellate-jurisdiction-judgments.

[6]See, e.g., art 48(5), ICSID Convention.

[7]See the book on the GFC coedited by the author. Peter Maynard and Neil Gold, eds, Poverty, Justice and the Rule of Law: the Report of the Second Phase of the IBA Presidential Taskforce on the Global Financial Crisis, London: International Bar Association, 2013, available free of charge in a download from the IBA website www.ibanet.org accessed 12 November 2013.

[8] See, e.g., Gerhard Wegen and Stephen Wilske, supra.

multi tier, first invoking negotiation and mediation, and, only when they fail, arbitration. But, the focus here is on arbitration.

B. Atlantic Tigers?

Pacific rim "tigers" are well-known arbitration centres. Singapore and Hong Kong compete for arbitration business mainly relating to China and the Far East. The Singapore International Arbitration Centre (SIAC) is well equipped.[9] China has the Hong Kong International Arbitration Centre (HKIAC)[10] and the China International Economic and Trade Arbitration Commission (CIETAC).[11]With headquarters in Beijing, CIETAC has centres or sub commissions in Chongqing, Shanghai, Shenzhen and Tianjin.[12]

Tigers of the Arctic (Canada[13] and the Scandinavian countries[14]) also offer considerable facilities. Middle East countries, notably Dubai, Bahrain and Qatar, have built significant arbitration centres.The Dubai International Financial Centre (DIFC) partnered in 2008 with a leading arbitral institution, the London Court of International Arbitration (LCIA) to form the DIFC-LCIA Arbitration Centre.[15]Bahrain teamed up with the American Arbitration Association (AAA)to establish the Bahrain Chamber of Dispute Resolution(BCDR-AAA).[16]Qatar has several options available, such as the Qatar International Centre for Conciliation and Arbitration (QICCA).[17]

Western cities, such as Paris, the Hague, London and New York, continue to be very prominent in the arbitration world. Miami has grown as a seat of arbitration to number two after New York among US seats. There is a surfeit of arbitral

[9] www.siac.org.sgaccessed on 15 August 2013.
[10] www.hkiac.rg accessed on 15 August 2013.
[11] cn.cietac.org/rules/rules.pdf accessed on 15 August 2013.
[12] But, the Shanghai and Shenzhen sub commissions have split off after being suspended; because of the infighting, a decision of the Shanghai sub commission could not be enforced. In May 2013, a court in Suzhou, China decided not to enforce an award made by a CIETAC Shanghai Sub-Commission tribunal in December 2012 because the tribunal failed to inform the parties of the change in the Shanghai Sub-Commission's status. See Civil Order (2013) Su Zhong Shang Zhong Shen Zi No. 0004 (the Civil Order) www.lw.com/thoughtLeadership, www.mondaq.com/x/211642/Arbitration+Dispute+Resolution/Arbitration+in+Asia+An+Overview+of+the+CIETAC+HKIAC+SIAC+and+UNCITRAL+Arbitration+Rules accessed on 15 August 2013.
[13] Note the Canadian Commercial Arbitration Centre (CCAC) www.ccac-adr.org and the British Columbia International Commercial Arbitration Centre bcicac.comaccessed on 15 August 2013.
[14] Each Scandinavian country has an arbitral institution, notably the Arbitration Institute of the Stockholm Chamber of Commerce www.sccinstitute.comaccessed on 15 August 2013.
[15] www.difcarbitration.com accessed on 15 August 2013.
[16] www.bcdr-aaa.org accessed on 15 August 2013.
[17] www.qatarchamber.com/arbitration-2/

institutions,[18]mainly as private non governmental organizations[19] but notably within regional intergovernmental organizations and the United Nations system,[20]and also the International Federation for Commercial Arbitration Institutions (IFCAI).

In an increasing number of ad hoc and institutional cases, ultimate users presently exploit the comparative advantages[21] of The Bahamas and the Caribbean, of strategic location; proximity to the North, South and Central America;convenient transport connections;political neutrality;good physical and business infrastructure both for the arbitral proceedings themselves and the work and living arrangementsof associated personnel; moderate administrative costsof the proceedings; skilled human resources such as lawyers, technical experts, accountants, interpreters and court reporters;and relatively efficient, non-corrupt administrative systems.

Several countries in the region are parties to the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.[22]But, the Dominican Republic is the only regional island state party to the Inter-American Convention on International Commercial Arbitration adopted in Panama in 1975 (Panama Convention) and in force since 1976.[23] The other countries interested in becoming international and regional hubs, attractive to the rest of the hemisphere, should consider joining the Panama Convention as well, lodging a reservation similar to that of the United States. That reservation applies the Panama Convention to arbitration agreements in which the majority of the parties are citizens of states members of the Panama Convention and the OAS, unless the parties agree otherwise; and for other arbitration agreements, the NYC would apply.[24]

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[18]See e.g., arbitration-links.de/00000099670ba0802/ with arbitral institutions and centres arranged regionally starting with German institutions, such as the Frankfurt International Arbitration Centre.

[19]The International Chamber of Commerce (ICC)www.iccwbo.org/products-and-services/arbitration-and-adr/, the Chartered Institute of Arbitrators (CIArb) www.arbitrators.org, the London Court of International Arbitration (LCIA) www.lcia.org, the American Arbitration Association www.adr.org, the Permanent Court of Arbitration www.pca-cpa.org/showpage.asp?pag_id=363, the Association for International Arbitration www.arbitration-adr.org, and JAMS The Resolution Expertswww.jamsadr.comare major players (accessed on 18 August 2013).

[20]Notably UNCITRAL www.uncitral.org, the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) icsid.worldbank.org/ICSID/FrontServlet and the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center www.wipo.int/amc/en/index.html accessed on 18 August 2013.

[21]These factors are present in varying degrees depending on the particular jurisdiction.

[22] With reference to the countries dealt with in this article, Bahamas, Barbados, Dominican Republic, Jamaica, and Trinidad and Tobago are all parties to the NYC. Many other countries in the region and hemisphere are parties. As of April 2013, there were 149 parties, with Myanmar becoming the 149th, indicating its own increased openness to foreign investment. See, e.g., www.uncitral.org, newyorkconvention1958.org,wikipedia.org, accessed on 18 August 2013.

[23]www.oas.org/juridico/english/sigs/b-35.html accessed on 12 November 2013. Of 35 OAS members, 19 are parties to the Panama Convention.

[24]Id.

Other countries in the region have enacted new legislation based on the UNCITRAL Model Law,[25] and have made it a matter of economic development policy to become international and regional arbitration hubs and to establish international arbitration centres. Those latter objectivesare regarded as part of their open door to foreign direct investment.[26]CARICOM also encourages the increased use of arbitration and ADR in the context of regional trade and the Caribbean Single Market and Economy.[27]Thus,The Bahamas and certain Caribbean countries have the potential to become "Atlantic Rim Tigers" in this field. Conditions appear to be present for them to play a significant role in providing international and regional commercial arbitration services.

C. The Arbitration Clause

A great deal turns on the arbitration agreement or clause that binds the disputing parties. It is fundamental to the discussion. Therefore, it is useful to deal with itas a point of departure. Simply put, an arbitration clause is a written agreement in which the parties undertake to finally resolve their existing or future disputes by arbitration.[28] The primary point is that the parties agree to settle their disputes out of court and by arbitration.

In the wee early morning hours of the day of a closing, someone may choose to copy and paste into the contract an arbitration clause from another contract. In other words, often not enough attention is paid to the arbitration clause. This is a recipe for disaster. Instead, the clause should be carefully considered and designed to fit the transaction, and the parties' needs. An "off the shelf" clause from another contract or a model clause from the website of an arbitral institution or centre will rarely do as a starting point, because it has to be adapted to make it right for the particular transaction and parties.

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[25] So far, The Bahamas, Barbados, and the Dominican Republic have incorporated the UNCITRAL Model Law into their legislation, but not Belize, Jamaica, or Trinidad and Tobago.
[26]Indeed, for example, The Bahamas pronounced its intention to become a "gateway" to investment in the region and the hemisphere.
[27] Under the Revised Treaty of Chaguaramas, the parties to a dispute may use any of the voluntary modes of dispute settlement provided for in article V of Protocol IX [article 188 of the Revised Treaty] in the settlement of a dispute. Regarding arbitration, the parties concerned agree to take their dispute to an arbitral tribunal. To facilitate this process, the Secretary-General is required to maintain a List of Arbitrators from which an arbitral tribunal of three can be constituted (articles XXI and XXII of Protocol IX [articles 204 and 205 of the Revised Treaty]). This tribunal shall establish its own rules of procedure. The term of each arbitrator listed is five years. E.g., idatd.eclac.cl/controversias/soluciones/iTemplate-CARICOM-explicacion.pdf accessed on 18 August 2013.
[28] Practically every set of institutional rules have a broad and detailed definition of arbitration agreement or clause, related to or derived from Article II (1) NYC, which states, "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

The eight major elements of an arbitration clause are as follows. The parties and their counsel choose:

1) Institutional or ad hoc arbitration. An ad hoc arbitration is run by the parties themselves and the arbitrators that are selected; an institutional arbitration is run from the outset by the institution after the request for arbitration and a deposit of fees are made.
2) A set of arbitration rules (ICC, UNCITRAL, AAA, etc.) and use their recommended model clause as a starting point.
3) A broad definition of the scope of the disputes. Only exceptionally is a narrow definition used.
4) The place or seat of arbitration, based on practical considerations and its arbitration law, which governs certain procedural aspects, such as arbitrators' powers and judicial oversight. This choice of forum is so important that it is useful to follow three rules of thumb; choose:(a) a NYC party, (b) whose law supports arbitration, and (c) whose courts have a supportive track record.
5) The number of arbitrators, either one or three.
6) The method of selection and replacement of arbitrators, and regarding ad hoc arbitrations, the appointing authority.
7) The language of the arbitration.
8) The substantive or governing law of the contract (in addition to the procedural law in 4 above). Issues may arise under this choice of law during contract performance, independent of any arbitral dispute.

There are seven additional elements, which used to be considered optional, but are more common and vital, especially having regard to the time and cost efficiency concerns:

9) Provisional and conservatory measures to be used by the tribunal and courts.
10) Document production or discovery.
11) Confidentiality.
12) Costs and fees.
13) Arbitrators' qualifications.
14) Time limits.
15) Finality of arbitration.

D. Seat or Centre?

A seat has a special meaning in international commercial arbitration. The seat is the jurisdiction to which the arbitration is tied procedurally. It prescribes the relevant procedural law. The parties are free to select the seat (procedural law), which may be different from the proper law of the contract or even the proper law of the arbitration agreement. The common law does not allow the possibility of delocalized proceedings not connected with any national system of law.

The seat has a lot to do with the binding force of an arbitral award. It is increasingly recognized that, to qualify as an attractiveseat of international commercial arbitration, a jurisdiction must at least (1) become a party to multilateral instruments providing for the enforceability of awards, especially the

1958 New York Convention for the Recognition and Enforcement of Arbitral Awards (NYC); (2) adopt internationally recognized "best practice" standards, especially the Model Law prepared by the United Nations Conference on International Trade Law (UNCITRAL Model Law); and (3) have courts with a proactive track record of being fair and open-minded about international commercial arbitration.[29] Among the five countries, all have satisfied the first criterion and have the strong potential to satisfy the third, but only three have so far complied with the second. There are, of course, other countries in the region who have met one or more of the criteria.[30]

Once the seat is chosen, the tribunal's hearings and deliberations may be held in any place. For example, in their arbitration agreement, parties from Saudi Arabia and the United States may agree that ICC Rules apply and that the seat is The Bahamas (or Barbados or the Dominican Republic). The place for arbitration is not necessarily the seat. While the place for arbitration is usually the seat, it is possible that the tribunal, with the seat in The Bahamas, may be called upon to have hearings in Port of Spain, New York or Buenos Aires, or Tokyo. The award is considered to be made at the seat.[31] If a party wants to set aside the award, it applies to the competent court of the seat in accordance with local law.

Meanwhile, a centre requires a substantial financial investment in the appropriate facilities either by the government, the private sector or a public private partnership. It is evident that a jurisdiction should be an attractive seat before contemplating setting up a centre. An attractive seat need not establish a centre, but a centre ought to be an attractive seat.

In deciding which to choose – seat or centre –a careful business plan is required. The demand for the services and the supply of the financial and other resources required to be committed to the ongoing operations and infrastructure must be carefully assessed. The economic impact of a centre is usually more significant, and a wider employment effect is necessarily a part of that undertaking. One must reach a critical mass to make the centre effective and successful. It may be overkill to try to convert a thriving seat into a centre if the level of business and resources will not sustain it. The proposed centre may bring in a marquee organization, such as the LCIA or ICC, such as Dubai and Saudi Arabia respectively. In Barbados, such a partnership with the LCIA was not established. But, that does not preclude other aspirants, such as the Bahamas, from forging such a partnership.

E. Bahamas

[29]See, e.g., the IBA Guidelines for Drafting Arbitration Clauses, para. 22, p. 13, discussing the selection of the place or seat of arbitration. Of course, there are practical considerations as well, such as neutrality, hearing facilities, proximity to witnesses and evidence, language, culture, and availability of arbitrators. Id., para. 20, p. 12.

[30] E.g., British Virgin Islands (BVI) is on a path to meet the criteria but as a UK dependent territory.

[31]See, e.g., Article 16, LCIA Rules.

For The Bahamas,[32] the impetus to sign the NYC came originally from the maritime sector. As arbitration is a preferred method to resolve maritime disputes and as The Bahamas has the third largest ship registry (after Liberia and Panama), signing onto the NYC was imperative in order to allow awards to be automatically enforceable in member countries. On 20 December 2006, The Bahamas became a party to the NYC, and incorporated it into domestic law through the Arbitration (Foreign Arbitral Awards) Act, 2009.[33]

However, others within the financial sector saw this as a timely opportunity to completely overhaul the arbitration law in The Bahamas and to make it a more attractive arbitration seat and possibly a centre.[34] Hence, the full blown legislation was prepared and passed incorporating internationally recognized standards. The Arbitration Act 2009 is based on the UNCITRAL Model Law and also purports to draw on the lessons of other modern legislation also based on the UNCITRAL Model Law.[35] Consisting of 106 sections, its scope is comprehensive.[36]While Nassau would be the hub for general cross border commercial disputes, Freeport, Grand Bahama would be the seat specifically for the resolution of maritime disputes.[37]

A refinement or consequential amendment since the passage of the Arbitration Act explicitly applies that Act to trust disputes. The Trustee Amendment Act 2011 (TAA), under section 91 A, enables any dispute or administration question related to a trust to be determined by arbitration in accordance with the provisions of the trust instrument.[38]Any provision in a trust instrument referring a matter to arbitration shall operate as a arbitration agreement between the parties. Further,

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[32]As in the other countries that are the focus of this article, arbitration has along history. By the late 1800s, arbitration came to be governed by colonial statute. The old Bahamas Arbitration Act was passed at the end of the 19th century; Arbitration Clause (Protocol) Act 1931 gave effect to the Protocol signed at the League of Nations in 1923 (staying of proceedings to be referred to arbitration);the Arbitration (Foreign Awards) Act 1931 gave effect to the Geneva Convention (for the enforcement for arbitral awards).

[33]Found in the Supplement Part 1 of the Official Gazette No. 52(A) dated 31 December 2009, www.bfsb-bahamas.com/legislation/ArbitrationForeignArbitralAwards2009.pdf.

[34]For example, the Arbitration Committee of the Bahamas Financial Services Board (BFSB) encouraged a complete revamping of the arbitration legislation. Early in 2013, the Bahamas government formed the Arbitration Council that is to provide an action plan for establishing The Bahamas as a major arbitration hub. The author is a member of both the BFSB committee and the Arbitration Council.

[35]Notably English Arbtiration Act, 1996, www.legislation.gov.uk/ukpga/1996/23/contents accessed on 31 August 2013.

[36] Located at www.bfsb-bahamas.com/legislation/ArbitrationAct2009.pdf accessed on 25 August 2013.

[37]As maritime arbitration is regarded as a separate species of commercial arbitration requiring expert knowledge of maritime law and the shipping industry, the institutions to be targeted should included organizations such as the London Maritime Arbitrators Association (LMAA) www.lmaa.org.uk; Society of Maritime Arbitrators, Inc. (SMA) www.smany.org; and China Maritime Arbitration Commission (CMAC) www.cmac-sh.org accessed on 25 August 2013.

[38]Extraordinary Official Gazette (B) of 20 December 2011 found at www.bfsb-bahamas.com/legislation/Trustee_Amend_2011.pdfon 25 August 2013. Note the Second Schedule set out in section 20(b).

the TAA, in section 91 B, gives the tribunal of a trust arbitration all of the powers of the Court in relation toadministration, variation, execution, or the exercise of any other power under a trust.

The Arbitration Council formed in 2013 is looking at how The Bahamas can be more competitive in this field. The Council, consisting of members from government and private sector including the Bahamas Maritime Authority, Grand Bahama Port Authority and Bahamas Financial Services Board is mandated to consider how to generate more activity in this area, to position The Bahamas as a leading arbitration hub and gateway to investment in the region and hemisphere, to establish commercial and maritime arbitration centres, and to prepare the appropriate strategic or business plan.

Abaco Towns by the Sea Limited v. O'Neil and Wagno Construction Company Limited,[39] was a case decided under the Arbitration Act, 1899 before the new Arbitration Act, 2009 came into force. O'Neil and Wagno sought to enforce an arbitration award dated 15th September, 2009 made by a sole arbitrator. Abaco Towns soughtto set aside the award under s. 12(2) of the old Act, which allowed an award to be set aside where an arbitrator or umpire misconducted himself, or an arbitrator or award has been improperly procured.

The Court did not accept that a letter from the arbitrator demanding payment of costs manifested a bias against Abaco Towns. If Abaco Towns considered the amount of the costs too high it could have required those costs to be taxed. The Court found it was an unwarranted leap to assert that forwarding the invoice manifested a bias against Abaco Towns. In the circumstances, the Court rejected the claim made under section 12 of the Act that the award be set aside for misconduct. Leave was granted to enforce the award.

In a 2011 case in Florida, Lindo v. NCL (Bahamas), Ltd., Lindo, a Nicaraguan citizen, having injured his back carrying heavy trash bags on a private Bahamian island of Norwegian Cruise Lines (NCL) and having had surgery for the injury,sued his employer NCL for breach of its duty to provide a safe place to work. The US Court of Appeals for the Eleventh District upheld the first instance court, in dismissing the action, and granting NCL's motion to enforce the arbitration clause. The Court agreed to compel the matter to go to arbitration, in accordance with Lindo's employment contract. Nicaragua was the place or seat of arbitration and its procedural law applied. As set out in the contract, the governing law was Bahamian law, the law of the flag state of the vessel.[40]

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[39]Action No. CLE/GEN/ 1621 of 2009, Supreme Court (The Bahamas), Barnett C.J. BS 2011 SC 94 (Carilaw).

[40]US Court of Appeals for the 11th District, case no. 10-10367, 29 August 2011, attached in full at www.newyorkconvention1958.org/index.php?lvl=notice_display&id=688. This is a majority decision per Hull and Kravitch JJ. Note also the dissent of Barkett J. that public policy was a defence to arbitration that can be raised at the agreement enforcement stage, and not only at the award enforcement stage.

In 2012, the new Bahamas Arbitration Act was examined in a case in Massachusetts. In Lewis v Capo Group and RAV Bahamas,[41]Lewis alleged he was defraudedby developers, the Capo Group and RAV Bahamas (a subsidiary of the Capo Group) of $106,000 he paid for a condo. Lewis claimed the developers misrepresented the facilities at the Bimini Bay resort complex, having promised in the contract to provide a casino and golf course at the resort by a certain date and having failed to provide them. He asserted that misrepresentation, fraud, unjust enrichment and racketeering were not covered by the arbitration clause.

In his memorandum and order, Judge Rya Zobel pointed out that the Arbitration Act of The Bahamas gave arbitrators jurisdiction to determine"what matters have been submitted to arbitration in accordance with the arbitrationagreement."[42]RAV argued that theparties agreed to have the scope of the arbitration clause determined by an arbitrator,because the parties referred to the Arbitration Act in the arbitration clause. The Court did not address that specific argument. However, it found in favour of a presumption of arbitration under US federal law, upheld the arbitration clause and stayed the proceedings in Massachusetts. It also found that, while it was not clear that all of Lewis' claims were covered by the arbitration clause, any ambiguity was to be resolved by the Bahamas tribunal itself.

Finally, and as a segue to the other countries in this article, it is noteworthy that The Bahamas and Caribbean presently receive significant ad hoc international commercial cases. For example, in recent years, several arbitrations in The Bahamas have involved parties from Sharia law countries and the US who chose The Bahamas as a neutral and convenient venue.[43]The strategic location of the islands just off the mainland, paid off. It is apparent that the arbitration infrastructure of legislation, facilities and skilled personnel is already attracting major cases to the region.

F. Barbados

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[41] Memorandum and Order, US District Court, District of Massachusetts, Civil Action No. 12-10965-RWZ, 17 December 2012. Available at pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=zobel/pdf/lewis%20v%20capo%20dec%202012.pdf accessed on 31 August 2013.

[42]Ibid., at footnote 2, p. 6. He was referring to section 41.1 (c) of the Act and the principle of Kompetenz-Kompetenz under which the tribunal determines its own jurisdiction.

[43] These are remarkable occurrences. However, the information is anecdotal and generic, gathered by the author from counsel involved or knowledgeable about the cases, as the cases were confidential. Nassau has been the place of arbitration for about six cases involving private parties in US-Sharia investment fund disputes. The parties had invested in US real estate and US-based life settlements, and agreed in the arbitration clauses that arbitration would take place in Nassau. US parties did not wish to litigate in an Islamic country; and Islamic parties wished to avoid US jurisdiction, because of the post 9/11 and Patriot Act environment. As for the arbitration rules, four were AAA-ICDR, and two were UNCITRAL. The approximate size of the assets ranged from US$50 million to US$250 million. Costs were borne by the losing party with a discretion of arbitrator to shift allocation.

Arbitration in Barbados revolves around the following main Acts:Arbitration Act 1958, cap. 110(AA); the Arbitration (Foreign Arbitral Awards Act) 1980, cap. 110A (AFAAA); and International Commercial Arbitration Act 2007 (ICA).[44]The AA applies to domestic arbitration and international arbitration that is not of commercial nature. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is given effect in Barbados under the AFAAA.The ICA applies to international commercial arbitration and is based on the UNCITRAL Model Law.

Setting up a centre is explicitly advocated in the legislation of Barbados. According to section 4 of the ICA, its objectives are to establish in Barbados a comprehensive, modern and internationally recognized framework for international commercial arbitration by adopting the UNCITRAL Model Law; and to provide the foundation for the establishment in Barbados of an internationally recognized centre for international commercial arbitration.

A potential arbitration powerhouse in the region, Barbados intended to compete with Miami and New York.[45] It engaged in discussions with the LCIA to establish an LCIA office.

In 2007 the Barbados government announced the signing of a letter of intent with the LCIA so that the LCIA could establish in Barbados its first regional branch office globally[46] and contribute to make Barbados a more desirable venue. The letter of intent was supposed to be followed by a memorandum of understanding before the end of 2007. A relationship with one of the most reputable arbitral bodies was going to give a significant platform to build out this industry. Domestic arbitration personnel could transition into international arbitration. Arbitration was going to be the new niche in Barbados where it could, from this location, service arbitrations for Latin America and the Caribbean. Arbitration would benefit the international financial services sector, tourism, law, accounting and the business development. Invest Barbados would work closely with the Barbados Tourism Authority to promote Barbados as a perfect centre. Cases would be managed through the regional LCIA office and actual hearings would also take place there.[47]

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[44] International Commercial Arbitration Act, 2007. It was published as 2007-45 in the Supplement to the Official Gazette No.105 dated December 20, 2007. But, see, e.g., www.investbarbados.org/docsaccessed on 18 August 2013, which also contains a useful essay by Jonathan Haydyn-Williams, "International Commercial Arbitration in Barbados."

[45]"Barbados wants to compete with Miami and New York," adrresources.com/adr-news/495/barbados-miami-new-york-arbitration-hub#sthash.1glD7iqq.dpuf accessed 31 August 2013.

[46] This aborted initiative predated the joint venture in Dubai. On 17 February 2008, the Dubai International Financial Centre (DIFC) and the London Court of International Arbitration (LCIA) launched a new regional international arbitration centre - the DIFC-LCIA Arbitration Centre. www.difcarbitration.com

[47]barpublish.bits.baseview.com/291089686455304.php accessed on 31 August 2013.

But, for various reasons,[48] the discussions fell through. The attention shifted more to an indigenous effort, or a regional joint venture between, for example, The Bahamas and Barbados.

However, the cases continued to occur. For example, in September 2009, in Allard v. Barbados,[49]Allard, a Canadian,lodged a notice of dispute against the government of Barbados. He argued that the Barbados government's failure to enforce environmental laws, on which his nature sanctuary relied, led or would lead to the pollution of the site and the violation of the government's commitments to him. He contended that Barbados failed to provide his investment full security and fair treatment in accordance with the Canada-Barbados BIT.The dispute was to be decided by arbitration under ICSID, the ICSID Additional Facility rules or the UNCITRAL rules.[50]Regarding the government's failure to protect the Graeme Hill Sanctuary, Allard argued that Barbados, among other things, failed to: (i) prevent the repeated discharge of raw sewage into the Sanctuary wetlands, (ii) investigate or prosecute sources of runoff of grease, oil, pesticides, and herbicides from neighboring areas, and (iii) investigate or prosecute poachers that have threatened the wildlife within the Sanctuary.

Additionally, Allard referred to actions taken by the Parliament of Barbados in 2008, which resulted in the adoption of a new National Physical Development Plan. It revoked the previous protective land use policies and instead called for the commercial and residential development of most of the large green space surrounding the Sanctuary. In Allard's view those changes, which will inevitably cause further environmental damage to the Sanctuary, led to the indirect expropriation of his investment.

G. Dominican Republic

The Dominican Republic meets the criteria suggested above, and is quite active in the arbitration world. Law 489-08 on Commercial Arbitration of 19 December 2008[51] applies to arbitral agreements, proceedings and enforcement of commercial arbitration awards in the Dominican Republic. Law 50-87 on Chambers of

[48]The letter of intent was signed during the government of Owen Arthur and Mia Mottley as prime minister and deputy prime minister respectively, both of whom avidly supported the idea. With the change of government, arriving at agreed financial terms was apparently a challenge and not as high a priority, especially in the era of austerity following the 2008 global financial crisis.

[49]See Notice of Dispute, graemehall.com/legal/papers/BIT-Complaint.pdf, of 8 September 2009. Also, www.legalfrontiers.ca/2012/01/criticizing-the-field-of-international-investment-law-a-simple-story-made-complex/, and www.iisd.org/itn/2010/02/10/claimant-seeks-enforcement-of-environmental-laws-in-notice-of-dispute-alleging-expropriation-of-barbadian-nature-sanctuary/. All accessed on 31 August 2013.

[50]Article XIII(4) of the BIT, www.investbarbados.org/docs/BIT%20-%20Canada.PDF accessed on 31 August 2013.

[51]Gazetted in No. 10502 on 30 December 2008. Available in Spanish athttp://camarasantiago.org/images/Leyes/Ley_489-08-Sobre%20Arbitraje%20Comercial.pdf accessed on 11 November 2013.

Commerce and Production, as amended by Law 181-09 of 6 July 2009, makes provision for international arbitration cases to be administered by the Alternative Dispute Resolution Centres.

Law 489-08 is based on the UNCITRAL Model Law with slight variations, including: a narrower definition of international arbitration because it does not have an "opt-in" provision by which parties agree the subject of arbitration can relate to more than one country; and the freedom of the parties to determine the number of arbitrators, as long as they are an odd number, and, if no such determination is made, a sole arbitrator shall be appointed instead of three (article 14). Where parties have not agreed otherwise, the notification by the claimant of the name of the proposed arbitrator and a claim for arbitration, and within the specified time limit, the respondent shall notify the claimant of its defence and proposed arbitrator (article 27). The Law differs from the UNCITRAL Model Law where firstly the claimant serves a request for arbitration, and then the statements of claim and defence are submitted within agreed time limits or set by the tribunal. Also, recognition and enforcement of an award can be refused if the court, on its own initiative, holds there was a disregard of due process amounting to violation of rights of a party, in addition to the grounds set forth in article 36(b) on the Model Law (article 46).

The Dominican Republic-Central America Free Trade Agreement (DR-CAFTA),[52]calls for dispute resolution under arbitration. The Dominican Republic entered into about fifteen bilateral investment treaties (BITs) with other countries (such as France, Spain, Argentina, Chile and Panama), most of which submit disputes to arbitration.

In TCW Group, Inc. and Dominican Energy Holdings, L.P. v. Dominican Republic, TCW had been seeking some US$ 680 million for alleged violations of CAFTA-DR: violations of Article 10.3 (national treatment), Article 10.4 (most-favored nation treatment), Article 10.5 (minimum standard of treatment) and Article 10.7 (expropriation).On 30 June 2009, the parties announced that they had reached an agreement and requested that the arbitration proceedings be discontinued. The tribunal agreed and ordered that costs of the arbitration, fixed at some 212 thousand euros, be borne equally between the parties.[53]

H. Jamaica

Portions of the 1889 and 1950 English Arbitration Acts are still present within the laws of some Commonwealth Caribbean countries, such as Jamaica, although considered by most countries to be archaic.International commercial arbitration in Jamaica is governed primarily by the Arbitration Act, 1900 (Jamaican Act of 1900)[54]and the Arbitration (Recognition and Enforcement of Foreign Awards) Act,

[52]http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text accessed on 11 November 2013.
[53]italaw.com/documents/TD-DRConsentAward_002.PDF and www.iisd.org/itn/2010/02/10/twc-group-settles-with-the-dominican-republic-2/accessed on 3 September 2013.
[54]www.moj.gov.jm/laws/arbitration-act accessed on 3 September 2013.

2001[55]which makes provision for the application of the New York Convention. International commercial arbitral proceedings usually involve the rules of a major institution such as the ICC, ICSID, LCIA or UNCITRAL.

Though outdated, the Jamaican Act of 1900 was designed to facilitate arbitration. For example, the Court may stay legal proceedings where a valid arbitration agreement is in place (s.5), and may remove an arbitrator engaged in misconduct (s. 12(1) and (2)). But, much attention is centred around modernising the Act of 1900 so as to bring it in line with the UNCITRAL Model Law.

In Alcoa Minerals of Jamaica, Inc. v. Jamaica (ICSID Case No. ARB/74/2), Alcoa invested a substantial amount of capital in Jamaica in reliance on an agreement with the Jamaican government. The tribunal held that contribution of capital was a type of investment. The case showed the use of a subjective consent criterion in addition to objective elements to qualify the meaning of "investment" under Article 25(1) of the ICSID Convention.[56]

The case of Kaiser Bauxite Company v. Jamaica (ICSID Case No. ARB/74/3)showed that ICSID tribunals have held that the fact that a party later pulls out of ICSID does not change the terms of the investment treaty.[57]In Reynolds Jamaica Mines Limited and Reynolds Metals Company v. Jamaica (ICSID Case No. ARB/74/4), the Government of Jamaica declined to participate in the proceedings, but reached a settlement with the claimant.[58]

In Alcan Jamaica Company v. Nakash Goshine Engineering Co. Ltd.,[59]Alcan had engaged the contractor Nakash to construct piled foundations for a structure. The dispute involved whether Nakash were entitled to be paid additional sums (and if so, the amounts) for the work. In 1993, Alcan sought to set aside the award made for additional sums. Clarke J. held that the Court had inherent jurisdiction to set aside the award if an error of law appeared on its face. There being no error of law on the face of the award, no excess of jurisdiction and no misconduct by the arbitrator within the meaning of section 12(2) of the Jamaican Arbitration Act of 1900, the motion was dismissed with costs to the contractor.

In a more recent decision of 2006, 1-Stop Building Supplies Ltd v. Meridian Construction Company Limited,[60]Orme and 1-Stop were limited liability companies incorporated in Jamaica. The addresses, directors, shareholders and share capital of

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[55]www.moj.gov.jm/sites/default/files/laws/The%20Arbitration%20%28Recognition%20and%20Enforcement%2C%20etc.%29%20Act.pdfaccessed on 3 September 2013.

[56] Todd Weiler, ed, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, London: Cameron May, 2005, footnote 38, page 55.

[57]Decision on Jurisdiction of 6 July 1975, 114 I.L.R. 144 (1999).

[58]Rosemary Rayfuse and Elihu Lauterpacht, editors, ICSID Reports: Reports of Cases Decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, vol 10, Cambridge: Cambridge University Press, 1993.

[59]Suit No. M 168 of 1993, Supreme Court (Jamaica) JM 1994 SC 38 (Carilaw)

[60]Suit No. HCV 3034 of 2004, Supreme Court (Jamaica), JM 2006 SC 72 (Carilaw)

both companies were identical. Meridian was a construction company. In the first claim, Orme claimed moneys paid in September 2004 to Meridian for light fixtures and bathroom partitions which were to be installed at a supermarket but were not installed. In the second claim, 1-Stop sued Meridian for the cost of goods alleged to have been delivered to Meridian between June and July 2004. Meridian applied for a stay of proceedings pursuant to section 5 of the Arbitration Act or in the alternative, a stay of proceedings pursuant to the inherent power of the Court. Clause 35 of the contract with Orme had an arbitration clause diverting any dispute from the Courts to arbitration.

Sykes J. found that the arbitration clause between Orme and Meridian could not bind 1-Stop. Arbitration proceedings were usually arrived at by agreement between the parties and not by force of law. 1-Stop had not agreed with anyone to arbitrate its dispute with Meridian and so could not be compelled to subject itself to another forum. There was no basis to stay this action by 1-Stop against Meridian. It was a separate and distinct claim from that made by Orme. There was also no evidence that 1-Stop was assigned the contractual rights and obligations of Orme.

Therefore, not unexpectedly, Jamaica has been actively involved in arbitral decisions in the mineral sector, especially bauxite. Notwithstanding an outdated act, there have been cases in other commercial sectors as well. Although arbitral awards can now be enforced under the NYC, an overhaul of Jamaica's arbitration legislation is long overdue.

I. Trinidad and Tobago

Really the same observation applies to Trinidad and Tobago. It too has been engaged in international commercial arbitration cases notably in the mineral sector, i.e., petroleum. But, arbitration in Trinidad and Tobago is governed by the Arbitration Act Chap 5:01 (T&T Act)[61]based on early English legislation and having provisions similar to those under the Jamaican Act of 1900.The New York Convention was given effect in Trinidad & Tobago by the Arbitration (Foreign Arbitral Awards) Act Chap 5:30.

The Dispute Resolution Centre (DRC) of Trinidad and Tobago was initially formed by the Trinidad and Tobago Chamber of Industry and Commerce, and officially launched in 1996[62] The goal of the DRC was to be the premier institution for the promotion and operation of an ADR training and referral system within Trinidad and Tobago and at the sub-regional level. So far, the DRC appears to have had little impact on updating the T&T Act.

[61]rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/5.01.pdf accessed on 3 September 2013.
[62]chamber.org.tt/services/mediation/ Launched on August 24, 1996 by the then Chief Justice, Michael de la Bastideaccessed on 3 September 2013.

A case under this antiquated legislation,Tesoro Petroleum Corporation v. Trinidad and Tobago (ICSID Case No. CONC/83/1),[63]represented an exceptional case of choosing conciliation over arbitration, known as the first ICSID conciliation. The parties had availed themselves of the option in the third paragraph of Article 42 of the ICSID Convention to authorize orempower the tribunal to use ex aequo et bono decision-making.

In F-W Oil Interests, Inc. (USA) v. Republic of Trinidad and Tobago (ICSID Case No. ARB/01/14), F-W Oil, a US company, commenced ICSID arbitration against the government of Trinidad and Tobago for contract revocation. F-W Oil alleged that corruption of a government minister led to revocation of contract and its award to a competitor. The government corruption allegation was withdrawn prior to the hearing. On 3 March, 2006, the award was made in favour of the government.[64]

In Airport Authority of Trinidad and Tobago v. Calmaquip Engineering Corporation,[65] the Airport Authority of Trinidad and Tobago (the Authority) applied for orders pursuant to sections 12(2) and 32 of the T&T Act with respect to the arbitration between itself and the respondent, Calmaquip Engineering Corporation (Calmaquip). The Authority sought the Court's leave to revoke the arbitration agreement or alternatively an order that the arbitrator state a special case for the decision of the Court as to the effect of the purported cancellation of the contract between them. Clauses 23 and 24 provided for (i) any claim arising out of or related to the maintenance contract to be subject to arbitration; (ii) save as may have been provided for by the clause, the arbitration was to be conducted in accordance with the Arbitration Act, Chap. 5:01; and (iii) the award was to be final and binding upon the parties. Nothing in the clause affected the applicability of either section 12(2) or section 32 of the Arbitration Act.

Jones J. held that there was nothing to suggest that the Arbitrator went wrong or had mistaken the law. Accordingly there was no need to make any of the orders sought by the Authority. The claim by the Authority was dismissed.

J. Conclusion - The Way Forward

Using the Caribbean as a seat for institutional and ad hoc arbitrations is an increasing trend. More and more government agencies in the region are taking proactive approaches to tap into this marketto resolve disputes and generate more economic activity.

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[63]https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded, no. 16, accessed on 3 September 2013; Lester Nurick & Stephen J. Schnably, "TheFirst ICSID Conciliation**:** Tesoro Petroleum Corporation v. Trinidad and Tobago", 1 ICSID Review – FILJ 340 (1986).

[64] See, e.g., accessed on 3 September 2013 www.steptoe.com/assets/htmldocuments/Corruption%20in%20Arbitration%20Presentation.pdf

[65]Suit No. 600 of 2007, High Court, (Trinidad & Tobago), TT 2010 HC 262 (Carilaw)

Ultimate users presently use the comparative advantages of the Caribbean in a variety of international commercial cases. The Caribbean must determine if they will become "Atlantic Rim Tigers" in this field. Conditions such as up to date legislation and the commitment of resources are present so that some countries of the region can play a greater role in providing arbitration services. The Bahamas for example is taking aggressive steps to generate more market activity.

This article set out certain factors that should be addressed by countries, notably those in the Caribbean, that are considering the possibility of developing either a seat or a centre for international commercial arbitration. Therefore, the article examined: the impact of the global financial crisis, the jurisdictions that are the "tigers" of international arbitration, the arbitration clause as a point of departure, and elements of an attractive arbitration seat or centre.

This article touched primarily on five countries: The Bahamas, Barbados, Dominican Republic, Jamaica, Trinidad and Tobago. If there are two lessons emerging from this article, the first is that many of the jurisdictions are quite similar in the comparative advantages they offer; and secondly, that the first three jurisdictions – The Bahamas, Barbados, and the Dominican Republic – appear to have the political will to differentiate themselves from the rest of the competition notably by accepting the New York Convention and introducing modern, widely recognized and trusted laws based on the UNCITRAL Model. Other interested jurisdictions in the region, that have not yet done so, would do well to follow a similar path.

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