

FEASIBILITY OF A CARIBBEAN ARBITRATION
CENTRE

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An increasing feature of modern commercial life is the extent to which business activities have become more and more complicated, more and more complex, more and more diverse, more and more sophisticated. A major contributory factor is the growth in the international dimensions of commercial transactions.

The very essence of international trade involves the relationships of purchasers and suppliers in different jurisdictions in respect of goods and services of an infinite variety.

Within the Caribbean Community the liberalisation of trade brought about by the initiatives taken within the Common Market are directed at the elimination of barriers to trade as we move towards a single unitary market.

All these developments have witnessed a significant development of intra-Caribbean trade in goods and services now estimated to be valued in excess of US\$ Million. In addition, there is an increasing presence of multinational corporations, including those of Caribbean origin.

No longer are commercial transactions sealed with the spoken word and a firm handshake. Complex documentation incorporating the terms of business dealings

will inevitably arise in the course of commercial dealings. These differences may relate to the interpretation of the rights of the parties; they may relate to circumstances which have arisen which were not contemplated by the parties. These differences may be of an infinite variety. But whatever they are it is desirable that adequate machinery should exist for the speedy resolution of such disputes in the most economical manner.

It is here that arbitration and the existence of a Caribbean Arbitration Centre dealing with Commercial Arbitrations could play a pivotal role as an instrument for facilitating the speedy resolution of disputes and for creating the institutional confidence building framework for the encouragement and promotion of intra-Caribbean trade and investments.

One might legitimately ask the question - Why is it necessary to seek an alternative forum to the established judicial system in the Caribbean for the settlement of disputes. There is no doubt that the judicial system in the Caribbean has been fortunately endowed with judges of experience and integrity. The independence of the Judiciary in the Commonwealth Caribbean is well established and has not been compromised by the political winds of change which ushered in independence. Our Courts have established themselves as pillars of impartiality and have frequently given

Firstly, the diversity and complexity of modern international commercial transaction, including intra-Caricom commercial transactions are such that it requires a diversity of skills and experience to be able to come to grips rapidly with the issues and resolve them. The experience and expertise in the judicial system may not be wholly adequate to deal expeditiously with these matters. The experience required may call for recognized competence in fields such as law, commerce, industry, finance and engineering. Although competence in the field of law would no doubt be of great importance in most arbitrations a wider breadth of experience would enable the issues to be seen not merely in a technical or legalistic context but in the context of the realities of business life.

Secondly, the inordinate length of time which it takes before a commercial litigation can be brought to trial defeats the main requirements of commercial transactions, that there should be a speedy resolution of issues. The delay in the Judicial System within the Caribbean is quite notorious. A Caribbean Arbitration Centre would provide an alternative forum for certain types of commercial transactions, would

The old reminder that the "forms of action we have buried, but they rule as from the grave" is still relevant today. The great advantage of the arbitration system is that the procedure can be greatly simplified, be informal in character and tailored to the needs of the litigants and the issues in dispute.

Fourthly, In all international commercial transactions, including intra-Caricom trade and investments, as well as investments by outsiders and multi-national corporations there is the need to provide a "neutral forum" in order to avoid the perceptions of "home made" decisions by our Courts. This is part of the confidence building factor in promoting outside investments, and experience has shown that where the nationality of the parties is different neither party is generally willing to submit disputes to the jurisdiction of the national courts of the other party. For example, in the Investment Agreements between Jamaica and the Bauxite Companies, including the Joint Venture Agreements, provisions exist for the settlement of disputes by ad hoc arbitration of three (3) persons, one (1) appointed by each party and the third by agreement of the parties. The Agreements prohibit a national of either party to be the Chairman, and stipulate that where there

Caribbean. These include -

- (a) Ad hoc arbitration governed by the local Arbitration Laws.
- (b) Arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (I.C.C.); some of our bauxite and alumina supply contracts incorporate this provision.
- (c) Arbitration in accordance with the UNCITRAL Arbitration Rules with the American Arbitration Association as the Appointing Authority. An example of this is the Joint Venture Agreement for large scale banana expansion between Jamaican interests and United Brands Company. In this case only disputes of a major nature, as defined, are referable to the American Arbitration Association whereas other disputes are to be submitted to Arbitration in Jamaica under the Arbitration Act of Jamaica "by a single arbitrator to be appointed by mutual agreement of the parties or failing such agreement, by Queen's Counsel or Attorney-at-Law of at least fifteen years standing appointed by the President of the Jamaican Bar Association".

(f) Regional Centres for International Commercial Arbitration such as the Centre at Cairo.

Fifthly, in arbitrations the parties have a greater freedom to choose the applicable law to govern their relations and may even leave the determination to be made on the basis of ex aequo et bono.

Sixthly, the private nature of arbitration proceedings enables the parties to resolve their differences without being inhibited or embarrassed by the glare of publicity - a characteristic feature of a court. In addition, it is generally provided that the decisions of the arbitrator may not be made public without the consent of the parties. These provisions facilitate ongoing relations between the parties and are particularly useful in long term business dealings, such as a joint venturing manufacturing enterprise.

Seventhly, arbitration, in general, is far less expensive than litigation involving complex commercial transactions and the allocation of the costs between the parties may be agreed in advance.

Finally, an arbitration by precise terms of reference enables the essential dispute between the parties to be identified and by virtue of the written pleadings (Claim, Statement of Defence and

exist within the Region so as to provide a more accessible forum for the parties. This is particularly important in matters relating to -

(i) Intra-Caricom Trade Investments and Services:

In 1988 the value of Intra-Caricom Trade amounted to US\$

(ii) Investments financed under the auspices of the Caribbean Development Bank. In 1988 the Caribbean Development Bank made seventeen (17) loans amounting to US\$65 Million. To date the C.D.B. has made 491 loans amounting to US\$743 Million.

(iii) Investments which enjoy or would qualify for Caricom Enterprise status.

(iv) Disputes relating to the Caribbean Association of Industry and Commerce.

(v) Disputes of a commercial nature relating to other institutions of the Caribbean Community such as the University of the West Indies.

In addition, the Centre should be open in respect of international commercial transactions particularly where multinational corporations are involved.

There is a wealth of expertise both within and without the Caribbean which could provide the skills required of an International Commercial Arbitration Centre and it would, of course, be important that in order to promote the prestige and integrity of the Centre that its reputation be well established. How is this to be achieved:

INSTITUTIONAL MACHINERY FOR CARIBBEAN
ARBITRATION CENTRE

The institutional machinery for the Caribbean Arbitration Centre should be simple and effective. The organs of the Centre should consist of -

- (a) A small Secretariat headed by a Director who would be responsible for receiving requests for arbitration, making a prima facie determination as to whether the reported dispute falls within the jurisdiction of the Centre and organizing the appointment of the Arbitration Tribunal.
- (b) An Administrative Council responsible for overall policy of the operations of the Centre and comprised of one representative from each Caricom country.
- (c) A Panel of Arbitrators to which may be nominated persons of high moral character with recognized competence in the fields of law, commerce, industry, finance and engineering and who may be relied upon to exercise independent judgment. Nominations to the Panel should be open to all Caricom States and Institutions of the Community. Nominations from outside institutions should be considered. Nominees should not be confined to Nationals of Caricom States.

- (c) disputes relating to investments enjoying Caricom Enterprise status;
- (d) disputes relating to the Caribbean Association of Industry and Commerce;
- (e) disputes of a commercial nature relating to the University of the West Indies or other institutions of the Caribbean Community.

It is a matter for consideration whether it should be restricted to commercial disputes with an international dimension.

REQUESTS FOR ARBITRATION

Requests for arbitration should be submitted in writing to the Director of the Centre who should immediately send a copy of the request to the other party. The request should contain -

- (a) a reference to the Contract out of or in relation to which the dispute arises;
- (b) the identity of the parties and their consent to arbitration;
- (c) the issues in dispute.

The Director would be required to register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.

to indicate their preferences but leaving the final selection to the Director of the Centre.

GOVERNING LAW

There should be a large element of freedom of choice left to the parties to decide on the applicable law. Accordingly, the Arbitral Tribunal should be required to decide the dispute in accordance with the law designated by the parties. Failing such designation, the Arbitral Tribunal should apply the law it considers appropriate given all the circumstances surrounding the dispute (the proper law). The Arbitral Tribunal should have the power to decide ex aequo et bono or as amiable compositeur if the parties have expressly authorized it to do so.

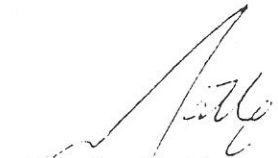
THE AWARD, ITS INTERPRETATION, RECOGNITION AND ENFORCEMENT

Provisions would be made for the making of the Award by majority, for the giving of reasons and for the prohibition of the publication of the Award without the consent of the parties.

Provisions would also be made for the Award to be final but with provisions for its interpretation.

It would be important to ensure that the Award will be recognized and enforced at least within the Caricom States as if it were a final judgment in that

role it could play in the development of the Caribbean Community. It is clear that the development of intra-Caribbean trade and investments could be further accelerated by the establishment of an institution which would speedily promote the resolution of commercial disputes by persons of the highest integrity with the relevant skills and experience.



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