# REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO

## ARTÍCULOS



## COMERCIO INTERNACIONAL



## RESEÑAS




1994 VOLUMEN 63 NÚMERO 1

# THE PRESENT STATUS OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE ENGLISH SPEAKING CARIBBEAN

ROBERT B. LUBIC*

## I. INTRODUCTION

Before entering upon the main thesis of this article, the question of what is meant by the term "English Speaking Caribbean" should be defined since, to some extent, it is a misnomer. Factually speaking, none of the islands of the Bahamas or the nation of Guyana touch upon the Caribbean Sea. However, historically both countries have been considered part of the British West Indies and the Bahamas comprise part of the Caribbean Archipelago. On the other hand, English is the official language of the U.S. Virgin Islands and spoken widely in Aruba and the islands forming the Netherlands Antilles, all of which are clearly within the Caribbean. However, each of these dependencies have political systems and economic origins differing, to a degree, from those deriving from the British Empire. As a result, they will not be included within this discourse. Finally, although the British colony of Bermuda has been historically associated in one way or another with the British West Indies, its location within the North Atlantic at a considerable distance from the subject region excludes it from consideration within the scope of this article.

The independent states, forming part of the English Speaking Caribbean include, in addition to the Bahamas and Guyana, Antigua-Barbuda, Barbados, Belize, Dominica, Granada, Jamaica, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago, twelve sovereign nations in all. The balance of the political communities within the region are governed as colonies or dependencies of the United Kingdom; they include Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands. Although not sovereign nations in the sense of that term, each has its own separate political and legal structures for determining most internal actions. Accordingly, the foregoing seventeen political entities will be considered as comprising the English Speaking Caribbean or the Commonwealth Caribbean as the region is also known.

---

* Visiting Professor, Faculty of Law University of Puerto Rico.

## II. Unifying Factors

Historically, the seventeen territories have a great deal in common in addition to language and location. Practically all of their legal and political institutions descend from Great Britain and, for over two centuries, their economies have been closely aligned to the British Empire. Despite the failed attempt to form a West Indies Federation at the time when independence began to take hold in the area, following the end of the Second World War, some vestiges of unity persist in the structure of the University of the West Indies (UWI) with branches throughout the area and a unified cricket team. In addition, there presently exists the Organization Of Commonwealth Caribbean Bar Association (OCCBA), consisting of fifteen bar associations in the region.[1]

The most important present unifying structure in the Commonwealth Caribbean is the Caribbean Common Market, a regional economic community patterned somewhat along the lines of the European Economic Community (EEC) and more commonly known as CARICOM. The organization consists of the twelve independent regional Commonwealth nations plus Montserrat.[2] CARICOM, originally formed in 1973, was somewhat moribund for a while but has become increasingly active of late due to various economic factors. Among these is the concern of its members with the possible effects of the North American Free Trade Act (NAFTA) between the United States, Canada and Mexico. In addition to CARICOM, seven of its smaller members have joined together in the Organization of Eastern Caribbean States (OECS) for mutual legal and economic benefits.[3]

Until recently, there was little thought within the region for harmonizing their laws since the judicial systems in the seventeen entities were quite similar, based for the most part upon the English Common Law with the courts modeled along the lines of the British system; for some the Privy Council in London remains as the highest court of appeals. In 1988, however, because of the perceived need for the interchange of information among the various territories of the Commonwealth Caribbean regarding their respective legal systems, the Caribbean Law Institute (CLI) was created under the auspices of Florida State University and the University of the West Indies (UWI) in Barbados. Funding was provided by a grant from the AID Program of the United States.[4]

---

[1] Only the Cayman Islands and the Turks and Caicos Islands appear not to be members.

[2] The Dominican Republic, a non-English speaking nation in the Caribbean has observer status and there has been talk of reaching out to some of the other non-Commonwealth islands in the area.

[3] Antigua-Barbuda, Dominica, Grenada, Montserrat, St. Kitts-Nevis, St. Lucia, and St. Vincent and the Grenadines.

[4] Velma Newton, The Environmental Law of the Commonwealth Caribbean at For-

Since its founding, several books have been published by the CLI in conjunction with UWI including The Environmental Laws of the Commonwealth Caribbean and the Commercial Law Monograph Series No. 1, containing legal decisions from the courts of the Bahamas, Barbados, the Cayman Islands, Granada, Jamaica, Trinidad and Tobago, Turks and Caicos Islands, and the OECS Court of Appeals. In addition, and most pertinent to this article, an advisory body was created by the Institute to investigate the possibilities of updating and unifying the commercial arbitration process throughout the English Speaking Caribbean.

## III. Historical Prospective

Commercial arbitration has been known and utilized from time to time in the region with mixed success, beginning in the last century. Until the reforms in English law culminating in the Common Law Procedure Act of 1854,[5] utilization of arbitration for determining commercial disputes was generally considered ineffectual. Neither agreements to arbitrate or decisions arrived at as a result of the process were enforceable. But, as a result of changes brought about by the British Parliament, arbitral agreements and awards became enforceable through assimilating the process within the jurisdiction of a court, "thus allowing the parties to carry on the arbitration as if it were entirely of their own making, while having a reserve of sanctions of the court to stay an action brought in breach of an agreement to arbitrate . . .".[6] In effect, this prevented defendants from revoking the agreement to arbitrate while, at the same time, rendering any award enforceable through the processes of the judiciary. Subsequently, the British Parliament enacted the English Arbitration Act of 1889[7] which, in effect, codified the arbitral system throughout the Empire.

Additional Acts of Parliament in Great Britain affecting arbitration followed the 1889 legislation. These included the enactments of 1934[8] and 1950,[9] the latter of which, in addition to consolidating the Acts of 1889 and 1934, ratified the two major international arbitration treaties in existence at the time - the Geneva Protocol of 1923 and the Geneva Convention of 1927.[10] The two multilateral conventions were the first adopted enactments in the British Empire applicable solely to international as op-

---

ward (1991).

[5] The Common Law Procedure Act, 1854, 17 & 18 Vict., ch. 125 (Eng.).

[6] Michael John Mustill, *Arbitration: History and Background*, 6 J. Int'l Arb. 43, 46 (1989).

[7] Arbitration Act, 1889, 52 & 53 Vict., ch. 49 (Eng.).

[8] Arbitration Act, 1934, 24 & 25 Geo. 5, ch. 14, at 39 (Eng.).

[9] Arbitration Act, 1950, 14 Geo. 6, ch. 27, at 442 (Eng.).

[10] Convention for the execution of Foreign Arbitral Awards, Sept. 26, 1927, XCII L.N.T.S. 302.

posed to domestic commercial arbitration. The Geneva Protocol called for enforcement by its signatories of all validly executed international arbitration agreements and enforcement of any award stemming therefrom in the territory where made. The Geneva Convention enlarged the Protocol by providing for the enforcement of awards rendered within the boundaries of any one signatory, by the courts of any of other parties to the treaty.[11] Since independence had not been declared by any of the members of the Caribbean Commonwealth at the time, both treaties were applicable throughout the region.

Although considered archaic by many former colonies and replaced by more modern arbitral legislation in the United Kingdom and several other members of the British Commonwealth of Nations, portions of the 1889 and 1950 Arbitration Acts are still present within the laws of other members of the Commonwealth including several in the Caribbean. Thus any attempt to deal with a unifying system for commercial arbitration in the English Speaking Caribbean must begin with these enactments.

From the time of the first arbitration in the region until recently, no attempt was made to differentiate domestic from international commercial disputes. This was probably due to the fact that during the development of arbitration in the English Speaking Caribbean in the last century and beginning of this, the British courts made no such distinction. This was most likely due to form of adjudication within the region. As stated previously, since the judicial systems within the different political entities were basically similar, there appeared to be little aversion toward bringing a legal action, outside of the plaintiff's jurisdiction within the region, against a party residing in another territory of the Commonwealth Caribbean. As a result, the need to litigate in a neutral forum, one of the primary motivations for a separate system of international commercial arbitration, were lacking in the English Speaking Caribbean.

The arbitration laws and regulations in effect among the different governing entities differ to a degree, depending to an extent upon the legislation enacted after the attainment of independence or achievement of self governing status. For instance, several of the seventeen entities are still governed by vestiges of the 1889 legislation, including the Bahamas, Belize, Jamaica, Montserrat, and the Turks and Caicos Islands, while others have incorporated articles from the 1950 English Arbitration Act. In all probability, the most consequential provision of both the 1889 and 1950 legislation was the "Statement of Case" clauses contained respectively in Articles 19 and 21 thereof. Under those provisos the parties in an arbitral process could refer questions of law "in the form of a special

---

[11] ALAN REDFERN & MARTIN HUNTER, INTERNATIONAL COMMERCIAL ARBITRATION 61-62 (2d ed. 1991).

case" to the British High Court sitting in the jurisdiction where the arbitration was taking place. In effect, it perverted the concept of isolating the process of arbitration, except for purposes of enforcement, from interference by the prevailing judicial system.

Independence from the British Empire in the Caribbean began with Jamaica and Trinidad and Tobago in 1962 and continued among the eventual twelve separate nations, culminating with the 1983 declaration of sovereignty by St. Kitts-Nevis.[12] It was during this period that some of the most momentous treaties and laws involving international commercial arbitration were written and took effect. These, including the United Nation's New York Convention On The Recognition And Enforcement Of Foreign Arbitral Awards of 1958,[13] extending to a considerable extent, beyond the boundaries of the Geneva Protocol and Convention, the scope for enforcement of international commercial arbitration agreements and awards. The New York Convention was incorporated into the laws of the Great Britain by the United Kingdom Arbitration Act of 1975. Next came the Washington Convention of 1965, under the aegis of the International Bank for Reconstruction and Development (the World Bank), establishing the International Center for the Settlement of Investment Disputes (ICSID) for determining investment disputes.[14] This was followed by the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention) recognizing the Rules of Procedure of the Inter-American Commercial Arbitration Commission (IACAC) and providing for their use when the parties to an arbitration agreement fail to provide otherwise.[15] In 1979, in accordance with its need to modernize it arbitration legislation, the Parliament of the United Kingdom adopted the English Arbitration Act of 1979.[16] Of pertinent significance, Section 1(1) of that enactment specifically repealed Article 21 of the 1950 Act (which had previously consolidated the Arbitration Acts of 1889 and 1934), abrogating the power of British courts to interfere with the arbitration process or remit or set aside an award on the ground of error in fact or law on the face of the award. During the end of this period the United Nations Commission On International Trade (UNCITRAL) was nearing completion of the Model Law on International Commercial Arbitration, eventually adopted in 1985.[17]

---

[12] The dates of independence of the other English Speaking states in the region are as follows: Barbados and Guyana 1966; Bahamas 1973; Grenada 1974; Dominica 1978; St. Lucia and St. Vincent and the Grenadines 1979; and Antigua-Barbuda and Belize 1981.

[13] New York Convention On The Recognition And Enforcement Of Foreign Arbitral Awards of 1958, 21 U.S.T. 2518, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

[14] 575 U.N.T.S. 160.

[15] 14 I.L.M. 336.

[16] Arbitration Act, 1979, ch. 42 (Eng.).

[17] G.A. Res. 40/72, U.N. (1985).

## IV. Steps Toward Harmonization of Arbitral Legislation

As a result of the foregoing pronouncements, coupled with the accelerated growth of International Commercial Arbitration cases throughout the world, it became evident that it was time to harmonize, not only the economies and legal systems within the Commonwealth Caribbean territories, but also the regional arbitration systems. Accordingly, under the auspices of the CLI, an Arbitration Project was funded for the purpose of modernizing and unifying the arbitral process within the English Speaking Caribbean.

The first meeting of the Arbitration Project Advisory Committee was held at the beginning of December of 1988 in Miami, Florida. It was attended by various attorneys, academics, businessmen, and judges from the region. At the first session the attendees were given a detailed account of the work to date of the Project. Discussion was then held on various points including the distinction and separation of domestic arbitration from international arbitration, adoption of the Model Law together with the UNCITRAL Arbitration Rules for the conduct of ad hoc arbitrations in the region, limitation of the right to judicial appeal from an arbitrator's decision in accordance with the English Arbitration Act of 1979, ratification of the New York Convention, mandatory reasoned awards in all international commercial arbitration decisions, and possible ratification of the Panama Convention.[18]

Following the December meeting, visits to Belize, Dominica, Grenada, Guyana, St. Lucia, and Trinidad and Tobago were conducted by Ms. Wendy Straker, for the purpose of determining problems that might be encountered regarding the Arbitration Project. A thirty one page presentation was then prepared by Ms. Straker to assist the Advisory Committee during its next meeting on April 20, 1989. The document also contained a summary of what had taken place during the first meeting in Miami while at the same time provided a comparative table of the various legislative acts involving arbitration in the different territories. Additionally it proposed that in view of the fact that the current stage of arbitral legislation in the Caribbean was considered unsatisfactory, a need existed for modernization of the laws pertaining thereto. Emphasis was placed upon the fact that "one of the reasons why arbitration was not being used to a greater extent in the territories was the antiquated state of existing legislation."[19] The report went on to describe the arbitral enactments in Bermuda, Canada, Australia and Hong Kong and recommended the selection of one of the following alternatives for utilization of the Model Law in the English Speaking Caribbean: (1) adoption of the proposed act in its

---

[18] Minutes of the Meeting of the Advisory Committee (Dec. 2, 1988).

[19] Wendy Straker, University of West Indies Presentation, at 2.

entirety; (2) incorporation of some of its most pertinent provisions into existing legislation; or (3) incorporation of the Model Law with certain amendments. Conciliation as an additional means for alternative dispute resolution was also addressed. The paper, in addition, described how the arbitration acts of most of the territories in the region were based upon either the English Arbitration Acts of 1889 or 1950 and, as a result, differed to an extent. Furthermore, it was concluded from talks with some members of the judiciary, during Ms. Straker's visit to the territories described above, that the time had come to consider an alternative to solely judicial means for settling disputes.

The second meeting of the Arbitration Project Advisory Committee took place in Barbados on April 20, 1989. After reading of the minutes of the previous meeting, the Committee listened to a summary of Ms. Straker's report. This was followed by discussion of the fact that since arbitration was still not used much in the Caribbean Commonwealth region, it would probably prove even more difficult to incorporate any harmonized system of conciliation into the laws of the territories. A recommendation was made that an arbitration desk be established within the office of the Caribbean Association of Industry and Commerce (CAIC) and that the members of the latter organization take up the matter of harmonized arbitration legislation with the respective Ministers of Trade of their various governments. It was also proposed that steps be taken so that one of the Governments of the region take the matter of harmonized arbitration to the Heads of Government Meeting scheduled for the following July. Finally, the attendees endorsed a recommendation that draft legislation be prepared for the next meeting of the Advisory Committee.[20]

Subsequent meetings of the Advisory Committee were held in St. Kitts-Nevis and Antigua-Barbuda and, in September of 1991, a report summarizing the Arbitration Project was prepared for the members of the Advisory Committee. This document described the importance of encouraging interest in arbitration by the Caribbean business community while proposing revision of existing arbitration legislation within the territories. In addition, the paper called for the establishment of a Caribbean Arbitration Center. The reality that arbitration proceedings were not considered expeditious within the region was set forth as well the fact that most adopted legislation was based upon the 1950 Act of the United Kingdom which permitted judicial interference in the arbitration proceeding.

Although draft legislation for two model laws (one for domestic and the other for international commercial arbitration) was eventually adopted by the Arbitration Project Committee and approved by the Board of the

---

[20] Minutes of Meeting of the Advisory Committee at the Dover Convention Center in Barbados (Apr. 20, 1989).

CLI, nothing further seemed to have followed in regard to this matter. It appeared that the effort toward harmonization of international commercial arbitration among the English Speaking Caribbean territories had drawn to a halt. Investigating the reason for the sudden demise in interest, the author encountered the following opinions. Ms. Wendy Straker related that, during her visits to government officials in the territories described above, most of the individuals she spoke to were apathetic toward the concept of harmonization of arbitral legislation in the region. The general feeling, according to Ms. Straker, was that there were many other more important matters that had to be addressed first by the Commonwealth Caribbean territories.[21] Mr. Patterson Thompson, Chief Economic Officer of the CAIC, felt that the reason for disinterest in the Arbitration Project by the business community of the Commonwealth Caribbean was that the process of arbitration was deemed to be neither speedier nor less expensive than the adjudicatory process, especially in view of the fact that in most cases the parties had to go to court to enforce awards in their favor. Commercial disputants, according to Mr. Thompson, felt more comfortable with the courts in the islands.[22] Alfred Clarke, Q.C., Attorney at Law and a member of the Arbitration Committee felt that the project lost its impetus when Mr. N.J.O. Liverpool, the Chairman of the Arbitration Committee and driving force behind the arbitration harmonization project, accepted an appointment to the position of Justice of Appeal of the Eastern Caribbean Supreme Court sitting in St. Lucia.[23] Mr. Claude Denbow, Attorney at Law in Port-Of-Spain related how a commercial arbitration proceeding in Trinidad and Tobago involving Trinidad Tesoro Corporation, a Texas-based company, and Federal Chemical (owned by W.R. Grace) continued for a period of eight years, engendering considerable disillusionment to those interested in the arbitral process.[24] On the other hand, some members of the Arbitration Project Committee believed that the project had achieved a certain amount of success through the preparation of the two model arbitration laws and their submission to the various Attorneys General of the subject territories for adoption by any of the member governments of the OECS or CARICOM.[25] According to this assumption, the ultimate determination regarding an harmonized system of International Commercial Arbitration for the English Speaking Caribbean has not been concluded since the proposed legislation on the subject is now available for adoption.

---

[21] Conversation with Wendy Straker, Esq., in Barbados (Mar. 6, 1993).

[22] Conversation with Patterson Thompson in Barbados (Mar. 5, 1993).

[23] Conversation with Mr. Clarke in Barbados (Mar. 6, 1993).

[24] Conversation with Mr. Denbow in Port-Of-Spain (Mar. 8, 1993).

[25] Letter from Charles R. Norberg, Esq., Director General of the Inter-American Commercial Arbitration Commission (Nov. 12, 1993).

## V. Prospective on Other Reasons For the Demise of the Project

It is the opinion of the author, assuming the lack of a ground swell in favor of the proposed international arbitral model law by several of the subject territories within the near future, that the reason for the apparent failure of the Project was that it was too ambitious. The process of amending any legal system can be excruciatingly slow and when applied to a number of independent governing bodies, can prove to be even more difficult. As a result, it is the belief of the writer that the Advisory Committee should have concentrated initially upon the harmonization of international as opposed to domestic commercial arbitral law and, in that respect, upon no more than two specific changes within the systems in place within the Caribbean Commonwealth. Furthermore, it should have sought a different path for adoption of its recommendations. Primarily, the Committee would have done better to direct its efforts toward elimination of any equivalent provision within the legislation in the region to Articles 19 or 21 of the English Arbitration Acts of 1889 or 1950 respectively. Thus, the power of the local courts to interfere in the arbitration process in matters other than enforcement would have been reigned in and the criticism of arbitration hearings taking longer than judicial proceedings (deriving to an extent from such interference) could have been partially countered.

At the same time, the Committee should have proceeded to lobby for ratification within the region of the New York Convention of 1958, providing for enforcement of international commercial arbitration awards within the territories of any of the signataries.[26] This would have alleviated most problems involving enforcement. As a practical matter, no rational litigator would proceed within a dispute resolution system, when enforcement of the award would be questionable.

Although several of the other proposals of the Advisory Committee were meritorious, none reach the importance of the foregoing measures. Despite the fact that the Model Law was painstakingly drafted by UNCITRAL for the purpose of providing acceptable international arbitration legislation for adoption by nations throughout the world, its record of incorporation into domestic legal systems has proved less than satisfactory. Regarding utilization of UNCITRAL's arbitration rules, the parties to an arbitral hearing are better left with the flexibility of selecting the rules and regulations that they prefer to govern the proceeding rather than to

---

[26] Antigua-Barbuda, Dominica, and Trinidad and Tobago as independent nations have ratified the New York Convention. According to the 1991 report to the Arbitration Committee, *supra* n. 123, Anguilla, the British Virgin Islands, and St. Kitts-Nevis give effect to the New York Convention through their Arbitration Acts while Barbados has a separate Foreign Award Act therefor.

be bound by predetermined rules no matter how exceptional they may be. The same reasoning applies to adoption of the Panama Convention and the IACAC rules. Furthermore, the creation of an arbitration center is unnecessary to the establishment of an harmonized system and is an extra expense that can be done without. Within the last decade arbitration centers have been created in British Columbia, Hong Kong, Cairo, Nigeria, and Kuola Lumpur with varying results. In addition, despite the number of centers available, arbitral hearings throughout the world are for the most part held at sites outside the confines of designated arbitration centers. Finally, experience has shown that it is not necessary to require reasoned awards from international arbitrators since this is the established norm in practically all reported proceedings.

One other perceived reason for the demise of the project was the method chosen for seeking adoption of the recommendations of the Advisory Committee. Instead of suggesting that the Government of one of the parties involved in the Project be requested to take the matter to the next Heads of Government Meeting, the organization in the best position to lobby for adoption of a harmonized system of arbitration in the English Speaking Caribbean is CARICOM. It is the most active of the Caribbean Commonwealth unifying structures and, due to economic necessities, appears to be in the best position to influence the enactment of the necessary arbitral legislation among its constituent members.

## VI. Possibilities For Resurrection

CARICOM, like many regional economic bodies, is presently engaged in seeking an advantageous position for its members within the world of international trade, especially vis-a-vis the United States.[27] Developments during the last two decades have exposed the vulnerability of the economies of the territories of the Commonwealth Caribbean and the need for urgent policy reform. Given the limited amount of resources together with their physical size and location, it is practically impossible for the nations and dependencies of the English Speaking Caribbean to isolate themselves from the changes taking place in the rest of the world.[28] [What is obviously required is the need for a unified effort in confronting the problems of world trade as it effects the worsening economic conditions in the region.] This is one of the major concerns of CARICOM, especially in view of the unknown but worrisome effects resulting from the ratification of NAFTA by the United States.

---

[27] Doreen Hemlock, *Caricom's needs on Clintons agenda*, The San Juan Star, Aug. 30, 1993, at B-7.

[28] Ramesh F. Ramsaran, The Challenge of Structural Adjustment in the Commonwealth Caribbean 52 (1992).

Regional trade blocs such as NAFTA, the EEC, ASEAN etc. appear to be the reign of the future. For the purpose of operating among a myriad system of laws within each such bloc, it becomes incumbent to create a harmonized system of laws and regulations in order to provide a framework for resolving the inevitable commercial disputes. One example is the 1961 European Convention on International Commercial Arbitration[29] developed under the sponsorship of the Trade Development Committee of the U.N. Economic Commission for Europe to settle trade disputes between parties from different European nations. In addition, eleven of the twelve member nations of the EEC have ratified the New York Convention of 1958[30] as have all of the members of ASEAN and the three constituents of NAFTA. How then can the members of CARICOM fail to follow this trend, especially in view of their current dependent economic positions? As previously stated, only a minority of the thirteen Caricom members have formerly ratified the New York Convention. In answer, it has been said that the liberalization of economic policies carries consequences that many Caribbean governments are not yet prepared to face.[31] Unfortunately for their purposes, economic survival in the future requires the surrender of part of a nation's sovereignty.

The last decade has shown a tremendous growth in the number of international commercial arbitration proceedings and, as previously stated, has led to the creation of an increasing number of arbitration centers in Asia and Africa in addition to the ones within Europe and North America. The Chinese and Japanese, who have been traditionally opposed to any type of adversarial proceeding, have come to accept the necessity of international commercial arbitration through the creation of administrative arbitration agencies within their boundaries —the China Council for the Promotion of International Trade (CCPIT) and the Japan Commercial Arbitration Association (JCAA).[32] China and Japan as well as South Korea are also signatories to the New York Convention.

The world of international trade requires a neutral forum for the settlement of trade disputes, isolated from intrusion by the national courts of any one nation. The days of Pax Brittanica and Pax Americana, when businessmen from either nation could demand settlement in their courts, have been concluded. The only true neutral forum for the settlement of private international commercial disputes lies within international arbitration. However, by necessity, international commercial arbitration can only function under the aegis of a national law but one which precludes

---

[29] 484 U.N.T.S. 364.

[30] Only Portugal has not ratified the New York Convention to date although it still remains a party to the Geneva Protocol.

[31] RAMSARAN, *supra* note 28, at 54.

[32] Upon whose panel the author was appointed while living in Japan.

undue interference with the process.

The provision within an agreement calling for arbitration as well as the contract as a whole requires determination under some domestic substantive law. The parties are generally free to select whichever law they desire as applicable to the terms of their agreement. For the most part, this does not require the amendment or modernization of existing commercial legislation since the laws in place are generally acceptable.

It is what is known as the Lex Arbitri or the law of the territory governing the arbitration procedure that can be most crucial to the process. It is this law that determines the validity of the mechanism. Any action within the hearing process possibly contrary to the procedural law of the situs could render the outcome a nullity. It was for this reason that the drafters of the Model Law sought to create legislation that would be acceptable as the Lex Arbitri by most nations. Unfortunately this has not occurred. With the exception of Canada, Hong Kong and a few of the American states, most nations have refrained from adopting the UNCITRAL proposal.

This fact poses no serious problem as long as the existing Lex Arbitri within a nation does not interfere to any serious degree with the hearing process. Unfortunately this is not the case in respect to Articles 19 or 21 of the English Arbitration Acts of 1889 or 1950 or their Commonwealth Caribbean equivalents. As a result of the infamous "Case Stated" provision framed within these sections, any number of arbitration proceedings were steered away from London for a considerable period of time until abrogation by the English Arbitration Act of 1979.[33] As a result of a decision by a Singapore court requiring that the lawyers for both parties to an arbitration proceeding be members of the Singapore Bar,[34] many trading companies refused to accept Singapore, within the terms of their commercial agreements, as the location for any possible arbitration hearing in the event of any unsolvable dispute.[35] To the credit of Barbados, in a case involving a similar issue regarding representation by foreign attorneys, the court refused to interfere with the arbitration process by utilization of the "case stated" concept.[36]

---

[33] REDFERN & HUNTER, *supra* note 11, at 60.

[34] Builders Federal v. Turner, High Court of Singapore (1985).

[35] During a recent visit to the Law Faculty of the University of Singapore, the author was advised that the laws of Singapore were amended to prevent any similar occurrence of judicial interference with international arbitration hearings on its territory.

[36] In The Matter of an Arbitration between Lawler, Matusky & Skelly, Engineers and the Attorney General of Barbados, Supreme Court of Judicature of Barbados, No. 320 of 1981.

## VII. Conclusion

Singapore, with one of the fastest growing economies in the world, realized that it was not to its benefit to permit any judicial interference on its soil with the system of international commercial arbitration. Until the territories of the Commonwealth Caribbean come to a similar conclusion, the vast majority of international traders will avoid the shores of its territories for purposes of determining commercial disputes. As a result, outside trade will be negatively effected. Despite this, archaic legislation in most of the territories still permits judicial interference under the "case stated" proposition.

In addition, over eighty-five nations have now ratified the New York Convention as opposed to only three of twelve independent Commonwealth Caribbean nations. Furthermore, none of the political units of the Commonwealth Caribbean have become parties to the Inter-American Convention on International Commercial Arbitration. It is time for the territories of the English Speaking Caribbean to expand their position in the international trading world by various means including the abolishment of antiquated arbitral legislation and the adoption of multilateral conventions involving enforcement of awards rendered as a result of the arbitration process. Such action goes hand in hand with the improvement of their economies.