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Aspects of the Uncitral Regimes for Procurement and for International Commercial Arbitration, and Government International Commercial Contracts in the Commonwealth Caribbean

Hugh A. Rawlins
The University of the West Indies, Faculty of Law

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ASPECTS OF THE UNCITRAL REGIMES FOR PROCUREMENT AND FOR INTERNATIONAL COMMERCIAL ARBITRATION, AND GOVERNMENT INTERNATIONAL COMMERCIAL CONTRACTS IN THE COMMONWEALTH CARIBBEAN*

HUGH A. RAWLINS**

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** B.A.; LL.B.; LL.M.; Barrister and Solicitor, Lecturer in Law, University of the West Indies; formerly Solicitor General of St. Christopher (St. Kitts) and Nevis, West Indies. The assistance of my colleague, Mr. Graeme Broadbent, Lecturer in the Faculty of Law, University of the West Indies, and Mrs. Joan Guthrie of the Caribbean Law Institute Centre, both of whom vetted the penultimate draft of this paper, is hereby acknowledged with grateful appreciation. It is also in the same spirit that I acknowledge the assistance of my colleague, Mr. Sampson Owusu, Lecturer in the Faculty of Law of the University of the West Indies, and Mrs. Tamara Best and Mrs. Marcia Bradshaw, secretaries in the said Faculty, who lent their computer skills in the preparation of the various drafts of this paper at times of particular difficulties.

I. PROLOGUE

1.1. Introduction

Against a background of expanding commercial activity in the Commonwealth Caribbean[1] in recent years, the necessity to adopt or to elaborate a coherent, modern legal framework to guide international commercial practices has become rather obvious. It is in this context, and with particular reference to the framework which United Nations Commission on International Trade Law (UNCITRAL) has sought to provide in its Guide and Model Law on the Procurement of Goods and Construction, and its Model Law on International Commercial Arbitration, that this paper considers aspects of the present law and practice which relate to government international commercial contracts in the Caribbean.

This paper gives a brief historical context of government contracting in the Caribbean. It also surveys present practices as well as current initiatives for the introduction of these UNCITRAL Regimes. This paper suggests that, although the introduction of these Regimes is desirable, they do not provide a panacea for all difficulties. There are certain aspects of them which may not be feasible, or which may not be compatible with the economic interests or with the fundamental constitutional law of Caribbean countries. Ultimately, therefore, Caribbean countries may adopt these Regimes, but with such modifications as may be compatible with their circumstances.[2]

1.2 The Historical Context

The economies of the Commonwealth Caribbean have been described as plantation-type economies.[3] While this may not be an apt description for present day purposes, it affords a helpful

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1. In this study, "Commonwealth Caribbean" may be used interchangeably with "Caribbean" or "West Indian." These terms refer to the former British possessions of Belize in Central America and Guyana in South America, and, in the Caribbean archipelago, Antigua and Barbuda, The Bahamas, Barbados, Dominica, Grenada, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago, which are now independent countries. The term also includes Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands which are not independent states. These countries constitute an integrated economic unit known as the Caribbean Community (CARICOM).

2. *See* M. Sornarajah, *The UNCITRAL Model Law: A Third World Viewpoint*, 6 J. INT'L ARB. 7 (1989) and Thomas Noecker & Matthias K. Hentzen, *The New Legislation on Arbitration in Canada*, 22 INT'L LAW. 829 (1988). These writers point out that in Canada the Model Law on Arbitration was adopted with amendments. *See also* Robert K. Paterson, *Implementing the UNCITRAL Model Law—The Canadian Experience*, 10 J. INT'L ARB. 29 (1993), and Zhang Yulin, *Towards the UNCITRAL Model Law: A Chinese Perspective*, 11 J. INT'L ARB. 87 (1994).

3. Lloyd Best, *Outlines of a Model of Pure Plantation Economy*, 17 SOC. & ECON. STUD. 283 (1968).

historical context of their economic relationships which is still of practical significance. Basically, it is a relationship of dependence on extraregional products, capital, markets and technology. In short, it is a history which is written in trade, with the mercantile system as the dominant economic feature up to the middle of this century. The role of governments in the Caribbean under this system has been described as "largely passive except in framing the regulations regarding trade, production and property."[4]

This passive role changed significantly with the advent of Responsible Government in most of the territories during the 1950s, and particularly after the advent of independence from Britain during the 1960s. As Lloyd Best explains it, "[w]ith the demise of colonial administration, Caribbean peoples looked to their new leaders for initiatives that would enhance their material well-being."[5]

At that time, Caribbean governments saw their new roles as providers of social and essential services and as leaders in new business initiatives. In a recent statement, the Attorney General of Barbados said that government got involved in business initiatives after independence in order to stimulate production. This, he said, was because the business sector was so wedded to the tradition of buying and selling that they were slow to get into other endeavours which were necessary for growth.[6]

The entry of Commonwealth Caribbean governments into the arena as traders has been justified at times on notions such as the control by the State of "the commanding heights of the economy."[7] On the basis of this notion, some countries moved to nationalize or to hold controlling interests in various business endeavours. This was particularly evidenced in Guyana and in St. Kitts and Nevis during the 1970s. As a result, Caribbean governments either own and operate, or participate under joint venture or other agreements in, public utility companies or other commercial undertakings.

Very often, however, there is a pragmatic reality underlying these government endeavours. This is very well encapsulated in the following statement which relates to the role of the Caribbean public sector in economic activity: "In most Caribbean countries historical factors combine with heightened expectations . . . to make the public

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4. *Id.* at 287.

5. DELISLE WORRELL, SMALL ISLAND ECONOMIES: STRUCTURE AND PERFORMANCE IN THE ENGLISH SPEAKING CARIBBEAN SINCE 1970 at xiii (1987).

6. Budget Debate, April 4, 1991, Barbados House of Assembly Debates, Feb.-June 1991, First Session 1991-1996, at 589-90.

7. *See* Sir Allan Lewis, *The Separation of Powers: Its Relevance for Parliamentary Government in the Caribbean*, 1978 W. INDIAN L.J. 4, 7; *see also* WILLIAM F. FOX, INTERNATIONAL COMMERCIAL AGREEMENTS 25 (1988).

sector a key economic actor. Not only does the state perform its traditional functions but is directly involved in providing social and economic infra-structure as well as economic production."[8]

It may be instructive to note a statement which was made by Mr. Errol Barrow, the late Prime Minister of Barbados, when he said[9] that his government had agreed to enter into an arrangement with the Barbados Telephone Company to purchase a block of shares in that company, in order to forestall the imminent curtailment of the employment of about 170 persons, as well as to ensure that the company expanded its services to the extreme northern and southern districts of the island. Similar statements can be found in the Hansards of many other Caribbean countries.[10]

This role which is undertaken by Caribbean governments in trade has been criticized, sometimes for good reasons. Parris, for example, notes

> One of the many indicators of the economic ills of Trinidad and Tobago and, I dare say, of most third world countries pursuing the mixed economic strategy of development, is the consistently poor performance of most public enterprises . . . cries for reform ranging from greater decentralization . . . to limits on the overall size of the public sector, abound either in the daily newspapers, the official Hansard or on the streets of relevant towns and cities . . . .[11]

The involvement of Caribbean governments in this role varies from country to country, but it was de-emphasized during the 1980s and 1990s as private sector and joint venture initiatives became more evident. Yet, the role which Caribbean governments continue to play is important. It involves significant contracting for various services, for loans for budgetary support and the provision of infrastructure and housing, development agreements and agreements for construction and works, among others.

This background will be incomplete, however, unless note is taken of another economic factor which relates to Caribbean countries—the fragility of Caribbean economies. It was in this context that the Attorney General of Barbados spoke, when he explained the involvement of the Government of Barbados in business endeavours.[12]

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8. UNITED NATIONS, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, ECONOMIC ACTIVITY 1983 IN CARIBBEAN COUNTRIES at 12, U.N. Doc. LC/CAR/G.123.

9. *See* Budget Debate, July 22, 1975, Barbados House of Assembly Debates, Second Session 1975, Part II, at 5246-5247.

10. *See, e.g.*, Hansard, Vol. V., House of Representatives, Third Session of the First Parliament of The Republic of Trinidad and Tobago, Session 1978-1979, pp. 185-186, 245-257.

11. Carl D. Parris, *Joint Venture I*, 30 SOC. & ECON. STUD. 108 (1981).

12. *See supra* note 6. On the subject of state trading, *see* GILBERT P. VERBIT, TRADE AGREEMENTS FOR DEVELOPING COUNTRIES ch. 6 (1969).

Sydney Chernick[13] explains and tabulates the very narrow resource base of these countries against the background of their small size, high production costs, dependence on extraregional countries and imbalance in the region's economic organization. He concludes that because of these factors each country has found economic viability an elusive goal. On the other hand, extra-regional governments or private entities with which Caribbean governments contract have at their disposal financial and other resources which are many times in excess of the resources which are at the disposal of Caribbean governments. As a result, Caribbean governments are usually at a marked disadvantage in the bargaining process and, it is submitted, this adds an adhesion dimension to these contracts.

Another aspect of commercial contracting in the Caribbean which gives cause for concern is the apparent unawareness of the complexity and uncertainty of the legal principles and practices which are inherent in this activity. This consideration has led to attempts in other regions of the world,[14] and also to initiatives by international bodies, primarily UNCITRAL, to unify international trade rules.[15] For the purposes of this paper, a brief overview will be afforded to the UNCITRAL initiatives in relation to the procurement of goods and construction and in relation to international arbitration.

II. THE UNCITRAL INITIATIVES

2.1. Procurement of Goods and Construction[16]

The UNCITRAL initiatives which led to the drawing up of the legal guide and the drafting of the Model Law on Procurement of Goods and Construction had their geneses in the resolutions of the United Nations General Assembly of 1974 and 1975.[17] These

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13. World Bank, WORLD BANK ECONOMIC REPORT, *The Commonwealth Caribbean* 4-7 (1979).

14. On a Regional Uniform Rules basis.

15. On a Universal Rules basis. The aim has been the development of uniformity worldwide, in the law and practice of international trade, by the creation of a comprehensive and standardized system as the basis of a *lex mercatoria*. In the Caribbean, in the absence of other initiatives, the Caribbean Law Institute has taken steps to introduce the UNCITRAL legal framework for arbitration.

16. CLIVE M. SCHMITTHOFF & JOHN ADAMS, SCHMITTHOFF'S EXPORT TRADE 4 (9th ed. 1990). Here, the authors state that these transactions are often major export projects involving a considerable amount of capital, which occur particularly frequently where developing countries wish to procure the establishment of new industries, which often means transferring technology from the industrialized to developing countries.

17. *See* Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631. *See also Resolutions Adopted by the General Assembly During its Sixth Special Session*, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559; *Resolutions adopted by the General Assembly*, U.N. GAOR, 7th Special Sess., Supp. No. 1, U.N. Doc. A/10301.

resolutions were intended to be the bases for ushering in a new international economic order by removing or reducing, as far as possible, the factors which have traditionally created a disparity in bargaining strength and which have thus worked to the disadvantage of developing countries in the international commercial arena.[18]

2.2. *The UNCITRAL Legal Guide*

The UNCITRAL legal guide on Drawing up International Contracts for the Construction of Industrial Works[19] came out of a realization that these contracts, which are of critical importance to the progress of developing countries, are typified by great complexity both in the technical aspects of the works and in the legal relationships which are incidental thereto. In its own terms, the publication of the Guide was

> largely motivated by an awareness that the complexities and technical nature of this field often make it difficult for purchasers of industrial works, particularly those from developing countries, to acquire the necessary information and expertise required to draw up appropriate contracts. The guide has therefore been designed to be of particular benefit to those purchasers, while seeking at the same time to take account of the legitimate interests of contractors.[20]

Basically, the Guide offers guidance to suppliers and purchasers on all aspects of contracting, from the stage of negotiations through to the drafting process and to the resolution of disputes in relation to the construction of industrial works.

The Guide is arranged in two parts. Part one is concerned with certain matters which are to be considered prior to the drafting of the contract. These include the identification of the project; the setting of the parameters of the project and pre-contract studies;[21] the various contracting approaches which the parties may adopt;[22] the procedures for concluding the contract;[23] and matters relating to the form and validity of the contract.[24] The discussion which the Guide

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18. *See* Friedrich K. Juenger, *The European Convention on the Law Applicable to Contractual Obligations: Some Critical Observations*, 22 VA. J. INT'L L. 123, 129 (1982).

19. *See Report of the United Nations Commission on International Trade Laws on the Work of its Twentieth Session*, U.N. GAOR, 42nd Sess., Supp. No. 17, ¶ 315, U.N. Doc. A/42/17 [hereinafter the Guide]. The Guide was adopted by UNCITRAL at its twentieth session in August 1987 and published by the United Nations in 1988.

20. *See id.* at 1-2.

21. *See id.* ch. 1.

22. *See id.* ch. 2.

23. For example, whether by tendering or by negotiation without prior tendering. *See id.*

24. *See id.* ch. 3.

provides is aimed at directing the parties to important matters which they should consider prior to the commencement of negotiations, and prior to the signing of contracts. It also provides advice on the discussion of the legal issues involved in the contracting process.[25]

Part two, which is referred to as the core of the Guide, deals with the drawing up of specific provisions in procurement and works contracts. It also discusses the issues which are to be addressed in those provisions and, in many cases, suggests approaches to the treatment of those issues. Each chapter in part two deals with a particular issue which may be addressed in a works contract, and, as far as possible, the chapters are arranged in the order in which the contractual terms are usually dealt with in actual works contracts.[26]

2.3. The Model Law on Procurement

The Model Law on Procurement does not, either by its terms or its purport, aim to provide a framework particularly to assist developing countries. Basically, it is aimed at securing greater international competition in the government procurement market, thereby achieving greater liberalization and expansion of world trade. In this regard, it shares a commonality with the provisions of the GATT Agreement on Government Procurement.[27]

The Gatt Procurement Agreement, however, contains provisions for special and differential treatment for developing countries. Thus, for example, Article III of that Agreement requires state parties to take into account the development, financial and trade needs of developing countries and, in particular, the trade needs of the least developed countries, since there is a very real need to safeguard their balance-of-payment position. In this regard, the Article encourages the taking of steps to establish or develop domestic industries, including small-scale and cottage industries in rural or backward areas. It also requires state parties to take steps to support industrial units which are wholly or substantially dependent on government procurement, as well as to encourage economic development through regional or global arrangements among developing countries.[28]

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25. The Guide provides detailed discussion on the various aspects and indicates alternative solutions which may be utilized under different contracting approaches.

26. *See* the Guide, *supra* note 19, at 1-3.

27. *See Revised Text of the Agreement on Government Procurement* (Published in Document II.C. 5 at 127-153). [Hereinafter the GATT Procurement Agreement.] It came into force on Jan. 1, 1981, and was amended by a Protocol which entered into force on Feb. 14, 1988.

28. In the context of government procurement. *See id.* art. 3(1). Article 3(2) of the GATT Procurement Agreement also requires state parties to facilitate imports from developing countries, bearing in mind the special problems of the least developed countries. In the same

Special and differential treatment for least-developed country Members is also extended in specific areas under the General Agreement on Tariffs and Trade of 1994, and other agreements which now fall under the aegis of the World Trade Organization (WTO), by virtue of the Marrakesh Agreement which establishes this organization.[29] This is reflected, for example, in the Agreement on Textiles and Clothing, the Agreement on Trade-Related Investment Measures, the Agreement on Safeguards and the Agreement on Technical Barriers to Trade, particularly in Article XII. It is also reflected in the General Agreement on Trade Services, particularly in Article IV.[30] It is noteworthy that this latter Agreement provides, in Article XIII, for the commencement of multilateral negotiations on government procurement in services within two years from the date of entry into force of the Marrakesh Agreement.

For its part, the Model Law on Procurement applies "to all procurement by procuring entities"[31] except procurement involving national defense or national security,[32] unless the procuring entity expressly declares otherwise to suppliers or contractors at the very

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context, Article 3(4) permits developing countries to negotiate mutually acceptable exclusions from the rules on national treatment in relation to certain entities or products, and to modify their lists of entities in accordance with Article 4(5). The Rules on National Treatment and Non-Discrimination are contained in Article 2 of the Agreement. The GATT Procurement Agreement only applies to procurement by governmental entities listed in Annex I to the Agreement, which does not apply to procurement by regional or local governments or authorities.

29. This latter Agreement was concluded on April 15, 1994, and entered into force on January 1, 1995. Under Article II, WTO provides the common institutional framework for the conduct of trade relations among Member States within the General Agreement of Tariffs and Trade 1994 (GATT 1994) as well as the multilateral and plurilateral trade agreements, understandings, and protocols which were annexed to the Marrakesh Agreement. The functions of the WTO, as set out in Article III, include cooperation with the International Monetary Fund and the International Bank for Reconstruction and Development in order to achieve greater coherence in global economic policy-making.

30. An analysis of the scope of the relevant provisions and issues under the GATT/WHO system is beyond the scope of this paper. Its particular concerns for the difficulties which developing countries may encounter under a fully liberalized world trade system were first evidenced in the various decisions which were adopted by the Trade Negotiating Committee on December 15, 1993. *See, e.g.*, the Decision on Measures in Favour of Least-Developed Countries, and the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Importing Developing Countries.

31. *See* GATT Procurement Agreement, *supra* note 27, art. 1(1). By Article 2(b) "procuring entity" means any governmental department, agency, organ or other unit, or any subdivision thereof, in the State that engages in procurement, or such other entities or enterprises, or categories thereof, as the State may determine. The State may provide for the exception of certain entities. *See also*, A. R. Carnegie, *The Commonwealth Caribbean Law Relating to Contracts, in* COMPARATIVE AND LEGAL STUDIES: LAW AND LEGAL SYSTEMS OF THE COMMONWEALTH CARIBBEAN STATES AND OTHER MEMBER STATES OF THE ORGANIZATION OF AMERICAN STATES 125, 129-30 (1986).

32. *See* GATT Procurement Agreement, *supra* note 27, art. 1(2)(e).

initial stages in the procurement proceeding.[33] The Model Law also applies to other specified procurement.[34]

The definition of "procurement" is expansive. It means the acquisition by any means (including purchase, rental, lease or hire-purchase) of goods or construction services. This includes services incidental to the supply of the goods or construction services, where the value of those incidental services does not exceed that of the goods or construction services themselves.[35]

The term "goods" is defined to include raw materials, products, equipment and other physical objects "of every kind and description," whether in solid, liquid or gaseous form, and electricity.[36] The term "construction" is defined as all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract.[37]

The Model Law on Procurement also provides for the promulgation of Procurement Regulations[38] for public accessibility to the text of the legislation;[39] for the qualification of suppliers and contractors;[40] for prequalification and contract processes and proceedings;[41] for the evaluation and comparison of tenders and award of contracts;[42] for procurement by methods other than by open tendering and by competitive negotiation;[43] and for review by the procuring entity;[44] or for administrative[45] or judicial review.[46]

Article III of this Model Law should be of particular interest to independent Caribbean countries. It provides that where the Model Law on Procurement is enacted by a state, that law will give way only to any treaty or agreement to which the enacting state is a

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33. *See id.* art. 1(3).
34. *See id.* art. 1(2)(b).
35. *See id.*
36. *Id.* art 2(c). The enacting State may include additional categories of goods.
37. *See id.* art. 2(d). In Article 2(f), "procurement contract" means a contract between the procuring entity and a supplier or contractor, resulting from procurement proceedings. *Id.*
38. *See id.* art. 4.
39. *See id.* art. 5.
40. *See id.* art. 6.
41. *See id.* arts. 8-11, 13-15, 21-30.
42. *See id.* arts. 12, 31-35.
43. *See id.* arts. 36-41.
44. *See id.* arts. 42, 43, 45.
45. *See id.* arts. 42, 44, 45.
46. *See id.* art. 47.

party.[47] It is submitted, however, that inasmuch as this Model will be enacted by ordinary legislation, it must also give way to the provisions of the constitutions of Caribbean states, since these constitutions embody their supreme or fundamental law.[48]

2.4. The Model Law on Arbitration

In its discussion on arbitration, the Guide states[49] that the most satisfactory method of settling disputes is usually by negotiation between the parties. It advises that, if the parties fail to settle their dispute through negotiations, they may wish to attempt to do so through conciliation before resorting to arbitral or judicial proceedings.[50]

The Guide further indicates that disputes which arise from works contracts are frequently settled through arbitration on the basis of an agreement by the parties to arbitrate. This usually takes the form of an arbitration clause included in the contract.[51] In this regard, the Guide advises that parties should specifically stipulate in their contract what disputes are to be settled by arbitration. It also advises them to select the type of arbitration that best suits their needs and to establish by agreement the procedural rules to govern their arbitral proceedings.[52] It further advises them to settle practical matters relating to the arbitral proceedings, including the number and appointment of arbitrators, the place of arbitration and the language of the proceedings.[53]

Legally, contracting parties have the right to make express stipulation for arbitration. They may even agree, in the absence of such

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47. It should be noted that "treaty or agreement" here may include an agreement between the State and an intergovernmental international financial institution. Where there is a federal government, it may also include an agreement between the federal and peripheral states, or between peripheral states.

48. This is mainly by express provision of the "Supreme Law Clause" contained in the written constitutions of Caribbean countries. The typical provision states: "This Constitution is supreme, and any other law which is inconsistent with this Constitution is void to the extent of the inconsistency." *See* ANT. & BARB. CONST. § 2; BAH. CONST. § 2; BELIZE CONST. § 2; JAM. CONST. § 2; ST. KITTS & NEVIS CONST. § 2; TRIN. & TOBAGO CONST. § 2; BARB. CONST. § 2; DOMINICA CONST. § 117; GREN. CONST. § 106; GUY. CONST. § 8; ST. LUCIA CONST. § 120; ST. VINCENT CONST. § 101. It has also been held, in the case Collymore v. Attorney General, 12 W.I.R. 5 (1967), that even in the absence of an express "Supreme Law Clause", the supremacy of these written constitutions may be implied.

49. *See supra* note 19, ¶¶ 10, 11.

50. It suggests that the parties may wish to provide for conciliation under the UNCITRAL Conciliation Rules. *See id.* ¶¶ 12-15.

51. *See id.* ¶ 24. It also invites the parties to compare the advantages and disadvantages of arbitral proceedings with those of judicial proceedings.

52. *See id.* ¶¶ 30-36. The suggestion is that they consider the use of the UNCITRAL Arbitration Rules.

53. *See id* ¶¶ 37-49.

express stipulation, to settle any dispute which arises from their contract by arbitration.[54] The growing practice in international trade contracts is for the parties to build arbitration into their contracts as the disputes resolution mechanism as an alternative to litigation.[55] It was in recognition of this practice and also out of a desire to standardize the principles in this area that UNCITRAL issued its Arbitration Rules.[56] The adoption of the Model Law on Arbitration and its recommendation by the United Nations marked another chapter in the endeavour by that body to standardize the rules for international commercial arbitration.[57]

III. THE CARIBBEAN PERSPECTIVE—THE PROCUREMENT REGIME

3.1. Introduction

Perhaps not surprisingly, Caribbean countries have not promulgated legislation to implement the UNCITRAL Model Law on Procurement. In part, this is reflective of the low priority which Caribbean governments, hard pressed to satisfy heightening expectations within their societies, often accord to matters with international dimensions. It also mirrors a caution which is engendered by the region's commercial legacy, the mercantile system, which is typified by chronic adverse trade imbalances and an inability to compete on the open market.

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54. Under the doctrine of party autonomy. *See* Arbitration Act, Cap. 110, § 3 (Barb.). These provisions facilitate adjudication by experts. It is also thought that arbitration allows international contractors some escape from the uncertainty of diverse national legal systems. *See* Jack Garvey & Totton Heffelfinger, *Towards Federalizing U.S. International Commercial Arbitration Law*, 25 INT'L LAW. 209 (1991). Under the doctrine of party autonomy.

55. *See* Jack Effron, *Alternatives to Litigation: Factors in Choosing*, 52 MOD. L.R. 480 (1989), and Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187 (1989). The authors indicate that alternative dispute resolution mechanisms are used in order to avoid protracted litigation and consequent high expenditure which can arise on these contracts. Such mechanisms may also take the form of provisions in the contract for contract adaptation, for the renegotiation of terms in the contract, in certain circumstances, as well as provisions for mediation, conciliation, or mini trial.

56. *See supra* note 52.

57. There have been initiatives by other bodies such as the International Chamber of Commerce (ICC). Often the rules afford some scope for the delocalization and subsequent increasing internationalization of arbitrations. The European Convention on International Commercial Arbitration 1962, used by many Western and Eastern European countries, requires arbitrators to "take account of the terms of contract and trade usages." *See* European Convention on International Commercial Arbitration, April 21, 1962, art. VII(1). The term "trade usages" refers to internationally accepted customs of the trade, a sort of *lex mercatoria* to standardize the rules of international commercial arbitration.

3.2. *Open Market Competition*

There are, of course, legislative provisions for government procurement in the Caribbean. It is doubtful, however, that they are designed to encourage the universal open market competition which the UNCITRAL Regime seeks to foster.[58] The legislative provisions do not expressly discourage open market competition either. The legal procurement rules of Barbados, which are contained in Part XII of The Financial Administration and Audit Rules, 1971,[59] illustrate this. These rules were considered in the case *C.O. Williams Construction Ltd. v. Blackman*.[60] In this case, the Privy Council held that a decision of the Cabinet of Barbados to award a contract for the construction of a phase of a highway to a company which had not submitted the lowest tender was reviewable in principle. In that case, the Privy Council describes the regulations as an elaborate code.

The essential aspects of the regulations were summarized by the Court.[61] Basically, they provide that whenever a government contract will involve expenditure in excess of twenty-five thousand dollars (Barbados currency) tenders are to be invited. The tenders are to be examined in the first instance by a Tenders Committee,[62] or where, as in the *C.O. Williams* case, funds borrowed from an international financial institution are expended, by a Special Tenders Committee.[63] The Court noted that the constitution of these committees is precisely defined by the Rules, as is the procedure which they are to follow in dealing with the tenders. It also noted that, throughout the

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58. Art. 8 of the UNCITRAL Model Law on Procurement, *supra* note 19, seeks to urge governments to legislate to permit suppliers or contractors to participate in procurement proceedings without regard to nationality. It allows for exceptions on grounds which may be specified in the legislation. Where such exceptions are made, the procuring entity is mandated to include, in the record of the procurement proceedings, a statement of the grounds and circumstances on which it relies to limit participation on the basis of nationality. The Model Law also provides that, where a procuring entity first solicits the participation of suppliers or contractors in procurement proceedings, it shall declare to them that they may participate in the procurement proceedings regardless of nationality. It may not later alter this declaration. Where, however, it decides to limit participation on the basis of nationality, it shall so declare to them. Additionally, Articles 15 and 27 buttress this provision by urging the use of the official language, or languages, of the enacting state, as well as a language customarily used in international trade, in the pre-qualification documents, solicitation documents and other documents for the solicitation of proposals, offers or quotations.

59. Financial Administration and Audit Act, Cap. 5, § 39 (1971) (Barb.) [hereinafter 1971 Rules].

60. [1995] 1 W.L.R. 102.

61. *See id.*

62. In accordance with the 1971 Rules, *supra* note 59, § 129(1), the members of the Tenders Committee are the Chief Supply Officer who, under section 130, is the *ex officio* Chairman, the Solicitor General or his nominee, and five other public officers appointed by the Minister.

63. The members are the members of the Tenders Committee and not more than five other persons appointed by the Director of Finance and Planning with the approval of the Minister.

procedural provisions, there are carefully devised safeguards designed to eliminate the possibility of corruption, to protect the public purse from exploitation and to ensure fairness to tenderers. To this extent, rule 27 provides, inter alia, for contracts to be drawn up in a form approved by the Solicitor General or his nominee.

It is apparent from the provisions of the 1971 Rules that tenders are to be invited[64] in the local press only. It is also clear that local tenderers are afforded pride of place. In this regard, rule 134(4) provides that "[s]ubject to rule 135, tenders shall be invited from members of the public by the publication in one or more newspapers in Barbados of a notice containing the particulars required to be stated by rule 137."

Additionally, rule 135 provides that

> [i]n the case of a contract for the supply of goods or materials or the undertaking of any works or services in respect of which the Committee is satisfied that there are not more than 7 contractors in Barbados capable of tendering for the supply of such goods or materials or the undertaking of such work or services to justify the publication of a notice required by rule 134, such notice need not be given; but in such case each of such contractors shall be invited by letter to submit a tender.

Further, where there is specific provision under the 1971 Rules for procurement outside of Barbados, that provision is in relation to goods and services of a specialized nature which are not otherwise available in Barbados.[65]

In 1983, the legislature of Jamaica passed The Contractor-General Act,[66] which created a new institutionalized framework aimed at ensuring the fair and meritorious award of government contracts. The legislation provides for the establishment of the office of Contractor-General as an independent authority which, in accordance with section 5(1), is not to be subject to the direction or control of any other person or authority. By virtue of section III, appointments to the office are to be made by the Governor-General, after consultation with the Prime Minister and the Leader of the Opposition.[67] Section

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64. *See* 1971 Rules, *supra* note 59, § 3(2). The Chief Supply Officer is authorized to issue invitations to tender, accept tenders, issue orders and enter into contracts for supplies on behalf of the government.

65. *See id.* R. 137A. Such goods and services may be procured otherwise than by invitation to tender.

66. The Contractor-General Act, No. 15 (1983) (Jam.).

67. In accordance with § 30A, when there is no Leader of the Opposition, the Governor-General is entitled to make the appointment in his own discretion, after consultation with the Prime Minister.

VI entitles the Contractor-General to hold office initially for a period of seven years and for five-year periods on reappointment.

By the provisions of section VII, he may be removed from office only by a resolution of each House of Parliament on grounds of inability to discharge the functions of the office, misbehaviour, or for contracting with the government without prior permission. Section eleven provides for the remuneration of the Contractor-General on the same terms as those which obtain for a Judge of the High Court.

Section III of the Act empowers the Contractor-General to monitor the award, as well as the implementation, of government contracts, in order to ensure that those contracts and licences incidental thereto are awarded on the basis of impartiality and merit, and without irregularity or impropriety. To this end, sections XVII and XVIII have entrusted to the office wide investigatory powers.

While, however, the provisions of The Contractor-General Act are innovative, in a Caribbean context, in their attempt to secure the general integrity of the award of government contracts, the Act does not make specific provision for government procurement outside of the jurisdiction.

3.3. Administrative Review Procedure

The open market regime which is encouraged by the UNCITRAL Model Law on Procurement is supported by provisions which require flexible hierarchical administrative review redress procedures. These procedures are to be activated and followed where any supplier or contractor suffers loss or injury as a result of the breach of a duty which is imposed on the procuring entity under the said Model Law.[68] The administrative review procedures are designed to permit the informal resolution of disputes by mutual agreement between the parties, as far as this is possible. In this regard, Article XLIII provides for review by the procuring entity or by the approving authority, in the first instance, where the procurement contract has not yet entered into force. Article XLIV provides for the submission of a complaint to administrative review by a body specified in the Model Law.

The flexibility of these provisions is exemplified in the note which states that where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system, the enacting state may omit Article XLIV and provide only

68. *See supra* note 58, arts. 42-47. Note, however, that by Article 42(2), some activities under this Model Law are exempted from the review provisions.

for judicial review.[69] A feature of the administrative review procedures which may commend itself to enacting states in the Caribbean is the provision which requires the statement of reasons for decisions which are to be made by a review tribunal.[70]

The common law which governs this area in all Caribbean countries, except Barbados, is in an unsettled and unsatisfactory state.[71] In Barbados, the opportunity might be taken to rethink the restrictions which have been provided by the legislation which has imposed a conditional duty to state reasons, while exempting important bodies from the requirement.[72] The point must be made, however, that the administrative review procedures which are set out in the Model Law will have no legal status in Commonwealth Caribbean countries unless they are enacted by legislation.

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69. Art. 47 provides for judicial review by the specified court, or courts, of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time limit. There is also an additional note which permits states enacting the Model Law to incorporate the articles on review without change, or with only such minimal changes as are necessary to meet particular important needs. It states, however, that because of constitutional or other considerations, states might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

70. *See, e.g.*, Rule 43(4)(a).

71. At common law, there is no general duty to state reasons for such decisions. There are, however, exceptions which have overtaken the general rule. Assertions have been made recently that fairness or justice require that administrative tribunals should state reasons for their decisions. *See, e.g.*, R. v. Civil Serv. Appeal Bd., 4 All E.R. 310 (1991), and R. v. Home Secretary, 1 A.C. 531 (1994), 3 All E.R. 92 (1993). *Cf.* R. v. Higher Educ. Funding Council, 1 W.L.R. 242 (1994). *See also* J. Herberg, *The Right to Reasons: Palm Trees in Retreat*, [1991] P.L. 340; R. M. Antoine, *A New Look at Reasons-One Step Forward-Two Steps Backward*, 44 ADMIN. L. REV. 443 (1992); P. P. Craig, *Reasons and Administrative Justice*, 110 L.Q. REV. 12 (1994); T. R. S. Allan, *Requiring Reasons for Reasons of Fairness and Reasonableness*, 53 CAMBRIDGE L.J. 207 (1993); P.P. Craig, *The Common Law, Reasons and Administrative Justice*, 53 CAMBRIDGE L.J. 282 (1994). Stephen Cragg & Diamond Ashiagbor, *A Duty to Give Reasons*, 144 NEW L.J. 291 (1994). For a perspective on the stating of reasons in the context of an International Convention, to wit, the Convention on the Settlement of International Disputes between States and Nationals of other States, 1965, [in Art. 48(3), the words, "the award . . . shall state the reasons upon which it is based" and in Art. 52(1), the words "failure to state reasons"] see David D. Caron, *Reputation and Reality in ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.-FOREIGN INV. L.J. 21, 42-45.

72. *See* Administrative Justice Act of Barbados, 1980, No. 63, sched. 1 (Barb.). By the provisions of § 14(1) of the Act, reasons for an administrative decision must be requested within fourteen (14) days of the date on which the decision was made. Section 14(2) provides that the request must be in writing, but that, where there is an oral hearing, the request may be made orally, before the conclusion of the oral proceedings. Section 13 exempts from the duty to state reasons any decision relating to a disciplinary matter which is made by the Judicial and Legal Services Commission, the Public Service Commission, the Police Service Commission, the Statutory Boards Service Commission and any authority acting under the Defense Act. The section also exempts from the duty any decision which is made by a Minister or government official under the Immigration Act, or any decision which relates to an order which is made under the Expulsion of Undesirables Act.

3.4. *Pre-contract Considerations*

(a) Pre-contract Studies

This is an area which should be of particular importance to Caribbean governments in their commercial contracting. The Guide indicates[73] that it is necessary for a purchaser who is contemplating investment in industrial works to acquire and analyse a large amount of technical, commercial, financial and other information in order to be in a position to decide whether to proceed with the investment, and in order to determine the nature and scope of the works. This information is to be acquired and analysed in "pre-contract studies" which are, in most instances, carried out by or on behalf of the purchaser.

The Guide further indicates[74] that in some countries, and in particular those countries which are in the process of industrialization, pre-contract studies may also constitute an element of the overall planning process to the extent that they enable the authorities to compare and evaluate various potential industrial projects in order to determine national investment priorities. It therefore recommends that contracting parties should undertake pre-contract studies,[75] on the ground that these studies may assist the purchaser to decide whether to proceed with an industrial works project, or to determine the nature and scope of the works.[76] It further suggests that the pre-contract studies should not be conducted by a firm which may be engaged in any manner as a contractor to construct the works because of the potential which this holds for a conflict of interest.[77]

(b) Negotiating the Contract

The Guide indicates[78] that, in the course of negotiating, the purchaser should contact one or more enterprises which he judges to be capable of constructing the works and which offer the best terms. It further suggests that it may be advisable for the negotiating parties to agree upon a basic framework for the negotiations, in order to

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73. *See* the Guide, *supra* note 19, at 9.

74. *See id.*

75. According to the Guide, *supra* note 19, pre-contract studies may include opportunity studies, preliminary feasibility studies, feasibility studies and detailed studies. *See id.* ¶¶ 6-12. *See also* R. B. SUNSHINE, NEGOTIATING FOR INTERNATIONAL DEVELOPMENT: A PRACTITIONER'S HANDBOOK (1990).

76. *See* the Guide, *supra* note 19, ¶¶ 1-5.

77. *See id.* ¶¶ 14, 15. It indicates, however, that in some cases it may be advantageous to the purchaser for the firm which performs the pre-contract studies to be engaged subsequently to supply the design, or to serve as the consulting engineer in connection with the construction.

78. *See id.* ¶ 44.

agree on preliminary matters and procedures, and in order to provide for matters which, in their opinion, are important.

It has been pointed out,[79] however, that, notwithstanding their increased role in international commercial contracting, Commonwealth Caribbean governments do not usually afford adequate consideration to the legal aspects of their agreements. It has also been pointed out[80] that it is apparent that some of the terms which are contained in these contracts are not closely studied or negotiated, and that government legal advisers complain that they are usually brought into the process at a late stage, if at all, and usually only after the contract is signed and disputes arise.[81] The fact, however, is that early legal involvement may forestall many disputes and eliminate the costs which protracted disputes may occasion. It has therefore been suggested that governments should permit their legal advisers to afford close scrutiny to contracts, particularly where those contracts are presented by suppliers or contractors for signature.[82]

An element of adhesion?

There appears to be some basis for the view that there may be an adhesion connection in international contracts between governments and international commercial concerns in instances where there is an absence of the element of factual bargaining because the parties are not of relatively equal bargaining strength.[83] There is a dictum from a case decided in the United States of America, where the court, in relation to a statutory policy in insurance matters, stated that "[i]f any trend is discernible in these cases, it is that of a forum to apply its own law to adhesion contracts of insurance entered into by its residents."[84]

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79. *See* Hugh A. Rawlins, Some Choice of Law and Jurisdiction Problems in Relation to Government International Commercial Contracts: A Commonwealth Caribbean Perspective 15 (1991) (unpublished LL.M. thesis, University of the West Indies).

80. *See id.*

81. *See* WILLIAM F. FOX JR., INTERNATIONAL COMMERCIAL AGREEMENTS at vii (1988). He indicates that in the United States, lawyers are almost always involved in these matters from the very initial stages to completion of agreement.

82. *See* Rawlins, *supra* note 79, at 15.

83. *See generally*, Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory And A Suggestion*, 15 ANGLO-AM. L. REV. 255 (1986). In this article, the author surveys the origins and development of these contracts and reviews and analyses the recent cases, articles and legislation. He cites the case Schroeder Music Co. v. Macaulay, 3 All E.R. 616 (1974), as an illustrative authority for contracts of adhesion.

84. *See* Zogg v. Pennsylvania Mut. Life Ins. Co., 276 F.2d 861, 864 (2d Cir. 1960). *See also* Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

Further, the 1980 European Economic Community (ECC) Convention recognized the need for protection against adhesion contracts. This was, however, in relation to consumers contracts.[85] Additional support may also be found in an assertion which is made by Juenger. He indicates that the drafters of the Second Restatement recognized the problem of disparity in bargaining strength. Additionally, he suggests that they recognized, as did the drafters of the 1980 EEC Convention, that complete freedom to choose the applicable law would pervert the principle of party autonomy in situations where one party had no real freedom of choice. Additionally, according to section 187, statement (b), of the Second Restatement, the one-sided use of bargaining power to dictate the applicable law may vitiate consent.[86]

Curtis also supports this view when he states that "economically, developing states are at a disadvantage. They execute economic development agreements because they need foreign expertise and capital."[87] He cautions, however, that this does not mean that the agreements are unreasonable, since the governments of developing states can employ outside advisers, or renegotiate the agreement, thereby shifting the balance in favour of the government, and by these means the elements of adhesion are squeezed out of these agreements.[88] He admits, however, that these elements may not have been squeezed out of all agreements. In his opinion, the test by which this is to be determined is "whether an agreement is reasonable and fairly negotiated at arms length."[89]

In the same vein, Weintraub,[90] who advocates the replacement of the doctrine of party autonomy with exceptions with a rule of validation, contends that there is a strong claim for the application of the invalidating rule to protect a party to a trans-jurisdictional agreement who is in a markedly inferior bargaining position.[91]

The problem is, however, that the legal principles which are applied by the courts may not give effect to these enlightened ideas

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85. EEC Convention, Art. 5. The provision relates to the supply of goods, services and credit for purposes other than the consumer's trade or profession.

86. *See* Friedrich Juenger, *The European Convention on The Law Applicable to Contractual Obligations: Some Critical Observations*, 22 VA. J. INT'L L. 123, 129 (1982).

87. *See* Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317, 360 (1989).

88. *See id.*

89. *See id.*

90. *See* Russel J. Weintraub, *How to Choose Law for Contracts and How Not to: The EEC Convention*, 17 TEX. INT'L L.J. 155, 158. The author suggests that the parties' choice should only be given effect on a validating rule basis, if there is no good reason to apply the invalidating rule of another jurisdiction.

91. *See id.*

for a very long time. They may not, therefore, constitute a practical substitute for the careful and knowledgeable negotiating of government contracts. It is, therefore, in the interests of Caribbean governments to ascertain that their international contracts are properly negotiated by skilled and knowledgeable negotiators.

(c) Drafting the Contract

The actual drafting of the contractual provisions of international commercial contracts is another area which requires the exercise of great care and attention on the part of Caribbean governments. If the persons who draft these contracts are to be effective, they must be brought into the process from the initial stages. It is necessary that these persons should be of sound knowledge in relation to the subject matter of the contracts which they draft. They should also be keenly aware of the legal implications of the contractual provisions which are required. It is suggested that the multi-jurisdictional nature of these contracts requires that during the process, particular attention should be focussed on the principles of private international law. This point is very succinctly made in the Guide, which indicates[92] that, in the drawing up of these contracts, the parties should take into account, inter alia, the law applicable to the contract and the different types of relevant mandatory legal rules of an administrative, fiscal or other public nature in the country of each party.

(d) Choice of Law

The Guide urges the parties to international commercial contracts to choose the legal rules which are to govern their mutual contractual obligations in order to limit uncertainty by providing in the choice-of-law clause that the law of a particular country is to govern their contract.[93]

It is trite law that the parties to a government international commercial contract may expressly stipulate the governing law of the contract. Such express choice will usually be given effect by a court

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92. *See* the Guide, *supra* note 19, at 43.

93. *See id.* ch. 28, ¶¶ 1-4, 6. Caribbean governments sometimes do not ensure that there are express governing law clauses in very important development contracts. There is, for example, no express choice of law clause in the 1967 agreement for the mining and processing of bauxite, made between the government of Jamaica and Revere Copper and Brass Company Incorporated, a United States company. The case *Revere Jamaica Aluminum Ltd. v. Attorney General*, 26 W.I.R. 486 (1977), arose out of a dispute between these parties over the imposition of certain levies on the company, contrary to tax stabilization guarantees in the agreement. Although the conflict of laws point is not clearly reflected in the judgment, Jamaican law was applied in the determination of the dispute.

on the basis of the doctrine of party autonomy.[94] An express choice of law lends a degree of certainty and predictability to the *lex causae.* This is very desirable for commercial transactions, since it will almost always obviate the need for protracted litigation, and resultant expenditure, merely to determine preliminary issues such as the *lex causae.*

An express stipulation will not, however, avert uncertainty or foster predictability in all circumstances, since the courts do not always accept the express choice of the parties. There are instances in which a court may still impute the applicable law, even in the face of an express choice of law provision, on the basis of the jurisdiction with which the contract is most closely connected.[95] It may also find that the chosen law is contrary to public policy,[96] or that it is not bona fide or legal,[97] or that it is a "floating non-law."[98]

What must be emphasized, however, is the necessity for great care to be exercised in the drafting of choice of law clauses, in order to eliminate ambiguity and other difficulties which may be created by provisions which are cumbersome, unclear or imprecise. Consider, for example, the following provision: "The interpretation of this Agreement shall be governed and construed in accordance with the laws of the co-operative Republic of Guyana in force from time to time."[99] The utility of the words "in force from time to time" is doubtful. The provision as a whole does not provide for the law which governs the formation, validity or discharge of the contract. The provision could have simply provided that "[a]ll aspects of this agreement shall be governed by the laws of the Co-operative Republic of Guyana."

Consider also the following provision, drafted in the context of arbitration, which states in part:

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94. The conceptual foundation which underlies this doctrine is derived from the classical theory of a contract as a bargain freely entered—the basic idea of freedom of contract. In the Caribbean, the acceptance of this principle is underlined by the statement of Graham-Perkins, J., in *National Chemsearch Corp. v. Davidson,* 9 J.L.R. 468, 471H (1966), that "[t]he law of this country is committed to the principle of the unfettered freedom of contract and where the parties to a contract have therein expressed an intention that a particular legal system shall govern their rights and obligations that intention almost invariably must prevail. *See also* Young & Sons Ltd. v. Chase Manhattan Bank N.A., 15 Barb. L. Rep. 271, 273 (1980).

95. *See* The Fehmarn, 1 W.L.R. 159, 162 (1958) (Eng. C.A.) (Lord Denning).

96. *See* Tzortzis v. Monark Line A/b, 1 W.L.R. 406, 411 (1968) (Lord Denning). See a similar statement by Lord Wright in Vita Food Prods., Inc. v. Unus Shipping Co., [1939] App. Cas. 277, 290 (Eng. P.C.). *See also* Southern Int'l Sales Co. v. Amf, Inc., 410 F. Supp. 1339 (S.D.N.Y. 1976).

97. *See* Golden Acres Ltd. v. Queensland Estates Property Ltd., Queensl. L. Rep. 378 (1969).

98. *See* The Amar, 2 Lloyd's Rep. 450, 455 (1980) (Q.B. Eng.) (Megaw L.J.).

99. Guyana Draft Mining Agreement of 1988, art. 46.

> The Tribunal will apply the law of the (country, including its rules on conflict of laws and its treaties and other rules of international law as may be applicable), excluding, however any enactment passed or brought into force before or after the date of this agreement which is inconsistent with or contrary to the express terms thereof.[100]

This provision is unnecessarily complex. It is also a recipe for legal difficulties. For example, the exclusion provision of this clause is a stabilization provision which purports to exclude the application of past legislation which may be inconsistent with the terms of the agreement, whether that legislation was enacted prior to or after the agreement. Additionally, since its terms are in relation to legislation "passed or brought into effect before or after the date" of the agreement, what is the status of any relevant legislation which is enacted on the date of the agreement? An even more fundamental consideration, however, is the question of the validity of this provision, in that it seeks to preclude even provisions of the country's constitution[101] which are contrary to the terms of the agreement.

Similar difficulties are contained in a Draft Registrar's Agreement[102] between a Caribbean government and a consortium of European financiers. It states, inter alia: "This Agreement shall be governed by, and construed in accordance with, English Law except with respect to its authorisation and execution by or on behalf of (Country)." The Agreement, however, does not stipulate the law by which that "authorisation and execution" is to be governed.

3.5. Choice of Jurisdiction.

The failure of the parties to stipulate jurisdiction in an international commercial contract may occasion litigation for its determination. This, in turn, may occasion frustration, inconvenience and the

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100. Extracted from Main Document (Part 2 at 4) of contract clauses for week 1 of Workshop on The Negotiation of International Commercial Contracts, held at the Faculty of Law of the University of the West Indies, June to July, 1987. Clauses extracted from *Commonwealth Caribbean Government Agreements*, prepared by Dr. Anthony Carty, as he then was, of the University of Glasgow.

101. The Constitutions of all of the Caribbean countries are written. They are *enactments* which were promulgated by Statutory Instruments of the United Kingdom Parliament, or, as in the case of the Republican Constitutions of Guyana and Trinidad and Tobago, by acts of the Parliaments of these countries. *See, e.g.*, The Barbados Constitution Order, S.I. 1966, No. 1455; The Commonwealth of Dominica Constitution Order, S.I. 1978, No. 1027; The Grenada Constitution Order, S.I. 1973, No. 2157; The Jamaica Constitution Order, S.I. 1962, No. 1550; The St. Christopher and Nevis Constitution Order, S.I. 1983, No. 811; The St. Lucia Constitution Order, S.I. 1978, No. 1901; The St. Vincent and the Grenadines Constitution Order, S.I. 1979, No. 916; The Constitution of the Co-operative Republic of Guyana, No. 2 (1980); and the Constitution of the Republic of Trinidad and Tobago, No. 4 (1976).

102. This Registrar's Agreement is related to a Placing Loan Agreement.

expenditure of scarce resources. The consequences which flow from this can be dysfunctional when it is considered that development is the purpose for which Caribbean governments enter into these agreements. Yet jurisdiction is not always stipulated in government commercial contracts in the Caribbean.

On the other hand, there are instances in which jurisdiction is stipulated but the provisions are so inherently complicated, both in the manner in which they are drafted and in their content, that they can potentially create grave legal difficulties. This is typified, for example, is the jurisdiction provision in a facility agreement between a Commonwealth Caribbean government and a European private company which was the agent of the government for the purpose of raising a loan on the European financial market. The first sub-clause of the jurisdiction clause states, in part:

> Each of the parties hereto irrevocably agrees . . . that the courts of England shall have jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with this agreement and, for such purposes, irrevocably submits to the jurisdiction of such courts.

The language of this provision is archaic, inelegant and unnecessarily verbose. What it signifies, in substance, is consent by the government to be bound by the jurisdiction of English courts. In the second sub-clause of the clause, however, the government has also agreed to submit to the jurisdiction of its own courts, as well as to the jurisdiction of the courts of New York. That sub-clause states, in part that "[t]he Borrower irrevocably agrees that the courts of the State of New York . . . and the courts of (host country) shall have jurisdiction to . . . settle any disputes, which may arise out of . . . this agreement and . . . irrevocably submits to the jurisdiction of such courts."[103]

It is noteworthy that there is legislation in the United States which, while generally precluding states from pleading sovereign immunity in relation to international commercial transactions, permits States to plead that immunity specifically in relation to such transactions which are effected within the United States "and having substantial contact with the United States."[104] Now, the agreement which contains this sub-clause was not made in New York. It does not have any connection with that State. If therefore the lenders opt to pursue the litigation of any dispute on that agreement in the State of New York, the State party to the agreement may be unable to avail itself of the protection which the legislative provision has sought to

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103. Most of the words which have been omitted are superfluous.

104. *See* The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(e).

afford. However, this may not even arise for consideration in light of sub-clause seven of the same jurisdiction clause which states, in part: "To the extent that the Borrower may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment . . . or other legal process . . . the borrower hereby irrevocably agrees not to claim and . . . irrevocably waives such immunity".

The assertion has been made[105] that, by insisting on the inclusion of clauses which provide for waiver of immunity from jurisdiction, attachment and execution in agreements with foreign States or states agencies, U.S. lenders are seeking the security of having disputes litigated in a forum convenient to the lender. It has also been contended[106] that this is done in order to have disputes litigated in an atmosphere divorced from considerations of sovereignty and the uncertainties of litigation against a sovereign in its own court. The question of waiver is not without difficulty. It is against this background that the third sub-clause of the jurisdiction provision is considered. By this sub-clause, the government agrees to surrender present rights, as well as rights which it may acquire in the future, to object to a forum specified in the agreement, or to plead forum non conveniens.[107] It provides:

> The Borrower irrevocably waives any objection which it might now or hereafter have to the courts referred to . . . being nominated as the forum to hear . . . any . . . action . . . which may arise out of . . . this agreement and agrees not to claim that any such court is not a convenient or appropriate forum.

The validity of sub-clause five of the said jurisdiction clause is also questionable. It is certainly inimical to the interest of the State party to the agreement to the extent that it permits concurrent proceedings. Sub-clause five states:

> The submission to the jurisdiction of the courts referred to . . . shall not . . . limit the right of (the private parties to the agreement) to take proceedings against the Borrower in any other court of competent jurisdiction, nor shall the taking of proceedings in any . . . . jurisdiction preclude the taking of proceedings in any other jurisdiction, whether concurrently or not.

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105. *See* George Kahale III, *State Loan Transactions: Foreign Law Restrictions On Waivers of Immunity and Submission to Jurisdiction*, 37 BUS. LAW. 1549 (1982). The author states that with superior bargaining power, the lender often gets what it wishes in these agreements.

106. *See id.*

107. A doctrine which itself gives rise to difficulties. *See, e.g.*, Aarif Barma & David Elwin, *Forum non Conveniens: Where do we go from here?*, 101 L.Q. REV. 48 (1985).

The validity of this foreign jurisdiction provision is a matter for the proper law of the contract of which it forms a part.[108] The effect of the clause is a matter for the *lex fori*.[109] The contract which contains this clause is expressly governed by English law. According to English conflict of laws principles, where exclusive jurisdiction in a matter is given to a foreign court, and where proceedings on that matter are brought in England, the English court will stay the action unless the plaintiff proves that it is just and proper to allow the action to continue.[110]

The difficulty with the foregoing jurisdiction clause is that it selects more than one forum, including English courts. The agreement to concurrent proceedings is a complicating factor. If the government party initiates proceedings on a dispute in its own courts, the private contractors can prosecute the same dispute in England and New York at the same time. The possible impact of this on the resources of the government party is obvious. The government may not be able to attend to the multi-jurisdictional proceedings adequately.

Additionally, judgments may be given for the government party in one forum, and for a private contractor in another. With its scope for a wide selection, this provision allows forum shopping, which can work to the disadvantage of the government party. In short, the government party may expend much more than any benefit which it derives from this agreement if a dispute on it leads to litigation. Commonwealth Caribbean governments would be best advised to circumscribe jurisdiction choices within the narrowest possible limits. Ideally, of course, it would be convenient and economical to expressly stipulate the local forum.

IV. ARBITRATION

4.1. Overview

The tradition of resolving disputes by way of litigation in the courts of law rather than by arbitration, is very deeply rooted in the legal culture of Caribbean countries. It is not, therefore, surprising that, until recently, the contractual practice of Commonwealth Caribbean governments left the resolution of disputes to the ordinary court litigation process. This practice is, however, now rendered

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108. *See* Hamlyn v. Talisker Distillery, 1894 App. Cas. 202; *see also* Spurrier v. La Cloche, 1902 App. Cas. 446 (P.C.).

109. *See* J. H. C. MORRIS, THE CONFLICT OF LAWS 99 (3d ed. 1984).

110. *See id.* at 88, 99.

anachronistic as the trading world embraces international commercial arbitration out of a conviction that the process inspires confidence, and also convinced that its convenience, speed and economy render it desirable.[111]

There are legal commentators, however, who doubt that there are substantial advantages to be gained from arbitration. DeVries, for example, contends[112] that international arbitration has now become the focus of the same adversarial pattern of litigation which is the norm in municipal courts. He further contends that the price for "legal neutrality" of international arbitration is an increase in the complexity of the process, delays and the expense of the proceedings.[113] In conclusion, he states[114] that, notwithstanding this, international arbitration is legally effective as a mode of settlement for business disputes, primarily because arbitral awards are more readily enforceable than foreign judgments, and that they are less subject to judicial control by appeal or review. He urges, however, that the process should redeem its promise to create a workable uniformity of arbitration laws and procedures.

On the other hand, Sornarajah contends[115] that Third World countries should approach the Model Law on Arbitration with caution, since its norms are based on the existing traditions of developed States and may not, therefore, be sufficiently neutral. He admits, however, that many of its procedural rules are "eminently acceptable."[116]

In the Caribbean, the initiative which has been taken by the Caribbean Law Institute (CLI) to introduce the Model Law on Arbitration on a Regional Rules basis has been painstaking, cautious and diligent. The project commenced in September of 1988 in response to

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111. *See* Sornarajah, *supra* note 2, at 9-15. The author notes, however, that Third World attitudes are becoming more favorable towards international arbitration, notwithstanding that there is some ambivalence, and in some instances even hostility, evidenced by the enactment of mandatory rules which seek to limit its scope.

112. *See* Henry P. deVries, *International Commercial Arbitration: A Transnational View*, 1 J. INT'L ARB. 7, 11-12 (1984). *See also* Georges R. Delaume, *Reflections on the Effectiveness of International Arbitral Awards*, 12 J. INT'L ARB. 5 (1995).

113. *See* deVries, *supra* note 112. *See also* Pierre A. Karrer, *Arbitration Saves Costs: Poker and Hide and Seek*, 3 J. INT'L ARB. 35 (1986). The writer contends that the actual costs of arbitration are higher than normal litigation in many respects, but that if care is exercised in selecting the type of arbitration, it can be more advantageous. L. Nurick, *Costs in International Arbitration*, 7 ICSID REV.-FOREIGN INV. L.J. 37 (1992), indicates that it is difficult to determine the relative costs of international arbitration, since there has been little analysis on this and since arbitration decisions contain a dearth of material on this aspect because arbitrators do not usually discuss in detail the reasoning for their decisions on costs. *See also* Schmitthoff & Adams, *supra* note 16, at 646-648; HEINRICH KRONSTEIN, THE LAW OF INTERNATIONAL CARTELS 374 (1973).

114. *See* deVries, *supra* note 112, at 19.

115. *See id.*

116. *See id.* at 9.

requests, essentially from legal and commercial sources in the Commonwealth Caribbean.[117] The project has been undertaken out of a realization that at this juncture it is desirable that Caribbean countries should embrace international arbitration. The alternative may very well be alienation from the mainstream of international business and investment.

In its initiative, the CLI, through its Executive Directors[118] and its Arbitration Advisory Committee,[119] has utilized the services of knowledgeable and competent draftsmen to draw up separate bills for municipal and international arbitration.[120] P. D. O'Neill Jr.[121] suggests that some difficulties in the process of international arbitration may be dealt with by informed draftsmanship at the inception.[122] Caribbean concerns are well served by the CLI initiative. However, it may be useful to consider a few issues which, although they are mainly of a theoretical nature, will arise for consideration from time to time.

4.2. Internationalization

The Guide suggests[123] that some difficulties may arise if the parties choose the general principles of law, or the principles common to some legal systems, as the law applicable to their contract, instead of the law of a particular country. This is buttressed by the UNCITRAL Model Law on International Commercial Arbitration which provides[124] that a tribunal should apply the law chosen by the

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117. *See International Commercial Arbitration Bill*, C.L.I., 1991, at 1-7, under the rubric *"The Arbitration Project."* In the absence of legislation for international commercial arbitration, the aim of CLI is to have Caribbean countries adopt the UNCITRAL Model Law for Arbitration for international arbitrations and to adopt the UNCITRAL Arbitration Rules to supplement the Model Law. The Rules deal mainly with procedural matters. The ultimate aim of the CLI is the setting up of a Caribbean Arbitration Tribunal.

118. Professor A. Ralph Carnegie, Professor of Law at the University of the West Indies (UWI), is the Executive Director of the Caribbean Law Institute Centre at the UWI. Professor Elwin Griffith, Professor of Law at the Florida State University College Of Law is the Executive Director of the Caribbean Law Institute at that University.

119. Its membership includes former Caribbean judges with experience in arbitration, attorneys-at-law with similar experience, from within and without the Caribbean, and members of the Caribbean business community.

120. In their legislation, Caribbean countries have not, to date, made a distinction between domestic and international arbitration. The various Arbitration Acts are mainly for the regulation of domestic arbitration.

121. *See* Philip D. O'Neill, *American Legal Developments in Commercial Arbitration Involving Foreign States and State Enterprises*, 6 J. INT'L ARB. 117 (1989).

122. *See also* Stephen R. Bond, *How to Draft an Arbitration Clause*, 6 J. INT'L ARB. 65 (1989).

123. *See* the Guide, *supra* note 19, at 299.

124. UNCITRAL Model Law on Int'l Commercial Arb., Art. 28 (U.N. Comm'n on Int'l Trade Law, 1985).

parties and, where none is chosen, apply the law determined by the conflict of laws rules which it considers applicable.[125]

In addition, however, it allows tribunals to take into account trade usages.[126] This mirrors a phenomenon, which should be noted by Caribbean governments, that international tribunals very often afford primacy to public international law principles,[127] and even ignore constitutional law principles which are so fundamental to Caribbean countries.[128] This 'internationalization' approach comes out of the widely held view that international arbitrations are governed by a kind of *lex mercatoria*.[129]

Academicians have urged the internationalization of commercial contracts which contain foreign elements.[130] Indeed, there have been clauses in some of these contracts which specifically stipulate that the contract is to be governed by principles of public international law.

Provisions for compulsory arbitration lend themselves to the application of public international law principles. Under these provisions, jurisdiction may be assumed by a tribunal which is independent of a specific forum. It may even apply public international law principles to override municipal conflict of laws rules, notwithstanding that a municipal law system is stipulated[131] or is found to

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125. The European Convention on International Commercial Arbitration, art. VIII (i), 1962, makes similar provision.

126. *See id.*

127. The government of Jamaica refused to arbitrate disputes which arose from its contracts with Alcoa, Kaiser and Reynolds Bauxite mining companies before the International Centre for the Settlement of Investment Disputes. Its agreements with these companies provided for arbitration. *See* Revere Copper v. Opic, 56 I.L.R. 258 (1978) [hereinafter Revere Arbitration].

128. This is reflected, for example, in Revere Arbitration, *id.* The case was brought before the tribunal on a claim by the corporation for compensation from its insurers for losses incurred as a result of the imposition of a levy and the disruption which it caused to the enterprise. The main issue which arose for determination was whether a 1974 enactment, which increased the royalties payable on bauxite leases, was in breach of the 1967 agreement. The tribunal applied principles of public international law. In relation to the governing law by which this issue was to be determined, it stated:

> In the majority view, the law of Jamaica is not the only law to be considered by this tribunal. Although the agreement was silent as to the applicable law, we accept Jamaican law for all ordinary purposes of the Agreement, but we do not consider that its applicability for some purposes precludes the application of principles of public international law which govern the responsibility of states for injuries to aliens.

Id. at 288.

129. *See, e.g.*, Campbell McLachlan, *The New Hague Sales Convention and the Limits of The Choice of Law Process*, 102 L.Q. REV. 591, 617 (1986).

130. *See, e.g.*, McLachlan, *supra* note 129; *see also* Baxter, *International Conflict of Laws and International Business*, 34 INT'L CONFLICT L.Q. 538 (1985); and Paasivirta, *Internationalization and Stabilization of Contracts Versus State Sovereignty*, 60 B.Y.B. INT'L L. 315 (1989).

131. This is evidenced, for example, in Calvo Clause provisions.

be the governing law.[132] Caribbean courts, however, apply purely municipal contract law or private international law principles to these disputes. There are no written decisions, of which this present writer is aware, in which a Caribbean court applied public international law as the governing law.

Caribbean countries may find that the use of public international law rules for the adjudication of disputes which arise out of their commercial contracts is not in their best interests, particularly because these principles are not always certain. This difficulty was well stated by Stephenson, L.J., in *Trendtex Trading Corp. v. Central Bank of Nigeria*[133] in relation to the question: when should a court accept or assent to alleged new rules of international conduct? The grave difficulty which the finding of a new public international law principle may create was stated as follows:

> But rules of international law, whether they be part of our law or a source of our law, must be in some sense 'proved' .... How do you prove that the gestation of a new rule is over and that it has come to birth? Or that an old rule has grown and developed into a new norm?[134]

4.3. Constitutional Aspects

Two issues are considered under this aspect. The first issue relates to the implication of arbitration provisions for the jurisdiction of Caribbean courts, while the second is concerned with the impact of arbitration provisions upon the sovereignty which is conferred upon Caribbean countries by their written Constitutions.[135]

(a) Implications for Courts' Jurisdiction

The European tradition is to accept the decisions of arbitrations as final. In the Caribbean, however, there is a tradition of litigation in municipal courts, rather than by arbitration. Where there is an arbitration, the decision of the tribunal is invariably appealed to a municipal court.

Additionally, Commonwealth Caribbean judges, ever conscious of the constitutional law which supersedes all other law,[136] have on

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132. This is reflected, for example, in the approach of the tribunal in the Revere Arbitration decision, *supra* note 127.

133. 1 All E.R. 881 (1977).

134. *See id.* at 902-03.

135. *See* BARB. CONST. § 48(1); *see also* BAH. CONST. § 52; BELIZE CONST. § 68; DOMINICA CONST. § 41; GREN. CONST. § 38; GUY. CONST. § 65; JAM. CONST. § 48(1); ST. KITTS & NEVIS CONST. § 37(1); ST. LUCIA CONST. § 40; ST. VINCENT CONST. § 37; and TRIN. & TOBAGO CONST. § 53.

136. *See supra* note 48.

some occasions ignored arbitration provisions and assumed jurisdiction in a matter. This is evidenced, for example, in the case *Hadlinston Construction Co. v. Casilla Development Ltd.*[137] This case was brought as a result of a dispute on a building contract. The matter was instituted in the Supreme Court of Jamaica, rather than before the arbitration tribunal for which the contract provided. The court assumed jurisdiction and determined the matter. The reason of the court was expressed thus: "But as the jurisdiction of the Supreme Court cannot be ousted in a dispute between parties in Jamaica a reference to the court has been made and, therefore, it must wrestle with the complaint which has been put in issue."[138]

This approach is contrary to the suggestion made in the Guide[139] that it is desirable that the arbitration agreement should impose an obligation upon the parties to implement arbitration decisions. It also suggests that where the parties wish their disputes to be settled in judicial proceedings it may be advisable for the contract to contain an exclusive jurisdiction clause to reduce the uncertainties connected with judicial settlement. It hastens to add, however, that the validity and effect of the exclusive jurisdiction clause should be considered in the light of the law of the country of the selected court, as well as the law of the countries of the two parties.[140]

The flexibility which this suggests can, in some measure, reassure private contractors and thereby inspire the confidence which is so vitally important to the growth of commercial endeavours. This will not, however, override the fundamental legal principle that, in the context of Caribbean constitutional law, the jurisdiction of the High Court, upon which the constitution has conferred original jurisdiction, cannot be ousted.[141]

This approach by Commonwealth Caribbean courts is also aided by the absence of legislation for international commercial arbitration,[142] as well as by the purport of Caribbean legislation for domestic arbitration. These latter statutes, which have sometimes impacted international commercial arbitrations, are mainly adaptations of The

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137. Unreported judgment of March 5, 1980 (Sup. Ct. of Jam.).

138. *Id.* at 2. In Europe, courts often cannot assume jurisdiction, even after Arbitration on the basis of provisions for international commercial arbitration. *See* Rita M. Cain, *Commercial Disputes and Compulsory Arbitration*, 44 BUS. LAW. 65 (1989). *See also* Robert D.A. Knutson, *The Interpretation of Arbitral Awards: When is a Final Award not Final*, J. INT'L ARB. 99 (1994).

139. *See supra* note 19 at 306.

140. *See id.* at 306-07.

141. See, *e.g.*, Farrell v. Attorney General, 27 W.I.R. 377 (1979).

142. *See supra* note 117.

Arbitration Act of 1889 of the United Kingdom.[143] In some instances, where this statute was actually incorporated into the local law by reference, grave uncertainties arise as to the exact statutory position, in the light of The Arbitration Act of 1950 which consolidates the 1889 and other subsequent legislation, as well as subsequent amending acts.[144]

Even at common law, however, the English courts tended to discourage the practice of parties who made provisions for arbitration disregarding the provision by bringing a dispute directly to the court. Thus, arbitration clauses which did not specifically purport to oust the jurisdiction of the courts were upheld if, for example, the parties had simply provided that they would resort to arbitration prior to invoking the jurisdiction of the courts.[145]

Statute has, however, provided the means by which courts, both in England and in the Caribbean, can give latitude to arbitration in order to render the provisions of arbitration statutes effective. Thus, in *Lawler v. Attorney General of Barbados*[146] the Court stated that "the Arbitration Act, Cap. 110, provides a ready and informal means of settling disputes between contracting parties who have agreed to submit differences arising on the contract to the arbitration of an 'umpire' of their own choosing."[147]

Where there is an arbitration agreement, the statutes also enable the courts to stay court proceedings in order to facilitate the arbitration.[148] It was in the exercise of that discretion that, in a recent decision in the case *Attorney General v. Cable Television of Nevis Co.*,[149] Velma Hylton, J., granted an injunction to the Nevis Island Administration in the Federation of St. Christopher (St. Kitts) and Nevis, restraining the respondent companies from unilaterally imposing increased rates for providing a cable television service to subscribers on that island. The injunction was granted an order to allow the dispute to be taken to arbitration.[150]

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143. *See, e.g., The Arbitration Act*, Cap. 19 (Rev. ed. 1973, Jam.); *The Arbitration Act*, Cap. 7:03 (Rev. ed. 1973, Guy.); *The Arbitration Act*, Cap. 110 (Rev. ed. 1971, Barb.); *The Arbitration Act*, Cap. 5:01 (Rev. ed. 1980, Trin. & Tobago); *The Arbitration Act*, Cap. 14 (Rev. ed. 1957, St. Lucia), and *The Arbitration Act*, Cap. 13 (Rev. ed. 1990, St. Vincent).

144. This difficulty arises, for example, on *The Arbitration Act*, Cap. 6 (Rev. ed. 1961, St. Kitts & Nevis) (Rev. ed. 1962, Montserrat). An analysis of the issues which arise as a result of this incorporation is beyond the scope of this paper, and is not therefore canvassed here.

145. *See, e.g.*, Scott v. Avery, 5 H.L.C. 811 (1855).

146. Barb. Sup. Ct. (Sept. 1, 1982) (Williams, J.).

147. *Id.* at 9.

148. *See, e.g.*, § 5, *The Arbitration Act of Guyana* and sections in pari materia in other Caribbean statutes.

149. Misc. Suit No. 156, High Ct. St. Kitts & Nevis (Nevis Circuit) (Aug. 31, 1995). The respondent companies are referred to in the agreement as "Cable".

150. *See* The St. Christopher and Nevis Constitution Order, S.I. 1983, No. 811.

The respondent companies in the case are owned largely by an American interest. On September 18, 1986, they entered into an agreement with the Nevis Island Administration. In clause 16, the parties agreed to refer any dispute which arose between them on the agreement to arbitration under the 1965 Convention on the Settlement of Investments Disputes, notwithstanding that the Convention had not been ratified by the government of St. Kitts and Nevis at the time of the agreement. Clause 7 provided for rates to subscribers. Clause 7(d) provided that "[a]fter the second year of service, Cable may increase its basic charges proportionate to Cable's increased costs of goods and services. After the first year of service, premium charges will not be controlled."

The respondents' proposed unilateral action to increase the rate for its service to subscribers with effect from September 1, 1995, came after its attempts to satisfy the applicant that the basis on which it calculated the proposed increased rates to subscribers was accurate were, in the opinion of the respondents, frustrated by requests from the applicant for additional information and for time to consider that information. It appears, however, that the task of the court was facilitated since the respondents had in fact indicated to the applicant, prior to the application, that in the event that the government opposed the increase the respondents would "have no alternative but to forthwith offer the matter to International Arbitration as prescribed for in Section 16."[151]

In the Caribbean, the Arbitration Acts define the exercise of the jurisdiction of the courts in arbitration matters. They also confer upon them appellate jurisdiction in these matters. If, therefore, the parties agree to arbitration, Caribbean courts should merely exercise a supervisory role over all aspects of the arbitration on any dispute which arises in order to ensure that the tribunals apply the correct legal principles.

Recent arbitration statutes in the United Kingdom have sought to circumscribe the discretion of the courts to grant stays of proceedings in a manner which make it even more difficult for parties to arbitration agreements to ignore those agreements and to resort to the courts for the resolution of their disputes. The Arbitration Act of 1975,[152] for example, requires a court to make an order to stay the proceedings, unless the court is satisfied that the arbitration

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151. Letter from the president of the respondent companies to the Premier of Nevis (July 26, 1995).

152. The Arbitration Act, 1975, ch. 3. § 1(1) (Eng.). This Act expressly repeals § 4(2) of The Arbitration Act, 1950, ch. 27, but does not repeal § 4(1), which is similar to § 1(1) of the 1975 Act.

agreement is void, inoperative or incapable of being performed, or that there is no dispute on the matter. The Arbitration Act of 1979 goes even further in this regard. It is therefore not surprising that the House of Lords granted an order to stay the proceedings in the case *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*,[153] in order that the parties could seek to settle the dispute by arbitration.

(b) The Impact on Sovereignty

Sovereignty,[154] in the Caribbean context, refers to the power of Parliament to legislate within the limits set in the Constitutions of Caribbean countries. The typical enabling constitutional provision reads: "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Barbados."[155]

Government international commercial contracting, however, has the potential to detract from this sovereign power in measures which fall outside of the constitutional provisions which circumscribe the sovereign power of Parliament. The plea of sovereign immunity, by which a sovereign government may not be subjected to the jurisdiction of a court, or to the laws, of another sovereign, may now be of little avail to Caribbean governments when they enter the arena as traders.

The concern here, however, is with the impact of extra-constitutional contractual provisions, and particularly "freezing" provisions contained in international commercial contracts to which Caribbean governments are parties, upon the law making power of Parliament. "Freezing" provisions are usually included in development contracts where the supplier fears that the government may attempt to change the terms of their agreement in its own favor by changing its laws. "Freezing" provision are therefore usually included in international commercial contracts at the instance of the foreign contracting party in order to insulate their contracts from such changes. This practice appears to be particularly widespread in contracts for loans from lending agencies and in development agreements.[156]

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153. 1993 App. Cas. 334. *See also* Claude Reymond, *The Channel Tunnel Case and The Law of International Arbitration*, 109 L.Q. REV. 337 (1993); Lawrence Collins, *The End of The Siskina*, 109 L.Q. REV. 342 (1993); Andrian Briggs, *Jurisdiction Clauses and Judicial Attitudes*, 109 L.Q. REV. 382 (1993); and John Kendall, *Ousting the Jurisdiction*, 109 L.Q. REV. 385 (1993).

154. *See* A.R. Carnegie, *Judicial Review of Legislation in West Indian Constitutions*, 1971 PUB. LAW 276, 277, that the concept lacks clarity. Paasivirta, *supra* note 130, discusses sovereignty in an international law, not a constitutional law, context.

155. *See* BARB. CONST. § 48(1).

156. *See* Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317, 346 (1989). Note that, in the United States, the power of government to

The typical "freezing" provision for this may take the form of an intangibility clause which provides that the government may not take certain actions to modify the agreement. It may also take the form of what has been referred to as a "stabilization clause *stricto sensu*."[157] This usually provides that laws which are enacted subsequent to the date of the agreement shall be of no effect in relation to the agreement. The question is, should these clauses be held to be invalid on the ground that they fall outside of the constitutional limitations on the sovereign power of Parliament?

There is a division of opinion on this question. Mettala,[158] for example, is of the view that the use of such clauses is not advisable on the ground that a court will probably not uphold them. In his opinion, even if they are used, subsequent legislation may yet modify them and become applicable to the agreement. Secondly, he suggests that such clauses show a distrust of the ability of the country whose laws they seek to freeze. In the third place, he contends that the use of these clauses is contrary to the principles of the New International Economic Order.

Curtis,[159] on the other hand, thinks that the use of stabilization clauses and other means[160] to render agreements legally secure is valid and should be enforced in order to encourage investment. He notes[161] the contention of some commentators that if a contract is governed by the law of the contracting state then the stabilization clause, like the rest of the contract, is modifiable if the state modifies the governing law. His opinion, however, is that this argument is of no moment because it does not give effect to the intention of the parties to render their contract legally secure.

Curtis suggests[162] that in order to achieve the purpose of "freezing" or "stabilization" clauses while respecting the choice of law of the parties these clauses should be viewed as imposing an

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interfere with contracts, including its own, is specifically limited by the Constitution. Article 1, § 10 applies to the States ("No State shall . . . pass any . . . Law impairing the Obligations of Contracts"). *See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). The Fifth Amendment applies to the Federal Government. *See* Perry v. United States, 294 U.S. 330 (1935).

157. *See* Curtis, *supra* note 156, at 346.

158. *See* Kimmo Mettala, *Governing Law Clauses of Loan Agreements in International Project Financing*, 20 INT'L LAW. 219, 235.

159. *See* Curtis, *supra* note 156, at 321

160. Including "internationalization".

161. *See* Curtis, *supra* note 156, at 347-48. *See also* F.V. GARCIA-AMADOR, THE CHANGING LAW OF INTERNATIONAL CLAIMS 393-94 (1984).

162. *See* Curtis, *supra* note 156, at 348.

independent obligation governed by Public International Law, regardless of the governing law of the contract.[163]

These opposing views very neatly illustrate the dilemma with which Caribbean Governments are faced with regard to this consideration in their international commercial contracting. The purest or, perhaps, most utopian constitutional theories on sovereignty militate against the inclusion of these clauses in international contracts to which governments are parties. Yet there is a pragmatic dimension here—the need for economic development. For small and fragile economies this can be inextricably linked to inspiring outside private investor confidence. The refusal of Caribbean governments to accept "freezing" or "stabilization" clauses at the instance of outside private parties, or any attempts to change their laws to the disadvantage of those private investors, can be inimical to their development needs.

From another standpoint, this is not an area of the law which may be impacted by purist constitutional law theory only. It may also be impacted by the fundamental contract law theory of party autonomy and by international law theory. This underlines the fact that the commercial contracting of Caribbean governments is attended by a plethora of complex legal and policy considerations which ought to dictate that they seek to be advised in these matters by persons who are very knowledgeable.

V. EPILOGUE

The need to fulfill development objectives, coupled with historical reasons, has imposed upon Caribbean governments a vital role in commercial endeavours. All indications are that this role will continue in the foreseeable future, until private sector organizations emerge as the primary players. Caribbean governments will therefore increasingly become parties to international commercial contracts which will be of primary importance in economic development. Of critical importance is the need for stability, certainty and predictability within the legal regime for international trade. The UNCITRAL Regimes appear to point the way forward, and the Regional Rules approach which has been adopted by the Caribbean Law Institute is the most appropriate method by which the adoption of these Regimes should be pursued. This is an approach which will promote the uniformity and harmonization which will, in turn, foster the stability of the legal regime for international trade. To this end, it

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163. He cites as authorities for this view the decisions of arbitration tribunals in Agip Co. v. Popular Republic, 21 I.L.M. 726, 727 (1982), and Revere Copper v. Opic, 56 I.L.R. 258, 268.

is hoped the UNCITRAL legal regimes will be adopted in the Caribbean in due course, with such modifications as are required for their effective use.