

# **Role of Domestic Courts in the International Commercial Arbitration Process**

**FOURTH HIGH LEVEL MEETING ON  
THE ROLE OF THE JUDICIARY IN  
INTERNATIONAL COMMERCIAL ARBITRATION**

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## 1. INTRODUCTION

Permit me to begin with the surely uncontroversial point that the role of domestic courts in the international arbitral process has evolved significantly over the past four hundred years. At first, common law courts were hostile to arbitration. In *Vynoir's* case, decided in 1609,<sup>1</sup> and the many others following it over the next 250 years,<sup>2</sup> the courts developed the doctrine of revocability by which a party to an arbitration clause was free to rescind it. This was rationalized on the basis of the jealousy with which the courts guarded access to justice but it was also suggested that this rationale could have been self-serving given that there was a direct correlation between the Judges' salaries and the number of cases heard by those Judges.<sup>3</sup>

By the middle of the 19<sup>th</sup> Century, however, the growth in commercial trading caused a judicial re-thinking of the benefits of arbitration in the settlement of complicated commercial disputes. In 1856, Lord Campbell criticized the original hostility towards arbitration and confessed that he "never could imagine for what reason parties should not be permitted to bind themselves to settle their disputes in any manner on which they agreed."<sup>4</sup> He pronounced, without remorse, that the era when courts of law seemed to consider a reference to arbitration to be wrong to have, "passed away".<sup>5</sup>

## 2. LEGISLATIVE AND TREATY INTERVENTION

This paradigm shift in judicial thinking was been aided and abetted by certain legislative and international treaty interventions asserting the right of litigants to choose arbitration. The English *Common Law Procedure Act 1854* contained a considerable number of provisions devoted to arbitration including provisions which gave power to the courts to stay proceedings brought in breach of an agreement to arbitrate; to prevent the revoking of the arbitration clause; and to provide for the enforcement of arbitral awards. These provisions, which formed the basis for the

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<sup>1</sup> 8 Co. 80a, 81b(1609) decided by Lord Coke.

<sup>2</sup> *Wellington v Macintosh* 2 Atk. 569 (Ch. 1743), *Kill v Hollister* 1 Wilson 129 (K.B. 1746), *Street v Rigby* 6 Ves. 815 (Ch. 1802), *Waters v Taylor* 15 Ves. 10 (Ch. 1807), *Horton v Sayer* 4 H. & N. 643 (Ex. 1859)

<sup>3</sup> This line of reasoning was first proposed by Lord Campbell who made the following observation in *Scott v Avery* (1856): "There was no disguising the fact that as formerly, the emoluments of the judges depended mainly or almost entirely on fees, and as they had no fixed salary there was great competition to get as much as possible of litigation into Westminster Hall and there was a great scramble in Westminster Hall for the division of the spoil. . . . And they had great jealousy of arbitration whereby Westminster Hall was robbed of those cases."

<sup>4</sup> *Russell v. Pellegrini* 6 E. & B. 1020 (K.B. 1856).

<sup>5</sup> *Ripley v. Great Northern Railway* 31 L.T.R. (N.S.) 869 (Ch. 1875).

modern law, were enhanced and consolidated in the *Arbitration Act 1889* (the bedrock of early Caribbean law) and most recently, were restated and improved in the *Arbitration Act 1996*.

International treaty interventions similarly provided for the autonomy of parties to settle their disputes via arbitration. Legislation in<sup>6</sup> Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Jamaica, St. Vincent and the Grenadines, Trinidad and Tobago adopts and domesticates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) providing for the enforcement of ‘convention awards’ in the same manner as judgments or orders of domestic courts. Statutes in<sup>7</sup> Barbados and Bahamas as well as the Associate Member States of British Virgin Islands, Bermuda and Cayman Islands transform the UNCITRAL Model Law 1985 and its 2006 Amendments, into domestic law. A fundamental principle of the Model Law and therefore of the Caribbean statutes is to delimit the role of domestic courts in the arbitral process. As the Explanatory Note by the UNCITRAL Secretariat on the Model Law states:

“...there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court. In this spirit, the Model Law envisages court involvement in [only specified] instances.”<sup>8</sup>

The instances of judicial involvement specified in the Model Law fall into two primary groups. The first are the functions which the local court may perform in assisting the arbitration in to (a) an appointment, challenge, and termination of the mandate of an arbitrator; (b) the jurisdiction of the arbitral tribunal; and (c) the setting aside of the arbitral award. A second group comprises court assistance in the form of (i) taking evidence, and (ii) recognition and enforcement of arbitral awards. The range of functions and powers vary according to whether or not country is

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<sup>6</sup> See Table X (supra)

<sup>7</sup> See Table XX (supra)

<sup>8</sup> At para. 15. Available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf>

the seat of arbitration.<sup>9</sup> Beyond the instances in the two groups the Model Law stipulates: “no court shall intervene in matters governed by this law.”<sup>10</sup>

### 3. PARTY AUTONOMY AND JUDICIAL INTERVENTION

The Model Law reflects the contemporary notion that party autonomy is “a key principle of current arbitration law”<sup>11</sup> and “the cornerstone of modern arbitration.”<sup>12</sup> Party autonomy allows the parties to choose arbitration rather than litigation; to choose the laws and make the rules which govern the arbitral proceedings; and to be reasonably confident that the arbitral award will be legally binding and enforceable. In my view, party autonomy and judicial intervention are not adversaries. Parties to arbitration want a prompt, inexpensive and final resolution of the dispute and equally States want to ensure the arbitral process is just and impartial; judicial intervention is essential in guaranteeing the integrity of the arbitration process and for the recognition and enforcement of the arbitral award. To paraphrase Professor Paulsson a great paradox is that arbitration must be free from courts in order to be effective but it also needs the support of national courts in order to be effective.<sup>13</sup>

### 4. ILLUSTRATIONS OF JUDICIAL INTERVENTION

Caribbean courts have sought to balance the competing interests of respecting party autonomy to choose arbitration as a means of resolving disputes, and at the same time, exercising sufficient supervision and control to ensure the integrity of the process. A brief review of the courts’ intervention in relation to some of the major concepts in international commercial arbitration is illustrative.

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<sup>9</sup> Article 1, Model Law; Arbitration Act, Bahamas, section 4.

<sup>10</sup> Article 5, Model Law.

<sup>11</sup> *Bay Hotel & Resort Ltd v Cavalier Construction co Ltd* [2001] UKPC 34, PC, [2001] ArbLR 12.

<sup>12</sup> *American Diagnostica Inc. v Gradipore Ltd. and Centerchem Inc* (1998) 44 New South Wales Law Review, 312-42; (1999) XXIVa Ybk Comm Arbn 574-90.

<sup>13</sup> A Redfern, International Commercial Arbitration: Jurisdiction Denied – The Pyramid Collapse (1986) JBL 15; J Paulsson “Arbitration in Three Dimensions” (LSE Legal Studies Working Paper No. 1 2.2010 <<http://ssrn.com/abstract=1536093>>) at 2.

(a) The Arbitration Agreement

The existence of a valid agreement to arbitrate is a necessary pre-requisite for engagement of the process. Both the UNCITRAL Model Law and the New York Convention require that the arbitration agreement be in writing and signed by the parties,<sup>14</sup> and the UNCITRAL Model Law requires the court to refer the parties to arbitration **unless** it finds that the alleged agreement “is null and void, inoperative or incapable of being performed.”<sup>15</sup> In *British Caribbean Bank Limited v The Attorney General of Belize*<sup>16</sup> the CCJ held that a bilateral investment treaty between the United Kingdom and Belize had resulted in an agreement between the investor and Belize to arbitrate. This agreement was not itself a treaty but flowed from the treaty provisions, not unlike making a contract from an advertisement containing certain terms to get a reward. Citing the old case of *Carlill v Carbolic Smoke Ball Co.*<sup>17</sup> the CCJ held that such an advertisement constitutes a binding unilateral offer that can be accepted by any investor of the foreign country who performed its terms (i.e., who invests in the host country in reliance upon the treaty terms).<sup>18</sup>

Having found the existence of a valid arbitration agreement, the Court stated that it would exercise “heightened vigilance” when asked to issue an injunction to restrain international arbitration. An anti-arbitration injunction would only be granted where the resort to arbitration was abusive of the Court’s process. The mere fact that a party had invoked the jurisdiction of the Belize Court did not make its subsequent invocation of arbitration an abuse of process, particularly since the Court action was necessary to preserve rights accrued under Belizean legislation. The parties had agreed to arbitration in London and should be held to their bargain.

*British Commercial Bank* is illustrative of the widespread policy of Caribbean courts to enforce valid arbitration agreements and thereby encourage and facilitate the arbitral process. Stays have been refused where the issue of entitlement to an equitable or restitutionary right and compensation was not properly within the scope of arbitration clause (ECSC in *Ocean*

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<sup>14</sup> Article 7 of UNCITRAL Model Law 1985; Article II of New York Convention.

<sup>15</sup> Article 8 (1).

<sup>16</sup> [2013] CCJ 4 (AJ), [2014] 2 LRC 11.

<sup>17</sup> [1893] 1 QB 256, [1891–94] All ER Rep 127, UK CA.

<sup>18</sup> *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] 2 All ER 225, [2006] QB 432, UK CA.

*Conversion Limited v The Attorney General of the Virgin Islands*)<sup>19</sup> but refusals have been the exception rather than the rule. The Jamaican courts in *American Home Assurance Company v Edward Shoucair*<sup>20</sup> considered a summons filed by the defendants/appellants to stay the arbitration proceedings while civil proceedings were on going between the parties. The Court of Appeal upheld the Supreme Court's dismissal of the summons on the grounds that the subject-matter in dispute in litigation, namely the liability of the insurer, did not fall within the terms the arbitration agreement which covered the quantum of any loss or damage arising from the destruction of the insured property.<sup>21</sup>

A similarly liberal approach was taken in *Belize Water Services Limited v the Attorney General of Belize*<sup>22</sup> where the Court of Appeal set aside an injunction restraining arbitration because the judicial review proceedings were "entirely different" from the arbitration process. In the judicial review claim, the Applicant sought to identify and correct the alleged errors of the Public Utility Commission and as such this was an action in public law. By contrast, the arbitration proceedings were concerned with enforcing the right of the Applicant against the Government of Belize pursuant to the arbitration clause in the investment agreement signed by the parties.<sup>23</sup>

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<sup>19</sup> (unreported) HCVAP 2007/030: A dispute arose in relation to the ownership of a desalination plant. At the expiration of the agreement the Government was to become the sole owner of the plant. Ocean Conversion refused to deliver up possession on the basis that it retained an equitable interest in the plant owing to the improvement works conducted during the pendency of the agreement. The principal agreement between the parties contained an arbitration clause which provided that "[e]very question, dispute, or difference arising, none excluded, between the parties with regard to the rights, duties, or liabilities of the parties hereunder that cannot be settled amicably shall be submitted to arbitration, within ten (10) days of written demand by either party upon the other for arbitration under this Section." The Eastern Caribbean Court of Appeal refused to grant the stay. It held that the issues surrounding Ocean Conversion's equitable and restitutionary rights to the plant and compensation did not fall within the arbitration clause and it would be more appropriate for such matters to be ventilated by the courts in treating with the claim for possession brought by the State.

<sup>20</sup> (1993) 30 J.L.R. 12.

<sup>21</sup> Carey J.A., the Acting President of the Court of Appeal felt that it would be wholly inequitable to restrain the arbitrator from proceeding to carry out his terms of reference under the arbitration clause. Forte J.A. relied on the *Scott v Avery* condition in the insurance policy that the award by an arbitrator was a condition precedent to any right of action.

<sup>22</sup> (unreported) BZ 2005 CA 20.

<sup>23</sup> See also, *Cavalier Construction Company Limited v Ottershaw Investment*: Civil Appeal No. 75 of 2002, BS 2004 CA 1 (unreported, Court of Appeal of the Bahamas, delivered on February 25, 2004).in which a dispute arose between the parties in connection with the construction of the Sandals Hotel in Nassau. The appellant claimed damages attendant to the respondent's delay in completing the project. The construction contract contained an arbitration clause (clause 4.5.1) which provided for all disputes to be settled in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. This clause was later amended to make provision for the settlement of any dispute to be conducted under the laws of the Commonwealth of the Bahamas and the Arbitration Act. Clause 4.5.2 under the heading "Rules and Notices" provided for the arbitration to be "decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration

Two Eastern Caribbean Supreme Court cases, decided earlier this year, bear reference. First, in *C-Mobile Services Ltd. v Huawei Technologies Co Ltd*,<sup>24</sup> the defendants' statutory demand for payment of debts triggered liquidation proceedings. The Applicant claimed that the debt was statute-barred under the UN Convention on the International Sale of Goods and referred the matter referred to arbitration in accordance with the arbitration clause in the parties' contract. The trial judge refused to grant a stay under section 6 (2) of the Arbitration Ordinance, reasoning, among other things, that the legislation did not apply to liquidation proceedings. He also refused to grant a stay or leave to appeal against his judgment. C- Mobile applied to the Court of Appeal and was granted leave to appeal the trial judge's judgment. Fearing that the Liquidation proceedings would continue, C- Mobile thereafter applied for and Chief Justice Dame Janice Pereira granted an interim stay on an *ex parte* application, and on the *inter partes* hearing Justice of Appeal Blenman granted a stay of the judgment of the trial judge pending the hearing and determination of the substantive appeal.

Second, in *Anzen Ltd v Hermes One Ltd*,<sup>25</sup> Clause 19.5 of a shareholders agreement in respect of a BVI company provided that any party "may" submit disputes to binding arbitration. A dispute arose and the respondents commenced proceedings in the Commercial Court without referring the matter to arbitration. The appellants sought to stay the court proceedings under section 6 (2) of the Arbitration Act on the ground that there existed a valid, operative and binding arbitration agreement between the parties. The trial judge and the Court of Appeal rejected the application for a stay because, in their opinion, the arbitration clause did not oblige either party to refer a

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Association currently in effect unless the parties mutually agree otherwise." The appellant invoked the arbitration clause and attempted to have the dispute settled before the American Arbitration Association applying the Construction Industry Arbitration Rules. The respondent filed an originating summons restraining the appellant and also seeking a declaration that clause 4.5.2 was void and that the dispute was to be settled in accordance with the Arbitration Act. The Court of Appeal held that clause 4.5.2 was to be viewed only as a contingency provision in that it applied only if the parties failed to agree otherwise. The amendment of clause 4.5.1 demonstrated the clear intention that disputes between them arising out of the agreement shall be settled by arbitration in accordance with the laws of the Commonwealth of the Bahamas and the Arbitration Act. Therefore the respondent was entitled to a declaration that the arbitration was to be held in Nassau, in the Bahamas as the seat or forum of the arbitration.

<sup>24</sup> BVIHCMAP2014/0017, 2 October 2014

<sup>25</sup> BVIHCMAP2014/0013, dated June 11, 2014. See also: *Kenneth Kryss, John Greenwood (As Joint Liquidators of Value Discovery Partners, LP) v. New World Value Fund Limited, KBC Partners LP, by its General Partner, Salford Capital Partners Inc., SCI Partners LP, by its General Partner, Salford Capital Partners Inc. and Salford Capital Partners Inc.* Claim No: BVIHCM (COM) 2013/0026 (unreported, decision of Eastern Caribbean Supreme Court, delivered on April 19, 2013) in which Bannister J. refused to grant an injunction restraining the commencement of litigation. The Judge held that the dispute between the limited partners in this case was about the entitlement to distributions and was not covered by the arbitration agreement which only covered disputes between the general partner and one or more of the limited partners.

dispute to arbitration but merely created only an option to resort to arbitration. Relying on a number of English cases,<sup>26</sup> the courts held that it was only in circumstances where one party had actually exercised the option and made that reference that the dispute would have to be settled by arbitration. The Court of Appeal has given leave for an appeal to the Privy Council, and Counsel for the appellants has indicated an intention to rely on a battery of cases decided by the UK Supreme Court,<sup>27</sup> the Ontario Court of Appeal,<sup>28</sup> and the Fourth Circuit Court in the United States<sup>29</sup> which, in the view of counsel, specifically held that the grant of a stay did not require arbitration proceedings to have been commenced or even contemplated. The decision of the Privy Council is awaited with interest.

(b) Arbitrability

Normally the issue of whether a matter is capable of being settled by arbitration arises in the context of the enforcement of an arbitral award but it can also emerge in the preliminary stages as an issue of jurisdiction. A party may apply to the courts of the seat of the arbitration for an injunction or declaration that the subject matter of the dispute is not capable of settlement by arbitration. Conversely a party may begin court proceedings on the merits and in the event the opposing party seeks to have the matter stayed to facilitate arbitration, the court may have to decide whether the dispute is arbitrable.<sup>30</sup>

There is a presumption in favour of arbitrability i.e., which any doubts concerning the nature of the issues are resolved in favour of arbitration.<sup>31</sup> Some courts have expanded the scope of arbitration to cover subjects such as securities and antitrust law, which traditionally were regarded as public policy issues.<sup>32</sup> Whether a dispute over the rates of imposition of taxation is arbitrable was considered by the Belize Supreme Court in *BCB Holdings Limited and The Belize*

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<sup>26</sup> *Fiona Trust & Holding Corporation and Others v Yuri Privalov and Others*, [2007] EWCA Civ 20; *Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [2000] BLR 65, [1999] All E.R. (D) 1300; *Westfal-Larsen & Co A/S v Ikerigi Compania Naviers SA (The Messiniaki Bergen)* [1983] 1 All ER 382.

<sup>27</sup> *Ust-Kamenogorsk Hydropower Plant JSV v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2014] All E.R. 335.

<sup>28</sup> *Canadian National Railway Co. v. Lovat Tunnel Equipment Inc.* 174 DLR (4<sup>th</sup>) 385 (1999).

<sup>29</sup> *United States v. Bankers Insurance Company* 245 F. 3d 315 (4<sup>th</sup> Cir. 2001).

<sup>30</sup> Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* at p. 108 (OUP, 2005).

<sup>31</sup> *Moses H Cone Memorial Hospital v Mercury Construction Corp.* 460 US 1, 24-25 (1983).

<sup>32</sup> *Vimar Seguros S.A. v M/V Sky Reefer* 115 S.C. 2322, 515 U.S. 528 (1995); *Scherk v. Alberto - Culver Co.* 417 U.S. 506 (1974) Redfern and Hunter on International Arbitration at p. 164.



*Bank v Attorney General*.<sup>33</sup> Sir John Muria rejected the defendant's argument that matters of income tax were 'quintessentially territorial' and therefore non-arbitrable. The learned judge noted that "arbitration of tax-related disputes proves very much a reality despite the doctrinal objections."<sup>34</sup> He went on to illustrate the point by citing two Ecuadorian decisions: *Occidental Exploration and Production Company v Ecuador* and *Ecana v Republic of Ecuador*, where issues relating to taxation arising out of an exploration contract for oil and gas were resolved by arbitration. Muria J held that by parity of reasoning, the tax matters arising out of the Settlement Deed entered into by the Government of Belize were arbitrable issues so that the enforcement of the arbitral award issued in favour of the claimants could not be resisted on this ground. The argument of non-arbitrability was not dealt with at the level of the Court of Appeal.<sup>35</sup> When the case was heard by the CCJ, the Court found it unnecessary to express any view on the argument as the public policy point was considered dispositive of the appeal.<sup>36</sup> It therefore follows that Muria J's ruling represents the final word on the matter, at least for the time being.

(c) Separability

Caribbean courts have made a signal contribution to the jurisprudence of international commercial arbitration in as much as the 1989 Bermuda Court of Appeal decision in *SNE v. JOC Oil*<sup>37</sup> is cited in several respected texts as a leading decision on the doctrine of separability. A central allegation in *SNE* was that a 1976 contract between the parties for the sale of oil and oil products, and which contained a clause referring disputes to arbitration in Moscow, was invalid because it had been signed by one representative of SNE, instead of two as was required under Soviet legislation. The Moscow arbitration tribunal held that although SNE could not claim the contractual price of goods because of the invalidity of the sale contract, it was entitled to restitution in a sum of almost US\$200m representing the value of the oil and oil products delivered to JOC Oil. In effect, the Tribunal applied rules of Soviet law equivalent to the doctrine of restitution and unjust enrichment.

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<sup>33</sup> Claim No. 743 of 2009 (unreported, decision of the Supreme Court of Belize, delivered on December 22, 2010)

<sup>34</sup> At para. 50 and 51 referring Professor William W Park, *Arbitrability: International and Comparative Perspective* (2008).

<sup>35</sup> *Attorney General v BCB Holdings* (2012) 82 WIR 167, [2013] 2 LRC 403.

<sup>36</sup> [2013] CCJ 5 (AJ), [2014] 2 LRC 81.

<sup>37</sup> (1990) XV Ykb Comm Arb 31; [1989] Bda LR 11.

In exhaustive litigation in Bermuda involving by two eminent teams of counsel and expert witnesses, JOC OIL argued that the arbitral tribunal lacked jurisdiction to adjudicate but the court disagreed. It held that when the parties agreed in 1976 that all future disputes and differences should be settled by arbitration they had in mind the legally-binding relationship which they intended and hoped they had created. Thus both parties believed in 1976 that they were entering into a valid and binding agreement. The additional facts that goods had shipped, property passed, and some payments made, meant that the contract though invalid could not be classified as non-existent and there was therefore a legal basis on which the arbitration clause could operate. The court accepted Judge Schwebel's opinion to the effect that when a party enters into an agreement which contains an arbitration clause it enters into two agreements and not one; "the arbitral twin of which survives any birth defects or acquired disability of the principal agreement."<sup>38</sup>

The Court also distinguished separability from the doctrine of kompetenz-kompetenz. The latter was couched as a rule of convenience which obviates the need to halt proceedings *in limine* merely because one of the parties challenges the jurisdiction of the arbitral tribunal. As such, the tribunal is able consider and rule upon its own jurisdiction and competence in the first instance. Separability therefore has an effect not on the concept but on the practice of kompetenz-kompetenz. The acceptance of separability meant that an arbitral tribunal would in fewer instances be compelled to deny its own jurisdiction on the ground that the main agreement is invalid.

(d) Challenge to Arbitrators

The UNCITRAL Model Law recognizes that Courts may entertain an action relating to the appointment and termination of the mandate of an arbitrator. The primary concern is that arbitrators must be independent and impartial in the performance of their duties. In *Fiton Technologies v the Attorney General*<sup>39</sup> the Government of Barbados sought the removal of the arbitrator citing his lack of his impartiality consequent upon certain e-mail correspondence between him and the other party's attorney. The court applied the test for bias as contained in the

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<sup>38</sup>Ibid., at p. 36 of 122.

<sup>39</sup>No. 844 of 2008, BB 2013 HC 28 (unreported, High Court of Barbados, delivered on June 17, 2013).

CCJ's decision in *Barbados Turf Club v. Melnyk*<sup>40</sup> namely, "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased." The Court found that the arbitrator's conduct in the e-mail correspondence was appropriate and could not be objectively viewed as casting doubt on his impartiality.

By contrast, *Eckhart v Attorney General*<sup>41</sup> involved a successful application for the removal of an arbitrator on the ground of bias. The arbitrator was acting as counsel for Dominica Electricity Services Ltd, a company in which the Government held a 53% shareholding and he was still receiving legal fees owed to him for having represented the Government in a previous arbitration suit as well as a civil suit. Adams J held that the "the village shopkeeper from Colihaut" would have reasonable suspicions about the impartiality of the arbitrator and the court could not ignore the evidence presented.<sup>42</sup>

Another case, *Powers and Anglo-Suisse Finance Limited v. Sustainable Forest Holdings Limited and Fisher Capital Partners Limited*,<sup>43</sup> concerned Court involvement in the appointment of a third arbitrator after the parties had each appointed its own arbitrator. The Bermuda Supreme Court started from the premise that the arbitration agreement had provided that the UNCITRAL Rules were to govern the appointment of the third arbitrator in the event the party-appointed arbitrators were unable to agree. As the UNCITRAL Rules provided a mechanism for resolving the stalemate (under the Rules the parties had designated the Permanent Court of Arbitration at The Hague as the appointing authority), the Court declined to intervene to resolve the impasse.

However the same the Court agreed to the appointment of the third arbitrator in *Princess Cruise Lines Limited v. Matthews*<sup>44</sup>. The distinguishing feature in this case was that the parties had not

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<sup>40</sup> [2011] CCJ 14 (AJ); [2011] 79 WTR 153,

<sup>41</sup> Suit No 570 of 1992, DM 1993 HC 3 (unreported, High Court of Dominica, delivered on April 6, 1993).

<sup>42</sup> The Judge noted the sage advice, noting the sage advice of learned authors Mustill and Boyd in their book *Commercial Arbitration* that:

"With the exercise of common sense a situation should never arise in which the arbitrator's personal impartiality is put in question. A person who is approached to act and knows that he has some kind of relationship with one of the parties (underlining mine) should remember that there is no keener sense of injustice (end of page 30) than is felt by someone who has doubts about whether the arbitrator is doing his honest best. He should also bear in mind that the question is not just whether he really is impartial but whether a reasonable outsider might (not should) take this view. He should decline to act."

<sup>43</sup> Suit No 143 of 2010, BM 2010 SC 51 (unreported, Supreme Court of Bermuda, delivered on August 31, 2010).

<sup>44</sup> Suit No 252 of 2011, BM 2011 SC 49 (unreported, Supreme Court of Bermuda, delivered on November 4, 2011).

selected an appointing authority and thus it fell to the court to make the appointment as set out in Article 11 of the UNCITRAL Model Law which was incorporated into Bermuda domestic law by the Bermuda International Conciliation and Arbitration Act 1993. As to the actual appointment, the Court held that experience in US law was not essential given that the issue of damages, which was likely to be an important determinant, would be governed by the laws of Bermuda as the seat of the arbitration.<sup>45</sup>

(e) Miscellaneous: Interim Measures, Taking of Evidence

Article 9 of UNCITRAL Model Law reflects the accepted principle that the domestic court retains discretion to grant interim relief in certain cases at the request of a party, notwithstanding that the parties have resolved to settle their dispute via arbitration.<sup>46</sup> Similarly, the court can upon the request of the arbitration tribunal or a party assist in the taking of evidence. In this process they will be guided by their national law on evidentiary matters.<sup>47</sup>

## 5. RELEVANCE OF THE CONSTITUTION

Finally, the Constitution could be relevant to any determination of the role of Courts in the arbitral process; a fact in sync with the increasing tendency by arbitral tribunals to apply human rights principles in deciding commercial disputes.<sup>48</sup> The innovative Article 5 of the UNCITRAL Model Law expressed the principle that a court should only intervene where it has been given the power to do so; beyond the specified instances, "no court shall intervene in matters governed by this law." It is instructive that Caribbean legislation incorporating the Model Law, such as the Act in The Bahamas, does not go as far as Article 5 in making the court's intervention an absolute prohibition. Rather the statutory language is that the Court "should not intervene" beyond the powers assigned to it.<sup>49</sup> A possible reason for nuanced refinement lies in our Westminster Model of Governance, under which the interpretation and enforcement of *all* legislative rules *prima facie* fall within the exclusive domain of the courts.

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<sup>45</sup> Kawaley J. appointed a Bermudan, Mr Geoffrey Bell, Q.C., "a retired judge who has not practised at the Bar for some years and who was far more senior than the party-appointed Bermudian lawyer [and] could not reasonably be perceived as lacking independence and impartiality" to act as the third arbitrator.

<sup>46</sup> Article 9 states: "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the protection."

<sup>47</sup> Article 27 of the Model Law provides that "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

<sup>48</sup> *Técnicas Medioambientales S.A. v. Mexico* (Tecmed case); *Revere Copper & Brass, Inc. v. Overseas Private Investment Corp* (U.S. v. Jam.), 56 I.L.R. 258, 291-92 (Am. Arb. Ass'n 1978). James Fry, International Human Rights Law in Investment arbitration: Evidence of International Law's Unity, *Duke Journal of Comparative & International Law* (2009); Jorge E. Vinales, Access to Water in Foreign Investment Disputes, 21 *Georgetown International Environmental Law Review* 733 (2009).

<sup>49</sup> Similar to UK Act 1966 (p.497-8).

The court's jurisdiction to interpret and apply the law cannot be ousted entirely, although the obtaining of an arbitral award may be made a condition precedent to court proceedings by the insertion in the arbitration agreement of what has come to be known as a "Scott v Avery"<sup>50</sup> clause. Both the Model Law and Caribbean legislation recognize the supremacy of the courts to determine the validity of an arbitration agreement by providing that where the court orders that an arbitration agreement shall cease to have effect as regards any particular dispute, it may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect.<sup>51</sup>

In Belize, the *Supreme Court of Judicature (Amendment) Act 2010* amended the *Supreme Court of Judicature Act*<sup>52</sup> by introducing a new section 106A which vested in the Supreme Court power to issue an injunction restraining international arbitral proceedings. Consistent with the constitutional obligation of the court to apply the law of the land, the Act was construed and applied in the *British Caribbean Bank* case mentioned earlier.

Constitutional considerations were relevant in a series of cases arising from the enactment by the Parliament of Jamaica of the Bauxite (Production Levy) Act 1974, which imposed a new "production levy" on all bauxite extracted or won in Jamaica on or after January 1, 1974.<sup>53</sup> Several foreign mining companies alleged that the Act of 1974 breached previously concluded investment agreements whereby the Government of Jamaica undertook not to impose further taxes beyond those provided for in the various investment agreements. In *Kaiser Bauxite Company v Jamaica*<sup>54</sup> and *Reynolds Metal Company v Jamaica*<sup>55</sup> the arbitral tribunal ruled that neither the failure of Jamaica to appoint an arbitrator nor its failure to appear invalidated the

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<sup>50</sup> 5 H. L. Cas. 811 (1856). The case of *Scott v Avery* arose out of an insurance policy, which provided for the reference of disputes to arbitration, and declared that the obtaining of the decision of the arbitrators should be a condition precedent to maintaining of an action by the assured. The House of Lords held the clause to be valid and generally, therefore, a clause to this effect will ensure that the parties go to arbitration before litigation.

<sup>51</sup> Section 25 (4) English Act 1950.

<sup>52</sup> Act No. 4 of 2010.

<sup>53</sup> A companion measure, the Mining (Amendment) (No. 2) Act 1974, empowered the Minister to prescribe minimum amounts of minerals to be extracted by holders of mining leases.

<sup>54</sup> ICSID Case No. ARB/74/3, 6 July 1975.

<sup>55</sup> Case No. ARB/74/14. Note that the decision in *Kaiser* was "in all material respects" identical to the decision in *Alcoa Minerals v Jamaica* Case No. ARB/74/12 and *Reynolds Metal Company v Jamaica*: Case No. ARB/74/14. See: <http://internationalinvestmentlawmaterials.blogspot.com/2011/09/kaiser-bauxite-company-v-jamaica-icsid.html>

jurisdiction or competence of the tribunal.<sup>56, 57</sup> In *Alcoa Minerals v Jamaica*<sup>58</sup> decision the arbitral tribunal held that the Act of 1974 imposing additional taxes constituted a breach of the investment contract. The Supreme Court of Jamaica took a radically different view in *Revere Jamaica Alumina v Attorney General*.<sup>59</sup> Smith CJ held that the investment agreement between the Government and the foreign investor could be characterized as “ordinary commercial contracts capable of subsisting between private citizens”<sup>60</sup> but decided that the stabilization clause in the contract was not capable of conferring valid contractual rights with respect to taxes. The clause was invalid because the Government was not competent to give an undertaking in respect of further taxation since the power to tax was constitutionally vested in Parliament.<sup>61</sup>

Other cases have raised the relevance of the constitution in the context of the fundamental right to a fair and public hearing by an independent and impartial court or authority established by law.<sup>62</sup> In *Deweer v Belgium*,<sup>63</sup> the European Court of Human Rights decided that this right was subject to implied exceptions such as where the parties agreed to have their disputes resolved by arbitration and not by a public hearing. This exception did not offend the fundamental right but rather had “undeniable advantages for the individual concerned as well as for the administration of justice.”<sup>64</sup>

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<sup>56</sup> Ibid. The tribunal was properly constituted in accordance with the parties’ prior agreement to arbitrate disputes. Note: A settlement was eventually reached by the parties and the proceedings were discontinued at the request of Kaiser. An Order of discontinuance was issued by the Tribunal on 27 February 1977 pursuant to Arbitration Rule 44.

<sup>57</sup> For this reason, too, the subsequent reservation (of 8 May 1974) to exclude the present dispute from arbitration was not ineffective.

<sup>58</sup> (1979) IV Ybk Comm Arbn 206

<sup>59</sup> (1977) 26 WIR 486.

<sup>60</sup> Ibid., at p. 491

<sup>61</sup> But the clause was considered valid in subsequent arbitral decision where the tribunal applied international law: *Revere Copper & Brass, Inc. v. OPIC*, 17 ILM 1978, at 1321 et seq.

<sup>62</sup> See e.g., section 16 (2) (3) Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (NO. 12 – 2011)(Jamaica)

<sup>63</sup> Application No 6903/75. See also *Jakob Boss Sohne KG v Federal Republic of Germany*, Application No. 18479/91.

<sup>64</sup> This did not mean that arbitral process could be conducted unfairly since the national court retained control through the process of recognition or enforcement of the award. Effect would only be given to awards which the court considered to have been carried out in conformity with fundamental rights of the parties concerned: Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* pg. 499 (OUP, 2005).

With this decision may be compared with the case of *Airports Authority of Trinidad and Tobago v Calmaquip Engineering Corporation*<sup>65</sup> involving a dispute over payment for work executed at the Piarco International Airport and the matter was referred to arbitration. The applicant sought to have the arbitration agreement declared void on the ground of fraud.<sup>66</sup> Jones J rejected the application in the circumstances but did accept that a “stay [of judicial proceedings] would be refused almost as of course if the party charged with the fraud objects to a stay and wants to clear his name in open court.”<sup>67</sup> Without explicitly saying so, the court seems to have been alluding to the right of the criminal accused to a fair and public trial, regardless it appears, of his prior consent to arbitration of a related dispute.

With these remarks I thank you and yield the floor to the Chairman.

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<sup>65</sup> Claim No. CV 2007-00600 (unreported, High Court of Trinidad and Tobago, delivered on October 20, 2010). The decision centers on the power of a court to revoke an arbitration agreement on the ground of fraud pursuant to section 12 of the Arbitration Act of Trinidad and Tobago. Section 12(2) of that Act provides that: “Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to as provided for in subsection (1) and a dispute which so arises involves the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to enable that question to be determined by the Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any arbitration agreement made thereunder.” The parties entered into two contracts arising out of the construction of a new airport terminal in Piarco, Construction Package 13 (CP 13) and a Maintenance contract. A dispute arose regarding payment for work executed under the Maintenance contract and the matter was referred to arbitration as provided for by clause 12 of the contract.

<sup>66</sup> Placing reliance on the fact that the respondents, in criminal proceedings, were found guilty of bid rigging, bank fraud and wire fraud in relation to project.

<sup>67</sup> Relying on statements by Lord Dillion in *Cunningham-Reid v Buchanan-Jardine* [1988] ICLR 678.

