

International Commercial Arbitration in Barbados

JONATHAN HAYDN-WILLIAMS

1. Introduction

I will begin with a question to myself: “Why am I, an English solicitor, writing an article about international commercial arbitration in Barbados?” My answers, which I hope will persuade you to read on, are:

- Barbados, in addition to its many other attributes, is in my view an excellent venue for international commercial arbitration, not least following the entry into force in early 2009 of a new international commercial arbitration statute, closely based on the UNCITRAL Model Law.¹ That view merits wider circulation, especially to those who might consider choosing the island as an arbitration venue.
- The new statute expressly allows for lawyers like me, who are qualified to practise under the law of a state other than Barbados, to participate in international commercial arbitration in Barbados.
- The statute is international in origin and provides that this fact is to be taken into account when it is interpreted.
- It is necessary to refer to the laws of Barbados, of which the new statute forms part, and I have had the considerable benefit of advice and comment from The Honourable Mr Justice Peter Williams, Justice of Appeal of the Barbados Supreme Court,² for which I am extremely grateful.

2. The Legislative and Judicial Framework

In 2007, the Parliament of Barbados enacted the International Commercial Arbitration Act 2007 (the Act),³ which came into operation on January 19, 2009 by virtue of a Proclamation of the Governor-General.⁴

The Act applies to “international commercial arbitration, subject to any agreement in force between Barbados and any other State or States”.⁵ Where the Act applies, the Arbitration Act⁶

¹ In the words of UNCITRAL: “The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedures so as to take into account the particular features and needs of international commercial arbitration.”

² All and any errors and omissions are, however, mine. As I do not profess to practise under the laws of Barbados, the usual warning that an article such as this is for general guidance only has more than usual force. Before any decision is made in relation to the subject matter of this article, specific advice should be taken from a lawyer (attorney-at-law) practising under the laws of Barbados.

³ 2007-45 published in the Supplement to the Official Gazette No.105 dated December 20, 2007.

⁴ Proclamation of January 17, 2009 (SI 2009/2), published in the Supplement to the Official Gazette No.7 dated January 19, 2009.

⁵ Act s.3(1).

⁶ Cap.110 of 1958.

of August 15, 1958 does not apply.⁷ In broad terms, therefore, the Act governs international commercial arbitration in Barbados, whilst the 1958 Arbitration Act continues to govern domestic arbitration and non-commercial international arbitration.

Nothing in the Act affects the right to seek recognition and enforcement of an award under the Arbitration (Foreign Arbitral Awards) Act⁸ 1980,⁹ which gave effect in Barbados to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁰

The Act contains a saving provision, according to which it shall not affect any other law of Barbados which prohibits the submission of certain disputes to arbitration or which requires disputes to be submitted to arbitration only in accordance with other statutory provisions.¹¹ It is not thought that this is of any materiality to international commercial arbitration.

Like all other legislation, that relating to arbitration is subject to the overriding provisions of the Barbados Constitution,¹² which provides in Chapter I that “This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”.

On reading Chapter III of the Barbados Constitution, concerning the fundamental rights and freedoms of the individual,¹³ those familiar with the European Convention on Human Rights (ECHR)¹⁴ will be struck by some similarities. That is not coincidental, because it is known that the chapter was greatly influenced by the ECHR,¹⁵ which was in turn influenced by the

⁷ Act s.3(6)(a).

⁸ Cap.110A of 1980.

⁹ Act s.3(6)(b).

¹⁰ Act ss.48 and 49 provide for recognition and enforcement of awards, but only in international commercial arbitration, as defined in the Act.

¹¹ Act s.3(5).

¹² Scheduled to The Barbados Independence Order 1966 (SI 1966/1455), which came into operation on November 30, 1966.

¹³ Such fundamental rights and freedoms are granted to “Every person in Barbados”: Constitution s.11. It does not appear that this is restricted to citizens of Barbados. Although the non-discrimination provisions of the Constitution (ss.11 and 23) do not refer to discrimination on the grounds of nationality, and s.23(3)(a) expressly permits laws which discriminate against non-citizens, there is no aspect of the Act which seeks to discriminate against non-citizens. Accordingly, it seems clear that parties to international arbitrations have the benefit of such rights, at least to the extent that they are present at arbitral hearings, or arbitration-related court hearings, held in Barbados. Reference to a person includes a legal person such as a corporation: Interpretation Act 1966 as applied by the Constitution s.117(11).

¹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) (now referred to as the European Convention on Human Rights).

¹⁵ In the Privy Council in *Minister of Home Affairs v Collins MacDonald Fisher* [1980] A.C. 319, Lord Wilberforce, delivering the opinion of their Lordships in relation to an appeal from the Court of Appeal of Bermuda, stated: “Chapter I [of the Bermuda Constitution] is headed ‘Protection of Fundamental Rights and Freedoms of the Individual’. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of

United Nations Universal Declaration of Human Rights (UDHR).

Of potential relevance to arbitration is the Constitution s.18(1), which provides that:

“Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such court or other tribunal, the case shall be given a fair hearing within a reasonable time.”

This has significant similarities with the wording of the ECHR art.6(1).¹⁶

This article will not address in detail the application of such “due process” rights to arbitration.¹⁷ Suffice it to say that there seems no reason in principle why s.18(1) should not extend to international commercial arbitration in Barbados¹⁸ and that the Act appears to be compliant with it, as is to be expected of a statute based on the UNCITRAL Model Law. The Act provides for arbitrators to be both independent and impartial¹⁹ and there is sufficient provision to ensure a fair hearing for parties.²⁰ An arbitrator who fails to act without undue delay is liable to be removed by the parties or the court.²¹

The Constitution s.18(1) applies where there is recourse, under the relevant provisions of the Act (see section 5 of this article below), to the Barbados courts. Those courts are undoubtedly independent and impartial and provide parties with a fair hearing,²² but the existence and

most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations’ Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.”

¹⁶ ECHR art.6(1) provides: “In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Whilst those who agree to arbitrate probably waive their right to a public hearing, that issue does not arise to the same extent under the Barbados Constitution as under the ECHR, in that the Constitution s.18(9) expressly provides for parties to be able to agree that a hearing shall not be held in public and an agreement to arbitrate probably amounts to such an agreement, at least impliedly.

¹⁷ J. Haydn-Williams “Arbitration and the Human Rights Act 1998” (2001) 67 *Arbitration* 288.

¹⁸ An arbitral tribunal is one “prescribed by law” and “established by law”, namely by the Act. An arbitration (other than a statutory arbitration, which is not at issue here) needs the ingredient of consent of the parties, but also needs the ingredient of statute (or the common law) if it is to have legal effect.

¹⁹ Unlike the English Arbitration Act 1996 s.24(1)(a), which provides for arbitrators to be impartial but does not specify that they should be independent.

²⁰ In particular s.31: “Parties shall be treated with equality and each party shall be given a full opportunity of presenting the case of the party”.

²¹ Act s.17(1) and (2).

²² There have been delays in the Barbados courts in the past, though not in international arbitration cases. There seems to be considerable determination, on the part of both the senior judges in Barbados and the Caribbean Court of Justice, to avoid delay and it seems likely that references to the High Court and Court of Appeal under the Act would, in practice, be fast tracked.

content of the Constitution, as well as its partial genesis in the ECHR and the UDHR, should provide overseas parties with additional reassurance.

Chapter VII of the Constitution contains provisions that established and now regulate the Supreme Court of Judicature of Barbados, comprising the High Court and the Court of Appeal. The route of further and final appeal to the Privy Council has been replaced with a system of appeals to the Caribbean Court of Justice²³ (CCJ).²⁴

Copies of the Act and the Constitution may be conveniently accessed online.²⁵

3. The Objectives of the Act

The stated objectives of the Act are twofold: “to establish in Barbados a comprehensive, modern and internationally recognized framework for international commercial arbitration by adopting the UNCITRAL Model Law on International Commercial Arbitration”;²⁶ and “to provide the foundation for the establishment in Barbados of an internationally recognized centre for international commercial arbitration”.²⁷

The first objective was substantially achieved when the Act came into operation in January 2009. Whether that achievement is complete or whether there are refinements that could usefully be made is examined below.

As to the second objective, the Act contains no specific provision for the establishment of a centre for international commercial arbitration in Barbados. It would seem, therefore, that the “foundation” that the legislators were seeking to provide was the legislative framework referred to in the first objective. It is not clear from the wording of the Act whether they envisaged that a physical and organisational “centre for international commercial arbitration” would be established and run by a specific administrative entity, such as has been established in some other jurisdictions,²⁸ or the looser establishment of Barbados as a venue with

²³ Caribbean Court of Justice Act 2003-10.

²⁴ The CCJ “is the regional judicial tribunal established on 14 February 2001 by the Agreement Establishing the Caribbean Court of Justice. The agreement was signed on that date by the Caribbean Community (Caricom) states of: Antigua & Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; Suriname and Trinidad & Tobago. Two further states, Dominica and St. Vincent & The Grenadines, signed the agreement on 15 February 2003, bringing the total number of signatories to 12. The CCJ was inaugurated on 16 April 2005 in Port of Spain, Trinidad & Tobago”: website of the CCJ: <http://www.caribbeancourtsofjustice.org> [accessed November 1, 2010]. The CCJ’s impressive website contains extensive information about the court and its judges (who are drawn from within and outside the Caribbean, contributing to its international expertise) and has an archive of audio and video transcripts that enable the viewer to see and hear the morning session in the afternoon of the same day and the afternoon session the next morning.

²⁵ <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwebar.htm> [accessed November 1, 2010] or search “Lexadin Barbados”.

²⁶ Act s.4(a).

²⁷ Act s.4(b).

²⁸ For example the independent subsidiary of the London Court of International Arbitration in India (LCIA India), the Dubai International Financial Centre (DIFC-LCIA Arbitration Centre) in Dubai and the Bahrain Chamber for Dispute Resolution (BCDR) established in partnership with the American Arbitration Association (BCDR-AAA), in liaison with the International Centre for Dispute Resolution (ICDR)).

international recognition as an attractive jurisdiction in which to hold an international commercial arbitration. Either aspiration would be worthy of pursuit, but the initiative between Invest Barbados²⁹ and the London Court of International Arbitration (LCIA) to establish a regional office of the LCIA in Barbados, which was under discussion in 2008, suggests that it was the former that those who drafted the Act had in mind.

That initiative has not yet gone ahead, due to the ongoing uncertainties of the world economy.³⁰ Invest Barbados remains keen to establish a centre for international commercial arbitration in Barbados in partnership with a leading arbitral institution. In the meanwhile, Barbados is already an attractive jurisdiction for international commercial arbitration (as I hope this article will demonstrate) and the establishment of a regional office of an organisation such as the LCIA, whilst a laudable aim, should not (in my view) be seen as a prerequisite to achieving international recognition of the island as an international arbitration venue. Other practical steps could be taken, such as the formation of an international advisory committee with a remit to assist in the achievement of such recognition, the creation of a website or webpage dedicated to international commercial arbitration in Barbados and the appointment of an officer of Invest Barbados (or other appropriate organisation) to assist parties and arbitrators in the practical aspects of holding an arbitration on the island.

4. To What Extent Does the Act Diverge from the UNCITRAL Model Law?

The UNCITRAL Model Law will be familiar to many readers and its text is readily available,³¹ as are commentaries on it. Therefore, rather than setting out the Act's provisions, I will indicate the main respects in which it diverges from the Model Law and draw attention to some specific issues.

The 2006 version of the UNCITRAL Model Law

The Act is based upon the 1985 UNCITRAL Model Law, amended in 2006. In the words of UNCITRAL:

“The Model Law ... covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

Amendments to articles 1(2), 7 and 35(2), a new chapter IV A to replace article 17 and a new article 2A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernise the form requirement of an arbitration agreement to better conform with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version”.³²

²⁹ A Barbados government organisation: <http://www.investbarbados.org> [accessed November 1, 2010].

³⁰ As confirmed to me by both Invest Barbados and the LCIA.

³¹ On-line at <http://www.uncitral.org> [accessed November 1, 2010].

³² http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [accessed November

Barbados has chosen not to adopt the 2006 amendments to arts 7 and 35(2), adopting instead the original 1985 versions but has adopted the other 2006 amendments.

Provisions of the Act specific to Barbados

Self-evidently, references in the Model Law to “this State” become, in the Act, references to “Barbados”. The Act specifies the High Court or the Court of Appeal of Barbados as the courts competent to perform “certain functions of arbitration assistance and supervision” as specified in the Model Law³³ (see section 5 below).

The Act contains references to Barbados statutes: those referred to in section 2 (above) of this article; the Telecommunications Act³⁴ (for the purpose of adopting its definition of “telecommunications”); the Legal Profession Act³⁵ (in the context of allowing non-Barbados lawyers to participate in international commercial arbitration, on which see section 5 below).

The Act also contains the following provisions which do not appear in the Model Law: a statement of its objectives, as referred to in section 3 (above) of this article; provisions devolving, to the minister with responsibility for legal affairs, responsibility for the general administration of the Act and for making rules for giving effect to the Act;³⁶ provision that the Act shall not affect any arbitral proceedings that commenced before the commencement of the Act³⁷ and that the Act shall apply to any arbitral proceedings commenced after the Act’s commencement under any agreement made before its commencement;³⁸ provision that the Act binds the Crown; provision for the Act to come into operation on a day fixed by Proclamation.

Differences in grammar, expression and arrangement of provisions

Comparison of the Act with the Model Law reveals some changes in grammar and expression. It is surprising to note, in this age of equality of gender, that masculine pronouns are used throughout in the Model Law, without even a provision to the effect that reference to one gender includes all genders. Those who drafted the Act have rectified this, with the minimum of extra wording, by avoiding the use of gender-specific pronouns. Provisions of the Model Law, which are sometimes rather long and combine several different points in one block of wording, have been reorganised in the Act by breaking them down into sections and sub-sections or by moving some wording into separate sections. For the most part, this is an improvement and not only makes it easier to understand the text, but also will assist the referencing of different parts of the Act by those (including arbitrators and lawyers) who have to analyse it, orally or in writing. The process has resulted in two minor drafting errors, which will no doubt be corrected in due course.³⁹

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³³ Art.6 and Act s.9.

³⁴ Cap.282B; Act s.2.

³⁵ Cap.370A; Act s.50.

³⁶ Act ss.5 and 51.

³⁷ Act s.52(1)(a).

³⁸ Act s.52(1)(b).

³⁹ In the Act s.47(2)(a)(iv), the words “subject to subsection (2)” should clearly be “subject to subsection (3)”. The other, even smaller, error is in the Act s.2, where the numeral for sub-section (1) does not appear.

General principles

The Act s.2(6) tracks the wording of art.2A(2): “Questions concerning matters governed by this Act that are not expressly settled in it are to be settled in conformity with the general principles on which this Act is based”. But whereas the Model Law does not state what those principles are,⁴⁰ s.2(7) sets out the following concise and non-exclusive list of principles:

- “(7) For the avoidance of doubt, the general principles referred to in subsection (6) include:
 - (a) the preservation of party autonomy;
 - (b) the definition of the relations between courts and arbitral tribunals in respect of arbitral proceedings;
 - (c) the determination of the jurisdiction of arbitral tribunals;
 - (d) the preservation of due process in the conduct of arbitral proceedings;
 - (e) the separability principle;
 - (f) the setting aside of an arbitral award as the [exclusive]⁴¹ recourse against an award; and
 - (g) the determination of the conditions for recognition and enforcement of awards and the grounds for the refusal of recognition and enforcement of awards in a manner consistent with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June, 1958.”

Interpretation of the term “commercial”

The Act s.3(2)(a) reproduces, almost verbatim, footnote 2 to the Model Law as to the wide interpretation to be given to the term “commercial”, including 16 examples of relationships of a commercial nature, thus giving the footnote the force of law.

Definition and Form of “Arbitration Agreement”

The 2006 amendments offer two options for the wording of art.7. The second option is the shorter of the two and provides a “Definition of arbitration agreement”, which makes no provision as to the form that an arbitration agreement should take. The first option provides a “Definition and form of arbitration agreement”. The Act⁴² defines and specifies the form of an arbitration agreement, but in doing so adopts the original wording of art.7 as it appeared in the 1985 unamended version. Art.7, as amended in 2006 (Option 1), requires that an arbitration agreement shall be in writing and may be in the form of an arbitration clause in a contract or in a separate agreement, but also provides that “An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been

⁴⁰ No doubt some or all of the principles are in the 15-page “Explanatory Note by the UNCITRAL secretariat” appended as Part Two. One such is the “separability principle”, explained as meaning “that an arbitration clause shall be treated as an agreement independent of the other terms of the contract”. The UNCITRAL secretariat helpfully supplied to those responsible for drafting the Act the concise list of principles that appears in the Act.

⁴¹ The word “executive” appears in the text of the Act. It should presumably be “exclusive”.

⁴² Act s.10(1).

concluded orally, by conduct, or by any other means”.⁴³ It further provides that the requirement of a written arbitration agreement shall be met by an electronic communication “if the information contained therein is accessible so as to be useable for subsequent reference”.⁴⁴

The Act (following the 1985 unamended version of art.7) is more restrictive. Rather than permitting an arbitration agreement to be treated as in writing where its content is *recorded in* any form, it requires that the agreement “is *contained in* (a) a document signed by the parties [or] (b) an exchange of letters, telex, telegrams or other means of telecommunications which provide a record of the agreement”.⁴⁵ This appears to exclude from the ambit of the Act an arbitration agreement which is concluded orally or by conduct and which is later recorded in any form, whereas such an agreement would be within the ambit of the Model Law as amended. Furthermore the requirements as to written form are stricter in the Act.

Whilst the Model Law, as amended, refers to “electronic communication” and the Act to “telecommunications”, the definition of the latter adopted in the Act⁴⁶ is such that there is probably little difference between the two terms. Certainly, they both cover email.

Both the amended Model Law and the Act recognise the existence of an arbitration agreement where it is alleged and not denied in an exchange of statements of claim and defence.⁴⁷ Both provide that a reference in a contract to any document containing an arbitration clause amounts to an arbitration agreement in writing, provided that the reference makes the clause part of the contract.⁴⁸ But the Act specifies that the contract in which the reference is made must be in writing, whereas the amended Model Law does not, leaving open the theoretical possibility of an oral contract incorporating by reference a document containing an arbitration clause.

The more restrictive approach of the Act as to what qualifies as an arbitration agreement, apparently excluding arbitration agreements made orally or by conduct but recorded in writing, is reflected in the Act’s provisions as to recognition and enforcement of awards, which adopt the 1985 unamended version of art.35(2). Whereas the Model Law as amended requires a party relying on an award or applying for its enforcement to supply the original award or a copy of it,⁴⁹ the Act also requires that the party supply the original arbitration agreement or a copy of it,⁵⁰ which would not be possible in the case of an oral agreement or one made by conduct, albeit recorded in writing or other form.

⁴³ Option 1 art.7(3).

⁴⁴ Option 1 art.7(4).

⁴⁵ Act s.10(2)(a) and (b).

⁴⁶ The Act s.2 adopts the meaning assigned to the term “telecommunications” in the Telecommunications Act (Cap.282B) s.2.

⁴⁷ Option 1 art.7(5) and Act s.10(2)(c).

⁴⁸ Option 1 art.7(6) and Act s.10(3).

⁴⁹ Art.35(2).

⁵⁰ Act s.48(2)(b).

Conclusion

The UNCITRAL secretariat encourages states “to make as few changes as possible when incorporating the Model Law into their legal systems ... to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State”.⁵¹

The limited divergence of the Act from the Model Law is likely in most instances either to enhance the confidence of foreign parties in international commercial arbitration in Barbados or to be neutral in effect. However, it is suggested that, should the opportunity arise, the Act’s more restrictive provisions as to the form of an arbitration agreement would be worthy of review and that consideration be given to adopting the text of arts 7 (Option 1) and 35(2), as amended in 2006.

5. Specific Issues Concerning the Act

I begin by focusing on the first two words of the title of the Act, before addressing other issues.

International

The Act adopts the Model Law definition of “international”,⁵² with some minor grammatical changes:

“an arbitration is international where

- (i) parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States;
- (ii) one of the following places is situated outside the State in which the parties have their places of business:
 - (A) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (B) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
- (iii) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country”.⁵³

The Act also follows the Model Law in providing that

“where a party

- (a) has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
- (b) does not have a place of business, reference is to be made to the habitual

⁵¹ “Explanatory Note by the UNCITRAL secretariat” on the ML para.3.

⁵² Art.1(3).

⁵³ Act s.3(2)(b).

residence of the party”.⁵⁴

This is clearly a broad definition of the term “international”. In the words of the UNCITRAL secretariat, “The vast majority of situations commonly regarded as international will meet this criterion”.⁵⁵ The international nature of the Act is further reflected in the provision that “No person shall be precluded by reason of the nationality of the person from acting as an arbitrator, unless the parties otherwise agree”.⁵⁶

Commercial

As mentioned above (in section 4), the Act reproduces, almost verbatim, footnote 2 to the Model Law as to the wide interpretation to be given to the term “commercial”, including 16 examples of relationships of a commercial nature.⁵⁷

Whilst “the term ‘commercial’ shall be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not”,⁵⁸ the edges of the definition are not clear cut, possibly giving rise to uncertainty as to whether some cases fall within the scope of the Act or within that of the 1958 Arbitration Act. Whilst there is likely to be little doubt surrounding business to business (B2B) transactions, those between a business and a consumer (B2C) seem more likely to give rise to difficulty. The Act specifies “investment”, “banking” and “insurance” as examples of commercial relationships within its scope, but do they encompass transactions, or all transactions, in those fields that are of a B2C nature?

Aside from such difficulties arising from the blurred edges of the definition of “commercial”, it would seem perhaps regrettable that matters such as offshore private trusts are excluded (it would appear) from the Act’s compass. Disputes in that field are well suited for resolution by international arbitration.

The limitation of the Act to “commercial” relationships follows from the adoption of the Model Law, which is the product of a body, UNCITRAL, whose purpose is to improve the legal framework for international trade. However, the UNCITRAL secretariat has stated that “While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration”.⁵⁹ If the opportunity should arise for a review of the scope of the Act, it is therefore suggested that consideration be given to extending it to all kinds of international arbitration.

⁵⁴ Act s.3(3), following ML art.1(4) with some changes of grammar and expression.

⁵⁵ “Explanatory Note by the UNCITRAL secretariat” para.11.

⁵⁶ Act s.14(1), following art.11(1) with some changes of grammar and expression.

⁵⁷ Act s.3(2)(a).

⁵⁸ Act s.3(2)(a).

⁵⁹ “Explanatory Note by the UNCITRAL secretariat” para.10.

Place of Arbitration

Consistent with the Model Law,⁶⁰ the provisions of the Act apply only where the place of arbitration is Barbados, except for specified provisions which necessarily have to extend to arbitrations with a place of arbitration in another state.⁶¹

The Act also provides (again following the Model Law)⁶² that:

- “(1) Parties are free to agree on the place of arbitration.
- (2) Where the parties fail to agree on the place of arbitration, the place shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- (3) Notwithstanding subsections (1) and (2), the tribunal may, unless the parties otherwise agree, meet at any place it considers appropriate for
 - (a) consultation among its members;
 - (b) the hearing of witnesses, experts or the parties; or
 - (c) the inspection of goods, other property or documents.”⁶³

It is apparent from these provisions that the “place of arbitration” means, in the context of the Act, the juridical seat of the arbitration. In other words, the place of arbitration is not determined by where hearings and the like actually and physically take place, but according to what the parties agree is the place of arbitration (or failing that, what the arbitral tribunal determines shall be the place of arbitration).

The significance of the place of arbitration is that the arbitration will be subject to the arbitration law of that place and to the jurisdiction of the courts of that place (insofar as the law of that place permits its courts to intervene in or assist in arbitrations there). That remains so even if hearings and the like are held in another place (usually another state). Thus, for example, if there were an arbitration between US and Brazilian corporations, in which the parties had chosen Barbados as the place of arbitration, with three arbitrators from Canada, England and Barbados, the tribunal might visit the USA and Brazil to hear evidence from

⁶⁰ Art.1(2).

⁶¹ Act s.3(4). The excepted provisions relate to stay of court proceedings in favour of arbitration, interim court measures of protection in aid of arbitral proceedings, grant or refusal of recognition and enforcement of interim measures issued by an arbitral tribunal and grant or refusal of recognition and enforcement of arbitral awards.

⁶² Art.20.

⁶³ Act s.33.

witnesses, hold a hearing in London or Toronto to receive legal submissions and meet in Barbados to discuss and make their award. The Act would apply throughout.⁶⁴

By the same token, were arbitrators in an arbitration with a place of arbitration in England or Canada to consider it appropriate to travel to Barbados in January for consultation between them—and should the parties not object—the Act would not apply, save for the ancillary purposes referred to above,⁶⁵ such as the granting by a Barbados court of an interim measure of protection in aid of the arbitration. There is perhaps a residual risk of the 1958 Arbitration Act being held to apply to such an arbitration if, for instance, all hearings were held in Barbados. However, it seems unlikely that a Barbados court would reach such a decision. Putting aside the legal position, it is almost as much in the interests of the Barbados economy to encourage parties and arbitrators to use Barbados as a location for hearings in arbitrations with a place of arbitration overseas, as it is to encourage parties to choose Barbados as a place of arbitration. Accordingly, if there were perceived to be any significant risk of the 1958 Act applying substantively in a situation such as outlined in this paragraph, it would seem sensible to amend the legislation to prevent it from happening.

Role of the Barbados courts and the Caribbean Court of Justice

The Act follows the framework of the Model Law in relation to intervention by the courts in providing that “In matters governed by this Act, no court shall intervene except where so provided in this Act”⁶⁶ and in the provision made for court intervention.

The Act provides for the High Court to make arbitral appointments where the parties have failed to agree on a procedure for appointing the arbitrator(s) or where an appointment has not been made under an agreed procedure.⁶⁷ The High Court’s decision on such matters is not subject to appeal.⁶⁸

The Court of Appeal is entrusted with deciding upon a challenge to an arbitrator, where the initial challenge has been rejected under an agreed procedure or by the tribunal;⁶⁹ deciding upon a controversy as to whether an arbitrator is unable to perform the functions of the

⁶⁴ When holding hearings and the like in a state other than that of the place of arbitration, there is a risk of the local courts seeking to intervene and asserting that local arbitration law applies. That risk should not arise in states which have adopted the Model Law, save for the purposes referred to above (stay of court proceedings in favour of arbitration, interim court measures of protection in aid of arbitral proceedings, grant or refusal of recognition and enforcement of interim measures issued by a tribunal and grant or refusal of recognition and enforcement of awards). The Act s.44(4) provides that an award shall state the place of arbitration and be deemed to have been made at that place. That adopts the Model Law art.31(3). Accordingly, it should not be necessary for an award to be physically made in Barbados and awards of tribunals of more than one person do not have to be signed by the members gathering at the same place.

⁶⁵ Stay of court proceedings in favour of arbitration, interim court measures of protection in aid of arbitral proceedings, grant or refusal of recognition and enforcement of interim measures issued by a tribunal and grant or refusal of recognition and enforcement of awards.

⁶⁶ Act s.8.

⁶⁷ Act s.14(3) and (4).

⁶⁸ Act s.14(5).

⁶⁹ Act s.16(4).

arbitrator or has failed to act without delay,⁷⁰ deciding upon a party's challenge to an arbitral tribunal's ruling that it has jurisdiction.⁷¹ In each of those three instances, the Act provides that the Court of Appeal's decision is not subject to an appeal.

The Act also gives power to the Court of Appeal to set aside an award on the same grounds as set out in the Model Law.⁷² In that instance, a further appeal is not expressly precluded and it would seem, therefore, that, subject to the requirement of leave to appeal, an appeal would lie to the Caribbean Court of Justice (CCJ).

As to the recognition and enforcement of interim measures and awards (including interim measures and awards issued or made in overseas states), court-ordered interim measures and court assistance in taking evidence, the Act⁷³ does not specify whether application is to be made to the High Court or the Court of Appeal. Absent specific provision, the High Court would hear such applications.⁷⁴ However, it is possible that this aspect will be the subject of rules for giving effect to the Act.⁷⁵ Whichever is the competent court, there is no express curtailment of rights of further appeal, including (with leave) an appeal to the CCJ.

Entitlement of overseas lawyers to participate in international commercial arbitration

The Act⁷⁶ allows lawyers from jurisdictions other than Barbados to participate in international commercial arbitration. This is achieved by express disapplication of the Legal Profession Act,⁷⁷ which usually precludes overseas lawyers from practising law in Barbados. It is made clear, however, that this does not extend to any related court proceedings,⁷⁸ for the purpose of which lawyers entitled to practise law in Barbados would need to be retained.

Any party engaged in Barbados international commercial arbitration would be wise to retain Barbados lawyers, even if also retaining lawyers from that party's home jurisdiction. Even if court intervention is not contemplated, local counsel can assist by advising upon the Act and other relevant legislation and by using their local knowledge to ensure that the practical aspects of arbitral hearings held on the island run smoothly.

⁷⁰ Act s.17(2).

⁷¹ Act s.19(8).

⁷² Act s.47 and ML art.34.

⁷³ Act ss.28, 29, 30, 40, 48 and 49.

⁷⁴ The 1985 Arbitration (Foreign Arbitral Awards) Act, which gave effect in Barbados to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, provides for the High Court to have jurisdiction over applications to enforce a Convention award. Consistency with that statute would suggest that the High Court should also have jurisdiction over applications for recognition and enforcement of awards under the Act. However, the Act confers jurisdiction on the Court of Appeal to set aside awards, on grounds that are very similar to those on which, under the Act, recognition or enforcement of an arbitral award may be refused.

⁷⁵ Pursuant to the Act s.51.

⁷⁶ Act s.50(1).

⁷⁷ Cap.370A.

⁷⁸ Act s.50(2).

In *Lawler, Matusky & Skeller v Attorney General of Barbados*,⁷⁹ the High Court upheld the direction of an arbitrator that, notwithstanding the Legal Profession Act, a party should be permitted to be represented in an arbitration in Barbados by a lawyer who was not entitled to practise law in Barbados, upon the proviso (of the arbitrator) that the lawyer should act in association with a lawyer who was so entitled. That decision pre-dated the Act, of course, but will remain of relevance to the extent that any international arbitration is not “commercial” and does not therefore fall within the scope of the Act.

6. Why Choose Barbados as a Venue for International Commercial Arbitration?

The preceding sections of this article have addressed the legal aspects of Barbados as a venue for international commercial arbitration. As anyone who has been involved in the organisation of an arbitration outside one’s home state will know, other factors are also important. The following are some of the non-legal advantages⁸⁰ of choosing Barbados as a venue for international commercial arbitration, not only where the place of arbitration is Barbados but also where participants in an arbitration with its seat elsewhere decide to hold hearings and the like in Barbados.

Barbados is a stable parliamentary democracy and a member of the Commonwealth. It achieved independence from the UK in 1966. The Queen remains head of state, as the Queen of Barbados, represented by the Governor-General. As well as being politically stable, the country is socially and economically stable. The crime rate is low and its health care, education services and standard of living are ranked third in the Americas.⁸¹ The population is well educated, with a skilled English-speaking workforce of over 140,000 people. The business environment is well regulated and respected internationally.⁸² It is also user friendly. Many international banks and accountancy firms have branches on the island, principally in the capital, Bridgetown. The currency is the Barbados dollar, which has a fixed exchange rate with the US dollar of Bds\$2=US\$1.

There are extensive conference facilities on the island, well suited to holding hearings in international commercial arbitrations. Hotel accommodation is excellent. Barbados is geographically well located. A glance at a world map shows that it is at the centre point of a hemisphere that takes in North, South and Central America, Western Europe and much of Africa, as well as the Caribbean. This is reflected in its accessibility by air, with flight times

⁷⁹ Civ. Case No. 320 of 1981 (High Court of Barbados, August 22, 1983), [1983] 18 Barb. L.R 130, an excerpt of which appears in Gary B. Born *International Commercial Arbitration: Commentary and Materials* (The Hague: Kluwer Law International, 2001).

⁸⁰ I have tried to think of disadvantages, so as to present a balanced view, but cannot think of any substantial ones, save perhaps for the thought of a Caribbean beach distracting one from the task in hand. But, equally, the prospect of a post-hearing drink watching a Caribbean sunset will assist in getting one through even the most tedious of hearings.

⁸¹ And thirty-seventh in the world: *UN Human Development Index 2008*: available at <http://data.un.org/DocumentData.aspx?id=185> [accessed November 1, 2010].

⁸² For example, the World Economic Forum’s *Global Competitiveness Report 2008-2009* ranked Barbados as having the third most stable banking system in the western hemisphere. For more recent reports see the WEF website: <http://www.weforum.org/> [accessed November 1, 2010]. In April 2009, the OECD recognised Barbados as the only independent Caribbean nation which had substantially implemented the internationally agreed tax standard.

of about 3½ hours from Miami, 4 hours from Toronto, 5 hours from New York, 7½ hours from London and 9 hours from Los Angeles. The island's international airport terminals have been substantially extended and upgraded over recent years. Getting around the island is easy, as there are plenty of taxis and hire cars. Nowhere is far away, as the island is 21 miles long and 14 miles wide and occupies 166 square miles. The infrastructure is good, with reliable power supplies and one of the world's purest underground water supplies.⁸³ Telecommunications connections with the rest of the world are excellent, with fast broadband.⁸⁴ The tropical climate is warm all year round, with more rain from July to November than in other months. Barbados lies to the east of the other Caribbean islands and is therefore off the usual hurricane track. Finally, international commercial arbitration is known to be a demanding and sometimes exhausting activity. If any participants felt that they needed to stay on in Barbados for a few days rest and recuperation after an arbitral session, the island is a holiday Paradise.

7. Conclusion

The adoption of the Model Law has established in Barbados a comprehensive, modern and internationally recognised framework for international commercial arbitration, thus substantially meeting the objectives of the International Commercial Arbitration Act, 2007. That, and the legislative and judicial framework in which the Act sits, as well as the non-legal attributes identified above, make Barbados an excellent venue for international commercial arbitration in the second decade of the twenty-first century.

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The author is a Solicitor in England and Wales and a Fellow of the Chartered Institute of Arbitrators. He is a full time Consultant with Goodman Derrick LLP, Solicitors, London. Contact details:

Direct tel: +44 (0)20 7421 7936

Mobile: +44 (0)7713 743019

Email: jhw@gdlaw.co.uk

www.gdlaw.co.uk

⁸³ Due to the island's geology being largely coral.

⁸⁴ The author had faster broadband from a house next to a Barbados beach than in London.