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Caribbean Islands in the Mood for Arbitration

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In an interview given to the Paris Review in 1981, Colombian writer Gabriel Garcia Marquez observed that “Caribbean reality resembles the wildest imagination.” This myth (or reality) of the Caribbean as a wild region declines into various aspects such as its unsettled climate, ruthless history, or multicultural society.

This might explain, on top of their location at the heart of America, the key role of the Caribbean islands as an international political and economic playground since the Conquista. In view of the many disputes generated in this context, this article wishes to emphasize the recent trend in these islands in favor of one means of international dispute settlement: arbitration.

This article focuses on the sovereign Caribbean islands i.e. Antigua & Barbuda, the Bahamas, Barbados, Cuba, Dominica, the Dominican Republic, Grenada, Haiti, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & Grenadines, and Trinidad & Tobago.

At first sight, the Caribbean islands characterize by their great diversity, having followed different social and economic models. David Berry notably explains this diversity as follows: “[b]oth the peoples and islands of the Caribbean were shaped by territorial and commercial ambitions of a number of European powers […] The colonial empires of Europe both unified and divided Caribbean islands” (Caribbean Integration Law (Oxford University Press, 2014), 17). Most of these islands yet play a key role into international transactions and foreign investment. FDI has exponentially increased over the past 40 years in all of these islands. Whereas these economies are traditionally driven by agriculture (mostly exporting hard liquor, tobacco, sugar), and oil and gas/mining, they also offer industrial goods, and have developed their tertiary sector through tourism and financial services. Most commercial partners are located outside of the Caribbean. The US is the biggest export destination and China appears the most for import.

Along with this position at the heart of international transactions and foreign investment, and, resultantly, at the heart of the related disputes, these islands have set a solid basis for arbitration. The New York Convention is in force in all islands, to the exception of Grenada, St Kitts & Nevis and St Lucia, and the ICSID Convention is in force in all islands to the exception of Antigua & Barbuda, Cuba, Dominica and the Dominican Republic. Since 1973, the sovereign Caribbean islands have concluded over 140 IIAs.

The unfolding of arbitration-friendly initiatives in the Caribbean islands has marked the last decade.

To start with, arbitration benefits from great promotion in the region. Lately, new arbitration institutions have been created in the BVI (the BVI International Arbitration Centre, "BVIIAC") and Jamaica (the Mona International Centre for Arbitration and Mediation, "MICAM"). Antigua & Barbuda, the Bahamas, and Barbados announced imminent creation of similar institutions. In addition, many conferences are routinely held in the region. The ICC has been particularly active co-organizing with the Cuban Court of Arbitration a conference to celebrate the 50th anniversary of the latter in Havana in August 2016 and holding its 3rd International Forum on ICC Arbitration in Santo Domingo in May 2017. The ICC YAF further created its "Caribbean series," a special set of events in the region to contribute to growing regional dialogue on the usefulness of international commercial arbitration. Other significant initiatives, such as the Fifth Annual Arbitration and Investment Summit in Nassau in January 2017, or the Cuban International Arbitration Moot taking place annually in Havana since 2013, are also worth noting.

Further, the modernization of the relevant legislations and practice of arbitration confirm the same trend. New commercial arbitration laws have been adopted in Barbados and Cuba in 2007, the Dominican Republic in 2008, the Bahamas in 2009, the BVI in 2013, and Jamaica is currently debating an arbitration act. Furthermore, the adoption of Law No. 118, Cuba's Foreign Investment Act, in 2014, represents a milestone for foreign investors in the region. Several Caribbean islands have been involved in ICSID arbitrations, either as the country of nationality of the Claimant (the Bahamas, Barbados, Grenada, St Kitts & Nevis) or as the Respondent State (the Dominican Republic, Grenada, St Kitts & Nevis, St Lucia, Trinidad & Tobago). The Dominican Republic and Barbados have also recently appeared as Respondents in investment disputes registered with the PCA. Finally, arbitration has been relied on in interstate disputes such as Barbados v Trinidad and Tobago and Italian Republic v Republic of Cuba, respectively settled in 2006 and 2008.

This trend in favor of arbitration raises the issue of regional integration.
Despite the existence of some regional organizations in the region, those are not "all-inclusive" and the islands have different interests in integration.

This incomplete integration first results in a disparity of legal regimes related to arbitration. As far as commercial arbitration is concerned, this may be less true since the latest laws on commercial arbitration mentioned above are all aligned on the UNCITRAL Model Law. In addition, the OHADAC, a regional organization inspired from African OHADA which started acting in 2007 and includes all islands listed above, also drafted Model Rules of Arbitration and Conciliation. As far as investment law is concerned, the divergence in protection standards constitutes another challenge, not only between islands, but also in the same island when derogatory regimes are implemented (i.e. ZED Mariel in Cuba). The two main regional organizations contribute to this multiplicity. Both the revised Treaty of Chaguaramas, establishing the Caribbean Community ("CARICOM"), and the revised Treaty of Basseterre, establishing the Organization of Caribbean States Economic Union ("OECS"), include arbitration among the modes for the settlement of disputes concerning the interpretation or application of the relevant Treaty. Nonetheless, both treaties leave open the choice of the arbitral institution to administer such disputes.

Luckily, the development of arbitration in the Caribbean islands is also full of opportunities.

First, it illustrates the significant role to be played by the "big islands." The Dominican Republic established itself as a leading forum for commercial arbitration in the region, thanks to the dynamism of its Centro de Resolución Alternativa de Controversias ("CRC") and the hosting of multiple arbitration events. The participation of the State to proceedings initiated against it by

foreign investors, including under the ICSID Additional Facility Rules since the ICSID Convention is not in force in this island, shows its reliance on this method of alternative dispute settlement. As far as Cuba is concerned, its dynamism in terms of commercial arbitration and its recent moves to attract foreign investors offers this island a unique opportunity to play a leading role in the region in favor of arbitration.

Second, the development of arbitration in the Caribbean islands could benefit from experiences coming from other regions. Inspiration could be found, in particular as to the balance between investment protection and sustainability, in the Pan-African Investment Code, or the new Protocol for the Cooperation and the Facilitation of Investment within the Mercosur.

Overall, this recent trend in favor of arbitration in the Caribbean islands places arbitration as a reality, which resembles, what still was, some years ago, the wildest imagination. At a time when arbitration is often criticized, this trend in this particular region raises the interesting issue of whether its development responds to national, regional or international dynamics. The development of arbitration might simply show that this region, although not integrated as such, obeys to its own rules, and is able to set them.

The views set forth in this post are the personal views of the authors and are not intended to reflect those of their employers or clients.

This entry was posted on Wednesday, July 12th, 2017 at 12:01 am and is filed under Caribbean
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