

EXPLANATORY NOTE

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EXPLANATORY NOTE

PART I. PRELIMINARY NOTES

1. OHADAC AND ARBITRATION

The Organization for the Harmonization of Business Law in the Caribbean (OHADAC, as per its French acronym) came into being as a result of the successful strategy developed by OHADA in Africa, paving the way for the implementation of a uniform or harmonious legal framework intended to facilitate regional and international trade in the region. On May 15, 2007, Bahía Mahault (Guadeloupe) oversaw the signing of a document, which may be called the OHADAC, or Pointe-à-Pitre Proclamation, originally designed to spur a movement of great significance. Representatives of the public and private sectors of Guadeloupe and of the member countries of the CARIFORUM gathered in the Eastern Caribbean city upon the invitation of the Guadeloupian regional authority, the Pointe-à-Pitre Chamber of Commerce and Industry, and the Caribbean Association of Industry and Commerce (CAIC).

The meeting between regional authorities of the French Overseas departments and CARICOM (Caribbean Community) member states, was held in the presence of major representatives of the Caribbean regional bodies, such as the CARICOM/CARIFORUM Secretary General, the Association of Caribbean States (AEC as per its Spanish acronym) Secretary General, the President of the CAIC, the Haitian Secretary of State for Justice, and representatives of the cabinet of the Minister for Commerce and Trade in Haiti, of the United Nations Mission for the Stabilization in Haiti (MINUSTAH), of the Dominican Republic Justice Minister, and several other experts in the area. The Ambassador to AEC and CARICOM in charge of regional cooperation in the Antilles-French Guiana area, and a representative of the European Commission in Guiana, also took part in the meeting as observers.

The increasing share of the private sector in the development of commercial exchanges and the contribution made by economic agents to the process of regional integration have provided the basis for the constitution of OHADAC, together with the necessity to elicit a collective commitment from organizations representing the private sector, to cooperate closely with the public institutions in their endeavor to achieve economic integration in the region.

But economic integration and exchanges between economic actors require the availability of a legal platform affording the stability and security necessary to any purposeful negotiations, collaboration or exchanges - hence the importance of law as a regulating instrument to stabilize and guarantee the security of international commercial relations.

As a region with distinctive geographical, historical, cultural and political features and diverse legal traditions, the Caribbean has required legal stability in order to foster the development of international commercial exchanges, probably to a greater extent than any other region on the planet.

For this purpose the willingness of the States to work towards harmonizing national legislations and administrative practices is of paramount importance, as is the willingness of economic actors in the region to work, in turn, towards a sort of Caribbean *lex mercatoria* devised as a soft-law mechanism apt to fill any gap which may remain in the legislation in spite of ongoing institutional efforts.

OHADAC is the fruit of such willingness and determination. True to its early principles it holds that arbitration, as an institution devised to facilitate international trade, is bound to play a major role in the process of unification or harmonization. Such view was enshrined in the Pointe-à-Pitre proclamation and in the second OHADAC Conference, held in Port au Prince in June 2008.

Consequently there is a natural, logical, historical, necessary and wished-for connection between the OHADAC project, the Caribbean region, the ongoing efforts towards integration, the necessity to improve and ensure security for international transactions in the region, and arbitration as an institution devised to facilitate international trade.

It is no coincidence that, from the moment of its constitution, one of the primary aims of OHADAC should have been the initiative to create a Center of International Commercial Arbitration, to be called the OHADAC Caribbean Center of Arbitration, and to draw up a legal framework for the approval of its OHADAC International Arbitration Rules.

This was not thought of on a whim, without any planning or purpose - on the contrary, such initiative stemmed from a commendable and vital ambition to set firm bases for the development of commercial transactions involving nations of the Caribbean, as a pathway to economic development.

This territory has distinctive features, not only from a geographical, historical, political and cultural point of view, but also as regards the formation of the legal systems of the countries which compose it. As such, a specific study of the existing needs and specific proposals to address those needs seem essential in order to make a concrete analysis of a tangible situation.

2. THE CARIBBEAN AS A STAGE FOR OHADAC

The Caribbean is a vast region comprising the Caribbean Sea, its islands (known as the Greater Antilles and the Lesser Antilles) and the surrounding coasts. It stretches from the eastern part of the Lesser Antilles to the Western part of Central America, and from the south of the Gulf of Mexico and North America to the north of South America.

The Caribbean is the stage for the evolution of the OHADAC project - a stage which comprises territories with different characteristics; its islands and coasts are a patchwork of

nationalities, each having their own language, customs, culture and legal tradition. It has immense economic potential, which it is expected to develop in the coming years.

A simple glance at its composition makes it possible to appreciate the difficulties of OHADAC's mission.

2.1 Islands and Archipelagos

French overseas regional authorities: 1,080,500 inhabitants

- Guadeloupe: 404,000 inhabitants
- Martinique: 402,000 inhabitants
- Saint Martin (in the Caribbean): 36,000 inhabitants
- Saint Barthélemy (in the Caribbean): 8,500 inhabitants

British overseas territories: 209,100 inhabitants

- Anguilla: 13,500 inhabitants
- Bermuda: 66,000 inhabitants
- Caiman Islands: 70,000 inhabitants
- Turks and Caicos Islands: 30,600 inhabitants
- Virgin Islands: 23,100 inhabitants
- Montserrat: 5,900 inhabitants

Dutch dependencies: 335,000 inhabitants

- Dutch Antilles: 225,000 inhabitants
- Aruba: 110,000 inhabitants

United States dependencies: 4,125,000 inhabitants

- Virgin Islands: 125,000 inhabitants
- Puerto Rico: 4,000,000 inhabitants

Countries of French tradition: 10,035,000 inhabitants

- Haiti: 10,035,000 inhabitants

Countries of English tradition: 5,167,200 inhabitants

- Antigua and Barbuda: 69,000 inhabitants
- Bahamas: 302,000 inhabitants
- Barbados: 280,000 inhabitants

- Dominica: 69,200 inhabitants
- Grenada: 90,000 inhabitants
- Jamaica: 2,740,000 inhabitants
- Saint Kitts and Nevis: 39,000 inhabitants
- Saint Vincent and the Grenadines: 118,000 inhabitants
- Saint Lucia: 160,000 inhabitants
- Trinidad and Tobago: 1,300,000 inhabitants

Countries of Spanish tradition: 21,342,000 inhabitants

- Cuba: 11,242,000 inhabitants
- Dominican Republic: 10,100,000 inhabitants

2.2 Continental Overseas Territories

French overseas territories and *départements*: 230,000 inhabitants

- French Guiana: 230,000 inhabitants

Countries of English tradition: 1,272,000 inhabitants

- Belize: 372,000 inhabitants
- Guyana: 900,000 inhabitants

Countries of Dutch tradition: 630,000 inhabitants

- Suriname: 630,000 inhabitants

Countries of Spanish tradition: 223,056,500 inhabitants

- Colombia: 45,300,000 inhabitants
- Costa Rica: 4,600,000 inhabitants
- Guatemala: 14,000,000 inhabitants
- Honduras: 7,800,000 inhabitants
- Mexico: 112, 336,500
- Nicaragua: 5,500,000 inhabitants
- Panama: 3,320,000 inhabitants
- Venezuela: 30,200,000 inhabitants

OVERVIEW OF THE CARIBBEAN POPULATION BY LANGUAGE AND CULTURAL TRADITION

	ISLANDS	CONTINENT	TOTAL
FRENCH	11,115,500	230,000	11,345,500
SPANISH	21,342,000	223,056,500	244,398,500
ENGLISH	5,376,300	1,272,000	6,648,300
DUTCH	335,000	630,000	965,000
U.S. ENGLISH	4,125,000	-	4,125,000

As the table above shows, the region is home to over 266 million inhabitants and boasts significant economic potential, whose further development can be expected in the coming years.

3. WORKING TOWARDS INTEGRATION

Much has been said about the movements for self-determination and independence in the territories of former Caribbean colonies, whether in the Greater or Lesser Antilles, and about the several attempts to foster the formation of Caribbean groups on the basis of their common colonial experience or, sometimes, of more modern movements. A full-length analysis of this issue would exceed the purpose intended here. It suffices to mention that José Martí heralded these ideas when he viewed the unity of Cuba and Puerto Rico as “the twin wings of a bird”.

In the 20th century, more precisely in 1947, a movement pursuing unification emerged in the Antilles of British tradition, sparked by Jamaica and Trinidad. Prior to the independence of the various territories, most of the British Antilles joined into a confederation, aiming to achieve political, administrative and economic unification.

In the wake of this movement and following a conference in London in 1953, the British Caribbean Federation was formed, and subsequently ratified by the territories involved. The conference set the basis for a federal administration with a Governor-General and a legislative body comprising a Lower House and an Upper House. A federal vote was held in 1958, leading to the election of Sir Grantley Adams, a native of Barbados, as Prime Minister of the new Parliament of the Antilles. The federal capital was located in Port of Spain. Yet this commendable ambition for unity in the Caribbean, which had kindled hope for new independence and an autonomous government within the British Commonwealth, could not

prevent differences from arising between the two main protagonists, Jamaica and Trinidad, whose lack of cooperation ultimately hindered the project.

In 1962 a referendum took place in Jamaica; it resulted in a vote against the confederation, and was followed, in the same year, by Trinidad's decision to secede. These two events entailed, inevitably, the end of the confederation as it had been initially planned.

Over a decade later and as the result of 15 years of diligent work towards regional integration, CARICOM was brought into being through the Treaty of Chaguaramas, which came into force in 1973. The first signatories were Barbados, Jamaica, Guyana and Trinidad-Tobago. The organization substituted the Caribbean Free Trade Association (CARIFTA), originally designed to preserve the ties among Caribbean English-speaking countries in the wake of the dissolution of the West Indies Federation, and which remained in place between 1965 and 1972.

The formation of CARICOM was aimed at serving three main objectives:

- a) Stimulate economic cooperation within a Caribbean common market.
- b) Closer political and economic relationships among member states.
- c) Promote educational, cultural and industrial cooperation among countries of the Community.

CARICOM encompasses: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago. The Virgin Islands are an associate member. The countries participating as observers are: Anguilla, Aruba, the Dutch Antilles, Bermuda, Colombia, the Caiman Islands, Mexico, Puerto Rico, the Dominican Republic and Venezuela.

The main bodies of the Caribbean Community are the Conference and the Council.

True to its intent, CARICOM adopts and promotes measures to accelerate structural diversification of the industrial and the agricultural production, on a sustainable and regionally integrated basis. Finally, it fosters and develops policies and programs designed to facilitate the circulation of people and goods.

The structure of CARICOM relies on several internal entities. These include the Legal Affairs Committee (LAC), which provides guidance on treaties, international law issues and the unification of laws in the Community, and institutions such as the Caribbean Court of Justice (CCJ) and the Council of Legal Education (CLE), which are vested with the responsibility to apply the rules of justice and to create the conditions for the development of law.

CARICOM has a justice system and a legal administration system comprising: Attorney General, Minister of Justice, Minister of Legal Affairs, Office of the Director of Public Prosecutions, Law Enforcement services, a Judicial and Legal Services Commission, and Bar Associations.

The justice system in countries of continental European tradition is most often comprised of a Minister of Justice, a Public Prosecutor and Law Enforcement services. Courts have jurisdiction *ratione materiae*, with most differences stemming from the legal tradition.

Notwithstanding the efforts towards integration, CARICOM, and to an even greater extent the whole of the Caribbean, remains a colorful patchwork with legal traditions inherited from the mother countries of the various states composing it. To summarize, the Caribbean can be seen as the place of convergence between Romano-French law and Romano-Germanic law, with on the one hand French overseas districts or countries which achieved independence after the promulgation of the Napoleonic Code, inheriting the latter directly or through the 19th century Spanish Civil Code; and on the other hand countries which were influenced by English or United States common law or Dutch law, and which maintain the principles thereof. All of which represents a true challenge to any codification movement.

Additionally it must be said that notwithstanding the efforts already made, not minimizing in the least what has been successfully achieved in various fields, CARICOM in particular and the Caribbean in general are yet to implement a uniform, or even harmonious arbitration system, and their states are even further from boasting their own Arbitration Courts, even though this is a much sought-after aspiration for a number of Caribbean and Latin-American leaders who have voiced such objective in many forums.

It is the purpose of OHADAC to provide such opportunity, and in so doing to further the efforts made towards integration.

4. ARBITRATION IN THE CARIBBEAN

Any analysis of the evolution and the current situation of arbitration in the Caribbean must begin with an assessment of the differences between legal customs or legal systems. The legislative origins of the laws governing “domestic”, internal or national arbitrations, and of the rules applicable to arbitral proceedings in the former British territories, are largely grounded on English legislation. Yet, save for a few exceptions, each nation has its own legislation, which encompasses original laws and any amendments added to the said laws since their adoption.

An analytical comparison reveals similarities in the wording of the laws and in the systems of rules in force in Caribbean countries; it also highlights the fact that the legislation formerly applicable in the majority of those countries was derived from the English 1950 Arbitration Act, which provided for the consolidation of the previous 1889 and 1934 English Acts. Thus

the arbitral legislation in force in most English-speaking Caribbean countries has its origins in the said Act.

Over the years the need for updating the common model of arbitration rules has become more and more patent, despite the relative consistency of arbitration laws in English-speaking Caribbean states and in current CARICOM member states. The increasing cultural and commercial ties among Caribbean territories require the promulgation of a unified legislation to govern the resolution of international commercial disputes, understood as cross-border disputes arising where one of the parties is foreign, or where the issue in dispute or the motive thereof is situated or has its source in a foreign country.

Article 1 (3) of the UNCITRAL Model Law offers a wise and comprehensive definition of international arbitration, which has been adopted in most modern legislations on the matter, and considers that arbitration is deemed international where:

- a) the parties to the arbitration agreement have their places of business in different States at the conclusion of such agreement; or
- b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration, where specified in the arbitration agreement or determined in the manner prescribed in the said arbitration agreement
 - (ii) the place of performance of any substantial part of the commercial relationship or the place most closely related to the issue in dispute; or
 - (iii) the parties have expressly agreed that the subject-matter of the arbitration is related to more than one State

In the United States, the earliest arbitration laws exhibiting the modern features date back to 1920. In 1925 Congress approved the United States Arbitration Act (the Federal Arbitration Act), which was applicable in many commercial disputes. 1955 saw the passing of the Uniform Arbitration Act by the National Conference of Commissioners on Uniform State Laws, which was ultimately amended and updated in 2000, and which is the cornerstone of the arbitration system of Puerto Rico and the United States Virgin Islands.

The influence of English legislation is patent in the Caribbean, especially – as might be expected – across English-speaking territories, but without being limited to the latter. The legislation on arbitration currently in force in Great Britain is embodied in the 1996 Arbitration Law. However, not until a very recent date was such relatively novel legislation adopted by the totality of the English-speaking countries of the Caribbean, being circumscribed, as evidenced in the list below, to the few states which undertook to modernize their arbitration laws. Others followed suit yet maintained in place a system based on the 1950 English legislation, as was the case of Guyana or Trinidad and Tobago, where a careful reading of the laws reveals that as regards the enforcement of “foreign” arbitral awards, the

obligation pertaining thereto, which was promulgated by the Assembly of the Society of Nations in 1923 in compliance with the Protocol on Arbitration Clauses, still remains. Such regulation is clearly obsolete since the international body ceased to exist even before World War II. Subsequently, in 1958, owing to the efforts of UNCITRAL and the ICC, the New York Convention on the recognition and enforcement of foreign arbitral awards was adopted under the auspices of the United Nations Organization, although only the most advanced legislations, such as those of Belize, Bermuda, the British Virgin Islands and Dominica, contain references to the said Convention.

As regards the enforcement of foreign awards, in the Lesser Antilles the signatories or countries having ratified the 1958 New York Convention are in the minority. Some countries such as Antigua and Barbuda, Barbados, Dominica and Trinidad and Tobago, are signatories of the treaty. Several would not adhere. Others fall within the scope of application of the Convention through their mother countries, as is the case of the French, Dutch and United States Overseas territories. This is an incentive consistent with the perceived need for a regional assessment with a standardized perspective applicable across the territories concerned as regards the enforcement of foreign awards in international arbitrations.

The study of Caribbean arbitration legislations highlights the compelling necessity for seeking a model unique to the region.

The situation is different in the Spanish Caribbean, where most countries – i.e. Costa Rica, Mexico, the Dominican Republic and even Cuba, have promulgated modern arbitration laws based on the UNCITRAL Model Law - albeit not exactly following its letter - which nonetheless resulted in the modernization of the institution in 2007.

Differences can also be observed in the French and Dutch overseas territories, where arbitration is governed by a 2011 order to reform the institution and by the 2007 Dutch law, respectively. In the specific case of the French overseas districts, arbitral tradition and modern French law afford the combined advantages of legislation, case law and customs in respect of an institution whose practice is not recognized in other neighboring islands in the Lesser Antilles, although it is not entirely foreign to them.

5. COMPARISON OF REGIONAL LAWS

A general overview of national arbitration legislations in the Caribbean appears necessary to identify with precision those institutions consistent with modern arbitral procedure, such institutions being essential to any move towards uniform regulations. Up until a few years ago many of the said territories lacked an arbitration legislation of their own. The following list shows that 34 out of the 39 territories which may aspire to enter the OHADAC area have their own national regulations on the matter.

6. OHADAC TERRITORIES: ARBITRATION LEGISLATION

- **Anguilla**
 - England & Wales Arbitration Act, 1996, Chapter 23.
- **Netherlands Antilles**
 - ARBITRAGE EN MEDIATION REGELS van de NEDERLANDSE ANTILLEN en ARUBA, 20/ 11/ 2007.
- **Aruba**
 - ARBITRAGE EN MEDIATION REGELS van de NEDERLANDSE ANTILLEN en ARUBA, 20/ 11/ 2007.
- **Antigua and Barbuda**
 - Antigua and Barbuda Arbitration Act, 1975.
- **The Bahamas**
 - Arbitration Act, 2009.
- **Barbados**
 - Barbados International Commercial Arbitration Act, 2007.
- **Belize**
 - Belize Arbitration Act, 2000.
- **Bermuda**
 - Bermuda International Conciliation and Arbitration Act, 1993.
- **Colombia**
 - Decreto núm. 1.818 de 1998: Estatuto de los mecanismos alternativos de solución de conflictos de Colombia. (1998 Legislative decree n°1.818 of Colombia : Statute of alternative legal mechanisms for dispute resolution)
 - Reglas de Procedimiento del Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá. (Procedural Rules of the Arbitration and Conciliation Center of the Bogota Chamber of Commerce)
- **Costa Rica**
 - Ley N°. 8937, de 27/04/2011, sobre Arbitraje Comercial Internacional. (Law N°. 8937, of 27/04/2011 on International Commercial Arbitration)

- **Cuba**
 - Decreto-Ley n°. 250, de la Corte Cubana de Arbitraje Comercial Internacional. (Legislative Decree-law n° 250 of the Cuban International Commercial Arbitration Court)
- **Dominica**
 - Dominica Arbitration Act (1998).
- **Guadeloupe**
 - Règlement d'arbitrage de la Cour Commune de Justice et Arbitrage du 11 mars 1999. (Legislative Decree n° 2011-48 of 13 January 2011 on the reform of arbitration, France).
- **French Guiana**
 - Règlement d'arbitrage de la Cour Commune de Justice et Arbitrage du 11 mars 1999. (Legislative Decree n° 2011-48 of 13 January 2011 on the reform of arbitration, France).
- **Guyana**
 - Guyana Arbitration Act, 1916.
- **Guatemala**
 - Decreto n° 67-95: Ley de Arbitraje de Guatemala. (Legislative Decree n° 67-95: Guatemala Arbitration Law)
 - Reglamento de Conciliación y Arbitraje del Centro de Arbitraje y Conciliación de la Cámara de Comercio de Guatemala. (Rules of Conciliation and Arbitration of the Center for Arbitration and Conciliation of the Guatemalan Chamber of Commerce)
- **Haiti**
 - Haiti Arbitration Law, Legislative Decree on the amendments to Volume IX of the Haitian Code of civil procedure (28/12 /05).
- **Honduras**
 - Decreto n° 161-2000: Ley de Conciliación y Arbitraje de Honduras. (Legislative Decree n° 161-2000: Law on Conciliation and Arbitration of Honduras)
- **Caiman Islands**
 - ARBITRATION LAW, 2012.
- **Turks and Caicos Islands**
 - Arbitration Ordinance, 7 of 1974.

- **British Virgin Islands**
 - Arbitration Act., 17/12/13
- **United States Virgin Islands**
 - Uniform arbitration Act, 2000.
- **Jamaica**
 - Jamaica Arbitration Act (1900), amended in 2004.
- **Martinique**
 - Règlement d’arbitrage de la Cour Commune de Justice et Arbitrage du 11 mars 1999 (ROHADA). (Legislative Decree n° 2011-48 of 13 January 2011 on the reform of arbitration, France).
- **Montserrat**
 - England & Wales Arbitration Act, 1996.
- **Mexico**
 - Ley de Arbitraje Comercial, de 22 de julio de 1993, Modifica e incorpora artículos al Título IV del Libro V del Código de Procedimiento Civil, Artículos 1415 al 1463. (Law on Commercial Arbitration of 22 July 1993, Amending and incorporating articles to Title IV of Volume V of the Code of civil procedure, Articles 1415 to 1463)
 - Reglas de Arbitraje del Centro de Arbitraje de México. (Arbitration Rules of the Mexico Center for Arbitration)
 - Reglamento del Centro de Arbitraje y Mediación para las Américas. (Rules of the Center for Arbitration and Mediation of the Americas)
 - Reglamento de Arbitraje de la Cámara Nacional de Comercio de la Ciudad de México (Arbitration Rules of the National Chamber of Commerce of Mexico City)
- **Nicaragua**
 - Ley n°. 540 de 25 de mayo de 2005(Law n° 540 of 25 May 2005, on Arbitration and Mediation, Nicaragua).
- **Panama**
 - Decreto-Ley n°. 5 de 8 de julio de 1999. (Legislative Decree n° 5 of 8 July 1999)
 - Reglamento del Centro de Conciliación y Arbitraje de Panamá. (Rules of the Center for Conciliation and Mediation of Panama)

- RCESCON: Reglamento del Centro de Arbitraje, Conciliación y Mediación del Centro de Solución de Conflictos (Panamá). (Rules of the Center for Arbitration, Conciliation and Mediation of the Center for Dispute Resolution, Panama).
- **Puerto Rico**
 - “Puerto Rico Law of Commercial Arbitration. (PRLCA), Law N° 376 of 8 May 1951. The Porto Rican Code of Civil Procedure devotes a whole chapter to arbitration. It is very similar to the current version of the Uniform Arbitration Act of the United States, enacted in 1955 and amended in 2000.
- **The Dominican Republic**
 - Ley n°. 489-08 sobre Arbitraje Comercial de la República Dominicana. (Law n° 489-08 of Commercial Arbitration of the Dominican Republic)
- **Saint Martin**
 - Règlement d’arbitrage de la Cour Commune de Justice et Arbitrage du 11 mars 1999 (ROHADA). (Legislative Decree n° 2011-48 of 13 January 2011 on the reform of arbitration, France).
- **Saint Barthélemy**
 - Règlement d’arbitrage de la Cour Commune de Justice et Arbitrage du 11 mars 1999 (ROHADA). (Legislative Decree n° 2011-48 of 13 January 2011 on arbitration reform).
- **Trinidad and Tobago**
 - Act Relating to Arbitrations, 1939.
 - Act. No. 8, Mediation, 2004.
 - Laws of Trinidad Tobago, Chapter 501, 2012.
- **Venezuela**
 - Ley de Arbitraje Comercial de Venezuela (1998). (1998 Law on Commercial Arbitration of Venezuela)
 - Reglamento de Arbitraje de la Cámara de Comercio de Caracas. (Arbitration Rules of the Caracas Chamber of Commerce)

7. GENERALLY ACCEPTED RULES

Arbitration in the Caribbean has clearly been influenced by the factors previously enumerated as regards the inception, drawing up and promulgation of national legislations. Yet as regards its implementation – that is, its application by local courts – and even the inception of some of

the previously mentioned legislations, the existence of a “binding” force resulting from the practical application of some of the main existing Arbitration Rules is also patent.

The fact is that international commercial arbitration is governed by rules of its own, and its arbitrators, lawyers and supervisory institutions do not hesitate to gain inspiration from the most successful experiences, much as sports enthusiasts are inclined to do in their own field. Such reality is also true in the case of arbitration.

Arbitration is born and develops out of the will of the parties, yet it rests in the bosom of the States. The procedure to be followed to resolve any specific dispute is set out in the agreement concluded between the parties. Such procedure may be consistent with the rules set out by an institution, or it may be drafted and created by the parties themselves, as in the case of *ad hoc* arbitration. Thus, by relying on the will of the parties to the dispute, and on the support provided by the institution chosen by the said parties, a decision will eventually be reached, and such decision shall be internationally enforceable, as any ruling delivered by an ordinary court; all of which makes plain and materializes expressions of the will of the parties, the discretionary nature of the agreement between the parties, and the underlying support of the state.

Therefore everything will be in perfect order so long as the parties establish their own rules while acknowledging the limitations to their freedom of action. Such limitations include: any mandatory laws from which the parties may not derogate by contract (since the arbitration agreement is but a contract between the parties); any mandatory arbitration laws in force in the place of arbitration, or in the country or territory involved in the arbitral procedure. It ensues that the specific arbitration law governing the dispute, along with any current international laws on public order, constitute the limit to the freedom of the parties. Although it is not our purpose to dwell on the principles enshrined in the law, it is important to show the reasons why arbitrators, in spite of the freedom they enjoy and their discretionary powers to resolve the dispute at hand, are bound by certain limitations, which constitute or are known as the “rules of the arbitral tribunal”. Apart from the limitations set out in the arbitration agreement, there are only a few limits, beyond which there are no external rules, applied *prima facie*, which may prevent the arbitrator from conducting and controlling his or her procedure.

To sum up, the rules, methods and proceedings emanating from the Rules drafted by institutions with greater international experience and inscribed within a long arbitral tradition, have contributed to creating a sort of arbitral *lex mercatoria*, which parties often adopt when involved in a particular dispute, and which at other times fosters the development of customary arbitration in a given territory, or defines the regulatory path adopted by an arbitral institution.

When applying this concept to the Caribbean, after having consulted and studied national regulations as well as procedures, it may be inferred that there are four typical sets of rules

emanating from recognized arbitral institutions currently having significant influence and being widely applied in the Caribbean. They are:

- a) the London Court International Arbitration (LCIA) Rules, of 1 January 1998;
- b) the American Arbitration Association (AAA) Rules, amended and in force as of 15 September 2005;
- c) the International Chamber of Commerce (ICC, with seat in Paris) Arbitration Rules, and;
- d) the United Nations Commission on International Trade Law (UNCITRAL) Rules.

Although the present section is not concerned with providing a detailed explanation of each of the rules set out in the suggested Rules, it must first be stated that the latter were drafted based on the common denominators of national arbitration laws, in combination with the best elements of each of those regulatory instruments, with the added value brought by the practical experience of the academics and arbitrators consulted for that purpose.

As is well known, the standard rules of an organization or authority overseeing or administering arbitrations, may only be used with the express consent of such institution, and only after agreeing to the payment of the scheduled fees.

Comparison of international rules: a brief comparison of the main international arbitration rules, those most commonly-used and most influential in the development of national laws in the Caribbean, makes it possible to identify their differences and similarities.

PART II. OHADAC ARBITRATION

8. WHY OHADAC ARBITRATION?

Since its inception, the OHADAC project for the harmonization of Business Law in the Caribbean, as previously indicated, has included international commercial arbitration among its objectives. And although the very title of the project refers to “harmonization”, (whose meaning and effect as regards codification is different to the concept of substantive uniformity), the initial idea underpinning the project was the creation of a Latino-American and Caribbean International Arbitration Court of its own.

This avowed purpose must not be a cause for concern for those Chambers of Commerce currently overseeing arbitrations in the region, for national or international arbitral tribunals, or for the courts of arbitration of worldwide renown. The reasons for this are obvious: for many years, arbitration has been a valuable instrument to stimulate international trade, as an alternative means of resolving disputes involving international commercial relationships, becoming a healthy aspiration for those institutions devoted to supporting traders, and for some countries wishing to establish their own court of arbitration. There is enough space, competition is both lawful and accepted, and furthermore there would be no such competition,

since the object of this undertaking is to actively foster economic activities in the region, involving small and medium-sized companies which have no reason or necessity to take their cases to arbitral courts in far-away places which have no experience as to the specific situation and features of the territory in question.

Much has been said about the legal nature of arbitration and its contractual or jurisdictional conceptualization. This is devoid of any interest from the perspective adopted here, the theories on the legal nature of rules being but an obsolescence of medieval scholastic theory, which still lingers in the minds of modern-day legal experts. What does retain our attention is the yearning for an arbitral institution with specific features tailored to the requirements of the surrounding states, and to their international commercial relationships. This interest is commonly observed in any movement for political or commercial integration, such as CARICOM, the Bolivarian Alternative for the Americas (ALBA) or any other.

In respect of arbitration matters, the harmonization of business law may lead to three different paths, two of which point towards institutional arbitration, and one to *ad hoc* arbitration: one model law for the countries of the region, as a gateway to a future harmonized national codification (that is, harmony within varied legislation), or to a common court of arbitration. The third path may lead to a set of *ad hoc* arbitration rules.

Consequently the first questions asked were: model law or arbitration rules? Institutional or *ad hoc* arbitration?

And should the choice be that of an institution administering arbitrations with a set of rules intended for a court with a specific seat, or a set of rules without a court, for *ad hoc* arbitration?

The idea of a model law was discarded from the very beginning, since this path has already been cleared and paved with the UNCITRAL model law on arbitration. Such law served as the primary piece of legislation for around twenty Latino-American and Caribbean countries to develop their own national laws. However, in spite of this, in most other countries national legislation is based on quite dissimilar criteria. Furthermore, a model law only contributes to laying out the elements of domestic arbitration - which, even though it may have international projections, stems from a national court; such a court, in order to become the center for arbitration in the region, would require the acceptance of the other countries or trade operators. The commendable purpose of OHADAC, so frequently mentioned already, to make two forms of arbitration available –namely, institutional and *ad hoc* arbitration – should be reiterated at this point. Institutional arbitration is administered by a permanent arbitral institution, i.e. a court with a specific seat. *Ad hoc* arbitration, on the contrary, relies not on a court, but on a set of arbitration rules, based on which the parties appoint the arbitrators and the arbitrators appoint the president; failing any choice by the arbitrators, the president will be appointed by an appointing authority. The place of arbitration is not pre-determined, neither

are the rules governing the proceedings, as the parties or the arbitrators designated by them are at liberty to choose the rules to be used in each arbitration.

These alternatives have been meticulously assessed, always from the perspective that arbitration is the prime alternative instrument for resolving disputes arising out of international transactions, and it has come to be, without a doubt, the most appropriate tool for resolving international commercial disputes. There is in this respect a gap in the Caribbean legislative landscape.

The most famous international courts, such as the ICC, hold on a yearly basis hundreds of arbitrations to which the parties are Caribbean. OHADAC does not consider trade operators resorting to international courts to be misguided in their choice, especially since the prestige of these courts - already made patent by their power to revise awards to ensure compliance with any applicable legal and formal requirements - is on a par with the quality and efficiency the said courts apply to the administration of arbitration proceedings. There is a long tradition and valuable experience associated with international courts (such as the ICC), which is not to be rejected, underestimated or ignored, but on the contrary should be admired, respected and held up as an example by any institution endeavoring to develop an arbitration scheme, as other national or international arbitral courts have done.

Now it must be said that the main arbitral forums, those with greater tradition and experience, are not only situated in areas remote from the Caribbean, but in many cases the characteristics of Caribbean countries are also foreign to those forums; as stated earlier, the Caribbean is a heterogeneous region but it is well-defined, and its nations share common interests.

For this reason, the main objective of OHADAC is to bring the place of arbitration closer to the place of the contract, or stage for the dispute, and also to provide purpose-built training for arbitrators in order to produce a corps of experts with extensive knowledge of the characteristics of the territories. It would be sound to note that many a renowned arbitrator with ample skills to resolve, wisely and fairly, disputes regarding a given matter, has lapsed out of context where the source of the dispute originated in customs or rights which are deeply-rooted in specific territories and are utterly foreign to his or her usual tasks and manner of understanding institutions, facts and material objects.

And here lies, precisely, one of the advantages of arbitration over national judicial institutions: the possibility of choosing an arbitrator with knowledge not only of the procedure and of the applicable law and legislation, but also of the subject-matter of the dispute, and of any characteristics and situations that may be relevant to the facts out of which the dispute has arisen. It is common knowledge that courts of arbitration differ from arbitral tribunals. It is no less true that an arbitration administered by a court of arbitration or an arbitral institution located in Europe, may have its place of arbitration in any city. However, it is generally observed that, independently of the fact that by virtue of the principle of autonomy of the will

of the parties they may choose a sole arbitrator or appoint an arbitrator, in practice the most frequently-appointed arbitrators are those who most assiduously participate in arbitrations in the courts of greater prestige. As a result of the increased workload the said arbitrators often participate in arbitrations which unavoidably fall outside the scope of their expertise. Similar names will be found in arbitrations concerning entirely unrelated matters. Versatility, as the ability to understand and oversee several matters concomitantly, is certainly a good thing, yet specialization is one the significant advantages of arbitration over the judicial institutions, and under such circumstances it is bound to lose its meaning. The knowledge of the arbitrator, and his independence and impartiality *vis-à-vis* the parties, are essential to ensure that arbitration retains the place of honor it has earned.

The other objective of OHADAC is to provide a legal framework relying on the principle of harmonization, and using specific techniques and devices to set up a legal platform designed to provide the greatest possible legal certainty to trade operators, thus facilitating commercial exchanges in the Caribbean. In this sense, the Center for the promotion of arbitration and the adoption of *ad hoc* arbitration rules for the Caribbean will constitute an opportunity to foster legal, cultural and economic ties among the States involved.

The ambition of the OHADAC Project is to design an international commercial arbitration scheme – one more convenient than the existing alternatives for the parties and the legal operators involved. For this purpose, its concept of arbitration relies on five main principles:

- a) independence and autonomy of the arbitrator *vis-à-vis* the parties;
- b) expedited proceedings made possible through short time periods and no adjournments;
- c) efficiency of the arbitral tribunal, whose arbitrators are required to hear a limited number of cases simultaneously;
- d) to foster *ad hoc* arbitration as a means of keeping the procedure consistent with the wishes of the parties;
- e) to promote arbitral culture in the region, through the publication, exchange and development of events and courses providing specific training to local experts.

Although the principle of autonomy of the parties should be the essence of any international commercial arbitration model, the unfortunate reality is that in many cases arbitral procedures are not designed to serve the interests of the parties or of the operators, but to serve the purpose of arbitral institutions, arbitrators and lawyers. All too often do the parties feel that they are victims of the proceedings initiated by them? It is the aim of the OHADAC Project to bring the interests of the operators back to the core of the arbitration. In terms of legal technique, the autonomy principle translates firstly into an arbitral procedure which may give the parties the greatest possible leeway in setting out and composing the tribunal according to their own wishes; and secondly it requires reasonable limits to be set on the discretionary powers of arbitrators as regards the handling of the proceedings and the making of the final

award, respecting to the letter the mandate given by the parties. But the ultimate requirement in achieving this goal is the commitment of an arbitral institution willing to promote arbitration and encourage its practice; to publicize the elements of knowledge gathered from the best international experience; an institution which may serve as appointing authority in *ad hoc* arbitration, and which may, upon request by the parties, administer arbitrations while guaranteeing at all times the principles of autonomy of the parties, neutrality and impartiality, and holding the interests of the parties above those of the arbitral tribunal itself and of the institution administering the arbitration.

No arbitration system can be grounded exclusively on the interests of the parties from a strictly formal point of view. The arbitration scheme must provide trade operators with an efficient and fair solution in terms of foreseeability and neutrality. Efficiency requires the arbitral procedure to be simple, quick and economical. A different model is needed to create optimal conditions for fair arbitrations – one which would require arbitrators to adjust their degree of involvement as regards the procedure, which would put a stop to multiple appointments often resulting in arbitrators undertaking to resolve more disputes than they can and should handle, and leading to widespread irresponsibility. Quite frequently in the course of an arbitration, scheduled hearings or hearings for the taking of evidence or oral arguments are postponed or adjourned because one or several arbitrators have contracted other professional obligations. This could be reasonably acceptable to a point, but the excessive engagement of arbitrators and their reiterated appointments, sometimes by the parties and sometimes by the court itself, failing any choice by the parties, has led to a deplorable situation. In many prestigious international arbitration forums, following the closure of the proceedings, the parties may have to wait for months, sometimes for a period of up to one year, before the arbitral tribunal renders an award. The waiting period commonly seen as reasonable for the making of an award in an international dispute of some magnitude is around two years, without taking into account the postponements that may result from any intervention or judicial review proceedings that may be brought to ensure the enforcement of the award. In economic terms, the delays in arbitral procedures cause great prejudice to the parties, and such flaws in the system must be corrected through several practical steps: by reducing the procedural time periods, seeking the expertise of the court to expedite the procedure and demanding that arbitrators display greater commitment and zeal than is currently required of them.

Efficiency also requires arbitration costs to remain within reasonable limits, in terms of administrative costs and arbitrators' fees. Any efficient arbitral system must aim to appoint arbitrators of proven competence and acknowledged prestige; but the statement of impartiality and availability is the actual representation of the ability to carry out with loyalty and efficiency the mandate given by the parties, acknowledging their decision to rely on an independent third party to resolve the dispute at hand. Furthermore, the calculation mechanisms for determining the fees of the arbitrators, currently based on the pro rata of the

monetary amount in dispute, must be corrected and determined applying a set of more reasonable and more modest criteria which may provide for fair compensation for the services rendered. Clearly, the designation of the place of arbitration is relevant with regard to the efficiency of the arbitration, and the parties must therefore take it into account. In principle, the fact that the arbitration should take place in the Caribbean should contribute to lowering its costs.

It is crucial for the parties to have confidence that the decisions of the arbitrators will be fair and equitable, grounded essentially on legal certainty and foreseeability. To this end, the appointment of the arbitrators must be seen as a guarantee of their competence and professionalism. Insofar as such function is exercised based on the OHADAC arbitration rules, the method suggested for appointments does not rely on a system of closed “lists” often crippled by its own rigidity. When appointing arbitrators, their arbitral experience must not be as decisive as their expertise concerning the points at issue and, more particularly, as their in-depth and accredited knowledge of the specific subject-matter and of the law applicable to the merits of the dispute. An arbitrator who is an expert on the issues in dispute is preferable to an “arbitral litigant” and, paradoxically, guarantees greater efficiency in the handling of expert assessments and the taking of evidence, which leads to a better-quality award.

Providing quality justice entails applying strict requirements as regards both the arbitral proceedings and the drafting of the award. The guarantees that may be invoked in defense of a party are not exclusively reserved for procedures brought before national judicial institutions. An arbitral procedure guaranteeing the procedural stance of the parties also facilitates the international recognition of an award, the structure of, and legal grounds for which, must be consistent with the mandate given by the parties. Finally, the quality of the proceedings as a whole must rely on the most rigorous rules regarding the impartiality and independence of arbitrators, which may not be deflected by any argument invoking immunity or exemption from responsibility in the exercise of their functions.

The adoption of the OHADAC arbitration rules intends to provide trade operators, lawyers, professors, legal practice bodies and any party interested or involved in international business in the Caribbean, with an appropriate instrument in order to have recourse to arbitration as an alternative means of resolving disputes arising out of cross-border commercial relationships.

9. ARBITRATION RULES ALLOWING FOR *AD HOC* OR INSTITUTIONAL ARBITRATION.

9.1 What are the advantages of *ad hoc* arbitration over institutional arbitration for OHADAC?

The creation of a permanent court of arbitration requires financing, at least until such time as the court hears a number of cases sufficient to self-finance its activities. Initial requirements are: a seat, premises for offices and for holding hearings, staff for its secretariat, a

management board, and the secretaries or advisors administering the arbitrations submitted to the court. Such court would be “openly competing” with national arbitral courts in the region, and of course with international arbitral courts. As regards permanent arbitration courts, arbitration is, to a certain extent, an operation which requires it to be profitable and it is kept going by the arbitral fees paid by the parties, according to the established schedule; such profit is used to cover the costs of arbitration and pay the fees of the arbitrators. The new OHADAC Court in the Caribbean will require financing for a number of years until it has gained acceptance among business leaders and lawyers in the region.

For these reasons, although the idea initially favored is institutional arbitration, which offers the added incentive of assisting the parties in the conception and development of the arbitration, the *ad hoc* arbitration is scheduled to start the work, without prejudice to both systems coexisting at a later stage, since at times the parties may opt, for specific reasons, for *ad hoc* arbitration.

The concept of institutional arbitration, through a Center for arbitration or any other permanent body requires prior definition of its terms, especially concerning its seat, its personnel and the budget necessary to launch the activities. Furthermore the positive aspect of institutional arbitration lies in the fact that the purpose of OHADAC is to promote and publicize arbitration, thus requiring a professional center.

A recent study on documents used as legal instruments in international transactions, international agreements and investments, shows that the main difficulty for the parties lies in adopting a consensual solution for dispute resolution. This is why a center for arbitration has become indispensable.

The most frequent deficiencies of arbitration in the region are:

- a) Flawed, void or inapplicable agreement (known as “pathological clause”).
- b) Inappropriate choice of arbitration courts.
- c) Inappropriate places of arbitration.
- d) *Ad hoc* arbitration, with no knowledge of the standard clause, resulting in the lack of designation of the elements needed to ensure its viability.

As can be observed, the ample freedom of action which the parties enjoy by virtue of the principle of autonomy of will, is not sufficient for them to develop an arbitration agreement of their own. Certain items need to be specified when drafting the arbitration agreement, in order to avoid drafting a pathological clause, or an incomplete clause likely to prevent the parties from making due use of the rights that the law or the rules confer upon them. Failing any stipulation by the parties, such items must be specified by the court or the arbitral tribunal. A few examples are listed below:

- a) The name of the institution administering the arbitration.
- b) The place of arbitration (which must be a city and not a country).
- c) The law applicable to the merits of the dispute.
- d) The law applicable to the proceedings, and the rules thereof.
- e) The language or languages to be used.
- f) The period of time or deadline to submit the notice of arbitration (a requirement in order to submit any dispute to arbitration).
- g) The obligation (where applicable) to exhaust other remedies.
- h) The number of arbitrators.
- i) The arrangements or method for appointing the sole arbitrator or the third arbitrator.
- j) The restrictions concerning any actions or appeals.
- k) The appointing authority (in the case of *ad hoc* arbitration).
- l) The terms of payment (where not provided for by the rules, as in the case of *ad hoc* arbitration).

Instead of specifying these items, the parties frequently waste time and energy stipulating elements already provided for in the very rules of the arbitration court, in the applicable legislation of the country and in international treaties. All of which, even though one might be tempted to recall that “no abundance of arguments can vitiate proceedings” leads to repetitions which are often uncalled for and sometimes even inaccurate or contradictory, causing provisions that should have been applicable *ipso jure*, pursuant to the chosen rules, to become inapplicable.

Arbitration rules should enable the parties to avoid such problems when opting for arbitration, either institutional or *ad hoc*. The OHADAC arbitration rules are intended to serve such purpose.

10. SEAT OF THE CENTER AND PLACE OF ARBITRATION

The creation of a Caribbean Center of Arbitration entails the designation of a seat for the Center. The following is a brief analysis summarizing the many studies carried out towards the proposal submitted in the present article.

10.1 Place of arbitration

The notion of seat in international arbitration generally designates the place where any concrete actions associated with the arbitral procedure, such as the hearing of the parties, the taking of evidence or the execution of the award, are carried out.

Its location also determines which courts, within the state, have jurisdiction to resolve the problems encountered by arbitrators in the exercise of their arbitral functions; any appeals against the award may also be raised before such courts.

The place of arbitration entails the legal determination of:

- a) the law governing the arbitral procedure, which in turn has effects on the arbitration agreement;
- b) the composition and jurisdiction of the arbitral tribunal;
- c) the conduct of the proceedings;
- d) the content of the award;
- e) the causes of invalidity of the award;
- f) the grounds for rejecting the recognition or enforcement of the award, and
- g) any elements concerning the intervention or assistance of judges in the arbitral procedure.

Furthermore, the place of arbitration is a decisive factor in the determination of the international nature of the procedure, arbitration being deemed international when the place agreed upon in the arbitration agreement is situated out of the State in which the parties have their place of business.

It also determines the nationality of the award, which may be of great significance when the time comes to request its recognition and enforcement; for instance, the recognition and enforcement of an award may be denied where the arbitration agreement is deemed not to be valid pursuant to the law of the place where the award was rendered.

In certain States the place where the award is rendered determines its enforceability, since under certain legal systems only awards which have been rendered in specific States may be enforced. For that reason it is essential that the place of arbitration (a city and not a country) should be located in a State which has signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Among the factors to be taken into account to designate an appropriate place of arbitration are, notably, the following:

- a) The relationship between the law of the place of arbitration and the arbitral procedure, although this issue is becoming less and less relevant given the increasing number of States adhering, in whole or in part, to the UNCITRAL Model Law, thus resulting in a more widespread harmonization of arbitral procedures. A State whose legislation is inspired by the Model Law is considered to be a State with a modern body of rules in the field of arbitration, in favor of this legal institution.
- b) The existence of a multi-party or bilateral treaty in force between the State where the arbitration takes place, and the State or States in which the award is likely to be enforced;

in this respect the compulsory reference is the previously mentioned New York Convention, and notably the provisions in Article V of the said Convention, which led to the adoption of uniform solutions by the various state judges involved, in matters of annulment of arbitral awards, to the extent that the causes invoked for annulment do not differ from the causes enumerated in the previously mentioned provisions.

- c) The geographical location of the subject matter of the dispute and the proximity of the evidence.
- d) The degree of involvement and collaboration of judges in the arbitral procedure, in accordance with local legislation.
- e) The appeals against arbitral awards provided for by the local legislation.
- f) The existence of any peremptory provisions whose violation may entail the nullity of the award.
- g) The search for a neutral place, as the place of arbitration thus elected will prevent either party from retreating behind the advantages of their own legal systems.
- h) The proximity of the place of arbitration to the place of residence of the parties in order to facilitate travel.
- i) The availability of support services.
- j) Political stability, personal safety, no threats of riots or open conflict.

Let us recall at this point that we are considering the place of arbitration, and not the seat of the arbitral institution. The latter does not necessarily have to coincide with the place of arbitration, which the parties may designate freely without being required to keep its location consistent with that of the institution administering the arbitration, where resorting to international arbitration.

It is essential that the seat of arbitration should always be located in a specific place. Electing a State is not sufficient, since the designation of a place of arbitration entails that of a national judicial body which is individualized in order to exercise its judicial supervision over the procedure. Thus, the designation of a place of arbitration has vital importance regarding the conduct of the procedure and the viability of the arbitral award, a concept remote from any search for a pleasant arbitral setting (arbitral tourism).

A study of the legislation on arbitration matters in force in the State concerned appears necessary in order to determine the extent to which its rules can provide for fair arbitration; it also seems wise to consider the stance of national courts regarding arbitration as a legal institution in the said State. It is worth stressing again that the place of arbitration is the criterion by which to determine international jurisdiction of a court for the purposes of annulment of the award. It ensues that the acceptance by ordinary courts of the legal grounds on which the arbitration rests is a necessary requirement. Arbitrary judicial involvement or the

judicialization of the arbitration are bound to be extremely detrimental to the procedure and may preclude the choice of a place as an appropriate seat of arbitration.

In light of these statements, considering the degree of trust to be placed in judges responsible for initial scrutiny regarding their application of the local laws, it has to be remembered that the place of arbitration is the product of the parties' free choice, which is not the case of the State in which the award is to be enforced.

From this point on the court of enforcement shall deal exclusively with any errors of an international nature which the arbitral award may contain, having discretionary jurisdiction in the matter, which is not applicable where local criteria determine the defect in the award.

10.2 The seat of the arbitral institution

The process of international commercial arbitrations relies, undisputedly, on several postulates, whose existence are the condition for a given country to be elected as arbitral seat - not only as a possible place of arbitration, but as a permanent arbitral institution.

The postulates necessary to carry out arbitrations with the required efficiency, previously stated with regard to the arbitral procedure, may also be required in the seat of the Center to provide an appropriate legal framework for the procedure, building trust towards the trade operators and lawyers resorting to arbitration.

The main features identifying a given place as a possible seat for an arbitral institution are as follows:

- a) geographical location, access from all other countries in the region;
- b) existence of a law compliant with the modern principles of arbitration;
- c) presence and validity of the principle of autonomy of will (basic principle on which the structure of arbitration rests);
- d) recognition, support and assistance from judicial authorities, without excessive involvement, relying on an appropriate legislative basis and case-law basis;
- e) the need to create a favorable case-law database, consistent with any basic principles internationally recognized in matters of international commercial arbitration – as an arbitral “*ius cogens*”;
- f) the development and reproduction (or proliferation) of a general culture favorable to arbitration;
- g) civil safety, political and social stability.

Many of those features, which form the backbone for the development of arbitration in any given place, are present in the proposed seat of arbitration as stated in the draft Statute. Furthermore – and this comes as a novelty, matching the geographical scattering which characterizes the territories of the Caribbean – there is a proposal for the Center to create sub-arbitration seats, in which a small office or even just a local secretary might receive notices of

arbitration and bring the management of the proceedings closer to the place of the contract or place of the dispute.

11. AD HOC ARBITRATION RULES

Ad hoc arbitration has developed mostly on the basis of the United Nations Commission for International Trade Law (UNCITRAL), Arbitration Rules, which came into force through U.N. General Assembly Resolution 31/98 on 15 December 1976.

The UNCITRAL Rules have caused *ad hoc* arbitration to shift towards institutional arbitration. By designing a set of rules without a court, there lacks a permanent organization overseeing the arbitration, as well as the Secretariat which lends its assistance in the course of the proceedings, but the pre-established rules set out the procedural rules and therefore relieve the parties of the burden of stipulating them in their agreement. A mere reference to UNCITRAL *ad hoc* arbitration is sufficient for the Rules to become applicable, and the sole obligation of the parties is to fill in the blanks, indicating the place of arbitration, the applicable law, the number of arbitrators and the authority responsible for appointing the arbitrators or the third arbitrator acting as president of the tribunal, failing choice by the parties.

However, UNCITRAL incorporated in its rules a series of measures of “transparency”, which caused many trade operators and lawyers to consider the said rules as unsuitable in their present state, since the arbitral procedure seemed to have lost in the process one of the main characteristics which typically identifies and characterizes arbitration, namely, privacy - giving the edge to national courts. This situation has left a void in the world of international commercial arbitration – a void which may well be successfully filled by the OHADAC Rules.

Ad hoc arbitration is bound to be of easier implementation for OHADAC. The Rules are made available to trade operators and lawyers, and upon a decision by the parties to adopt the said Rules, the proceedings are initiated in accordance with their provisions. The tribunal either carries out or contracts out the tasks of the Secretariat, and the role reserved for the Caribbean Court is that of appointing authority, responsible for addressing any failure to choose an arbitrator or president of the arbitral tribunal, and for resolving differences concerning the seat or any other differences whose resolution may be attributed to the Court as per the Rules.

The proposed OHADAC Arbitration Rules take without contest their substance from the best of the UNCITRAL Rules, and of other rules and arbitral practices of unquestionably successful application, such as: the terms of reference of the ICC Rules, and other rules emanating from the London Court (LCIA) and the American Arbitration Association (AAA), whose functionality has been proven, all of which were taken into account in the drafting of the OHADAC Rules.

However, as occurs with other subject-matters for harmonization by OHADAC, it is prudent to treat the legal specificity of Caribbean countries with particular attention. In matters of arbitration the countries within the OHADAC territory present a very varied landscape. Some, like Cuba (where international commercial arbitration has been a reality for nearly 50 years), Mexico, Panama, Venezuela and the Dominican Republic have arbitration rules, some of which are modern and were only recently promulgated; these countries have acquired practical experience, they have their own Courts (in many cases, more than one), they have developed a broad arbitration culture, and are signatories of the main international conventions on arbitration: the 1958 New York Convention and the 1961 Geneva Convention. A small number of countries have not promulgated any arbitration rules, others do not have arbitration courts, which in some cases may lead to the institution being hindered in its functioning by the interference of national courts. In this sense, arbitration must be seen for what it is - an option, an alternative means of resolving disputes, and not a straight jacket.

On the other hand, in order to design an instrument that was both consensual and adaptable for commercial trade operators in the countries involved, it appeared mandatory to make good use of any beneficial provisions that the more renowned rules may offer, and to overcome any errors or limitations which may have been observed.

For these reasons the proposed rules are based on *ad hoc* arbitration, as a result of which they may come into force without delay, facilitating their application from the very beginning, and thus filling the gaps in such method of arbitration. The parties may apply the Rules without taking the dispute before the Caribbean Center, or before any other arbitral institution, other than to determine the appointing authority intended to complement the will of the parties in *ad hoc* arbitration.

Having stated this, and although it has provided for *ad hoc* arbitration to be put directly into the hands of trade operators and lawyers, OHADAC has not renounced its ideal of an arbitral institution, which it will continue to seek while progressing on the grounds of *ad hoc* arbitration. The OHADAC rules, with their specific features (*sui generis*), leave the gates open, once the conditions have been created, in the event that the parties should voluntarily and expressly decide to bring their dispute before the Caribbean Center of Arbitration and request its services for administering the arbitration. The Rules could be called “ambidextrous”, as they combine into a single body of rules the extensive and detailed regulation of arbitral procedure, where such procedure is carried out before arbitrators having no connection with an institution (*ad hoc* arbitration), while at the same time allowing their application to arbitral procedures brought before the Caribbean Centre upon request of the parties, provided the latter satisfy the requirements set out in Part II of the Rules.

PART III. STRUCTURE OF THE RULES

The OHADAC International Commercial Arbitration Rules are structured into sections or chapters which coincide exactly with those set out in the Technical Memorandum previously submitted and approved. The structure and final content of the Rules have remained unaltered following the study of the data and information gathered regarding arbitration in the Caribbean, by the Rapporteur and his team of experts.

The Rules include a standard arbitration clause, in accordance with which the parties may submit disputes to arbitration in one of the two prescribed manners: either *ad hoc* arbitration, or arbitration administered by the Caribbean Center. The standard arbitration clause includes the specific requirements for each type of procedure. Additionally, it informs the parties of the necessity to agree on the number of arbitrators, the place of arbitration, the applicable law, and the appointing authority. From a practical point of view it is but a summary of the prime aspects of arbitration, since the parties only have to fill in the blanks, which prevents the drafting of any pathological clauses of such a nature as to make the arbitration non-viable.

Contrary to traditional *ad hoc* arbitration, the parties submitting a dispute to arbitration as per the OHADAC Rules, have the option to request the services of the Secretariat of the organization, which entails the application of Part II, as a result of which the arbitration will be administered by the Center, or the Center may act as appointing authority, failing any choice by the parties regarding the arbitrators or the president of the arbitral tribunal.

The projects presented below rest on the principles and techniques previously described. It is worth noting that they were drafted keeping in mind not only the fruit of the work of the most accredited legal experts and institutions, but also the cultural and legal diversity which, in matters of arbitration, is reflected in the legislation and legal practice of the Caribbean States which were scrutinized. Such a novel approach has made it possible to develop an appropriate scheme for resolving international disputes, with a body of rules intended to be attractive and convincing for the whole of the Caribbean.

PART IV. OHADAC DATABASE ON INTERNATIONAL COMMERCIAL ARBITRATION

The *ad hoc* OHADAC Arbitration Rules are supplemented by the OHADAC Database on international commercial arbitration in the Caribbean, which provides updated material regarding arbitration laws in the main countries of the region, the main arbitration courts, their seats and their rules; the addition of a list of possible arbitrators for appointment can also be considered.

It is absolutely necessary for the practice of arbitration in the Caribbean region to have good knowledge of the fundamental features of international commercial arbitration in Latin America and the Caribbean. For this purpose the Rules provide, as stated earlier, for a database on international commercial arbitration in the Caribbean. Such lists may be made

available to trade operators and lawyers, to whom it provides valuable information which they can use to decide on the place of arbitration and on the choice of arbitrator.

The OHADAC Database is designed as follows: it consists of a website with a database listing all the existing arbitration laws in the Caribbean. In addition to information on the international treaties that each State has acceded to (1958 New York Convention, on the Enforcement of Foreign Awards; 1961 Geneva Convention; Inter-American Convention on International Commercial Arbitration, Panama, 1975), this website also provides, wherever possible, information about the main arbitration courts of each country, their seats, contact information, and rules. In the case of the laws it also indicates the dates and the means through which they were promulgated.

All the information stored may be consulted using filters to display any relevant elements. The service shall be accessible through the website. It will also be possible to restrict access for unregistered users, should this be deemed necessary. The website will also have a current events section where users may keep abreast of the advances of the various OHADAC work groups, or read editorials on the subject or on any other significant news in connection with arbitration in the Caribbean. Other items may also be published, especially concerning the system of work implemented in favor of harmonization, namely, any project likely to be presented in this field.

The website could also be integrated into social networks and comments by web users may be allowed. A discussion space could be made accessible under the tab “What is the Caribbean Center of Arbitration?”; questions from web users could be answered in real time or later, from home or from the office. The website could also release a newsletter to be emailed to any users having subscribed to it, containing updated information on the advances made by the OHADAC project, the work of the Caribbean Center, any qualifying courses to be programmed or events to be organized, as well as any information deemed relevant to the development of the project.

Once the website is set up, as previously stated in the Technical Memorandum, it will be possible to incorporate new technological applications to make it more or less interactive with the users, depending on the goals to be achieved and the actual necessities.

Regarding the best exposure for the OHADAC database, as previously described, the setting up of a link to the official OHADAC website could be contemplated.

PART V. PRESENTATION OF THE RULES

12.1 Preliminary provisions

As is customary, the Rules begin with the regulation of the scope of application (as do their counterparts AAA or UNICITRAL), and since *ad hoc* arbitration is favored, they do not

adhere to the pattern of defining the institution or court (contrary to ICC, LCIA, CCACI). In paragraph 2 they offer the possibility of resorting to arbitration administered by the Caribbean Court, referring to the provisions applicable to such procedure as set out in Part II. It seemed preferable to incorporate the definition of the Caribbean Center of Arbitration in the Statute. Finally, paragraph 3 refers clearly to the relationship of the Rules, as the standard voluntarily adopted by the parties, with the mandatory statutory provisions applicable to arbitration (see also Art 1 AAA).

Definitions are given for the purpose of clarification (Art2) and rules are set out regarding communications, notices and computation of time periods (Art 4). This provision is absolutely essential for the initiation and pursuit of the proceedings, and it improves the wording and content of UNCITRAL and AAA, by including the best relevant elements from the ICC and the LCIAⁱ.

The system which has been adopted provides for the proceedings to be initiated by a notice of arbitration, to be answered within 30 days; the notice of arbitration and subsequent answer to it are to be distinguished from the statement of claim and other statements exchanged during the course of the proceedings, further to the constitution of the arbitral tribunal. However, the memorandums and periods of time are simplified. Following the criterion set out by the ICC, a provision has been made regarding the request for an extension of the period of time allowed for the answer, it being specified that the answer does not include any decisions concerning the number of arbitrators, their appointment, the place of arbitration and the language to be used, with the aim of expediting the procedure by postponing any decisions regarding procedural steps which may be taken at a later stage.

12.2 Constitution of the arbitral tribunal

Five articles are devoted to the constitution of the arbitral tribunal, the number of arbitrators, their independence and impartiality, and the challenging and replacement of arbitrators. Regarding the number of arbitrators the rule adopted provides that, unless otherwise agreed, the tribunal is composed of three arbitrators. This rule contrasts with other well-known provisions (ICC, LCIA, AAA, CIMA) and with most of the laws and rules consulted; however, international practice has showed that procedures with three arbitrators, although possibly more costly, offer greater stability and ensure that opinions are balanced out. The default choice of three arbitrators, should the parties remain silent on the matter, is included in other arbitration laws and rules in South America and the Caribbean (BICA, CCACI, among others).

The statement of independence and impartiality is of paramount importance, and it must be treated as a fundamental aspect of the arbitration, to be addressed with particular attention. The Court or the arbitral tribunal, as the case may be, should ascertain any possible ties between the arbitrator and any of the parties. There may not remain the slightest doubt about its independence and impartiality, particularly regarding any personal, commercial and

professional ties, direct or indirect, between the arbitrator and the other arbitrators, the parties, their legal representatives and their attorneys. Upon consideration of the statement of independence and impartiality of the arbitrator, the nominating party may reject their appointment, regardless of whether or not the arbitrator was challenged by another party. The arbitral tribunal or the Center may also exercise this prerogative. Such legal device, designed to ensure certainty and transparency, must be maintained throughout the proceedingsⁱⁱ.

12.3 Arbitral proceedings

The rules on arbitral proceedings are spread over 16 articles of the Rules, and constitute the backbone of the instrument. The tribunal may issue procedural orders, having previously consulted with the parties, and establishes the procedural timetable. The *dies ad quem* and periods of time regarding the claim, the answer, the reply and the rejoinder are relatively reduced in comparison with any other model; this section actually represents a synthesis of the best existing models. The system for appointing arbitrators gives primacy to the autonomy of the will of the parties, and to that of the arbitrators where appointing the third arbitrator, acting as president of the tribunal. The appointing authority or the Center, where applicable, shall only intervene where the parties involved fail to agree. On the other hand, by curtailing time periods, this rule aims at preventing any party from using the process of appointing arbitrators as a means of hindering or stalling the procedure. The basic principles of autonomy, efficiency and speed also underpin this rule. The system of providing a list of arbitrators registered with the Court has also been dismissed, giving priority to the freedom of choice of the parties. While conducting arbitral proceedings, the arbitral tribunal shall act with the greatest diligence in order to expedite procedural steps, avoid any unnecessary costs and guarantee the adversarial nature of the procedure. Throughout the course of the arbitration, the arbitral tribunal must preserve the confidentiality of the proceedings; it may adopt any measures it deems relevant to protect industrial and commercial secrets and any other confidential information. Once the place of arbitration has been agreed upon by the parties, or by the arbitral tribunal, where applicable, consultation meetings or deliberations may be held at any place deemed appropriate.

The *kompetenz-kompetenz* principle makes it possible for the tribunal to rule on its own jurisdiction and on the existence, validity and efficiency of the arbitration agreement, in accordance with the current laws on arbitration and the existing rules (see ICC, LCIA, AAA, UNCITRAL)ⁱⁱⁱ.

The rules for drafting and approving the terms of reference^{iv} are also the synthesis of the best existing models; in international practice it is considered highly beneficial to hold hearings, wherever circumstances allow. The content of the terms of reference, while not providing a framework so strict it could be likened to a straight jacket, defines the scope of the *litis* by outlining the issues in dispute and materializes the relevant aspects of the proceedings. The accurate determination of the subject-matter of the arbitration is instrumental in preventing arbitrators from overstepping their mandates, which might be detrimental to the enforceability

of the award. It is also useful in establishing which facts will require evidence or exhibits to be submitted, thus avoiding any artificial overload in the submission of evidence. Likewise, the preliminary determination of the law applicable to the merits of the dispute, by means of a partial award if necessary, appears essential to keep the subject-matter of the dispute in focus throughout the exchange of statements between the parties (claim, answer, counterclaim, reply and rejoinder) and throughout the arbitration, which guarantees the adversarial nature of the proceedings and precludes any appeal against the award based on a lack of foreseeability of the legal grounds for it or the absence of an open debate about essential issues regarding the law applicable to the merits or content of the dispute.

Upon request of any of the parties, the arbitral tribunal may adopt any interim measure it may deem necessary regarding the subject-matter of the dispute, such as prohibitions, measures intended to protect or preserve assets or to entrust custody of assets to a third party. Such interim measures may be adopted by means of a provisional award and the arbitral tribunal shall require a security deposit to cover the costs associated with the said measures. This prerogative, which is recorded in the modern rules on this matter^v, facilitates the subsequent enforcement of the award, and grants the arbitral tribunal the authority it requires. In accordance with the principle of court intervention in the pre-arbitral phase or even during the course of the arbitration, the parties may request from judicial authorities the adoption of interim and precautionary measures, without prejudice to the enforceability of the arbitral award or to the conduct of the proceedings. Regarding the adoption of precautionary measures the parties may also put their request to the emergency arbitrator (see also ICC).

12.4 Award

The rules relative to the delivery of the arbitral award (article 27) are consistent with the models most commonly used in the practice of international commercial arbitration. A relatively short period of time –two months from the closure of arbitral proceedings – has been provided for the arbitral tribunal to render its award (article 27). Only under exceptional circumstances and if clear grounds exist for doing so may the arbitral tribunal extend such deadline, strictly for another month, given that speed must be a consistent feature the procedure: only thus may arbitration fulfill its purpose of providing support and assistance to international commercial transactions, since expeditiousness is of paramount importance in the world of international business, regardless of the size of the companies involved.

Regarding the law applicable to the merits of the dispute, the Rules adhere to the most recent stances in international commercial arbitration^{vi}. The basis is the principle of autonomy of the will which endows the parties with the legal capacity to choose the applicable law; the parties may also refer to the *lex mercatoria*. Failing any choice by the parties, the arbitral tribunal is free to adopt any conflict-of-laws rules it deems applicable. It appeared preferable to resort to conflict-of-laws rules, as do most of the main modern rules on arbitration, rather than to leave excessive discretionary powers to arbitrators to choose an applicable law without any prescribed reference model. It has been held that, in matters of arbitration, especially

arbitration in law (unlike arbitration in equity) the powers of the arbitrator must be regulated and should only exceptionally be discretionary. Paragraph 4 of Article 30 enounces a rule which is a novelty in a legal instrument, but which embodies a clear tendency in arbitral practice, which may contribute to legal certainty. A study of arbitral practice shows that the consideration of national and international mandatory rules has become, for all practical purposes, a sort of general principle of comparative private international law. The concurring opinion of the International Chamber of Commerce, acting as *amicus curiae* before the U.S. Supreme Court in the case of *Mitsubishi Motors Corp. v. Soler Chrysler – Plymouth*”, 473 US 614 is enlightening: “...there is a growing tendency of international arbitrators to take into account the antitrust laws and other mandatory legal rules expressing public policy enacted by a State that has a significant relationship to the facts of the case, even though that State’s law does not govern the contract by virtue of the parties’ choice or applicable conflicts rules”. In this respect the Rules contemplate, in principle, certain limits to the mandatory rules of any law closely connected to the contract, taking their inspiration from article 9 of “Rome I”, Regulation no. 593/2008 (EC) of 18 June 2008 on the law applicable to contractual obligations. The basis for the application of these rules by the arbitrator is not to be found in their regulatory powers or their sovereign nature, but in their close connection with the laws of a State which make it mandatory for the parties to provide for their application. Such application is justified by the legitimate expectations of the parties and concomitantly, by the content of a legal measure, which it is possible to transpose or assimilate within the framework of the general principles governing international law. As a matter of fact it is feasible, and even common, for the parties to establish in their agreement clauses whose effectiveness is conditioned by compliance with certain mandatory rules of the country where the agreement is to be performed, regardless of whether or not such clauses are consistent with the *lex contractus*. The drafting of such a clause is not required for the arbitrator to apply or consider the mandatory rules, for the very possibility of applying those rules results in an ineluctable obligation. Yet what is really essential to commercial arbitration is for the alternative balance between mandatory rules and the autonomy of the will of the parties to be consistent with generally-accepted practice, and to abide by the transposable public policy prerogatives of any State involved, without exercising any form of discrimination based on the economic model of the State in question. What is at stake is not the “universal recognition” of the content of the measure or rule, but its “general’ recognition or acceptance (as would apply to *ius cogens*). Finally, the application of the rule must be consistent with the reasonable expectations of the parties.

The Rules then deal with arbitrations requiring partial awards, or ending in settlement by agreement between the parties; they provide for the simplification of procedural steps and the reduction of periods of time for the interpretation, correction or amendment of the award, always for the purpose of making the arbitration expeditious and efficient.

The arbitral tribunal fixes the costs of the arbitration in its award. The costs must be reasonable, and regarding fees and administrative costs the rates indicated in the appendices will apply – such rates being extremely modest in comparison with the rates applied by any international court. No less modest is the provision as an advance on administrative costs, which is required to initiate the arbitration.

12.5 Institutional Arbitration

Part II of the Rules is devoted to institutional arbitration, project foreseen for a later stage, and to the role of the Caribbean Center of Arbitration as appointing authority. As an institution administering arbitrations, in resolving disputes submitted to its jurisdiction the Center itself does not intervene, but relies on arbitral tribunals composed of one or three arbitrators, in accordance with the provisions of Articles 6 to 10 of the Rules.

The Center shall be assisted by a Secretariat in charge of monitoring the terms and time periods of the proceedings, communicating any unforeseen event to the arbitral tribunal and alerting it to the expiration of the prescribed time periods; where requested by the arbitral tribunal, it will be the responsibility of the Secretary of the Court to allow, where applicable, an extension of the time period prescribed to deliver the award.

In the event of institutional arbitration the Center must not intervene as regards the content or resolution of the arbitration; its role is limited to approving the terms of reference submitted to it by the arbitral tribunal and the award project, limiting itself exclusively to delivering decisions on formal or legal aspects of the arbitration, pursuant to any applicable mandatory rules of the place of arbitration.

Failing any choice by the parties, it will be the duty of the Center to correct, clarify or amend the award and to determine the place or language of the arbitration, having heard the view of the parties on the matter.

One of the major roles of the Center will be to appoint the sole arbitrator or the co-arbitrator, failing a choice by the parties, and to appoint the third arbitrator acting as president of the arbitral tribunal. It will also appoint the emergency arbitrator, upon request by one of more of the parties, and fix the costs of the arbitration, the amount of the advance on costs, and the fees of the arbitrators.

PART VI. APPENDICES

The OHADAC Arbitration Rules are supplemented by four appendices, as follows:

- 1.- **Model Arbitration Clause** (Annex 1). It provides for the submission of disputes to arbitration according to the Rules, in two alternative manners, providing for either *ad hoc* arbitration, or arbitration administered by the Caribbean Center. The model arbitration

clause contains the specific requirements for each procedure, and informs the parties of the necessity to agree on the number of arbitrators, the place of arbitration, the applicable law and the appointing authority, which is but a summary of the prime aspects of arbitration, since the parties only have to fill out the blanks, which prevents the drafting of any pathological clauses of such a nature as to make the arbitration non-viable.

- 2.- **Statement of independence and impartiality** (Annex 2). This document is key to the selection and acceptance of an arbitrator in any arbitral procedure. It provides for two alternatives: firstly, in the event that there are no statements to make – that is, where the arbitrator states that there exist no circumstances of such nature as to raise doubts about his total independence. Secondly, in the event the arbitrator has to disclose the past or present ties he had, or has, with the parties, their representatives or attorneys, and with the other arbitrators.
- 3.- **OHADAC fee schedule** (Annex 3). This is the table which is used for fixing the fees of the arbitrators, which shall be the responsibility of the arbitral tribunal, in the case of *ad hoc* arbitration, and of the Center in the case of institutional arbitration. The system of remuneration is not based on a percentage of the amount in dispute, but on fixed amounts which, although they increase in relation to the amount in dispute, do not apply automatically (as occurs with systems based on a percentage of the amount). Instead, the authority fixing the fees, be it the arbitral tribunal, its president, or the Center, depending on whether the arbitration is *ad hoc* or institutional, may assess the work of the arbitrator, taking into account the complexity of the arbitration and the number of hours it has required, and determine the corresponding amount, which can vary from the minimum to the maximum amount stipulated for each monetary bracket.

The fees fixed are modest, and although sufficient, they are lower than those of any of the arbitral courts and tribunals consulted, with the aim of making OHADAC arbitration both efficient and reasonable in cost.

- 4.- **Schedule of administrative costs** (Annex 4). Like the previous table, it contains the estimated costs of arbitration, from the lowest to the highest, and always lower than the costs charged by other international arbitral courts and tribunals.

This table is applicable both by the arbitral tribunal in the event of *ad hoc* arbitration, and by the Secretariat of the Center in the event of institutional arbitration, since it is intended to cover the costs and expenses incurred during the procedure, many of which are of absolute necessity, such as translations, courier services for the shipping of documents and any other expenses which typically occur in this type of procedure.

PART VII. STATUTE OF THE CARIBBEAN CENTER OF ARBITRATION

The draft Statute is basic but its content is sufficient to enable the Center to initiate its activities and function in an appropriate manner, until such time as practice, which should ultimately expose any flaws or omissions, prompts their amendment.

The Statute enumerates the functions which are the credo underpinning the OHADAC ARBITRATION project: to promote arbitration in the region, publicize the Rules, contribute to the training of arbitrators and experts, serve as appointing authority in *ad hoc* arbitration, and, subsequently, where possible under the conditions, administer arbitrations expressly submitted to it by the parties.

The independence of the Center in respect of any institution or body, as that of the arbitrators in respect of the Center while dispensing arbitral justice, is made patent.

The intended seat of the Court is the city of Pointe-à-Pitre, Guadeloupe, in consideration of the fact that the French law on arbitration and excellent arbitration rules are applicable in the said territory, and that furthermore, Pointe-à-Pitre meets several of the requirements set out for the seat, as previously detailed in the statement of legislative intent of the Rules. Only the distance between the island and the westernmost Caribbean territories may cause some inconvenience, in the event that one of the parties to the dispute has its residence in a country situated far to the west (Costa Rica, Cuba, Honduras, Mexico, Nicaragua, Panama, etc.). However this is precisely the reason why it has been suggested that the Court should create other secondary seats or sub-seats in other territories. A sub-seat of the Court in Havana, Santo Domingo or Panama might be a solution to the problem.

Its governing bodies have been given a modest structure, for the purpose of ensuring the efficiency and promptness of its decisions. Among them, the Council and the plenary sessions shall convene periodically and allow reasonable intervals to pass between meetings; not so the Conference, as its annual organization may prove quite laborious. However it shall be so during the initial stage, and any necessary amendments shall be carried out after one year.

The Secretariat shall be the central point of control for institutional arbitrations. Its duties entail preparing the Council and the plenary sessions, and assisting the president.

Particular attention must be devoted to the appointment of arbitrators, failing choice by the parties, and to the assessment of the independence and impartiality of the arbitrators, striving

to avoid any compromise, prior involvements, relationship or ties of any kind, of such nature as to raise doubts regarding the independence, impartiality and neutrality of the arbitrator. The arbitrator should be in full capacity to duly carry out his or her mandate, namely, to resolve any disputes submitted to the arbitration powers of an independent third party, and keeping in mind the ultimate goal of justice and equity.

Once approved, the Statute will have to be revised within the first year, which is not indicated in the instrument, but could be incorporated into it as a final provision.

Madrid - 5May 2014
“Year 7 of OHADAC”

LIST OF ABBREVIATIONS

- AAA:** International Arbitration Rules of the American Arbitration Association, 2006.
- ABAC:** Antigua and Barbuda Arbitration Act, 1975.
- AMRNA:** Rules of Arbitration and Mediation of the Dutch Antilles, 2007 (*Arbitrage en Mediation Regels van de Nederlandse Antillen*).
- AOITC:** Arbitration Ordinance, Turks and Caicos Islands. 1974.
- AUOHADA:** Uniform Act of 11 March 1999 on OHADA Arbitration Law.
- BAA:** Bahamas Arbitration Act, 2009.
- BICA:** Barbados International Commercial Arbitration, 2007.
- BIA:** Bermuda International Conciliation and Arbitration Act (1993).
- BZA:** Belize Arbitration Act, 2000.
- CCA:** Caribbean Center of Arbitration.
- CCACI:** Legislative Decree n°. 250 of the Cuban Court of International Commercial Arbitration.
- CCM:** Mexican Code of Commerce, articles 1415 to 1480, amended by Legislative Decree 27/1/11.
- CENAC:** Rules on Conciliation and Arbitration of the Center for Arbitration and Conciliation of the Guatemalan Chamber of Commerce.
- CG:** Geneva Convention on international commercial arbitration, 21 April 1961.
- CIMA:** Madrid Civil and Commercial Arbitration Court.
- CPC:** Code of Civil Procedure (France).
- CPCH:** Code of Civil Procedure (Haiti).
- CPCN:** Arbitral legislation of the Netherlands (1986): Volume IV of the code of Civil Procedure.
- DAA:** Dominica Arbitration Act (1998).
- DPU:** French overseas districts, Legislative Decree no. 2011-48, on the reform of arbitration in France, 13 January 2011.
- EWAA:** England & Wales Arbitration Act 1996.
- GAA:** Guyana Arbitration Act (1998).
- HAL:** Haiti Arbitration Law, Decree on the Amendments to volume IX of the Haitian Code of Civil Procedure, 2005.

ICAL: Arbitration Law, Islas Caiman, 2012.

JAA: Jamaica Arbitration Act, 2004.

LAC: Arbitration Law, Colombia, Law 1563 of 12/7/12.

LACR: Law n°. 7.727 on alternative dispute resolution and the promotion of social peace, Costa Rica, 1997.

LAG: Legislative Decree n° 67-95, Arbitration Law, Guatemala, 1995.

LAH: Legislative Decree n° 161-2000, Arbitration and conciliation Law, Honduras, 2000.

LAN: Law n°. 540, Arbitration and Mediation Law, Nicaragua, 2005.

LAP: Decree-Law n°. 5 Arbitration law, Panama, 1999.

LARD: Law n°. 489-08 on Commercial Arbitration, the Dominican Republic, 2008.

LAV: Commercial Arbitration Law, Venezuela, 1998.

LCIA: London Court of International Arbitration Rules.

LMU: UNCITRAL Model Law on International Commercial Arbitration, 1985.

RCCI: Arbitration Rules of the International Chamber of Commerce, 2012.

RCAM: Arbitration rules of the Center for Arbitration, Mexico.

RCAMCA: Rules of the Center for Arbitration and Mediation of the Americas.

RCANACO: Arbitration Rules of the National Chamber of Commerce of Mexico City.

RAO: OHADAC Arbitration Rules.

RCCB: Procedural Rules of the Center for Arbitration and Conciliation of the Bogota Chamber of Commerce.

RCCC: Arbitration Rules of the Caracas Chamber of Commerce.

RCCR: Rules of the Center for Conciliation and Arbitration of the Costa Rican Chamber of Commerce.

RCECAP: Rules of the Center for Conciliation and Arbitration of Panama.

RCESCON: Rules of the Center for Arbitration, Conciliation and Mediation of the Center for Dispute Resolution (Panama).

RCIMA: CIMA Arbitration Rules.

RUNCITRAL: UNCITRAL Arbitration Rules, 1976.

ROHADA: Arbitration Rules of the Common Court of Justice and Arbitration of 11 March 1999.

TTAA: Trinidad-Tobago Arbitration Act, 2012.

UAA: Uniform Arbitration Act USA, 2000.

UNCITRAL: United Nations Commission for International Business Law.

FOOTNOTES:

ⁱSee: RUNCITRAL, art.2 and 3; RCCI, art. 3; LCIA; AAA, art. 2; ICAL, art.4; LCIA; ROHADA, art.12; CENAC, art.15 and 16; LACR, art. 42; LMU, art. 3.1; LAG, art.6; CCM, art.1418 and 1419; LAN, art.25; LARD, art. 6; AMRNA, art.7; RCAMCA, art.4 and 5; RCAM, art.4 and 5; RCCR, art. 3; RCANACO, art.2; RCCB, art.16.

ⁱⁱSee: RUNCITRAL, Art.12 and 13; RCCI, art. 11; AAA, art.17; LCIA, art.19, ABAC, art. 24 and 25; BICA, art.34,35 and 36; BIA, art.34; EWA, art.23; LMU, art. 12 and 13; LAV, art. 35-40; CCACI, art. 19; JAA, art.6 and 7; LPA, art. 16; LAG, art. 16 and 17; RCANACO art 15-17.

ⁱⁱⁱSee: RUNCITRAL, art. 23; RCCI, art. 6.4; AAA, art. 7; LCIA, art. 23; EWAA, art.12; LMU, art. 16; BICA, art.19; LACR, art.37 and 38; AUOHADA, art. 11; LARD, art. 37 and 38; LAG, art.21; CPCN, art. 1052 and 1053; JAA, art.8; ROHADA, art. 21; RCANACO, art. 26. LAN, art.42; LAP, art 11-17.

^{iv}See: RCCI, art. 18; ROHADA, art. 15; RCAM, art. 24.

^vSee: RUNCITRAL, art. 26; RCCI, art. 23; LCIA, art. 25; AAA, art. Art.21; LAN, art. 43; BICA, art. 20-30; CCAIC, art. 34 and 35; LAG, art. 22; LARD, art. 21; LAV, art. 26; RCANACO, art. 31; RCAM, art. 28; ICAL, ART.24.

^{vi}See: RUNCITRAL, art. 35; RCCI, art. 17; LCIA, art 22; AAA, art.28; LMU, art.28; LAG, art. 36 and 37; LAN, art. 54; CCAIC, art. 22 and 29; LAP, art. 26 and 27; RCANACO, art. 40; ROUHADA, art. 17; LAH, art. 88; JAA, art. 963; ICAL, art. 55; BICA; art. 22, 23 and 24.