Pension Plan Administration and the Free Movement of Capital within CARICOM- Are we any closer to achieving financial integration?

Rachel Simms

Abstract

This paper explored the laws governing pension plan administration and the investment of pension plan assets in Trinidad & Tobago, Jamaica and Barbados. It sought to determine whether the laws in these countries are compliant with the CARICOM Single Market and Economy ("CSME") obligations relating to the free movement of capital. The paper also examined the current approaches to the supervision of pension plans in Trinidad & Tobago, Jamaica and Barbados, in light of the two common approaches for pension plan supervision, namely the "prudent person approach" and the "use of quantitative restrictions", with a view to determining which approach was utilized in these countries. The merits and demerits of each approach were also discussed. An examination of the laws concerning pension plan supervision was undertaken since there are hundreds of pension plans in these three jurisdictions, with assets totaling hundreds of millions of US dollars, so achieving freer movement of capital with respect to pension plan investment would be a major step towards achieving financial integration amongst CARICOM Countries and improvements in regulatory oversight would also benefit the Region as a whole.

I. Introduction:

There are approximately 644 pension plans operating in Trinidad & Tobago, Barbados and Jamaica with assets of approximately USD 626 Million.[1] Given the large sums of money involved, the investment of pension fund assets can potentially have a significant impact on capital flows in the Region. This paper therefore looks at

[1] According to the Financial Stability Report issued by the Central Bank of Trinidad and Tobago, there were 256 private pension fund plans with assets totaling TTD 24,719 million or approximately USD 392 M (using a rough exchange rate of 6.3 TTD to 1 USD) as at September , 2008.

According to the Financial Services Commission website the total number of pension fund plans in Jamaica is 188 and there are 11 approved retirement schemes. These funds have collective assets of JAD 219,753,644,464.00 which is approximately USD 24 M using an exchange rate of 89.77 (rate quoted on Bank of Jamaica website as at February 18th 2010).

In Barbados the major pension plan administrator is Sagicor stated in its report for the Barbados Segregated Funds, that they manage funds exceeding USD 210 M invested on behalf of almost 200 companies in Barbados.

the two main approaches to pension plan administration, namely the “prudent person rule” and the use of “quantitative restrictions” and examines the extent to which these approaches are utilized in Trinidad & Tobago, Barbados and Jamaica. The pension laws of these jurisdictions are also examined in light of the CSME provisions with respect to the movement of capital.

II. Pension Plans – classification and administrative structure

There are two main types of pension plans – defined benefit (DB) plans and defined contribution (DC) plans. In a DB plan, the employer guarantees an agreed level of pension benefit to the employee based on his/her salary and years of service (Peng, 2009 p.3). In such plans the employee may or may not be required to contribute to the plan. The onus is on the employer to ensure that there are sufficient resources to guarantee the agreed benefits, and if there is a shortfall in funding this will normally have to be met by the employer.

In a DC plan however, the employee sets aside a certain percentage of his wage in an individual account and the employer would normally also make a contribution either equal to, or less than, the employee’s contribution (Peng, 2009 p. 3). In this type of plan the benefits received by the employee are based on the amount of funds contributed but are also affected by the proportion of the plan’s income, losses, gains and expenses which are allocated to the employee’s account. It is also possible to have a plan which is a hybrid of a DB and DC plan.

Most pension plans are set up under a trust with either an institutional trustee or a specified number of individual trustees who are nominated by the members of the plan, in both cases the appointed trustee(s) are responsible for overseeing the administration of the affairs of the plan. The main roles of a pension plan trustee are really to ensure legislative compliance and to ensure that the plan is administered in the best interest of the beneficiaries. They are held to the fiduciary standard of care established at common law for the conduct of trustees, but they must also satisfy the legislative standards and requirements. Trustees are responsible for maintaining proper accounts, establishing a statement of investment policy to be followed by the investment manager, appointing agents such as actuaries, investment managers, accountants and lawyers and monitoring the activities of these agents. They are also responsible for monitoring the financial and actuarial position of the fund or scheme so that appropriate adjustments can be made as needed.

In some jurisdictions such as Barbados, the plan need not be established under trust, in which case the management of the plan may be carried out by an administrator rather than a trustee. In such cases, many of the duties outlined above would be carried out by the plan's administrator, who will have primary responsibility for ensuring proper accounting and ensuring regulatory compliance. In jurisdictions where a plan has to be established under trust, a plan may also have an administrator in addition to a trustee, but in such cases the role of the administrator would be limited to procedural and administrative matters such as maintaining records of members, calculation and payment of benefits to members, filing of returns in respect of members with the appropriate regulatory authority.

Most pension plans have a management committee which is charged with managing the day to day affairs of the pension plan and which also supervises the trustee's performance. The company establishing a pension plan is often referred to as a sponsor company and this company will select a trustee and shape the initial structure of the plan. Thereafter its major responsibility is providing contributions to the plan at the specified level. The sponsor company is also responsible for maintaining adequate records and communicating with employees.

Most plans are also required to have an investment manager and actuary, who are appointed as agents of the trustee to advise the trustee on investment of the fund's assets (in the case of the investment manager) and on the demographics of the plan at its funding needs over time (in the case of the actuaries). The section below examines the different approaches to supervising the **investment** of pension plan assets.

III. The regulation of pension plans- the Prudent Person Rule vs. Quantitative Restrictions

There are two main approaches utilized in the supervision and regulation of pension plans. The first and older approach is the "prudent person rule" which is a behavioural standard to which the trustees, administrators and investment managers ought to adopt in the management of the assets of a plan. This rule has been defined as follows:

A fiduciary must discharge his or her duties with the care, skill and diligence that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and aims. (Galer, 2002 at p. 45)

This rule has its origins in the law of trusts and the standard of behaviour which is expected of a fiduciary in order to satisfy the rule are as follows:

1. **The duty of separation.** A fiduciary must keep the assets of the pension plan separate from other assets (Galer, 2002, p. 45-46).
2. **The duty of loyalty.** This duty requires trustees to administer the pension fund plan or fund solely in the interest of the plan's members (the beneficiaries of the trust) (Ibid, p.48).
3. **The duty to avoid conflicts of interest.** It is a general principle of trust law that a fiduciary must avoid situations where his interests will conflict with those of the beneficiaries. Most trust deeds permit trustees to act as trustees for more than one pension plan even where the sponsor companies are within the same industry. This is usually a permitted exception to this rule which is expressly stated in the trust deed for the particular plan. But if for instance, the plan holds securities in the company acting as trustee or an associate of that company – the trustee must be careful in making any decisions involving these assets and will usually be required to act on the advice of independent third party experts in making such decisions.
4. **Due diligence and process**. The prudent person rule requires a trustee or fiduciary to perform his or her obligations diligently and to make decisions regarding investment after following a reasonable process for assessing the suitability of that investment for the particular plan. Having correct procedures in place (usually found in the statement of investment policy) and documenting the decision making process is an important aspect of acting prudently. (Ibid, p. 47)
5. **Care, skill and delegation.** Fiduciaries are expected to have sufficient knowledge, understanding and skills to administer the trust property. In order to satisfy this standard it is permissible to hire an expert such as an investment

management firm, accountant or actuary to whom certain activities will be delegated by the trustee or who will advise the trustee in order that they may make prudent investment decisions. (Ibid p. 47)

6. **The duty to monitor.** Even where activities are delegated to agents, the Trustee or person with fiduciary responsibility for the plan remains responsible for the actions of these agents so they must monitor and review the delegated activities to ensure that they were properly and prudently executed. (Ibid, p. 48)
7. **The principle of diversification.** This principle requires that the investment portfolio of a pension fund be suitably diversified, both as to the asset classes and also within each asset classification. This is necessary to avoid the undue concentration of a plan's assets in any one class of asset or specific asset which should reduce the plan's exposure to any shocks in that asset class or if for example that company were to go bankrupt (Ibid pp. 48-49). This principle is very important in light of the current global financial crisis which began in 2008.

These principles have been distilled from the many judicial decisions on the common law rule and the codification of same.

The other approach to regulating the investment of pension fund assets is the use of *quantitative restrictions*. These restrictions are normally expressed as limits on how much a fund's assets can be invested in the different classes of investment assets such as shares, fixed income assets such as bonds, cash or even real property. There are other types of quantitative restrictions which are usually found even in countries which follow the prudent person approach to regulation. These include restrictions on the percentage of a fund's assets which can be invested in foreign securities and concentration limits for investments in the securities of a particular issuer or a group of companies. Another common quantitative restriction is one which restricts the percentage of a fund's assets which can be invested in securities issued by the sponsor company of the particular fund or an affiliate of the sponsor company, this limit is normally set at 5% or 10% or in some cases there is an outright ban.

There has been a raging debate over which approach to the regulation of pension plan investment is more effective at balancing the need for curtailing risky investment by fiduciaries while at the same time maximizing returns which will benefit the pensioners. There is no verdict on this issue since the many variations of the prudent person rule and the fact that many jurisdictions adopt both approaches, makes comparison quite difficult (Galer, 2002 pp. 64-68).

A recent judicial decision re the prudent person rule and quantitative investment limits

The recent Canadian case of *R. v. Bernard Christophe et. al.* 2009 ONCJ 586 (CanLII) is a good example of the interplay of the "prudent person rule" and the use of "quantitative restrictions". In this case the Crown (representing the Province of Ontario) brought a case against the Board of Trustees of a multi-employer pension plan with assets totaling over CAN $ 1.1. Billion, for making certain investments in, or granting loans to (i) a litigation funding company in California, (ii) various resorts in the Caribbean (all held by one company) and (iii) a food processing company in Idaho. The loans to the resort in the Caribbean (which were at one point in excess of US $92 million) defaulted. Even after these loans went into default monies were still advanced to the hotel operating company and/or its successor, to facilitate their continued operation of the facilities (since the trustees were seeking to sell the properties or find a joint venture partner for these properties).

The Crown alleged that these investment activities were unduly risky and were in breach of the prudent person standard, so they brought charges against the individual members of the Board of Trustees. They also brought charges in relation to the failure by the Board to observe quantitative restrictions in the legislation by making loans to the hotel holding company (and/or its successor company) for the Caribbean resorts, which pushed the exposure of the pension plan to this hotel holding company above the concentration limits specified in the legislation.

It was held by the Ontario Court of Justice, *inter alia*, that:

1. There was insufficient evidence lead by the Crown to prove that the trustees acted in breach of the duty to exercise the care, diligence and skill of a person of ordinary prudence in dealing with the pension plan assets;
2. The Board had delegated the investment actions to the members of the Investment Committee; the members of the Investment Committee were therefore found guilty of the offence of failure to comply with the quantitative limits set out in the Pensions Benefits Act and the regulations; and
3. The members of Board of Trustees were also found guilty of offences relating to their failure to supervise the Investment Committee in relation to breach of the statutory quantitative restrictions.

The Court in coming to the second and third conclusions, looked at the lack of documentation by the Investment Committee relating to the loans which caused the plan to breach the quantitative restrictions, and the rationale for granting these loans (the minutes of investment committee meetings were found to be grossly inadequate). The Court also found that there was insufficient evidence (through minutes or otherwise) of the Board of Trustees supervising the investment decisions of the Investment Committee concerning the loans made to the hotel holding companies, or even of investigating the failure by the Investment Committee to maintain the statutory quantitative limits.

Whilst this case would not be directly applicable in the Caribbean, it would be instructive on the operation of the more recent pieces of legislation such as the Pensions (Superannuation Funds and Retirement Schemes) Act which exists in Jamaica, the Occupational Pensions Benefit Act which will soon be proclaimed in Barbados, and the proposed pensions Bill in Trinidad & Tobago. Indeed, the case highlights the standard of prudence expected by a pension plan trustee and shows how this standard can be breached through the failure to meet statutory quantitative limits.

The laws governing pension plan administration and investment in Trinidad and Tobago, Barbados and Jamaica will now be examined in light of the discussion above on the different types of regulatory framework.

IV. Pension Fund Plans in Trinidad and Tobago

The Central Bank of Trinidad & Tobago ("CBTT") regulates pension plans in Trinidad and Tobago and the operative provisions are found in the Insurance Act Chapter 84:01 of the Laws of Trinidad and Tobago. Section 175 of the Insurance Act states that all pension plans which are established under trusts, and which are established to achieve one or more of the objectives listed below, must be registered with the CBTT. The stated objectives are:

(1) The provision of superannuation allowances on retirement to persons employed by the plan's Sponsor Company or the organization(s) establishing the plan;

(2) The provision of pensions to the spouses of persons who are or have been employed and of periodical allowances to or in respect of the children of such persons; or

(3) The assurance of capital sums on the death of persons who were employed by the Plan's Sponsor Company or organization.

The general supervisory requirements for the proper administration of a pension plan are found in Part VI of the Insurance Act. In order to be registered, plans must submit for approval copies of their Trust Deed and Rules (Section 176) and any amendments to the Trust Deed and Rules must be registered with the CBTT (section 177). The Trustees of the Plan must submit annually to the CBTT the balance sheet and statement of accounts for the particular plan (section 184). Once every three years the plan must be investigated by an actuary who must submit a report on the Plan's financial condition and a copy of this report must be submitted to the CBTT (section 185).

Rules governing the investment of pension plan assets in Trinidad & Tobago

Section 186 of the Insurance Act provides that the trustees of a registered plan may invest the assets of the plan only in such securities as are prescribed by the Second

Schedule to the Insurance Act. The second schedule to the Insurance Act provides that a maximum of 50% of the assets of a pension fund may be invested in equity securities, and a maximum of 20% of the fund in real estate and leaseholds (within Trinidad and Tobago). The remaining 30% can be in cash and other forms of securities such as mutual funds, bonds and other fixed income instruments. But of this 30%, only 10% can be invested in mutual fund securities. There is also a restriction that only 20% of a plan's assets[2] may consist of assets from approved jurisdictions outside of Trinidad and Tobago[3]. It should also be noted that just because a security is listed on the Trinidad and Tobago Stock Exchange does not mean that it is an asset originating in Trinidad and Tobago, rather the CBTT's position is that unless the company issuing the security is domiciled in Trinidad and Tobago, it would not be classified as a Trinidad and Tobago asset.

Under the Proposals for the Establishment of an Occupational Pension Plans Bill drafted by the Central Bank of Trinidad and Tobago and released in December 2009 ("Pension Bill Proposal"), the CBTT provides the framework for the development of a separate pensions legislation which would cover issues such as governance of a plan, supervision of pension plans, prudential standards for investment of pension assets and it defines the permissible benefits to which members of a plan may be entitled to and provides guidance on the vesting date of such benefits to be received by members of a plan. Of particular importance is the fact that the Pension Bill Proposal defines the roles and responsibilities of the trustee, investment manager, management committee and sponsor company. It therefore greatly improves the very limited scope of the pensions legislation which now exists in Trinidad and Tobago.

In respect of investment, the Pension Bill Proposal continues along the existing vein of quantitative restrictions. It also requires that the Trustee submit a Statement of Investment Policy for approval and that this statement be reviewed on an annual basis

---

[2] Section 2 of the Insurance (Pension Fund Plan Investments) regulations provides as follows: "for the purposes of investment by the Trustees of a registered plan in such securities as are set out in Second Schedule to the Act, the percentage which the registered plan's assets originating in Trinidad and Tobago shall bear to the total of the plan's assets shall not be less than eighty (80) per cent."

[3] The approved countries include: any Commonwealth country or dependency or the Republic of Ireland, the United States of America, the company in which the head office of the Sponsor Company is located, any member of the Organisation of Economic Co-operation and Development (OECD) and any other country approved by the Central Bank of Trinidad and Tobago.

(though the CBTT need not be notified of the actual amendments if any). It does, however, make some changes to the quantitative restrictions in the Second Schedule to the Insurance Act. Some of the proposed investment provisions are as follows:

- A maximum of 50% of the value of a plan can be invested in equities (as obtains in existing legislation), but plans whose total assets exceed 150% of its total liabilities can also invest up to 50% of the "surplus funds" in equities, provided that the aggregate value of equity investments by the plan does not exceed 70% of the total value of assets held by the plan. It is submitted that this is a sensible rule since it allows funds with a large surplus to take advantage of the more profitable but more risky equity market, since even if the plan suffers short-term losses in the equity market there would be enough funds to cover immediate liabilities owing to the large surplus;
- The way in which concentration of investments in corporations is determined will change under the Pension Bill Proposal. Under the existing regulations (section 9 of Second Schedule to Insurance Act), a plan can only purchase up to 30% of the ordinary shares of any corporation. But under the Pension Bill Proposal the restriction is now on the **percentage of a plan's assets** which can be invested in a corporation and its related corporations (not just on the percentage of shares which can be held in any one corporation). Under the Pension Bill Proposal only 10% of the plan's assets can be invested in a corporation (or related counterparties of that corporation), and this investment limit now includes bonds, equities and other credit exposures, not just shares.
- The value of the pension plan assets which could be invested in real estate or leaseholds is reduced from 20% to 10% in the Pension Bill Proposal;
- The Pension Bill Proposal, like the Insurance Act, contains an express ban on the investment of pension fund assets in the sponsor company of the plan or a related company;
- The percentage of a plan's assets which may be invested in mutual funds remains at 10%; and

- The Pension Bill Proposal maintains the status quo in respect of investment of pension assets overseas, since the a plan must ensure that at least 80% of its assets are invested in instruments issued in Trinidad and Tobago.

It is submitted that this restriction on the percentage of funds which can be invested overseas is too stringent, a relaxation of this would be beneficial to individual pension plans and to the operation of the capital markets within CSME. It is also suggested that the strict interpretation of an asset originating within Trinidad and Tobago given by the CBTT should be revised to include companies which are registered and operating in T&T with at least 20% of their revenue or profits being derived from its T&T operations. These arguments for reform of the pension plan investment laws will be dealt with in greater detail in section IX (Recommendations) below.

V. The Regulation of Pension Plans in Barbados

There is currently no operative law in Barbados which is dedicated to the regulation of pension plans. In order to benefit from tax exemptions under the Income Tax Act, pension plans in Barbados have to register with the Commission of Inland Revenue, but other than this there is presently very little oversight of the activities of Pension Plans in Barbados. Rather, it is left up to the investment managers and sponsor companies to determine the breakdown of assets in a plan's portfolio and how the investment of these assets will be conducted over time. However, in the absence of any specific legislation in this area, most plans adopt the common law prudent person rule in respect to investments.

This lack of supervision of pension plan assets is expected to change soon when the Occupational Pensions Benefit Act Chapter 350 B is proclaimed. This Occupational Pensions Act is a comprehensive piece of legislation with 97 sections dealing with the establishment, management and regulation of occupational pension plans. Under this Act, pension plans are to be regulated by the Supervisor of Pensions and the Act therefore requires all pension plans to register with the Supervisor of

Pensions. It goes on to prescribe who is eligible to join a pension plan, and who is eligible to receive pension benefits. It requires all plans to have an administrator and sets out the duties of the administrator, the main ones being to file annual returns, collect and collate information concerning a plan's members and provide this information to the Supervisor of Pensions. It also regulates the funding and contributions to a plan. It deals with the winding up of a plan and the treatment of any surplus funds belonging to a plan. Section 54 provides that the persons with responsibility for investment of a pension plan's assets must do so in accordance with the criteria established in the Act and prescribed by the regulations. However, these regulations are only in draft form and not yet effective.

Until this piece of legislation is proclaimed and the investment regulations passed, pension administrators in Barbados are free to invest pension funds according to their discretion, once they act in accordance with the dictates of the sponsor company or management committee of the pension plan. Given that the main pension plan administrator in Barbados, Sagicor Life Inc., claims to be acting as administrator/investment manager for approximately 200 pension plans with assets of approximately US $210 Million[4], this means that a large proportion of assets in Barbados remain largely unregulated by the Government of Barbados.

VI. The Regulation of Pension Plans in Jamaica

Private pension plans and retirement schemes in Jamaica have existed for over 50 years and are established through formal arrangements. They have to be registered under the Income Tax Act and also under the Pensions (Superannuation Funds and Retirement Schemes) Act "JPSR Act" which came into force during 2005 (FSC website, 2010). The Financial Services Commission ("FSC") in Jamaica is the regulatory body charged with the supervision of Plans in Jamaica (Ibid). Under the JPSR Act a "pension" is defined as a periodic payment payable to a member on retirement, at least annually for the lifetime of that member (JPSR Act section 2). A pension may be payable under (i) a pension plan established by a sponsor company in which either both the employer and employee, or the employer alone makes

[4] Sagicor's report on the Barbados Segregated Funds, July 2009 at http://www.sagicor.org/segfunds.aspx

contributions towards the employees' pension benefits (a superannuation fund), or (ii) a retirement scheme which is not established by an employer but is a fund to which persons can contribute in order to receive a pension on retirement. These different schemes/plans will be collectively referred to as Funds for the purposes of this section.

Section 5 of the JPSR Act requires all Funds to be registered before they can operate. Section 7 of the JPSR Act requires the administrator to be licensed and section 8 provides for the licensing of the investment managers. The trustee of a Fund must also be registered (section 9) and must designate a responsible officer for each Fund for which they act as trustee, and the responsible officer must also be registered with the FSC (section 11). Funds are required to submit annual financial returns to the FSC (section 37, JPSR Act). The JPSR Act also makes provisions for the termination and winding up of a Fund as well as other administrative matters. Section 58 of the JPSR Act provides for Regulations to be made for providing for matters which are necessary to fulfill the purposes of the Act and one such regulation is the Pensions (Superannuation Funds & Retirement Schemes) (Investment) Regulations, 2006 (the "Investment Regulations") which is discussed below.

Rules governing the investment of pension plan assets in Jamaica

The Investment Regulations in Jamaica are quite comprehensive. They incorporate a version of the prudent person rule as well a few quantitative restrictions on investment. The prudent person rule is found in section 3 (1) which states as follows:
Trustees and investment managers shall prudently invest and manage the assets of any fund or scheme under their responsibility in a manner consistent with the fund's or scheme's statement of investment policies and principles.
Section 3(2) goes on to instruct trustees and investment managers how to invest the plan's assets prudently. It requires trustees and investment managers to have regard to the following in the performance of their duties:

- the need to balance returns with risk in order to achieve the plan's stated objectives;

- the need to keep expenses to a minimum;
- the importance of carrying out due diligence on an issuer/borrower of a loan facility ;
- the need to ensure that a loan facility has sufficient collateral//security backing;
- the importance of ensuring that the plan's monies are not kept idle unless this is absolutely necessary to make cash payments and in any case the period in which such funds are not invested should not exceed one month;
- the need to regularly monitor and seek collection of outstanding receivables; and
- the FSC's investment code of practice.

Section 8(1) provides that Trustees are to prepare a written statement of investment policy and principles (SIP) and submit same to the FSC for approval. If a material change occurs with respect to the Fund the SIP should be reviewed within 90 days of the change (section 9(3) of the Investment Regulations). Section 10 sets out what should be contained in a SIP and section 11 lists some considerations which should determine the contents of the SIP, these include:

- the kind of benefits being offered by the Fund;
- the demographic circumstances of the Fund;
- prevailing economic conditions and circumstances;
- the sponsor company's financial circumstances and condition;
- the risks to which the Fund is exposed.

Quantitative Restrictions:

The Investment Regulations although being premised on the prudent person rule, does contain a few quantitative restrictions. These restrictions are as follows:

1. **Concentration Limits** - Section 16 sets out a 5% concentration limit for investment in securities of any one person or an associate of that person, although section 17 provides for a few exceptions to this limit.
2. **Real Property** – investment in real property is limited to 5% of the total fair value of the plan (section 29 of the Investment Regulations) and

investment in leases in Jamaica is also limited to 5% of the total fair value of the plan;

3. **Restriction on Investment in Foreign Securities** – Section 31 provides that "A fund or scheme may invest in the aggregate, an amount not exceeding twenty percent of the fair value of its assets in eligible foreign securities[5]

In addition to the quantitative restrictions above, the Investment Regulations go on to prohibit certain investment activities in section 35. The activities or investments prohibited in section 35 include bans on: (i) "short selling" by Funds, (ii) investment in unsecured loans or leases, (ii) speculative investments and (iii) mortgages for properties located outside of Jamaica. Given the comprehensive guidelines and prohibitions established under the Investment Regulations, Jamaica cannot be said to simply adopt the prudent person rule, rather it incorporates this rule along with procedural requirements and quantitative restrictions, Jamaica is therefore a "hybrid jurisdiction" with respect to the supervision of the investment of pension plan assets.

VII. CSME Requirements re Movement of Capital:

The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CSME ("the Revised Treaty") provides for the removal of restrictions on banking, insurance and financial services (Article 38). This means that any company in the Region should be able to provide these services within another CARICOM territory provided they meet the same licensing requirements imposed on domestic service providers. Article 39 goes on to provide that *"the Member States shall not introduce any new restrictions on the movement of capital and payments connected with such movement and on current payments and transfers, nor render more restrictive existing regulations except as provided in Article 43 and Article 46"*[6]. Most importantly for the investment of

[5] Foreign Securities have the definition given to the them in the definition section of the Bank of Jamaica Act which is – *"foreign securities" includes shares, stock, bonds, notes (other than promissory notes) debentures or debenture stock on which capital monies and dividends are payable in foreign currency.*

[6] Article 43 provides for exceptions to the rule in Article 39 in cases where a Member State is experiencing serious balance of payments and external financial difficulties or a threat thereof – in those cases the Member of State may adopt or maintain restrictions on the movement of capital. Article 46 provides for the movement of skilled Community Nationals (who meet the criteria set out in Article 46) – this will be necessary to allow companies to provide financial services across CARICOM.

pension plans assets, in Article 40, member states agreed to remove among themselves restrictions on the movement of capital payments and restrictions on all current payments including payments for goods and services and other current transfers. These capital payments and financial assets are set out in article 40(3) which states:

For the purpose of this Article, capital and related payments and transfers include:

(b) equity and portfolio investments;

(c) short-term bank and credit transactions;

(d) payment of interest on loans and amortization;

(e) dividends and other income on investments after taxes;

(f) repatriation of proceeds from the sale of assets; and

(g) other transfers and payments relating to investment flows.

Since pension plans invest in all types of securities, cash and real property, if Articles 39 and 40 are properly applied, then restrictions will be removed on the movement of the capital payments and transfers listed above, and as a consequence of this a pension plan in one CARICOM jurisdiction should be able to invest in security, cash or property in another CARICOM Member State in the same manner and quantities as they would be able to invest in their home country (i.e. they should adhere to the legislative concentration limits for investment in a particular security or company). But as can be seen from the pension plan investment laws discussed above, this is not the case. Instead, the laws of Trinidad & Tobago and Jamaica, both set limits on the amount of funds which can be invested overseas (including in other CARICOM Member States). There is no law currently operating in Barbados which deals with this issue.

VIII. Assessment of the Compatibility of Pension Plan legislation with the CSME Provisions:

If the CSME Provisions cited above are to be strictly applied, all restrictions on the movement of capital in the CARICOM region should be removed. The provisions in both Trinidad and Tobago and Jamaica, which provide that at least 80% of a pension plan's assets must be invested within Trinidad & Tobago and Jamaica respectively, therefore contravene articles 39 and 40 of the CSME Treaty. But it is submitted that a complete removal of the limits on foreign investment of pension plans may not be reasonable in light of the fact that the economies of the region are not yet integrated and are unlikely to be integrated in the next few years. The restriction on the investment of the pension fund assets overseas may be necessary to avoid flight of capital abroad, which may negatively effect the economy of the particular Caribbean country. Indeed, some countries in the Region may argue that strict control of foreign exchange is a key component in maintaining their exchange rates at current levels and avoiding balance of payment difficulties[7]. Thus they may cite the exception in Article 43 of the CSME Treaty as grounds for maintaining restrictions on the amount of pension fund plans that can be invested abroad – including CARICOM countries. In summary, Trinidad & Tobago and Jamaica are both out of compliance with the CSME requirements of section 39 & 40, although they could potentially seek to rely on the Section 43 exception to the provision requiring free movement of capital among CARICOM states. Barbados, like many other jurisdictions in CARICOM, has no operating law on this issue.

It is submitted that if CARICOM intends to integrate its financial markets, that part of that integration process must involve a relaxation of the restrictions by individual member states, on the investment of pension plan funds overseas, to allow for the treatment of securities issued in other CARICOM countries to be treated in the same manner as those issued in the domestic jurisdiction of a pension plan. Those countries which presently lack legislation to deal with this matter should also be required to enact appropriate pensions legislation, which would facilitate, among other things, the treatment of CARICOM securities in the same manner as domestic securities (i.e. a non-discrimination provision should be part of all pensions legislation in CARICOM countries). But in order to achieve this goal of integration in the financial sector the proper regional regulatory framework needs to be put in place first. The components of this regulatory framework are discussed in greater detail in the section below.

[7] An example of a country which maintains strict control of its exchange rate in relation to the US dollar is Barbados.

IX. Recommendations

1. Increasing the Limits on Foreign Investment by Pension Plans:

It is proposed that one means of increasing the movement of capital in the Caribbean region and overcoming the illiquidity problem faced by many regional stock exchanges is to increase the limit on foreign investment by pension plans. Indeed, Roldos has noted that a characteristic of pension plans in emerging markets is the concentration of the plan's portfolio in domestic securities especially domestic bonds (Roldos, 2004 p. 3). He notes that this is usually the result of regulatory limits which are driven by (i) a desire to safeguard pension participants from the capital market risks of investing overseas and to avoid transferring of large amounts of capital overseas (Ibid). Indeed, both Trinidad and Tobago and Jamaica have a 20% limit on investment of pension fund assets overseas.

These regulatory limits have resulted in the domestic securities market of the country imposing them becoming illiquid. Also, the limited number of stocks available on the local stock exchanges has resulted in plans having less diversification than desirable and increases the risk of loss if any issuer were to become bankrupt, a recent example of this would be the CLICO collapse which occurred in January 2009 which would have affected many pension plans in Trinidad & Tobago, had the government not intervened in a substantial way. Given that there are only 45 listed companies in Jamaica, 35 in Trinidad and Tobago and 23 in Barbados, the problem of low liquidity and low turnover of securities is especially acute in the region (CARICOM Concept Paper). It is in light of this reality that I propose an increase in the percentage of assets which can be invested abroad from 20% to 30%, with the proviso that the foreign securities meet a minimum rating set by the regulator in the particular jurisdiction.

2. Cross-listed securities should not be classified as "foreign" securities:

In addition to increasing the limit on the amount of pension plan assets which are invested in foreign securities, it is also recommended that securities which are cross-listed on regional exchanges should not be classified as foreign securities. This is not the case now in either Trinidad & Tobago, or in Jamaica. Currently, stocks which are listed on the Trinidad and Tobago stock exchange but are issued by corporations which are headquartered outside of Trinidad and Tobago do not qualify as assets originating in Trinidad and Tobago for the purpose of satisfying the regulation that at least 80% of a pension plan's assets must "originate" in Trinidad & Tobago. Groups of companies, like the Sagicor group, with significant operations in Trinidad & Tobago will not qualify since it is headquartered in Barbados. In Jamaica there is also a restriction that a maximum of 20% of a plan's assets can be invested in foreign securities, that is securities in different currencies than the Jamaican dollar. This could also unduly hamper investment in securities listed by Caribbean companies operating in Jamaica, who issue securities in foreign currencies. These rules in Trinidad & Tobago and Jamaica also directly contradict the CSME requirement for the removal of restrictions on capital flows across the region (although, as discussed above, immediate implementation of these CSME provisions may not be practical at this time).

3. Use of both Prudent Person Rule and Quantitative Restrictions in Supervision of Pension Plan Investments

The Prudent Person Rule is adopted in Jamaica along with procedural requirements and quantitative restrictions. The present law in Trinidad & Tobago does not mention the Prudent Person Standard at all but rather sets quantitative limits on investment. The proposals for the Pension Bill Proposal (CBTT, 2009) also heavily rely on quantitative restrictions (which seems to be the preferred regulatory mechanism in Trinidad and Tobago). Barbados' Occupational Pension Plans Act only refers to investment being dealt with under regulations (which are in the process of being drafted), so it remains to be seen whether Barbados will follow the example of Trinidad & Tobago and opt for strict quantitative limits, or of Jamaica where there are less quantitative investment restrictions and a greater reliance on the Prudent Person Rule and its attendant procedural requirements.

It is submitted that the "hybrid approach" adopted by Jamaica may be best suited to the needs of the Caribbean. The prudent person approach offers countries more flexibility in the selection of investments so that a plan can make adjustments for any sudden changes in the market (Chan-Lau, 2004, p.21)[8]. Evidence suggests that this approach is no less effective in curtailing risky investment management practices than the use of quantitative restrictions (Galer, 2004, pp. 64-68). But the prudent person approach on its own may not be enough and the use of a few quantitative restrictions is necessary to avoid particularly risky investment practices such as the concentration of large amounts of investment in any one entity or group of companies. In both the USA and the UK, the prudent person rule is adopted along with a few quantitative restrictions. It is therefore recommended that law reform in the Region should seek to adopt this "hybrid approach" to pension plan supervision rather than simply imposing extensive quantitative restrictions on investments by pension plan trustees and investment managers.

4. Harmonization of Laws and Regulatory Co-operation:

There are many similarities in the pension laws across the Region but there are also quite a few differences, a few of which will now be discussed. Pension plans and retirement schemes must be established under a trust in both Trinidad & Tobago and in Jamaica but this is not necessary in Barbados, where a plan need only have an administrator. The Prudent Person Rule is the preferred approach to supervision in Jamaica along with a few quantitative restrictions but in Trinidad & Tobago pension plan supervision is achieved through quantitative restrictions alone. Trinidad & Tobago, in addition to having a greater degree of quantitative restrictions, will also have more procedural requirements than the legislation in Jamaica if the proposed Bill eventually comes into force. For instance, this proposed Bill requires trustees to review SIPs annually, whereas in Jamaica a review of a SIP is only necessary if there has been a material change affecting the plan. The proposed legislation in Trinidad and Tobago will also impose onerous duties on a plan's management committee, whereas this is not the case under the Jamaican legislation. Many jurisdictions in the Region do not have any formal pensions legislation or are now in the process of drafting same.

The many differences highlighted above suggest that there is a definite need for a harmonization of the financial laws across the Region and in particular those concerning

[8] These sudden changes include the collapse of a conglomerate (CLICO) or the rapid decline of the oil price, both of which occurred in 2009

pension plan administration and investment. Indeed, it is submitted that a harmonization of these laws will encourage plans to invest outside of their domestic market and would ensure that these laws are consistent with CSME obligations. A regional supervisory body would also assist in this process and would move us one step closer to creating a regional securities market for the investment of pension fund assets.

X. Conclusion

The laws relating to the supervision of pension plans in the Caribbean are not uniform. Many countries have no legislation at all (such as Barbados where a law has been passed but is not yet effective), or are now in the process of drafting legislation. Those with legislation, such as Trinidad & Tobago and Jamaica also adopt different approaches to regulation, with Trinidad & Tobago utilizing strict quantitative restrictions on pension plan investment and Jamaica utilizing the prudent person approach along with a few quantitative restrictions. Both Trinidad & Tobago and Jamaica restrict the amount of pension plan assets which may be invested in foreign securities, including those of fellow CARICOM countries. There is therefore a great need to harmonize the laws in the Region to encourage investment of pension plan assets outside of their domestic markets, and to ensure that restrictions on the movement of capital within the Region are gradually lifted. These steps will serve to stimulate the capital markets in the Region by encouraging the creation of new securities, and a greater cross-listing of securities, which will result in pension plan portfolios in the Region becoming more diversified and more resilient. It is hoped that steps to harmonize laws and create a regional supervisory body will be undertaken soon since this will be an important step towards achieving greater integration of the financial markets in the Region.

References:

1. Brown, Eleanor, "The CSME and the Integration of Financial Services" in *Production Integration in CARICOM – From Theory to Action,* 2006, eds. Benn, Dennis and Hall, Kenneth Kingston: Ian Randle Publishers.
2. CARICOM, undated, "A Concept Paper on the Strategic Plan on the Securities Services in the CARICOM Single Market and Economy (CSME)". (CARICOM Concept Paper) Available at: http://www.caricom.org/jsp/single_market/services_regime/concept_paper_securities.pdf (accessed 19 February 2010).
3. Central Bank of Trinidad and Tobago (CBTT), 2009. Proposals for the Establishment of an Occupational Pension Plans Bill, issued in December 2009. Available at http://www.central-bank.org.tt/.
4. Central Bank of Trinidad and Tobago (CBTT), 2008. Financial Stability Report 2008. Available at http://www.central-bank.org.tt/.
5. Chan-Lau, Jorge A. 2004. Pension Funds and Emerging Markets. IMF Working Paper WP/04/181.
6. Financial Services Commission of Jamaica (FSC Website). Available at http://www.fscjamaica.org/
7. Galer, Russel.2002. "Prudent Person Rule" Standard for the Investment of Pension Fund Assets". OECD, Financial Market Trends, No. 83, November 2002.
8. R. v. Bernard Christophe et. al. 2009 ONCJ 586 (CanLII). Available at the Canadian Legal Information Institute website, http://www.canlii.org/en
9. Roldos, Jorge, E. 2004. Pension Reform, Investment Restrictions, and Capital Markets. IMF Policy Discussion Paper PDP/04/4.
10. Peng, Jun. 2009. *State and Local Pension Fund Management,* New York: CRC Press.