

A Case for Modernising the Jamaican Arbitration Statute

Introduction

Arbitration is defined as a process used by the agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award.¹

This procedure for resolving disputes has been accepted internationally as a viable alternative to litigation. The trend worldwide has been to increase its use. There are encouraging signs in Jamaica that the commercial sector would like to see this happen also.

A major problem however is the state of the law. The principal arbitration statute in Jamaica is more than 100 years old. It is the Arbitration Act 1900 which is modelled off the United Kingdom (UK) Arbitration Act, 1889.

Since that time, arbitration law has seen many far-reaching developments. Of particular note is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 which was amended in 2006 ('the Model Law'). Over fifty-five countries have enacted legislation based on the Model Law.²

The UK itself has enacted the Arbitration Acts 1889 to 1934, the Arbitration Act 1950, and the Arbitration Act 1975 (which was enacted to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New

¹ HALSBURY'S Laws of England, Fourth Edition Reissue Volume 2 (3) p.2 para. 1

² <http://www.uncitral.org/uncitral/en/about/origin.html>

York Convention 1958) ('the New York Convention'), the Arbitration Act 1979 and the Arbitration Act 1996³

By contrast, the Jamaican Arbitration Act remains substantially as it was enacted in 1900 as there have been no significant amendments to the statute. One commentator has described the Act as being very basic, although it deals with the most fundamental aspects of arbitration.⁴

To compensate for some of the limitations in the law, domestic arbitration practice relies on a number of international rules, such as the International Chamber of Commerce (ICC) Arbitration Rules and the UNCITRAL Arbitration Rules, as a matter of course⁵ and the common law. These Rules however, are not incorporated into domestic law and therefore do not have the force of law. One important exception is the New York Convention, to which Jamaica acceded on July 10, 2002, the provisions of which are contained in the Arbitration (Recognition and Enforcement of Foreign Awards) Act, 2001.

Fortunately, the Jamaican courts have taken a deferential approach to the application of the 1900 Act and have brought a modern interpretation to the Act. This is clear when one examines the courts' treatment of applications under the core provisions of the Act, namely, sections 5, 12(2) and 13. The courts' approach however cannot cure the inherent limitations of the Act and in any event, such important matters should not be left to the discretion of judges.

There is therefore urgent need to update and modernise the Jamaican Arbitration Act.

This will have enormous benefits for the domestic and hopefully, international

³ Keren Tweeddale & Andrew Tweeddale, *a practical approach to Arbitration Law*, 1999 p. 1

⁴ Stephen Shelton 'Arbitration as an Alternative Means of Dispute Resolution: An Introductory Road Map', Continuing Legal Education Seminar, Jamaica Bar Association (unpublished paper presented at the Norman Manley Law School on June 12, 2001) p.5

⁵ Christopher P. Malcolm 'The Settlement of Foreign Investment Disputes: Distilling Some of the Considerations for Jamaican Arbitration Practitioners', *Caribbean Law Review* 2004 p.25

arbitration practice in Jamaica. Modernisation alone will not be enough. Other steps including programmes to sensitise the public and to train arbitrators will also be critical.

In this paper I will:

- a. examine the approach of the Jamaican courts to the application of the Act;
- b. discuss some encouraging developments on the Jamaican arbitration landscape;
- c. look at three possible models for a new Jamaican statute;
- d. suggest which model would be most appropriate;
- e. look at the benefits of modernisation; and
- f. suggest a way forward.

The Jamaican Arbitration Act, 1900

The Courts' Approach

The courts have an inherent jurisdiction to stay legal proceedings. However, for the purposes of arbitration reliance is placed on section 5 of the Arbitration Act.

Section 5

This section gives the court power to stay litigation where there is a valid arbitration agreement. It provides as follows:

‘...If any party to a submission... commences any legal proceedings in the court against any other person to the submission....any party to such legal proceedings may...apply to the court to stay the proceedings, and the court or a Judge thereof...**may** make an order staying the proceedings.’ (emphasis mine)

In applying this section, the Jamaican courts have adopted the principle that where the parties have agreed to, they should be compelled to carry out that agreement.

A review of a significant number of cases which have come before the courts demonstrate that the Jamaican courts will refuse a stay of proceedings only in exceptional cases.

So for example, in a well known case in the insurance industry, *American Home Assurance Company and Eight Others v. Edward Shoucair T/A S.N. Shoucair*⁶ the Court of Appeal had to consider a summons filed by the appellants/ defendants to stay the arbitration proceedings while civil proceedings were on going between the parties. The summons had been dismissed by the Supreme Court.

The facts are that the respondent submitted a claim arising out of damage caused by a fire. The appellants made no admission of liability and the respondent filed suit on the day before the limitation period expired claiming indemnity. The appellants admitted liability after the suit was filed. The respondent commenced arbitration proceedings under a clause in the policy which provided that any disputes as to quantum of any loss or damage arising from destruction of the insured property, must be referred to arbitration. The respondent subsequently filed a statement of claim in which he abandoned the action in respect of the indemnity but maintained the action for damages for unreasonable delay in the settlement of the claim.

The appellants contended that where a party has filed a writ in breach of an arbitration clause and the subject matter before the arbitrator is the same as that before the court, the party has thereby chosen to place the matter before the court which, being the overriding authority, must proceed to adjudicate upon the matter in the absence of an application by the other party for a stay of the court proceedings.

⁶ (1993) 30 J.L.R. 12

Carey, J.A., the acting President of the Court of Appeal, relying on the English decision of *Lloyd v. Wright*⁷ opined:

‘It is, I think, important to note from this case that the matter in dispute must be the same in the arbitration proceedings as it is in the action. And as well it should be noted, that the defendant is at liberty to invoke the provisions of the Arbitration Act which allow for the action to be stayed. If this is so, then I do not accept that the mere filing of the action renders the arbitration proceedings at an end.’

Carey, J.A., also felt that it would be wholly inequitable to restrain the arbitrator from proceeding to carry out his terms of reference under the arbitration clause unilaterally imposed by the appellants, by process initiated at the instance of the very appellants themselves. Forte, J.A., in dismissing the appellants’ attempt to convince the court that it being seized of the matter, should not surrender its superior jurisdiction to the arbitrator or engage in a race with the arbitrator as to a determination of the quantum of the indemnity for which it is liable said that:

‘ having regard to the condition stipulated in condition 18, i.e. that an award by an arbitrator is a condition precedent to any right of action- the action cannot be proceeded with, until the arbitrator’s award has been obtained.’

In another case, *Douglas Wright T/A Douglas Wright Associates v. The Bank of Nova Scotia Jamaica Limited*,⁸ the issue involved an application for an order setting aside judgment and granting a stay of further proceedings in the action on the ground that both parties had agreed to refer the matter to arbitration in the event of a dispute. The

⁷ [1983] 2 All E.R. 970

⁸ (1994) 31 J.L.R. 350

judge relied on the learned authors of Mustill and Boyd on Commercial Arbitration (2nd Edition) page 472 and said:

‘The circumstances which accompany an act may be looked at to see whether the act amounts to an election to give up the right to stay. Thus, an application to the Court which might otherwise amount to a step in the proceedings is deprived of this characteristic if the applicant makes it clear- by stating that his application is without prejudice to a subsequent request for stay or in simultaneously taking out a summons to stay- that he intends to insist on a reference to arbitration.’

The judge accepted this as a correct statement of the law and in keeping with the authorities ruled that the applicant by issuing a summons to set aside the judgment and applying for a stay of proceedings in one document on the same day that execution was levied, had acted promptly and did not take any step such as to preclude it from seeking a stay of proceedings. He said further that the dispute involved questions of both law and fact and evidence would be needed both as to the technical terms used in the agreement and the custom in the profession in order to construe the contract. He held that there was no sufficient reason why the matter should not be referred to arbitration.

A similar result was arrived at in the case of *Bentley Estates Limited v. Castle Construction Limited and A. L. Richards (T/A A.L. Richards and Associates)*.⁹ Here the appellant brought an action against the respondent contractors alleging breach of contract and in the alternative negligence. A clause in the contract provided for disputes to be referred to arbitration. The trial Judge granted a stay of proceedings to the respondent. The appellant appealed. The Court of Appeal held that since the

⁹ (1992) 29 J.L.R. 480

appellant had alleged a breach of contract there must be a construction of the contract and therefore the matter was within the ambit of the arbitration clause. The court also felt that the onus lay on the appellant to show that there was sufficient reason why the dispute should not be referred to arbitration.

Section 12 (2)

This section deals with the conduct of the arbitrator or umpire and the manner of procuring an arbitration or award. It provides as follows:

‘Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the court **may** set aside the award.’

(emphasis mine)

The court’s power to set aside the award for misconduct, includes ‘misconducting the proceedings’, in addition to serious breaches of the *nemo iudex in sua causa* and the *audi alteram partem* maxims. These include acting without or outside jurisdiction such as where there was no binding arbitration agreement, where the matter in dispute fell outside the agreement, where the relief granted lay outside the arbitrator’s powers and where he was not validly appointed.¹⁰ Parties aggrieved or dissatisfied with the award of an arbitrator, attempt to persuade the court to set aside an award usually on the basis that there is an error on the face of the record. This is a finding that the basis of the award is some legal proposition which is erroneous.¹¹

How have the Jamaican courts treated with this provision?

In *Book Traders (Caribbean) Ltd. v. Jamaica General Insurance Company Ltd.*¹², a challenge was made to an arbitrator’s award on the basis that it was bad on the face of it because his refusal to award interest at commercial rates was erroneous in law. The respondent alleged in response that the appellant had demanded and accepted the

¹⁰ Michael Forde, *Arbitration Law and Procedure*, 1994 p. 23

¹¹ Honourable Irish Society v. Minister for Finance [1958] NI 170 at p.180

¹² Jamaica SCCA No: 128/2000, Judgement Book October- December 2002 Vol.4,

payment of the award including interest. The trial judge dismissed the appellant's contention on a preliminary point on the basis that they were 'approbating and reprobating.' The appeal court declined the invitation to interfere with the arbitrator's findings and confined its decision to the issue as to whether the acceptance of the payment by the appellant amounted to a waiver. The court concluded that the appellant was estopped because of its conduct, from challenging the arbitrator's award and affirmed that the nature of an award under the Arbitration Act is of a different character as it results from an agreement by the parties to subject the resolution of their dispute to an arbitrator and to accept any award given by him which has no error on the face of it.

More recently, the Court of Appeal in the case of *National Transport Co-operative Society Ltd. v. The Attorney General of Jamaica*¹³ was faced with an appeal from the judgment of trial judge Brooks J. who set aside the award of a formidable team of arbitrators¹⁴ for a number of errors on the face of the record. The appeal court ruled that the failure of the arbitrators to find that a Minister of Government had no power to grant exclusive licences to transport operators was an error of law. The court relied on the English Court decisions of *Harbour Assurance Company v. Kansa*¹⁵ and *Soleimany v. Soleimany*¹⁶ that a court will not enforce an arbitral award having its genesis in an illegal contract and will set it aside on the ground of misconduct. The court found that the contract was illegal and accordingly, the arbitrators would have been in a similar position to a court of law and would be precluded by fundamental public policy from enforcing the contract and awarding damages. In addition, the court found that there was ample material for the learned trial judge to conclude that

¹³ Jamaica SCCA No. 117/2004, Judgment delivered on June 8, 2008

¹⁴ Former Justices of Appeal Ira Rowe & Boyd Carey and Mrs. Angela Hudson Phillips Q.C.

¹⁵ [1993] 3 All E.R. 897

¹⁶ [1997] 3 All E.R. 847

the Heads of Agreement had amended the Franchise Agreements. The arbitrators had therefore committed an act of misconduct when they misconstrued a clause in the Heads of Agreement. These amounted to errors on the face of the record. The decision is the subject of an appeal to Jamaica's highest court, the Judicial Committee of the Privy Council in the United Kingdom.¹⁷

In *Marley and Plant Limited v. Mutual Housing Services Limited*,¹⁸ the respondent applied to the Supreme Court to set aside the award of the arbitrator on the ground that he did not follow one of the terms of reference which states as follows: - (c) (he has the power) to rule on the issue set out in the claims before him and hand down such findings as he may deem fit, based on the evidence before him. The respondent further contended that the arbitrator had no power to award interest and that there was an error on the face of the record. The trial judge set aside the award on the ground that in keeping with term (c) the arbitrator ought to have made specific findings in relation to the claims. The Court of Appeal disagreed and stated that where parties have chosen to use arbitration, the jurisdiction of the Supreme Court to set aside an arbitration award can only be exercised in well defined circumstances, where the arbitrator has committed an error in law. Further that the general law is that save in an award in a special case, an arbitrator need not give any reason for his award. His findings of fact and law cannot be challenged unless an error of law appears on the face of the award and such error can only be detected if there is a speaking award.

Section 13

This section deals with the manner of enforcement of an award. The section provides as follows:

¹⁷ The Constitution of Jamaica – section 110 gives a right of appeal to Her Majesty in Council
¹⁸ (1988) 25 J. L.R. 38

‘An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.’

The judge remarked that the advantages of s.13 are many but the most significant one is that once permission is given, the award can be enforced as if it were a judgment of the Supreme Court.¹⁹ In that case, the court dismissed an application to set aside an award even though the court found that there was a non-disclosure by the party seeking to have the judgment enforced. The judge noted that section 13 does not state the applicable criteria when an application is being made to set aside the permission granted to enforce an award.²⁰

A foreign award is enforceable either by action or under this section.²¹

The foregoing analysis of the cases demonstrate that despite the antiquity of the Act, the courts have not sought to control and supervise arbitrations taking place in Jamaica. Instead, the courts have sought to provide support for the arbitration process by refusing to intervene or interfere in the process itself, as opposed to a strict supervision of the arbitration process. The courts have adopted a minimalist approach to arbitration and are trying to make the best use of an old Act.

Encouraging Developments

A number of encouraging developments have been taking place in Jamaica over the last few years which show that there is a growing appreciation in the commercial sector for the need to modernise the arbitration framework in Jamaica.

The Private Sector Organisation of Jamaica (PSOJ) which was established in 1967 is a national organisation of, as the name suggests, private associations, companies and

¹⁹ *VRL Services limited v. Sans Souci Limited Supreme Court Judgment October- December 2004, Per Sykes J.*

²⁰ *VRL Services limited v. Sans Souci Limited*

²¹ The Arbitration (Recognition. and Enforcement of Foreign Awards) Act, 2001, Section 4

individuals working together to promote a competitive and productive private sector. It seeks to influence national policy issues of a political, social or economic nature.²² The Jamaica Chamber of Commerce (JCC) is a membership based organisation, comprising businesses and professionals working together to build and promote a healthy economy and to improve the quality of life in the country.²³ Both organisations have been persuaded by Mr. Justice Hugh Small Q.C.²⁴ to make an application to the Multilateral Investment Fund (MIF) of the Inter-American Development Bank for funding to establish a Commercial ADR Centre. He is optimistic that the application will succeed and has committed to supporting the project when it is established.

According to the Project Proposal submitted to the MIF:²⁵

‘The ultimate long term goal is to assist the private sector in developing a system which will provide efficient, flexible, effective and transparent settlement of disputes as they arise and therefore help reduce the backlog of cases in the Jamaican court system through the establishment of a modern alternative dispute resolution system that obviates the need to have the Courts resolve the disputes.’

The establishment of the Centre and the cultivation of a culture of alternative dispute resolution of commercial disputes are expected to benefit ‘small, medium and large businesses working in the areas of commerce, finance, manufacturing, the service sectors and professionals in construction, accounting and law.’ In addition, the

²² The Private Sector Organisation of Jamaica: www.psoj.org last visited on August 2, 2008

²³ The Jamaica Chamber of Commerce: www.jamaicachamber.org.jm

²⁴ A former cabinet Minister in Jamaica (Jamaica) and a retired High Court Judge in the Bahamas

²⁵ Project Proposal made available by the kind courtesy of the PSOJ

Jamaican business environment will become 'more attractive to local, regional and international firms that operate' in the country.²⁶

The Dispute Resolution Foundation of Jamaica (DRFJ) was incorporated in 1994 to increase co-operation in the management and resolution of disputes involving business, the police, courts, social services agencies and the people, through the controlled process of mediation. The core objectives of the DRFJ includes the establishment of methods of resolving disputes which are supplementary, complementary or alternative to litigation, to encourage and educate the public about using ADR techniques to handle conflicts and to explore and establish ADR techniques as methods of resolving commercial disputes.²⁷ Arbitration is a major service offered by the DRFJ. In 2007, Mr. John Bassie²⁸ (a mediator and arbitrator) and the DRFJ came together to establish a local arm of the Chartered Institute of Arbitrators (CIArb). In March 2008, an inaugural workshop for certification of arbitrators as Associates of the Chartered Institute of Arbitrators was held. It is felt that there is a demand for competent and certified arbitrators supported by a credible and respected organisation with global influence. It is hoped that a pool of local arbitrators will eventually be identified and that programmes will be conducted to enable persons to become certified as arbitrators.

Partners for Economic Development Limited and the University College of the Caribbean will in November 2008 jointly stage an International Commercial Arbitration Post-graduate Certificate Course. The objective is to develop a cadre of local and regional arbitration practitioners who will become members of the CIArb and who will be able to promote greater use of arbitration in settlement of commercial

²⁶ Project Proposal to the Multilateral Investment Fund to establish a commercial alternative dispute resolution centre in Jamaica

²⁷ Website www.disputeresolutionfoundation.com

²⁸ Barrister and Attorney at Law and a fellow of the Chartered Institute of Arbitrators

disputes. The programme is accredited by the CIArb and will be endorsed by the DRFJ.

Successful completion of this programme will satisfy the examination requirements for membership in the CIArb and thereafter enable use of the designation Member of the Chartered Institute of Arbitrators (MCIArb). It will also enable additions to the Arbitration Panel of the DRFJ and ultimately to the panels for Caribbean Community (CARICOM) and the Organisation of Eastern Caribbean States (OECS).

Possible models for a new Jamaican statute

A piecemeal approach towards the modernisation of the statute is not recommended. The statute is old, limited and not user- friendly. A new comprehensive Act which takes a modern and flexible approach to arbitral procedures is proposed.²⁹ There is also the need to introduce international arbitration legislation as part of a modern and complete legal framework, according to international standards.³⁰

In crafting the new statute, the logical starting point is the UNCITRAL Model Law. Indeed this has been recognised in the Commonwealth Caribbean where an initiative has been undertaken by the Caribbean Law institute (CLI) to introduce the UNCITRAL Model Law on a regional rules basis. It has been painstaking, cautious and diligent. The project commenced in September 1988 in response to requests from legal and commercial sources. The project has been undertaken out of a realization

²⁹ Andrew Bartlett, 'The Journal of the Chartered Institute of Arbitrators,' Volume 66, Number 1, February 2000

³⁰ HEW R. Dundas, 'The Journal of the Chartered Institute of Arbitrators,' Volume 73, Number 4, November 2007

that, at this juncture, it is desirable that Caribbean countries should embrace international arbitration.³¹

UNCITRAL Model Law

The UNCITRAL Model Law has been recognised as a model for countries without modern developed law and practice in the field of arbitration.³² This is illustrated by a review of the countries which have based their laws on the Model Law.

UNCITRAL was established by the United Nations General Assembly in 1966 ([Resolution 2205\(XXI\)](#) of 17 December 1966). In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.³³

The General Assembly gave the Commission the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.³⁴

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the

³¹ Hugh A. Rawlins, 'Aspects of the UNCITRAL Regimes for Procurement and for International Commercial Arbitration and Government International Commercial Contracts in the Commonwealth Caribbean,' *Caribbean Law Review*, June 1997 p. 214

³² Lord Mustill and Stewart Boyd, *Commercial Arbitration*, Second Edition, 2001 Part 1 p. 7

³³ <http://www.uncitral.org/uncitral/en/about/origin.html>

³⁴ <http://www.uncitral.org/uncitral/en/about/origin.html>

arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.³⁵

The Model Law was adopted by the UNCITRAL on 21 June 1985 and by the UN General Assembly on 11 December 1985. Its presentation and content is indeed ‘a model’. ‘It commences by defining an international arbitration and continues in a logical order through the whole processes of arbitration down to enforcement of arbitration awards. Its language is simple and its text short.’³⁶

On July 7, 2006 UNCITRAL amended the Model Law in three important respects – general principles concerning the interpretation of the Model Law, the form of the arbitration agreement and interim measures. These amendments were made so that the Model Law would ‘conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures.’³⁷

General Provisions of the Model Law³⁸

The Model Law comprises thirty-six articles divided into nine chapters. The sequence of the chapters and articles is straight forward and logical.

Chapter I with six articles sets out the General Provisions.

Article 1(1) provides that the Model Law is applicable to international commercial arbitration. Commercial is to be given a wide interpretation.

Article 1 (3) defines the word ‘international’ as where the parties to the arbitration agreement have, at the time when the arbitration agreement was concluded, their places of business in different states, or one of the parties has its place of business in a

³⁵ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

³⁶ Lord Hacking, ‘Arbitration law reform: the impact of the UNCITRAL Model Law on the English Arbitration Act 1996’, *Arbitration*, November 1997, p. 292

³⁷ Resolution of the General Assembly dated December 4, 2006

³⁸ Keren and Andrew Tweeddale, ‘*a practical approach to Arbitration Law*’, 1999 Chapter 19 p. 320

state other than that of the 'place' of arbitration, or a substantial part of the contract is to be performed in a state different to where one of the parties has its place of business.

Article 2A was introduced in 2006 and sets out general principles concerning the interpretation of the Model Law.

Article 4 deals with the waiver of the right to object where a party knows that any provision of the Model Law has not been complied with and does not object within the necessary time.

Article 5 is a critical article and provides that '[i]n matters governed by this Law, no court shall intervene except where so provided by this Law.'

Chapter II has three articles and deals with the Arbitration Agreement.

Article 7 was amended in 2006. It now has two optional wordings. Option 1 defines arbitration agreement as an agreement to submit disputes to arbitration 'which have arisen or which may arise' between the parties in respect of a defined legal relationship, whether contractual or not. This Option which is similar to the original article 7 requires the arbitration agreement to be in writing. The definition of 'in writing' has been expanded considerably by the amendment to take into account evolving practice in international trade and technological developments.³⁹

Option II is simply the same definition of arbitration agreement under Option I. There is no requirement as to form.

Countries are required to select the option which best suits their needs.

Article 8 states that where an action is brought before a court in a matter which is subject to an arbitration agreement and a party so requests, the court shall refer the

³⁹ Explanatory note by the UNCITRAL secretariat on the Model Law, paragraph 4

dispute to arbitration unless it finds the agreement null and void, inoperative or incapable of being performed.

Article 9 provides that it is not incompatible with the arbitration agreement for a party to request before or during the proceedings that a court provide interim measures of protection.

Chapter III of the Model Law has six articles and deals with the composition of the arbitral tribunal.

Articles 10 & 11 deal with the composition and setting up of the arbitral tribunal.

Article 12 states the grounds of challenge to the arbitrator. The challenge procedure is set out in article 13.

Article 14 deals with the situation where the arbitrator becomes *de jure* or *de facto* unable to perform his functions or fails to act without undue delay.

Article 15 deals with the appointment of a substitute arbitrator.

Chapter IV consists of article 16 and deals with the jurisdiction of the arbitral tribunal.

Article 16 is one of the cornerstones of the Model Law. It provides that the ‘arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement.’

Chapter IVA comprises articles 17 to 17J and deals with interim measures and preliminary orders. This new chapter represents the third substantive amendment made in 2006. It bears little resemblance to the original article 17 which dealt only with the power of the arbitral tribunal to grant interim measures.⁴⁰

This new chapter, in addition to giving the arbitral tribunal the power to order interim measures, also:

- a. defines interim measures;

⁴⁰ <http://www.uncitral.org/uncitral/en/about/origin.html>

- b. sets out the conditions for granting interim measures;
- c. introduces preliminary orders;
- d. provides for the recognition and enforcement of interim measures;
- e. provides for court-ordered interim measures.

According to the Explanatory Note by the UNCITRAL secretariat on the Model Law, paragraph 4:

‘The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures.’

Chapter V has ten articles and deals with the conduct of arbitral proceedings.

Article 18 provides for the equal treatment of the parties.

Article 19 gives the parties the right to determine the procedure for the proceedings, subject to the provisions of the Model Law.

Articles 20 and 22 state that the parties can choose the place of arbitration and the language of the arbitration.

Article 23 deals with the statement of claim and defence, article 24 with the hearing and article 26 with the appointment of experts.

Chapter VI comprises six articles dealing with the making of the award and termination of proceedings.

Article 28 provides that the tribunal shall decide the dispute in accordance with the law designated by the parties in relation to the substance of the dispute.

Article 29 provides that the decision-making of the arbitral tribunal shall be by majority or by the presiding arbitrator unless otherwise agreed.

Article 30 provides for the situation where the dispute is settled during the arbitral proceedings.

Article 31 provides that an award should be in writing and signed by the arbitral tribunal or a majority of them.

Article 32 provides for the termination of the arbitral proceedings. This may occur on the publication of the final award.

Article 33 deals with residual powers of the arbitral tribunal after the issue of an award.

Chapter VII consists of article 34 which deals with recourse against an award.

Article 34 provides that recourse to a court against an award can only be made by application to set aside in accordance with the provisions of the article which lists the grounds on which the award may be set aside. The grounds reflect those on which recognition and enforcement may be refused under the New York Convention.

Chapter VIII, the final chapter, has two articles and deals with the recognition and enforcement of awards.

Article 35 provides for the enforcement of awards properly made. The award, irrespective of where it is made, shall be recognised and enforced. There is therefore no need for reciprocity in recognition and enforcement. Article 35 (2) deals with the conditions that are required before enforcement will be allowed.

Article 36 sets out the grounds for refusing recognition and enforcement. These grounds are identical to those in the New York Convention. Article 36 (1) (b) sets out other grounds on which the award may be refused recognition or enforcement.⁴¹

⁴¹ Keren and Andrew Tweeddale, *a practical approach to Arbitration Law*, 1999

In proceedings under the Model Law, unless the parties have agreed otherwise in writing:

- a. the arbitral proceedings commence on the date that the request for arbitration is received by the respondent;
- b. the arbitral tribunal can make interim [and preliminary] orders for the protection of the subject matter in dispute;
- c. the arbitral tribunal may conduct the arbitration in such a manner as it deems appropriate;
- d. the arbitral tribunal may determine the place of the arbitration;
- e. the arbitral tribunal may determine the language of the arbitration;
- f. the arbitral tribunal may seek the advice of one or more experts;
- g. the award shall set out the reasons on which it is based;
- h. the arbitral tribunal may order interest up to the date of the award;
- i. the arbitral tribunal may order interest from the date of award until payment;
- j. the arbitral tribunal may order costs; and
- k. either party has 30 days within which to request a correction to or interpretation of the award or to seek an additional award.

On application of a party, a stay of litigation must be ordered by a court for which the Model Law applies unless the court finds that the arbitration agreement is null and void, inoperable or incapable of being performed.⁴²

There are no mandatory provisions in the Model Law.

The UK Arbitration Act 1996⁴³

⁴² The Australian Encyclopaedia of Forms and Precedents, Third Edition, 2007

The UK Arbitration Act, 1996 (the UK Act) is the second proposed model. Its format and language were significantly influenced by the Model Law.

Section 1 of the UK Act is very important as it sets out the guiding principles of the statute. Regard should be had to these principles in the case of doubt in the interpretation of any section of the statute. The section merits reproduction in full.

- ‘1. The provisions of ... Part [1 of the UK Act] are founded on the following general principles, and shall be construed accordingly-
- (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense;
 - (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
 - (c) in matters governed by ... Part [1 of the UK Act] the Court should not intervene except as provided by ... Part [1 of the UK Act].’

This section encapsulates the main advantages of arbitration proceedings over litigation.

Section 4 provides for mandatory and non-mandatory sections of the Act. The mandatory provisions are listed in Schedule 1 to the Act ‘and have effect notwithstanding any agreement to the contrary.’ They are:

- a. sections 9-11 - stay of legal proceedings;
- b. section 12 - power of the court to extend agreed time limits;
- c. section 13 - application of Limitation Acts
- d. section 24 - power of the court to remove arbitral tribunal
- e. section 26(1) - effect of death of arbitrator

⁴³ Keren & Andrew Tweeddale, ‘a practical approach to Arbitration Law’ ,1999 Chapters 3- 18

- f. section 28 - liability of parties for fees and expenses of arbitrators
- g. section 29 - immunity of arbitrator
- h. section 31 - objection to substantive jurisdiction of tribunal
- i. section 32 - determination of preliminary point of jurisdiction
- j. section 33 - general duty of tribunal
- k. section 37(2)- items to be treated as expenses of arbitrators;
- l. section 40 - general duty of the parties
- m. section 43 - securing the attendance of a witness
- n. section 56 - power to withhold an award in the case of non-payment
- o. section 60 - effectiveness of agreement for payment of costs in any event
- p. section 66 - enforcement of award
- q. sections 67-68 - challenging the award: substantive jurisdiction and serious irregularity and
- r. sections 70 and 71 - supplementary provisions; effect of order of court so far as relating to those sections;
- s. section 72 - saving for rights of person who takes no part in proceedings;
- t. section 73 - loss of right to object;
- u. section 74 - immunity of arbitral institutions, & c;
- v. section 75 - charge to secure payment of solicitor's costs.

The parties are free to exclude the non-mandatory provisions of the Act by written agreement.

Section 5 provides that an arbitration agreement must be in writing. 'Agreement in writing' has a wide definition. Agreement to terminate an arbitration agreement however, need not be in writing (section 23(4)).

Section 6 (1) defines an arbitration agreement as 'an agreement to submit to arbitration present or future disputes (whether they are contractual or not).' By virtue of section 82 (1) dispute includes any difference.

Section 7 provides that the arbitration agreement must be treated as a distinct agreement from the substantive agreement of which it may form a part.

Section 9 gives the court the power to stay legal proceedings in favour of arbitration. A stay will only be granted on application.

Section 12 deals with the power of the Court to extend time limits which are set out in contracts, not those set out in statutes. It should be read alongside section 14 which gives the parties the freedom to agree when arbitral proceedings are to be regarded as commenced.

Under section 13, '[t]he Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.'

Section 14 gives the parties the right to decide when arbitral proceedings commence.

Under section 15, the arbitral tribunal may be composed of one or more arbitrators. The parties are free to agree on the number of arbitrators to form the arbitral tribunal and whether there is a chairman or umpire. If there is no agreement on the number of arbitrators, the tribunal shall consist of a sole arbitrator.

Section 29 gives the arbitrator indemnity 'for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.' Importantly, section 74 gives an

indemnity to ‘an arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator.’

Section 30 provides for the arbitral tribunal to rule upon its own jurisdiction.

Section 33(1) imposes positive duties on the tribunal to:

‘(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.’

Section 33 which is a critical section in the UK Act should be read alongside section 1(a).

Section 35 states that the parties are free to agree to consolidate one arbitral proceeding with other arbitral proceedings or to hold concurrent hearings.

The parties are given the power to choose the law to be used to determine the dispute under section 46. If there is no choice or agreement, the tribunal must apply conflict of law rules.

Section 47 provides that the tribunal may make more than one award at different times on different aspects of the matters to be determined.

The parties are free to agree the powers of the arbitral tribunal in respect of awarding interest under section 49.

Section 50 allows the parties or the arbitral tribunal to apply to the court for an extension of time for the making of the award.

Sections 59 – 65 set out a comprehensive code for awarding costs in arbitration.

Section 66 deals with the enforcement of awards. Under sub-section (1):

‘An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.’

Alternatively, under sub-section (2), where leave is given ‘judgment may be entered in terms of the award.’ This alternative is useful where registration of the judgment in a foreign court is necessary to secure enforcement in that country or for the purpose of bringing other proceedings.

The court will not grant leave to enforce the award where it is shown that ‘the tribunal lacked substantive jurisdiction to make the award.’ ‘Substantive jurisdiction’ is defined in section 82 by reference to section 30 (1) (a) to (c) to mean:

- ‘(a) where there is a valid arbitration agreement.
- (b) whether the tribunal is properly constituted, and
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.’

Sections 67(1) gives a party the power to challenge any award where the arbitral tribunal lacks substantive jurisdiction. The arbitral tribunal’s jurisdiction can be challenged on questions of fact and law.

Section 68 (1) provides that an arbitral tribunal’s award may be challenged by any party on the ground that the arbitral tribunal has committed a ‘serious irregularity.’

Sub-section (2) defines serious irregularity to mean;

‘an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant -

- a. failure by the tribunal to comply with section 33 (general duty of tribunal);

- b. the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- c. failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- d. failure by the tribunal to deal with all the issues that were put to it;
- e. any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- f. uncertainty or ambiguity as to the effect of the award;
- g. the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- h. failure to comply with the requirements as to the form of the award; or
- i. any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.'

Section 69 gives a party the right to appeal to the court on a question of law arising out of an award made in the proceedings, provided there is no agreement by the parties to the contrary.

Sections 85 – 98 constitute Part II of the UK Act and deal with domestic arbitration agreements, consumer arbitration agreements, small claims arbitration in the county courts, appointment of judges as arbitrators and statutory arbitration.

Part III of the UK Act comprises sections 99 – 104 which deal with the enforcement of Geneva Convention awards and the recognition and enforcement of New York Convention awards.

Sections 105 – 110 make up Part IV of the Act which is the final Part. Under section 106, the Crown can be a party to an arbitration agreement.

Comparison between the UNCITRAL Model Law and the UK Arbitration Act

1996⁴⁴

The Model Law does not have an article like section 1 of the UK Act. Aspects of section 1 of the Act are reflected in articles 5 and 19(1) of the Model Law. Article 5 provides that ‘no court shall intervene’ in matters governed by the Law, except where so provided by the Law. This however, is stronger than section 1 (c) in which ‘shall’ is replaced with ‘should.’ This was done to preserve the inherent jurisdiction of the English Courts.⁴⁵

Article 19(1) of the Model law provides: ‘[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.’ This is similar to section 1 (b) of the UK Act.

Section 5 of the Act requires that arbitration agreements be in writing. ‘[I]n writing is given a wide definition. Before the 2006 amendment of article 7 of the Model Law, there was a wide difference between the ‘in writing’ definition under the UK Act and the Model Law. This is no longer the case. Indeed, in Option II of article 7 there is no requirement as to form of the arbitration agreement.

Section 6 of the Act defines “arbitration agreement.” This definition is similar to that in article 7 of the Model Law.

Section 7 of the Act, which deals with the separability of the arbitration agreement from the substantive contract, reflects Article 16(1) of the Model Law.

⁴⁴ Keren and Andrew Tweeddale, *a practical approach to Arbitration Law*, 1999 Chapter 19 p. 327 and Lord Mustill and Stewart Boyd, *Commercial Arbitration*, Second Edition, 2001 Part 1 p. 37

⁴⁵ T. Landau, ‘New Duties and Liabilities-Party Autonomy v Powers of the Tribunal’, IBC Conference, 4 July 1996

Section 9 of the Act which deals with stay of legal proceedings follows Article 8 of the Model Law. Under both, a Court is required to stay legal proceedings unless the arbitration agreement is found to be ‘null and void, inoperative or incapable of being performed.’

Section 30-32 of the Act deal with the jurisdiction of the arbitral tribunal. These sections follow Article 16(1) of the Model Law to a large extent.

Section 33 follows the Model Law in part. Section 33 (1) (a) of the Act imposes an obligation on the arbitral tribunal to ‘act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent’. Article 18 of the Model Law provides that “[T]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

The use of the words ‘reasonable’ and ‘full’ must be noted.

There are other similar provisions in the Model Law of the UK Act.

There are some provisions of the UK Act which arise out of the peculiarity of the English law and are therefore absent from the Model Law. These include:

- section 12 - the power to extend time for commencing an arbitration
- section 21 - provisions relating to umpires;
- section 23 - revocation of the arbitrator’s authority;
- sections 29 and 74 - explicit immunity for arbitrators and arbitral institutions;
- section 38(8) - the power of the arbitrator to order security for costs;
- section 41(3) - the power of the arbitrator to dismiss a claim for want of prosecution;

- section 56 - the lien on the award for the arbitrator's fees;
- section 65 - the power of the arbitrator to impose a limit on recoverable costs of the arbitration.
- section 69 - the possibility of bringing a preliminary question of law before the court;

Other provisions present in the UK Act but missing from the Model Law are:

- sections 1(a) and 33(b) - the requirement to proceed with dispatch;
- section 1(b) - the principle of party autonomy;
- section 4 - mandatory and non-mandatory provisions;
- section 28 and 64 - the liability of the parties for the fees of the arbitrator and the limitation of those fees to what is reasonable;
- section 34(1) and (2) - disclosure of documents and evidence;
- section 34(2)(g) - the power of the arbitrator to decide the extent to which proceedings should be inquisitorial or adversarial;
- section 35 - consolidation of arbitrations;
- section 36 - the right to legal representation;
- section 38(5) - administration of oaths to witnesses;
- section 39 - provisional awards;
- section 40 - the duty of parties to comply with the orders of the arbitrator and to do everything necessary for the proper and

- expeditious conduct of the proceedings;
- section 47 - interim awards;
- section 49 - awards of interest;
- section 59 - awards of costs.

Finally, the Model Law is confined to international commercial arbitration. There is no such limitation in the UK Act.

Arbitration in Australia⁴⁶

The Australian situation represents an interesting option for Jamaica because it operates two separate regimes for arbitration – one for domestic disputes and the other for international disputes. Each regime is governed by its own legislation.

Domestic Arbitration

Each of the states and territories of Australia has enacted substantially identical legislation which regulates the arbitration of commercial matters between the years 1984 and 1986. These Acts are known collectively as the Uniform Acts.

Salient aspects of the Uniform Acts include:

- a. Unless the contrary intention appears in the agreement the arbitral tribunal will consist of a single arbitrator.
- b. The parties are required to participate in such a manner that does not delay or prevent the making of an arbitral award.
- c. Unless the contrary intention appears in the arbitration agreement, where any person refuses to attend or give evidence or to produce a document, the

⁴⁶ The Australian Encyclopaedia of Forms and Precedents, Third Edition, 2007

arbitrator, umpire or opposing party may seek a court order that the person comply with the arbitral procedure.

- d. A rebuttable presumption arises that each party has a duty to exercise due diligence in referring a dispute to arbitration.
- e. The arbitrator may conduct the proceedings in a manner that he deems fit, subject to the other legislative provisions and the arbitration agreement itself.
- f. Specifically, the arbitrator may conduct the arbitration without regard to the rules of evidence and may choose whether to require oral evidence be given on oath.
- g. Where certain preconditions are met the parties may be represented by legal practitioners.
- h. The arbitrator is required to decide questions arising from the dispute according to law unless the parties have agreed otherwise.
- i. Alternatively, the Uniform Acts allow for the arbitrator to make decisions according to notions of general justice and fairness if this is provided for in the arbitration agreement.
- j. Unless the contrary intention appears in the arbitration agreement the arbitrator may give interim awards.
- k. Unless the contrary intention appears in the arbitration agreement, the arbitrator may order specific performance of a contract.
- l. The award by the arbitrator must be in writing, signed and include a statement of the reasons for the making of the award.
- m. There is a rebuttable presumption that the arbitral award is final and binding on each of the parties.

- n. The authority of an arbitrator is irrevocable unless a contrary intention is expressed in the arbitration agreement.

The procedure in arbitration will typically approximate that of litigation proceedings. Fast Track Arbitration Rules were developed in response to a perceived demise in the utilisation of arbitration procedures. In essence, Fast Track Arbitration expedites the resolution of disputes by limiting or prescribing the time to be taken in completing each aspect of arbitral proceedings.

The courts have an important administrative jurisdiction in regard to the arbitral process. The appropriate court may:

- a. On application of a party to the arbitration agreement, issue subpoenas requiring a person to attend for examination before an arbitrator or umpire, or to produce documents to the arbitrator or umpire.
- b. Set aside an appointment of an arbitrator and appoint a replacement.
- c. On application of a party to the arbitration agreement, remove an arbitrator or umpire where the arbitrator or umpire is guilty of misconduct. Misconduct is defined as including corruption, fraud, partiality, bias and a breach of the rules of natural justice.
- d. Set aside an award where the arbitrator is guilty of misconduct.
- e. On application of a party to the arbitration agreement, remove an arbitrator or umpire where undue influence has been exercised in relation to the arbitrator or umpire.
- f. On application of a party to the arbitration agreement, remove an arbitrator or umpire where the arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute.

- g. On application of a party to the arbitration agreement, where an arbitrator or umpire has been removed, appoint a replacement.
- h. On application of a party to the arbitration agreement, where an arbitrator or umpire has been removed, order that the arbitration agreement cease to have effect in relation to the dispute in question.
- i. Remit an award for reconsideration by an arbitrator.
- j. On application of a party to the arbitration agreement, where there has been undue delay in the arbitral proceedings, terminate the arbitration proceedings and remove it into the court.
- k. On application of a party to the arbitration agreement, where the necessary consents are given, determine any preliminary question of law where such a determination would produce substantial savings in costs.

Appeals

Pursuant to section 28 of the Uniform Acts an award made by an arbitrator or umpire is final and binding on the parties to the agreement unless the arbitration agreement states otherwise. Although the court has power to review procedural directions or rulings of the arbitrator there is no general right of appeal to the court. The court has no general power to set aside the arbitrator's decision for an error appearing on the face of the record.

An appeal lies to the court only for a question of law in circumstances where all of the parties are in agreement or the court has given leave.

Stay of proceedings

The court has a discretionary jurisdiction, on application of a party to the dispute, to order a stay of litigation proceedings. However, the court may only order a stay where there is no sufficient reason preventing the referral of the dispute to arbitration in accordance with the parties' agreement and it has been shown that the applicant was ready, willing and able to participate in the arbitration at the time the proceedings were commenced and remains so.

Enforcement of arbitral awards

Where an award has been made pursuant to an arbitration agreement, a party may apply for leave of the court for the award to be enforced as if it were a judgment or order of the court. If leave is granted then the court may enter judgment in the same terms as that of the arbitral award.

International Arbitration

International arbitration is governed by the International Arbitration Act 1974 (Cth). This legislation gives effect to the UNCITRAL Model Law. Parties may agree to exclude the operation of the UNCITRAL Model Law, in which case the Uniform Act of the state or territory where the arbitration is held will apply.

Australian colonies inherited the English Arbitration Act 1697.⁴⁷ The reform of the English law on arbitration in 1979 was the catalyst for the revision of state legislation on arbitration between the years 1984 and 1986.

Australia has adopted the Model Law only in respect of international commercial arbitration and accordingly, English and Australian Law have departed quite significantly from each other.⁴⁸

⁴⁷ Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, Second Edition, 2002

A Model for Jamaica

The main drawback with the UNCITRAL Model Law is that it was crafted to deal specifically with international commercial arbitration. Although its provisions could be extended to cover domestic disputes, such an exercise would be in the nature of recreating the wheel which is not desirable. In addition, the Model Law leaves many important areas of arbitration law untouched.

Jamaica needs to modernise its statute dealing with domestic arbitration and to introduce provisions applicable to international arbitration. The UK Act represents an attractive fusion of domestic and international requirements.

The UK Act creates an accessible and almost complete code of conduct, embodying a consistent vision of the arbitral process, which will in the great majority of cases take effect automatically.⁴⁹

The UK Act took the existing English Law on arbitration and supplemented it with many principles from the UNCITRAL Model Law. It radically alters the existing English Law of arbitration and at the same time preserves many perceived benefits of English arbitration law that have developed over centuries.⁵⁰

Using English legislation as a model would be in keeping with the legal tradition of Jamaica. The fact is that the Jamaican legal system is based on the British legal system. Jamaica was colonised by Britain in 1655 and at that time, received the English common law to the extent suitable to its situation. Jamaica received English

⁴⁸ D Mark Cato, 'Is the Australian Arbitrator Disadvantaged over his UK counterpart?' (1998) 16 (4) *The Arbitrator* p. 252

⁴⁹ Lord Mustill and Stewart Boyd, *Commercial Arbitration*, Second Edition 2001

⁵⁰ Keren and Andrew Tweeddale, *a practical approach to Arbitration Law*, 1999

statute law which was in use prior to 1728.⁵¹ Jamaica remained a colony of Britain until 1962 when it gained its Independence. The Independence Constitution recognises a right of appeal from the court of appeal to Her Majesty in Council. Our final court of appeal to this day remains the Judicial Committee of the UK Privy Council.⁵² Judgements from the English courts are highly persuasive authorities for Jamaican courts. Our colonial past explains why we look to English legislation whenever there is a need to update our legislation.

In recent times, we have also modelled our new legislation off other Commonwealth jurisdictions and, in particular Australia. This is also due to a similar jurisprudential heritage from Britain. In this case however, the Australian model is not attractive because it comprises two separate regimes- domestic and international which are governed by their own specific statutes. One comprehensive statute would be better suited to the needs of Jamaica. In addition, the Australian statutes pre-date the UK Act and would therefore not include some of its innovative features.

Arbitration in Australia is just one process in a well-developed inter-connected system of ADR processes. The others are negotiation, mediation, conciliation, facilitation and expert appraisal and determination. There are also hybrid processes, namely, early neutral evaluation, med-arb, which is a combination of mediation, conciliation and arbitration and mini-trial.⁵³ Adoption of the arbitration process without the other processes would be short sighted and not desirable.

Another very important factor which would support the use of the UK Act as a model is that the Act has been in force for more than ten years. In that time a body of learning would have built up around the Act. Jamaica would be able to benefit from

⁵¹ C. Dennis Morrison, The Reception of English Law in Jamaica, *West Indian Law Journal*, October 1979, p.43

⁵² The debate continues in Jamaica as to whether the Caribbean Court of Justice should replace the Judicial Committee of the UK Privy Council as the final appeal court for Jamaica

⁵³ Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, Second Edition, 2002

that learning which would assist in crafting the Jamaican statute. It is also important to mention the Departmental Advisory Committee on Arbitration Law (DAC) Report on the Arbitration Bill of February, 1996. The intention is not to adopt the UK Act wholesale but to fashion a statute suitable to Jamaica and its international needs.

The UK Act is modern and innovative. It is said to provide for swift, effective and fair resolution of disputes.⁵⁴ This is a critical feature for any new statute in Jamaica.

A modern user-friendly and updated arbitration statute should minimise the court's involvement in the arbitration process. The UK Act provides that feature in that it uses straightforward and logical language to explain arbitration principles and presents them in a chronological format. A cross referencing system is used within the Act to assist both lawyers and lay persons to find other sections of the Act relevant to the matter in dispute.⁵⁵

The UK Act also has many unique and distinctive features not present in any other arbitration statute. These include section 42 which deals with the enforcement of a peremptory order of the arbitral tribunal, section 44 which deals with the enforcement of interim awards, section 35(1) which deal with multi-party arbitrations and section 68(2) which defines serious irregularities. Importantly section 33(1)(b) enables the arbitrator to adopt procedures suitable to the circumstances of the particular case. This gives the arbitral tribunal wide discretion and the ability to avoid unnecessary delay and expense.

The UK Act does not address the important issue of confidentiality. The position is similar in Australia where, an expressed agreement of confidentiality is required to ensure that the proceedings remain confidential. The High Court of Australia has

⁵⁴ D. Mark Cato, Arbitrate don't litigate- *The Arbitration and Dispute Resolution Law Journal* [1997] ADRLJ 158

⁵⁵ Lord Mustill and Stewart Boyd, ' *Commercial Arbitration*'

ruled that arbitration is private, in that others cannot attend, but is not confidential and the documents produced in the course of the arbitration could be made public.⁵⁶

The New Zealand Arbitration Act 1996 is unique in that section 14 states:

‘ Disclosure of information relating to arbitral proceedings and awards prohibited- (1) Subject to subsection (2), an arbitration agreement, that unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to the arbitral proceedings under the agreement or to an award made in the proceedings.’

Arbitration proceedings in New Zealand are therefore confidential.

The case law in England has developed in such a way for one to conclude that there is in fact an implied duty of confidentiality.⁵⁷ It is however recommended that the new arbitration statute in Jamaica adopt the position taken by the New Zealand legislature. Such a clear statement would no doubt encourage users of commercial arbitration, in particular the private sector which places great importance on privacy and confidentiality.

A modern arbitration statute would complement the efforts of the Jamaican Government in modernising and improving the Jamaican justice system. As part of that effort, in September 2002, the Civil Procedure Rules 2002 (CPR 2002) were introduced. CPR 2002 has brought about a revolution in the conduct of civil litigation in the courts.⁵⁸ It has had and continues to have an educative effect. It introduced case management techniques and greater procedural flexibility. It places emphasis on the idea that the legal costs and effort expended on a case should be proportionate to its

⁵⁶ *Eso Australia Resources Ltd v Plowman* (1995) 183 CLR 10

⁵⁷ *Hassneh Insurance Co. of Israel v Stuart J Mew* [1993] 2 Lloyd’s Rep. 243, *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All E.R. 136, Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co. [2004] 4All E.R. 746 and Redfern and Hunter, ‘ Law and Practice of International Commercial Arbitration’, Fourth Edition p.29

⁵⁸ Andrew Bartlett, *Client- Friendly Arbitration*, *The Journal of the Chartered Institute of Arbitrators*, Volume 66, Number 1, February 2000

importance and the amount in dispute.⁵⁹ The underlying spirit of the CPR 2002 is very much in accord with the UK Act.

Benefits from a modern arbitration statute

Modernising the arbitration statute would answer some of the criticisms levelled against the process in Jamaica. These criticisms were summed up by one of Jamaica's most brilliant and able counsel Gordon Robinson who has stated repeatedly that he prefers a judge to an arbitrator because a judge comes free of cost. In elaborating Robinson says:

‘Arbitration very much resembles court proceedings in that there is a case management conference (preliminary meeting with the arbitrator) followed by an exchange of pleadings (briefs to the arbitrator) and a formal hearing with cross examination of the witnesses, submissions etc before the arbitrator hands down the award.’

Lawyers, he finds, have become a necessity at every arbitration and so the cost to the parties resembles the cost of a lawsuit except, in the courts, the judge works for free. In arbitration proceedings, not only must the lawyers be paid but also the arbitrator (who charges by the hour) and the verbatim note-taker. In addition, the premises in which the arbitration is held must be rented. Robinson continues:

‘Despite the usual ‘agreement’ in the reference that the arbitrator's decision will be final, 99% of losing lawyers find a reason to carry the arbitrator's decision into the Supreme Court to be quashed for some technical reason. So, the parties to an arbitration do not even have the consolation of avoiding the

⁵⁹Supreme Court of Jamaica civil Procedure Rules 2002- The Overriding Objective

costs, delays and inconveniences associated with litigation as litigation will follow arbitration as sure as night follows day.’

Modern legislation would introduce procedural flexibility and restrict the situations in which awards can be challenged. This would no doubt save time and expense.

In Jamaica at present, the major users of arbitration are the construction and the insurance industries. There is a tendency to use retired judges, distinguished lawyers and senior engineers as arbitrators. Another criticism levelled by Robinson is that ‘the upside of arbitration’ which ‘is supposed to be that the arbitrator will likely have special technical skills in the subject matter while a judge must be taught by way of expert evidence’ is not available in Jamaica. He says that because Jamaica is very small, most professionals will find themselves in a conflict of duty as they will be in one camp or the other due to the shortage of expertise and the consequential unavoidable involvement with one or the other of the parties.

A new modern arbitration statute would assist this situation as it will enable more persons to be trained as arbitrators thereby creating a much larger pool to choose from.

An allied benefit from modernisation is that practitioners would be able to go to one comprehensive piece of legislation instead of having to look at different instruments, for example, the Act, the UNCITRAL Arbitration Rules and the ICC Arbitration Rules in order to deal with a dispute. This should result, over time, in the greater utilisation of arbitration as a means of resolving commercial disputes. It is fair to say that domestically, ignorance of the benefits and profits is a major problem which has contributed to ambivalence towards arbitration.

Modern legislation would introduce a framework for international arbitration. This would be welcomed in Jamaica having regard to the initiatives being pursued by the

PSOJ and the JCC and the DRFJ. This would enhance Jamaica's chances of becoming the seat for arbitration, at the very least, in the Commonwealth Caribbean. Maurice J. Stoppi,⁶⁰ a well respected quantity surveyor and perhaps Jamaica's foremost arbitrator in the construction arena, thinks that the time is now right for Jamaica to develop an international/regional system of commercial and/or political dispute settlement system.

The experience of countries like Singapore and Hong Kong has shown that having a modern arbitration system adds to the attractiveness of countries to foreign investment.

Modernisation should also lead to the creation of new institutions offering arbitration services. This will increase the skills in this area and hopefully provide quality jobs for Jamaicans.

Arbitration is unquestionably an attractive alternative for the resolution of commercial disputes. Its increased use will reduce the burden on the court system. The expansion in the commercial sector has shown up inadequacies in our court system. The commercial sector is interested in the resolution of disputes in a timely and efficient manner. There have also been criticisms levelled at the judiciary whom it is felt have little or no knowledge of commercial matters. The appointment of a specialist commercial judge and a revenue judge has not solved these problems. Arbitration however would go a far way in assisting.

Commercial contracts usually include a clause making arbitration a prerequisite to any litigation. An ordinary arbitration clause is not a contract to oust the court's

⁶⁰ Author of the book , *Commercial Arbitration in the Caribbean, A Practical Guide*,2001

jurisdiction and, with one qualification, the parties to such clauses are not thereby prevented from prosecuting their claims in court rather than by arbitration.⁶¹

The combined effect of a modern arbitration statute and the CPR 2002 will help to create the framework for more timely resolution of commercial disputes.

The way forward

The proposed new arbitration statute must not only be modern but must suit the needs of Jamaica both domestically and internationally. A delicate balance must therefore be achieved. This will only be possible if a Committee similar to the DAC is established by the Government of Jamaica to conduct a comprehensive study of the arbitration needs and to recommend the necessary changes to the law. A similar strategy was employed in Australia. Following the reform of the English law in 1979 a number of State Reform Commissions were set up to examine arbitration law in Australia and to recommend the revision of state legislation. The recommendations of the Commissions led to the passing of similar but not identical Commercial Arbitration Acts during the period 1984 – 1986.⁶²

The study must include the Arbitration (Recognition and Enforcement of Foreign Awards) Act and any treaty obligations which the country may have. Of particular importance is the Caribbean Community (CARICOM) connection. CARICOM has commenced the establishment of a single market and economy called the CARICOM Single Market and Economy (CSME).

A programme to sensitise the public would contribute to more widespread use of arbitration and possibly erase or at least ease the well entrenched mindset by Jamaicans that only a court can bring about finality to legal proceedings. The tradition

⁶¹ Lew, Mistelis and Kroll, *Comparative International Commercial Arbitration*, March 2003

⁶² Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, Second Edition, 2002

of resolving disputes by way of litigation in the courts of law rather than by arbitration is very deeply rooted in the legal culture of Caribbean countries.⁶³ Even if it is not possible to completely change this mindset and tradition, the availability of a modern arbitration process would provide a very useful option to Jamaicans.

In tandem with the modernisation of the legislation, there is an urgent need to train arbitrators. A cadre of highly qualified and experienced arbitrators must be available if Jamaica is serious about becoming the seat of arbitration in the Caribbean.

The teaching of arbitration as a core subject in our Universities must be seen as a matter of urgency.

Lawyers should be encouraged to develop specialist arbitration practices in order to increase the pool of arbitrators in the short term.

A strong judicial policy favouring arbitration as in the UK⁶⁴ is critical. This ought not to be difficult as the courts already seem to be favourably disposed to arbitration. The establishment of a specialist court would also support the process.

On an international level, there must be a commitment to membership to other international arbitral tribunals and institutions.

Conclusion

Jamaica needs a comprehensive, modern, innovative, user-friendly arbitration statute. The UK Act has all those features and therefore presents the best model. Adjustments would have to be made to take into account Jamaica's specific needs and circumstances. In addition, to ensure a successful implementation of the process, supporting activities including widespread consultation, public education and training

⁶³ Hugh A. Rawlins, 'Aspects of the UNCITRAL Regimes for Procurement and for International Commercial Arbitration and Government International Commercial Contracts in the Commonwealth Caribbean,' *Caribbean Law Review*, June 1997 p. 214.

⁶⁴ *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA 20; [2007] UKHL 40

would be necessary. If these are achieved, I anticipate an exciting future for arbitration in Jamaica.

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