Modernising the Framework for Arbitration in Jamaica – some Salient Points

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Introduction

This is a text of the contributions I made on the proposal or Working Draft Law (WDL) distributed to participants at the workshop on Modernising the Framework for Arbitration in Jamaica: identifying the Imperatives and Crafting an Implementable Plan of Action, which held at Mona Visitors Lodge, University of the West Indies, Mona Campus, Kingston Jamaica on Thursday 18 February 2010.

The current law on arbitration in Jamaica is the 1900 Arbitration Act which is based on the 1889 English Arbitration Act. The organisers of this workshop are of the opinion that this law is effectively no longer fit for purpose. The organisers of the workshop hope that, 'when implemented, this new law will enable Jamaica to market itself as a *progressive* jurisdiction for arbitration' (emphasis added).

General observations

The new law on arbitration in Jamaica to achieve the status of a progressive jurisdiction in arbitration must be radically different from the 1900 Act currently applicable in Jamaica. This new law must take account of all the developments in arbitration since 1900 and fashion out a regime that is not only acceptable to the international arbitration community but one that will also serve the needs of domestic arbitration in Jamaica. With these goals in mind, my view will be to start crafting this new law from the text of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments in 2006.

The Model law was drafted by UNCITRAL as a tool to assist jurisdictions wishing to make laws on international commercial arbitration. States can adopt or adapt the Model Law as they see fit. The arbitration laws of about 68 jurisdictions are based on the Model Law from those of developed economies like Germany to the developing economies like Kenya (see UNCITRAL website). It has influenced more modern laws such as the English Arbitration Act 1996 (EAA). It is said to represent the benchmark on the law and practice of international commercial arbitration.

The adoption of the Model Law in these various jurisdictions with different legal traditions assists with the harmonisation of the law in this area. It must be noted that there are differences in the texts of these laws since being a model law, states adopting the Model Law can depart from it. In addition to this, it is one thing to harmonise laws and rules and yet a whole different thing to aspire unto uniform interpretation. This question of interpretation is greatly simplified in Model Law jurisdictions which have access to the interpretation of its articles in the courts of different jurisdictions. These are available on the UNCITRAL as well as other websites. This will prove an invaluable tool to the courts in Jamaica when they are faced with matters calling for the interpretation of the provisions of their new law based on the articles of the Model Law.

I will therefore recommend that just like the new Scottish law on arbitration 2010 and the new arbitration law of Ireland (both common law jurisdictions like Jamaica), the new framework

should proceed on the basis of the Model Law.

The modern trend and regime in both domestic and international arbitration is to limit the involvement of courts (and so the State) in the arbitral process. This is achieved by clearly identifying in the law where and in what areas national courts may be invoked (so an express limitation on the jurisdiction of the courts) in the arbitral reference. In addition, courts are clearly limited to giving assistance to the arbitration process and not to interfere with it. Thus, courts will not act *suo moto* but upon the invocation of either the parties, one party or the arbitral tribunal, to support the process in those clearly identified limited circumstances. It may appear that national courts in such jurisdictions are reduced to playing second fiddle to the parties and arbitrators, but this is not the case at all. National courts remain in the background and available to the parties to ensure that certain minimum standards of due process are maintained and respected by both the parties and arbitrators. In this regard, it may be useful to adopt the model of the English Arbitration Act 1996 (EAA) and attach a schedule to the new law listing its mandatory provisions.

This modern trend therefore raises the status of the principle of party autonomy. The parties are deemed masters of their dispute and are entrusted with the power to determine who best and how best to resolve their dispute. To achieve this feat, most national laws on arbitration grant the parties the powers to make provisions for the conduct of their arbitration reference with very minimum prescriptions, which are directed to safeguarding due process and fair hearing on the grounds of public policy. Thus for example, every party should have a right to be heard and given the opportunity to respond to the case raised against him. However this does not entitle a party to waste time and resources of the other party and arbitrators. Thus the new law must have built into it such safeguards as to protect these basic norms of justice.

The importance given to party autonomy demands that, the law is written in simple and accessible language. It is important to bear in mind that the primary users of arbitration as a process are not lawyers (and ideally should not be). These are mainly commercial people who should not be required to pay a legally trained person to understand the provisions of the law. It is also important to remember that not all arbitrators are legally trained, and these arbitrators need to understand the provisions of the new law which they will need to apply and work with. It goes without saying that the new law should be internally consistent.

It is important to clarify whether the new law will apply to both international and domestic arbitration references. Some laws make provisions for both regimes in different parts of the same law (examples are India and Nigeria). Others on the other hand have one comprehensive law with specific provisions applying to either regime or for parties to opt in or out of (example are Germany, England and France).

It is difficult to justify the drafting of one law for all manners of dispute resolution mechanisms that are alternatives to litigation as provided under section 1(5) of the WDL. The goal which appears to be to circumvent the difficulties with the creation or amendment of laws in Jamaica does not justify this style. The identifiable trend in national laws is to provide for arbitration and conciliation in separate parts of one comprehensive law. There is no law on arbitration known to me which contains provisions that equally apply to mediation, adjudication, etc as proposed under

the WDL. It is important for the Working Group (WG) to carefully examine this option and clearly delimit and provide for the various regimes. My view is to draft a law in arbitration as a stand alone law. In the alternative, and if this must be provided for, then another part on conciliation using the UNCITRAL Model Law on Commercial Conciliation 2002 (text on UNCITRAL website) as a working guide. This is the method adopted under the arbitration and conciliation laws of India and Nigeria for example.

Observations on Sections of the Working Draft Law

1. Scope of application

There is need to clearly and expressly clarify the scope of the new law and when it applies. The following questions need to be answered:

- Does it apply to both domestic and international arbitrations?
- Does it apply to any arbitrations with seat in Jamaica only?
- Does it apply only where the parties state that it applies?
- Does it apply in default of any choice to the contrary?

2. It is important to include a definitions section which will clarify and simplify the meaning of certain words and phrases used in the law. In addition there is need to clarify the meaning of months and days as used in the law.

3. On receipt of written communications, it is important to include electronic communications and give the parties the power to agree these in their arbitration agreement. The current format in the WDL should include guidance even where the whereabouts of the party is known.

4. Section 5 defines arbitration agreement without a writing requirement. It is necessary to indicate how this agreement will be proved so possible guidance from section 5 EAA may be useful.

5. On arbitrability in section 6, the sentence is a bit confusing and so needs clarification. For example under what law will this be determined? Should the subject matter be arbitrable under the law of Jamaica even where for example in an international context the only connection the dispute has with Jamaica is that the seat of the arbitration is in Jamaica. The current section 6(3) of the WDL also requires clarification as to whether it applies to domestic arbitration only. As it stands, it is conceivable that the law requires purely international references without any connection (except as to seat) to Jamaica to be subjected to arbitrability requirements of all laws in Jamaica. This will not make Jamaica an attractive venue for international arbitration. Some examples of some provisions relevant to arbitrability for guidance are article 177 Swiss PIL Federal Statute on Arbitration and section 1030 German Arbitration Law.

6. On the form of arbitration agreement under section 7 of the WDL, there is no requirement for the agreement to be in writing. A very good modern example is article 7 option II of the 2006 amended version of the Model Law and I would highly recommend this article.

7. The reference to the Evidence Act of Jamaica in section 7(5) is unsatisfactory. It is useful to have the arbitration law as a comprehensive ‘one-stop shop’ especially for international arbitration references. The last thing Jamaica needs is a law that keeps referring its users to other local laws.

Moreover, gathering of evidence in arbitration should be flexible. A good example for consultation is the IBA rules of taking evidence in international arbitration which is currently under review (text is available on the IBA website).

8. On claims before national courts, article 8 of the 2006 version of the Model Law is very instructive. The same applies to article 9 on national courts and interim measures.

9. I would suggest that provisions on multiparty arbitrations should fit in with the sections on composition of the arbitral tribunal as is the case under section 16(7) which refers to section 18 EAA, section 13 DIS Rules, article 10 ICC Rules, section 8 SIAC Rules (in all the Rules, an appointing authority can act in place of the institution).

10. Appointment of arbitrators should start with the appointment of a sole arbitrator and then a tripartite arbitrator. It is important to make provision for the position where an umpire is provided for as in sections 15(2) and 16(6) of the EAA.

11. To avoid early recourse to national courts, it is useful to provide for an appointing authority to assist the parties with appointment of the arbitrator as required under article 11(3) Model Law.

12. On consolidation of proceedings and concurrent hearing, section 35 of EAA provides that arbitrators have this power if the parties agree otherwise they do not, so effectively parties will request this from the court under section 44(5) EAA. There are fundamental questions that will need to be addressed here: Arbitration is founded on the consent of parties and so that all the parties in all the arbitration references to be consolidated will have to agree. Again depending on the stage of the consolidation, the arbitrator should have the right to resign (without incurring any liability) if he or she does not wish to arbitrate the enlarged or consolidated dispute.

13. The provisions of third parties under section 12 of WDL raises the same fundamental questions addressed in (12) above. Third parties are strangers to the arbitration agreement and lack privity as a question of contract. It is therefore important to clarify how this will work in practice, especially without the consent of the parties to the arbitration agreement. It must be remembered that the arbitrator's power emanates from the arbitration agreement based on the consent of the parties. It is difficult to see how the arbitrator can, on his own impose a third party on the parties to the arbitration agreement. It is even more difficult to see under what powers or jurisdiction he will purport to act. An example of a law that makes a not too dissimilar provision is article 25 paragraph 4 of the OHADA Uniform Act on Arbitration, which basically gives a third party whose rights are adversely affected by an arbitral award, the right to challenge the award before the arbitral tribunal. This provision raises various difficult questions such as the locus of the third party to make this application and whether the arbitral tribunal would still have jurisdiction to entertain the application after rendering their award.

14. The most difficult part of the WDL for me is contained in sections 13-17 which make provision for a certifying authority to licence and regulate arbitrators in Jamaica. It is very difficult for me to see how such a requirement translates into making Jamaica a modern and attractive venue to hold arbitration references. From the exchanges at the Workshop, the sentiments expressed for quality assurance for arbitration practitioners are understandable

however there may be better ways of achieving this assurance without putting such a requirement in an arbitration act. My argument is that if the users of arbitration and arbitration practitioners in Jamaica want such a certifying body/agency for domestic arbitrations in Jamaica, that they can achieve by creating a statutory body for this in a separate legislation but not in a statute for arbitration. This observation is on the assurances given by the organisers of the Workshop that such a requirement will not apply to international arbitrations with seat in Jamaica. Drawing from the experiences of Malaysia and Singapore in this regard, it is important that Jamaica asks herself what the benefit of placing such a hurdle is to the development of local expertise in arbitration and whether the need to protect users from appointing less than competent persons as arbitrators outweighs the need to give and ensure open access to as many as wish to practice as arbitrators in Jamaica.

15. On challenge procedure, it is important to provide number of days when various actions should be taken. See the example under article 13 of the Model Law for guidance.

16. On the appointment of a replacement arbitrator under section 24 of the WDL, consideration may be given to the requirement and practice of appointing an alternate arbitrator as referred to under article 16 of the Arbitration Law of Brazil.

17. On the jurisdiction or competence of the arbitrator under section 25 of the WDL, it may be useful to add a clause to the effect that there arbitrator will determine his jurisdiction in the first instance before the parties approach the court to rule on this question. This clarifies that the court will determine the question as a matter of appeal and not in the first instance except the question arises before the composition of the arbitral tribunal in connection with the validity of the arbitration agreement. It also supports the provision on the arbitration agreement under section 8(1) of the WDL. The decision on jurisdiction should be made in an award to avoid any confusion as to whether it can be challenged before the courts or not. So it will be useful to delete the reference to ‘preliminary ruling’ in section 25(3) of the WDL.

18. On interim measures under section 26 of the WDL, it will be useful to be guided by article 17 and 17A of the 2006 amended version of the Model Law.

19. On conduct of the arbitral proceedings, it is useful to include a clause on the bare minimum requirement of due process or fair hearing as for example article 18 of the Model Law. It is preferable to consider the whole of Chapter V of the Model Law on the conduct of arbitral proceedings.

20 On rules applicable to substantive hearing under section 36 of the WDL, another formulation to consider is article 17 ICC Arbitration Rules which is a more robust provision.

21. It may also be useful to add a list of remedies the arbitrator can grant as for example under section 48 EAA and make an express provision on the grant of interest again for example under section 49 EAA.

22. It is important to expressly provide that the final arbitral award has *res judicata* effect. This is especially important since your 1900 Act provides otherwise.

23. On costs, it is important to list what this includes. See for example the formulation under section 59 EAA for guidance.

24. On application to set aside awards under section 44 of the WDL, there is no reference to a court before whom presumably the application to set aside will be made. It is equally important to expressly identify which court or class of courts in Jamaica have competence to deal with international arbitration related matters and this can be included in the definitions section. On the grounds and their formulation, guidance may be sought from article 34 of the Model Law.

25. Section 45 of the WDL is titled recognition and enforcement of domestic awards but the clause does not contain anything on enforcement which is instead found in section 49 of the WDL. Guidance can also be sought from article 35 of the Model Law.

26. The justification for including sections 47-50 is not quite clear.

27. It may be useful to make expressly provisions on the immunity of arbitrators and arbitration institutions. See section 29 EAA for guidance on this.

28. It may also be useful to make express provisions on the confidentiality of the arbitral reference and what this covers. A good guide is article 34 of SIAC Rules.

Summary

The desire to have a modern and arbitration friendly law in Jamaica is laudable and will invariably contain some novel provisions. However, it may be prudent to also err on the side of caution and retain provisions that have been tested and shown to work. This is especially important in achieving the goal of minimal court interference and prescription in the Act. The new law should act as a gap filler and evidently honour party autonomy while at the same time ensuring that matters of fundamental importance to Jamaica as a nation and her economic growth remain protected within the new law. In drafting this new law, the goals and needs of CARICOM must be borne in mind.

Legend: ICC (International Chamber of Commerce); OHADA (Organisation for the Harmonisation of Business Law in Africa); SIAC (Singapore International Arbitration centre); UNCITRAL (United Nations Commission on International Trade Law).