Presented at the Jamaican Bar Association/General Legal Council
Continuing Legal Education Seminar, November 19 – 20, 2011

Arbitration as an Alternative to Litigation

AN ANALYSIS OF THE DRAFT ARBITRATION ACT 2011

Ronald Hugh Small Q. C.

October 25, 2011

The primary reason why Jamaica needs a new Arbitration Act is that the existing one was enacted in 1900 and is not satisfying the needs of the Jamaican economy in 2011. In the overview of the problems of the system the Jamaican Justice System Report identified the delays in disposition of civil cases as unreasonable. Modern Arbitration legislation must therefore be structured in a way that assists in reducing these delays.

The Model Law on Arbitration

The Model Law on Arbitration is one of 8 Model Laws adapted by UNCITRAL. Others cover such areas as Electronic Commerce, Credit Transfers and Procurement of Goods, Construction and Services, areas in which Jamaica has laws and regulations, but in which it has not copied the texts into its domestic legislation. Model Laws are drafted to cover myriad systems of law such as the Common Law, Scandinavian Civil Law System, Napoleonic Code, Soviet Civil Law, Islamic Sharia Law and Chinese Law.

The main purpose of Model Laws is to promote ways and means of ensuring uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade.

The Common Law is the system which is the system practiced in Jamaica's Constitutional Democracy. It depends significantly on the system of judicial precedents. It is therefore within the traditions of our system to enact laws that are consistent with these principles and which can benefit from the Common Law body of jurisprudence.

<u>Shortcomings of the draft as it relates to the domestic economy</u>

- The title of the Act is **Arbitration (Commercial Act) 2011.**
- The draft Act copies the definition of "Commercial" from Article 1 of the Model Law and does not include disputes outside that definition. It leaves no forum for the arbitration of disputes that may have

widespread social and community impact, such as disputes between and within sporting bodies.

- Although Section 3 of the draft states that the Act applies to domestic and international commercial arbitration, the Act is geared only towards international arbitration and adopts the language of the Model Law in a slavish and uncritical fashion. There are no concessions in it to the needs of the domestic market.
- Nowhere in the draft is Act there a provision for confidentiality of arbitration proceedings. One of the reasons for choosing arbitration is that it is thought to keep disputes confidential. The Act ought to expressly adumbrate that there is a duty to respect confidentiality
- Section 6 of the draft is a rehash of Article 5 of the Model Law. Article 5 provides "In matters governed by this Law, no court shall intervene except where so provided by this Law." Section 6 provides "In matters governed by this Act, no court shall intervene except where so provided by this Act."
- Section 7 restates the exact same circumstances for court intervention as is provided in Article 6 of the Model Law.
- Without getting into a technical enumeration of the circumstances in which the Model Law sanctions court intervention, the draft Act limits the intervention in respect of the right of the court to the following circumstances: (a) to make an appointment of an arbitrator if the parties cannot agree; (b) to review a challenging an arbitrator; (c) to terminate the appointment of an arbitrator who is unable to perform his function or for other reason fails to act without undue delay; (d) to rule on a challenge to the competence of an arbitral tribunal on a finding of the arbitral tribunal on a preliminary question.
- The most comprehensive jurisdiction given to a court is that of setting aside an arbitral award in the following circumstances (e) a party to the arbitration was under incapacity or there was some other invalidity under law; (f) there was improper notice of the proceedings; (g) the award deals with a dispute not contemplated by the terms of the

submission; (h) the composition of the tribunal was not in accordance with the agreement of the parties.

The draft Act does not contain the following powers that are essential for the smooth functioning of arbitral proceedings

- The enforcement of the peremptory orders of an arbitral tribunal. It is essential that arbitral tribunals have swift access to the coercive nature of court orders
- Securing the attendance of witnesses
- To support the arbitral proceedings such as the taking and preservation of evidence, orders relating to property that is the subject of proceedings, the sale of goods the subject of proceedings and the granting of interim orders
- The determination of preliminary points of law.
- The issue of interim injunctions and the appointment of receivers
- The removal or revocation of the appointment of an arbitrator
- Enforcement of an award made by an arbitral tribunal
- Challenging an award for serious irregularity
- Appeals on questions of law

Recommendations

1. That the Government reconsider the policy decision to adopt the identical language in the draft Act as that contained in the Model Law.
2. That the Government give consideration to enacting an Arbitration Act along the lines of the Arbitration Acts of Common Law countries like the United Kingdom, Canadian provinces, Australia, The Bahamas, Singapore etc. Attention is directed to Appendix 4 of the leading work on Arbitration **Russell on Arbitration** (23rd edition 2007). It sets out a comparison between the Arbitration Act of 1996 and the Model law.
3. That the Government consider the option of having separate legislation to cover international Arbitration and that it carefully examines the model of the International Arbitration Act 2008 of Mauritius.

4. That the Government consider the enactment of a separate Act to deal with the enforcement of international arbitration awards along the lines of the Arbitration (Foreign Arbitral Awards) Act 2009 of the Bahamas.

Ronald Hugh Small Q. C.