The Law Reform Commission

REVIEW OF THE ARBITRATION LAWS OF THE CAYMAN ISLANDS

DISCUSSION PAPER

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TABLE OF CONTENTS

A. OBJECTIVES OF THE REVIEW

1. The Attorney-General in 2006 referred for the review of the Law Reform Commission the Foreign Arbitral Enforcement Law (1997 Revision) and the Arbitration Law (2001 Revision).

2. The objectives of the review are threefold:

(i) to determine whether a single regime of arbitration should be formulated on the basis of the UNCITRAL Model Law on International Commercial Arbitration[1] ("Model Law") for all types of arbitration;

(ii) to ensure that the law on arbitration is responsive to the issues surrounding the resolution of domestic and transnational commercial disputes by enabling the business community and arbitration practitioners to operate in a regime which is consistent with acceptable international arbitration practices and developments; and

(iii) to consider whether any steps can be taken to promote the Cayman Islands as a jurisdiction of choice for international arbitration.

3. This review is prompted by the fact that the financial services industry does not generate any international arbitration business which is actually conducted in the Cayman Islands. Rather, the majority of the civil work concerning the financial services industry is dealt with satisfactorily in the Grand Court. While this state of affairs is considered complimentary of the judiciary, it is widely believed that the outmoded Arbitration Law of the Cayman Islands is a deterrent to arbitration business. The goal, therefore, is to introduce proposals for the reform of a legislative regime which, having regard to the interconnected global village in which we function, should out of necessity assume an international context.

B. THE ARBITRATION CONCEPT

4. Arbitration is a mechanism of binding dispute resolution which is the equivalent of litigation in the courts. At the same time however, it is distinct from the various forms of non-binding dispute resolution techniques, such as negotiation or mediation.[2] It entails resolving disputes outside the courts in accordance with procedures, structures and substantive legal or non-legal standards chosen by the parties.[3]

5. An arbitration may be classed as international if the parties to the arbitration are domiciled in different countries and the dispute originated in a foreign state or the subject matter of the dispute involves a state other than the state in which the parties are nationals. On the other hand, a domestic classification of an arbitration may arise where the claims by individuals are made locally in the state in which the action originated. Further, it is not unusual for arbitrations

[1] UNCITRAL Model Law on International Commercial Arbitration (United Nations documents A/40/17, annex I and A/61/17, annex I) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).
[2] Arbitration - Law.com Dictionary.
[3] Julian D.M. Lew, *et al*, Comparative International Commercial Arbitration 1 (Kluwer Law International, 2003).

to also be classified as ad hoc in circumstances where the parties, when agreeing to submit their dispute for arbitration, do not stipulate procedural rules of any particular arbitration body to govern the conduct of their arbitration.[4]

6. The arbitration mechanism commences with the referral by the parties of a dispute to one or more persons sitting on an arbitral panel (the "arbitrators" or "arbiters"), by whose decision (the "award") they agree to be bound. Arbitrators do not have adjudicatory power over individuals or institutions if the individuals or institutions do not submit themselves to the jurisdiction of the tribunal.[5]

7. The critical aspect of arbitration is that it is based on an agreement between parties to conduct proceedings outside of the publicity and formality of the courts of law[6] and such agreement cannot come into existence unless the parties contractually undertake to pursue its creation. The result is that an emerging arbitration agreement becomes the primary source of the rights, powers and duties of the arbitral tribunal.[7]

8. Among the potential advantages[8] that may emerge from engaging in arbitration proceedings are the flexibility of the arbitration procedure, privacy of arbitration proceedings, opportunity to determine choice of arbitrator, finality of arbitration proceedings, opportunity to identify a neutral forum to conduct the proceedings, efficiency in the conduct of the proceedings and cost effectiveness.

9. Over time arbitration practices have evolved to enhance its conduct by removing procedural barriers in the way of parties proceeding to arbitration or to prevent excessive intrusion by national laws and courts. In the process, the principle of party autonomy has been firmly entrenched in arbitration proceedings and is described as the benchmark for international arbitration law worldwide.[9] This principle has facilitated the increased prominence of arbitration practices, particularly in the context of disputes involving international commercial transactions.[10]

C. CAYMAN ISLANDS ARBITRATION LAW

10. Arbitration matters are dealt with in the Cayman Islands under the Foreign Arbitral Enforcement Law (1997 Revision), the Arbitration Law (2001 Revision) and the Grand Court Rules 1995 (Revised Edition) Orders 56 and 73.

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[4] Rajah & Tann, Arbitration as a Method of Dispute Resolution, November 2004 p.1.
[5] National Law, Rules & Procedure: The Assistance of the National Courts in International Commercial Arbitration – The Singapore Experience, 13th February, 2004 By: Mr. Leslie Chew SC M/s Khattar Wong & Partners Singapore p. 3.
[6] *Ibid.*
[7] Michael Mustill, 'The New Lex Mercatoria: The First Twenty-Five Years' (1988) 4 *Arbitration International* 86.
[8] Rajah & Tann, Arbitration as a Method of Dispute Resolution, supra at p.1.
[9] *Ibid.*
[10] *Source: Wikipedia.*

The Foreign Arbitral Awards Enforcement Law (1997 Revision):

11. The Foreign Arbitral Awards Enforcement Law (1997 Revision) gives effect to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958[11] (the New York Convention) and governs the recognition of foreign arbitral proceedings and the enforcement of foreign arbitral awards.[12]

12. The New York Convention imposes two obligations upon signatories.[13] The first is that contracting states[14] are required to recognise that an award is binding and to enforce that award in accordance with prescribed rules of procedure laid down in the Convention.[15]

13. In this regard, a party seeking enforcement of a foreign award needs to supply the court with the arbitral award and accompanying arbitration agreement.[16] The party against whom enforcement is sought may object to the enforcement by submitting proof of one of the grounds for refusal of enforcement.[17] If the award is subject to an action for setting aside in the country in which, or under the law of which it is made, the foreign court before which enforcement of the award is sought may adjourn its decision on enforcement.[18]

14. The second obligation contemplated by the New York Convention is the referral by a court to arbitration. In circumstances where the court of a contracting state receives the appropriate documentation pointing to the formation of an arbitration agreement, that state is obligated at the request of one of the parties to refer the matter to arbitration.[19]

15. Accordingly, a party seeking to enforce a New York Convention award in the Cayman Islands is required to swear an affidavit to which are exhibited (i) the authenticated original or certified copy of the award; (ii) the original or certified copy of the arbitration agreement and (iii) where the award or agreement is in a foreign language, a certified translation. In circumstances where a matter cannot be resolved or is contrary to public policy a court may refuse to enforce an award.[20]

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[11] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on the 10th June, 1958. http://www.uncitral.org/uncitral/en/uncitral texts/arbitration/NYConvention.html.

[12] Cayman Islands: Recent Developments in Arbitration Law Jeremy Walton and Chris Easdon Appleby– The Arbitration Review of the Americas 2009 at p. 39. Note although the Cayman Islands enacted legislation derived from the New York Convention in 1975 it was not until 26th November 1980 that notification was made by the UK that the New York Convention would apply to the Cayman Islands.

[13] The New York Convention of 1958: An Overview- Albert Jan van den Berg- Hanotiau & van den Berg, Brussels, Belgium.

[14] Article I.

[15] Article III.

[16] Article IV. This application is made by *ex parte* original summons under GCR O. 73, r.4.

[17] Article V(I)– By GCR O. 73, r 4(4) the debtor may apply to set aside the order within 14 days of service. The court may also on its own motion refuse enforcement for reasons of public policy.

[18] Article VI.

[19] Article II(3).

[20] Alternative Dispute Resolution ("ADR") in the Cayman Islands, Anna Peccarino, Attorney, Maples and Calder, July 2002, see http://www.adrlawinfo.com/cayman.html.

The Arbitration Law (2001 Revision):

16. The Arbitration Law (2001 Revision) (the Law) deals with judicial supervision of domestic arbitration proceedings and the enforcement of domestic arbitration awards. This Law is based on the United Kingdom Arbitration Act, 1950[21] which conferred upon the courts extensive powers to intervene in the conduct of arbitrations, thus providing the losing parties with an opportunity to delay the resolution of disputes. In this regard, the UK law was thought to be inconsistent with that of other jurisdictions with the result that the City of London was not viewed as being an attractive venue to conduct arbitration business.

17. This situation was corrected in the UK Arbitration Act 1979 by the introduction of fundamental and far-reaching changes in the power of the courts to intervene in and control arbitral awards. Later, the UK Arbitration Act 1996[22] repealed all statutes governing the law of arbitration, consolidated earlier enactments, codified the principles established by English case law and incorporated the provisions of the UNCITRAL Model Law.[23]

18. However, it should be noted that the Cayman Islands Arbitration Law has not since been amended to reflect the changes adopted by the UK Arbitration Act, 1996. The Law continues to reflect the pre-1979 UK provisions with the result that the Grand Court still has extensive powers to intervene in the arbitration process in a way which was thought to be counter-productive in the UK. Further, the Law facilitates the court's maintenance of a supervisory jurisdiction over arbitration matters that originate domestically and where the circumstances require, it provides interim relief in support of the arbitral process.

19. An arbitrator can be required to "state a case" for the decision of the Grand Court in respect of any question of law arising in the course of an arbitration or in respect of any award.[24] The Grand Court has power to order that any matter referred to arbitration be "remitted" back to the arbitrator for further consideration by him on the grounds that there is some error on the face of the award or the arbitrator has made a mistake or new evidence has become available or that the arbitrator has improperly conducted the reference to arbitration in some way.[25] The Grand Court also has power to set aside an award on these grounds.[26]

20. The Grand Court's supervisory jurisdiction however appears never to have been invoked.[27] There is certainly no reported case in which the Grand Court has required an arbitrator to "state a case" or ordered a reference to be "remitted" or set aside an award.[28] The absence of any such litigation is no doubt a reflection of the fact that only a small handful of

[21] As amended and supplemented by the English Arbitration Acts of 1975 and 1979.
[22] The 1996 Act applies to England, Wales and Northern Ireland.
[23] See later discussion on the UNCITRAL Model Law.
[24] Arbitration Law, s.17.
[25] Arbitration Law, s.18.
[26] Arbitration Law, s.19.
[27] Law Reform Commissioner, Mr. Andrew Jones, QC arbitrated insurance claims arising out of both Hurricane Lilley and Hurricane Ivan. He is not aware of the Grand Court ever having adjudicated upon a "case stated" or ordered that a reference be remitted or an award to be set aside.
[28] There is a reported case in 1988 in which an application to set aside or remit an arbitral award was struck out on the ground that it disclosed no reasonable cause of action. See *CH Limited –v- F* [1988-89] CILR 516.

arbitrations have been conducted in the Cayman Islands over the past thirty years. It is difficult to judge whether the mere existence of an outdated law has deterred international arbitration business which might otherwise have been conducted in the Cayman Islands.

21. From all indications the court seeks to exercise its jurisdiction in a manner which preserves the integrity and independence of the arbitration process.[29] This core objective is consistent with the principle of allowing the parties to an arbitration dispute to resolve that dispute in accordance with the established arbitration agreement. In fact in recent times, the court has decided several cases in support of the arbitration principle[30] and has maintained its consistency by respecting the autonomy of the parties in circumstances in which there was a valid agreement to refer a dispute to arbitration.[31]

D. SOURCES OF ARBITRATION BUSINESS

22. The arbitration mechanism can be used to resolve disputes in most areas of the law. In Australia for example, arbitration is relied upon to resolve disputes under the Family Law Act 1975 relating to property, spousal maintenance and other financial agreements. It is also an effective tool in collective and individual employment related disputes.[32]

23. The Sri Lanka Arbitration Center notes that areas where arbitration has proved especially effective include "building and civil engineering contracts; shipping; imports and exports and international trade; foreign investment agreements; commodities trading; partnership disputes; insurance contracts; intellectual property agreements; and rent review in commercial leases.". The Center emphasises that this list is not exhaustive for almost *any* commercial dispute which can be resolved by litigation in court, can be resolved by arbitration, and there is a widespread increase in the use of arbitration generally.[33]

24. In London there are numerous international arbitration proceedings involving the financial services industry. Historically, a high proportion of such arbitration has arisen out of the shipping and insurance industries. This work gravitates to London for obvious commercial reasons. London is home to the Baltic Exchange and a vast array of agents, brokers and ship owners carry on business in that location. It is also home to the Lloyds insurance market and a large number of insurance companies and brokers are involved in the international insurance and reinsurance business. The result is that London has immense human resources and infrastructure to support shipping and insurance arbitration.

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[29] Cayman Islands: Recent developments in Arbitration Law, Jeremy Walton and Chris Easdon Appleby– the Arbitration Review of the Americas 2009, *supra*.

[30] Cayman General Insurance Co. etc v. Divi Hotels and others (Grand Ct) 2003 CILR 363.

[31] Alternative Dispute Resolution ("ADR") in the Cayman Islands, Anna Peccarino, Attorney, Maples and Calder, July 2002, see http://www.adrlawinfo.com/cayman.html.

[32] Note recent Jamaican case of William "Bill" Clarke v Nova Scotia where plaintiff, the retired president and chief executive officer of the Bank of Nova Scotia (Jamaica),sought to have the impasse with the bank over his retirement package taken to arbitration- Civil Division, Supreme Court of Jamaica, 2009.

[33] Matters not suitable for arbitration include criminal matters and those requiring power of enforcement e.g. granting injunctions and the imposition of fines- East Asia Chartered Institute of Arbitrators

25. Over the past thirty years[34] there have been very few domestic or other arbitrations in the Cayman Islands. The Commission however believes that arbitration could be a useful tool in resolving disputes, not only in any of the areas mentioned above, but more particularly in the area of hedge funds. More than half of the world's offshore funds are domiciled in the Cayman Islands and there is a large pool of professionals engaged in the industry as administrators, lawyers, auditors, insolvency practitioners and independent directors.

26. The Commission is of the view that two of the principal reasons that have contributed to the lack of growth in the range of arbitrations dealt with in the Cayman Islands including those relating to the hedge fund industry are the fact that the Grand Court provides an effective service and secondly, the Arbitration Law is perceived to provide a discredited model which is likely to have been unacceptable to those foreign investors and investment managers who have contemplated the possibility of conducting arbitrating proceedings in the Cayman Islands. Local professionals have tended not to promote arbitration, no doubt partly because their clients are comfortable using the court system and partly because they are reluctant to promote an arbitration regime which is inconsistent with modern legislative trends.

27. Reform of the Arbitration Law (2001 Revision) is a necessary pre-condition to the growth of international arbitration business.[35] With the establishment of a legislative framework which minimises the scope for judicial intervention in the arbitral process, the jurisdiction is likely to attract arbitration work arising out of the hedge fund industry and that it might possibly attract some insurance arbitration, in addition to the purely domestic work that may arise should the Cayman Islands be affected by future hurricanes.[36]

[34] Law Reform Commissioner, Mr. Andrew Jones, QC has indicated that he has conducted international arbitrations under the American Arbitration Rules during the past 25 years but none of them have involved actual hearings in the Cayman Islands. During this time he has conducted international arbitrations in writing and conducted an arbitration with oral hearings outside the jurisdiction, but none of these cases have involved any local parties or law firm.

[35] Cayman Islands: Recent developments in Arbitration Law, Jeremy Walton and Chris Easdon Appleby – the Arbitration Review of the Americas 2009, *supra*- stakeholder practitioners seem to share the same thoughts as the Commission by underscoring the need to build upon the existing arbitration regime and in so doing putting in place a comprehensive and modern legislative framework to respond to issues arising from developments in arbitration proceedings. Practitioners have alluded to the fact that reforms are more pertinent against the background of the current global financial crisis. The circumstances indicate that investors and creditors are losing confidence in finance mangers and as a recovery mechanism; proceedings are likely to be initiated concerning Cayman domiciled funds.

[36] In our research we noted that Singapore has emerged as an arbitration authority by virtue the establishment of the Singapore International Arbitration Centre (SIAC) established in 1991 and the enactment of the International Arbitration Act, 1994 (IAR). This Act incorporates the UNCITRAL Model Law on Commercial Arbitration. In order to attract the conduct of arbitration proceedings in Singapore, the SIAC has ensured that the facilities it offers, and the fees it charges remain competitive in comparison with other major arbitration centres. It has also formulated a comprehensive set of rules governing international arbitrations, with the emphasis always on upholding party autonomy while preserving the integrity of the arbitral process by continually seeking to improve the transparency and efficiency.

E. THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION:

28. In modernising the arbitration legislative regime in the Cayman Islands we are proposing the formulation of legislative provisions which have as their foundation the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").

29. The Model Law was formulated in recognition of the value of arbitration as a method of settling disputes arising in the international commercial environment. It was adopted by the United Nations Commission on International Trade Law ("UNCITRAL") as a unified legal framework for the fair and efficient settlement of arbitral disputes.

30. Its aim is to promote the harmonisation and uniformity of national laws regarding international arbitration procedures, minimise judicial intervention and facilitate party autonomy.

31. Arguably, the Model Law meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different states and legal systems[37] by dealing with all stages of the arbitral process from formation of the arbitration agreement to the recognition and enforcement of the arbitral award.

32. The Model Law was approved with the recommendation that "all nations give consideration to the international commercial arbitration Model Law in view of the desire to standardize arbitration procedural laws and the specific needs of international commercial arbitration practice."[38]

33. It has however been noted that the Model Law can also serve as a model for legislation on domestic arbitration.[39] When reviewing those jurisdictions adopting the Model Law, several legislative techniques have been adopted. Some jurisdictions create two regimes of arbitration, that is, international and domestic, whilst some adopt the Model Law for domestic arbitrations.[40]

34. In the former category, separate laws are provided for each regime. In the latter, all provisions dealing with domestic and international arbitrations are comprised in a singular law and stipulate the provisions applicable to each regime.[41]

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[37] See UNCITRAL Model Law explanation.

[38] G. Biggs, "Arbitraje Comercial Internacional. Una Tarea Pendiente", Re— vista del Cole Gio tie Abc gados tie Chile 30(2004), 8 et seq.

[39] United Nations Document A/CN.9/264, Article 1, paragraph 22.

[40] See, for example, the Kenya Arbitration Act 1995 (No. 4 of 1995), the India Arbitration and Conciliation Ordinance (No. 8 of 1996), the New Zealand Arbitration Act 1996 and the Zimbabwe Arbitration Act 1996 (No. 6 of 1996); Scotland Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the Australia International Arbitration Amendment Act 1989, the Bermuda International Conciliation and Arbitration Act 1993 and the Singapore International Arbitration Act 1994 (Cap.143A), Guatemala International Arbitration Act 2006, Brazil– Law No 9.307 of 3 September 1996, Zimbabwe Arbitration Act, 1996 (No. 6 of 1996), New Zealand Arbitration Act 1996, Oman Law of Arbitration in Civil and Commercial Disputes 1997.

[41] In the Canadian Commercial Arbitration Act, the Model Law is modified, thereby applying it to both domestic and international arbitrations. In the Kenya Arbitration Act, it states that, except as otherwise prescribed in a particular case, the provisions of the Act shall apply to domestic arbitration and international arbitrations.

35. This method of combining the categories of arbitration into one regime accords with the recognised international trend which favours reducing the extent of judicial supervision and intervention in arbitral proceedings, whether domestic or international.[42]

The Provisions of the UNCITRAL Model Law:

36. Generally the UNCITRAL Model Law sets out the essential elements of an arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the manner in which arbitral proceedings should be conducted and the enforcement of the tribunal's award.

37. The provisions in the Model Law include the following:

(i) A commercial arbitration is defined[43] as one which covers matters arising from commercial relationships of any nature. In addition, it states that an arbitration is international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, had their places of business in different States."

(ii) Definitions concerning the scope and form that must be given to an arbitration agreement of an international nature and the limits to the exception of arbitration agreements.[44]

(iii) The composition of the arbitral tribunal[45] and provisions which permit the parties the freedom to stipulate the number of arbitrators, appointment and challenging procedures of arbitrators.

(iv) Issues related to the competence of the arbitral tribunal to determine its own jurisdiction thereby ensuring the autonomy of the arbitration agreement in relation to other contract provisions.[46]

(v) Ancillary regulations in the event that the parties to an arbitration agreement fail to reach an agreement.[47]

(vi) Rules concerning the nature of arbitral procedures and their preparation, arbitral awards and their contents, the grounds for setting aside an award and the requirements, formalities and periods of time for the submission, recognition and enforcement of the arbitral award.[48]

[42] See for example, Singapore Law Reform Committee Sub-committee on Review of Arbitration Laws (1993), paragraph 13, see also paragraph 47 of the UK Departmental Advisory Committee on Arbitration Law, 1997 and the supplementary Report on the Arbitration Act 1996 (1997) which favours the abolition of the distinction between domestic and international arbitration and the application of the international regime throughout.
[43] Chapter I.
[44] Chapter II.
[45] Chapter III.
[46] Chapter IV.
[47] Chapter V.
[48] Chapters VI, VII and VIII.

38. Accordingly, it is the proposal of the Commission to treat the Model Law as a template upon which the reform of our arbitration legislative framework will be based. Additionally, we intend to draw from the legislative models of other jurisdictions including the United Kingdom, Bermuda, Singapore and Hong Kong.

F. ARBITRATION LEGISLATIVE MODELS IN OTHER JURISDICTIONS

The United Kingdom Arbitration Act, 1996:

39. The UK Arbitration Act (the Act) appears to have adopted and refined many of the provisions of the UNCITRAL Model Law and is based on three principles. These are:

(i) obtaining the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(ii) facilitating free agreement between parties on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and

(iii) minimising court interventions in arbitrations.

40. The Act seeks to place more autonomy in the hands of arbitral parties, while at the same time imposing obligations designed to achieve the efficiencies and cost effectiveness contemplated by the arbitration process.

41. Indeed one of the themes which runs through the Act is that of party autonomy. It provides that notwithstanding the jurisdiction of the arbitral tribunal to decide evidential matters, the right of the parties to agree on any matter takes precedence. It is only where there is no such agreement that the tribunal will decide the procedure.

42. The Act applies to agreements in writing. The agreement does not however have to be signed by the parties if written and can be made by an exchange of oral communications.

43. Oral agreements remain outside the scope of the Act but may be enforceable under common law. Any variations of an arbitration agreement including an agreement to vary the non-mandatory provisions of the Act must be in writing. Parties are permitted to contract out of much of the Act given that the provisions serve as a means to facilitate the parties where there is a failure to reach agreement.

44. This option to contract out of the Act does not however extend to the mandatory provisions of the Act which comprise provisions considered to be contrary to public policy. These mandatory provisions include the power of the court to stay legal proceedings brought in breach of an arbitration agreement.

45. Further, the Act permits an arbitration agreement to be treated as separate from the substantive agreement of which it forms and can still be effective even if that substantive agreement is void.

46. If the parties to an arbitration agreement fail to designate the seat of arbitration, the court is permitted under the Act to decide the seat by reference to the terms of the agreement and all the circumstances of the case.

47. Unless otherwise agreed by the parties, arbitrators may rule on their own substantive jurisdictions which would include such questions as, whether there was a valid arbitration agreement. However, any decision by the arbitral tribunal may be subject to review by the court, although objection must be taken in the arbitration before a party takes a step to contest the merits of the case.

48. The Chairman of the tribunal is invested by the parties with powers defined by the parties. In the absence of an agreement on such powers, the Chairman may make an award arising from a majority decision. It is only where there is neither unanimity nor a majority that the Chairman will enter a decision. An umpire may be preferred when the other arbitrators fail to agree and in that case the umpire assumes a role making him the sole arbitrator.

49. The Act provides for the arbitral tribunal to act fairly and impartially between the parties by affording each party a reasonable opportunity of presenting its case and adopting appropriate procedures. In this regard, arbitrators are required to consider, in the absence of agreement, what the appropriate procedures are.

50. A general duty is imposed on the parties to do all things necessary for the proper and expeditious conduct of the arbitral proceedings. Failure to do this may provide an opportunity for the arbitral tribunal to use its default powers or for the court to enforce orders of the arbitrators, provided all available arbitral processes have been exhausted.

The Bermuda Arbitration Act 1986 and the International Conciliation and Arbitration Act 1993:

51. Arbitration in Bermuda is dealt with under the Arbitration Act 1986 ("the 1986 Act") and the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act").

52. The legislative precedents for the 1986 Act were the Hong Kong Arbitration Ordinance then in force, and the English Arbitration Acts. The 1986 Act applies to domestic arbitrations and also to those international arbitrations where the parties have elected to contract out of the provisions of the 1993 Act.

53. In terms of international arbitrations, Bermuda has adopted the UNCITRAL Model Law.[49] The 1993 Act provides[50] that the Model Law shall have the force of law in Bermuda and it governs any international commercial arbitration where the parties have chosen Bermuda as the place of arbitration.[51] It also incorporates the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards which ensures that such awards made

[49] It is estimated that awards are enforceable in 142 jurisdictions.
[50] Schedule 2.
[51] Articles 1(1) and (2) of the Bermuda International Conciliation and Arbitration Act 1993.

in Bermuda are readily enforceable in other countries. It is worthy of note that Bermuda has an arbitration centre which was established in 1996 to accommodate arbitration hearings.

54. The arbitration process in Bermuda is facilitated by the relaxation of the work permit requirement for any of the members of an international arbitral tribunal or the attorneys of the respective parties. Further there is no requirement that representing counsel should originate from Bermuda or be eligible to practise in Bermuda.

55. Under the Bermuda law, the parties can mutually agree to arbitrate in Bermuda and may agree on the procedure to be followed by the arbitral tribunal. If a party is desirous of objecting to the jurisdiction of the arbitral tribunal, the law provides that the objection should be made to the tribunal.

56. The Supreme Court of Bermuda is nominated as the sole and final appellate court in respect of appointment of arbitrators, the challenge of arbitrators and the jurisdiction of an arbitral tribunal. The 1993 Act[52] permits an application to be made to the Supreme Court of Bermuda in cases involving the appointment of an arbitrator in default of the appointment procedure in the arbitration clause, failure or impossibility of an arbitrator to act.

57. While the 1993 Act minimises the powers of the court to intervene in the arbitral process, the judicial review of arbitration awards is within the exclusive jurisdiction of the court of Appeal of Bermuda.[53]

58. No participant in an international commercial arbitration in Bermuda is liable to service of process on any civil matter relating to the dispute in question while in Bermuda for the purposes of the arbitration.

59. The Bermuda courts will uphold arbitration agreements and court proceedings brought in breach of an arbitration clause will be stayed.[54] Additionally, an injunction will be granted to restrain a party subject to the jurisdiction of the Bermuda courts[55] from suing abroad in breach of an arbitration clause. Decisions have shown that the Supreme Court of Bermuda has refused to enforce a foreign judgment[56] obtained in breach of a Bermuda arbitration clause, which the foreign court had held was not binding.

60. In the final analysis, the Bermuda law offers finality to parties who have confidence in the arbitral process and the court is less inclined to interfere with arbitration awards.

[52] Section 25(a).
[53] Section 25(b) of the 1993 Act.
[54] Raydon Underwriting Management v. North American Fidelity & Guarantee Ltd, Supreme Court of Bermuda, 4 August 1999, Mr. Justice Meerabux).
[55] Skandia International Insurance Co v. Al Amana, supra.
[56] Muhl v. Ardra [1997] 6 Re LR 206.

The Singapore Arbitration Act, 2001 and the International Arbitration Act, 1994:

61. The arbitration regime in Singapore is dual in nature.[57] In existence is one law governing domestic arbitrations and another regulating international commercial arbitrations.

62. Domestic arbitrations with no international element are dealt with by the Arbitration Act 2001 (AA) which is based on the UK Arbitration Act, 1996. Domestic parties may however agree to be bound by the provisions of the International Arbitration Act, 1994 (IAA) which governs international commercial arbitrations. The IAA incorporates the UNCITRAL Model Law on Commercial Arbitration and is the enabling legislation which gives effect to the New York Convention.

63. The importance of the distinction between domestic and international arbitrations stems from the fact that it serves to determine the rules by which the arbitration will be conducted unless the arbitration agreement itself stipulates a set of rules different from that imposed under either Act, in which case it is the contractually agreed rules that will be treated as authority.

64. It should be noted that the parties to an international commercial arbitration whose seat of arbitration is Singapore, is bound by the IAA[58] legal framework.

65. In other words, whether any particular arbitration is to be regarded as international will depend on whether it meets any one of the following criteria:

(i) at least one of the parties to the arbitration agreement has its place of business in a country other than Singapore;

(ii) the place of arbitration, as determined pursuant to the arbitration agreement, is in a country which is neither party's place of business;

(iii) the country in which a substantial part of the obligations of the commercial relationship is to be performed is a country which is neither party's place of business;

(iv) the country in which the subject-matter of the dispute is most closely connected is a country which is neither party's place of business; or

[57] National Law, Rules & Procedure: The Assistance of the National Courts in International Commercial Arbitration – The Singapore Experience By: Mr. Leslie Chew SC M/s Khattar Wong & Partners Singapore.

[58] Section 5(1) of the IAA states, "This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration". Section 5(2) of the IAA goes on to define when an arbitration is an international one. An arbitration is international, if at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (iii) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(v) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

66. The two regimes of the IAA and AA contain a few significant differences which, depending on the issues that arise during any specific arbitration, can be critical to its conduct and result. Unlike the IAA, the AA does not provide any guidelines or rules as to whether it applies to a particular arbitration. The AA seems to be treated as the default law applicable to an arbitration that comes under Singapore law.

67. Under the IAA parties are permitted to opt out of the arbitration regime which it provides, by stating that if parties to an arbitration agreement have agreed that any dispute that has arisen or may arise between them is to be settled or resolved otherwise than in accordance with the IAA, the IAA will not apply in relation to the settlement or resolution of the dispute. Further, the court will stay proceedings where an arbitration agreement exists between the parties.

68. In addition to empowering arbitrators to make a range of interim orders covering matters such as security for costs, the giving of evidence by affidavit and other procedural matters, the Singapore arbitration regime confers powers on the courts to compel parties to abide by its orders or to compel witnesses to appear thus ensuring the arbitration proceedings cannot be compromised. Arbitrators are also empowered to take the necessary steps to make an award where one party delays proceedings, thereby protecting the integrity of the proceedings.

69. A particularly important consideration of parties in arbitration is the desire to ensure that arbitral awards are not later reversed by a court. In that regard a useful feature of the IAA, is the limited grounds under which a court can refuse to enforce an arbitral award.

The Hong Kong Arbitration Ordinance, 1997 CAP 341:

70. Hong Kong's international arbitration law may be found in the Arbitration Ordinance Cap. 341. It was formulated along the lines of the UK Arbitration Act 1996. The Ordinance currently creates a regime for domestic and international arbitrations.

71. Under the Ordinance, an arbitration may take place if the parties to an agreement agree in writing and that agreement to arbitrate may be included as part of an original contract, or may be reached at a later stage, before or after a dispute has arisen. If the parties to a domestic agreement have agreed to arbitrate and there is an attempt by one party to have the matter dealt with through the courts, the courts may in their discretion act to stay proceedings. However, in the case of non-domestic arbitrations no discretion exists and the court is obliged to stay proceedings.

72. Although the parties can agree on the number of arbitrators, the Ordinance provides that in the absence of agreement, there should be one arbitrator only. Provision is made for the situation where the arbitrators fail to agree and in the circumstances where an agreed method of appointing an arbitrator breaks down, the courts may intervene to make the necessary appointment.

73. In this regard, the courts are given extensive powers to assist arbitrations by issuing summonses to witnesses and by making various preliminary orders such as security for costs, discovery or for the preservation of evidence. If an arbitrator fails to act promptly, there is power for the court to remove him.

74. The Ordinance consists of a series of provisions giving powers to the arbitrator in the absence of agreement to the contrary. These include the power to examine witnesses on oath, to order specific performance, to correct accidental mistakes in an award, and to award costs and interest on awards.

75. A review power of an arbitrator's decision by the courts exists under the Ordinance in relation to errors of law and the court is given the power to decide preliminary questions of law. In exercising its review power the court may intervene to remit an award to an arbitrator for reconsideration, remove an arbitrator for misconduct and may also revoke the authority of an arbitrator on account of misconduct, lack of impartiality or if fraud is proved. These review powers apply automatically in the case of both domestic and international arbitrations. However, in the case of international arbitrations the parties may by agreement exclude the jurisdiction of the courts.

76. The Hong Kong Law Reform Commission now proposes[59] the creation of a unitary regime of arbitration on the basis of the UNCITRAL Model Law for all types of arbitration, thereby abolishing the distinction between domestic and international arbitrations under the current Ordinance.

77. Some of the main recommendations are as follows:

(i) Introduction of an implied term as to confidentiality in all arbitration agreements subject to any agreement to the contrary.

(ii) Imposition of a general duty on the parties to pursue the arbitration and obey orders and directions of the Tribunal.

(iii) Extension of arbitral agreements to electronic communications.

(iv) Abolition of payment into court in arbitration and granting the tribunal a discretion to take into account appropriate settlement offers when making orders as to costs.

(v) Introduction of a provision for appointment of umpires where there is a tribunal with an even number of arbitrators and clear stipulation of the situations in which arbitrators should have the power to refer only limited issues to an umpire.

(vi) In case of personal fault by an arbitrator who has been successfully challenged, the court would have power to disallow his fees. There should also an obligation on

[59] Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill, December 2007.

challenged arbitrators to consider resignation (especially if the challenge arises early in the arbitration).

(vii) Introduction of a provision in which, where the Tribunal rules it has no jurisdiction, such decision will be final and the dispute can only be heard by the court.

(viii) The parties should have power to opt out of the provisions relating to security for costs.

(ix) The Tribunal should have power to act in default of an agreement.

(x) The Tribunal would have the power to assess costs and should not be bound by court scales or approaches to costs. The Tribunal should have power to award costs for work prior to the notice of arbitration.

(xi) The court should have power to review disputed arbitrators' fees.

G. SUMMARY OF ISSUES FOR CONSIDERATION

Reform of the Arbitration Law:

78. There appears to be widespread support for repealing the Arbitration Law and replacing it with a new law substantially based upon the UNCITRAL Model Law, which would apply to both domestic and international arbitrations. The Commission proposes for consideration the adoption of the UNCITRAL Model Law as the foundation upon which a unitary regime for arbitration law may be established in the Cayman Islands and as a consequence there will be no distinction between domestic and international arbitrations. The UNCITRAL Model Law provides a sound framework within which arbitrations can be conducted and that the general philosophy behind the Model Law of giving more autonomy to the arbitrator is one which is more likely to appeal to practitioners and parties. As the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, this would have the added benefit of enabling the Cayman business community and arbitration practitioners to operate in an arbitration regime which accords with widely accepted international arbitration practices and developments.

79. We also recommend that the proposals draw from the several other legislative models that have adopted the UNCITRAL Model Law as the foundation for the formulation of their laws. These include the laws as they exist in the United Kingdom, Singapore, Bermuda and Hong Kong, among others.[60] The arbitration regime in these jurisdictions reflects a modern approach from both a legislative and jurisprudential perspective to dealing with arbitration proceedings from which the Cayman Islands can benefit.

[60] Reliance is also placed on the Arbitration Laws in Australia.

80. The Commission does not however view it as necessary at this time to amend the Foreign Arbitral Enforcement Law (1997 Revision) but rather to incorporate the provisions into the proposed Arbitration Law.

Elimination of administrative obstacles:

81. It is useful for any country attempting to establish itself as a venue for international arbitration to have in place an immigration system which facilitates the free movement of arbitrators, parties, witnesses and advocates. In this regard it may be desirable to reconsider the laws and procedures relating to the application and grant of temporary work permits for those involved in international arbitration in a way which facilitates freedom of choice. Indeed freedom of choice in respect of legal representation is an essential feature of any successful international arbitration venue. The Cayman Islands has met this need in the context of litigation. Greater flexibility may however be required in respect of arbitration.[61]

Establishment of an institutional arbitration centre:

82. While other jurisdictions have gone the route of establishing an arbitration centre to facilitate the conduct of arbitral proceedings, it is the belief of the Commission that the establishment of an arbitration centre comprising physical facilities and an administrative staff would require a significant financial investment on the part of Government. Accordingly, the Commission's present view is that the establishment of such a centre is not a necessary pre-condition to the growth of international arbitration business in the Cayman Islands.

H. CONCLUSION:

83. Arbitration proceedings can be treated as a mechanism which provides relief to an already overburdened judicial system by removing disputes which ordinarily would fall within the jurisdiction of the court and placing them within the purview of the arbitral process. It allows the parties to elucidate more complex controversies, contributes a greater degree of specialisation and offers more technically-equipped locations on the respective subject matters. Arbitrations become indispensable by conferring upon those who participate in trade and international exchange activities, clear, efficient and safe conditions in order to resolve the disputes that may inevitably arise.[62]

84. A successful arbitral process can only be realised if its awards and the outcome of the case between the parties are enforceable. Enforcement of an arbitral award requires that the enforcing party seek the intervention of a national body within the territory in which the enforcing party desires to enforce the arbitral award.

85. Since the arbitral tribunal issuing the award is not a national body, there is no immediate obligation for any territory to enforce or indeed recognise the arbitral award itself. The

[61] For example, the parties should not be restricted to employing lawyers as advocates and, if they do employ lawyers, they should not be obliged to employ only those who are eligible to be admitted as Cayman Islands attorneys under the Legal Practitioners' Law.
[62] Chilean Experience.

immediate implication is that arbitral awards, certainly those made by international arbitral tribunals, require national law to legitimise their enforcement.[63]

86. If Cayman sees value in transforming itself into an effective international arbitration venue, it must further enhance its own legislative strengths which would be considered by parties upon choosing Cayman as their seat of international arbitration. The main strength is provision of the appropriate legislative framework which offers the legal safeguards to protect the arbitration system. We believe that these safeguards are rooted in the UNCITRAL Model Law.

87. The UNCITRAL Model Law does not seek to constrain party autonomy, rather it seeks to guide states in formulating an appropriate arbitration law which provides parties with flexibility in the formulation of the optimal arbitration procedure for the contract and subject matter.

88. While there can be no perfect arbitration law, the hallmark of a good arbitration law is that it grants the maximum autonomy to the parties to define their own arbitral procedure.[64] The Commission is therefore seeking to strike a balance between establishing a default legislative framework and at the same time enabling the parties to contractually vary the legal position.

89. Against the background of the issues identified, the Commission invites comments and views from stakeholders and the general public on the proposals to introduce a modern legislative framework to deal with arbitration proceedings in the Cayman Islands.

90. Submissions should be posted no later than **19th June, 2009** to the Director, Law Reform Commission, c/o Government Administration Building or delivered by hand to the offices of the Commission on 3rd Floor Anderson Square or emailed to cheryl.neblett@gov.ky.

[63] National Law, Rules & Procedure: The Assistance of the National Courts in International Commercial Arbitration– The Singapore Experience, 13th February, 2004 By: Mr. Leslie Chew SC M/s Khattar Wong & Partners Singapore p. 4.

[64] International Comparative Legal Guide Series- The Arbitration Act Ten Years On – A Paragon of Party Autonomy?