THE UNCITRAL MODEL LAW AND THE ARBITRATION ACT NO 11 OF 1995: CONFLICT OR CONVERGENCE?

Aruna D. de Silva

LL.B. (Honours) London, B.A. (Sp. Econ.) Colombo, LL.M. (Distinction) University College London

This article presents for consideration a basic interpretative model that arbitral tribunals and courts may look to adopt when faced with issues of interpretation concerning the provisions of the Arbitration Act No. 11 of 1995. It sets out the background and the problems that give rise to the need to consider such a model in Sections I-IV below. It then looks at how this model might be applied in practice and explores several issues that this process brings into focus in Sections V and VI.

I. Background

The UNCITRAL Model Law on International Commercial Arbitration[1] (**'Model Law'**) was born out of the need to establish a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. The rationale underlying its project was that, a common framework for international dispute resolution acceptable to States with different legal, social and economic systems, would contribute towards the development of harmonious international economic relations.[2] The Model Law sought to achieve this by addressing two specific problems that the New York Convention[3] had left unaddressed: first, the inadequacy of domestic laws that regulated international commercial arbitration and, second, the disparity between the national laws that

[1] UNCITRAL, 'Model Law on International Commercial Arbitration' (1985) UN Doc A/40/17/ annex I and A/61/17/annex.

[2] See Resolution adopted by the UN General Assembly on 11th December 1985 at its 112th plenary meeting (Resolution 40/72 'Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law')

[3] 330 UNTS 3

dealt with this subject matter, which were already in place.[4]

The first of these issues arises in this way: national laws often were silent on many aspects of the arbitral process. Jurisdictions that had ratified the New York Convention were only obliged to adopt measures regulating the recognition and enforcement of arbitral awards and arbitration agreements, leaving virtually untouched, and to the absolute discretion of national legislators, the regulation of the entire process that lay in between these two procedural milestones. The result is crippling uncertainty for parties who wish to avail of international arbitration as the method to resolve their international commercial disputes.

Secondly, having disparate national laws impacts the predictability of the arbitral process and its potential outcomes. International commercial parties looking to invest and trade in foreign, unfamiliar territories value the ability to predict and quantify the risk attached to their investments and therefore would in turn value a process that would enforce their respective bargains in a foreseeable and consistent way.

II. Legislation 'based on' the Model Law

In this background, legislation based on the Model Law (which was amended on 7 July 2006, at the thirty-ninth session of the Commission) has been adopted in 80 States in a total of 111 jurisdictions.[5] The term 'adopted' here must be understood contextually. The UNCITRAL website provides a helpful disclaimer in this regard:

> *"A model law is created as a suggested pattern for lawmakers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text …"*

Therefore, jurisdictions seeking to adopt the Model Law have done so in a variety of

[4] UNCITRAL, 'Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration' (2008) United Nations

[5] UNCITRAL <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 30 September 2019

ways. For example, Singapore, a popular 'pro-arbitration' seat, provides for the adoption of the Model Law under Section 3(1) of its International Arbitration Act 2002 which enacts that the Model Law (which is set out under the Act's Schedule 1), with the exception of Chapter VIII thereof, shall have the force of law in Singapore, subject to the Act. This legislation then goes on to effect specific additions or amendments to the Model Law with its own tailored provisions.

Taking a slightly different approach, the Hong Kong Arbitration Ordinance 2011, provides that,

> *"The provisions of the UNCITRAL Model Law that are expressly stated in this Ordinance as having effect have the force of law in Hong Kong subject to the modifications and supplements as expressly provided for in this Ordinance."*

Other jurisdictions that are considered to be major 'arbitration hubs', such as England and Wales (together with Northern Ireland), have not sought to adopt the Model Law at all. Rather, the English Arbitration Act of 1996, seeks to be a statement in statutory form of *"… the more important principles of English law of arbitration, statutory and (to the extent practicable) common law*".[6] Whilst consideration was given to having the same structure and language as the Model Law so as to enhance its accessibility to those who are familiar with the Model Law, the drafters of the English Act were mindful that its provisions were not limited to the content of the Model Law. The reasons for enacting the 1996 Act was provided by Saville LJ as being an exercise in consolidating and codifying the various English statutes on arbitration passed since 1698 as well as incorporating well-settled principles on arbitration as developed by the English common Law.[7]

III. The Arbitration Act No 11 of 1995

The UNCITRAL Secretariat records that Sri Lanka's Arbitration Act (**'the Act'**) is based

[6] Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill*, February 1996.

[7] A Tweedale and Keren Tweedale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, OUP 2010)

on and/or adopts the Model Law.[8] However, our Act cannot said to be Model Law-compliant in the same way the Singapore and Hong Kong arbitration laws are. This is mainly because our Act has also 'drawn inspiration' from the draft Swedish Arbitration Act of 1994.[9] Therefore, the provisions of the Act, whilst meant to secure Sri Lanka's compliance with its international obligations under the New York Convention, contains several important deviations from the scheme of the Model Law[10].

Several of these deviations occur due to the use of language in our Act that is different from the Model Law. Others are based on substantive rules that are not contained in the Model Law (or, indeed, the draft Swedish Arbitration Act of 1994) at all.

IV. Problems and Possible Solutions

Consequently, the following difficulties arise: first, where the language used in the Act is different to that in the Model Law, disputing parties may seek to exploit these differences to argue to their benefit that the Act envisages a scheme that is wholly separate and distinct from that contained in the Model Law, thereby invariably eroding the object and purpose of the Model Law and what the Act's adoption thereof, has sought to achieve. Second, where the Act deviates in its substantive content from the comparable provisions of the Model Law, arbitral tribunals and judges face difficulties in ascertaining applicable judicial precedent to interpret these provisions. This is because unlike in the case of the English Arbitration Act of 1996, our common law that predates the Act has not posited and developed principles relating to international commercial arbitration.

These are compounded by the fact that there is no identifiable *travaux préparatoires* available for the assistance of tribunals and courts in interpreting the Act.[11]. The sum

[8] See n.6 above.
[9] Claes Lindahl, Gustaf Moller and Sundeep Waslekar, 'Support to Building an Institutional Capacity for Arbitration in Sri Lanka' (1998) SIDA Evaluation 98/34, Swedish International Corporation Agency

[10] Our Act makes no mention of the Model Law in its preamble.
[11] That the draft Swedish Arbitration Act of 1994 was not enacted by the Swedish legislature in its original form further aggravates these issues concerning the interpretation and application of our Act.

outcome of the foregoing is the risk of decisions being rendered by courts and arbitral tribunals that are somewhat incongruent with international best practice, or amount to deviations from the object and purpose of the Model Law that are not justified on either principled or policy grounds.

Some argue that the obvious solution to these issues might be for the Act to be suitably modernized or repealed and replaced. However, until such time, courts and arbitral tribunals continue to be faced with these difficulties when called upon to address the following questions:

a) how must the unique provisions of our Act, i.e. those which are ostensibly not based on either the Model Law or the draft Swedish Arbitration Act of 1994, be interpreted?; and

b) what aids may be used in interpreting these provisions?

The limited thesis of this article is therefore that courts and tribunals must in the interim, seek to construe the provisions of the Act in a manner that is 'pro-arbitration', unless a plain reading of the Act clearly excludes the possibility of such a construction. It is appreciated that this is an inherently difficult judgment call to make: what amounts to a 'pro-arbitration' interpretation of the Act? The answer would depend on the view one takes of the various conflicting values the Act seeks to reconcile and where one finds the right balance between these competing values to be situated. For example, would it be 'pro-arbitration' to construe the Act in a manner that grants parties an unfettered autonomy to shape certain aspects of the arbitral process? Or must this be tempered with controls imposed by the tribunal and court? If so, how, if at all, should the exercise of such controls be delineated?

In deciding on what the 'pro-arbitration' interpretation of a particular provision of our Act is, tribunals and courts may, in the absence of any directly applicable legal precedent, look to decisions of other Model Law-compliant common law jurisdictions whose judiciaries have historically been

identified as being 'pro-arbitration'[12] and have interpreted the corresponding (and often similarly worded) provisions of their respective arbitration laws.

V. Illustration: Article 16 of the Model Law and Section 11 of the Act

Section 11 of our Act offers an illustration on how the approach under discussion might work in practice. It provides that:

> *"11. (1) An Arbitral tribunal may rule on its jurisdiction … but any party to the arbitral proceedings may apply to the High Court for a determination of any such question.*
>
> *(2) Where an application has been made to the High Court under subsection (1) the arbitral tribunal may continue the arbitral proceedings pending the determination of such question by the High Court."*

The comparable provision of the draft Swedish Arbitration Act of 1994[13] is set out below:

> *"The arbitrators may rule on their own jurisdiction to decide the dispute. This does not prevent a court from ruling on such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court …"*

In contrast, Article 16 of the Model Law reads:

> *"(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement …*
>
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope*

[12] Such as Singapore and Hong Kong (as contrasted with Russia, the PRC and certain older Indian judgments)

[13] Gillis Wetter "The Draft New Swedish Arbitration Act: The 'Presentation' of June 1994" (1994) Arbitration International, Vol. 10 No.4, 407

of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

A comparison of these provision raises several immediate questions on how Section 11 of our Act might be interpreted: (1) at what point in time may a party raise an objection to the tribunal's jurisdiction?; (2) at what point during the arbitration can the tribunal decide on a jurisdictional objection (whether as a preliminary issue or in an award on the merits)?; and (3) is the allocation of competence under our Act between the High Court and the arbitral tribunal to determine issues of jurisdiction concurrent, contingent or alternative?

Some of these questions were addressed by the High Court in the case of ***Mahawaduge Priyanga Lakshitha Prasad Perera Vs. China National Technical Imports & Export Corporation***[14] where the issue before the court was whether a decision by the arbitral tribunal that it did not have jurisdiction was subject to review by the High Court under Section 11 of our Act.

The Court, having considered the Model Law provisions (though not the similarly-worded provision in the draft Swedish Arbitration Act of 1994) rightly determined that like Article 16 of the Model Law, our Act does not provide parties a right to review before the High Court, a negative jurisdictional ruling by an arbitral tribunal. It further held that no such right existed under Section 11, even where the tribunal rules that it has jurisdiction (positive jurisdictional ruling).

[14] HC/210/2014/ARB; Order dated 5 June 2017.

In deciding the above, the High Court observed that,

> *"... Section 11 of the Arbitration Act has provided two options to any party to challenge the jurisdiction of the tribunal, either to invite the tribunal to decide its jurisdiction as a preliminary question or apply to the High Court for a determination of any such question..."*[15]

Therefore, unlike the Model Law, our courts have taken the view that Section 11 of our Act does not afford a right of review of an arbitral tribunal's positive jurisdictional ruling but an alternative right to obtain a jurisdictional ruling from the High Court. The 'pro-arbitration' ramification of this decision might be that once a positive ruling on jurisdiction is made by a tribunal, the losing party will have to continue with the arbitration until such time a final award is rendered, as the right to apply to the tribunal for a stay of proceedings pending court's review of the jurisdictional issue will not arise. The losing party may only raise the jurisdictional issue again during set-aside proceedings at the very end under Section 32 of the Act.

On the other hand, a view can be taken that, particularly in complex and time-consuming arbitrations, the scheme of Section 11 creates uncertainty and added risks for claimants who must wait till the very end of the arbitral process to know whether the tribunal in fact did have jurisdiction over their dispute. In contrast, the scheme set out under Article 16 of the Model Law, it might be argued, provides for a speedier resolution of jurisdictional issues by the court (with such decisions having preclusive effect) and is therefore more 'pro-arbitration'.

The scheme of concurrent/alternative court control over jurisdiction envisaged under Section 11 may also lead to parties seeking the court's ruling on jurisdiction merely to delay and obstruct the arbitral proceedings.[16]

Whatever pros and cons one might assign to the foregoing interpretation of Section 11,

[15] At paragraph 14.

[16] See the High Court's consideration of the Singaporean case of *Malini Ventura v. Knight Capital Pvt. Ltd and others* [2015] SGHC 225 at paragraph 50 on this point.

the High Court in this case was faced with the unenviable and inescapable task of having to reconcile the object and purpose of Article 16 of the Model Law with the ostensibly different wording contained in Section 11 of our Act.

If the issue before the High Court was based on different facts however, there might have been a more compelling argument for the court to look beyond the plain words of the statute and perhaps "read in" standards that would align better with the object and purpose of the Model Law.

For example, what approach to interpretation should the court adopt in a scenario where an Applicant to the High Court under Section 11 objects to the tribunal's jurisdiction for the very first time, after substantial costs and resources have been incurred by the parties in long-running arbitration proceedings? Should the court allow such an application purely based on the plain textual interpretation of Section 11, or should it interpolate the requirements set out under Article 16(2) of the Model Law relating to the timing of jurisdictional objections when making its decision? And if the latter approach is permissible to do justice between the parties under certain factual scenarios, then are there good enough reasons for the court to not look to the object and purpose of the Model Law and international 'pro-arbitration' jurisprudence in every case where it is faced with interpreting such bespoke provisions of our Act?

VI. Conclusion

It is not denied that this approach remains open to several criticisms, including that looking to the object and purpose of the Model Law and 'pro-arbitration' jurisprudence in interpreting provisions in our Act that are plainly worded differently will undermine parliament's intention in enacting our legislation. However, notwithstanding these weaknesses, adopting an approach that has been sanctioned by a wider international community of stakeholders and 'pro-arbitration' jurisdictions will serve to promote uniformity and efficiency within the arbitral process whilst improving investor

perceptions of Sri Lanka's landscape for commercial dispute resolution. The interpretative model that is proposed here therefore merits further consideration.