

International Commercial Arbitration in a Global Economy:

Where does Sri Lanka Stand?

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ABSTRACT

The development of trade, infra structure and business opportunities throughout the world has impacted and instigated alternative dispute resolution to be recognized as an essential means to resolve disputes among parties due to its many advantages over litigation. As Arbitration is the most popular alternative dispute resolution mechanism possessing the characteristics of being private and confidential in nature outside courts with quick results, it is no surprise that parties all over the world resort to alternative dispute resolution mechanisms like arbitration to resolve their disputes as a viable alternative. The great perplexity of arbitration is that it pursues the assistance of the very public authorities from which it wants to free itself. Therefore, one of the foremost problems in arbitration endures to be the strain that exists between courts and the arbitral process. The line demarcating the two processes are an intricate balance and while judicial support is fundamental, excessive intervention would diminish and disrupt the concepts such as party autonomy and efficient dispute resolution through arbitration. This research intends to analyze and determine the extent of court intervention at different stages of the arbitral process. The researcher further assesses and analyzes the provisions of the Arbitration Act No 11 of 1995, relevant case law, text books and articles in this area for the purpose of evaluating the extent of the involvement and intervention of courts in arbitral proceedings in Sri Lanka. The

researcher will adopt black letter approach throughout the research. It is paramount to note that commercial arbitration in Sri Lanka too should take cognizance of the modifications and alterations and move forward towards the digital era, which would also succor in revitalizing the overall economy of the country. Confidence in the process of arbitration with its flexibility, relative speed and finality of decisions ensures growing reception globally of third-party adjudication of disputes. Dissemination of this concept might well turn out to be one of the most significant benefits of globalization. Hence, there is no skepticism that arbitration benefits from the multiculturalism of the world in which we live in, since it is the need to find a neutral system that fosters the resolution of conflicts through arbitration. There is no doubt that international business players benefit from the multicultural and flexible approach that arbitration provides, which would unswervingly impact on the economization and would be a sustainable adjudication strategy.

Keywords- Commercial Arbitration, Dispute resolution

1. INTRODUCTION

Sri Lanka possesses a noteworthy chronicle of dispute resolution dating back to over 2500 years. Sri Lanka, as a result of its location in the east-west trade route eventually befitted into a trade entrepot. Prior to the modern law

on arbitration which is the Arbitration Act no 11 of 1995 which is the current law on arbitration, previously statutes such as the Arbitration Ordinance no 15 of 1856, Chapter 51 of the Civil Procedure Code No 2 of 1889 and the Reciprocal Enforcement of Foreign Judgements Ordinance No 41 of 1921 prevailed with regard to arbitration. The striking feature of the Arbitration Act 1995 is that it was the very first arbitration in South Asia that was grounded on the United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration and was also influenced by the draft of the Swedish Arbitration Act.

Alternative dispute resolution is preferred over common adjudication methods due to conflicting national laws, lack of specialist expertise and the substantial demands made in terms of time and money in the court structure as opposed to alternative dispute methods like arbitration.

An important feature of International commercial arbitration is that disputes are brought before a neutral third party and this process opens up possibilities for alternative methods of resolution of conflicts which may acclaim themselves to either or both parties as being speedier and more confidential. Furthermore, parties have the option of selecting the arbitrators, the place of arbitration and the legal or regulatory code in which proceedings will be conducted.

Having emphasized on the importance and growing popularity of resolving disputes through alternative dispute resolution; with the attention on international commercial arbitration, the need arises to demarcate the clear-cut line between arbitration and litigation.

One of the major problems in arbitration endures to be the tension that exists between courts and the arbitral process. The line demarcating the two processes are a delicate balance and while judicial support is fundamental, excessive intervention would diminish and disrupt the concepts such as party autonomy and efficient dispute resolution

through arbitration. The recent speech by Justice Andrew Phang at the China-ASEAN Justice Forum depicts and highlights this view as; ‘ A pro-arbitration policy is one that acknowledges the boundary between national courts and arbitral tribunals as having a co-existence and alliance and that which finds the correct equilibrium to further the efficiency and legitimacy of arbitration and respect for the parties’ autonomy. This is portrayed by the apparent setback of the minimum intervention approach when the courts are expected to play a supportive role.’ (Phang, Alternative Dispute Resolution and Regional Prosperity: A view from Singapore, China ASEAN Justice Forum) Thus it is believed that Singapore has risen and developed as an arbitral friendly arbitration hub as well as an appealing focal point in the World for commercial arbitration as a result of the effective and supportive Singaporean courts. The Singaporean courts’ judicial attitude which reflects their stance of cogitating arbitration as a complementary as well as analogous mechanism to court process and also the effective practice of minimal court intervention could be cited as apparent reasons for the global acuity and recognition of Singapore as an exceptional seat for arbitration. It is thus ostensible that the delicate relationship which exists amongst the courts and arbitral tribunals does not necessarily need to be cast in a negative light. (Blog) As Lord Mustill observes; ‘ the courts must work in partnership, not superiors or antagonist in a process which is vital to commerce at home or abroad’.

2. LITERATURE REVIEW

2.1. Arbitrability of a Dispute

The concept of Arbitrability assists in determining whether a dispute can be resolved by arbitration or by courts. (Hunter, 2015) Therefore this concept aids in providing a clear demarcation of disputes between arbitration and the domain of the courts. Arbitrability is a fundamental concept in the law of arbitration as disputes which are not arbitrable cannot proceed to arbitration. In circumstances in which a party intends to raise an objection on

arbitrability of a dispute, such an objection should be raised as a preliminary issue to be decided forthwith. (Ranin Kumar, Proprietor, Messers Pharma Chemie v State Pharmaceutical Corporation, 2004)

2.2. Competence- Competence

The power which an arbitral tribunal possesses to decide upon its own jurisdiction is considered as an 'inherent' power. Nevertheless the common exercise under modern international and institutional rules of arbitration are to mention in express terms the powers of an arbitral tribunal to adopt and determine upon its own jurisdiction or in other words its competence to decide upon its own competence. (Redfern A, 2004) This is commonly denoted to as the doctrine of competence-competence. The doctrine of competence-competence is also recognized in international institutional rules such as ICC rules which provides that; Unless otherwise provided, the arbitral tribunal shall not conclude to have jurisdiction by reason of any claim that the contract is null and void or for allegations that it is non-existent as long as that the arbitral tribunal upholds the validity of the arbitration agreement. (6.4) Under the Arbitration Act no 11 of 1995; section 11 acknowledges the doctrine of Competence-Competence which permits the arbitral tribunal to rule on its own jurisdiction, which includes any question with regard to the existence or validity of the arbitration agreement or whether such agreement is contrary to public policy or is incapable of being determined. (11(1))

2.3. Party Autonomy

A significant feature of international commercial arbitration is that the parties are free to decide for themselves and select the law and the legal rules which are applicable to the international commercial agreement as well as any procedural laws. Party autonomy had been pronounced as " a key principle of current arbitration law and the keystone of modern arbitration." (Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd , 2001) Many countries and arbitration institutional rules

accept the doctrine of party autonomy which is the golden thread which runs along the process of arbitration. Sections 6, 7, 15, 16, 17, 22, 24 and section 38 of the Act (1995) are occasions by which the Sri Lankan national law recognized the concept of party autonomy. The Supreme Court of Sri Lanka has further confirmed the concept of party autonomy. (Merchant Bank of Sri Lanka Ltd v D V D A Tillekeratne)

2.4. Section 5 and Ouster of Jurisdiction

Section 5 was a noteworthy variation in the thinking behind the legislation in Sri Lanka in which the Courts' power and jurisdiction over arbitration agreements was taken away. Subsequently as a result the agreement and the desires of the relevant parties or in other words party autonomy at the time the contract was entered into was given more value on any substantive dispute that would arise out of the dispute. Conversely this is not a complete ouster of jurisdiction as with the development of the law, in very limited circumstances, the court in fact intervene despite the provisions of Section 5. The issue with regard to ouster of jurisdiction of court rests on the same side of the coin as that of the issue of arbitrability. It is trite law that the courts of Sri Lanka would not usually exercise its jurisdiction to hear a case that is already being subjected to an arbitration agreement. Where a valid arbitration agreement exists between the plaintiff and defendant that covers the dispute before the courts, the court must according to section 5 of the Arbitration Act No 11 of 1995; Stay its proceedings upon an objection by the defendant. However even in such a state, the High Court may have to rule on the subsistence or the validity of the arbitration agreement. (Elgitread Lanka v Bino Tyres)

3. GENERAL OVERVIEW OF ARBITRATION IN SRI LANKA

The remarkable and opulent folklore of dispute resolution Sri Lanka possesses dates back to over two thousand five hundred years. The convenient central locality in the East-West

trade route resulted in Sri Lanka being a trade entrepot. Furthermore the initial acquaintances with different trading countries aided the early Sri Lankans to progress a social configuration amid a conciliatory judiciary system. Before the adversarial dispute resolution system was initiated by the Dutch and the British, the early Sri Lankans mainly focused on the fundamental principles of arbitration for the determination of resolving their disputes. However in Sri Lanka before the emergence of the open economy in the seventies, Commercial arbitration was not prevalent as an effective alternative dispute resolution mechanism. At that time it was the court system that predominated to resolve disputes in matters relating to commercial activities.

As a result of the growth of trade both locally as well as globally; as a result of the open economy, Sri Lanka was in dire necessity of a more efficient and effective alternative dispute resolution contrivance to cater to its needs. In this milieu, the Swedish International Development Cooperation Agency (SIDA) volunteered to support Sri Lanka to develop and enhance the arbitration laws of Sri Lanka and to further improve the commercial arbitration at that time to a greater level. SIDA together with the Institute for the Development of Commercial Law and Practice (ICLP) assisted in the formation of the Arbitration Act No 11 of 1995 which emanated into subsistence on 30th June 1995 and afterwards became operative from 1st August 1995. (Wijeratne, 2011)

The most anticipated advancement headed for facilitation of international commercial arbitration in Sri Lanka was established mainly through the enactment of the new Act on arbitration, the (1995). As analyzed by Saleem Marsoof, the legislative intent as according to the new Act was to encourage arbitration being the modern advancement and approach to courts and the legislature of Sri Lanka. (Marsoof, Arbitration Procedure, Law and Facilities in Sri Lanka, 2009) This view is manifest through a careful analysis of the preamble to the Act. (Arbitration Act No 11, 1995) The preamble itself indicates that it is an

Act to provide for the demeanor of arbitral proceedings and further to give effect to the Convention on the recognition and enforcement of foreign arbitral awards. (11, 1995) This contemporary statute has its ancestries embedded in the UNCITRAL Model law which additionally gives effect to an internationally renowned standard that is applied in the arbitral process. By the introduction of the novel Arbitration Act it is manifest that the legislature envisioned to promote international commercial arbitration in Sri Lanka. It is Justice Marsoof's opinion that the judiciary of Sri Lanka is well postulated with the necessary tools to facilitate international arbitration. (Marsoof, Arbitration procedure, Law and facilities in Sri Lanka, 2009) Upon analysis of the findings, the extent of judicial intervention is clearly delimited through the Arbitration Act. (11, 1995) Mainly Section 5 of the Act averts judicial intervention when a valid agreement to arbitrate is in subsistence. K. Kanag-Isvaran PC, views that this section as the first legislative effort to restrain the powers of the court in intervening in arbitration proceedings. (Amerasinghe, 2007)

However this cannot be seen as a total ouster of jurisdiction and this section is unable to completely bar court intervention in the arbitral process as there are other provisions in the Act which promotes intervention. For instance according to Section 7 of the Arbitration Act; parties that do not have an arbitration agreement, can apply to the High Court to appoint an arbitrator. Similarly there are many provisions which enable court intervention such as appeals grounded on challenges made regarding arbitrators according to section 10, regarding competence of the tribunal as per section 11, interim measures as per section 13, summons procedure according to section 20, enforcement of awards under section 31 and during examination of witnesses under section 21 of the Arbitration Act (11, 1995) are some of the instances that the court involvement can be seen. Therefore, it is clear that the legislative intent by presenting a statutory framework with the objective of limited court intervention thus becomes only theoretical.

4. CASE AGAINST RADICAL DELOCALIZATION

The current attitude of many international as well as Sri Lankan parties to an arbitration agreement is in favour of radical delocalization or in other words total exclusion of the national courts from arbitration. However radical delocalization can in many instances be counter-productive to the arbitral process itself. Total eradication of courts results in there being no review, enforcement or recognition of an arbitral award and the parties to a dispute would therefore have no recourse to courts in any instance. The evolution of the Belgium arbitration law provides an excellent insight into the evolution of (1995) (1995) (1995) (Blog, The Singapore Approach to Scrutiny of Arbitral Awards) arbitration. Belgium is a jurisdiction that embraced the delocalization theory in a very radical form. However it is a positive feature that the Arbitration Act employs a middle path attitude between the seat and the delocalization theory. However it is paramount to note that the middle path journey avoiding excessive delocalization is in reality a desirable state to a developing country. It is also paramount to reminisce that there is a need to review the current Arbitration Act and laws which have remained immobile since 1995; to be in par with the Model Law which has been addressed to novel developments in the growing commercial world. Further developments to increase party autonomy within arbitration and the use of new technology to cater to the evergrowing community will no doubt raise Sri Lanka to be more competitive in the international arena of dispute resolution.

5. IMPLICATIONS OF THE STUDY

Sri Lanka is deliberated an excellent choice of location with regard to the facets of affordability, proximity, resources and accessibility. (Marsoof, Arbitration Procedure, Law and Facilities in Sri Lanka, 2009) Regardless of the aforesaid favorable characteristics, Sri Lanka is still not regarded as an anticipated seat of arbitration in the region. The importance of this research is that

it delves into the process of arbitration; highlighting the extent of court intervention and critically analyzing the role played by the courts and how it affects arbitral proceedings eventually. It is commanding that the future requires a comprehensive as well as modern legal framework which supports and encourages arbitral process together with minimal judicial intervention and far-reaching judicial assistance. These requirements should be in place to ensure Sri Lanka to be a hub for international commercial arbitration, which would result in economic development and globalization.

6. RECOMMENDATIONS/ REFORM

The researcher proposes the following reforms to be embraced in the Sri Lankan arbitration regime for improved facilitation of international commercial arbitration in Sri Lanka: To Introduce provisions in Arbitration legislature by vesting administrative powers to the arbitral tribunal, such as powers to send summons, calling of witnesses, calling of documents to be under the purview of the arbitral tribunal, which are currently under the powers of the courts. The objective of such a reform would be to lessen the intervention of courts in the arbitral process. Such a reform would also provide towards the supportive role of courts in this process and by enhancing the common discernment and confidence on international commercial arbitration in Sri Lanka.

Contemplating other jurisdictions, we can establish a separate and distinctive court for the sole purpose of dealing with international commercial arbitration matters, by employing specialized recruits in the field of international commercial arbitration.

7. CONCLUSION

It is a known fact that commercial arbitration has encountered snags in the recent past. Further stringent procedures and statutory requirements have made the process of arbitration almost a replica of court proceedings. The intention of the legislature of

Sri Lanka to limit court intervention is reflected through the provisions of the Arbitration Act No 11 of 1995 which seeks to limit court intervention as to the best of its ability and to further encourage and promote for Sri Lanka to emerge as a popular and well-equipped hub for the conduct of international commercial arbitration

In developed jurisdictions, Commercial arbitration has been able to supersede litigation to resolve domestic as well as international disputes. Further in many jurisdictions and under many well known and reputed international arbitration institutes, it is common to witness expedited rules of arbitration imposed by parties; which is a clear signal that the corporate world entails speedy results. (Cabral) With the growth of trade and commerce; Sri Lanka too would perceive a definite growth in the area of commercial arbitration if the systemic deficits are successfully addressed. With the improvement and advancement of technology worldwide together with the evolution of activities in the commercial world with advancements in e-commerce; the intact panorama of commercial arbitration has been altered internationally where most of the documentation, correspondence and even oral testimony are being carried out electronically. It is paramount to note that commercial arbitration in Sri Lanka too should take cognizance of the modifications and alterations and move forward to the digital era.

However, it is to be understood that the role of the courts cannot be completely dispensed as a complete ouster would result in causing miscarriages of justice. The importance of the supportive role of courts is encapsulated by the observations of a commentator as follows; ‘The reality is that arbitration would not survive without the courts. Indeed as Lord Mustill observed, it is only a court with coercive powers that could rescue an arbitration which is in danger of foundering’. (Lurie, 2010) The substratum of an arbitration friendly jurisdiction be it domestically or internationally vestiges based on the issue whether national courts are supportive or

interventionist in their attitude towards arbitration. (Croft)

It is also imperative to ensure that the supportive role of the relevant courts which are the High court and Supreme court of Sri Lanka be enhanced if the objectives of arbitration are to be accomplished.

Increased globalization of business and expansion of international trade has led to a paradigmatic shift in the way international business disputes are being resolved. Furthermore, a robust framework for the purpose of resolving cross border commercial disputes can help unlock valuable trade and investment opportunities for many jurisdictions including Sri Lanka. If this can be achieved: it could be expected to make a considerable contribution towards strengthening trade and investment as well as boosting economic growth.

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