SENIOR CONTRIBUTIONS

ARE LEGAL PROFESSIONALS SHIRKING THEIR RESPONSIBILITY? : THE REALITY OF CURBING CORRUPTION IN SRI LANKA

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Introduction

Approximately $2 trillion are wasted on corruption in the world annually. This figure does not take into account consequences of corruption that are difficult to quantify, such as lost investments and a reduced tax base. It only factors in the amount paid as bribes.[1] Many countries in the world, especially in Asia, were embroiled in corruption in the mid 1900s'. These countries, much less developed than Sri Lanka at the time, held Sri Lanka as an example of what their systems should aspire to become. With a population density of 325 persons per square kilometre, Sri Lanka continues to enjoy an abundance of space and natural resources which have made us the envy of Asia. Many of these other nations with much higher population densities, lacked natural resources, and struggled to cater to their expanding populations, creating breeding grounds for corruption to thrive in.

"*We have to keep our own house clean. No one else can do it for us*"

-Lee Kuan Yew, Former Prime Minister of Singapore-

Lee Kuan Yew, the founder of modern Singapore, was a visionary who recognized the merits of a corruption-free society. A law graduate from Cambridge and a Barrister himself, as soon as he assumed office, executed a 5 year plan which called for urban renewal, construction of public

1World Economic Forum: *We waste $2 trillion a year on corruption: Here are four better ways to spend that money* available at <https://www.weforum.org/agenda/2017/01/we-waste-2-trillion-a-year-on-corruption-here-are-four-better-ways-to-spend-that-money/>

housing, rights for women, educational reform and industrialization. He also ensured his cabinet of ministers included only highly qualified individuals. Together with K.M. Byrne, Lee's minister of labour and law, Lee turned the course of Singapore's history and made it in to one of the most developed and cleanest economies in the world.

Likewise, many countries have successfully turned tables, mostly because their leaders recognized the necessity to eradicate bribery and corruption from their systems. They ensured the lack of natural resources was compensated for, by inculcating a culture of integrity in their societies. This instilled trust and confidence in the international community which in turn drew international investors to their shores. The service based economies which developed and sustained as a result of this culture of integrity ensured these nations have reached the highest echelons of development. Unfortunately, despite 70 years of independence during which Sri Lanka had the freedom to chart its own future, it has yet failed to muster a sustainable anti-corruption vision for the nation.

Against this backdrop, this article will discuss why it is important to address bribery and corruption?, What do these terms mean in the Sri Lankan context?, The different models adopted by countries to fight corruption, the challenges inherent in the law enforcement model of anti-corruption which Sri Lanka has adopted, where we stand as a country, and what we have done to address our corruption situation. In doing so, I will draw from comparative experiences, of alternative approaches to eradicate corruption, which have been successfully tested in other jurisdictions in the region. I will conclude with some thoughts on what is expected from young lawyers to address these issues.

Why is it important to curb bribery or corruption?

"Yes the truth is that men's ambition and their desire to make money are among the most frequent causes of deliberate acts of injustice."

— Aristotle, *Politics*

Most do not recognize the extent to which widespread corruption negatively impacts the country: from the reduction of both local and foreign investments to the diminishing of State revenues, increasing costs and diminishing access to essential services such as healthcare and education, increases in the costs of production, the breakdown in law and order which would eventually compromise the development of the country.[2]

Therefore, it is imperative that States adopt measures to eradicate bribery and corruption. It is generally accepted that the Constitutional framework of a country could promote and provide the framework for the anti-corruption efforts in that country. Therefore, countries have found means to ensure that their Constitutional frameworks include explicit or implicit anti-corruption clauses, at times even providing for the creation of specialized anti-corruption bodies within their Constitutions. Bhutan, a South Asian country ranking high on the world's anti-corruption indices[3], constitutionally recognizes the duty to fight corruption[4] while, another clean state, Hong Kong provides for the establishment of an independent Commission Against Corruption in its Basic Law.[5]

However, until the 19th amendment to the Constitution, Sri Lanka did not have explicit anti-corruption provisions in the Constitution.[6] The only constitutional provisions referring to the misuse of public property were contained in the Directive Principles of State Policy[7] and Fundamental Duties provisions of the Constitution.[8] The legislative thinking behind Article

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2 Ibid

3 Bhutan ranked 25th out of 180 countries in the Corruption Perceptions Index 2018

4 Article 8(9) of the Constitution of the Kingdom of Bhutan casts a "duty to uphold justice and to act against corruption" on all persons while Article 27 of the Constitution provides for the establishment of the Anti-Corruption Commission of Bhutan.

5 Article 57 of the Basic Law of Hong Kong

6 This lacuna was remedied by way of Article 156A introduced by the 19th amendment to the Constitution which provides for the establishment of a Commission to investigate into allegations of bribery or corruption and for the implementation of the obligations under UNCAC

7 Article 27 (6) and (7) of the Constitution of Sri Lanka

8 Article 28 (d) of the Constitution of Sri Lanka

27(6)[9] and (7)[10] of the Constitution was to protect public property and to create a level playing field for all citizens, without distincting higher levels of personal and economic development. Since protecting public property is not solely the responsibility of the State or Government, Article 28(d) of the Constitution also casts a duty upon citizens to preserve public property and prevent the misuse and waste of such property. Regrettably, unlike a criminal statute or fundamental rights,[11] the directive principles of state policy or fundamental duties contained in the Constitution are not enforceable in a court of law. Therefore, no person or body can be compelled to comply with these provisions but provide mere guidance for the different organs of state in the enactment of laws and governance, and aid the judiciary in interpreting legal provisions.[12]

Therefore, despite these provisions, the State has often been accused of rampant corruption in every corner of the society, leading to the unequal distribution of wealth, slower development, and inequality. As a citizenry which aspires for a developed country and a country which honour its international obligations, it is imperative that we as a nation join hands to end corruption in Sri Lanka. Eradicating corruption requires a collective effort. It requires: the political will of the elected representatives; proactive conscientious efforts of the public service; an ethically conscious private sector; a robust and morally upright legal profession; and the understanding and simultaneous agitation of the general public. However, the sole responsibility to fight corruption in Sri Lanka is unfortunately pinned on one single institution: the Commission to Investigate Allegations of Bribery or Corruption (CIABOC). The Commission is constantly plagued by the common rhetoric-

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9 Article 27(6) of the Constitution of Sri Lanka states "The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation"

10 Article 27(7) of the Constitution of Sri Lanka states "The State shall eliminate economic and social privilege and disparity and the exploitation of man by man or by the State"

11 See Note 52

12 See *Bulankulama v. Secretary, Ministry of Industrial Development* (Eppawala Case), *Sugathapala Mendis and another v. Chandrika Bandaranaike Kumarathunga and others* (Water's Edge Case) , and *Vasudeva Nanayakkara v. Choksy and others* (John Keells Case) for instances where the judiciary has employed Articles 27 and 28 to interpret Fundamental Rights provisions in the Constitution. However, these principles have not contributed to the development of the Criminal Law at all.

-churned out by the media, which is often instigated by certain quarters for political expediency. It is my view that law enforcement should not be the sole model to fight corruption, but be coupled with other models of anti-corruption for the most effective response to corruption in the country. The fight against corruption requires a multi-pronged approach, of which law enforcement is one method.

What does bribery, presumption of bribery, and corruption mean?

In simple terms bribery is the giving or accepting of a gratification by a public servant in return for doing or refraining from doing ordinary government business.[13] In the aftermath of the Second World War due to the scarcity of most commodities, the government was required to bring in price controls and regulations for the commodities. As a result, public servants in charge of issuing permits and those responsible for enforcing regulations wielded great power, which created opportunities for bribery. At the same time, elected representatives who were responsible for appointments and involved in other decision making processes too were exposed to opportunities of bribery.

Therefore, the **Bribery Act No. 11 of 1954** was introduced to respond to allegations of bribery against public servants including members of parliament, judicial officers, and the police.[14] The Bribery Act sought to criminalize all forms of bribery within the public sector. Sections 14 to23[15]

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13 Black's Law Dictionary defines 'bribery' as the offering, giving, receiving, or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty.

14 See Section 90 of the Bribery Act No. 11 of 1954 for the definition of Bribery.

15 Section 14- Bribery of judicial officers and Members of Parliament, Section 15- Acceptance of gratification by Senators and Members of Parliament for interviewing public servants, Section 16-Bribery of police officers, peace officers and other public servants, Section 17-Bribery for giving assistance or using influence in regard to contracts, Section 18- Bribery for procuring withdrawal of tenders, Section 19- Bribery in respect of Government business, Section 20- Bribery in connection with payment of claims, appointments, employments, grants, leases, and other benefits, Section 21- Bribery of public servants by persons having dealings with the Government, Section 22- Bribery of member of local authority, or of scheduled institution, or of governing body of scheduled institution, and bribery

of the Bribery Act contain the forms of bribery that are prohibited by law. While private sector bribery[16] is not generally criminalized, a deviation is made in Section 20[17] which criminalizes the conduct of even private persons who may accept a bribe in order to secure services from the government. This provision impacts the conduct of the private sector which depend and benefit from public services belonging to the State and therefore to the people.[18]

As time went by, shrewd public servants found ways of concealing the illicit wealth accumulated through bribery and devised other means of evading detection. Such illicitly gained assets were sometimes converted into other forms of assets. As a response to this, the legislature introduced a presumption by way of Section 23A to the Bribery Act.[19] The presumption is that any unexplainable wealth in the possession of a public servant is deemed to have been acquired by way of bribery.

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of officer or employee of local authority or of such institution, and Section 23- Use of threats or fraud to influence vote of member of local authority, or of scheduled institution, or of governing body of scheduled institution.

16 Private sector bribery is private-to-private or commercial bribery. Black's law dictionary defines commercial bribery as "the corrupt dealing with the agents or employees of prospective buyers in order to secure an advantage over business competitors". The transactions therefore transpire wholly within the private sector, often with no involvement of the government or public sector. Jurisdictions have adopted different approaches to the offence of private sector bribery or corporate bribery. In certain jurisdictions the offence binds both the individual and the company he/she represents, unless the company can prove that it has adequate preventive procedures in place to dissuade persons from engaging in such conduct. In other jurisdictions (eg.India) the offence is committed vis-a-vis public officials by employees/agents of commercial organizations. However, it carries both personal liability and corporate liability.

17 Section 20 of the Bribery Act reads "A person-

(a) who offers any gratification to any person as an inducement or a reward for-

(i) his procuring from the Government the payment of the whole or a part of any claim, or

(ii) his procuring or furthering the appointment of the first-mentioned person or of any other person to any office, or

(iii) his preventing the appointment of any other person to any office, or

(iv) his procuring, or furthering the securing of, any employment for the first-mentioned person or for any other person in any department, office or establishment of the Government, or

(v) his preventing the securing of any employment for any other person in any department, office or establishment of the Government, or

(vi) his procuring, or furthering the securing of, any grant, lease or other benefit from the Government for the first-mentioned person or for any other person, or

(vii) his preventing the securing of any such grant, lease or benefit for any other person, or

(b) who solicits or accepts any gratification as an inducement or a reward for his doing any of the acts specified in sub-paragraphs (i), (ii), (III), (iv), (v), (vi) and (vii) of paragraph (a) of this section,

shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding five thousand rupees."

18 Private sector bribery undermines public trust, leading to companies incurring high costs, which harms the economy of the country, ultimately burdening the tax-payer.

19 Bribery (Amendment) Act No. 40 of 1958

With the introduction of the open economy in the 1970s, Sri Lanka saw the growth of an extremely powerful public service, far surpassing that of the colonial times. Due to the many commercial and development activities, the open economy paved way for many avenues to the public service to engage in bribery and illicit accumulation of wealth. Therefore, the **Declaration of Assets and Liabilities Law, No. 01 of 1975** was introduced to regulate the accumulation of wealth by public servants. This law was a useful investigative and a preventive tool to detect illicit accumulation of wealth. Firstly, it was introduced to assist in identifying unexplained additions of wealth thus making it a valuable investigative tool. Secondly, the necessity to declare all assets of a person morally compels the person to refrain from amassing wealth through dishonest means, therefore acting as an effective preventive tool.

As time went by, it appeared that some public servants did not engage in bribery or illicit accumulation of wealth. However, they still abused their office or functions in order to gain benefits from it for themselves or for others or to cause a loss to the government. This conduct was not captured within any of the Provisions of the Bribery Act, making it difficult to hold these persons responsible for their actions. As a result, the offence of Corruption[20] was introduced as an amendment to the Bribery Act in 1994. The offence of Corruption entails the abuse of functions or office with a criminal intent. The intent is to either benefit themselves or others or to cause a loss to the Government. While Corruption is synonymous with bribery in other countries and is used in its generic sense to capture all bribery offences including embezzlement, misappropriation etc, Sri Lanka makes a legal distinction between corruption and bribery. The ingredients of the offence of corruption in Sri Lanka are captured in other offences in comparative jurisdictions.

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[20] Section 70 of the Bribery Act

Anti-corruption Approaches

Different countries around the world use diverse approaches to fight corruption. While, in the early days stringent **law enforcement** was the preferred approach to corruption, it was found to be costlier than other approaches. It was also a time consuming process with disheartening results due to the complex nature of the offences and the ingenuity of offenders who did everything within their power to evade authorities. Even when they were apprehended, evidence was scarce. Also, because the law enforcement approach is based on the theories of retribution[21] and deterrence[22], the burden of proof was high. Guilt was required to be proved beyond a reasonable doubt. The strict law enforcement approach sometimes combines detection, investigation and prosecution in one body such as CIABOC in Sri Lanka and the Permanent Commission against Corruption in Malta. In other instances, it has a separate detection and investigation body while the prosecutions are conducted by the public prosecutor. An example for this model is the Department of Internal Investigations in Germany.

However, due to the inherent challenges in a strict law enforcement approach, in 1950s, when Singapore established the Corrupt Practices Investigations Bureau (CPIB), it avoided introducing law enforcement as the sole method of fighting corruption. Following the footsteps of Singapore, Hong Kong too shunned from the exclusively law enforcement model and incorporated elements of **prevention**[23] and **value-based education**[24] in to their anti-corruption law.[25] The Hong Kong model was closely followed by Malaysia, Mauritius, and recently Bhutan, in establishing their anti-corruption regimes.[26]

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21 The theory of retribution requires the wrongdoer to pay back or suffer by way of retaliation even if no benefit accrues to the victim.

22 The objective of deterrence is to prevent future crimes from occurring.

23 The role of preventive measures is to assess the risks of corruption and minimize or eliminate the opportunities for corruption

24 Value-Based Education is the process by which a person develops positive human values.

25 See Hong Kong Independent Commission Against Corruption Ordinance of 1974

26 See Malaysian Anti-Corruption Commission Act 2009 Act 694 and Anti-Corruption Act of Bhutan 2011

These jurisdictions approach corruption from the punitive angle as well as the preventive angle. In addition to law investigations and prosecutions, they also coordinate anti-corruption strategies, assess corruption risks, assist in the development of integrity plans for public and private institutions, conduct awareness raising and education, advise government institutions on compliance with anti-corruption standards, and review laws for compliance with anti-corruption norms in order to ensure a comprehensive corruption eradication strategy. While in some of these jurisdictions prosecutions may remain separate from the main anti-corruption body such as in Singapore, Malaysia, Bhutan, and Hong Kong, some other jurisdictions such as the Corruption Eradication Commission (KPK) in Indonesia conduct its own prosecutions.

The culmination of these individual efforts was the adoption of the United Nations Convention against Corruption[27] (UNCAC) in 2003. UNCAC was adopted in recognition of the importance of a global response to fight corruption in order to establish a corruption free world. Sri Lanka became a party to UNCAC in 2004 and hence is bound to honour the obligations incurred under UNCAC.[28] This Convention is the only legally binding multilateral treaty on anti-corruption. The global community came together to deliberate best practices adopted by different jurisdictions in their responses to overcome challenges posed by corruption. As a result, the drafters incorporated preventive[29] as well as punitive (law enforcement)[30] measures within the Convention. At the same time, recognizing that the effects of corruption are not confined to one jurisdiction but has cross-border ramifications, UNCAC also contains provisions on international cooperation[31] and on the return of proceeds of crime[32] which are in foreign jurisdictions.[33] The

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27 UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, United Nations, *Treaty Series*, vol. 2349, p. 41; Doc. A/58/422

28 Sri Lanka also completed the first and second review cycles of UNCAC implementation in 2016 and 2018 respectively. CIABOC has implemented many of the recommendations made therein and currently is in the process of addressing the remainder of recommendations.

29 Articles 5-12 of UNCAC

30 Articles 15-42 of UNCAC

31 Articles 43-50 of UNCAC

32 Proceeds of crime are the financial or other assets which are received as a result of criminal conduct.

33 Articles 51-59 of UNCAC

Convention also emphasizes the importance of the participation of citizens and civil society organizations in anti-corruption efforts.[34]

Challenges inherent in the law enforcement model- The Sri Lankan experience

One of the foremost fallacies of the fight against corruption is the undue reliance placed on law enforcement to address corruption effectively. This is true for Sri Lanka as well. This over-reliance often yields unsatisfactory results. It is short-lived and provides only a momentary distraction to the public. For law enforcement to be effective, detection of crime is important. At the same time, timely and effective investigations and expeditious and rigorous prosecutions are mandatory in order for the impact of the Law Enforcement approach to be successful. Further, swift punishment is necessary to be meted out to the offenders in order to deter them from committing future offences.

Detection of crimes frequently occurs as a result of victims of crime or their family or friends alerting law enforcement authorities of the commission of an offence. Unfortunately, unlike in most traditional criminal offences such as murder or rape, where a clearly disadvantaged or aggrieved victim would come forth, in offences relating to bribery and corruption, both parties are often beneficiaries. This mutually beneficial relationship effectively brings investigations to a grinding halt as both parties go to excessive lengths to conceal or destroy evidence.

Timely and effective investigations require the services of independent investigators who possess expertise beyond traditional law enforcement training, with specialized knowledge and expertise in accounting, forensic auditing, criminology etc. in order to

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34 Article 13 of UNCAC

conduct complex and challenging investigations. It is also necessary to employ cutting edge technology for evidence gathering and to ensure investigators possess up to date knowledge and skills necessary to meet the demands of investigations and adequate financial resources to sustain these services.

Also, for investigations to be successful, accurate evidence is important. Eye-witnesses, rarely come forward in bribery or corruption offences. Therefore, often the investigators and prosecutors have to rely on the giver of the gratification (who is often the complainant) as a witness and on documentary evidence. In instances where there is no practice of maintaining electronic records, documentary evidence could be destroyed as a result of the passage of time. Documents tend to be misplaced with change of regimes or when officers in charge of such documents vacate office. Further, Sri Lanka does not have procedures or systems in place to clearly identify the whereabouts of documentation.

Expeditious and rigorous prosecutions are dependent on a criminal justice system which does not have law delays. At the same time, it is reliant on an independent judiciary, highly qualified prosecutors well versed in the subject matter, and a substantive body of jurisprudence to aid the bench and the bar in understanding and applying the law accurately.

A successful prosecution often hinges on sufficient and solid evidence. However, as stated above, evidence in bribery or corruption related offences are not easily obtainable. While CIABOC is often queried on its low numbers of successful prosecutions in high level bribery and corruption cases, it has often had to rely on foreign complainants who come from high value systems to assist the Commission in detecting and apprehending offenders.

As such, the law enforcement approach will not be successful unless other approaches are simultaneously used in a comprehensive anti-corruption response.

Where does Sri Lanka stand?

Unfortunately, Sri Lanka continues to adhere to only the law enforcement model of combating corruption, despite having proved itself to be a failed model when used exclusively. Several issues are highlighted in relation to the anti-corruption practices of Sri Lanka:

- *The need for law reform*

Since the introduction of the CIABOC Act in 1994, none of the anti-corruption legislation has undergone significant amendments to keep abreast of new developments both in the domestic law and practice. While other jurisdictions in the world have introduced new offences in relation to bribery and corruption such as private sector bribery[35], bribery of foreign public officials[36], non-declaration of conflicts of interest[37], trading in influence[38] etc. to give effect to UNCAC obligations as well as to effectively respond to the changing landscape of bribery and corruption, Sri Lanka has not done the same.

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[35] Article 21 of UNCAC recommends state parties to criminalize Private sector bribery. Private sector bribery is defined as "(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;" when committed intentionally in the course of economic, financial or commercial activities.

[36] Article 16 of UNCAC defines Bribery of foreign public officials and officials of public international organizations as the intentional "1….promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

[2]. …the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties"

[37] See Note 49

[38] Article 18 of UNCAC defines Trading in Influence as "(a) Promising, offering, or giving a public official an undue advantage in exchange for that person abusing his or her influence with an administration, public authority or State authority in order to gain an advantage for the instigator;

(b) Solicitation or acceptance by a public official, of an undue advantage in exchange for that official abusing his or her influence in order to obtain an undue advantage from an administration, public authority, or State authority".

- *Necessity for Institutional Strengthening*

CIABOC was established under Act No.19 of 1994 as a permanent independent Commission to replace the office of the Bribery Commissioner (which was established in 1958). The Bribery Commissioner's Department only conducted investigations. The investigation reports were then forwarded to the Attorney General to decide, on an evaluation of the material available, and to initiate prosecutions if necessary. With the advent of the Commission, this practice completely changed as the Commission was given prosecutorial power.[39] This was a unique mandate where the Commission is one amongst the few anti-corruption agencies in the world that prosecutes offenders in addition to carrying out investigations into alleged offences. However, the Commission grapples with several issues:

Firstly, the Commission does not have autonomy over its finances or human resources as required by Articles 6[40] and 36[41] of UNCAC to ensure an efficient, independent, and effective anti-corruption agency.[42] Resource constraints due to relying on the national budget for financial allocations,[43] and having to rely on the recruitment criteria set out by the public administration, CIABOC grapples with its inability to attract qualified prosecutors and specialized investigators as much as it requires to effectively carry out its mandate.

The remuneration packages offered to prosecutors of CIABOC fall behind in the competition with those offered by the Attorney General's Department or the Legal Draftsman's Department,

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39 However, Section 13 of the CIABOC Act authorizes any Attorney-at-Law specially authorized by the Commission to conduct the prosecution at a trial of an offence held in a High Court on an indictment signed by the Director-General.

40 Article 6 requires state parties to establish preventive anti-corruption bodies with the necessary independence "to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided"

41 Article 36 requires state parties to "ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks."

42 See The Jakarta Statement on Principles for Anti-Corruption Agencies 2012 which contains 16 recommendations to ensure the independence and effectiveness of Anti-Corruption Agencies.

43 Sri Lanka allocates only 0.14% of the total national budget annually for CIABOC in contrast to 0.82% in Hong Kong, 0.54% in Malaysia, and 0.29% in Bhutan towards their respective anti-corruption agencies.

making CIABOC a less attractive option. It is noteworthy that CIABOC was on par with the Attorney General's Department when it was first established in 1994. However, at present, the salaries of the Commission are one third (1/3) of the remuneration drawn by the officers of the Attorney General's Department. Therefore, there is urgency to the call to strengthen the Commission to respond effectively to complaints of bribery or corruption, which has been overlooked by successive governments. This begs the important question of whether there exists a genuine political will to strengthen the anti-corruption regime in Sri Lanka?

Secondly, in order to ensure effective and timely investigations, the Commission requires the services of an adequate number of investigators who possess expertise beyond traditional law enforcement training, but reaching areas such as human behavior, information technology, law, forensic auditing and other interdisciplinary expertise in order to conduct complex and challenging investigations. At present, the investigators of the Commission are deputed from the Police with only regular law enforcement training. This practice is in stark contrast to that of Hong Kong, Malaysia, or Singapore which do not have police officers as investigators. Their investigators are persons with expertise in different fields such as auditing, engineering, criminology etc, recruited directly to the antic-corruption agency and are independent to the police force.

Additionally, CIABOC has only 200 investigators to cater to a population of 22 million. This ratio is to be compared with the 1400 officers of the Hong Kong Independent Commission Against Corruption (ICAC)[44] to a population of approximately 7.3 million,[45] or with the 60 investigators[46] of the Anti-Corruption Commission of Bhutan to a population of 750,000.[47]

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44 ICAC, Organization Structure, available at <https://www.icac.org.hk/en/about/struct/index.html>

45 Hong Kong, the Facts, available at <https://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf>

46 ACC Bhutan, ACC Staffing Pattern & Staff Strength, available at < https://www.acc.org.bt/sites/default/files/ApprovedACCStaffing.pdf>

47 BBC, Bhutan country profile, available at <https://www.bbc.com/news/world-south-asia-12480707>

Thirdly, it is also necessary to employ cutting edge technology for evidence gathering and to ensure investigators possess up to date knowledge and skills necessary to meet the demands of investigations. All of the foregoing requires phenomenal financial resources, the lack of which challenges the efficacy of the Commission and the timeliness of its response. CIABOC faces many difficulties in obtaining the requisite financial resources. I have personally had to make many requests for adequate finances, which often are not accommodated.

- *Law Delays*

Expeditious and rigorous prosecutions have also been problematic in the Sri Lankan context. Law delays are a perennial issue that plagues the criminal justice system in Sri Lanka, leading to inordinate delays in prosecutions. These delays have created a sense of distrust in the minds of victims of justice not being served. It therefore discourages victims from seeking justice. As you well know, counsel and instructing attorneys too play a role in unnecessarily prolonged prosecutions.

- *Dearth of Jurisprudence*

A specifically important consideration for the legal profession in regard to the quality of the prosecution is the scarcity of legal literature and a body of rich jurisprudence on anti-corruption. The law on anti-corruption in Sri Lanka has not undergone significant development in the recent past. Until recently, even the most serious Corruption offence related proceedings were instituted in the Magistrates Court,[48] which did not have the time or the opportunity to go into the complexities of such white collar crimes. All significant jurisprudence pertaining to the offence of corruption in Sri Lanka has been with regard to the maintainability of the action on technical grounds such as whether all 3 Commissioners have signed the direction to initiate prosecutions?, or whether the particular court has the jurisdiction to entertain the action?, rather than on substantive merits of the matter. This is not a surprise as Sri Lanka is an extremely

[48] See Bribery (Amendment) Act No.22 of 2018

litigious country. However, it has led to technicalities trumping the spirit of the law. The only important judgments regarding the misuse of public property such as the judgments in **Bulankulama v. Secretary, Ministry of Industrial Development** [49] (Eppawala Case), **Sugathapala Mendis and another v. Chandrika Bandaranaike Kumarathunga and others** (Water's Edge Case)[50], and **Vasudeva Nanayakkara v. Choksy and others** (John Keells Case)[51] were cases agitated through the fundamental rights jurisdiction of the Supreme Court rather than invoking the criminal jurisdiction on bribery and corruption.[52]

A driving factor behind this phenomenon is the lack of anti-corruption legal education in the country as well as limited access to electronically available legal material. No specific or comprehensive modules on anti-corruption are offered by public higher education institutions in Sri Lanka, i.e. the law faculties, departments of law, and the Sri Lanka Law College unlike in countries such as the UK, the USA, Hong Kong, Singapore, Australia etc. In fact, I was surprised to find not a single article on anti-corruption in the Judge's Journal of Sri Lanka or the BASL Law Journal in the last decade. This dearth of knowledge has resulted in a breed of legal professionals not in a position to assist the bench to make a significant contribution to jurisprudence and has left a significant gap in qualitative anti-corruption research in the country. Jurisdictions such as Hong Kong have ensured a robust legal system not only through legal education but also through the judiciary. Hong Kong invites eminent foreign judges from common law jurisdictions such as Canada, the United Kingdom, Australia and New Zealand to sit in the Court of Final Appeal as non-permanent judges whose experiences and knowledge enrich Hong Kong's jurisprudence. The Malaysian Anti-Corruption Academy is renowned as a

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49 (2000) 3 SLR 243
50 (2008) 1 SLR 339
51 (2008) 1 SLR 134
52 The infringement of a Fundamental Right does not attract criminal sanctions. In criminal proceedings, the ingredients of the offence of corruption and bribery need to be proved beyond a reasonable doubt and the alleged perpetrator needs to be identified. A Fundamental Rights application is decided on affidavit evidence while the culpability of the respondent/s is decided on a balance of probabilities. Often, the actual offender will not be penalized as the institution or the head of the institution is held responsible for the infringement.

hub for anti-corruption training, not only in Malaysia but also in the region. It was established to share Malaysia's expertise in eradicating corruption with others.

Anti-corruption legal education and electronically accessible knowledge bases would provide enhanced understanding of the theoretical underpinnings of anti-corruption. Such understanding will assist in increased application of substantive legal norms in prosecutions and the development of jurisprudence. It will also enable the accumulation of a repository of knowledge/research in relation to anti-corruption. If I may share a personal anecdote on the alarming proportions of this issue, when CIABOC was searching for legal researchers to assist it in the ambitious law reform project it undertook in 2017, to the dismay of the Commission it could not find a single junior lawyer competent in anti-corruption research. I could not but compare this scenario with that of the Hong Kong Independent Commission Against Corruption (ICAC) which has its own research arm staffed with qualified legal researchers or the research arm of the Department of Justice in Canada which has dedicated lawyers to carry out research on areas of interest for Canada.

- *Absence of Corruption Prevention*

Another, most glaring omissions in addressing corruption in Sri Lanka has been the near absence of preventive measures which has already gained traction in other parts of the world with more robust anti-corruption regimes. Prevention encompasses not only value-based education, but also the introduction of systemic as well as systematic changes to governance and administrative structures with a view to minimize if not eliminate the potential for corruption. Prevention is the forerunner of investigations and prosecutions, which, if effective, often dispenses of the need for investigations. Prevention is a sustainable alternative to the colonial adversarial heritage of our country with its strong emphasis on penal sanctions as a means of effective deterrence, which has proved to be costlier than ever foreseen.

- *Need for Value-Based Education*

A sub-set of 'Prevention', value-based education plays a significant role in corruption prevention. Value-Based Education could take the form of formal education as well as informal. The values and learnt from one's elders or from the family are informal methods of value-based education. It instils in the citizenry from younger days the notion that the misuse of state assets or taking of anything that does not rightfully belong to oneself is wrong. Formal value-based education is imparted in schools and universities. Subjects such as Civics and Ethics offered by schools and universities are examples of formal value-based education. Value-Based Education is expected to cultivate positive values such as honesty, mutual respect, non-consumerist lifestyles, and self-discipline. These are the forerunners of sustainable development. Unfortunately, at present, value-based education is not part of the primary or secondary level education in Sri Lanka. Nor is there any concerted effort to raise awareness of such values in all segments of society.

- *Need for vigorous Civic Engagement*

The fight against bribery and corruption must reach beyond law and policy and thus requires vigorous civic engagement. For example, Hong Kong, which hails as one of the most developed economies in the world, established ICAC in response to the public outcry that arose against the Peter Godber bribery scandal. The Chief Superintendent of the Royal Hong Kong Police Force when Hong Kong was still a British colony, Godber was a British National who fled to Britain to escape investigations into his unexplained wealth. This escape led to a large public outcry over the integrity of investigations of the police into their own conduct and called for reforms in the Government's anti-corruption efforts. Godber was later extradited to Hong Kong and tried and sentenced for bribery. This public outcry led to Governor Sir Murray MacLehose establishing the ICAC in 1974. Such civic engagement could only be expected through an ideological change within the citizenry impacted by no small measure through value-based education.

Sri Lanka, the way forward- A multi-pronged approach

Taking note of the many challenges discussed above, CIABOC has forged ahead with a multi-pronged approach to combat corruption.

- **National Action Plan for Combatting Bribery and Corruption in Sri Lanka 2019 – 2023 (NAP)[53]**

The most significant step taken by the Commission is developing the National Action Plan for Combatting Bribery and Corruption in Sri Lanka 2019 – 2023 (NAP) subsequent to lengthy consultations, which was ceremonially launched in March 2019. The launch of the NAP was in recognition of Sri Lanka's obligations under UNCAC, which was constitutionally recognized in the 19th Amendment to the Constitution. Furthermore, the compulsory recommendations of UNCAC and Sri Lanka's commitments as per the Open Government Partnership warranted the formulation of a comprehensive plan to combat bribery and corruption in Sri Lanka. The NAP integrates a multi-pronged strategy, premised on the four pillars of Prevention, Value Based Education, Institutional Strengthening, and Law and Policy reforms as the foundation of the country's anti-corruption plan over the next five-year period, i.e. from 2019 to 2023.

In addition to the NAP, four (04) Handbooks too were published, exploring certain identified areas which would shape the course of the drive against bribery and corruption in the nation. The 04 Handbooks are:

i. Draft proposal on Gift Rules[54]

[53] See https://ciaboc.gov.lk/media-centre/resources/national-action-plan-2019-2023 for the full version of the NAP

[54] Sets out guidelines in relation to the instances in which gifts are allowed to be accepted and instances in which gifts are not allowed to be accepted by public officials.

ii. Draft proposal on Conflict of Interest Rules[55]

iii. Integrity Handbook for State Officials

iv. Proposed amendments to laws related to bribery, declaration of assets and liabilities, CIABOC, regulation of election campaign finances, and whistle-blower protection.

- **Comprehensive law reform**

, Since the beginning of 2018, CIABOC has been steadfastly engaged in effecting comprehensive amendments to the laws relating to bribery and corruption. It has also supported related initiatives of other institutions in order to increase anti-corruption efforts and expedite prosecutions relating to bribery or corruption in Sri Lanka.

Commissions of Inquiry are a unique fact-finding process in Sri Lanka established by presidential warrant.[56] However, despite recording evidence of witnesses, these Commissions are not investigative or judicial bodies. Previously, CIABOC was required to record evidence and statements of witnesses afresh before instituting proceedings in a matter despite the fact that a Commission of inquiry may have already recorded such evidence. Therefore, the Commissions of Inquiry (Amendment) Act, No. 3 of 2019 was introduced which enables CIABOC to initiate proceedings based on material which has

[55] Conflict of interest is premised on the principle that one's private interests should not override one's official interests. A Conflict of interest occurs when a public officer's ability to make an impartial decision with regard to his/her public responsibility is affected by his/her personal interests. These guidelines aim to raise awareness on taking necessary precautionary steps to prevent conflicts of interests.

[56] Commissions of Inquiry Act No. 17 of 1948

already been obtained by a Commission of Inquiry, without recording evidence afresh. This amendment improved the efficacy and the timelines of the prosecutions.

Further, the strange legal provision which allowed for proceedings in even the most serious of corruption offences to be instituted in the Magistrates Court while lesser bribery offences were prosecuted in the High Court was amended, by way of the Bribery (Amendment) Act, No. 22 of 2018 to allow proceedings relating to the offence of Corruption to be instituted in the High Court in addition to the Magistrates Court.

While this measure gave due regard to the severity of the offences, it led to the high Court being overwhelmed with cases. Therefore, Judicature (Amendment) Act, No. 9 of 2018 established permanent High Courts-at-Bar to try the most serious of financial and economic offences including offences relating to bribery and corruption as well as money laundering in order to expedite the process of criminal prosecutions and ensure a timely criminal justice response.

CIABOC has also initiated introducing fresh legislation on anti-corruption. The proposed draft Composite Anti-Corruption Act is an amalgam of the content of the Bribery Act No. 11 of 1954, Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, and the Declaration of Assets and Liabilities Law, No. 01 of 1975. However, key changes have been proposed to the above legislation and included in the Composite Act to strengthen the anti-corruption regime and to ensure the proposed legislation is in line with international standards. In keeping with international obligations such as UNCAC, the Open Government Partnership (OGP), and the GSP+ trade concessions, and the

Jakarta Statement on Principles for Anti-Corruption Agencies[57] the draft Composite Act contains extremely progressive provisions. Some of the key provisions are:

- Expanding the mandate of CIABOC to include prevention measures;
- Strengthening investigations[58] and prosecution powers[59];
- Powers of recruitment without relying on the criteria laid down by the public Service;
- To receive finances directly from the Parliament
- Introduction of new offences such as private sector bribery, bribery of foreign officials, trading in influence, and conflicts of interest, offences relating to sporting events, money-laundering, and procedural offences with appropriate sanctions;
- Whistle-blower[60] and Witness Protection[61];
- Enhancing the existing asset declaration regime including the introduction of an Electronic Assets Declaration system and the setting up of a central agency for the collection and verification of asset declarations

- **Strengthening investigations and prosecutions**

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57 See Note 36. Adopted by experts and practitioners at a meeting in Jakarta, Indonesia in 2012, the Jakarta Principles aim to strengthen the effectiveness and independence of anti-corruption authorities around the world. CIABOC was invited to co-host the Global Expert Group Meeting (EGM) on the Jakarta Principles in July 2018. The EGM was convened to develop a "Commentary on the Jakarta Statement on Principles for Anti-Corruption Agencies". The Commentary, which will be known as the Colombo Commentary to the Jakarta Principles (COCO) has been finalized by the UNODC and will be launched in December 2019 at the Eighth session of the Conference of the States Parties to UNCAC in Abu Dhabi. It provides guidance and clarity on the Jakarta Principles as requested by state parties to UNCAC in order to strengthen the effectiveness and independence of national anti-corruption authorities.

58 For instance, obtaining the assistance of Experts, taking of finger impressions, photographs, non-intimate samples, prohibition of dealing with property outside Sri Lanka, employing special investigation techniques, obtaining information from service providers, protection and preservation of information, joint investigations, international cooperation.

59 For instance, entering into Deferred Prosecution Agreements(DPA) with the accused

60 Whistleblowers are persons reporting on corruption within their organization. Protection is proposed to be provided for both private as well as public sector whistle-blowers. Whistle-blowers are to be protected from disclosure of identity, civil or criminal liability, as well as disciplinary action within the organization and adverse conditions of employment that may be imposed on them.

61 Witnesses are interpreted similarly to the definition contained in the Assistance to and protection of victims of crime and witnesses Act. Such persons will be protected from civil or criminal liability, physical harm, harassment, threats to life or liberty etc.

As stated in the preceding section, a strong investigative and prosecutorial regime is indispensable to effectively fight corruption. Fully recognizing this reality, CIABOC is in the last stages of recruiting 200 graduate independent investigators to the Commission for the first time in its history. These investigators possess expertise in accountancy, auditing and finance, criminology, engineering, law etc. It is expected that an investigations arm, independent of regular law enforcement personnel i.e. police investigators and staffed with investigators possessing expertise in different fields will optimize investigations leading to successful prosecutions.

The independence of the investigation branch of any anti-corruption agency is important as highlighted in the Report of Sir Alastair Blair-Kerr, Chairman of the Hong Kong Commission of Inquiry into Godber's escape. In his report he pointed out that;

> *"responsible bodies generally feel that the public will never be convinced that Government really intends to fight corruption unless the Anti-Corruption Office is separated from the Police...".*

At the same time, Article 36 of UNCAC requires member states to have separate agencies specialized in combating corruption through law enforcement and that these agencies should have necessary independence, resources, and training. In addition, fully recognizing the importance of information and communication technology in criminal investigations, the Commission is preparing to use latest technology in its investigations by employing electronic investigation tools and training for its investigators.

The Commission has also made representations to the highest levels of government to provide commensurate remuneration packages for prosecutors of the Commission in order to strengthen the prosecuting arm of the Commission. For comparison, in Fiji the prosecutors of the Fiji Independent Commission Against Corruption (FICAC) are remunerated at a higher rate than the prosecutors of the Office of the Director of Public

Prosecutions in Fiji. While, in Bhutan, the Anti-Corruption Commission does not have its own prosecutors, the other officers of the Commission as well as the prosecutors of the Public Prosecutor's Office receive salaries which are 25% higher than that of the public service. Singapore's meritocratic recruitment processes and commensurately higher remuneration has ensured efficient and knowledgeable public prosecutors. The rationale for competitive salaries for the officers of the anti-corruption agencies is to ensure the agencies are always staffed with highly sought-after personnel equipped to respond effectively in order to combat corruption.

- **Introducing and strengthening prevention mechanisms**

While a robust legal framework and rigorous law enforcement maybe the preferred methods of addressing corruption, Preventive measures go a long way in effectively uprooting corruption. Article 5 of UNCAC requires state parties to develop and implement effective and coordinated anti-corruption policies and practices while Article 6 requires state parties to ensure separate bodies with the necessary independence to function effective for prevention activities. At the same time, comparative experiences illustrate the indispensable need for formal prevention mechanisms within anti-corruption agencies. ICAC in Hong Kong, the Anti-Corruption Commission of Bhutan, and the Malaysian Anti-Corruption Commission have been structured to include formal prevention as well as community education units within their structures. These units ensure public institutions establish transparent and accountable procedures, assists in improving system controls and safeguards, monitors developments in the law, public policy, and government initiatives to advice their governments to comply with anti-corruption measures, and even provide free and confidential advice to private sector organizations on preventing corruption.

In this regard, as an initial step, CIABOC has established a formal prevention unit within its institutional structure and has recruited 50 prevention officers who will be appointed shortly. Their role is to guide and assist the integrity officers appointed to government institutions in terms of the NAP. The proposed prevention activities include educating the public on corruption risks, advising and assisting government departments on compliance including of public procurement and finance guidelines, reviewing legislation, and collecting and verifying declarations of assets.

- **Introducing value-based education and legal education on anti-corruption**

In recognition of the importance of value-based education and anti-corruption education in curbing corruption, CIABOC has conducted discussions with the National Institute of Education (NIE), public higher education institutions in Sri Lanka, and specifically public law schools in the country, outcome of which has been positive. As a result of a series of discussions held with the NIE, it has undertaken to include anti-corruption as a component of "good habits" in the school curriculum. I fervently hope that these measures will ensure that integrity is injected into the DNA of our younger generations.

Discussions with public higher education institutions including law schools highlighted several approaches in introducing anti-corruption education in to the curricular, such as: orientation programmes; undergraduate courses; post-graduate programmes; continuing professional education seminars, workshops and debates; intern and apprenticeships. Therefore, as a next step, CIABOC envisages providing technical expertise and other necessary assistance for higher education institutions and professional bodies in revamping and revising their curricula to include anti-corruption education employing one or more of these different approaches.

Conclusion

An effective anti-corruption response requires adopting a multi-pronged approach to anti-corruption. To date, Sri Lanka has only the law enforcement model of anti-corruption. Regrettably, we have failed to master even that. Fortunately, this is an era where the CIABOC is in a state of positive transformation and reformation. Therefore, I reiterate that all citizens, irrespective of age or profession, are necessarily obligated to fight corruption in order to establish a just and free society leading to a developed country. Young legal professionals are not mere spectators in these efforts. Their role is not merely to observe their seniors' presentations in court. A much larger role awaits them. These young lawyers may go on to become private sector executives, private practitioners, state prosecutors, and judicial officers. CIABOC has carved out a special role for those who will join the public sector. Public Sector institutions will henceforth have compliance officers to guide the integrity officers appointed in terms of the NAP. These compliance officers will play a vital role through the study of the processes within their institutions and making suggestions to the government to plug those loopholes. The professional competence of these officers will ensure they reach high offices in their careers.

As Lee Kuan Yew stated, it is up to us to clean our own house. As legal professionals these young lawyers are bound to encounter corruption in their daily lives. It may be in the court registry, amongst their colleagues, or even their clients. The most heinous act a lawyer could do is to turn a blind eye to these corrupt practices. They must be proactive. At the same time as they must not engage in these practices, they must not encourage corrupt practices. It is the duty of every young lawyer to be armed with relevant knowledge on anti-corruption, to equip themselves with adequate skills, to not ignore corruption they may become privy to, and to confront corruption

fearlessly. Therefore, I place especial emphasis on the obligation of young legal professionals to take this responsibility seriously. While it is easier to blame the politicians for the state of the country, the legal profession and the judiciary play a vital role in ensuring a corruption free society. If you ensure public assets are conserved for the generations to come and serve your country with passion and dedication, you will have the satisfaction of a noble professional.

THE "PUBLIC POLICY" EXCEPTION- TETHERING THE UNRULY HORSE OF ARBITRAL ENFORCEMENT

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Arbitration in the present era has emerged as a byword for the efficacious settlement of disputes. However, the transnational justice system created by arbitration is often incapacitated by the unruly horse famously known as the "public policy" exception. It has become very common, especially in Sri Lanka, for a party against whom an arbitral award is sought to be enforced, to often piggyback on 'public policy' to frustrate and delay the process of this otherwise efficacious dispute resolution mechanism.

In an age of globalization and where arbitration is increasingly becoming the preferred dispute resolution mechanism, proper fencing of the stables and tethering of this unruly horse is much needed. Legal practitioners who will be sitting astride the unruly horse must necessarily be aware of the parameters of this amorphous challenge to the enforcement of arbitral awards.

A. Birth of the Foal

The New York Convention[1] and Model Law[2] provide several grounds upon which the recognition and enforcement of an arbitral award may be refused. At the very outset, it is important to emphasize that the language used in the Convention is discretionary and not mandatory,

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Article V
[2] UNCITRAL Model Law on International Commercial Arbitration.

allowing courts to exercise discretion in refusing recognition and enforcement based on such exception. Furthermore, given the pro-enforcement nature of the Convention, it has been recognized that as far as the grounds for refusal of enforcement of the award are concerned, they are to be construed narrowly.[3]

The Convention and Model Law provide that a State may refuse to recognize and enforce an award if doing so would be contrary to the public policy of the State in which enforcement is sought.[4] However, the term 'public policy' has not been defined. Lack of definition of the term has led to inconsistency and uncertainty in its application.

Interestingly, another aspect of public policy has been envisaged by the Convention as well as our Act[5] which is whether the subject matter of the dispute is contrary to public policy (arbitrability).

It is in the light of these observations that this article will proceed to succinctly discuss the internationally accepted parameters of public policy exception in the sphere of arbitration.

B. What is public policy?

The absence of a uniform definition of 'public policy' is due to the fact that the wording of the New York Convention and many national legislation based thereupon, referring to the exception in relation to the public policy of 'the State'. As such, it may substantially vary from one jurisdiction to another. Therefore, national Courts have attempted to define 'public policy' to

[3] Albert Jan van den Berg, "*The New York Convention of 1958: An overview*" https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf
[4] Article V(2)(b) of the Convention and Article 36(1)(b)(ii) of the Model Law.
[5] Arbitration Act No. 11 of 1995, Section 4 and Section 34(1)(b)(i)

suit the legal system of each country. However, UNCITRAL in its guidelines on the Convention[6], has broadly defined 'public policy' as "*a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an Award and enforce it without abandoning the very fundaments on which it is based*."[7]

In Sri Lanka, the 'public policy' exception has been recognized to cover the enforcement of an award in breach of fundamental principles of law and justice in substantive as well as procedural aspects.[8] However, it is also held that not every error of law but only a violation of a fundamental principle of law applicable in Sri Lanka that would be held to be contrary to public policy.[9] Despite the absence of a universally accepted definition, almost all jurisdictions have held that the public policy exception shall be applied with great caution and recourse thereto shall only be made in exceptional circumstances.[10] Nevertheless, it must be appreciated that a national court, as one of the integral branches of the Government would be hesitant to enforce an Award which is contrary to the legislative policies espoused by the legislature in the form of laws and regulations. Due to the dearth of decided cases on the subject in Sri Lanka, reference shall be made to the respective statutes and judgments of other jurisdictions to recognize the parameters of public policy. Upon a careful perusal of statutes and decided cases on public policy in arbitration, it can be observed that violations of public policy have been identified at different stages of a contractual relationship.

This Article will now deal with each such category and consider the various jurisprudence in this regard, including that of Sri Lanka, and consider the instances where such violations have been held to be appropriate and sufficient to set aside or refuse enforcement of an arbitral award.

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[6] United Nations, "*UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*" 2016 Edition https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf
[7] Ibid at page 24
[8] *Light Weight Body Armour Ltd*. vs. *Sri Lanka Army* [2007] 1 SLR 411 at p. 419.
[9] *Kiran Atapattu* vs. *Janashakthi General Insurance Co. Ltd.,* SC Appeal 30-31/2005 (Unreported).
[10] Sri Lanka see *Kiran Atapattu* vs. *Janashakthi General Insurance Co. Ltd*., SC Appeal 30-31/2005; England *Krombach* vs. *Bamberski* [2001] All ER (EC) 584 and India see *Penn Racquet Sports* vs. Mayor International Ltd Ex. P. 386/08 & EA Nos 451/2010, 704-705/2009 & 77/2010

B.1 Contracts furthering an Illegal Purpose

One of the most common substantive public policy violations which transcends national boundaries and result in the refusal of recognition and enforcement of an arbitral award is an award giving effect to an illegal or criminal activity, such as contracts for murder, terrorism, drug trafficking, prostitution etc. Where a Respondent adduces *prima facie* evidence that the award was based on an illegal contract, enforcing such an award would undoubtedly contravene public policy of the enforcing state, provided such illegality is recognized by the enforcing state.[11]

The rationale being that a party cannot by procuring an arbitral award, conceal that they are seeking to enforce an illegal contract, as public policy will not allow it.[12] If such restrictions are not deployed, arbitration could be misused to enforce contracts based on egregious illegality. However, it must be emphasized that enforcement is governed by the public policy of the *lex fori*. Accordingly, an award refused to be enforced in one jurisdiction for contravening public policy may be enforced in another.

B.2 Allegations of Bribery and Corruption in procuring a Contract

Allegations of bribery and corruption have been at the heart of several international arbitrations especially in the procurement of public contracts. In England, a few landmark cases have been decided on the question whether an award to enforce a contract which is not legal would be refused enforcement, based on an allegation of fraud or corruption in procuring it. In deciding the law in this regard, English courts have drawn a distinction between the enforcement of contracts to commit fraud or bribery vis-à-vis contracts which are procured by bribery.[13]

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[11] See *Lemenda Trading Co. Ltd.* vs. *African Middle East Petroleum Ltd.* [1986] QB 448, *Kaufman* vs. *Gerson* [1904] 1 KB 591.
[12] *Soleimany* vs. *Soleimany* [1999] Q.B. 785 at 800.
[13] *Honeywell International Middle East Ltd.* vs. *Meydan Group LLC* [2014] 2 Lloyd's Law Rep 133.

It is indisputable that corruption and fraud are universally denounced. However, English courts would not necessarily refuse enforcement on an allegation of bribery or corruption as the "*public policy of sustaining the finality of arbitral awards outweighs the public policy in discouraging corruption*."[14] It is explained that "*although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking.*"[15] It denotes that different weightage is accorded to various public policy issues, determinable and peculiar to the facts of each case.

Thus, English courts will not refuse to enforce an award giving effect to a contract procured by bribery.[16]

It has been established that, introducing a concept of tainting of an otherwise legal contract would create uncertainty, and in any event wholly undermines party autonomy. However, parties who have committed a criminal act could be prosecuted independent of the agreement.[17] Accordingly, a mere allegation or innuendos of corruption or bribery would not suffice to sustain a refusal of enforcement. The cardinal rule is that such allegations must be proven.

Interestingly, however, English case law demonstrates that even a finding of corruption in the procurement of a contract is in itself an insufficient ground to sustain a challenge to an award based thereupon. Accordingly, in England and most other pro-arbitration jurisdictions, predominant weightage is given to the public policy of sustaining the agreement of the parties to arbitrate their disputes. A similar approach is identified in Sri Lanka, where it was held that great caution should be exercised when applying Section 34(1)(b)(ii), particularly in the context that an arbitral award is the end result of arbitration proceedings, which give effect to the intention of the parties to a dispute to refer their dispute for arbitration.[18]

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[14] *Westacre Investment Inc*. vs. *Jugoimport-SPDR Ltd.* (at first instance) [1998] 3 WLR 770
[15] Ibid at 798-800.
[16] See *Sinocore International Co Ltd* vs. *RBRG Trading* (UK) Ltd, [2017] EWHC 251 (Comm)
[17] See *National Iranian Oil Company* vs. *Crescent Petroleum Company International & Crescent Gas* [2016] EWHC 1900 (Comm) and *R* vs. *V* [2008] EWHC 1531 (Comm).
[18] See *Kiran Atapattu* vs. *Janashakthi General Insurance Co. Ltd.,* SC Appeal 30-31/2005 (Unreported).

However, it is important to note that allegations of bribery and corruption must necessarily be proven in the arbitral proceedings. No further evidence shall be permitted to be adduced at the stage of enforcement. It is a well-established principle of law in Sri Lanka that Court "*cannot sit in appeal over the conclusions of the Arbitral Tribunal by scrutinizing and reappreciating the evidence considered by the Arbitral Tribunal… since the arbitral tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties - the only issue that needs consideration is whether the purported fundamental flaws of the award in question would tantamount to a violation of public policy*."[19] Additional or fresh evidence will only be permissible in extremely exceptional circumstances, where it can be demonstrated to the satisfaction of Court that such evidence was unavailable at the time of the first hearing, and that such new evidence is of such nature to entirely change the aspect of the case.[20]

B.3 Performance of a Contract

When considering the application of the public policy exception, the public policy of several jurisdictions become significant, such as the place of entering into the contract, place of performance and place of enforcement.

For example, a contract for the purchase of personal influence, though unenforceable for reasons of domestic public policy, if performed in Sri Lanka, would not fall into the class of contracts whose enforcement was contrary to public policy irrespective of their proper law and place of performance. Thus, where such a contract was to be performed abroad, it would be enforced in Sri Lanka unless it also was contrary to the domestic public policy of the country of enforcement.

Similarly, English courts recognized that different courts and tribunals might take different views as to the enforceability of contracts depending on their proper law and place of performance

[19] Supra note 9 at page 418.
[20] See *Westacre* supra note 15 and *National Iranian Oil Company* supra note 18.

and it has been held[21] that English public policy would not be offended if an arbitral tribunal enforced a contract which, though contrary to the domestic public policy of the place of performance, did not offend the domestic public policy of the country of its proper law or curial law.

B.4 Procedural Public Policy

If the process by which a dispute was adjudicated in the arbitral proceedings is contrary to fundamental procedural rules, enforcement of an Award delivered at the end of such process may be refused. For example, it is not atypical to refuse enforcement of an Award if financial impropriety on the part of the tribunal or a member thereof is proven by the losing party, as it is tantamount to a violation of procedural public policy. Other common examples are fraud in the composition of the tribunal, breach of natural justice, lack of impartiality, manifest disregard to the facts or some other significant procedural irregularity in following due process.

In Singapore, the International Arbitration Act ("IAA") provides[22] that, notwithstanding Article 34(1) of the Model Law, the High Court may set aside[23] the award of the arbitral tribunal if the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice in connection with the making of the award by which the rights of any party have been prejudiced.

Singapore IAA is one such enactment where procedural public policy has been statutorily recognized.[24] This unique feature is not embraced by our Act. In a recent judgment in

[21] See *Westacre* Supra note 15.
[22] Section 24(a) and (b)
[23] It is noteworthy that procedural public policy has been recognized as grounds for setting aside an award as opposed to refusing enforcement.

[24] Similar provisions are also included in Arbitration Acts of England, Australia, India and New Zealand.

Singapore[25] it was held that Section 24 of the IAA contemplates a situation where the alleged fraud or corruption relates to the Award itself and not the underlying contract.

B.5 Enforcement of Award

Our Arbitration Act very clearly sets out under Section 34(1)(b)(ii) that Court may refuse recognition or enforcement of an arbitral award if it finds that that the award is in conflict with the public policy of Sri Lanka. Accordingly, the defence would only be allowed where the enforcement of the award would violate the forum country's most basic notions of morality and justice.

It is the trite law that the duty of the enforcing court only extends to find whether the purported fundamental flaws of the award in question would amount to a violation of public policy in Sri Lanka. Finality of awards is of paramount importance especially in international commercial arbitration. There is a recognized commercial international policy in favour of enforcing arbitral awards.

This is reflected in section 33 of our Arbitration Act, which places a mandatory duty upon court to enforce a foreign arbitral award but for its discretionary right to refuse recognition based on one of the section 34 exceptions.

Due regard must be cautiously given to whose public policy is relevant in enforcing an award. Upon a careful analysis of the cases discussed above it appears that more weight is placed upon the public policy of the place where the award is being enforced and that of the governing law, but less emphasis seems to be placed on the law of the place of performance.

[25] *Rakna Arakshaka Lanka Ltd.* vs. *Avant Garde Maritime Services (Pte) Ltd.* [2019] SGCA 33

Article V(2)(b) of the Convention also provides that an award would be refused if "*the recognition or enforcement of the award would be contrary to the public policy of that country*". "That country" refers unequivocally to the country where recognition and enforcement is sought. This interpretation is warranted because the purpose behind the exception was to permit a country to refuse enforcement of an award that was contrary to its own system.

C. Arbitrability and Public Policy

Arbitrability refers to the question of whether a particular dispute may or may not be settled through arbitration. It is a separate and distinct ground for refusing enforcement which is also coloured by considerations of public policy to what is contemplated in Section 34(1)(b)(ii). This view stems from the fact that the Convention refers to arbitrability and public policy as defences to enforcement in connected but two separate Articles; V(2)(a) and V(2)(b) respectively.

In-arbitrability is usually invoked at the very beginning of the arbitration process, as an argument for the tribunal to decline jurisdiction, while public policy is typically raised at the stage of enforcement or setting aside proceedings before the national courts. However, when faced with an in-arbitrable dispute, an arbitral tribunal may be required to decline jurisdiction. If it fails to do so, the enforcement of its final award may be successfully challenged if the national law of the state where enforcement is sought considers the dispute to be in-arbitrable.

The underlying rationale being that, due to the seriousness and criminality, certain disputes are best dealt by Courts in as much as greater means of investigation is needed to serve the public interest. Accordingly, criminal matters and matters relating to personal status (divorce, nationality, etc.) are typical examples of in-arbitrable disputes.

Arbitrability of a dispute differs from one jurisdiction to another. Whilst there is general consensus that disputes of a purely commercial nature are capable of settlement by arbitration,

views are more divergent when it comes to disputes involving matters that are not purely commercial, such as labour, intellectual property, securities transaction, insolvency and antitrust disputes.

In our Act, in addition to the arbitrability of a dispute that is contemplated in the grounds for refusal of enforcement of an award, Section 4 provides that a dispute coming within the purview of an arbitration agreement may still not be capable of being resolved by arbitration if it is "*contrary to public policy or, is not capable of determination by arbitration*".

In a decided case[26], where Section 4 of our Act was read in conjunction with Section 5, vis-à-vis party autonomy, the Court reiterated the right of a party to an arbitration to decide whether or not to object to the jurisdiction of a court where the same is invoked by the other party to the agreement. Where a party to such an agreement decides not to take up any objection to the exercise of jurisdiction by court, it is free to hear and determine the case or other proceeding, and in such a case Section 4 would not make it mandatory for the matter to be determined by arbitration.

In any event, when deciding the arbitrability of a dispute, English courts have emphasized that courts should lean in favour of giving effect to the arbitration clause to which the parties have agreed, if the circumstances allow to do so.[27]

D. <u>Conclusion</u>

The approach of courts have been far from consistent in the application and determination of principles of public policy. A certain level of latitude has to be given to national courts to decide on public policy, depending on the circumstances of each case. Parameters of public policy as

[26] *Elgitread Lanka (Private) Limited* vs. *Bino Tyres (Private) Limited* SC (Appeal) No. 106/08 (Unreported).
[27] *Astro Vencedor Compania Naviera S.A.* vs. *Mabanaft G. M.B.H.* [1970] 2 Lloyd"s Reports 267.

well arbitrability are bound to evolve over time especially to suit the commercial realities of international trade and commerce.

However, there is an emerging international consensus that public policy in the context of enforcement should be given a cautious and restrictive interpretation. Mere allegation or innuendo of a violation of public policy is insufficient to sustain a valid defence. A public policy must first be identified, and then it must be shown which part of the award is in conflict with such public policy.

When applying public policy as a ground of refusal of recognition or enforcement, Courts and parties should not lose sight of the fact that the right of the citizens to resolve their disputes by referring such disputes to arbitration is also a right endorsed by the law of the country and therefore arbitration itself is part and parcel of the public policy. Further when exercising its discretion to utilize the public policy exception courts must be careful not to permit an unsuccessful party in an arbitration use this exception as means of resisting and/or delaying the enforcement of an award.

Therefore, by adopting a more transnational perspective which views the public policy exception through a pro-arbitration lens and ensures international comity, would not only enshrine the fundamental principle of party autonomy, but also would help to create a greater degree of consistency in preserving the finality of an arbitral award, thus allowing Sri Lankan Courts to tether this once unruly horse.

DISCOVERY OF A FACT- SECTION 27 OF THE EVIDENCE ORDINANCE

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INTRODUCTION- SCOPE OF SECTION 27

A criminal investigation commences at the point where information relating to the commission of an offence is received by a Police Officer or an inquirer. **Chapter XI** of the **Code of Criminal Procedure Act of 1979** identifies provisions relating to investigation of offences. Once the information is received, it will be recorded under **Section 109** of the Code. Thereafter, the investigation would commence and the statements of persons acquainted with the facts and circumstances of the case would be recorded under **Section 110** of the Code.

In the course of a police investigation, there are two types of statements that would be recorded under **Section 110**,

a) Statements of witnesses,
b) Statements of a suspect

Section 110(3) deals with the use of such statements in Court in subsequent judicial proceedings. **Section 110(3)** of the Code of Criminal Procedure reads as follows;

Statements to a police officer or an inquirer to be used in accordance with Evidence Ordinance.

(3) A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court;

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time.

Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code.

A suspect may make two types of statements;

a) A statement denying his involvement in the offence,
b) A statement admitting liability.

Where the statement falls under the above category, (b) provisions of **Sections 25** and **26** would automatically operate and the confession would be inadmissible. **Section 126** and **127** of the Code of Criminal Procedure Act, identify the procedural provisions relating to the recording of confessions by Magistrates. The two sections are reproduced below;

No inducement to be offered.

Section 126- Except as provided in Chapter XXI any peace officer or person in authority shall not offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence to induce such person to make any statement having reference to the charge against such person. But any peace officer or other person shall not prevent or discourage by any caution or otherwise any person from making any statement which he may be disposed to make of his own free will.

Power to record statements and confessions.

Section 127.

(1) Any Magistrate may record any statement made to him at any time before the commencement of any inquiry or trial.

(2) Such statement shall be recorded and signed in the manner provided in section 277 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried.

(3) A Magistrate shall not record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily, and when he records any such statement he shall make a memorandum at the foot of such record to the following effect; -

"I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him".

In my view the above two sections ought to be read together with **Section 26** of the Evidence Ordinance.

Section 27 of the Ordinance deals with **"discovery of a fact consequent to any information received from a person accused of an offence".** Accordingly, if any information is received either from a police statement made by a person accused of an offence, and recorded under **Section 110** of the **Code of Criminal Procedure Act of 1979**, the provisions of **Section 27** of the Evidence Ordinance would apply.

Accordingly, if the confession has been made to a Police Officer and recorded under **Section 110,** such confession would remain inadmissible. However, if the information contained in the said statement leads to a discovery of a fact, so much of such information leading to the discovery would be admissible.

In the case of a confession recorded by a Magistrate under **Section 127** of the **1979 Code**, the confession is relevant and admissible and if any discovery of the fact is made consequent to information received from such statement evidence of such discovery is also admissible.

The law would be applied in similar fashion in respect of forest offences and excise offences as per **Section 27(2)**. **Section 27(2)** of the Evidence Ordinance reads as follows;

How much of information received from accused may be proved?

Section 27

(2) Subsection (1) shall also apply mutates mutandis, in the case of information received from a person accused of any act made punishable under the Forest Ordinance, or the Excise Ordinance, when such person is in the custody of a forest officer or an excise officer, respectively.

REQUIREMENTS UNDER SECTION 27

Discovery of a fact is admissible under **Section 27** if the following requirements are satisfied;

1) The evidence sought to be led under **Section 27** must be relevant to the fact in issue,
2) The fact discovered ought to have been discovered consequent to the information received from the accused,

3) At the time of making the information known he must be in the custody of the Police Officer,
4) He must be accused of an offence, (even at a later stage)
5) Only the portion of his information which led to the discovery of the fact can be proven.

WHAT IS A FACT?

In **Nambiar v Fernando**[1], the Magistrate wrongly admitted the discovery of a shirt alleged to be stolen in a charge of retention of stolen property punishable under **Section 394** of the **Penal Code**. The shirt was not discovered consequent to a statement made by the accused. It was held that **Section 27** would not be applicable. **"Since the fact was not discovered consequent to a statement made by the accused"**.

In **King v Gunawardane**[2], it was held that to lead evidence of a discovery of a fact under **Section 27** of the Evidence Ordinance, it is necessary that at the time of making out the information, the accused was in the custody of the Police Officer and where this is not satisfied evidence under **Section 27** cannot be led. In **Justin Fernando v IP Police Slave Island**[3]. The Police Constable was investigating a complaint relating to a Hercules bicycle, the accused was detained as a suspect relating to the investigation. While in custody the accused had made a statement leading to the recovery of another Raleigh bicycle. It was held that if a suspect detained by the Police on one charge gives information relating to a subject matter of a separate charge, he must be treated as **"an accused in the custody of the Police Officer"**, within the meaning of **Section 27** of the Ordinance.

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[1] **27 NLR 404**
[2] **44 NLR 189**
[3] **46 NLR 158**

In **Rex v Jinadasa**[4], the evidence against the accused was purely circumstantial. This was a case of murder using a katty consequent to information given by the accused. The body was found the next morning. In his statement the accused also stated **"I can point out the place where I threw it".** The katty was discovered thereafter. The main question which came up for consideration in this case was whether any oral information given by the accused could be used to prove a discovery of a fact. It was held, that even where a fact had been discovered consequent to an oral information, such evidence can be led.

In **Rex v Packeerthamby**[5], it was held, that even though a confession may be generally inadmissible, any discovery could be proved under **Section 27**.This judgment was cited with approval in **Iver v Galgoda**[6].

In **Rex v Sudahamma**[7], it was held that discovery of a witness would not amount to a discovery of a fact. However, this decision requires very careful attention. The accused in this case was charged with the theft of a savings pass book and a forgery of a withdrawal form. While being in Police custody she pointed out one Bruin as the person who filled up the withdrawal form. It was held that **Section 27** would not apply and that it would have applied only if the accused described such fact during the making of his statement.

The effect of the above judgment is that the discovery of a witness can be proved under **Section 27**, if the name of the witness is disclosed by the accused in the form of an information.

Basnayake CJ, refused to follow the above decision in **Queen v Appuhamy**[8], It was held by the Learned Judge that discovery of a witness cannot be considered as a discovery of fact.

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[4] **51 NLR 529**
[5] **32 NLR 262**
[6] **44 NLR 94**
[7] **26 NLR 220**
[8] **60 NLR 313**

SHOULD HE BE ACCUSED OF AN OFFENCE AT THE TIME THE INFORMATION WAS GIVEN?

In **Queen v Ramasamy**[9], the Privy Council, considered an appeal from the Judgment of the Court of Appeal of Ceylon reported as **Ramasamy v Queen**[10]. It was held in this case that it was not necessary for the maker of the statement to be an accused at the point of making the statement which leads to the discovery. Such a statement could either be oral or documentary. It was also held in this case that a limited portion of the statement could be marked in evidence in proving discovery of a fact in terms of **Section 27** of the Ordinance.

In **Queen v Albert**[11], the Learned Trial Judge permitted the evidence of a Police Officer to go into the record in an irregular manner. This was a charge of theft and involved three counts of house breaking at night. On a statement made by the accused some of the items were recovered from his house. The inspector of Police was asked whether the accused pointed out the goods, recovered from his possession. He answered in the affirmative even though the question was objected to by the Defence Counsel. It was held by **L.B. De Silva J**, that such evidence should not have gone in since the evidence amounted to a confession and where the goods are recovered from the possession of an accused as in this case, the words of the accused are not directly or distinctly relevant to the discovery. In **Queen v Jayasena**[12], **Sansoni J**, analysed **Section 27** of the Evidence Ordinance. The question in issue was whether an oral statement made by an accused based on which a bag was discovered would satisfy the requirements of **Section 27**. It was argued by the defence that in view of the provisions of **Section 91** of the Evidence Ordinance where oral evidence on the contents of a document is prohibited, the discovery of the fact envisaged in **Section 27** had arisen consequent to information that had been recorded at that time. The Learned Chief Justice opted to follow the decision in **King v Haramanisa**[13] and held

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[9] **66 NLR 265**
[10] **64 NLR 433**
[11] **66 NLR 543**
[12] **68 NLR 369**
[13] **45 NLR 532**

that the discovery of the fact may be proved through the statement recorded from the accused and not by oral evidence.

Etingsingho v Queen[14], was a case of murder, where two accused were indicted, the prosecution led the evidence of a recovery of a club which was hidden under the culvert. The trial judge directed the jury to consider the recovery and if the jury was satisfied that the club recovered is the same that was used to assault the deceased such evidence could be used against the 2nd accused.

It was held that when a fact is discovered and such evidence is led under **Section 27** the only inference that could be drawn was to arrive at a finding that the accused had the knowledge of where the weapon was and nothing more. **T.S. Fernando J**, referred to the case of **Kottaya v Emperor**[15] at Page 70 and cited the following passage;

" ***In Their Lordships' view it is fallacious to treat the' fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ' I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ' with which I stabbed A ' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.***"

[14] **69 NLR 353**
[15] **1947 AIR PC**

In **Queen v Sugathapala**[16], the Prosecution, in a case of murder, attempted to lead discovery of a knife, arising out of information provided by the Accused, while he was in Fiscal's custody. It was held that such evidence should not have been allowed since the custody of the Fiscal Officer cannot be considered as being in the custody of a Police Officer referred to in **Section 27** of the **Evidence Ordinance**. Similar decision was made in **Queen v Jayasinghe**[17]**.**

In **Petersingham v Queen**[18], the Prosecution led evidence of the discovery of certain articles. It was argued by the Defence that at the time the Accused made the statement he had neither been arrested, nor the charges had been explained to him. It was argued that in such circumstances, he cannot be treated as a person accused of an offence. This was rejected by **Alles J**, who held that what is relevant is for the Accused to be charged at some point of time.

A slightly different view was taken in **Nallathamby v Muttukrishnan**[19], where it was held that a statement made prior to the arrest would not attract **Section 27** of the **Evidence Ordinance**. Whenever evidence under **Section 27** is admitted, there is a clear duty on the trial judge to explain to the jury that the only matter that arises under **Section 27** is that the Accused knew where the fact discovered was, and such discovery does not amount to a situation where an inference may be drawn that the Accused has consented. The above decision was followed in **Heen Banda v Queen**[20]. However, where the recovery does not take place in circumstances mentioned in **Section 27**, such a warning would be necessary, as held in **Wijewantha v Attorney General**[21]**.**

The Court of Appeal considered the Application of **Section 27** in full, in the case of **Samson Atygala v Attorney General**[22]**.**

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[16] **69 NLR 457**
[17] **71 NLR 574**
[18] **73 NLR 537**
[19] **74 NLR 95**
[20] **75 NLR 54**
[21] **1983 2 SLR 418**
[22] **1986 1SLR 390**

It was held as follows;

Held -

(1) **Section 27** of the Evidence Ordinance when it relates to confessional statements operates as a proviso to **Sections25** and **26** of the **Evidence Ordinance**.

(2) For the purposes of **Section 27** of the Evidence Ordinance the person making the statement should be a person accused of an offence, and be in police custody. For requirement (a) the test is the position of the maker when the statement is sought to be adduced in evidence and not his position when he made it. For the requirement (b) the words "**police custody**" do not necessarily mean detention of formal arrest. It Includes police surveillance and restraining of the movements of the person concerned by the police. The term "**Custody**" has to be interpreted within wide limits.

(3) Unlike under **Section 122 (1)** of the old Criminal Procedure Code under **Section 70 (3)** of the Administration of Justice Law which was the law applicable at the time (and even under **Section110 (1)** of the present **Code of Criminal Procedure Act**) a police officer making an investigation may examine orally any person acquainted with the facts. He shall reduce into writing any such statement made by the person examined and the person making the statement shall sign the statement thus adopting the statement and making the record of what he said his own. In other words, there is a legal requirement that such a statement be reduced to the form of a document. **Section 91** of the Evidence Ordinance requires that when any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of such matter except the document itself or secondary evidence of it. **Section 91** does apply to a statement recorded in terms of **Section 70 (3)** of the Administration of Justice Law. For this reason, such a statement which led to the discovery of a relevant fact made admissible by **Section 27** of the Evidence Ordinance must be reduced to the form of a document and it is only

that document that could be proved as evidence in a case. No oral evidence of the contents of such a document is admissible in evidence.

SECTION 27

A few years earlier in **Nandasena V Republic of Sri Lanka**[23]a similar decision had been made regarding the requirement of being in **"Police Custody"**. It was held in this case, that a formal arrest is not necessary to satisfy the purposes of **Section 27**.

It is relevant to note that a conviction cannot be obtained by way of evidence of a recovery made under **Section 27** of the Ordinance. Even though the discovery of such fact becomes relevant, the only inference that the Court can draw in such an instance is only that the Accused knew where the "thing" recovered was.

[23]**1978-79 2 SLR 235**

“LET NO ONE SWERVE OFF THE HIGH ROAD OF TRUTH AND HONOUR.”

-WINSTON CHURCHILL FEBRUARY 14, 1945

Kaushalya Nawaratne

Attorney-at-Law

Secretary of the Bar Association of Sri Lanka

Just as the great Winston Churchill, the former British Prime minister quoted, one must hold on to the truth and their honour as those are the high roads of a man of highest standards. Just as it applies to all mankind, these words pose even more applicability to the role of an attorney-at-law.

Lawyers as guardians of justice play a pivotal role in being true to their profession and keeping their honour. Being a lawyer is an honourable profession which requires an abundance of knowledge and sincerity towards upholding the rights of individuals and ensuring a free and democratic society.

To become an Attorney at law it calls for great knowledge, a strong mind and wide learning culture. However, intellect on its own is not sufficient. Far more important is the moral and ethical character of a man exercising this legal profession.

G.W.Warvelle in his book Legal Ethics, states the following,

‘'Because of the magnitude of the interests placed in the hands of its members, the responsibilities which they assume and the confidence with which they are entrusted, there is demanded of them in the exercise of their duties, an exemplification of the highest qualities of moral excellence.'[1]

[1] Warvelle, G. (1920). *Essays in Legal Ethics*. 2nd ed. Chicago Callaghan & company.

John Stuart Blackie, Scottish scholar says: 'A man may be as brilliant, as clever, as strong and as broad as you please and with all these, if he is not good, he may be a paltry fellow; and even the sublime which he seeks to reach in his most splendid achievements, is only a brilliant sort of badness.'

Character is a key necessity in all professions but in the legal profession in particular honesty and moral values when practising the profession and how he carries himself is a matter of great importance and must be enlightened to all lawyers in the profession.

One of the core duties of a lawyer is to maintain the highest standards of moral and ethical conduct. The word ethics would have various meanings. As per Dr A.R.B Amarasinghe, 'professional ethics' is the group of standards relating to the activities of professionals.[2] A lawyer is a representative of clients who seek to protect their rights and interests. He is an officer of the legal system and has a profound responsibility to maintain and safeguard the interests of justice. Dr ARB Amarasinghe in his book pointed out that a lawyer has many obligations. He has a duty toward the client, to the court and to the tribunals and bodies before whom he pleads his client's case.[3]

The necessity to ensure high ethical values in the profession is the need of the hour since with years passing by rather disturbing indications provide that the profession is not righteously honoured. Complaints by the general public each day will regrettably bear a position that the legal fraternity is being deteriorated.

This article will further address in detail the profession of an attorney at law and what is expected of him in his profession. Without free and honourable lawyers the world will see little of justice. Thus the role of lawyers is to ensure that justice prevails for centuries to come. To

[2] Dr A.R.B Amarasinghe "book of professional ethics and responsibilities of lawyers' pg. 7
[3] Supra 1

become a lawyer is a gift of justice that must be safeguarded at all costs. And lawyers all alike must be aware of the rules of conduct and moral values expected from them in society.

Regulatory Framework in Sri Lanka

On the 11th of February 1988, the Supreme Court of Sri Lanka under the rulemaking powers vested under S. 136 (1) (g) of the Constitution made the Supreme Court (conduct of and etiquette for Attorney – at – law) Rules 1988. These rules drafted by the Bar Association has the force of written law.[4] However, the Sri Lankan rules on legal and moral ethics are not exhaustive. And no code of conduct is expected to be exhaustive.

President of the New Zealand Law Society, Graham Cowley observed in 1990 in the preface to the New Zealand Society Rules:

> "Our profession has come under attack from a number of directions. It has never been more important to maintain professionalism in its truest sense."

Chief Justice G.P.S De Silva at the convocation of the Bar association of Sri Lanka in 1993 said the follows:

> "It is with great regret that I am constrained to refer to the decline in standards of professional conduct. Complaints concerning misconduct on the part of Attorney at law are not infrequent now. This, in turn, enhances the need to maintain proper ethical standards."

Mr H.L. De Silva former bar association president quoted the following:

> "Of all the qualities which are expected of us, the supremely important values are those of moral integrity and fairness conscientious attention to a client's cause, a never-ending quest

[4] Per Samarakoon CJ in Land Reform Commission V grand Central Ltd. (1981) 1 Sri LR at 255

for perfection in the exercise of our professional skills, indomitable courage in the face of improper pressures that conflict with our duty."

These values must at all times be exercised as the supreme duty towards upholding justice. Few of the common unethical practises of an attorney must be addressed below.

Advertising and Touting

One of the most commonly received complaints by the Bar association/Supreme Court is the disapproved practices of touting by the lawyers in Sri Lanka. The practice of touting had been a common occurrence in the legal practise for years and has now become a menace that cannot be simply eradicated.

An attorney's primary concern must be public service and not the mere making of money. Thus he mustn't publicize his services or attract any clients through a 3rd party.

Section 39 of the SC rules include the following:

An attorney is not prohibited from advertising. However he may not by himself or through another person, organization directly or indirectly do or permit in the carrying on of his practise…Nor should he obtain work by touting.[5]

Malaysia Rule 45(a) provides that,

'an advocate and solicitor shall not solicit work or advertise either directly or indirectly, whether by circular, advertisements , touts , personal communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or procuring his photographs to be published in connection with cases in which he has been charged or concerned'[6]

[5] Supreme court rules 39
[6] Malaysia Legal profession act and Rules 45(a)

New Zealand Rule 4.02 states the following:

"In offering services to members of the public other than by normal advertising channels, a practitioner must ensure that approaches to persons who are not existing clients are made in a manner which does not bring the profession into disrepute"

In **State V Dawson**[7] the following was stated:

> "This court has condemned the practice of ambulance-chasing through the media of runners and touters. In similar fashion we have with equal emphasis condemned the practice of direct solicitation by a lawyer"

Both of these offences are serious breaches of the canons of ethics and must be dealt with seriously.

In **Re A.V.de Silva**[8], the driver of a lorry had been charged with overloading his vehicle. His wife and mother came to court to retain a certain proctor but they were diverted to another advocate by one Jamaldeen. The advocate gave Jamaldeen Rs.1 out of the fee given by the clients. The advocate was convicted under S.2 (d) of the court's ordinance No.1 of 1889 of the offence of touting.

His defence was that although one time he had a considerable practise he has now lost it and thus he requested support from another to attract clients

Mac Donnel CJ said that such an argument cannot be acceded at any moment. ***The bar and its traditions exist because of the independence of each advocate. He must succeed in accordance with his merits, and it would be subversive of all the traditions of the bar if he were to employ any such assistance as that of a tout to obtain his practice.***

[7] 111 So. 2d 427,431 (fla.1959)
[8] (1934) 37 NLR 99

Touting has long been an offence even under the Intermeddlers with suitors Act 1894. However prosecutions under this act have been very low. Therefore it is time that all forms of touting and advertising are erased and rooted out from the legal practice.

The subject of ethics cannot be dealt with within a few minutes. However, when considering the incalculable complaints received by the ministry of justice regarding the disapproval and dissatisfaction of the client with their lawyer's professional service and improper conduct, the Supreme Court and the Bar must be stern on such disciplinary matters against lawyers.

The Supreme Court is vested with the power to admit and enrol lawyers or refuse to do so as well as exercise disciplinary control over them. The Bar Association alongside aids the inquiry in determining the conduct of the attorney at the alleged misconduct.

THE PROCEDURE

As the court observed in **Attorney General V. Ellawala**[9]

The power of the court to investigate charges against members of the legal profession is unfettered but rigid rules of procedure or by any strict definition of or limitations as to the nature of such material upon which alone such proceedings may be founded.

In essence, the procedure is as follows,

- Where the chief justice or Supreme Court judge considers it vital to hold proceedings to determine the suspension or removal of an attorney, they shall direct a preliminary inquiry held by the disciplinary committee of the Bar association, Sri Lanka.[10]However

[9] (1926) 29 NLR 13 at 17-18
[10] S.43(1) Judicature Act No. 02 of 1978

this isn't mandatory, the discretion whether to refer to a preliminary inquiry or institute action is vested in the Supreme Court.

- The Chief justice shall appoint 15 members of the BASL for 3 years to constitute the disciplinary committee and when a matter is referred to the disciplinary committee, CJ will appoint 3 members from the disciplinary committee[11]
- Once the inquiry is concluded the findings shall be reported to the Supreme Court. Even so, the Supreme Court is not bound by those recommendations.
- If further proceedings are necessary against the attorney the CJ will issue a charge and will call him to show cause as to why he should not be removed/suspended from the legal profession. And such notice of such charge is given to the BASL and AG.
- At the hearing before a bench of 3 SC judges, the Attorney General /Solicitor General or any other officer may appear to support with the rule.
- At the hearing evidence will be led, cross-examined and submissions by both parties will be taken.
- If charges are proved the SC will suspend/dismiss the attorney. And if not, may acquit him.

Where an attorney's conduct is criminal in character, whether it was done in pursuit of his profession or not, he may be struck off the roll, suspended from practise, reprimanded, advised, even though he has not been brought by the appropriate legal process before a court of competent criminal jurisdiction and convicted, and even though there is nothing to show that a prosecution is pending or contemplated.[12]

Integrity and nobility is the intrinsic quality of any person who seeks to become a member of the legal profession. If such lawyer acts dishonourably and in conduct

[11] S 44, S.44(4) Judicature Act No.02 of 1978
[12] Re Edgar Edermal 1877 Ramanathan 380

unworthy of an attorney, and whether such act was done within the sphere of professional or private life, it will undoubtedly reflect adversely on the attorney, the profession and the entire justice system.

The public will consequently look towards this honourable profession as one which does not uphold its core values and it will remain scarred for failing to sustain the rights of the clients. Unfortunately then, It will take a while to regain trusted confidence in the justice system. In this day and age, competition and commercialization of the legal practitioners is high. This will result in lawyers leaning towards the monetary rewards of the profession rather than the core values and standards of the profession.
We must not forget that lawyers and judges and the entire administration of justice are the wheels of the prevailing justice system and it is of prime importance that lawyers must not conduct unjustly for ulterior motives, or conduct themselves in any way that would impair the justice system.

There are several interesting cases where the Supreme Court has issued rules against aberrant lawyers. Few of them must be presented at this stage.

In **Chandratilake V Moonasinghe** [13]
An attorney found guilty of breach of trust of criminal character and deceit, was struck off roll although he had not been convicted.

As per S.42 (2) of Judicature Act 1978, the SC can suspend/dismiss an Attorney at Law who is found guilty of fraud, wrongful act or criminal offence.

[13] Chandratilake V Moonasinghe SCRule 2/90SC Minutes of 5/6 1992

In **Dematagodage Don Harry Wilbert**[14] it was held that this procedure is expected to protect the public welfare and safety of the service of attorney at law. In this case, the facts were such that the advocate had forged the GCE O/L certificate and entered Law College. He was dismissed from the profession for committing deceit within the meaning of S.42 (2)

In **Re Dharmarathne**[15] who had prepared a petition of appeal in false and scandalous terms insulting the judge against whose decision the appeal was made was suspended for a month.

In **Re Batawantudawe,** [16]the court refused to enrol an advocate who was guilty of forgery and cheating and sentenced to imprisonment. Dias SPJ made it clear that a person convicted of that kind cannot be restored to the ranks of an honourable profession, the good name of which he had degraded by his conduct.

In **Re Brito**[17], a proctor convicted under the post office ordinance for sending a postcard with words of indecent and scandalous character was struck off.
Similarly, the court would remove an attorney guilty of criminal misconduct if it was done in function of his professional functions.

In **Re Edgar** [18] a proctor who misappropriated his clients' money was struck off his roll.

[14] Dematagodage Don Harry Wilbert, (1989) 2SriLR 18
[15] 1862 Ramanathan 134
[16] (1950) 51 NLR 513
[17] (1942) 43 NLR 259
[18] (1877Ramanathan 380)

In the matter of a Rule on Proctor Joseph Gerald Fernando [19] a proctor who was convicted of attesting a fraudulent deed and thereby committing an offence punishable under the notaries' ordinance for defrauding the government was struck off his roll.

In **Schware V Board of Bar Examiners** [20] it was expressed that,

It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield'.... in defence of right and to ward off wrong. From a profession charged with these responsibilities, there must be exacted those qualities of truth-speaking, of a high sense of honour, of granite discretion…"

Commenting on **Model rule 8.4** The American Bar Association provides that many kinds of illegal conduct reflect adversely on fitness to practise law. Such as offences involving fraud and the offence of willful failure to file an income tax return.

Because of the position of an attorney placed in a society, even minor violations of law will undermine and lesson public confidence in the legal profession. Obedience to law embodies respect for the law. To lawyers especially, respect for the law should be more than a commonplace.

As the Canadian code[21] states,

"Our justice system is designed to try issues in an impartial manner and decide them upon the merits. Statements or suggestions that the lawyer could or would try to circumvent the system should be avoided because they might bring the lawyer, the legal system and the administration of justice to disrepute"

[19] (1944) 45 NLR 379
[20] 353 U.S 232,247 1 L.Ed.2d.796,806
[21] ChXIX Commentary 2

As Dr ARB Amarasinghe addressed in 1992 to the organization of Sri Lanka “Do not violate the law. Do not even sail close to the wind’

Thus as professionals, lawyers must comply with the justice system now more than ever since many lawyers have undermined the justice system by not keeping their expected higher standards.

As Justice Nanayakkara states,

‘We live at a time when the core values of the profession are being threatened. As a result, the whole climate of opinion has become hostile to the legal profession. Decline in competency, efficiency and the standards of the legal profession are bound to bring about the corresponding decline in the standards on the Bench because it is the Bar, which nurtures and fosters those who aspire to a career in the judiciary. [22]

The primary concern in this country is the fact that most lawyers are unaware of these codes of conduct and etiquette or although aware, does not give it the attention that it requires. It must be added, however, that at present, ‘professional legal ethics’ as a subject has been included in the course curriculum in university LLB programs and in the Law College. Such inclusion is necessary since it plays an integral part to prepare a person seeking to join the profession.

Moreover, the rules in the code may be inadequate since they might be out of date. Indeed, compliance with the provisions of the code which may be inappropriate to time may be seen as disobedience. Thus the rules must be critically evaluated from time to

[22] Justice Chandradasa Nanayakkara, 'Predicament of the Legal Profession' (*Daily Mirror*, 2018) <http://www.dailymirror.lk/opinion/Predicament-of-the-Legal-Profession/172-152074> accessed 24 September 2019.

time with the evolving circumstances in law, in the profession and society and in view of the public expectations.

Cheatham[23] observes,

The law and its institutions change as social conditions change. They are to change if they are to preserve, much less advance, the political and social values from which they derive their purposes and life.

CONTEMPT OF COURT

When addressing the subject on professional ethics, contempt of court by lawyers' should be unfailingly voiced. One of the most common forms of professionals degrading their standard is the manner they conduct in court.

Lawyers more than any other must behave respectfully in a manner that is expected by law in courthouses.

Contempt of court is foreseen to be one of the most relevant issues to date for an attorney to be suspended or removed from the bar. A recently concluded case, one which gained much publicity was of the public interest litigation lawyer, Nagananda Kodituwakku who was suspended for 3 years for contempt of court. The gist of the case is below.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Nagananda Kodituwakku, Attorney-at-Law

SC/Rule/01/2016

Where

[23] NSW Sol. (5261)

H.N.J. Perera, CJ

Held that the contemptuous submissions that Nagananda Kodituwakku brought to court has ridiculed the court and has caused the erosion of public trust and confidence reposed in the judicial system. By reason of such conduct, he had acted in a manner which would be regarded as disgraceful or dishonourable of an attorney at law of good repute and competency.

Thus he was found guilty of contempt of court and suspended the respondent from practice for 3 years under S.42 (2) of the Judicature Act No. 02 of 1978

As held in one Indian authority **T.N. Godavarman Thirumulpad's case** [24] Judiciary is the guardian of the rule of law. If the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs.

In **Re: Vinay Chandra Mishra,** [25], the court found the advocate (contemnor) guilty of committing criminal contempt of court having interfered with and "obstructing the course of justice by trying to threaten, overawe and overbear the court by using insulting, disrespectful and threatening language"

As Master Jacob describes "the authority of the judiciary is to uphold, to protect and to fulfil the judicial function of administering justice according to the law in a regular, orderly and effective manner. Such a power is not derived from statute nor truly from the common law but instead flows from the very concept of a court of law."

[24] [(2006) 5 SCC 1]
[25] (1995) 2 SCC 584

This article must end with the profound words of Dr.Wikrama Weerasooriya where at a speech given in 2013 to lawyers in practice, he quotes his late father, Mr N.E Weerasooriya Q.C where he emphasized on a characteristic that a young lawyer must possess, which is “honesty to court”.

“At no time as a lawyer must you ever compromise your duty to the court to win your case. A lawyer’s duty is paramount. Without it, courts cannot function"

The best judge of a lawyer who is honest and dependable is not only the judge but his fellow brother lawyers. Profession shall remain, individually and as a body, but the assessment of a lawyer by the profession is what matters the most.

However more and more complaints by the general public shows that there are delays in processing the disciplinary inquiry.

The Supreme Court and the bar association must regulate stern disciplinary matters against the lawyer and no matter must be dealt with lightly. Although much has been spoken and written on the deteriorating standards of the legal profession, substantial output expected by all has not been adequate to completely eradicate this trend of malpractice and misconduct. More and more litigants affected by the disapproved conduct of attorneys are left with little to no aid or remedy as there aren’t any legitimate efforts to address and mitigate the issues affecting the litigants. There is a large number of questions and issues relating to the legal profession. However unless and until such serious problems are addressed righteously, further deterioration of professional standards must be expected. This will eventually lead to the collapse of the law and justice system in the island.

Oftentimes, lawyers receiving complaints on their conduct would raise objections that since they are not members of the bar association Sri Lanka, they are not duty-bound by the rules pertaining to the conduct of lawyers nor must they adhere to the disciplinary

inquiries. However countering such objection, it must be stressed that when an attorney takes his oath in the Supreme Court which has the utmost power to appoint and remove an attorney, they are part of the Supreme Court and is inevitably amenable to the rules of the Supreme Court although such preliminary inquiry is conducted by the bar association of Sri Lanka.

Code of ethics and professional conduct must be adhered to by the lawyers at all times. So long as the lawyers are guided by these principles the law will continue to be a noble profession. It shall offer no compromise.

An attorney at law must strive for greatness both in intellect and character since both necessitate the value of a noble career. The legal profession is claimed to be one of the most supremely noble professions, and it is the duty of the members in it to conduct themselves in a manner which would sustain such nobility.

APPLICABLE RULES OF EVIDENCE IN ARBITRATION

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A. Introduction

The use of "Arbitration" for settlement of disputes is traceable to the ancient Middle Eastern settlements. Archaeological evidence in the form of clay tablets found from places such as Iraq and Egypt show that dispute over water rights have been resolved by arbitration.[137] There is also evidence that it was common amongst the ancient Romans to "to put an end to litigation" by means of arbitration.[138]

The first evidence of an outlined plan for the arbitration of international disputes dates back to the early fourteenth century, when Pierre Dubois, a royal advocate of Normandy, wrote a pamphlet in which was developed an elaborate plan for the recovery of the Holy Land.[139] As the success of a Crusade depended on a general peace in Europe, Dubois advocated arbitration to

[137] Pfeiffer & Speiser, One Hundred New Selected Nuzi Texts, in M. Burrows & E. Speiser (eds.), XVI The Annual of The American Schools of Oriental Research 79, 95 (1936), cited in Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) – P 25
[138] PANDFX bk. 4, t. 8.
[139] Pierre Dubois, *De Recuperatione Terre Sancte Ed 1891* (Hachette Livre-Bnf 2012).

settle outstanding quarrels.[140] Therefore, the popular belief that Arbitration is a modern form of dispute resolution is inaccurate.

The recognition of arbitration agreements as a fundamental requirement to enable a dispute to be resolved by arbitration, marked an important milestone in the evolution of arbitration as an effective and alternative dispute resolution mechanism. However, the use of arbitration was still very much limited since national courts refused to enforce arbitration agreements and did not recognize the same as binding.[141] Subsequent judgments such as the celebrated judgment of Lord Campbell in **Scott v. Avery**[142] revisited this issue and upheld arbitration agreements to be binding and enforceable by courts and that courts should not intervene in an instance where the parties have effected an arbitration agreement.

As far as Sri Lanka is concerned, certain historical records state that Lord Buddha during his second visit, in the fifth year of Buddhahood (5 B.E. or 523 B.C.), arbitrated a dispute over a Jewelled Throne between two Naga Kings, namely, Culodara and Mahodara and handed over the custody of the Jewelled Throne to Naga King Maniakkika of Kelaniya.[143] According to legend, the Nāgānanda International Institute for Buddhist Studies cradled in the heart of Kelaniya is the venue of this first arbitration known to man either in legend or history.

Today, arbitration is an alternative dispute resolution mechanism which is almost indispensable due to its wide spread use owing to factors such as the global acceptance of the New York Convention,[144] the UNCITRAL Model Law and the harmonization of national laws on arbitration with the provisions contained in the said Convention and the Model Law. In Sri Lanka, the British legal reformers introduced arbitration as a less formal dispute resolution mechanism in 1866 by enacting the Arbitration Ordinance No.15 of 1866 and thereafter the Civil Procedure Code of

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[140] Henry S. Fraser, A Sketch of the History of International Arbitration (1926) 11 Cornell L. Rev. 179. Available at: <http://scholarship.law.cornell.edu/clr/vol11/iss2/3>
[141] *See Kill v Hollister* [1746] 95 ER 532, 532 (English KB)
[142] [1856] 5 HL Cas 811 (House of Lords)
[143] *The Mahavamsa: The Great Chronicle of Sri Lanka*.
[144] Formally known as the: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

1889. With the introduction of the UNCITRAL Model Law, Sri Lanka enacted the current arbitration law in force, i.e. the Arbitration Act No. 11 of 1995, based on the said Model Law,

B. The Need for Rules and Procedures for Arbitration to be Effective

With arbitration becoming a popular mechanism for settlement of disputes, the complexity of procedures to be followed for an arbitration to be effective, continued to escalate. Practical issues surfaced by reason of the inherent lack of a uniform legal framework applicable to settle disputes by arbitration. Unlike in the case of formal dispute resolution by instituting actions before Courts, where legislation dealing with procedures and evidence (for example, the Civil Procedure Code and the Evidence Ordinance), in Arbitration, there were no such detailed procedures and rules.

In terms of international arbitration, to some extent, uniformity was achieved through instruments such as the New York Convention and the UNCITRAL Model Law.[145] However, these instruments restricted its spectrum to cover only the fundamental elements of arbitral procedure with provisions to the effect of excluding court intervention in determining the dispute,[146] appointment/challenge of arbitrators,[147] time frames to issue notices[148] and other general powers of the tribunal.[149] Particularly, the question of what a suitable procedure would be in taking evidence in an arbitration, remained unsettled.

Unlike in any national courts system where strict procedural laws on evidence dictate the conduct of evidence taking, in arbitration such strict rules are not followed. For example, the provisions in the Sri Lankan Evidence ordinance which provide that documents must be proved by primary evidence unless in listed exceptional circumstances;[150] rules as to giving notice to

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[145] *See* UNCITRAL Model Law (as amended in 2006), Art. 2A(1): *"In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application…."*.
[146] ibid, Art. 5; Sri Lankan Arbitration Act, s. 5; English Arbitration Act, s. 9.
[147] UNCITRAL Model Law, Art. 12; Sri Lankan Arbitration Act, s. 10.
[148] Sri Lankan Arbitration Act, s. 10, 27; UNCITRAL Model Law Arts. 13, 33.
[149] UNCITRAL Model Law, Art. 19(2), 33(2); Sri Lankan Arbitration Act, s. 17, 27(3).
[150] Evidence Ordinance of Sri Lanka, s. 64.

produce;[151] rules requiring that copies of documents be certified etc. are dispensed with. In fact, almost all arbitration laws include provisions to the effect of excluding the national evidentiary laws from application to arbitrations under such laws.[152] Thus, what typically takes care of the evidentiary process would be "party autonomy" and the tribunal's discretion and therefore, arbitrations enjoy much procedural flexibility.[153] In fact, arbitrators are given wide powers and almost all national laws/institutional rules empower arbitral tribunals to determine admissibility, relevance, materiality and weight of any evidence.[154]

According to Gary Born, one of the principal reasons that this procedural autonomy is granted is to enable the parties and arbitrators to fashion procedures "tailored" to particular disputes. As a result of this, technically complex disputes can include specialized procedures for testing and presenting expert evidence and other ways which the parties are free to agree on in gaining an optimum outcome of the exercise of arbitration.[155] However, despite the autonomy arbitration enjoys outside the regular judicial systems, there are instances where such intervention by courts are needed. Particularly, the assistance of courts is required in evidentiary matters. Since arbitrators may only "require" a witness to attend an examination and if such witness refuses, they are not empowered to compel witnesses to attend hearings, an application can be made to court seeking the court's indulgence to compel such witness to attend the hearing.[156]

Apart from such instances where court intervention is sought, arbitration functions independently of the national courts and arbitrators exercise wide powers in terms of setting procedures for the arbitration. It is universally accepted that the arbitrators are empowered to

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[151] Ibid, s. 66.
[152] Sri Lanka Arbitration Act, s. 22(3); Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, P 34.
[153] *See*, *Slanely v International Athletic Federation*, 244 F.4d 580, 591 (7th Cir. 2001); *McDonald v. City of W Branch* (466 U.S. 284), 292; *Forsythe International, SA* v. *Gibbs Oil Co*, 915 F.2d 1017, 1022 (5th Cir. 1990).
[154] UNCITRAL Model Law, Arts. 19, 24(1); Sri Lanka Arbitration Act, S. 17, 19(2), 22(3); English Arbitration Act, S. 33 - 34; UNCITRAL Arbitration Rules, Art. 27(4); HKIAC Rules, Art. 22.2 - 22.7; SIAC Rules, Art. 19.2, 19.4.
[155] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014), P 85.
[156] *See* UNCITRAL Model Law, Art. 9, 17(J), 27; Sri Lanka Arbitration Act, S. 20(1), 21(1) – (3); *Also see* Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014)*, P1275: "Court actions in this regard does not affect exclusivity of arbitration"*

decide on the admissibility and relevancy of evidence. It is also universally accepted that arbitrators are not bound by usual rules on taking evidence.[157] Therefore, the taking of evidence in arbitration, would largely depend on the legal background and training of the arbitrators. The dependence of the evidentiary procedure on the arbitrators' legal background and training may defeat the objective of achieving uniformity in international arbitral procedure. For an example, an arbitrator from a civil law background may follow an inquisitorial approach in taking evidence and may use tools such as "discovery" to obtain evidence. Whereas an arbitrator of common law background would follow an adversarial approach in taking evidence and may not use "discovery" procedures but rather keep to "disclosure" procedures.

In exercising discretion however, a tribunal must be cautious because if in case a party does not agree with the evidentiary approach taken by the arbitrator and the arbitrator nevertheless proceeds and makes an award against such party, chances are that this party would apply to court to set aside the award on the ground that the arbitral procedure followed was not in accordance with the agreement of the parties.[158] On the other hand, if the arbitrators do not follow any approach at all and do not make use of general rules and evidentiary principles, the final award may still be set aside in the enforcement stage on the ground that it contradicts public policy[159] where irrelevant and/or inadmissible evidence may have been considered due to not using any rules and principles in taking evidence. Therefore, it is of fundamental importance that a proper and uniform procedure in taking evidence is developed to avoid subsequent complications and to complement the tribunal's duty to determine the dispute in an impartial, fair, efficient and expeditious manner.[160]

[157] *See* Model Law (n 20), Art. 19; Arbitration Act (20), S. 22(3).
[158] *See* Sri Lanka Arbitration Act, s. 32(1)(a)(iv); UNCITRAL Model Law, Art. 34(2)(a)(iv).
[159] *See* Arbitration Act (n 22), Art. 34(1)(b)(ii); Model Law (n 22), Art. 36(1)(b)(ii)
[160] *See* UNCITRAL Model Law, Art. 18; Sri Lanka Arbitration Act, s. 15(1)

C. Challenges to Establishing Common Evidentiary Rules for Arbitration

A publication by the Global Arbitration review highlights one of the key constraints in developing universally acceptable rules of evidence for arbitration as follows: *"…. nowhere can the divide between common law and civil law be better illustrated than in the conduct of proceedings by arbitrators (adversarial versus inquisitorial approach), the weighing of different kinds of evidence (witness testimony versus documentary evidence) and the volume of rules regulating the evidentiary procedure."*[161] Further, parties from common law background may be inclined to seek for evidence to be filed through liberal discovery in support of a claim even after it has been filed. However, a party from a civil law background would follow the approach of obtaining an order from the tribunal to produce documents in the possession of the other party or even a third party, if the said parties have referred to such documents in their pleadings.

As stated above, although, typically, arbitration processes are not governed by strict rules concerning the taking of evidence, Michael Moser and Chiann Bao suggest that tribunals should give due regard to such rules, for the following reasons:

a) "The rules themselves have evolved based on years of judicial and legislative experience and expertise. They are, by and large, rational and designed to achieve fairness;

b) The rules are comprehensive and should cover most situations. They will therefore be a source of persuasive guidance to the tribunal;

c) If the tribunal were to make decisions on evidential issues based on its own whims and without any rational basis, the parties may have legitimate grounds to feel aggrieved, and possibly recourse."[162]

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[161] Andrea Gritsch, Stefan Riegler and Alexander Zollner, The taking of Evidence in The Guide to M&A Arbitration – First Edition.
[162] Michael Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press 2017), P 9.154.

At present, although national rules on taking of evidence in arbitration is not common, uniformity is achieved to a great extent due to the introduction of the "Rules on the Taking of Evidence in International Arbitration" developed by the International Bar Association (IBA Rules), gradually evolving through its initial introduction in 1983 up to the latest version of the rules that were issued in 2010, and the more recent introduction of the "Prague Rules on the Efficient Conduct of Proceedings in International Arbitration'', which was released in December 2018.

D. The IBA Rules

The IBA Rules were the pioneers in introducing uniform rules dealing with evidentiary procedure in international commercial arbitration. The status quo prior to the introduction of these rules where evidentiary procedure is concerned, was to find limited recourse to the broad provisions in various national arbitration laws and institutional rules.[163] As stated earlier, these provisions only addressed the fundamentals of an evidentiary procedure and left most other advanced aspects of evidence taking for the tribunal and the parties to decide. Therefore, it can be said that national arbitration laws and institutional rules formed the basis of the evidentiary procedure in international commercial arbitrations prior to the introduction of dedicated rules of evidence.

These rules were drafted by a sub-committee under the supervision of the Arbitration Committee of the International Bar Association.[164] The latest version of the IBA Rules was introduced in 2010. These rules gained much popularity among parties, arbitrators and counsel involved in international commercial arbitration. This has been evidenced in a survey carried out by White & Case LLP in 2012, which shows that the IBA Rules were used in 60% of the international

[163] *See* UNCITRAL Arbitration Rules Sections 24, 25, 26(1), 27, 28(3), 29.
[164] IBA Rules on the Taking of Evidence in International Arbitration (2010), pg 1.

arbitrations that year, with 85% of the respondents believing them to be useful. It was further shown that 53% of the respondents used them as guidelines and 7% from the rest, as binding rules.[165]

The primary goal behind the introduction of these rules was to "provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between parties from different legal traditions".[166] Thus, it can be seen that the IBA Rules intended to introduce a hybrid system of evidentiary rules encompassing both common law and civil law qualities. The provisions dealing with expert evidence are one such instance that is indicative of the hybrid approach used by the IBA Rules.[167] The common law approach in terms of experts is to allow parties to appoint their own expert witnesses to give evidence on technical matters whilst the civil law approach is for the tribunal to appoint experts and conduct their own line of inquiry. The IBA Rules have made provision for both these situations and it is also possible under these rules to have both types of experts appointed simultaneously. However, despite the intention to bridge the gap between the different legal systems and their practices, the IBA Rules still face criticism by some practitioners as to their inclination towards a common law approach and thereby creating a common law dominance in the sphere of international commercial arbitration. This criticism warranted the introduction of the Prague Rules which uses an inquisitorial approach to taking of evidence.

[165] White & Case LLP, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process at p 11.
[166] IBA (n 28), paragraph 1 of the preamble.
[167] IBA (n 28), Art. 5-6.

E. The Prague Rules

The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration, which was introduced very recently, is claimed to be an ideal evidentiary procedure that can be used where parties prioritize a cost efficient and fast-track arbitral process. These rules follow a civil law approach and unlike in the IBA Rules, the tribunal is equipped with substantial powers and discretion in the conducting of proceedings in terms of evidentiary matters. The Tribunal's power to limit the duration of a hearing,[168] the *"Iura Novit Curia"* principle which allows proactive arbitrators to apply legal provisions that were not set out by the parties[169] and power to grant assistance in amicable settlement,[170] are some of the interesting provisions which are not seen in the IBA Rules but are included in the Prague Rules.

F. Key Differences between the IBA Rules and Prague Rules

It may sometimes be said that the discussion between IBA Rules and the Prague Rules is more or less a discussion between common law and civil law evidentiary procedures. What is important is however, that these rules address important issues that are not generally provided for in the applicable laws and institutional rules.

The key aspects where provisions can be contrasted from each other in these rules are: the provisions dealing with the tribunal's role in case management; document production; number of witnesses; examinations of witnesses and expert witnesses as demonstrated in the following table.

[168] Prague Rules, Art. 8.2.
[169] ibid, Art. 07.
[170] Ibid, Art. 09.

Key Aspect	Article	Prague Rules	Article	IBA Rules
Case management	2, 3.1 – 3.3	Provide for a proactive tribunal, including the tribunal's power to hold case management conferences, make orders for site inspections and/or any other necessary action for the purpose of fact-finding, imposing cut-off dates for production of evidence.[171]	3.10	The rules do not expressly require the tribunal to be proactive in comparison to the corresponding provisions in the Prague Rules.[172] The tribunal merely requests the parties to produce evidence that they consider appropriate[173] and the tribunal under these rules do not have the power to impose cut-off dates for production of evidence.
Document Production	4.3, 4.5	support the notion that document production must be limited in order to save costs and time. Under these rules a party may request the tribunal to order another party to produce a	3.3 - 3.10,	The wording of the IBA Rules does not suggest strict considerations for the tribunal to refuse to request a party to produce documents.[176]

[171] Prague Rules, Arts. 2, 3.1 – 3.3.
[172] However, Art. 02, IBA Rules provides that the tribunal shall invite parties to consult each other to agree on an efficient, economical and fair process for the taking of evidence.
[173] IBA Rules, Art. 3.10.
[176] IBA Rules, Art. 3.3-3.10.

		specific document which shall be relevant, material, not to be found in the public domain and is in the possession of another party or within its power[174] and it may be granted only if the tribunal is satisfied.[175]		
Tribunal's power to decide on number of witnesses	2.4(b), 5.2	Under the Prague Rules the tribunal may decide on factors such as, the number of witnesses to be called and which witnesses may be called.[177]		A tribunal following the IBA Rules would not have such powers as the Parties are at liberty to decide on the necessary witnesses.
Examination of witnesses	5.3, 8.1	In alignment with its objectives of achieving cost and time efficiency, the Prague Rules, although having retained the common law-typical cross-examination mechanism, have made provisions to the effect of empowering	8.2	Such encouragement to dispense with hearings is not found in the IBA Rules. They however, empower the tribunal to take control over the evidentiary hearing and to limit and/or

[174] Prague Rules, Art. 4.5.
[175] ibid, Art. 4.3.
[177] Prague Rules, Art. 2.4(b), Art. 5.2.

		the tribunal to decide that a certain witness should not be called for examination during the hearing.[178] The tribunal is even encouraged in appropriate cases to seek to resolve the dispute on a documents-only basis instead of having hearings.[179]		exclude any question to a witness.[180]
Expert witnesses	6.1, 6.5	A tribunal following the Prague Rules would in the first instance appoint the expert. This is the default step as laid out in the rules.[181] However, this appointment would not preclude a party from submitting reports by its own appointed expert.	5, 6	The IBA Rules provide for a hybrid mechanism where both party-appointed and tribunal-appointed experts may be called to give evidence.[182]

[178] ibid, Art. 5.3.
[179] ibid, Art. 8.1.
[180] IBA Rules, Art. 8.2.
[181] Prague Rules, Art. 6.1.
[182] IBA Rules, Art. 5 & 6.

Although differences exist between the IBA and Prague rules, it must be noted that such differences only arise in terms of the scope of the tribunal's powers in taking evidence. The general mechanisms of document production, which must be done through the tribunal's intervention; empowering the tribunal to decide on the relevance, admissibility and materiality of evidence; the requirement for parties to make known the witnesses each other intend on calling and making provisions for the calling of both party-appointed and tribunal appointed expert witnesses and the fixing of the expert's terms of reference, are the similarities that form common ground between the two sets of rules.

G. Assessing of Evidence using IBA Rules and Prague Rules

G.1 Burden of Proof

The various provisions dealing with the burden of proof in arbitrations, merely requires each party to prove the facts upon which it relies.[183] It must be noted however, that tribunals and parties must exercise caution in dealing with issues on burden of proof since it may raise an issue of characterization, as the same is treated as an issue of substantive law in civil law jurisdictions whereas in common law jurisdictions it is treated as a procedural issue. Owing to this reason, a rule on burden of proof was not included in the Model Law as well.[184]

Regardless of the absence of provisions dealing with this aspect, it is widely accepted that an arbitral tribunal should apply the normal standard of proof used in civil cases, i.e. on a "balance of probability"[185] while not restricting the proceedings to strict rules of evidence. On the contrary, however, some cases may require a higher standard of proof. This is typical when

[183] HKIAC Rules, Art. 22.2; UNCITRAL Arbitration Rules, Art. 27.
[184] UN Doc A/40/17, P 328 and UN Doc A/CN9/SR331, paras 20, 29 (statements of the Swiss, German and Finnish delegates)
[185] Blackaby, Hunter, Partasides and Redfern, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International 2015), P 378; Michael Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press 2017), P.152.

allegations of fraud and illegality are made in arbitrations. In such cases, tribunals would require more evidence than that is usually needed to ensure such allegations are adequately proven.[186]

G.2 Adverse Inferences and Procedural Good faith

Adverse inferences may be drawn by the tribunal in instances such as where a document was requested to be produced, but the party within whose possession or powers to produce such document, does not produce it; where a witness whose attendance has been requested but such witness refuses to attend and where a witness who has submitted a witness statement refuses to attend a hearing for oral examination.[187] However, it must be noted that in instances where a witness refuses attend examination, it will be difficult to justify the drawing of such adverse inference as against an instance where a party does not produce documents that are within its control, because a party may have genuinely attempted to procure the witness's attendance and/or the witness may have a satisfactory justification for not attending, such as illness etc.

The concept of adverse inferences is found in both the IBA and Prague Rules. The IBA Rules provide for instances where if a party without satisfactory explanation, refuses to produce a document being requested under a "Request to Produce" to which it has not objected in due time; and where a party refuses to make available any other relevant evidence including testimony, without satisfactory explanation. Accordingly, in these instances the tribunal may infer that such refusal is made because of its adversity to the interests of that party.[188] Article 10 of the Prague Rules empower the tribunal to draw adverse inferences "with regard to a party's case or issue" where such party does not comply with the tribunal's orders or instructions in the absence of justifiable grounds.

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[186] *See Wells Ultimate Service LLC v Bariven, SA,* Court of Appeal of the Hague (Judgment dated 28.10.2019): On the contrary, caution must be exercised as to avoid placing a standard too strict. In this case, an ICC award was annulled for the reason that the tribunal placed a standard as to "clear and convincing evidence" to prove that the contract in question was concluded through means of corruption, which was deemed by courts as a standard too strict.

[187] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014), P 2351

[188] IBA Rules, Art. 9.5 – 9.6.

In addition to this power of the tribunal to draw adverse inferences, a requirement for parties to conduct itself in good faith during the evidence taking process, is also set out in the IBA Rules. Accordingly, if the tribunal determines so, it is empowered to assign costs of the arbitration including costs of taking evidence against such party.[189]

G.3 Admissibility of illegally obtained evidence

In deciding issues relating to admissibility of evidence, Redfern and Hunter have generally stated that *"In practice, tribunals composed of three experienced international arbitrators from different legal systems approach the question of the reception of evidence in a pragmatic way. Whether they are from common law or civil law countries, they tend to focus on establishing the facts necessary for the determination of the issues between the parties and are reluctant to be limited by technical rules of evidence that might prevent them from achieving this goal."*[190]

Redfern and Hunter's above statement may however not apply to instances where the issue is on the admissibility of illegally obtained evidence. That being mentioned, this issue is now considered a moot point where it is debated whether actually, in international arbitration, such evidence should be deemed inadmissible. What is clear is that the admission of such evidence is put in the juxtaposition between the party's right to be heard and the requirement to render an award aligned with public policy, i.e. not tainting the arbitral procedure by admitting illegally obtained evidence.

In negotiating this rather tricky bend, George von Segesser has stated, *"…. assessment of admissibility of illegally obtained evidence …. is generally undertaken by balancing the interest in finding the truth against the legal interests which were harmed when the evidence was obtained."*[191]

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[189] IBA Rules, Art. 9.7.
[190] Blackaby, Hunter, Partasides and Redfern, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International 2015), P 377.
[191] George Von Segesser, Kluwer Arbitration Blog, Admitting illegally obtained evidence in CAS proceedings – Swiss Federal Supreme Court shows Match-Fixing the Red Card, 17th October 2014 - http://arbitrationblog.kluwerarbitration.com/2014/10/17/admitting-illegally-obtained-evidence-in-cas-proceedings-swiss-federal-supreme-court-shows-match-fixing-the-red-card/>

This approach was also used by the Swiss Federal Supreme Court where the issue as to whether the reliance on an illegally obtained video recording in a CAS award (Court of Arbitration for Sports) violates public policy was raised.[192]

The IBA Rules (Articles 9.1 - 9.3) empower the tribunal to decide on whether to exclude certain evidence or not. These Articles provide for instances where evidence have been produced under legal impediments/privilege, affecting commercial or technical confidentiality etc. and the tribunal is empowered to exclude such evidence in those instances. There is similar provision in the HKIAC Rules as well.[193] Article 19.4 of the IBA Rules provides that the tribunal may make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

The Prague Rules, however, do not contain such provision to this effect. In terms of such exclusion, the only provisions dealing with exclusion is where a tribunal may preclude a witness from attending a hearing.[194] However, if such party insists on calling such witness, the tribunal as a general rule must call the witness.[195] Even the process of document production, in setting requirements to enable parties to request for documents, provides only that such document be relevant and material to the outcome of the case, not in the public domain and if in the possession of another party.[196]

H. Conclusion

Many argue that when conducting arbitration, strict adherence to the rules of evidence is not necessary, as that would have an adverse impact on the effective and speedy resolution of the disputes referred to arbitration. The key justification behind this argument is that rules of evidence can be misused to obstruct and/or obfuscate the facts and thus, delay the proceedings.

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[192] Decisions 4A_362/2013 and 4A_448/2013
[193] HKIAC Rules, Article 22.3.
[194] Prague Rules, Art. 5.3.
[195] ibid, Art. 5.7.
[196] ibid, Art. 4.5.

In this article we have argued and endeavoured to demonstrate that rules and procedures concerning evidence is actually not bad for arbitration, if properly used. The advantages of having rules such as the IBA Rules and the Prague Rules have also been discussed.

We are of the view that if Arbitrators could endeavour to manage the application of rules of evidence consistent with the purposes of arbitration in a manner that would not defeat the expectations of the parties, and also manage to ensure that the process is not misused by the lawyers and/or parties to frustrate the effective and speedy conclusion of arbitral hearings, then the application of rules of arbitration would result in more fool proof awards being delivered. In other words, the arbitrators should apply the rules of evidence to find the evidence that will reach the merits and truth of the claims, and defenses to those claims, in a manner that would encourage the parties to present solid evidence in support of their respective cases and avoid unnecessary delay.