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**Practice of Commercial Arbitration in Sri Lanka**

**By Dr. Harsha Cabral, PC[[1]](#footnote-1)**

1. **An Introduction**

In the present day, there is an increased significance and a necessity for commercial arbitration compared to other dispute resolution mechanisms in Sri Lanka. This is partially attributable mainly due to the mismatch between the needs of the business community and the process of dispute resolution other than commercial arbitration- less flexibility, inexpediency and inefficiency.

The scope of this paper, the author submits, is limited to a brief exposition of the actual operation of commercial arbitration in Sri Lanka. This paper is by no means a critique of the law on commercial arbitration in Sri Lanka. Neither it is a paper which partly deals with the pros and cons and ailments of commercial arbitration in Sri Lanka.[[2]](#footnote-2) Hence, it is the intention of the author to simplify the intricacies of commercial arbitration, so that any lay person (non-lawyers) could grapple the practical aspects of commercial arbitration without much frustration.

1. **Legal framework on Commercial Arbitration**

The entity of the law on commercial arbitration is contained in the Arbitration Act, No. 11 of 1995 (**‘the Act’**), a simple piece of legislation comprising of 50 Sections coherently compartmentalized into 9 parts. The Act has broadly sought to repeal the previous law on commercial arbitration[[3]](#footnote-3) as well as to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[[4]](#footnote-4)

1. **Basic requisite of arbitration**

In today’s context, most commercial contracts incorporate the ‘path for arbitration’ by including an arbitration agreement in the form of a clause contained either in the main agreement itself or in a separate agreement.[[5]](#footnote-5) In such agreement, regardless of the place of inclusion, parties may broadly agree on a variety of aspects- the mode of arbitration[[6]](#footnote-6) the place of arbitration, the the law applicable to arbitration[[7]](#footnote-7), the number of arbitrators to be appointed etc. However, if parties to a contract fail to incorporate an agreement to arbitrate, it must be noted that, such parties would not be eligible to resolve their disputes by way of arbitration. What is more important is not merely to incorporate an arbitral clause, but also to obtain proper legal advice prior to incorporating such clause in a contractual agreement.[[8]](#footnote-8)

1. **How to ‘go for’ arbitration**

Once the contract is entered and the project is ongoing, it is natural for disputes to arise between contracting parties. In most contracts in the present day, arbitration clauses are drafted extremely wide, that is, it refers to ‘any dispute’ in the arbitral clause. Consequently, even a ‘minor’ difference, for instance, a change of origin of country of a supplied vehicle for a project, can be referred to arbitration. On the contrary, ‘major claims’ such as underpayment of items in the Bill of Quantities, disputes emanating in the defect liability period are also referable to arbitration. Thus, to initiate the process of arbitration, the stepping stone is to send, the Notice of Arbitration to the opposing party.

Usually, parties can can follow the steps in the arbitral clause and thereby commence arbitration. However, not all arbitral agreements stipulate the steps to be followed in the event of a dispute. In such situations, parties would be required to follow the legal provisions contained the Act.

***Appointment of Arbitrators***

First step is the appointment of arbitrators. In terms of the act, the default number of arbitrators to be appointed is three. However, if the parties to the arbitral agreement have stipulated the number of arbitrators to be appointed, such number ought to be an odd number of arbitrators. In that, each party would appoint their respective arbitrator(s) pursuant to which such appointed arbitrators would jointly appoint the umpire- the Chairman of the arbitral panel. On the contrary there can be arbitrations with a sole arbitrator as well. In any case, in the event of a dispute over the appointment of arbitrators, the Act provides for an application to be made to the High Court to resolve such dispute.[[9]](#footnote-9)

***Venue of Arbitration***

Next step is the venue of arbitration. If parties have not agreed on a venue in the agreement to arbitrate, parties are free to decide a venue for same. In Sri Lanka, there are two major institutes functioning as arbitration centres- the Sri Lanka National Arbitration Centre (SLNAC) and the Institute for the Development of Commercial Law and Practice[[10]](#footnote-10) (ICLP). Apart from the above two centres, the Ceylon Chamber of Commerce (CCC) also ‘functions’ as centre for arbitration.[[11]](#footnote-11) The venue of arbitration is also termed as the seat of arbitration.[[12]](#footnote-12)

In practice, these initial steps are usually executed through correspondences between disputant parties. Pursuant to these initial steps, the parties would arrange a conference at the selected venue and agree on time-frames of the arbitral proceedings- for instance, when to file the Statement of Claim, the Statement of Defence and the Statement of Reply, if needed. Moreover, the parties may at the outset agree on certain costs of arbitration, for instance, fees payable to the arbitration centre, fees payable to the arbitrators[[13]](#footnote-13) etc.

1. **What is better- Institutional arbitration or ad hoc arbitration?**

The Seat of arbitration should not be confused with institutional arbitration and/or ad hoc arbitration. Whereas the latter has a bearing on the procedure governing the arbitration, the Seat of arbitration refers to the ‘actual’ location at which the arbitral proceedings take place.

In most international arbitrations and/or arbitrations involving ‘big claims’, it is quite common for parties to opt for institutional arbitration. The reason for such choice lies in the ‘package’ that comes therewith, rules governing arbitral proceedings from the commencement to the delivery of the award.

The Institute for the Development of Commercial Law and Practice (ICLP), the Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC), the Hong Kong International Arbitration Centre (HKIAC), the London Court of International Arbitration (LCIA), the China International Economic and Trade Arbitration Commission (CIETAC) and the Dubai International Arbitration Centre (DIAC) are few of the mostly utilized arbitration institutes around the globe. Each of such arbitration institutes carries with it, its own model clauses which the contracting parties worldwide could use.

On the contrary under ad hoc arbitrations, in the absence of readily available rules governing arbitration proceedings, parties to a dispute need to decide on each step of the arbitral proceeding. However, parties can only do so to the extent such freedom is allowed under the relevant *lex arbitri*. Lack of case management[[14]](#footnote-14), Long dates given in Arbitrations[[15]](#footnote-15) and Arbitrators not having 'control' over proceedings[[16]](#footnote-16) are some of the disadvantages seen in ad hoc arbitrations. All of the said disadvantages are contributable to the absence of pre-agreed firm set of rules to govern arbitrations which is seen in institutional arbitrations.

1. **Once arbitration starts, what’s next?**

Once the arbitral tribunal is properly constituted, parties would proceed to file their respective pleadings as agreed at the initial conference. In litigation, the party filing action is named either the Plaintiff or the Petitioner; the respective term attributed in arbitration is the Claimant. On the contrary, the party against whom action is filed in litigation is named either as the Defendant or the Respondent; the respective term attributed in arbitration is the Respondent. In certain instances, parties may at the outset agree on the documents (Agreed Bundle) to be submitted to the tribunal as well as the non-contested documents.

If at all, there is an application needed to be filed during the arbitral proceeding, a party may file it by way of a motion. For instance, to bring to the attention of the tribunal on the death of an arbitrator, on grounds giving rise to justifiable doubts as to an arbitrator’s independence and impartiality.

***Powers of the Arbitral Tribunal***

*To determine the jurisdiction*

In practice, once the tribunal is constituted, a party disputant may raise an objection on the jurisdiction of the arbitral tribunal- i.e. whether or not the tribunal has the power to hear and determine the dispute. Usually, such objection is raised along with the filing of the Statement of Claim.[[17]](#footnote-17) Accordingly, it would be incumbent on the arbitral tribunal to deal such objection as expeditiously as possible unless the parties agree same to be decided together with substantive claims.

*Interim protection*

On the other hand, the arbitral tribunal is empowered, on the application of a party, to make an Order in the form of interim measures of protection of the subject matter of the dispute.[[18]](#footnote-18)

*Settlement*

In practice, it is usual for the arbitral panel headed by the Chairman to inquire from parties whether or not the matter could be reached at a settlement. If the parties, by such time or even at a later stage, have agreed on a settlement, the tribunal would enter an Award of Settlement on Agreed Terms.[[19]](#footnote-19)

The author, at this juncture, requests the reader to refer the annexed paper of the author titled ‘*The law in Sri Lanka on Arbitration’* for a detailed analysis on the legal framework of the conduct of proceedings in commercial arbitrations in Sri Lanka.

1. **Conclusion of Arbitral proceedings and thereafter?**

***Enforcement***

Once arbitral proceedings comes to an end, i.e. the Award is delivered, the next crucial step is for the party in whose favour the award is delivered to enforce the award. This has to be done by way of an application made to the High Court in accordance with the provisions in the Act.[[20]](#footnote-20)

***Proceedings before Court***

Each application to the High Court in terms of the provisions of the Act, it is to be noted, is to be made by way of a Petition supported by an Affidavit and all parties to the arbitration other than the Petitioner should be made Respondents.[[21]](#footnote-21) Upon such application party Respondent is given an opportunity to state his Objections supported by Affidavit.

***Setting aside the Award***

On the other hand, the party dissatisfied with the award has an opportunity to make an application to set-aside the arbitral award in terms of the provisions of the Act.[[22]](#footnote-22) However, it must be noted that, such party is not allowed to challenge the merits of the award similar to an appeal. This highlights a distinct feature of arbitration as oppose to litigation- party autonomy.

***Recognition of the Award***

Moreover, if the award is made out of Sri Lanka, in terms of the New York Convention, the party in whose favour the award is delivered has the option of enforcing the award in Sri Lanka and thereby chase assets of the unsuccessful party to the arbitration. In such instance, the unsuccessful party to the arbitration has the option of refusing recognition on limited grounds similar to an application to set aside the arbitral award in terms of the provisions of the Act.[[23]](#footnote-23)

***Appeal to the Supreme Court***

Finally, it is noted that the Act, leaves open for an extremely limited window of opportunity to appeal against a judgment and/or order of the High Court purely on questions of law and after leave to appeal being granted by the Supreme Court.[[24]](#footnote-24)

1. **Conclusion**

Commercial arbitration in Sri Lanka is entirely governed by the simple straightforward piece of legislation comprising of 50 Sections. In addition to the theoretical knowledge on arbitration, it is extremely vital to be possessed with the knowledge on the actual operation of arbitration for those who engage in arbitration- majority being non-lawyers such as Engineers and Quantity Surveyors. To achieve that end, it was the intention of the author, through this brief paper, to set the backdrop stepping stone.

1. For a detailed exposition on this topic refer the book, *‘Law and Practice of Commercial Arbitration in Sri Lanka (2018)’* by Dr. Harsha Cabral. [↑](#footnote-ref-1)
2. For the law governing Commercial Arbitration in Sri Lanka, see the author’s outline in Annex A titled ‘*The law in Sri Lanka on Arbitration*’. For pros, cons and deficiencies in commercial arbitration, see the author’s outlines annexed as Annex B and Annex C titled respectively as ‘*The Advantages and Disadvantages of Arbitration*’ and ‘*Deficiencies in Commercial Arbitration in Sri Lanka’*, either in a Cabral, PC.(i.e.) rbitration in Sri Lanka'ity Surveyorsrop itration, International Court of Arbitration in Paris e [↑](#footnote-ref-2)
3. The Arbitration Ordinance and certain Sections of the Civil Procedure Code. [↑](#footnote-ref-3)
4. See below, to understand on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. [↑](#footnote-ref-4)
5. However, in practice, most commonly the arbitration agreement is incorporated in the main agreement itself. [↑](#footnote-ref-5)
6. Whether arbitration is to proceed as ‘*Institutional*’ or ‘*ad hoc*’. Under institutional arbitration, parties would refer the dispute to an arbitral center with institutional rules. If the arbitration is *ad hoc* parties would determine the procedure of arbitral proceedings. In practice institutional arbitration is more recommended. [↑](#footnote-ref-6)
7. Parties may choose a legal system neutral to both parties. For instance, in a dispute between a Sri Lankan party and a Chinese party parties may choose English Law as the substantive law applicable to parties. [↑](#footnote-ref-7)
8. The importance of prior legal advice cannot be highlighted enough, especially in the backdrop of certain arbitration agreements having not being properly drafted thereby resulting in failed arbitrations- for instance, the venue of arbitration incorporated being extremely costly resulting in parties abandoning such arbitral proceedings. [↑](#footnote-ref-8)
9. See, Section 7 of the Act. [↑](#footnote-ref-9)
10. ICLP has its own institutional rules. [↑](#footnote-ref-10)
11. Despite the availability of state-of-the-art facilities for an arbitration centre, unfortunately, very few arbitrations have been held in the CCC. On the contrary, currently steps are being taken by the CCC and the ICLP to form a new ADR Centre under the name CCC-ICLP ADR Centre to provide high quality services on *inter alia* arbitration. [↑](#footnote-ref-11)
12. The seat of arbitration can be abroad. For instance, Singapore International Arbitration Centre, London Court of Arbitration, International Court of Arbitration in Paris etc. [↑](#footnote-ref-12)
13. Parties would pay for their respective appointed arbitrators. Moreover, parties would jointly pay for the Chairman of the arbitral panel. [↑](#footnote-ref-13)
14. Lack of case management is a major drawback under ad hoc arbitrations. This makes the arbitration process drag on with regard to time management. This is an issue of discipline and invariably the parties pay the price. In almost all reputed international institutional arbitrations, case management is given priority and the parties and their counsel know exactly how the arbitration will progress on a tight schedule. Infact, ICC opened its own case management Centre in Singapore at the Maxwell Chambers in April 2018. An arbitration without strict case management is like a wild horse. [↑](#footnote-ref-14)
15. Due to busy counsel and busy habitual arbitrators, long dates are given as the next date for arbitration, since they are not free to give early dates. This slows down the entire process of commercial arbitration and negates the purpose of arbitration. [↑](#footnote-ref-15)
16. Some arbitrators lack the skills needed to 'control' proceedings. This allows the counsel and witnesses to take charge of the proceedings to the detriment of the arbitration process. It is upto the tribunal or the chairman of the tribunal to handle the proceedings in a disciplined manner. In international arbitrations, parties are informed ahead of, the time period available to state their ‘case’. Sometimes a short witness might get 10 minutes and an important witness a maximum of 1 hour. This is rarely seen in Sri Lanka where most arbitrations prolong as the counsel and the tribunal both act in a loose manner. Arbitrators should never be under obligation to any counsel in arbitration. [↑](#footnote-ref-16)
17. See, Section 11 of the Act. [↑](#footnote-ref-17)
18. See, Section 14 of the Act. [↑](#footnote-ref-18)
19. See, Section 14 read with Section 25 of the Act. [↑](#footnote-ref-19)
20. See, Section 31 of the Act. [↑](#footnote-ref-20)
21. See, Section 40 of the Act. [↑](#footnote-ref-21)
22. See, Section 32 of the Act. This is a limited window of opportunity strictly limited to the ground stipulated in this provision. [↑](#footnote-ref-22)
23. See, Section 34 of the Act. [↑](#footnote-ref-23)
24. See, Section 37 of the Act. [↑](#footnote-ref-24)