EVALUATING THE "PUBLIC POLICY" WITH JUDICIAL INTERVENTION IN INTERNATIONAL COMMERCIAL ARBITRATION PROCESS IN SRI LANKA AND MECHANISMS TO DEVELOP SRI LANKA AS AN INTERNATIONAL COMMERCIAL HUB

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Introduction

Arbitration is perhaps the oldest form of dispute resolution, and it probably pre-dated litigation.[1] It has been used by ancient civilizations from time immemorial to resolve disputes and to preserve the peace. Evidence of its use as an institutionalized form of social control and dispute resolution can be found as early as about 3,000 B.C. in Egypt, Babel and Assyria.[2]

According to the historical evidences, Sri Lanka also a country which participated into international commercial transactions and international trade activities. As the immediate result of the liberalization of the Sri Lankan economy in 1977 the state has focused into many economic transactions such as improvement of foreign investments, transactional electronic commerce. Those may lead to many institutional commercial disputes and to overcome those disputes there should be an effective international commercial dispute resolution mechanism in the country.

The main feature of arbitration is that it is consensual in nature and private in character. The concept of party autonomy associated with arbitration not only allows the parties to select their arbitrators,[3]the seat of arbitration[4] and the rules of procedure to be followed by the arbitrators,[5]but even permits them to choose the "rules of law" to be applied in determining the substantive dispute before them. The Arbitration Act No. 11 of 1995 provides that "an arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute."[6] Thus Sri Lankan Act which is purely based on the United Nations Commission on International Trade Law (UNCITRAL)

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1 ICJ, *The International Court of Justice*, Chapter 1: History,available@ *http://www.icj-cij.org/icjwww /igeneralinformation /ibbook/Bbookchapter1*.

2 Christian Bühring-Uhle, *Traditional Mediation v. Modern Mediation*, Stockholm Arbitration Newsletter, 1-2001 1, available@ *http://www.sccinstitute.com/_ upload/shared_files/newsletter/newsletter_1_2001.pdf.*

3Sec 7(1) of the Arbitration Act No. 11 of 1995.

4 Art. 20 of the UNCITRAL Model Law(1985).

5UNCITRAL Model Law on International Commercial Arbitration, 1985 – UN doc.A/40/17.

6 Art. 25(4) and Art.32(5) of the UNCITRAL Rules.

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Model Law on International Commercial Arbitration (1985).

The relationship between the arbitral tribunal and courts may be interpreted as one of the "partnership". Each has a specific role to play at different times, but what is important is for both institutions to co-operate for the achievement of the justice in the end. That simplifies the effective and efficient, standardized judicial intervention is a basic requirement of the establishment of effective dispute resolution process. This article will examine the existing judicial intervention mechanism and hope to grant recommendations to develop the country as a commercial hub with regard to the comparative analysis with Singapore.

On the other hand, International Commercial Arbitration Centre in Sri Lanka was commenced on 7 th of May 2015.But there are some reasons behind the screen for not being Sri Lanka as a famous and recognized venue for international arbitration. However with the establishment of mass projects like Port City the government is aimed to establish an International Financial Centre in the Port City. So Sri Lanka might be a hub for arbitration once the investors have visited here to commence their projects. In order to achieve that target there should be an effective international commercial arbitration process with minimal judicial intervention in the country. Basically this paper will illustrate judicial interfere into the public policy concept which directly connected with the recognition and enforcement of arbitral awards too.

UNCITRAL Model Law, New York Convention and Sri Lankan Arbitration Act

The Sri Lankan Act has been greatly inspired by the UNCITRAL Model Law (1985) and few provisions of the Act have been drafted on the Recognition and Enforcement of Foreign Arbitration Awards or New York Convention (1958). When parties choose arbitration as the mechanism for dispute resolution their intention is to exclude the court interference. But judicial interference in the process only as a supporter and a one who facilitates the arbitration process in the commercial arbitration process due to the frustrations occurred in clashing two different jurisdictions.[7]However judicial intervention into Commercial Arbitration process in Sri Lanka can be identified in for situations.

01. for constituting the arbitral tribunal
02. for implementing the agreement to arbitrate
03. for the grant of interim measures
04. for the recognition or enforcement of the arbitral award

Article 5 of the UNCITRAL Model Law[8], states as follows:

"In matters governed by this law, no court shall intervene except where so provided in this law."

This is the most crucial area under this research because judicial intervention into international arbitration comes under this. Sri Lankan Act[9] has also drafted several provisions to enhance the role of the court by

[7]UNCTAD,DisputeSettlement:International Commercial Arbitration.5.8 Court Measures,3(2005).

[8] Art. 5 of UNCITRAL Model Law on International Commercial Arbitration(1985).

[9]Arbitration Act No.11 of 1995.

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promoting international arbitration. Theoretically, Section 5 minimizes the intervention of court where there is a valid arbitration agreement while setting out provisions[10],limiting the court's mandate to specific instances in support of arbitration; Sections 32 and 34 encourage the finality of the arbitration award through defining narrow grounds for court intervention. The Act further sets out provisions for parties to waiver appeals to the Supreme Court through an exclusion agreement.[11]

In order to the Section 26 of the Sri Lankan arbitration Act "an award made by the arbitral tribunal shall be final and binding on the parties to the arbitration agreement" and under part VII of the Act national court has powers to set aside or to refuse the recognition and enforcement of an arbitral award.[12]Then there are several grounds for refusing the enforcement and recognition of an arbitral award according to paragraph (a) and (b) of Article 36(1) of the UNCITRAL Model Law and Section 34 (1) of the Sri Lankan Arbitration Act and paragraph 1 and 2 of Article V of the New York Convention.

Before the enactment of the Arbitration Act, arbitral awards were enforced in terms of the provisions of the Civil Procedure Code[13]and the extent of enforceability of foreign awards were according to the Reciprocal Enforcement of Judgements Ordinance.[14]However New York Convention has tried to reduce the above difficulties in the enforcement process. Sri Lanka ratified the New York Convention without any "territoriality" or "commercial" reservations [15] and the Sri Lankan Act states as follows;

"*A foreign arbitral award irrespective of the country to which it was made, shall subject to the provisions of section 34 be recognised as binding and, upon application by a party under section 31 to the High Court, be enforced by filing the award in accordance with the provisions of that section."*[16]

Thus section 50 which is the definition part of the Arbitration Act has clarified a foreign arbitration award as "an award made in an arbitration conducted outside Sri Lanka."Part VII of the Sri Lankan Arbitration Act explains the provisions which are related to set aside an award made within the country[17] and section 31[18] explains the enforcement of domestic arbitral award and section 34[19] describes the foreign arbitral awards. Then the applicant has to go to the High Court to enforce such an award as mentioned in the Act.[20]It is noteworthy that the Sri Lankan Arbitration Act does not

[10] Sec 7,10,11,13,20,21 and 39, Arbitration Act No 11 of 1995.

[11] Sec 38 of Arbitration Act No 11 of 1995.

[12] Sri Lankan Arbitration Act No 11 of 1995.

[13] Civil Procedure Code,Ordinace No 2 of 1889,Sec 676-698.

[14]Reciprocal Enforcement of Judgements Ordinance No 41 of 1921.

[15]Marsoof,Recognition and Enforcement of Foreign Arbitral Awards ;Some Salient Points (2005) LCLR 27.

[16]Sec 33, Sri Lankan Arbitration Act No 11 of 1995.

[17]Sec 32, Sri Lankan Arbitration Act No 11 of 1995.

[18]Sec 31, Sri Lankan Arbitration Act No 11 of 1995.

[19]Sec 34, Sri Lankan Arbitration Act No 11 of 1995.

[20]Sec 50, Sri Lankan Arbitration Act No 11 of 1995,This Court is not the same as the Commercial High Court established by virtue of an order made in terms of sec 2(1) of the High

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permit to appeal against an arbitral award on its merits and in facts reveals that, under the provisions of part VII of the Act, it emphasise the finality of the award made by the tribunal.[21]

According to section 34 of the Sri Lankan Arbitration Act seven grounds are recognised to consider in an application regarding to the recognition or enforcement of a foreign arbitral award can be refused or rejected. These grounds are drafted in accordance with the New York Convention[22] and the UNCITRAL Model Law.[23]Thus the grounds are comprehensive and it is overdone and no need to supplicate more other grounds. Out of those public policy is the crucial point in here.

Public Policy

Articles 36(1)(b)(ii) and 34(2)(b)(ii) of the UNCITRAL Model Law[24] restrict the enforcement of an award if that arbitral award contradicts with the public policy. This provision will come to effect when the enforcement could contravene the fundamental principles of justice and morality.The significant finding of this research is there is not any case in Sri Lanka where an arbitral award or an arbitration agreement was set aside or reject the recognition or enforcement on the basis of contradiction with public policy.

In ***Light Weight Body Armour Ltd V Sri Lanka Army*** [25]the Supreme Court of Sri Lanka identified and Justice Tilakawardene stated that the concept of "public policy" encircled the procedural and as well as substantive fundamental principles of law and justice.[26]When the award would be contradicted with the public policy of Sri Lanka the recognition or enforcement of such award may be set aside.[27]Further Tilakawardane J stated that excepting the first five grounds (invalidity of arbitration agreement, breaches of natural justice, outside the scope of submission, improper composition of tribunal or arbitral proceedings) the sixth and the seventh grounds in the Arbitration Act permits High Court to find whether the subject matter to dispute was arbitrability or not or whether the award is conflicting with the public policy of Sri Lanka. Thus in this case held that public policy concept confines and held that "court had powers to bother the parties a just and equitable settlement". Here the judiciary has clearly refused to expand the scope of the public policy.

In the cases such as ***Hatton National Bank V KiranAtapattu and Another***[28] and ***KiranAtapattu V JanashakthiGeneal***

Court of the Provinces (Special Provisions) Act,No10 of 1996.

[21]Sec 23, Sri Lankan Arbitration Act No 11 of 1995.

[22] Para 1 and 2 of Art.V of the New York Convention(1958).

[23] Art 36(1)UNCITRAL Model Law on International Commercial Arbitration Art 36(1).

[24]Art.36(1)(b)(ii) and 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (1985).

[25]*Light Weight Body Armour Ltd V Sri Lanka Army*(2007) BALR 10.

[26]*Light Weight Body Armour Ltd V Sri Lanka Army*(2007) BALR 10,page13.

[27] Sec 34(1)(b)(ii) compares with Sec 32(1)(b)(ii) Sri Lankan Arbitration Act No 11 of 1995.

[28]*Hatton National Bank V KiranAtapattu and Another* (2013) XX BALR 45 .

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Insurance Co.Ltd[29] the Supreme Court clearly diminished to depend on its decision on public policy when other paths were disclosed and remarked. Justice Marsoof in his judgement stated that, the concept of public policy cannot be repudiated and there should be an utmost consideration for that concept.

Theoretically aspect of the above cases and the final observation is a court can decide on an issue of public policy without examining the factual matrix of a dispute, the two contrasting approaches discussed above in the ***KiranAtapattu*** case and the *Body Armour* case are clearly established.

Singapore Legal Regime In Order to Public Policy

According to UNCITRAL Model Law a court may entitle to set aside an award when it is contradicted with the public policy. As similarly The New York Convention also permits to refuse the recognition and enforcement of an award on the same ground. However the main issue is the public policies may be vary from jurisdiction to jurisdiction. But that inconsistence unavoidable in the international context and the pro arbitration jurisdictions can abstain from acquiring such narrow-minded approaches when drafting the outlines of its public policies. When challenging an award on a public policy should have to show that which part of the award is contradicted with that policy. Normal statement is insufficient to prove it.

In ***AJT v AJU***[30]Singapore High Court set aside an award which permits a settlement agreement that necessitate the constraining of the prosecution of amalgamated and non-amalgamated criminal offences under Thai Law. However court has a role to uphold the integrity of the arbitration process while maintaining the finality of an award. Thus courts have to protect the public interest and should not have to encourage the litigants to violate those. In the case the judiciary found that when one party withdraw his police complaint on fraud and forgery in order to uphold the settlement agreement, was contrary to public policy.

In this juncture when permitting a guilty person to escape from punishment would fail to achieve the primary objective of criminal justice. Thus in the case the settlement agreement was also identified to be illegal. In this case court held that "an award can be set aside on basis of public policy, where exceptional circumstances would lead the court to justify the rejection of the enforcement of the award".

Analysis

When comparing the Sri Lankan Legal framework regarding to the judicial intervention into the commercial arbitration process with Singapore, in Singapore there are two Acts as International Arbitration Act / IAA(Cap 134A) and Arbitration Act / AA(Cap 10). According to differences between domestic and international commercial arbitration, according to the choice of the parties and their intention regarding the degree of the court supervision, parties can select the process. But in Sri Lankan context even there is not any distinguish of powers of the arbitrators

[29]*KiranAtapattu V JanashakthiGeneal Insurance Co.Ltd* SC Appeal 30-31-2005 decided on 22-02-2013.

[30]*AJT v AJU* [2010] 4 SLR 649.

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between the domestic and international arbitration. Thus According to IAA Singapore arbitral tribunal has more power than the powers which are provided in Sri Lankan Arbitration Act.

On the other hand, as discussed in the above UNCITRAL Model Law allows for court intervention in four broader situations and Sri Lankan Arbitration Act greatly inspired by it. However Model Law does not provide powers to courts to review the merits of an arbitral decision, but contains requirement for the recognition and enforcement of foreign arbitral awards as in the New York Convention. This is the most significant part of this research and public policy is a crucial factor to set aside a foreign arbitral award out of the all the other grounds provided in UNCITRAL Model Law.

In order to ***Light Weight Body Armor*** case[31] in Sri Lanka the court has clearly refused to expand the concept of public policy while Singapore and other countries in the world have expanded the scope where an award itself was clearly harmful to public safety and morality. However in the above case and ***KiranAttapattu*** *case*[32], the approach of judiciary was that an arbitration award should not be lightly set aside and that a court can only look into the matter, in the context of violation of public policy only if there is some illegality or immorality that is more than a mere misstatement of the law.

Therefore a wider meaning to term "public policy" should be introduced in the context of Sri Lankan law, the policy of the Sri Lankan law and not on considerations adopted by the courts of Singapore in the domestic legal policy. This contention has been upheld by the High Court.[33]The public policy concept in Sri Lanka weighs regarding the finality of an arbitration award and that upset the same on mere misstatement of the law would not be in keeping with the public policy of Sri Lanka.

In additionally national courts have powers to interfere into the arbitration issues linked to their territory. However that intervention may be taken place before constituting the arbitral tribunal, during the on-going process of the arbitration process and after making the award. This level of intervention by national courts may be needed to assist and support the arbitration procedure. At the initiating of the arbitration, during the process and at the enforcement stage national courts provide assistance and therefore the provisions of UNCITRAL Model Law constitute the circumstances to the national courts to positively intervene into the arbitration process. That assistance is generally for support for the arbitration process.

When analysing the practical aspect in judicial intervention process in Sri Lanka there is an issue relating to the effectiveness of the process of judicial intervention into the arbitration process even after the establishment of commercial High Courts. To resolve commercial disputes take number of years. Even though the Sri Lanka is a party to the New York Convention, UNCITRAL Model Law there is no any efficient administrative institution to manage or administrate the commercial arbitration process. Thus due to the lack of facilities to

[31]*Supra 25.*

[32]*Supra 28.*

[33]*Southern Group Civil Constructions V.Ocean Lanka* (PVT) HC/ARB/38&39/1997 minutes of 15.02.2012.

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hear international arbitration matters in courts such as cases related to appeals, challenges to recognition and enforcement of awards there are long delays. So Sri Lanka is not an arbitration friendly jurisdiction. But in Singapore conclude an arbitration matter referred to judiciary within 18 months after the commencement.[34]

Even the Sri Lanka law has been adopted the provisions of UNCITRAL Model Law and New York Convention as Singapore; Singapore has developed and upheld the law according to their context. However in the Arbitration Act of Sri Lanka, there are some poorly drafted provisions. In this juncture Section 11 of the Act is an ideal example and it grants parallel jurisdiction empowering both the arbitral tribunals and the courts to consider the matters related to jurisdictional issues. This defeats the globally accepted principle of "competence-competence" which gives the sole authority to arbitral tribunal on its own jurisdiction.

On perusal Singapore is identified as high-tech, customized for international commercial arbitration and the reason for selecting Singapore as one of the most favoured seat for arbitration is the effective, efficient and transparent dispute resolution mechanism. In order to the above mentioned legal framework and the positive approaches of judiciary which indicates the minimum judicial intervention into the arbitration process in Singapore, it owns excellent and efficient Singapore International Commercial Court (SICC) which was launched in 2015.The aim of this court is to resolve international commercial disputes. Normally Singapore High Court tenders to transfer the cross boarder issues such as international commercial arbitration disputes into SIAC. Therefore Unlike the delays in the Sri Lankan court procedure, Singapore courts give decisions specially the matters in appeals and, matters in review the merits of the arbitral awards and challenges in set aside a foreign arbitral award. On other and Singapore has an International Arbitration Centre (SIAC) to govern and support the arbitration process.

In their commercial arbitration scenario Singapore has adopted the TPF mechanism which encourages the parties for arbitration by providing financial support and establishing the legal validity of their contracts. This is also a significant factor to enhance the view of Singapore as a preferred venue for international commercial arbitration. Sri Lanka should adopt those lessons from Asian Countries like Singapore.

Theoretically, there is an observation through this research that the both jurisdictions try to assist the arbitration process through judicial intervention instead of overruling the powers of the arbitral tribunal. However the degree of court intervention in Singapore than Sri Lanka is at a restrictive stage and court is not entitled to interfere unless provided in the law. Singapore Court does not simply set aside or challenge an arbitral award which is not fallen within the scope of the provisions of the governing law. Thus judiciary of Singapore takes pro-arbitration approach as discussed in the above to prevent challenges

[34] Ho May Kim, Singapore-Developing a Hub for International Arbitration (2016)1 National Law Conference Report, Sri Lanka.

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of the recognition or enforcement of international arbitral awards.

Mr. K. Kanag-Isvaran, P.C. observed that Sri Lanka has not faired "*too well at all*"[35] in its endeavor to introduce arbitration as the preferred mode of dispute resolution. Justice Saleem Marsoof in his works "the Judiciary and the arbitration process" investigates that judicial intervention has resulted in the deterioration of the fundamental concepts of arbitration of "being consensual in nature and being private in character"[36]At the same time Dr. Harsha Cabral states that the "delays and snags" of the judiciary has caused serious impediments to the growth of international arbitration.[37]Throughout the facts found in the research those statements have been proved and the researcher is going to grant recommendations to enhance the effectiveness of the judicial intervention process.

However in light of the findings of the research and the statements of the scholars as mentioned in the above ,the supportive role of the judiciary should be there and the level of intervention should be at a minimum stage. On the other hand the reality and the observation through the research is without the court support the arbitration process cannot be effective. As mentioned in the introduction part in order to the development of the Port City it may be a rapid increase in international trade and investments. Therefore effective arbitration mechanism should be there to settle the disputes.

Recommendations

- Establish two different legislations as AA and IAA for international and domestic commercial arbitration process as Singapore to clearly distinguish the provisions and applicable laws.

- Introduce attractive adjudicating mechanism to Sri Lankan International Arbitration Centre to promote it as SIAC.

  As discussed SIAC has introduced well reputed arbitration rules and such kind of rules may be needed in appointing arbitrators and instituting the arbitral tribunal in Institutional arbitration process. International Commercial Arbitration Centre in Sri Lanka is commenced in 2015.But it is not populated .To promote Sri Lanka as a famous seat for arbitration as Singapore, has to implement such kind of attractive adjudicating mechanism and rules.

- Establishing a separate special court as Singapore International Commercial Court which can specially deals with recognition or enforcement of foreign arbitral awards.

  In Sri Lanka especially the issues relating to the recognition and enforcement of the awards are hearing at the Commercial High Court. Even there are three court houses in Colombo, arbitration matters are calling in only one court house. Then so many delays can be seen. Due to that delays the process of enforcement or recognition of foreign

[35] K. Kanag-Isvaran, 'A Comment on the Operation of the Arbitration Act – Has it Worked?' in K. Kanag-Isvaran and S.S. Wijeratne (eds). *Arbitration Law in Sri Lanka* (ICLP 2006).

[36]S Marsoof , 'The Judiciary and The Arbitral Process' [2011] ICLP 73 .

[37] Dr. Harsha Cabral, ''Bottlenecks in Arbitration' [2016] National Law Conference Report,[BASL] working paper.

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arbitral awards are not effective or efficient. As a reason of practical delays in Commercial High Courts due to the number of litigations, separate court as SICC should be established. However for such implementation, an amendment to the Judicature Act 1950 should be required as Sri Lanka's Courts of First Instance are established under the Judicature Act and it sets out the rules and procedures for establishing new courts.

The judiciary of such court should be consisted with expertise in commercial law field and that court should only for commercial matters and arbitration matters with regard to recognition or enforcement of foreign arbitral awards. This might lead the effectiveness of the judicial intervention process.

- Developing the virtual evidence leading facilities in litigation process

Implementing the virtual evidence leading process in those commercial arbitration matters is a significant fact and this can be done through Skype, whatsapp, viber or any other social media. Such evidence is admissible according to Act No 10 of 2006 Electronic Transaction Act in Sri Lanka. According to the prevailing, worldwide pandemic situation it may help to prevent the spread of Covid 19 too. So without visiting to Sri Lanka investors can participate into the litigation process and this might be a cost effective mechanism. Such infrastructure developments may enhance the attractiveness of Sri Lanka as a preferred seat for international commercial arbitration and further this may enhance the effectiveness of the judicial intervention into international commercial arbitration process.

- Implement TPF mechanism

To promote Sri Lanka as a preferred seat for arbitration, this is an ideal fact. When a third part can fund on behalf of the party to arbitrate that will encourage the parties because arbitration is a very expensive process.

Conclusion

Throughout the findings it is a crystal clear fact that the court should support the commercial arbitration process and assist that. Sri Lankan legal framework provides sufficient approach to do so. However practical circumstances as well as the efficacy and the effectiveness of the judicial intervention cannot be expected through the existing scenario. In order to the development of Colombo Port City as an International Trade City the importance of the international commercial arbitration will be increased. Therefore to promote Sri Lanka as a famous venue for arbitration and to uphold the effectiveness of the judicial intervention process the above recommendations should be implemented.

Bibliography

Conventions

UNCITRAL Model Law on international Commercial Arbitration (1985)

New York Convention (1958)

Statutes

Arbitration Act No 11 of 1995

Singapore Arbitration Act (Cap 10)

Singapore International Arbitration Act (Cap 134A)

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Books

Kanag-isvaran K, PC, Arbitration in Sri Lanka. in SS Wijeratne (ed), Arbitration law in Sri Lanka (The Institute of Development of Commercial Law and Practice 2006)

Articles

Dr.Cabral H, "Bottlenecks in Arbitration' [2016] National Law Conference Report, [BASL] working paper

Ho May Kim, 'Singapore- Developing a Hub for International Arbitration '[2016] 1 National Law Conference Report, Sri Lanka

Marsoof,Recognition and Enforcement of Foreign Arbitral Awards ;Some Salient Points (2005) LCLR 27

Cases

AJU v AJT [2010] 4 SLR 649

Hatton National Bank V KiranAtapattu and Another (2013) XX BALR 45

KiranAtapattu V JanashakthiGeneal Insurance Co.Ltd SC Appeal 30-31-2005 decided on 22-02-2013

Kristy (Pvt) Limited Vs. The State Timber Corporation [2002] 1 Sri L.R 225

Light Weight Body Armour Ltd V Sri Lanka Army(2007) BALR 10

Southern Group Civil Constructions V.Ocean Lanka (PVT) HC/ARB/38&39/1997

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