EVOLVING TO RESOLVE: IS ARBITRATION A FACILITATOR OR A DISRUPTOR IN SPEEDY CONFLICT RESOLUTION?

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"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Abraham Lincoln

Conflict resolution has been associated with Sri Lankan culture for a long time even before the advent of foreign rule. It was the Dutch who introduced a formal state assisted court system that was improved by the British and has now evolved into the legal system in Sri Lanka.

History shows that before the introduction of the formal legal system that carries the coercive enforcement authority of the state, the parties to a dispute have chosen to present their disputes before a village headman or a priest and submit themselves to the jurisdiction of the resolver. Alternate dispute resolution methods like mediation, conciliation and arbitration have become more popular simply due to the long delays associated with the court system.

Dispute resolution through arbitration is another process that comes under the acronym ADR, i.e. alternate dispute resolution. Sri Lanka was a pioneer in the region with the enactment of the Arbitration Act No. 11 of 1995, which replaced the outdated provisions of the Civil Procedure Code and the Arbitration Ordinance. India followed suit but such mechanisms are still not found in most countries in the SAARC region. However, the ASEAN region and EU region have progressed in leaps and bounds in terms of ADR.

Sri Lanka is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[1], which facilitates

[1] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959

enforcement and recognition of foreign arbitral awards. Foreign investors look forward to arbitration to facilitate conflicts in commercial contracts. Legally enforceable ADR mechanisms enhance the quality of the Investment ecosystem.

A modern law of arbitration is an important aspect of facilitating and promoting arbitration in general, and for the promotion and establishment of Sri Lanka as the regional centre for arbitration in the South and South-East Asian region. This is of utmost significance given the fact that Colombo Port City is proposed to have its own jurisdictional zone for dispute resolution governed by arbitration and the Port City is to have its own International Arbitration Center. Also an efficient Arbitration Process is a sine qua non for attracting Foreign direct Investment.

But, it seems that the local arbitrational regime is losing its fire. There are many institutions, including banks that are proposing to remove the arbitration clauses from their regular agreements. Thus, the question has been at many a fora: **Has commercial arbitration actually facilitated or has it acted as an unnecessary roadblock in the speedy resolution of disputes?**

Arbitration in Sri Lanka: Historical Perspective

Sri Lanka has a rich tradition of dispute resolution going back to over two thousand five hundred years. As per the recorded history, the first migrant groups began settling down in Sri Lanka from about the fifth century BC. Among the early settlers were trading groups who continued to carry on trade with the ports of the Indian subcontinent but also expanded the trade with Mediterranean countries through these ports. Few centuries later, Sri Lanka by virtue of its central location in the East-West trade route became a trading center. The initial ties with different trading nations helped the early Sri Lankans to develop a social structure with a conciliatory dispute resolution system.[2]

It is stated that the introduction of Buddhism in third century BC influenced the governance and administration of justice in a fundamental manner. The Buddhist principle of just and equitable governance or "Dasaraja Dharma; the Ten Principles of just governance" contributed to a culture of conciliatory resolution of disputes both at the apex and community levels.[2]

The fourth Dharma, "Ajjawa" or strict impartiality in the administration of justice combined with "Avirodha" or non-adversarial conduct complemented the Sri Lankan good governance principles up to the advent of western powers to Sri Lanka beginning with the Portuguese in 1505.[2]

The Portuguese who ruled the maritime provinces of Sri Lanka did not contribute to any notable legal reforms but the Dutch who suceeded the Portuguese from 1656 to 1796 made a lasting contribution in the legal field by the introduction of the Roman Dutch law as the legal

[2] Arbitration in Sri Lanka – SS Wijerathne (Arbitration Law in Sri Lanka pp2)

system in the Maritime Provinces. Even now, Roman Dutch Law remains the common Law of Sri Lanka. The advent of British in 1796 replacing the Dutch in the Maritime Provinces, and the annexation of the independent kingdom of Kandy in 1815 paved the way for the gradual introduction of the English legal practices and administration of justice in Sri Lanka.

Despite the guarantee to continue with the existing Roman Dutch Law, the British Rulers directly and indirectly introduced English legal rules and practices. The British Governor and his administrators were not familiar with the Roman Dutch Law and considered it expedient to resort to English Law wherever it was feasible. Introduction of English Law took a formal form with the enactment of a Charter of Justice on the recommendation of the Colebrook-Cameron Commission in 1833. The judicial reforms laid the foundations for an adversarial and vexatious dispute resolution mechanism, which caused untold hardship to the uneducated peasant litigants. These hardships are continuing to date, despite various attempts to improve the dispute resolution systems in Sri Lanka

Means of Resolving Disputes

Disputes between persons, natural or juristic, may be settled in one or the other way through negotiation, mediation, arbitration, adjudication, or by a combination of such methods. Each method has its own objectives and techniques as well as its own advantages and disadvantages.

Mediation

The purpose of adjudication and arbitration is to have a decision with regard to differences over objective standards and their application to the facts of the case. However, mediation is not primarily concerned with standards, and in any event standards are looked upon subjectively rather than objectively. This is more so where the mediation focuses on the interests of parties rather than those issues in rights-based cases where the mediator might use his view of the likely outcome in court as a point of reference in helping the parties to come to a settlement.

The aim of mediation is to find some mutually acceptable way of finding solutions that will yield the maximum mutual benefit to the disputing parties by investigating unseen or hidden factors such as personalities, positions and issue, to reach the underlying causes of the conflict. The decision is the decision of the parties: The role of the mediator is, in an informal atmosphere, to act as a go-between, helping the disputants to agreement through improvement of communication, identification and clarification of the real, underlying issues, lowering tensions, identifying potential solutions and persuading the parties to adopt a mutually acceptable solution.

The process is collaborative and not adjudicatory where the parties decide with the mediator acting as a facilitator who is helping them to help themselves. The aim is to achieve an integrative solution of the “win-win”variety rather than the distributive “win-lose” variety that characterizes adjudication and arbitration. There being no winner and a loser, no one is hurt, and both parties achieve a degree of satisfaction, even though concessions may have been

made, for the concessions would have been made voluntarily. That is why mediation rather than adjudication or arbitration, which are adversarial in nature, should be given serious consideration when on-going relationships such as those between family members, neighbours, suppliers and distributors, landlords and tenants, employers and employees - are important[3].

Arbitration

Mediation may not be the appropriate dispute-resolution technique in certain matters: Where relationships are of little or no consequence, where the concern is the past rather than future, where objective standards and overlying facts, rather than the underlying issues, are of fundamental importance to the parties, where the paramount purpose is the existence of a binding, enforceable decision as to the meaning of objective standards laid down by the law or contained in some document as applied to the facts of a case, the formal adjudicatory process by Courts of Law has been the usual technique for the resolution of disputes in Sri Lanka[4].

Arbitration has objectives that are similar to adjudication. However, it is conducted in a less formal atmosphere than that of a Court. It also dispenses with the need to wait for years in the long line of cases awaiting adjudication by the Courts. It also affords disputants the several advantages encapsulated by the phrase "party autonomy" that litigation does not allow[5]. The Sri Lanka Arbitration Act, No. 11 of 1995 now provides for arbitration as an effective method of dispute resolution.

What is Arbitration?

Arbitration is a consensual process of dispute resolution that takes place consequent to an Arbitration Agreement. All Arbitration Agreements could be classified into two categories. Either the parties could agree to refer a future dispute to Arbitration at the contract negotiation stage by inserting the procedure or manner of dispute resolution as an "Arbitration Clause" in the contract or the parties could enter into a "Submission to Arbitration Agreement" once the dispute has arisen.

Irrespective of the manner of Arbitration Agreement entered into, the consent of the parties to the dispute is indispensable if dispute resolution is to take place outside court. Consequently it is argued that where the consent of the parties to refer the dispute to Arbitration is established, the jurisdiction of the Court is ousted[6].

[3] Arbitration Act 11 of 1995 - A presentation – Dr ARB Amarasinghe (Arbitration Law in Sri Lanka pp2)
[4] Arbitration Act 11 of 1995 - A presentation – Dr ARB Amarasinghe (Arbitration Law in Sri Lanka pp2)
[5] Party autonomy is the liberty of the parties to the arbitration to have certain choices eg: of the applicable law etc.
[6] Arbitration Act, No 11/1995 Sec (5) provides as follows;"Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of that matter. "

Arbitration and Litigation

This section examines some of the fundamental differences between Arbitration and Litigation.

Competence and Expertise of the Decision Maker

In litigation, parties generally do not have any influence over the selection of the judge assigned to hear their dispute and are therefore not in a position to assess how technically competent he or she is. In an arbitration, however, the parties are able to select the arbitrators (or the entity which will select for them in the event of disagreement) and can select individuals with the relevant technical expertise to decide their dispute.

Privacy/Confidentiality

Litigation is generally open to the public, with the documents filed and judgment of the court available for public inspection. Arbitration proceedings, documents and awards, however, are typically private between the parties and arbitral tribunal (and arbitral institution, if used). However, an arbitral award can enter the public domain when an enforcement proceeding is commenced, or where a party has a legal obligation to disclose. Some courts have ruled that arbitral documents and proceedings are not protected by confidentiality, so the local law may be an important factor in choosing the seat for the arbitration.

Enforceability

Court judgments are enforced through the coercive powers of the state. Arbitration awards do not have any such automatic powers of enforcement, meaning that the award must be voluntarily complied with by the losing party. Where this does not happen, the winning party can seek enforcement before a national court. Court judgments have a territorial limitation, however, and there are no multilateral conventions for their enforcement except within the European Union. Nevertheless, under the New York Convention, an award made in one Convention state can be enforced in any of the other Convention states (currently 146) upon the production of the arbitration agreement, the award, and translations, if necessary.

Speed and Finality

A court judgment is generally subject to appeal on the merits and usually becomes final only when it is no longer appealable. In contrast, an arbitral award is final and subject to appeal on only very limited grounds. Challenges to arbitral awards are usually limited occasions where there has been a procedural flaw or for reasons of public policy. Under Article 34.3 of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), an arbitral award must be challenged within three months.

Neutral Forum

Litigation takes place before national courts connected to either the dispute or a party to the dispute. A party litigating before a national court must have standing to sue before the court. In contrast, parties in arbitral proceedings can arbitrate in any forum of their choice without

the necessity of a connection to the forum. Forum neutrality is one of the major advantages of arbitration since disputing parties from different countries often prefer to have the arbitration take place in a neutral third country to assure a level playing field and to avoid one party getting a "home advantage" and the perception of bias.

Procedure

The procedure adopted before national courts is laid down in rules applicable before such courts. These rules are not necessarily tailored to individual cases. Parties involved in an international arbitration have flexibility and can tailor their procedural rules to their particular dispute, even where the arbitration is conducted under specified arbitration rules.

Cost

The cost of filing civil proceedings before national courts may be minimal. In comparison, the cost incurred in arbitral proceedings is usually higher. One reason for this is that the parties pay for the arbitrators, the arbitral institution (if any), and administrative facilities, in addition to other common legal costs, whereas in a civil proceeding many of these costs are absorbed by the state.

Special Powers

In litigation, the powers a court can exercise and the remedies it can offer are regulated by the state's applicable law. However, an arbitrator may exercise wider powers as conferred upon him/her by the parties. An example is where the parties empower the arbitrator to decide the dispute as amiable "compositeur or ex aequo et bono"[7].

Development of Sri Lankan law on arbitration

Arbitration was formally linked to the modern Sri Lankan legal system in the 19th century. The two principal statues enacted in the 19th century governing arbitration were the Arbitration Ordinance No. 15 of 1866 and the Civil Procedure Code of 1889.

The mechanism for a speedier and well integrated procedure for the disposal of commercial arbitration and a curb on unnecessary challenges and appeals was necessary if commercial arbitration was to be attractive as an alternate source of dispute resolution. In this light the Arbitration Act No. 11 of 1995 came into force in 1995.

Drafting of the new Arbitration Act was guided by the overall objective of making comprehensive legal provision for the conduct of arbitration proceedings and the enforcement of awards and to make legal provisions to give effect to the principles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

[7] That is, without reference to the law but on the basis of what s/he judges to be fair and just under the circumstances

In 1985, the United Nations Commission on International Trade Law (UNCITRAL) drafted a model law on international commercial arbitration for adoption or adaptation by states as their national arbitration law. Sri Lankan act is based on the UNCITRAL model law.

Following fundamental features are observed in the Sri Lankan Act.[8]

- A valid arbitration agreement must constitute a bar to court proceedings, if so pleaded; in other words if the parties have agreed on arbitration the courts cannot ignore such agreement.

- Once arbitration has commenced, court intervention should be extremely minimized and controlled, its role supportive of arbitration.

- Once an arbitral award has been rendered there can be no review of the merits, but only a possibility to have the award set aside on narrowly defined procedural grounds; the finality of the award must be enhanced;

- Acceptance of party autonomy to the largest extent possible in conducting the arbitration proceedings, i.e. the arbitrators, must follow the rules agreed upon by the parties:

- Provisions to be provided setting forth the generally accepted principle of audiatur et altera pars[9]. At the same time provisions should be made to the effect that a party who does not avail himself of this opportunity cannot prevent the proceedings going forward:

- An efficient enforcement procedure to be provided; on the international level, as is provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. It was important that clear and unambiguous domestic implementing legislation be enacted so that an equally efficient enforcement procedure was provided for domestic awards.

The Arbitration Act of 1995 was the first Arbitration law in South Asia to be based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and inspired by the then draft Swedish Arbitration Act.

The Model Law has assisted many countries in South Asia to modernize and harmonize their respective Arbitration laws facilitating the application of the New York Convention on the Recognition of Enforcement of Foreign Arbitration Awards of which Sri Lanka is a party signatory along with more than 160 other nations of the world.

[8] THE NEW LAW ON ARBITRATON K. Kanag-Isvaran, P.C. (Arbitration Law in Sri Lanka pp 31-34)

[9] Audi alteram partem (or audiatur et altera pars) is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

From inception of the Act thousands of commercial disputes have been arbitrated in Sri Lanka mostly through ad-hoc arbitrations[10].

The modern perception of arbitration

At the inception, experts heralded arbitration as a sensible, cost-effective way to keep disputing parties out of court and away from the kind of litigation that devastates winners almost as much as losers. The businesses adopted the Arbitration as a dispute resolution mechanism and many of these businesses reported considerable savings in time and money.

But the great hope for arbitration seems to have faded quickly. In fact, there is a perception that rather than reducing costs and delays, court-annexed arbitration—had actually increased the cost and the delays.

One of the reasons is that arbitration as currently practiced too often mutates into a private judicial system that behaves and costs just as the litigation it's supposed to prevent. At many forums the Arbitration procedures now typically include a lot of excess baggage in the form of motions, briefs, discovery, depositions, judges, lawyers, court reporters, expert witnesses, publicity, and damage awards beyond reason (and beyond contractual limits).

The other main factor is that in order to effect enforcement, parties to the dispute will have to always go back to the court system. In the event of a noncompliance of an arbitral award parties will need to seek the assistance of the court system that they sought to avoid at the first instance by resorting to arbitration.

Since the arbitration clause in the contracts ousts litigation, parties often feel that arbitration process is a waste of time and resources in the event of a noncompliance of an arbitral award. Faced with this scenario too often, some contracting parties have decided to remove the arbitration clauses from their contracts altogether.

It is to be noted that some Licensed Commercial Banks have decided to remove arbitration clauses from their finance lease indentures.

Finding a solution

As stated,there is a perception among users of international arbitration that the process has lost two of its most important advantages over litigation; speed and cost savings. There have been constant complaints that arbitration is too lengthy with a knock on effect that they become more expensive and the root cause of this delay is the arbitral process.

[10] Without an Institutional Assistance

If one looks at the stakeholders involved in an arbitration, it is apparent that the delay can be caused on at least three fronts:

- by the arbitral institution
- by the parties engaged in an arbitration or
- by the arbitral tribunal and the arbitrators

International arbitration institutions have a right to address perceived procedural shortcomings and in recent years many of them have updated or changed their rules to fix the problems. For example: introducing mechanisms that allow expedited proceedings[11], easier joinder of parties to an existing arbitration process, commencement of a single arbitration and multiple contracts and claw back and reduction of arbitrator's fees for unjustified delay in submitting draft awards etc.

A good example is the 2017 ICC rules article 30[12] of which introduced expedited procedures and reduced the time frame within which the terms of reference are to be signed from 2 months to 30 days. Some regional arbitration centres (such as Hong Kong) rules encourage the use of technology and include effective provisions for disputes involving multiple parties and contracts and have introduced a determination procedure expressly to empower an arbitral tribunal to remove a point of law or fact that is manifestly without merit or outside the jurisdiction of the arbitral tribunal.

The new 2018 ICC rules also include several notable novelties such as the introduction of new administrative body and provisions on multi party and multi contract arbitration and set out the number of initiatives aiming to make arbitration faster and more efficient. These are certainly significant steps forward and represent a very welcome trend.

Unethical behaviour and misconduct of the parties to the arbitration

One has to examine and analyse the issues involving the behaviour of parties to arbitration and what regulations apply to them with regard to the type of procedural behaviour that causes delays. There are already several regulations in place, primarily the International Bar Association guidelines on party representation in international arbitration that contain among other items sanctions for misconduct. But a potential drawback of these guidelines is that they are non-binding. As such, it is strictly up to the parties whether or not they want to observe them.

In an attempt to overcome this, and to make such regulatory guidelines enforceable or binding, there are regular calls in professional journals and blogs for a supranational binding

[11] The Sri Lankan ICLP Arbitration affiliated to the Institute for the Development of Commercial Law and Practice (ICLP) introduced expedited procedures in 2006.

[12] https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/ (International Chamber of Commerce)

code of ethical rules or a uniform legal framework to regulate ethical conduct in international arbitration.[13]

However, quite apart from the fact that it is difficult to identify an international body that could enforce such rules, there remains the question of whether such rules would really be in the best interest of arbitration. After all, every additional set of rules takes away some flexibility from the arbitration process.

Faults that lie with arbitrators

The role of the arbitrator is finely balanced between proactive and judicious efforts to keep the proceedings and the parties moving forward in a linear and efficient manner towards resolving, and at the same time ensuring party autonomy and equality.

Yet arbitrators have broad discretion to organise the conduct of the proceedings, subject to the arbitration agreement, including the arbitration rules and/or the lex arbitri[14] and any additional agreement between the parties. Accordingly, arbitral tribunal's general procedural discretion has been included in many arbitration laws and rules in order to ensure effective case management.

Under Article 22(1) 1CC Rules, the tribunal and the parties are to "make every effort to conduct the arbitration in an expeditious and cost-effective manner having regard to the complexity and value of the dispute". Moreover, after consulting the parties the tribunal may adopt such procedural measures as it considers appropriate in order to ensure effective case management.

Likewise, the UNCITRAL Rules 2010 (Article 17.1) provide that the arbitral tribunal shall conduct the proceedings "so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute". Arbitral tribunals possess the power to conduct their proceedings and to levy appropriate sanctions if necessary.

It appears that under most institutional arbitration rules, arbitrators already have not only far-reaching powers to structure the proceedings, but also the power (and even obligation) to structure them in such a way as to prevent procedural delays and unnecessary expense. Arbitral tribunals should therefore take the lead in addressing and combatting the delay issue.

[13] "Resolver" Winter 2019 Edition Dr Andreas Respondek LLMFCIArb(American Attorney at Law and German Rechtsanwalt.)

[14] Law of the Seat of Arbitration

Time Period Limits

Increasingly, delay can be attributed to so-called 'guerrilla tactics'. This refers to a range of hostile practices employed by some parties in arbitration in an attempt to gain advantage over the opposing party.

The "Guerrilla Tactics" may include: changing counsel in mid-proceedings in order to create a conflict with the arbitrator; abuse of discovery; excessive requests for document disclosure; late introduction of evidence; commencement of injunctions in the courts, and intimidation of witnesses and similar tactics.

The principal and foremost tool and appropriate vehicle through which such delay can be addressed and sanctioned by the tribunal are the Terms of Reference and/or Procedural Orders. With this in mind, the Terms of Reference must include a clear road map covering (at least) following points[15]:

- what constitutes permissible behaviour,
- what constitutes delay, and, most importantly,
- what sanctions the tribunal will apply in the case of such delays.

To reduce the risk of disruptive behaviour and to make it easier to deal with such behaviour when it arises, the Terms of Reference should clearly set out the financial and other consequences of non¬compliance, with directions contained in the Terms of Reference or Procedural Order. That means the Terms of Reference should not only incorporate a framework for the conduct of the arbitration, but also include the repercussions for failure to adhere to this binding framework. Costs should be awarded during the proceedings explicitly on the basis of tactics that cause delays or other additional costs.

In order to avoid delay the terms of reference should address the following crucial objectives:

- **Reduce document production**

It is essential that the tribunal ensure a limited document disclosure process. The terms of reference could even direct that whatever document requests are made by the party must be paid for by the requesting party. This will ensure that they only ask for really important and relevant documents.

- **Set page limits on written submissions**

The length of documents to be submitted to the tribunal should not exceed a certain size. Penalties should be applied for anything longer than the stated size. Tribunals may also require the parties to respond to specific points identified by the tribunal as being material to its determination

[15] "Resolver" Winter 2019 Edition Dr Andreas Respondek LLMFCIArb (American Attorney at Law and German Rechtsanwalt.)

- **Limit scope of witness and expert evidence**

To prevent the submission of relevant items the tribunal may define the issues on which it requires evidence and may demand that experts meet in advance of preparation of reports so that the reports can focus on the disputed issues only.

- **Set time limits**

Efficiency and fairness can be enhanced when the tribunal manages the proceedings effectively. Directions should be linked to an agreed time table for each step of the arbitration so that the parties also know what they have to do and by when and also know the sanctions for noncompliance. For example fixed deadlines must be imposed within which every party must present its submissions.

Conclusion

It is apparent on the first glance that the steps suggested above will benefit the litigation/ adjudication process as well. However there could be many obstacles for the implementation of such drastic steps to the justice system of a country. Despite the odds, in 2017 Sri Lankan legislators introduced few amendments to the Civil Procedure Code. These introductions were made with the noble ambition of reducing the delays inherent in the litigation process and to streamline procedures.

But it is not so difficult to implement these measures to arbitration processes as all processes evolve with the market demand. If one adopts a Darwinian point of view, in order for the Dispute Resolution method to survive, such method should adapt and evolve. As such new measures should be introduced to the country's justice system as well, to make the justice system to evolve in keeping with modern times and to cater to new generation of the populace who demand more technologically savvy, efficient and acceptable dispute resolution regimes.

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