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Enforcement of Arbitral Awards and Maritime Law – A Sri Lankan Perspective

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Introduction

The significant development of international business, commercial, and financial opportunities have given rise to a considerable number of commercial disputes. As a consequence, this has resulted in the emergence of the various forms of alternative dispute resolution ("**ADR**") procedures.

Basically, ADR is a way to settle or resolve disputes without having to go through the process of litigation. This may exist in several forms or procedures such as facilitation, mediation, conciliation, neutral evaluation and arbitration. Whilst all these procedures are widely recognized, arbitration is considered to be the most formal of the ADR procedures, and is influenced by both national legislation and international convention.

This article examines the Sri Lankan perspective on the arbitration regime as a mechanism of ADR, its enforceability, the various forms of arbitration, as well as the recognition of foreign awards. This article also provides an overview of maritime law and arbitration law, coupled with a comparative analysis of the application of admiralty jurisdiction on the face of arbitration agreements.

Overview of the Sri Lankan Law on Arbitration

Although arbitration has gained traction over the past few years in Sri Lanka ("**SL**"), it is not exactly a modern form of dispute resolution. Arbitration has always been based on the basic legal principle, '*pacta sunt servanda'*, or the sanctity of the contract and party autonomy.

Historically, SL relied on the accepted practice of a chosen 'arbitrator', considered to be learned and unbiased (for example, a village headman or chief priest of the temple), to resolve disputes. This occurred long before the adversarial system of dispute resolution was introduced by the Dutch and the British.[1]

Legal Framework

Sri Lanka follows a dualist approach, whereby international conventions signed require the passing of enabling statutes for incorporation into domestic law. Some of the relevant legislation relating to arbitration is set out below:

- Code of Civil Procedure No 2 of 1889 ("**CPC**")
- Arbitration Act No 11 of 1995 ("**AA**")[2] – currently in force; has repealed certain sections of the CPC.
- The current AA in force is based on the UNCITRAL Model Law, and the New York Convention ("**New York Convention**")[3]. By being a member of the New York Convention, SL has ratified and given effect to its provisions through the current arbitration law (that is, the AA) in force.

Is an Arbitration Agreement Separate from the Contract?

A prerequisite to commencing arbitration proceedings is that the contracting parties have agreed to such arbitration. Although SL law recognizes the freedom of the contracting parties to choose their own frame of arbitration agreement (along with the freedom to select the number of arbitrators, rules, proceedings, place, language and so on), the existence of an agreement to arbitrate, either as an

arbitration clause or as a separate agreement, is the one common foundation it is all based on.[4]

In the event the parties prefer to have a separate arbitration agreement in addition to the main contract, this is possible, but the provisions in the two separate agreements must not be contradictory.

Recognition and Enforcement of Arbitral Awards (Local and Foreign) in SL

The AA provides for the recognition and enforcement of both local and foreign arbitral awards.

Section 33 of the AA specifically provides for an arbitral award to be recognized as binding irrespective of the country in which it was rendered. This may be done upon application by a party to the High Court of SL under and in accordance with the provisions of the AA.

A contractual party to an arbitration agreement may, within 1 year after the expiry of 14 days of the delivery of an arbitral award is made, apply to the High Court of SL for the enforcement of such award.

The Procedure in Enforcing an Arbitral Award

The procedure to be adopted in enforcing an arbitral award delivered in SL or outside of SL is the same and is provided for under Section 31 of the AA. The procedure is as follows:

1. Institute proceedings in the Commercial High Court, by way of filing a petition and supporting affidavit naming all relevant parties along with all the relevant supporting documents.
2. Issue of notice of the application on the respondent by the Court specifying a date for the respondent to appear and provide objections, if required.
3. Fixing of a date by the Court for inquiry, once objections are filed.
4. Inquiry to be held either by the provision of oral or written submissions.
5. The case shall be fixed for judgment at the conclusion of the inquiry.
6. If the judgment is delivered in the petitioner's favour and no appeal is lodged by the respondent, the petitioner can take steps to enforce the said judgment against the respondent upon the entering of decree as per the judgment and proceed to execute a writ in satisfaction of judgment.

In the event of an appeal, the Supreme Court may in the exercise of its appellate jurisdiction, affirm, reverse, or vary the order, judgment or decree of the High Court, subject to the provisions of the AA. This is provided the parties have not signed an "exclusion agreement" in which they have sought to exclude any right to appeal in relation to the award.

Grounds for Setting Aside & Refusal of Enforcement in SL

a. SL Awards

Section 32 of the AA provides that an arbitral award made in an arbitration held in SL may be set aside by the High Court, on application made within sixty days of this receipt of the award, where the party making the application furnishes proof that:

1. A party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or failing any indication on that question, under the law of Sri Lanka;
2. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
3. The award deals with a dispute not contemplated by or not falling within

the terms of the submission to arbitration, or contains decisions on maters beyond the scope of the submission to arbitration: Provided however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

A SL seated award may also be set aside where the High Court finds that:

(a) The subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka: or
(b) The arbitral award is in conflict with the public policy of Sri Lanka.

In the event an application is made to set aside an award, the High Court may order that any money made payable by the award be brought into Court, or otherwise secured pending the determination of the application.[5]

b. Foreign Awards in SL

The limited grounds on which the enforcement of a foreign arbitral award may be refused by SL Courts is provided for by Section 34 of the AA. These grounds which are stated below, mirror those in Article V of the New York Convention:

1. A party to the arbitration agreement is under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication as to the law to which the parties have subjected such agreement, under the law of the country where the award was made;
2. The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator, the arbitral proceeding or was otherwise unable to present his case;
3. The award deals with a dispute which was not contemplated by or did not fall within the terms of the submission to arbitration, or it contains a decision on matters beyond the scope of the submission to arbitration;
4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such agreement, with the law of the country where arbitration took place; and
5. The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under law of which, that award was made.

Application of Section 5 of the AA in Arbitral Proceedings and Enforcement of Awards

Section 5 of the AA states that where a party to an arbitration agreement institutes legal proceedings in a court against the other party in respect of a matter initially agreed to be submitted for arbitration, "*the court will have no jurisdiction to hear such matter should the other party object to the same"*. However, there are certain limited situations where courts have permitted a party to an arbitral agreement to obtain interim or injunctive relief in support of arbitration. For example:

(a) To preserve the status quo of a disputed matter until the constitution of the arbitral tribunal and/or determination of an Arbitral Panel of the substantive dispute. Parties seeking such interim relief from court will be to require inter alia to establish a prima facie case (by full disclosure of facts) and convince court that they will suffer grave and irreparable damage (which would render any subsequent decision by an arbitral tribunal nugatory) unless such interim relief is granted.

(b) In addition to the injunctive relief described above, there are also certain instances where the CPC of Sri Lanka permits a party to make an application against another party (against whom he has a cause of action in respect of certain money/damages claims) to sequester the property of the debtor where it can be established inter alia that he has no adequate security to meet the claim, and that the debtor is fraudulently alienating his property to avoid payment of the said debt/damage and/or intends to leave Sri Lanka.

"An Error on the Face of an Award" and the Duty of Arbitrators to Give Reasons

An error in the award is regarded as one of fact or law, or both. As to whether a failure to provide reasons by an arbitrator gives rise to such an error, this is explained below.

Although there is no reported judgment in SL in relation to the duty of an arbitrator to give reasons, SL Courts have shown willingness to recognize principles of natural justice in arbitration.[6]

The role of an arbitrator, particularly 'the duty to give reasons' is imposed by Section 25(2) of the AA, although the consequences for failure to give such reasons is not specified by the AA following a similar approach taken in the UNCITRAL Model Law.

Section 25(2) provides that "[t]*he award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 14"*.

However, in the case of *Light Weight Body Armour,* [7] it was upheld by the Supreme Court of SL that the basic principle of law is that an arbitral award cannot be questioned or scrutinized on the merits of the award or dispute but can be revised or set aside on the limited bases as set out in Sections 32 and 34 of the AA alone.

Accordingly, even though the application of this duty to give reasons is universally recognized and is also regulated by the AA, SL Courts are reluctant to interfere and evaluate the merits of an award, unless it falls within the ambit of the limitations set out in the AA.

Institutional vs ad hoc Arbitration

Arbitration can either be institutional or ad hoc. Institutional arbitration refers to arbitration rules administered, promulgated and endorsed by an arbitration institute. As the institute provides the procedural infrastructure for arbitration, contracting parties may find this method to be more expedient than ad hoc arbitration, which is more generic in nature, in the sense that it is not administered by the procedural infrastructure of a particular arbitration institutional and the parties having to be responsible for all aspects of arbitration.

Both these types of arbitration are recognized and accepted in SL, although institutional arbitration is more encouraged. The Institute for the Development of Commercial Law and Practice and the Sri Lanka National Arbitration Centre ("**SLNAC**") are two well known, reputed Sri Lankan institutes that facilitate both institutional and ad hoc arbitrations in an organized, expeditious and a cost-effective framework. Although the SLNAC does not have any institutional rules on arbitration, this centre conducts a large number of international and domestic arbitrations annually.[8]

Status of SCMA Awards in SL

While the same provisions described above[9] in relation to the recognition and enforcement of foreign arbitral awards is applicable in the case of awards being delivered at the SCMA, the setting aside of a particular award shall also be bound by the aforementioned provisions (if the award is SL seated).[10] Once an arbitral award is rendered in Singapore, the procedure for applying for its recognition and

enforcement in SL shall be the provisions of the AA which is based on the New York Convention. Considering how both Singapore and Sri Lanka are parties to the New York Convention, the interested party may be bound by such convention as well as the SCMA Arbitration rules in respect of the recognition and enforcement of the particular arbitral award.

As the option of an arbitral clause being incorporated into the contract or the option of having a separate arbitration agreement are both accepted in SL to constitute an agreement for arbitration, the contracting parties' desire to have their maritime dispute determined at the SCMA must specify this desire in writing either by incorporating an arbitration clause to that effect, or by entering into a separate arbitration agreement specifying such terms.

The SCMA is a reputed arbitration centre specializing primarily in maritime arbitration. The SCMA possesses an effective framework inclusive of specific rules and model clauses, which are recommended to be taken into consideration by the contractual parties when drafting their arbitration clauses or agreements.

Overview of Maritime Law in Sri Lanka

The maritime law of SL is founded on English maritime law. The modern law governing maritime activities in SL is composed of both national legislation, and international conventions or treaties.

Maritime law was firstly introduced to SL by the British through Section 2 of the Civil Ordinance of 1852, and the law since then has been supplemented by numerous statutes, conventions and judicial decisions. These are listed below:

National Maritime Legislation and Arbitration

- Merchant Shipping Act No 52 of 1971 (as amended by Act No 36 of 1988 and Act No. 3 of 2006)
- Carriage of Goods by Sea Act No 21 of 1982
- Admiralty Jurisdiction Act No 40 of 1983 ("**AJA**")
- Arbitration Act No 11 of 1995
- The Marine Pollution Prevention Act ("**MPA**")

International Conventions/Treaties on Maritime Legislation and Arbitration applicable in SL

- Hague/Visby Rules of 1968 – which is currently in force and have been given statutory force in SL by the recent Carriage of Goods by Sea Act No 21 of 1982.
- The New York Convention
- Conventions regulating pollution: such as the international convention for the prevention of pollution from ships, which was given statutory force in SL by the MPA, The Convention on Civil Liability for Oil Pollution Damage 1969, and International Oil Pollution Fund
- The United Nations Convention on the Law of the Sea
- The International Convention for the Safety of Life at Sea

Admiralty Jurisdiction in Sri Lanka

Section 2(1) of the AJA lists the type of 'maritime claims' [11] upon which an admiralty action can be instituted. The AJA read together with Section 13(1) of the Jurisdiction Act No 2 of 1978 confers admiralty jurisdiction on the High Court of SL.

Apart from the determination of maritime disputes, the AJA also provides for the institution of action in relation to collisions of a vessel within the territorial waters of SL. In either case, the carrier should be either the owner or charterer in possession or in control of the ship, whilst also being the beneficial owner or demise charterer of the vessel at the time the action is brought (establishment of the *personam* link).

Procedure Applicable to Maritime Claims

SL Courts follow an adversarial process and maritime claims may be brought by way of (a) regular proceedings before national Courts; or (b) *in rem* proceedings under the AJA.

a. Maritime actions founded as regular actions

The procedure of a regular action governed by the CPC is as follows:

1. Institution of action by filing of a plaint by the plaintiff/claimant, followed by an answer by the party defendant.
2. In the event the party defendant pleads a counter/cross claim against the plaintiff, the plaintiff to be given the opportunity to file a replication addressing the said counter claim.
3. Commencement of the trial process by way of leading evidence (leading of evidence in chief by way of affidavit of witnesses may also be allowed).
4. Filing of written submissions by both parties and provision of oral submissions (at the discretion of court or on the motion of a party). All matters of law and legal arguments will be made at this stage.
5. Conclusion of trial.

b. In rem proceedings

In the case of *in rem* proceedings, where arrest orders are sought upon filing of action as per the AJA, the skeletal procedure in brief is as follows:

1. Service of the writ of summons on the defendant vessel.
2. The process of arrest and release made either on the payment of the claimed sum into court, or on the provision of security is affected by following the 'regular' trial process.
3. In certain circumstances, interim application by the owners of the defendant vessel challenging the maintainability of the action is allowed by Court.

Maritime Arbitration

a. The New York Convention and the AA

The provisions of the AA as detailed above are applicable in matters concerning maritime arbitration and as mentioned, the New York Convention which has been ratified by SL, obliges the SL Courts to recognize and enforce arbitration agreements, as well as foreign arbitral awards without reviewing the arbitrator's decision, except in the very limited instances.

As mentioned earlier in this article, the grounds for setting aside an arbitral award listed in Article V of the Convention is applicable to cases of maritime arbitration as well.

A judgment obtained from the national court under the 'regular procedure' may require enforcement overseas where the judgement-debtor is a foreign party or does not have assets locally. The enforcement of such an award (delivered in SL) in a foreign jurisdiction, may be effected without much inconvenience, as most States are a party to the New York Convention. Therefore, regulating certain maritime disputes through arbitration is relatively more conducive.

b. Convention on the Carriage of Goods by Sea

Hague-Visby rules are included in its entirety as a schedule to the Carriage of Goods Act. However, the Hague-Visby rules do not contain provisions on arbitration, although the time bar limits may have an impact on the application of arbitral causes. Accordingly, Article 3(6) of the Hague-Visby Rules provides for a one-year limit in bringing suits against the carrier and the ship computed from the date of the delivery or the date when the goods should have been delivered.[12]

Arbitration Clauses & Agreements and the Application of Admiralty Jurisdiction

Many charter parties and bills of lading provide for disputes to be determined by arbitration.

According to Section 5 of the AA, where such a document contains an arbitration clause, the carrier may object to a SL Court exercising jurisdiction in respect of such dispute, thereby binding both parties to resort to arbitration as originally agreed. Section 5 of the AA states that where a party to an arbitration agreement institutes legal proceedings in a court against the other party in respect of a matter initially agreed to be submitted for arbitration, "*the court will have no jurisdiction to hear and determine such matter if the other party objects…"*

This is contrasted with Section 2(1) of the AJA, which states:

> *"*The admiralty jurisdiction of the High Court of the Republic of Sri Lanka shall, *notwithstanding anything to the contrary in any other Law*, be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims*.*

The impact of Section 5 of the AA on Section 2 of the AJA has been determined by SL Courts in that Section 5 of the AA cannot have any adverse effects on Section 2(1) of the AJA in determining maritime claims. This is because the AJA is recognized as specialized legislation, and is *sui generis* as to the type of action or procedure.

Although in the case of *SCI Mumbai*,[13] it was expressed that the provisions of the AA are applicable to admiralty proceedings when there is an arbitration agreement between the parties due to the acceptance of the principle of 'party autonomy', the Court was also of the view that the provisions of the AA do not derogate from the jurisdictional powers of the Admiralty High Court, in determining maritime claims under the AJA.

The phase "*notwithstanding anything to the contrary in any other Law"* refers to anything that may contradict the provisions of AJA as being ineffective, and in line with the Sri Lankan case law, it can be said that the AA does not have an application, especially in the absence of any expressed arbitration agreement, in connection with the claims made under Section 5 of the AJA.

This is further confirmed by Lord Hatherley's statement in *Garnet v. Bradbury*:[14]

> "An Act directed towards a special class of objects will not be repealed by a subsequent General Act embracing in its generality these particular objects unless same reference be made, directly or by necessary inference, to the preceding special Act."
>
> (Where in this scenario the 'General Act' being the AA, and the 'Special Act' being the AJA).

Conclusion

Arbitration as an ADR procedure is an indispensable mechanism available to disputants in this fast-changing global economy.

The provisions of the AA are applicable in matters concerning all arbitration agreements maritime or otherwise, while the New York Convention which has been ratified by SL, obliges Sri Lankan Courts to recognize and enforce arbitration agreements, as well as foreign arbitral awards without reviewing the arbitrator's decision, except in the very limited instances. Having an arbitration agreement would give the parties the opportunity to enforce an award in a foreign jurisdiction in a more conducive and a timely manner, as most States are a party to the New York Convention.

[1] Law and Practice of Commercial Arbitration in Sri Lanka, by Dr. Harsha Cabral – Chapter 2, page 5.
[2] Arbitration Act (AA), accessible at: https://www.slnarbcentre.com/pdf/ARBITRATION-ACT.pdf.
[3] Convention on the recognition and enforcement of foreign arbitral awards of 1958
[4] Section 3(1) of the AA – "in the form of an arbitration clause in contract or in the form of a separate agreement."
[5] Section 32(2) of the AA.
[6] *Kristley (Private) Limited v The State Timber Corporation* (2002) 1 SLR 227.
[7] *Light Weight Body Armour Ltd V Sri Lanka Army SC (HCA) 27A/2006.*
[8] Law and Practice of Commercial Arbitration in Sri Lanka, by Dr. Harsha Cabral – Chapter 20, page 129.
[9] Please refer the provisions under the headings "Grounds for Setting Aside & Refusal of Enforcement in SL" in this article.
[10] Please refer the provisions under the heading "Grounds for Setting Aside & Refusal of Enforcement in SL", article.
[11] The admiralty jurisdiction of the High Court of Sri Lanka shall have jurisdiction to hear and determine any of the following questions or claims:
(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
(b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
(c) any claim in respect of a mortgage of or charge on a ship or any share therein;
(d) any claim for damage received by a ship;
(e) any claim for damage done by a ship;
(f) any claim for loss of life or personal injury sustained in consequence of
(i) any defect in a ship or in her apparel or equipment; or
(ii) the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglect or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of good on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
(g) any claim for loss of or damage to goods carried in a ship;
(h) any claim arising out of an agreement relating to the carriage of goods in a ship, use or hire of a ship;
(i) any claim in the nature of salvage;
(j) any claim in the nature of towage in respect of a ship;
(k) any claim in the nature of pilotage in respect of a ship;
(l) any claim in respect of
(i) goods or materials supplied, or
(ii) services rendered, to a ship for her operation or maintenance;
(m) any claim in respect of the construction, repair or equipment of a ship or dock charges or dues;
(n) any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master or member of the crew of a ship for any money or property which under any law in force for the time being is recoverable as wages ;
(o) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
(p) any claim arising out of an act which is or is claimed to be a general average act;
(q) any claim arising out of bottomry;
(r) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for jetsam, flotsam, lagan and derelict found in or on the sea, the shores of the sea or any tidal water or for property found in the possession of convicted pirates.
[12] Maritime Arbitration, by K. Kanag-Isvaran, P.C.
[13] *Colombo Commercial Fertiliser Limited V Motor Vessel "SCI Mumbai CA PHC APN 47/2013.*
[14] [1878] 3 App, Cases 944.

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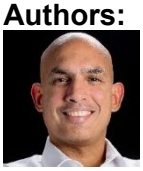

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