

Should the Sri Lankan government develop a government-sponsored arbitration centre for the resolution of international commercial disputes? – An effort to make Sri Lanka a viable commercial hub

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Abstract— One of the major objectives of Sri Lanka is to achieve economic prosperity after the end of decades long conflict that ravaged the country. The desire to achieve this objective is reflected through massive development programmes undertaken by the present government. It is also evident that these development activities have been designed with a view to promote and prosper in international trade, investment and transnational electronic commerce within the country with the ambition of becoming a major player in Asia. In order to achieve the expected economic and non-economic goals through the development activities, the existence of an effective dispute resolution mechanism is a must in any particular country. In fact, it is questionable as to whether the existing Sri Lankan national courts have been updated adequately from both legal and institutional perspectives to resolve international trade-related cross-border disputes. As an option to overcome the existing drawbacks of the national courts, it is desirable to analyse and promote Alternative Dispute Resolution (ADR) mechanisms, especially international commercial arbitration for the resolution of such cross-border disputes.

In order to substantiate the central argument of this paper, a two-pronged methodological approach is adopted, entailing a case study of Sri Lanka and related literature review. In support of this methodological approach, materials used have been gathered through the Internet and Law Libraries in Sri Lanka.

This paper argues that the Sri Lankan government needs to develop an effective government-sponsored internationally viable commercial arbitration centre in Sri Lanka complying with the fundamental requirements which contribute to the development of an effective dispute resolution centre in an international setting in order to promote and prosper international trade and investment. The lack of attention to these fundamental elements can lead to diminishing the objectives of setting up of such an institution. Accordingly, the purpose of this paper is to develop international commercial arbitration-friendly culture in Sri Lanka and to make it a promising hub for providing effective dispute resolution mechanisms

for both local and the international business community. Developing such a dispute resolution-friendly environment in the country will be a contributory factor in achieving the development goals of the government and becoming a hub in Asia from a commercial perspective. It is further believed that the leadership from the government is a crucial factor in achieving these overall objectives.

Keywords— Alternative dispute resolution, International commercial arbitration and National court

I. BACKGROUND

One of the major objectives of Sri Lanka is to achieve economic prosperity after the end of decades-long conflict that ravaged the country. The desire to achieve this objective is reflected through massive development programmes undertaken by the present government. It is also evident that these development activities have been designed with a view to promote and prosper in international trade, investment and transnational electronic commerce within the country with the ambition of becoming a major player in Asia. In order to achieve the expected economic and non-economic goals through the development activities, the existence of an effective dispute resolution mechanism is a must in any particular country. In fact, it is questionable as to whether the existing Sri Lankan national courts have been updated adequately from both legal and institutional perspectives to resolve international trade-related cross-border disputes. As an option to overcome the existing drawbacks of the national courts, it is desirable to analyse and promote Alternative Dispute Resolution (ADR) mechanisms, especially international commercial arbitration for the resolution of such cross-border disputes.

The purpose of this paper is to argue that there is a need for developing an internationally viable Arbitration Centre (AC) supported by the government in Sri Lanka and it should be set up complying with the fundamental requirements which contribute to the development of an effective dispute resolution centre in an international setting. The lack of attention to these fundamental elements can lead to diminishing the objectives of

setting up of such an institution. It is also highlighted that disputants and arbitrators should be given access to the centre, for the resolution of such disputes via technology where necessary in order to conduct and promote arbitration for the resolution of disputes arising out of international cross-border transactions. Such a modernized mechanism would arguably promote confidence among the international business community, given the increase in international trade-related disputes and the tendency toward the development of electronic commerce in both local and cross-border setting. Moreover, developing such a dispute resolution-friendly environment in the country will be a contributory factor in achieving the development goals of the government and becoming a hub in Asia from a commercial perspective. It must also be noted that the leadership from the government is a crucial factor in achieving these overall objectives. For substantiating the argument of this paper, a two-pronged methodological approach is adopted entailing a case study of Sri Lanka and a related literature review. In support of this methodological approach, materials used have been gathered through the Internet and Law Libraries in Sri Lanka.

Accordingly, this paper structures in the following manner. With the background in this section, Section 2 outlines the reasons to justify the need for establishing an AC sponsored by the government. Section 3 examines the fundamental requirements that should be taken into consideration when setting up this AC. The 4th entails concluding remarks.

II. THE NEED FOR ESTABLISHING A GOVERNMENT-SPONSORED AC IN SRI LANKA

The question as to whether there is a need for establishing a government-sponsored AC can be answered affirmatively. At the outset, it must be noted that the Sri Lankan economy is going through a transformation which focuses on foreign investment, international trade and the development of information technology. These activities inevitably demand not only appropriate dispute resolution mechanisms to be effected, but also effective institutions for the resolution of these disputes in line with their commercial objectives and those of the international market.

Moreover, arbitration is a private dispute resolution method which is based on an agreement between the parties to it and results in a binding final outcome which may deny parties the right of recourse to national court on the same course of action. It is recognized that 'Choose the right arbitration institution' is one of the important elements for the success of any particular arbitration, especially when parties intend to resort to arbitration as the last resort (Brekoulakis). When parties are choosing an AC, they expect the advantages that the arbitration method would provide compared to both national courts and other ADR such as mediation and conciliation (Blackaby and Partasides, 2009). It is worth noting that some of the advantages would include 'neutrality', 'enforcement',

'flexibility' and 'confidentiality' (Blackaby and Partasides, 2009). Unfortunately the arbitration culture in Sri Lanka has been problematic due to various reasons some of which that highlighted in the literature resourced, being the involvement of retired judges, lawyers, extended dates being given, conduct of arbitration proceedings only in the evenings (Cabral, 2009). Through the suggested AC, the Sri Lankan Government should remedy this situation without much delay.

Currently addressing the arbitration proceedings in Sri Lanka there are only two arbitration centres existent, namely the Sri Lanka National Arbitration Centre and the Institute for the Development of Commercial Law and Practice (DailyFIT) which are mainly operated only within the private domain. As such, there is an urgent need for establishing a government-sponsored AC given the resources and strength of the government in modernizing such an institution in line with the changes taking place in the complex international market.

The Sri Lankan Government has an obligation to promote arbitration in Sri Lanka as a consequence of becoming parties to the ICA related legal instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, commonly known as the New York Convention (NYC) and the United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration of 1985 as amended in 2006. Establishing a government-sponsored AC can be evaluated as an element to show its commitment to uphold such obligations. Compliance with this obligation is further required given that the effectiveness of the government-sponsored courts is problematic, due to the lack of an appropriate or well developed legal framework to resolve international trade disputes and enforce their final outcomes across the countries. As an example the recent judgment of *TCL Air Conditioner v The Judges of the Federal Court of Australia* delivered in Australia recognized the fact that international arbitration law did not violate the Constitution of Australia (McDonald and Simmons, 2013). This trend signifies that there is no legal barrier to rely on the exiting international commercial arbitration-related laws and to set up an effective AC in Sri Lanka as well.

The other element worth mentioning is the involvement of the government sector in the promotion of international commercial arbitration and the setting up government-sponsored arbitration centres in order to comply with the already successful arbitration centres in the region as well as other jurisdictions (DailyFT). As example, ACs set up by the Government of Malta (MHANS), that 'funded by the Korean Bar Association and Seoul's municipal government' (GLP) and the AC by the High Court of Karnataka in India can be cited (The Hindu). In line with this move, the Sri Lankan Government is also in the process of amalgamating

the existing two arbitration centres in the country and establishing a unilateral government-sponsored AC (DailyFT). Importantly this initiative reflects the recognition of the government in its commitment towards the promotion of private justice, especially for the resolution of international commercial disputes.

III. COMPLIANCE WITH THE BASIC KEY COMPONENTS APPLICABLE TO SETTING UP AN AC

The argument put forward in this paper can be substantiated by discussing several key components that need to be taken into consideration when a government-sponsored AC is set up. The important areas can be examined from two perspectives which are the establishing of the legitimacy of the AC and the other factors mixed with law and market.

A. Ensuring the Legitimacy of the AC

At the outset, it must be noted that there is no specific legal framework that should be adopted in setting up an international AC either nationally or internationally. This does not mean that an AC can be set up without due regard to the legal principles and other fundamental elements that must be followed. In the absence of a specific legal framework for establishing an AC, legitimacy of the centre can arguably be established by adhering to the following two areas: First is the management of the functions of the centre by using an appropriate legal framework and second that basic principles that are developed and recognized by the international community for the development of appropriate dispute resolution providers. Each warrants separate consideration.

1) Management of the Function of the Centre: It is important to note that powers and duties of the board which is set up for the management of the centre need to be governed by a set of principles. These principles must be developed by the parliament with the opportunity for the board to make rules consistent with the statutory law of the country in consultation with the relevant minister. This approach is important as minor changes to the existing rules can be implemented without delay on approval from parliament. This law must be designed taking into consideration the institutional rules of other leading arbitration centres and the international commercial arbitration-related legal frameworks such as UNCITRAL Model Law on International Commercial Arbitration and the NYC which are internationally accepted and applicable.

2) Principles Recognized by the International Community: Legitimacy of the centre can be further ensured by complying with principles embedded in 1998 EU recommendation (EU Recommendation), the Guidelines for Consumer Protection in the Context of Electronic Commerce developed by the Organization for Economic Co-operation and Development of 1999 (OECD Guidelines) and the Australian Guidelines for Electronic Commerce of 2006 (Australian Guidelines). However it must be noted

that these recommendations and guidelines have been designed mainly focusing on business to consumer disputes and that they would provide a set of useful principles that can be taken into consideration when the AC is established. This would mainly facilitate an effective mechanism not only in the resolution of business to business disputes (B2B) but also in business to consumer disputes. The other important point is that even though these documents are not binding on Sri Lanka, setting up the centre on these guidelines is important as international investors and business community may assess the effectiveness of these institutions based on their principles even though they are applicable only to a limited number of countries. The 1998 recommendations focus on binding out-of-court dispute resolution mechanisms. Furthermore OECD guidelines are applicable to OECD member countries and Australian Guidelines have been designed based on OECD guidelines.

These principles which bear commonalities (NADRAC Paper) provide a set of criteria to be considered when dispute resolution providers or centres including arbitration providers are set up for the resolution of disputes in the private domain. In other words, common criteria can be formulated based on these three documents. The principle such as transparency, accessibility, impartiality, procedural fairness, efficiency, effectiveness, access to court, legality, independence, liberty, representation and adversarial principles can be cited in this respect (EU Recommendation). In the case of Guideline 46 of the Australian Guidelines it is noted that 'Businesses should provide consumers with clear and easily accessible information on any independent customer dispute resolution mechanism to which the business subscribes.' In addition, Guideline 47 provides that dispute resolution method should be accessible, independent, fair, accountable, efficient, and effective and such dispute resolution method should not undermine parties' access to judicial redress. The last guideline needs to be understood from the view of the protection of consumers and a limitation can be made on it when disputes are of a B2B nature.

In addition, there are several 'ingredients' that have been suggested by the World Bank that need to be followed in establishing an arbitration centre in any particular country (IFC). They include 'complete independence and neutrality', 'unquestioned reputation and integrity of all who are involved', 'private sector needs to be directly involved in the design of the centre', 'key leaders of the judicial system should be supportive...', 'start modestly and build step-by-step' and 'monitor operations and use financial resources carefully from day one' (IFC). Accordingly, these components are worth considering given the lack of mandatory principles in establishing an AC and provide a foundation to show the compliance with the basic principles recognized in the previous section.

3) Arbitration Rules to be Followed by the Centre: Arbitration rules play a major role in the recognition of the institution as an effective and market friendly dispute resolution provider. In developing arbitration rules, government is free to design its own set of arbitration rules or adopting a set of rules already developed by the UNCITRAL which is a leading body working for the development of arbitration at international level. UNCITRAL Arbitration Rules (as revised in 2010) are a possible option for the government to consider. Government can evaluate the rules developed by the existing ACs in Sri Lanka and develop them in line with the arbitration rules adopted by other leading arbitration centres worldwide. Singapore International Arbitration Centre, Hong Kong and the London Court of International Arbitration have a set of arbitration rules already developed in line with the arbitration laws nationally and internationally applicable to the market requirements.

The rules should entail clear and comprehensive rules on the following areas applicable to conducting arbitral proceedings from the commencement of the proceedings to the delivery of the final decision of the arbitrators of the AC. Rules should encompass areas such as the number of arbitrators, arbitration agreement, types of evidence, hearing in oral form, hardcopy documents or those in electronic form or in any combination of all these and arbitral awards and the types of disputes that can be arbitrated. In designing these principles, it must be noted that attention must be given to the theoretical underpinnings of arbitration such as freedom of party autonomy, privity of contract, regulatory approach of delocalization, doctrine of competence, doctrine of severability and binding element of an arbitration award.

B. Other Factors for Consideration

In this section, several other factors that need to be taken into consideration are highlighted as follows. The drafting clear objectives of the AC, bringing reforms to the existing arbitration-related laws, establishment of a research centre and interaction with other leading arbitration centre in the region as well as other jurisdictions and adopting appropriate marketing strategies.

1) *Drafting Clear Objectives of the Centre:* Objectives of the centre need to be articulated as they provide guiding principles for the operation of the institution and discharge dispute resolution services. Several objectives can be highlighted as follows; commitment to adopt a pro arbitration policy, including the development of pro-arbitration culture, no immunity be given in cases where the state is involved in commercial transactions, flexible approach to types of disputes that can be arbitrated, due consideration to the public policy in Sri Lanka and international public policy and technology neutral approach to both arbitration-related laws and rules followed by the centre and resolution of disputes.

2) *Reforms to the Existing ICA-Related Laws:* Sri Lankan arbitration has been subject to criticisms as noted above. Another fact is that the Sri Lankan Arbitration Act No. 11 of 1995 (AA) has not been updated or reformed by taking into consideration the 2006 Model Law amendments which provide arbitration, market and technology friendly frameworks for international commercial arbitration. Some areas that need to be reformed are the definition of arbitration award and the formalities applicable to the validity of an arbitration award.

The Sri Lankan arbitration law has defined the scope of arbitration agreement so that online arbitration agreement can be made a valid arbitration agreement under AA. Such a broad approach has not been taken in terms of the definition of arbitration award. The other area is the expansion of jurisdiction on issuing interim measures, especially where arbitral proceedings are conducted in another country, the Sri Lankan Court should have the jurisdiction to issue an injunction to prevent the award being ineffective if not issued. The another important element worth noting is the need of adopting a technology neutral approach in interpreting the provisions of the AA in Sri Lanka in light of the Electronic Transaction Act of 2006 as it provides arguably legal principles to conduct arbitral proceeding in electronic form.

3) *Establishment of a Research Centre for Arbitration:* Currently lacking in Sri Lanka is the establishment of a research centre for giving advice or policy directions to the government, which is of utmost importance. The National Alternative Dispute Resolution Advisory Council (NADRAC) which is a government organ in Australia can be considered as a proper example in this respect (Australian Government). Its research covers all types of ADR mechanisms, including the role of ADR within the judiciary. Based on policy directions given by the NADRAC, Australian government receives valuable insights for introducing changes to the legal framework applicable to ADR and it is engaged in research on the development of online dispute resolution to meet the challenges posed by the growing electronic commerce-related disputes. Similarly the research centre that should be set up in Sri Lanka should consist of judges, practicing lawyers and academics who have expertise in the field of ICA. Their research must focus not only theoretical aspects of arbitration but also empirical research so that better reforms can be implemented.

4) *Interaction with other Regional Arbitration Centres:* The recent trend shows the interaction with international arbitration centres. This strategy such as signing of cooperation agreements (AMEinfo.com) is an effective one given the less competitive environment dealt with and getting exposure to the market. There are examples that can be followed in designing and choosing another institution to work together. This will further enable the institution to exchange their expertise and understand

and bring appropriate changes to the arbitration laws and institutional rules.

5) *Adopting Appropriate Marketing Strategies:* Promulgation of an appropriate legal framework which facilitates the function and operation of an AC is not sufficient to achieve an effective government-sponsored AC. This is mainly due to the fact that arbitration originates from the market and therefore marketing strategies need to be complied. The only challenging area that needs to be considered thoroughly is the competitiveness in the market and that it is designed in such a manner as to attract as many cases as possible. Competition from the many successful ACs in the region as well as in other developed countries which provide better incentives not only from legal perspective but also from speedy function of their institutions have to be considered.

For the purpose of attracting more business within the context of arbitration, measures such as conducting annual conferences opened to the international community on arbitration, offering courses on arbitration to the persons interested and also to those willing to become arbitrators should be considered. Publications such as newsletters updating recent developments and producing scholarly journals on arbitration such as the Institute of Arbitrators & Mediators Australia (IAMA) are yet another way to make the institution more attractive and competitive in the market. These programmes can be measured for making awareness of the importance of arbitration and increasing confidence to develop the resolution of international cross-border disputes.

IV. CONCLUDING REMARKS

The objectives of setting up an effective and efficient arbitration centre cannot be achieved unless there is an institution established with diligent consideration to the needs and is designed in a practical manner. Hence, in order to compete in the market, the Sri Lankan Government should provide an active arbitration friendly legal framework as well as develop a culture which recognizes the importance of arbitration and to streamline the arbitral proceedings and other related matters with pro-arbitration approach. As highlighted in this paper, bringing reforms to the exiting arbitration law in Sri Lanka, adhering to the underlying principles that needs to be followed in establishing an AC and setting up a research centre will complement the objectives of the government in achieving this goal. Such an institution will reflect the true commitment to enhance private justice mechanisms in the resolution of international commercial disputes and to make it a viable source in generating income that can be used for the development of the entire dispute resolution landscape in Sri Lanka. Transformation of the exiting dispute resolution mechanism will further increase the trust and confidence in the minds of investors and international and

national traders enabling Sri Lanka to become the new commercially viable destination in international trade and investments.

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