DUTY OF ARBITRATORS TO GIVE REASONS; FAILURE AND ITS CONSEQUENCES UNDER THE ARBITRATION ACT

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The practice of Arbitration, and its importance in Sri Lanka's legal landscape has developed steadily in the recent past. Foreign investment in Sri Lanka has shown an increase in the last two decades and there has also been an increase in accessibility to global commerce and trade. In the backdrop of this development, the relevant stakeholders have raised concerns in connection with delays in enforcement of contracts and the resolution of commercial disputes. This has resulted in contracting parties preferring to enter into arbitration agreements or to incorporate arbitration clauses in agreements. Consequently, there has been an increase in the number of disputes involving parties from Sri Lanka that have been referred to both domestic and international Arbitration.

In this backdrop, the role of the Arbitrator has become significantly more important. Although an Arbitrator who is called upon to determine a dispute plays a more informal role than a judge,[1] this does not mean that Arbitrators are exempt from adhering to fundamental principles of Natural Justice. One such fundamental principle that an Arbitrator must keep in mind, is the Duty to give reasons.

Duty to give reasons

It is a fundamental principle of law that any court, tribunal, or any other body or person determining disputes should give reasons when making an order, judgement, award or any decision of such nature.[2] Therefore, just like in court proceedings,

[1] K.C. Kamalasabayson, P.C., 'Powers and Duties of the Arbitrators', in K Kanag-isvaran PC and S.S. Wijeratne, *Arbitration Law In Sri Lanka* (3rd edn, 2011)

[2] *Wijepala v Jayawardene* S.C. (Application) No. 89/95, S.C. Minutes of 30.06.1995; *Karunadasa v Unique Gemstones* [1997] 1 Sri L.R. 256; *Hapuarachchi and others v Dissanyaka and the AG* S.C. (FR) Application No. 67/2008, S.C. Minutes of 19.03.2019; *Wijeratne v Amarasinghe*

unless the parties otherwise agree, the Arbitrator is duty bound to give reasons, when making an award.

The Arbitration practice in Sri Lanka is governed by the Arbitration Act No. 11 of 1995. The Arbitration Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 and was the first such Arbitration law in South Asia.[3] The influence of the Model Law is evidenced by provisions similar or identical to those in the Model Law being found in the Arbitration Act, as will be seen below.

Whilst Section 25 of the Arbitration Act sets out the form and content of an Arbitral award, Section 25(2) provides as follows;

> *"(2) The 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."*

Accordingly, Section 25(2) of the said Act specifically imposes a duty on Arbitrators to provide the reasoning upon which the Arbitral award has been arrived at. Although such a duty is imposed, it is not absolute in its application. The said Act provides that a duty to give reasons would not exist in the event the award is an award on agreed terms or, taking into consideration the autonomy of parties to determine the procedure adopted in Arbitrations, in the event the parties agree that no reasons are to be given.[4]

In certain respects, the justifications for a reasoned award parallel those applying to a reasoned judgment of a Court. The reasoned determination tells the parties why they won or lost, and assists to satisfy the expectation that justice be seen to be done.[5]

While this duty to give reasons is imposed on Arbitrators under the Sri Lankan Arbitration Act, the application of this duty is universally recognized. Section 25(2) is

and others SC Appeal No. 40/2013, S.C. Minutes of 12.11.2015

[3] S.S. Wijeratne, 'Arbitration in Sri Lanka', in K Kanag-isvaran PC and S.S. Wijeratne, *Arbitration Law In Sri Lanka* (3rd edn, 2011)

[4] Arbitration Act No. 11 of 1995 (SL Arbitration Act), s 25(2)

[5] Peter Gillies and Niloufer Selvadurai, 'Reasoned Awards: How Extensive Must the Reasoning Be?' (2008) 72 ARBITRATION 125

similar, if not almost identical, to provisions found in the UNCITRAL Model Law,[6] the Indian Arbitration Act,[7] the Commercial Arbitration Acts in the states and territories of Australia,[8] the Singaporean Arbitration Act[9] and the Arbitration Act of the United Kingdom[10] to name a few, as all these statutes have been influenced by the Model Law. Furthermore, the introduction of this duty in the Arbitration Act of UK has been recognized as what "justice to the parties required".[11] Judiciaries in foreign jurisdictions have been forthcoming in recognizing this duty.[12]

Although there is no reported landmark judgement in Sri Lanka in which the duty of an Arbitrator to give reasons has been specifically recognized, Sri Lankan Courts have shown a willingness to recognize principles of Natural Justice in Arbitrations.[13]

Degree to which Reasons must be given

While Arbitrators are now under a duty to give reasons, it must be remembered that an Arbitrator may be considered to have failed to fulfill this duty by either not giving any reasons at all, or failing to give adequate, sufficient or relevant reasons. Therefore, a question arises as to the degree to which reasons must be given.

Certain jurisdictions have imposed a high standard on Arbitrators when determining the degree to which reasons should be given. Most notably in the Australian case of ***Oil Basins Ltd v Bhp Billiton Ltd & Ors***,[14] the Supreme Court of Victoria held *inter alia* that an Arbitrator is subject to similar obligations as a judge. The Court stated;

[6] UNCITRAL Model Law on Commercial Arbitration 1985 (Model Law), art 31(2)
[7] Arbitration and Conciliation Act, 1996 (India), s 31(3)
[8] Commercial Arbitration Act 2010 (NSW), s 31(3); Commercial Arbitration (National Uniform Legislation) Act 2011 (NT), s 31(3); Commercial Arbitration Act 2013 (QLD), s 31(3); Commercial Arbitration Act 2011 in (SA), s 31(3); Commercial Arbitration Act 2011 (TAS), s 31(3); Commercial Arbitration Act 2011 (VIC), s 31(3); Commercial Arbitration Act 2012 (WA), s 31(3); Commercial Arbitration Act 2017 (ACT), s 31(3)
[9] Arbitration Act (Singapore), s 38(2)
[10] Arbitration Act 1996 (UK), s 52
[11] John Saunders, 'The Obligation of an Arbitrator to Give Reasons for a Decision' (June 2012) <http://www.hkiarb.org.hk/PDF/Seminar_12_June_2012> accessed on 05 October 2019
[12] *Westport Insurance Corporation & Ors v Gordian Runoff Limited* [2011] HCA 37; *Gora Lal v Union of India* (2003) 12 SCC 459
[13] *Kristley (Private) Limited v The State Timber Corporation* (2002) 1 SLR 227
[14] (2007) 18 VR 346

> *"In arbitration, the requirement is that parties not be left in doubt as to the basis on which an award has been given. To that extent, the scope of an arbitrator's obligation to give reasons is logically the same as that of a judge.*"[15]

However, it appears that the general practice is to adopt a lower threshold. Russell on Arbitration states that;

> "*No particular form is required for a reasoned award…When giving a reasoned award the tribunal need only set out what, on its view of the evidence, did or did not happen, and explain succinctly why, in the light of what happened, the tribunal has reached its decision, and state what that decision is*." [16]

This view has been shared in the courts of New South Wales in ***Imperial Leatherware v Macri & Marcellino***[17] where Rogers CJ stated;

> "*Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the Court should not construe his reasons in an overly critical way. However, it is necessary that the arbitrator deal with the issues raised…and make all necessary findings of fact…. The reasons must not be so economical that a party is deprived of having an issue of law dealt with by the Court.*"

Similarly, a court in Egypt held that the reasoning must not be contradictory and that it must allow whoever reviews the award to determine the logic followed by the Arbitrator in fact or at law.[18] In evaluating the sufficiency of the reasons expressed, a Canadian court considered that the fact that an arbitral award did not expressly disclose any legal reasoning did not make the reasoning insufficient where the Arbitrators were commercial persons.[19]

Presently, there is no reported jurisprudence in Sri Lanka in which the Sri Lankan Courts have specifically and authoritatively answered the question as to the degree to which an Arbitrator has to

[15] (2007) 18 VR 367 [56]
[16] David St John Sutton, Judith Gill, Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet and Maxwell 2007), 6-032
[17] (1991) 22 NSWLR 657

[18] Cairo Court of Appeal, Egypt, 5 May 2009, case No. 112/124
[19] CLOUT case No. 10 [*Navigation Sonamar Inc. v Algoma Steamships Limited and others*, Superior Court of Quebec, Canada, 16 April 1987], 1987 WL 719339 (C.S. Que.), [1987] R.J.Q. 1346, ,

give reasons. However, the views of the Supreme Court in the case of ***Light Weight Body Armour Ltd. v Sri Lanka Army,***[20] may be indicative of the approach the Court may take in the event the question of degree is placed before it. While the case did not specifically deal with the issues of giving reasons and the degree to which reasons must be given, the Court was *inter alia* required to look into issues in relation to the existence of errors of law on the face of the award. In the **Light Weight Body Armour** case Shiranee Tilakawardane J. states the following;

> *"…the Court cannot sit in appeal over the conclusions of the Arbitral Tribunal by re-scrutinizing and re-appraising the evidence considered by the Arbitral Tribunal…The Court cannot re-examine the mental process of the Arbitral Tribunal and contemplate its findings even where slim reasons are given by the Arbitral Tribunal for its findings, nor can it revisit the "reasonableness" of the deductions given by the arbitrator, since the Arbitral Tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties."* [21]

It is clear from the above that the Courts are reluctant to interfere in the arbitral process. Further, Courts have clearly articulated its intention of refraining from stepping into the shoes of the Arbitrator and evaluating the merits of an award. In this regard, it stands to reason that Courts in Sri Lanka would adopt an approach similar to that which has been put forward in Russell on Arbitration.

Consequences of not giving reasons

Whilst various jurisdictions, as illustrated above, impose a duty to give reasons by legislative enactments, several enactments go further to specify the consequences of failing to give reasons.

In the United Kingdom, a party may challenge an award on the ground of serious irregularity if the party can satisfy Court that the failure to comply with the requirements of the form of the award has caused, or will cause, substantial injustice

[20] [2007] 1 SLR 411

[21] ibid 418

to the applicant.[22] Further, on an application or appeal, if it appears that the award does not contain the tribunal's reasons, or set out the reasons in sufficient detail as to allow the court to properly consider the application or appeal, the courts are vested with the power to order the tribunal to state the reasons for its award in sufficient detail for the purpose required by Court.[23] The Singaporean Arbitration Act vests similar powers in its courts to order the Arbitral tribunal to state reasons for its award to Court.[24]

Although, Section 25(2) of the Sri Lankan Arbitration Act imposes a specific duty to give reasons, similar to the UNCITRAL Model Law the said Act does not specify the consequences of failing to give such reasons. In countries where the Model Law has been adopted, the alleged failure of the Arbitral tribunal to give sufficient reasons in the award has been used by applicants, under different provisions of their respective acts, as a ground for setting aside or for seeking an order refusing enforcement of the award.[25]

Under the Sri Lankan Arbitration Act, the grounds on which an Arbitral award may be set aside are set out in Section 32 of the Act. However, the question of whether an Arbitral award may be set aside on the basis of failure to give reasons and, if so, under which heading it may be set aside has not been conclusively determined by Sri Lankan Courts.

Of the grounds that have been specified, it stands to reason that it may be possible for a party to challenge the award on the basis that; (1) the alleged failure to provide reasons is not in accordance with the arbitral procedure agreed by the parties or the provisions of this act (in this absence of such agreement);[26] or (2) that such arbitral award is in conflict with the public policy of Sri Lanka.[27]

The concept of party autonomy extends to the freedom for parties to adopt the

[22] Arbitration Act 1996 (UK), ss 68(1) and 68 (2)(h)
[23] ibid, s 70 (4)
[24] Arbitration Act (Singapore), s 50 (4)
[25] UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, para 116
[26]Arbitration Act SL, s 32(1)(a)(iv)
[27] ibid s 32(1)(b)(ii)

procedure of their choosing. Apart from mandatory provisions of the law governing the Arbitration agreement and the *lex arbitri*, and subject to "unacceptable" amendments to institutional rules, the parties enjoy very broad freedom in selecting the Arbitration regime they desire and in prescribing the procedure to be followed.[28] Therefore, in the circumstances in which the parties to the Arbitration have agreed that reasons are to be given in the award, or alternatively have not agreed to an award without reasons being given, if an Arbitral award is made without reasons, it may be considered that such award is not in accordance with the procedure agreed upon by the parties.

A party seeking to set aside an Arbitral award on the basis that it is contrary to public policy may face certain difficulties. Although it may be argued that the duty to give reasons is a matter of public policy and failing to give reasons would amount to a breach of public policy, the Sri Lankan Courts have displayed a reluctance to give broad interpretations to the term 'public policy'. Courts have repeatedly voiced their displeasure with parties seeking to set aside Arbitral awards for various reasons on the ground of public policy, most famously in the **Light Weight Body Armour** case.[29] Public policy was generally understood in the case to include instances such as corruption, bribery and fraud and similar serious cases. Therefore, it is unlikely the courts would consider the failure to give reasons as being contrary to public policy.

While courts may set aside an Arbitral award due to the failure of the Arbitrator to give reasons, it is also important to examine the possibility of remission to the Arbitral tribunal in terms of Section 36 of the Act. The courts are empowered to set aside an Arbitral award for such period as it may consider necessary to enable the Arbitral tribunal to resume Arbitral proceedings or take such measures as may be necessary to eliminate the grounds for invalidating the award. Similar provisions

[28] Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) *Journal of Intl Arb* 4 <https://www.arbitration-icca.org/media/4/48108242525153/media01222389 5489410limits_to_party_autonomy_in_international_commercial_arbitration.pdf> accessed 05 October 2019

[29] *Light Weight* (n 20) 419

have been made use of by courts internationally, such as by the High Court New Plymouth, New Zealand where an Arbitrator obtained a surveyor's report but failed to provide a copy to the parties. However, the court remitted the case to the Arbitrator (instead of setting aside the award) on the ground that the party waived its right to rely on the breach of Natural Justice as it was aware that a surveyor had been engaged, and instead of demanding a copy of the report, only complained after receipt of the award.[30]

Where an Arbitral tribunal has issued a final award, globally courts have not found it appropriate to remit the case to the Arbitral tribunal for the purpose of enabling the Arbitral tribunal to recall or revise its decision on the merits of the case or to take fresh evidence on the merits of the case.[31] Similarly, where an Arbitrator has failed to give reasons for the award, it is unlikely that courts would remit the case to the Arbitral tribunal to give such reasons as it would raise issues as to the authenticity and impartiality of the reasons provided at such time.

Conclusion

The duty of an Arbitrator to give reasons for his/her awards under the Arbitration Act is sometimes veiled with ambiguity. In this article, I have shown that the degree to which an Arbitrator must give reasons has not been authoritatively defined in Sri Lankan jurisprudence. While this study does not offer a conclusive answer to the question of "to what degree should reasons be given?", it stands to reason, keeping in mind the reluctance of Courts to interfere in the arbitral process, that the Courts would adopt a low threshold with regard to the degree to which reasons are to be given. In the absence of Section 32 clearly defining the failure to give reasons as a ground to set aside an award, it is likely that Courts would entertain the idea of setting aside such an award on the ground

[30] *Alexander Property Developments v Clarke,* High Court New Plymouth, New Zealand, 10 June 2004, CIV. 2004-443-89

[31] CLOUT case No. 12 [*D. Frampton & Co. Ltd. v Sylvio Thibeault and Navigation Harvey & Frères Inc.*, Federal Court, Trial Division, Canada, 7 April 1988];

that it is not in accordance with the procedure agreed between the parties.

In the aforesaid circumstances, I propose that it would be prudent to introduce an amendment to the Arbitration Act No. 11 of 1995 of Sri Lanka to clear the lacuna that is found in it with regard to the duty of an Arbitrator to give reasons for his/her award. The inclusion of an additional ground under Section 32(1)(a) in this regard is therefore recommended.