IS THE PRINCIPLE OF MINIMAL COURT INTERVENTION EFFECTIVELY PRACTICED IN ARBITRAL PROCEEDINGS IN SRI LANKA- A COMPARATIVE ANALYSIS WITH SINGAPORE?

Samithri Akushla Wanniachy

Attorney-at-Law,
LL.M (University of West London)
LL.B (University of Staffordshire)

It is well known and accepted that a supportive and effective judicial system is a vital and central building block which supplements and accompanies the alternative dispute resolution mechanism of a particular country. However, the need arises to demarcate a clear-cut line between arbitration and litigation. They have exclusive features, which makes them distinctive in their procedures. In Sri Lanka too, recent trends have shown that arbitration proceedings are conducted in a manner similar to litigation, which is a result of the intervention of courts at different instances in the arbitral proceedings. Therefore, instances where the court can intervene in arbitral proceedings should be greatly minimized to achieve the intended purpose of arbitration and in order to circumvent from disrupting the very nature of arbitration. 'The great enigma of arbitration is that it pursues the assistance of the very public authorities from which it wants to free itself'[1] Therefore one of the foremost problems in arbitration endures to be the strain that exists between courts and the arbitral process. The line demarcating the two processes are a delicate balance and while judicial support is fundamental, excessive intervention would diminish and disrupt the concepts such as party autonomy and efficient dispute resolution through arbitration.

In the words of Hon. Justice Clyde Croft,

> '*The substratum of an arbitration friendly jurisdiction both domestically as well as internationally is based upon the fact on how the national courts*

[1] Jan Paulsson. Arbitration in Three Dimensions, LSE Legal Studies Working Paper No 2/2010

involve itself in the arbitral process, by engaging in a supportive or interventionist role.'[2]

A novel and all-embraced feature of the Arbitration Act No 11 of 1995 was that, it provided the courts the function of playing a supportive role rather than an interventionist role in arbitration, mainly addressed by Section 5 of the Act.[3] Subsequently the agreement and the desire of the relevant parties or in other words party autonomy at the time the contract was entered into was given more value. It is trite law that the courts of Sri Lanka would not usually exercise the jurisdiction to hear a case that is already being subjected to an arbitration agreement.

It is widely known that the intervention of the courts must be reduced to a great extent in the arbitral process. In order to attain this objective some of the following features had been incorporated into the Sri Lankan Act. When there is a valid arbitration agreement, it emanates restrictions to court proceedings if so pleaded[4]. Once an arbitral proceeding is initiated, court intervention is restricted to specific instances which are supportive of arbitration[5].

The Arbitration Act of Sri Lanka as any other piece of legislature, was enacted with a definitive vision and tenacity by the legislature of the country. It had a clear purpose and objective to cater to the requirements of the commercial community and to help the country's economic regenerations benefit in the due process of ensuring dispute resolution to be faster, less technical and less expensive. However, when trying to evaluate how successfully the intended objectives have been realized, it is paramount to inquire how the arbitrators, parties to a dispute and the judicial system have honored and obliged with the objectives, purpose, and intention reflected by the provisions of the Arbitration Act and the guidelines provided by the system in whole.

The role of the courts before the arbitral tribunal established, is not unusual; this is because once an issue arises,

[2] The Hon. Justice James Allsop and The Hon. Jutice Clyde Croft, The role of the Courts in Autralias Arbitration Regime
[3] Arbitration Act No 11, 1995
[4] Section 5, Arbitration Act No 11 of 1995
[5] Sections 7,10,11,13,20,21,39 Arbitration Act No 11 of 1995

instantaneous protective action is needed and it would be commercially detrimental to wait until an arbitral tribunal is established to take action. In such an instance, the parties and the arbitral process have no other place to turn to for protection other than domestic courts.[6] As a result, most national laws and the Model Law stipulates that the courts have the right to grant interim relief in such situations and an application for such a relief is compatible with the existence of an arbitration agreement. It is important to note that domestic courts' intervention at such a point is not disruptive but rather beneficial to the arbitral proceedings.[7]

Similarly, in the composition of the arbitral tribunal, the courts have a dynamic character to play. Further, the use of the supervisory powers of courts in regard to challenges to arbitrators is also paramount though it will earnestly disrupt the arbitral proceedings.

During the arbitration proceedings, there are many instances where the court involvement can be seen. It is thus questionable whether this can be considered as an intervention or not. The court needs to involve itself in the arbitral process where there may be issues that may arise because the tribunal lack the necessary coercive powers and rights to conduct the arbitration in an apposite manner by protecting the rights of the parties or in preserving the existing evidence in the matter.[8] It is important to note that the Model Law and many other national laws permit several types of court intervention in such circumstances. Granting assistance in the admission of evidence, interim relief, extension of time limits and determining preliminary issues of law are some of such instances.

The Court also has a function to play in the arbitration process after the award has been rendered in regard to Challenges, Appeals and Enforcement. The rising favorable climate of arbitration has directed arbitral awards as being regarded final and binding and to a pro-enforcement policy over the past years. Therefore, challenge proceedings can be

[6] Coppee-Lavalin SA/NV v Ken Ren Chemicals and Fertilizers Ltd [1994] 2 Lloyd's Rep 109,116
[7] Derains and Schwartz, ICC Rules,272
[8] Comparative International Commercial Arbitration, 'Arbitration and the Courts'

grounded upon an excess of jurisdiction of an arbitral tribunal or on a procedural anomaly that has prevented a fair procedure. The Sri Lankan Arbitration Act[9] uses the word 'Court' or 'High Court' 61 times and that facades snags as laws delays is a foremost hurdle which needs to be overcome in arbitration.[10]

With the development and expansion of international commercial transactions and foreign direct investments, resorting to courts may be necessary even when there is an arbitration clause to ensure that the aims of justice are properly served. "It may be that the tide is now turning; it is increasingly realized in international arbitration circles that the intervention of courts is not inevitably disruptive of arbitration, it may equally be definitely supportive."[11] It is thus vital that the appropriate equilibrium must be initiated between the rights of the courts in supervising arbitral proceedings and the rights of parties' to implore the courts' assistance in times of need.

Although judicial support is paramount to the arbitral process without doubt, unwarranted and excessive judicial intervention in the arbitral process may taper the concept of party autonomy and the effective resolution of disputes by the process of arbitration. The case of *Elgitread Lanka (Private) Limited v Bino Tyres (Private) Limited*[12] illustrated the pro enforcement stance of the judiciary of Sri Lanka by playing a supportive role in the arbitral process while giving effect to the intentions of the parties to an arbitration. In *Light Weight Body Armour Limited v Sri Lanka Army*[13] the court held that when an appeal from an arbitration award has been selected, the court would have no control to examine the evidence of that before the arbitral tribunal. It was also held that the arbitral tribunal is the solitary assessor of the evidence before it. Hence, it is evident that the appeal process of the arbitral awards to the Supreme Court is playing a supportive

[9] Arbitration Act No 11, 1995
[10] Harsha Cabral, Law and Practice of Commercial Arbitration in Sri Lanka
[11] Reymond, 'The Channel Tunnel case and the law of arbitration' (1993) 109 LQR 337

[12] Elgitread Lanka (Private) Limited v Bino Tyres (Private) Limited SC Appeal No 106/08
[13] Light Weight Body Armour v Sri Lanka Army SC (CHC) Appeal No 27/2006

rather than an interventionist function as a result of the fact that an appeal can be instituted based on a question of law but not on the merits of the case under consideration.

It is without doubt, that in recent years Singapore has emerged and coagulated its position regionally as well as globally as a prominent and leading location recognized for arbitration. Its ascendency can be attributed to many factors such as the pioneering stewardship of the Singapore International Arbitration Centre (SIAC), the competent and impartial judiciary considerate of the principles of arbitration as well as the effervescent arbitration bar which constitutes both Singapore as well as foreign Counsel.

The favorable location and trade links of Singapore place itself in a unique locus which further assists in marketing itself as a leading arbitration hub in Asia. Furthermore, Singapore's strategic geographic setting is strengthened by its noteworthy legal system and legislative framework which is both arbitration friendly as well as vigilant of the rule of law. It is no doubt that in recent years Singapore has emerged and coagulated its position regionally as well as globally as a prominent location recognized for international arbitration. Its ascendency can be attributed to many factors such as the pioneering stewardship of the Singapore International Arbitration Centre (SIAC), the competent and impartial judiciary considerate of the principles of arbitration as well as the effervescent arbitration bar constituting both Singaporean as well as foreign Counsel.

The Judiciary of Singapore's non intervenient approach in the arbitral process is mirrored in many case law such as **Trulzi Cesare SRL v Xinyi Group (Glass) Co Ltd**[14], in which the appellant challenged the arbitration award on the basis that the arbitral process was prejudiced. Conversely the decision of the Singaporean Judiciary was that they would not intervene into issues that are within the four corners of the arbitrators'

[14] Triulzi Cesare SRL v Xinyi Group (Glass) Co. Ltd [2014] SGHC 220

discretion and that their stance in such matters would be a non- intervenient approach. Similarly, in *PT Central Investindo v Franciscus Wongso*[15] the court confirmed and affirmed the position taken in the case of *Trulzi Cesare*[16].

Another significant feature with regard to arbitral proceedings in Singapore is that of expedited proceedings. This is a positive development in Singapore's arbitral proceedings which can be practiced in Sri Lanka. Furthermore, Singapore Courts have employed several measures such as the clearing of back log ca. The Singapore International Arbitration blog has further set out appealing and novel developments in arbitration. This is reflected by the case of *RI International Pvt Ltd v Lonstroff AG*[17], where the Singapore Court of Appeal was able to create precedent in sustenance of Singapore seated arbitration.

In view of precluding deferment in the judicial process, it is also vital to make use of a contrivance which averts and also controls frivolous applications which are made to Court.

In the case of *Government of the Republic of Philippines v Philppine International Air Terminals Co. Inc*[18], it was held that the judiciary is not vested with the power to consider the merits of a disagreement before it and that unwarranted scrutiny of the arbitration award would thus end up instigating statutorily acknowledged mechanism for delays in the procedure. Singapore further implements reparation costs to be paid in instances where a party institutes a court proceeding in violation of the arbitration agreement.

The institution of the Singapore International Commercial Court in 2015 was another fruitful novelty of the Singapore jurisdiction which aided in the reduction of delay caused by court proceedings. This court was anticipated to operate as a division of the High Court of Singapore. It was established with anticipation to entirely deal with international commercial arbitration matters which comprises of applications

[15] PT Central Investindo v Franciscus Wongso and Others [2014] SGHC 190
[16] Triulzi Cesare SRL v Xinyi Group (Glass) Co. Ltd [2014] SGHC 220
[17] RI International Pvt Ltd v Lonstroff AS, [2014] SGCA 596
[18] Government of the Republic of Philippines v Philippines International Air Terminals Co. Inc [2007] 1 SLR 278

from arbitrators. Exorbitant delays triggered by manual processes had been effectively removed by the usage of technological advancements in the judicial scope which therefore helped to expedite the process by eradicating unnecessary delays.

The establishment of the Singapore International Commercial Court (SIAC) is a definite landmark in the arbitration framework of the entire region. The foremost purpose of the SIAC Court of Arbitration consists of appointment of arbitrators, determination of jurisdictional challenges, and overall case administration supervision at the SIAC.[19] Further, the Singapore International Commercial Court (SICC), despite being a court based system, tries to replicate the positives of arbitration which includes confidentiality, procedural flexibility in terms of pleading, and leading evidence. Another significant development in this regard is the Supreme Court of Judicature (Amendment) Bill being passed in January 2018, which elucidates that that the SICC has similar jurisdiction to the Singapore High Court to hear proceedings relating to international commercial arbitration under the International Arbitration Act and also eliminates the pre-action certification procedure.[20]

The current attitude of many international as well as Sri Lankan parties to an arbitration agreement is in favour of radical-delocalisation or in other words total exclusion of the national courts from arbitration. However, radical-delocalisation can in many instances be counter-productive to the arbitral process. Total eradication of courts, results in there being no review, enforcement or recognition of an arbitral award and the parties to a dispute would therefore have no recourse to courts in any instance.

Belgium is a jurisdiction that embraced the delocalization theory in a very radical form. It is a positive feature that the Arbitration Act employs a middle path attitude between the seat and the delocalization theory. However, it is paramount to note that the middle path journey avoiding excessive delocalisation,

[19] SIAC – Annual Report 2013- www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2013.pdf.

[20] Ministry of Law, 'Note by Senior Minister of State for Law and Finance, Indranee Rajah S.C., on The Supreme Court of Judicature (Amendment) Bill and the Singapore International Commercial Court : www.mlaw.gov.sg/content/dam/minlaw/corp/News/Note%20on%20the%20SCJ%20Amendment%20Bill%20and%20SICC%20190118.pdf.

in reality, is a desirable status to a developing country.

Commercial arbitration has been able to supersede litigation to resolve domestic as well as international disputes. A majority of international commercial disputes referred to arbitration are being resolved in an tremendously methodical and expeditious approach in many jurisdictions. Further, in many jurisdictions and under many well-known and reputed international arbitration institutes, it is common to witness expedited rules of arbitration implored by parties; which is a clear signal that the corporate world entails speedy results. With the growth of trade and commerce; Sri Lanka too would perceive a definite growth in the area of commercial arbitration if the systemic deficits are successfully addressed. With the improvement and advancement of technology worldwide together with the evolution of activities in the commercial world with advancements in e-commerce; the intact panorama of commercial arbitration has been altered internationally where most of the documentation, correspondence and even oral testimony are being carried out electronically. It is paramount to note that commercial arbitration in Sri Lanka too should take cognizance of the modifications and alterations and move forward to the digital era.

The judicial approach of the Singaporean Courts is pivoted upon the delicate equilibrium between party autonomy and efficiency, which requires restricted recourse against an arbitral award. It is further backed up by the legitimacy and integrity of the arbitral process which entails rigorous scrutiny of arbitral awards within the framework of minimal court intervention. The Singaporean Courts identify that a harmonious affiliation between courts and arbitration is essential for parties to a dispute to resolve their disputes efficiently, fairly and according to their preference in the method of dispute resolution.

However, it is to be understood that the role of the courts cannot be completely dispensed as it would result in causing miscarriages of justice. The importance of the supportive role of courts is encapsulated by the observations of a

commentator as follows; 'The reality is that arbitration would not endure isolated of the courts. Indeed, as Lord Mustill observed, it is only a court with strong powers that could liberate an arbitration which is in danger of foundering'.[21]

The substratum of an arbitration friendly jurisdiction, be it domestic or international, rests based on whether national courts are supportive or interventionist in their attitude towards arbitration.[22] It is also essential to ensure that the supportive role of the relevant courts in Sri Lanka be improved, if the objectives of arbitration are to be accomplished. However, it is also paramount to reminisce that there is a prerequisite to review the current Arbitration Act and laws, which have not been amended since 1995, to be in par with the Model Law, which has adopted novel developments in the growing commercial world. Further, developments to increase party autonomy within arbitration and the use of new technology to cater the ever-growing community will no doubt raise Sri Lanka to be more competitive in the international arena of dispute resolution.

[21] John Lurie, 'Court Intervention in Arbitration: Support or Interference' (2010) 76(3) The International Journal of Arbitration, Mediation and Dispute Management 447

[22] The Hon. Justice James Allsop AO and Hon. Justice Clyde Croft, The Role of the Courts in Australia's Arbitration regime