THE IMPACT OF JUDICIAL INTERVENTION ON ARBITRAL PROCESS IN THE CONSTRUCTION INDUSTRY OF SRI LANKA

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Declaration

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Abstract

The Impact of Judicial Intervention on Arbitral Process in the Construction Industry of Sri Lanka

The characteristics of built environment activities are complexity and disputability in its own nature. This complexity drives most of the construction projects and contracts towards disputes between parties. Both the traditional way of litigation and alternative methods of dispute resolution practices in the construction industry. At present Arbitration as an alternative dispute resolution method (ADR) does not efficiently resolve disputes.

This research examines the usage of Arbitration as an ADR method to resolve the construction disputes instead of traditional litigation and review on impact of judicial interference to Arbitral process in the construction industry in Sri Lanka. It also investigate how to improve the arbitration process by minimizing of judicial interference. Efforts have been made to recognise and examine problematic areas which are highly influencing the Arbitration.

The survey has conducted in order to recognise priorities and to observe the extended appraisal of panel of industry experts who are actively engaged in Construction Arbitration. The panel consisted the professionals, consultants, construction resource persons.

Current arbitration method and its practice hinders the advantages by intervene of judiciary which prolong its efficiency. The research is recommended for arbitration practice in Sri Lanka by reviewing the minimising of judicial interference. It proposes a well-planned Arbitration method which can avoid pitfalls in the current legal regime of the Arbitration practice in Sri Lanka. Further it seeks to suggest amendments to the Arbitration Act No 11 of 1995 to avoid discrepancies and minimise the challenging grounds of arbitral awards in the construction industry of Sri Lanka.

Keywords: Dispute Resolution, Arbitration, Construction Industry, Judicial Interference

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Randima Senarathna (159171P)

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Abbreviations

AIR	:	All India Law Reports
ADR	:	Alternative Dispute Resolution
BLR	:	British Law Reports (England)
DAB	:	Dispute Adjudication Board
FIDIC	:	International Federation of Consulting Engineers
HGCRA	:	Housing Grants Construction and Regeneration Act (UK)
IAA	:	Indian Arbitration Act
ICLP	:	Institute for the Development of Commercial Law and Practice
CIDA	:	Construction Industry Development Act
JCT	:	Joint Contract Tribunal
NLR	:	New Law Reports (Sri Lanka)
QS	:	Quantity Surveyor
RICS	:	Royal Institution of Chartered Surveyors
SBD	:	Standard Bidding Document
SLLR	:	Sri Lanka Law Reports
SLNAC	:	Sri Lanka National Arbitration Centre
TCC	:	The Technology and Construction Court
UK	:	United Kingdom
UNCITRAL	:	United Nations Commission on International Trade Law

CHAPTER 01

Introduction to Research

1.1 Background

The construction industry operates in different complex activities. As construction projects get complex, the disputes also get more complex. Complexity of the construction industry creates disputes. (Cheung *et al*, 2000). In the construction industry, Disputes are a common feature (Ashworth, 2002). At any point during the construction process disputes might arise. Construction disputes have the potential to rise at any stage of the construction process. Disputes widely arise with respect to variations, extensions of time, late payments, project delaying issues, disruption and prolonged on claims and issues related to termination of contracts.

Complexity of most of the construction projects lead to disputes between parties. (Saleem M, 2016) Disputes might arise at any scale of a construction and they tend to be more intensive and multi-faced in comparison with the ordinary civil disputes. According to the economic policy of the Sri Lanka, many of construction opportunities have been attracted cost effectiveness and the efficiency of the dispute resolution methods. (Amerasinghe, (2011) Abeynayake (2015) illustrates that traditional litigation for construction disputes do not provide the purposive level of answer and it has resulted in the development of alternative methods like arbitration, mediation, conciliation etc. The proper and the evaluation of these methods is to make as an alternative to the litigation method and ensure the confidentiality, to develop understating among the parties, to save cost and to obtain technical support. Apart from these advantages, Rohith, Shishir, and Mayank (2016) argue that there are certain pitfalls involved in alternative dispute resolution. Most of these arguments emphasize on the cost, limited jurisdiction engaged in the process and the interference of the courts.

Mustill & Boyed (1989) states, before introducing the Dispute Resolution Methods to the construction field, most of the disputes were solved by mutual agreement between parties or, under litigation. However, as a result of many technological issues and the complexity of the construction projects viz. construction of expressways, Power Stations and large scale of Housing Projects etc: informal mutual agreements between disputed parties were not so beneficial and, litigation also couldn't answer the complexity of those projects as lawyers and judges rarely have the knowledge of the technical aspects of the projects.

Alternative Dispute Resolution Methods were introduced in order to answer the pitfalls occurred in the use of traditional litigation. In the case of *State of Kerala Vs. Joseph Auchilose* (1990), the judiciary has stated that lengthy, everlasting, complex and expensive court process provoked the jurists to explore an alternative, effective and speedy resolution method.

Most of the countries around the world began to recognise the above mentioned dispute resolution methods as an alternative to the traditional litigation method in Sri Lanka as well. Lord Denning in his landmarked judgment in the Court of Appeal in *Dawnays Ltd Vs Minter Ltd* (1971) states that; *"There must be cash flow in the building trades. It is the very lifeblood of the enterprise. One of the greatest threats to cash flow is the incidences of disputes, resolving them by litigation is frequently lengthy and expensive. Arbitration in the construction industry is often as bad or worst* ". Due to lengthy litigation practices, parties often interfere with risks of maintaining their cash flow which is vital to construction projects' continuity.

Justice Wimalachandra (2007) defined ADR method as any form or procedure, whether formal or informal, whereby parties can resolve their disputes instead of litigation before courts of law. The Parliament of Sri Lanka has enacted statutes to implement and control the ADR methods. Mainly the arbitration proceedings are controlled by the Arbitration Act No.11 of 1995. Mediation practices are regulated by Mediation Board Act No. 72 of 1988 and its amendments. Further the Commercial Mediation Centre of Sri Lanka Act No. 44 of 2000, Mediation Boards

(Special kind of disputes) Act No. 21 of 2003 and its recent amendment Act No 04 of 2011regulate the given issue. On the other hand, the introduction of the Adjudication and Arbitration to Sri Lankan law was done by Construction Industry Development Authority - (CIDA) in the year 2006 by issuing their first reviewed edition of Standards Building Documents. It is to say that when there is a dispute the parties should enter the process of adjudication as the first step and if not agreed then should move to Arbitration as the second step. It encourages the involvement of construction professionals from engineering, architecture, quantity surveying and other disciplines in construction dispute resolution in Sri Lanka. It will bring the knowledge of engineering architecture and law in to a common platform. Involvement of these three domains in dispute resolution method is much beneficial than engaging in civil litigation. This research is concern about the process of Arbitration in the construction field as it is obvious that lack of well planning of Arbitration can result in numerous problems including waste of time, cost and the effort of the parties.

This research is attempted to prove that Arbitration have to be developed as an independent alternative to the litigation process, which ensures a process that fall outside the government judicial process and its interference

1.2 Problematic areas and Conflicting spheres of Construction Arbitration Practice and its procedure

Sir Michael Latham expresses dissatisfaction towards current methods available for dispute resolution in the United Kingdom (UK) construction industry. Study by King (1998) reveals that in both the United State of America (USA) and UK the dissatisfaction not only with the frequency of construction disputes but with the manner of resolving them seems strong. Many researchers involved in the field of Arbitration provide valuable information regarding its social aspects and most of the methodologies used by these researchers seek to identify the advantages and disadvantages of the Alternative Dispute Resolution and the practical aspects of court intervention. However most of these research papers and articles do not figure

out the importance of enhancing the current Arbitration Framework to enhance the efficiency of the system. The basic value and basic advantage of Arbitration in comparison with litigation is 'Choice'. The first stage of entering into the process of arbitration is the choice of the parties who are involved in the dispute and in large part they have the opportunity to choose their arbitrators and the rules of the proceedings according to their choice. However, the crucial fact which required requires attention is, arbitration has to be proved with logical reasons to be adopted by the parties to resolve their disputes. Parties should be satisfied that selecting the process of arbitration is the best decision that they had instead of litigation. Theoretically the process of arbitration and the system of litigation is fundamentally, historically and philosophically different.

Uff, J. (2001) states there are advantages of adopting litigation to resolve construction disputes in courts. It is generally treated as the highest quality decision making process. Judges can compel the parties to comply with time frames and have powers of sanction for non- compliance. Further, judges have the power to make orders to provide interim relief to protect a party's position pending the final judgment. Also, it is an opportunity to appeal if someone is not satisfied with a decision of the court. Similarly, Stipanowich, (2004) states disadvantages which are interconnected with the litigation process for construction disputes are greater cost, and the possibility that dispute may not be well managed at the right time by the lawyers. Litigation is a long-winded process where court proceedings are generally conducted in the public and confidentiality may be divulged to the public. Further, Judgments will be subjected to appeal or challenge Arbitral awards and it will affect the certainty of those decisions.

Construction contracts in the industry are more complex than all other type of business contracts by its nature. This complexity itself has paved the path for the disagreements between parties concerned to such contracts. (Ashworth, 2005) As such it is high time to explore the available options or to create new alternatives to address this issue. In an arbitration, arbitrators are appointed on the basis of experience or expertise in the subject matter of the dispute. On the other hand,

Althaf, (2012) arbitrator's potential lack of legal knowledge is a disadvantage. While the courts can generally offer sound opinion on points of law, the arbitrator may seek the court's opinion as part of the arbitration. However, by doing so, the arbitrator again engages with the long-term court process and he has to wait until the court makes their decision.

From one of the options of an Arbitrator can prepare the case clearly in writing and highlight the question of law that the court have to answer and after the court announces the decision he can continue his arbitration by following that decision.

In addition, Kanag-Isvaran, (2011) shows that parties can contact for arbitrator anytime without much formalities. However, it is significantly difficult that a judge in a litigation ever makes a visit to the court every time there's a problem which needs immediate suggestion or decision. Over time the procedure of the arbitration becomes similar to litigation and lacks its characteristics in the way of an alternative to litigation. Abeynayake, (2015), Rohith et al. (2016) argue that the use of arbitration in the matters of construction field has simply become more like litigation and it has resulted in the conviction that in a nutshell, arbitration is not what it sets out to be anymore. Because in practice the procedure of arbitration automatically loses its behaviour of an alternative to the litigation system. It can observe that very often Arbitration adopts a traditional litigation approach like requiring large scale disclosure, followings by lengthy and detailed witness statements and longer expert reports which make the arbitration procedure equal to litigation. This is not the actual purpose of arbitration for which it has been designed. According to Saleem, (2016), It's appears that preventing arbitration is similar to litigation. However, arbitration is controlled by the discovery of evidences, motion practices, judicial intervention and the lack of finality.

Arbitration does not function completely apart from the judicial system. Kanag-Isvaran, (2011) The court intervention in arbitration can't be refused and court assistance in the process may be sought in many cases like appointment of arbitrator, termination of arbitrator's mandate and removal of arbitrators, grounds

for challenge, competence of arbitral tribunal, interim measures of proceedings, obtaining summons, refusal or failure to Attend before Arbitral Tribunal, Application for filling and enforcement of award , remission to arbitral tribunal , appeals and enforcement which depend on the assistance of the courts with regard to Sri Lankan law of arbitration. (Kanag-Isvaran, 2011) There's no arbitration without the assistance and the guidance of the judiciary. What need to be done is moderating the way of this assistance and reducing the duration of time which results as a consequence of the intervention of the judiciary. In order to achieve this, the recommendation is to enhance the way of court intervention to expedite the process and encourage the judiciary to make their decisions regarding the arbitration within a short duration or during the construction period itself, if possible.

1.3 Research problem

Literature based on the process of Arbitration in Sri Lanka and other countries revealed that using Arbitration as an alternative method to the court system will be more beneficial than litigation. It is evident that there would be a high possibility to ensure the efficacy of the process of Arbitration by minimizing the interference of the court system. Though a thorough search conducted on research articles there were no sufficient research has been conducted regarding the issues relating to Construction Arbitration and its judicial interference for challenging Arbitral awards.

This research's purpose is to encourage the process of the arbitration, minimising judicial intervention and to recommend modifications to the Sri Lankan construction arbitration. When considering litigation as the traditional way of resolving disputes, it is the process of engaging in or contesting to legal remedies in court as the means of dispute resolving. The court will enforce or regulate one party's rights or obligations. Litigation is much common in construction milieu because of its adversarial nature and the tendency for disputes to arise.

With regard to the literature findings on Arbitration method in the Sri Lankan construction industry and other countries in the world, it is evident that introducing the improvements to the Arbitration method for their efficient performance (as an alternative to the current Arbitration procedure) will bring definite advantages. It can be argued that there could be a higher possibility to implement suitable ADR approaches in the construction industry Sri Lanka. Therefore, intention of this piece of research is to fill gaps by examining the suitability of Arbitration methods to the problematic Arbitration practice and procedure in the Sri Lankan construction industry.

In this background, the research problem explored in this research is the effectiveness of Arbitration method for resolving construction disputes in Sri Lanka and the necessary improvements for the dispute resolution practice to make Arbitration methods more attractive and efficient. Accordingly, research problem can be summarize as “How minimising of judicial intervention to improve and modernize Arbitration method in the construction industry of Sri Lanka”?

1.4 Hypothesis

The Hypothesis of the research is that there is more impact on judicial interference to the Arbitration process. However, the study emphasises that, there is a need of making special initiatives to ensure that the method is effectively utilized for the purpose of enhancing its benefits.

1.5 Aim

The aim of this research is to review on impact of judicial interference to Arbitration method as an ADR method to resolve construction disputes in the construction industry in Sri Lanka. Accordingly it can investigate how to improve the arbitration process by encouraging to minimize the judicial interference and allowing process to stand as an independent ADR method.

1.6 Objectives

In order to fulfil above aim, objectives of the research would be to;

1. Review the features of Arbitration method and its conflicting areas in arbitral procedure and practice.
2. Identify the impact of judicial interference in Sri Lankan arbitration method.
3. Review progressive efforts taken by other jurisdictions to enhance the efficiency of Arbitration in the construction industry.
4. Make recommendations to minimising of judicial interferences for arbitral awards to improve the efficiency of Arbitration.

1.6.1 Research questions

Above objectives are purposed to achieve by answering the following questions.

1. What are current issues regarding Arbitration especially in Sri Lanka?
2. What are conflicting spheres related to Arbitration which make it in efficient and time consuming?
3. What are the possible advantages if the unnecessary intervention of the courts is reduced?
4. What are the necessary recommendations that should be adapted to minimize the judicial intervention?

1.7 Research Methodology

To accomplish the above objectives, and as a legal research the literature based on construction Arbitration is analysed. The literature review based on this research was conducted to identify the effective steps which can enhance the purpose of Arbitration method as an alternative to litigation. With regard to this basically the literature review focused on the progressive Arbitration modules which have been taken in other jurisdictions like India and England. In Sri Lanka, there is no literature based on the purpose of suggesting the reduction of the court intervention in most stages of Arbitration and it can be only found in the Arbitration Act of Sri Lanka. Hence the literature review based on this research was conducted based on

other related articles on formal Arbitration and related to the construction Arbitration and its applicability of recent trends.

A survey was conducted based on structured interviews of the highly qualified professionals in the field of Arbitration and a comprehensive questionnaire was distributed among industry professionals and the partied involved in like Contractors, Builders, Engineers and basic level employees recruited in a construction project. Thus, the methodology of this research is based on the Literature review of articles on Arbitration which analyse the constructional based Arbitration and the structured questionnaire survey to find the degree of knowledge of professionals about the construction Arbitration.

1.8 Scope and Limitations of the Research

This research limits to analyse the construction Arbitration in Sri Lanka based on the developed other jurisdictional efforts which have been taken to enhance the effectivity of the Arbitration. And basically, the data has been collected is limited to the knowledge of professionals who are actively engaged in the Arbitral dispute settlements and also the other stakeholders viz engineers, consultants etc.

1.9 Research Output/ Dissemination

Arbitration as an alternative method has been receiving much more attraction than other models in the area of dispute resolution methods of construction industry. In this research, it is highly encouraging to analyses the effects of the court intervention which have been engaging in too many struggles like delaying the Arbitration. Based on this issue it is aiming to propose some recommendations which can fulfill the gap which is still haven't answered by any of the research is about to facilitate the outputs as,

1. Finding problematic areas of the present regime regarding the construction Arbitration in Sri Lanka,

2. Make awareness among the construction field about the Arbitration methods as a greater disputes resolution method which is highly useful more than the traditional way of litigation,
3. Investigate in what level and under what circumstances the Arbitration method is used in construction field in Sri Lanka,
4. To develop the modified way of Arbitration which is highly encourage by the minimum intervention of courts which caused more delay in the process,
5. Making suggestions by absorbing other progressive jurisdiction which already found solution for the betterment of the Arbitration.

1.10 Structure of the Dissertation

The research is divided into chapters as follows for easy reference. the first chapter discusses the summarized introduction of this research which includes aims, objectives, research problems, scope of the research, its limitations and research dissemination.

Chapter two is to review the literature related to the process of Arbitration in the field of construction industry. It analyses the scholarly ideas about construction Arbitration legislation and conditions of contract of FIDIC, Indian Amendments Act. Chapter three consists of the framework of the research which can be guided to achieve the aims and objectives of the research, Research methodology and the way analysis of the data.

Chapter four includes the findings of the research which has been achieved by interviews which the professionals of the constructional Arbitration and include an analysis, solutions and the basic requirement of arbitration according to the opinions of interviewees.

Chapter five present the conclusion of the research findings which is based on the library-based literature review and the professional based interviews and the recommendations which can enhance the efficiency of the Arbitration method based

on the progressive amendments which was introduced in other countries for their Arbitration process with suggestions.

Accordingly, the structure of the research would be summarized as per figure No.1.

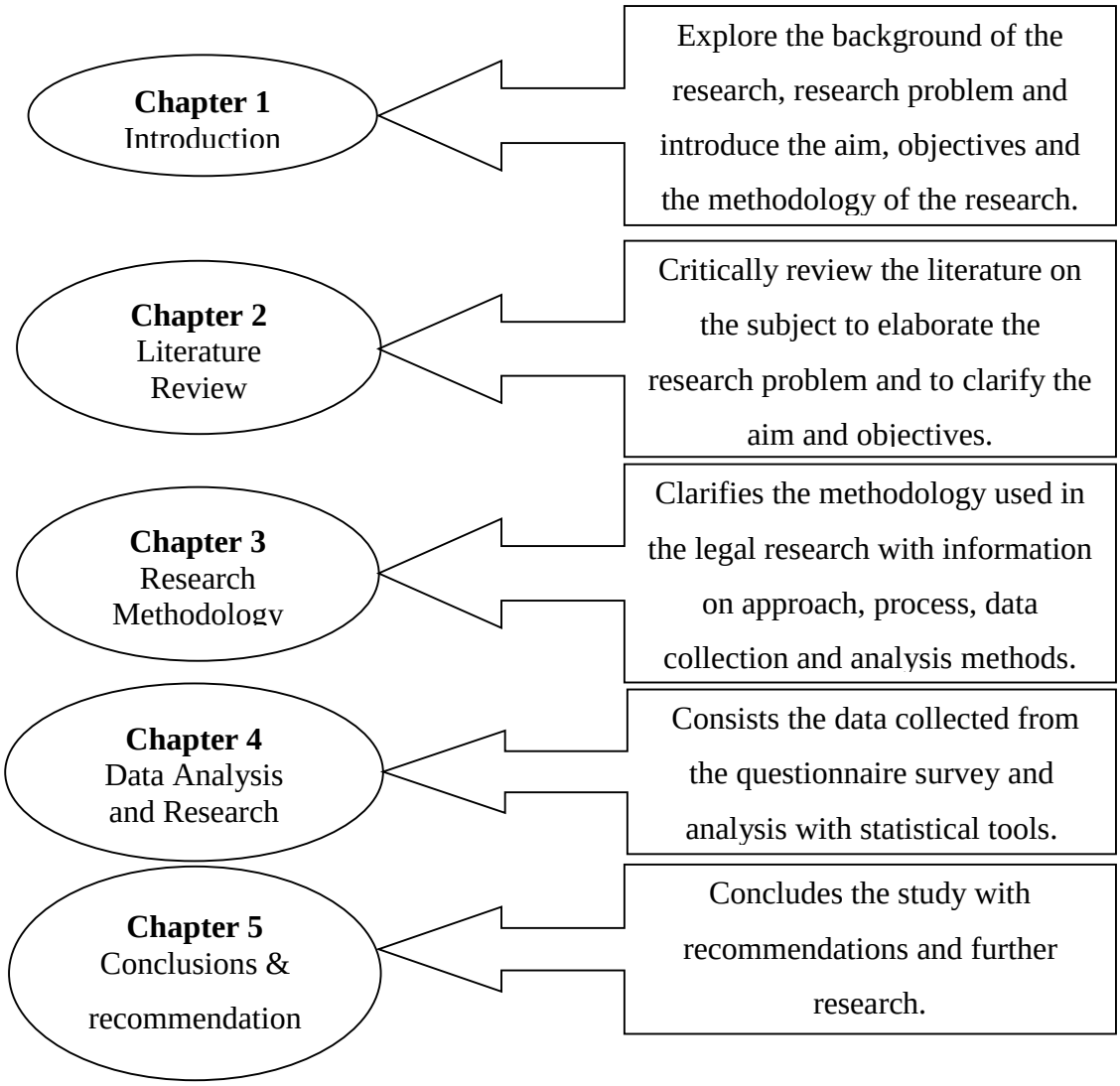

Figure 0.1: Chapter Breakdown

CHAPTER 02

Literature Review

2.1 Introduction

The purpose of a literature review is to demonstrate the research gap which is going to be addressed in a new research. A literature review interprets the available data and information related to a research problem in order to identify the specific issues that have already been investigated and to analyse the outcomes of those studies. Ann analysis of the intellectual interpretations and arguments related to previous research can help a researcher to identify the scope of his/her study and to devise an appropriate methodology to investigate the research problem.

A literature review is a survey which analyses books, scholarly articles and other relevant materials and created an overall summary of critical opinions with regard to the research problem which is being investigated in a study. (Naoum, 2012) It gives an interpretation to the available literature of the research problem combine with the new interpretation as a perspective of the researcher of this research. It will help to evaluate the intellectual ideas of the relevant field and interconnect with the major debates which can propose new recommendations to the new research. (De Vaus, D. A., & de Vaus, D. 2001). Basically, after analysing these existing literatures of the research use a s method which is helpful to identify where gaps exist in the problematic areas and how those problems have been researched to the date and what can we suggest. (Brydon-Miller & Coghlan 2014) The purpose of the literature survey is to analyse the existing literature of the research areas is to understand what type of research problems already studied by researchers and understand the interconnection between those works and understand the different types of information what were recognized by them. And investigate what are the remaining and requiring an immediate response under a new research. McNamara, (1999) means that relevant gaps of those existing works. And it is to guide to prevent the duplication efforts which can be a reason for unnecessary conflicts between

intellectual minds. Make the research a new one which is still can't be recognized in the relevant field. Therefore, this chapter seeks to analyse the disputes in the construction industry, review the litigation, its practice and procedure as a conventional dispute resolution method in the construction industry and explore the availability of Arbitration as a greater method of resolving disputes.

2.2 Disputes in the construction industry

Dispute is an argument or a disagreement between two persons or groups (Oxford dictionary). The meaning of 'Dispute' is further defined by Brown and Marriot (1993) as a class of conflict, which manifests itself in distinct and justifiable issues. Being prejudiced still stakeholders in the construction industry have not come up with a proper management tool to eradicate dispute causing factors. Harmon (2003) has presented poor project organisation, lack of attention to the details relating to project structure, poor communication skills, poorly prepared and executed contract documents, inadequate planning and financial issues had given rise to disputes. Loosemore (1999) in his research has concluded that the majority of construction disputes are unintentional. This argument is realistic as no one or no organisation in the construction industry would prefer disputes. Furthermore Loosemore (1999) declares that misunderstandings and tactical miscalculations resulting from poor communication and opposing parties following parallel routes, implications of blame, structure and constitution of project team and goal inflexibility of organizations would escalate those unintentionally occurred disputes. Due to the above causes including its complex nature, in the performance of any construction contract, the disputes between the parties rise in unavoidable nature. Unresolved disputes can lead to project interruption, amplified tension, and can harm long term business affairs as a result (Cheung and Suen, 2002).

The disputes and their resolution have become a primary focus in the strategic plans of businesses (Kleiner and Mose 1999). According to Dart (cited in Latham 1994) the best solution is to avoid disputes even though disputes may arise. It lies in the parties involved in the contract to avoid them. In case where any dispute occurs

unintentionally avoidance would not be successful. According to Coutts and Dann (2009) the disputants should obtain a fair resolution to any dispute arising under a contract without unreasonable delay. Failure of dispute resolution heavily effects the effective implementation. And would not be founded upon on good understanding and principles of dispute resolution. The UK and the US, have been identified as the most advanced jurisdictions where the use of mediation has become common place to resolve commercial disputes, including construction disputes.

Newman, (1999) The US has developed a special Dispute Board concept, involving the appointment of a panel of independent persons who maintain the affairs of project throughout its life. If a dispute arises this panel is called in to make a recommendation rather than a decision on the dispute. This recommendation is not binding but would be accepted by the parties. This system has been credited for its nature of saving many hundreds of millions of dollars for project participants.

According to Jayasena & Kavinda (2012) there is a wide general acceptance for the quick and effective methods for the resolution of disputes in construction projects. Dispute Adjudication Boards which render decisions that are temporarily binding but pending further procedure have become the standard model without possessing an insight knowledge of formal and conventional way of dispute resolution it is futile understand the alternative ways. Therefore, first and foremost it is required to get a brief idea about the litigation as a formal way of dispute resolution.

2.3 Arbitration and other ADR methods in the construction industry

David, Judith and Gearing (2009) states that Arbitration was born in England as an Alternative Dispute Resolution. Earlier it was an alternative distinctive from litigation. When considering the archaeological traces, the procedure of arbitration leads backs to as far as 2800 B.C and the clay tablets by ancient Babylon were identified as referring to commercial arbitration proceedings. Aristotle distinguished his argument of arbitration as a procedure preferred over litigation because an arbitrator goes by the equity of a case, a judge by law. Philip of Macedon, father of

Alexander the Great, is recorded to have used arbitration to settle territorial disputes arising from a peace treaty with some of the Greek states in 337 BC.

2.4 Litigation – A Conventional way of dispute resolution

Litigation is resolving of disputes in courts by means of legislation and law. Litigation is practised as a decisive and legally enforceable method of dispute resolution worldwide. It is a dispute resolution method adopted at courts. It involves third parties trained in the law, usually the lawyers and judges who are appointed by State (Asworth, 2005). When considering the Sri Lankan judicial system, the courts and their jurisdictions are basically governed by the Constitution and the Judicature Act No. 02 of 1978. According to the aforesaid legal provisions the original civil jurisdiction which heavily affects the contractual matters in the construction industry is vested on District Courts except where the cause of action has arisen out of some commercial transactions of more than five million rupees. (Kanag-Isvaran, 2011) The jurisdiction vested in the Commercial High Court was established by High Court of Provinces (Special Provisions) Act No. 10 of 1996.

The judicial system is one form of dispute resolution that is available to the parties of dispute. ‘However, in Sri Lanka there is a tendency to assume that litigation is the normal dispute resolution method and there is a concern that people turn too quickly to the courts with their disputes’ (Wimalachandra, 2007). The whole process of litigation involves when the parties feel that they cannot resolve the dispute on their own and therefore they feel the need to refer the dispute to the Courts of Law. The decision that is made to go before a court has the effect of applying procedural and substantive legal issues of judicial system. Amerasinghe, (2011) states that Civil Procedure code of Sri Lanka outlines the procedural mechanism for civil issues that would have to be adopted by a litigant seeking relief in respect of any infringement of his rights. Procedural rules for pleadings, plaints and averments, amendment of such plaints, filing the case, issuing summons, answers, replications, list of witnesses, trial of the case, interim relieves, judgments and such other various

complex procedural rules are broadly discussed in the Civil Procedure Code which is difficult to be understood by professionals.

The litigation process is summarized by Turner in the figure 3.1. It shows that when considering the litigation process after the cases are filed that it is settled before the trial. If the parties are unable to reach a settlement, the litigation continues to trial. In the majority of case the courts would require the parties to come to a settlement.

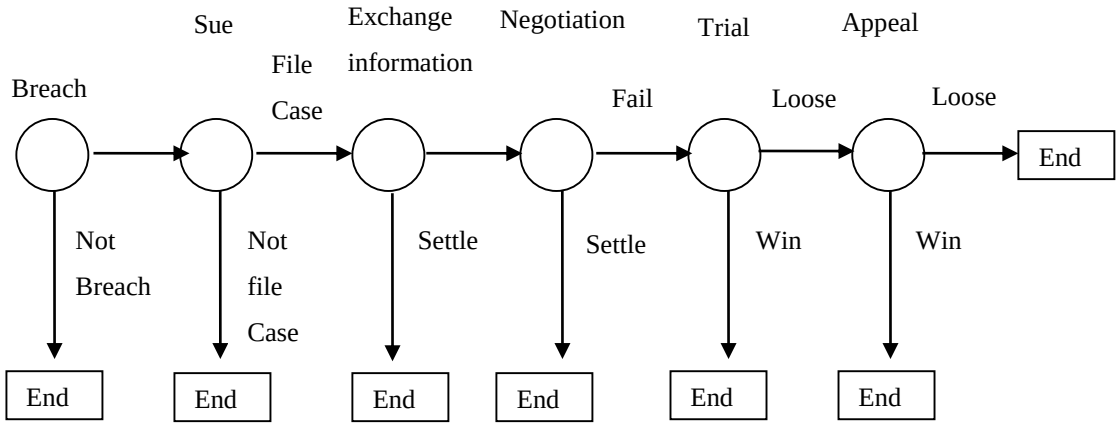

Figure 0.1: The value- process chain of litigation (**Source: Turner 2008)**

Since litigation system is adversarial it requires the parties to engage in a contest before the court by submitting enough evidence to try to establish the fact that one party's case is stronger than that of the other party. It will involve representing the case through lawyers at the courts of law. When a case is alleged, and facts are presented in its attempt to prove their own part of bargain. A decision that a party has proved their case or defence to the standard of proof is based 'on the balance of probabilities' (Turner, 1999). Further, Turner (1999) elaborates once the judgement is delivered the litigation ends, the party in whose favour the judgement is entered will receive the damages. Unhappy party would refer the case to the appellate court on a question of law or fact.

2.5 Arbitration History in Sri Lanka

Early Sri Lanka has evidences of practicing non-adversarial dispute resolution systems. However, from 1833 onwards, an adversarial and vexatious dispute resolution mechanism was laid by the Colebrook and Cameron Communion. Alternative Dispute Resolutions are not a novel thing to Sri Lanka. Even in the ancient time the traditional dispute resolution methods were formed by the way of mediation, arbitration and conciliation. Cooray (1992) in his book "An Introduction to Legal Systems of Sri Lanka" states that '*The Gamsabawa*' or village tribunal whose origin dates back to the origin of the village itself was composed of the village elders. It is said to have met an '*Ambalama'* or under a shady tree. It dealt with very minor offences such as small debts, minor quarrel, boundary disputes and theft. The Gamsabawa attempted not so much to mete out punishment but to amicably settle disputes on the basis of common sense and compromise. The procedure was characterized by admonition, compromise and common sense, unsullied by legal technicalities and rigid rules of procedure. This is a kind of mechanism which has a voluntary nature that both parties take the responsibility of resolving their own dispute.

2.5.1 Arbitration Law up to 1995

Until the enactment of the modern law of Arbitration in 1995, the Arbitration Law practiced in Sri Lanka was based primarily on three statutes as follows;

1. Arbitration Ordinance No. 15 of 1856
2. Chapter 51 of the Civil Procedure Code of No. 2 of 1889

The Arbitration Ordinance and the Civil Procedure Code provided for both compulsory Arbitration by order of court and voluntary arbitration by the consent of parties. There was hardly any institutional Arbitration and there was no possibility to obtain professional training as an Arbitrator. The development of trade, commerce and the emphasis on foreign investment in the economy of Sri Lanka after 1978 made it incumbent for the lawmakers to modernize Sri Lankan Arbitration practice. The Arbitration Act No 11 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.

2.5.2 Opinions of jurists on Arbitration

> "Business people are increasingly striving to find opportunities to avoid using lawyers and, in fact, the long-standing battle between attorneys and business people has been portrayed as a struggle for the soul of arbitration".
>
> (Sherrill, 2014)

Sherrill, (2014) explains that by nature parties try to avoid lawyers and seek cost effective and efficient way like Arbitration. Where there are no joinder provisions and no consolidation provision in the arbitration agreement obvious problems tend to arise. Separate proceedings may have to be commenced, different arbitrators are likely to be appointed and separate findings of fact or law will inevitably result. With the continuing problems of joinder and consolidation and the perceived advantages of technical wisdom, speed, cost and confidentiality having been eroded, eventually the construction industry and arbitration have moved away from each other.

It is essential to observe why the international construction industry selects Arbitration as the method of choice for resolving disputes. Choi (1995) identified two reasons as neutrality and enforcement. Usually unique difficulties arise in International construction projects. Mainly there are '*foreign*' regulatory and employment issues, different procurement in plant and materials and profit margins may reduce by taxes and customs. Therefore, serious disputes appear in the contract. Moreover, those disputes are governed by a foreign law and are determined through litigation in a foreign court. Parties naturally has fear of any court significantly a foreign court. Foreign laws are routinely biased in favour of the locals. However, when a risk is assessed, contractors are reluctant to take such risk

where a foreign court will decide to for the works undertaken in a foreign soil. Therefore, the presence of an international arbitration tribunal is often vital. The concentration on arbitration during an ongoing construction project is very important. It is because while the project is still on, the process the awards of the arbitration can be used as the method of adjustment to the unexpected problems. The cost of these adjustment may be the expenses and losses that project might have to suffer if a problem arises. And it may be a cause for misunderstandings between the construction parties. The most important thing is that the evidences related to the problem is fresh in character and it will be practically useful.

The basic argument here is, the settlement of arbitration should come into existence only before the project is over. If '*Judicialisation'* of arbitration in an assumption requires detailed pleadings, extensive discovery, prehearing motions and filings, followed by extensive trials to reach a binding decision. The extended duration and expenses of these court procedures are inconsistent with dynamic project management.

2.5.3 Arbitration Act in Sri Lanka

Countries around world have reformed their arbitration laws with reference to the UNCITRAL Model Law. In 1995, Sri Lanka parliament enacted a new Act for Arbitration (No. 11 of 1995). As stated earlier, an objective is to make "comprehensive legal provision" to execute arbitration proceedings and to enforce arbitral awards. Another objective is to develop legal provision to "give effect", to the principles of the Convention on the Recognition and Enforcement of Foreign Awards of 1958. (the New York Convention).

The local Arbitration Act mostly trails UNCITRAL Model law. At the same time, certain departures from, or additions to, the rules given in the Model Law have been considered necessary. Important departures and additions will be referred to, in this article, at the appropriate place. Sri Lanka was the first country in South Asia that enacted an Act to deal with arbitration. The Arbitration Act of Sri Lanka stated how

to resolve disputes arise in any industry. The Act provides that an arbitration agreement shall be in writing.

In Sri Lankan context arbitration is conducted according to the Arbitration Act No 11 of 1995. Main contents of the Arbitration Act of Sri Lanka and its provisions for judicial intervention are as follows.

1. Form of arbitration agreement (Sections 2, 3)
2. Appointment of arbitrators (Sections 6-10)
3. Prepare the procedure for arbitration (Sections 6-10)
4. Define the competencies of arbitration tribunal (Sections 11, 12)
5. Issue of interim measures of protection (Section 13)
6. Define duties and responsibilities of the arbitral tribunal (Section 15)
7. Notice of place or venue for arbitration (Sections 16)
8. Determination of rules & procedure (Section 17)
9. Commencement of arbitration procedure (Section 18)
10. Submission of the dispute to the arbitration (Section 18)
11. Issuing of summons (Section 20)
12. Issuing of awards (Sections 25, 26)
13. Correction and interpretation of award & additional awards (Section 27)
14. Compensation of arbitrators (Section 29)
15. Application to the High court for enforcement of the award (Section 31)
16. Application for setting aside the award (Section 32)

In Sri Lanka, arbitration become solitary legally enforceable ADR method covered by the Arbitration Act. This Act was enacted in 1995 as a comprehensive piece of legislation for arbitration to substitute the legislation in existence, which eventually become inadequate to settle the disputes through current practice.

Having entertained, The Court application sustained a primary objection that as the "Commercial High Court" is working out a "special jurisdiction" has no jurisdiction in line with applications raised under the Arbitration Act No. 11 of 1995, and that the application was a "nullity". An application was made from that decision to the

Supreme Court pertaining to Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

Judgment of the Supreme Court of Sri Lanka in *Kristley (Pvt) Limited Vs. The State Timber Corporation* (2002) 1SLLR 225 in which it was held, inter alia, that

> "On the facts and circumstances of the case, copies of the awards tendered with the claimant's application were duly certified copies within the meaning of section 31(2)(ii) of the Act.
>
> "Even in a case where the copy of the award filed with the application is not a duly certified copy of the application may not be summarily rejected without giving an opportunity to tender duly certified copies interpreting "accompany" in section 32(2) purposively and widely."

For the determinations of Sec. 31 (2), a translation must certify by an official, sworn translator, diplomatic or a consular representative in Sri Lanka of the country where the award delivered or else to the satisfaction of the Court.

An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court on application made there for within 60 days of the receipt of the Award. It was held by the Supreme Court in the case of Southern Group Civil Construction (Pvt) Limited Vs. Ocean Lanka (Pvt)Ltd. (2002) 1 SLR 190 that the time are of sixty (60) days contained in section 32 (1) should be strictly applied. Flow of enforcing arbitration award can be illustrated as below.

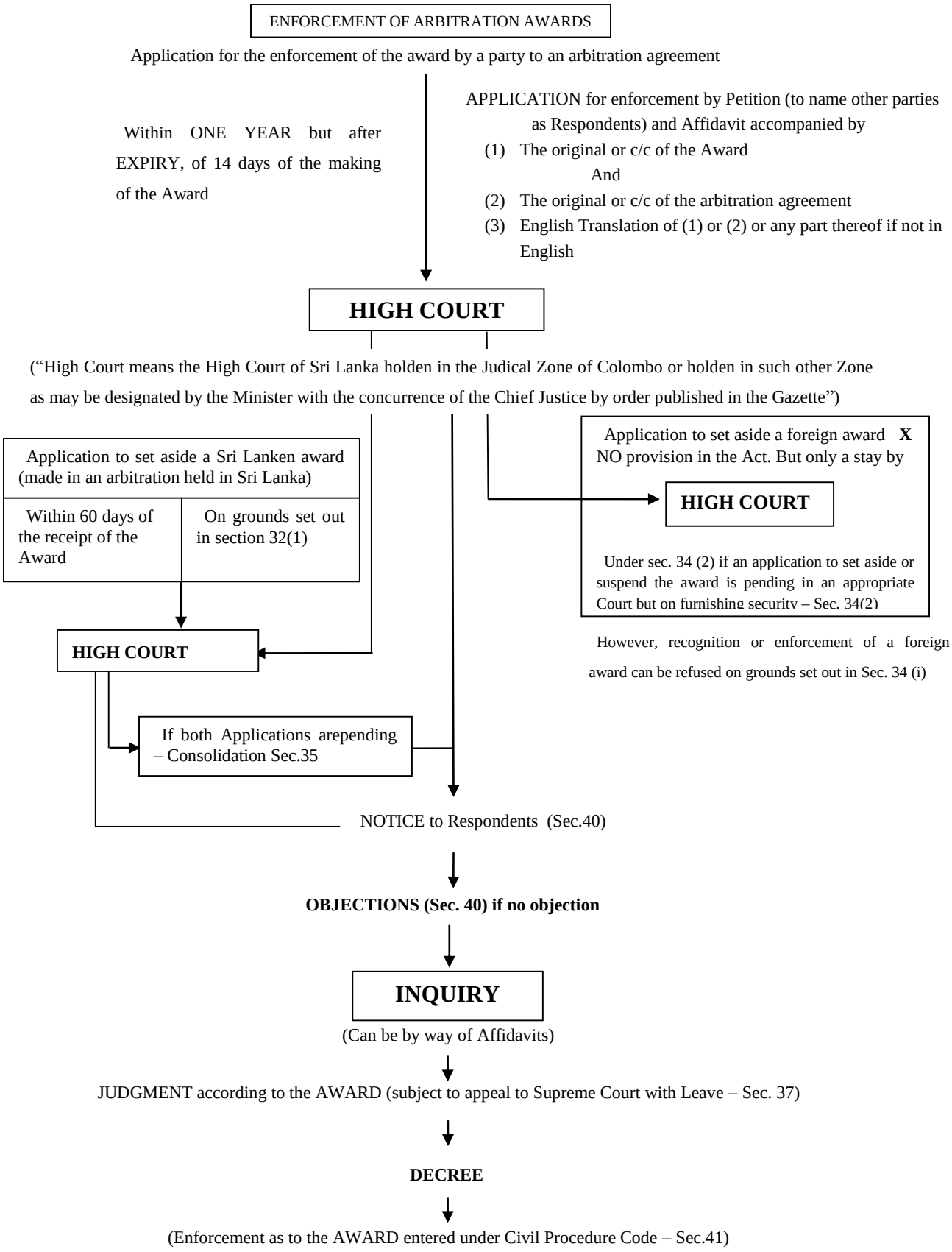

Figure 0.2: Enforcement of Arbitration Awards (Source: Abeynayake 2014)

2.6 Arbitration practice in India and United Kingdom

Majumdar, (2006) states the core purpose of this research is to analyse the new Arbitration Act of 2015 of India while analysing the shortfalls of the earlier Act of 1996. According to them the introduction of the amendments to the earlier Act named Arbitration Act 2015 was introduced to overcome shortfalls which were recognized inside the earlier Act. New Indian Arbitration Act of 2015 included some significant amendments as follows in brief;

1. *"Every award must be made within twelve (12) months from the date the arbitrator receives a written notice of appointment;*
2. *The parties may mutually decide to extend the time limit by not more than six (6) months;*
3. *If the award is not made within eighteen (18) months, only a court can extend the period as it may deem fit, upon an application filed by any of the parties;*
4. *Further, if the court, while extending the time for making the award, finds that the delay was attributable to the tribunal, it may order a reduction in the arbitrator's fee by an amount not exceeding 5 per cent for each month of such delay;*
5. *The court while extending a time limit, also has the right to change arbitrators as it may deem fit and can also impose certain conditions on the parties and the arbitrators;*
6. *An application to the court should be disposed of by the court within sixty (60) days from the date the opposite party receives the notice; and*
7. *If an award is made within six (6) months, the arbitrators shall be entitled to receive such additional fees as the parties may agree."*

(The Arbitration and Conciliation (Amendment) Act, 2015)

Indian legislature introduced their new Arbitration Act in 2015 in answering these issues. In parallel to the amendments, article by Rohith et al; (2016), Dispute Resolution in India in Light of the New Arbitration Act 2015 highlights the significant increment in the role of domestic and international trade in economic

development of India. Further, Considerable increment of the commercial disputes accompanied with that economic are emphasised. They recognized the reason as rapid globalization of the economy and competition has led to exponential problems in commercial arbitration. Therefore, according to research findings the rapid development of globalization has led the court system to be overburdened and it will cause the slow adjudication of commercial disputes. Hence, arbitration become critical for business sector which can facilitate a prevalent mode of dispute resolution for commercial disputes. Further, the Arbitration Act of 1996 in India was enacted to achieve the twin goals of inexpensiveness and quick resolution of the disputes.

In consideration of the Sri Lankan judiciary system, Sri Lanka judiciary might be reluctant to accept such amendments to arbitration which may abolish their powers of intervention in to significant extent. It is because if it is a matter of arbitration or another matter judiciary is still playing the vital role of interpreting and applying every law of Sri Lanka. Based on this argument the researcher of this article is going to propose a pure court system which can deal with arbitration matters without establishing arbitral tribunals. In order to propose this the researcher was inspired by the newly introduced court in England named "*Technology and Construction Courts*."

Further, Construction Arbitration Council is another development achieved by India in the area of construction disputes. The Manual of the Arbitration Rules (2013) of India stated the council as a newly introduced concept to reduce the delays occurring inside the resolution methods which already exists in India. Rohith et al; (2016) believed that substantial sums amounting to several crores of rupees are locked up in many contractual disputes in the Construction Sector alone in India. The Construction Industry therefore felt the need to introduce new measures so that disputes are resolved in a fair, speedy and cost-efficient manner. With a view to provide an institutional mechanism for resolution of construction and infrastructure related disputes, the Construction Industry Development Council, India (CIDC) in cooperation with the

Singapore International Arbitration Centre (SIAC) set up an Arbitration Centre in India called the Construction Industry Arbitration Council (CIAC) on 6th June, 2006. CIAC is a Registered Society with its headquarters in New Delhi. Construction Industry Arbitration Council (CIAC) is an independent, not-for-profit institution headquartered in New Delhi to provide an Institutional Mechanism for the Resolution of Disputes arising in the Construction and Infrastructure Sector in India. The Council was inaugurated on 15th November 2006 by then his Excellency the President of India, Dr. APJ Abdul Kalam. To maintain the expected level of professionalism, it is the basic requirement that a panel of experts in arbitration is drawn from different fields such as legal practitioners, engineers, management & financial specialists etc. CIAC has succeeded in creating such a panel of Arbitrators. The Council has so far added to its panel 249 experts as arbitrators from the participants of the Empanelment Workshops.

CIAC provide facilities for:

1. Alternative Dispute Resolution (ADR), which includes international, domestic & commercial arbitration.
2. Conducts executive development programmes, workshops and National/ International Conferences on various aspects of Alternate Dispute Resolution process (ADR).

Analysis of the proceedings of the Council can be used to recommend more efficient enhancements to Sri Lankan Arbitration as well.

2.7 Progressive efforts on Arbitration in United Kingdom

The literature review is based on The Technology and Construction Court Guide Second Edition Issued 3rd October 2005, third revision with effect from 3 March 2014. In general, The TCC addresses mainly with disputes arising in the field of construction and technology. This covers engineering and technology disputes, construction, IT disputes, negligence, challenges to arbitrators' decisions and enforcement of adjudication decisions. TCC often involves with allegations against professional negligence of lawyers arising in connection with property, planning,

construction and other technological pertaining to the guidelines including the following sources of disputes;

(i) involves technically complex issues or questions (or for which trial by a TCC judge is desirable) and

(ii) Has been issued in or transferred into the TCC specialist list. Paragraph 2.1 of the TCC Practice Direction identifies the following as examples of the types of claim which may be appropriate to bring as TCC claims –

(a) building or other construction disputes, including claims for the enforcement of the decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996;

(b) Engineering disputes;

(c) Claims by and against engineers, architects, surveyors, accountants and other specialized advisors relating to the services they provide;

(d) claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings;

(e) claims relating to the design, supply and installation of computers, computer software and related network systems;

(f) Claims relating to the quality of goods sold or hired, and work done, materials supplied or services rendered;

(g) Claims between landlord and tenant for breach of a repairing covenant;

(h) Claims between neighbours, owners and occupiers of land in trespass, nuisance, etc.

(i) Claims relating to the environment (for example, pollution cases);

(j) claims arising out of fires;

(k) Claims involving taking of accounts where they are complicated; and

(l) Challenges to decisions of arbitrators in construction and engineering disputes including applications for permission to appeal and appeals.

(HM Courts & Tribunals Service 2nd Ed, 2005)

Further the guidelines indicated that The TCC often address allegations against lawyers' negligence arising in relation to planning, property, construction and other technical disputes and with applications under the Arbitration Act 1996. A non-exhaustive list of special features which will usually justify listing the case in the High Court is:

(a) Adjudication and arbitration cases of any value;
(b) International cases irrespective to the case value (international cases will generally involve one or more parties' resident outside the UK and/or involve an overseas project or development);
(c) Cases involving new or difficult points of law in TCC cases;
(d) Any test case or case which will be joined with others which will be treated as test cases;
(e) Public procurement cases;
(f) Part 8 claims and other claims for declarations;
(g) Complex nuisance claims brought by a number of parties, even where the sums claimed are small;
(h) Claims which cannot readily be dealt with effectively in a County Court or Civil Justice centre by a designated TCC judge;
(i) Claims for injunctions.

(HM Courts & Tribunals Service 2nd Ed, 2005)

An important part of this Court system is that parties can also request a judge from the court to act as an arbitrator in their dispute. The Section 18 under the guideline heading of TCC 'judge as arbitrator' states;

"18.1.1 Section 93(1) of the Arbitration Act 1996 ("the 1996 Act") provides that a judge of the TCC (previously an Official Referee) may "if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as an umpire by or by virtue of an arbitration agreement." (UK Arbitration Act, 1996) Judges of the TCC may accept appointments as sole arbitrators or umpires pursuant to these statutory

provisions. The 1996 Act does not limit the appointments to arbitrations with the seat in England and Wales."

"18.1.2 However, a TCC judge cannot accept such an appointment unless the Lord Chief Justice "has informed him that, having regard to the state of (TCC) business, he can be made available": see section 93(3) of the 1996 Act. In exceptional cases a judge of the TCC may also accept an appointment as a member of a three-member panel of arbitrators if the Lord Chief Justice consents but such arbitrations cannot be under section 93 of the 1996 Act because section 93(6) of the 1996 Act modifies the provisions of the 1996 Act where there is a judge-arbitrator and this could not apply to arbitral tribunals with three arbitrators, one of whom was a judge-arbitrator."

"18.1.3 Application should be made in the first instance to the judge whose acceptance of the appointment is sought. If the judge is willing to accept the appointment, he will make application on behalf of the appointing party or parties, through the judge in charge of the TCC, to the Lord Chief Justice for his necessary approval. He will inform the party or parties applying for his appointment once the consent or refusal of consent has been obtained."

According to Section 18, TCC accept appointments as sole arbitrators, TCC may also accept an appointment as a member of a three-member panel of arbitrators, which leads to an efficient practice in appointing arbitrators. In the recommendations for the Sri Lankan Arbitration Law, this would be a more suitable approach of introducing a Court system which can purely handle all the Arbitration matters without establishing Arbitral Tribunals. The problem of this research is to seek the possibilities to enhance Sri Lankan law of construction arbitration either by maximising the intervention of courts, complete removal of court intervention, or to enhance the laws and Acts forming new model to the arbitration in Sri Lanka.

In summarising surveyed case law following chart reviews the judgement made and significant fact relevant to Arbitral process.

Table 0.1: Summary of famous Judgements challenged the arbtral award

Case	Summary of Judgement
Southern Group Civil Construction Vs Ocean Lanka (Pvt) Ltd. (2002)	Challenged. An arbitral award held in Sri Lanka may be set aside by the High Court on application made there for within 60 days of the receipt of the Award
Wakachiku Construction Co. Ltd., Vs. Road Development Authority (2013)	Challenged. To set aside and to declare that the High Court did not have jurisdiction to have entertained proceedings in H.C (challenge made being unaware the Arbitral procedure)
Merchant Bank of Sri Lanka Vs D.V.D.A Tillekeratne (2001)	Challenged. Supreme Court held that the Party autonomy as a fundamental principle of Arbitration Law and this is given effect to by the legislature in Section 7(1) of the Arbitration Act.
State Timber Corporation vs. Moiz Goh (pvt) Ltd	Challenged. held that the district court had no jurisdiction to enter in to the arbitration proceedings. (challenge made being unaware the Arbitral procedure)
Vanik Corporation Ltd Vs. Silva and others (2000 SLLR 110	Challenged and subsequently enforced Supreme Court held that enforceability the Arbitration Act.

Case	Summary of Judgement
Mahaweli Authority of Sri Lanka Vs United Agency Construction (Pvt) Limited 2002 SLLR 08	Challenged.
Kristly (Pvt) Limited Vs, State Timber Corporation-2001 SLLR 225	Challenged.

Challenging an award and resisting enforcement, usually take place at different points in time. Challenge is normally made to the Commercial High Court and enforcement of an award under the place in courts. For these reasons, and because the grounds for a challenge extend beyond the grounds and it has become extravagant aspects of the arbitration process shall reviewed and should be the subject of a separate checking process by Act.

2.8 Summary

This chapter comprehensively discussed problematic areas and issues of existing Arbitration process in Sri Lanka. It was achieved the objectives of literature review which were derived to fulfill the aim of the research.

It is obvious that current Arbitration practice does not conveniently aid to resolve disputes but to prolong them. Having gaps with other international practices, and loopholes in the existing Act, Arbitration appears to be a waste of time, cost and effort as the involved parties couldn't come to an agreement with the decisions. Though arbitration is binding the parties with the decision, parties tend to challenge the decision or seek judicial interference merely to prolong the process when the decision is not in favour to them. Hence, there is a necessity to review and improve the outdated current Arbitration Act and its practice in order to minimize the time, cost and to reinforce the procedure and tribunal powers.

CHAPTER 03

Research Methodology

3.1 Introduction

This chapter elaborates the approaches and methods followed by the researcher to gather the required data and to achieve the intended outcome. Mainly, the previous research related to arbitration were analysed and compared to find out its effectiveness and applicability in the Sri Lankan context. Secondly, structured interviews and questionnaires were employed to examine the professionals' perspective regarding the use of arbitration as a means of dispute resolution in the construction industry.

3.2 Background of Study

According to Naoum, (2012) the description of types of researches there are two basic methods which can use as an approach to the research. It is *quantitative approach* and the *qualitative approach* is the structured methods of the research. both of these methods can be used as a mixed method in this research. First one is the method which can involves with the collection of data in quantitative form which can make a quantitative analysis of the data as a whole. This method can be achieved under sub ways of experimental and, inferential, and simulation approaches to research. Campion, Campion, & Hudson Jr (1994) under the way of inferential it is to form a data base from which to infer characteristics or relationships of population which is recognized in related to the research. Under this the population studied under the questionnaire or observations relevant to the research area. Experimental approach is something like greater control over the research environment and observe the effects on the variables of the environmental background of the research. And further in the approach of simulation it is like involvement of construction of an artificial environment of the real research and which is engaged with the relevant information of the research. Further qualitative

approach it is concern about the subjective background of the research which is based on the attitudes opinions and behaviours inter connected with the research objectives. Generally based on the approach it is motivated the famous methods like group interviews, projective techniques and depth interview focused the relevant to relevant professionals of the research. The field survey adopted a questionnaire survey where the target group of respondents were experienced professionals and eminent contractors. Because they have knowledge about ADR methods.

3.3 Literature Review

Based on the research problem a comprehensive literature review was conducted to explore the legal and regulatory structure of the Arbitration method in Sri Lanka and connected matters of the practical situation of the process. The literature review basically focused on related text books, statutes, case law, and standard documents of FIDIC and scholarly research articles. The literature studied for the research was restricted to areas like construction disputes, dispute resolution methods, Arbitration as the best way of the resolution methods and connected matters and issues in the practical aspects of dispute resolution in Sri Lanka.

3.4 Main contents of Legal Research

As of Levin, (1988) the purpose of conducting a legal research is to acquire necessary information to support the gaps existing in the regime, and to support the decision-making process to take more effective decisions. Any legal research consists of the ability of providing improvements to the legal system of a country. According to Naoum, (2012) Information gathered under legal resources is a key component of the study and that information was gathered using different methodologies like Primary sources of law which are generally identified as statues and case law, Secondary authorities which are generally recognized as law reviews and related treaties and encyclopaedia. The third method is non- legal sources like supporting information gathered from professionals who are identified as the expertise of the related field of research.

In this research, legal instruments can be widely useful to support progressive enhancements of the Sri Lankan Arbitration. Mainly the Arbitration Act of Sri Lanka No. 11 of 1995 is the basic instrument which was analysed and evaluated based on the above legal instruments. The UNCITRAL model law on International Commercial Arbitration, is the core legal framework which has been implemented by most of the countries all over the world and each and every country which signatory to this model law is obliged to amend the national law of Arbitration according to this. Proceedings of Construction Industry Arbitration Council 2015 India With a view to providing an institutional mechanism for resolution of construction and infrastructure related disputes, the Construction Industry Development Council, India (CIDC) in cooperation with the Singapore International Arbitration Centre (SIAC) has set up an Arbitration Centre in India called the Construction Industry Arbitration Council (CIAC). Further, in England the Technology and Construction Court Guide Second Edition Issued 3rd October 2005, third revision with effect from 3 March 2014.

3.5 Research Design

The research design refers to the overall strategy that choose to integrate the different components of the study in a coherent and logical way, thereby, ensuring it will effectively address the research problem. It constitutes the blueprint for the collection, measurements and analysis of data. (De Vaus, 2001)

Further the purpose of using a research design is to ensure and prove those evidences which was gathered by the researcher. It can be use as the instrument which will enhance the possibilities of identifying the research problem clearly, review and analyse previous literature which already existed, clearly identify research hypothesis and decide the different types of methods of analyses to be applied to the data determining whether the research hypothesis is useful or not. The essentials of action research design follow a characteristic cycle whereby initially and exploratory stance is adopted, where an understanding of problem developed, and plans are made for some forms of strategies. Then the intervention is

carried out during which time, pertinent observations are collected in various forms. The new interventional strategies are carried out, and this cycle process repeats continuing until a sufficient understanding of the problem is achieved. (Brydon-Miller & Mary, 2014) Aouad & Sexton (2000) identified research methodology as complying with three key steps sequentially as identification of the research philosophy, research approach and research techniques. While the selection of research techniques for data collection and data analysis is based on the research approach, the selection of the research approach is based on the research philosophy.

Accordingly, De Vaus, (2001) explains the research methodology of this research is structured including three major steps like identifying the research philosophy, the approach and the other relevant research techniques and on the other hand the methodology is based on the responses produced by the professionals and expertise of the field answering questionnaires and it can be identified a way of qualitative interviews. These are to be used to identify and improvements which can use to enhance the efficiency of Sri Lankan Arbitration in practice. Basically, the questions provide to the professionals and the answers given by them is centred in to the object of highlighting the purpose of minimizing the unnecessary court interventions in to the practical process of the Arbitration.

Sexton (2000) identified research methodology as complying with three key steps sequentially as identification of the research philosophy, research approach and research techniques. While the selection of research techniques for data collection and data analysis is based on the research approach, the selection of the research approach is based on the research philosophy. The figure 2.2 gives different key steps of research methodology as illustrated by researchers.

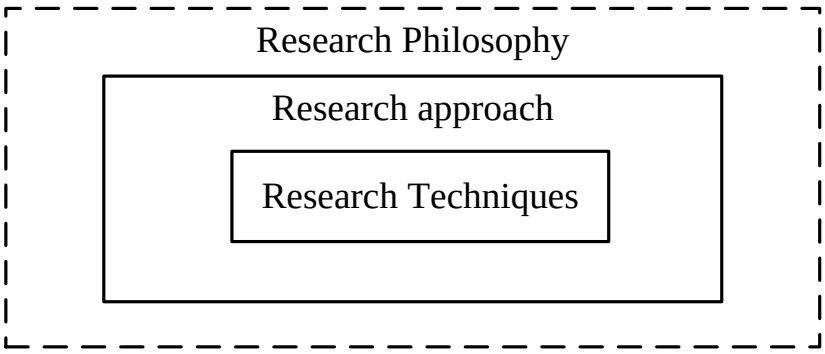

Figure 0.1: Nested reseach methodology (Source: Aouad, & Sexton 2000)

3.6 Research Philosophy

A research can describe as a way which the data of the research have to gather analyse and used in a better way. There are two main research philosophies already recognized by the western tradition named positivist and interpretivist. Positivist believe that reality is stable and can be observed and described from an object view point (Levin, 1988). Most of the debates argues that positivist's paradigm is most suitable for the researches based on social sciences. Interpretivist is different than positivists and it is much more contend with a subjective interpretation of the reality. Under this paradigm it can be identified various methodology like subjective/ argumentative methods review, action research, case studies descriptive and interpretative discussions, future research arguments and role playing of the research as a whole. Since the research problem of this research consider the head of find out solutions and recommendation to modify the Sri Lankan Arbitration law and take it in to a progressive stage it is further requires finding out more suitable jurisdictions which can be used as an example. Therefore, interpretivism is the best way to achieve the aim under the topic of the research philosophy.

3.7 Research Approach

The research is the process which should have to adopt under the collection of data of the research. It uses to analyse the relevant activities of the population of the research and the objectives of the research. In all and every research should have to base on a well-planned research approach and it is the best instrument which make

the research interconnected with the research philosophy. The most popular research approaches are generally divided in to three main categories as Deductive, Inductive and Adductive. “The relevance hypotheses to the study is the main distinctive point between deductive and inductive approaches. Deductive approach tests the validity of assumptions in hand, where Inductive approach is contributing to the emergence of new theories and generalizations. Abductive research on the other hand, starts with surprising facts or puzzles and the research process is devoted therein explanation” (Bryman, 2015) Inductive approach is what which actually do not involve formulation of hypotheses. It starts with achieving the research question and aims and also objectives of the research. In deductive research approach, it is formulated to achieve and the hypothesis. It is something answering like when the research already set of hypotheses and the research approach can use to confirm or reject the hypothesis during the research process. The path of the deductive approach is consisting with theory hypothesis, observation test and finally confirmation or rejection of the hypothesis.

Bryman, (2015) illustrates as abductive research approach the process of research is dedicated to clarification of inadequate observations surprising proofs or puzzles specified at the start of the study. This research requires to find out the practical problems of the existing Arbitration of Sri Lanka and the required improvement and recommendations which can use and therefore the researcher of this research selected the deductive approach as the best way of research approach of the research. With regard to this research it is survey method is the useful way because it can helpful to associate with the opinions of construction professionals and other stakeholders in this research the researcher chooses the survey method as it can propose more effective alternative and modernizing Arbitration which can answering the unnecessary time taking aspects by minimizing unnecessary court intervention in some stages of the process.

Survey research can be identified as the most importantly engage with asking questions of relevant people and getting answers. It is stated with any kind of short

form paper base feedback type questions from to an intensive depth interview. Questions and questioning is the core concept of the survey research and once selected the survey method it should have to construct the survey addressing number of issues like types of questions, decisions about questions content, decision about question wording, decisions about question placement and sequence in the instrument. Those questions should have to be relevant with the objectives and the aim of the research and as well as the research hypothesis. According to the objectives of the research it seems to be more useful to adopt a survey research because it should have to gather more opinion and ideas by the construction related professionals. And it is the best way to access that information. Based on this the survey is planned to conduct under well planned questionnaire.

3.7.1 Techniques of survey approach

This approach is basically based on two surveys as questionnaire and interviews. These surveys basically targeted professionals in the construction industry and to find out their opinions, attitudes, motivations, memories, behavior actions, methods of interaction and even future plans. The aim of this research is based on investigating the Arbitration practice in Sri Lanka and the issues relating to the intervention of court. Hence it is useful to adopt methods suggested in this research.

Burns (2000) states that the survey is the most commonly used descriptive method in research and gathers data at a particular point of time. Survey research mainly focuses on people and the vital fact of people and their benefits, opinions, attitudes, motivations, memory, behaviors, actions, interactions and even future plans.

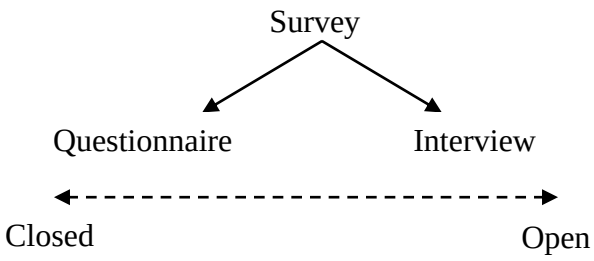

Figure 0.2: Techniques of survey approach

Informal, conversational interview does not involve prearranged questions, to remain as adaptable and open as possible to the interviewee's priorities and nature. In the middle of the interview, the interviewer "goes with the flow". Generally, open-ended interviews are similar to open-ended questions which to be asked from all interviewees; this approach facilitates faster interviews that can be more easily analysed and compared. General interview guide approach is the guide approach is intended to ensure that the same general areas of information are collected from each interviewee; this provides more focus than the conversational approach, but still allows a degree of freedom and adaptability in getting the information from the interviewee. Closed, fixed-response interview is where all interviewees are asked the same questions and asked to choose answers from among the same set of alternatives. This format is useful for those not practiced in interviewing. (Campion, M, Campion, J, & Hudson Jr, 1994)

Table 0.1: Difference between Interview and Questionnaire Methods

Questionnaire Method Interview	Interview
1. Data is gathered indirectly 2. No face to face contact between two Interviewer should have the general knowledge of the topic 3. Interviewee will hesitate to write it	4. Data is gathered directly 5. There is face to face contact between interviewer and interviewee 6. Skilful interviewer is needed 7. Some confidential information can also be obtained

Source: Prabhat Pandey Dr. Meenu Mishra Pandey.
Research methodology: tools and techniques. 2015.

The interviewer can probe into casual factors, determine attitudes, and discover the origin of problem. It's appropriate to deal with young children and illiterates person and can make cross questioning possible. It helps the investigator to gain an

impression of the person concerned and also deal with delicate, confidential and even intimate topics. Sincerity, frankness, truthfulness and insight of the interviewee can be better judged through cross questioning.

Similarly, the schedule is presented by the interviewer and the questions asked and the answers are noted down by him. It aids to delimit the scope of the study and to concentrate on the circumscribed elements essential to the analysis. It aims at delimiting the subject. In the schedule the list of questions is pre-planned and noted down formally and the interviewer is always armed with the formal document detailing the questions.

3.7.2 Research Technique

3.7.2.1 The schedule technique

When a research is using a step of questionnaires for interview purpose it is known as schedule. Set of questions on a given topics distribute when conducting the interview with the related person. According to this the interview hold the major role and he is the one who asked questions and noted down the answers. Those questions are required to be professional and distribute in an attractive manner. In this research, the purpose of using the schedule as the research technique is to provide a standardized tool for observation or interview in order to attain the objectives of the research.

Qualities of good schedule are generally, the Content, which has to cover all the related aspects of the research and it has to represent by well-planned questions or statements. Criterion of the schedule should have to use in sound and logical way which encourage clear response from the person who is targeted by the schedule. Construction of the schedule need to prepare in way of sub divisions of the study. It is very useful if each and every aspect of the study divided into parts with sub topics. Language shall be clear and straight forward language it is more useful to get more direct answers and expressions from the participants. These qualities to be achieved more successful outcome of the schedule by using short, clear questions without

using long, complex, presumptuous, personal and hypothetical issues. The purpose of including the qualities is to sum up an accurate response by the participants. Accordingly, it is the basic requirement which is determined by using a schedule as a research technique.

The basic steps under the survey research strategy can be identified as,

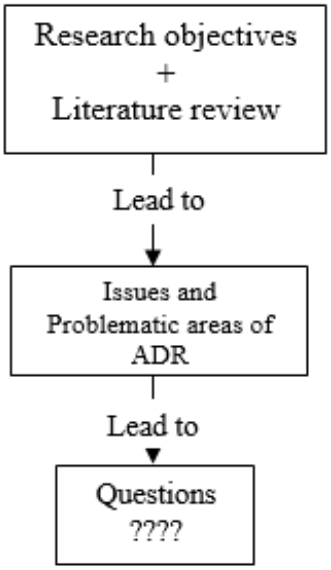

Figure 0.3: Questionnare construction (Source: Naoum 1998)

The impacts of how the participants will answer the questions are based on the way how the questions are phased. Those questions should have to phased by understand the different level of individuals, and culture and also the educational level of the people. In this research Techniques of survey approach is going too achieved through the literature survey and interviews. Interviews are particularly useful for getting the story behind a participant's experiences. The interviewer can pursue in-depth information around the topic. Interviews may be useful as follow-up to certain respondents to questionnaires, e.g., to further investigate their responses. (McNamara, 1999)

Higher percentage of responses can be obtained by schedule and possible to observe personality factors. Through interview personal contact is possible and it is possible

to give human touch to schedule. Removal of doubts is possible because face to face interaction is there. It is possible to know about the flaws of the interviewee.

Schedules can be recognized in different ways. Rating schedule is used to get opinion and preferences by distributing a statement or questionnaire on the phenomenon of the study. It need to include both negative and positive statements which can get more attractive opinion and response from the participants. Document schedule normally used to collect information from recorded evidences like case histories. Survey schedules only concentrate about the questionnaire Observation. Schedules are very useful when targeting the method of data collection by the way of observation based on the participants. This method can be structured or unstructured interview based schedules and the central part of this schedule is the interview. These different types of schedules hope to use in this research under the techniques of schedule. Basically, the research technique of this research is structured under these two methods. Questionnaires and schedules. The similarities of these two methods can be mentioned both are set of related items having questions relating to a central problem. Both use mainly structured set of questions and these questions are so phases and interlocked that they have a built mechanism for testing the reliability and validity if the response. The same set of question is administrated to all the respondents and comparable results are obtained. To be used with the same general principles of designs and should take into account the same problems and basic difficulties the have to be limited in lend. In both, the central problem has to be concentrated upon the following considerations involved in problem of evolving the questionnaire and a schedule as a unit.

1. Drawing the responding into a situation through awake and interest.
2. Proceeding from simple to complex questions.
3. No early and sudden request for information of a personal and embracing intimate nature.
4. Not asking embarrassing questions without giving the respondent and opportunity to explain himself.

5. Moving smoothly from one item to another.

In both, certain types questions should be eliminated such as vague and ambiguous questions, emotionally changed questions, loaded and leading questions, questions eliciting no response and questions having structured response to the queries, violence to the existing facts. Pilot studies and pre-tests are necessary for formulating the instrument and for bringing them to the final form. They have to go through the same stages of development. (McNamara, 1999)

3.7.2.2 Mean weighted rating

Data derived from questionnaire include the Mean Weighted Rating (MWR). In addition to this technique content analysis were done in data analysis. Those techniques facilitate analysis of statistical data. This includes descriptive statistics as charts, frequencies, plots, and lists. To assist the plotting charts Excel was used.

Following briefly describes each technique and rationalises the selection of each technique for this research study.

Mean weighted rating

Mean Weighted Rating = ($\sum$ Vi *Fi) / n

Where,

- Vi - Rating of each factor
- Fi - Frequency of responses
- n - Total number of responses

Since ratings range between 1 and 5, point 3 is considered as the neutral point.

3.7.2.3 Content analysis

Content analysis will be used in this research to develop objective inferences from the communicated data, and analysis will be done. Once data collection is done a quantitative or qualitative analysis can be done. In this research mix method will be

focused since it is necessary to examine the "latent" or inferred meanings of the communication which will lead to the construction of the stories based on the researchers knowledge and the evidences drawn from the study.

3.8 Design of questionnaires

A questionnaire was used as a data collection method of finding information regarding the theoretical background of the Arbitration of Sri Lanka as well as the practical situation of the process. By collecting information regarding the practical situation, the researcher found out the major issues attached with the process.

These questions were based on laws related to Arbitration, Alternative dispute resolution in Sri Lanka, advantages and disadvantages of arbitration and the participants' perspective regarding arbitration. The questionnaire targeted experts and professionals in the construction industry. The participants were explained the aims and objectives of the research before distributing the questionnaire. Prior to answering the questions, they were required to provide certain background information as their scope of work in the industry, experience and especially the issues they have encountered in relation to dispute resolution.

3.9 Survey of questionnaire

The survey plan for both questionnaire and schedule based data collection method based on six or seven months of duration. In this part of the research the design of the questionnaire structured under different types of methods like, Determine the questions to be asked where in this step is a key one that seems not to be sufficiently stressed in the literature or conducted in practice. The key link need to be established between the research aims and the individual question via the research issues.

- Select the question type for each question and specify the wording and
- Design the question sequence and overall questionnaire layout

Types of questions are planned to design as Open and closed questions where this research is aimed to use open questions which can elicit whole range of replies of the subject area. Since the aim of doing a very precise and judgemental questionnaire this is the best approach to achieve the aim. In this research, it aims to summarising replies to produce a picture of population and as an example questions like, do you think unnecessary delays of the current Arbitration of Sri Lanka is caused by; Lack of specific time period of the process? Lack of knowledge of the Arbitrators about the Law and the other technical matters of the construction disputes? Or Un-necessary intervention of the court in several stages of the process according to the provisions of Arbitration Act of Sri Lanka?

And further in this survey it used the sufficient space for include more opinions of the participants if it still feels that the questions cannot be categorised until all the replies are returned. It can be used as mentioning a specific question like, what was the main problem of the delay of the Arbitration of Sri Lanka based on your perspectives of the method.

A Questionnaire was based on the findings grabbed through the findings of literature review and expert interviews. Respondents were presented with a range of questions designed to the extent the pros and cons of Construction Arbitration in Sri Lanka as well as to obtain the comment on prospective suggestions to current Arbitration practice in Sri Lanka. This was specifically intended to get their understanding and attitude of Arbitration currently practicing. For the assessment questionnaires were distributed to government and private consultants, Arbitrators and construction professionals. This was carried out through a scale type questionnaire. 35 questionnaires were distributed and 30 of them were collected in time.

3.10 Sample selection

Selection of the sample from the related population of the research is the basic requirement to achieve the intended outcome from a questionnaire and schedule. For the interviews in-depth discussions expected to conduct cover different disciplines

and view points towards the current Arbitration Practice. This comprises Commercial High Court Judge, Locally Experienced Arbitrator from legal practitioner background and Internationally Experienced Arbitrator from Quantity Surveying Background. In depth interviews were limited to one from each discipline due to the difficulties of taking appointments from very limited resource persons in Sri Lanka. In this research the person who is selected for the sample should possess basic knowledge of the Arbitration method as an alternative dispute resolution and the practical situation of the process in Sri Lanka as well as the issues already existing with regard to the unnecessary time-consuming factors of the process. The sample of the data collection was selected from a wide group of people engaging in the process of the Arbitration as an Alternative Dispute Resolution in Sri Lanka.

Accordingly, Professionals (construction engineers, quantity surveyors, construction law lawyers, and Judges who are professionally dealing with construction matters.) and experts who are directly engaged in the current Arbitration of the country was selected. The output of the progressive and useful data always depends on the correct selection as well the correct distribution of the questionnaire. Therefore, the questionnaires were distributed to the professionals and experts when they were engaged in their respective professional work in order to achieve the maximum output. In this research, it is to be distributed the questionnaire among the famous professionals who engage with the Arbitration. The selected group comprised of Quantity Surveyors, Civil Engineers, Architects, Project Directors, Consultants, Senior managers, and Project Contractors etc:

3.11 Questionnaire, schedule process and data collection for the research

The purpose of the research survey is to analyse the effectiveness of the current Arbitration practice in Sri Lanka and to investigate existing legal and practical issues like the unnecessary intervention of courts. Therefore, both questionnaire and schedule method were selected as appropriate for the study.

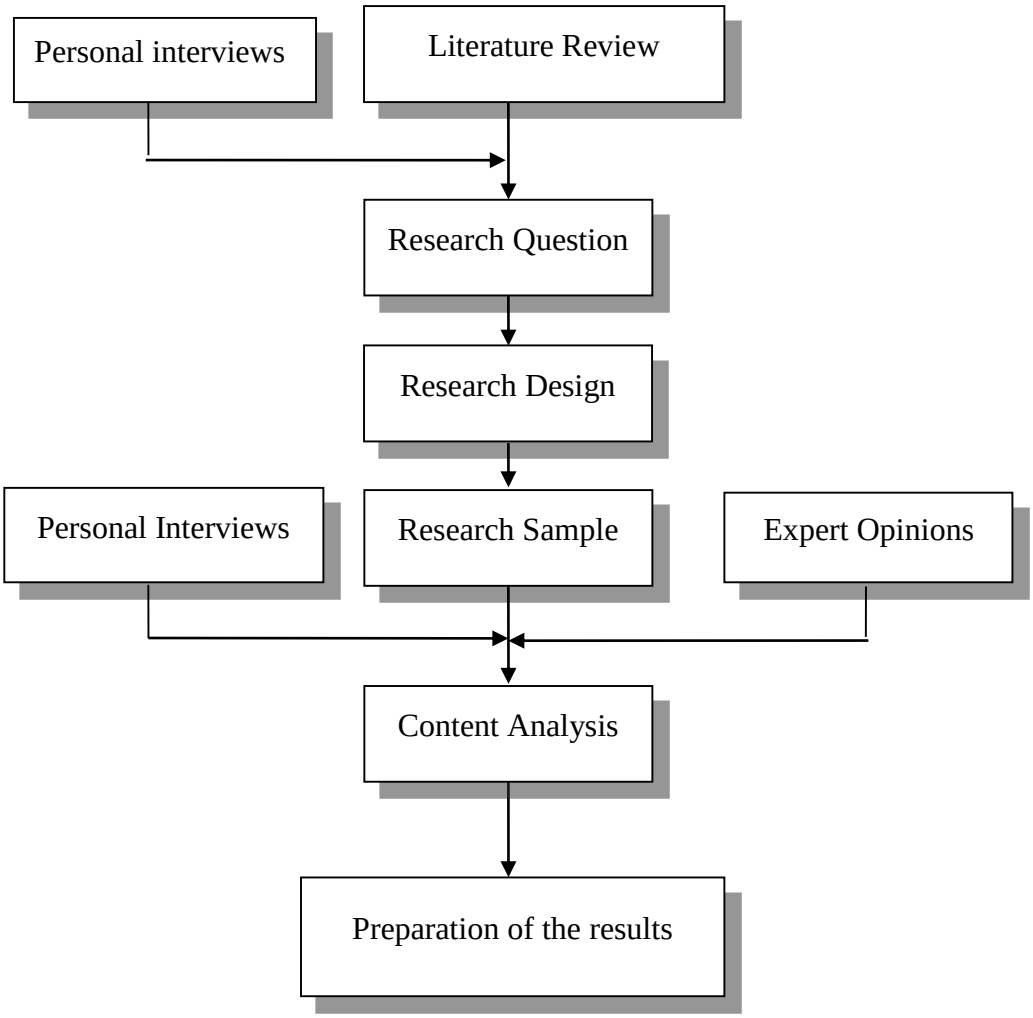

Figure 0.4: Research process

3.12 Summary

The purpose and the aim of this chapter is to describe the research philosophy research approach and the research techniques which were used to achieve the core aims and objectives of this research. Accordingly, the research philosophy was recognized as social constructionism and research approach as qualitative inductive. This chapter further justifies the methodology adopted and the research process to achieve the intended outcome. Research problem, background study, literature review, research design and data collection techniques have been further explained and justified.

Chapter 04

Analysis, Discussion and Research Findings

4.1 Introduction

This chapter analyses the primary and secondary data collected. In order to present the findings of the research. Since the aim of the research is to review the impact of judicial interference in the Sri Lankan Construction Arbitration, the following discussion suggests improvements to the Arbitration regime to make it more efficient;

4.2 Data Analysis and Research Findings

Arbitration in resolving commercial based matters including construction disputes and conflicts has become one of the efficient and useful methods. It can be used as an alternative to the traditional litigation. Most of the stakeholders who are engaged in the commercial deals including construction projects were found to be interested in selecting this method over litigation because they believe that it has minimal interference by Court and it is an independent way of resolving disputes. It is because people are convinced that traditional court proceedings take too much time to arrive at a final decision as it includes a long proceeding. This has been proven by the International Arbitration Survey 2015 conducted by the Queen Mary university, London and according to their survey 90% of respondents showed interest in selecting Arbitration as a preferred method to resolve commercial matters instead of Litigation.

4.2.1 Analysis of Arbitration Act of Sri Lanka

The main objective of entering the arbitration method instead of Court proceeding is to settle the dispute more expeditiously. The Arbitration Act No. 11 of 1995 of Sri Lanka itself facilitate this by ensuring that Courts shall not interfere in arbitration proceedings unless otherwise required by the said Arbitration Act. It clearly states

the circumstances where Courts intervene in the Arbitration proceedings. This Act was drafted according to the UNCITRAL Model Laws on Commercial Arbitration and the Article 5 of the Model Law under the heading of "*Extent of Court Intervention*" states that,

> *"In matters governed by this Law, no court shall intervene except where so provided in this Law".*

The section 5 of the Arbitration Act of Sri Lanka also highlights the above fact under the heading of "*Jurisdiction*", as follows,

> *"Where a party to an arbitration agreement institutes legal proceeding 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 such matter".*

This is generally known as severability where court cannot interfere when there is an agreement to arbitrate.

And further the Article 6 of the Model Laws states to which extent the Court intervention is required under an Arbitration proceeding. And under Article 11(3), 11(4), 13(3), 14,16(3) and 34(2) states the functions which shall be performed by Court or other authority of Arbitration support and administration.

These Articles in detail,

Article 11(3) - Failing such agreement,

> *(a)* in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the

appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

Article 11(4) - Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Article 13(3) – If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14(1) - If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

Article 16(3) – The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 34(2)- ***Application for setting aside as exclusive recourse against arbitral award***

An arbitral award may be set aside by the court specified in article 6
only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 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 thereon, under the law of this State; or

(ii) 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; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions 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

(iv) 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 a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

4.2.2 Parties behavior on accepting Award given in Arbitral tribunal

In repose to questionnaire, Notable responses received for the tendency towards challenging the Arbitral award where parties hesitate to accept the binding decision and tend to challenge the Arbitral award.

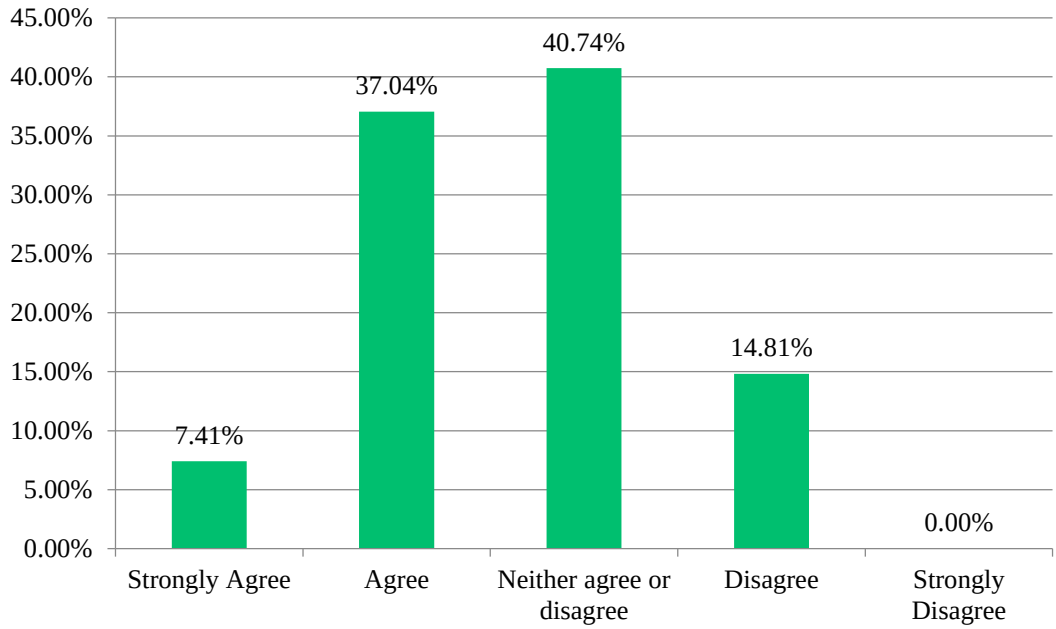

Figure 0.1: Parties reluctant to accept the award and tend to challenge

There were 2 respondents whom strongly agreed with the statement and the percentage of the same is 7.41%. Participants were agreed with the statement by representing 37.04% out of 100% 11 respondents, which is represent the majority has neither agreed or disagreed with the statement and it shows 40.74% out of 100%There were 4 respondents disagreed with the statement and the percentage of the same is 14.81%. None of the participants stated their disagreement strongly to the statement given.

The major point which has to be specifically understood here is that all of these interventions by the Courts or other Authorities are treated as the level of Assistance and Supervision. Model Law itself do not grant a solely power for Courts to engage in the arbitration process and it ensures independency of the Arbitration. This kind of assistance from the Court side is a necessary to functioning the Arbitration without any destructions. The minimal interference of the judiciary is a fundamental requirement that it can be more helpful to ensure the efficiency of the arbitration. The principle of this minimal interference of Courts in the arbitration was encouraged by the Judgement of *McDermott International Inc. vs Burn Standard Co. Ltd* (2006) and it was based on the Arbitration Act in India.

4.2.3 Supervisory role of Courts in construction Arbitration

The 1996 Act derives a provision for the supervisory role by Courts to review the Arbitral awards just to make sure fairness. However, Construction disputes are complex, and industry recognizes that disputes to be addressed by the industry professionals to ensure its fairness. The interference of the court is predicted in few events like, violation of natural justice, in case of fraud, etc. if it is desired, the court unable to rectify the errors of the arbitrators against. Hence the provisions targets to maintain the supervisory role of the court at a reduced level and this may justified as parties to the agreement deliveres a sensible decision to avoid the court's jurisdiction by adopting arbitration as they desire convenience.

Further in the Article 16(1) of the Model Laws under the heading of "*Competence of Arbitral Tribunal to rule on its Jurisdiction*" stated that,

> *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause"*

It has granted the sole right to the arbitrators to determine any of the matter related to its own jurisdiction and similar provision with some changes that can be recognized under the section 11(1) of the domestic Act and according to that,

> *"An Arbitral tribunal may rule on its jurisdiction including any question, with respect to the existence or validity of the arbitration agreement or as to whether such agreement is contrary to public policy or is incapable of being performed; but any party to the arbitral proceedings may apply to the High Court for a determination of any such question"***.**

The specialty of this section is that there are two options available for the competence regarding the tribunal of arbitration. Parties could either invite tribunal to choose the jurisdiction as a primary query or forward to High Court in order to determine any such question, most importantly including the question of the agreement's validity to arbitrate.

The matter to answer is whether the Arbitration Tribunal has the jurisdiction to hear related matters or not. In the UNCITRAL Model Laws Article 16(3) stated that,

> *"The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award".*

This is ensuring that Court can intervene in to the Arbitral proceedings but not in a dominating manner but only in the manner of inquisitive approach.

There are 3 situations in which the intervention of the court may be necessary at the beginning of the arbitral process where expert opinions also seconds;

1. Enforcement of arbitration agreement
2. Establishment of arbitral tribunal
3. Challenges to jurisdiction

4.2.4 Role of Courts during Arbitration Proceedings in Sri Lanka

Forced cohabitation and true partnership swings between the connection between arbitral tribunals and national courts. Arbitration is dependent on the underlying support of the courts which alone have the power to rescue the system when one party seeks to sabotage it. The Model Law seeks to exclude the involvement of the courts as far as possible. Art 5 states that 'in matters governed by this law, no court shall intervene except where so provided in this Law.' However, the Model Law recognizes the importance of the courts in carrying out certain functions of arbitration assistance and supervision.

Sri Lankan Act recognizes the following instances in which the Court may intervene in arbitral proceedings. (Identical to Model Law):

- Section 7 – Appointment of Arbitrator
- Section 10 – Appeal on challenge to Arbitrator
- Section 11 – Competence of Tribunal
- Section 13 – Interim Measures
- Section 20 – Summons
- Section 21 – Examination of witnesses
- Section 30 – Delay in prosecuting claims

Once an arbitral tribunal has been constituted, most arbitrations are conducted without any need to refer to a national court, even if one of the parties fails or refuses to take part in the proceedings. There may be times, however, when the involvement of a national court is necessary in order to ensure the proper conduct of the arbitration. It may become necessary, for instance, to ask the competent court to

assist in taking evidence, or to make an order for the preservation of property which is the subject of the dispute, or to take some other interim measure of protection. During the course of an arbitration, it may be necessary for the arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. In many cases where interim measures of protection are required, the arbitral tribunal itself has the power to issue them.

Comprehensive illustration of pros & cons on judicial impact can be summarized as follows;

Table 4.1: Provisions of existing Act which has positive and negative outcomes

Provisions generate positive impacts of Judicial Intervening	Provisions generate negative impacts on Judicial Intervening
These Provisions tend to secure actual discrepancies of tribunal and make sure the supervisory role of a higher authority. 1. Enforcement of arbitration agreement 2. Establishment of arbitral tribunal 3. Challenges to jurisdiction	Below Provisions that allows judicial intervention also favours the process but almost every event cause delay and disruption to the process. 1. Appointment of Arbitrator 2. Appeal on challenge to Arbitrator 3. Competence of Tribunal 4. Interim Measures 5. Summons 6. Examination of witnesses 7. Delay in prosecuting claims

4.2.5 Insufficient powers to issue interim measures by an arbitral tribunal

There are, five situations identified where the tribunal's powers may be insufficient and thus favour recourse to a national court.

1. The arbitral tribunal may not have the necessary powers
2. Most of the cases it was observed by the experts that tribunal's power is not sufficient to issue an interim injunction or interim relief as such power is not vested by the Act.
3. The arbitral tribunal cannot issue interim measures until the tribunal itself has been established.
4. This is where the aid of national court is essential to a party when a party wants to hold up into a matter when there is no existence of a tribunal.
5. The powers of an arbitral tribunal are generally limited to the parties involved in the arbitration itself.
6. Act does not allow to tribunal any power to execute beyond the parties where necessary. Assistance of courts itself consume time as well as require justification of the requirement too. This is where a existence of a Technological courts or additional power vested by the Act is vital.
7. The interim measures ordered by an arbitral tribunal do not, by definition, finally resolve any point in dispute.
8. A party may need to make an application ex parte.

The measures requested may include the granting of injunctions to preserve the status quo or to prevent the disappearance of assets, the taking of evidence from witnesses, or the preservation of property or evidence. Applying for such measures before a court is likely to give rise to at least two problems. First, if a party to an arbitration agreement makes an application for interim measures to the court rather than to the arbitral tribunal, will this be regarded as a breach of the agreement to arbitrate? Secondly, if the choice between seeking interim measures from the courts or from the arbitral tribunal is truly an open choice, should the application be made to the courts or to the arbitral tribunal?

Most arbitration rules are explicit in confirming that the application for interim relief from a court is not incompatible with an arbitration agreement.
The Model Law also states categorically:

"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

Section 13 of the Act states that the tribunal is with the jurisdiction to issue interim orders. According to the provisions of Section 13(2) of the Arbitration Act the orders given the arbitral tribunal pertaining to section 13 (1), enforcement can be made through the high court. Such High Court application should be made by the party seeking the said interim measures. The important provision in section 13 is clearly set out in section 13(3) of the said Act, i.e. the applications under section 13(2) is not in contravention to the imperative provisions of section 5 of the said Act wherein the jurisdiction of court has been removed with regard to any dispute which falls within the ambit of an arbitration agreement. However, most of the time the tribunal got insufficient powers to issue interim measures, else application to high court prolongs the proceedings.

4.2.6 Contemporary philosophies of Commercial High Court

Sri Lankan applicability of Arbitration method as an alternative to the Litigation seems increasingly developed in the past few years and the Court itself ensured the necessity of minimizing the intervention of courts in the Arbitration proceedings. One of the recent case decided by the Commercial High Court of Sri Lanka in June 5th of 2017 by issuing an outstanding order emphasized the value of the principle of minimizing the Court interference in most of the stages of the Arbitration proceedings. The case is *Mahawaduge Priyanga Lakshitha Prasad Perera Vs. China National Technical Imports & Export Corporation*. Under the judgement High Court judge made a statement as follows;

> *"In this case a preliminary objection was raised to the maintainability of the application on the grounds that the petitioner has no right in law to invoke the jurisdiction of High Court in terms of Section 11 of the Arbitration Act*

subsequent to both parties inviting the tribunal to decide its jurisdiction and the tribunal ruling that it had no jurisdiction"

According to this judgement delivered by the Commercial High Court, under the law of Sri Lanka, any positive decision of the tribunal related to its jurisdiction is subject to challenge only following the making of the award in an application for setting aside an award under the Section 32(1). Further the section 32(2) indicated that an arbitral award to set aside. The inclusion of the word **may be** specifically ensures that Courts has no sufficient power to set aside an arbitral award in every situation but under some recognized criteria like,

An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, within sixty days of this receipt of the award ---

(a) where the party making the application furnishes proof that ---

(i) 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; or

(ii) 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; or

(iii) 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

(iv) 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: or

(b) where the High Court finds that ---

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka: or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka.

4.2.7 Necessity of contemporary framework

Findings illustrates that, statements given regarding Introduce time framework to expedite the settlement of disputes are as follows. Out of 27 responses, 12 each

response received as strongly agreed and agreed which shows 44.44% each, which represent a majority view shared equally Neither agreed or disagreed, disagreed and strongly disagreed shares the responses as 3.7% each, which shows the view of 1 participant for each answer.

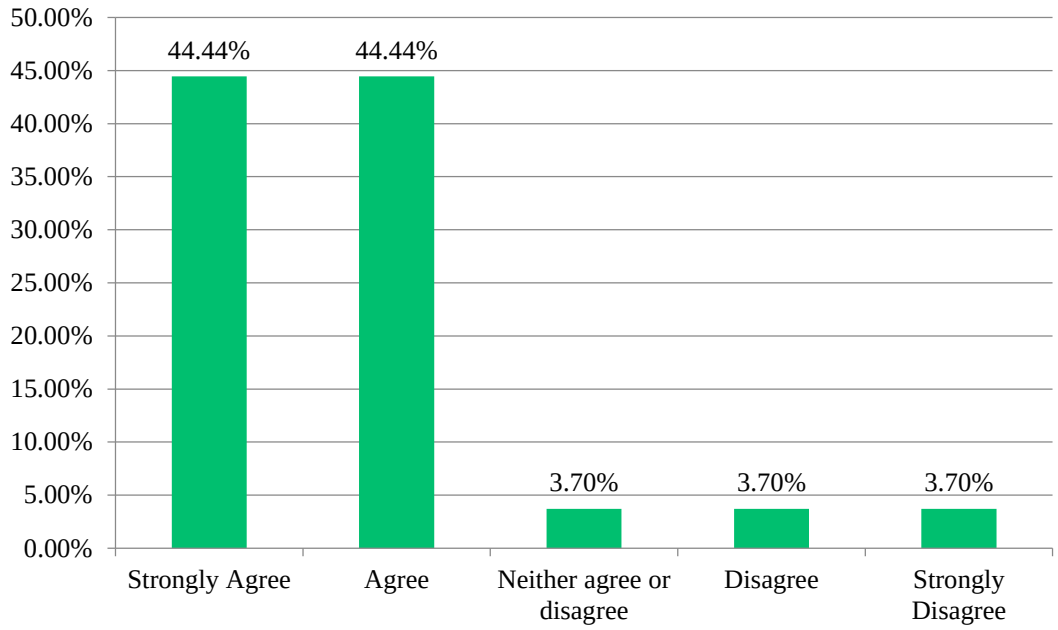

Figure 0.2: Introduce time framework to expedite the settlement of disputes.

The facts of the Case of *Mahawaduge Priyanga Lakshitha Prasad Perera Vs. China National Technical Imports & Export Corporation* is much related to this research as it engages within the contract of a trading engineering and manufacturing company with the Road Development Authority for the construction of the Southern Transport Development project- South Section Highway section from Pinnaduwa to Kottawa. When dispute got in to the arbitration the said respondent the manufacturing company has made many objections and further with regard to these objections the tribunal delivered to ruling on the preliminary objections raised by the respondent on the basis that there was no valid arbitration agreement between two parties and therefore, both notices of arbitration had no force or effect in law.

According to the judgement of this case the major issue which had to be solved was, Whether the High Court has the power to determine the jurisdiction of the tribunal under Section 11 of the Arbitration Act when the tribunal rules that it had no jurisdiction/ competence because there was no valid arbitration agreement between the parties. Court mentioned that Section 11 of the Arbitration Act itself empowers the tribunal to rule on its own jurisdiction. Most importantly it includes matters relating to the validity of the Arbitration Agreement or when there is a contrary to the public Policy in such agreement. Judge of Commercial High Court held that, when the challenge to jurisdiction is rejected by the tribunal upon the invitation of the parties, there can be no further challenge by applying to the High Court against such decision and such positive ruling can be challenge following the final award under section 32(1) (a) (i) of the Act as mentioned before. It ensures that there is a minimal judicial interference in respect of such a positive jurisdictional decision.

In Arbitration Law in Sri Lanka by Kanag-Isvaran and Wijeratne (2011) it is stated that,

> *"However, parties are free to apply to the High Court to determine any question relating to the jurisdiction of the tribunal (partial or total) without inviting the tribunal to rule on it. The fact that such an application has been made to the High Court does not have effects of suspending, which may continue its pending the determination of such question by the High Court……,*
>
> *Parties must therefore either decided to invite the tribunal to rule on any jurisdictional issue or in the alternative, apply to the High Court to determine issues and request the tribunal to adjourn proceedings until the decision of the High Court which it has a discretion to do or not to do having regard to all the circumstances".*

4.2.8 Role of the Act as a regulatory guide

And further in the foresaid case Commercial High Court judge by analyzing section 11 indicated to which extent can a arbitral tribunal may deal with or dispose of a

challenge to its jurisdiction and under this he recognized the preliminary question and decided that it lacks jurisdiction as a negative ruling and also postpone for decision on the award on merits and decide that it lacks jurisdiction also as a negative jurisdiction on ruling. Further this case ensures that any party cannot apply to the High Court seeking guidance as to the jurisdiction of the tribunal when the tribunal makes a negative ruling upon invitation of both parties, unless Section 11 or any other section statutorily recognizes that such remedy is available in the Arbitration Act. This has to be argued that the legislation itself secured the powers of the Arbitration Tribunals by determining to reduce unnecessary delays in Arbitration.

In an overview of responses by focus group was also a similar one to amend the Arbitration rules to adopt an efficient practice which illustrated in following chart that summarizes the responses;

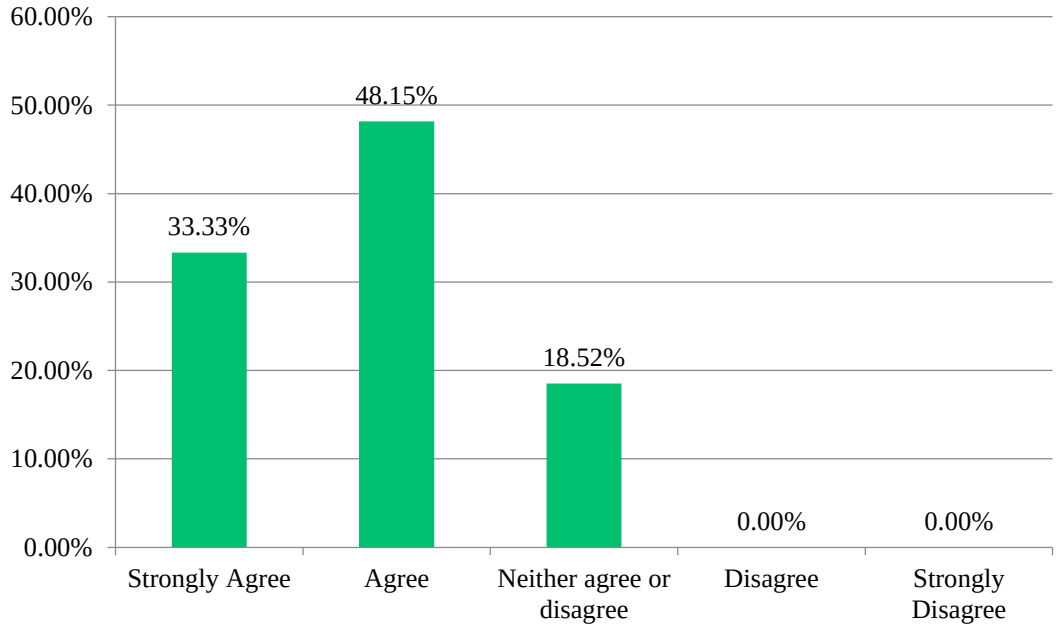

Figure 0.3: Amending rules and guidelines of Arbitration is Vital

Out of 27 responses, Amending rules and guidelines for Arbitration by absorbing progressive amendments from other jurisdictions received responses are as follows

from the given answer choices There were 9 respondents whom strongly agreed with the statement and the percentage of the same is 33.33% participants were agreed with the statement by representing 48.15%, which shows majority5 respondents, respond as neither agreed or disagreed with the statement and it shows 18.52% out of 100% None of the participants stated their disagreement or strong disagreement to the statement given. This clearly illustrates that Sri Lankan Arbitral practice including the Act shall amended in progressive manner.

4.3 Summary

In a nutshell it appears that judicial intervention does a supervisory role to the Arbitration process and such oversee often tends to prolongation of Arbitral process itself. Significant necessity of intervention is to maintain and keep the control of judiciary and preventing Arbitration process being independent but allowing powers to expedite for efficient practice. Apart from Arbitrators analysed case law illustrates that judicial interference often leads to unnecessary delays in the process which supposed to be speedy and efficient than Litigation.

CHAPTER 05

Conclusion & Recommendations

5.1 Introduction

The aim of this chapter is to present the conclusions of the research findings by suggesting an effective and efficient Arbitration method in the Sri Lankan construction industry. The level of success in achieving the objectives of the research are identified by the conclusions of the research. In addition, the limitations of the research and the further research areas are discussed in this particular chapter.

This research considers the actual situation of the Arbitration method in the construction industry with an assessment of the Sri Lankan context**.** Accordingly, the application of Arbitration method relevant to construction industry in Sri Lanka is examined in this research. The objectives of this research are to identify the existing Arbitration regime Sri Lankan construction industry, identify issues of Arbitration method and to recommend possible solutions to enhance the effectivity of the Arbitration in the Sri Lankan construction industry. At the inception of this research discussions were held with experts and professionals who are working under organizations of contractors, consultants and clients.

Further the Construction Industry Development Act (CIDA) do not encourages Arbitration as an effective ADR method. Instead Section 50, 52 under Part IX of the Act encourages Adjudication as the ADR method of settlement of disputes. This situation itself discourages a necessity of binding decision towards dispute resolution in construction industry which already requires to be enhanced.

The construction process of projects involves multi organizational activities. Conflict and disputes can exit at all levels in the contractual chain, between client and consultant or client and contractor or contractor and sub-contractor and so on. Success in construction projects mainly depends on how construction professionals

handle conflicts and disputes. Using the traditional litigation to solve the conflicts and disputes takes long time period and it results in problems relating some technical issues of the construction field. In this sense, the parties of the construction industry have to select Alternative Dispute Resolution Methods and Arbitration will be the best practice according to the facts found in this research work. In researcher's point of view, it can prevent deterioration of relationships to avoid adverse effects of time and cost etc. This research also revealed that conflict / dispute management techniques are not disseminated in the construction industry of Sri Lanka.

5.2 Conclusion

This research is based on the usage of Arbitration method as the best way of resolving disputes in the construction and this was done under the analysis of the existing law relating to the Arbitration practice of Sri Lanka.

ADR method are used in dispute resolution regime as alternatives for litigation. Professionals prefer ADR methods over litigation due to their inbuilt advantages which can't be catered in formal litigation proceedings. While ADR regime plays a greater role solving disputes in the construction industry Arbitration is significant among other methods, reasoning to binding nature similar to the traditional litigation, nature of arbitral arguments, evidences and granting awards. Since a number of researches has been conducted on different aspects of ADR methods and their advantages. This particular research is to identify the pitfalls that we are experiencing regarding the Sri Lankan Arbitration procedure and make recommendations which can help to overcome those obstacles.

Arbitration method can be considered as a well-established ADR method which is governed by Arbitration Act, No.11 of 1995. However, it seems that the stakeholders and professionals in the construction industry are not satisfied with the arbitral proceedings. Following facts are identified as the reasons for the dissatisfaction of arbitration.

- Time and cost incurred through the process is high
- Process is being adversarial, business relationship between parties are sometimes damaged

Some experts argue that these are inherent characteristics of arbitration. As a matter of fact, it is true that these are inherent, but any professional can minimise the effect of them. For example, stakeholders can go for hundred-day arbitration in order to minimise the time spent on the process and can use economical venues in proceed with hearings. Existing procedure regarding the Arbitration practice of Sri Lanka is recommended to absorb progressive amendments introduced to Indian Arbitration Act and if it is done, Arbitration method for Sri Lankan construction industry is recommended. Ultimately, ADR regime has to cater to the expectation of the industry by providing impartial and decisive solutions in minimum time span and cost without damaging reputation of the parties.

5.3 Recommendations

At present, public and private-owned infrastructure development and construction projects are increasing throughout the country. Therefore, if any party is willing to use Arbitration as the dispute resolution method, the process has to fit in with the commercial, development and social goals of the construction project. Hence the trust towards Arbitration as the best way of resolving disputes need to be developed in the processing of areas of construction management, project management and contract administration.

These approaches can be added it to enhance the applicability of the Arbitration procedure when there is a dispute or a conflict inside a construction project or a construction contract. Due to the absence of comprehensive construction policy document and weak relationship between some stakeholders of the industry, construction projects in Sri Lanka suffer from a lack of legitimate expectations from ADR methods. Therefore, preventive approach is suitable, however it is not yet considered in the Sri Lankan construction industry. Parties can be mutually managed

using preventive type of dispute resolution methods during execution of works. Amicable solution of conflicts and disputes is applicable on all projects and is the best option.

There are few recommendations to avoid disputes. Those can conclude as follows.

1. Ensure that client, consultant and contractor have adequate & correct appreciation of their respective professional & ethical obligations.
2. Should agree on a compressive and clear dispute resolution agreement.
3. All parties shall ready for amicable settlement of disputes

Sri Lankan construction shall give attention to avoid or reduce the incidence of disputes. Also Construction industry of Sri Lanka needs to have appropriate policy guidelines for efficient performance of construction projects.

In the light of the experts' interviews and the results of the questionnaire survey which were analyzed, the followings are recommended to enhance the standard of Arbitration methods in the Sri Lankan construction industry.

1. Arbitration requires longer duration for the award and it is costly. Therefore, it should be reviewed and modified.
2. There should be a proper way to record the Arbitrators' awards for future usage.
3. The ICLP (Institute for the development of Commercial Arbitration Centre) Arbitration center and Sri Lanka National Arbitration center act as Arbitration institutes. Most of the times in construction industry ADR proceedings are conducted on an *Ad Hoc* basis. Therefore, it is necessary to implement new institution to conduct construction related ADR methods.
4. Most of the construction professionals who are involved in dispute resolution criticize the lawyers' involvement in construction related disputes. It is difficult to avoid this issue and it is required to select suitable professionals for ADR methods who have both legal and construction related competence. Construction professionals works on more applications of laws than

previously and construction disputes typically call for answer by a collective and well-balanced use of management skills, technical knowledge and legal principles.

5. The Government of Sri Lanka Shall make an amendment to the legislation related to Arbitration Law with regarding the amendments introduced by the Indian Government.

Overall the new amendment Act of Indian Arbitration (2015) has attempted to make Arbitration more efficient. It introduced more effective ways to empower the Arbitration panel by granting more useful sanctity to the Arbitration awards by restricting and minimizing the court intervention. The purpose of this is to speed up the proceedings of Arbitration and to ensure the process as the earliest possible solution for disputes before they become critical. Basically, the Indian Act of Arbitration 2015 consist of three major aims as,

- Minimizing the judicial intervention during Arbitration
- Empowering Arbitration panel with limited court powers
- Recommending strict timelines for proceedings and also for the extensions

The effective amendments which introduced to the Indian Arbitration Act can be recommenced to Sri Lankan law of Arbitration also in following manner;

Table 0.1: Comparison of existing clause and suggestion to improve the clause.

Existing Provision in **Section 13 (1)**	Recommended Provision for **Section 13 (1)**
• "13. (1) An arbitral tribunal may, at the request of a party, order any other party to take such Interim measures as it may consider necessary to protect or secure the claim which forms the subject matter of the dispute." • The arbitral tribunal may also order the party making such request to provide the party ordered to take such interim measures, with security for any expense, loss or damage that may be caused in taking such interim measures:"	• Where the Court passes an order for any interim measure before the commencement of arbitral proceedings, the arbitral proceedings shall be commenced within a period of 90 days from the date of such order. • Thus, it restricts the tendency to approach courts for seeking interim relief.
Existing Provision in **Section 13 (2)**	Recommended Provision for **Section 13 (2)**
• **"13. (2) An order of an arbitral tribunal requiring the taking of interim measures may be enforced by the High Court, on an application made therefore, by the party requesting the taking of such interim measures.:"**	• The arbitral tribunal shall have to grant all kinds of interim measures **which the Court is empowered to grant under section 13 (1) of the Act.** • **Allow such interim measures to be granted by the arbitral tribunal** during the arbitral proceedings or at any time **after making the arbitral award.**

Existing Provision in **Section 15 (2)**	Recommended Provision for **Section 15 (2)**
• "(2) An arbitral tribunal shall afford all the parties an opportunity, of presenting their respective cases in writing or orally and to examine all documents and other material furnished to it by the other parties or any other person. The arbitral tribunal may, at the request of a party, have an oral hearing before determining any question before it."	• The arbitral tribunal shall, insofar as possible, hear oral hearings for the presentation of evidence or for oral argument on **day-to-day basis**, • **Tribunal shall not grant any adjournments** unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause
Existing Provision in **Section 31 (1)**	Recommended Provision for **Section 31 (1)**
• **"31. (1) A** party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award, apply to the High Court for the enforcement of the award."	• Arbitration proceedings shall ensure and pass the award within 6 months from the date when the tribunal enters upon the reference. • Parties may extend such period for a further period not exceeding 6 months. If the award is made within 6 months, the arbitral tribunal shall be entitled to receive additional fee as the parties agree. • If the award is not made within specified period or extended period, the mandate of the arbitrator shall terminate unless the time is extended by the court.

Additions to enhance features with a structure appointment of Arbitrators.

Existing Provision in **Section 7 (1)**	Recommended **Addition** for **Section 7 (1)**
• **"(a)** in an arbitration with a sole arbitrator if the parties are unable to agree on the arbitrators, that arbitrators shall be appointed, on the application of a party by the High Court;" • **"(b)** in an arbitration with three arbitrators, such party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrators; if a party fails to appoint the arbitrator within sixty days of receipt of a request …. the appointment shall be made upon the application of a party, by the High Court."	**Grounds give rise to impartiality of arbitrators:** • Arbitrator's relationship with the parties or counsel • Relationship of the arbitrator to the dispute • Arbitrator's direct or indirect interest in the dispute • Previous services for one of the parties or other involvement in the case • Relationship between an arbitrator and another arbitrator or counsel • Relationship between arbitrator and party and others involved in the arbitration

Further Awareness programs and trainings have to be given to construction industry professionals. There are many publications related to construction law and ADR methods in developed countries. However, in the Sri Lankan context there are limited publications related to the ADR regime. Therefore, relevant institutes should conduct research-oriented conferences in ADR methods and encourage professionals and their institutes to publish articles and other publications related to ADR methods.

5.4 Limitations of the Research

During the research process I have encountered several limitations. They are discussed under this topic in order to educate the reader with the context in which the research was done.

The main limitation is that involved professionals in the construction industry and only few resource personals, who are thorough with the Alternative Dispute Proceedings in Sri Lanka.Therefore, this research was mainly concerning about Arbitration method, which is currently used for resolving disputes in the Sri Lankan construction industry. Also, the research was limited only to professionals in the construction industry which consist of experienced professionals from clients, consultants and contracting organizations. There were a limited number of institutes that could provide information which are required in conducting the research.

5.5 Summary

The study compared and contrasted the advantages and disadvantages of the existing Arbitration method in Sri Lanka in order to analyze the capability of current practice to overcome the problems in the methods. Hence, it identified such problems which occurred in the current Arbitration regime of Sri Lanka and suggested solutions for the success of Arbitration practice in construction industry. In the construction industry of Sri Lanka, no adequate concern given as to how the fundamentals of engineering and law must be used in the process of managing disputes. The importance of adopting fundamentals of engineering principles as adopted in other aspects of construction processes must be emphasized in every instance of the dispute management process as well. There has to be a contribution to the industry by way of using scientific methods for programming, monitoring, evaluations, analyses which should form the basis of scientific dispute resolution. The professionals should persuade the stakeholders to adhere to the fundamentals of engineering, law and ethics in the process of dispute management in order to have a more sustainable and healthy construction industry. Limiting the challenging grounds is vital since parties has major tendency to challenge the award granted by competent tribunals. If current Arbitration process organized under a well-designed

structure of laws and regulations specially under Arbitration Sri Lanka will be experienced a progressive Arbitration which will encourage the attraction of the construction opportunities.

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