SECURING PARTY AUTONOMY IN THE ARBITRATION PROCESS: A CASE OF SRI LANKA

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DECLARATION

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Ch.QS. Prof. (Mrs.) B.A.K.S.Perera Date

Dissertation Supervisor

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ABSTRACT

Party Autonomy in Arbitration Process in Developing Countries: Case of Sri Lanka

International arbitration is one of the most popular dispute resolution methods in the commercial world, which provides an opportunity to understand impact of globalization on the international practice of commercial law. Due to the complexity of the construction projects and different foreign entities involved in construction contracts, it is difficult to reach to a solution when disputes arise in the commercial contracts. Therefore, arbitration is recognized as the most commonly used method to resolve disputes due to the element or party autonomy used in the arbitration process. However, there are some issues regarding the mechanism of using element of party autonomy in arbitration and different strategies to get an award within a reasonable time. This study aims to propose a framework of party autonomy for arbitration in the Sri Lankan construction industry. In order to achieve the research aim, elements of party autonomy and sub elements of party autonomy have been identified through the literature review, document survey, interview survey and manual content analysis was used to analyze the qualitative data in the research.

Research revealed that it is vital to consider the elements of party autonomy and strategies in the initial stage of contractual process if parties expect to receive an award within a reasonable time in arbitration process. Through research findings, it could be recommended that parties develop more awareness of the arbitration procedure and different elements and sub elements could be used to receive an award within a reasonable time. Agreed elements, sub elements and strategies should be in a written document, which can o be used time-to-time in arbitration process and awareness should be raised regarding the importance of them.

Key Words: Arbitration, Elements, Party Autonomy, Strategies

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LIST OF ABBREVIATIONS

Abbreviation	Description
ADR	Alternative Dispute Resolution
FIDIC	Federation of International consulting engineers
ICC	International Chamber of Commerce
SCC	Stockholm Chamber of Commerce
SIAC	Singapore Institute of arbitration center
ICLP	Institute of Commercial Law & Practice
LCIA	London Court of International Arbitration
ICSID	International Convention of Settlement of Investment Disputes
UNCITRAL	United Nations Commission on International Trade Law

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CHAPTER I

1.0 INTRODUCTION

1.1 Background

Most philosophers state that arbitration existed before the court systems were formed and people became civilized highlighting the ancient Egyptian, Greek and Roman reports (Dynalex, 2017). In fact, in International Arbitration of construction contracts or business contracts, reaching an agreement is a crucial factor due to the involvement of different legal systems, foreign entities, Customs and by lateral and multi-lateral treaties in between countries. Thus, in recent years arbitration is the furthermost favored choice to reach an award within a reasonable time frame (Dursun,2013). Arbitration is used to resolve different forms of disputes such as Construction, Technology, Engineering and Oil and Gas Industries, Banking, Insurance, Intellectual Property etc. (Blake & Others 2011). International arbitration is an emerging mechanism of global dispute resolution, which provides an avenue to understand the impact of globalization on the international practice of law (Slaughter and Ali 2009). The present era of globalization has increased the number of multinational contract agreements entered by the parties and different legal systems (Carlquist, 2006). Over the past 25-30 years international arbitration has become the most commonly used method to resolve business disputes (Dezalau & Garth & Bourdieu1996). When a businessperson enters multinational relationships such as contracts for the sale of goods, joint ventures and construction projects, mostly disputes arise between parties and then they will plea for arbitrations to be conducted in a private and confidential manner to preserve the relationships between the parties (Dezalau, Garth & Bourdieu 1996).

Arbitration is similar to reassembling a perilous jigsaw puzzle with many of the sections are mislaid forever (Blackkaby & others 2009). Arbitration is the most preferred dispute resolution method in the ancient Egypt in order to solve the public and private disputes between parties (Roebuck,2008). Therefore, arbitration was considered the dispute resolution method, which ruled the natural justice since it does

not have the solid rules, which were mostly recognized in the litigation. Therefore, parties were given an opportunity to insert an arbitration clause or a submission agreement to enter arbitration when arbitration arises (Pryles N.D). Further, he states that there are three types of ways parties can use arbitration and they are institutional arbitration, adhoc arbitration and expedited arbitration.

The doctrine or the guiding principle, which makes arbitration flexible, is party autonomy (Dursun, 2013). Further, he states that this principle is the one governing arbitration agreement and the reason behind the popularity of arbitration locally and internationally. There are several decisions available for the parties such as either institutional or ad-hoc arbitration, place of arbitration, arbitration procedures, governing law or to exclude the appeals (Kazutake, 2005). "Autonomy usually could have defined as total independence of parties in organizing but not conducting an arbitration" (Chatterjee, 2003). It is impossible to proceed with arbitration without respecting the parties' will in the arbitration agreement. For instance, when an institution is appointed to conduct the arbitration process it is mandatory to follow the initial agreed conditions by parties without replacing those decisions. Further, he states that in the case of violation of principle of party autonomy by the institution or any court it will be a ground to set aside the arbitration award. In other words, party autonomy is the cornerstone, which safeguard the parties' rights to conduct the arbitration procedure according to their will (Dursun, 2013). Further, he emphasizes that mostly internationally and locally arbitration is recognized as the flexible Alternative dispute Resolution method than other ADR methods as parties do not want to have a formal procedure, they have the freedom to conduct the arbitration in any place (for example a place which is neutral for both parties) and choose the suitable arbitrator who have the specialized knowledge in the disputed area In history, parties have moved to arbitration process as it will be helpful in avoiding delay, higher cost and the formal procedure of arbitration (Marful-sau, 2013).

The doctrine, which governs the arbitration, is party autonomy and it is the keystone of arbitration proceeding since it could be helpful in the post commencement of arbitration process to avoid the conflicts between parties to commence the arbitration

process (Ansari, 2014). Arbitration agreement is the main source of arbitration since it highlights the parties will to conduct the arbitration when dispute has arisen between parties (Shackelford, 2006). Thus, guiding principle of party autonomy can be concluded as the freewill of parties to design the arbitration process in an effective manner (Abdulhey, 2004). Further, he states that if the parties do not conclude their freewill to arbitrate then they have to go before the court in order to solve the dispute. International Chamber of Commerce (ICC) in France, which is facilitating the arbitration from 1919 has made an outstanding revolution in the international commercial arbitration (Palkhivala, 1994). He further clarifies that business groups in different foreign entities have identified it as one of necessities to consider in their business contracts and to use the commercial arbitration as dispute resolution and ICC Rules to reach to an solution without having a time consuming process through arbitration. Another remarkable transformation in international commercial arbitration was New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which was held in 1958 with participation of 157 signatory countries, which recognize and enforce the foreign arbitral awards entered by the signatory country parties (Julian, 2006).

According to the Arbitration Act No.11 of 1995 *(Refer Appendix C)* in Sri Lanka "An Arbitration agreement may be in the form of arbitration clause in a contract or form of a separate agreement". Therefore, even when parties do not have an arbitration clause in the contract agreement contractual parties have been given the freedom to exercise the arbitration by having a separate agreement called submission agreement (Marsoof,2013). Further, he explains that Sri Lankan arbitration act recognizes the local and international awards and main principles such as party autonomy, independence; Arbitrability, impartiality, severability and less court introversion and significant features recognizing the party autonomy are as follows. Parties are free to agree on the appointment of arbitrator and arbitrator's appointment procedure (Section 7 of Arbitration Act No.11 of 1995) parties are willing to arbitrate through arbitration clause or submission agreement court shall not have jurisdiction (Section 5 of Arbitration Act No.11 of 1995);parties can challenge the arbitrator when they fail to exercise their duties (Section 10 of Arbitration Act No.11

of 1995);parties are free to agree on place of arbitration (Section 16 of Arbitration Act No.11 of 1995);parties are free to move for the settlement when they think it is necessary (Section 14 of Arbitration Act No.11 of 1995) *(Refer Appendix C).*

Researchers have identified the importance of proposing suitable elements of party autonomy and strategies of party autonomy. Hence, arbitration has become another type of a litigation, which causes commercial loss and the delays for the parties in the construction projects. Therefore, it is significant to understand the fact that if parties recognize the need of party autonomy and strategies of party autonomy in order to minimize the problems and receive an award within a reasonable time period without having time consuming process in arbitration.

1.2 Problem statement

Doctrine of party autonomy is the most significant factor in arbitration, which gives the power for the parties to arbitration agreement to take several important decisions in order to design the arbitration process (Abdulhey 2004). However, he further states that it assists the arbitration process in controlling the arbitration according to the will of the parties. Nevertheless, "the doctrine of party autonomy is a recognized concept in commercial arbitration and worldwide the question as to extent of freedom or autonomy of party in international commercial arbitration has remained largely unsettled and has been acknowledged as disputable" (Fagbemi 2015). For instance, principle of party autonomy allows the parties to choose the proper law depending on the merit of dispute, to appoint arbitrator, decide the number of arbitrators, arrangement of arbitration procedure, selection of suitable language, place of arbitration and to whether to exclude the appeals in the national courts *(Refer Appendix H)* (UK arbitration Act *(Refer Appendix H)* (1996). The question as to what is the framework of party autonomy to follow in arbitration to have an solution without having a time consuming process through arbitration *(Refer Appendix H)* (UK arbitration Act (1996). Thus when the elements and strategies of party autonomy are not recognized in the initial stage there is a chance it could lead to a dispute in the pre or post commencement of arbitration. (Pyres, N.D). In

addition, he stipulates that there is a significant impact on recognizing the basic element of party autonomy in the arbitration agreement before commencing arbitration. For an instance if parties do not recognize the law of arbitration and there are two or three foreign entities in an arbitration agreement it could lead to conflict between the parties and then it could be important to make a decision based on the proper law.

Therefore, the need of recognizing the elements and strategies of party autonomy prior arbitration commencement and post commencement of arbitration has been identified along with the need to highlight the importance of it and finally propose the framework of party autonomy to have an award within a reasonable time frame through arbitration.

1.3 Hypothesis

Party autonomy is the guiding principle, which facilitates arbitration for reaching a solution within a reasonable time without leading it to a time consuming process in arbitration locally and internationally.

1.4 Aim

Aim of this research is to propose a framework of party autonomy to reach a solution within a reasonable time without leading it to a time-consuming process through arbitration in Sri Lankan Construction Industry.

1.5 Objectives of the Study

- Identifying the elements of party autonomy and sub elements in the arbitration process.
- Identifying the importance of sub elements of party autonomy and strategies in arbitration process.
- Proposing suitable elements of party autonomy and strategies for arbitration in Sri Lankan Construction Industry.

1.6 Research Methodology

This study consists of three phases, they are namely comprehensive literature survey, document survey and interview survey, and qualitative data collection method has been utilized in order to achieve the outcome of the research, which is explained in the Figure 1-1.

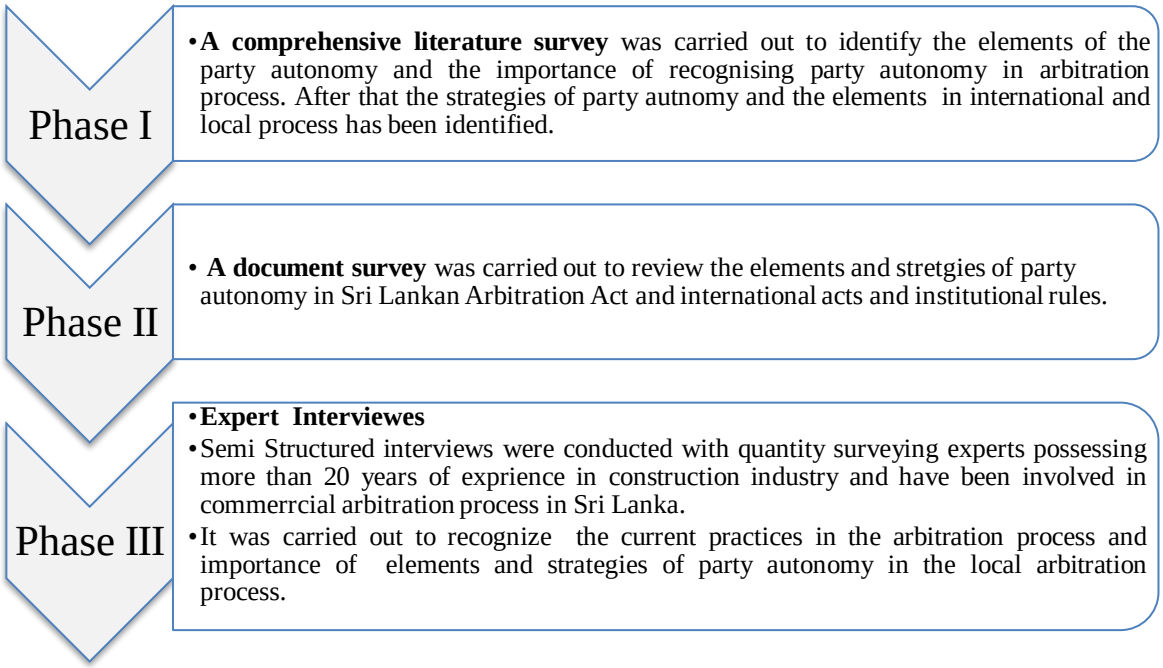

Figure 1-1 Research Methods

1.7 The Scope of the Study

This research is only limited to the principle of party autonomy in arbitration in the private construction contracts in Sri Lanka.

1.8 Chapter breakdown

Chapter 1: Introduction

This chapter illuminate the background information of the research and introduce the research topic, research problems, aims and objectives of the research and research methods and the scope of the study.

Chapter 2: Literature Synthesis

This chapter detailed literature review on elements of principle of party autonomy and the recognition of party autonomy in the pre commencement and post commencement of arbitration process.

Chapter 3: Research Methodology

This chapter illustrates the research methods, which are going to be used to conduct the research such as research approach, data collection technique, data analyzing technique and the research process.

Chapter 4: Data Analysis

This chapter clarifies the include data analysis utilizing Delphi method and the questionnaire survey.

Chapter 5: Conclusion and Recommendations

This chapter reveals the conclusions and recommendations reached based on the research findings.

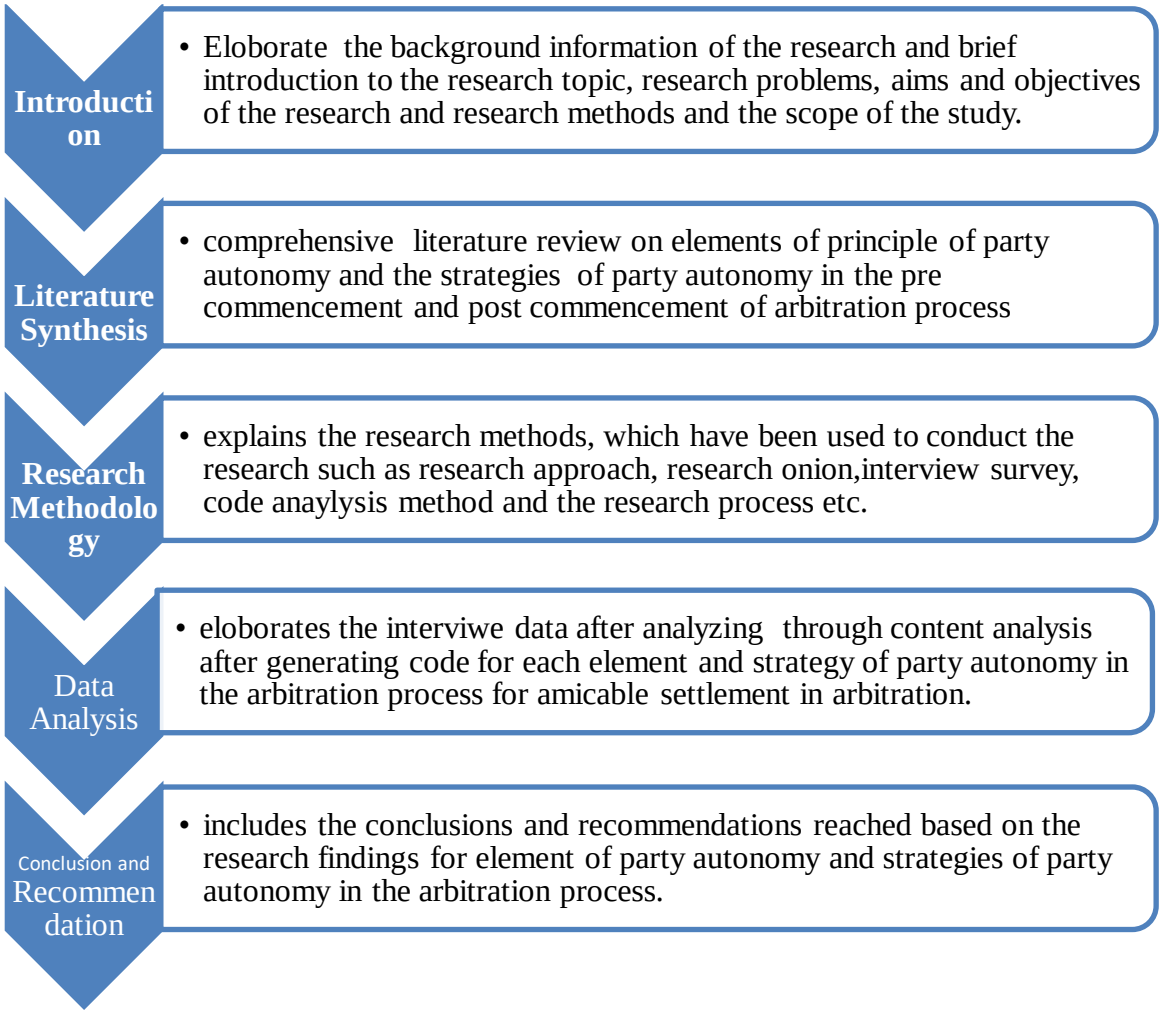

Figure 1.2 Chapter Breakdown

1.9 Summary of the Chapter

This chapter describes the background information of the research, research problem, aim and objectives of the research, research limitations, methods and the chapter breakdown.

CHAPTER II

2.0 LITERATURE SYNTHESIS

2.1 Introduction

The literature review chapter explains Alternative Dispute Resolution methods in the construction industry, benefits of arbitration and remaining principles and concepts of party autonomy in order to answer the research problem and to achieve research objectives. The main purpose of the literature survey is to confirm the validity of the research problem and the framework of party autonomy to follow in the arbitration process.

The literature review focuses on providing an introduction to ADR Methods and the concept of party autonomy and researching the history of party autonomy in the local and international arbitration process. Furthermore, elements of party autonomy are reviewed to find the framework through concept of party autonomy.

The latter part of the literature review investigates the significance of recognizing the party autonomy in pre-commencement of the arbitration process and post-commencement of the arbitration process and the strategies of party autonomy in the local and international arbitration process.

2.2 ADR methods in construction industry

ADR stands for Alternative Disputes Resolution in the construction industry and due to the loopholes in the litigation; it has been given the opportunity to use the ADR in the construction industry such as negotiation, mediation, arbitration, adjudication, expert determination (Abeynayake, 2017). Further, he explains that ADR has become most popular in the construction industry as it has so many benefits such as flexibility, speed of the process and its private and confidential procedure. Many construction contracts such as New Engineering Contract (NEC), Joint Tribunal Contract (JCT), Federation of International Consulting Engineers (FIDIC), and Standard Bidding Conditions of Contract (SBD) have set out a procedure for ADR in

construction contracts because of its flexible procedure (Designing building wiki,2019).

ADR methods have a dissimilar approach compared to litigation, which has led to positive rejection of it, as it is time-consuming and expensive and would not be beneficial to the construction industry considering the contract time, cost and quality of the construction project (Levin, P., 1998). In addition, he has stated that most of the construction companies in the construction industry broadly using these methods while rejecting litigation.

According to Godman, (2016), different ADR methods defined in the construction industry have been explained in the below table.

Table 2.1 (a) ADR Methods (Source: Godman, 2016)

ADR Method	Description
Negotiation	It is a discussion between two or more parties to reach a mutual agreement to settle the dispute and it is a non-binding method.
Mediation	It is a process where independent third party is appointed following the agreement of both parties and it is a non-binding method.
Adjudication	It is a contractual process to solve the dispute between parties when parties submit their dispute to independent third party and it is a contractually binding method.
Expert Determination	It is a method where a specialist in the construction industry would be used to solve the disputes according to his /her expertise area.
Med-Arb	A process where parties want to settle some of their issues through informal mediation process, yet they expect a final and binding solution.
Arbitration	It is the ADR method where parties refer their disputes to independent third party arbitrator and when arbitrator provides an award for the dispute it becomes legally binding.

(Godman, 2016)

According to the Global Construction Disputes Report, (2018) disputes are defined as “a situation where two parties typically differ in the assertion of a contractual right, resulting in a decision being given under the contract, which in turn becomes a formal dispute”. Further, it has identified that the common causes of dispute and the most popular ADR methods are

- Failure to properly administer the contract
- Poorly drafted or incompletely / unsubstantial claims

Employer/ Contractor/ Subcontractor failing to understand and comply with its contractual obligations.

According to the Global Construction Disputes Report (2018), analysis it is clear that disputes are arising due to party autonomy because parties also have a duty to follow the procedures properly and when parties are not aware of their obligations and the contract administration process it can lead to different conflicts and finally to dispute resolution methods. Furthermore, in the Global Construction Disputes Report (2018) the most commonly used ADR method in the construction industry has been analyzed as follows.

- Party to Party negotiation
- Arbitration
- Dispute Adjudication Board

According to it, arbitration has been ranked as the second method due to elements and strategies in the arbitration process compared to the other ADR. Disputes are inevitable, and it is important to have a dispute resolution mechanism understanding of the advantages and disadvantages of each method before dispute arise between parties. (Nabatova, 2017)

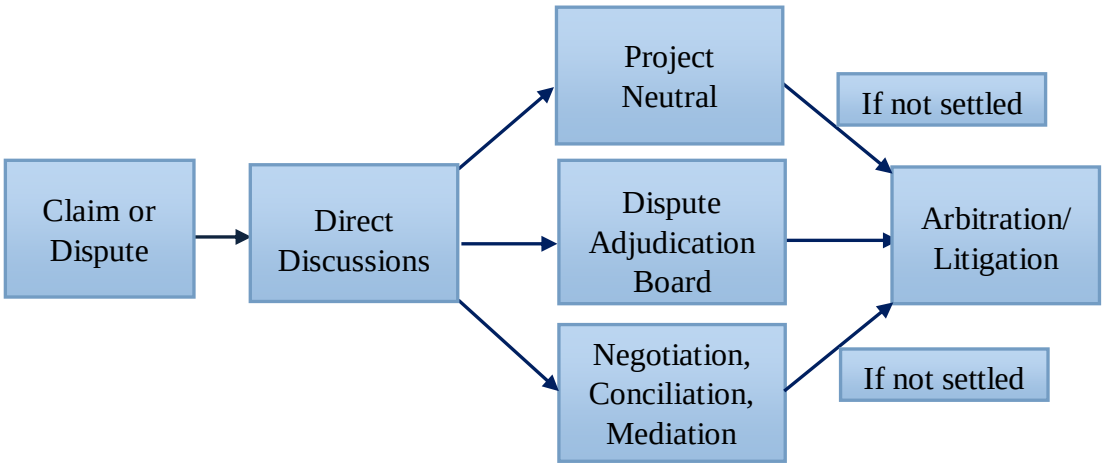

Figure 2.1 (b) ADR Method (Source: (Nabatova,2017)

2.3 Arbitration in Construction Industry of Sri Lanka

Arbitration is not a new mechanism to Sri Lanka. It was introduced by the British reformers as the alternative method to solve the disputes by enacting Arbitration Ordinance No.15 of 1866 (Nihaj,2016). Further, he has stated that Arbitration Ordinance was connected with the Civil Procedure Code of 1889 and arbitration was categorized into two as;

- Voluntary Arbitration
- Compulsory arbitration

Henceforth, in the year1995, Sri Lankan Arbitration Act *(Refer Appendix C)* was enacted and the objective of the act was to provide a suitable mechanism to conduct the arbitration in Sri Lanka and enforcement of local and foreign arbitral awards in Sri Lanka (Abeynayaka,2008). Furthermore, he has stated that according to the Arbitration Act in Sri Lanka in order to arbitrate, disputes shall be arbitrable, arbitration agreement shall be in writing, it can be a single document, letter, telex or fax or other means of communication and considering the duties of arbitrators,when disputes are submitted for the arbitration, court should have no jurisdiction to hear and determine the same.

According to the Sri Lankan Arbitration Act, the arbitration mechanism is as follows:

Table 2.3 Arbitration Mechanism (Arbitration Act No.11 of 1995) *(Refer Appendix C)*

Section	**Law**
Section 2	Arbitration agreement may be in form of arbitration clause or submission agreement.
Section 3	Arbitration agreement shall be in writing
Section 4	Disputes shall be arbitrable
Section 5	Court shall have no jurisdiction to hear and determine the disputes when it is submitted for arbitration
Section 6 -9	Appointment of arbitrators
Section	**Law**
Section 10	Challenge of arbitrators
Section 11	Competencies of arbitral tribunal
Section 12	Severability of the agreement
Section 13	Interim measures of protection
Section 14	Settlement using any method according to party autonomy
Section 15	Duties of arbitral tribunal
Section 16	Place of arbitration
Section 17	Rules and procedures of arbitration
Section 18	Commencement of arbitration
Section 19	Submission of disputes for arbitration
Section 20	Obtaining summons
Section 22	Evidence for arbitral tribunal
Section 24	Law applicable for arbitration
Section 25	Form and content of Arbitration Award
Section 27	Correction of the award
Section 29	Compensation for arbitrators
Section 31	Enforcement of award
Section 32	Grounds to set aside the arbitration award
Section 33	Recognition of foreign arbitral award
Section 34	Grounds to refuse the recognition of the award

The practice of arbitration therefore has improved and it is only ADR method, which provides the legally binding solution, and it has become a natural method to solve the dispute. The practice of arbitration continues to provide a less formal and less expensive method compare to the courts (Ranasinghe, 2015).

2.4 Concept of party autonomy

Principle of party autonomy is considered the guiding principle in local and international commercial arbitration since it is the concept used to design the arbitration process (Kanag-Isvaran, 2016). Further, he has stated that "party Autonomy is the guiding principle in determining the procedure to be followed in international commercial arbitration; It is a principle that has been endorsed not only in national laws, but also by international arbitral institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition..." (Redfern and Hunter 2004).

Autonomy is a concept, which is considers the choices available for the parties to make the right decisions, which they think, fit for the situation from different alternatives (Matz 1994). Thus, the concept of party autonomy clarifies the opportunity given for the parties to draft a framework for the arbitration agreement according to their would (Blackkaby & others 2009). As an example, the other ADR Methods such as litigation, adjudication, and mediation do not give the parties an opportunity to make the decisions to control the dispute resolution process, as a result arbitration is the best option for the parties when they are in a dispute to resolve it since they can make the decisions regarding the procedure of drafting the arbitration agreement. (Flume,1992). Further, he stated that it has given the power for the parties to take the decisions regarding the selection of proper law, the seat of arbitration, arbitrator appointment procedure and the number of arbitrators. Nevertheless, principle of party autonomy plays a major role to conduct the arbitration procedure according to the freewill of the parties (Chatterjee, 2003). Besides this principle has been accepted nationally as well as internationally in

conventions. As an example, following are some clauses in the institutional arbitration rules;

"The parties have full autonomy to determine the procedural and substantive rules and principles that are apply in arbitration" (Institute of International 1989, Article 6).

"Parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of dispute" (ICC Rules, 2012).

"The arbitral tribunal shall decide the merit of the dispute on the basis of the law or rules of law by the parties (SCC Rules, 1999).

International commercial arbitration was entirely based on the principle of party autonomy (Bermann, 2016). Further, he stated that it plays a major role when setting out the arbitral tribunal in the arbitration process. Hence, fundamental decisions of the arbitration process such as a number of arbitrators, selecting the arbitrators from each side or selecting arbitrators, who are experts in the specific area, depending on the substance of the dispute are taken in this stage. He ascertains that this will be a good opportunity for the parties to use their power of party autonomy to select the suitable arbitrators, who possess relevant qualifications according to the dispute that has arisen. In Nigeria Supreme, the court in *MV Lupex V Nigeria* Overseas Chartering Ltd case it was held that an arbitration clause is considered as the written submission agreed by parties in the initial stage of the contract. Henceforth, it was provided in a similar language and circumstances the contract agreement was made and furthermore parties have their own free will to draft an arbitration clause to the substance of the disputes.

2.5 History of party autonomy

2.5.1 Concept of party Autonomy in local arbitration process

Sri Lankan Arbitration act *(Refer Appendix C)* was enacted in 30th 1995 as Arbitration Act.No.11 of 1995 to stimulate the arbitration process in Sri Lanka and it made a significance difference in local arbitration process (ASUS & Raghavan, 2000). He added that they stated that it has been fabricated referring the United Nations Commission on International Trade Law and 1958 New York Convention facilitating the arbitration process to conduct it in a more effective manner locally and internationally. One can argue that there was no any evidence about the use of arbitration with regard to commercial transactions in Sri Lanka. However, it is not true since there were some situations where it was used in history (Amerasinghe, 2011). Supporting this notion he stated that when there is a quarrel in the village they direct it to one of respected relative in the family where both parties have due respect and finally, this respected relative would explain them how to settle without leading to escalation of anger between both parties, while demonstrating the benefit of settling. Sri Lankan Arbitration Act has given a significant attention to party autonomy. For instance, when there is an arbitration clause or parties to conduct arbitration, unless parties agree otherwise, submit submission agreement it prohibits the jurisdiction of court in Sri Lanka (Ranasinghe, 2015).

- "Parties are free to determine the number of arbitrators" (Section 6)
- "Parties are free to decide the procedure for appointment" (Section 7)
- "A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment was made" (Section 10)
- "With the agreement of the parties, the arbitrator may use at any time during the arbitral proceedings:(a) mediation;(b) conciliation or(c) any other procedure to encourage settlements" (Section 14)
- "Parties are also allowed to amend or supplement the prayers for relief already introduced and to rely on new circumstances, in support of their respective cases" (Section 15)

- "Parties may determine the venue of arbitration, by agreement" (Section16)
- "A party may, with the written consent of the arbitral tribunal, apply to the High Court for summons to witnesses" (Section 20)
- "An arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute" (Section 22)
- "Unless otherwise agreed upon by the parties, an arbitral tribunal "shall not be bound by the provisions of the Evidence Ordinance" (Section 24)
- "The parties to an arbitration agreement may agree in writing (hereinafter) Referred to as an "exclusion agreement "to exclude any right to appeal in relation to the award" (Section 38) (Arbitration Act, No.11 of 1995, Sri Lanka).

2.5.2 Concept of party autonomy in international arbitration process

It is impossible to have any commercial trade without having any disputes and if there is successful business it means there is commercial arbitration from the beginning of commercial transactions (Mustil, 1989). Further, he states that party autonomy is considered the cornerstone in arbitration process in the dawn of twentieth century. The Privy Council in England has recognized principle of party autonomy as the fundamental principle (Bay Hotel & Resort Ltd vs Cavalier Construction Co. Ltd 2001). Party autonomy is recognized as the cornerstone in international arbitration and it is recognized in many countries all over the world and different organizations (Redfern and Hunter, 2004). Additionally, they state that section 1 (c) of the 1996 English Arbitration Act *(Refer Appendix H)* highlights that primary purpose of arbitration is to reach to a reasonable dispute resolution in an impartial and independent manner. In fact, party autonomy is recognized in international arbitration since parties do not want to resolve their disputes through court procedures and prefer to solve the disputes within a reasonable time -using concept of party autonomy (Darsun, 2013). They state that parties prefer to use arbitration process because of fundamental principle of party autonomy and it gives them a chance to solve their disputes in a private and confidential manner and to

select an arbitrator who have suitable qualifications and experience according to the merit of the dispute. They have ascertained stating that in this century most of the parties like to avoid court procedures, strict rules and public glare when disputes arise between the parties and they look forward to see a dispute resolution mechanism, which can be used to according to their needs. All the conventions, international laws and rules recognize the principle of party autonomy as is impossible to solve the disputes within a reasonable time without it (Gaillard, 2003). Further, he states that this concept is recognized in 1958 New York Convention, UNCITRAL Model Law, English Arbitration Act and International Chamber of Commerce Rules

2.6 Elements of Party Autonomy

With reference to the party autonomy in arbitration researcher has identified the difference between the arbitration and other dispute resolution methods in order to demonstrate that arbitration is the more flexible procedure to carry out as it could be done according to the parties' will.

2.6.1 Form of arbitration agreement

Litigation continues according to the procedural laws and judges appointed by the court system whereas arbitration only proceed with the agreement to arbitrate (Kazutake, 2005). He further states that from the beginning of arbitration concept of party autonomy is recognized. Hence, according to section 3(1) of the Sri Lankan Arbitration Act "an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of the separate agreement" (Arbitration Act no.11 of 1995). *(Refer to Appendix C)* When there is a dispute between different parties, unlike in litigation, first and foremost consideration is whether parties has a valid arbitration agreement to proceed to arbitration (Isik,2013). In addition, he states that arbitration agreement which has been drafted as an arbitration clause or submitted as a submission agreement when a dispute arises, is considered separate agreement. According to him, separate agreement takes effect when the main contract ends and yet the main contract will not have effect on the separate agreement and it could be

continued at any situation without any issue. For Instance, in the *Water's Edge case* Sri Lanka Supreme Court has declared that main contract between Sri Lankan government and the foreign investor is canceled but it consists of a valid arbitration agreement due to the principle of severability and it gives the investor to compensate for the development (Gunawansa, 2010). He further declares that according to local and international law, if there is an arbitration clause, even when main contract is terminated it does not have any impact on arbitration agreement concluded between parties .He has further highlighted that in the case of ***Heymen v Darwin's,*** where the House of Lords has declared that in the presence of a written arbitration clause it is considered an independent agreement submitted by the parties and no intervention can be made to dispute resolution through arbitration. Mainly there are two categories of arbitration agreements and they are so-called arbitration clause and submission agreement. The difference is when remaining disputes are referring to arbitration through agreement it is called a submission agreement and for disputes, which could arise in future there must be an arbitration clause in the main contract (Wijethilake, 1998). In addition, he stipulates that according to the Sri Lankan Arbitration Act section 3(2) *(Refer to Appendix C)* arbitration clause or submission agreement must be in writing and also under the UNCITRAL model law article 7(2) and New York Convention 11(2) requires to have arbitration clause or submission agreement in writing by a text or evidence of letters, telex or telegrams.. In addition, he has highlighted the main elements to be considered when drafting an arbitration clause to protect the will of parties and to exercise more control over arbitration according to interest of the parties.

2.6.2 Freedom to choose Arbitrator Appointment and Procedure

Freedom to choose arbitrator appointment is one significant situation where principle of party autonomy applies in local and international arbitration and it has given the choice for the parties to select the arbitrators who are qualified and who have an expert knowledge in disputed area (Latham & Watkins,2015). According to Section 6 (1), (2), (3) of Sri Lanka Arbitration Act.No.11 of 1995, it has given freedom for the parties to decide the number of arbitrators and if number of arbitrators not

identified then number of arbitrators shall be three and in the case of even number of arbitrators appointed by the parties then appointed arbitrators have to agree on a principle arbitrator who will act as a chairman (Kanag - Isvaran PC &Wijerathna,2011). Furthermore he states that in the case if parties think it is suitable and cost effective to appoint single arbitrator they can exercise that option also and if there is a disagreement regarding the arbitrator appointment then parties can apply to high court for appointing single arbitrator according to section 7(2) of Sri Lanka Arbitration Act.No.11 of 1995 *(Refer to Appendix C).* Freedom to choose the arbitrators allowed under UNITRAL law has been identified in Figure 2.6 Appointment of arbitrators and under that claimant appoint one arbitrator from their side and inform respondent party to appoint an arbitrator from their side and finally, both appointed arbitrators have to agree on the principle arbitrator who will chair the arbitral tribunal (Pulkowski,2017).

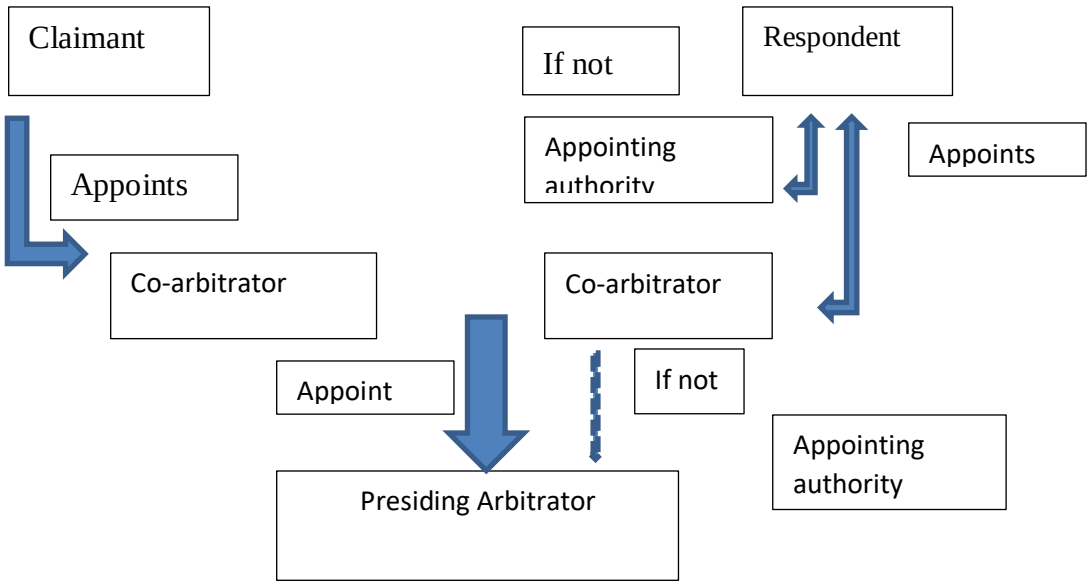

Figure 2.6 Appointment of arbitrators (Source: Pulkwski, 2017)

2.6.3 Appointment procedure of arbitrators

Unlike Litigation, party autonomy has given the opportunity for the parties to take the decisions regarding the arbitrator appointment procedure (Kanag-Isvaran PC & S.S Wijerathna, 2011). Further, Kanag-Isvaran and Wijerathna state that there are

different procedures parties can follow in respect of arbitrator appointment and they are procedures such as,

- Agreement of the parties

There is an arbitration clause drafted in the arbitration agreement and parties can follow its procedure when a dispute arises between the parties.

- Arbitration Institutes

National Arbitration Center in Sri Lanka, Institute Of Commercial Law And Practice in Sri Lanka or International Arbitration Institutes such as Singapore Arbitration Center and Hong Kong Arbitration Center can be considered Arbitration Institutes.

- Professional Institutes

Professional institutes such as Institute of Quantity Surveyors Sri Lanka or Institute of Engineers Sri Lanka are identified as Professional Institutes.

- National Courts

In the Sri Lankan Arbitration Act when parties failed to agree on arbitrator parties has been given the freedom to make an application to High Court in order to appoint an arbitrator with the national court support.

- List System

Each party identifies the list of arbitrators and list will be exchanged between parties and agree on the arbitrators who will conduct the arbitration process.

Freedom given for the claimant and respondent in arbitration process regarding the arbitrator appointment procedure under Sri Lankan Arbitration Act is as follows:

When parties have given their own choice of arbitrators and in the case of there is an disagreement between parties they can make an application to High Court in Sri Lanka and High Court will appoint qualified arbitrators to conduct the arbitration process (Section 7(1) & (2) Arbitration Act No.11 of 1995) *(Refer Appendix C)*

Under the UNCITRAL rules, they have clearly mentioned the appointment procedures of arbitrators as follows, *(Refer Appendix F)*

Step 1: Appointing authority make a list of qualified arbitrators

Step 2: List transferred between parties and parties will delete or cut the names of arbitrators whom they disagree to appoint as arbitrators

Step 3: Appointing authority will refer the returned list and appoint the arbitrators where both parties have are in agreement: (Pulkowski, 2017).

2.6.4 Ad-hoc, Institutional and Expedited Procedure

According to the Sri Lankan Arbitration Act unless parties specifies the arbitration procedure parties have been given freedom to select arbitration procedure, which they consider suitable according to the situation (Kanag-Isvaran PC & S.S Wijerathne, 2011). Further, they state that there are different procedures available for the parties, which is explained below.

Ad-hoc Procedure

According to Article 2(a) of UNCITRAL, model law ad-hoc arbitration procedure has been defined as an arbitration procedure, which is not governed by a permanent arbitral institution (Rajoo, 2016). He adds that since there is no institute to govern the arbitration process UNCITRAL model law can be utilized to govern the ad-hoc arbitration procedure.

In ad hoc arbitration procedure, there is no administering process of arbitration and very independent procedures such as equal treatment, place of arbitration, interim measures of protection and it can be implemented according to the parties' will (Fornara, 2017). Furthermore, she indicates the arbitration clause to be used in the ad hoc arbitration as follows:

"Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration. The number of arbitrators shall be ... (generally one or 3), and shall be nominated as follows:

The seat of the arbitration shall be ... (name of city and country).

The arbitral proceedings shall be conducted in ... (desired language).

The applicable procedure to the arbitration shall be … (reference to a specific national procedure; reference to a model procedural law, for example UNCITRAL; reference to the procedure set forth by an institution; completely tailor made procedure,)"

Advantages and disadvantages of using Ad-hoc Arbitration procedure explained in Table1-1.

Table 2.6 (a) Ad-hoc Procedure (Source: Masons, 2011)

Advantages	Disadvantages
It will be flexible for the parties to design their own procedure and timetable.	Arbitrator may face difficulties if there is no proper structured procedure.
If parties have a good, understanding it will be easy to resolve the disputes in an amicable manner.	If parties are tough, it will be a disadvantage to continue the arbitration process.
There will be no institutional fees and additional cost compared to the institutional arbitration therefore, it will be cost effective.	If parties fail to reach an agreement regarding any matter it can result in getting the guidance from national courts (Masons, 2011).

Institutional procedure

The Federation of International Consulting Engineers Conditions of contract (FIDIC) of the construction industry specifies that in the case of a dispute has arose between the parties, the arbitration shall be conducted under the rules of International Chamber of Commerce (ICC) (Kanag-Isvaran PC & S.S Wijerathna,2011). They ascertained that ICC was a non-profit institutional arbitration in Paris and designed set of rules to conduct international commercial arbitration and for this purpose, it was found in 1923. In institutional arbitration, the arbitration agreement has provided

the institution the process to follow when a dispute arises between the parties and it has a procedure to administer the arbitration process unlike ad-hoc arbitration (Rajoo, 2016). Furthermore, he specifies that there are different institutional arbitrations in the world such as Singapore Institutional Arbitration Centre (SIAC), Dubai arbitration Centre (DIAC), Hong Kong Institutional Arbitration Centre (HIAC) etc. The Institutional Arbitration has a pre-designed set of rules, which will help the parties to administer the arbitration process to reach to dispute settlement in an amicable manner (Fornara, 2017). Further, below find the model clause to use in the Institutional Arbitration according to Fornara.

"Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Rules of the … (Institution) in force on the date on which the notice of Arbitration is submitted in accordance with these rules.

The number of arbitrators shall be ... (generally 1 or 3).

The seat of the arbitration shall be ... (name of city and country).

The arbitral proceedings shall be conducted in ... (desired language)."

Advantages and Disadvantages of Institutional Arbitration has listed in Table 2-2.:

Table 2.6 (b) Institutional Procedure (Source: Masons, 2011).

Advantages	**Disadvantages**
There are set of designed rules and guidance to facilitate the arbitration process.	Sometimes parties will face difficulties in adhering to strict rules in the institute.
There will be qualified arbitrators to select depending on the merit of dispute.	There will be expenses separately for location, arbitrators, secretary etc.
There will be a permanent record of arbitration process, which will be convenient for both parties.	Parties have to respond within the period agreed with the institute.

Expedited Procedure

Arbitration process, which is speedier with tighter schedule, has been identified as the expedited procedure or fast track arbitration (Redfern and Hunter, 2004). Further, they state that there are some international and local institutions, which offer this specific arbitration process to cater to solve the disputes within a reasonable time in arbitration process and party autonomy has given the opportunity for contractual parties when they want to use an expedited procedure to get the benefit of it. Most important thing in the fast track arbitration is avoiding the unnecessary delay and sometimes-ordinary arbitration processes will take more time to solve the disputes when parties use more flexible procedure using party autonomy (Welser & Klausegger 2008). Further, theyave highlighted the following key elements in expedited procedure :

- It has a firm deadline to act which apply for parties as well as arbitrators
- There are several restrictions on the arbitration procedures such as limitations regarding the recording process, number of written documents etc.
- Due process and impartiality is highly recognized during the arbitration process.
- Arbitrator's neutrality considered as one of significant feature to avoid further issues.

2.6.5 Governing Law of Arbitration

Compare to litigation, one of the most flexible opportunities given through party autonomy is to select the proper law applicable to the arbitration agreement (Chukwumerije, 1994). They further state that it has given freedom for the parties to select the suitable law according to the substance of the dispute. According to the Sri Lankan Arbitration Act arbitral tribunal shall solve the dispute in arbitration using the rules of the law selected by parties and in the case of parties does not provide the suitable law then conflict of laws rules shall be applicable (Arbitration Act no.11 of 1995 24 (1). *(Refer to Appendix C)* It is one of the critical factors in arbitration,

which leads arbitration to success (Kanag-Isvaran PC & S.S Wijerathna, 2011). Further, they have ascertained if not it will lead to parties into a confusion and following factors could considered when selecting the suitable law for arbitration process:

- The law governing the arbitration proceedings
- Law governing the place of arbitration and the role of courts
- Enforceability
- Neutral site if there are foreign parties
- Economic policies
- Public policies in the place of arbitration etc.

It is important to consider the public policy of the country when conducting the arbitration process As an example if parties do not give both parties an opportunity to present the case then it does not treat the both parties in fair and reasonable manner which means it is against the public policy natural justice (Samuel,1989). According to the Article 18 of the UNCITRAL Model Law if there is unfair treatment done to the parties to the arbitration agreement using principle of party autonomy in an unfair manner, then arbitration agreement will be considered as invalid and cannot be recognized and the arbitration award cannot be enforced (Holzmann and Neuhaus, 1995). In addition, if there are multinational parties involved in arbitration it is a critical factor to consider whether all the parties involved in the arbitration process are party to the 1958 New York Convention (Wijethilake, 1998). Further, he has highlighted that in case parties are not party to the New York Convention, foreign arbitral award cannot be enforced in that particular country and they cannot claim the damages. He has identified following factors to be considered when choosing the place of arbitration:

- Nationality of the parties
- Expenses
- Travelling cost
- Admissibility of evidence
- Political Acceptability

2.6.6. Settlement

According to section 14 (1) of the Sri Lankan Arbitration Act when parties have an agreement and want to settle using an alternative dispute resolution method such as mediation and conciliation, it is unlikely that any other ADR method parties will be given the freedom to use that option as well (Marsoof,2012). Further, he explains that if there are any settlement needed they have to inform it to arbitral tribunal and it has recorded as an award in agreed terms. Presently, parties can request arbitral tribunal to record the award as a consent award when parties think it fits the situation without dragging the process and wasting time to reach to an agreement (Devydenko, 2015). In addition, he further states the difference between the internationally recognized consent award and normal arbitration award is that consent award recognizes the agreement of the parties other than considering arbitrator's decisions on the dispute and it has been recognized in the 1958 New York Convention.

2.6.7 Confidentiality

Compared to litigation, in arbitration parties are given the freedom to exercise the arbitration process without having public glare and in a private and confidential manner, as a result it has become a fundamental characteristic in local and international commercial arbitration (Day, 2015). The confidentiality means no third party will get an opportunity to be present in the arbitration process or hearings and mainly there will not be any disclosure of information to the public (Samuel,2017). Further, he states that parties have the freedom to decide the confidentiality level that they want to maintain in the arbitration process, taking the parties, who will get the opportunity to involve in arbitration such as arbitration institution, translators, witnesses, in to consideration. In the institutional rules implemented by Institute of Commercial Law and Practice in Sri Lanka it has been highlighted that confidentiality is ensured in the disputes resolved through the institute and if parties wish to they can sign a confidential form in order to maintain confidentiality in arbitration. (ICLP, 1996). In the English Arbitration Act, it highlights the confidentiality of arbitration as follows:

- Arbitration held must be in private
- Implied confidentiality in every arbitration
- Such confidentiality is subject to certain exceptions such as a court order, parties consent, public interest, and reasonable necessity (Samuel, 2017).

In addition, there is also a special provision in International Center for Settlement of Investment Disputes (ICSID) regarding the confidentiality and transparency in arbitration, and in ICSID rules it has been identified that parties can agree whether they want to keep their information private and confidential or up to which level they want to maintain confidentiality in the arbitration process (ICSID,2017).

2.6.8 Interim measures of Protection

Interim measures of protection are designed to safeguard the parties and provide a sudden relief for them and the Sri Lankan Arbitration Act states that if parties require sudden relief in arbitration they can obtain interim relief only after the arbitral tribunal has formed and in section 13(1) of Arbitration Act same has been stated as follows:

"An arbitral tribunal may at the request of the 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" (Marsoof, 2012). Furthermore, he has stated that this is one of fundamental principles of party autonomy where parties can secure their claim until the final solution is given through arbitration. During the course of arbitration, a party may need protection from another party to protect their assets or evidence by a sudden relief and that is the reason interim measures of protection are designed in arbitration process to exercise it according to parties' will (Kanag-Isvaran PC & S.S Wijerathna, 2011). Further, in the ***Channel Tunnel Group v Balfour Betty Ltd*** case one party was in a situation of facing irreparable damage if they did not take interim measures of protection. Accordingly, court declared that a party who applies directly to get the interim relief is not deemed to have waived the arbitration agreement but to get the sudden relief to secure the claim.

In the UNCITRAL model law also special attention has been given to interim measures of protection, hence according to article 26(1) the arbitral tribunal may grant the interim measures of protection where necessary considering the merit of dispute to maintain the status quo (Oetiker,n.d). Further, he states that according to UNCITRAL model law it is required to grant the appropriate security to secure the claim as well.

According to section 13(3) of Sri Lanka Arbitration Act, enforcing the interim measures of protection shall not be incompatible with the section 5 of the Arbitration Act. Therefore, section 5 states that when there is an arbitration clause there will be no any jurisdiction in the courts for disputed matters and it will only be solved through arbitration (Marsoof, 2012).

2.6.9 Exclusion Agreement

This is an exclusive right given to the parties in the principle of party autonomy in arbitration, thus parties have freedom to exclude any appeals from the courts and exercise their freedom in arbitration (Wijethilake, 1998).

Moreover, he states that following is indicated in section 37(4) of Sri Lankan Arbitration act. *(Refer Appendix C)* "The parties to an arbitration agreement would agree in writing (hereinafter) referred to as an "exclusion agreement "to exclude any right to appeal in relation to the award". Further, he states that many international institutes such as International Chamber of Commerce and London Court of Arbitration have recognized this.

2.6.10 Evidence

Compared to litigation it is not necessary to follow the evidence ordinance in arbitration and parties have been given freedom to decide whether they are bound with the evidence ordinance or not. Hence, in the Arbitration Act under section 22(1) it states that unless otherwise agreed by the parties' evidence before the arbitral tribunal may be given orally or in writing by an affidavit (Arbitration Law in Sri

Lanka, 2000). Therefore, in arbitration principle of party autonomy an opportunity has been given to decide the use of evidence in a flexible manner (Turner, 2010). He further states it is this that helps to run the arbitration procedure smoothly rather than having a complicated process of evidence in litigation.

2.7 Strategies in Arbitration Process in Sri Lanka

2.7.1. Supportive Role-play by national court System

According to Section 5 of the No. 11 of 1995 Sri Lankan Arbitration Act, *(Refer to appendix C)* "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". Therefore, no interference can be made by the national court system when parties have submitted their disputes for arbitration (Wijethilake, 1998). Additionally, he states that there will be no opportunity for any party to delay the arbitral proceedings using the national court system and in addition to that the national court system has given an opportunity to proceed with the arbitration in an amicable manner. After arbitration has commenced court plays only a supportive role to facilitate the arbitration process guiding the parties whenever needed (K.Kanag-Isvaran, 2016). He furthers adds that there were several issues in the previous Arbitration Act and as the new act was drafted it was identified to make the national court system play a supportive role rather than interfering with the arbitration process. According to him whenever parties require a sudden relief, national court system can play this role. For instance, he highlights the section 7 (2) which states that where parties have a disagreement regarding the appointment of arbitrators they can make an application to High Court to appoint an arbitrator and proceed with the arbitration. In Sri Lankan Arbitration Act, situations where parties can get the support from national court system are as follows:

- To appoint an arbitrator where parties have a disagreement
- To appoint a chief arbitrator where parties have a disagreement
- To summon a witness to give evidence or produce documents (Wijethilake, 1998).

2.7.2 Duties of Arbitrators

Section 15 of Sri Lankan Arbitration Act specifies the arbitrator's duties and according to it arbitrators have to exercise their duties in an impartial, practical and expeditious manner (Section 15(1) (Wijethilake, 1998) *(Refer to appendix C.)* He adds that arbitrators should maintain the natural justice in arbitration providing opportunity for each party to present their case. Section 45 of Sri Lankan Arbitration Act specifies that arbitrators shall be liable for acting in fraudulent manner or omitting any work that he/she has to exercise in arbitration (Lawrence, 2013). He further emphasizes that arbitrators have certain duties such as duty of disclosure where he/she has to disclose all of his/her past experience, companies and parties he has worked with and be careful not to be bias towards any party in arbitration and dedicating adequate time to solve the disputes without unnecessary delays.

2.7.3 Awareness of time limits in the arbitration process

According to the Section 6 of Sri Lankan Arbitration Act, time given to appoint the arbitrator to maintain the time limit in arbitration is sixty days, in a situation where parties have a disagreement regarding the appointing arbitrator or appointment of the chief arbitrator. According to Section 10(2) of the Arbitration Act, time limit to challenge the arbitrator is 30 days and according to Section 27(1) of the Arbitration Act time limit given for the correction of award is 14 days. Period given to set aside the arbitration award is 60 days according to Section 32 (1) of the Arbitration Act (Marsoof,2012). *(Refer to Appendix C)*

2.7.4 Use of expert evidence

Using experts in the arbitration is one of the advantages parties are gaining through arbitration hence in some disputes it is essential to have an expert guidance to get the support to identify the substance of dispute (Hammes, 2012). He also asserts that when there are some complex disputes and it is difficult to find the correct path to find a solution expert can guide the parties showing the root cause of the dispute and the practical solutions available for it. In other hand, it will be a crucial factor to find

out the weak point of the opposing party through expert evidence; hence, experts will provide the impartial, independent opinion after the objective assessment to solve the disputes without having the time consuming process (Yanos, 2012). Further, he states that expert's evidence emphasizes strengths and weaknesses of the facts and therefore it will minimize the heavier burden on the parties.

When selection experts it is crucial to consider the characteristics of them as they are going to play an important role to help parties who are in an impasse or deadlock (Samberg, 2017). He further states that following characteristics should be considered when selecting an expert

- Required expertise
- Relevant experience in the field
- Communication skills
- Trust and impartiality
- Fluency of language in the proceeding.

2.7.5 Appointment of Arbitrators Who has Knowledge in Construction

When appointing arbitrators for arbitration it is significant to consider whether they have adequate knowledge about construction industry due to new technologies and a variety of issues that can arise in construction arbitration (Stephenson, 1993). Similarly, he stated that if there is a dispute arising out of road construction or building construction project it is essential to hire an arbitrator who has practical experience in relevant field. Therefore, depending on the engineering project technical nature of the issues that could arise may differ, for instance if a dispute arises in a water supply project it is better to hire an arbitrator who has knowledge on water supply projects.

2.7.6 Professional Ethics of Parties

Behaving ethically is at the heart of what it means to be a professional; it distinguishes professionals from others in the marketplace and ethical standards ensure that all those professionals deal with have confidence in them (RICS, 2017).

Further, they have recognized it is important to follow five main ethics by every professional, which are mentioned below:

- Act with integrity

  Act with integrity refers to being honest and straightforward with regard to all functions performed by the professional and being transparent in the way they work, especially when sharing the knowledge related to work with others without taking undue advantage from a client or any project parties (Rics, 2017).

- Always provide high standards of service

  When delivering the standards to client, contractor, consultant or any organization ensuring that best services are offered and being clear about the client's expectations and being transparent about the fees after the service is provided and especially taking responsibility over the standards provided (Rics,2017).

- Act in way that promote trust in profession

  Act in a manner, which promotes the profession not only in public but also in private space and building trust between the people by not behaving in a way that is not adequate to a professional. These standards should be maintained in not only work but also when there is a duty to be performed in private life, hence it is not mere letter of standards but the standards maintained throughout the life and being role models to others (Rics, 2017).

- Treat others with respect

  It is essential to treat everyone with respect, politeness and taking cultural sensitiveness and business practices in to consideration, if not it could lead to discrimination of certain parties creating conflicts in the business which will make others demotivated to perform their duties (Rics,2017).

- Take responsibility

  Professionals should take responsibility for all the actions he/she takes, they have to act with a duty of care, skill and due diligence, and if there is a complaint about the work he/she could act in a way taking the responsibility for it and fix it in a reasonable manner (Rics, 2017).

2.7.7 Time awarded for parties to present documents

Unlike adjudication, there is no specific procedure to follow when it comes to presenting documents in the arbitration procedure (Konrad, 2017). Further, they state that there is much flexibility in the arbitration process for parties to present the documentation. As an example when it comes adjudication it has a specific time limit to proceed the adjudication such as 42 days in the local contract and in FIDIC contract 84 days and compare to it. First and foremost, it is important to have in writing arbitration clause prior dispute arise or submission agreement after dispute has been arose between parties and after that notice of arbitration will be sent by the party to inform the respondent that arbitration has been commenced along with the statement of claim (Chovankova, N.D). In addition, he stated that notice of arbitration consists of relief that parties were pledged in the arbitration proceedings, supportive documents will submit later in proceedings, respondent party will be entitled to submit the statement of defense and parties are free to decide on the procedure and time limits to submit the documentation according to their will. He has highlighted significance of such flexible procedure because it will provide the parties to come up with relevant information and produce documentation to convince their claim or defense in arbitration unlike any other alternative dispute resolution method and as an example documentation submitted by parties are as follows:

- Relevant information which support the claim, defense or counterclaim
- Legal issues in the dispute
- Relief pledged by the parties
- Legal principles applicable to the situation
- Calculation of damages, expenses, counseling fees

2.7.8 Nationality of parties

It is a crucial factor to consider the nationality of arbitrators when selecting an arbitrator for the arbitration process hence it can be a problem to protect the natural justice in the arbitration process (Demirkan & celik, 2017). Especially they have specified that in international rules the restrictions imposed to secure the natural justice in table 2-3 – Nationality of parties.

Table 2.7 Nationality of parties

International Institution	Rules on nationality of arbitrators
UNCITRAL rules	when parties to the arbitration are of different nationalities it is a mandatory rule to appoint an arbitrator who is having neutral nationality to both parties
ICC rules	According to article 13/5 it is prohibited to appoint an arbitrator who is having the same nationality to either of parties when parties to arbitration are having different nationalities
SCC rules	Article 17/6 highlights that it is mandatory to consider the arbitrator who is having neutral nationality to both parties when different foreign entities are involved in arbitration
LCIA	Article 6 mandated the similar procedure to appoint an arbitrator who is having neutral nationality when different nationalities are involved in arbitration

(Source: United Nations Commission on International Trade Law Rules, Institute of Chamber of commerce rules, Stockholm chamber of commerce rules, London Court of Arbitration Rules)

2.8 Importance of using elements of party autonomy and strategies

2.8.1 Importance of elements of party autonomy in arbitration Process

An international arbitration agreement is an agreement where more than two parties have a promise that when a dispute arises between the parties they will follow a particular procedure rather than identifying the procedure in that time (Goldman, 1999**).** Further, the author has stated that in case parties do not have an agreement in the form of the arbitration agreement it will become another dispute where parties have to solve before starting the arbitration process. Generally, considering the freedom they have been given in the arbitration process parties believe that it could be advantageous for them if they design the form of arbitration agreement in a way they can facilitate the arbitration process. Accordingly, it could be problematic if they have not identified the most suitable form of arbitration agreement considering the nature of construction project (Landan, 1996). He also asserts that when parties get the freedom to design the form of arbitration agreement they can avoid interference from the national court and conduct the arbitration process according to their will.

When arbitration process relates with the litigation, one of the main opportunity given in arbitration is to choose the arbitrator's appointment where parties can select an arbitrator who has knowledge in a disputed area. If not it will be difficult for the arbitrator to give a proper solution and this clearly applies to the construction industry (Red fern and Hunter 1999).They have further explained that it is not only to benefit the parties but also to maintain the prominence of arbitration and its process compared to other ADR methods. New York Convention and the UNCITRAL Model Law has identified that when arbitration appointment and the procedure are not in accordance with the parties' agreement it will be a fact to set aside the arbitration award (Model Law Article V and New York Convention). This shows the ample support given by composing the arbitral tribunal and identifying the suitable procedure to appoint the arbitrator according to his or her own interest.

Considering the importance of different types of arbitration procedures if the ad-hoc procedure has been chosen and parties are unable to select an arbitrator for the arbitration, as clearly stated in the Arbitration Act, they can make an application to High Court (Legal desk, 2016). In addition, they have stated that in a situation where parties have chosen the institutions such as ICC, SCC, and DIAC those institutions have their own framework to administer the arbitration process to minimize the failures.

As a rule, it was understood that selecting the governing law would be considerably helpful for the arbitration process. If not conflict of laws rules should be applied and there can be some problems regarding the place where arbitration going to be conducted or the suitable law to proceed the arbitration; or whether it is the law, under which the contract is written between parties; or most suitable law to solve the disputes, which have been arisen between parties (Global, 2010). They have further identified that English Law is the most suitable law that has been used in the worldwide and the reason behind that is it being the most mature legal system compared to the other legal systems. Apparently when parties have no choice regarding the governing law of arbitration arbitral tribunal can consider any interests of parties rather than choosing a law according to the arbitrator's will and tribunal

could consider the law, which has a close connection with the contract agreement, substance to the dispute, laws applicable for the recognition and enforcing award (Fidel, 2016). As matter of fact, settlement can be considered as a primary advantage in the arbitration process. Hence, parties have given the freedom to decide the suitable law before first hearing or during the proceedings (Celikboya, 2016). In addition, they have clarified that if parties want they can go for both mediation and arbitration as well for settling in the future, which is beneficial for both parties.

In litigation when a dispute arises between different parties all the problems between the companies, will receive the attention of public, which is not good for their reputation. However, in the arbitration process, it is totally private and confidential and parties can limit the number of persons who can involve in the arbitration (Sussman and Wilkinson, 2012). Further, they have illuminated that this will provide many advantages to parties such as keeping all the facts private and confidential, signing a confidential form by all the parties or parties can agree for any specific procedure they think which a fit for the situation is. In the London Court of International Arbitration Institutional Rules Article 30.1 identifies that if there is no any specific procedure agreed by the parties as a general principle, parties should keep all the arbitration proceedings private and confidential and without having the consent of the parties any of the information cannot be shared with general public (Elliot,2013). He further states that according to the ICC Rules parties have a duty to keep the arbitration proceedings in a private and confidential manner, as it will be important to protect the trade secrets.

Interim measures of protection have been designed to facilitate the arbitration process to have a meaningful award at the end of the arbitration process because if it consumes a longer period, in the end parties will not get the chance of covering all the losses, which was there in the beginning of the process (Teshome,2018). In addition, he has indicated that in some occasion's arbitration take place similar to litigation consuming more time and there is a chance one party will take advantage of it. Therefore, interim measures of protection will help in a manner by ordering one party to prohibit calling upon a bank guarantee, commanding authorizing a party to

suspend the work or performing the work hence, they have contractual obligations anyway or commanding a contractor to continue his contractual obligation as he agreed in the conditions of the contract (Khatchadourian, 2017). Accordingly, he asserts that it can prevent destroying the evidence related to disputed matter or commanding to provide the inspection for the material, place or work related to the disputed matter and if interim measures of protection is not there in the arbitration process it will be a vital disadvantage to have an award which will be not beneficial for the suffering party.

2.8.2 Importance of strategies of party autonomy in arbitration Process

There are different types of benefits in the strategies of arbitration and it is rapidly attempting power and creating the freedom to resolve the disputes compared to other ADR methods (Masadeh,2013). In addition, he states that parties have been given enough freedom in the arbitration process even though it is vital to have support from the national courts for issues such as appointment of an arbitrator, selecting a principal arbitrator, sudden issues arising in the arbitration process. This has been clearly provided in the Sri Lankan Arbitration Act no.11 of 1995 and it was used as a strategy in different Arbitration Acts. Support of national courts was clearly explained in the case law *Bino tires vs Elgitrade lanka 2010,* which was heard at the Supreme Court of Sri Lanka, where honorable justice Marsoof has stated that when there is an arbitration clause in the contract agreement it is condition precedent to follow it and obtain an award before getting a judgement from a national court. Further, he adds that in the case of *hotel galaxy v mercantile hotel*,1987 according to (*Refer to Appendix C)* Section 5 of Sri Lankan Arbitration Act when there is an arbitration clause national courts do not have jurisdiction until there award is obtained by parties through arbitration. (Supreme Court law reports of Sri Lanka, 2010).

Unlike the lawyer duties when compared with arbitrator's duties arbitrators are responsible to act in an independent and impartial manner since they are independent third parties and they have to carefully investigate the evidence provided apply the

relevant knowledge and the ethics when the decision is going to be made regarding the disputed issues (Expert Evidence,2016). This strategy is having a significant impact on receive an award without having time-consuming process in arbitration. As an example if for a construction industry dispute if the lawyer has appointed it will be a problem because we have different standard documents referring to enter into a contract compare to the general a contract such as drawings, specifications, general conditions, particular conditions. It was globally recognized that the quality of arbitration is depending on the qualification and skills of arbitrators choosing the arbitrators according to the latitude of disputes is considered a significant feature of arbitration (Kluwer, 2003). Further, he states that through that parties can exercise their freedom of choosing arbitrators that will be helpful for obtaining a satisfactory award for both parties. It is the duty of the parties to measure whether arbitrators have been chosen considering the frame of arbitration process, who will be flexible for them to solve the disputes without leading to time consuming and cost effective process.(Webster, 2002). Further, he states that after submitting the disputes to resolve through arbitration most critical factor of the arbitrating is selection and appointment of arbitrators according to the parties will.

2.9 Summary

Main purpose of this chapter is to identify the concept of party autonomy and recognition of concept of party autonomy in local and international arbitration process. According to the literature review researcher has further identified ten elements of party autonomy which are form of the arbitration agreement, freedom to choose arbitration appointment and the procedure, appointment procedure of arbitrators, ad hoc/institutional/expedited procedure, governing law of arbitration, settlement, confidentiality, interim measures of protection, exclusion agreement and use of evidence.

It is important to consider other strategies, which support the elements of party autonomy to conduct the arbitration process without leading the arbitration to time consuming and cost effective ADR method. Therefore, it has identified through

strategies in arbitration process such as supportive role played by the national court system, duties of arbitrators, awareness of time limits in the arbitration process, use of expert evidence, appointment of arbitrators who has knowledge in construction, professional ethics .

It is important to use arbitration rather than wasting time in litigation. Therefore, through literature review it is identified importance of recognizing the above elements and strategies for receive an award within a reasonable period in the arbitration process.

CHAPTER III

3.0 RESEARCH METHODOLOGY

This chapter focuses on describing the research methodology that is used to conduct the research and to explain the intended pathway to achieve the objectives of the study. The research design, research process, methods of data collection, analysis and the statistical tools, which were used for the analysis, were also discussed in this chapter. Research methodology facilitate to answer the research problems and achieve the research objectives set by researcher bringing the research data from here to there (Yin, 1994). The research consists of primary data as well as secondary data to achieve the research objectives and research methods has been chosen according to the set research objectives.

3.1 Background Study

This research Background study of the research was carried out to gain knowledge of research area and importance of local and international arbitration has been highlighted with the concept of party autonomy and most importantly the advantage of choosing arbitration in multinational business contracts and the current trend of using arbitration as the ADR method. Further, identified the importance of recognizing party autonomy in the arbitration process locally and internationally and the way it drives the parties to have a flexible dispute resolution process compare to the litigation.

3.2 Problem Statement

The researcher has identified the importance of recognizing the party autonomy in the initial stage of construction contract and the way this guiding principle drives parties to receive an award in a satisfactory manner. Further, when this principle is not used in an effective manner the way it will lead to the confusion and loss of control in arbitration process.

3.3 Research Design

The researcher has designed an important element of research to understand the type of data required to collect and use to analyze the data and the way to answer the research problem. This descriptive study consists of four phases where primary and secondary data were used with qualitative approach

Firstly, research philosophy has been identified to define the way of carrying out the research. Secondly, an appropriate approach has been selected for theory reviewing and testing the opinion, and finally research techniques have been selected for data collection and data analysis.

3.3.1 Research Onion

Figure 3.1 Research Process (Source: Institute Numeric, 2012)

Research onion was developed specifically for this research identifying different layers in order to conduct the research in a more expressive manner, which is

explained in the figure 3.4-research onion. In these process four layers, namely research philosophy, research approaches, strategies of inquiry and research techniques have been identified. The research philosophy has been identified as constructivist. Constructivist philosophy understands theory generation by getting the responses from multiple participants and social and historical construction (Creswell, 2009). Subsequently, as the research strategies researcher has used literature survey, document survey, expert Interviews and as the research approach, qualitative research approach was chosen. The qualitative approach was designed from the constructivist paradigm (Bryman & Allen, 2011). Further, they have ascertained that aim of this approach is to investigate the reality of the current situation in the industry. When the type of knowledge that can be gained through qualitative method is taken into consideration, it can be identified that it is subjective and the aim of the qualitative method is exploratory and observational. Characteristics of the qualitative method are flexible, continuous view of change, nature of data is particular, and analysis is thematic (Methods of data collection and analysis, n.d). Therefore, an interview survey has to be carried out with the freedom of questioning (Feilzer, 2010).

3.4 Research Design Process

3.4.1 Phase I: Literature Survey

A comprehensive literature survey was carried out by using peer reviewed journal articles, text books (print and electronic), periodicals (print and electronic), thesis and dissertations, reports, web pages, other online works, and unpublished materials. The literature survey helped to identify the introduction to party autonomy and the concept of party autonomy in local and international arbitration process and finally the elements of party autonomy. Therefore, the researcher has identified the importance of recognizing party autonomy and the confusions parties are facing when the concept of party autonomy was not used in a proper manner and the way these confusions are leading to dissatisfaction in arbitration.

Elements of party autonomy identified through literature review are form of arbitration agreement, freedom to choose arbitrator appointment and procedure for appointment, ad-hoc, institutional and expedited procedure, governing law of arbitration, settlement, confidentiality, interim measures of protection, exclusion agreement, evidence etc.

Furthermore, through literature review strategies in the arbitration process were identified such as supportive role play by the national court system; duties of arbitrators; awareness of time limits in arbitration; use of expert evidence; appointment of the arbitrators who has knowledge in construction; professional ethics of parties and time awarded for parties to present the document during arbitration process such as statement of claim, statement of defense and supportive documents.

3.4.2 Phase II: Document Survey

Document survey was carried out to investigate the elements of party autonomy and strategies using the documents such as:

Arbitration Act No.11 of 1995 (Refer the Arbitration Act *APPENDIX C* in International Chamber of Commerce rules (ICC Rules) United Nations Commission on International Trade Laws (UNCITRAL Laws)

3.4.3 Phase III: Expert Interviews

Expert Interview is one of the popular methods utilized to get the practical knowledge of the research other than writing the research based on literature-reviewed data (Dalkey & Helmer, 1963). Further, he states that when the number of experts giving their opinion about the research area is considered as a group communication process for a specific issue with detailed examinations, it enables the researcher to get the current practical opinion about the research problem.

Qualitative code analysis determines the significance of data which are coded identifying the categories and group of interviewees, and if the collected data suitable for those categories or not (Fellows and Lui 2003). Further, they elucidate that Codebase analysis is used to observe important concepts for effective interpretation. Coding is the way you define how you are analyzing your data (Gibbs, 2007). Therefore, the researcher has carried out code analysis for the elements of party autonomy and the strategies of party autonomy and has identified the code for each element and strategy of party autonomy in order to design the framework of the party autonomy in the arbitration process.

In this study, researcher has used the codebase analysis to t interpret data in a more effective manner.

3.5 Research Techniques

Research Techniques contain data collection instruments and data analysis techniques (Amarathunga, Heigh and Thurairajah (2007).

3.5.1 Data Collection Instruments

The expert interview survey was used to collect the data to fulfil objectives 2 and 3. A comprehensive literature survey was carried out as described in the phase I, to review the similar research to identify the appropriate questions for the expert interview.

3.5.2 Expert Interview

Interview survey is a method of collecting data through presenting the research data orally by researcher and getting the reply in terms of verbal responses (Kotahari, 2004, pp.97). The expert interview was carried out for data, which cannot be researched through literature review in order to fulfill the requirement of designing the framework of party autonomy in arbitration. After conducting, a comprehensive literature review researcher has identified elements of party autonomy and strategies

of party autonomy, which directs the arbitration process and experts who were interviewed were asked to propose the elements and strategies to design the framework of party autonomy in arbitration.

3.5.3 Sample Size

After conducting a feasibility study and the literature review, it was identified that the sample size is 15. The sample was selected from local and international construction practitioners, arbitrators, project managers who are experts and practicing arbitration processes.

3.5.4 Data Analysis

The researcher has used case law analysis and content analysis to analyze the data. Content analysis is one of the most popular methods used by researchers as a research technique and content analysis provides the main three research approaches such as conventional, directed and summative (Hsieh and Shannon,2005). In addition, they state that the main characteristic in the content analysis is directly delivering coding categories from text data and analysis is done with the use of relevant theory or research findings. The main purpose of content analysis is as follows:

- Elaborating the characteristics of content
- Understanding the important elements of content
- Presenting the important aspects and characteristics of content
- Supporting the argument through findings
- Providing the attitude and behavioral responses through communication (Obaid,2011)

After conducting a content analysis, the same was used to analyze the qualitative data, which were collected through expert interviews. Code analysis has been used to interpret data and to understand the themes and it takes a significant amount of time and effort to carry out the process wisely (Farrell, Sherett and Richardson, 2016).

As Christians and Carey suggest, “coding is the data analysis process that breaks the text down into the smallest units and reorganizes these units into relatable stories.” (Yi, 2018). Therefore, researchers have transferred the interview data into written from verbatim and this method is called Jefferson system (2004). Even though itis time- consuming it can be considered productive as it has identified why these elements and strategies in party autonomy are essential and how it can incorporate in to current system

The researcher has used the case law analysis as well to prove the importance of using the elements of party autonomy and the strategies of party autonomy in the arbitration process.

3.6 Summary

The aim of this chapter was to explain about the research methodology used during the research. In order to achieve the aim and objective of the research the qualitative research approach was used by the researcher. This chapter consists of background study of the research, research process, and research design and different layers of research methods were explained through research onion, research design process and there are three phases of literature survey, document survey and Delphi method.

Research techniques consist mainly of data collection instrument and data analysis technique. Finally, data-analyzing technique identified in this chapter is content analysis.

CHAPTER IV

4.0 ANALYSIS AND RESEARCH FINDINGS

4.1 Introduction

Research methodology describes the research methods used to collect data to achieve the research objectives and this chapter focuses on explaining the analysis of the findings of the research. This chapter consists of most important data of the research and comprehensive literature review was carried out to identify the main elements of party autonomy in the arbitration and other strategies used in arbitration process. After that, interviews were carried out to verify the findings of literature review and to design a framework of party autonomy identifying the most suitable elements of party autonomy and strategies that could be used to have a satisfactory award for both parties through arbitration.

As the researcher has done a qualitative research, it is quite a complex process to identify the current situation and improvements to the contemporary life depends upon the intimate understanding of participants (McCracken, 1988).

4.2 Discussion of findings of elements of party autonomy and strategies of party autonomy

As the data collection, method interviews were carried out after identifying the arbitration practitioners in the construction industry who have over 10-15 years of experience more than and who are experts in arbitration. The Interview was carried out as per the guidelines mentioned in subsection 3.6.2 in chapter 3. Furthermore, all the interviews took thirty minutes to forty minutes

4.2.1 Objectives of Interviews and Design of Interview Guideline

The main objective of the interview was to verify the elements and strategies identified through literature review and to propose suitable elements of party autonomy and strategies for arbitration in Sri Lankan construction industry based on data gathered experts who have practiced arbitration for many years in the

construction industry. Hence, interview guideline was designed using the elements, strategies identified through literature review, and experts asked to propose the elements of party autonomy in arbitration, explain why those elements and strategies are suitable, and propose the ways to incorporate those elements to current system.

The interview guidelines include section A and Section B. Section A was designed to collect the data regarding the background information of arbitration experts in the construction industry and section B was designed to gather the specific information to achieve the third objective of proposing suitable elements of party autonomy and strategies for arbitration in Sri Lankan construction industry to receive an award within a reasonable time in arbitration without having a time consuming process. ***(****Refer Appendix E).* The selected construction arbitration practitioners have gained experience in many contracting, consulting and client organizations as well as many construction projects in which they settled the disputes through arbitration. All the interviewees had more than 10-15 years of experience in the construction industry. In table, 4.1 details of interviewees are explained in respect of the number of interviewees, their designation and years of experience.

Table 4.1 Details of interviewees

No	Profession of Interviewees	No of years' Experience
A	Engineer	15 years
B	Engineer and Quantity surveyor	20 years
C	Quantity Surveyor	20 years
D	Civil Engineer	30 years
E	Construction Lawyer	40 years
F	Construction Lawyer	40 years
G	Lawyer	15 years
H	Quantity Surveyor	30 years
I	Civil Engineer	30 years
J	Project manager and Civil Engineer	15 years
K	Quantity Surveyor	20 years

No	Profession of Interviewees	No of years' Experience
L	Engineer	30 years
M	Quantity Surveyor	30 years
N	Lawyer	10 years
O	Quantity Surveyor	10 Years

4.2.2 Results of Interviews and Document Survey

The results of the interviews were analyzed as described in the methodology chapter *(Refer Appendix A).* In literature review, it was identified that the elements of party autonomy, which helps to resolve the disputes within reasonable period in arbitration process, are elements such as form of the arbitration agreement; whether it is suitable to use the arbitration clause or submission agreement in arbitration; freedom to choose an arbitrator through the agreement of parties or arbitration institutes or professional institutes or national courts or list system; freedom to conduct the arbitration procedure as an ad-hoc procedure or institutional procedure or expedited procedure; the governing law of arbitration such as the law governing the arbitration proceedings or law governing the place of arbitration and role of courts in arbitration proceedings or law applicable to the enforceability of award or public policy or economic policies; settlement while arbitration proceedings are going on using conciliation or mediation or expert determination or any other method parties prefer or think fit to the situation and securing the confidentiality in the arbitration such as holding arbitration in private manner or implied confidentiality or signing a confidential form by the parties , interim measures of protection or exclusion agreement .

Strategies identified through literature review were supportive role played by the national court system, duties of arbitrators, awareness of time limits in the arbitration process, use of expert evidence, the appointment of arbitrators who have knowledge in construction, professional ethics of parties, time awarded for parties to present the documents and nationalities of parties.

The above findings through literature review were developed through the interviews. Interviewees were asked to provide their opinion regarding those literature review findings and elements of party autonomy and the strategies of party autonomy. Most of the interviewees agreed on those findings, they provided different comments about the use of those elements and strategies and the way it was not used properly leading the arbitration process to become lengthier and unpleasant dispute resolution method.

4.2.3 Findings of Summary of Elements of party autonomy in Sri Lanka

Findings of party autonomy reveals that elements of party autonomy should be chosen wisely and there are some situations when suitable elements of party autonomy were not chosen it would lead to arbitration to become time consuming and a very expensive process. Therefore, interviewees have recommended using these elements in the pre commencement of arbitration process and all the parties should be aware of the need of using these elements wisely in order not to make arbitration another type of litigation.

Table 4.2 –Summary of Elements of Party Autonomy

Elements of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Form of arbitration agreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Freedom to choose Arbitration Appointment	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Freedom to choose Arbitration Procedure	✓	×	✓	✓	×	✓	×	✓	✓	×	×	✓	✓	×	×	×	✓
Governing Law of Arbitration	✓	✓	✓	×	✓	✓	×	✓	×	✓	✓	✓	×	×	×	✓	✓
Settlement	✓	✓	✓	✓	✓	✓	✓	×	✓	×	✓	✓	×	×	✓	✓	✓
Confidentiality	✓	×	✓	×	×	×	✓	×	✓	×	✓	✓	✓	×	✓	×	✓
Interim measures of Protection	✓	✓	✓	×	✓	✓	×	✓	✓	×	✓	✓	×	✓	×	✓	✓
Exclusion Agreement	×	✓	×	×	×	✓	×	×	×	✓	✓	×	×	×	×	×	×
Use of Evidence	✓	✓	✓	✓	✓	×	×	✓	✓	×	✓	✓	×	×	×	×	×

This summary of findings (Appendix A-Interview Analysis Table 1) as reflected in the table consists of elements of party elements. Interview Analysis have been used to propose the suitable elements in arbitration process. Findings reveal that there are some elements have been identified only through literature, and some elements have been found through document survey regarding the Arbitration Act. Further, industry practitioners have given their opinion about the elements of party autonomy to be used to resolve arbitration within a reasonable period. Not all the interviews have agreed with the use of all elements in the arbitration process and their agreement and disagreement have been displayed in the table.

4.2. 4 Findings of Summary of Sub Elements of party autonomy in Sri Lanka

Findings of sub elements reveals that sub elements have to be chosen wisely than the elements, therefore some sub elements would only be suitable when specific problems are raised in the arbitration process and for the general arbitration procedure use of sub elements does not give a specific advantage.. Further, some sub elements can be used when one sub element has been used. For example, if parties do not have a valid arbitration clause and a dispute arises between parties then they can have a submission agreement to arbitrate. Further, in a situation where freedom to choose arbitration procedure have been chosen referring to the agreement of parties but parties have reached an issue regarding the appointment of chief arbitrator they can get the support of national court system and parties can continue the arbitration process without having a serious issue. If parties wanted to use ad hoc, institutional or expedited procedure it is recommended to use it wisely. For instance, if parties want specific institutional rules to be followed they can use the institutional procedure and they wanted to have arbitration in an independent manner they can use ad-hoc arbitration procedure. However, if parties want quick process of arbitration they can use the expedited procedure in the arbitration.

In addition, when parties are moving to arbitration it is important they decide the suitable law for the arbitration as well as the place of arbitration because if not later there would be problems to select the suitable law for the arbitration process. Unlike

other ADR Methods, arbitration gives the opportunity of settlement if parties want to settle in the middle of the arbitration process, when they have reached a decision find satisfactory and if they feel that arbitration is time consuming and not cost effective they can settle the dispute using any other ADR method they think fit for the situation. However, most of the parties in the arbitration are not aware of this sub element and as a result they are not benefited from it Signing a confidentiality form or securing the confidentiality is a one of the significant sub elements in the arbitration, hence if parties do not conduct or they do not take actions to make the dispute between parties confidential it would create issues such as improper stake holder management and loss of company reputation and the business relationships.

Table 4.3 – Summary of Sub Elements of Party Autonomy

Sub Elements of party autonomy	**Literature**	**Arbitration Act**	**Interviewees**														
			A	**B**	**C**	**D**	**E**	**F**	**G**	**H**	**I**	**J**	**K**	**L**	**M**	**N**	**O**
Form of arbitration agreement																	
a. Arbitration agreement	✓	✓	✓	✓	✓	✓	×	✓	×	✓	×	✓	✓	×	×	✓	✓
b. Submission agreement	✓	✓	×	×	×	×	✓	×	✓	×	✓	×	×	✓	✓	×	×
Freedom to choose Arbitration Appointment																	
a. Agreement of the parties	✓	✓	✓	✓	×	✓	×	✓	✓	×	×	✓	✓	×	×	×	✓
b. Arbitration Institutes	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
c. Professional Institutes	✓	×	×	×	×	×	✓	×	×	✓	×	×	×	×	×	×	×
d. National courts	✓	✓	×	×	×	×	×	×	×	×	✓	×	×	×	×	×	×
e. List System	✓	×	×	×	✓	×	×	×	×	×	✓	×	×	✓	✓	×	×
Freedom to choose Arbitration Procedure																	
a. Ad-hoc Procedure	✓	×	✓	✓	×	✓	×	×	✓	✓	✓	×	✓	×	✓	**P**	×
b. Institutional procedure	✓	×	×	×	**P**	×	**P**	×	×	×	×	**P**	×	**P**	×	×	**P**
c. Expedited Procedure	✓	×	×	×	×	×	×	✓	×	×	×	×	×	×	×	×	×
Governing Law of Arbitration																	
a. The law governing the arbitration proceedings	✓	×	✓	✓	×	×	✓	×	✓	✓	×	✓	✓	✓	×	✓	

Sub Elements of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
b. Law governing the place of arbitration and the role of courts	✓	✓	×	×	✓	✓	×	×	×	×	×	×	×	×	×	×	×
c. Enforceability	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
d. Neutral site if there are foreign parties	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
e. Economic polices	✓	×	×	×	×	×	×	×	×	×	×	✓	×	×	×	×	×
f. Public policies in the place of arbitration	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
Settlement																	
a. Conciliation	✓	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
b. Mediation	✓	✓	✓	✓	✓	✓	✓	×	✓	✓	×	×	×	×	✓	✓	✓
c. Expert determination	✓	✓	×	×	×	×	×	✓	×	×	✓	✓	×	✓	×	×	×
Confidentiality																	
a. Arbitration held must be in private	✓	✓	✓	✓	✓	×	✓	×	✓	×	×	✓	×	✓	✓	×	✓
b. Implied confidentiality in every arbitration	✓	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
c. signing a confidential form	✓	✓	×	×	×	✓	×	✓	×	✓	✓	×	✓	×	×		✓

In this table of summary of findings *(Appendix A-Interview Analysis Table 1)* the way sub elements of party autonomy referred in the Interview Analysis is demonstrated .Findings reveal that there are some elements that has been identified only through literature and some elements that have been identified through document survey with reference to the Arbitration Act. Further, industry practioners have given their opinion about the elements of party autonomy and recommended them to be used in arbitration process. Not all the interviewees have agreed with the use of all sub elements in the arbitration process and their agreement and disagreement have been displayed in the table. It is important to use some sub elements only in the arbitration process wisely and in an appropriate manner.

4.2.5 Findings of Elements of Party Autonomy in arbitration process

Form of arbitration agreement states that parties could either go to arbitration using in writing an arbitration clause or using a submission agreement and it has given a choice to the parties to arbitrate according to their flexibility (Wijethilake,1998). Elements of the party autonomy plays the major role in the arbitration process because it shows the benefits parties could exercise in the arbitration compare to other ADR methods and it encourage the parties to use arbitration in order to have a reasonable solution for the arose dispute in legal manner.

Table 4-4. Form of arbitration agreement

Sub Elements of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. Arbitration agreement	✓	✓	✓	✓	✓	✓	×	✓	×	✓	×	✓	✓	×	×	✓	✓
b. Submission agreement	✓	✓	×	×	×	×	✓	×	✓	×	✓	×	×	✓	✓	×	×

Most of the interviewees were of the opinion that a clause should be used as a form of arbitration and they were explaining the significance of drafting a clause in the contract before entering to the contract because it gives enough freedom for them to choose arbitration. *Most of them responded why they have selected clause as a form of arbitration because parties have freedom to decide whether they are moving towards with arbitration and the way they want to control the procedure before dispute arise between parties and if not it would create the problems such as language, place and action that are going to be used in arbitration*. Further, interviewees who have commented submission agreement as the form also have commented that it would give freedom for them to design the procedure according to the substance of dispute. Accordingly, they can use arbitration only if they want as they have enough freedom to exercise other suitable ADR methods.

Table 4-5 Freedom to choose Arbitration Appointment

Sub Elements of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. Agreement of the parties	✓	✓	✓	✓	×	✓	×	✓	✓	×	×	✓	✓	×	×	×	✓
b. Arbitration Institutes	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
c. Professional Institutes	✓	×	×	×	×	×	✓	×	×	✓	×	×	×	×	×	×	×
d. National courts	✓	✓	×	×	×	×	×	×	×	×	✓	×	×	×	×	×	×
e. List System	✓	×	×	×	✓	×	×	×	×	×	✓	×	×	✓	✓	×	×

Freedom to choose arbitrator appointment means where parties to arbitration has given an opportunity to decide whether they wanted to appoint sole arbitrator or number of three arbitrators and most significant fact is parties choose a construction arbitrator depend on the suitable of dispute rather than appointing a general lawyer for the arbitration or panel of construction arbitrators which would really helpful to receive an award in effective manner (Latham & Watkins,2015).According to the findings in the interview, most of the interviewees were in an opinion to choose the arbitrators considering the agreement of the parties. Because it is essential to have formal procedure to appoint arbitrators and further they have commented that, it would not create future problems regarding the arbitrator appointment since they can select the arbitrators whom they think fit for the situation. *Most of interviewees commented that having the formal procedure would help parties to consider the arbitrators past experience in arbitration in order to ensure that they have conducted the arbitration process in impartial and independent manner*. Further interviewees commented that it is better to appoint the arbitrators through arbitration institution since institution has a formal procedure where they can select experienced and suitable arbitrators according to the dispute arise between the parties. *In addition,*

interviewees who commented that transferring list system is a better method to choose the arbitrators, added that list system would allow the parties to choose the suitable arbitrators as they can delete or add arbitrators names they wish to proceed and finally they would get the more suitable arbitrators after transferring the list of arbitrators who can be used for arbitration.

Table 4-6 Freedom to choose Arbitration Procedure

Sub Elements of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. Ad-hoc Procedure	✓	×	✓	✓	×	✓	×	×	✓	✓	✓	×	✓	×	✓	✓	×
b. Institutional procedure	✓	×	×	×	✓	×	✓	×	×	×	×	✓	×	✓	×	×	✓
c. Expedited Procedure	✓	×	×	×	×	×	×	✓	×	×	×	×	×	×	×	×	×

There is a disadvantage in the arbitration act to the parties hence it has not explained the types of procedures parties can use to agree the arbitration procedure and it seems like arbitration act need to be updated considering the above facts explained in the table 4 .6 Freedom to choose Arbitration Procedure.

According to the findings in the interview, most of the interviewees were of the opinion of using ad-hoc arbitration procedure using the UNCITRAL rules of arbitration. *Accordingly, they have commented that it would provide more flexibility to parties to design the arbitration procedure according to their would, whereas institutional arbitration may impose certain rules and regulations on the parties whether they like or not*. Further, interviewees who commented on the institutional procedure stated that some issues might arise when they are using ad-hoc procedure. As an example, if parties cannot agree for the arbitrator appointment then they have to get the support form national court system and issues arising in ad-hoc procedure

they have to run before the court hence there is no institutional rules to guide the parties. *Therefore, interviewees were of the opinion to select the procedure only when an expedited procedure is needed, as it is suitable only for some disputes.*

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Table 4-7 Governing Law of Arbitration

Sub Elements of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. Ad-hoc Procedure	✓	×	✓	✓	×	✓	×	×	✓	✓	✓	×	✓	×	✓	✓	×
b. Institutional procedure	✓	×	×	×	✓	×	✓	×	×	×	×	✓	×	✓	×	×	✓
c. Expedited Procedure	✓	×	×	×	×	×	×	✓	×	×	×	×	×	×	×	×	×

This is an important element in arbitration act hence compare to other ADR methods in the construction industry parties to arbitration could get a chance to select the suitable law in respect of arise disputes and further issues regarding the law could not aroused when arbitration process starts to hinder it's progress. Most of the interviewees were of the opinion it is better to select the law governing the arbitration proceedings as if not it can create lot of conflicts during the arbitration proceedings such as laws related to the place of arbitration and parties' nationalities, public policies of the country. They were also of the opinion that if the parties are from the same country, they could agree for their country law. However, if the parties are from different countries they have to agree for law governing arbitration. *Interviewees who have selected the neutral site commented that when parties to the arbitration are from two different foreign entities it would be better to select the neutral site. As an example if parties are from China and Sri Lanka they can go for Singapore arbitration law rather than considering Chinese law or Sri Lankan law to minimize the conflict of laws between the parties.*

Table 4-8 Settlement

Sub Elements of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. Conciliation	✓	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
b. Mediation	✓	✓	✓	✓	✓	✓	✓	×	✓	✓	×	×	×	×	✓	✓	✓
c. Expert determination	✓	✓	×	×	×	×	×	✓	×	×	✓	✓	×	✓	×	×	×

According to the findings from interviews most of the interviewees were of the opinion that if parties want to settle while the arbitration proceedings are ongoing, the could use mediation as it is the most suitable ADR method. Accordingly, mediator could not have any influence on the parties so parties can agree on their own procedure which they think fits considering the arbitration process done so far and parties could find their own ways to settle rather than a getting an opinion from another third party who could look beyond the things they agreed in the contract agreement. Further, *interviewee who has selected the expert determination as the settlement method were of opinion that experts could determine the most suitable way to settle considering the technical nature of the disputes arose between parties.*

Table 4-9 Confidentiality

Sub Elements of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. Conciliation	✓	✓	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
b. Mediation	✓	✓	✓	✓	✓	✓	✓	×	✓	✓	×	×	×	×	✓	✓	✓
c. Expert determination	✓	✓	×	×	×	×	×	✓	×	×	✓	✓	×	✓	×	×	×

Most of the interviewees were of the opinion that arbitration could held in a private and confidential manner rather than having implied confidentiality in arbitration, which could minimize the increasing of anger between the parties. Even company secrets and issues could be confidential without having public glare and they have commented that parties can have their privacy notwithstanding the outcome of the proceedings. *Interviewees who commented that it is better to sign a confidential form stated that it would be safer to secure the confidential manner hence parties have to agree rules of confidentiality when they sign the confidential form.*

Table 4-10 Interim measures of Protection

Sub Elements of party autonomy	Literature	Arbitration Act	Interviewees													
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Interim measures of Protection	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

All the interviewees were of the opinion that interim measures of protection should be used until the completion of the arbitration process (final award). Both parties benefit by getting an interim protection and if not they could face issues when securing their claim. Interviewees commented the benefit of using it is finally getting an award, which would be valuable for both parties, rather than just getting the award in arbitration, which would only benefit one party. *Further, they stated that it would secure the natural justice in arbitration without making it disadvantages to any party in arbitration.*

Table 4-11 Exclusion Agreement

Elements of party autonomy	Interviewees														
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Exclusion Agreement	×	×	×	✓	×	×	×	×	✓	✓	×	×	×	×	×

Most of the interviewees recommended not using the exclusion agreement as it can create a conflict in the arbitration award if there are errors in the award, in case award does not cover all the disputes that arose between the parties, or if there are problems in public policy or the impartiality and independence of the arbitrators. *If there is an exclusion agreement for appeal it could be a disadvantage for the parties to set aside the award even when award is not correct.* There were some interviewees who were of the opinion of using the exclusion agreement and getting the benefit of securing the award only considering the arbitrators and parties' opinion without having the interference from national courts to set aside the award.

Table 4-12 Use of Evidence

Elements of party autonomy	Interviewees														
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Use of Evidence	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

As the final element of party autonomy all interviewees have recommended to use the evidence in the arbitration process and they commented that it is important to confirm the documentation and opinions provided by the parties to have more validity in order to give a correct award rather than just finding the solution to the disputes arose between the parties. *Further, they commented that it is parties' freedom to decide the weight of evidence according to the technical nature of dispute rather than being bound to evidence ordinance in Sri Lanka and if not it could be similar to litigation of evidence ordinance followed fully in arbitration process*.

4.2.6 Findings of Summary of Strategies of party autonomy in Sri Lanka

Strategies of party autonomy are providing the necessary help to parties in need when they are in trouble in arbitration as there are situations even the elements and sub elements used in the arbitration process are in need of additional support. Therefore, in those situations parties have the chances of securing the arbitration process through the strategies. As an example, if parties have to face a situation

where they cannot appoint an arbitrator as they agreed because some disagreements have been raised. At this stage, parties can get the help through national court system and they can choose a suitable arbitrator with the help of national court. In the arbitration process if parties feel that arbitration held was not impartial and independent, it implies that arbitrators has not performed their duties properly. In such a situation, parties receive the chance to challenge the arbitrators according to the situations explained under the duty of arbitrators. In addition, if parties are aware of time limits, it could be an added advantage for the parties to get necessary benefits such as correction of award, challenge the arbitrator and to set aside the award where award has been concluded in wrong manner.

Specially, in the construction industry if arbitrators appointed are having construction knowledge could understand the nature of dispute properly hence in the construction industry consists of specific documents to use only for construction purposes such as building scheduling rates, new rules of measurements and standard bidding documents etc. If parties have reached a situation where they need an expert to give guidance in arbitration, they can appoint an expert to minimize the issue of making arbitration a time consuming process.

Table 4.13 –Summary of strategies of Party Autonomy

Strategies of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Supportive Role-play by national court System	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Duties of Arbitrators	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Awareness of time limits in arbitration process	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Use of Expert Evidence	✓	×	×	✓	✓	×	✓	✓	×	✓	×	✓	✓	×	✓	✓	✓
Knowledge in Construction	✓	×	✓	✓	×	✓	×	✓	×	✓	✓	×	✓	✓	×	✓	✓
Time awarded for parties to present documents	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Nationality of parties and arbitrators	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

In the above table which consists of a summary of findings *(Appendix A-Interview Analysis Table 2)* the way strategies of party autonomy have been selected to propose the suitable strategies in arbitration process has been reflected. Findings reveal that there are some strategies, which have been identified only through literature, and some strategies has been identified through document survey referring to the arbitration act. Further, industry practitioners have given their opinion about the elements of party autonomy to be used in arbitration process. Not all the interviewees have agreed with the use of all strategies in the arbitration process and their agreement and disagreement has been displayed in the table below.

4.2.7 Findings of Strategies of Party Autonomy in arbitration process

Table 4-14 Supportive role-play by national court system

Strategies of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. To appoint an arbitrator where parties have a disagreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
b. To appoint a chief arbitrator where parties have a disagreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
c. To summon a witness to give evidence or produce documents	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

All the interviewees were in a position to agree the supportive role played by the court system and where there is, a disagreement created between the parties it could be difficult to proceed the arbitration without proper guidance. Therefore, all the interviewees explained that national court facilitates the arbitration process guiding the parties whenever needed and when the process has reached a deadlock.

Table 4.15 Duties of arbitrators

Strategies of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. Impartiality and independence	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
b. exercising arbitration in practical and expeditious manner	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
c. Natural justice	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
d. Duty of disclosure of past experience	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

All of the interviewees were of the opinion that arbitrator has a duty to act in an impartial and independence manner; hence if the arbitrators are not impartial and independent, the outcome of the award could not be genuine. As a result, people could lose trust in arbitration. In addition, some interviewees were of the opinion that it is important to exercise the arbitration in practical and expeditious manner while securing the natural justice in the arbitration process. This has been caused by expectation of the parties to get a suitable solution without a time consuming and prolonged process and avoid too many expenses especially in construction projects, as contract time is important. *There were few interviewees who had given their opinion regarding the importance of duty of disclosure to minimize the arbitrator appointment issues, such as being a past employee in one of the parties. In such situations, one party may receive an undue advantage compared the other party and therefore it is important to disclose the past experience of arbitrator.*

Table 4-16 Awareness of Time Limits in Arbitration process

Strategies of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Awareness of Time Limits in Arbitration process																	
a. Disagreement in appointment of arbitrator and chief arbitrator	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
b. Time limit to challenge arbitrator	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
c. Correction and enforceability of award	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
d. Set aside the award	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

All the interviewees were of the opinion that all parties should be aware of the time limits in arbitration process and if not it could create more conflicts in arbitration process rather than solving the disputes. They explained that time is a crucial factor and parties in the arbitration process are liable to act within the time limits when there are issues such as disagreement in appointment of arbitrator or time limit to challenge arbitrators or correction, enforceability and to set aside the award. *Further, interviewees explained that having a time limit is very important in the commercial world to reach a settlement*. Therefore, parties are forced to present their case within the time limit and get the maximum benefit of it and with this approach; parties would like to use arbitration agreement in their contract.

Table 4-17 Use of Expert Evidence

Strategies of party autonomy	Interviewees														
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Use of Expert Evidence	×	✓	✓	×	✓	✓	×	✓	✓	✓	✓	×	✓	✓	✓

Most of the interviewees were recommended using the expert evidence and they explained that parties could use industry experts to give evidence for a dispute. If the expert is impartial and independent, parties could get clear idea about the dispute. This could expedite the process and could get the most suitable option to solve the dispute, especially when the dispute is more technical in nature rather than common dispute that arise in construction projects. *Some interviewees were of the opinion the expert evidence should not be used again where arbitrators are appointed who are specialized in the technical nature of the disputes.*

Table 4-18 Knowledge in Construction

Strategies of party autonomy	Interviewees														
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Knowledge in Construction	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

All the interviewees were in favor of choosing an arbitrator or arbitrators who have knowledge in construction rather than a lawyer, who has knowledge in general law principles. The reason of this is construction field there are different standards referred by the construction professionals such as code of practice and standard documents such as Standard Bidding Document, Federation of Institute of Consulting Engineer's guidelines or building scheduling rates. Therefore, it is important to appoint an arbitrator who has knowledge in construction to understand the technical nature of the dispute and if not it could create more conflicts delaying arbitration.

Table 4-19 Professional Ethics of Parties

Strategies of party autonomy	Literature	Arbitration Act	Interviewees														
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
a. Act with "Integrity	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
b. Always provide "High standard of service	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
c. Act in a way that promotes "trust in the profession	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
d. Treat others with "Respect"	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
e. Take "Responsibility"	✓	×	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Almost all the interviewees agreed that it is important to follow the professional ethics in the arbitration process and if not it can create other conflicts which could lead to increase of an anger and issues in the business relationships. Therefore, all parties should agree honestly to follow the ethics. Similarly, most of the interviewees commented that there are some tough parties in the arbitration processes such as who do not respect each other; who are not honest with professional ethics; who always try to take their power over positions and companies rather than honestly involving in the arbitration process. Therefore, it is difficult to settle the parties through arbitration. *Further, a disadvantage of not following professional ethics could result in the parties losing in the arbitration and leading it to litigation. However, if all the parties are working honestly to be professional and ethical most of the disputes can be avoided*. Whenever they came across any disagreements, parties should be transparent to one another and respect other party to understand the situation.

Table 4.20 Time awarded for parties to present documents

Strategies of party autonomy	Interviewees														
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Time awarded for parties to present documents	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Most of the interviewees held the opinion that having a time period could expedite the process, hence award can be granted quickly. With this approach, wastage of resources and money would be minimal and parties cannot prolong submission to delay a settlement. *Further, they were of opinion that there is a direct impact of time to in arbitration process, because if arbitration is also time consuming like litigation it would be difficult to reach solution according to the parties will . Therefore, it is better to design the period in the initial stage of arbitration process with the agreement of parties to submit the relevant documents within a stipulated period in the arbitration process*. Some interviewees were of the opinion there should not to be a period and flexibility should be maintained in the arbitration process unlike the adjudication. Hence, they have commented that when there are limits like in adjudication process in certain occasions parties would be compelled to produce documents without the proper supporting particulars or relevant documents or documents with more errors etc. Therefore, it could result in an award, which is not reasonable for both parties.

Table 4-21 Nationality of parties and arbitrators

Strategies of party autonomy	Interviewees														
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Nationality of parties and arbitrators	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

All of the interviewees held the opinion of considering the nationality of parties when appointing the arbitrators in the arbitration process to minimize undue advantage being given to any of the parties. If the arbitrators are from the same

nationality that of the parties, it could be easier to understand cultural and egoistic aspects, however *in the case of different foreign entities are involved in arbitration process it is better to select the arbitrators from a neutral location rather than having the same nationality of arbitrator to either of the parties.*

4.2.8 Importance of recognizing the Elements of Party Autonomy and strategies of party autonomy

According to the findings interviewees identified that it is important to formulate the arbitration process recognizing the elements of party autonomy, because if not it could result in different failures in the arbitration process.

According to the SBD 02 Clause 1.1.2.1, "Party" has been defined as either or both the employer of the contractor as the context require.

Table 4.22 –Contractual parties' definitions

Employer	Contractor	Engineer
Clause 1.1.2.2: Employer is defined as the person named as employer in the contract data and the legal successor to this title to this person	Clause 1.1.2.3 The contractor is defined as the person named as contractor in the bid accepted by the employer and the legal successor to this person.	Clause 1.1.2.4 Engineer is defined as the person named in the contract data or any other competent person appointed by the employer and notified to contractor who is responsible for administering and supervising the execution of work.

Researcher has analyzed case laws and the content in order to understand the importance of elements and strategies of party autonomy in arbitration.

Case study 1: *(Refer to Appendix E)*

Company Names: Development Ltd., and another –SLR-246, Vol 2 of 2002

In this case, a dispute had arisen between parties in respect of a contract and the dispute had been referred to arbitration. In the meantime, Ceylinco decided to forfeit performance bond where another party try to take the interim relief of protection (which is an element in party autonomy) but Colombo District Court gave an injunction restraining the bank from paying on bond until arbitration is concluded.

However, due to the following ground district judge refused that injunction:

The Performance Bond was not conditional and it is an unconditional one payable on demand.

The arbitration would only be relevant to determine the failure in the performance of the main contract. The Bond was not conditional to finding the arbitrator.

This is a situation where one party has tried to claim the performance bond not in a fraudulent manner but another party has tried to take undue advantage through interim relief to stop it. Therefore, when the other party appealed for the judgment in appeal court, the appeal court also dismissed the case in the ground when a party to the contract gives performance guarantee to bank. When demand of guarantee is there, bank has to honor it and must pay accordingly without proof or condition and only exception is there when party demanding has done a clear fraud which bank could notice at its earliest.

Finally, the party who tried to stop the interim injunction failed as they had not followed the correct procedure.

Case Law 2 **:***(Refer to Appendix E)*

Company Names: Backsons Textiles Industries Ltd V. Hydro Industries Ltd

Interim measures of protection are designed in the arbitration act section 13*(Refer Appendix C)* to conduct the arbitration in meaningful manner. If the parties are in an arbitration process and defendant act in a fraudulent manner or going to receive

money from the bank from the bank guarantee, interim measures of protection are there to safeguard the parties and give a sudden relief for the parties. For instance, an injunction can be brought preventing the defendant's action. "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 claim which forms the subject matter of the dispute and 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: "(Section 13 of Arbitration Act 1995, Sri Lanka *(Refer to Appendix C)*).

In the ICC rules, they are known as "interim or conservatory measures". ICC (2012) Sri Lankan Arbitration Act is designed to provide a sudden relief for the parties. Hence, parties can exercise any situation when they need sudden relief during the arbitration and most institutional rules are designed identifying interim measures of protection.

In this case, while the arbitration process was going on one party tried to take undue advantage from the performance security in a fraudulent manner. Therefore, contractor raised this issue to arbitral tribunal where arbitral tribunal ordered to get the interim relief through the High Court.

It was held that, until the arbitral tribunal makes the final award, parties could go before the court and seek the interim relief to maintain the status quo (Marsoof, A. (2012).

Case Study 3 : *(Refer to Appendix E)*

Company Names: "Southern Group civil construction private limited vs. Ocean Lanka private limited" (2002)

In this case, party has failed to set aside the award within the stipulated time in the Arbitration Act according Section 32 of the Arbitration Act No. 11 of 1995.

The appellant applied to the High Court according to the section 31(1) read with section40 of the Arbitration Act, No. 11 of 1995 (the Act) *(Refer to Attachment C)*

for enforcement of an arbitral award made against the respondent. The respondent applied according to the section 32 of the Act to set aside the award. Under section 32 such application has to be made within sixty (60) days of the receipt of the award. The High Court consolidated both applications. Therefore, considering the above sections in arbitration act it was held that parties lost the chance of setting a side award and case was dismissed by the district court due to same.

Case Law 4: *(Refer to Appendix E)*

Company Names: Merchant Bank of Sri Lanka Ltd V D.V.D.A Thilakarathna

According to the Sri Lankan Arbitration Act parties are given the freedom to appoint the arbitrators as they wish. Nevertheless, in the case of *merchant bank of Sri Lanka LTD V D.V.D.A Thilakrathna case* there were several issues due to the problem where parties have not been agreed on the arbitrators. Therefore, parties have raised this issue to the arbitral tribunal regarding the impartiality and independent manner of the arbitrator, where one arbitrator has failed to disclose the experience information. As a result, it was considered that arbitrator in question is a past employee of one party, which makes him/her arbitrator, is bias to that party.

However, issues have been arising due to the impartiality and independent manner of the arbitrators *(*Kanag-Isvaran PC & S.S Wijerathna, 2011, P.317). It is important to consider the duty of disclosure when parties appointing arbitrators for arbitral panel. Since the parties had not considered it in the earliest stage of arbitration, the process has failed. (Kanag-Isvaran PC & S.S Wijerathna (2011)

Case Law 5 **:** *(Refer to Appendix E)*

Company Names: Mihali, international cooperation v Government of Sri Lanka

In the case of *Mihali, international cooperation v Government of Sri Lanka the two* parties were at a deadlock in the arbitration process due to concerns over the governing law, as there were two types of laws exercised by the two countries. In this case two countries have entered to the construction contract and when the

dispute arose between the parties they had a problem in the post commencement of arbitration process regarding the governing law of the arbitration process because parties have not considered the elements and strategies of the party autonomy properly. Therefore, honorable counsel Kanag-Isvaran has highlighted the fact whether parties have selected the place of arbitration. When parties have chosen the seat of arbitration, it means parties have selected the place where legal proceedings of arbitration going to be held. When dispute arise and obviously when seat of arbitration is chosen it means parties have selected the geographical place where arbitration going to be held. Therefore, it was held that the governing law of the place would be applicable for arbitration process. (Kanag-Isvaran PC & S.S Wijerathna (2011 P.70)

In the case of *Union of India V. Mc Donnel Douglas Corporation* the dispute was regarding the proper law governing the arbitration procedure whether the law governing arbitration proceedings was English Law or Indian Law,since seat of arbitration in the arbitration clause was London and law was in accordance with the Indian Arbitration Act 1940. Kanag-Isvaran PC & S.S Wijerathna (2011) P.393.The word "Seat", he suggested is a legal term of art ,meaning the legal place of the arbitration proceedings, by choosing the legal place of arbitration proceedings it chosen that the laws of that place govern their arbitration proceedings. Indeed, although the choice of seat also indicates the geographical place of arbitration. Kanag-Isvaran PC & S.S Wijerathna (2011). P.400.

Case Law 6: *(Refer to Appendix E)*

Company Names: Kristley (Pvt) Limited Vs. The State Timber Corporation (2002) 1SLLR 225

It is important for the parties to follow the said procedure in the Arbitration Act, if not it could be a reason to set aside the award. Therefore, it is extremely important to obtain the advantages of recognizing the elements and strategies of the party autonomy and if not due to the party's failure, it could result in setting aside a meaningful award. This case is a good example to prove the importance of

recognizing elements of party autonomy and stories of party autonomy in the arbitration process.

In this case, parties have failed to follow the set out procedure in the Arbitration Act. The procedure to be followed when parties have to enforce the arbitration award is stated in section 31 as follows;

"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.

(2) An application to enforce the award shall be accompanied by

(a) The original of the award or a duly certified copy of such award: and

(b) The original arbitration agreement under which the award purports to have been Made or a duly certified copy of such agreement."

Nevertheless, parties have submitted the award, which is not duly certified as the set out procedure. Therefore, it was held to set aside the award according to the section 32 of the Arbitration Act of Sri Lanka hence parties have provided the documents, for which they do not have, the capacity to enforce the award.

4.2.9 Proposed Elements and strategies of Party autonomy

Aim of the research was to propose a framework of party autonomy in order to receive an award within a reasonable time period without leading to a time consuming process in arbitration involving Sri Lankan Construction Industry, as there are situations where some parties make arbitration also time consuming and expensive ADR method without getting the maximum benefits of it by using the principle of party autonomy. Therefore, researcher has identified the problem of not using the principles of party autonomy and attempts to propose the framework and identified the need of framework of party autonomy and other supportive strategies that can be used to facilitate the arbitration.

Elements of party autonomy, which can be used, and strategies that can be used to support the arbitration was identified by the comprehensive literature review and

expert interviews were carried out to justify the findings of the literature survey. According to the literature review main ten elements of party autonomy have been identified as form of arbitration agreement, freedom to choose arbitrator appointment, freedom to choose the arbitration procedure, governing law of arbitration, settlement using any other ADR method parties prefer during ongoing arbitration process, using confidentiality in arbitration to preserve the relationships and to secure the company secrets between parties, interim measures of protection, exclusion agreement and final element was using evidence according to parties' will .

Furthermore, strategies identified through literature review were supportive role played by national court system, duties of arbitrators and awareness of time limits in arbitration process, use of expert evidence, knowledge in construction, professional ethics of parties, time awarded for parties to present documents and nationality of parties and arbitrators.

After conducting data code analysis the main topics and the sub topics in the element and strategies of party autonomy were identified. After that the final element to be discussed in each main topic or anchored topic was selected after considering the most highlighted and the suitable opinion for each element and strategies of party autonomy. In order to understand it easily researcher has identified a color code as well for each code, which was helpful to organize the final topic. Finally, researcher has analyzed the literature source for each element and strategy of party autonomy to identify the importance of using it in arbitration. In the below table it explains the frequency of each element and strategy of party autonomy and the literature source. Findings of expert interview revealed that elements identified through literature review were correct and most suitable elements and strategies to be used are as follows according to the content analysis and case law analysis.

In the figure 4-1 –Framework of using Elements of Party Autonomy and Strategies in Arbitration Process Sri Lanka

CONCEPTUAL FRAMEWORK

THE ELEMENTS OF PARTY AUTNOMY

- Form of Arbitration Agreement
- Freedom to choose arbitration appointment
- Freedom to choose arbitration procedure
- Governing law of arbitration
- Settlement
- Confidentiality
- Interim measures of protection
- Exclusion Agreement
- Use of Evidence

Proposed Elements, Sub elements and criteria's of party autonomy to receive and award within a reasonable time

STRATEGIES OF PARTY AUTONOMY

- Supportive role play by national court system
- Duties of Arbitrators
- Awareness of time limits in arbitration process
- Use of Expert Evidence
- Knowledge in Construction
- Professional Ethics of Parties
- Time awarded for parties to present documents.

ANALYSIS

1. **Form of Arbitration Agreement**
   a) Arbitration Clause
   b) Submission Agreement
2. **Freedom to choose arbitration appointment**
   a) Agreement of the parties
   b) Arbitration Institutes
   c) Professional Institutes
   d) National Court
   e) List system
3. **Freedom to choose Arbitration**
   a) Ad hoc Procedure
   b) Institutional Procedure
   c) Expedited Procedure
4. **Settlement**
   a) Conciliation
   b) Mediation
   c) Expert Determination
5. **Confidentiality**
   a) Arbitration held must be private
   b) Implied confidentiality in every arbitration
   c) Signing a confidential form
6. **Interim measures of Protection**
7. **Exclusion Agreement**
8. **Use of Evidence**

Criteria's for receiving an award in reasonable time arbitration

1. Using agreed Arbitration clause in the beginning of the contract
2. Agreement of the parties to select arbitrators
3. Ad hoc procedure to conduct arbitration more independently
4. Using Mediation as settlement
5. Use of interim measures of protection when there is a need
6. Chose the law governing the arbitration proceeding according to parties' will
7. Confidently could maintain through the arbitration process
8. Use of exclusion agreement only in situations parties think suitable
9. Being not bound to the evidence ordinance
10. All the strategies have been recommended to use accordingly.

1. **Supportive role play by national court system**
   a) To appoint an arbitrator where parties have a disagreement
   b) To appoint a chief arbitrator where parties have a disagreement
   c) To summon a witness to give evidence or produce documents
2. **Duties of Arbitrators**
   a) Impartiality and independence
   b) Exercising arbitration in practical and expeditious manner
   c) Natural justice
   d) Duty of disclosure of past experience
3. **Awareness of time limits in arbitration process**
   a) Disagreement in appointment of arbitrator and chief arbitrator
   b) Time limit to challenge arbitrator
   c) Correction and enforceability of award
   d) Set aside the award
4. **Use of Expert Evidence**
5. **Knowledge in Construction**
6. **Professional Ethics of Parties**
   a) Act with integrity
   b) always provide high standard of service
   c) act in a way that promote trust in the profession
   d) Treat others with respect
   e) Take Responsibility
7. **Time awarded for parties to present documents.**

Figure 2.1 Framework of using Elements of Party Autonomy and Strategies for Arbitration Process

According to the findings of the expert interview, it was proposed by the interviewees that, eight elements of party autonomy are more suitable to be used compared to ten elements reviewed through literature review. It is important to use the arbitration clause rather than using the submission agreement after a dispute arose between parties hence decisions such as arbitration procedure are to be used in arbitration, number of arbitrators, arbitration act and place of arbitration etc. If not, it could create many conflicts in the pre commencement of the arbitration as well as the post commencement of the arbitration process. As the second element interviewees suggested that it is better to appoint the arbitrators according to the agreement of parties to minimize future disputes regarding the arbitrator appointment, if not it could cause setting aside the award in the final stage if there are is any disagreement regarding the arbitrator appointment. The Third element suggested by most interviewees was ad-hoc procedure due to the flexible rules that could adopt in the arbitration process. As the fourth element, interviewees suggested that law governing the arbitration proceedings is more suitable to select, if not conflict of laws could affect arbitration process leading to confusion. As the fifth element if parties want to settle during ongoing arbitration since they feel that it is too expensive and time-consuming most of the interviewees commented that choosing the mediation will provide more satisfaction for parties, as they can select the most preferable choice they think will fit for the situation. As the sixth element interviewees suggested that it is important to hold the arbitration in a private and confidential manner rather than having public glare. Further, interviewees suggested that as seventh and eight elements, it is important to consider the interim measures of protection, which could be used when parties want a sudden remedy in the arbitration process and it will be flexible for parties to decide the use of evidence in arbitration rather than being bound to Evidence Ordinance of Sri Lanka. When it comes to the strategies interviewees almost agree to all the above strategies to be used in the arbitration process in the arbitration process.

4.2.10 Identification of elements and strategies of party autonomy

Arbitration Act *(Refer Appendix C)*

According to the No.11 of 1995 (*Refer Appendix C*), Sri Lankan Arbitration Act elements of party autonomy used are explained in the table 2-4 Sri Lanka arbitration act rules. Sri Lankan arbitration act has given freedom to parties to the arbitration to take decision in respect of number of arbitrators they want appoint and the procedure whether ad hoc or institutional and to decide a convenient place as they think suitable making arbitration procedure more flexible (K.Kanag-Isvaran, 2016).

Table 4.22 Sri Lanka arbitration act rules (Source: K.Kanag-Isvaran, 2016)

Section	Element of Party Autonomy
Section 6	Parties are given freedom to decide the number of arbitrators
Section 7	Parties are given freedom to decide on the procedure for appointing arbitrators
Section 16	Parties are given freedom to decide the place of arbitration
Section 14	Parties are free to agree on any other ADR method to settle during the arbitration process
Section 15	Parties are given freedom to amend or supplement the prayers for relief during the arbitration process.
Section 17	Parties are given freedom to decide the manner of evidence to be used for the arbitration process
Section 22	Parties are given the freedom to decide on the rules of law substance to the dispute
Section 27	Parties are given freedom to request correct the award if there are any errors in arbitration award
Section 38	Parties can have in writing agreement to exclude the appeal in relation to the award.

Further, he states that purpose of giving party autonomy to the new act was to make a flexible and positive environment to exercise the arbitration minimizing the several problems and rigid procedure in the old act.

United Nations Commission on International Trade Law Rules (UNCITRAL)

(Refer Appendix F)

In table, 2-5 United Nations Commission on International Trade Law Rules has been explained.

Table 4. 23 United Nations Commission on International Trade Law Rules (Source: United Nations Commission on International Trade Law Rules) *(Refer appendix C)*

Article Number	**Element of Party Autonomy**
Article 6	Parties are given freedom to decide on the appointing authority of arbitrators
Article 7	Parties are given freedom to decide on the number of arbitrators
Article 10	Parties are given freedom to decide the procedure of appointing arbitrators
Article 12	Parties are given freedom to challenge the arbitrator if they have justifiable doubts about the impartiality of arbitrators
Article 19	Parties have freedom to decide the language of arbitral proceedings
Article 20	Parties have freedom to request the interim relief when they want sudden protection to secure the claim
Article 21	Each party have the burden of proof to prove the facts they have provided in their statement of claim or statement of defense
Article 22	Parties have freedom to decide whether they are going to use expert witnesses for specific issues
Article 36	If parties are expecting to settle during the arbitral proceedings they have freedom to do it
Article 38	Parties have freedom to request the correction of any errors in the award

4.3 Summary

This chapter contained the analysis and findings of the research. Researcher has finally achieved the aim of the research by achieving the research objectives, and research problem has answered that designing the framework using the elements of party autonomy and strategies could be used in arbitration process in Sri Lanka. Findings of the interviews were very valuable to reach to the final judgments for designing the framework and it justified that research methodology selected was suitable to confirm the literature review findings and content analysis were used to analyze the qualitative data of the research.

CHAPTER V

5.0 CONCLUSION AND RECCOMENDATIONS

5.1 Introduction

This chapter explains the conclusion and recommendations from the research findings. Additionally, the researcher at the end of this chapter while concluding the whole study has suggested further research areas.

5.2 Conclusion

Arbitration is one of most recognized dispute resolution method locally and internationally. It has so many benefits compare to the other alternative dispute resolution methods. In Sri Lanka, it is the only alternative dispute resolution method, which provides the final, and legally binding solution hence all the other methods do not have a separate act to conduct the dispute resolution process and provide a final and binding solution. If this method is used in a proper manner, it will provide a valuable solution to the parties who are suffering to get an award within a reasonable time through alternative dispute resolution processes. Specially, when it comes to construction projects it is a nightmare if there is a situation to use a lengthy and expensive dispute resolution process to settle. as disputes haven been arising between the parties and construction projects already have problems such as construction risks, conflicts, different parties, balancing of main key restrains such as cost, time quality and complexity issues etc. Therefore, this research aim at the main principle in arbitration ,party autonomy, to design a framework identifying the most suitable elements of party autonomy and strategies that could be used to solve the disputed without having a time consuming process and receive an award within a reasonable time.

Objective one - 1 identifying the elements of party autonomy and sub elements in the arbitration process.

This objective was achieved through the literature review and by referring the case law from books, journals, research papers and newspapers. First, identified the concept of party autonomy and the history of the concept in local and international arbitration process. Reviewing the literature about the concept of party autonomy guided the researcher towards the correct path to achieve one of the research objectives and elements and sub elements of party autonomy were identified. Elements of party autonomy identified are form of arbitration agreement, freedom to choose arbitrator appointment, freedom to choose the arbitration procedure, governing law of arbitration, settlement using any other ADR method preferred by the parties during an ongoing arbitration process, use of confidentiality to preserve the relationships and to secure the company secrets between parties, use of interim measures of protection to have a meaningful award in the arbitration process. Meanwhile, exclusion agreement and use of evidence have not been concluded as suitable elements to be used in all the situations and those two elements can only be used when parties think those are suitable for the arbitration.

Objective two - Identifying the importance of sub elements of party autonomy and strategies in arbitration process.

In order to achieve this objective further comprehensive literature review was carried out and document survey was carried out to identify the importance of each element and to identify the strategies, which can be used in arbitration process of Sri Lanka. Importance of each and every element was identified and strategies such as supportive role played by national court system, duties of arbitrators and awareness of time limits in arbitration process, use of expert evidence, knowledge in construction, professional ethics of parties, time awarded for parties to present documents and nationality of parties and arbitrators was identified and strategies play an important role in arbitration and if parties are aware of those strategies from the beginning of the arbitration process it will make arbitration more flexible and assist

in getting a meaningful award in the end of the process. Document survey was carried out using the Sri Lankan Arbitration Act No.11 of 1995 and the United Nations Commission on International Trade Law Rules, which is using for ad-hoc arbitration procedure.

Objective three- Propose suitable elements of party autonomy and strategies for arbitration in Sri Lankan Construction Industry.

Finally, after conducting the literature review elements, importance of elements, strategies used to design the expert interview were identified, and interview was conducted with construction arbitration practitioners in the construction industry. Party autonomy is the guiding principle/cornerstone of the arbitration to receive an award within a reasonable time in arbitration process. Recognizing the concept of party autonomy by the parties who are engaging with the arbitration process in the early stage is vital. All the interviewees were requested to propose the elements of party autonomy after selecting the suitable element they were further requested to provide the importance of recognizing such elements of party autonomy and the strategy, which can be used to reach a solution within a reasonable period without leading to a time consuming arbitration process in Sri Lanka.

Considering all the elements, seven elements of party autonomy has been identified which includes arbitration clause, agreement of the parties, ad-hoc arbitration, the law governing arbitration, mediation, interim measures of protection and sub elements were also identified to understand the importance of receiving an award within a reasonable time in arbitration. Strategies such as supportive role played by national court system, duties of arbitrators, awareness of time limits in arbitration, use of expert evidence, knowledge in construction, professional ethics of parties and time awarded for parties to present the documents were identified. It is essential to understand the way to design the arbitration process in a more flexible manner referring to suitable elements and strategies of party autonomy rather than using another method of dispute resolution process, which will be time consuming and will not give a final legally binding solution.

After considering all the research findings content analysis was done to develop the framework of using element of party autonomy and the strategies could be used for in arbitration process.

5.3 Recommendations

The significance of the recognizing the concept of party autonomy by the parties who are engaging in the arbitration process in the early stage is important, as then only parties will understand the way to design the arbitration process in a more flexible manner without using another method of dispute resolution process, which will be time consuming and to where they will be losing in the end. Therefore, it is important to first identify the elements of party autonomy, which is suitable for them depending on the situation. It is better to draft an arbitration clause in the initial stage in the construction contract identifying the nature, complexity of the construction project and construction parties. When drafting an arbitration clause it is important to consider arbitration act, number of arbitrators, procedure language and especially proper law. Secondly, it is important to consider the arbitrator appointment procedure according to the agreement of parties to minimize the future disagreements in the arbitration process. Thirdly, to consider the suitable arbitration procedure, whether it is ad hoc procedure or institutional procedure should be decided depending on the substance of dispute and parties behavior because then only it will provide more flexible procedure in the arbitration process for parties. Fourthly, choosing the proper law for the arbitration process especially when foreign parties are also involved in the contractual process to minimize the further conflicts regarding which law should be used to solve the disputes. Mediation can be selected as the settlement in arbitration process, it is a flexible, and the friendliest settlement method compared to all other ADR methods. There is a significant impact to arbitration award when arbitration process carried out in a private and confidential manner to further safeguard the company policies and to avoid publicity of company issues to safeguard their reputation. Furthermore, benefit of interim measures of protection can be gained when parties are in a situation where they need sudden relief before the outcome of arbitration comes to secure the claim. Using exclusion agreement only

where parties specially agree to use it and if not it is better to keep the flexible procedure to correct or set aside the arbitration award. As final element of party autonomy, using the evidence according to the agreement of parties without being bound to evidence ordinance in Sri Lanka has been identified hence it not easy to follow the evidence when parties are bound with the evidence ordinance.

It is recommended to use the strategies of arbitration process such as supportive role played by national court system, duties of arbitrators and awareness of time limits in arbitration process, use of expert evidence, appointing arbitrators who has knowledge in construction, use of professional ethics of parties, time awarded for parties to present documents and nationality of parties and arbitrators to avoid future disputes in arbitration and to facilitate the arbitration process. Additionally, having elements and strategies of party autonomy documented in writing to be used time to time in arbitration will be effective, as it will minimize the issues in post commencement of arbitration.

It is recommended to design a period for arbitration considering the cost effectiveness without leading to time consuming process, hence in the Arbitration Act, there is no specific or reasonable time to receive an award and it is important to use the framework of element and the strategies of party autonomy time to time in arbitration process.

5.4 Further Research

This research proposes that there is a requirement to cover some areas and those areas can be considered as further researches.

Critical analysis of negotiation Vs arbitration in construction industry.

Comparison of elements of party autonomy and strategies in the pre commencement and post commencement of arbitration process.

Scope and specific limitations of party autonomy in international arbitration.

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APPENDIX A – INTERVIEW ANALYSIS

Data Coding Number	Main Category Headings (Anchor code)	Final Sub Category heading	Frequency	Meaning	Literature Sources
16	Documents	Amicable Procedure	69	it is important to get an amicable settlement in arbitration process because if not it will be time consuming and not inexpensive for the parties	Wherefore, in recent years, arbitration is the furthermost favored choice to reach to an amicable settlement (Dursun,2013). Experts will provide the impartial, independent opinion after the objective assessment providing parties an amicable settlement (Yanos,2012).
6	Private	Confidentiality	36	it is really important to keep construction companies disputes in confidential without having public glare because if not it will result not to preserve relationships, company reputation, company issues, further disputes between the parties	The meaning of confidentiality means there will be no any third party will get an opportunity to be present in arbitration process or hearings and mainly there will be no any disclosure of particular information to general public (Samuel,2017). Sri Lanka in the institution rules they have highlighted that confidentiality is ensured in the disputes resolved through institute and if parties want, they can sign a confidential form in order to maintain the confidentiality in arbitration. (ICLP, 1996).

Data Coding Number	Main Category Headings (Anchor code)	Final Sub Category heading	Frequency	Meaning	Literature Sources
9	Evidence	Correct	14	Evidence is really important to consider in arbitration hence unlike other ADR methods parties have given freedom to discover certain facts through evidence to identify correct measures.	arbitration act time limit given for the correction of award is 14 days and in order to set aside the arbitration award is 60 days according to the section 32 (1) of the arbitration act (Marsoof, 2012). He also asserts that when there are some complex disputes and it is difficult to find the correct path to find a solution expert can guide the parties showing the root cause of the dispute and the practical solutions available for it ((Hammes, 2012).
17	Nationality	different nationalities	6	it is important to consider different nationalities when foreign parties involve with arbitration process because if we have selected arbitrators having same nationalities it can be a undue advantage for the enforcement of award	when parties to the arbitration are of different nationalities it is a mandatory rule to appoint an arbitrator who is having neutral nationality to both parties (UNCITRAL Rules)

Data Coding Number	Main Category Headings (Anchor code)	Final Sub Category heading	Frequency	Meaning	Literature Sources
13	Expert	Expert guidance	4	Expert guidance is needed when parties required a solution where they have reached to a deadlock in arbitration because only a expert in that area can give the proper guidance regarding it.	fundamental decisions of the arbitration process will be taken in this stage such as number of arbitrators, selecting the arbitrators from each side or selecting arbitrators, which are experts in the specific area, depend on the substance of the dispute (Bermann,2016), It has given the choice for the parties to select the arbitrators who are qualified and who has an expert knowledge in disputed area (Latham & Watkins,2015).
10	National court	Facilitate	15	it is important to facilitate arbitration process when arbitration is conducted hence there are situations where parties fail to proceed for the arbitration when issues arised regarding the arbitration procedures.	There are set of designed rules and guidance to facilitate the arbitration process (Masons, 2011). After arbitration has commenced court plays only a supportive role to facilitate the arbitration process guiding the parties whenever needed (K.Kanag-Isvaran, 2016).

Data Coding Number	Main Category Headings (Anchor code)	Final Sub Category heading	Frequency	Meaning	Literature Sources
14	Knowledge	Flexible options	20	There is a significant impact between the selection of arbitrators who has knowledge in construction and amicable settlement in arbitration because there are situations when general lawyers appointed for the arbitration problems arised regarding the interpretation of contract documents.	Compare to litigation, one of most flexible opportunity given through party autonomy is to select the proper law applicable to arbitration agreement (Chukwumerije,1994). He has highlighted significance of such flexible procedure because it will provide the parties to come up with relevant information and produce documentation to convince their claim (Chovankova, N.D).
2	Appointment	Formal procedure	8	when arbitrators are appointed having a formal procedure it will minimise further disputes between parties if not arbitrators appointment will be a another conflict to resolve in pre commencment of arbitration process.	he emphasizes that mostly internationally and locally arbitration is recognized as the flexible ADR method than other ADR Methods hence parties do not want to have a formal procedure, they have freedom to conduct the arbitration in any place (for example neutral place for the both parties and choose the suitable arbitrator who have the specialized knowledge in the disputed area (Dursun, 2013).

Data Coding Number	Main Category Headings (Anchor code)	Final Sub Category heading	Frequency	Meaning	Literature Sources
1	Form	Freedom	70	There is a major advantage of having freedom for arbitration compare to litigation because even there is no arbitration clause to arbitrate but there is submission agreement which gives more freedom for the parties to exercise the arbitration as they wish.	The doctrine of party autonomy is a recognized concept in commercial arbitration worldwide the question as to extent of freedom or autonomy of party in international commercial arbitration has remained largely unsettled and has been acknowledged as disputable" (Fagbemi 2015). According to the Sri Lankan arbitration act unless parties specifies the arbitration procedure parties have given their freedom to select arbitration procedure which they consider suitable according to the situation (Kanag-Isvaran PC & S.S Wijerathna,2011).
15	Ethics	Important	7	If arbitrators and parties do not follow the professional ethics it will be difficult to expect the genuine or meaningful award in the end of arbitration process.	Rics have recognized it is important to follow five main ethics by an every professional (RICS, 2017). he states that according to the ICC Rules parties have a duty to keep the arbitration proceedings in a private and confidential manner hence it will be important to protect the trade secrets (Elliot,2013).

Data Coding Number	Main Category Headings (Anchor code)	Final Sub Category heading	Frequency	Meaning	Literature Sources
4	Law	Minimise Conflicts	14	when designing the arbitration clause in the pre commencement of arbitrtion if parties identified the proper law to conduct in the abitration process they can minise future conflicts can be arise regarding the suitable law to govern the arbitration proess.	The doctrine which govern the arbitration is party autonomy and is the keystone of arbitration proceeding since it will helpful in the post commencement of arbitration process to avoid the conflicts between parties to commence the arbitration process (Ansari, 2014).
8	Exclusion Agreement	Minimise Disputes	42	if parties recognised the need of exclusion agreement they can avoid inereference from national court to interfere the enforcement of arbitration process.	If parties have a good understanding it will be easy to resolve the disputes in an amicable manner (Masons, 2011). Therefore, no interference can be made by national court system when parties have submitted their disputes for arbitration (Wijethilake 1998).
7	Protection	secure claim	14	interim measuers of protection is their to secure the claim in the arbitration process because if not parties cannot have a meaningful award in the end if party has to suffer with a disadvantage due to time consuming process in arbitration.	An arbitral tribunal may at the request of the 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 (Marsoof, 2012).

Data Coding Number	Main Category Headings (Anchor code)	Final Sub Category heading	Frequency	Meaning	Literature Sources
3	Procedure	Set of rules	3	It is important to have set of rules in the arbitratiotor appointment procedure to secure natural justice if not parties cannot expect impartial and independent arbitrators for	Therefore, arbitration was considered as the dispute resolution method, which ruled the natural justice since it does not have the solid rules, which were mostly recognized in the litigation (Blake & Others 2011). "Parties shall be free to agree upon the rules of law to be applied by the arbitral Tribunal to the merits of Dispute" (ICC Rules,2012). "The arbitral tribunal shall decide the merit of the dispute on the basis of the law or rules of law by the parties (SCC Rules, 1999).
5	Settlement	Settle	82	Settlement is the most helpful element in arbitration hence if parties want they can stop the arbitration proces and can go for the quick settlement considering the facts investigated so far in arbitration.	"With the agreement of the parties, the arbitrator may use at any time during the arbitral proceedings: (a) mediation; (b) conciliation or (c) any other procedure to encourage settlements" (Section 14) (Ranasisnghe, 2015).

Data Coding Number	Main Category Headings (Anchor code)	Final Sub Category heading	Frequency	Meaning	Literature Sources
11	Duties	Suitable arbitrators	45	There is a direct impact of getting suitable arbitrators who will follow the exercise their duties impartial, independent and practical manner for the amicable settlement hence if they are bias to any party or they are taking undue advantage it will not be beneficial for other parties.	He ascertains that this will be a good opportunity for the parties to use their power of party autonomy to select the suitable arbitrators having relevant qualifications according to the dispute has been arisen (Bermann,2016).
12	Limits	Time limits	21	it is important to aware of time limit hence prescription ordinance in sri lanka also applicable to the arbitration process, hence if parties do not fulfill their duties it will considered as condition precedent where parties will not get the chance of getting the benefit if they do not follow the procedures stated in arbitration within the time limits.	According to the Sri Lankan Arbitration act, section 6 time given to appoint the arbitrator to maintain the time limit in arbitration is sixty days in a situation where parties have an disagreement regarding the disagreement of appointing arbitrator or appointment of chief arbitrator, according to the section 10(2) of the arbitration act time limit to challenge the arbitrator is 30 days, according to the section 27(1) of the arbitration act time limit given for the correction of award is 14 days and in order to set aside the arbitration award is 60 days according to the section 32 (1) of the arbitration act (Marsoof,2012).

APPENDIX B – CODE ANALYSIS

Data Coding Number	Main Category Headings (Anchor code)	Sub Category Headings	Final Sub Category heading
1	Form	Facilitate	Freedom
		Freedom	
2	Appointment	Freedom	Formal procedure
		Flexibility	
		Formal procedure	
3	Procedure	Flexible	Set or rules
		Set or rules	
		Not Flexible	
4	Law	Place	Minimize Conflicts
		Economic Policies	
		Public policies	
		minimize Conflicts	
5	Settlement	Suitable Solution	settle
		settle	
		secured procedure	
6	Private	Privacy	Confidentiality
		Confidentiality	
7	Protection	Benefited to parties	secure claim
		secure claim	
		secure	
8	Exclusion Agreement	minimise Disputes	minimise Disputes
		Interference	
		Conflicts	
		Errors	
		Burden	
9	Evidence	Data Validity	correct
		correct	
		Freedom	

Data Coding Number	Main Category Headings (Anchor code)	Sub Category Headings	Final Sub Category heading
Strategies			
10	National court	Facilitate	Facilitate
		Final Decision	
		Difficult	
11	Duties	Genuine award	Suitable arbitrators
		Suitable Solution	
		Importance	
12	Limits	crucial	time limits
		time limits	
		conflicts	
13	Expert	expedite	Expert guidance
		specialized	
		expert guidance	
14	Knowledge	Important	Flexible options
		Flexible options	
		Ethics	
15	Ethics	Important	Important
		conflicts	
		honestly	
		behaviour	
16	Documents	amicable	amicable
		time frame	
		flexibility	
17	Nationality	same nationalities	different nationalities
		different nationalities	
		disputes	

APPENDIX C – ARBITRATION ACT

Arbitration Act. No. 11 of 1995 1 (Certified on 30th June-1995)

AN ACT TO PROVIDE FOR THE CONDUCT OF ARBITRATION PROCEEDINGS: TO GIVE EFFECT TO THE

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: TO REPEAL THE

ARBITRATION ORDINANCE (CHAPTER 93) AND CERTAIN SECTIONS OF THE CIVIL PROCEDURE CODE (CHAPTER 101): AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

WHEREAS it is necessary to make comprehensive legal provision for the conduct of arbitration proceedings and the enforcement of awards made thereunder:

AND WHEREAS it is necessary to make legal provision to give effect to the principles of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958:

BE It therefore enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:

Short title and date of operation.

1. This Act may be cited as the Arbitration Act No. 11 of 1995 and shall come into operation on such date as the Minister may appoint by Order published in the Gazette (hereinafter referred to as the“ appointed date”).

PART I

PRELIMINARY

Application.

2 (1) The provisions of this Act shall, subject to the provisions of Section 48, apply to all arbitration proceedings commenced in Sri Lanka after the appointed date, whether the arbitration agreement in pursuance of which such arbitration proceedings are commenced, was entered into before or after the appointed date.

(2) Where arbitration proceedings were commenced prior to the appointed date, the law in force prior to the appointed date, shall, unless the parties otherwise agree, apply to such arbitration proceedings.

(3) Where the State is a party to an arbitration agreement (whether in right of the Republic or in any other capacity) the State shall be bound by the provision of this Act.

PART II

ARBITRATION AGREEMENT

Form of arbitration agreement

3. (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing. An agreement shall be deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement.

Arbitrability of the dispute

4. Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the matter in respect of which the arbitration agreement is entered into is contrary to public policy or, is not capable of determination by arbitration.

Jurisdiction of Court in respect of dispute covered by arbitration agreement.

5. Where a party to an arbitration agreement institutes legal proceedings 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.

PART III

COMPOSITION OF THE ARBITRAL TRIBUNAL

Number of Arbitrators

6. (1) The parties shall be free to determine the number of arbitrators of an arbitral tribunal subject to the provisions of subsection (3) of this section.

(2) Where no such determination is made, the number of arbitrators shall be three.

(3) Where the parties appoint an even number of arbitrators, the arbitrators so appointed shall jointly appoint an additional arbitrator who shall act as Chairman.

Appointment of arbitrators

7. (1) The parties shall be free to agree on a procedure for appointing the arbitrators, subject to the provisions of this Act.

(2) In the absence of such agreement –

(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 to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within sixty days of their appointment, the appointment shall be made upon the application of a party, by the High Court.

(3) 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 the arbitrators are unable to reach an agreement required of them under such procedure: or

(c) a third party, including an institution, fails to perform any function assigned to such third party under such procedure,

any party may apply o the High Court to take necessary measures towards the appointment of the arbitrator or arbitrators.

(4) The High Court shall in appointing an arbitrator, have due regard to any qualifications required of an arbitrator under the agreement between the parties and to such consideration as are likely to secure the appointment of an independent and impartial arbitrator.

Termination of Arbitrator's mandate and removal of Arbitrator.

8. (1) The mandate of an arbitrator shall terminate if such arbitrator becomes unable to perform the functions of that office or for any other reason fails to act without undue delay, or dies, or withdraws from office or the parties agree on the termination.

(2) Where an arbitrator unduly delays in discharging the duties of his office the High

Court may upon the application of a party, remove such arbitrator and appoint another arbitrator in his place.

Provided however that where the parties have so agreed such removal and appointment shall be made by an arbitral institution.

(3) Where the mandate of an arbitrator is terminated, proceedings shall not be had denovo unless the parties otherwise agree.

Appointment of substitute arbitrator.

9. Where the mandate of an arbitrator terminates under section 8, a substitute arbitrator shall be appointed in the manner applicable to the appointment of the arbitrator whose mandate has terminated.

10. (1) Where a person is requested to accept appointment as an arbitrator, he shall first

Grounds for challenge.

disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, and shall, from the time of his appointment and throughout the arbitral proceedings, disclose without delay any circumstances referred to in this subsection to all the parties and to the other arbitrators, unless they have already been so informed by the arbitrator.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment was made.

(3) A party who seeks to challenge an arbitrator shall, unless the parties have decided that the decision shall be taken by some other person, first do so before the arbitral tribunal, within thirty days of his becoming aware of the circumstances which give rise to doubts about the arbitrators' impartiality or independence.

(4) Where a party who makes an application to an arbitral tribunal under this section, is dissatisfied with the order of the tribunal on such application, he may within thirty days of the receipt of the decision, appeals from that order to the High Court.

PART IV

JURISDICTION OF THE ARBITRAL TRIBUNAL

11. (1) 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

Competence

Arbitral

Tribunal. of

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.

(2) Where an application has been made to the High Court under subsection

(1) the arbitral tribunal may continue the arbitral proceedings pending the determination of such question by the High Court.

Severability of agreement

12. An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement when ruling upon the validity of that arbitration agreement for the purpose of determining the jurisdiction of the arbitral tribunal.

Interim measures of protection

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:

Provided however that, other than in exceptional cases no such order shall be made except after hearing the other parties.

(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.

(3) An application to the High Court, under subsection (2), for the enforcement of interim measures, shall be deemed not to be incompatible with section 5 or the arbitration agreement or a waiver of the agreement.

Settlement

14. (1) It shall not be incompatible with arbitration proceedings for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or any other procedure at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings the parties settle the dispute, the arbitral tribunal shall if requested by the parties, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with Section 25 and shall State that it is an arbitral award on agreed terms.

(4) An arbitral award on agreed terms has the same status and effect as any other arbitral award made in respect of the dispute.

PART V

CONDUCT OF ARBITRATION PROCEEDINGS

Duties of Arbitral Tribunal

15. (1) An arbitral tribunal shall deal with any dispute submitted to it for arbitration in an Impartial, practical and expeditious manner.

(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.

(3) An arbitral tribunal may, notwithstanding the failure of a party without reasonable cause, to appear before it, or to comply with any order made by it, continue the arbitral proceedings and determine the dispute on the material available to it.

(4) Parties may, introduce new prayers for relief provided that such prayers for relief fall within the scope of the arbitration agreement and it is not inappropriate to accept them having regard to the point of time at which they are introduced and to other circumstances. During the course of such proceedings, either party may, on like conditions, amend or supplement prayer for relief introduced earlier and rely on new circumstances in support of their respective cases.

16. (1) The parties to an arbitration proceeding shall be free to agree on the place of

Place of arbitration.

arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of subsection (1) providing for the place of arbitration, the arbitral tribunal may, unless otherwise agreed upon by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

17. Subject to the provisions of this Act, the parties shall be free to agree on the

Determination of rules of procedures.

procedure to be followed by the arbitral tribunal in conducting the proceedings. The power

conferred upon the arbitral tribunal hall include the power to determine the admissibility, relevance, and weight of any evidence.

18. An arbitration shall be deemed to have been commenced if ---

Commencement of arbitral proceedings.

(a) a dispute to which the relevant arbitration agreement applies has arisen: and

(b) a party to the agreement ---

(i) has received from another party to the agreement a notice requiring that party to refer, or to concur in the reference of, the dispute to arbitration; or

(ii) has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join or concur in or approve the appointment of, an arbitral tribunal in relation to the dispute.

19. (1) Unless a contrary intention is expressed in the arbitration agreement, any

Manner in decision made in the course of arbitral proceedings, by a majority of the arbitrators and failing a which

decisions are majority, the decision of the arbitrator appointed by the other arbitrators, or where in terms of the made.

arbitration agreement or this Act, there is Chairman, the decision of such Chairman, shall be binding.

(2) Where there is a Chairman of an arbitral tribunal, the Chairman shall have the power to administer the conduct of the arbitral proceedings.

20. (1) Any party to an arbitration agreement having obtained the prior consent in writing of the arbitral tribunal may apply to the High Court for summons requiring a person to attend for Parties may

obtain examination before the tribunal and to produce to the tribunal any document or thing specified in summons.

The summons.

(2) A person shall not be compelled under any summons issued in accordance with subsection (1) to answer any question or produce any document or thing which that person could not be compelled to answer or produce at the trial in an action before court.

21. (1) Unless otherwise agreed upon by the parties, where any person not a party to the

Refusal or failure to attend before arbitral tribunal.

arbitration agreement ---

(a) refuses or fails to attend before the arbitral tribunal for examination when required under summons or by the arbitral tribunal to do so ;

(b) appearing as a witness before the arbitral tribunal ---

(i) refuses or fails to take an oath or make an affirmation or affidavit when required by the arbitral tribunal to do so ; or

(ii) refuses or fails to answer a question that the witness is required by the arbitral tribunal to answer ; or

(iii) refuses or fails to produce a document that he is required under summons or by the arbitral tribunal to produce; or

(c) Refuses or fails to do any other thing which the arbitral tribunal may require.

(2) the High Court may order the defaulter to appear before the Court for examination or to produce to the Court the relevant document or thing or to do any relevant thing if a party to the arbitration proceedings makes an application to Court in that behalf.

(3) No such application shall be made except after notice to the other parties and with the prior sanction or consent of the arbitral tribunal and no order shall be made under subsection (1), unless the court after hearing the defaulter considers that it is necessary in the circumstances to make such order.

(4) Where the court makes an order under subsection (1) it shall, in addition make an order for the transmission to the arbitral tribunal of ---

(a) a record of any evidence given pursuant to an order made under subsection (1) ;

(b) any document or thing produced pursuant to an order under subsection (1) or a copy of any such document ; or

(c) particulars of anything done pursuant to an order under subsection (1) and any such evidence, document or thing shall be deemed to have been given, produced or done, as the case may be, in the course of the arbitration proceeding.

Evidence before arbitral tribunal

22. (1) Unless otherwise agreed upon by the parties, evidence before the arbitral tribunal may be given orally, in writing or by affidavit.

(2) Unless otherwise agreed upon by the parties, an arbitral tribunal may administer an oath or affirmation or take an affidavit for the purposes of proceedings under the agreement.

(3) Unless otherwise agreed upon by the parties, an arbitral tribunal in conducting proceedings in pursuance of an arbitration agreement shall not be bound by the provisions of the Evidence Ordinance.

23. Unless otherwise agreed in writing by the parties to the arbitration agreement, a party to Representation. an arbitration agreement ---

(a) may appear before the arbitral tribunal personally or, where the party is a body of persons, whether corporate or unincorporated, by an officer, employee or agent of that body; and

(b) may be represented by an attorney-at-law if the party so desires.

24. (1) An arbitral tribunal shall decide the dispute in accordance with such rules of law as are Law chosen by the parties as applicable to the substance of the dispute. Any designation of the law or applicable to substance of legal system of a given state shall be construed, unless otherwise expressed, as referring to the dispute.

substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties to any arbitration agreement, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The provision of subsection (1) and (2) shall apply only to the extent agreed to by the parties.

(4) The arbitral tribunal shall decide according to considerations of general justice and fairness or trade usages only if the parties have expressly authorized it to do so.

PART VI

AWARDS

Form and content of award.

25. (1) The award shall be made in writing and shall be signed by the arbitrators constituting the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 14.

(3) The award shall state its date and place of arbitration as determined in accordance with Section 16. The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators constituting the arbitral tribunal in accordance with subsection (1) of this section shall be delivered to each party.

Award to be final.

26. Subject to the provisions of Part VII of this Act, the award made by the arbitral tribunal shall be final and binding on the parties to the arbitration agreement.

Correction and

Interpretation of award: Additional awards.

27. (1) Within fourteen days of receipt of the award, unless another period of time has been agreed upon by the parties, whether at the request of the arbitral tribunal or otherwise --- or

(a) a party, with notice to the other party, may request the arbitral tribunal --

(i) to correct in the award any errors in computation, any clerical or typographical errors or omissions or any errors of a similar nature ; or

(ii) to modify the award where a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision on the matter referred ;

(b) if so agreed upon by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request to be justified, it shall make the correction, modification or give the interpretation within fourteen days of the receipt of the request, or such longer period as the parties may agree to, at the request of the arbitral tribunal. The interpretation shall form part of the award.

(3) The arbitral tribunal may correct any error of the type referred to in sub-paragraph (i) of paragraph (a) of subsection (1) of this section, on its own motion within fourteen days of the date of the award.

(4) Unless otherwise agreed upon by the parties, a party with notice to the other party, may request the arbitral tribunal within fourteen days of receipt of the award to make

an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal after hearing the other parties, considers the request to be justified, it shall make the additional award within thirty days of conclusion of the hearing.

(5) The provisions of section 26 shall apply to a correction, modification or interpretation of the award or to an additional award.

Interest

28. Unless otherwise agreed upon by the parties where an arbitral tribunal makes an award for the payment of money (whether on a claim for a liquidated or unliquidated amount), the arbitral tribunal may in the award, order interest, at the rate agreed upon between the parties in the arbitration agreement or in the absence of any such agreement, at the legal interest prevailing at the

time of making the arbitral award, to be paid on the principal sum awarded, from the date of commencement of arbitral proceedings to the date of the award, in addition to any interest awarded on such principal sum for any period prior to the institution of arbitral proceedings, with further interest at the aforesaid rate on the aggregate sum so awarded from the date of the award to the date of payment or such earlier date as the arbitral tribunal thinks fit.

29. (1) The parties shall be jointly and severally liable for the payment of reasonable compensation to the arbitrators constituting the arbitral tribunal for their work and disbursements:

Compensation of arbitrators.

Provided however that when the arbitral tribunal declares in its award that it has no jurisdiction to decide the dispute, the party who did not request the arbitration liable for such payment only if there are exceptional circumstances which warrant such payment by him.

(2) The final award shall order the payment of compensation to each of the arbitrators constituting the arbitral tribunal in such sum, and with such period, as may be specified in the award, with legal interest on each such sum calculated with effect from the date of expiration of a period of one month from the date on which the award was delivered.

(3) The arbitral tribunal may order the payment of deposit of security by the parties, for the payment of the compensation of the arbitrators constituting the arbitral tribunal, in such sum and within such period as may be specified in the order. Separate deposits of security may be ordered in respect of each prayer for relief.

(4) Where a party fails to pay his share of the deposit of security ordered by the arbitral tribunal within the period specified in the order for payment of deposit of security, the other party or parties may pay the whole of the deposit of security ordered.

(5) Where none of the parties pay the deposit of security ordered by the arbitral tribunal, within the period specified in the order for the payment of the deposit of security, the arbitral tribunal may terminate the arbitral proceedings.

(6) The arbitrators constituting the arbitral tribunal may, during the course of arbitral proceedings, draw on such deposit or security, for the purpose of meeting their expenses.

Award not to be withheld.

30. An arbitral tribunal shall not withhold delivering its award pending the payment of the compensation payable to the arbitrators constituting the arbitral tribunal.

PART VII

APPLICATION TO COURTS RELATING TO AWARDS

(INCLUDING RECOGNITION AND ENFORCEMENT OF FOREIGN AWARD)

Application for filing and

Enforcement of award.

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.

(2) An application to enforce the award shall be accompanied by ---

(a) the original of the award or a duly certified copy of such award : and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy of such agreement.

For the purposes of this subsection a copy of an award or of the arbitration agreement shall be deemed to have been duly certified if ---

(i) it purports to have been certified by the arbitral tribunal or, by a member of that tribunal, and it has not been shown to the Court that it was not in fact so certified : or

(ii) it has been otherwise certified to the satisfaction of the court.

(3) If a document or part of a document produced under subsection (2) is written in a language other than the official language of the court or other than in English, there

shall be produced with the document a translation in such official language, or in the English Language, of that document or that part, as the case may be, certified to be a correct translation.

(4) For the purposes of subsection (3), a translation shall be certified by an official or a sworn translator or by a diplomatic or a consular agent in Sri Lanka of the country in which the award was made or otherwise to the satisfaction of the Court.

(5) A document produced to the court in accordance with this section may upon its production be received by the Court as sufficient evidence of the matters to which its relates.

(6) Where an application is made under subsection (1) of this section and there is no application for the setting aside of such award under section 32 or the court sees no cause to refuse the recognition and enforcement of such award under the provision contained in sections 33 and 34 of this Act, it shall on a day of which notice shall be given to the parties, proceed to file the award and give judgment according to the award. Upon the judgment so given a decree shall be entered.

32. (1) An arbitral award made in an arbitration held in Sri Lanka may be set aside by

Application for setting aside arbitral award.

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.

APPENDIX D – UNCITRAL RULES

UNCITRAL Arbitration Rules

(as revised in 2010)

Section I. Introductory rules

Scope of application*

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.
2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.
3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice and calculation of periods of time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.
2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall

* A model arbitration clause for contracts can be found in the annex to the Rules.

be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

(a) Received if it is physically delivered to the addressee; or

(b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or nonbusiness days occurring during the running of the period of time are included in calculating the period.

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (herein after called the "claimant") shall communicate to the other party or parties (hereinafter called the "respondent") a notice of arbitration.
2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.
3. The notice of arbitration shall include the following:
   (a) A demand that the dispute be referred to arbitration;
   (b) The names and contact details of the parties;
   (c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(e) A brief description of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(c) Notification of the appointment of an arbitrator referred to in article 9 or 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:
   (a) The name and contact details of each respondent;
   (b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).
2. The response to the notice of arbitration may also include:
   (a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;
   (b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;
   (c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(d) Notification of the appointment of an arbitrator referred to in article 9 or 10;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;

(f) A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Representation and assistance

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Designating and appointing authorities

Article 6

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary General of the PCA to designate a substitute appointing authority.

5. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.

6. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

2. Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

Appointment of arbitrators (articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.
2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

   (a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

   (b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects

   and numbered the remaining names on the list in the order of its preference;

   (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

   (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Article 10

1. For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Disclosures by and challenge of arbitrators**

(articles 11 to 13)

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as

to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

** Model statements of independence pursuant to article 11 can be found in the annex to the Rules.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

Replacement of an arbitrator

Article 14

1. Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Repetition of hearings in the event of the replacement of an arbitrator

Article 15

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Exclusion of liability

Article 16

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

APPENDIX E – INTERVIEW QUESTIONNAIRE

Dear Sir / Madam,

REQUEST FOR FILLING QUESTIONNAIRE

I am currently a Post Graduate student reading Masters in Construction Law and Dispute Resolution at University of Moratuwa. As a part of my MSc programme I am carrying out my dissertation on the topic of **"PARTY AUTONOMY IN ARBITRATION PROCESS IN DEVELOPING COUNTIRES: CASE OF SRI LANKA".**

Confidentiality statement

The sole purpose of this interview is to collect data for preliminary survey to achieve. I strictly confirm the confidentiality of your identity and the details you provide. I assure you that the actual names of the projects and the interviewees will not be revealed in this report or any other document relating to this study. Tape recording (if the interviewee grant permission) will be doing while interviewing to collect data accurately. Thanking you in advance in anticipation of your kind collaboration.

Yours faithful,

B.A Harshi Madubashini
Post graduate Student
Department of Building Economics
Faculty of Architecture
University of Moratuwa

Supervisor:

Ch.QS. Prof. (Mrs.) B.A.K.S.Perera
Professor in Quantity Surveying
Department of Building Economics
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INTERVIEW QUESTIONNAIRE

PARTY AUTONOMY IN ARBITRATION PROCESS IN DEVELOPING COUNTIRES: CASE OF SRI LANKA

AIM

The aim of this research to propose a framework of party autonomy to reach to an amicable settlement in Sri Lankan construction industry.

OBJECTIVES

- Identify the elements of party autonomy in the arbitration process.
- Identify the importance of recognizing the elements of party autonomy and strategies in pre commencement and post commencement of arbitration process.
- Propose suitable elements of party autonomy and strategies for arbitration in Sri Lankan Construction Industry.

SECTION A: BACKGROUND INFORMATION

- Your Profession and role in Construction Industry

Architect ☐
Engineer ☐
Lawyer ☐
Arbitrator ☐
Quantity Surveyor ☐
Project Manager ☐
Other …….(Please Specify)

- Experience in Construction industry

0-5 Years ☐ 6-10 Years ☐ 11-15 Years ☐ 16-20 Years ☐

Above 20 Years ☐

. **Elements of party autonomy**	**Proposed Elements of party autonomy for amicable settlement in arbitration**	**Why these elements are suitable?**	**how to incorporate this to the current system**
Form of arbitration agreement • Arbitration Clause • Submission agreement			
Freedom to choose Arbitration Appointment • Agreement of the parties • Arbitration Institutes • Professional Institutes • National courts • List System			
Freedom to choose Arbitration Procedure • Ad-hoc Procedure • Institutional procedure • Expedited Procedure			
Governing Law of Arbitration			

. **Elements of party autonomy**	**Proposed Elements of party autonomy for amicable settlement in arbitration**	**Why these elements are suitable?**	**how to incorporate this to the current system**
• The law governing the arbitration proceedings • Law governing the place of arbitration and the role of courts • Enforceability • Neutral site if there are foreign parties • Economic polices • Public policies in the place of arbitration			
Settlement • Conciliation • Mediation • Expert determination • Any other method			
Confidentiality • Arbitration held must be in private • Implied confidentiality in			

. **Elements of party autonomy**	**Proposed Elements of party autonomy for amicable settlement in arbitration**	**Why these elements are suitable?**	**how to incorporate this to the current system**
every arbitration • Signing a confidential form			
Interim measures of Protection			
Exclusion Agreement			
Use of Evidence			
Are there any other elements can be used for amicable settlement in arbitration?			

Strategies in Arbitration Process in Sri Lanka

Strategy	Proposed strategy for amicable settlement in arbitration Sri Lanka	Why these strategy is suitable to have an amicable settlement	How to incorporate this to the current system
Supportive Role-play by national court System • To appoint an arbitrator where parties have an disagreement • To appoint an chief arbitrator where parties have an disagreement • To summon a witness to give evidence or produce documents			
Duties of Arbitrators • Impartiality and independence • Exercising arbitration in practical and expeditious manner • Natural justice • Duty of disclosure of past experience			

Strategy	Proposed strategy for amicable settlement in arbitration Sri Lanka	Why these strategy is suitable to have an amicable settlement	How to incorporate this to the current system
Awareness of time limits in arbitration process • Disagreement in appointment of arbitrator and chief arbitrator • Time limit to challenge arbitrator • Correction and enforceability of award • Set aside the award			
Use of Expert Evidence			
Knowledge in Construction			
Professional ethics of parties • Act with "**Integrity**" • Always provide "**High standard of service**"			

Strategy	Proposed strategy for amicable settlement in arbitration Sri Lanka	Why these strategy is suitable to have an amicable settlement	How to incorporate this to the current system
• Act in a way that promotes "**trust in the profession**" • Treat others with "**Respect**" • Take "**Responsibility**"			
Time awarded for parties to present documents			
Nationality of parties and arbitrators			
Are there any other strategies can be used for amicable settlement in arbitration?			

I would like to thank you for the information given and time you have dedicated to this research.

Thank you!

APPENDIX F - CASE STUDIES

INTERTEC CONTRACTING A S v.CEYLINCO SEYLAN DEVELOPMENT LTD AND ANOTHER

COURT OF APPEAL

UDALAGAMA, J. AND

NANAYAKKARA, J.

CALA NO. 396/2000

DC COLOMBO NO. 5544/Spl

SEPTEMBER 21, 2001

Performance Bond - Liability of the Bank to honour a demand - Is the Performance Bond conditional to a finding of the Arbitrator? - Or is the Bond payable on demand? The plaintiff-petitioner entered into a contract to carry out certain work for the 1st defendant-respondent, the plaintiff-petitioner also furnished a "Performance Bond" from the 2nd defendant-respondent Bank, by the said Performance Bond, the Bank undertook to bind themselves to the 1st defendant-respondent in ascertain sum should the contractor fail in the due and punctual performance of the conditions set out in the contract. As there was a dispute, the first defendant respondent claimed from the Bank the value of the Performance Bond.The interim relief prayed for by the plaintiff-petitioner was refused by the District Court.Held:

(1) The Performance Bond is not conditional; it is an unconditional one payable

On demand.

(2) The arbitration would be relevant only to determine the failure (if there was one) in the performance of the main contract. The Bond was no conditional to a finding of the Arbitrator.

Per Udalagama, J.

"I would hold that the Performance Bond is in fact an accessory and a separate obligation to the main contract and one capable of being independently CA Intertec Contracting A/S v. Ceylinco Seylan Development Ltd, and Another (Udalagama, J.) 247 acted upon providing for payment on demand, the Bank could not violate its guarantee as per the Bond."

APPLICATION for Leave to Appeal from the Order of the District Court of Colombo.

Cases referred to :

1. Edward Owen Engineering (Pvt) Ltd. v. Barclays Bank International Ltd.

- 1978 - 1 QB 159.

2. United International Merchants Investments Ltd. v. Royal Bank of Canada

- 1982 - 2 All ER 720.

3. Indica Traders v. Seoul Lanka Construction - 1994 3 Sri LR 387.

S. L. Gunasekare with Nihal Fernando for the petitioner.

K. Kanag-lswaran, PC with Anil Tittawella and A. Rodrigo for the respondent.

Cur. adv. vult.

November 15, 2001

UDALAGAMA, J.

The plaintiff-petitioner entered into a contract to carry out certain work more fully described in the documents marked P2 (a) and P2 (1) and filed of record in the court below, for the 1st defendant-respondent. The contract also contains an arbitration clause. The plaintiff-petitioner also furnished to the 1 st defendant-respondent a performance bond valued in Rs. 16,200,000/- from the 2nd defendant respondent, the People's Bank. By the said performance bond the People's Bank undertook to bind himself or herself to the employer (1stdefendant-respondent) in a sum not exceeding Rs. 16,200,000/- should the contractor fail in the due and punctual performance of the conditions set out in the contract referred to above. It appears that a dispute

248 Sri Lanka Law Reports [2002] 2 Sri L.R. arose between the plaintiff-petitioner and the 1 st defendant-respondent in respect of the contract and the 1st defendant-respondent claimed

from the 2nd defendant-respondent bank the value of the performance bond.

The above facts are conceded. It is apparent that by letter dated 19. 12. 2000 the Attorney-at-

Law for the plaintiff-petitioner notified the 2nd defendant-respondent bank to refrain from making any payment on the performance bond referred to above. In fact, the plaintiff filed action against the defendant-respondent Seeking a declaration that the 1 st defendant is not entitled to demand and/or receive payment on the previously mentioned performance bond and for a declaration that the 2nd defendant-respondent is not entitled to make payment to the 1st defendant-respondent on the said performance bond and also moved for interim relief restraining the 1st defendant respondent from demanding and/or receiving any payment on the

Performance bond and further interim relief restraining the 2nd defendant from making any payment on the performance bond. By order dated 30. 12. 2000 the Additional District Judge dismissed the application for interim relief and the plaintiff-petitioner seeks leave

to appeal from the said order.The dispute appears to have arisen on the contradictory stances

taken up by the two parties as to whether the performance bond referred to above should or should not be complied with or acted upon until at the arbitration referred to above it is concluded that the contractor has defaulted. It is the contention of the plaintiff-petitioner

that until and unless determined by the arbitrator that the plaintiff had

CA Intertec Contracting A/S v. Ceyllnco Seylan _____Development Ltd, and Another (Udalagama, J.)_____249 failed in the due and punctual performance of the contract referred to above that the 2nd defendant-respondent is restrained from making 40 any payment to the first defendant-respondent. Vide submissions of the learned Counsel for the 1st defendant-respondent, his contention is that the performance bond referred to above is ancillary to the main contract and the obligation created by the said bond is separate and distinct and that same is exclusively between the first defendant respondent and the 2nd defendant-respondent bank. Perusing the performance bond (marked X2) I am inclined to the view that second defendant-respondent bank by the performance bond referred to above guaranteed payment in respect of the contract between the plaintiffs and the 1st defendant. In fact, the relevant paragraph in the performance so bond, inter alia, reads as follows :'The bank in consideration of such agreement as aforesaid hereby guarantee, undertake, bind and oblige themselves to the

Employer, that if the contractor fail in the due and punctual performance and fulfilment of the contract referred to then in that case to make payment on demand at Colombo to the employer

of a sum not exceeding Rs. 16,200,000/-." As described by Halsbury Laws of England, 4th end. : "A guarantee is an assessor contract by which the promisor undertakes to be answerable to the promise for debt default or miscarriage of another person whose primary 60

Liability to the promise must exist or be contemplated". From the wording referred to above I am unable to agree with the learned Counsel for the plaintiff-petitioner that the said bond is

Conditional. On the contrary, I would agree with the learned District Judge and hold that same is, in fact, an unconditional one payable on demand.

250 Sri Lanka Law Reports [2002] 2 Sri L.R.

The learned Additional District Judge appears to have relied on the following judgments to arrive at a finding on the nature of a performance bond :

(1) E dw a rd Owen E n g in e e rin g (Pvt) Ltd. v. B a rc la y 's Bank 70

International Ltd™

(2) United International Merchants Investments Ltd. v. Royal Bank

12) of Canada.

These authorities deal with the obligations arising out of a contract whereby banks are required to pay on guaranteed bonds they executed. The learned Additional District Judge also relied on Indica Tradersv. Seoul Lanka Construction which dealt with section 54 of the Judicature Act in relation to ingredients necessary for the issue of an interim injunction and I am inclined to the view that he came to a correct finding as to the strength of the petitioner's case. So

It is observed that the learned Additional District Judge has also Come to definite finding that the performance bond is, in fact, unconditional and payment due accordingly on demand even though the dispute between the plaintiff-petitioner and the first defendantrespondent is subjected to arbitration. The learned District Judge had Also come to a finding for that reason

that he is precluded from injunction the 2nd defendant-bank from paying the sum mentioned in the bond until the confirmation of a violation of the terms of the main contract between the plaintiff and the 1st defendant is ascertained. I am inclined to hold that the words "to make payment on demand" 90 are crucial words when interpreting the construction of the terms of

the bond itself. These words could not refer to a situation as submitted by the learned Counsel for the plaintiff-petitioner, that payment on the performance bond is subject to a finding by the arbitrator". CA Intertec Contracting A/S v. Ceylinco Seylan Development Ltd, and another (Udalagama, J.)_____251 I would hold that arbitration would be relevant only to determine the failure (if there was one) in the performance of the main contract. I would unequivocally reject the contention of the petitioner that the performance bond was conditional to a finding of the arbitrator. As stated earlier, I would on the contrary hold that the same was,

in fact, a bond payable on demand. This fact is apparent from the 100 bond itself. Perusing an authority cited by the learned Counsel for the 1st defendant-respondent, namely, Edward Owen Engineering Ltd. v.Barclay's Bank International Ltd. referred to above which authority was also relied on by the learned District Judge, I would with approval concur with Lord Denning when he observed therein that : "A bank which gives performance guarantee must honour that

Guarantee according to its terms. It is not concerned in the least with the relation between the supplier and the customer nor with the question whether the supplier had performed his contractual no obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or condition. The only exception is when there is a clear fraud of which the bank has notice."

In the instant case, there is no allegation of fraud. In all the circumstances aforesaid I would hold that the performance bond (X2) is, in fact, an assessor and a separate obligation to the

main contract and one capable of being independently acted upon providing for payment on demaind. The words "If the contractor fails 120 in the due and punctual performance and fulfilment of the contract 252 Sri Lanka Law Reports [2002] 2 Sri L.R. Referred to" in my view do not make a performance bond conditional but, in fact, considered with the words, "make payment on demand "inserted therein that same is, in fact, unconditional. The bank could

Not violate its guarantee as per the bond. For the reasons stated above I am inclined to interfere with the finding of the learned District Judge and the plaintiff-petitioner's appeal is dismissed with costs fixed at Rs. 10,500/-.The stay order issued by this Court dated 19. 12. 2000 is set aside.

NANAYAKKARA, J. - I agree.

Application dismissed.

MERCHANT BANK OF SRI LANKA LIMITED

AMAR.ASIRI DE SILVA

SUPREME COURT
S.N. SILVA, c.J.
BANDARANAYAKE,. J. AND ISMAIL, J.
SC (APPEAL) NO. 79/99 (A)
SC (HC) LA APPLICATION NO. 9/99
(HC/ARB/34/97)
AND
(HC/ARB/127/98)
29TH NOVEMBER. 2000

Arbitration - Arbttratžon Act, No. 11 of 1995 - Requirement to deliver a copy of the award to each party - Section 25(4) of the Act - Appltcatton for erýorcement of the award under section 31 (l) of the Act - Whether the regtstered article postal recetpt must be attached to such application tn proof of the communication of the award under sectdon 25(4).

In arbitration proceedings between the appellant and the respondent. the Registrar of the Sri Lanka National Arbitration Centre had sent a letter dated 13.12.1996 to the appellant with the original of the award dated 27.11.1996. The letter stated that a copy of the award was sent to the respondent's address. The appellant made an application on 17.07.1997 for enforcement of the award in terms of section 31 (l) of the Arbitration Act, No. 1 1 of 1995 ("the Act")

The High Court of Colombo refused to enforce the award on the ground that the registrated postal article receipt in proof of the communication of the award was not attached. Thereafter the appellant med a petition and affidavit with a motion dated 4. I l . 1998 in the High Court tendering the relevant postal article receipt dated 17.12.1996 but submitted that it was not mandatory to attach the receipt. The High Court disallowed the appellant's application for non-compliance with section 25(4) of the Act which required that a copy of the award shall be delivered to each party.

Held :

The delivery of the award to the parties is mandatory. However, [n the circumstances the appellant had adduced sufficient evidence of compliance with section 25(4) as to the delivery of the award to the respondent. Hence the High Court should take action in terms of section 31 (6) of the Act.

sc Merchant Bank Qf Sri Lanka Ltmlted v. Amarastr.i de Stloa 221 (Bandaranayake, J.)

APPEAL from the Judgment of the High Court of Colombo.

Romesh de Silva. P.C. with Htran de Alwis for appellant.

Jefry Zatnudeen for respondent.

Cur. adv. vult.

March, 27, 2001.

SHIRANI A. BANDARANAYAXE, J.

This is an appeal from the judgment of the High Court of Colombo dated 24.04.1998. Leave to appeal was granted by this Court by Order dated 22.09.1999 The facts are briefly as follows:

The appellant entered into a lease ageement, bearing No. 94/2501 dated 23.09.1994 with the respondent in Colombo. In terms of clause 16 of the said lease agreement, provision was made for recourse to arbitration, in the event of any dispute between the appellant and the respondent. In April 1996, the appellant informed the respondent that a sum of Rs.712,826/ 79 was due from him as at 31st October 1995. The appellant then informed the respondent that he is referring this dispute that had ensued. for arbitraüon and in terms of clause 16 of the lease agreement, requested the respondent to nominate an arbitrator within a week from the date of his letter. The respondent failed to nominate an arbitrator and the sole arbitrator, nominated by the appellant, fixed arbitration proceeding for 07.10.1996. The respondent was informed of the commencement of the arbitration proceedings.

By his letter dated 07.10.1996, respondent undertook to settle his dues and wanted time to meet the Bank officials but had failed to do so. When the proceedings commenced on 05.11.1996, the respondent was absent and unrepresented and the arbitrator proceeded with the inquiry ex-parte.

The arbitrator made an award dated 27.11.1996 and the Registrar of the Sri Lanka National Arbitration Cenfre, had sent

a letter dated 13.12.1996, to the appellant with the original of the award. In that letter it is stated that a copy of the award was sent to the address of the respondent. The appellant made an application on 17.071997 for the registration and enforcement of the said arbitral award in terms of section 31 (l) of the Arbitration Act, No. I I of 1995.

The High Court of Colombo refused to enforce the arbitral award on the ground that the registered postal article receipt, in proof of the communication of the arbitral award to the respondent was not attached. The appellant thereafter filed a petition and affidavit with a motion dated 04.1 1.1998 in the High Court of Colombo tendering the relevant postal article and submitted however that it was not mandatory to attach the registered postal article receipt. The High Court Judge, by order dated 04.1 1.1998, disallowed the appellant's application for non-compliance of section 25(4) of the Arbitration Act. No. I I of 1995.

Section 25(4) of the Arbitration Act. No. I I of 1995 states that,

"After the award is made, a copy sigied by the arbitrators constituting the arbitral tribunal in accordance with subsection(1) of this section shall be delivered to each party.

According to Russell,

. a requirement that the award be delivered will be satisfied when it has been notified to the parties by service of a copy on each one of them (Russell on Arbitration, 21 st edition, 1997, pg.275)."

Thus section 25(4) of the Arbitration Act, No. I I of 1995, clearly requires that a signed copy of the arbitral award be delivered to each party after it is made by the tribunal. Such delivery of the award to the parties, in my view, is mandatory considering the consequential steps that could be taken by the parties relation to the enforcement of the award thus communicated, viz, to

enforce or to set it aside in terms of section 31 or 32 of the Arbitration Act, No. 1 1 of 1995.

It appears that at the time this matter was taken up at the High Court, Colombo, the original registered postal article receipt in proof of the communication of the arbitral award to the respondent, was not attached to the petition. However, by motion dated 04.11.1998, the appellant had produced the original registered postal article receipt dated 17.12.1996 and the pink slip, certifying the regstered postal article receipt. In fact the appellant had brought it to the notice of Court by his petition dated 04. I I. 1998 that the ortgnal of the regstered postal article receipt was filed in a similar application in High Court case No. 26/97.

In these circumstances, I hold that the appellant has adduced sufficient evidence of compliance with the requirement in section 25(4) of the Arbitration Act, No. 1 1 of 1995 as to the delivery of the award to the respondent. The appeal is accordingly allowed and the judgnent dated 24.04.1998 of the High Court, Colombo is therefore set aside. In all the circumstances, there will be no costs.

This matter is referred back to the High Court for action to be taken in terms of section 31 (6) of the Arbitration Act, No. I I of 1995.

S.N. SILVA, C.J. I agree. ISMAIL. J. I agree.

Appeal allowed.

SOUTHERN GROUP CIVIL CONSTRUCTION (PVT) LTD V OCEAN LANKA (PVT) LTD

SUPREME COURT

S. N. SILVA, CJ.t

BANDARANAYAKE, J. AND ISMAIL, J.

SC APPEAL NO. 69/99

HC NO. ARB/39/97

24 MAY AND 14 JUNE, 2001

Arbitration Act, No. 11 of 1995 — Application for setting aside arbitral award — Section 32 of the Act — The need to set out in the application the grounds for setting aside the award — Period for making the application — Whether grounds set out in written submissions after the lapse of that period can be considered.

The appellant applied to the High Coun in terms of section 31 (1) read with section 40 of the Arbitration Act, No. 11 of 1995 (the Act) for enforcement of an arbitral award made against the respondent. The respondent applied in terms of section 32 of the Act to set aside the award. Under section 32 such application has to be made within sixty (60) days of the receipt of the award. The High Court consolidated both applications.

In his written submissions filed beyond the requisite period of sixty (60) days, the respondent urged that the award should be set aside on the ground set out in section 32 (1) (b) of the Act that it is in conflict with the public policy in Sri Lanka, a ground which he had not set out in his petition. Counsel for the appellant took up a preliminary objection to that ground that the same had not been set out in the petition but in his written submissions filed beyond the period of sixty (60) days for making the application.

Held:

(1) The High Court has no power ex mere motu to set aside an award on the ground stated in section 32 (1) (b) of the Act, in the absence of material supporting such a finding being contained in the application.

(2) The time bar of sixty (60) days contained in section 32 (1) should be strictly applied and all grounds of challenge with supporting material on the basis of which a party wishes the High Court to come to a finding

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in terms of section 32 (1) (b) should be adduced by an applicant in the application under section 32.

APPEAL from the judgment of the High Court.

K. Kanag-[swaran, PC with Chandaka Jayasundera for appellant.

Shibly Aziz, PC with P. Wimalachanthiran, A. P. Niles and Rohana Deshapriya for respondent.

Cur. adv. vult

February 25, 2002

SHIRANI A. BANDARANAYAKE, J.

The appellant is a company engaged in the business of civil 1 construction work, heavy equipment hiring, earth moving and filling and metal industries. The appellant also undenakes work in the nature of rock blasting, crushing the blasted rock into specified sizes and quarrying. The respondent carries on business of manufacturing knitted fabrics. By an agreement made and entered into on 01. 06. 1995, the appellant and the respondent entered into a contract for the appellant to provide services to clear the rock out cropping situated in the respondent's land in EPZ Zone B. This was to be done by drilling, blasting and crushing the blasted rock boulders and piling 10 the crushed rock at the project site. In terms of the agreement, the parties agreed to refer to arbitration all disputes or differences that would arise between the appellant and the respondent.

Disputes arose between the appellant and the respondent and the sole arbitrator delivered the arbitral award on 04. 06. 1997 (X2). The appellant in terms of section 31 (1) of the Arbitration Act, No. 11 of 1995 (hereinafter referred to as the Act), read with section 40 of the Act, made an application for the enforcement of the said award in the

High Court (X3). The respondent made an application in terms of section 32 of the Act to set aside the said award in the 20 High Court (X4). The High Court consolidated the two actions in terms of section 35 of the Act.

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The appellant objected to the respondent's application in the High Court on several grounds which are as follows:

(a) in order to set aside the award, specific grounds given in section 32 have to be urged within 60 days of the award. This has not been done by the respondent;

(b) respondent's ground to set aside the award on the basis of section 24 is misconceived in law as it is not a ground enunciated in terms of section 32;

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(c) section 26 of the Act makes the award final and binding on the parties to the arbitration agreement and does not permit any challenge on the merits of the award.

The respondent contended in the High Court that the award was fundamentally flawed and submitted that it should be set aside on the ground that it is in conflict with the public policy of Sri Lanka in terms of section 32 (1) (b). The respondent's position is that, although section 32 (1) of the Act requires an application to set aside an award to be made within sixty (60) days of the receipt of the award, this requirement does not apply to section 32 (1) (b) of the Act. 40

Learned President's Counsel for the appellant took up a preliminary objection that one of the grounds on which the respondent sought to set aside the award, relating to the conflict with the public policy of Sri Lanka, has not been set out in the petition, but only contained in the written submissions filed beyond the period of 60 days after the award was made. The learned High Court Judge overruled the preliminary objections raised by the appellant and fixed the case for further inquiry.

The appellant sought leave to appeal from the order of the High

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Leave to appeal was granted by this Court on 20. 08. 1999 on the following questions:

'Was the learned Judge of the High Court in error in holding:

(i) that section 32 (1) entitled the Court ex mere motu to set aside the award whether such grounds were included in the petition or not;

(ii) whether the learned Judge of the High Court was in error in concluding that a party may seek to have an award set aside under section 32 either by way of oral or written submissions, not necessarily within 60 days of the receipt of the award. 60

An overall examination of the provisions of the Arbitration Act, clearly indicates that the grounds on which an arbitral award could be set aside are contained only in section 32. In terms of this provision, a party seeking to set aside an award should make an application to the High Court within sixty (60) days of the receipt of the award. Section 32 (1) is subdivided into paragraphs (a) and (b). Paragraph (a) imposes limitations on the finality of the award by setting out the specific grounds on which a party may challenge the validity of an award.

Section 32 (1) (a) reads as follows . 70

"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

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(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains 80 decisions on matters 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 [90] with the provisions of this Act : or. . . "

Sub paragraph (b) of section 32 (1) provides for setting aside an arbitral award on the finding of the High Court on one of the grounds set out therein. This paragraph reads as follows .

„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.„

In terms of the provisions of the Act, the arbitral tribunal is vested [100] with the power to 'decide the dispute' submitted for arbitration. The High Court is vested with the jurisdiction for the enforcement and recognition of an award or in the alternative to set aside such an award. In terms of section 31 of the Act, a party to an arbitration agreement, pursuant to which an arbitral award is made, may apply to the High Court within one year after the expiry of 14 days of the making of the award for its enforcement. However, according to section 32 (1), in order to set aside an arbitral award, an application has to be made within sixty (60) days of the receipt of the award.

A plain reading of section 32 (1) reveals clearly that the opening 110 paragraph applies to both sub paragraphs (a) and (b) of section 32 (1). The difference between the two sub paragraphs (a) and (b) is that the former requires an applicant to furnish proof of four situations, whereas the latter permits the High Court to find and arrive at a conclusion on the two situations which would enable an arbitral award to be set aside. However, for the High Court to find that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka or that the arbitral award is jn conflict with the public policy of Sri Lanka, as stated in sub paragraph (b), it would be necessary for the party making an application for setting 120 aside an arbitral award, to adduce necessary material for this purpose in his application filed in terms of section 32 (1).

The words in sub paragraph (b) of section 32 (1), ᵗwhere the High Court finds' are clearly referable to the application made in terms of section 32 (1) and the material adduced in such application. A finding cannot be made by the High Court in terms of sub paragraph (b) of section 32 (1) other than on the averments of the application and the material contained therein. Therefore, I am of the view that the High Court was in error when it came to the finding that it has the power [1] ex mere motÙ to set aside an award on the grounds stated [130] in sub paragraph (b) of section 32 (1) even in the absence of material supporting such a finding being contained in the application.

The next question that has to be considered relates to the application of the time bar contained in the opening paragraph of section 32 (1). I have at the commencement of this judgment adverted to the distinction between the respective time periods with which applications could be made for recognition and enforcement on the one hand and to set aside an award on the other. The clear legislative

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intent in having a shorter time period for setting aside an arbitral award is to ensure that a challenge to the validity of the award should be [140] made early and the party having the benefit of the award may take a longer time to enforce it. Such a distinction is not uncommon to our procedure regulating civil action. Even in the case of a decree of the District Court in a regular action, a party seeking to challenge the validity of the decree

has to fife the notice of appeal within 14 days and the petition within 60 days, whereas in terms of section 337 of the Civil Procedure Code an application for enforcement could be made within 10 years. Therefore I am of the view that the time bar of sixty (60) days contained in section 32 (1) should be strictly applied and all grounds of challenge with supporting material including [150] the material on the basis of which a party wishes the High Court to come to a finding in terms of section 32 (1) (b), be adduced by an applicant in terms of section 32 in the application.

For the aforementioned reasons, the appeal is allowed and the order made by the High Court dated 29. 06. 1999, is set aside. This matter is referred back to the High Court for inquiry de novo.

There will be no costs.

S. N. SILVA, Cd. — I agree.
ISMAIL, J. I agree.
Appeal allowed.

Inquiry de novo ordered.

KRISTLEY (PVT) LIMITED v. THE STATE TIMBER CORPORATION

SUPREME COURT FERNANDO, J,, GUNASEKERA, J. AND WIGNESWARAN, J.

SC APPEAL NO. 51/99

HC NOS. ARB 50/97 AND 52/98

20 MARCH, 10 APRIL, 20 JUNE AND 12 SEPTEMBER, 2001

Arbitration - Arbitration Act, No. 11 of 1995 - Applications to enforce / set aside award - Failure to file a certified copy of the award - Lack of legal competence of the claimant at the time of reference to arbitration - “Incapacity" as a ground for setting aside the award - Objection to award on the grounds of public policy

- Consolidation of Applications - Sections 31 (2) (a), 31 (2) (ii), 32 (1) (a) (i), 32 (1) (b) (ii) and 35 (1) of the Act - Issues in arbitration - Natural justice.

In October, 1993, the appellant an Australian Company (the claimant) and the respondent State Timber Corporation (STC) signed a contract for the supply of 300 cubic metres of sawn pine radiata timber from Australia. When one consignment of goods supplied by the claimant reached Colombo by ship on 09. 12. 1993, the STC terminated the contract for certain stated reasons.

On 24. 10. 1994 the claimant gave notice of arbitration in terms of the contract agreement and submitted its claim on 04. 06. 1996 on the ground that the termination of the contract by the STC was unlawful. On 09. 07. 1996 the terms of reference for arbitration were signed by the parties.

The STC in its statement of defence dated 20. 06.1996 objected to the jurisdiction of the Arbitral Tribunal and pleaded that the contract had been lawfully terminated. The objection to jurisdiction was later withdrawn.

On 16. 08.1996 during the cross-examination of the claimant's Managing Director, counsel for the STC stated that the claimant had been de-registered and dissolved on 28. 08. 1995, hence the claimant was non-existent at the date it made its claim; and consequently arbitration proceedings were a nullity. Counsel contended that an issue was unnecessary but the Arbitrators compelled him to raise issues which was followed by counter issues for the

claimant. Documents were tendered to prove that the claimant had been restored to the roll with effect from

11. 09. 1996. After inquiries arbitrators held that there was no proof that the claimant had been dissolved and that upon re-registration it was in the same position as if its registration had never been cancelled.

In the course of the arbitration, an allegation was also made that a cetificate supplied by the claimant including on seasoning of timber was a forgery and evidence of one Morrison was led but without raising an issue in that regard. This was in the background of a unanimous ruling by the Arbitrators that forgery should be established beyond reasonable doubt.

On 10. 12. 1997 by a majority decision (the Chairman and another arbitrator) it was held that the termination of the contract was wrongful. In two separate awards they upheld the claimant's award. The third arbitrator disagreed.

The Chairman held (with the other arbitrator agreeing) that the genuineness of the impugned certificate was never put in isssue, that in the absence of a specific issue which would have enabled the claimant to know the case it had to meet,

the claimant was not obliged "to counter the conjecture suggested by Bill Morrison". The third Arbitrator held that there was a "preponderance of evidence" that the impugned certificate was a forgery; and that the claimant had not established it genuineness. He opined that whilst the counsel for the STC was remiss in failing to raise a specific issue, it was the duty of the Tribunal to have raised the issues on the evidence of Morrison.

On 29. 12. 1997 the STC applied to the High Court to set aside the award annexing copies of the separate awards. On 21. 10. 1998 the claimant applied for the enforcement of the award annexing copies of the separate awards certified by an attorney-at-law. The applications were consolidated under section 35 (1) of the Arbitration Act (the Act). The High Court Judge by his order dated 09. 02. 1999 refused the application and set aside the majority award on the grounds :

(a) that the application for enforcement was not accompanied by a duly certified copy of the award.

(b) that the award was based on a forged certificate, hence it was contrary to public policy; and

(c) that the claimant had been de-registered and lacked legal capacity at the time of the reference to arbitration.

Held:

(1) 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.

Obiter

Even in a case where the copy of the award filed with the application is not a duly certified copy 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.

(2) In the circumstances of the case, the majority was justified in refusing to consider the question of forgery without a specific issue. Natural Justice demands such issue to enable each party to know from the beginning what

case it has to meet and to afford the affected party an opportunity of meeting the case against it. In any event, the third Arbitrator's finding was on a “preponderance of evidence" contrary to the Tribunal's previous unanimous ruling that forgery required proof beyond reasonable doubt which is a

proposition supported by a long line of decisions. Therefore, the High Court was not entitled to review the decision on the ground of public policy, in terms of section 32 (1) (b) (ii) of the Act.

(3) “Incapacity" which is a ground for setting aside an award in terms of section 32 (1) (a) (i) is established where a party to the arbitration agreement was under some incapacity, i.e. some incapacity to which a party was subject to when the arbitration agreement was entered into. In the instant case, the de-registration of the claimant which was relied upon occurred much later on 28. 08. 1995, but the High Court considered the question

of incapacity as at 09. 07. 1996 (the time of reference to arbitration) and not at the date of the arbitration agreement (October, 1993), which contained the arbitration clause. In any event, it was established that the claimant was restored to the roll the legal effect of which was to place it in the same position as if its registration had never been cancelled. As

such, the High Court erred in holding that the claimant was under an incapacity within the scope of section 32 (1) (a) (i) of the Act.

Cases referred to :

1. Lanka General Workers' Union v. Samaranayake - (1996) 2 Sri LR.
2. Nagappa Chettiar v. Commissioner of Income Tax - AIR 1995 Madras 162.
3. Narayan Chettiyar v. Official Assignee - AIR 1941 PC 93.
4. Coomaraswamy v. Vinayagafnoorthy - (1945) 46 NLR 246, 249.
5. Selliah v. Sinnammah - (1947) 48 NLR 261, 263.
6. Muthumenika v. Appuhamy - (1948) 50 NLR 162, 164.
7. Lakshmanam Chettiar v. Muttiah Chettiar - (1948) 50 NLR 337, 340.

notification of the seller, the buyer will have the option of either

granting extension or termination of this contract . . . 70

There was no requirement of a certificate regarding "treatment" or "seasoning".

The claimant having duly furnished a performance bond on

05. 11. 93, sought permission on 09. 11. 93 to effect a partial shipment of 182.5 cubic metres. Having first refused, the STC later agreed, on 16. 11. 93. The claimant then confirmed that it would notify on

19. 11. 93 the exact amount of the first shipment, to be shipped on the vessel Fishguard Bay leaving Melbourne on 23. 11. 93, and that the balance would be shipped on another vessel on 14. 12. 93. The claimant then sent the pro forma invoice on 19. 11. 93; the STC 80 acknowledged receipt by fax dated 22. 11. 93, but pointed out an

error, whereupon the claimant sent a corrected invoice the same day. The STC established a letter of credit on 03. 12. 93, which reached the claimant on 06. 12. 93. That called for a certificate different to the stipulation in clause (ct) above, namely :

"certificate of grading, species, seasoning, treatment, quality and quantity from Forestry and Forest Products Industry Council . . . " [emphasis added].

The letter of credit also required that certain identification marks be placed on each bundle of timber. The vessel had already left 90 Melbourne by then, and the claimant immediately notified STC that it was not possible to fulfil some of these new and/or amended terms. Further, it was admitted that the Assistant General Manager of STC knew that the Forestry (etc) Council had ceased to exist in 1990. The letter of credit also required negotiation within fourteen days of shipment, which period expired on 07. 12. 93.

Naturally, by fax dated 06. 12. 93, the claimant requested several amendments. Although there was evidence, in the arbitration proceedings, that the matter had been discussed by telephone, and that the sc Kristley (Pvt) Limited v. The State Timber Corporation was claim that the STC "had wrongfully and/or illegally and/or maliciously and/or fraudulently terminated the contract".The STC in its statement of defence dated 20. 06. 96 objected to the jurisdiction of the arbitral tribunal, and pleaded that the STC had lawfully terminated the contract. On 09. 07. 96, "the terms of reference for the arbitration" were signed by the parties. Thereafter, fourteen admissions were recorded, and 39 issues were framed by the parties : nine by the claimant, 26 by the STC, and a further four consequential issues by the the claimant. Counsel for the STC withdrew his objection to jurisdiction. Evidence was led on 16. 07. 96, 18. 07. 96, 23. 07. 96, 31. 07. 96,On 16. 08. 96, in the course of his cross-examination of the claimant's Managing Director, Counsel for the STC stated that the claimant-company had been deregistered and dissolved on uo 28. 08. 95; that, therefore, the claimant was not in existence at the time the statement of claim was filed; and consquently that the arbitration proceedings were a nullity. On 29. 08. 96, although Counsel for the STC contended that "actually an issue is not really necessary", all three Arbitrators insisted that an issue must be

raised in regard to that matter. Counsel then raised five issues, which were allowed. On a subsequent day, 12. 11. 96, Counsel for the claimant raised four consequential issues, and tendered certain documents in proof of the fact that the company had been restored to the roll with effect from 11. 09. 96. On 18. 11. 96, both Counsel stated that they did 1 so not intend to lead any evidence as to the Australian law. Having heard Counsel on 29. 08. 96, 12. 11. 96 and 18. 11. 96, the arbitral tribunal ruled against the STC on 28. 11. 96. One Arbitrator held that - assuming, on the basis of the admissions, that the claimant-company had been deregistered - it had not been proved that it had been dissolved. The other two Arbitrators held that the claimant-company had been restored to the roll, and was thereupon in the same position as if its registration had never been cancelled.On 16. 08. 96, before that question of deregistration arose, the claimant's Managing Director had testified that the impugned certificate 160 had been received from the supplier of the timber, ''Thompson Saw Mills", who had obtained it from TPC. Counsel for the STC then tendered an affidavit dated 06. 08. 96 from Bill Morrison (described as Quality Assurance Manager of TPC) to the effect that the impugned certificate tendered by the claimant was a forgery. Counsel for the claimant objected, submitting that the impugned certificate had already been produced without objection, that forgery must be established by the best evidence, and that the maker of the affidavit should give evidence and be cross-examined. Counsel for the STC then said he would get down Morrison only if the affidavit was rejected. The 170 Chairman of the arbitral tribunal then asked him to make up his mind whether he was calling Morrison, to which Counsel's response was "provided the claimant deposits the costs incurred in the tribunal". The Chairman then ruled that :"According to Morrison this document which is a vital document produced by the claimant is a forgery. The issue of forgery has been raised, and in our view forgery should be established beyond reasonable doubt by positive evidence. It is not sufficient to base our conclusion that an important document such as [this] is a forgery on the belated affidavit of one Mr. Morrison purported to iso be from Australia. We know that Mr. Morrison has been listed as a witness for the [STC], but [its Counsel] states that he is not calling Mr. Morrison. The position of the tribunal is that we cannot accept a series of allegations on forgery without the person testifying and subjecting himself to cross-examination . . . Therefore, we reject the affidavit." [emphasis added].

Mihaly International Corporation

v. Democratic Socialist Republic of Sri Lanka

(ICSID CASE NO. ARB/00/2)

INDIVIDUAL CONCURRING OPINION BY MR. DAVID SURATGAR

1. Although in agreement with the findings of the Arbitral Tribunal as set out in this Award, I believe that there are important features in this case which need to be set out for the record and should be taken into consideration by the Government of Sri Lanka and by other Governments interested in encouraging private foreign investment in infrastructure projects. This is particularly true in the case of public utility projects in power generation and distribution or in water and waste water treatment. These invariably require some form of international competitive bidding or competitive proposals leading to a Build Own and Transfer (BOT) or Build Own and Operate (BOO) transaction or to a Concession.

2. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) was devised by the World Bank in order to assist in the improvement of the climate for private foreign investment. At the time, there was a limited flow of private foreign or indeed private investment in infrastructure projects in emerging markets and in many cases there was some degree of disinvestment. Governments were yet to embark on programmes of privatisation of public utilities. The drafters of the Convention debated a definition of "investment" for purposes of the Convention and following debate decided against a definition. Under Article 25(4), States could put investors on notice as to the type of disputes that they would be prepared to have submitted to the Centre, and also to define the scope of their advance consent to the jurisdiction of ICSID by means of a law or by Bilateral Investment Treaties such as the United States–Sri Lankan Bilateral Investment Treaty.

3. Sri Lanka accordingly had the opportunity to adopt a precise and limited definition of "investment" for purposes of its consent to jurisdiction of the Centre. Apparently it had not done so. It signed a Bilateral Investment Treaty with the United States which sets out in Article I(1)(a) a very general definition of investment for purposes of the Treaty. It specifically provides in Article I(1)(a) that investment should include:

"(ii) a company or shares of stock or other interests in a company or interests in the assets thereof

(iii) a claim to money or a claim to performance having economic value, and associated with an investment, . . . and

(iv) any right conferred by law or contract, and any licenses and permits pursuant to law". (emphasis added).

4. As the Award accepts, the claimant in this case argued (cogently in my view) that they were given a period of exclusivity in which to develop a BOT project for a 350 mw power generating facility in accordance with Sri Lankan law and rules and under a series of performance benchmarks. This commitment by Sri Lanka was set out in a "Letter of Intent" (15 February 1993) which followed expressions of interest from some 25 groups from which 5 groups were invited to enter into negotiations and finally out of which the claimant's group was selected and given the "Letter of Intent". (See Award paras. 40 and 41). This "Letter of Intent" was superseded by a "Letter of Agreement" (dated 22 September 1993) and by a "Letter of Extension" (dated 20 July 1994). The Award (paras. 40-41) fully describes these letters and their scope and content.

5. As the Award indicates (paras. 31-32) the ICSID Convention (Article 25(1)) states that the necessary basis for jurisdiction requires that there be a dispute, that it be a legal one, that the dispute arises directly . . . out of an investment and that there was an investment. The Award notes (paras. 33-34) that as the Convention does not define investment ". . . the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment."

6. The Award takes the position that while expenditures directly incurred under BOT procedures prior to final contract could become investments in accordance with internationally accepted accounting practices, this would only occur once contracts were signed. While noting the

expert opinion of Per Ljung, cited by the Claimant, to the effect that such expenditures would constitute investment in the host country, the Award holds that the Respondent had not given its consent to this treatment of development costs (para. 36). In taking this position the Award appears to rely on the need for actual consent by Sri Lanka to a

particular development cost being accepted as constituting an "investment" for purposes of the case. On this matter I believe the Tribunal should have called for evidence of international legal and utility precedents and practice. This could have been done by joining the final decision on jurisdiction to the hearings on the merits.

In this context I believe the Tribunal should have called for evidence from the World Bank and the International Finance Corporation as well as from insurance agencies such as the Multilateral Investment Guarantee Agency (MIGA) and the Overseas Private Investment Corporation (OPIC). It does appear for example that investment insurance can be obtained for development costs. As for the World Bank practice attention should be paid to the guidelines set out in the World Bank's Discussion Paper of September 1999, Submission and Evaluation of Proposals for Private Power Generation Projects in Developing Countries where (at p.14) a full discussion is provided with respect to the correct make-up of proper Capacity Payments. The document emphasizes that in addition to Fixed O&M costs, Financing Costs, Insurance Costs and agreed Equity Shareholder returns, there should be included "Project Capital Costs. These comprise all project development and construction costs, including but not limited to pre-feasibility engineering, legal and auditing services."

In its decision relying on the lack of consent to such treatment of development costs the Award lays emphasis on the specific language to be found in the Letter of Intent, Letter of Agreement and the Letter of Extension to the effect that these instruments were not intended to create a binding legal obligation on either party (paras. 36-47).

I believe that the Tribunal should have sought the position of the parties and have called for evidence as to whether this exculpatory language was designed to ensure that there was no contractual liability before a final BOT contract was signed or whether its effect under Sri Lankan and general principles of international law was to exclude any liability of Sri Lanka arising from its conduct after the award of the Letter of Intent— including a duty to negotiate in good faith.

7. Although I agree with the Award's finding that the development expenditures allegedly incurred by the Claimant were not accepted by Sri Lanka as "investments" and that the Claimant has in this respect not succeeded in meeting the requirements of Article 25(1) of the ICSID Convention, I believe the position clearly would be different if the Claimant could have demonstrated that the expenditures had been incurred by a Sri Lankan

company in which it had a share. Such a shareholding by Mihaly International Corporation of the United States would appear on its face to meet the definition of investment set out in Article I of the US–Sri Lanka BIT.

8. Further examination of the Claimant's written materials (see Claimant's Memorial on Jurisdiction para. 22 and p. 33 of Mr. John Walker's first affidavit of the Claimant's Memorial on Jurisdiction para. 65 and also Tab. 49, Exhibit A Vol. 2 from Mr. Walker's first affidavit) appear to indicate that although the international consortium of participants in the successful bidding group established and incorporated a Sri Lankan project development company, the South Asia Electricity Corporation (Private) Limited, Mihaly International Corporation of the United States did not take up shares in such a company. If they did in fact do so or if they had done so, I believe that the test of "investment" under the ICSID Convention Article 25(1) as buttressed by Article I of the U.S.-Sri Lankan BIT would have been met. In this case the Tribunal would perforce have to accept that jurisdiction existed ration[e] material.

9. In the absence of such evidence, I reluctantly must agree with the conclusions of the Award. In so doing it should be added that the written and oral evidence presented to the Tribunal suggests that the Claimant may well have a sound basis for pursuing its claim before other fora. The expense and patience displayed by the Claimant and its associated corporate partners in following the letter of the requirements imposed by Sri Lanka under its own contract procedures and the Letters of Intent, of Agreement and Extension were considerable and apparently carried out in good faith. The Embassies of numerous governments also supported these efforts.

10. If private foreign investors are to be encouraged to pursue transparency in seeking such BOT opportunities the international community must address the lessons of this case. Expenditure incurred by successful bidders do indeed produce "economic value" as specified by Article 1 of the US–Sri Lanka BIT and the protection mechanism developed under the aegis of the World Bank in the form of the ICSID Convention should be available to those who are encouraged to embark on such expensive exercises.

David Suratgar

March 7, 2002