Sri Lanka has potential to be South Asia's arbitration centre: Hiran De Alwis

Hiran De Alwis, from the Sri Lanka National Arbitration Centre (SLNAC) shared some valuable information and insights about the Arbitration Act and how it operates in Sri Lanka. He underscored the importance of arbitration for the local business community and the country's economy. De Alwis recently attended the London Chartered Institute of Arbitrators 100th conference and was the only representative from Sri Lanka. Following are excerpts from the interview:

By Kiyoshi J Berman

Sri Lanka National Arbitration Centre CEO Hiran De Alwis

Q: Can you briefly explain the history of the Sri Lanka National Arbitration Centre and its significance to Sri Lanka?

A: Sri Lanka National Arbitration Centre is a private, non-profit company; something similar to a social service. The membership consists of members of various chambers of commerce, professional associations like the Architect's Institute, Sri Lanka Bank Association and so on. SLNAC was incorporated in 1974 and is one of the oldest arbitration institutions in the country. Most members of the board of governors offer their services voluntarily.

I'm also a lawyer and a charted arbitrator but as I'm in the board of governors, I work in an honorary capacity. We perceive this to be important for the economy of the country and and a way of providing dispute resolution services more efficiently. The operations here are run by the Chief Operations Officer Johann Atapattu and we have a registrar and our staff. This is one of the oldest and in my opinion highly respected arbitration institutions. We offer a place or facility where parties can avail themselves to the services required.

Q: Why is the law of arbitration important?

A: An arbitration decision given has full validity in law as Arbitration Act 1995 validates all decisions. There is also an international treaty to govern this and is enforced in the local Acts. There is a slight difference from a court procedure because the parties involved in business usually state in the contract how they would want to resolve any disputes. Having disputes is not wrong, it's part and parcel of everyday life. Whether it's matrimonial matters or in business dealings people can have different viewpoints and misunderstandings or genuine viewpoints that clash. The important thing in my view is how you resolve these things.

Our motto is expeditiously resolving commercial disputes under due process of law; so arbitration is one such approach. One of the most important things is where parties can go to court, that's a fundamental right and in some instances is good. When the parties have agreed to go to arbitration in commercial contracts then you have no choice but to go for arbitration. Knowledge of this subject is widely important. When you're involved with international trade and considering the projected growth of foreign direct investment into Sri Lanka and exports from Sri Lanka, how parties do their business ultimately boils down to an agreement or contract which the parties sign. This invariably provides how to resolve disputes and almost all those contracts would say arbitration is a methodology of resolving disputes.

This is a lengthy topic but in brief, there are different modalities of arbitration. For example, there is arbitration under the ICC, UNCITRAL and various other bodies which you have to get professional advice. In Sri Lanka we have what is called arbitration under the Arbitration Act. One of the main functions of the arbitration centre and our board is disseminating knowledge of arbitration to the local business community and to our professionals. It's important to be aware of it whether you use it or not. You can get sued all over the world and get millions of dollars of claims against you, if you're not careful. One classic example is the Hedging case where our petroleum corporation entered into hedging instruments with the banks and ultimately got sued in various jurisdictions incurring big costs to the country. Even for state bodies like the BOI, sports authority or the airport and aviation services, arbitration is important because we are looking at a financial gain or loss. At SLANC we maintain strict neutrality and confidentiality. Sometimes the arbitration parties want confidentiality because their business secrets should be thrashed out possibly not in publicly in court. Most of the time the parties involved select their arbitrator; and they should know to select someone of competence and integrity. The centre makes sure that the proceedings are maintained properly. Once they get an arbitration decision and if the other party doesn't honour it, you only have to go to the commercial high court, register and enforce that award or decision. For this, certified copies of the arbitration case is required and we provide that service as well.

Q: What is the difference between ad-hoc and institutional arbitration?

A: Institutional arbitration is when a party enter a contract or agreement they decide on how and what law would apply, should they go in for arbitration. Within that selected law you can select various rules that govern the operation of the arbitration. The decision is up to the parties; they can put it into the contract or not. If they put it into the contract, then the arbitration would go under institutional. On the hand, if the parties enter the contract merely saying it will follow arbitration without setting out a rule, then the arbitration is ad-hoc. There are pros and cons for both of these.

Q: What are the benefits of arbitration to the economy and country?

A: This centre is doing a service to the business and professional community. We would like the state to fund this centre especially to improve the facilities, infrastructure and the efficiency. According to our COO, 80% of the cases here are concluded within a year. There would be another 20% which takes longer so it would be necessary for proper focus to be given to expeditious disposal of these matters. This is basically the facility we're offering here.

Being a non-profit, we only have to make sure that we don't run at a loss. We are highly respected overseas because of our neutrality and for a long time we had corporation agreements with other international bodies. Our expertise has been sought after by foreign entities to get advice on improving their centres. There is a great potential of developing this modality of dispute resolution for the benefit of the country and economy.

One of the suggestions I made in 2012 through a paper was on positioning Colombo as a regional arbitration centre. For example, in the SAARC region there are over a billion people, a lot of trade is conducted and there are cross border transactions. Invariably there are going to be disputes and I think Colombo is an ideal place to resolve these. This way a significant amount of foreign exchange can be generated into the country. Firstly, by attracting these services to a neutral venue and then utilising the professional services in the country.

For some of our local exporters, importers and state agencies, having a place in Sri Lanka where they can resolve their issues without being sued all over the world is more cost effective. To develop these areas, we would like to work with the state. However, my request would be for the state to act as a facilitator and not to get involved in running it as it would negate the whole principle. Arbitration is a private sector dispute resolution and the important thing is party autonomy.

Once in Singapore, a minister said that arbitration has become a multi-million dollar industry. There are arbitration centres in Singapore and Malaysia which are good and Colombo has great potential too. Let's look at the positives – we have an Arbitration Act 1995 based on the UNCITRAL model which is in my opinion very good. We have arbitration statutes prior to that which was running for over 100 years. We have commercial laws based on international trade and we have competent professionals. Arbitration is important not only for legal professionals but for various others such as engineers, architectures and sportsmen.

Now that a lot of emphasis is given to knowledge based and learning based development of the economy; this is an ideal professional development opportunity.

Q: On average how many arbitration sittings does the centre conduct for a week?

A: Approximately about 20 sittings are conducted for a week. Sometimes it's more sometimes not but it's usually around 20.

Q: Can you comment on the importance of following proper procedures in arbitration?

A: Arbitration is valid in law and it's important that the due process of law is maintained and observed. The parties nominate their arbitrators, so once the arbitrators are appointed they have to maintain strict neutrality and decide matters independently and expeditiously as possible. We are currently focusing a lot of attention to expediting the process some more. As I said earlier, 80% is very good but it needs to be made better.

Apart from the integrity of the process that needs to be maintained, it's important that arbitrators who are knowledgeable to be appointed. Knowledgeable on the areas of question and the law on which they have to return. For instance, if it's a cross boarder transaction involving some foreign law they should have some awareness of that. If the arbitration involves foreign institutional arbitrations they should be aware of those institutional rules.

Most importantly an independent decision should be given. The role of the centre ends once the decision or award is given. Then the question is about enforcing that award.

Q: Can you comment on the London Chartered Institute of Arbitrators 100th conference you recently attended?

A: Arbitration has been going on all over the world. Interestingly it has originally developed as an antidote to war. Especially after the First World War there were lot of concern about why these disputes cannot be discussed and resolved, and why some of these end in trade animosity and problems like that. So international bodies got together and developed a system where states can resolve their disputes through treaties. Then they developed that into arbitration.

One of the most important things people don't know is that you minimise violence with arbitration. After the world wars there was a massive increase in international trade so the International Chamber of Commerce (ICC) got involved; and they had to have a mechanism to resolve their disputes. As a result cross-border arbitrations also developed.

Presently, with the dramatic increase in arbitration which is presented with the growth of e-commerce and all, there will be more cross-border transactions. One of the institutions for the development of the professions of arbitrations is the Charted Institution of Arbitration London of which I'm a member. This year was the century celebration of their conference. I was honoured to attend this event and there were arbitrators from all over the world. One of the main things at the conference was the setting of basic principles for arbitration on the development of arbitration. These principles involved the integrity of the process, whether to pick experienced arbitrators or knowledgeable arbitrators and likewise.

They also focused on certain areas of unnecessary costs. For example the process 'discovery of documents' is apparently costing a lot of time and money specially in overseas jurisdictions; so parties should have way to tackle that. Secondly the independence of arbitrators has to be considered. They also discussed how to make the process more efficient and cost effective. Typically they were looking at the next stage of arbitration.

In this conference, there were arbitrators and legal practitioners from all over the world including the president of the IBA and president of the Charted Institute of Arbitrators. A lot of the countries that were present are looking into the potential of developing their countries as arbitration centres. In that context I would say, Sri Lanka has a lot of goodwill and a great opportunity to develop an arbitration centre here in Colombo.

FT Quote

"An arbitration decision given has full validity in law as Arbitration Act 1995 validates all decisions. There is also an international treaty to govern this and is enforced in the local Acts. There is a slight difference from a court procedure because the parties involved in business usually state in the contract how they would want to resolve any disputes. Having disputes is not wrong, it's part and parcel of everyday life. Whether it's matrimonial matters or in business dealings people can have different viewpoints and misunderstandings or genuine viewpoints that clash. The important thing in my view is how you resolve these things

Institutional arbitration is when a party enter a contract or agreement they decide on how and what law would apply, should they go in for arbitration. Within that selected law you can select various rules that govern the operation of the arbitration. The decision is up to the parties; they can put it into the contract or not. If they put it into the contract, then the arbitration would go under institutional. On the hand, if the parties enter the contract merely saying it will follow arbitration without setting out a rule, then the arbitration is ad-hoc. There are pros and cons for both of these"