

# The Dispute Resolution Landscape in Sri Lanka Perspectives on arbitration and dispute resolution

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## The history of dispute resolution in Sri Lanka

Sri Lanka, an island in the Indian Ocean on the East/West sea route off the South coast of India, has a recorded history of over 2,500 years. As the well-known Jurist Professor C. G. Weeramantry states in the Law of Contracts, "The legal system of Sri Lanka has often been likened to a many coloured mosaic. Laws springing from sources as diverse as England, Arabia and the Gangesic Plain stand side by side jostling for recognition with those taking their origin in Rome, in the Netherlands and in indigenous custom".

The introduction of Buddhism into Sri Lanka around the 3<sup>rd</sup> century BC had a fundamental effect on the system, based on a conciliatory approach with a history of a village tribunal concept with the participation of a village elder to resolve disputes.

Foreign influence through the Portuguese, Dutch and British led to a major impact on the system, together with the contribution of its historic personal law regimes.

In the original history of Sri Lanka the Village Headman, the Head Priest of the Temple, intervened to resolve disputes. This was accepted practice as he was recognised as an honest, learned, unbiased, and respected resolver of disputes - an Arbitrator.

Sri Lanka, although it has a heritage of Roman-Dutch common law, also has a long history that imbibes the principles of English law in specific commercial contexts. The Law of Contracts is primarily based on English law. However, one area which encompasses the interface of these two legal systems is in the concept of consideration and the doctrine of *justa causa* (just cause).

Apart from Sri Lanka, Roman-Dutch law applies in a small number of other countries including South Africa and Zimbabwe. As set out by the Supreme Court, the Roman-Dutch law has more similarity to the law of Scotland because both these legal systems were founded upon the principle of Roman law. However, the Roman-Dutch law application has been modified by statutory laws and judicial decisions. Therefore, in relation to commercial matters, the applicability of the Roman-Dutch law has been displaced by English law.

The application of Roman-Dutch law provides, for example, in relation to contract law provisions for the concept of *justa causa*, the concept of unjust enrichment and in relation to Delicts and Mortgages. This Roman-Dutch law concept of *justa causa* is wider than the concept of consideration in English law.

In relation to commercial matters, the Civil Law Ordinance of 1852 introduced English law for commercial and business matters such as agencies, partnerships, banks, shipping, maritime laws, and sale of goods.

Accordingly, the administration of justice in Sri Lanka has now essentially been based on the English Model for over 200 years. In fact, the Supreme Court of Sri Lanka is one of the oldest in Asia, established in 1801.

However, in the modern context, "A Ceylon (Sri Lanka) Court of Justice is a British Court of Justice".

Accordingly, the Sri Lankan legal system is primarily based upon an amalgam of laws, including:

- English law
- Certain elements of the Roman-Dutch law
- Customary laws such as Kandyan, Muslim, and Tesawalamai
- Specific statutory laws
- Judicial decisions

The law in relation to arbitration accordingly has a long history in Sri Lanka. The Arbitration Ordinance was introduced in 1856.

Being a dualist legal system, Sri Lanka became a signatory to the New York Convention in 1962.

With this background, Sri Lanka enacted the Arbitration Act No. 11 of 1995, specifically making provision for the recognition and enforcement of arbitral awards, based upon the New York Convention of 1958. This led to dramatic growth and recognition of arbitration, particularly as a free-market economic system had been introduced from 1977.

With regard to alternative dispute resolution, Sri Lanka has specific legislation in relation to mediation and arbitration. With the introduction of the landmark Arbitration Act No. 11 of 1995, Sri Lanka adopted the model law, influenced by the UNCITRAL model law.

The Court Judicial system in Sri Lanka has evolved over the years and now has been specifically incorporated by the Constitution, which sets out judicial independence and powers, and the structure of the courts, in particular the Supreme Court, Court of Appeal and High Courts.

The Judicature Act also provides for courts of first instance for the administration of justice through High Courts, District Courts, and Magistrate Courts. There are three Commercial High Courts in Colombo for specific commercial disputes, and one such High Court is specifically empowered for the enforcement of arbitral awards, both local and foreign. A right of appeal to the Supreme Court with the leave of the Supreme Court obtained is provided for. The grounds for setting aside an arbitral award are limited and based on international best practice and public policy. The Supreme Court of Sri Lanka, in its judgements, has set out a very limited criteria for setting aside an arbitral award.

## Forthcoming legislative changes

An initiative has been taken to upgrade and modernise the Arbitration Act significantly. The Ministry of Justice has formulated a committee of experts and accordingly, after lengthy deliberations, a draft of recommendations have been forwarded to the Ministry, the Bar Association and other stakeholders. The most significant of these include:

- In relation to interim reliefs, significant reforms have been brought in *inter alia* for interim measures by an Arbitral Tribunal upon notice, to maintain the status quo, the preservation of assets, security for costs, modification or suspension of interim measures and specific provisions for enforcement of interim measures in the High Court.
- Proposing rules for the Commercial High Court of Enforcement to establish time frames for conclusion of applications to enforce or set aside an arbitration award.
- The objects clause to provide for the repeal of the present Arbitration Act of 1995 and to provide for the conduct of arbitration proceedings and give effect to the New York Convention.
- Using international best practices to facilitate arbitrations without undermining party autonomy, appointment of arbitrators, procedure to challenge arbitrators, determination of rules of procedure in the event of ad hoc arbitrations, representations of parties to provide clarity that foreign parties / agents are not prohibited.
- Laws governing the substance of the dispute.
- Further rules governing service of process and specific strengthening of provisions which provides for electronic documentation.

The recent establishment of another Commercial High Court for the enforcement of arbitral awards in Kandy City has lent significant impetus to enforce such awards.

Currently, due to the strategic maritime location of Sri Lanka and especially Colombo Port, an offshore Colombo Port City is being constructed. The Government has promulgated and passed legislation by way of the Port City Commission Act. In relation to dispute resolution, the Act specifically provides for a dispute resolution mechanism and the setting up of an Arbitration Centre. Thus, there is significant potential for recognition of foreign direct investment and arbitrations. The State has also made further provisions strengthening the infrastructure facilities and, more particularly, to boost foreign direct investments, incentives, tax exemptions by gazettes dated 7 July 2023.

These fiscal incentives, State-backed infrastructure support, present economic stability and monetary reforms and legislation facilitating investments, together with the geographic location, tourism opportunities and proposed legislation to enhance investment and speedier dispute resolutions, would further improve the opportunities for an efficient, effective cross border dispute resolution mechanism for all stakeholders.

## Opportunities

There already exist Sri Lanka Arbitration Centres, which facilitate local and international disputes and which also provide for ad-hoc and rule-based arbitrations.

The Sri Lanka National Arbitration Centre also provides for any party to facilitate the resolution of disputes by UNCITRAL Rules.

Furthermore, in a significant hybrid approach, it also recommends and permits the voluntary adoption by subsequent incorporation of an expedited set of rules which is based upon the UNCITRAL Expedited Rules mechanism.

Another significant legislative area which can contribute towards a more efficient dispute resolution system is the Electronic Transactions Act, which provides for electronic evidentiary documentation. A new Data Protection Act has already been enacted and new anti-corruption legislation was just passed. Amongst proposed legislation is a special Investor Commercial Court for investments over \$100 Million and a new Insolvency Act.

Special Small Claims Courts have been established island-wide to ease the backlog of small claim monetary cases.

Another area of legislation contemplated is the proposed update to Mediation law.

The President recently announced that upon the restructure and monetary reforms that have been effected, significant impetus would be given to embark on a dramatic economic growth trajectory from 2024. This includes Free Trade Agreements with Singapore, India, China, Thailand, and Indonesia, with the resulting legislative framework including a proposal for over 100 new laws to be enacted to facilitate such investments.

Sri Lanka was once known as Serendip, and accordingly, a serendipitous possibility and opportunity beckons.

About the author: Hiran de Alwis FCI Arb is Chair of CIarb Sri Lanka Branch and a Fellow of the Malaysian Institute of Arbitrators. He is a Legal Counsel and Arbitrator in Colombo with over 25 years of experience in Civil and Commercial law litigation, Counsel and Arbitrator in Colombo with over 25 years of experience in the Board of Governors and Chief Legal Advisor of the Sri Lanka National Arbitration Centre. He was also previously a Director of the Colombo Stock Exchange, Chairman of the Colombo Stock Exchange's Arbitration and Dispute Resolution Committee, member of the Bar Council of Sri Lanka and Chairman of the National Law Conference BASL. Several Ministers of Justice have appointed him for committees on reforms to Arbitration Laws and for developing arbitration law and practice. Most recently, Hiran was part of the committee of experts involved in revising and modernizing Sri Lanka's Arbitration Act.



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