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Sri Lanka

Key points

Arbitration in Sri Lanka is governed by the Arbitration Act No. 11 of 1995. The law is based on the UNICITRAL model law.

There are two main arbitral institutions in Sri Lanka: the Institute for the Development of Commercial Law and Practice Arbitration Centre (ICLP Centre) and the Sri Lanka National Arbitration Centre (Sri Lanka Centre).

The courts are supportive of international arbitration and will not accept jurisdiction where there is a valid arbitration agreement. Under the Arbitration Act the courts will enforce interim measures ordered by the tribunal.

Sri Lanka is a signatory to the New York Convention without reservation.

Applications to enforce arbitration awards must be made within one year and 14 days of the award. Enforcement can take between two and four years, depending on whether the enforcement is challenged.

Confidentiality
Sri Lankan law does not provide for the confidentiality of arbitrations, although parties can include a confidentiality clause in the arbitration agreement.

For a model confidentiality clause, see the Arbitration section on drafting arbitration clauses.

Model arbitration clause

Any doubt, difference, dispute, controversy or claim arising from, out of or in connection with this contract, or on the interpretation thereof or on the rights, duties, obligation, or liabilities of any parties thereto or on the operation, breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Centre of the Institute for the Development of Commercial Law and Practice.

Institute for the Development of Commercial Law and Practice (ICLP) Arbitration Centre

See the Arbitration section for best practice in drafting arbitration clauses.

Weblinks

www.iclparbitrationcentre.com
Institute for the Development of Commercial Law and Practice Arbitration Centre (ICLP Arbitration Centre)

The Sri Lankan Arbitration Act is available at www.iclparbitrationcentre.com/act.htm

1 What arbitration bodies are there within the jurisdiction?

The Institute for the Development of Commercial Law and Practice Arbitration Centre (ICLP Centre), established in 1996, and the Sri Lanka National Arbitration Centre (Sri Lanka Centre), established in 1985, are the main arbitral institutions in Sri Lanka: they facilitate both ad hoc and institutional arbitrations.

2 Is there an Arbitration Act governing arbitration proceedings, and is it based on the UNCITRAL model law?

The Arbitration Act No. 11 of 1995 (the Act) governs arbitration proceedings in Sri Lanka. It is based on the UNCITRAL model law.

3 What are the available rules?

The ICLP Centre has regular rules and expedited rules. However, even if the arbitration is being conducted at the ICLP Centre, the parties may agree to use alternative institutional rules or ad hoc procedures for the arbitration.

The ICLP rules are modelled on the rules of the Arbitration Institute of the Stockholm Chamber of Commerce and changes have been made only where necessary to make the ICLP Centre rules accord with Sri Lankan laws and conditions. The rules provide that the ICLP Centre may conduct arbitration proceedings under other rules such as the UNCITRAL rules and the ICC rules.

The ICLP Centre also acts as an appointing authority.

The Sri Lanka Centre was the first institution in Sri Lanka to administer arbitrations: it does not have its own set of arbitration rules, nor does it act as an appointing authority.

The provisions of the Act apply in ad hoc arbitrations, and in institutional arbitrations where the institutional rules do not provide for a particular situation.

4 What supervision is there of arbitrators and their awards?

The Sri Lankan courts have no general jurisdiction to hear and determine matters covered by a valid arbitration agreement (section 5 of the Act). However, the Act does give the High Court limited jurisdiction on matters such as the removal of arbitrators and the setting aside of an arbitral award.

Under the Arbitration Act

An arbitrator may only be removed in circumstances that give rise to justifiable doubts as to that individual's impartiality or independence. Either party may request that an arbitrator be removed within 30 days of becoming aware of the relevant circumstances. If, having made such a request, the party is dissatisfied with the tribunal's decision, it may, within 30 days of being informed of it, appeal the matter to the High Court.

If an arbitrator unduly delays in discharging their duties, the High Court may, upon the application of either party, remove the arbitrator and appoint another in that person's place.

Under the ICLP Centre rules

The Board of the ICLP will appoint arbitrators in the following circumstances (rule7):

- two party-appointed arbitrators fail to appoint a chair
- the parties are unable to agree upon a sole arbitrator

- an arbitrator resigns or is removed (if this arbitrator was party-appointed, the Board will act in concurrence with that party).

The ICLP rules also provide for instances where arbitrators may be challenged and for the disqualification of arbitrators (rules 9 and 10). A party wishing to challenge an arbitrator must set out its reasons in writing for the Board (with copies to the arbitrators and to each of the other parties). The Board can also decide that an arbitrator is disqualified (with effect from the date of its decision).

The Board can remove an arbitrator for failure to perform their duties in an adequate manner; before a decision on removal is made the Board must ascertain the views of the parties and the arbitrators.

The award has to be made not later than one year after the case has been referred to the arbitral tribunal; however, the Board has discretion to extend this period if appropriate (rule 25).

5 How quickly can a tribunal be set up?

The parties are free to determine the number of arbitrators and the procedure for appointing them.

Under the Arbitration Act

In an ad hoc arbitration with a sole arbitrator, the two parties must agree on the arbitrator. If they are unable to do so, the arbitrator can be appointed by the High Court. In an arbitration with three arbitrators, each party must appoint one arbitrator, and the two arbitrators thus appointed must then appoint a third. If a party fails to appoint an arbitrator within 60 days of receipt of a request from the other party to do so, or if the two arbitrators fail to agree on the third arbitrator within 60 days of their appointment, the appointment can be made by the High Court.

Assuming that the parties comply with the above procedure without resorting to the courts, it may take about two months to appoint a tribunal with three arbitrators.

Under the ICLP Centre rules

A request for arbitration must be made in writing to the ICLP Centre, by the claimant. The request must contain the names and addresses of the parties and a statement of claim along with a brief description of the dispute, and may also include the appointment of an arbitrator (rule 1).

If the Board approves the request, the respondent will be required to submit a reply within a fixed time. The reply may contain the appointment of an arbitrator (rule 5).

After receiving the request for arbitration and the reply from the respondent, the chair of the tribunal (or a sole arbitrator can be appointed.

The Board will determine the place of arbitration unless the parties have done so and will fix an amount to be paid as security for costs. As soon as this amount has been paid, the Board will refer the case to the arbitral tribunal.

6 What happens if one party refuses to participate in the process?

Under the Arbitration Act

If a party fails to appear before the tribunal without reasonable cause, or fails to comply with an order made by the tribunal, the tribunal may continue the arbitration proceedings and determine the dispute on the basis of the material available (section 15(3) of the Act).

Where a party fails to appoint an arbitrator or to take part in the proceedings, the Act does not provide for a tribunal to proceed ex parte. In the event of a party failing to appoint an arbitrator, the party referring the matter to arbitration must apply to the High Court (section 7(3)).

If a party to a valid arbitration agreement institutes legal proceedings in court, and the other party objects to the court exercising jurisdiction in this respect, the court will refuse to hear and determine the matter (section 5).

Under the ICLP Centre rules

The failure by the respondent to submit a reply does not prevent proceedings from continuing (rule 5).

In the event that a party fails to appoint an arbitrator within the time prescribed by the Board, the Board must make the appointment (rule 7).

If a party fails to appear at a hearing or to comply with an order of the tribunal without good reason, the tribunal will proceed with the case or render the award (rule 23).

7 What interim measures are available?

Before the tribunal is constituted, a party may apply to the High Court for interim measures effective until the tribunal is constituted. Thereafter, any such application must be made to the tribunal.

Under the Act (which follows the model law) wide powers are vested with the arbitral tribunal to grant interim measures of protection when required. These measures are confined to the parties to the arbitration; the law does not empower the tribunal to make orders against third parties who are not a party to the arbitration (section 13 of the Act).

However, if circumstances require an order against a third party – in order to maintain the status quo or protect or secure the claim – a party to the arbitration would have recourse to court to obtain interim relief against the third party.

Other than in exceptional cases, an order for interim relief is only granted after the tribunal has heard the other party. If a party refuses to comply with an order for interim relief, the party requesting the relief may apply to the High Court for enforcement.

Interim relief available covers:

- injunctive relief
- security for costs
- security for the amount in dispute
- pre-arbitration disclosure of documents
- the preservation of evidence.

The Act allows any party to an arbitration agreement (having obtained the prior consent in writing of the tribunal) to apply to the High Court for a summons requiring a person to attend for examination before the tribunal and to produce to the tribunal any document or thing specified in the summons (section 20 (1)). A person cannot be compelled under any summons 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 the court (section 20 (2)).

The High Court is empowered to order a defaulter to appear before the court for examination, or to produce to the court the relevant document or thing, if a party applies to court in that regard (section 21). A defaulter will be anyone summoned before a tribunal who:

- refuses or fails to attend examination
- when appearing as a witness, refuses or fails to take an oath or make an affirmation or affidavit when required to do so
- refuses or fails to answer a question that the witness is required by the tribunal to answer
- refuses or fails to produce a requisite document
- refuses or fails to do any other thing which the tribunal may require.

8 What right is there to challenge the appointment of an arbitrator?

Under the Arbitration Act

When someone is asked to accept an appointment as an arbitrator, he or she is required to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. This duty continues throughout the arbitral proceedings. A party may challenge an arbitrator whom they have appointed only for reasons of which they became aware after the appointment was made.

Unless the parties have agreed otherwise, a party who seeks to challenge an arbitrator must do so before the tribunal, within 30 days of becoming aware of the circumstances that give rise to doubts about the arbitrator's impartiality or independence. Should the tribunal then hold against that party, it may appeal to the High Court within 30 days of receipt of the tribunal's decision.

An arbitrator may also be challenged if that individual does not have the qualifications required under the agreement; if he or she becomes unable to perform their duties; or if they unduly delay in discharging their duties.

Under the ICLP Centre rules

A party wishing to challenge an arbitrator must set out its reasons in writing and submit them to the Board, the arbitrators and the other parties (rule 9).

The Board decides whether an arbitrator may be disqualified and notifies the arbitrator (who is deemed to have been removed with effect from the date of that decision) (rule 10).

The Board may remove an arbitrator for failure to perform their duties in an adequate manner. Before removing an arbitrator, the Board must ascertain the view of the parties and the arbitrators.

9 Can a party appeal the arbitrator's decision and, if so, are there any time limits to be aware of or unusual provisions?

Under the Act, arbitration awards are final and binding on the parties (section 26 of the Act) and courts have no jurisdiction to interfere with the merits of an award. There is no right of appeal.

The Act specifies limited grounds upon which a domestic arbitration award may be set aside. However, it does not provide for the setting aside of foreign arbitration awards. If a foreign award has been set aside by a court of the country in which (or under the law of which) the award was made, an application for recognition and enforcement of the award in Sri Lanka may fail.

10 Is Sri Lanka a party to the New York Convention?

Yes, without reservation.

11 Will an arbitration award be enforceable in Sri Lanka and, if so, what is the procedure?

Sri Lanka has acceded to the New York Convention without reservation. Accordingly, an arbitration award from another New York Convention country is recognised in Sri Lanka as binding and enforceable (section 33 of the Act). However, the High Court may refuse to recognise and enforce a foreign arbitration award on the limited grounds set out in article 5 of the New York Convention.

The procedures for enforcement of domestic and foreign arbitration awards are the same. An application must be made within one year after the expiry of 14 days after the making of the award (any correction, modification or interpretation of the award having been made during the 14-day period). The application, supported by an affidavit, must be accompanied by the original award and arbitration agreement, or duly certified copies. Translations of these documents must also be submitted if they are in a language other than English or the official language of the court.

The time taken to enforce an award varies from case to case. If an appeal is made to the Supreme Court from an order of the High Court, it may take up to three to four years from the time the order is filed in the High Court to complete the case. If there is no appeal, a party may be able to complete enforcement proceedings in the High Court in about two years from the time of filing the award.

12 What are the likely costs of arbitration?

The costs of an arbitration depend on the rules selected by the parties. Generally, each party bears its own legal costs. In an arbitration with a sole arbitrator, the two parties share the arbitrator's fees equally. In an arbitration with three arbitrators, each party pays for its own nominated arbitrator, and the fees of the third arbitrator are shared equally between the parties. The parties are also required to share equally the administrative charges of the institution at which the arbitration is held.

The tribunal may order the parties to pay a security deposit before commencing arbitration proceedings. At the conclusion of the hearing, the tribunal may award costs at its discretion.

The Act allows for interest to be paid at a rate agreed by the parties or at the legal interest prevailing at the time of making the award. This is to be paid on the principal sum awarded, from the date of commencement of proceedings to the date of the award (in addition to any interest awarded on the principal for any period before proceedings were instituted), with further interest – at the aforesaid rate – on the aggregate sum from the date of the award to the date of payment (or any earlier date determined by the tribunal) (section 28 of the Act).

Under the ICLP rules (32 to 34), the tribunal must decide in the award the amount of fees due to the ICLP Centre and the arbitrators. The parties will be liable jointly and severally for the payment of all such sums. The party against whom the award is made must pay the fees and costs as well as the fees and costs of the other party unless the circumstances call for a different result.

When a case is terminated before it has been referred to the tribunal, the ICLP Centre must decide the amount of compensation due to it. When a case is terminated before an award has been rendered, the tribunal may decide that the parties shall pay compensation to the ICLP Centre and the arbitrators.

An award may be rendered even if it deals only with costs.

The fees of arbitrators must be reasonable in amount and based upon the time spent, the complexity of the case, the amount in dispute and other circumstances.

The amount of fees due to the ICLP Centre will be based on its own regulations.

13 Are split clauses valid and enforceable?

Split clauses allow one or more parties to elect arbitration or litigation after the dispute arises.

There is no statutory provision in Sri Lanka dealing with split clauses. These clauses have not yet been brought before the Sri Lankan courts for interpretation. Accordingly, it is unclear whether the courts would recognise such clauses as valid and enforceable or whether an award made based on these clauses would be enforced. ■