

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary

The sample contains 910 arbitral awards. The researcher identified that 30 arbitral awards become unenforceable from above 910 arbitral awards. From above 30 unenforceable awards, 3 arbitral awards had been set aside while for other 27 the enforcement had been refused by the High Court. The list of unenforceable arbitral awards is attached as Appendix 3. Table 4.3 provides a summary of these cases. Therefore objective 01 given in section 1.3 is achieved.

The research sample contained 910 cases, the whole of the arbitration cases decided by the High Court and/or the Supreme Court for the cases registered during year 2009-2012. This 4 years time period is more than 20% of the total time of the operation of Arbitration Act 1995 (from 01.08.1995 to the cutoff date of data collection at the High Court on 29.05.2015). Due to above described reasons the results obtained through the research can be generalized to the target population.

Table 4.3 indicates that 3.3% of local arbitral awards become unenforceable from finalized arbitration cases registered at the High Court for setting aside or enforcement during 2009 – 2012. This result can be generalized to the target population. Therefore objective 02 given in section 1.3 is achieved.

Further as per Table 4.4, when considering the finalized arbitral cases registered at the High Court for setting aside or enforcement during 2009 – 2012, on construction disputes, 11.76% of construction sector related arbitral awards become unenforceable either due to setting aside or refusal to enforce by the High Court. When compared to the financial and insurance sector this unenforceability percentage of construction sector related arbitral awards is considerably high. Therefore objective 03 given in section 1.3 is achieved.

When considering the arbitration context in Sri Lanka a local arbitral award can be set aside only on very specific narrowly defined grounds in section 32 of the Arbitration Act

1995. However when considering the enforcement of arbitral awards, there are several other procedural grounds to be adhered to. These procedural grounds includes requirements given under section 31, section 40 of the Act and relevant court procedures and legal principles such as res judicata.

In this context as described in section 4.2.3 and indicated in Figure 4.2, percentage of arbitral awards become unenforceable due to “non adherence to enforcement procedure” is 57%. The second largest ground “award conflict with the public policy” is responsible for 27% of unenforceable awards. Therefore awards becoming unenforceable due to “non adherence to enforcement procedure” is more than twice the number of arbitral awards become unenforceable due to public policy grounds. Further as explained, the result obtained from the research can be generalized to the target population.

In this scenario, it can be determined that when considering Sri Lankan context the most common ground which leads to setting aside or refusal enforcement of local arbitral awards by local courts (where the arbitral proceedings conducted under the purview of Arbitration Act 1995) is “non adherence to enforcement procedure”. Therefore Objective 04 given in section 1.3 is achieved.

When further scrutinizing the cases where the awards become unenforceable due to “non adherence to enforcement procedure”, as indicated in Figure 4.3, it can be found that delay in application for enforcement, not submitting arbitration agreement as required, not submitting arbitral award as required, not submitting a formal affidavit and not adhering legal principles or court procedures outside Arbitration Act are the constituents of “non adherence to enforcement procedure”. The first two constitute 47% and 35% of the category respectively. The other three constitute 6% each.

As per Figure 4.4, performance defects of legal counsel caused 64% of arbitral awards to become unenforceable under “non adherence to enforcement procedure”. Another 22% of the arbitral awards in the category become unenforceable due to the performance defects of the officer in charge (other than legal counsel) of the case to follow up the

case. Not understanding the requirements of section 31 of the Arbitration Act is responsible for causing 7% of arbitral awards unenforceable while another 7% of awards become unenforceable due to the failure of the company strategy on arbitral awards. Therefore performance defect factor constitutes 86% of unenforceable awards under the most common ground on which local arbitral awards become unenforceable. Therefore the researcher has identified the reasons to occur the most common ground leading to the unenforceability of arbitral awards as above described. Therefore the researcher has achieved the objective 05 given in section 1.3.

As per Table 4.3, only 3 numbers of arbitral awards have been set aside under section 32 of the Arbitration Act. Therefore as per Table 4.5, from 30 numbers of unenforceable awards, other than above 3 arbitral awards been set aside and 17 arbitral awards become unenforceable under non adherence to enforcement procedure, there are another 10 numbers of unenforceable arbitral awards. These 10 arbitral awards become unenforceable due to refusal of enforcement under section 34 of the Arbitration Act. Provisions in section 34 of the Act are almost synonymous with the provisions in section 32 of the Act. Further in the total sample of 910 cases only 8 cases are registered under section 32 of the Act. From these 8 cases only in the 3 cases above mentioned the arbitral awards have been set aside. Therefore it can be concluded that though there are ground for setting aside of arbitral awards, the parties involved in arbitral process do not obtain the precise usage of the provisions in section 32 of the Act for challenging arbitral awards.

A close scrutiny of Appendix 3 reveals that HC/ARB/1818/2009, HC/ARB/1916/2009 and HC/289/2011/ARB are the arbitration cases where the awards become unenforceable other than from financial and insurance industry. In HC/289/2011/ARB arbitration award was set aside. Other two cases are belonging to non adherence to enforcement procedure. Therefore all the 10 cases where the arbitral awards were not challenged under section 32 are from financial and insurance industry and the lessee or the borrower had not utilize their rights.

Section 34 of the Arbitration Act starts with “ Recognition and enforcement of a foreign arbitral awards irrespective of the country in which it was made, may be refused only...”. This indicates that section 34 of the Act is for foreign arbitral awards. However as described above, the courts used section 34 to refuse enforcement of local arbitral awards too.

However in the case *Hatton National Bank v. Sella Hennadige Chandrasiri* (2015), the Supreme Court of Sri Lanka set aside the High Court judgment on the arbitration case HC/ARB/388/2011 whereby the High Court refused to enforce an arbitral award on the grounds mentioned in section 34 of the Act. In the Supreme Court judgment, it was held that section 34 of the Arbitration Act is for foreign arbitral awards and cannot be applied to local arbitral awards. This makes more pressure on the parties involving in arbitral process to exercise their right under section 32 of the Arbitration Act more vigilantly and promptly.

5.2 Conclusions

Performance defects of either legal counsel or officer in charge of the case are responsible for 86% of arbitral awards to become unenforceable under “non adherence to enforcement procedure” while above ground been the most common ground for unenforceability of local arbitral awards.

The customers of finance industry are lacking of utilizing the provisions of section 32 of the Arbitration Act to challenge unreasonable arbitral awards. The courts lean to use section 34 of the Act to refuse enforcement of unfair local arbitral awards while section 34 is designated for foreign arbitral awards.

5.3 Recommendations

- i. Unenforceability of arbitral awards on the grounds of public policy or excess of authority may occur due to an error of the arbitral tribunal. On the other hand, following the correct enforcement procedure is totally in the hands of the award

creditor and his counsel. However, non adherence to enforcement procedure is surfaced as the most common ground on which local arbitral awards become unenforceable in Sri Lanka. Delay in application for enforcement become most frequent constituent under the non adherence to enforcement procedure. “performance defects of legal counsel” and “ performance defects of the officer in charge” become most common reasons for unenforceability under the category. Therefore it is important to establish proper reporting and monitoring systems in financial companies and legal firms to follow up arbitral cases properly.

- ii. As some borrowers and lessees in financial industry do not utilize their rights given in Arbitration Act properly to challenge unjust arbitral awards, an awareness programme needs to be carried out aiming the relevant strata of the society to improve their knowledge on the impact of arbitration agreement they sign when they obtaining financial facilities and to improve their knowledge on the repercussion they would face if they do not utilize the provisions in Arbitration Act for their good. This is very important to uphold the arbitration practice in Sri Lanka as the financial and insurance industry constitutes around 95% of the arbitration cases referred to the courts.
- iii. During the interviews conducted with finance companies and banks, most of them expressed that enforcement proceedings at courts become cumbersome and very time consuming. Due to these reasons, one bank and one finance company have removed the arbitration clause from their loan and leasing agreements. This difficulty in enforcement process is a considerable drawback in the arbitration sphere in Sri Lanka. Therefore, it is highly recommended that the government should take some steps to smoothen and speedup the enforcement proceedings of arbitral awards.

5.4 Further Research

- i. During the data collection process at the High Court the researcher noticed that in a considerable portion of arbitration cases, the respondents, specially in financial and insurance industry, the borrowers or lessees had not participated in the arbitral proceedings. The arbitrators issued ex parte decisions. The respondents file their objections only in enforcement proceedings in the High Court after they were summoned by the court. The researcher identified that their absent in arbitral proceedings make considerable disadvantages to them at the enforcement proceedings. Therefore a further research on;

Repercussions to the respondents due to their absence in financial sector arbitral proceedings in Sri Lanka is proposed.

- ii. As described in 5.1 some award debtors do not utilize section 32 of the Arbitration Act to challenge arbitral awards made against to them. Some of above arbitral awards contains grounds given in section 32 of the Act. The award debtor face considerable disadvantages at the enforcement proceedings if they do not challenge the award under section 32 of the Act. Therefore a research on;

Repercussions to the award debtor due to not utilizing the provisions of section 32 of the Arbitration Act 1995 is proposed.

- iii. The researcher noticed that some finance companies proceeds hundreds of arbitral cases with a few selected arbitrators by them. Due to this situation there may be an impact on the independence and impartiality of such arbitrators. Therefore a further study on;

The status of independence and impartiality of arbitrators involving in financial sector arbitrations in Sri Lanka is proposed.

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