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Scaling Impartiality and Independence of Arbitrators in Commercial Arbitration: A Comparative Legal Perspective

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Abstract

Commercial arbitration being one the most favoured Alternative Dispute Resolution (ADR) mechanisms in the corporate world, manifests private justice, confidence as well as flexibility throughout its process while preserving party autonomy. However, in Sri Lanka, arbitration is not commonplace or often practice resolving commercial disputes and reluctance to resort to arbitration is evident, even after more than two decades of the enactment of the existing statute; The Arbitration Act, No. 11 of 1995. This issue can also be identified by the massive number of court cases in terms of commercial matters. The legal framework on arbitration needs well-crafted reformations and the concerns on 'impartiality' and 'independence' of arbitrators should be provided with better legal interpretations. Impartiality and the independence of arbitrators are universally accepted norms within the arbitral proceedings. In the arbitration process, justice is perceived and visible through the behaviour of the third party who is called the 'arbitrator/s' who is appointed to resolve the matter between the parties. Hence the legal principles must be evaluated on how these two cardinal norms are measured in the Sri Lankan jurisdiction to provide a better legal approach to the Sri Lankan arbitration legal framework. This article seeks to approach the issue in a comparative legal perspective with special reference to the laws of the United Kingdom and the United States of America while considering the international benchmarks of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and

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UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. The study follows the black letter approach in law and the international and comparative legal research methodology predominantly. Further, it recommends legal reformation to the existing law on arbitration with the objective of promoting ADRs into the commercial dispute resolution sphere and embracing confidence towards commercial arbitration when pursuing private justice.

Keywords: *Private Justice, Impartiality and Independence of Arbitrators, Party Autonomy, Commercial Arbitration, Alternative Dispute Resolution*

Introduction

Arbitration can be identified as an out of court dispute resolution/ settlement mechanism which is also known as one of the most preferred Alternative Dispute Resolution (ADR) mechanisms in the world. Hence arbitration is triggered by way of an inwritten agreement between the parties to the dispute, resolution obtained through the arbitration process is considered as a matter of private justice. It is said that

> '[i]nternational arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment...in short, [arbitration] is an effective way of obtaining a final and binding decision on a dispute or series of disputes, without reference to a court of law...'[1]

Arbitration provides a substantial amount of freewill to parties to control over the arbitral process which is utilized to resolve their dispute. Through the party autonomy concept, it will provide a levelled playing field without assuming a 'home court advantage' to anyone in the dispute. Arbitration offers a more neutral forum, where each side believes it will have a fair hearing[2]. Flexibility and the autonomy of the

[1] Nigel Blackaby and others, Redfern and Hunter on International Abitration (5th edn, Oxford University Press 2009) para 1.01.
[2] MargaretL Moses, The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2012) 1.

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parties are the key reasons for the attraction towards arbitration by the corporate community.

Considering the advantages of arbitration is pertinent in this discussion. Neutral forum and the likelihood of enforcement of the award without legal complications were emphasized as advantages in an empirical survey conducted by Christian Buhring-Uhle[3]. Preference to neutral third-party intervention instead of upper hand of the 'home court' can be justified since the availability of the fair playground in arbitration. On the other hand, unified international legal principles based on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) such as pro enforcement biasness leave domestic courts with no choice but to recognize and enforce arbitral awards without much discretion. The private nature of the process is another aspect to be recognized as an advantage. Corporate culture is built upon confidential and sensitive business information. Thus, dispute resolution mechanisms should also entail the same culture to facilitate the corporate requirements in the community. There are two reasons behind it; corporate secrets are held confidential for business purposes and secrecy over negative outcomes of dispute. Therefore, arbitration provides the best platform to serve the corporate world with a confidential setting to resolve disputes.

In Sri Lanka, arbitration has not yet become the most preferred mechanism to resolve commercial disputes. Arbitration Act No, 11 of 1995 was enacted with the special purpose of facilitating the corporate world with an effective method of settling disputes and attracting investments by providing infrastructure such as effectual dispute resolution. However, reference to court procedure is still in place despite, the two-decades-old enactment that was supposed to facilitate the dire needs of the business community in dispute resolution.

Impartiality and independence are the two cornerstones that strike a balance between the fairness and justice attained through

[3] Christian Buhring-uhle, 'A Survey on Arbitration and Settlement in International Business Disputes'. In ChristopherR Drahozal and RichardW Naimark (eds), Towards a Science of International Arbitration (Kluwer Law International 2005)

arbitration. If impartiality and independence are not aligned properly, the arbitration process can be considered compromised and the foremost advantage of arbitration will be hindered accordingly. In the Sri Lankan Act, it is stated that impartiality and independence of the arbitration can be challenged[4]. However, there is no other guidance or interpretation provided to measure and assess the impartiality or independence.

Methodology

The study is a qualitative research based on two main legal research methodologies; namely, the black letter approach in law and international and comparative research methodology. The black letter approach was utilized to analyze the current legal requirements on the impartiality and independence of arbitrators. It was compared the Sri Lankan law with the international standards embedded in the New York Convention, 1958) and the UNCITRAL Model Law on International Commercial Arbitration, 1985, as amended (hereinafter referred to as the 'Model Law') while considering the standards set in the United Kingdom and the USA. The article comparatively reviews the need for change in the law on arbitration specifically on requirements of impartiality and independence of arbitrators.

Impartiality and Independence of Arbitrators

The previous USA approach to impartiality and independence of arbitrators was different from the internationally accepted norm. It was considered that an arbitrator who was appointed by a particular party as non-neutral and he was expected to favour the party-nominated. Statutorily[5] as well as judicially[6] partial approach of the arbitrator towards the party-nominated was regarded as legal. In the case of *Del Monte Corp v Sunkist Growers*[7], in accordance with the

[4] Section 10 (1) of the Arbitration Act, No 11 of 1995 (Sri Lanka) reads that where a person is requested to accept appointment as an arbitrator, he shall first 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.
[5] AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes 1977 (USA).
[6] Del Monte Corp v Sunkist Growers 10 F 3d USA (1993).
[7] ibid.

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arbitration agreement, each party was provided with the opportunity to appoint one arbitrator and thereafter they had agreed mutually to appoint the third arbitrator. One of the Party-appointed arbitrator's impartiality was challenged based on the pre-meetings held between witnesses and the arbitrator before the commencement of the arbitral proceedings. However, in the appeal, the court decided that

> '[a] party-appointed arbitrator must consider the evidence of record in good faith and with integrity and fairness. The fact that [the arbitrator] may have been predisposed towards Del Monte's case is not sufficient to vacate the arbitration award. The evidence relied upon by Sunkist is insufficient to support a finding that [the arbitrator] acted improperly either before or during the arbitration hearing. Therefore, the district court did not abuse its discretion in denying Sunkist's motion to vacate the arbitration award.'[8]

The AAA/ABA Code of Ethics for Arbitration in Commercial Disputes of USA has now been amended[9] and conforms with the international legal standpoint of impartiality and independence accrued in arbitrators during the arbitral proceedings. Article 12 (2) of the Model Law, recognizes the impartiality and independence of arbitrators as mandatory obligations.

Obligation to be impartial and independent are regarded as two inter-related but different concepts. Impartiality is a more subjective concept compared to independence. Impartiality is considered as essential to an arbitrator than independence in many instances and it is a non-waivable obligation. Independence is objective since it is not related to the state of mind of the arbitrator. Rather, it is linked to the relationships of the arbitrator, economically, personally, or professionally.

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8 ibid.

9 'The Code of Ethics for Arbitrators in Commercial Disputes was originally proposed in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. It was revised in 2003 by an ABA Task Force and a special committee of the AAA. The Revised Code was approved and recommended by both organizations in 2004...'
American bar association, 'Code of Ethics for Arbitrators in Commercial Disputes' (American Bar Association, 1 July 2014)<https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/Code_Ethics_Com_Arb_Ann/> accessed 14 October 2021.

In this context, measuring impartiality objectively is a daunting task compared to the evaluation of the independence of an arbitrator due to the abstract nature and the subjectivity attached to impartiality. Occurrence of partiality during the arbitral process that raises justifiable doubts on the conduct of the arbitrator, may be wielded because of the discretionary power given to him. The state of mind to balance the impartiality requirement while attending the discretionary power is rather overwhelming. The flexibility embraced during the arbitral process may also be a challenge to such discretionary power and the impartiality notion expected from the arbitrator. The Arbitration Act, c 23 (UK) has not deviated from the non-waivable requirement of impartiality of the arbitrator and it is indispensable to adhere to it.

Lack of impartiality and independence may adversely impact the arbitral proceedings in many aspects. Breach of coherent principles in the process dilutes the whole legal structure of the proceedings as well as the arbitral tribunal. On the other hand, lack of proper mechanism domestically as well as internationally to the challenges arise due to the impartiality and independence issues of arbitrators, impact upon the same system.

The Arbitrators' Duty to Disclose

In accordance with Section 10 (1) of the Arbitration Act, No. 11 of 1995 of Sri Lanka[10] arbitrator is obliged to disclose any fact which is likely to give rise to justifiable doubts to his impartiality or independence. Disclosure is considered an essential undertaking and cornerstone of an arbitrator's duty of independence[11]. The Sri Lankan law is not clear about when the justifiable doubts might occur and what kind of information that required disclosure. When considered the English Law, by virtue of Section 33 (1) (a), it is the general duty of the arbitral tribunal to act fairly and impartially[12]. Section 24 (1) provides impartiality as one of the grounds to remove an arbitrator

[10] See n 4.

[11] Dominique Hascher, 'Independence and Impartiality of Arbitrators: 3 Issues' [2012] 27(4) American University International Law Review 789, 793.

[12] Arbitration Act 1996 cl 33(1 (a)) reads, '[t]he tribunal shall…act fairly and impartially as between the parties, giving each party a reasonable 244 opportunity of putting his case and dealing with that of his opponent…'

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from his office[13]. A recent decision by the Supreme Court of the United Kingdom (UKSC) it was established the English law position whether and to what extent an arbitrator may

> '…accept appointments in multiple references on the same or overlapping subject matter with only one common party, without thereby giving rise to an appearance of bias; and do so without making disclosure to the party who is not the party in common…'[14]

In the UKSC decision of ***Halliburton Company v Chubb Bermuda Insurance Ltd*** [15] (Formerly known as Ace Bermuda Insurance Ltd) it was applied the objective test of fair-minded and informed observer and detachment in relation to the appearance of bias. When considering the duty of disclosure, it was determined whether the arbitrators have a legal duty to disclose all or specific factors and whether disclosure relevant to apparent bias. UKSC reiterated that 'facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased'[16]. UKSC decided that failure to disclose imply the apparent bias on the part of the arbitrator while confirming that due to disclosure as a 'continuing duty'.

The legal position of the USA is pertinent to discuss in this context. The language of the Federal Arbitration Act allows to vacate arbitration awards where it is evident partiality or corruption in the arbitrators[17]. New York Arbitration Act and the Uniform Arbitration Act of 1955 require prejudice to be proven due to the partiality of the arbitrator to set aside the award. However, the US law is silent on challenging the appointment of the arbitrator by a party to the arbitration procedure.

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[13] Arbitration Act 1996 cl 24(1 (a)).

[14] Racheal O'grady, 'To disclose or not to disclose? UK Supreme Court defines standards for arbitrator's impartiality and duty of disclosure'(Mayor Brown, 27 November 2020) <https://www.mayerbrown.com/en/perspectives-events/publications/2020/11/to-disclose-or-not-to-disclose-uk-supreme-court-defines-standards-for-arbitrators-impartiality-and-duty-of-disclosure> accessed 14 October 2021.

[15] [2020] UKSC 48.

[16] ***Halliburton Company v Chubb Bermuda Insurance Ltd (Formerly known as Ace Bermuda Insurance Ltd)*** [2020] 1 SC 1 (UKSC) [27](Lord Hodge).

[17] 9 USC Section 10 (2) (1994).

The Standard of 'Justifiable Doubt' and Challenging the Arbitrator's Office

The standard of 'justifiable doubt' to measure the impartiality and the independence of arbitrators was first introduced by the UNCITRAL Arbitration Rules in 1976 by virtue of Article 10 (1)[18]. It was reiterated that the same standards are applicable to both party-nominated arbitrators and neutral arbitrators. However, many experts in the field agree that the guidance provided to determine the standards of 'justifiable doubts' by way of statutory recognition, case law or any other means is weak. Some argue that the standard should be measured in a subjective perspective rather than an objective viewpoint[19].

If party autonomy is the foundation of arbitration, then a 'justifiable doubts' standard adopted by most arbitral institutions should be respected[20]. In the English case of ***AT & T Corp v Saudi Cable Co***[21] it was held that the same test applied to a judge in a court should be applied on a complaint of bias. In the AT & T case, the arbitrator's appointment was challenged since he lacked independence. It was further held that,

> '…it would be surprising if a lower threshold for disqualification applied to arbitration than applied to a court of law. The courts are responsible for the provision of public justice. If there are two standards, I would expect a lower threshold to apply to courts of law than applies to a private tribunal whose 'judges' are selected by the parties. After all, there is an overriding public interest in the integrity of the administration of justice in the courts…'[22]

Application of the 'real danger of bias' test for disqualification of

[18] 'An arbitrator may be challenged only if circumstances exist that give rise to the justifiable doubts as to his impartiality or independence', Section 10 (1) of UNCITRAL Arbitration Rules (1976).
[19] See AJ van den Berg, 'Justifiable Doubts as to the Arbitrator's Impartiality or Independence' [1997] 10(1) Leiden Journal of International Law 509-519.
[20] Hong-Lin Yu and Laurence Shore, 'Indepence, Impartiality, and Immunity of Arbitrators-US and English Perspective' [2003] 52(1) International and Comparative Law Quarterly 935, 939
[21] *AT & T Corp v Soudi Cable Co* [2000] 2 All ER 625 (CA).
[22] *AT & T Corp v Soudi Cable Co* [2000] 2 All ER 625 (CA) (Lord Woolf).

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arbitrators was upheld by the English Court of Appeal accordingly. It is noteworthy that the relationship and the link towards a specific field build his expertise. However, the same relationship may be regarded as a ground for challenge in appointment based on lack of independence which is incongruous. *AT&T* also teaches that the State courts frame the boundaries within which matters of disclosure, independence and impartiality are finally decided[23].

In the US case of C***ommonwealth Coatings Corp v Continental Casualty Co***.[24] the Supreme Court held that the non-disclosure of the long-standing business relationship (although not significant) led to partiality and undue means. However, the promising approach in Commonwealth Coatings did not prevail in the US legal framework. In the case of ***Merits Ins Co v Leatherby Ins Co.***[25] it was carved a new standard which is identified as the 'serious doubt test. It has been criticized that the 'serious doubt test' for non-provision of satisfactory explanation as to how it relates to 'appearance of bias' leaves Commonwealth Coatings invisible[26].

Impact of Party Autonomy towards Challenging the Arbitrator's Office

By virtue of Section 10 of the Arbitration Act, No. 11 of 1995, when the arbitrator's disclosure does not satisfy the duties of impartiality and independence, any party can object to his appointment as the arbitrator. According to the provision, the party can appeal to the High Court if he is not satisfied with the determination by the arbitral tribunal. However, the legal standpoint in Sri Lanka is unclear in many ways. It does not give the clear ruling as to when the justifiable doubts may occur. On the other hand, if it is a sole arbitrator, whether he is allowed to decide on his own about the impartiality or independence of himself is uncertain. Inarticulacy of the legal standpoint about impartiality and independence may lead to hinder the fairness of

[23] Hong-Lin Yu and Laurence Shore, 'Indepence, Impartiality, and Immunity of Arbitrators-US and English Perspective' [2003] 52(1) International and Comparative Law Quarterly 935, 942.
[24] 393 US 145 (1968).
[25] 715 F 2d 673 (7th Cir 1983).
[26] Hong-Lin Yu and Laurence Shore, 'Indepence, Impartiality, and Immunity of Arbitrators-US and English Perspective' [2003] 52(1) International and Comparative Law Quarterly 935, 948.

the total system of arbitration since it is at the party's discretion to challenge the justifiable bias and selecting the panel to determine about such bias according to Section 10 (3) of the Arbitration Act, No. 11 of 1995[27].

Conclusion and Recommendations

Independence and impartiality underpin the entire arbitral process. Without their assured vitality, arbitration as the favoured dispute resolution method in international commercial contracts will have a troubled future[28]. Arbitrators' fundamental duty to disclose all the material facts which may give rise to justifiable doubts to his impartiality and independence needs to be reiterated and respected. Series impairment of the same duty should give the opportunity to challenge the arbitrator's appointment at the commencement and afterwards to apply for an order of setting aside the award.

It is certain that there is a need for law reformation to recognize a proper standard on arbitrator's impartiality and independence to avoid the denial of justice. On the other hand, the judiciary must consider a narrow approach in the application of the 'justifiable doubt' test in the cases on lack of independence although the approach to measure impartiality is unaltered. Two concepts; impartiality and independence should be scaled in two different approaches accordingly. Party autonomy in considering waiving off the disclosure requirements should be narrowed down by way of expressed legal provisions.

In conclusion, statutory reformation is required to the Sri Lankan law on arbitration to identify a proper legal mechanism to inquire into the impartiality and independence of the arbitrators to evade ambiguous approaches as in the US. Processes of inquiry can be of two folds; challenging the sole arbitrator and challenging a member of panel of arbitration. However, both processes should be addressed before the court of law to cultivate confidence and fairness in the process further.

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[27] Section 10 (3) of the Arbitration Act, No 11 of 1995 (Sri Lanka) reads that 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.

[28] Hong-Lin Yu and Laurence Shore, 'Indepence, Impartiality, and Immunity of Arbitrators-US and English Perspective' [2003] 52(1) International and Comparative Law Quarterly 935, 936.