ESTABLISHMENT OF THE MOST COMMON GROUND ON WHICH LOCAL ARBITRAL AWARDS BECOME UNENFORCEABLE IN SRI LANKA

Manathunga Don Hemantha

119313T

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Department of Building Economics

University of Moratuwa

Sri Lanka

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Declaration

I declare that this is my own work and this dissertation does not incorporate without acknowledgement any material previously submitted for a Degree or Diploma in any other University or institute of higher learning and to the best of my knowledge and belief it does not contain any material previously published or written by another person except where the acknowledgement is made in the text.

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…….. ……

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Dedication..

……to whom, who devoted to uphold the arbitration practice in Sri Lanka

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Abstract

The parties select more adversarial arbitration process over other alternative dispute resolution methods mainly due to the enforceability of the arbitral award. If the arbitral award becomes unenforceable due to any reason, the selection of arbitral process is useless. In this scenario, in the absence of a comprehensive research in the arena, this research was conducted to investigate the status of enforcement of arbitral awards in Sri Lanka, specially to find out the most common ground on which local arbitral awards become unenforceable in Sri Lanka and to explore the reasons to occur the unenforceability under that most common ground with the expectation that this improved knowledge would assist to minimize the unenforceability of local arbitral awards.

The research was conducted under the quantitative paradigm. A cross-sectional, retrospective and non-experimental study design was adopted. The arbitration cases registered at the High Court during 2009-2012 for the setting aside or for the enforcement of the awards and where the arbitral process conducted under the purview of Arbitration Act 1995 and the courts completed their proceedings were selected for the sample.

The data collection process was a two tiered process. In the first tier a cross sectional survey was carried out at the High Court-Colombo to find out arbitral awards become unenforceable due to setting aside or refusal to enforce by the High Court. If the judgment of the High Court was appealed to the Supreme Court the judgment of the Supreme Court was also considered. Through the first tier of data collection, it was found that non adherence to the enforcement procedure is the most common ground on which local arbitral awards become unenforceable in Sri Lanka.

During the second tier of data collection, semi structured interviews were conducted with parties who failed to enforce the arbitral award due to non adherence to enforcement procedure. Through the interviews it was found that performance defects of the legal counsel or of the officer in charge of the case are the main reasons for the unenforceability of arbitral awards under the most common ground.

This is an avoidable circumstances with due diligence. The award creditors should be more vigilant of their right to enforce the award which obtained through a hard and expensive process. Therefore it is recommended to establish proper monitoring and reporting systems within the organizations involving with arbitral process to minimize arbitral awards becoming unenforceable.

Key Words: arbitration, setting aside, enforcement, unenforceability

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LIST OF ABBREVIATIONS

Abbreviation	Description
ADR	Alternative Dispute Resolution
HC	High Court
LK	Sri Lanka
S.	Section
SC	Supreme Court
UNCITRAL	United Nations Commission on International Trade Law
US	United States

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CHAPTER 1: INTRODUCTION

1.1 Background

The Arbitration Act No. 11 of 1995 of Sri Lanka became in to operation on 1st August 1995. It is based on the Model Law on International Commercial Arbitration of United Nations Commission on International Trade Law (UNCITRAL) (Wijeratne, 2011). Subject to the provisions in section 48, the Act applies to all arbitral proceedings commenced after the appointed date, irrespective of whether the arbitration agreement was entered into before or after that date.

While safeguarding the party autonomy, the Act provides provisions to ensure the supportive roles of courts for arbitral process. Section 26 of the Act enacts that arbitral award is final and binding on the parties subject to the provisions in Part VII of the Act. It further provides mechanism to enforce the award through the High Court under section 31 of the Act. In addition, if there is a serious miscarriage of justice the Act provides provisions to set aside local arbitral awards under section 32 and refuse enforcement of foreign awards under sections 34 of the Act. Further courts may refuse enforcement under other procedural grounds required in enforcement process.

1.2 Research Problem and Rationale

Mustill and Boyed (1989) described that, misconduct of arbitrators, error on the face of the award, excess of jurisdiction by arbitrators, patent defects in the award, misunderstandings of one of the parties which prevented that party to present his case effectively, mistakes by arbitrators and fresh evidence which was not available at the hearing stage, leads to remit the award or to set aside the award by courts. The Court has the discretion to decide whether the setting aside of the award or the remitting is most appropriate remedy and to decide which part of the award to set aside or to remit. The court has to consider all the circumstances of the case, when exercising this discretion. A serious error or miscarriage of justice, in most of the cases will lead to setting aside of the award.

As described, according to Arbitration Act 1995, there are two broad reasons which make local arbitral awards unenforceable in Sri Lanka. First one is the setting aside of arbitral awards by local courts under section 32 of the Arbitration Act. Second one is the refusal to enforce the arbitral award by the local courts. The courts may refuse enforcement on non adherence of the parties to adhere to the procedure laid down in section 31 or section 40 of the Act.

Recognition and enforcement are essential elements in arbitration. If the wining party is not able to enforce the award, the whole process of arbitration is pointless (Nacimiento& Bamashov, 2010). Nacimiento and Barmashov (2010) further added that parties will only recognize arbitration as a viable alternative to litigation, only if the arbitral award can be enforced with the equivalent effects as a state court's judgment.

In any of the events of setting aside or refusal to enforce the arbitral award, the effort given on the arbitral process will be in vain. Therefore it is important to identify the most common ground which leads to setting aside or refusal to enforce the arbitral awards in Sri Lanka. After identifying this most common ground it can be searched for the reasons to occur this most common ground.

By identifying the reasons to occur the most common ground leading to unenforceability of arbitral awards in Sri Lanka, it would be easy to find ways to minimize such adverse effects on arbitral awards. It would facilitate to save the value of resources spent on arbitral process and to uphold arbitration practice in Sri Lanka.

1.3 Aims and Objectives

The aim of the study is to establish the status of enforcement of local arbitral awards in Sri Lanka.

To achieve above aim, following objectives were set.

1. Identify local arbitral awards been set aside or refused to enforce by the High Court – Colombo whereby the awards registered at the High Court during 2009 - 2012.

2. Calculate the proportion of local arbitral awards becoming unenforceable due to setting aside or refusal to enforce by local courts.

3. Calculate the proportion of construction sector related local arbitral awards becoming unenforceable due to setting aside or refusal to enforce by local courts.

4. Determine the most common ground which leads to setting aside or refusal of enforcement of the local arbitral awards by local courts

5. Find out the reasons to occur above most common ground which leads to setting aside or refusal enforcement of local arbitral awards.

1.4 Research Methodology

After forming the aim and objectives, an initial literature review was carried out to enhance the knowledge on grounds which make arbitral awards unenforceable. A pilot survey was carried out using the judgments of High Court- Colombo on arbitration cases to identify the level of data availability.

To achieve the objectives quantitative paradigm with a retrospective, cross-sectional, non-experimental study design was adopted. A detailed literature review was carried out to enhance the theory base. Then a cross sectional survey was conducted at the High Court to identify the arbitration cases where the arbitral award set aside or been refused to enforce by the High Court. Only the registered arbitration cases at the High Court during 2009 - 2012 were considered concerning accessibility of data and finalization of the law suit.

However, whole of the finalized judgments at the time of survey, for registered arbitration cases for above mentioned period was taken for the sample. Therefore if the

judgment of the High Court was appealed to the Supreme Court, the judgment of the Supreme Court was considered. If the Supreme Court had not issued its final decision, the case was excluded from the sample.

In addition, to achieve objective 5, semi structured interviews were conducted with the relevant parties to find out reasons to occur the most common ground which lead to the unenforceability of arbitral awards.

1.5 Scope and Limitations

1. The scope of the research is limited to arbitral proceedings commenced in Sri Lanka after the appointed date of Arbitration Act No 11 of 1995 of Sri Lanka and conducted under the purview of the Arbitration Act.

2. For the research, only the final and binding judgments of the High Court or the Supreme Court for arbitral awards registered at the High Court-Colombo for setting aside or enforcement of the arbitral awards during 2009 - 2012 were considered.

3. If an arbitral award was set aside or been refused to enforce due to grounds outside the purview of Arbitration Act 1995 (such as other legal principles and rules of courts) such arbitration cases will not be considered for further analysis to find our reasons for unenforceability if the effect of such cases to the objective 5 is minimal.

4. If the award creditor company had outsourced the handling of arbitration cases to an outside law firm and the relevant officers of award creditor company do not know the actual reasons for the grounds lead to the unenforceability of the award, or if the relevant officers of award creditor company expressed that the unenforceability occurred due to a performance defect of outside law firm, this research does not extend to inquire such outside law firms to find out the actual reasons causing the ground for unenforceability of the award.

1.6 Dissertation Outline

Dissertation out line is given below,

Chapter 1 – Introduction

Chapter 1 mainly focused to provide the reader a foresight of the research dissertation. It explained the background, research problem and rationale of the research. Further it explained the aim and objectives of the research and briefly explained the methodology used to carry out the research. Apart from that introduction chapter outlined the scope and limitations of the research as well.

Chapter 2 – Literature Review

Chapter 2 is aiming to review and analyze the existing literature in the subject area. The intention is to strengthen the theory base in subject area, which is required to carry out the research accurately focusing the right direction.

The literature chapter discussed the nature and important aspects of arbitration process, form, content, status and modifications to the arbitral award and effects to the arbitral award. Further the chapter specially discusses the grounds for unenforceability of arbitral awards in Sri Lanka under the Arbitration Act 1995 of Sri Lanka.

Chapter 3 – Research Methodology

Chapter 3 describes the research methodology adopted for the research in details. It explains the selection of research paradigm, study design, data collection methods, target population and the sample. Further this chapter explains how the researcher dealt with ethical issues concerning the publication of data collected during the research process.

Chapter 4 – Data Collection and Analysis

This chapter focuses to analyze the data collected during the data collection process. Further it presents the findings of the research.

Chapter 5 – Conclusions and Recommendations

Chapter 5 presents the conclusions drawn from the findings of the research. Further it provides the recommendations to minimize the adverse effects on arbitral awards due to setting aside or refusing enforcement. Further it described some other actions required to uphold the arbitration practice in Sri Lanka.

Apart from conclusions and recommendations, the researcher suggests areas where further researches can be carried out, where the researcher identified such areas during the data collection process at the High Court- Colombo.

CHAPTER 2: LITERATURE REVIEW

2.1 Nature of Arbitration

2.1.1 Arbitration and alternative dispute resolution

According to Fenn, Lowe, and Speck (1997), "though conflict and dispute are inter-related, they involve two different concepts. Conflict is about an incompatibility of interests, but dispute is a subsequent stage that involves the resolution of legitimate issues" (p.513). Kerzner (as cited in Chong & Zin, 2012) reported that a conflict becomes a dispute when the contracting parties fail to manage the conflict. However both conflict and dispute are inevitable events in all construction projects. Dispute resolution involves unsettled conflict through binding arbitration or litigation, or otherwise through nonbinding forms.

Burger (as cited in Neale & Kleiner, 2001) stated:

> The notion that ordinary people want black-robed judges, well dressed lawyers and fine courtrooms as settings to resolve their disputes is incorrect. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible (p.112).

Neale and Kleiner (2001) further added that people and organizations are turning away from the court system because of frustration with the litigation, the high cost due to lengthy judicial proceedings and lack of confidence in the outcome.

International commercial arbitration is the most popular alternative dispute resolution (ADR) method in recent years. Flexibility of the process is one of the reasons behind this popularity. Party autonomy is the principle which makes arbitral process flexible (Dursun, 2012). Arbitration is a process which is consensual in nature but executed in a judicial manner whereby two or more persons finally resolve their disputes by a decision of an arbitrator which is binding upon the parties and enforceable in law (Reynolds, 1993).

Arbitration is an important part of modern day commercial regime, and every jurisdictions should in some degree be concerned with it (Mustill & Boyd, 1989). Reichert & Murphy (2001) highlighted that an arbitration agreement is deemed to contain terms that the arbitral award shall be final and binding on the parties. However, Mustill and Boyd (1989) found that states may choose two alternative roots when dealing with arbitration. First they may consider arbitration as an aspect of public law. Here the arbitrator is delegated with judicial powers. The powers of enforcement and control are attached to arbitral process. Other states may consider arbitration as a branch of private law thus the rights, duties and powers of the arbitrator, conduct of the arbitral process are created by parties' consent and are no concern of the state.

Ranasinghe (2011) pointed out that the existence of an arbitration agreement does not sufficient to commence arbitral proceedings. There will be no jurisdiction to the arbitral tribunal if there is no existing dispute between the parties on the matter referred to the arbitration.

According to Abeysekera (2007) the doctrine of party autonomy is the most important aspect of arbitration which differentiates arbitration from litigation. Abeysekera (2007) further added that, aspect of party autonomy is always recognized in arbitration statutes. Sri Lankan Arbitration Act No.11 of 1995 too safeguarded the principle of party autonomy in appointment and determination of number of arbitrators, the place of arbitration and the procedure to be followed by the arbitrators.

In this ground it is important to discuss key features of commercial arbitration to clearly understand how arbitration works in international commercial regime.

2.1.2 Important aspects of arbitration

2.1.2.1 Consensual nature

A universally accepted, the most important and fundamental condition for a contract is the consent of the parties, which is respected in all legal systems in the world. The consent is a must for an arbitration agreement too. Without parties consent, there is no jurisdiction for an arbitral tribunal. The consent to arbitral tribunal is considered to be

given, when the parties reach agreement on the important elements of the arbitration agreement. This agreement should not be affected by external factors such as error, duress or misrepresentation (Steingruber, 2009).

Steingruber (2009) further added that the process, by which the consent of the parties achieved, is understood as the acceptance by one party of an offer made by the other. The essential elements of the arbitration agreement or the *essentialia negotii* of an arbitration agreement, are an agreement between the parties that to resolve any dispute between them by arbitration and an reference of the dispute to arbitration.

Arbitrators generally refer to general principles of contract interpretation to determine the existence of parties consent. Therefore the question that which law should govern the arbitration agreement is paramount important. There are two theories generally national contract laws adopt. They are subjective theory, where investigation into the intentions of the parties prevails. Other one is objective theory which depends primarily on the meaning of the text. Meaning of the text is taken into consideration where the parties intentions cannot be established (Kohler & Stucki, 2004).

Bucher (as cited in Steingruber, 2009) reported that a differentiation has to be made between the negotiation of the terms of an agreement and the parties' intention to create a legal relationship during the conduct of contractual negotiation. Steingruber (2009) further argued that while the general acceptance is that the contract is the outcome of "consenting mind" indeed, the parties are judged by what they have expressed, implied or done, not by what is in their minds at the time contract is formed.

When considering the public international law, there are three schools of thoughts on interpretation of a contract. As per the subjective school, the goal of the interpretation is to observe the intent of the parties. According to objective school, the goal of interpretation is to ascertain the meaning of the text; they presume that the parties' intent is reflected by the text. The teleological school focuses primarily on the object and the purpose of the treaty (Kohler, 2005).

Ascertaining the meeting of mind between the investor and host state is a difficult task in investment arbitration. In such situations, the consent is construed from standing consent given in the international treaties by the state and the subsequent consent given by the investor at the time the claim is submitted to arbitration (McLachlan, Shore & Weiniger, 2007).

However Schreuer (2007) expressed some contradictory views to above described. He argued that though participation in treaties plays an important role on the jurisdictional matter, by itself cannot establish the jurisdiction of the arbitral tribunal. Both parties must have expressed the consent to arbitrate. Schreuer (2007) further added that the consent to arbitration can be provided in the national legislation of the host state, most often in the investment code. However mere existence of such a provision in national legislation is not suffice as the consent to arbitrate is based on agreement of the parties.

Therefore it is clear that there are some contradictory opinions among scholars on the issue that how the consent to arbitration should be achieved for investment arbitration.

2.1.2.2 Party autonomy

Party autonomy is the golden thread that runs throughout the web of the arbitration law. Further party autonomy can be considered as the corner stone of the arbitration process and the arbitration law to be understood in that perspective (Abeysekera, 2007).

Primarily, principle of party autonomy is based on the selection of law in a contract. However party autonomy has broader meaning in international commercial arbitration. Not only the choice of law, parties have the freedom to draft the conduct of arbitral process, including the seat of arbitration, appointment of arbitrators, language of arbitration, time table and the procedure to be adopted by the arbitrators. However it should be noted that, the principle of party autonomy is not always freely applied in all international commercial arbitrations. It may be subjected to some restrictions in some circumstances such as mandatory rules of the lex arbitri and public policy of the law applicable to substance or seat of arbitration (Dursun, 2012).

A majority of parties to arbitration agreements believe that once the law is chosen that law exclusively govern the legal framework between them. However an arbitrator may be required to apply rules arising from a legal regime other than rules chosen by the parties. Where the dispute has international characters, restrictions on party autonomy may arise under several of the jurisdictions the dispute associated with (Carlquist, 2006).

Before the commencement of arbitration, parties enjoy broad freedom to construct the arbitral system of their choice. Their freedom is only subjected to few limitations. The arbitration agreement must be valid according to the law which governs it. Further the arbitral procedure itself should be complied with the mandatory rules of the lex arbitri (Pryles, 2005).

A question arises how the party autonomy operates after the establishment of arbitral tribunal. As per Gaillard and Savage (1999), the party autonomy is closely related with the contractual states of the arbitral tribunal. The view was that a contract necessarily exists between the parties and arbitrators; the contract become bilateral and imposes rights and obligations on the parties and arbitrators. However contractual relationship becomes triangular when the arbitration is administered by an arbitration institute.

This view was supported by the judgment of *Compagnie Europeene de Cerelas S.A v. Tradax Export S.A* (1986) (as cited in Pryles, 2005) whereby Hobhouse. J observed that by accepting the appointments, the arbitrators become parties to the arbitration contract. All the parties are bound by the terms of arbitration contract subject to the statutory provisions.

Referring to the judgments of Compagnie Europeene de Cereals SA v. Tradax Export SA (1986) and K/S Norjari A/S v. Hyundai Heavy Industries Co.Ltd (1991), Pryles (2005) argued that if the arbitrators become parties to the arbitration agreement, after the tribunal is constituted, the parties itself cannot alter the terms of an arbitration agreement unilaterally without the consent of the arbitral tribunal. Therefore Pryles (2005) concluded that if the arbitration agreement itself specified time frame for taking

procedural steps, the parties cannot agree to vary above time frame without the consent of the arbitral tribunal.

However when drafting the article 19(1) of the UNCITRAL Model Law, the matter that whether parties' freedom to an agreement to be limited to the time before arbitral tribunal is formed or otherwise it is to be continued, was considered. The final decision was that the freedom of the parties to agree on a procedure should be a continuing one. Therefore in an arbitration conducted under the UNCITRAL Model Law, the parties are free to agree on the procedure even after the tribunal has entered into arbitration contract (Holtzmann & Neuhaus, 1989).

2.1.2.3 Severability of arbitration agreement

When considering the validity of an arbitration agreement, which forms part of another agreement, the arbitration agreement shall be deemed to constitute a separate agreement (Amerasinghe, 2011). Idornigie (2005) highlighted that the contract other than arbitration agreement as primary or main agreement which concerns the commercial obligations of the parties and the arbitration agreement as secondary agreement which deals with how disputes arising from the primary or main agreement are to be solved.

Arbitration to operate as an effective dispute resolution process, the doctrine of severability is essential. If the arbitration agreement is not separable, the termination or invalidity of the main contract would end the parties' right to arbitrate (Kanag-Isvaran, 2011b).

In *Heyman v. Darwins Ltd* (1942) (as cited in Blackaby, Partasides, Redfern & Hunter, 2009) Lord MacMillan explaining the doctrine stated that:

> It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract (p.117).

Accepting the arbitrators authority, in *Fiona Trust & Holding Corp v. Yuri Privalov* (2007) (as cited in Dundas, 2007) the House of Lords confirmed the decision of the Court of Appeal that arbitrators not the courts should decide whether the contract is void due to bribery unless the bribery had impeached the arbitration clause in particular.

Therefore the severability of arbitration agreement is an essential feature, specially to resolve disputes on invalidity or the termination of the main contract. To achieve this purpose s.12 of the *Arbitration Act no. 11 of 1995* (LK) too provided that an arbitration agreement included in another agreement shall be deemed to constitute a separate agreement when ruling on the validity of the arbitration agreement.

2.1.2.4 Doctrine of kompetenz- kompetenz

In *Ashville Investments v. Elmer Contractors* (1988) (as cited in Kanag-Isvaran, 2011b), Bingham.J described "A non-statutory arbitrator derives his jurisdiction from the agreement of the parties at whose instance he is appointed. He has such jurisdiction as they agree to give him and non they do not" (p.232).

Doctrine of kompetenze-kompetenze recognizes that an arbitral tribunal has jurisdiction to rule on its own jurisdiction when there is a doubt regarding its existence, powers, scope and the validity of arbitration agreement (Amerasinghe, 2011). Blackaby et al. (2009) opted that the power to decide its own jurisdiction of an arbitral tribunal considered as an inherent power. However modern international and institutional rules spell out it in express terms confirming the tribunal's competence to decide on its own competence to resolve the disputes referred to it.

The allocation of the power between arbitral tribunal and the courts to decide jurisdiction, in a situation the jurisdiction of the arbitral tribunal is challenged, will be determined by the doctrine of Kompetenz- Kompetenze. The way this allocation of power made, will determine two things (i) in the first instance, whether the tribunal or courts have the authority to decide jurisdictional issues of the arbitral tribunal and (ii)

what standard of review adhered to the courts to review the rulings of arbitrators made on jurisdictional objections (Chaturvedi & Agrawal, 2011).

When considering Sri Lankan law, s.11 of the *Arbitration Act, No. 11 of 1995* enacts that an arbitral tribunal may decide on jurisdiction including any question on the validity of the arbitration agreement. However above section further provides that any party to the arbitral proceedings may apply at the same time for the determination of the High Court regarding the same issue.

2.1.2.5 Independence and impartiality of arbitrators

In international commercial arbitration, the independence and impartiality of arbitral tribunal are very important. Often parties perceive that his nominees acting impartially while other party appointed arbitrators are not (Smith, 1992). Such an imbalance would threaten the fundamental equilibrium of the proceeding (Crais, Park, & Paulsson, 1990).

Devries (as cited in Smith, 1992) reported that the issue of impartiality and independence of party appointed arbitrators is a much debated issue. The general custom in Europe is that the all the arbitrators including party-appointed arbitrators are to remain fully independent and impartial and not to act as representatives. The American domestic practice is that only the presiding arbitrator is expected to maintain strict independence and impartiality, while party –appointed arbitrators having partisanship to appointing party.

This system presents a problem to those who feel that all arbitrators should be neutral when exercising their quasi-judicial authority. Professionals within the international community urging those standards such that all arbitrators should more commonly resemble international norms. Finality of the arbitration process is a major reason for aspiring to a higher standard of neutrality (Byrne, 2002).

In International Arbitrations the term “independence” is one which deals with the relationship between the arbitrator and the parties on personal, social and financial

affairs. The closer the relationship in any of these spheres, the arbitrators having lesser independence from the parties (Donahey, 1992).

Arbitration rules of International Chamber of Commerce (ICC) and London Court of International Arbitration require that the chairperson of a panel of arbitrators to be of a nationality different from those of the parties. However the UNCITRAL Arbitration Rules and the International Arbitration Rules of American Arbitration Association, only require that, when selections the third arbitrator, the nationality of the parties to be considered (Donahey, 1992).

Therefore the requirements on independence and impartiality of arbitrators are vary in international arena. However when considering the Sri Lankan context, s.10(1) of the *Arbitration Act No. 11 of 1995* enacts that an arbitrator shall disclose any circumstances which leads to justifiable doubts as to his independence and impartiality, not only at the beginning but also throughout the arbitral proceedings. Further s.10(2) of the Act provides that an arbitrator may be challenge on the question of independence and impartiality. In this ground it is clear that Sri Lankan law requires the strict compliance of the arbitrators on independence and impartiality.

2.1.2.6 Confidentiality

Confidentiality has long been viewed as an inherent feature of alternative dispute resolution. In other words, ADR process has been considered as confidential (Reuben, 2006).

Thomson and Finn (2007) reported that though the national courts around the world have considered the issue on the confidentiality in arbitration, still the jurisprudence is inconsistence. Some English cases have recognized an implied obligation of confidentiality, but considered particular issue case by case basis. In *Dolling Baker v. Merrett* (1990) the Court of Appeal of England decided that, in arbitration there exists an implied obligation for confidentiality. This implied obligation extends to the documents prepared for the arbitral process, testimonial evidence and the awards. The parties

should not disclose such information without the consent of the other party or a order by a court.

There are four main areas of exception to the basic English rule on confidentiality in arbitration process. Those are disclosure made (i) by a party with the consent of the other party (ii) by order of the court (iii) by leave of the legitimate interests of an arbitrating party (iv) in the interests of justice (Lavers & Bellhouse, 2005).

In *United States v. Panhandle Eastern Corp & Others* (1988) (as cited in Lavers & Bellhouse, 2005), a federal district court decided that, without an agreement between the parties, or procedural rules which expressly guarantee the confidentiality, arbitration is not necessarily confidential. In *Bulgarian Foreign Trade Bank Ltd v. A. I. Trade Finance Inc* [2000], the Supreme Court of Sweden confirmed that in arbitration process, there is no implied legal duty to confidentiality without a special agreement of the parties to that effect.

Therefore above decisions essentially held that the confidential information in arbitration is protected only when parties intended specially to keep specific information confidential. In addition an arbitrating party must be entitled to disclose information to its insurers, its shareholders and even the market, all of whom have a legitimate interest in a company's affairs (Lavers & Bellhouse, 2005).

However when considering the Sri Lankan law, the *Arbitration Act No.11 of 1*995 is silent on the issue on confidentiality.

2.1.2.7 Enforceability

The common law of England recognizes that it is an implied term of an arbitration agreement, that any award made by the arbitral process will be honored. A breach of that implied term, gives rise to an independent cause of action to enforce the award which is essentially contractual. In the absence of statutory provisions to enforce an arbitral award, this would have been the only remedy. However, legislation was introduced in

the United Kingdom to provide a special statutory regime for recognition and enforcement of arbitral awards from the late nineteenth century (Marsoof, 2011).

Cogency, completeness, certainty and finality are the substantive requirements for the enforceability of an arbitral award. If all the disputes submitted to the arbitral tribunal are adjudicated, the award can be considered having completeness (Reichert & Murphy, 2001). In an application for the recognition and enforcement in Ireland of the arbitral award in *Danish Polish Telecommunication Group I/S v. Telekomunikacja Polska SA* (2011) (as cited by Wade, 2013), Geoghegan. J explaining the arbitration law of Ireland, stated that unless there is reason to avoid enforcement under the grounds for setting aside, enforcement is generally not problematic.

As cited by Reichert and Murphy (2001), in *Publicis Communication & Publicis SA v. True North Communications Inc* (2000), United States Court of Appeal decide that a ruling on a discrete time sensitive issue may be final and eligible for enforcement, although some of other issues remain to be decided by arbitrators. The court further held that the lack of the label "award" does not bar to the enforcement.

2.1.2.8 Limitations on court intervention

In *Inforica Inc v. CGI Information Systems and Management Consultants Inc* (2009) (as cited in Neville, 2010) the Court of Appeal for Ontario decided that if parties have resorted to resolve their disputes by arbitration, the intervention of the courts should be strictly limited to those provided by the legislations.

Reinforcing this instance, in *Kenya Shell Ltd v. Kobil Petroleum Ltd* (2006) (as cited in Torgbor, 2010), the Kenyan Court of Appeal held that the Arbitration Act of Kenya, emphasis the finality of disputes and imposes a severe limitations for accessing to the courts.

Kanag-Isvaran (2011a) expressed that when drafting the Arbitration Act 1995 of Sri Lanka, a decision was taken to incorporate provisions to achieve following basic element;

> A valid arbitration agreement must constitute a bar to court proceedings, if so pleaded; in other words if the parties have agreed on arbitration the courts cannot ignore such agreement. Once arbitration has commenced, court intervention should be extremely minimized and controlled, its role supportive of arbitration (pp.34-35).

Accordingly, s.5 of the *Arbitration Act No 11 of 1995* provides provisions to achieve this objective. It enacts that;

> Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter.

In this section it was identified consensual nature, party autonomy, severability of arbitration agreement, doctrine of kompetenze-kompetenze, independence and impartiality of arbitrators, confidentiality, enforceability and limitations on court intervention as important aspects of arbitral process. However the arbitral award is the final product of the arbitral process (Blackaby et al., 2009). Therefore next section is dedicated to discuss about “the arbitral award”.

2.2 The Arbitral Award

2.2.1 Form, content, status and modifications to the award

According to s.25 of the *Arbitration Act No 11 of 1995* of Sri Lanka, the arbitral award shall be made in writing and to be signed by the arbitrators of the tribunal. If the arbitral tribunal constitutes with more than one arbitrator the signatures of the majority of the arbitrators are sufficient, but the reasons for omitted signatures to be provided.

The award should states the reasons based to arrive the decisions of the tribunal, unless it was agreed by the parties that no reasons are required or the award is on agreed terms by the parties under section14 of the Act. Further section 25 of the Act stipulates that the date of the award and place of the arbitration determined as per section16 of the Act to be given in the Award. The award shall be deemed to be made at that place (Amerasinghe, 2011).

Provisions for correction, interpretation of the award and making additional awards are set out in section 27 of the Act. For this purpose a party should request to that effect within 14 days of the receipt of the award (Kanag-Isvaran, 2011c). As stipulated in s.26 of the *Arbitration Act No 11 of 1995*, the arbitral award shall be final and binding on the parties subject to the recourses provided in Part VII of the Act.

2.2.2 Setting aside and remission of arbitral awards

Where a losing party complains that the arbitral proceeding has not been conducted in a fair and proper manner, it is almost invariable for him to claim in the alternative that the award should be set aside in whole or in part or, that it should be remitted to the arbitrator for further consideration (Mustill & Boyed, 1989). Mustill and Boyed (1989) further added that, although only the setting aside is claimed by the petitioner, the court will always consider whether the remission would be the more appropriate remedy.

It is usual that challenging an arbitral award is been made in the local courts of the seat of arbitration. The ease of the challenge will depend on the local approaches of the country where the award is being challenged (Ramsey, 2012).

In the case *Lesotho Highlands Development Authority v. Impregilo SPA* [2005] at House of Lords, Lord Steyn expressed that in an allegation of excess of power by arbitrators, the courts should consider whether the tribunal exercised a power which it did not have or whether it erroneously exercised a power that it did have. If it is a case of erroneous exercise of power the tribunal had no excess of power is involved.

Some courts of United States had recognized that an arbitral award may be set aside on "manifest disregard of the law" though this is not mentioned in Federal Arbitration Act of United States. The courts must find both that (1) the arbitrator had known the governing legal principle but refused to apply it or ignored it and (2) the law ignored was well defined, obvious and clearly applicable to the case, to set aside an award on this ground (Greig & Reznik, 2002). However later in 2008, the Supreme Court of the United States rejected that line of jurisprudence. The Supreme Court held that the statutory grounds for setting aside are exhaustive (Timmer, 2012).

When considering the arbitration law in Sri Lanka, the grounds for invalidity or setting aside of an arbitral award are stated in Section 32 of Arbitration Act No 11 of 1995, and correspond generally to the provisions of the New York convention 1958 (Amerasinghe, 2011). Kanag-Isvaran (2011c) pointed out that as per Section 32 of the Act, an arbitration award made in Sri Lanka may be set aside by the High Court only on very specific, limited grounds and those grounds are intended to be exhaustive.

Inter alia, s.32 of *Arbitration Act No 11 of 1995* provides that, an arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court on an application made therefore, within sixty days of the receipt of the award,

(a) where the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or failing indication of that question, under the law of Sri Lanka; or

(ii) the party making the application was not given proper notice of the appointment of the arbitrators or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; Provided however that if the decision on matters submitted can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or in the absence of such agreement, was not in accordance with the provisions of this Act: or

(b) where the High Court finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka

In view of arbitrability and public policy grounds, in *Southern Group Civil Construction (Pvt) Ltd v. Ocean Lanka (Pvt) Ltd* [2002] the Supreme Court of Sri Lanka held that courts cannot raise above grounds ex mere motu unless the party seeking setting aside or objecting enforcement traversed these issues in the pleadings.

As per s.36 (1) of *Arbitration Act No. 11 of 1995;*

> The High Court may order the staying of an application to set aside an award for such period as it may consider necessary to enable the arbitral tribunal to resume arbitral proceedings or to take such measures as may be necessary to eliminate the grounds for invalidating the award.

S.36 (2) of *Arbitration Act No. 11 of 1995* added that no order shall be made by the High Court to remit the award unless all the parties request to that effect or one party requests to that effect and the Court is satisfied that there are grounds for invalidating the award.

The High Court referred to in the Act has been defined under Section 50 of the Act."High Court" defined as the High Court of Sri Lanka situated in the judicial zone of Colombo or situated in such other zone, as may be designated by the Minister with the concurrence of the Chief Justice, by order published in the Gazette. Until such time the Provincial High Courts are designated by the Minister with the concurrence of the Chief Justice, High Court sitting in Colombo vests the jurisdiction. (Legal Aid Commission [LAC], 2006).

2.2.3 Recognition and enforcement of arbitral awards

2.2.3.1 Recognition and enforcement generally

Arbitration awards are typically awards of damages against a party. However a tribunal usually has a range of remedies which may form a part of the award. The tribunal may order that a sum of money to be paid, make a declaration, order injunctive relief, order rectification, setting aside or cancellation of a deed or contract, or order specific performance (Mohammed & Nabi, 2008).

Despite the consensual nature and private character of arbitral proceedings, the enforcement proceedings of arbitral awards are judicial proceedings and public in character (Marsoof,2011). In *State Timber Corporation v. Moiz Goh (Pte) Ltd* [2000], the Supreme Court of Sri Lanka held that "the phrase arbitral proceedings is not synonymous with proceedings before a court of justice for enforcement of an arbitral

award. The judicial proceeding for enforcement is not a continuation of the arbitral proceeding" (p.316).

"Recognition" and "enforcement" are two different concepts. The recognition does not always leads to enforcement of an award. A foreign award recognized in Sri Lanka may merely operate giving res-judicata effect to future litigation or arbitration on the same dispute (Marsoof, 2011).

Marsoof (2011) reported that disputant parties in Sri Lanka faced procedural difficulties for enforcement of arbitral awards before the enactment of Arbitration Act No.11 of 1995. Adding further Marsoof (2011) spelled out that:

> The arbitration awards, even if consensual, could only be enforced as decree of court with all the attendant delays associated with civil litigation. Under the Reciprocal Enforcement of Judgment Ordinance the arbitral awards of United Kingdom which were reduced to decrees of court were expected to be registered and enforced by the District Courts in Sri Lanka. However all the procedural problems and inordinate delays associated with normal civil litigation were encountered in the enforcement of awards.

However, when considering the present Sri Lankan context, Section 31 of Arbitration Act 1995 enacts that an application for recognition and enforcement of an arbitral award to be made to the appropriate High Court within 1 year of the expiry of 14 days period from the making of the award (Amerasinghe, 2011). In addition, s.31 of *Arbitration Act No.11 of 1995,* requires that the application to enforce the award to be accompanied by the original of the award or duly certified copy of the award and original of the arbitration agreement or duly certified copy of such agreement. If a document or part of a document above mentioned is written in a language other than the official language of the court or other than in English, a certified translation of the relevant document or such part to be submitted along with the application. As per s.33 of *Arbitration Act No.11 of 1995,* the foreign arbitral awards are also to be applied under s.31 for the enforcement.

Further s.40 of the *Arbitration Act No.11 of 1995* provides that every application to the High Court under the provisions of the Act to be by way of petition and affidavit and all the parties to the arbitration other than petitioner should be named as respondents and shall be given the notice of the application. Therefore section 40 applies to the application under section 31 of the Act too.

Once an arbitral award is filed in the court and if the court satisfies that there is no reason to refuse the recognition and enforcement, the court will proceed to file the award and give judgment according to the award and enter the decree. A decree entered by the High Court of an arbitral award, can be enforced in the same manner and effects as a decree entered by a court as per Civil Procedure Code (Amerasinghe, 2011). Amerasinghe (2011) further added that as per the section 43 of the Act, the Supreme Court may make rules regarding to the applications and appeals to the High Court, in additions to the provisions given in the Act.

2.2.3.2 Recognition and enforcement of set aside awards

Though the courts of the seat of arbitration have set the award aside, the courts of the enforcing county have not always accepted such decisions of the courts of the seat intervening with the arbitral award (Ramsey, 2012).

"Residual Discretion" is a legal doctrine arises when an arbitral award to be enforced. The question is whether the court has a residual discretion to grant enforcement notwithstanding the proof of grounds by the respondent which leads to refuse enforcement (Garnett & Pryles, 2008). In the case *Quinhunangdao v. Million Basic Co* (1994), the High Court of Hong Kong decided that the court having a residual discretion to grant leave to enforce in any case.

In the case *Chromally Aeroservises v. Arab Republic of Egypt* (1996), the District Court of the District of Columbia in United States enforced an arbitral award which has been set aside by an Egyptian court. Where the US court held that it could enforce the award

as otherwise it would violate the public policy of United States favouring the final and binding arbitration of commercial disputes.

As cited by Ramsey (2012), in *PT Putrabali Adyamulia v. Rena Holdings* (2001), the spices consignment sold by an Indonesian company (PT Putrabali) to a French company (Rena Holdings) lost at sea. The arbitral tribunal seated at London held that Rena could refuse to pay for spices. On appeal, the English High Court decided that failure to pay for lost goods at sea is a breach of contract and remitted back the award to the arbitral tribunal. Consequently the tribunal ordered Rena to pay a sum to PT Putrabali. The first award (reversed by the tribunal) was enforced in France and on appeal the Supreme Court of France held that the setting aside of an arbitral award in the country of its origin is not a ground to refuse recognition and enforcement in France. On the face of the second valid award, the French Supreme Court held that, res-judicata effect attached to the ruling of first award enforced in France, prevents the enforcement of the second award. Therefore the second valid award could not be enforced in France.

In an application to enforce a Nigerian arbitral award, *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp.*(2005), Gross J. summerised the authorities leading to enforcement of a foreign arbitral award in England.

- Even when a ground for setting aside is established, the court has discretionary power to enforce the award.
- Section 103(2)(f) of England Arbitration Act applies only when a court at the seat suspended an award and not merely due to a challenge before the court at the seat.
- If the defending party relied on public policy to resist enforcement, it should be dealt with extreme caution. Public policy exception is not intended to be an open ended escape route for refusing enforcement, but to maintain fair and orderly administration of justice,
- Section 103(5) of the England Act deals with two equally legitimate rival concerns (i) mere application to setting aside of an award in the seat should not

frustrate the enforcement of the award (ii) the proceedings started at the court at the seat should not be forestalled by the rapid enforcement of the award in another jurisdiction.

- Several considerations to be drawn before taking the decision on adjournment under section 103(5).
  - whether the setting aside application has brought bona fide and not merely to delay the enforcement
  - whether that application has a realistic prospect of success
  - anticipated delay due to the adjournment and subsequent prejudice to the award creditor
- It should not be introduced any nationality condition to the enforcement process.

2.2.4 Refusal of recognition and enforcement of arbitral awards

The enforcement procedure is independent from the New York Convention and follow the state's own procedures (Blessing, as cited in Muller, 2007). Due to the local procedural law of enforcement, often the party against to whom the award to be enforced will have several possibilities to appeal over several judicial stages. This will take considerable time delaying the enforcement (Muller, 2007).

Muller (2007) further stated that at the enforcement stage, there is a risk that the entire arbitral process comes under the inquiry of municipal courts, which might favour the debtor who, probably, is a national of the enforcement country.

In Sri Lanka, the enforcement of arbitral awards to be made under section 31 of the Arbitration Act 1995 (Marsoof, 2011). S.31(6) of *Arbitration Act No 11 of 1995* provides that if there is no application for the setting aside of the award or the court sees no cause to refuse the recognition and enforcement of the award under the provisions of section 33 and section 34 of the Act, the award shall be enforced. S.34 of the *Arbitration Act No 11 of 1995* provides inter alia that,

(1) Recognition or enforcement of a foreign arbitral award, irrespective of the country in which it was made, may be refused only-

(a) on the objection of the party against whom it is invoked, if that party furnishes to the Court where recognition or enforcement is sought, proof that-

(i) a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication as to the law to which the parties have subjected such agreement, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceeding or was otherwise unable to present his case; or

(iii) the award deals with the dispute not contemplated by or not falling within the term of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided, however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains a decision on matters submitted to arbitration, may be recognized and enforced: or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the Court finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of Sri Lanka.

Therefore when considering Sections 32 and 34 of the Act, it is clear that in addition to the grounds described in Section 32 of the Act, Section 34(1)(a)(v) provides, the award would not be enforced if it is still not become binding on the parties or suspended or set aside. This denotes the suspension or setting aside in the seat of arbitration. Apart from this difference other substantial grounds given in section 32 and section 34 of the Act are synonymous.

In *Barker Marine (Nig) Ltd v. Chevron (Nig) ltd* (1999) (as cited by Ramsey, 2012) the United States (US) Second Circuit Court refused to enforce a Nigerian award which has been refused to enforce in Nigeria. The court based its decision on article V(1)(e) of the New York Convention. The US court further held that,

> As a practical matter mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary with enforcement actions from country to country until a court is found, if any , which grants the enforcement (p.370).

In *Shareen v. Sonatrach* (1983) (as cited by Marsoof, 2011), a United States District Court had a contrary view. It was held that the American party, which lost the ICC Arbitration, in Geneva and failed to raise various defenses before the arbitral tribunal, had waived such defenses. The Court further held that it would be a violation of the role and the purpose of New York Convention, if it denies the recognition and enforcement of the arbitral award at this stage.

In *Phil-East Asia Construction Corporation v. Galadari Hotels (Lanka) Limited* [2001], where the delay of referring the dispute to arbitration raised, the Court of Appeal of Sri

Lanka held that the time limitations in Prescription Ordinance do not apply to references to arbitration.

In this section it was discussed several aspects on arbitral awards. Therefore it is important to consider the differences in the provisions on arbitral awards among Arbitration Act 1995 of Sri Lanka , Model Law and arbitration law of some other Asian countries. Table 2.1 provides such a comparison among Sri Lankan law, Model Law, Indian law and Singapore law.

According to the discussion in this section it is clear that due to setting aside or refusal of enforcement of an arbitral award by a competent court the award will be unenforceable at least to that jurisdiction. Therefore it is worth to consider in detail, the grounds for setting aside and refusal of enforcement of an arbitral award pertaining to the provisions of Arbitration Ac No 11 of 1995 to understand the Sri Lankan situation. The next section is focused on this aspect.

2.3. Grounds for Setting Aside and Refusing Enforcement of Arbitral Awards in Sri Lanka under the Arbitration Act 1995

As explained in 2.2.2, 2.2.3 and 2.2.5 above, when considering sections 31, 32, 34 and 40 of the Arbitration Act, the permanent grounds for setting aside or refusal of enforcement of an arbitral award by Sri Lankan courts can be categorized as follows.

- Non adherence to enforcement procedure
- Invalidity of arbitration agreement
- Violation due process
- Excess of authority
- Irregular constitution of the arbitral tribunal or irregularity of arbitral procedure
- Non arbitrability of the dispute
- Award conflicts with the public policy of Sri Lanka

It is worth to consider these grounds in detail.

2.3.1 Non adherence to the enforcement procedure

The time limits for the commencement of recognition and enforcement proceedings vary to country to country and laid down in national legislations of the country (Blackaby et,al.,2009). Blackaby et al. (2009) further emphasis that these time limits and any other time limits of rules of the enforcing courts to be carefully considered.

Section 31 of Arbitration Act 1995 imposes several conditions for applying recognition and enforcement of an arbitral award. The application should be made within one year after the expiry of 14 days of receiving the arbitral award. The application should be made in a form of petition and affidavit. The originals or duly certified copies of the award and arbitration agreement to be submitted to the court along with the petition (Amerasinghe,2011). If the award or arbitration agreement is written in a language other than official language of the court or English language, duly certified translations of

above documents to be furnished (Marsoof,2011). Further as described in section 2.2.3, the requirements in section 40 of the Act applies to the applications under section 31of the Act.

However in *Kristley (pvt) Limited v. The State Timber Corporation* [2002], the Supreme Court decided that if an appellant has failed to submit duly certified copies of the award or arbitration agreement, he should be given an opportunity to furnish duly certified copies as required, by interpreting "accompany" in section 31(2) widely and purposively. Section 31(2) of the Arbitration Act is mandatory, but not to the level that one opportunity only.

There are some contrary foreign judgments, in *H&H Hackenberg GmbH v. NCS di Sbrolli Franco & C.snc* (1991) (as cited in Berg, 2007), the Court of Appeal in Florence, Italy refused enforcement of an arbitral award holding that only an informal photo copy of the award submitted for enforcement. Berg (2007) further pointed out that in *Glencore Grain Limited v. Sociedad Ibrica de Molturacion SA* (2003), the Supreme Court of Spain refused enforcement of the arbitral award as the award creditor had not submitted the original or duly certified copy of the arbitration agreement.

2.3.2 Invalidity of arbitration agreement

As per s. 32(1)(a)(i) and 34(1)(a)(i) of *Arbitration Act No.11 of 1995*, an arbitral award may be set aside or be refused to enforce "if a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it" or, failing any indication of that question, under the law of Sri Lanka or otherwise under the law of the country where the award was made.

In *Hotel Galaxy (pvt) Ltd and Others v. Mercantile Hotels Management Ltd* [1987], the Sri Lankan Supreme Court highlighted that an arbitration clause in a contract does not become invalid due to the breaches of the contract, unless the contract itself is null and void. Further in *Elgitread Lanka (pvt.) Ltd v. Bino Tyres (pvt.) Ltd* [2010] though there was no such entity called "Sri Lanka Chamber of Commerce and Industry- Colombo"

the Supreme Court of Sri Lanka upheld the agreement to refer any dispute to that entity for the resolution by arbitration. The Supreme Court decided that the agreement is a valid arbitration agreement and any dispute to be resolved by arbitration if a party objects to the court jurisdiction.

Generally death, dissolution or insolvency leads to the incapacity of a party. However the law applicable to the party to be applied at the time the incapacity occurred to determine parties capacity to enter the arbitration agreement (Marsoof, 2011). In *Kristley (pvt) Ltd v. State Timber Corporation* [2002], the Supreme Court of Sri Lanka held that the provision of section 32(1)(a)(i) of Arbitration Act 1995 apply only if a party was subjected to some incapacity at the time when the arbitration agreement entered into and that provision does not apply if the incapacity occurred later.

In *Casim Lebbe Marikar v. Samal Dias* (1896) a pending action before a district court was referred to arbitration by the judge of the court as requested in a joint motion of the attorneys of the parties. But the parties had not given their consent to arbitration formally as required under the Civil Procedure Code. The Supreme Court set aside the award holding that parties' consent to arbitration should be formally, expressly and deliberately given. In a similar case, in *Arachchi Appu et al. v. Mohotti Appu et al*. (1922) the Supreme Court set aside an arbitral award where the defendants or their attorney did not sign the reference to arbitration.

In *Actival International SA v. Conservas El Piar SA* (2002) (as cited in Berg, 2007), the Supreme Court of Spain refused to enforce an arbitral award made in Paris, where one party had not signed the sales confirmation, which contained the arbitration clause. It is to be noted that the validity of the arbitration clause had been previously upheld by the Court of Appeal in Paris. The distinction occurred as the requirements under the law of France is less demanding than the requirements in New York Convention.

2.3.3 Violation of due process

As per s. 32(1)(a)(ii) and 34(1)(a)(ii) of *Arbitration Act No.11 of 1995*, an award may be set aside or enforcement of the arbitral award may be refused if the party proves that he was not given proper notice of the appointment of arbitrators or arbitral proceedings or otherwise unable to present his case.

In a case involving the enforcement of an arbitral award, the Court of Appeal for the Second Circuit of United States, in 1976 held that provisions of Article V(1)(b) of New York Convention referred to forum state's standard of due process. Which represent fundamental principles of fair hearing in adversarial arbitration process (Berg, 2007).

In *Goonewardene v. Goonewardene* (1923) the arbitrators stated in their award that they declined to hear some matters included in the reference to arbitration. Bertram C.J, setting aside the award stated that, if the arbitrators refuse to hear evidence upon a material issue the award may be set aside as it amount to substantial miscarriage of justice.

As cited by Berg (2007) a court in Clologne, Germany refused to enforce an arbitral award made in Copenhagen, Denmark on the ground that the names of the arbitrators were not disclosed to the parties. Further in *Sesostris SAE v. Transportes Navales SA and M/V Unamuno* (1989), the District Court in Massachusetts in United States refused to enforce an arbitral award against a bank security on the basis that, a proper notice of arbitral proceedings had not been given to the bank.

2.3.4 Excess of authority

S.32(1)(iii) and s.34(1)(iii) of *Arbitration Act No 11 of 1995* of Sri Lanka provide that if "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration" either award may be set aside or otherwise be refused the recognition and enforcement of it. However, if it is possible to separate the decision on

matters submitted to arbitration from matters not so submitted, partial setting aside or partial recognition and enforcement is allowed.

In *Paris Lapeyre v. Sauvage* (2001) (as cited by Blackaby et al., 2009), the Court of Appeal of Paris decided that the arbitral tribunal exceeds its power by awarding damages that significantly exceeds the amount claimed. In *Tiong Huat Rubber Factory (SDN) BHD v. Wah-Chang International Company Limited and Wah-Chang International Corporation Limited* [1991], the arbitral tribunal in Malaysia awarded a sum on a claim on failure to open a letter of credit. However the Court of Appeal of Hong Kong decided that the arbitration agreement did not cover the disputes on a letter of credit and refused the enforcement of the award in Hong Kong.

As cited by Berg (2007), in *General Organization of Commerce and Industrialisation of Cereals of the Arab Republic of Syria v. SpA Societa delle Industrie Meccaniche di Rovereto* (1981), the arbitration agreement provided arbitration for non-technical matters in Syria and arbitration for technical matters under the ICC Rules. The Court of Appeal in Trento, Italy decided that arbitrators in Syria have decided both technical and non-technical matters and ordered the enforcement only the parts of arbitral award containing decisions on non-technical matters.

2.3.5 Irregular constitution of the arbitral tribunal and irregularity of the arbitral procedure

Section 6 and section 7 of the Arbitration Act 1995 laid down the rules on the number of arbitrators and the manner the arbitral tribunal appointed. The parties are free to determine the number of arbitrators of the tribunal. However if parties appoint an even number of arbitrators, the party appointed arbitrators shall jointly appoint an additional arbitrator to act as chairman. Where the parties do not determine the number of arbitrators it shall be three (Amerasinghe, 2011). Amerasinghe (2011) further pointed out that an arbitrator can only be challenge if there are justifiable doubts of his impartiality and independence. The challenge should first be taken before the arbitral

tribunal. If the party dissatisfied by the decision of the tribunal it can appeal to the High Court within 30 days of the receipt of the decision of the tribunal.

According to s.32(1)(iv) of the *Arbitration Act No 11of 1995* of Sri Lanka, an arbitral award may be set aside if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement is in conflict with the provisions of the Act, or, in the absence of such agreement, was not in accordance with the provisions of the Act. Further as per s.34(1)(iv) of the *Arbitration Act No 11of 1995*, an award can be refused to enforce if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or in the absence of such agreement, was not in accordance with the law of the country where the arbitration took place. Therefore if the conditions of above Section 32(1)(iv) or Section 34(1)(iv) of the Act fulfilled and the relevant party proves it, the award may be set aside or refused the recognition and the enforcement of it.

In *Fernando v. Migel Appu* (1913) the sole arbitrator has received a fee from one of the party before making the award. The Supreme Court set aside the award holding that such an act of the arbitrator undermine the confidence of the parties on the impartiality of the arbitrator.

In *Encyclopaedia Universalis S.A v. Encyclopaedia Britannica Inc* (2005), the arbitration clause requires arbitration by two party-appointed arbitrators. If the two arbitrators are unable to agree on any concerned matter, the two should select a third arbitrator. If the two arbitrators are unable to select the third arbitrator, the third arbitrator should be selected by Commercial Court in Luxembourg. Before arising a disagreement between the two arbitrators, a party-appointed arbitrator requested the Luxembourg court to appoint the third arbitrator. At the enforcement stage the United States' Court of Appeal, Second Circuit refused to enforce the arbitral award citing that the appointment of arbitrators was not in accordance with the arbitration agreement.

In *Rederi Aktiebolaget Sally v. Srl Termarea* [1979] the arbitration agreement requires arbitral tribunal to consist with two party appointed arbitrators and one arbitrator by the two selected. However party appointed arbitrators did not select the third arbitrator. The Court of Appeal in Florence, Italy decided that the composition of arbitral tribunal is not in accordance with the arbitration agreement and refused to enforce the arbitral award.

2.3.6 Non arbitrability of the dispute

As per s. 32(1)(b)(i) and 34(1)(b)(i) of *Arbitration Act No.11 of 1995*, an award may be set aside or the enforcement of the arbitral award may be refused if "the High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka".

The arbitral tribunal gets its jurisdiction from the consent of the parties to the arbitration. Therefore an arbitral tribunal would not have the jurisdiction to determine disputes on criminal and admiralty matters, impose a term of imprisonment or a fine. It cannot make a judgment which affect a third party or public at large (Marsoof, 2011). Blackaby et al. (2009) stated that "each state decides which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy" (p.124).

In *Comandate Marine Corp v. Pan Australia Shipping* (2006) (as cited in Skinner & Simpkins, 2011) Allsop J. identified a characteristic of non arbitrable matters as "a sufficient element of legitimate pubic interest in these subject matters making enforceable private resolution of disputes concerning them outside the national court system inappropriate" (p.56). Blackaby et al.(2009) categorized disputes involving patents, trademarks, antitrust and competition laws, insolvency, bribery and corruption are disputes for which questions of arbitrability arise.

In *Corcoran et al. v. Ardra Insurance Co. Ltd et al* (1988), the Appellate Division of the Supreme Court of New York Country has decided that a dispute with the liquidator of an insolvent insurer cannot be settled by arbitration.

Further disputes which are referred to exclusive jurisdictions of certain courts by the law itself cannot be resolved by arbitration. For example the Constitution of Sri Lanka confers to the Supreme Court the exclusive jurisdiction on certain matters (Marsoof, 2011).

In some states, disputes arising on the contract between foreign corporations and its local agents could be only resolved by the local courts. This protection is given to safeguard the interests of its local companies (Blackaby et al., 2009). In *Audi-NSU Union AG v. SA Adelin Petit & Cie* (1979) (as cited in Berg, 2007) the Supreme Court of Belgian refused enforcement of an arbitral award on the ground that the Belgian law confers the exclusive jurisdiction to its courts on the matters on termination of sole distributorship agreement unilaterally for an unlimited duration

2.3.7 Award conflicts with the public policy of Sri Lanka

As per s. 32(1)(b)(ii) and 34(1)(b)(ii) of *Arbitration Act No.11 of 1995*, an award may be set aside or the enforcement of the arbitral award may be refused if "the High Court finds that the recognition and enforcement of the award would be contrary to the public policy of Sri Lanka".

Ma (2009) explained the mandatory rules of public policy considering the enforcement of arbitral awards as;

> rules intended to encompass the arbitral award, proceedings or disputes under consideration, as expressed or embodied in the enforcement states statutory and case law, as well as in the international instruments and customs adopted or otherwise recognized by the enforcement state

In *Soleimany v. Soleimany* [1998], the contract was for the illegal export of carpets from Iran. Later disputes arose and referred to arbitration under Jewish law, the tribunal seated in England. The English Court of Appeal refused to enforce the award as it would be contrary to public policy to enforce an illegal contract.

In *Westcare Investment Inc v. Jugoimport SDPR Holdings Co Ltd* [1999], the contract was for the sale of military equipments. A dispute referred to ICC arbitration under Swiss law in Switzerland. During arbitral proceedings it was contended that the contract was illegal as sales procured through bribery. However the tribunal rejected that argument and decided in favour of the claimant. The defendant contended in enforcement proceedings in England that the enforcement of the award would be contrary to public policy of England. At that point the Court of Appeal rejected that contention as the arbitral tribunal already decided on the issue of illegality of the contract. In this case the public policy was out weighted by the policy in favour of finality of arbitral award.

Recognising the importance of finality of arbitral awards but also public policy as an instrument in protecting fundamental principles, mandatory laws and international obligations of a country, the International Law Association adopted a resolution during its 70th conference held in New Delhi in 2002.

The Resolution recommended to use public policy exception only when the arbitral award contravene with

> (i) fundamental principles pertaining to justice or morality, that state wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the state, these being known as "lois de police" or "public policy rules" and (iii) the duty of the state to respect its obligations towards other states or international obligations" (International Law Association (ILA), 2002. p01).

The Resolution further recommends that, when considering the fundamental principles, to refuse the enforcement of an arbitral award such concerned principles should be fundamental within the own legal system of the enforcement state rather than within the framework of the law governing the contract, law of the seat or the law of the place of performance (ILA,2002).

In *Xiaodang Yang v. S&L Consulting Pty Ltd* (2008) (as cited in Skinner & Simpkins, 2011) Young. J in New South Wales Supreme Court, made it clear that in enforcement of an award, the threshold for the public policy exception is much higher than when it is considered on the validity or enforceability of an arbitration agreement. It was held that even if the contract includes a guarantee with unlawful purpose, unless the guarantee is unenforceable under ordinary contractual principles, it would not be contrary to public policy to enforce an award in respect of the contract.

In this section, it was discussed the grounds leading to the unenforceability of an arbitral award. The grounds given in section 32 and section 34 of the Arbitration Act 1995 are synonymous. Therefore when categorizing the "grounds for unenforceability" it is possible to consider local and foreign arbitral awards together. However it is important to note that when considering a local arbitral award it is only possible to set aside under section 32 or refuse the enforcement under "non adherence to enforcement procedure". Section 34 of the Act is only applicable to foreign awards and not applicable to local awards (*Hatton National Bank v. Sella Hennadige Chandrasiri*, 2015).

Table 2.2 summarize the arrangement of Chapter 2 for easy reference.

Table 2.2: General arrangement of Chapter 2.

2.1: The Nature of Arbitration	2.1.1 Arbitration and alternative dispute resolution
	2.1.2 Important aspects of arbitration 2.1.2.1 Consensual nature 2.1.2.2 Party autonomy 2.1.2.3 Severability of arbitration agreement 2.1.2.4 Doctrine of kompetenze – kompetenze 2.1.2.5 Independence and impartiality of arbitrators 2.1.2.6 Confidentiality 2.1.2.7 Enforceability 2.1.2.8 Limitations on court intervention
2.2: The Arbitral Award	2.2.1 Form, content, status and modifications to the award
	2.2.2 Setting aside and remission of arbitral awards
	2.2.3 Recognition and enforcement of arbitral awards 2.2.3.1 Recognition and enforcement generally 2.2.3.2 Recognition and enforcement of set aside Awards
	2.2.4 Refusal of recognition and enforcement of arbitral awards
2.3: Grounds for Setting Aside and Refusing Recognition and Enforcement of Arbitral Awards in Sri Lanka under the Arbitration Act 1995	2.3.1 Non adherence to the enforcement procedure
	2.3.2 Invalidity of arbitration agreement
	2.3.3 Violation of due process
	2.3.4 Excess of authority
	2.3.5 Irregular constitution of the arbitral tribunal and irregularity of the arbitral procedure
	2.3.6 Non arbitrability of the dispute
	2.3.7 Award conflicts with the public policy of Sri Lanka

CHAPTER 3: RESEARCH METHODOLOGY

3.1 Introduction

Research design is paramount important in a research process. The design of a research starts with the selection of the topic and a paradigm (Firestone,1978, as cited in Creswell,1994). A research paradigm has two main functions. The first focuses on identification and/or development of procedures and logistics to undertake the research. The second focuses on the quality in the procedures to ensure the validity, objectivity and accuracy (Kumar,2005).

After selecting the topic of the research, several considerations were drawn to select the research paradigm as described under section 3.2.

3.2 Research Process

3.2.1 Selection of research paradigm

There are two main paradigms to use in research design, which are widely accepted and used. These paradigms are quantitative paradigm and qualitative paradigm (Creswell,1994). Table 3.1 illustrates the main differences in the assumption of above two paradigms.

As explained in Chapter 2, an arbitral award can only be set aside or refused to enforce on narrowly defined grounds given in section 32 and section 34 of the Arbitration Act or other technicalities to be adhered to in the enforcement process as laid down in section 31 and section 40 of the Act or Supreme Court Rules. The “most common ground on which local arbitral awards become unenforceable” is the most frequent ground which leads to setting aside or declining to enforce local arbitral awards in Sri Lanka by the High Court or by the Supreme Court. Therefore this reality is objective and singular, which has no relationship with the researcher.

The reasons to occur the "most common ground" can be found objectively through a carefully designed inquiry process with the participants of the arbitration proceedings, enforcement proceeding or setting aside proceedings of the relevant awards. It based on causation and therefore a deductive process.

Assumption	**Question**	**Quantitative**	**Qualitative**
Ontological Assumption	What is the nature of reality?	Reality is objective and singular, apart from the researcher	Reality is subjective and multiple as seen by participants in the study
Epistemological Assumption	What is the relationship of the researcher to that researched?	Researcher is independent from that being researched	Researcher interacts with that being researched
Axiological Assumption	What is role of values?	Value-free and unbiased	Value-laden and biased
Rhetorical Assumption	What is the language of research?	Formal Based on set definitions Impersonal voice Use of accepted quantitative words	Informal Evolving decisions Personal voice Accepted qualitative words
Methodological Assumption	What is the process of research?	Deductive process Cause and effect consideration Static design – categories isolated before study Context-free Generalization leading to prediction, explanation and understanding Accurate and reliable through validity and reliability	Inductive process Mutual simultaneous shaping of factors Emerging design-categories identified during research process Context-bound Patterns, theories developed for understanding Accurate and reliable through verification

Table 3.1: Differences between quantitative and qualitative paradigms
[Source: Creswell (1994)]

Due to above reasons it was decided that the quantitative paradigm is the most suitable paradigm for the research. In quantitative paradigm, there are two method for data collection. Those methods are survey and experiments. Due to the nature of the study, experiment is not suitable for the study. Therefore survey method is selected for data collection.

3.2.2 Study design

After selecting the research paradigm, next step was to decide the study design. Three different perspectives were considered for the selection of study design.

- The number of contacts with the study population or sample
- The reference period of the study
- The nature of the study

In the first tier, the research focuses to establish the prevalence of the most common ground on which local arbitral awards become unenforceable in Sri Lanka and in the second tier to find out reasons to occur that most common ground.

Therefore only one contact of the population or the sample is sufficient in the first tier and a cross sectional study was carried out on the arbitration case records. Further to find out the reasons to occur above most common ground, only one contact with the participants of the relevant process will suffice. Therefore the data collection in the second tier is also a cross sectional study.

The research investigates the grounds which leads the courts to set aside or to refuse the enforcement of arbitral awards and reasons to occur that most common ground, which happened or related to the past. Therefore the study is a retrospective one. The “most common ground” which is the “effect” is to establish first and next to determine causation by finding out reasons to occur the most common ground (causes). Therefore the study is non-experimental. In this ground the research design is retrospective, cross-sectional and non-experimental design.

3.2.3 Target population

Arbitral proceedings are private and confidential. In some cases the parties may have honored to the arbitral award. In some cases the wining party may have neglected to apply to the court to enforce the award or otherwise the losing party may have neglected to apply for setting aside of the award. Therefore it is clear that not all the arbitral awards made in Sri Lanka reported to the courts and therefore not become public. In other words some arbitral awards remain private and confidential; therefore it is very difficult to get access to them.

In contrast, if the parties willing to enforce or set aside the award, they should apply to the High Court holden in the judicial zone of Colombo, as still it is the only court designated to have original jurisdiction to that effect. In this ground almost all the arbitral awards become public are registered at the High Court-Colombo and therefore accessible.

However at a given time, not all the arbitration cases registered at High Court are finalized. Some cases are still ongoing, some cases have been suspended due to various reasons. For some cases the High Court issued its judgment, however the parties dissatisfied with the judgment of the High Court may have appealed to the Supreme Court and Supreme Court proceedings may be still ongoing. In all these cases the final judgment is pending.

In this ground the target population of the study is arbitral awards based on arbitral proceedings commenced in Sri Lanka after the appointed date of the Arbitration Act No 11 of 1995 and falling within the purview of the Arbitration Act and the arbitration cases where registered at the High Court Colombo for the setting aside or the enforcement of the arbitral awards and such arbitration cases were finalized by the courts.

3.2.4 Selection of the sample

A preliminary investigation revealed that it is difficult to find out old arbitration case records at the High Court. Further it was found that enforcement and setting aside proceedings of arbitral awards at the High Court and Supreme Court take a considerable time. Therefore considering the access to data and finalization of the law suit on arbitral awards, it was decided to select a convenience sample. The convenience sample of the study was selected as arbitral awards based on arbitral proceedings commenced in Sri Lanka after the appointed date of the Arbitration Act No 11 of 1995 and falling within the purview of the Arbitration Act and the arbitration cases where registered at the High Court Colombo during 2009-2012 for the setting aside or the enforcement of the arbitral awards and such arbitration cases were finalized by the courts. The sample contains 910 arbitration cases.

3.2.5 Data collection process

Data collection was a two tiered process. First it had to be collected data to establish the most common ground on which local arbitral awards become unenforceable in Sri Lanka. Secondly the data collection was to find out reasons to occur that most common ground.

The completed local arbitration cases were used to determine the most common ground leading to unenforceability. Therefore observation cannot be used as events occurred in the past. Further a large number of cases to be studied and interviews or questionnaire cannot be used because of no one could remember all these cases. In contrast, the records of case proceedings and judgments maintained by the courts provide official records of the cases. Therefore the best method to analyze the arbitration cases decided by the High Court is to analyze the official case records and judgments maintained by the High Court.

In this ground, the first tier of data collection was carried out at the High Court-Colombo to achieve Objectives 1, 2, 3 and 4. It was considered total available arbitration

case records where the cases were registered from 2009 to 2012 for setting aside or enforcement of the arbitral awards and proceedings by the High Court and the Supreme Court were completed.

The High Court does not maintain a record in registers to distinguish between local arbitral awards and foreign arbitral awards or completed proceedings and suspended proceedings (files of ongoing proceedings are kept separately) or under which section of the Act the application was made. Therefore the researcher had to scrutinize all the arbitration case records of the relevant period to identify the completed local arbitration cases by the High Court for the applications on setting aside or enforcement. A form was prepared to collect the details such as case number, whether arbitral award set aside or been refused to enforce, industrial sector involved, date of the judgment, whether appealed to Supreme Court, if appealed appeal number and other descriptions about the case. For the classification of industrial sectors, United Nations' publication of International Standard Industrial Classification of All Economic Activities (Rev.4) was used as it provides an internationally accepted industrial classification. This publication was issued by Department of Economics and Social Affairs of United Nations in 2008. The form is attached as Appendix 01.

The last date for the data collection at the High Court was 29.05.2015. The allowable period for the appeal from the judgments on arbitral awards of High Court to the Supreme Court is 42 days. Therefore the leave to appeal register of the Supreme Court was checked on 30.07.2015 to ensure that no appeal was made to the Supreme Court from the judgments of the High Court issued during 15.04.2015 to 29.05.2015.

For the cases where the records at the High Court revealed that the decision of the High Court was appealed to the Supreme Court, an investigation was carried out at the Supreme Court to check whether the Supreme Court has finalized its proceedings. Only the finalized cases were selected to the sample. The cutoff date for the investigation at the Supreme Court was 20.10.2015.

The second tier of data collection started after determining the most common ground above described to achieve Objective 5. As indicated in Table 4.5, the most common ground on which local arbitral awards become unenforceable is "non adherence to enforcement procedure" in other words failure of the parties to adhere to the enforcement procedure. As per Table 4.7, not adhering legal principles and court procedures outside Arbitration Act, not submitting arbitration agreement as required, not submitting arbitral award as required, not submitting a formal affidavit and delay in application for enforcement are the grounds for the High Court to refuse enforcement of the arbitral award under non adherence to enforcement procedure. The grounds outside the purview of the Arbitration Act will not be considered for further analysis in this study as the main consideration was given to the Arbitration Act. In addition only one arbitral award was refused to enforce on the grounds outside Arbitration Act. Therefore the impact on the Objective 5 is minimal though the above case is omitted.

Therefore next step was to find out reasons why the winning parties of the arbitral award failed to adhere to the enforcement procedure stipulated in the Arbitration Act. Not adherence to enforcement procedure due to failing to perform above requirements of the Act is totally an internal matter of the award creditor or his attorney and it cannot be expected to have formal records explaining why they failed to perform such requirements. Further as the events occurred in the past observations cannot be done.

In this ground, the only options left for the data collection were interviews and questionnaire. However there were only sixteen cases to be analyzed on this ground and generally the response rate for questionnaire is law. A sufficient number of responses is required to draw an accurate conclusion. Further the information required is sensitive and spontaneous responses are required. Questionnaire survey is lacking above properties.

The actual underline reasons for the non adherence to enforcement procedure may be different from organization to organization due to their different internal structures. Some kind of interaction with its relevant officers is required to explore the actual

reasons for the non adherence. Therefore interviews are the most suitable method for this task. Due to the requirement of exploratory nature semi-structured interviews were selected. To achieve this objective an interview schedule was developed to use in interviews conducted with the parties who were unable to enforce arbitral awards due to not following the enforcement procedure. The interview schedule is attached as Appendix 02.

Parties who failed to enforce the arbitral awards were mainly banks and other financial institutions. Interviews were conducted with relevant personnel in the organization who dealt with enforcement matters. Where the handling of court cases was out sourced, the interviews conducted with the officers who coordinated with the law firm.

3.2.6 Handling of ethical issues

Though arbitral proceedings are private and confidential, arbitration cases heard in an open court is public. Therefore there is no ethical issue on the publication of the data collected at the High Court during the first tier of data collection. However more concerning on the privacy of the parties involved, the names of the parties will not be published.

During the second tier of data collection data collected to find the answers to the question why the award creditor could not adhered to the enforcement procedure. These issues are sensitive and totally internal matters of such organizations. Therefore it is unethical to publish the identity of such organizations and its personnel. In this ground it was decided not to publish the case numbers or the names of the parties with the data collected during the second tier. An identification code will be assigned randomly to the cases under “non adherence to the enforcement procedure” and data will be presented with the use of such identification code.

CHAPTER 4: DATA COLLECTION AND ANALYSIS

4.1 Introduction

This chapter is aiming to analyze data collected during data collection process and discuss about the results. The data collected during first and second tier of data collection will be separately analyzed.

4.2. Analysis of data collected during first tier in High Court

4.2.1 Overview of the data collection

As indicated in Chapter 3, the first tier of data collection was carried out at the High Court-Colombo to collect data on local arbitration cases where the High Court finalized its proceedings. Table 4.1 gives a summary of court cases scrutinized at the High Court. The summary of cases involving local arbitral proceedings is given in Table 4.2.

Table 4.1: Arbitration cases scrutinized at the High Court – Colombo

Year	Total number of cases	Cases involving local arbitral proceedings	Cases involving foreign arbitral proceedings
2009	270	267	3
2010	463	463	0
2011	250	249	1
2012	120	120	0
Total	**1103**	**1099**	**4**

Table 4.2: Breakdown of cases involving local arbitral proceedings

Year	Cases involving local arbitral proceedings	Applications for setting aside	Applications for enforcement	Other interim applications
2009	267	1	261	5
2010	463	4	452	7
2011	249	5	240	4
2012	120	0	120	0
Total	**1099**	**10**	**1073**	**16**

This study is concerning on the unenforceability of local arbitral awards. Therefore only the finalized arbitration cases by the High Court and/or Supreme Court which were involving local arbitral awards and applied for setting aside or enforcement of the awards are considered for further analysis. The list is attached as Appendix 4. Appendix 3 provides the list of arbitral cases where the arbitration awards set aside or been refused to enforce by the High Court. Table 4.3 gives a summary of completed arbitration cases by the High Court on local arbitral awards.

Table 4.3: Summary of completed cases by High Court on local arbitral awards

Year	Completed cases on local arbitral awards	Applications for setting aside	Awards set aside	Applications for enforcement	Awards been refused to enforce	Awards become unenforceable and percentage of unenforceability	
2009	204	1	0	203	4	4	1.96%
2010	405	4	1	401	3	4	0.99%
2011	196	3	2	193	6	8	4.08%
2012	105	0	0	105	14	14	13.33%
Total	**910**	**8**	**3**	**902**	**27**	**30**	**3.30%**

In the case HC/289/2011/ARB the arbitral award partially set aside by the High Court. However for the analysis purposes it will be counted as an unenforceable event. As indicated in Table 4.3, 30 numbers of arbitral awards become unenforceable fully or partially from 910 of arbitral awards, either due to setting aside or refusal to enforce by the High Court. The percentage of unenforceability is very low in 2009 and 2010 with 1.96% and 0.99% respectively. The percentage is moderate in 2011 and recorded as 4.08%. However when considering the year 2012 the rejection rate is high and recorded as 13.33%. The overall result indicate that the percentage of unenforceable award as 3.30%. Yearly percentages of unenforceable awards are presented in Figure 4.1.

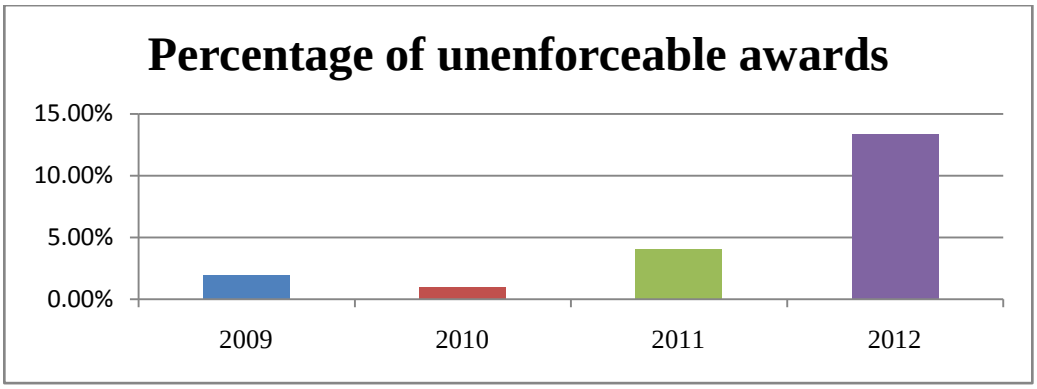

Figure 4.1: Percentage of unenforceable awards yearly

4.2.2 Analysis of arbitral cases based on industry

It is important to analyze the composition of the sample and how awards become unenforceable with respect to the relevant industry. Table 4.4 shows that 95.93% cases from the sample are belonging to financial and insurance industry. The contribution from construction industry is 1.87%. When considering the percentage of unenforceable awards, only 3.09% of awards become unenforceable in financial and insurance industry. However the percentage is considerably high for the construction industry, which is recorded as 11.76%.

Table 4.4: Categorization of arbitration cases based on industry

Industry	Total cases from 2009 to 2012	Percentage contribution of the industry	Awards become unenforceable	Percentage of unenforceable awards
Financial and insurance	873	95.93%	27	3.09%
Construction	17	1.87%	2	11.76%
Whole sale and retail	4	0.44%	0	0
Real estate activities	5	0.55%	0	0
Electricity, gas, steam and air conditioning supply	4	0.44%	0	0
Transportation and storage	2	0.22%	1	50%

Manufacturing	1	0.11%	0	0
Other	4	0.44%	0	0

4.2.3 Analysis of arbitration cases based on the ground for rejection

One of main objectives of this study is to find out the most common ground on which local arbitral awards become unenforceable. Table 4.5 provides a categorization of arbitral cases based on the ground for rejection of the arbitral awards.

Table 4.5: Grounds leading to unenforceability of arbitral awards

Ground for setting aside or refusal to enforcement	**Case numbers**	**Total for the category**
Non adherence to enforcement procedure	HC /ARB/1818/2009, HC/ARB/1916/2009, HC/ARB/2415/2010, HC/ARB/2493/2010, HC/176/2011/ARB, HC/331/2011/ARB, HC/54/2012/ARB, HC/55/2012/ARB, HC/78/2012/ARB, HC/149/2012/ARB, HC/150/2012/ARB, HC/151/2012/ARB, HC/168/2012/ARB, HC/176/2012/ARB, HC/177/2012/ARB, HC/215/2012/ARB, HC/276/2012/ARB	17
Violation of due process	HC/ARB/1718/2009, HC/ARB/2375/2010 HC/427/2011/ARB	3
Excess of authority	HC/289/2011/ARB	1
Irregular construction of the arbitral tribunal or irregularity of arbitral procedure	HC/ARB/2326/2010	1
Award conflicts with the Public Policy	HC /ARB/1821/2009, HC/107/2011/ARB, HC/300/2011/ARB, HC/304/2011/ARB, HC/404/2011/ARB, HC/61/2012/ARB, HC/281/2012/ARB, HC/283/2012/ARB	8

As per Table 4.5, it is clear that “non adherence to enforcement procedure” is the most common ground which leads to unenforceability of local arbitral awards. From 30 numbers of unenforceable awards above ground responsible for 17 awards to become unenforceable. The result given in Table 4.5 is graphically presented in Figure 4.2.

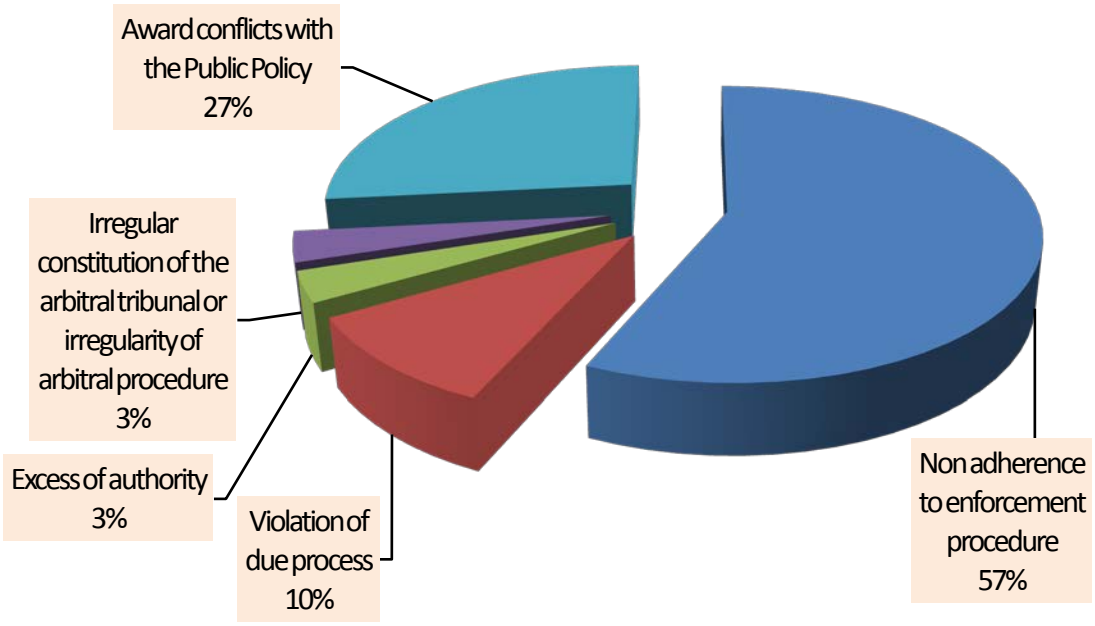

Figure 4.2 Grounds for setting aside or refusal recognition and enforcement

A close look at Figure 4.2 shows that 57% of unenforceable arbitral awards are belong to non adherence to enforcement procedure while public policy grounds lie next corresponding to 27% of unenforceable awards. Therefore the former is more than twice the size of latter. Violation of due process constitutes 10% of unenforceable awards while other two grounds constitute only 6%.

4.2.4 Analysis of the most common ground leading to unenforceability

The basic reasons to refuse the enforcement under non adherence to enforcement procedure are given in Table 4.6. Further the table categorized the basic reasons into categories which correspond to the Arbitration Act.

Table 4.6: Non adherence to enforcement procedure – basic reasons for refusal

Case number	**Basic reason for the refusal to enforce**	**Category of the default**
HC/ARB/1818/2009	Filing more than one cases in the High Court on the same dispute	Not adhering legal principles or court procedures outside Arbitration Act
HC/ARB/1916/2009	Original or certified copy of the arbitration agreement was not provided	Not submitting arbitration agreement as required
HC/ARB/2415/2010	The formal requirements for an affidavit were not adhered to	Not submitting a formal affidavit
HC/ARB/2493/2010	Application was not submitted within the time limit	Delay in application for enforcement
HC/176/2011/ARB	Application was not submitted within the time limit	Delay in application for enforcement
HC/331/2011/ARB	Original or certified copy of the arbitration agreement was not provided	Not submitting arbitration agreement as required
HC/54/2012/ARB	Only a part of the contract agreement was submitted which contained the arbitration clause	Not submitting arbitration agreement as required
HC/55/2012/ARB	Only a part of the contract agreement was submitted which contained the arbitration clause	Not submitting arbitration agreement as required
HC/78/2012/ARB	Application was not submitted within the time limit	Delay in application for enforcement
HC/149/2012/ARB	Application was not submitted within the time limit	Delay in application for enforcement
HC/150/2012/ARB	Application was not submitted within the time limit	Delay in application for enforcement
HC/151/2012/ARB	Application was not submitted within the time limit	Delay in application for enforcement
HC/168/2012/ARB	Original or certified copy of the arbitration agreement was not provided	Not submitting arbitration agreement as required
HC/176/2012/ARB	Application was not submitted within the time limit	Delay in application for enforcement
HC/177/2012/ARB	Application was not submitted within the time limit	Delay in application for enforcement
HC/215/2012/ARB	Original or certified copy of the arbitral award was not provided	Not submitting arbitral award as required
HC/276/2012/ARB	Original or certified copy of the arbitration agreement was not provided	Not submitting arbitration agreement as required

Table 4.6 indicate that not submitting the application for enforcement within the stipulated time limit is the most common basic reason for the refusal to enforce under

non adherence to enforcement procedure. The second common reason is that not submitting the arbitration agreement as required under the Act. Table 4.7 summarised the result given in Table 4.6 and Figure 4.3 graphically illustrates it.

Table 4.7: Categories of the default in enforcement process which lead to refusal of enforcement

Category of the default	**Number of cases**
Not adhering legal principles or court procedures outside Arbitration Act	1
Not submitting arbitration agreement as required	6
Not submitting arbitral award as required	1
Not submitting a formal affidavit	1
Delay in application for enforcement	8

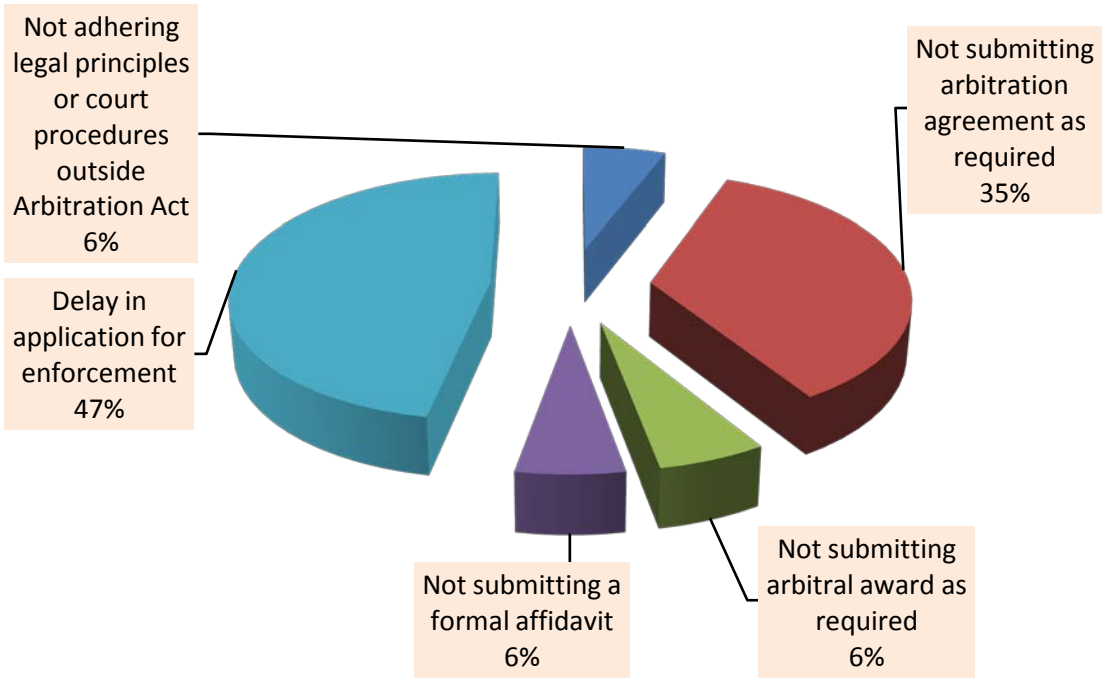

Figure 4.3: Refusal of enforcement due to non adherence to enforcement procedure

4.3 Finding out the reasons to occur the most common ground which leads to unenforceability

During the second tier of data collection, the data collection process was aimed to find out the reasons to occur the most common ground leading to the unenforceability of arbitral awards. However as described in section 3.27 due to the ethical concerns the identity of the collected data during the second tier of data collection will not be disclosed. Data collected will be presented with randomly selected identification codes.

Table 4.8 provides a summary of data collected using interviews during the second tier of data collection. As per the table, performance defects of the legal counsel are the most common reason with leads to non adherence of enforcement procedure. Out of 16 cases 9 cases are belonging to this category. Another 3 arbitral awards become unenforceable due to performance defects of the relevant officer (of award creditor company) to follow up the case. In the case NAEP 10 the legal counsel had not fully understand the requirement of s.31 of Arbitration Act. In this case the lease agreement had been rescheduled. The legal counsel did not think that it is required to submit the full rescheduled lease agreement, this ignorance lead to the unenforceability of the arbitral award. In another case NAEP 14, after receiving the arbitral award the award creditor company and award debtor agreed to a settlement. The award debtor continued paying as per the settlement agreement for around one year. At the time the award debtor breached the settlement agreement the time period for the enforcement of arbitral award had been lapsed. In two cases the relevant officers of award creditor companies did not know the reasons for the non adherence of enforcement procedure. They expressed that it is impossible to trace the relevant case files due to several reasons. Table 4.9 summarizes the reasons not to follow up the enforcement procedure correctly. Figure 4.4 gives a graphical representation of the contribution of the reasons which leads to non adherence to enforcement procedure.

Table 4.8: Summary of data collected from interviews

Code of the case	**Category of the interviewee**	**Reason for non adherence**	**Special remarks**	**Other information**
NAEP 01	Manager legal	Not knowing the actual reason	Relevant files were removed from the office	Arbitration clause has been removed from leasing/loans
NAEP 02	Senior manager	Performance defects of legal counsel	At the time, handling of arbitration cases outsourced to a law firm	Arbitration clause has been removed from leasing/loans
NAEP 03	Senior manager	Performance defects of legal counsel	Handling of arbitration cases outsourced to a law firm	
NAEP 04	Legal officer	Performance defects of legal counsel		
NAEP 05	Legal officer	Performance defects of legal counsel	At the time, handling of arbitration cases outsourced to a law firm	
NAEP 06	Legal advisor	Performance defects of legal counsel	At the time, handling of arbitration cases outsourced to a law firm	
NAEP 07	Senior manager	Performance defects of legal counsel	Handling of arbitration cases outsourced to a law firm	Arbitration clause has been removed from leasing/loans
NAEP 08	Senior manager	Performance defects of the officer in charge	Handling of arbitration cases outsourced to a law firm	
NAEP 09	Senior manager	Performance defects of the officer in charge	Handling of arbitration cases outsourced to a law firm	
NAEP 10	Legal officer	Not understanding the requirement of s.31	Legal counsel did not think that it is necessary to attached full rescheduled leasing contract.	
NAEP 11	Senior manager	Performance defects of the officer in charge	Handling of arbitration cases outsourced to a law firm	
NAEP 12	Senior manager	Performance defects of legal counsel	Handling of arbitration cases outsourced to a law firm	
NAEP 13	Legal advisor	Performance defects of legal counsel	At the time, handling of arbitration cases outsourced to a law firm	
NAEP 14	Manager legal	Failure of the company strategy on the award		
NAEP 15	Legal officer	Not knowing the actual reason	Handling of arbitration cases outsourced to a law firm	
NAEP 16	Legal officer	Performance defects of legal counsel		

Table 4.9: Reasons for non adherence to enforcement procedure

Reasons for non adherence	**Numbers of cases**
Performance defects of legal counsel	9
Not understand the requirements of s.31	1
Failure of the company strategy on the award	1
Performance defects of the officer in charge	3
Not knowing the actual reason	2

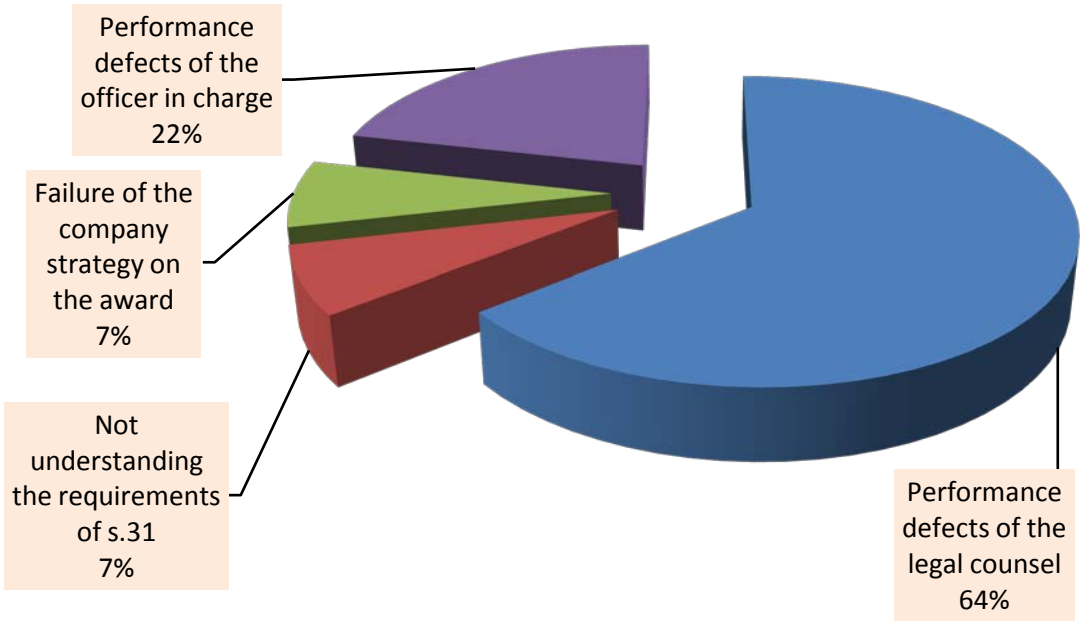

Figure 4.4:Reasons for non adherence to enforcement procedure

Figure 4.4 indicates that 64% of arbitral awards belonging to "non adherence to enforcement procedure" become unenforceable due to the performance defects of the legal counsel. Performance defects of the relevant officer in charge, to follow up the case is responsible 22% of arbitral awards to become unenforceable in the category. Another 7% of arbitral awards become unenforceable due to failure of the company

strategy on the arbitral award. Lack of understanding of the requirement of section 31 of the Act is responsible for 7% of arbitral awards to become unenforceable under this category.

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 section1.3 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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