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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

SRI LANKA

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the* lex arbitri *of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Sri Lankan Arbitration Act[1] (hereinafter referred to as the "Act") was enacted *inter alia* to regulate the conduct of arbitration proceedings. The provisions of the Act apply to all arbitration proceedings commenced in Sri Lanka,[2] regardless of whether such arbitration is domestic or international, including those binding the State in matters where the State is a party to an arbitration agreement (whether in the right of the Republic or in any other capacity, such as contracts entered into between private parties and state agencies and corporations engaged in Commercial matters).[3]

The Act is primarily based on the UNCITRAL Model Law on International Commercial Arbitration (1985), with certain departures from the original text.

Part V of the Act, which deals with the conduct of arbitration proceedings, stipulates that an arbitral tribunal shall afford all parties an opportunity[4] to present their respective cases in writing or orally and to examine all documents and other material submitted by the other party or any third person. This provision has gone beyond the rights conferred by Article 18 of the Model Law and has expressly conferred a right on a party to present his case and examine all documents and other material in writing *or* orally. However, the Act does not specify if the right to orally present his case or examine documents and other material as so provided must be exercised at a physical hearing.

The Act further stipulates that the arbitral tribunal may, at the request of a party, hold an oral hearing before determining any question before it.[5] This provision seems to suggest that where an oral hearing has been requested for by a party, discretion is vested in the arbitral tribunal to decide if to conduct an oral hearing prior to determining any

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[1] No. 11 of 1995.

[2] Section 2(1) of the Act. English translation available at <https://www.slnarbcentre.com/pdf/ARBITRATION-ACT.pdf> (last accessed 1 February 2021).

[3] Section 2(3) of the Act.

[4] Similarly to Article 18 of the UNCITRAL Model Law on International Commercial Arbitration (1985), available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf> (last accessed 1 February 2021).

[5] Section 15(2) of the Act.

question before it. However, this provision too does not expressly stipulate that an oral hearing should take place physically.

Therefore, it can be concluded that while the Act confers a statutory right on a party to present its case and examine documents and other material orally, there is no statutory right under the Act to a physical hearing.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's* lex arbitri *(e.g., a rule providing for the arbitration hearings to be "oral"; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: It can be excluded.

Given that there exists no specific provision under the Act which confers an express statutory right to a physical hearing, one can examine the provisions with regard to the conduct of arbitration proceedings, as provided for in the Act, in order to ascertain if such statutory provisions confer an inferred or implied right to a physical hearing.

As stated above, statutorily, a party can seek to present its case or examine documents and other material orally. The place where such oral presentation or examination, including the arbitration hearing itself, is to take place is a matter to be agreed by the parties.[6] Failing such agreement, Section 16(1) of the Act vests the arbitral tribunal with the discretion to determine the place of arbitration by having regard to the circumstances of the case, including the convenience of the parties.[7] Further discretion is vested in the arbitral tribunal wherein, notwithstanding the provision in Section 16(1) of the Act, and unless there is a contrary agreement between the parties, the arbitral tribunal is empowered to meet at "any place" it considers appropriate for consultations among its members, for hearing witnesses, experts or the parties, or for the inspection of goods, other property or documents.[8] The Act is silent on whether the words "meet at any place" in Section 16(2) mandate a physical hearing or not, and whether a meeting conducted remotely could be included within the meaning of this term. However, given that the Act was enacted in 1995, when remote hearings were not the norm or the practice, especially in Sri Lanka, it is most likely that the drafters of the Act merely intended to provide for the possibility to meet at a convenient location, rather than contemplating a right to a physical hearing. Nevertheless, given that the Act has not expressly specified the requirement of a physical hearing, courts could interpret the term "meet at any place" broadly enough to include a remote hearing. Further, given that the Act upholds party

[6] As provided for in Article 20 of the Model law and Section 16(1) of the Act.
[7] Section 16(1) of the Act.
[8] Section 16(2) of the Act.

autonomy and gives priority to the parties' agreement,[9] it can be argued that the parties to an arbitration proceeding can agree on holding an oral hearing remotely instead of a physical one.[10]

The Act allows parties to submit evidence before the arbitral tribunal either orally, in writing or by affidavit,[11] and has conferred powers upon the tribunal to administer an oath or affirmation for the purpose of the proceedings.[12] Here too, the Act is silent on whether the oral evidence must be given at a physical hearing or not.

Given the absence of a specific provision in the Act that stipulates that any oral hearing must be physical, it is possible to conclude that, by a reading of the above provisions of the Act, a right to a physical hearing can be excluded. There have thus far been no judicial determinations on this matter.

b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. In case the lex arbitri *does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: No. The general rules of civil procedure do not provide for a right to a physical hearing. They only provide for a right to a public hearing.

The Constitution of the Democratic Socialist Republic of Sri Lanka is the supreme legislation in the country. Article 106 of the Constitution deals with "Public sittings" and stipulates that:

[9] See, e.g., Section 6(1) (parties are free to determine the number of arbitrators of the arbitral tribunal); Section 7(1) (parties are free to agree on the procedure for appointing arbitrators); Section 16(1) (the place of arbitration can be decided by the parties' agreement); Section 17(1) (the procedure to be followed by the arbitral tribunal in conducting the proceedings can be agreed upon by the parties); Section 24(1) (the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute); Section 37(4) (parties can agree in writing – so-called "exclusion agreement" – to exclude any right to appeal in relation to an award). While Sections 6(1), 7(1), 16(1), 17(1) and 24(1) are similar to the provisions of the UNCITRAL Model Law, the Act has gone beyond them and permits that parties agree on the exclusion of an appeal pursuant to Section 37(4) of the Act.

[10] In fact, the Sri Lanka National Arbitration Centre and the ICLP Arbitration Centre (which is the only Centre operating under its own rules at present) have conducted several domestic and international arbitration arbitrations remotely during the Covid-19 pandemic period. These remote hearings have been held with the consent of the parties and of the tribunal.

[11] Section 22(1) of the Act.

[12] Section 22(2) of the Act.

> "(1) The sittings of every court, tribunal or other institution, established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.
> (2) A judge or presiding officer of any such court, tribunal or other institution can, in his discretion, whenever he considers it desirable –
> (a) in proceedings relating to family relations,
> (b) in proceedings relating to sexual matters,
> (c) in the interests of national security or public safety, or
> (d) in the interests of order and security within the precincts of such court, tribunal or other institution,
> exclude therefrom such persons as are not directly interested in the proceedings therein".[13]

The above provision of the Constitution clearly demonstrates that court proceedings are required to be open to the public, mainly in order to ensure that they are conducted in a transparent manner.

In addition to the aforesaid constitutional provisions, the Civil Procedure Code No. 2 of 1889, as amended (hereinafter referred to as the "Code"), lays down the procedure applicable to civil actions instituted in Sri Lanka.

Chapter XIX of the Code, which deals with civil trials, expressly stipulates that witness evidence shall be given orally, as prescribed in the Code, in "open court", in the presence and under the personal direction and superintendence of the Judge.[14] It is only for grave causes and reasons (to be recorded) that courts may deviate from the prescribed course.[15] This Chapter further provides that the evidence of each witness shall be taken down in writing by the Judge, or in his presence and under his personal direction and superintendence. The evidence shall be taken down ordinarily in the form of a narrative.[16] In practice, it is a stenographer of the Court who takes down the evidence given by a witness in the presence of the Judge, all proceedings are held physically in the designated Court houses and no remote hearings take place.

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[13] Article 106 of the Constitution. English translation available at <https://www.parliament.lk/files/pdf/constitution.pdf> (last accessed 1 February 2021).

[14] Section 167 of the Code. English translation available at <https://www.wipo.int/edocs/lexdocs/laws/en/lk/lk008en.pdf> (last accessed 1 February 2021).

[15] Section 166 of the Code; U.L. Abdul MAJEED, *A commentary on Civil Procedure Code and Civil law in Sri Lanka*, 1st edn. (U.L. Abdul Majeed 2013) p. 501, takes this same view.

[16] Section 169 of the Code.

The words "open court" are used at several points of the Code.[17] However, this term has not been defined in the Code. Having regard to the fact that the Code was first enacted as far back as 1889, it is understood that the original text contemplated a hearing which was open to the public and, in all likelihood, physical. However, it cannot be said that remote hearings are prohibited by the Code or that the Code mandates that parties be present in the same physical location when participating in a hearing.

Further, the Code in Section 87 permits a Judge to dismiss the plaintiff's action where the plaintiff makes default in making an appearance on the day fixed for the trial. Similarly, Section 142C, which was brought in with the amendment to the Code in 2017 and introduced a pre-trial procedure for actions, sets out that if any party fails to appear on the day fixed for the pre-trial hearing, the Judge conducting the pre-trial hearing may dispose of the action or make such other order as he may consider fit. The Judge conducting the pre-trial is also empowered to record the parties' admissions, their agreement on numerous matters, withdrawals of actions, the adjustment, settlement or compromise of actions, etc.[18] Further, where the Judge conducting the pre-trial hearing is of the opinion that the issues cannot be correctly framed without the examination of a person who is not present at the pre-trial proceedings, pursuant to the Code he may adjourn the framing of such issues to a future date to be fixed by the Court, and may compel the attendance of such person.[19]

There is also a relevant provision in the Mutual Assistance in Civil and Commercial Matters Act,[20] which has been enacted to provide for the rendering of mutual assistance in civil and commercial matters between Sri Lanka and other countries and to give effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Under this Act, the Minister is empowered to publish an order in the Gazette declaring the countries to which the provisions of the said Act would apply.[21] These provisions have been relied on, though not so frequently, in taking witness evidence remotely.[22]

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[17] See, e.g., Section 387 (pronouncement of final order in open court), Section 432(2) (commissioner to be examined personally in open court), Section 755(5) (petition of appeal to be supported in open court).

[18] Section 142F of the Code.

[19] Section 142H of the Code.

[20] Act No. 39 of 2000.

[21] The most recent Gazette is available at <http://documents.gov.lk/files/egz/2018/9/2090-17_E.pdf> (last accessed 1 February 2021).

[22] A trial in the Commercial High Court of Colombo was conducted remotely, with a witness seated in the USA being cross examined by Counsel, as far back as the year 2008: see Sarath MALALASEKERA, "Video link makes history in Commercial Court" (23 October 2008) at <http://archives.dailynews.lk/2008/10/23/news22.asp> (last accessed 1 February 2021). However, these provisions are not used too frequently, and the practice of courts has been for witnesses (even in the case of foreign witnesses) to be present at physical hearings.

Also, with the enactment of the Electronic Transactions Act,[23] recognition has been given to electronic documents.[24]

In conclusion, despite the aforesaid provisions of the Code suggesting the attendance of parties at a hearing, there is no specific provision stipulating that parties must necessarily be present physically at a hearing. As such, as the law stands today, the Code does not confer a right to a physical hearing on the parties, and the law solely mandates that hearings be public.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: This question would not arise as there is no right to a physical hearing pursuant to the Code.

In any event, the Code does not have a bearing on the conduct of arbitral proceedings, as the same are governed by the Arbitration Act.[25] Thus, even if a right to a physical hearing did exist under the Code, the same could not be extended to arbitrations, unless expressly provided. As stated above, the conduct of arbitrations in Sri Lanka is regulated by the provisions laid down in the Act.[26] Where required, the Act expressly provides for the applicability of specific provisions of the Code to matters coming under the scope of the Act. By way of example, the Act provides that judgments and decrees entered under the Act may be enforced in the same manner as a decree entered under the provisions of

[23] Act No. 19 of 2006.

[24] Section 3 of the Electronic Transactions Act provides that: "No data message, electronic document, electronic record or other communication shall be denied legal recognition, effect, validity or enforceability on the ground that it is in electronic form" (free translation by the Author).

[25] In *Phil-east Asia Construction Corporation v. Galadari Hotels (Lanka) Limited* [C.A.No. 460/98(F)](unreported), where the question of the applicability of the Prescription Ordinance (parallel act being the Limitations Act of England) was in issue, in considering the term "action" as set out in the Prescription Ordinance the Court proceeded to analyze the definition of "actions" set out in the Civil Procedure Code (as the Prescription Ordinance is silent on the matter), whose Section 6 defines an action as every application to a court for relief or remedy obtainable through the exercise of the courts power or authority or otherwise to invite its interference constitutes an action. The Court went on to conclude that the proceedings before an arbitrator, in the absence of express provisions to that effect, cannot be considered to be "actions" in the sense that they would attract the provisions of the Civil Procedure Code.

[26] In *State Timber Corporation v. Moiz Goh Pte (Ltd)* [2002 BALR 44], the Supreme Court observed that "the law which applied to arbitration proceedings is that which is agreed upon by the parties and the provisions of the Arbitration Act intended to facilitate these proceedings and provide for intervention by Court where necessary".

the Civil Procedure Code (Chapter 101 of the Code) and, accordingly, the provisions of the Code relating to the execution of decrees shall, *mutatis mutandis*, apply to such enforcement.[27] Similarly, in the case of service of notices and summons under the Act, it is specifically provided that if a person deliberately avoids accepting the notice or summons, summons can be served by substituted service in accordance with the provisions of the Civil Procedure Code (Chapter 101 of the Code).[28]

Therefore, unless the Act specifically provides for the provisions of the Code to apply to a matter arising under the Act, the provisions of the Code would not apply to matters coming under the purview of the Act.

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?

Short answer: N/A

As stated above, a right to a physical hearing is not statutorily provided for under the Act. However, given that the Act gives prominence to party autonomy,[29] parties would be free to agree as to whether a hearing should take place physically or remotely.[30]

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[27] Section 41 of the Act.

[28] Section 42(C) of the Act. Similar provisions are found in the definition of "legal interest" in Section 50(1) of the Act, which provides that "legal interest" means interest at the rate specified in an Order made under Section 192 of the Civil Procedure Code and for the time being in force.

[29] See fn. 9 above.

[30] In the case of *Merchant Bank of Sri Lanka Ltd. v. D.V.D.A. Tillekeratne* (2001) B.A.L.R. 71, where the non-appointment of an arbitrator by one party was challenged on the basis that the arbitration could not have proceeded with a single arbitrator, the Supreme Court held that the procedure followed had been in observance of the arbitration clause and went on to hold that "party autonomy is a fundamental principle of Arbitration Law and this is given effect to by the legislation in Section 7(1) of the Arbitration Act". This case has been cited with approval in the more recent case of *Wakachiku Construction Co. Ltd., v. Road Development Authority* [2011] (Supreme Court) Case No. Misc. 01/2011 decided on 6 February 2013. See also *State Timber Corporation v. Moiz Goh Pte (Ltd)* [2002 BALR 44] and *Kristley (Pvt) Limited v. The State Timber Corporation* [2002 (1) SLR p. 225] where the Supreme Court observed that "Section 17 of the Act gives the parties the freedom to agree on the procedure to be followed by the arbitral tribunal. Section 19 makes any decision made in the course of arbitral proceedings binding" (line 420).

6. To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?

Short answer: No.

The Act affords supremacy to party autonomy and stipulates that parties to an arbitration proceeding shall be free to agree on the place of arbitration.[31] The tribunal is empowered to determine the place of arbitration only where there is no such agreement between the parties.[32] Even where the tribunal is empowered to meet at any place it considers appropriate for consultations among its members, hearing witnesses, experts or parties, etc., the same can be done only if parties have not agreed otherwise.[33] Therefore, pursuant to the Act, the arbitral tribunal cannot decide to hold a remote hearing where the parties had expressly agreed to a physical hearing, unless the parties subsequently agree to change their previous agreement requiring a physical hearing.

The danger of an arbitral tribunal deciding to hold a remote hearing contrary to the parties' agreement is that the losing party to the arbitration can later challenge the arbitral award on the basis that the arbitral procedure was not in accordance with the agreement of the parties and/or, in the absence of such agreement, was not in accordance with the provisions of the Act.[34]

As such, an arbitral tribunal proceeding to conduct a remote hearing contrary to the parties' agreement can pose serious issues to the validity of a consequent award and its enforcement.

d. Setting Aside Proceedings

7. If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?

Short answer: Yes.

Generally, a party having participated in arbitral proceedings and not having raised an objection before the tribunal cannot thereafter raise such matters at the setting aside stage. Similarly, if a party fails to raise a breach of its right to a physical hearing during

[31] See fn. 9 above.
[32] See fn. 7 above.
[33] See fn. 8 above.
[34] Section 32(1)(a)(iv) of the Act in the case of domestic awards and Section 34(1)(a)(iv) of the Act in case of foreign awards.

the arbitral proceedings, the same would amount to a waiver of such right and an acquiescence by such party of the procedure adopted by the tribunal, and in all likelihood, such party will not succeed in raising the same as a ground for challenging the award.

The Supreme Court in the case of *Ranin Kumar, Proprietor, Messrs Pharma Chemie v. State Pharmaceutical Corporation*[35] upheld an objection raised by the State Pharmaceutical Corporation, holding that long participation and acquiescence in the proceedings preclude a party from later contending that the tribunal lacks jurisdiction. Where a party to an arbitration agreement participates in the arbitration proceedings with the clear knowledge that the matter is legally incapable of being submitted to arbitration, he cannot thereafter raise the question of lack of jurisdiction at the setting aside stage.

Further, in the leading case of *Kristley (Pvt) Limited v. The State Timber Corporation*[36] a vital document produced by the claimant in the arbitration proceedings was alleged to be a forgery, but a specific objection was not raised regarding forgery, despite serval other objections being raised. The Supreme Court reprimanded the acts of the State Timber Corporation for having evidence of the alleged forgery at least midway in the proceedings and nevertheless failing to raise the relevant objection, and refused the application for setting aside of the award, *inter alia*, on this basis.[37]

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[35] [2004] 1 SLR p. 276.

[36] [2002] 1 SLR p. 225, available at <https://www.lawnet.gov.lk/wp-content/uploads/2016/11/026-SLLR-SLLR-2002-V-1-KRISTLEY-PVT-LIMITED-v.-THE-STATE-TIMBER-CORPORATION.pdf> (last accessed 1 February 2021)

[37] In coming to the aforesaid conclusion in *Kristley*'s case, the Court observed the importance of raising issues on potential disputes and held that "the arbitral tribunal needed to know what exactly it had to decide in its award – deciding all the matters, and only the matters, which it was required to decide, and not deciding any others. Each party needed to know from the beginning what case it had to meet, so as to ensure an orderly presentation of evidence and submissions. Since parties sometimes change positions, or adopt new positions, in the course of an arbitration, the questions which then arise need to be recorded with clarity and certainty. Issues were, therefore, necessary" (line 461). The Court further went on to observe that "the learned High Court Judge erred in holding that it was the duty of the arbitral tribunal to have framed an issue on the question of forgery. A party and its legal advisers are presumed to know best what its case is, and what matters it should urge – and what matters it should not. It is true that section 146 (2) of the Civil Procedure Code expressly imposes a duty on a trial Judge to frame issues, where the parties are not agreed as to the issues. It is unnecessary to decide whether that same duty is cast upon an arbitral tribunal because this was not a case where the parties were not agreed as to an issue; it was, rather, a case where the STC failed to suggest an issue. It was not even an issue which arose from the pleadings. The tribunal was not obliged to frame an issue as to forgery" (line 478). The Court also observed that "even if I were to assume that, in the circumstances, the arbitral tribunal did have a power to frame such issues, natural justice required that the affected party should have been informed of those issues, and given an opportunity to suggest consequential issues and to lead further evidence – particularly, because the standard of proof of forgery proposed to be applied was lower than that notified to the parties. I hold that, in the circumstances, the

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute* per se *a ground for setting aside (e.g., does it constitute* per se *a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

As stated above, the Act does not recognize a right to a physical hearing. As such, a party having been deprived of a physical hearing cannot seek to set aside an award on this basis, unless of course the agreement between the parties specifically provided for a physical hearing.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: This would depend on the facts and circumstances of the case.

An application for setting aside an award can be made only in respect of an award made in an arbitration seated in Sri Lanka and not in respect of a foreign award. Such application must be based on the grounds set out in Section 32(1) of the Act.[38] The failure on the part of the tribunal to conduct a physical hearing could be relied on as a ground to seek the setting aside of an award only where the party challenging the award can establish that he was unable to present his case or that the arbitral procedure was not in accordance with the parties' agreement, where parties had expressly agreed to a physical hearing and the tribunal nonetheless failed to conduct one. However, Sri Lankan courts, in most instances, have been reluctant to set aside arbitral awards and a challenge based on these grounds would not lead *per se* to a decision setting aside an award, unless there is sufficient material for the Court to come to the conclusion that due process has not been respected and a party has not been afforded an opportunity to present its case.

Further, if a party were to seek to set aside an award on the grounds of a violation of public policy on the basis that he was not afforded a physical hearing, alleging that this amounts to a breach of public policy of the country, such party would have to adduce

majority was justified in refusing to consider the question of forgery without a specific issue, and the High Court was not entitled to review that decision on the ground of public policy or otherwise, under section 32 (1) of the Act" (line 490).

[38] The grounds for setting aside a domestic award are identical to the grounds set out under the Model Law.

sufficient material in the application to set aside the award, since a court cannot *ex mero motu* set aside an award on the grounds of a violation of public policy under Section 32(1)(b) of the Act, in the absence of such material.[39]

e. Recognition/Enforcement

10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?

Short answer: This would depend on the facts and circumstances of the case.

Sri Lanka became a signatory to the New York Convention on 9 April 1962 without reservations. As such, recognition or enforcement are given to foreign arbitral awards irrespective of the country in which they are made, and would be refused only upon proof of the limited circumstances set out in Section 34(1) of the Act. These grounds are identical to the grounds set out in Article V of the New York Convention. Article V(1)(b) (right of the party to present his case) is reflected in Section 34(1)(ii), Article V(1)(d) (irregularity in the procedure) is reflected in Section 34(1)(iv) whilst Article V(2)(b) (violation of public policy of the country where enforcement is sought) is reflected in Section 34(b)(ii).

The Supreme Court has observed that it is axiomatic that in interpreting the provisions of the Arbitration Act the Court has to bear in mind the international obligations cast on Sri Lanka by the provisions of the New York Convention, and has to lean in favour of giving effect to the arbitration clause.[40]

If a party seeks to resist enforcement on the basis that he was not afforded an opportunity to present his case and due process was not respected, a court could, if there is sufficient ground, interpret such circumstances to come within the ambit of Section 34(1)(ii) and Section 34(1)(iv) of the Act. However, this would largely depend on whether the facts and circumstances of the case make it blatantly obvious that due process has not been respected and that a party has not been afforded a fair opportunity to present its case. The Supreme Court of Sri Lanka has clearly expressed the view that the legislative intent behind the Act is clearly that a degree of finality is attached to the decision of the arbitral tribunal, which is the judge of both questions of fact and law referred to it, and that therefore, in exercising jurisdiction under the Act, the Court cannot

[39] *Southern Group Civil Construction (Pvt) Ltd. v. Ocean Lanka (Pvt) Ltd*. [2002] 1 SLR p. 190.

[40] *Elgitread Lanka (Pvt) Ltd. v. Bino Tyres (Pvt) Ltd*. (unreported) S.C. (Appeal) No.106/08 [Bar Association Law Reports, 2011 at p. 130].

review the conclusions of the arbitral tribunal by re-scrutinizing and re-applying the evidence considered by the arbitral tribunal.[41]

The Supreme Court in the case of *Light Weight Body Armour Limited v. Sri Lanka Army*,[42] which is the leading authority on the concept of public policy, has held that the concept must be construed narrowly. The Supreme Court observed that it is important that a court considering a challenge grounded on public policy bear in mind the possible misuse of this doctrine by the defendant in order to avoid the consequences of the arbitral award. The Supreme Court took the view that it is generally understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covers fundamental principles of law and justice in substantive as well as procedural aspects, and thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside an award on public policy grounds.

The Supreme Court has stated that Sri Lankan courts have adopted a more cautious approach and held that it is not every error of law, but only a violation of a fundamental principle of law applicable in Sri Lanka, that would be held to be contrary to public policy.[43]

Thus far, there have not been cases where the doctrine of public policy has been invoked to set aside an award based on a party's right to a physical hearing.

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: Yes.

Despite the fact that there had been few or no hearings conducted remotely, either in arbitral proceedings or proceedings before courts, prior to the Covid-19 pandemic, the current challenges have enabled the swift transition to remote hearings in arbitral proceedings.

[41] *Light Weight Body Armour Limited v. Sri Lanka Army* [2007] 1 SLR p. 411.
[42] *Ibid*.
[43] *Kiran Atapattu v. Janashakthi General Insurance Co. Ltd*., [2013] (Supreme Court) Appeal 30-31/2005 decided on 22 February 2013.

The Sri Lanka National Arbitration Centre,[44] which is the oldest centre in Sri Lanka, has conducted several remote hearings in arbitration proceedings, both domestic and international, since the Covid-19 outbreak. This Centre (which does not have its own rules) is adopting a safe approach by recording the consent of parties to be conducting proceedings remotely.

The Institute for the Development of Commercial Law and Practice ("ICLP") Arbitration Centre, which is at present the only centre that has its own institutional rules, has also commenced the conduct of remote hearings in domestic as well as international arbitrations, as well as the delivery of awards and recording of settlements, since the time Sri Lanka faced the Covid-19 pandemic in March 2020.

In September 2020, the ICLP Arbitration Centre successfully facilitated the first-ever remote hybrid international arbitration hearing in Sri Lanka. This hearing was a collaboration between the Hybrid and Virtual Hearings Solutions of Maxwell Chambers of Singapore and Opus 2, Singapore and the local technological provider.

The Sri Lanka National Arbitration Centre, as well as the ICLP and the more recently inaugurated CCC-ICLP ADR Centre – which has been set up as a collaborative effort of the Ceylon Chamber of Commerce ("CCC") and the ICLP – are geared to conducting arbitral proceedings in compliance with the Covid-19 rules issued by the Government of Sri Lanka.

Steps are also being taken to facilitate the conduct of court hearings remotely. A Sub–Committee, which was set up before the outbreak of the pandemic under the Special Unit of the Ministry of Justice on Digitisation and Court Automation, is currently advising on the manner in which remote hearings can be conducted. However, this process has not commenced thus far, except for the conduct of remote hearings in Magistrates Courts proceedings in respect of applications relating to prison inmates, where such inmates appear before the Court from the technology unit of the Welikada prison, instead of being physically brought to the Court houses.

[44] Sri Lanka National Arbitration Centre, "SLNAC Safety Guidelines for Its Staff and Patrons for Covid-19", available at <https://www.slnarbcentre.com/pdf/GUIDELINES.pdf> (last accessed 1 February 2021).