Challenging Arbitral Awards in the Construction Industry

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ABSTRACT

One of the most common alternative dispute resolution methods used in the Sri Lankan construction industry is arbitration. However, challenging arbitration awards based on legal grounds at the courts has been a current trend by the disagreeing party. If this situation occurs continuously, the purpose of having arbitration as an alternative dispute resolution method can be abandoned. Therefore, the study aims to identify the causes where arbitration is challenged in multi-story building construction projects in Sri Lanka through a case study. The methodological choice was qualitative and used semi-structured interviews from six arbitrators and 2 case studies that referred to courts to challenge arbitration awards as research strategies. The study found the poor attitude of parties, lack of technical knowledge, reliability, and capability of the arbitrator to act according to the arbitrary acts imposed by the government as the main causes. Further. The study recommends arbitrators consider the reasons to act well enough and reject the cases if the arbitration is likely to be challenged in courts, train arbitrators to be reliable and on technical knowledge, and improve parties' attitudes by educating on the arbitration procedure and its benefits.

KEYWORDS: *Arbitration, Challenge, Award, Dispute, Sri Lanka*

1. INTRODUCTION

The study is aimed at identifying the causes where arbitration is challenged in multi-story building construction projects in Sri Lanka. The aim was fulfilled under 3 objectives. Firstly, a thorough identification of the arbitration procedure in construction projects in Sri Lanka is completed. Secondly, the reasons for Arbitral challenges were identified and lastly, mitigatory solutions were formulated to overcome the challenges in Arbitral awarding.

The construction industry is complex. (Harmon, 2003 and Cheung, et al., 2002). With the use of many documents and different professionals working together, conflicts are inevitable. (HADI , 2015) to resolve such, the conventional legal system offers a range of paths supported by both public and private institutions with trained, skilled, and qualified professionals (Tanielian, 2013). (HANSEN, 2019). With that, it is clear not only human nature but also other special circumstances lead to creating disputes in the construction industry (Turner & Turner, 1999 & Cheung, 1999 and Ashworth, et al., 2002).

Practices such as negotiation, conciliation, mediation and arbitration have been conjoined now as Alternative Dispute Resolution (ADR) methods (Zavadskas, et al., 2010). However, litigation and negotiation come under the wide bracket of traditional dispute resolution methods but brought about the concepts of arbitration and mediation under the specific spectrum of ADR (Chinyere, 2011). As an alternative perspective, Colvin refers that ADR comprises a variety, inclusive of meditation, arbitration, ombudsmen and peer review (Colvin , et al., 2006). However, the court proceeding is costly and time-consuming. Therefore, parties go for these ADR methods (Hadi , 2015). It is identified as a ‘damage limiting exercise’ (Hadi , 2015). There are different methods to approach the resolution of disputes

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outside the court system. (Zavadskas, et al.,2010 and Abeynayake, 2017). There are two groups of ADR methods in the construction industry - binding methods and - non-binding methods. The former is predominantly arbitration and to some extent Adjudication. Latter includes negotiation and mediation (De Zylva, 2006).

2. LITERATURE REVIEW

2.1 Dispute resolution methods in Sri Lanka

Drawbacks of litigation have opened up (ADR) methods identified as negotiation, mediation, conciliation, adjudication and arbitration (Abeynayake , 2017) that the statistics show that ADR forums within the Construction arena have received much popularity in Sri Lanka (Gunasena, 2010). In this study, I take ADR as negotiation, mediation, conciliation, adjudication and arbitration. The main reasons are that parties' autonomy to choose their desired ADR method and ADR sessions are held confidentially. Also, the procedure is faster and avoids animosity to a great extent (Hadi , 2015).

However, it is essential to note that ADR in the manner of Conciliation Boards; commonly referred to as Samagi Mandalaya was formulated in the year 1958 in Sri Lanka, initiated to encourage settling civil disputes beyond the spectrum of traditional court proceedings (Hadi , 2015). Parliament has implemented several ADR statutory laws (Ekanayake, 1992)'i.e., Arbitration Act No.11 of 1995, Mediation Board Act No. 72 of 1988, Commercial Mediation Center of Sri Lanka Act No. 44 of 2000 and Mediation Boards (special kind of disputes) Act No. 21 of 2003. Additionally, it is important to note that The Institute for Construction Training and Development (ICTAD)- in their first revised edition of Standard Bidding Document (SBD) in 2006, brought up the practice of Adjudication. It spoke about how adjudication and arbitration practices are the very first step towards remedying disputes in Sri Lanka's Construction Industry. (Abeynayake, 2017). From ADR, the researcher selected negotiation, mediation, conciliation, adjudication and arbitration. From that, Arbitration is the most frequent ADR method. Most construction agreements include an Arbitration clause (Cheung, 1999).

2.1.1 Arbitration

Arbitration could easily be referred to as the most often used ADR system in Sri Lanka; mainly in the local construction industry (Abeynayake , 2017). It is an extremely confidential process in which parties to the claim nominate one or more individuals, formally known as 'Arbitrators'- where they make a legally binding decision to the dispute (Ganesaratnam, 2013). They can be either 'institutional' or 'ad hoc' (center, 2004). The freedom in having to nominate an arbitrator to the parties' liking is held to be an important characteristic of the Arbitration mechanism. The parties have the flexibility in nominating an Arbitrator who may have sufficient experience and knowledge in the specific area of the dispute, i.e., the Construction industry (Harmon, 2003) The practice of Arbitration has now grown at tremendous levels (Abwunza, 2020 and Hansen, 2019). It has been commonly agreed that there are two elements to Arbitration, namely ad hoc arbitration and institutional arbitration (Greenberg, et al., 2011) Institutional arbitration can be identified as a system governed by its own separate set of rules and regulations as laid down by a specialist arbitral institution (blackby et al, supra note 4). Whereas, ad hoc arbitration can be described as a separate spectrum inclusive of all arbitration ways that are in no way institutional (Sanders, n.d.) It is flexible and independent of all or any attachment to an institution. Furthermore, it is independent to the extent that the process of such is continued without any appointed administrative authority (Schroeter, n.d.).It has also been noted that parties to the claim prefer an adversarial process of arbitration over others. This is fundamentally due to its high enforceability in its arbitral award (Hemantha, 2016). Moreover, even in disputes about International Trade Law, the preference mainly lies in International Commercial Arbitration over the conventional litigation process due to lack of efficient legal recognition and enforcement of judicial decisions outside the scope of its jurisdiction in which the course of action took place (Hon. Justice Saleem Marsoof, 2013 and Greenberg, et al. 2011). The parties may resort to court to appeal an arbitral award to have it set it aside but unfortunately in the majority of countries, under their national arbitral laws and regulations, grounds for setting aside such an award are made limited (Organization, n.d.).

(Hemantha,2016) discussed the most common grounds on which local arbitral awards become unenforceable in Sri Lanka. ((Hansen,2019) researched to identify the circumstances for challenging arbitral awards in the Indonesian construction industry regarding infrastructure disputes. In the absence of thorough research in Sri Lanka's construction industry, this research will be conducted on challenging arbitral awards in Sri Lanka, particularly to find out the most common grounds on why there is a challenge in enforcing local arbitration Awards in multi-story construction.

The purpose of this research is, to find why the challenging grounds are generated. Parties spent money to settle the dispute through Arbitration. Then, why they cannot come to a settlement from the final award? Or didn't they consider the above legal grounds at the beginning of this procedure? If that decision also becomes again a problem, it will be a messy situation. Therefore, it is important to understand the procedure.

2.1.2 Arbitration in the construction industry

Disputes about the construction industry can take place within the course of a construction project with two or more parties involved (Hansen, 2019). Whereas, mainly due to many construction disputes, Arbitration has now become the most commonly resorted commercial ADR method (Hinchey, 2012 and Mistelis,2004 and Shontz, et al., 2011 and Abuwanza,2020 and Hansen, 2019 and Wijeratne, 2011). The growth of International Arbitration has also risen especially during the last 40- 50 years. It has easily become the most preferred dispute resolution method in global commercial conflicts in both Asia – Pacific and all over the world (Greenberg, et al., 2011). The parties mutually agree to execute an Arbitrator's judgment who they freely nominate and allow that judgment to be legally binding. Such judgment is final and the award has the legal force of a Commercial High Court (Hansen, 2019 and sims, et al., 2003 and Reynolds, 1993).

2.2 Arbitration history

It is under English Law; modern arbitration is developed. While arbitration in England dates back to the 15th century, it was formally recognized under the Arbitration Act of 1697. With the growth of international commerce, it is referred to as the International Commercial Arbitration (Wijeratne, 2011).

The foundation of English standards of arbitration in Sri Lanka was sanctioned in a resolution structured by the Arbitration Ordinance No.15 of 1856 (Wijeratne, 2011). Dr. A. R. B. Amerasinghe and K. Kanag – Isvaran additionally outlined the arbitration history as like the S.S Wijeratne. After the British conquering of Sri Lanka certain legitimate changes were presented which implied an intense change in the Sri Lankan legal system. The remainder of the change identifying with the agreeable settlement of disputes presented by the British was the Arbitration Ordinance No. 15 of 1866 and Civil Procedure Code of 1899. The system under these extremely old statutes was not fit for managing the assortment of issues associated with the advanced commercial disputes and with the sensible requests of the business community. (Amerasinghe, 2011 and Kanag - Isvaran, 2011)

2.3 Advantages and disadvantage

Sri Lankan Arbitration Act became law on 1 August 1995. (Amerasinghe, 2011 and Wimalchandra, 2007). This enables the arbitration process to become more thorough efficient and reliable (Weddikkara & Abeynayake, 2012). The main advantage of arbitration is that it is consensual and private in nature (Tannen, 2016). Parties allow them to choose their arbitrators, the arbitration seal and the rules of procedure of the arbitrators to be followed under the arbitration-related principle of "party autonomy" (commission,1985 and Weddikkara & Abeynayake, 2012 and Amerasinghe,2011). Arbitrators are not constrained by the same legal proceeding as courts and it avoids considerable costs and delays which are more likely in litigation. (Tannen, 2016). Lord Denning once famously complained: "One of the greatest threats to cash flow is the incidence of disputes. Resolving them by litigation is frequently lengthy and expensive. Arbitration in the construction context is often as bad or worse." (Skene & Shaban, 2002 and Tanielian, May 2013). This arbitration growth was due to its perceived positive qualities such as flexibility, expertise, perceived time performance (Naimark & Keer, 2002 and Stipanowich & Lamare, 2014). For various industries, including construction, banking,

mining, manufacturing, healthcare, electricity, communication, retail and wholesale, the above features have attempted to arbitrate (Stipanowich & Lamare, 2014). It seems that the claims on the construction industry are of the most technical sort and the cases are far more connected to the technical nature of the disputes. Therefore, parties are willing to give the case to a person who has the technical knowledge to decide according to the normal procedure (Weddikkara & Abeynayake, 2012). Arbitration is economical compared to court action. Parties do not have to wait for the court's free dates either (Weddikkara & Abeynayake, 2012). The whole procedure is simple too.

In the Sri Lankan arbitration process, researchers have shown some disadvantages such as delaying the process, high arbitrators' fees, less concentration on technical issues, unawareness of the procedure, various solutions offered by different arbitrators, difficulty in challenging the award, inability to conduct multi-party disputes using arbitration. Also, the inability to preserve the relationship between the parties (Abeynayake, 2017 and Cabral, 2018).

2.4 Arbitral awards in the construction industry Sri Lanka

One main role of the arbitrator is to grant the award. It could also be held as the 'make your time up' time (Hartwell, 2001). Arbitral Awards are both final and binding in law. There are only a few rare exceptions to such (Burch, 2010). An Arbitral Award, equivalent to an award granted by the traditional court system- is a written aid that is fully legal. There are held to be six requirements, whereas four out of the six are natural requirements such as the awards must be cogent, complete, certain and final (Hartwell, 2001). Moreover, the arbitrator has full discretionary powers over the arbitral awards. (Burch, 2010). There could be circumstances where the arbitral award may not have enforceability in every jurisdiction if it is inconsistent with local laws or with the arbitration seat rules. Therefore, the arbitration clause in the agreement must be precise and must not have any anonymity (Tanielian, 2013). The enforceability in awards showcases the balance that lies between the autonomy of the arbitral proceedings and the traditional powers of the local courts (Greenberg, et al., 2011). Thereby, if a party isn't satisfied with the arbitral award, they may contest in a court of law to have the award ruled void. But in many countries, this is made limited (Organization, n.d.). When a party needs to enforce an arbitral award, they may apply to the High Court within one year for 14 days of granting the said award (LANKA, 1995). If there is no contention, the court shall give the order favoring the award (Amerasinghe, 2011). Section 32 of the Arbitration Act No. 11 of 1995 encompasses the grounds for contesting an arbitral award. These include formal procedural mistakes or errors- which consists of cases of invalid arbitration agreements, non-arbitral subject matters of awards that conflict with public policy. (Amerasinghe, 2011). Statistics show that around 3.3% of arbitral awards in Sri Lanka have eventually become unenforceable within the cases that were filed in High Court during the years between 2009-2012. Within all such cases that were filed in the aforementioned years, 11.76% of arbitral awards given for construction matters have been made unenforceable because of being set aside or being refused to enforce by the court. This 11.76% is considerably high in comparison to cases in the financial and insurance industries (Hemantha , 2016).

Moreover, the implementation of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention,1958) has been shown to create adverse effects on the efficiency of arbitration. This issue revolves around a few parties from the Middle East countries who have been affiliated with Sri Lankan contractors- not being a part of the aforementioned New York Convention. Thereby, this requires all parties to the agreement to adhere to other various regional arrangements i.e., National Convention on Commercial Arbitration. This, for instance, requires the arbitration process to be held in Arabic (Abeynayake , 2017) Thereby, such adversities hinder the development of the ADR mechanism in Sri Lanka. It shows, that having low understanding skills within parties to an arbitral agreement makes it difficult to enforce arbitral awards. (Hansen, 2019).

3 RESEARCH METHODOLOGY

This research was done using the qualitative method. It was completed based on 2 main case studies and the cases were collected from the High court, Aluthkade related to challenging arbitral awards to identify the reasons to challenge the arbitral award. Both the cases were analyzed using the

content analysis method. To get a further understanding about the arbitration procedure of construction projects in Sri Lanka, data was collected from semi-structured interviews and 6 arbitrators were involved in the process. All arbitrators have conducted at least 4 arbitrary cases and the most experienced out of the lot had 15 years of experience in conducting Arbitration. This research is limited to Sri Lankan multi-story buildings and cases were collected from the past five years. Also, this research followed good ethics like no payment was offered to collect cases, Participants of the interview were the parties who were related to the cases including the project manager, the confidentiality of participants. The anonymity of the cases was maintained, and all participants were 18 years and gender were not considered.

4 RESULTS AND DISCUSSION

4.1 Introduction

Data was collected through semi-structured interviews and case studies. From semi-structured interviews, a) Arbitration procedure and b) Reasons to challenge the arbitral award can be identified. Then two case studies found the reasons to challenge the arbitral award. Both semi-structured interviews and the case studies give a clear idea on which areas have performed negatively and require addressing to make the necessary improvements in the arbitration procedure and the reasons to challenge the arbitral award. This will ensure the results are clear so conclusions can be drawn up effectively and subsequently recommendations developed from the conclusions.

4.2 Semi-Structured Interview

Six interviews were carried out on a semi-structured basis respectively with 6 elected freelance arbitrators in the industry. The elected arbitrators were duly interviewed around 30-40 minutes regarding why the arbitration award is being challenged and the arbitration procedure. The one who had the maximum working experience among all, (a period of 15 years) was interviewed initially and had involved with the maximum number of cases, which counts is between 10 to 15. The next one had experience of 10 years in the industry while all others had experience below 8 years. Apart from the first one, all others had involved below 10 cases while the second arbitrator was involved with the least number of cases.

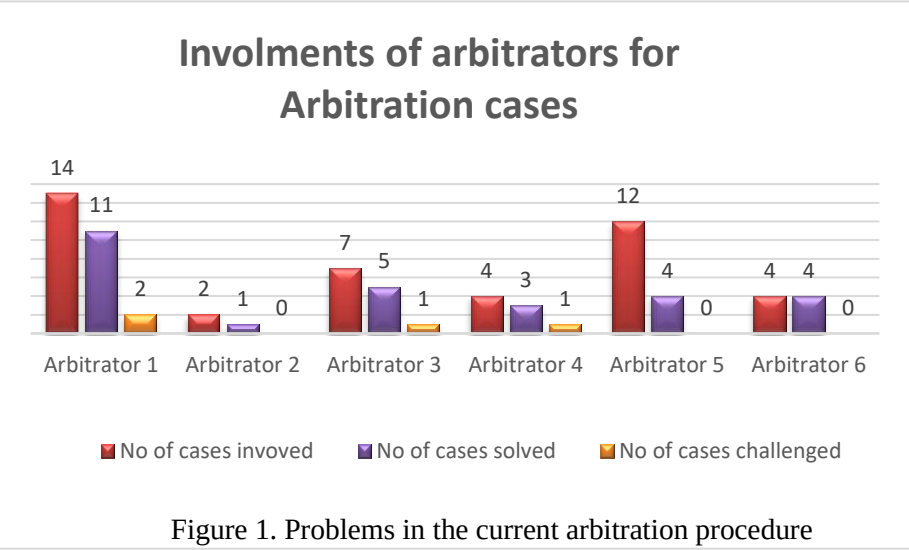

Figure 1. Problems in the current arbitration procedure

4.2.1 Findings - Arbitration procedure in Sri Lanka.

As per all interviewers, the most used arbitration method in Sri Lanka is ad hoc and three arbitrators are there in the panel mostly. If the procedure goes through institutional, Development of

Commercial Law and Practice (ICLP) is the most used arbitrational institute in Sri Lanka. In Sri Lanka, the arbitration procedure goes according to The Act. But all 6 arbitrators suggest some main improvements in this procedure as follows.

Table 1 Problems in Current Procedure

Current Procedure	Problem
1. Fix a date for arbitration meetings	- If an arbitrator is a lawyer, it is very difficult to get a hearing date. - Lack of space in arbitration centers.
2. Appointing arbitrators	-
3. Preliminary meeting	-
4. Statement of the claimant, Statement of response, Statement of reply	- No sufficient period for the response to respond.
5. Oral examinations, written examinations, cross-examinations, and re-examination	- Problem regarding the recording arbitration procedure
6. Witness statement (if parties want)	- Lengthy witness procedure
7. Final submissions	-
8. Issue the award	- Less general knowledge of construction contract law and experiences

Reasons to challenge the arbitral award

According to the findings from interviews, there are some main reasons identified for challenging the arbitral award in the high court.

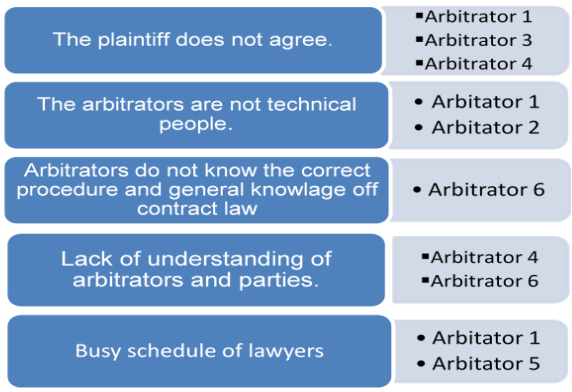

Figure 2. Reasons for challenging arbitral awards

4.3 Case Study

Two case studies were collected from the high court, Aluthkade. The two cases were used to identify the reasons for challenging arbitral awards. The cases are limited to Sri Lankan multi-story buildings and cases collected from the past five years.

Table 2 Summary of case studies

Case study - Summary	Lesson learned
Case 1 ▪ Both Petitioner and Respondent signhed the contract on 3rd December 2014. ▪ Proposed project completion date – 11th December 2016. ▪ Petitioner unable to complet the project as per the singed agreement. ▪ Petitioner received a project termination letter from the respondent on 27th March 2018. ▪ Petitioner referred the case to adjudication but the respondent disagreed. Then the case forwarded to arbitration by the respondent damage claiming 19 million. ▪ Arbitration award was infavour of the respondent recommending to pay 10 million. ▪ Petitioner filed an action against the company under section 32 of the Arbitration Act seeking to set aside the award which was awarded by the Arbitration board on 06.03.2019. ▪ After the inquiry, the court is not seen any reason to set aside the Arbitral Award and Court proceed to enforce the said given Arbitral Award on 06.03.2019	In this case, the judgment is entered in favor of the respondent as per the arbitral award dated 6.03.2019. The petitioner did not provide strong grounds on which an award could be nullified. The court confirmed the given arbitral award was correct after examining the case. This case took nearly one year.
Case 2 ▪ Both Petitioner and Respondent signed the contract on 09th November 2015. ▪ Petitioner was unable to complete the project on the agreed date ▪ Petitiner unable to complet the project on the stipulated time and received a termination letter from the Respondent on 16th May 2019. ▪ Petitioner referred the case to adjudication. ▪ But failing with that both parties referred the case to arbitration on 01st of August 2019. ▪ Arbitration award was in favour of the respondent and petitioner was asked to pay 3million damage claim. ▪ For the purpose of seeking relief Petitioner referred the case to high court to set a side the arbitration award. ▪ After inquiry held at the commercial high court Colombo, the court was in a position that there was no breach of contract according to the facts which have brought before the court. Therefore, the Court proceeds to enforce the said given Arbitral Award dated 2020.01.20	In this case, the judgment is entered in favor of the respondent as per the arbitral award dated 20.01.2020. The court gave judgment saying that there was no breach of a contract. This case shows human nature and attitudes. By referring to the whole matter it is shown that when the respondent asks claims, the petitioner thought the respondent claimed this as revenge before settlement. Also, this case shows the dishonesty of the petitioner.

Both cases were in similar scenario. The Arbitration Board has issued an award in favor of the respondent in both cases ordering petitioner to pay the damage. The dissatisfied Petitioner filed a case

against the respondent under section 32 of the Arbitration Act seeking to set aside the award. After receiving the arbitration award it took nearly one year to get the court order to enforce the arbitration award. Reasons stated in both cases by the petitioner to set a side the arbitatin awards are questioning arbitrator's neutrality, Amount of damage calculation was incorrect, Few technical issue relevant to each case. However, the high court agreed on the arbitration award and ordered to enforce the award.

Both cases display that lack of understanding, attitutes, qualities, mis interpretations and lack of knowledge on ADR are the main reasons to challenge the arbitration award in high courts.

5 CONCLUSIONS AND RECOMMENDATIONS

The study findings on reasons and suggestions to improve arbitration procedure is tabulated in table 3. As a summary construction industry stakeholders are lacking in construction contract law, lawyer involvement create unnecessary delay, lack of facilities to conduct arbitration, and lack of administration staff to deal with arbitration cases.

Table 3 Problem, Reasons and suggestions for the arbitration procedure improvements

Problem	Reasons and Suggestions
- No sufficient period for the response to respond.	There should be a sufficient period for the response to respond.
- Lengthy witness procedure	For calling witnesses in the procedure need to change. The current procedure dragged because of the examination & re-examinations of the witnesses by both parties. There should be a proper system for considering witnesses.The main reason is this procedure is too lengthy and time-consuming. As an example, there was an arbitration that continued for 10 years
- If an arbitrator is a lawyer, it is very difficult to get a hearing date.	Lawyers become a reason for dragging the process. It is very difficult to get a hearing date from a lawyer. Therefore, more technical people should involve as arbitrators.
- Lack of space in arbitration centers.	Facilities should improve in the arbitration centers in Sri Lanka. The allocated space is not enough to conduct the number of available arbitration cases.
- Problem regarding the recording arbitration procedure	Usually, the recording arbitration procedure should come within a week. But administrative staff take a few weeks. Without records, arbitrators do not like to have the next hearing.
- Lack of knowledge and experience in construction contract law.	In construction arbitration, professionals are involved. Constrution professional should have required knowledge on construction contract law. If a lawyer involve in arbitration he should have a requeied experience and knowledge in contract law and the construction industry. Furthe they should not adopt unnecessary court proceedings in arbitration process.

Table 4 The main reasons to challenge the arbitral award in the construction industry

Reasons	Mitigatory option
The legal grounds are generated because some arbitrators do not try to mitigate those grounds.	Arbitrators need to consider the reasons which are in the Act. If there is a reason like that arbitrator should reject the case.
Based on human nature and the party's attitudes.	Parties need to agree to pay approved claims if it is reasonable.
Dishonesty of the arbitrator	Arbitrators should reject the cases if they have a conflict of interest.
The arbitrators are not technical people and if they are lawyers and they go only strictly by the law.	Arbitrators need to have the technical knowledge and need to consider technical facts in addition to the written and oral words of the parties
Lack of understanding.	Parties should be educated enough to appoint an arbitrator after studying a particular arbitrator. They need to refer to past cases that were handled by him. Both arbitrators and the parties need to explain their facts clearly to avoid misunderstanding.
Arbitrators have less knowledge of arbitration procedures and principles.	Arbitrators should have good knowledge of good training. Especially they should have a general knowledge of construction contract law and experiences relevant to it. Lawyers cannot adopt the court procedure instead of the arbitration procedure.
Parties hired lawyers	If a dispute arises related to the construction industry, parties should hire professionals.
Lawyers have a very busy work schedule	Lawyers need to give a proper time to the parties to present their cases. Parties have the right to take sufficient opportunity to present their facts. Arbitration centers need to improve their space facilities due to a lack of space in the arbitration centers.

The study aimed to identify the situations where the Arbitral Award is challenging in the construction industry in Sri Lanka. The arbitration Act No.11 of 1995 includes only legally challenging grounds and the purpose of this research is, to find why such grounds are generated. Based on the party's choices they selected the arbitration procedure as a dispute resolution method. And, parties spent money to settle the dispute through this procedure. Therefore, why the parties cannot come to a settlement from the final award? Why not parties consider above grounds at the beginning of this procedure?. Therefore, if the decision becomes again a problem, it will be a messy situation. In that sence the above recommendations are with the main concerns taken from the findings and conclusions of this study. As a guidance to the parties and the arbitrators, the researcher recommends mitigatory options to avoid challenging the award and the improvements of the arbitration procedure.

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