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Mediation in Sri Lanka

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Abstract: This article discusses the use of the non-adversarial dispute resolution practice in Sri Lanka in its early periods and the subsequent introduction of mediation in its current more sophisticated form in more recent years, as a response to the need to provide a more accessible, cost effective, speedy and non-adversarial alternative to litigation, and the attempt to introduce mediation in more recent times to the commercial dispute resolution regime. Also discussed is Sri Lanka's commitment to the principles of the Singapore Convention and the prospects for the growth of mediation in the country.

Historical Use of Non-Adversarial Dispute Resolution Methods

Sri Lanka's history is dotted with periods during which there was a strong belief in and use of informal methods of dispute resolution. The only methods used during the pre-colonial times are known to have adopted informal processes blending with the culture, systems and the dictates of an unwritten law that prevailed then. Informal forums called "Village Councils" (*Gam Sabhawa's*) functioned in an environment that was devoid of strict rules of procedure and were presided over by wise elders (men) who listened to the disputants directly sans counsel and decided right and wrong and meted out 'justice'. The process is known to have had elements of adjudicatory features but also sought to make peace between disputants. The Councils held audience in public places and listened to complaints in relation to minor disputes. Successive rulers introduced more formal methods, particularly to respond to growing trade and business, culminating in

the institutionalization by the British of a court system which ensured that, over time, litigation based on an adversarial approach became the most formidable mechanism that disputants could have recourse to, with few exceptions. Despite the metamorphosis from informal tribunals to formal courts, the need to provide for inexpensive, easily accessible, less formal methods did not wane. In response, the country experimented with several mechanisms in the form of "Village Tribunals" , "Rural courts", and in 1958 "Conciliation Boards". Mediation was introduced in 1988.

Mediation – Introduction and Evolution

Mediation was first institutionalized in Sri Lanka with the enactment of the Mediation Boards Act, No. 72 of 1988. The Conciliation Boards Act No. 10 of 1958, which had provided for the use of conciliation as a means of resolving minor disputes, was repealed due to its weaknesses and an alternative was required. The need was for a statute that sought to eliminate all the weaknesses that the Conciliation Boards were found to have been riddled with, and which had been the reasons for its repeal, and yet ensure a non-adversarial approach. After studying global trends, mediation was identified as the preferred option given its growing acceptance globally. The introduction of a non-adversarial process to assist parties to resolve disputes based on their interests and needs rather than on strict legal positions was thought to be a meaningful intervention at this juncture. The 1988 Act incorporated all of the key features of mediation.

As the challenge to reduce the litigation overload grew, it was thought necessary to divert certain identified categories of actions of a higher value away from courts in cases where a non-adversarial approach was perceived to be more appropriate. The result was the enactment of the Mediation (Special Categories of Disputes) Act, No. 21 of 2003 to provide for the establishment of Mediation Panels for the resolution of specified categories of actions by mediators with appropriate qualifications.

Both these statutes provide for State-managed mediation services that can be accessed by disputants free of charge. The only expense to the disputant is the cost of a stamp to the value, which is prescribed by the Minister,[1] which is required to be affixed on the application. The State bears the expenses of maintaining the system as it does to maintain the courts of law.

Sri Lanka's attempts to introduce mediation for commercial dispute resolution through government-sponsored schemes have either not been successful or remains

[1] For applications in terms of the 1988 Act the fee prescribed originally was a very small amount of Rs. 5/=.

as yet largely untested, as will be seen in this article. Hence, the experience thus far has been limited to community level dispute resolution. However, inspired by global trends, there are serious efforts being made currently[2] for the increased use of facilitative mediation for commercial dispute resolution.

Mediation as Understood in the Sri Lankan Dispute Resolution Regime

Mediation is understood by a majority of disputants as a process which is very similar to the informal methods adopted in the past. The commonality between those processes and facilitative mediation as currently understood, is the informality of the process. Disputants understand that in mediation, there is no Judge, disputants appear in-person and speak for themselves, there is no representation by lawyers and no need for copious pleadings and documentation.

When disputants access the Community Mediation Boards (CMBs) today it is not necessarily with an understanding of all the features of facilitative mediation that distinguishes it from the processes used in the past. They do so because they must. At the level of resolving minor disputes, it is unlikely that party autonomy and the party-centric features will always be something that they are comfortable with or even need. It is a reality that at village level, disputants sometimes desire to be told how a problem can be solved because they do not have the sense of empowerment or the capacity to decide for themselves. Hence it is true that in CMBs there may be a tendency sometimes to deviate from the principle of a non-coercive approach and nudge the disputants with some suggestions as to how the dispute can be resolved. It is not a matter of adopting the evaluative mediation method but a sort of adaptation to suit the culture. However, studies do not show that mediators force solutions upon the disputants. That would be a transgression that would be unacceptable.

Sri Lanka is currently engaged in creating an eco-system for the use of mediation for business related disputes. The culture that would develop around commercial mediation would be very different. It can be expected that for now, the practice of mediation in this sector will be faithful to the true principles of facilitative mediation. It is exactly these distinguishing intrinsic features of facilitative mediation that users will find attractive. In commercial mediation, disputants will be those who can identify their needs and interests within a business environment and who can weigh the prospects for a solution that meets their needs and a belief in the process which offers features that are totally at variance with an adversarial

[2] As in April 2023.

approach. The mediators will need to have a very high degree of skill and expertise. The users will also be inspired by the prospects of speedy resolution and reduced expenditure that mediation offers, all of which are important for business. Essentially, mediation will be opted for voluntarily rather than mandatorily because the process offers these values that arbitration and litigation do not.

The Legal Framework for the Use of Mediation

Currently Sri Lanka has two statutes that are operational. The Mediation Boards Act (1988) which provides for the establishment and functioning of CMBs and the Special Categories of Disputes Act (2003). The provisions of these Acts are based on the premise that minor disputes that have the potential to be settled amicably and meaningfully outside of the courts should be referred to mediation mandatorily to provide the disputing parties the opportunity to pursue an amicable settlement. The reference to mediation is mandatory but staying within the mediation process is at the absolute discretion of the parties. A party has the right to refuse to attend a mediation or to withdraw from mediation at any stage. Hence there is no interference with the right to access a court of law. There was also an acceptance that, mediation being a new process, it was not advisable to vest discretion regarding its use in disputants by providing solely for voluntary reference.

The Community Mediation Boards

Mediation Boards were established across the country in 329 administrative divisions with approximately 8,400 functioning as mediators on these Boards.[3] In time, these Boards came to be referred to as "Community Mediation Boards" ("CMBs"). This initiative sought to address the challenge to reduce the case overload in courts and also to inspire a certain degree of stability in a community by resolving disputes using a non-adversarial approach that had better prospects for future peace among the disputing parties. The "duty" of a Mediation Board was articulated in the Act to be "by all lawful means to endeavor to bring the disputing parties to an amicable settlement and to remove, with their consent and wherever practicable, the real cause of grievance between them so as to prevent a recurrence of the dispute or offence...". That provision recognized the salient features of interest-based mediation – party autonomy and the non-coercive intervention of the

[3] THE MEDIATION BOARDS COMMISSION, [2023].

Mediator to identify needs and interests. The reference of disputes valued below a defined monetary threshold,[4] to mediation, was made mandatory by law.

The Mediation Boards Commission is vested with the task of appointing mediators. The Commission comprises five members at least three of whom are required to be from among those who have held office in the courts at the apex of the Sri Lankan court system, i.e., the Supreme Court or Court of Appeal. It was accepted that the inclusion of a majority of retired Judges of the superior courts would ensure the integrity of the appointment of Mediators and their independence. In evaluating the weaknesses of the Conciliation Boards, it was found that vesting powers of appointment in a political functionary compromised the ability of appointees to maintain independence.

The process to make appointments to the CMBs is set out in the Act. Nominations for appointment may be recommended by persons and bodies that are *not of a political nature* and also by the District Secretary of the area. Those who are selected by the Commission as being suitable to be considered, are required to follow a preliminary training in mediation skills and techniques. The Ministry of Justice maintains a cadre of mediation trainers who provide training. A report is required to be submitted in respect of each of the trainees and appointments are made by the Commission upon a consideration of the reports. The thinking was that training is a vital prerequisite to be a mediator and that the quality of the mediation would be assured if appointees had the necessary skills and aptitude. This feature sought to eliminate one of the identified weaknesses of the Conciliation Boards, where persons sought to bring about conciliation without the benefit of any special knowledge of the process, training or skill. The intention to keep politically affiliated persons out of these Boards and to thereby inspire confidence in its impartiality is also clear.

The Act sets out the categories of disputes that must be mandatorily referred to mediation, and also the categories of disputes that cannot be entertained by Mediation Boards. Disputes that must mandatorily be referred to Mediation are:

a) Disputes where the value is below the monetary threshold set out in the Act, unless it is one which gives rise to a cause of action which is specifically excluded by the Act. The current threshold introduced in 2016 is Rs, 500,000/=.[5]

   The categories of disputes that are specifically excluded are fifteen actions that are considered unsuitable to be settled through the CMBs. These include matrimonial disputes, disputes relating to trusts, adoption

[4] In 1988 the value threshold was below Rs.25,000/=, increased to Rs. 250,000/= in 2011 and stands at Rs. 500,000/= since 2016.

[5] Approximately US$ 1,375 in terms of current exchange rates.

of children, partition of land, Testamentary cases, election petitions, breach of fundamental rights, admiralty actions and actions under the Mortgage Act.

b) Disputes relating to specifically identified criminal offences punishable under the Penal Code. These are minor offences that are considered suitable for settlement through mediation rather than through prosecutions and punishment in court.

The following categories of disputes cannot be entertained by a Mediation Board:

- Where one party is the State;[6] or
- Where one party is a public officer, and the dispute relates to the recovery of property, money or other dues; or
- Where the Attorney General has initiated proceedings in respect of an offence.

The principle is that there can be no compromise when the dispute is with the State. It needs to be emphasized that this ouster applies only in respect of CMBs.

Where the value of the dispute is above Rs. 500,000, parties could submit those disputes for mediation voluntarily, unless the dispute relates to a matter which is specifically excluded. No statistics are available to indicate whether any of the applications to these Boards are in respect of disputes valued above the mandatory threshold.

In 2022, there were a total of 210,342 disputes pending before the CMBs.[7] Of the total number of disputes that went into the mediation process, 58% were mediated, 42% were not settled because one party didn't show up and 40% were settled after mediation. The positive factor is that of the number that was mediated, 69% were successful. The avoidance of mediation by refusing to attend is a cause for concern and needs to be addressed.

The Mediation (Special Categories of Disputes) Panels

Delay and expense in litigation was defeating the delivery of justice and several business groups were demanding better options. The Mediation (Special Categories of Disputes) Act, No. 21 of 2003 was the response. The Act provides for the establishment of Mediation Panels to mediate defined categories of disputes, in identified areas of the country. The category of dispute, the areas in which Panels are to be established, and the monetary threshold below which the disputes of this category must mandatorily be referred to mediation are required to be set out in

[6] Conversely, this is a possibility in other countries, such as Brazil. See: FERREIRA; SEVERO, 2021.
[7] Statistics of the Mediation Boards Commission.

Orders made by the Minister. In essence it's a policy decision that must be made based on "the need to provide for the meaningful resolution of disputes relating to social and economic issues".[8] The qualifications that mediators must have are required to be prescribed by Regulation made by the Minister.

While those appointed to CMBs are not required to have any specific educational qualifications, a distinguishing feature of this Act is that the Minister is required to prescribe the qualifications that a Mediator must possess having regard to the nature of the category of disputes that must be mediated. Different qualifications may be prescribed for different categories of disputes. The requirement that mediators must have specific qualifications, defines the significant difference between the two forums.

Panels of mediators were appointed under this Act in 2005 after the Tsunami of 2004 for the resolution of tsunami related disputes and in 2015, 2018 and 2021 for the resolution of disputes relating to the *ownership of lands.* The 2015 and 2018 Orders sought to establish Boards primarily in the Administrative Districts in the North and East to resolve land disputes that resulted due to the North-East conflict. The life of the people in Sri Lanka is closely connected to land and it was important to resolve the many issues faced by the people in these areas as a result of the conflict. A new Order of January 2022 provided for Panels to be established throughout the country but with a reduced scope.

The Orders currently in force[9] provide for the establishment of Panels for the resolution of "Financial disputes" (*i.e.,* disputes arising out of a financial business transaction) in six identified administrative districts in the country[10] and land disputes excluding certain causes of actions,[11] in all administrative districts in the country.[12] Land disputes and Financial disputes below the value of Rs. one million[13] are required to be mandatorily referred to these Panels, and court jurisdiction is ousted unless mediation fails.

The Commercial Mediation Center of Sri Lanka

Although statutory provision[14] was introduced in year 2000 to establish this Center, it was not able to be sustained and the Act is to be repealed. The Act states that the functions of the Center shall be "to promote the wider acceptance

8 Section 2(2) of the Act of 2003.
9 As at end April 2023.
10 Orders published in the Gazettes of December 21, 2022 and April 21 2023.
11 The excluded categories include actions that are required to be filed in the Primary Courts to prevent a breach of the peace, and also rent/lease actions.
12 Order published in the Gazette of January 6, 2022.
13 Rs. 1 million = approx. US$ 2,750.
14 The Commercial Mediation Centre of Sri Lanka Act, No 44 of 2000 as amended by Act No. 37 of 2005.

of mediation and conciliation for the resolution and settlement of commercial disputes; to encourage parties to resolve commercial disputes by mediation and conciliation; and to conduct settlement proceedings using mediation and conciliation". This statute was enacted as a response to the need identified by the business community for more efficient dispute resolution for commercial disputes. The Act provided for the appointment of a Board of Management with majority representation from four Chambers of Commerce,[15] aimed at assuring that there would be private sector ownership. The Board of Management was vested with the responsibility of making Rules for the manner of making applications, the procedure to be followed, the fees to be levied and a Code of Conduct for mediators. These were required to be approved by the Minister. The intention was to have private sector ownership with financial support from the Government.

The failure to sustain this Centre is attributed to a mismatch between the objective of ensuring private sector ownership and autonomy and the inability to honor that principle in implementation.

Common Features of the Statutes

The features discussed here are those in the CMB Act (1988), the CMCSL Act (2000) and the Special Categories of Disputes Act (2003).

- *Ouster of court jurisdiction* – In terms of the 2003 Act, if the parties have entered into a mediation agreement,[16] and a Panel for that category of dispute has been appointed, court jurisdiction is ousted unless mediation has been attempted and been unsuccessful. The ouster does not apply to actions seeking interim relief.
- *Objective of Mediation* – The Acts of 1988 and 2003 articulate the objective by providing that it's the duty of a mediator "by lawful means to endeavor to bring the parties to an amicable settlement and to remove with their consent wherever practicable, the real cause of the grievance between them so as to prevent a recurrence of the dispute."
- *Reference by a court or a Labor Tribunal* – A court may refer a dispute to a Mediation Board, with the consent of the parties. Under the Act of 2003, a Labor Tribunal has that power too.
- *Confidentiality* – All the statutes provide for confidentiality.

[15] (1) The Ceylon Chamber of Commerce, (2) the National Chamber of Commerce, (3) the Federation of Chambers of Commerce and Industry, and (4) the Ceylon National Chamber of Industries.

[16] A mediation agreement is an agreement to refer any dispute that may arise under a contract, to Mediation.

- *Prescription* – The period commencing the date of reference to Mediation and ending on the date of issuing the certificate of non-settlement is excluded in computing the prescriptive period.
- *Time limits to complete proceedings* – The Acts of 1988 and 2003 provide that proceedings must be concluded within 60 days. The Act of 1988 provides that in the case of offences, the proceedings must be concluded by a CMB in 30 days, highlighting the fact that criminal offences need to be concluded speedily to prevent an escalation of conflict.
- *Settlement Agreement* – Where the parties agree to settle, the parties enter into a "Settlement Agreement" which is signed by the parties and the Mediator. That brings closure to the Mediation.
- *Non-settlement certificate* – Where the parties are unable to reach an agreement, a non-settlement certificate is issued by the mediator. If litigation is pursued thereafter, and the cause of action is one which should have mandatorily been referred for mediation, this certificate is proof of compliance.
- *Enforcement of a mediated settlement agreement.*

Although there's no specific statutory provision, it is accepted that the parties assume a legal obligation to honor the terms of the settlement, and in the event of a violation, it can be treated as a breach of a contractual obligation as under any other agreement. In the case of Court referred mediations**,** a decree of court is required to be entered based on the terms of the Settlement Agreement. Where the settlement is reached on a reference by a Labor Tribunal, an Order is required to be made by the Tribunal, in terms of the settlement.

- *Exclusion of legal representation at a mediation*

The Acts of 1988 and 2003 provide that parties cannot be represented by an Attorney at Law, agent or other person. However, the prohibition does not extend to spouses or to a parent, guardian or curator appearing on behalf of a minor or a person under any disability. There is no bar however, to lawyers being present at the mediation, (a sort of "potted plant" presence),[17] where the lawyer is present and advises the disputants only when requested. The rationale for this exclusion is that mediation is a party centric process, and the intention is to give primacy to the wishes of the parties without being overwhelmed or intimidated by the dictates of others. Many lawyers have trained as mediators and perform in that role extremely well. It is another area of specialization that lawyers can pursue.

[17] This approach is discussed by Jean R. Sternlight (1999).

The International ADR Centre

The CCC-ICLP International ADR Center (Guarantee) Ltd., (IADRCSL) was established in 2018[18] as a purely private sector led not-for-profit limited liability company, as a joint venture initiative of the Ceylon Chamber of Commerce (CCC) and the Institute for the Development of Commercial Law and Practice (ICLP). The CCC is the oldest business Chamber in the country and one of the oldest in the region.[19] The ICLP is a non-profit entity[20] established to achieve a wide range of objectives relating to the advancement of commercial law and practice and has operated its arbitration center since March 1996.

The IADRCSL was mooted at a point in time when Sri Lanka was challenged to improve its dispute resolution regime for investors and improve the doing business landscape. At this juncture the efforts of the Government to establish an International Arbitration Centre[21] and the CMCSL through public-private partnerships had failed. The IADRCSL was established as a purely private sector initiative to fill that lacuna and offers arbitration and mediation services for commercial dispute resolution and has its own arbitration and mediation rules.

The Type of Mediation

The type of mediation that is used in Sri Lanka up to now is facilitative mediation or interest-based mediation. The training of mediators[22] by the Ministry of Justice as well as the training carried out by the IADRCSL promotes facilitative mediation. Essentially, this is the non-coercive approach where the mediator acts as a facilitator who assists and inspires disputing parties to reach solutions that respond to their needs and interests. Salient rules such as respecting the other party, confidentiality of the matters discussed, application of the 'without prejudice' principle, the independence and impartiality of the mediator to affirm the integrity of the process, are all entrenched in the Sri Lankan statutes and also in the Mediation Rules of the IADRCSL. As stated earlier, the CMBs may at times be tempted to play a more proactive role in suggesting solutions in situations where parties want the mediator to perform that role. No doubt, in time, the need for other types will be considered if needed.

[18] Incorporated under the Companies Act No. 7 of 2007.
[19] The CCC was established in 1839 and acquired legal status upon the enactment of the Chamber of Commerce Ordinance, No. 10 of 1895.
[20] Incorporated under the Companies Act No. 7 of 2007 on September 2nd, 1992.
[21] The Sri Lanka International Arbitration Centre (SLIAC).
[22] See: AWAD, 2020. See also: FARIAS, 2020.

New Legislation on Mediation for Civil and Commercial Disputes

An important development in Sri Lanka's mediation landscape is the proposed *Mediation (Civil and Commercial Disputes)* statute. The need for statutory recognition of vital principles that apply to the conduct of mediations in the private domain needs to be addressed. A Bill drafted by the IADRCSL has been submitted to the government and is currently being finalized.

The Singapore Convention

Sri Lanka signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention)[23] on August 7, 2019 when it first opened for signature in Singapore. The adoption of a Convention by the United Nations on the recommendation of UNCITRAL signaled the increasing belief in mediation as an effective mechanism in the dispute resolution arena in trade and business matters. The Government is currently finalizing a Bill drafted by the IADRCSL. Sri Lanka is hopeful of ratifying the Convention after the enactment of the law in Parliament. With the enactment of domestic legislation and the ratification of the Convention thereafter, Sri Lanka will provide a user-friendly environment to enforce mediated international settlement agreements relating to commercial matters.

Prospects for the Expansion of the Use of Mediation

The need for alternatives to litigation grows, as delays in courts have reached ridiculous levels. The practice of arbitration in Sri Lanka has not inspired confidence as a viable alternative that has eliminated delay and expense.

Searching for ways to reduce delays has been the preoccupation of many Ministers of Justice over many years. A 1984/85 study on the "Laws Delays and Legal Culture Committee" headed by Supreme Court Justice R. S. Wanasundera contained a poignant observation that "in an adversarial system of justice such as ours, delays destroy justice, deterrence is lost, costs are increased, court resources are wasted, and severe emotional hardship is inflicted upon litigants. In combination, these factors undermine the efficacy of the whole legal system, sapping its strength, vitality and even its integrity, and making the majority of litigants lose confidence". These sentiments remain relevant today, 38 years later, not only for Sri Lanka but globally. While substantive and procedural laws can be reformed in an attempt to eliminate delaying features, the legal culture which is a

[23] On the Singapore Convention see: COMETTI; MOSCHEN, 2022. See also: MASON, 2021.

significant contributor can only be reformed through good practice. Here is where we have failed. Hence the continuing focus on alternatives.

Laws Delays is not a phenomenon that's peculiar to Sri Lanka. It is a problem in many jurisdictions across the globe, and Sri Lanka has looked at global success stories to define and refine its own interventions.

In 2021, Sri Lanka enacted the Colombo Port City Economic Commission Act, No. 11 of 2021, providing for the establishment of the Colombo Port City Special Economic Zone to promote the Colombo Port City area as an attractive investment destination and attract enhanced foreign direct investment into the country. The objective of *creating a safe and conducive business environment and facilitating the ease of doing business* is also recognized as an objective in the statute. The Act provides for the establishment of an international commercial dispute resolution center for the purpose of offering ADR services, including mediation. Providing for the establishment of an ADR Center and recognizing mediation as one of the processes to be provided by the Center, resonates the global acceptance of mediation for commercial dispute resolution.

Notably, the *Mediation (Civil and Commercial Disputes) Bill* is forward-looking. Any private sector entity that offers mediation outside of the courts, will have the benefit of this legislation. In the current context, Sri Lanka does not have an eco-system that provides for the use of mediation for non-commercial civil dispute resolution (*e.g.* Divorce, child custody, etc.)[24] and it's expected that this lacuna will soon be filled due to the growing interest in mediation.

The need for court-referred mediation and court-annexed mediation in respect of several categories of disputes is urgent given the prospects of better results through mediation. The proposed new Bill includes provision for courts to refer disputes to mediation, and in terms of the current situation this essentially means to external service providers.

Conclusion

The prospects for the growth of mediation in Sri Lanka is very real. The dependence on the Government to provide all the answers to address the concern of delays in laws must stop. The arbitration practice prevails outside of the Government regime and mediation is emerging globally as the new option of choice. Those who realize that it's not smart to spend time and money just to be proven right (and risk being proven wrong), will find reason to have hope in the new developments in relation to mediation. It is the responsibility of service providers to ensure that quality service is provided and sustained.

[24] For Family Law Mediation in Brazil see BRAGANÇA; NETTO, 2020.

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