

‘MEDIATION’ - THE GUARDIAN ANGEL OF DISPUTE RESOLUTION IN SRI LANKA: A COMPARATIVE ANALYSIS

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ABSTRACT

As a less formal, less complex, time-efficient, and cost-effective method of dispute resolution, mediation has gained widespread recognition as a significant mechanism within Alternative Dispute Resolution (ADR). In addition to facilitating the resolution of disputes, mediation is widely acknowledged as an effective means of resolving commercial disputes through mutually beneficial outcomes. In Sri Lanka, community mediation and commercial mediation constitute the two principal forms of mediation and derive their legal validity from the domestic legal framework. Although community mediation has demonstrated considerable success, commercial mediation has yet to gain widespread acceptance as a preferred mode of dispute resolution. A comparative analysis of the mediation regimes of Sri Lanka and Singapore reveals several deficiencies and legislative gaps within the Sri Lankan legal framework. Consequently, there is a need to reform the legislative provisions governing mediation, enhance public awareness of its benefits, and strengthen the existing mediation framework to promote its effectiveness as a dispute resolution mechanism. This study examines the effectiveness of the legal framework governing mediation in Sri Lanka, identifies the shortcomings of the current legal regime with particular reference to commercial mediation, and proposes practical reforms to strengthen the existing framework. The research adopts both doctrinal and comparative research methodologies. The findings demonstrate an urgent need for legislative reform to enhance the legal framework governing mediation. Accordingly, the study recommends amendments to the Mediation Boards Act of Sri Lanka together with measures to strengthen the existing enforcement mechanisms, thereby promoting a more effective and sustainable mediation regime.

KEYWORDS: Mediation, Alternative Dispute Resolution, Commercial Mediation, Community Mediation, Commercial Mediation Centre

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1. INTRODUCTION

By their very nature human beings do often engage with disputes. Therefore, disputes are inevitable in a human society even if it is civilized and developed. This obvious characteristic of human society links us to the next question of how disputes can be resolved. Whether a society is developed or underdeveloped, it is a question that ought to be answered in a positive manner. From the roots of human civilizations, human beings did make effort to resolve their disputes amicably and mutually. Though the litigation procedure was developed and well-structured to resolve disputes, it did not reflect the ones actual needs most of the time. Simply, a litigation process does only enable a single party to be the winner while the other party loses. Even the winning party loses in reality whilst considering the cost and the time consumed. Therefore, Alternative Dispute Resolution is a handy, flexible and a simple method which is identified by most of the countries in their domestic legal frameworks as well as in dispute resolving in the international sphere.

It can be noticed that although there is statutory governance for the usage of Alternative Dispute Resolution in Sri Lanka, specifically for Mediation as well, most of the time parties does not attempt to resolve their disputes by Mediation. Due to the fact of such reluctance the Court system has been forced to maintain a backlog of cases which can even be resolved more effectively and in their initial perceptions if referred to Mediation. This research intends to find out and analyze reasons for such reluctance of applying mediation especially in the commercial sector.

The first research question is whether the existing legal framework sufficiently govern the process of mediation. Secondly, the researcher intends to find out what are the loopholes in the area of mediation with special reference to commercial mediation. The final research question is what the possible and practical steps are to be taken up to implement a more successful mediation procedure to resolve disputes.

The research is based on three main objectives. Firstly, to ascertain whether the existing legal framework sufficiently govern the process of mediation. Secondly, to address the loopholes in the area of mediation with special reference to commercial mediation. Lastly to recommend the possible and practical steps are to be taken up to implement a more successful mediation procedure to resolve disputes.

Yet Arbitration as well as Litigation is being addressed and discussed quite often in Sri Lanka it is a bit hard to expose discussions on mediation as a method of dispute resolution. The study also focuses the importance of overcoming and resolving disputes through Mediation and its practicability compared to Litigation and Arbitration. Therefore, this study is tagged with significance while visiting the subject matter.

2. METHODOLOGY

The researcher has mainly followed the Doctrinal research methodology which is also known as the Black letter research methodology. It is mentionable that this study has also been completed with the use of Comparative research methodology. The judication in Singapore with regard to commercial mediation has been compared throughout this study. The researcher has utilized both Primary sources such as Legislations and Legislative Instruments along with many secondary sources including journal articles and other internet resources.

3. DISCUSSION

3.1 Alternative dispute resolution and its key features

Alternative Dispute Resolution, which is commonly known as 'ADR' is a main set of methods of dispute resolution that is cost friendly, less time consuming, less complex, and less formal in contrast to litigation. Though the usage of Alternative Dispute Resolution methods is less popular compared to litigation in Sri

Lanka, many developed countries including Singapore (Arbitration Act 2001, Mediation Act 2017), United Kingdom (Arbitration Act 1996) and the United States have utilized those ADR methods throughout years to resolve their civil, commercial, and even criminal matters. Not only domestic legal frameworks in developed countries, but also legal frameworks such as United Nations Convention on International Settlement Agreements Resulting from Mediation, UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration and Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is also known as the New York Convention have been introduced to strengthen up the Alternative Dispute Resolution internationally. One of the most promising features in Alternative Dispute Resolution methods among its time saving, cost effective and simple methodology is that ADR does enable the parties to achieve a win-win solution. The so-called win-win solution is regarded as the most effective way of relieving disputes rather than win-lose solutions. Win-win solutions create harmonization between the parties and reduce the post-conflicts or negative aftermaths between the parties. Among various Alternative Dispute Resolving methods from negotiation to arbitration, and many modern Alternative Dispute Resolution methods such as Mediation-Arbitration or Med/Arb, mediation has become one such popular method which is also used in Sri Lanka.

3.2 What is 'mediation'?

The term 'Mediation' is defined as "the act or process of mediating; such as intervention between conflicting parties to promote reconciliation, settlement, or compromise" in Merriam-Webster online Dictionary. According to the JAMS Arbitrators "mediation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences." Therefore, it can be seen that mediation is a less complex, less formal and time effective method of dispute resolution in comparison with litigation. In accordance to Section 10 of the

Mediation Boards Act No. 72 of 1988 (as amended) it is mentioned that, each and every mediation board has a duty "by all lawful means to endeavor to bring the disputants 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...." Whilst comparing mediation with arbitration, though, both these methods are under the parameters of Alternative Dispute Resolution mechanisms it is evident that mediation is again less complex, less formal and time effective than arbitration. The role of the mediator is the most prominent role in a mediation process. Therefore, a mediator should be a non-partial, non-biased and an independent individual. Not only that, but also a mediator should reflect certain qualities while performing his or her role. A mediator should be a good communicator, a good listener and should try to resolve the dispute in all means and methods. A mediator should be patient and be flexible. Creating a friendly environment between the parties is another much needed requisite for a successful mediator. Consequently, it can be noticed that being a mediator does require both theoretical and practical knowledge in dispute resolving as well as handling emotions in a correct manner which may not offend either party at its very end.

3.3 mediation in Sri Lanka

Whilst considering Mediation as a dispute resolving method in Sri Lanka, it is clear that there are two main types of mediation processes which can be identified namely - the community mediation and the commercial mediation. Community mediation is governed by the Mediation Boards Act and its consequent amendments whereas the latter type of mediation is governed by Commercial Mediation Center of Sri Lanka Act. It is also mentionable that commercial mediation unlike community mediation is less popular in Sri Lanka. This less popularity is quite unfortunate and has resulted in many negative outcomes with regard to dispute resolving. For an instance most legal professionals, even ones in commercial setups, are reluctant to refer to arbitration

nowadays as a dispute resolution method hence it is not cost effective. As a result, they prefer litigation and court proceedings, which leads to unwanted and unnecessary volume of cases in court houses. Conversely, commercial mediation would have been the ideal solution for both cost considerations, particularly in relation to arbitration, and for mitigating the substantial volume of cases that currently overwhelm the courts in Sri Lanka.

3.4 Community mediation in Sri Lanka

Although mediation is a simpler, less complex, and less formal dispute resolving method, it is a need to have a legal framework governing the procedural matters regarding mediation. Accordingly, the Conciliation Boards Act was enacted as the earliest development of legalizing the mediation procedure. However, Conciliation Boards Act No. 10 of 1958 was repealed by the Mediation Boards Act No. 72 of 1988. Conciliation is an Alternative Dispute Resolution Method where the neutral third party does assist the disputed parties to come to an amicable and mutual settlement by suggesting terms. It can be clearly seen a more active participation of the third party in conciliation in contrast to mediation where the mediator assists to negotiate between the parties rather than making proposals and suggesting terms to resolve the dispute. The said Mediation Boards Act was amended time to time. The Mediation Boards Act, and its Amendment Acts do mainly focus and only focus on compulsory commune mediation in both civil and criminal disputes. Therefore, compulsory mediation does enable the relevant parties to present before a mediation board as mentioned and described in the Mediation Boards Act for petty crimes recognized under penal code and for civil disputes worth less than One Million Rupees (Rs. 1,000,000). The original monetary threshold for mediation in civil matters was Twenty Thousand Rupees (Rs. 20,000) under section 7 (1) (a) Mediation Boards (Amendment) Act No. 72 of 1988. However, the said threshold was amended and increased up to Two Hundred Fifty Thousand Rupees (Rs. 250,000) by the Mediation Boards (Amendment) Act No. 4 of 2011. In 2016 the threshold for mediation in civil

matters was again amended and increased up to Five Hundred Thousand Rupees (Rs. 500,000) by Mediations Board (Amendment) Act No. 9 of 2016. The latest amendment, which is the Mediation Boards (Amendment) Act No. 2 of 2024 did increase the monetary threshold up to One Million Rupees (Rs. 1,000,000) as mentioned earlier.

The certificate of non-settlement and the certificate of settlement are two noteworthy features introduced under the Mediation Boards Act of Sri Lanka. Accordingly, a party or any individual can only seek litigation and present it before a court regarding a civil matter when the subject matter is worth less than One Million Rupees after obtaining a non-settlement certificate under section 14A which was newly inserted by the Mediation Board (Amendment) Act No. 15 of 1997. If it is relating to a petty criminal offence the Chairman or the Chief Mediator shall issue a non-settlement certificate as per section 14A of Mediation Boards Act when there is an issue between the disputants or the parties that cannot be resolved by mediation. Apart from the Mediation Boards Act, the Mediation Special Categories of Disputes Act No. 21 of 2003 does provide the legal framework for special matters that involve mediation such as Tsunami Special, Mediation Boards, Land Mediation Boards, Migrant Workers Mediations (Limited), Financial Disputes Mediation.

3.5 Commercial mediation in Sri Lanka

Whilst considering commercial mediation in Sri Lanka it can be stated that, commercial mediation is not much popular like community mediation. Though there are certain legislations that establish and empower the process of commercial mediation in Sri Lanka, those legislations and enactments have become ineffective in the process of implementation. Commercial Mediation Center of Sri Lanka Act No. 44 of 2000 is one such Act that empowers the commercial mediation in Sri Lanka through establishing a Commercial Mediation Centre. But this so-called Commercial Mediation Centre is not functioning at present although the Act has specifically granted several ample powers and duties to the center to function and serve the matters connected to commercial mediation. Section 4 of the

Commercial Mediation Center of Sri Lanka Act provides the powers of the center such as to acquire and to hold, property, both movable and immovable, and to pledge or sell, mortgage, give on lease or hire, exchange, or otherwise dispose of, the same, to charge fees for services and facilities provided by it; to borrow or raise money, with or without security; to open, operate and close, bank accounts. It is noteworthy to mention that the said Commercial Mediation Center of Sri Lanka Act is empowered to conduct training courses and workshops for the purposes of discharging its functions in accordance with section 4 (i). This particular initiative is highly valuable to encourage the general public to utilize mediation in their day to day conflicts that can be solved by mediation.

On the other hand, the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation Act No. 5 of 2024 is another attempt to introduce a legal framework to the commercial mediation process. Sri Lanka was the 14th state party to sign the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation. The primary objective of this Act is to give domestic recognition to the Convention on International Settlement Agreements Resulting from Mediation also known as the Singapore Convention as Sri Lanka is a Dualist Country. Section 6 of the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation Act provides that any party to an international settlement agreement who is willing to enforce the said international settlement agreement may make an application to the High Court. As per section 8 of the Singapore Convention Act, the applicant should show admissible evidence including the international Mediated Settlement Agreement known as the iMSA and the evidence that the international settlement agreement resulted from mediation to the High Court. The Interpretation Section which is section 16 of the Singapore Convention Act empowers the Commercial High Court as the competent court under the said Act. According to section 3 of the Act the provisions of the Act shall not apply to - (a) settlement agreements that have been entered into, to resolve a dispute in relation to - (i) a transaction engaged in by one of the parties who is a consumer,

for personal, family or household purposes; (ii) family matters, inheritance, or employment matters; or (b) settlement agreements - (i) that have been concluded or recorded as a judgement of a court, in the course of judicial proceedings and are enforceable as a judgement of a court; or (ii) that are enforceable as an arbitral award. By the Extraordinary Gazette No. 2393/28 dated 17th July 2024 the Minister of Justice, Prison Affairs and Constitutional Reforms has certified that the said Recognition and Enforcement of International Settlement Agreements Resulting from Mediation Act would enter into force in respect of Sri Lanka on 28th August 2024.

3.6 Issues with regard to the commercial mediation centre of Sri Lanka

Although the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation Act of Sri Lanka is being enforced by the Extraordinary Gazette No. 2393/28 dated 17th July 2024, there are several issues that have been arisen with regard to the operations of the Commercial Mediation Centre of Sri Lanka. Firstly, the Centre was only operational for a limited period of time from 2011. The short lifespan of the Commercial Mediation Centre has obstructed the commercial sector of being attracted to Commercial Mediation on one hand. On the other hand, most of the individuals and commercial bodies might not be aware of such Mediation Centre due to this shorten lifespan of it. Secondly, it is noticeable that even the Board of Management was reappointed and was directed to re-activate the operations of the Commercial Mediation Centre, there are yet some procedural issues. Dr. Saranee Gunathilaka states that "However according to their notice calling for application for the training programme, one of the criteria for the eligibility for the programme is the seniority in the profession and being above the age of 40 years. This criterion is quite problematic..." The issue arises as the said criteria only allows senior professionals and does not allow the youth in participation. Thirdly, due to the unavailability, inactiveness and non-existence of the Mediation Centre most disputes have been referred to

either litigation or arbitration. Some of well-established commercial bodies even refer to international arbitration forums and institutions due to the lack of operations of the Commercial Mediation Centre.

Nadja Alexander in her article titled discusses about this loophole in Sri Lankan Commercial Mediation and suggests that without the voluntary acceptance by the business sector to mediate and overcome commercial disputes via mediation and other ADR methods a legal framework will not fulfil its goals in the long run. (Alexander 2001, P. 2-3) The IADRC Handbook acknowledges the said fact but also emphasizes the mandatory requirement of the legal provisions to be inclined and speedup the process of establishing the legal parameters and execution of the same upon establishing. (ARDC 2024, PP. 5-10) It is also notable that the Mediation - especially its commercial based approaches and application is not still in line even in late 2020s by the looks of the IADRC handbook being published in 2024 and it includes such a view on the subject matter.

3.7 A brief comparison with mediation in Singapore

Whilst considering the legal regime and the law relating to mediation in Singapore it can be seen that, as a well-developed country Singapore has come across many advancements and developments in standardizing a suitable legal framework with regard to mediation. According to the Director - Legal Industry Division of Ministry of Law in Singapore the Singapore International Commercial Mediation Model is closely associate with the goal of making Singapore a global dispute Resolution Hub. (Gloria 2019, P. 377) Dorcas Quek Anderson Assistant Professor at School of Law, Singapore Management University seconds this stance in his research publication. He further states that: "Apart from focusing on barriers to the formal legal system, the access to justice movement has also been driven by efforts to embrace a more conciliatory form of dispute resolution that empowers the parties and creates solutions meeting their interests." (Anderson 2020, P. 5) The Mediation Act 2017 of Singapore is

the prime and paramount legislation governing the mediation law in Singapore. The said Mediation Act 2017 has enriched legal concepts and aspects that can be seen in a developed legal system. For an example section 9 of the Singapore Mediation Act 2017 provides that "a person must not disclose any mediation communication relating to a mediation to any third party to the mediation." In comparison the Mediation Boards Act of Sri Lanka has no such express provision protecting the confidentiality of the mediation process. Protecting the confidentiality of a mediation process under certain legislative exceptions is a much-needed feature for mediation. In accordance with the Singapore Judiciary website the CDRC which is also known as State Court's Court Dispute Resolution Cluster provides and facilitates mediation for following matters: Civil cases commenced by a Writ of Summons, Civil cases commenced by an Originating Summons, Community Disputes Resolution Tribunals (CDRT), Magistrate's Complaints, Protection from Harassment cases. Therefore, it is much clearer that individuals have the opportunity to refer various kinds of disputes to mediation in Singapore compared to Sri Lanka as the Mediation Boards Act of Sri Lanka only covers a certain number of matters to be dealt by mediation. Further, the Mediation Act 2017 of Singapore directly interprets the term 'mediation' as "a process comprising one or more sessions in which one or more mediators assist the parties to a dispute facilitating the resolution of the whole or part of the dispute". The Singaporean legal framework does enable parties to go before mediation even for Supreme Court Cases with the consent of both parties to the dispute and with the approval of the Supreme Court. However, the Supreme Court of Singapore does not provide or facilitate mediation services, but the parties are free to decide an organization to facilitate the mediation process upon the approval of the Supreme Court.

On the other hand, the Singapore Convention on Mediation Act of 2020 does give effect to the United Nations Convention on International Settlement Agreements Resulting from Mediation. According to the section 3 (1) of the Singapore Convention on Mediation Act it emphasizes that the said "Act applies to a settlement agreement which, at the time

of its conclusion, is international within the meaning of article 1, paragraph 1(a) and (b), read with article 2, paragraph 1, of the Convention.” The Singapore High Court is being empowered as the competent court by this Act to record an international agreement as an order of court for the purpose of enforcing the agreement in Singapore.

As a part of the aftermath of Covid-19, Singapore has introduced mediation through online modes and facilities. This particular stance has made commercial mediation more flexible, time saving and less expensive. Although it appears there are limited instances according to researchers such as Sapna Jhangiani and Colin Seow where mediation is being conducted through virtual and online modes it is necessary to raise awareness on the advantages of mediation through online facilities and to develop the relevant technologies to meet success in mediation through online facilities.

Under the Article 8 of the United Nations Convention on International Settlement Agreements Resulting from Mediation which is commonly known as the Singapore Convention it mentions two main reservations, namely - application to Settlement Agreements by Government Entities and application only with party consent. Though Singapore in its Convention on Mediation Act does not include either of these reservations, Sri Lanka has included provisions under section 2 (2) enabling future reservations. One may argue these reservations are required for state sovereignty and express consent of the parties. But it is notable that those reservations once applied may also limit the application of the provisions of the Convention and/or the domestic legislations which empower the Convention. In “Diversity of Mediation and Its Impact on the Singapore Mediation Convention” Professor Wei Cai also warns implementation of the Singapore Convention depends not only on enforcement mechanisms. (Cai 2021, P. 12)

It is much more evident upon analyzing the above fact and different views of both local and foreign scholars the Singapore Mediation Experience is more complex; the mediators utilize technology and handle

a diversified portfolio of disputes compared to Sri Lanka. Sri Lankan Mediation has not advanced to global sphere, and it has not even widened up its pathways on Commercial Mediation but has more focused on Community based Mediation. Shortage of Mediators specially for Women Commercial Mediators in Sri Lanka has worsen the positive outcomes of an effective commercial mediation regime.

4. CONCLUSION

Consequently, it can be suggested and recommended that the Mediation Boards Act of Sri Lanka has to be amended in several ways. Accordingly, a non-disclosure provision as mentioned earlier is a much-needed feature to be included. Further, the term ‘mediation’ has to be interpreted in a more unambiguous and clearer manner. It is also mentionable that the areas covered by mediation should be increased. The Recognition and Enforcement of International Settlement Agreements Resulting from Mediation Act should be implemented and enforced in a proper manner. It is noticeable that the general public is less aware of Mediation as a dispute resolving method. This lack of knowledge impacts many unsolved disputes, and there are many instances where those disputes were needed up in tragedies - a minor issue relating to a land boundary may even result in a murder in the end. In concluding remarks, it can be stated that mediation is a more cost friendly, flexible, and less formal process than litigation and compared to arbitration. Mediation is being utilized in civil and commercial spheres in many countries internationally and domestically. Sri Lanka although, has legislative enactments regarding both civil and commercial mediation, those enactments should be further amended in a proper manner. In contrast to the mediation laws in Singapore it is much clear that, there are many aspects to be addressed whilst amending the remaining Sri Lankan legal regime with regard to mediation.

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