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International ADR developments

From communities to corporations: the growth of mediation in Sri Lanka

Nadja Alexander

'The practice of mediation in Sri Lanka dates back to the reign of the Ceylon kings, who ruled Sri Lanka prior to colonial settlement. In the former Kingdom of Ceylon the institution of Gamsabhawa (the village council) had the mandate to maintain peace and harmony at village level by facilitating the amicable settlement of disputes.'

During a recent visit to Sri Lanka I was surprised to discover the widespread practice of institutionalised community mediation throughout the island republic. Then again, as I was to learn, this is a region with a strong tradition of consensus based dispute resolution at village level. In a very different context, I experienced the genuine and rapidly growing interest in and enthusiasm for private commercial mediation, particularly in the business sector.

In this article I will outline the development of modern mediation in Sri Lanka. I use the term mediation to mean facilitative mediation. Accordingly, for the purposes of this article, mediation does not include processes such as conciliation or evaluative mediation, which are used in Sri Lanka, for example in industrial dispute resolution practice.

At the outset I would like to thank the Ministry of Justice and, in particular, the members of the Legal and Judicial Reforms Project for the opportunity to work with them, share with them and learn from them.

Background to mediation in Sri Lanka

Like many Asian countries, Sri Lanka has a strong tradition of consensus based dispute resolution, the historical thread of which has from time to time been broken during periods of political upheaval. The practice of mediation in Sri Lanka dates back to the reign of the Ceylon kings, who ruled Sri Lanka prior to colonial settlement. In the former Kingdom of Ceylon the institution of Gamsabhawa (the village council) had the mandate to maintain peace and harmony at village level by facilitating the amicable settlement of disputes. Similarly, the village temple formed the traditional centre of social life and the Head Priest of the temple also took an active role in dispute resolution.

Successive foreign rulers introduced new, more formal forms of dispute resolution. Eventually the adversarial legal system based on English common law became the dominant form of formal dispute resolution in Sri Lanka, suppressing traditional mediation processes.

It was not until 1958 that a serious attempt was made to reintroduce the concept of the 'amicable settlement of disputes' by introducing the *Conciliation Boards Act 1958*. The Act provided for mandatory community level resolution of minor disputes by impartial conciliators. The objective of the Act was to make available to disputants a much more accessible, less expensive, speedy and participatory dispute management process. According to Amir-Ul-Islam, several factors (including the selection process for suitable conciliators and the mandatory nature of the Act) were the subject of great controversy within legal and political arenas at the time.¹ Ensuing problems with the implementation and application of the Act ultimately led to its repeal in 1977.

On the other hand, the Sri Lankan *Mediation Boards Act 1988* has enjoyed a much greater success.

From the communities ...

Mediation in Sri Lanka today is practiced extensively on a community level. Wijayatilake² reports that between 1990 and 1999, 631,831 mediations took place under the *Mediation Boards Act 1988*. Of those, 395,268 resulted in a settlement — a settlement rate of 62.6 per cent. Essentially, the Act has institutionalised mediation at the community level in Sri Lanka.

According to the Act, mediation is defined broadly as any 'lawful means to endeavour 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 or offence'.³ Despite the broad definition, all mediators under the Act are required to attend a training course conducted by the Ministry of Justice before they can be approved as mediators. As a result, the mediators follow a very specific facilitative mediation model as taught in the training program.

The diagram on p 135 outlines the procedure under the *Mediation Boards Act 1988*.

Under the *Mediation Boards Act 1988*, once the application for mediation has been lodged with a mediation panel, the procedure can be summarised as follows. A matter can come to mediation in one of four ways.

1. Voluntary referral — subject to a number of exceptions, parties can voluntarily refer a dispute to a mediation panel. The exceptions include where one of the disputants is the state; where the dispute relates to the recovery of any property, money or other dues on behalf of the state; or where the Attorney General has instituted proceedings for any offence.

2. Mandatory referral (civil matters) — there is mandatory referral to mediation for civil disputes relating to property, debt, damage or demand not exceeding 25,000 rupees. There are a number of exceptions to this category, for example matrimonial disputes which may be dealt with in the Family Court conciliation procedures and fundamental rights applications to the Supreme Court.⁴

3. Mandatory referral (criminal matters) — there is mandatory referral to mediation for criminal offences specifically set out in the Act. These include property offences, assault, trespass and defamation.⁵

4. Court referral — any court may refer a dispute to a mediation panel with the consent of the parties.

In each of the above cases, the mediation panel refers the matter to a mediation board, which comprises three mediators from the panel. The board will then decide if any interested third parties (other than the disputants) should attend the

mediation, and will send the disputants and all nominated parties a notification of the mediation. Legal representatives may not attend the mediation.

Neither the disputants nor other interested parties can be compelled to attend the mediation. At the same time, if one or other of the disputants do not appear at the mediation, the certificate of non-settlement subsequently issued by the Board will state the name of the party who did not attend the mediation. Naming the non-attending party on the certificate was an amendment to s 10 of the Act made in 1997. In this way the legislation aims to persuade more parties to attend mediation meetings. At this stage no data is available to indicate the impact of this amendment.

Time limits apply for completing the mediation process (see diagram on p 135). Where the parties reach an agreement, copies of the settlement document are sent to the parties or, where the matter was referred to mediation by a court, back to the court. Where no agreement is reached a certificate of non-settlement is issued. The issuing of such a certificate enables the aggrieved party to file a court action.

A mediated settlement is not enforceable in a court of law, unless the matter was referred to mediation by a court. Where one party does not comply with the mediated agreement, the other party may refer the matter back to the mediation board for a new mediation or to issue a certificate of non-settlement. Confidentiality of the mediation process is provided under the Act.

In summary, the *Mediation Boards Act 1988* sets up a mandatory court connected mediation scheme, whereby certain matters cannot be filed in court before the aggrieved party has applied for mediation and a mediation meeting has been arranged. At this point, however, the mandatory nature of the process stops. In line with the grassroots, community based philosophy that mediation is a voluntary process that empowers parties to deal with their own conflicts, there is no compulsion to attend the mediation. The only sanction for non-attendance is the naming of the non-attending party in the certificate of non-settlement.

Mediators tend to be well respected members of the village community who practice an interest based model of mediation. Mediations often involve several meetings, site inspections (where, for example, the dispute is about real property demarcations) and meetings with other stakeholders.

Despite the considerable success of the mediation boards over the past 15 years, the practice of mediation has remained confined to the community mediation arena.

Meanwhile, the Sri Lankan court system, based on English common law, has suffered the same fate as many court systems in the common law world — namely, the protracted and expensive resolution of commercial disputes. As a result, disputing parties often write off losses and do not get involved in litigation. In addition to litigation, there are a large number of commercial and civil disputes in Sri Lanka which are referred to arbitration. However, these proceedings are as lengthy and costly as litigation. Retired judges usually conduct the arbitrations at weekends or late evenings.

Many local and foreign investors are therefore reluctant to start or expand business ventures in the country. This, in turn, has had, and continues to have, an adverse impact on economic growth.

... to the corporations

The growing discontent with the manner in which commercial disputes are dealt with in Sri Lanka has provided the impetus for a number of major judicial reform initiatives. One such initiative is the introduction of commercial mediation of disputes through the Commercial Mediation Centre of Sri Lanka (CMC). The business community anticipates that by introducing commercial mediation into the legal system, there will be an increase in the early and amicable settlement of commercial disputes, leading to faster and more cost effective resolution of business disputes. Further, the business community expects that the demonstrated ability of Sri Lankans to deal with business disputes in a commercially sensible manner will lead to increased ➤



'... if mediation as a dispute management process really did make business sense, then the business community would use it and continue to evolve it into a best practice dispute management tool.'

➤ confidence among investors, both local and foreign, in the legal system and the economy of Sri Lanka.

The Legal and Judicial Reform Project (the project) in Colombo, Sri Lanka, is the driving force behind the significant legal reform projects including the introduction of commercial mediation into Sri Lanka.

The project members adopted the view that if mediation were to have a real chance of success in the private commercial sector, it needed the support of the business community. Accordingly, the project consulted with representatives of the various Sri Lankan Chambers of Commerce. At the same time, the project liaised with the Bar Association and the law schools of the various universities in Colombo. According to anecdotal evidence, the response from the business community was positive and motivated, the universities displayed curiosity and the Bar Association responded in a lukewarm 'keep us informed' manner.

After a series of consultations and meetings, a mediation group was formed with representatives from the various Chambers of Commerce, the Bar Association and the University of Colombo in December 1998. The group formulated a mediation model and procedures as well as guidelines for a Sri Lankan Commercial Mediation Centre. The centre has now been established under an Act of Parliament, namely, the *Commercial Mediation Centre of Sri Lanka Act 2000*.

Essentially the Act provides for the establishment of the centre, its structure, functions and powers. Under s 3 of the Act, the functions of the centre are:

- to promote the wider acceptance of mediation for the resolution of commercial disputes;
- to encourage parties to use mediation as a means to resolve commercial disputes; and
- to conduct mediations.

The Act also provides for a Board of Management, consisting of representatives from the various Chambers of Commerce and the Ministry of Justice. There is no requirement that the legal profession be represented on this Board. The Board is responsible for the development and regulation of guidelines for the mediation

process, the code of conduct for mediators and the determination of fees payable to mediators and the centre.

So, what has the Board done so far?

Acknowledging the experience of the community mediation boards, the Board of Management of the Commercial Mediation Centre chose to employ a completely voluntary, interest based mediation process and to restrict the involvement of lawyers in the process. Both these criteria were considered by the Board to be critical for the success of a dispute management process designed to provide a real alternative to litigation and arbitration.

First, the feeling among the business community was that if lawyers were involved in mediation, then it would only be a matter of time before mediation met the same fate as arbitration. Arbitration was, of course, introduced as a speedy and less expensive alternative to litigation, yet it quickly developed into a process as lengthy and costly as litigation itself. Further, the business community feared the involvement of lawyers would make the use of mediation less attractive for disputing parties. Cervenak reports on the findings of a consultancy paper prepared by the Asia Foundation on commercial arbitration in Sri Lanka. The paper concluded that a strong anti-litigation bias existed in the business community, particularly in the outstations among small and medium sized businesses.⁶

Second, as mediation is a process based on consensus between the disputing parties, it was felt that credibility of the process in the business community would be enhanced if it was supported and utilised by the business community on a voluntary basis. In other words, if mediation as a dispute management process really did make business sense, then the business community would use it and continue to evolve it into a best practice dispute management tool. Making the process mandatory, it was felt, would place too much regulation on the process too early and take it out of the hands of the customer, that is, the business community. ➤



➤ The development of institutionalised mediation in Sri Lanka since 1958 to the present day indicates a distinct trend away from mandatory towards voluntary mediation processes that do not involve lawyers. It is still far too early to comment on the success of the Sri Lankan commercial mediation initiative. In essence, its success depends on the efforts of the business community, in particular, the various Chambers of Commerce, to 'walk the talk' by referring their disputes to mediation and committing to the process in good faith. ●

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Endnotes

1. Amir-Ul-Islam M *Status of Mediation in Bangladesh in the Sub-Continental Settings* Compilation of papers on alternative dispute resolution in the SAARC region, Bhutan April 2000.
2. Wijayatilake D *Alternative Methods of Dispute Resolution in Sri Lanka* Compilation

of papers on alternative dispute resolution in the SAARC region, Bhutan April 2000.

3. Section 10 *Mediation Boards Act* (No 72 of 1988).
4. Exemptions are set out in the *Mediation Boards Act 1988*, Third Schedule.
5. *Mediation Boards Act 1988*, Second Schedule.
6. Cervenak C *Commercial Arbitration in Sri Lanka: Constraints and Opportunities* Report prepared for the Asia Foundation 1999.

The paths to mediation under the Mediation Boards Act 1988

