ALTERNATIVE DISPUTE RESOLUTION FOR ECONOMIC DEVELOPMENT: AN ASSESSMENT FROM SRI LANKAN LEGAL FRAMEWORK

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ABSTRACT

A substantial backlog of cases in ordinary legal proceedings, particularly the Commercial High Court and District Courts, poses a challenge to the expeditious and amicable resolution of commercial disputes. Besides, globalization has ushered in a new era of cross-border trade, investment, and digital connectivity which significantly increases cross-border business interactions. However, this expansion has led to the rise of complex, multi-jurisdictional disputes including jurisdiction, conflicts of laws, and enforcement of judgment across borders, that traditional court systems are deemed inadequate to handle effectively. This situation hampers the effective mechanism required to build confidence among businessmen both locally and globally. In response, an alternative dispute resolution mechanism (ADR) provides a flexible substitute that allows to use of forums and expert arbitrators to resolve disputes. International investment agreements, trade treaties, cross-border contracts, and domestic contracts define rules for dispute resolution between countries and parties, respectively. Thus, harmonization of dispute settlement has become indispensable in bridging gaps in understanding and navigating the complexities of commercial conflicts. This is essential in helping to mitigate challenges, promote fairness, and ensure the seamless operation of the interconnected global economy, thereby promoting economic development. The primary objective of this paper is to investigate the existing ADR mechanism in Sri Lanka, evaluate its effectiveness, and propose strategies to strengthen its efficiency for fostering economic development in the country. The approach involves a comprehensive analysis of domestic laws related to ADR and international agreements and treaties relevant to Sri Lanka. Utilizing a doctrinal analysis methodology, the paper draws insights from primary and secondary data sources. The findings were presented systematically through the inclusion of tables and figures where necessary.

Keywords: *alternative dispute resolution, economic development, amicable settlement*.

INTRODUCTION

An effective dispute resolution mechanism holds a paramount position within the domains of investment, trade, and cross-border business transactions. It not only serves as a crucial avenue for resolving disputes but also substantially improves the confidence of business activities. This, in turn, plays a pivotal role in fostering economic development. Over the last two decades, commercial activities and foreign investments in developing nations have evolved significantly due to the influence of supranational laws, including contracts, bilateral investment treaties, and trade treaties. These legal frameworks incorporate dispute settlement provisions, emphasizing the importance of a harmonized dispute resolution system for economic growth.

Alternative dispute resolution (ADR) methods offer consensus-based solutions outside the traditional court system, drawing from historical roots in Sri Lanka. Early settlers used diverse approaches, and community leaders played a vital role in maintaining peace and resolving disputes.[1] Mediation and conciliation have long served as effective tools for resolving societal problems, especially for minor issues and commercial disputes. In earlier times, the distinction between mediation and arbitration may not have been of great significance. Instead, the focus was on appointing "community leaders" like *Gamini* and "great lords" like *Mahaparumabha* to form a governing body responsible for ensuring peace and harmony within village communities. During that period, these leaders played a pivotal role in upholding order and addressing disputes through both formally established mechanisms and informal means.[2] As the field of law developed, new doctrines emerged, leading to the codification of customary practices. This gave rise to the introduction of certain parameters, such as application procedures, mediation/arbitration agreement requirements, jurisdictional scope, and arbitrability, among others. Additionally, specific quasi-judicial forums were also introduced to address particular issues under specific Acts, providing alternative avenues for dispute resolution.[3]

Foreign rulers who governed Sri Lanka introduced two predominant legal systems, namely common law and civil law. The British period was instrumental in the introduction of English law to commercial matters, marking the beginning of English law's influence in commercial transactions. The enactment of Civil Ordinance No. 5 of 1852 played a significant role in this context.[4] The introduction of English law in Sri Lanka laid the foundation for the establishment of English principles of arbitration, which were subsequently formalized in the form of legislation through the enactment of the Arbitration Ordinance No 15 of 1856. This ordinance served as a statute governing the practice of arbitration in the country.[5]

[1] SS Wijeratne, "Arbitration in Sri Lanka", in K. Kanag-Isvaran and SS Wijeratne, (eds) (2011) Arbitration Law in Sri Lanka, 3rd ed. (ICLP, 2011) at 2.

[2] Ibid.

[3] Several dispute settlement bodies were established under various statutes of Sri Lanka - Workman's Compensation Ordinance; the Patents and Trade Marks Ordinance; the Rent Restriction Act; the Industrial Disputes Act; the Land Acquisition Act; the Inland Revenue Act; the Licensing of Traders Act, the Muslim Marriage and Divorce Act.

[4] See Section 3 of the Civil Ordinance No 5 of 1852 (Sri Lanka).

[5] See, generally, K. Kanag-Isvaran and SS Wijeratne, (eds) above n.1; Saleem Marsoof, "Sri Lankan Experience in Commercial Dispute Resolution through Local and International Arbitration", (2017), The Bar Association Law Journal.

In today's globalized and privatized world, harmonized laws are essential for consistent regulation of commercial matters. It has various legal frameworks and international practices to handle disputes, offering parties flexibility in choosing the appropriate ADR method. Commercial disputes can be complex and cover various areas, from contract performance to intellectual property and insurance claims. Parties should carefully select the most suitable dispute resolution mechanism, often including ADR clauses in contracts and relevant legal frameworks to prevent further unnecessary disputes.[6] This paper aims to assess ADR mechanisms in Sri Lanka, their effectiveness, and recent approaches to enhance ADR to promote economic development. The analysis includes the examination of domestic laws, international treaties, and agreements of dispute resolution using a doctrinal analysis methodology. This methodology drives insights from existing primary and secondary data sources.

RESEARCH METHODOLOGY AND DESIGN

This study takes a comprehensive approach to examining the importance of ADR mechanisms for economic growth, with a particular focus on Sri Lanka. The methodology integrates both descriptive and analytical approaches, drawing on both primary and secondary sources and incorporating theoretical analysis. Data is gathered through an extensive literature survey, library research, and internet searches. The theoretical framework involves synthesizing existing knowledge on ADR and its impact on economic growth. As a result, this paper offers an intra-comparative analysis, concentrating on jurisdiction-specific aspects instead of inter-jurisdictional comparisons. It explores how Sri Lanka aligns with international standards in commercial dispute resolution, benchmarking its ADR mechanisms against global standards to identify areas of alignment and potential improvement. The study aims to provide insights into the recent development and effectiveness of the Sri Lankan ADR framework and make specific recommendations for enhancing its efficiency.

EFFECTIVE ADR FOR ECONOMIC DEVELOPMENT

The safeguarding of legal rights within a jurisdiction is a crucial factor in mitigating the perceived risks connected to commercial activities. This protection cultivates an atmosphere of trust and predictability, thereby incentivizing investors and traders to allocate their capital with increased confidence, ultimately stimulating economic growth and development in those regions. The Annual Report of the Ministry of Justice, Sri Lanka, reveals a staggering backlog of cases, particularly in the Commercial High Court[7] and district courts dedicated to commercial matters (see Table I).[8] The rising caseload, compared with a limited number of judges available, poses a significant challenge to the timely dispensation of justice. The compelling data presented in the Annual Report underscores the imperative to explore innovative solutions to the challenges facing the judiciary. Enhancing the ADR system emerges as a pragmatic and effective strategy to not only address the backlog of cases but also to foster a business-friendly environment by offering expedited and tailored resolutions to commercial disputes.

Table 1: Case Statistics of Courts - 2022[9]

Type of Court	Brought Forward as at 01/01/2022	Brought Forward as of 01/01/2022 after physical Counting	Filed Cases During 2022	Concluded Cases During 2022	Pending Cases as at 31/12/2022
Supreme Court	5,021	5,021	1,657	1,196	**5,482**
Court of Appeal	3,969	3,984	1,309	1,870	**3,423**
Civil Appellate High Court	6,878	6,940	2,834	2,974	**6,800**
Commercial High Court	7,723	7,723	1,788	1,133	**8,378**
High Court	32,333	30,020	16,700	16,997	**29,723**
Special Court	3	3	0	0	**3**
District Court	259,904	256,356	72,093	64,968	**263,481**

[6] See generally, Hietanen-Kunwald, P., & Haapio, H., Effective dispute prevention and resolution through proactive contract design, (2021), 5(1-2) Journal of Strategic Contracting and Negotiation, 3–23. https://doi.org/10.1177/20555636211016878.

[7] Commercial High Court was established under the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, where the Commercial High Court is vested with the power to exercise jurisdiction in commercial matters; also see Notification published by way of Extraordinary Gazette No. 2112/33 on 28th February 2019 read with Paragraph 1 of the First Schedule of the aforementioned Act.

[8] Ministry of Justice of Sri Lanka, Annual Report, 2022, available at, https://www.moj.gov.lk/images/pdf/progress_report/2022/Ministry_of_Justice_E.pdf, [accessed 23rd August 2023].

[9] Ministry of Justice, Prisoners, and Constitutional Reforms Sri Lanka, Caseload Statistic 2022, available at, https://www.moj.gov.lk/index.php?lang=en [accessed 23rd August 2023].

Magistrate's Court	773,233	794,370	747,303	738,031	**803,642**
Labour Tribunal	5,779	6,008	1,707	2,490	**5,225**
Children Magistrate Court	**1,276**	**1,276**	**246**	**414**	**1,108**
Grand Total	**1,096,118**	**1,111,701**	**845,637**	**830,073**	**1,127,265**

Delays in judgment can have a significant impact on the economy, manifesting in several ways. For instance, the backlog of pending cases can have far-reaching economic consequences. The uncertainty and long wait for resolution can hinder decision-making and strategic planning for businesses involved in litigation. This uncertainty can lead to a reluctance to invest, expand, or make major business decisions, which can have a negative impact on economic growth. Furthermore, delays in resolving cases may place financial strain on the parties involved, exacerbating economic difficulties. Second, a delay in judgment can erode trust in the business community, particularly in international trade and investment. In a global economy that is interconnected, timely dispute resolution is critical for maintaining trust and facilitating smooth cross-border transactions. Prolonged legal proceedings can deter foreign investors and businesses from engaging in international commerce due to concerns about the unpredictability and inefficiency of the legal system. This lack of confidence may lead to a decline in foreign direct investment and commercial activities hampering economic development and reducing opportunities for job creation. Weinstein et al. argue that the legal maxim "justice delayed is justice denied" aligns with economic theory. The prolonged resolution of disputes, they contend, can lead to economic injury denial for parties awaiting redress. State-mandated interest rates are often lower than potential investment returns, leaving plaintiffs incompletely compensated. Accelerating dispute resolution is crucial to mitigating economic losses, benefiting both plaintiffs and defendants who face capital constraints during litigation.[10]

Third, delays in commercial dispute adjudication have an indirect and direct impact on various aspects of the economy, including consumerism and employment. Prolonged legal proceedings, for example, may result in increased costs for legal representation and court fees, which can ultimately be passed on to consumers through higher prices for goods and services. This cost burden has the potential to have a direct impact on consumers' wallets. Similarly, long-running legal disputes, particularly among small businesses, may discourage businesses from making new investments or expanding operations due to an uncertain legal environment. This hesitation can have a direct impact on job creation and employment opportunities. Kohling identifies such two impacts resulting from a weak judiciary, and he states that,

> The insecurity created by a weak judiciary changes economic behaviour in two ways. First, the overall cost structure of the economy increases….Increased collateral to make up for the risk associated with the poor performance of property rights increases the consumer price….Second, not all risks can be covered by higher premiums. If the risk is considered too high, certain transactions simply do not take place.[11]

Strengthening the consensus-based ADR mechanism emerges as the primary available alternative for expediting commercial dispute resolution. This approach not only minimizes collateral risks associated with prolonged legal proceedings but also enhances confidence in the dispute resolution process.

ADR is favoured for its benefits over traditional litigation in resolving disputes. Advocates argue that it is cheaper, faster, more informal, private, efficient, and convenient. ADR allows parties to reach agreed-upon terms and acceptable solutions. McLaughlin emphasizes the barriers of traditional litigation, such as formal adversarial processes, potential national bias, limited access to courts, and unfamiliarity with national procedures, and ADR provides a flexible and tailored approach, preserving business relationships and overcoming these challenges, making it a preferred option for businesses seeking efficient dispute resolution.[12] The increasing significance of ADR in addressing commercial disputes, aligning with international standards in dispute resolution, and enhancing the quality of ADR methods such as mediation and arbitration is vital for economic growth. By utilizing ADR, businesses can achieve time and cost savings, foster stronger relationships, and enhance the quality of cross-border transactions

ADR MECHANISM UNDER SRI LANKAN LAW

Negotiation and Conciliation

Negotiation is a prominent ADR method and often the primary choice for resolving disputes. Its effectiveness lies in its flexibility, informality, and adaptability to parties' preferences, aiming to find mutually agreeable solutions, preserve business relationships, and accommodate changing business dynamics. The negotiation process enables parties to navigate complex and uncertain information, allowing them to take shortcuts and fill gaps based on their respective business interests. This approach typically

[10] Roy Weinstein, Cullen Edes, Joe Hale and Nels Pearsall, "Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings", (March 2017), Microeconomics, Economic, Research and Consulting.

[11] Kohling, W.K.C., "The Economic Consequences of a Weak Judiciary," Center for Development Research, University of Bonn (November 2000) cited in Weinstein et al, n. 10.

[12] Joseph T. McLaughlin, "Arbitration and Developing Countries", (Spring 1979), Vol 13 No. 2, The International Lawyer, pp. 211-232, Published by: American Bar Association: https://www.jstor.org/stable/40705956.

limits the involvement of third parties, thereby facilitating parties to manage disputes and foster cooperation. While negotiation is a voluntary process, if parties agree to resolve their disagreements through negotiation, they are obliged to make genuine efforts to settle. For instance, Article 13 of Australia – Sri Lanka BIT explicitly states, "… the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations".[13] The resulting agreement reached through negotiation can then be formalized and executed as a binding contract between parties.

Conciliation, on the other hand, similar to mediation, involves the intervention of a third party known as a conciliator to assist the parties in reaching a mutually acceptable resolution. While mediation gained prominence over time, the use of conciliation in commercial disputes has significantly decreased, although it continues to be employed informally for dispute settlement. Initially, the terms "conciliation" and "mediation" were used interchangeably.[14] For instance, in the context of settling disputes, the terms "conciliation" and "mediation" often refer to the involvement of a "third party." Over time, legal developments and the enactment of legislation have provided more structure to mediation, defining the roles and responsibilities of mediators. This has resulted in some differentiation between mediation and conciliation in terms of procedural requirements and the scope of powers granted to the third-party facilitator. It is important to note that while the terms "conciliation" and "mediation" may have acquired some distinctions, their fundamental purpose remains the same: to enable the involvement of a neutral third party in assisting parties in resolving their disputes amicably.

Mediation

The mediation process in Sri Lanka provides voluntary and semiformal dispute resolution mechanisms to enable speedy and free access to justice for people. Initially, institutionalized mediation was developed by enacting the Conciliation Boards Act of 1958 to establish conciliation boards in village areas, which was repealed in 1977 and, thereafter, introduced a Mediation Boards Act in 1978, covering a broader scope of mediation in Sri Lanka. Since then, mediation in Sri Lanka has gained importance and is a popular way of solving disputes besides Arbitration.[15] Mediation is typically a voluntary process unless required by law. Unlike negotiation, mediation involves using a third party known as a mediator. The mediator has no authority to impose resolution as in arbitration and litigation. However, the mediator facilitates the negotiation to reach an acceptable settlement by the parties. The parties themselves may choose the person who will act as the mediator. It is the mediator's responsibility to manage the mediation process. [16]

Meditation in Sri Lanka is governed by - the Mediation Boards Act No. 72 of 1988 and the subsequent amendments (MBA)[17]; Mediation Special Categories of Disputes Act No. 21 of 2003 (MSD); Commercial Mediation Centre of Sri Lanka Act, No. 44 of 2000, and its subsequent amendment (CMA)[18]. Section 2 of the MBA stipulates the appointment of the Commission; accordingly, the Commission consists of five persons, and three of them should hold judicial office (supreme court or court of appeal). The powers and duties of the Commission are listed in section 3. Further, section 4 provides that the Minister shall time to time, by order of the Gazette, specify the Mediation Board Area. The MBA encompasses both mandatory and voluntary mediation where compulsory disputes are legally required to go to mediation prior to being heard by a court – such as movable, immovable property, debt, damage or demand, claims of less than Rs. 1 million[19] and other offences listed out in section 7. In case a party involved in a dispute accesses the court without first engaging in mediation, section 8 of the MBA allows the court to refer the matter back to the Chairman of the Panel for potential settlement through mediation. This can only be done with the written consent of all parties involved. By doing so, the court recognizes the potential benefits of resolving the dispute through mediation and allows the parties to seek a mutually agreeable solution outside of the formal court process.

Community Mediation Boards were established in 1990 by virtue of the MBA. The Mediation Programme established Mediation Boards in every divisional secretary division island-wide. There are 329 Mediation Boards throughout the island, and approximately 8,500 mediators assist people voluntarily in resolving land issues, family disagreements, financial disputes and minor offences. These Boards come within the purview of the Mediation Boards Commission in Sri Lanka.[20] The government of Sri Lanka strives to empower the community on mediation and recently introduced a convenient dispute intake system to encourage the public to access mediation as ADR at the Divisional Secretariat level. The current dispute intake system requires the public to hand over their disputes by way of a formal letter to the Chairperson of the Community Mediation Board in the area where the disputants are formed.[21] The powers, roles and responsibilities of the Mediation Boards Commission are set out in the MBA Act.

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[13] Australia - Sri Lanka BIT, date of signature 12/11/2002 and date of entry into force 14/03/2007

[14] UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. See, UNCITRAL Mediation Rules (2021), available at < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mediation_notes.pdf>

[15] See more on the history of mediation in Sri Lanka, Christopher W. Moore, Ramani Jayasundere, M. Thirunavukarasu, The Mediation Process, Trainee's Manual Community Mediation Programme, Ministry of Justice, Sri Lanka, available at < https://www.moj.gov.lk/images/pdf/trainee_english_final_med_process.pdf>

[16] See Robert Mnookin, (1998), Alternative Dispute Resolution, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series.

[17] The Mediation Boards Act No. 72 of 1988 and the subsequent amendments Acts No. 15 of 1997, 21 of 2003, 4 of 2011, 9 of 2016, and 2 of 2024.

[18] Commercial Mediation Centre of Sri Lanka Act, No. 44 of 2000, amendment No. 37 of 2005.

[19] Mediation Boards Amendment Act No. 2 of 2024.

[20] See, Mediation Board Commission, http://mediation.gov.lk/communitymediation.

[21] Ibid.

The Special Mediation Boards were designed and developed to provide access to justice for specialised types of disputes. The Special Mediation Boards were established under the MSD Act. The jurisdiction of the special mediation is set out in section 2 of the MSD Act; accordingly, the special categories of disputes shall be determined by the Minister by Order published in the Gazette. The provisions of this Act shall apply in regard to the settlement through the mediation of such categories of disputes as shall be determined by the Minister by Order published in the Gazette. In specifying such categories, the Minister shall take into consideration the need to provide for the meaningful resolution of disputes relating to social and economic issues.

The concept of commercial mediation has also been institutionalized through the Commercial Mediation Centre of Sri Lanka Act, No. 44 of 2000. The Commercial Mediation Centre of Sri Lanka established thereunder was launched on September 12th, 2000 and is statutorily mandated to promote the broader acceptance of mediation for the resolution and settlement of commercial disputes. Regrettably, the Centre is presently non-operational, and it is imperative to reinstate its functioning in order to facilitate the resolution of commercial disputes within Sri Lanka. Moreover, there is a pressing need to transform it into a hub for handling international commercial disputes. Restoring and revitalizing the Centre will not only address the urgent needs of the local business community but also enable Sri Lanka to serve as a hub for international commercial dispute resolution. Legislation has been developed by the International ADR Center to provide a comprehensive framework for utilizing mediation as a means of resolving civil and commercial disputes. The legislation acknowledges the importance of a governance regime, which establishes practice standards and universal principles for conducting mediations.[22]

Arbitration

Commercial arbitration has gained significant popularity both locally and internationally in recent decades. It has become a preferred method of dispute resolution among traders and business communities due to its flexibility, efficiency, and enforceability of arbitral awards. Many legal systems have recognized the value of commercial arbitration and have enacted specific laws to regulate and promote its use. In the case of Sri Lanka, prior to the enactment of its modern Arbitration Act in 1995, three primary statutes dealt with arbitration - Arbitration Ordinance 1859: This was one of the earliest statutes in Sri Lanka that governed arbitration. It provided a framework for the resolution of disputes through arbitration and outlined the procedures and requirements for conducting arbitrations within the country; Chapter 51 Civil Procedure Code 1889: Reciprocal Enforcement of Foreign Judgments Ordinance 1921. This Ordinance dealt with the enforcement of foreign judgments in Sri Lanka and had relevance to arbitration when it involved the recognition and enforcement of foreign arbitral awards.[23]

However, recognizing the need for a modern and comprehensive arbitration law that aligns with international standards, Sri Lanka enacted the Arbitration Act in 1995. This Act was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The UNCITRAL Model Law is a widely recognized and influential framework for modern arbitration legislation, providing a uniform and internationally accepted set of rules for the conduct of international commercial arbitration. Also, give effect to the Convention on the Recognition and Enforcement of Arbitral Award.[24]

By adopting the UNCITRAL Model Law, Sri Lanka demonstrated its commitment to creating an arbitration-friendly environment, fostering international trade, and enhancing the enforceability of arbitral awards. The Arbitration Act of 1995 played a pivotal role in establishing a robust legal framework for arbitration in Sri Lanka and marked a significant milestone as the first arbitration law in South Asia based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law).

The introduction of the Arbitration Act 1995 in Sri Lanka has likely contributed to the growth of commercial arbitration in the country and facilitated the resolution of commercial disputes through a reliable and efficient mechanism. The only institutional arbitration Centre is the ICLP Arbitration Centre, founded in 1996 by the Institute for the Development of Commercial Law and Practice. ICLP played a significant role, in cooperation with the Swedish International Enterprise Development Corporation (SWSWEDECORP) and Swedish Institute for Legal Development (SILD), in promoting and shaping the current Arbitration Act of Sri Lanka.[25] Arbitration proceedings under ICLP should be completed within eighteen months from the date the file was transmitted to the tribunal, and this period may be extended.[26] The parties may also opt for the Expedited Rules of the ICLP Arbitration Centre which provides a fast track for proceedings to be completed within six months. [27]

Moreover, the establishment of the Sri Lankan National Arbitration Centre (SLNAC) was established in 1985 in response to a pressing demand from the private sector community for a faster and more efficient mechanism to resolve commercial disputes. Recognizing the need for effectiveness, ethical values, and swiftness, the Centre was established to cater to these requirements. The SLNAC is the oldest institution committed to resolving commercial disputes between private parties by facilitating both institutional and ad hoc arbitration.[28] Recently, the SLANC established the Expedition Arbitration Rules based on the United

[22] The proposed legislation - the Mediation (Civil and Commercial Disputes) Bill.
[23] K. Kanag-Isvaran and SS Wijeratne, above n.1.
[24] See the Preamble to the Arbitration Act No 11 of 1995 (Sri Lanka)
[25] International Commercial Law and Practice (ICLP), http://www.iclp.lk/history.php
[26] See Rule 26: The Award, Constitution and the Rules of the Arbitration Centre of the Institute for the Development of Commercial Law and Practice, a copy of the Rules available at http://www.iclp.lk/pdf_doc/rules_2022.pdf
[27] Ibid, See Rule 31.
[28] For further information, visit, Sri Lanka National Arbitration Centre, https://www.slnarbcentre.com/.

Nations Commission on International Trade Law (UNCITRAL) adopted on 21 July 2021,[29] also aiming to bolster investor confidence.[30] Additionally, the Ceylon Chamber of Commerce (CCC) and ICLP jointly inaugurated the CCC-ICLP ADR Centre, an institution dedicated to promoting the efficient resolution of commercial disputes. [31] Notably, the International CCC-ICLP ADR Centre, housed at the World Trade Centre Colombo, stands as the solitary institution in Sri Lanka offering a comprehensive of services, encompassing arbitration, mediation, and negotiation as commercial dispute resolution mechanisms.[32] In the Context of the Colombo Port project, the largest investment undertaking in Sri Lanka, in par with the Colombo Port City Economic Commission Act,[33] the Commission has taken a significant stride by forming an agreement with the International ADR Centre (IADRC), to effectively fulfil the legislative mandate of establishing an independent International Commercial Dispute Resolution Centre (ICDRC) within the Port City Authority.

The IADRC is currently engaged in delivering ADR services, including arbitrators and mediator training, has its institutional rules for the conduct of ADR processes, and is a joint venture between the CCC and ICLP.[34] Moreover, the CCC and International ADR Centre (IADRC) have formalized a cooperative agreement with the Hong Kong International Arbitration Centre (HKIAC), setting Sri Lanka's position within the global ADR network.[35] The escalating landscape of arbitration in Sri Lanka attests to the nation's alignment with global standards and its persistent commitment to advancing arbitration as a dependable mechanism for alternative dispute resolution. Recent developments within the country substantiate this assertion

ADR MECHANISM UNDER INTERNATIONAL RULES RELEVANT TO SRI LANKA

UNCITRAL Rules – Conciliation, Mediation & Arbitration

UNCITRAL, recognizing the importance of conciliation or mediation in effectively resolving disputes that arise in the realm of international commercial relations, took steps to acknowledge its value.[36] In response, UNCITRAL adopted the UNCITRAL Conciliation Rules (1980), which provide a universally applicable set of procedural rules for conducting conciliation proceedings. These rules were subsequently updated and refined by the adoption of the UNCITRAL Mediation Rules (2021), which serve as an amendment to the earlier Conciliation Rules. These developments highlight the recognition and utilization of conciliation as a valuable tool for resolving international trade disputes. Conciliation allows parties to seek an amicable settlement with the guidance of a neutral third party, promoting cooperation and preserving business relationships.[37]

Conciliation and mediation are often used interchangeably in different jurisdictions. The UNCITRAL Conciliation Rules (1980) and the subsequent UNCITRAL Mediation Rules (2021) provide a comprehensive and globally recognized framework for conducting these processes. UNCITRAL's rules offer a valuable resource for parties involved in international commercial disputes, allowing them to seek a fair and efficient resolution. Initially, the UNCITRAL Model Law on International Commercial Conciliation (2002) guided conciliation in international commercial disputes. This was later expanded and revised with the adoption of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018), known as the Singapore Convention on Mediation provides a global mechanism for enforcing international mediation settlements, enhancing the enforceability of mediated outcomes in cross-border disputes. The Convention

[29] The Sri Lanka National Arbitration Centre (SLNAC) Expedited Arbitration Rules – 2022 ((Based upon UNCITRAL Expedited Arbitration Rules). Accordingly, the Expedited UNCITRAL Arbitration Rules as recommended adopted herein subject to modification as Sri Lanka National Arbitration Centre (SLNAC)
Expedited Arbitration Rules. A copy of Expediate Arbitration Rules is available at https://www.slnarbcentre.com/pdf/SLNAC-Expedited-Arbitration-Rules-2022.pdf.

[30]Launch of Sri Lanka National Arbitration Centre: Expedited arbitration framework, https://investsrilanka.com/2022/09/01/launch-of-sri-lanka-national-arbitration-centre-upskilling-is-a-must-for-arbitrators-amid-technological-advancement-boi-dg-highlights/

[31] New Alternative Dispute Resolution Centre Debuts, https://www.chamber.lk/index.php/news/16-chamber-on-media/152-new-alternative-dispute-resolution-centre-debuts

[32] CCC-ICLP International Alternative Dispute Resolution Centre Opens at WTC, http://www.iadrc.lk/index.php?option=com_content&view=article&id=86:ccc-iclp-international-alternative-dispute-resolution-centre-opens-at-wtc&catid=8&Itemid=163.

[33] The Colombo Port City Economic Commission Act, No. 11 of 2021 (Sri Lanka).

[34] International ADR Centre Sri Lanka, The Colombo Port City Economic Commission partners with the International ADR Centre to establish a dispute resolution hub, http://www.iadrc.lk/

[35] Sri Lanka enters into cooperation agreement in arbitration with Hong Kong, available at https://www.dailymirror.lk/business/Sri-Lanka-enters-into-cooperation-agreement-in-arbitration-with-Hong-Kong/215-264868, accessed 28/10/2023

[36] The United Nations Commission on International Trade Law (UNCITRAL) played a crucial role in promoting conciliation. During its eleventh session held from 30 May to 16 June 1978, UNCITRAL drafted a report titled "Conciliation of international trade disputes" (A/CN.9/167), see, Report of the Secretary-General: Commentary on the Revised Draft of UNCITRAL Conciliation Rules (A/CN.9/180), file:///C:/Users/SINGER/Downloads/A_CN.9_180-EN.pdf, [accessed 10th October 2022]

[37] See, generally, Wall, J. A., Stark, J. B., & Standifer, R. L. "Mediation: A Current Review and Theory Development", (2001) 45(3) The Journal of Conflict Resolution, pp 370–391. http://www.jstor.org/stable/3176150 ; Law Reform Commission, "Alternative Dispute Resolution: Mediation and Conciliation", (Law Reform Commission, 2010).

was open for signature on August 7, 2019, in Singapore and became effective on September 12, 2020. It serves as a valuable reference for countries looking to improve their mediation legislation for international commercial disputes. In the meantime, if the conciliator and the parties to the disputes may assess the anticipated success in the conciliation process; accordingly, based on the reasonable assumption, parties can discontinue the conciliation process in order to serve time and money, or parties may include provision for only to resort conciliation amidst other means of ADR to avoid potential disadvantages.[38]

The Singapore Convention on Mediation enhances the appeal of mediation in global commerce by providing a streamlined process for enforcing mediated settlement agreements across borders. This instils confidence in commercial parties, promotes international trade, and encourages cooperative dispute resolution. The convention offers a reliable framework for enforcing mediated agreements, making mediation a preferred method for resolving commercial disputes and supporting global business transactions. Article 1 of the Convention limits its scope to settlement agreements resulting from mediation for international commercial disputes, concluded in writing by the parties. It does not cover consumer, family, inheritance, or employment disputes. It also excludes settlement agreements that have been recorded and are enforceable as an arbitral award. In accordance with Article 2(2) of the Convention, the requirement for a settlement agreement to be "in writing" is satisfied by including electronic communication. Moreover, the Convention defines mediation broadly. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute."[39] Sri Lanka signed the Singapore Convention when it was opened for signature. However, the implementation of the Singapore Convention will exclusively take place at the domestic level, as the country follows a dualistic legal system wherein international agreements necessitate domestic enactment for their effectiveness. Although Sri Lanka has initiated discussions at the domestic level, more action is required. Accordingly, Sri Lanka has taken steps to ratify the Convention by enacting the Recognition and Enforcement of International Settlement Agreements Resulting from Mediation Act No 5 0f 2024.[40] Notably, as of January 2024, the Convention was signed by 55 countries, including significant signatories such as the United States, China, India, and Sri Lanka, and ratified by 13 countries. A few countries have made a reservation with regard to Article 8 (a) and (b).[41] This collective participation highlights the global recognition and support for the Convention's objectives, emphasizing the importance of utilizing mediation to effectively resolve international commercial disputes.[42] The UNCITRAL Model Law on International Commercial Arbitration was instrumental in standardizing arbitration laws worldwide, leading to 167 countries signing the New York Convention. This global agreement reflects the widespread acceptance of commercial arbitration for its impartiality, flexibility, efficiency, and enforceable awards, making it a preferred choice over national courts for dispute resolution, thereby promoting trade and investment across borders.

ICSID Rules – Conciliation, Mediation and Arbitration

With regard to investment, parties to international investment contracts can settle their investment-related dispute through conciliation. Accordingly, the International Convention for Settlement of Investment Disputes (ICSID), is a World Bank instrument that provides a Chapter on conciliation that outlines a step-by-step procedure for conducting conciliation proceedings. [43] Recently, the ICSID introduced the ICSID Conciliation Rules to govern the process after the registration of a Request for conciliation. These rules provide guidance on the appointment of conciliators, the exchange of information, and the conduct of meetings or hearings. The aim is to ensure a structured and orderly conciliation proceeding, promoting a fair and effective resolution of investment disputes. Article 33 of the Convention provides that; "Conciliations will be conducted in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation, except as the parties otherwise agree. The current rules came into effect on July 1, 2022.[44]

Accordingly, the ICSID define conciliation and mediation and the distinction between those primarily based on several procedural aspects, the roles of the conciliator and mediator, and the binding nature of their decisions. This differentiation can be observed within the framework of the ICSID Convention Conciliation Rules and the ICSID Additional Facility Conciliation Rules. These rules outline specific variations between conciliation and mediation in terms of scope, withdrawal, mandate, process, and confidentiality (see Table II). Parties have the discretion to choose the appropriate ADR mechanism based on the seriousness, nature, and value of the disputes. As a result, some investment and trade treaties and agreements include provisions for both conciliation and mediation, or they incorporate multi-tiered ADR clauses. This allows parties to select the most suitable approach for resolving their specific disputes on a hierarchical basis.

[38] Report of the Secretary-General: commentary on the revised draft of UNCITRAL Conciliation Rules, (n.35).

[39] Article 2(3)

[40] A Copy of the Act is available at https://www.parliament.lk/uploads/acts/gbills/english/6319.pdf.

[41] Such as Balrus, Georgia, Japan, Kriskistan and Saudi Arabia, see United States Treaty Collection, available at https://treaties.un.org/pages/Home.aspx?clang=_en accessed 12 January 2024.

[42] Ministry of Foreign Affairs, Sri Lanka, https://mfa.gov.lk/singapore-convention/

[43] See Chapter III, Article 28, International Convention on Settlement of Investment Disputes, https://icsid.worldbank.org/rules-regulations/convention/icsid-convention/chapter-three , [accessed on 10th October 2022]

[44] Overview of Conciliation under the ICSID Convention (2022), https://icsid.worldbank.org/procedures/conciliation/convention/overview/2022, [accessed 10th October 2022].

Table II: Difference between Conciliation and Mediation Under ICSID[45]

Conciliation Rules (ICSID Convention & Additional Facility)	Mediation (Mediation Rules)
Investment disputes between Contracting States and foreign nationals (Contracting States).	Parties do not have to be of foreign nationals or linked to an ICSID Convention Member State.
Disputing parties should have consented to ICSID conciliation.	No such prior consent is required.
Request for Conciliation (Based on prior consent)	Request for medication is sent to the Secretary-General, then the request is transmit the other party, the other party may accept or reject.
A party may not unilaterally withdraw from a conciliation once consent has been given.	Either party is entitled to withdraw from the mediation at any time
The Conciliators Commission is appointed based on the Conciliation Rules – Uneven members of conciliators	Number of Arbitrators appointed as per party agreement – Party Autonomy – one or two co-mediators.
The conciliation commission's mandate is broader which also includes an obligation to "clarify the issues in dispute."	The mediator's role is limited to assisting the parties in reaching a mutually acceptable resolution.
More formal	More informal

International responsibility and obligations are assumed by states when they become parties to an international legal instrument through the process of signing and ratifying it in accordance with their relevant domestic laws. Consequently, numerous countries have become parties to the ICSID Convention. Sri Lanka, for example, has been an ICSID Contracting State since November 11, 1967. Consequently, the preference for utilizing the ICSID Centre as a primary mechanism for settling investment disputes is evident in various contracts, domestic laws, and investment treaties. Notably, the first ICSID award was granted in the case of AAPL v Sri Lanka in 1987.[46] As of June 30, 2023, ICSID had registered a total of 933 cases under the ICSID Convention and Additional Facility Rules. Furthermore, an additional 22 cases were administered under alternative procedural rules, establishing a new record. The majority of these cases (16 out of 22) applied the arbitration rules of the UNCITRAL.[47]

Table II: Table of Cases Initiated Under ICSID Sri Lanka as Respondent State

Year of Initiation	Case	Summary	Outcome	Home State of Investor
2018	KLS Energy Lanka Sdn. Bhd. v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/18/39)	Investment: Investments in a renewable energy project. Summary: Claims arising out of the Government's cancellation of a wind and solar hybrid power plant project in which the claimant had invested.	Pending	Malaysia
2016	Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/16/25) Expand / Collapse	Investment: Ownership of a land plot on the banks of Lake Diyawanna for a hotel development project. Summary: Claims arising out of the allegedly insufficient compensation paid by the Government to the claimants for the expropriation of a land plot to be used for a hotel development project.	Decided in favour of State	United Kingdom
2009	Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2) Expand / Collapse	Investment: Rights under an oil hedging agreement concluded between Deutsche Bank and Sri Lanka's national petroleum corporation. Summary: Claims arising out of Deutsche Bank's termination of an oil hedging agreement concluded with Ceylon Petroleum Corporation, Sri Lanka's national petroleum company, and close-out amounts payable under such contract.	Decided in favour of investor	Germany
2000	Mihaly International Corporation v. Democratic	Investment: Expenditures of money upon the execution of certain letter of intent entered into with	Decided in favour of State	United States of America

[45] The table is based on the information on, Key Differences between Mediation and Conciliation at ICSID, available at https://icsid.worldbank.org/rules-regulations/mediation/key-differences-between-mediation-and-conciliation#.

[46] *Asian Agriculture Products Limited v Republic of Sri Lanka*, ICSID Case No ARB/87/3

[47] ICSID, ICSID Releases Caseload Statistics for the 2023 Fiscal Year, available at https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-caseload-statistics-2023-fiscal-year

	Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2) Expand / Collapse	the government in preparation for an investment project. Summary: Claims arising out of the unsuccessful conclusion of a contract between the Republic of Sri Lanka and the investor for the building, ownership and operation of a power generation facility.		
1987	Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka (ICSID Case No. ARB/87/3)	Investment: Shareholding in a Sri Lankan shrimp farming enterprise. Summary: Claims arising out of the alleged destruction of claimant's investment during a military operation conducted by Sri Lanka security forces.	Decided in favour of investor	United Kingdom

Source: UNCTAD, Investment Policy Hub[48]

The ICSID tribunal's awards are binding and distinct from commercial arbitrations, as they do not require court enforcement. However, under Article 52 of the Convention, a party against whom an award is made can seek annulment if they believe there was procedural injustice. In annulment proceedings, an ad hoc committee can only consider the grounds in Article 52(1) for annulment, not the substance of the dispute.[49] This makes ICSID more akin to a "court" than a traditional "arbitral body."[50]

Sri Lanka currently maintains 25 active Bilateral Investment Treaties (BITs) with both developed and developing countries. The majority of these agreements incorporate provisions for settling investor-state disputes, and they establish a hierarchy of preferred dispute resolution mechanisms. These mechanisms include domestic litigation, recourse to the ICSID Centre, and the option for ad hoc arbitration based on the UNCITRAL Rules.[51] Some treaties refer to local arbitration of contracting states, for instance, the Singapore – Sri Lanka BITs, such as the Singapore International Arbitration Centre (SIAC), and Sri Lankan National Arbitration Centre (SLNAC) and ICLP.[52]

CONCLUSION

An effective judiciary system plays a pivotal role in creating a conducive environment for business operations. It provides a dependable mechanism for the resolution and enforcement of contractual agreements, offering businesses a structured approach to conflict resolution. Recognizing the significant implications of dispute resolution mechanisms on the overall contractual relationship, it is imperative to have a harmonized set of such mechanisms tailored to the specific needs and circumstances of the parties involved. The selection of the "applicable law" in international arbitration holds substantial importance, as it directly impacts the enforcement or setting aside of awards. In a country that places a strong emphasis on ADR, it deserves commendation, as it becomes more attractive for cross-border commercial activities. Such commitment to ADR fosters confidence in conducting business across borders, beyond one's home nation.

Sri Lanka has taken notable steps to facilitate ADR in line with international standards. The recent growth of arbitration in Sri Lanka reflects the nation's commitment to complying with global norms and advancing the ADR mechanism as a reliable alternative forum for settlement. Nevertheless, Sri Lanka must actively promote ADR through educational and empowerment programs, raising awareness about its benefits as a viable alternative to traditional court proceedings. This proactive approach empowers parties to find mutually beneficial solutions by incorporating appropriate ADR clauses that contribute to a win-win situation in dispute resolution.

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[48] UNCTAD, Investment Policy Hub, < https://investmentpolicy.unctad.org/investment-dispute-settlement/country/198/sri-lanka>

[49] See, ICSID Convention Article 52.

[50]Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier", (2010), Law and Ethics of Human Rights, available at https://core.ac.uk/download/pdf/72826522.pdf p 8.

[51]Iran, Islamic Republic of - Sri Lanka BIT (2000), date of signature 25/07/2000 and date of entry into force 04/02/2016; Australia - Sri Lanka BIT, date of signature 12/11/2002 and date of entry into force 14/03/2007; Czech Republic - Sri Lanka BIT (2011), date of signature 28/03/2011 and date of entry into force 15/06/2016

[52] Chapter 10: Investment, Singapore - Sri Lanka FTA (2018), date of signature 23/01/2018 and date of entry into force 01/05/2018.

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