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Defining The Contours Of Non-Mediability

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Abstract

In recent years, interest in mediation as a tool of dispute resolution has revived at both local and global level. The Singapore Convention on Mediation has changed the essential character of mediation from being just an alternative to a mainstream choice for the disputing parties. Some States have also introduced mediation specific laws to enforce mediated settlement agreements. While, the popularity of mediation has increased, there is no clarity as to what can be mediated or what can't be mediated. This paper introduces the concept of 'non-mediability' to refer to disputes which are not capable of settlement through mediation. There are hardly any guidelines in national laws or international instruments on what is capable of settlement through mediation. Therefore, this paper examines the concept of non-mediability at national and international level to identify disputes which are non-mediable. At national level, framework of mediation in jurisdictions such as Australia, Hong Kong, India and Singapore are examined. At international level, the concept of mediability in Singapore Convention and UNCITRAL Model Law on Mediation is analysed. Based on the analysis of legal frameworks, this paper propose categories of disputes which are not suitable for mediation. It also carves out the distinction between mediation and processes akin to mediation.

Keywords: *Mediation, Mediability, Non-mediability, public policy, Singapore Convention*

I. INTRODUCTION

Mediation is not a new method of dispute settlement. Its existence is contemporaneous with the existence of civil society.[1] In different forms, mediation has been used since centuries to resolves disputes in most parts of the world.[2] The renewed interest in mediation is a result of combination of factors in both domestic and international arena. This shift is seen, for instance, in the creation of several private and public organisations that provide services to interested parties in an effort to promote amicable resolution of conflicts. At domestic level, the factors include, growing discontent with litigation and excessive burden on courts. Internationally, mediation is perceived as a means to bolster the international trade. As a result, in the last few decades,

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both States and international bodies are pushing the use of mediation to settle the disputes as a matter of policy.

However, there are some limits to such private settlement by the parties. While there is a global consensus on the efficacy and effectiveness of mediation, the underlying policy considerations in mediation differ among states and international bodies. Generally, the settlement arrived by the parties should not be against the law or the public policy of the country. A settlement agreement that is dehors the law or the public policy will not sustain in courts.

This means that the concept, practice and scope of mediation in each State would depend on the public policy and legal framework of the State. The result is the lack of consensus on the kind of dispute which are capable of being settled through mediation. For this reason, the settlement agreements also remains susceptible to be challenged or not recognized by the courts.

There are practical implications of mediating a non-mediable dispute. Such settlement will have no value in the eyes of law and can be set aside by the courts of law. From another perspective such settlement may warrant the court intervention and can defeat the very logic of mediation. Further, parties in international mediations needs to be more careful about the mediability of disputes. The Singapore Convention provides assurance to the parties in international mediation regarding the enforcement of settlement agreement, but it also has its limitations. It is applicable to only commercial disputes and doesn’t apply to any disagreement that results from agreements that one of the parties (a consumer) entered into for personal, family, or home needs; or (b) any dispute involving family, inheritance, or employment law. Furthermore, even if the subject-matter is mediable, the settlement may be set aside by the courts if it is induced by fraud or is against the public policy or is patently illegal.

Thus, there are no clear specifications in domestic and international laws to assist in determining which disputes are suitable for mediation and which are not. Therefore, this paper uses a three pronged approach to develop the framework of non-mediability. On a comparative note it examines the mediation laws in Australia, Hong Kong, and Singapore. In Asia Pacific, these are the only countries which have a standalone laws on mediation. At international level, it delves into the mediation framework laid down by UNCITRAL and Singapore Convention. These frameworks are important to understand the globally accepted standards on mediability. However, they are not sufficient as international frameworks are usually based on

compromises to develop larger consensus amongst the nation states. Therefore, to truly understand the contours of mediability the mediation regime at domestic level must also be analysed. At domestic level, this paper closely looks at Indian mediation laws. There are many advantages of focussing on India. The mediation is strongly rooted in the traditional as well as the legal culture of India. India has a mature mediation landscape with multiple laws laying down mediation framework. India is also on its path to bring a standalone law on mediation. The Indian Mediation Bill after it is enacted will be the only law on mediation which will have an explicit list of non-mediable disputes. Therefore, Indian mediation regime can help us in understanding the contours of mediability.

In this article, first, the concept of mediability is explained by examining jurisdictions such as Australia, Hong Kong, India and Singapore. Then, this paper examines the concept of mediability in Singapore Convention and UNCITRAL Model Law on Mediation. In third part, the circumstances under which disputes are non-mediable in India are analysed. In fourth part, non-mediable disputes are identified on the basis of comparative study. This is followed by conclusion.

II. CONCEPT OF MEDIABILITY

In the same way that some matters are not arbitrable, there are matters that are not mediable. The term 'mediability' refers to disputes which are capable of settlement through mediation. Mediation as a process empowers parties to decide what is right for them. However, the considerations of mediability are not same as arbitrability.

The edifice of mediation is built on self-determination and party autonomy. However, party autonomy has limitations. Though, mediation as a dispute resolution mechanism is a game changer in terms of access to justice, all kind of disputes can't be settled by mediation.

There are four categories of conflicts, according to the Maryland Handbook for Lawyers, in which mediation would be unsuccessful or inappropriate: When one party is being victimised by the other, when alcohol or drug abuse significantly contributes to the conflict or impairs a party's capacity to take part in the mediation, when remedy to the conflict can only be offered by court, particularly in cases of first impression or those requiring injunctive relief, and when relationships cannot be repaired. These are usually the considerations for a

mediator or a party to weigh. If the dispute is otherwise mediable, there is no bar that such matters cannot be mediated at all.

The Australian Law on Mediation specifies three categories of disputes which are excluded from mediation.

a. Proceedings of certain kind – Section 15 excludes certain kind of proceedings where pecuniary penalty is to be imposed, criminal offence or possible commission of criminal offence (preventive actions), appeal, review of specified tribunals decisions, proceedings involving court processes such as summons, warrants, etc., proceedings involving vexatious litigant, ex-parte proceedings etc.
b. Proceedings under certain Acts – Section 16 excludes proceedings under certain Acts such as, the Australian Citizenship Act 2007; the Child Support (Registration and Collection) Act 1988; the Fair Work Act 2009; the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009; the Family Law Act 1975; the Migration Act 1958; the National Security Information (Criminal and Civil Proceedings) Act 2004; the Native Title Act 1993; the Proceeds of Crime Act 1987; and the Proceeds of Crime Act 2002.
c. Proceedings as prescribed by Regulations - Section 17 excludes proceedings that are prescribed by the regulation. Such regulation must consider three factors in deciding mediability: nature of proceedings; subject-matter; and Act or regulation in which dispute has arisen. The regulation prohibits proceedings for sequestration order, winding up proceedings, review proceedings from decision of Registrar for resolution by mediation.

Sometimes institutions administering mediation may also stipulate circumstances wherein use of mediation will not be optimal. For example, according to World Intellectual Property Organization (WIPO) mediation is not appropriate in cases involving intentional, malicious counterfeiting or piracy that calls for joint effort. Likewise, mediation may not be the best course of action when a party is confident in its case or when the parties, or one of them, seek an impartial opinion to establish a precedent or gain public acquittal for a contentious issue.

With respect to family disputes under Hague Convention it is noted that all of them are not suitable for mediation. The nature of conflict, specific needs of the parties, specific circumstances of the case such as domestic violence or alcohol or drug abuse, and particular legal requirement must be identified to decide if the dispute is suitable for mediation or not. Also, at the time of screening for suitability of mediation, certain challenges for use of mediation in child abduction

cases must be considered. The language barriers, different cultural and legal background, enforceability issues, criminal proceedings against abducting parent, impact of international or regional instruments, applicability of multiple legal systems, can pose serious risk or challenges in mediation. These must be considered to decide the suitability of dispute for mediation.

Under Italian regime, mediation law doesn't lay down category of disputes which are non-mediable. It has a provision of mandatory mediation in cases of "joint ownership, property rights, division, inheritance rights, family contracts, leases, loans-for-use, leases of businesses, compensation for damage resulting from vehicle and boat traffic, medical liability and defamation through the press and other media, or insurance, banking and financial contracts". This implies that these are mediable cases under Italian law.

India has legislations where use of mediation is not just expressly permissible but is also mandated. The law encourages courts as well as the arbitral tribunal refer the parties for settlement of the disputes in appropriate cases. The mediation which is conducted at the behest of courts is termed as court-annexed or court-referred mediation. The 'mediability' of such disputes is usually not in question. There are also some legislations which permits conciliation of disputes such as Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; Industrial Disputes Act 1947; and part -III of the Arbitration and Conciliation Act, 1996. While in Singapore Convention and in some jurisdictions there is no distinction between conciliation and mediation, a subtle distinction between these two concepts does exist in India. Also, while mediation is not permissible in criminal cases, there is a provision of settlement in compoundable offences and plea bargaining. Therefore, there exist various forms of private settlement which goes by different nomenclatures.

These different kinds of settlements are akin to mediation but, in practice are not labelled as mediation. A broad interpretation of mediation can bring within its ambit all the different kinds of private settlements which are ordained by law. In fact, the newly proposed Mediation Bill uses a broad definition of mediation to even include conciliation under some statutes within its ambit. Yet, there are private settlements which are neither expressly ordained by law and nor expressly prohibited by law. As it stands now there is no specific law on mediation in India and it is unclear which disputes are non-mediable.

Further, the scope of the term disputes which are capable of settlement by mediation varies in international and domestic context. In international context, for enforcement under Singapore Convention, only commercial disputes are capable of settlement by mediation. This doesn't mean that mediation can't be used in non-commercial disputes in cross border disputes. Mediation can certainly be used even in cross border non-commercial disputes; however, parties won't be able to enforce such settlement under Singapore Convention. The test of 'mediability' from this perspective is not whether the dispute is mediable but whether, courts will allow the enforcement of such settlement agreement. Whereas in domestic context, even non-commercial disputes may be allowed to be resolved by mediation. The disputes which are incapable of being settled through mediation will not sustain under law.

It flows from the foregoing discussion that mediability as a concept depends upon the place given to it under relevant international law, transnational law, or domestic law. However, sometimes the law may simply be silent on the mediability. In a digitally globalized society, where persons of different nationalities, and culture interact and deal with each other at a phenomenal rate, a state-centric view of mediation can cause serious obstruction in harmonizing and universalizing the concept of mediation – which can otherwise be an effective and efficacious tool to promote justice and peace at a global level.

III. MEDIABILITY UNDER SINGAPORE CONVENTION AND UNCITRAL MODEL LAW

The United Nations Convention on International Settlement Agreements resulting from Mediation ('Singapore Convention' or 'Convention') has been adopted by the General Assembly on 20 December 2018 to facilitate the enforcement of international mediated settlements. Before the convention, the settlement agreements could be enforced as court decree, arbitration award or even as a contract. However, neither contract law systems nor arbitration systems neatly align with mediation Therefore, the desirability of a new international instrument was felt by the industry.

It is expected that simplified and streamlined procedure laid down under Convention will facilitate international trade, contribute to harmonious international economic relations and promote use of mediation as an effective method of dispute resolution. The Convention defines Mediation as a process driven by the third party

towards the amicable settlement. However, such third party referred to as mediator lacks any authority to impose the settlement.
The Scope of Convention is same as UNCITRAL Model law on Mediation (‘Model Law’). It applies to: (a) commercial disputes; and (b) international settlement agreements resulting from mediation. Such settlement agreement must be in writing. A settlement agreement will be considered as international if:

a. At least two parties to the settlement agreement have their places of business in different States; or
b. The State in which the parties to the settlement agreement have their places of business is different from either:

I. The State in which a substantial part of the obligations under the settlement agreement is performed; or
II. The State with which the subject matter of the settlement agreement is most closely connected.

Thus non-commercial disputes are excluded from the convention. The term ‘commercial’ is not defined but, it must be construed to the widest amplitude without any limitation on nature of remedy or contractual obligations. The suggestion of including the definition of commercial in footnote of the convention text was not accepted. As far as Model Law is concerned, it was agreed that the application of the uniform rules should be restricted to commercial matters.

However, Footnote 1 of the Model Law defines the term commercial to include the relationships of a commercial nature such as, “any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.”

The Mediation Center of WIPO deals with disputes concerning intellectual property or commercial transactions and relationships involving the exploitation of intellectual property. Common examples of such commercial transactions and relationships are patent, know-how and trademark licenses, franchises, computer contracts, multimedia contracts, distribution contracts, joint ventures, R & D contracts, technology-sensitive employment contracts, mergers, and acquisitions where intellectual property assets assume importance, and publishing, music, film contracts.

The term commercial should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Footnote 1 emphasizes the width of the suggested interpretation and makes it clear that the test is not based on what the national law may regard as "commercial". This may be particularly useful for those countries where a discrete body of commercial law does not exist; and between countries in which such a discrete law exists, the footnote may play a harmonizing role.

The restriction to commercial matters is not only a reflection of the mandate of UNCITRAL to prepare texts for commercial matters but also a result of the realization that mediation of non-commercial matters touches upon policy issues that do not readily lend themselves to universal harmonization.

In the Indian context, the Commercial Courts Act "commercial dispute" is defined as a disagreement that "arises out of (i) regular exchanges of merchants, bankers, financiers, and traders, for example, those concerned with mercantile documents, involving implementation and interpretation of such documents; (ii) export or import of goods or services; (iii) problems with regard to admiralty and maritime law; and (iv) exchanges in connection with aeroplanes, aircraft engines and equipment, and helicopters, such as sales, leasing, and financing (v) agreements pertaining to real estate used solely for trade or commerce; (vi) franchising agreements; (vii) distribution and licencing agreements; (viii) management and consultancy agreements; (ix) the transportation of products; (x) construction and infrastructure contracts, including tenders; (xi) joint venture agreements; (xii) shareholders agreements; (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; (xiv) mercantile agency and mercantile usage; (xv) partnership agreements; (xvi) technology development agreements; (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits; (xviii) agreements for sale of goods or provision of services; (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum; (xx) insurance and re-insurance; (xxi) contracts of agency relating to any of the above; and (xxii) such other commercial disputes as may be notified by the Central Government."

The definition of commercial dispute provided above is thorough and detailed. Clause xxii, which is residuary in character, allows the central government to notify further disputes that may meet the criteria for

commercial disputes. Thus, as time and circumstances change, more disputes may be included in the definition.

The term commercial also include investment related disputes and thus settlement agreement under Investor-State mediation can be enforced under the Singapore Convention. Even under the Commercial Courts Act in India it is provided that a dispute will be commercial even when one of the parties is "the State or any of its agencies or instrumentalities, or a private body carrying out public functions."

However, the Convention doesn't apply to consumer disputes of personal, family, and household nature; family disputes, inheritance disputes or employment disputes.

The exclusion of consumer disputes from Convention is consistent with commercial requirements and is reflected in the CISG. The Working Group used the CISG formulation: disputes "arising from transactions undertaken by one of the parties (a consumer) for personal, family, or household purposes." As some delegations did not find "personal" to be sufficiently clear, the parenthetical reference to the term "consumer" was incorporated as a clarification. While excluding consumer disputes, delegations hoped to prevent the problem that UNCITRAL experienced in past conversations in Working Group III's project on online dispute resolution, which delayed due to varying views on consumers' capacity to enter into pre-dispute agreements to arbitrate.

The drafters of the Convention were particular that it shall not overlap with other cross border enforcement mechanisms. Therefore, the Convention doesn't apply to court approved settlement agreements, court referred mediations, settlements that are enforceable as court decree or an arbitral award. For example, Family law issues are covered by the relevant Hague Convention.

Likewise, mediated settlements to resolve family law, employment law, or inheritance law disputes are not permitted. Even though these types of disputes were deemed important, the Working Group determined that they raised issues distinct from commercial disputes and were sufficiently sensitive to warrant exclusion. Inheritance law was subsequently added as an exclusion because some legal cultures doesn't consider it to be part of family law. These exclusions avoided issues of unequal bargaining power of the parties as well as overlap with the Hague Conference on Private International Law.

Under Singapore Convention as well as Model law, the court may deny the relief if settlement agreement is found to be ‘contrary to public policy’ or if the ‘subject matter of the dispute is not capable of settlement by mediation’ under the applicable law viz. the law wherein relief application is made.

These exceptions mirrors article relevant provisions of the New York Convention and the Model Law on Arbitration. The competent authority may deny the relief on these grounds.

The public policy standard under Singapore Convention and Model Law is as demanding as in New York Convention.

The public policy exception must be used in exceptional circumstances and restrictively interpreted. The Working Group recognized that it can be used for example, on the national security grounds.

There are some disputes which are to be mandatorily adjudicated by the designated State forums. Such disputes are not capable of settlement through mediation. The application of this exception should be sparing and in cases of express statutory bar for mediation of specific disputes or claims.

The application of exception under clause (2) of Article 5 will be rare as States doesn’t impose as many restriction on mediated settlement as they impose on adjudication by arbitration. In any case, these exceptions may prevent the enforcement of mediated settlement in certain jurisdictions and doesn’t make settlement per se invalid.

The UNCITRAL Notes on Mediation (2021) also recognizes that party Autonomy in mediation is subject to mandatory law. The parties are free to “[d]etermine the scope of issues to be submitted to mediation”, subject to mandatory requirements under the relevant source of law. Therefore, the parties when agreeing to the legal framework must keep in mind the consequence of such framework including applicable law and Singapore Convention.

Article 8 of the convention deals with ‘Reservations’. The party has a choice to decide the extent to which the Convention will apply to it. If a party opts for this reservation then it can exclude the applicability of the convention “to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration”.

This reservation makes the cases non-mediable, wherein dispute pertain to State or its instrumentalities. However, it will not affect the mediability and consequent enforcement in any Investment treaty under which such mediation might have been commenced.

Based on the above discussion following category of disputes may not be mediable under Singapore Convention:

1. Non-commercial cases.
2. Element of 'internationality' is not present.
3. Consumer cases for personal, family, or household purposes.
4. Employment cases
5. Family cases
6. Inheritance Cases
7. Cases wherein government or its agency is a party. (If reservation is opted).
8. Cases wherein conduct of mediation violates the public policy of the court wherein the relief is sought.
9. Cases wherein subject matter is not capable of settlement as per the mandatory legal provisions of the court wherein the relief is sought.

At the same time it must be noted that the concept of mediability under Singapore Convention is narrow because of its limited scope. Singapore Convention doesn't overlap with any other legal framework. It is not an exhaustive treaty in terms of coverage of mediation cases. Therefore, a dispute may not be mediable under Singapore Convention, but under some other legal framework.

Also, one may very well argue that Singapore Convention doesn't affect the mediability but only enforcement if the mediated settlement falls in any of the excluded category. Because, parties are free to choose any other legal framework for enforcement of their settlement agreement, mediability is not actually affected as the parties are free to choose mediation. While it might be true in some cases, however it must be noted that mediations which commenced from a dispute resolution clause in a contract specifically referencing to Singapore Convention then it is not just enforcement but also the mediability which is affected. The parties specific reference to Singapore Convention in a dispute resolution clause bounds them to the provisions of the Convention. The opposing party may argue that consent to mediate was based on the premise of Singapore Convention and not of any other legal framework.

IV. MEDIABILITY UNDER INDIAN LEGAL FRAMEWORK

In 1999, the Indian Parliament passed the Code of Civil Procedure Amendment Act of 1999 inserting section 89 in the Code of Civil Procedure 1908 ('CPC'), providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

Section 89 allows the court referred mediation. In a matter pending before the court, if there "exist elements of a settlement", then the court under Order 10 Rule 1A is bound to refer the matter to mediation or other suitable ADR process. The court must record the brief reason for not referring the matter for settlement.
The Supreme Court of Indian while interpreting section 89 of the CPC, having regard to the nature of cases, identified the categories of cases which are not suitable for resolution by ADR.

The illustrative and flexible list of non-mediable disputes as per *Afcons case* are as follows:

i. Order 1 Rule 8 CPC provides for representative lawsuits that affect the public interest or the interests of several individuals who are not parties to the suit. (In reality, reaching a compromise in a lawsuit like this is a challenging process that requires notification to the parties interested in the suit, before it is accepted.)
ii. Election-related conflicts concerning public office elections (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).
iii. Cases in which the court grants authority following an inquiry, such as, cases for letters of administration or grants of probate.
iv. Cases involving significant and detailed accusations of forgery, fraud, coercion, document falsification, etc.
v. Cases requiring judicial protection, such as claims against minors, deities, and mentally handicapped people, as well as lawsuits seeking a declaration of title against the government.
vi. Cases involving prosecution for criminal offences.

The Supreme Court noted that, "all other suits and cases of civil nature ... (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes.."

Family cases

Usually matrimonial cases are also mediable. An illustration of cases suitable for family mediation can be found in Rule 1 Order XXXII A of

CPC. There is a duty of the court with respect to these cases to assist the parties in arriving at a settlement. However, such duty must be consistent with nature and circumstances of the case. This order applies to “suits or proceedings relating to matters concerning the family.” Section 9 of the Family Court Act also imposes the similar duty of settlement upon the family court. The Family Court must “assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding.”

An illustrative list in clause (2) Rule 1 of Order XXXII A of CPC provides the category of cases wherein this order applies. It is as follows:

a. a lawsuit for matrimonial relief, such as one seeking a declaration of the legality of a marriage or the status of someone's marriage;
b. a lawsuit or other legal action to determine some person's legitimacy;
c. a lawsuit or other legal action involving the guardianship of a person or the custody of a minor or other family member who has a disability;
d. a lawsuit or proceeding for maintenance;
e. a lawsuit or other legal action regarding the legality or impact of an adoption;
f. a lawsuit or other legal action brought by a family member regarding succession, intestacy, or wills;
g. a legal action or case involving any other family-related issue in which the parties are bound by their own law.

The implication is that all the matters specified in the list are capable of settlement through mediation.

Commercial disputes

All commercial disputes can be mediated. Under, the Commercial Court Act, pre-litigation mediation is now mandatory for the commercial disputes except where urgent interim relief is required. The settlement arrived will have the same status as arbitral award under section 30 of the Arbitration and Conciliation Act, 1996.

The Supreme Court while deciding on the scope of the term commercial held, A disagreement over immovable property itself might not qualify as a commercial issue. However, if it is covered by sub-clause (vii) of Section 2(1)(c) of the Act, however, it is considered a commercial dispute viz. the agreements related to immovable property utilised solely in trade or commerce. It is important to interpret the phrase "used exclusively in trade or commerce" carefully. The word "used" refers to something that has been "really utilised"; it

cannot be "ready for use," "likely to be used," or "to be used." It must "actually be used".

Criminal cases

The ratio of the Supreme Court in *Afcons case* that mediation is not suitable for criminal prosecution is not absolute. The term proceeding in both CPC as well as Family Court Act implies that the family matters with allegations of crime can also be mediated. The mediation is permissible in prosecution under section 498A of the Indian Penal Code which deals with the offence of cruelty towards a married woman. Section 498A is a matrimonial as well as criminal dispute. In cases of matrimonial conflicts resulting from such problems, the Apex Court has advised mediation. The Supreme Court observed in the case of *K. Srinivas Rao v. D.A. Deepa*, a case involving Section 498A of the Indian Penal Code, that mediation, as a mechanism of alternative dispute resolution, has got legal recognition and directed all mediation centres to start making attempts to resolve matrimonial disputes at the stage before litigation.

Similarly, non- payment of maintenance to wife, children and parents attracts a penal action under the Code of Criminal Procedure, 1973, but nonetheless it is considered to be mediable. The settlement can be arrived by mediation even in domestic violence cases, unless it involves serious physical violence.

On the mediability of domestic violence case, the department of Women and Child Development (WCD) of the Government of Maharashtra issued a circular on 24th July, 2014 by which, among other things, it required that after the Domestic Violence Act case is filed in court and the judge issues instructions for counselling or mediation, the counselling or mediation can proceed, and other agencies cannot do such activities without the judge's directions. The Bombay High Court declared the circular unconstitutional. On the issue of prior filing of case before mediation it held that,

“(d) In the event where a woman has experienced serious physical domestic abuse, no joint counselling or mediation will be conducted. In these situations, the service provider—which may include the police, a counsellor, or an NGO—must immediately file a Domestic Incident Report (DIR) in accordance with Section 10(2)(a) of the DV Act and submit an application to the relevant Magistrate in accordance with Section 12 of the Act in order to request any of the reliefs made available by the DV Act. (e) In all other cases of DV the NGOs, Counsellors or the police, preferably through the Mahila Desk may undertake counselling of the woman and even joint counselling / mediation of the woman with her spouse / husband, family members

/ in-laws to settle the dispute amicably either by reconciliation or amicable separation."

Apart from it, minor criminal offences wherein law allows compounding can also be mediated. The compoundable offences are usually seen as private wrongs. For instance, the IPC's Sections 294, 499, 503, and 509 can be compounded. They permit a resolution that can be acquired through mediation. The Delhi High Court stated in the case of *Dayawati v. Yogesh Kumar Gosain* that even though there is no provision allowing the criminal court to refer the parties to alternative dispute resolution methods has expressly been provided in the statute, there is no prohibition against using ADR mechanisms for resolving disputes that covered by Section 320 of the Criminal Procedure Code. In addition, the court stated that if a mediation settlement is brought before a criminal court, the court cannot depend on the settlement and issue a civil judgement; rather, it can only convict or acquit the accused based solely on the evidence; if the case is compounded, the compounding will have the same effect as an acquittal under S. 320(8) of the Code of Criminal Procedure.

Even in non-compoundable offences there have been instances wherein the courts have quashed the criminal proceedings by exercising its inherent power under section 482 of the CrPC. The underlying point is that the idea of settlement is not alien to criminal law in India. In *K. Srinivas Rao v. D.A. Deepa*, the Supreme Court stated that in suitable situations, the criminal court should advise the parties to consider the prospect of settling through mediation while maintaining the rigour, effectiveness, and intent of the non-compoundable offence if the parties to the conflict are inclined towards it and there are chances of settlement. Only if the High Court determines that the settlement is fair and genuine in all circumstances, will it dismiss the criminal complaint. According to the court, such a course will be advantageous to those who sincerely desire to lay their problems to rest.

It must be noted that in most international jurisdictions serious criminal cases are not considered suitable for mediation. However, in one county in Kansas (US), court judges are acting as mediators to resolve serious criminal cases such as homicide, aggravated assault on a law enforcement officer, interference with an officer, child sex exploitation, drug possession, and criminal property damage. The judge mediator doesn't sit on trial and maintains confidentiality.

Consumer cases

As far as Consumer cases are concerned, the 2019 amendment promotes mediation by requiring District Commission to refer the matter to mediation if there exists an element of settlement unless the matter is declared to be non-mediable. Under section 101(r) Central Government has the power to provide by rules "the cases which may not be referred for settlement by mediation under sub-section (1) of section 37…" In exercise of its rule making power Department of Consumer Affairs vide Rule 4 laid down the category of non-mediable consumer cases as follows: medical negligence cases which resulted in death or grievous hurt; application for compounding (compromise) is pending; cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion; prosecution for non-compoundable offences; and cases involving public interest or interest of numerous persons.

Further, cases which are not specifically declared to be non-mediable, the consumer commission may deny the reference to mediation in cases where according to commission either the element of settlement doesn't exist or mediation will not be appropriate considering the circumstance of the case or the position of the parties.

The Mediation Bill 2023

The Mediation Bill seeks "to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost effective process and for matters connected therewith or incidental thereto." The Bill is yet to come into force as a law. The definition of Mediation in the Bill is similar to that in Singapore Convention. It does away with distinction between conciliation and mediation. Any settlement arrived by the party with an intervention of third party is termed as mediation under this Bill. The term mediation thus include, pre-litigation mediation, online mediation, community mediation, conciliation etc. The Bill adopts the definition of commercial as in Commercial Courts Act, 2015. Interestingly, the bill also provides for community mediation in cases of "any dispute likely to affect peace, harmony and tranquillity amongst the residents or families of any area or locality…"

The Mediation Bill applies wherein mediation is carried out in India and

(i) all or both parties regularly reside in India, are incorporated there, or have a place of business there; or
(ii) the mediation agreement stipulates that any conflict must be settled in as per the Mediation Act; or

(iii) there is an international mediation.

When "the Central or State Government, or agencies, public authorities, local authorities (inclusive of organisations governed or owned by Government), and corporations," are one of the parties to the dispute, the Mediation Bill does is not applicable. However, the Government or its agencies will be subject to the Mediation Bill when the dispute is of commercial nature. Further, the appropriate government may by notification can extend the application of the Mediation Act to resolve specific disputes through mediation wherein either government or its instrumentalities are a party.

Thus, unlike Singapore Mediation Act, 2017 which also binds the government, under proposed Indian law all the non-commercial disputes involving government and its instrumentalities are not mediable unless government by notification decide otherwise. Further, even in commercial disputes involving government and its instrumentalities, a prior written consent of the competent authority is required before signing a settlement agreement.

Section 6 of the Bill introduces the concept of subject-matter mediability by providing that mediation should not be carried out in respect of disputes which are listed in schedule 1. However, this limitation doesn't extend to court which may refer any dispute to mediation "relating to compoundable offences or matrimonial offences connected with or arising out of civil proceedings between the parties". But, settlement in such cases will not qualify as a decree as in other cases and further such settlement is to be 'considered' by the court.

A settlement agreement in violation of section 6 can be challenged before the court under clause 2 of section 28 which provides, "A mediated settlement agreement may be challenged only on all or any of the following grounds, namely:— (i) fraud; (ii) corruption; (iii) impersonation; (iv) where the mediation was conducted in disputes or matters not fit for mediation under section 6." While under Singapore law as well the court may refuse to record settlement in cases where the subject matter was non-mediable but, unlike Indian law it doesn't lay down a list of subjects which are not "capable of settlement." Schedule 1 of the bill describe disputes which are non-mediable.

Disputes may be non-mediable if they are barred specifically under any law. For example, as seen above, Notification under Consumer Act, which is in the nature of delegated legislation, specifically forbids mediation in certain matters. The cases involving allegation of serious

fraud, forgery coercion etc. are expressly declared to be non-mediable under the Consumer Act Notification and *Afcons* case (supra).

Then mediation is barred wherein one of the parties doesn't have capacity – legal, intellectual, psychological or physical. Therefore, when one of the parties in mediation is minor, deity, persons with intellectual disabilities, people with high assistance needs as a result of their disabilities, people with mental illnesses, and people who are mentally unstable.

Further, criminal prosecutions, claims against government for title declaration as well as cases wherein declaration will have effect in rem are also ousted from the scope of mediability. The matters expressly prohibited by law can't be mediated.

Complaints with respect to registration, discipline, misconduct issues against practitioners or professionals such doctors, lawyers, chartered accountants etc. can't be mediated. Disputes having effect on third party interests are non-mediable unless such parties also come on table.

Other matters which are declared to be non-mediable are:

i. Any proceeding under the National Green Tribunals Act, 2010.
ii. Taxation disputes
iii. Competition disputes involving investigation, inquiry or proceeding, under the Competition Act, 2002
iv. Electricity disputes wherein Tribunal under Electricity Act 2003 has jurisdiction
v. Energy disputes which falls under the jurisdiction of Petroleum and Natural Gas Regulatory Board or its appellate body.
vi. Land acquisition and determination of compensation.

V. NON-MEDIABILITY FROM COMPARATIVE PERSPECTIVE

This part discusses the categories of disputes which can't be mediated; specialized procedures akin to mediation; and cases which are mediable but, mediation is not advised in such cases.

Classification of non-mediability

The non-mediability of disputes can be classified into following categories:

i. Subject matter mediability

ii. Factual mediability
iii. Nature of remedy makes mediation impossible
iv. Nature of proceedings excludes the use of mediation
v. Express exclusion of disputes under certain Acts
vi. Due to the parties involved
vii. Prohibition on specific settlement terms
viii. Sovereign functions of the state

Subject-matter mediability

Mediation can't be used in cases wherein legal system prohibits certain subject matters to be settled through mediation. For example, serious criminal cases in most jurisdictions are non-mediable. Matters pertaining to taxation, election to public office, disciplinary proceedings are non-mediable. Disputes which affect national security also can't me mediated.

Factual mediability

Yet, there may be circumstances wherein the subject matter is mediable but, in the 'factual circumstances of the dispute' mediation is not a suitable tool. For example, matrimonial disputes are mediable but, wherein there is a history of spousal abuse, mediation may not be considered suitable. The courts in Australia must consider the exclusionary circumstances before referring the matter to mediation. For instance, the National Native Tribe Tribunal must evaluate the following for mediation referrals because it primarily deals with ownership and property issues (due to the significant aboriginal population). (i) the number of parties, (ii) the number of parties represented by the same agent, (iii) the time needed to reach an agreement, (iv) the size of the property, (v) the type of non-native title rights, and (vi) any other pertinent considerations. In the end, the courts have the discretion to decide these standards. Similar to this, Australian Family Courts established under the Family Law Act, 1975, have to take into account the following criterions (i) the level of equality, (ii) the potential for child abuse, (iii) the potential for family violence, (iv) the parties' emotional and psychological states, and (v) whether mediation is being utilised as a delay strategy or some other tactic.

The *factual* mediability may be determined by the court, mediator, institutions or even parties. In the Indian context, the courts in civil cases will assess the possibility of settlement as a precondition to mediation referral. Whether mediation should not be utilized because of power imbalance or because of history of abuse, is usually decided by the mediator.

Nature of remedy

As far as 'nature of remedy' test is concerned, there may be some remedies which can only be given by the court. A remedy for declaration of status. For example, a person can be declared insolvent only according to the process of law by the competent authority. Similarly, while terms of divorce can me mediated by the parties, the formal declaration of divorce can only be done by the court. The constitutional remedies such as mandamus to the public authority can only be ordered by the constitutional courts.

If the remedy sought will affect the world at large *(in rem)* or third parties, even then mediation is not permissible. For example, Rules framed under Consumer Act provides that "cases which involve public interest or the interest of numerous persons who are not parties before the Commission" are non-mediable. Usually disputes involving third party interests also can't be mediated unless third parties also become party to the mediation. For example, section 152 of the Motor Vehicles Act which deals with settlement between insurers and insured persons provides that, "No settlement made by an insurer in respect of any claim which might be made by a third party in respect of any liability of the nature referred to in clause (b) of sub-section (1) of section 147 shall be valid unless such third party is a party to the settlement."

Nature of proceedings excludes certain proceedings

The process of mediation may also not be suitable in certain kind of proceedings. For example, legislature as policy may exclude mediation at the appeal or review stage. Furthermore, the proceedings which might arise due to exercise of power "to to compel a person to answer questions, produce documents or appear before a person or body under a law…" can also be prohibited from mediation.

Express exclusion of disputes under certain Acts

The legislature as a matter of public policy can also state that mediation shall not be used with respect to proceedings under certain Statutes. For example, in Australia disputes under the Australian Citizenship Act 2007; the Migration Act 1958 etc. can't be mediated. In the Indian context, investigation, enquiry or proceeding under the Competition Act including proceedings before Director General, proceedings before the Telecom Regulatory Authority of India or Telecom Disputes Settlement and Appellate Tribunal, Proceedings before the Petroleum and Natural Gas Regulatory Board, Proceedings before the Securities and Exchange Board of India, and the Securities Appellate Tribunal etc., Land Acquisition proceedings are not considered suitable for Mediation.

Parties involved Some disputes can't me mediated because of the kind of parties involved. The dispute is not mediable if there is a history of severe physical abuse or one of the parties victimizes the other party, one party holds uneven bargaining power, or party is a vexatious litigant. Further, disputes involving parties who are minor, person with intellectual disability, person with disability having high support needs, persons with mental illness and persons of unsound mind are non-mediable.

Legislature as a policy may also suggest that if government or its agencies or bodies are a party then such disputes cannot be mediated. However, Singapore Mediation Act and Hong Kong Mediation Ordinance applies to government as well.

Further, any agreement to mediate between two or more parties would be inconvenient in circumstances where the issue or dispute impacts third parties' rights and interests. An effective and enforceable settlement shouldn't be made in the absence of third parties if such settlement affects their rights.

Prohibition on specific settlement terms
Some particular kind of settlements may also be prohibited by the legislature. For example, under Sexual Harassment at Workplace Act, monetary settlement can't be the basis of conciliation. Further, mediation can't be used to arrive at settlement terms which can't be enforced as court orders. Similarly in child custody mediations if the settlement term is not in the best interest of the child, then such settlement can't be recognized by the court.

Sovereign functions of the State
Mediation can't be used to resolve disputes where *lis* of dispute pertains to sovereign or public interest functions of the State. Matters pertaining to eminent domain, grant of pardon, taxation, legitimacy of marriage, police powers are example of sovereign function. The private adjudicatory process is barred in such matters. State has the monopoly to resolve such disputes.

Specialized procedure created by statutes which are akin to mediation
Some enactments also prescribe the specialized procedure through which such disputes must be resolved. These enactments are outside the scope of general framework on mediation in the country. For example, adjudication of industrial dispute by conciliation officer under the Industrial Relations Code, 2020; adjudication of dispute between film producer and cine worker by conciliation officer under

the Cine-workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981; conciliation of dispute between the Board and any State Government under the Brahmaputra Board Act, 1980, sexual harassment dispute under Prevention of Sexual Harassment at Workplace Act, 2013, have a specialized procedure through which such disputes must be settled under these enactments. Mediation Bill doesn't apply with respect to settlement mechanisms provided in these legislations. Likewise, under the Maharashtra Real Estate Regulatory Authority Act, MahaRERA Conciliation and Dispute Resolution Forum has been formed by the Chairperson to resolve the real estate disputes in an amicable manner by setting up conciliation benches.

Even in Australia, the proceedings in the Fair Work Act 2009; the Native Title Act 1993; the Family Law Act 1975 is excluded as they provide a specialized manner of resolving disputes.

Even in Hong Kong, Mediation referred to in section 11B of The Ombudsman Ordinance; Conciliation referred to in sections 6, 15 and 25 of the Labour Tribunal Ordinance; Mediation referred to in Part 2A of the Labour Relations Ordinance; The process described in section 17 of the Marriage Reform Ordinance; Mediation proceedings referred to in sections 32(3) and 33 of the Arbitration Ordinance etc., are excluded from the scope of the Hong Kong Mediation Ordinance.

The law permits settlement in all these statues with the intervention of the third party however the process and scope of mediation in these statutes varies from the regular mediation. Party autonomy is limited in these legislations. The common theme amongst the laws of India, Australia and Hong Kong is that these special mediation or conciliation procedures exist in for labour laws and family laws.

Cases where dispute is mediable but not advisable for mediation

There may be dispute wherein parties may conduct the mediation but due to some considerations they prefer the adjudication by courts. Some of these factors are:

a. the direction of a court is needed by law.
b. the case requires an authoritative interpretation of a statute.
c. there is need for a binding precedent.
d. there are governance issues relating to the responsibility and liability of the state, and the limits of state power.
e. the establishment, extension or implementation of a legal or social right is sought (eg cases of dowry, bonded labour, minority rights, prisoners' rights, environment protection, safety on roads and in workplaces, etc).

f. need for an urgent interim relief.

In child abduction cases, Guide to Good Practice on Mediation under Hague Convention has identified factors that affect the suitability of mediation in such cases. These factors are:

a. the parties' readiness to engage in mediation,
b. Whether one or both parties' opinions are too divisive for mediation,
c. signs of domestic violence and the severity of the abuse,
d. incapacity brought on by drug or alcohol abuse,
e. further signs of a serious power imbalance in negotiations,
f. signs of child abuse.

In circumstances where mediation would be futile, unproductive, and result in no outcome, it should not be adopted as a substitute for public forums.

V. Conclusion

As propounded by some all disputes under the sun are not mediable. There are limits on party autonomy and mediability of disputes at both domestic as well as international levels. The significance of mediability is both theoretical and practical. The relief can be denied by the court if settlement is not in accordance with applicable law and public policy. While in court referred mediation, the concerns of mediability will be less; it is important for parties opting for voluntary mediation to screen the dispute for feasibility to be settled by mediation. Such screening can also be conducted by the mediators or mediation service providers. Even in court referred mediation, the courts must be cautious to determine whether mediation is appropriate considering the circumstances of case and position of parties. The court must ensure that other party doesn’t use mediation to win time or for delaying the proceedings. Particularly, time may be a very crucial factors in parental child abduction mediation. The court must also ensure that vulnerable citizens such as minors or persons of unsound mind, victims of alcohol abuse or domestic violence, do not suffer because of automatic mediation referrals. These category of individuals may be especially prejudiced in cases of mandatory mediation.

It is very important that law gives clarity on the scope of mediability. Hong Kong law, Singapore law as well as Singapore Convention and UNCITRAL Model law merely state that if settlement agreement is not according to law or public policy then relief can be rejected. The Mediation Bill in India does an excellent job in this regard. The lack of

clarity over such issues, as experienced in arbitration regime, can result into undesirable litigation which is both costly and time consuming. Apart from Indian law only Australian law exhaustively states the non-mediable dispute.

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