Utilization of Alternate Dispute Resolution Mechanism (ADRM) for Effective Functioning of Construction Project

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Abstract—Dispute is one of the major factor which obstruct the successful completion of the construction projects. The construction industry undergoes from frequent disputes between all parties of construction contracts. Alternative dispute resolution is a process that can be used by parties to settle disputes for arriving at a claim by the legal court procedure. Alternative Dispute Resolution(ADR) relate to dispute resolution procedures that act as alternatives to litigation and are generally conducted with the help of a neutral third party. Negotiation, Mediation, Arbitration, Lok Adalat, Mini Trial, Conciliation, Expert Review and Dispute Review Board are various examples of Alternative dispute resolution methods. The research will be done using questionnaire survey with Contractors, Site Engineers, Consultants, Developers, Owners, Arbitrators and Lawyer with the objective of identifying factors affecting the selection of ADR method. At the end of the study as per the RII (Relative Important Index) and Mean Score techniques, the factors of the ADR selection method were analyzed and ranked accordingly and mean score for various ADR method were obtained. Where it has been found that the following factors are most common: Confidentiality, Overall Duration, Relative Cost, Flexibility in Issue, strategy and Agreement, Preservation of Relationships, Degree of Control by Parties, Degree of Control by neutral. The final selection model consists of a set of selection criteria, a set of mean scores and dispute resolution strategies. Mean score obtained for ADR methods according to factors.

Key words: Alternative Dispute Resolution Methods, Construction Dispute, Negotiation, Mediation

I. INTRODUCTION

Dispute is unavoidable in construction projects which arise from complexity and magnitude of works, poorly planned contract documents and execution of work, improper planning, financial problems and communication problems. Alternative dispute resolution mechanism is used to settle the disputes by worthwhile manner and accelerate manner, while encouraging long duration business relations for the parties involved in the dispute.

ADR is a less negative means of resolving construction disputes that may not involve court procedures. Alternative dispute resolution involves finding other alternatives which act as an alternative way for the litigation and settle the dispute. Alternative dispute resolution process is extensively suggested for lessen the court cases and give less costly and lesser negative means of justice, that is lesser legal and also lesser difficult procedure. Alternative dispute resolution involves not only the application of different methods to settle disputes, but also the selection of the procedure that is suitable to the appropriate dispute and for the involved parties.

II. LITERATURE REVIEW

Dispute settlement for the construction management has brought consideration and needful study. Most of researches concentrate primarily on problems like qualitative performance data, case studies of various disputes and average duration taken to settle a dispute, whereas, these research have not able to prepare a precise way for choosing the dispute settlement procedure. There have been some research containing various criteria for selection of strategy for dispute settlement. Kersulienne (2010), David (1988), York (1996), Cheung (1999), Brown and Marriott (1999) and Goldberg et al. (1992) all have done research to know various factors for selection of dispute settlement procedure. York’s research was main to involve most of criteria for choosing method for dispute resolution for construction project.

Whatsoever the project, it is concerned by criteria anticipated as essential for the clients involved in the dispute. Goldberg (1992) made a complete list of selection criteria which involve confidentiality, process of proceeding, third party and degree of formality. York (1996) display higher interest on degree of control by parties, confidentiality, flexibility in issue and strategy, preservation of relationship, cost, time and practical issues. David (1988) focussed on the human and social problems like preservation of business relationship, consensus and impartiality. Research completed by Cheung and Suen (2002), David (1988), York (1996), Goldberg et al. (1992), Hibberd and Newman (1999), Cheung (1999) and Brown and Marriott (1999) established a list of 16 choice factors. Additionally, their research requested 13 experts to fill a questionnaire querying them to choose at most five of the very crucial criteria for choosing a dispute settlement method from a list of 16 criteria. The experts include quantity surveyors, architects, engineers and solicitors who all retained leading directorial post in the construction industry. The five very crucial selection factors were preservation of the relationship, confidentiality, flexibility in issues and strategy, relative cost and overall duration. 61.5% of the professionals selected these selection factors as crucial.

III. FACTORS AFFECTING SELECTION OF ADR METHOD

A. Overall Duration

Overall duration is calculated by time seized to settle the arisen dispute in the construction project. It is not easy to examine amount of time taken to resolve the dispute because it rely upon on various criteria like complexity and involved disputants.
B. Relative cost
Relative cost is the total expense encountered in arriving a dispute resolution. The processes are less complicated and the relative cost incurred is less than those incurred during arbitration and litigation.

C. Flexibility in issue, strategy and agreement
ADR mechanism is an aggregate term representing dispute settlement methods like dispute review board, mini-trial and mediation. These methods are considered ‘flexible’ due to rigid juridical laws are not practiced and the elements of process can be made suitable to obtain the demands of the disputing parties participating in the dispute resolution process.

D. Confidentiality
An impact element of arbitration and mediation in which parties involved in a dispute are not granted to share any of the information to the public except by mutual approval of the disputing parties. These methods are selected whereas parties wish to keep the matter confidential.

E. Preservation of relationships
Long relationship is a main feature in the business management. Positive relationship is settled on the ground of common interests, mutual respect and trust. Good relationship wants struggle and the guarantee of the parties engaged to preserve a positive relationship.

F. Degree of control by parties
Disputing parties have more control over the arrangement and content of the procedure in Alternative dispute resolution rather than in formal legal system and to a lower degree to arbitration. In mediation process, the impartial person serves as a coordinator. Disputing parties have a great participant role in deciding the outcome.

G. Degree of control by neutral
In Alternative dispute resolution procedures, the impartial person has a role of responsibility to the disputing parties and to perform duty of no partiality should be done during guiding parties in coming at a resolution.

H. Binding decisions and enforcement
A resolution made using negotiation or mediation process without using the recorded agreement is not binding. In arbitration, arbitrator made arbitral award and in court, judges gave decisions which are binding and enforceable.

I. Voluntariness
In Alternative Dispute Resolution method, nothing is binding on the disputants until they agree upon an enforceable resolution agreement. Therefore, the disputants can leave at any moment during the procedure without interfering with their legal rights.

J. Neutrality and Fairness
In dispute settlement procedure, the impartial person has a role of responsibility to the disputing parties and to perform duty of no partiality should be done during guiding parties in coming at a resolution. He should help the disputing clients to reach a resolution and should made attempt to remove biases between them.

K. Knowledge in Construction
If the matter contains more technical problem, it is advisable for a neutral third person to have at least some relevant technical information.

L. Consensus Agreement
A neutral third person should assure that the procedure itself is managed in a system that is non-adversarial. She or he should ensure that the disputants are familiar with each one’s demands and should action as a coordinator, leaving all the big choices to the disputants.

M. Creative Agreement
Creative agreement is precisely associated to the inherent character, experience and skills of a neutral third person. She or he should able to arriving at a resolution that can satisfy both parties’ needs depending on the nature and needs of the disputants.

N. Enforceability
The drafting skill of the facilitator can play an important role in assisting the parties to draw up a settlement agreement, which should be drafted to reflect the true intention of both parties. As each dispute is unique, the facilitator should be prepared to come up with solutions that the parties are willing to agree upon.

O. Speed
It is difficult to calculate how long a dispute will take as each is unique. The duration of an ADR process can be measured in days or weeks, rather than months or years, as can be the case with litigation or arbitration.

P. Conflict Intensity
This might occur where the parties adopt a competing style of conflict behaviour. Disagreement with the way claims are being handled may be used as a means of securing higher levels of favourable and fair outcomes.

Q. Lawyer’s influence
In the dispute settlement process, lawyers are possibly to involve by contractors, especially where dispute contain a legal matter.

R. Confidence in ADR
Very few contractors have actual experience of ADR. Many contractors and subcontractors who had never used ADR declared an interest in doing so. The findings showed that, when considering features for which litigation and arbitration are heavily criticized, i.e. cost, speed and confrontational approach, contractors view ADR positively, but where there is no direct comparison.

S. Knowledge of ADR
The use of ADR would indicate a weakness in one’s case, compromising one’s position in the overall picture of the dispute. ADR would reveal too much to the other side, either of strategy or of substance. ADR would jeopardize one’s position in subsequent litigation/arbitration by delaying and disrupting it. ADR is non-binding, and this is a weakness.
T. Cultural Difference
In a practical sense, they should at least be able to recognize the expectations and behaviour of others.

U. Power Imbalance
The method that are more user-friendly and adaptable, and are therefore more appropriate in international projects context.

V. Legal system
Parties want to resolve the dispute through legal system to avoid damage to someone’s reputation and conflicts of law.

IV. ADR METHODS

A. Negotiation
Negotiation is a form of communication between two or more persons for the purpose of coming to a mutually agreeable situation. There are certain techniques of negotiation such as competitive bargaining, cooperation bargaining and principled negotiation which are different facets and styles of negotiations. It is a field process which is exercised most. It is more closest to the parties, flexible and party directed and informal. Those who work in negotiation professionally are called negotiators.

B. Mediation
Mediation is a dispute resolution process where a mediator facilitates the parties in arriving at a peaceful settlement through a structured process involving different stages which are introduction, joint session and agreement. This is an unofficial technique that has an impartial person without the potential to select or mostly to enforce a resolution that clients use to settle a dispute. Mediation process is non-binding and voluntary, yet, the parties can involve into an agreement that is binding as a decision of mediation process. This is a method which is geared to aid them in coming at fair settlement to the dispute and confidential. The main advantage due to mediation process is its flexibility.

C. Arbitration
Arbitration is an adjudicatory ADR mechanism wherein a private judge called arbitrator selected by the parties adjudicates their disputes on merits through a simple private procedure culminating into a binding award which is called arbitral award. The procedure is guided by the Arbitration and Conciliation Act, 1996 in India. An arbitration process started with one of the parties initiating the process by requesting the authority as per agreement for appointment of arbitrator and closes with publishing of arbitral award by the arbitrator.

D. Conciliation
Conciliation is a confidential, unofficial method where impartial person assists clients to come at a resolution of dispute. It is a method where settlement of dispute is obtained by voluntary agreement or compromise. In Conciliation, disputing parties, with the help of the impartial person, remove the dispute matter encountered, establish more alternatives and come at a resolution. It doesn’t give an award like arbitral award. The disputing clients have power to reject or accept the resolution of the neutral third party called conciliator. The conciliator is mostly a Government officer whose resolution includes some suggestions.

E. Lok Adalat
The Lok Adalat was a component of the ADR method to remove excessive duty on the legal system with waiting issues and to deliver gratification to the disputing parties who were in a line to get equity for the matter. Lok Adalat is managed by a retired judge as the Chairperson and with couple of persons, an advocate and a welfare person. The cost of Lok Adalat is nothing. In the court, for the earlier filed case, the money paid will be given back to the parties if the issue is resolved through this method. The major situation necessary to settle a dispute in the Lok Adalat is that the disputing clients should be ready to accept the resolution. The outcome of the Lok Adalat is irrevocable to the disputing parties and decision is efficient to execute through court procedure. Opposing of the decision of Lok Adalat can’t be done.

F. Mini Trial
When first client requests the second client for mini trial by sending a drafted request finding the matter of dispute, we can say that the procedure of mini trial is started. In this method, first, clients explain their issues and then the impartial adviser discuss the matter with the leading members of the clients. Impartial adviser can examine the issue with the professionals if needed. Then, neutral advisor expresses his perspective of the corresponding weaknesses and strengths of each party involved in the dispute. He also answers the doubts and questions the leading members may ask. The method benefits the clients to get an excellent knowledge of the matter. The leading members are then wanted to get in a conversation with an aim to coming at resolution of dispute.

G. Expert Review
The contracts containing long duration and complicated construction works, use the method of assigning “Experts” for dispute settlement. These “Experts” are civil or construction engineers who are feasible at the construction site. Within acceptable time, they are expected to resolve disputes among the clients. Likewise, “Experts” can be selected for the settlement of disputes rising under different contracts also. Experience and eligibility of “Experts” rely upon dispute and type of the contract.

H. Dispute Review Board
DRB is frequent in long duration contracts containing same type contracts and construction works. Settlement of disputes by DRB method is speedy, less expensive and bypass interruption of the construction work. Aferwards the contract is made, the DRB is mostly set up instantly. The DRB commonly comprise of three persons. DRB should not comprise of one and only person arbitrator. Next, the contractor and the employer, both have a power to appoint one person each in the DRB. These persons of the DRB elected by the Contractor should be approved by the Employer and the person elected by the Employer should be approved by the Contractor. The third person of the DRB is elected by the two elected persons and he should be approved by the involved parties in the dispute.
V. RESEARCH OBJECTIVES

- To study awareness regarding alternative dispute resolution (ADR) methods.
- To identify various factors affecting selection of specific ADR method.
- To identify the best method suitable for various conditions.

VI. RESEARCH SCOPE

- The data for this study will be collected through questionnaire survey from stakeholders like Consultants, Contractors, Site Engineers, Developers, Owners, Arbitrators and Lawyers.
- The research work will be limited up to construction industry of south Gujarat and Daman region.
- Data analysis will be done through RII Method (Relative Important Index) and MSM (Mean Score Method) technique.

VII. FINDINGS

Data analysis was done through the RII and MS. Total 348 questionnaires were distributed to Contractors, Site Engineers, Consultants, Developers, Owners, Arbitrators and Lawyers out of that 232 questionnaires were received.

<table>
<thead>
<tr>
<th>ADR Method</th>
<th>AWARENESS IN %</th>
</tr>
</thead>
<tbody>
<tr>
<td>NEGOTIATION</td>
<td>100</td>
</tr>
<tr>
<td>MEDIATION</td>
<td>87.93</td>
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<tr>
<td>ARBITRATION</td>
<td>55.60</td>
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<tr>
<td>CONCILIATION</td>
<td>40.95</td>
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<tr>
<td>LOK ADALAT</td>
<td>91.38</td>
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<tr>
<td>MINI TRIAL</td>
<td>36.21</td>
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<tr>
<td>EXPERT REVIEW</td>
<td>54.31</td>
</tr>
<tr>
<td>DISPUTE REVIEW BOARD</td>
<td>45.69</td>
</tr>
</tbody>
</table>

Table 1: Awareness regarding ADR methods

A. Relative Important Index Technique

The procedure used in analyzing the results was aimed at establishing the relative importance of the various Alternative Dispute Resolution Strategy selection factors by giving rank to the factors by RII technique. The questionnaire gave each respondent an opportunity to identify the factor that was likely to ADR strategy selection by giving the response “Very High Important (5), High Important (4), Moderate Important (3), Less Important to Very Less Important etc.

<table>
<thead>
<tr>
<th>FACTORS</th>
<th>RII</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidentiality</td>
<td>0.8534</td>
</tr>
<tr>
<td>Overall Duration</td>
<td>0.8474</td>
</tr>
<tr>
<td>Relative Cost</td>
<td>0.8457</td>
</tr>
<tr>
<td>Flexibility in Issue, Strategy and Management</td>
<td>0.8431</td>
</tr>
<tr>
<td>Preservation of Relationships</td>
<td>0.8103</td>
</tr>
<tr>
<td>Degree of Control by Parties</td>
<td>0.6491</td>
</tr>
<tr>
<td>Binding Decision and Enforcement</td>
<td>0.6069</td>
</tr>
<tr>
<td>Lawyer’s Influence</td>
<td>0.5793</td>
</tr>
<tr>
<td>Neutrality and Fairness</td>
<td>0.5767</td>
</tr>
<tr>
<td>Degree of Control by Neutral</td>
<td>0.4845</td>
</tr>
<tr>
<td>Legal System</td>
<td>0.4647</td>
</tr>
</tbody>
</table>

Table 2: Relative Important Index(RII) for factors which are important form stakeholder’s point of view

B. Mean Score

In this method of analyzing data, for each ADR strategy selection factors mean score for various ADR method is calculated for ranking of ADR method according to the factors. The questionnaire gave each respondent an opportunity to enter score for various ADR method according to factors by giving the score “10 to 110”.

<table>
<thead>
<tr>
<th>FACTORS</th>
<th>Mean Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidentiality</td>
<td>93.69</td>
</tr>
<tr>
<td>Overall Duration</td>
<td>93.40</td>
</tr>
<tr>
<td>Relative Cost</td>
<td>94.57</td>
</tr>
<tr>
<td>Flexibility in Issue, Strategy and Management</td>
<td>86.47</td>
</tr>
<tr>
<td>Preservation of Relationships</td>
<td>85.66</td>
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<tr>
<td>Degree of Control by Parties</td>
<td>70.94</td>
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<td>Binding Decision and Enforcement</td>
<td>40.03</td>
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<tr>
<td>Lawyer’s Influence</td>
<td>38.57</td>
</tr>
<tr>
<td>Neutrality and Fairness</td>
<td>33.10</td>
</tr>
<tr>
<td>Degree of Control by Neutral</td>
<td>27.67</td>
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Table 3: Mean Score for factors
<table>
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<tr>
<th>Legal System</th>
<th>22</th>
<th>28</th>
<th>48.0</th>
<th>37.9</th>
<th>26.9</th>
<th>21.2</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>97</td>
<td>8</td>
<td>34</td>
<td>24</td>
<td>4</td>
<td>5</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 3: Mean Score of ADR methods for important factors

VIII. CONCLUSION & RECOMMENDATION

Study has manifested some conclusions like:

- Dispute resolution has been identified as one of the key areas that require improvement in construction industry.
- The use of ADR processes in construction is an attempt to overcome the shortcomings of litigation.
- It has been found that the following selection criteria are most common (from prospective of all respondents): Confidentiality, Overall Duration, Relative Cost, Flexibility in Issue, Strategy and Agreement, Preservation of Relationships
- The respondents considered that negotiation and mediation are preferred options.
- Negotiation is usually the first attempt to solving any dispute, it sometimes could waste time and consequently money without reaching a satisfying solution.

Begin with awareness of the concept, requirement, importance and benefits of ADR need to be spread amongst the masses so as to foster the development of a collaborative attitude, a problem-solving approach and settlement culture amongst the masses as it is most important to revolutionize the mindest of people. Parties to a construction dispute should first try negotiation, but if negotiation fails, the disputants must consider the factors that created the dispute. The features of the methods employed should be appreciated by users in order to improve the actual practice and to obtain the desired benefits at the end of the proceedings. The Lok Adalat system should be further improved and the endeavour should be to organize more and more Lok Adalats, ensure greater participation, reduce formalism, spare more time and personalized attention thereby ensuring quality justice through Lok Adalats. Courts should provide comprehensive multi door alternatives to disputants under a single roof ranging from litigation to arbitration to mediation and other ADR mechanisms and develop court annexed ADR centres. There is a need to develop infrastructure for establishment of a comprehensive ADR system.

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