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STUDY OF ALTERNATIVE DISPUTE RESOLUTION IN CONSTRUCTION FIRMS

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***Abstract**: This study assessed the dispute resolution methods used in the Indian construction Industry. Arbitration, conciliation and mediation are the most frequently used dispute resolution methods in the construction industry. A literature review focused on arbitration, conciliation and mediation in the construction industry. The research concluded that for alternative dispute resolution (ADR) to be effective in solving disputes in the local construction industry, mediators, arbitrators and conciliator with knowledge of the construction industry should be appointed. In terms of its characteristics, ADR should be the best option to resolve construction disputes. However, it is not being fully utilised due to the characteristics of dispute resolution itself and the absence of an appropriate framework to guide the disputing parties on the overall Process. The literature review on the ADR developments and their effectiveness focused only on South Africa. This study provides a basis for using ADR effectively in the construction industry. The findings are of value for clients, contractors and consultants.*

Keyword: **Alternative dispute resolution,arbitration,concilliation,mediation,construction**

1.INTRODUCTION:

Alternative dispute resolution (ADR) encompasses a range of procedures other than litigation which are

Designed to resolve conflicts. In the past few decades the use of ADR has become more prevalent within both international and domestic contracts. Alternative dispute resolution mechanisms in the construction industry have wide application and disputing parties' reasons for adopting ADR are many and varied. However, the main reasons are that the costs of litigation are prohibitive and that it takes a long time to settle disputes or come to a ruling hence the parties in dispute and their advisers are now considering alternative methods to resolve disputes. The alternative methods are a realistic alternative to litigation and are cheaper and quicker methods of dispute resolution which do not so easily lead to a breakdown in the working relationships between the parties. Alternative dispute resolution techniques fall into two discrete types, i.e. those which seek to persuade the parties to settle and those that provide a decision. Where a decision is given then such a decision may have binding effect or may simply be a recommendation that the parties can accept or ignore. Recently a number of hybrid forms of ADR have emerged. For instance there has been a growth in med-arb, a

process which incorporates both mediation and arbitration and current scenario online arbitration also in use. The essence of ADR is to resolve conflict differences or disputes that exist between parties. The ADR
process seeks to resolve these differences in two ways, namely:
Where the ADR process provides the parties with a decision, the process is about establishing rights and obligations.
Where the process is facilitative, then its purpose is about the acknowledgement and appreciation of differences.
The aim for the parties must be to establish the correct process in order to resolve the dispute.
Construction disputes are fairly common, although they vary in their nature, size, and complexity

2. RESEARCH METHODOLOGY:

A two-stage methodology was conducted to achieve the research aim, these are:

2.1. Stage 1:-Identifying the relevant literature material

The literature review process started by looking into primary and secondary sources. The primary literature sources included refereed journals, refereed conferences, dissertations/theses, occasional papers and government reports. Secondary sources included text books, trade journals, newspapers and magazines. As a result number of ADR related articles were identified and for the purpose of this paper, the references listed below were selected for discussion as they directly fit the aim and the conference theme.

2.1. Stage 2 – Systematic note-taking and appraisal

At this stage, the recapitulation of the literature was sifted and a literature file was built. The main topics that were reviewed in this research are what is ADR? , mediation, conciliation, meb-arb, lok adalat, Early neutral evaluation, Expert determination, Mini trial and case study on arbitration and mediation.

3. CRITICAL APPRAISAL OF MODERN ISSUES RELATED TO ALTERNATIVE DISPUTE RESOLUTION CONSTRUCTION FIRMS.

3.1. Dispute- Civil dispute occur when a person's rights have been infringed or an individual has been injured as a result of another person's action or inaction

3.2. Arbitration-Arbitration is a procedure whereby both sides to a dispute agree to let a third party, the arbitrator, decide. In some instances, there may be a panel. The arbitrator may be a lawyer, or may be an expert in the field of the dispute. They will make a decision according to the law. The arbitrator's decision, known as an award, is legally binding and can be enforced through the courts.

3.3. Mediation-Mediation is a way of settling disputes in which a third party, known as a mediator, helps both sides to come to an agreement that each considers acceptable. Mediation can be 'evaluative', where the mediator gives an assessment of the legal strength of a case, or 'facilitative', where the mediator concentrates on assisting the parties to define the issues. When a mediation is successful and an agreement is reached, it is written down and forms a legally binding contract, unless the parties state otherwise

3.4. Conciliation-Conciliation is a procedure like mediation but in which the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in

suggesting possible solutions to help achieve an agreed settlement. The term 'conciliation' is gradually falling into disuse and the process is regarded as a form of mediation. It remains, however, a specific process available under various Institution of Civil Engineers' contracts.

3.5 Med arb-Med arbitration (med arb) is a combination of mediation and arbitration. The parties agree to a mediation initially but, if that fails to achieve a settlement, the mediator takes on the role of arbitrator, with powers to make a legally binding award. The same person may act as mediator and arbitrator in this type of arrangement.

3.6 Mini trial-Mini trial, also known as executive tribunal, in which each party, often through its legal advisers, makes a presentation of its case to a 'mini trial Panel'. An abbreviated version of the discovery process may have taken place in advance of the minitrial.The panel generally consists of three members – a management executive from each party (with sufficient authority to reach a settlement), and a third party neutral who may act as a mediator or adviser. The executive members usually have not been involved in the particular dispute. After the submissions have been made, the executives seek to negotiate a settlement. The role of the third party neutral may vary. They may act as a mediator or may act as an adviser, assessing objectively both the facts and the merits of the case and advising on the most appropriate solution.

3.7 Expert determination-Expert determination is a process in which an independent third party who is an expert in the subject matter is appointed to decide the dispute. The expert's decision is binding on the parties

3.8 Lok Adalat-The term Lok adalat means people's court. Organized by Legal Services Authorities/ Committees, constituted under the Legal Services Authorities Act, 1987.Based of the principle of Panch parmeshwar of Gram panchayat.In this type selected person which have wide experience of village or society listen dispute causes and conciliated problem. It is not binding Process and voluntary.

3.9 Negotiation-Two parties discussing and compromising to obtain a greed solution

Usually carried out without legal representatives, but party can takes their own legal representation to assist Negotiation is not binding.

4. CASE STUDY ON ARBITRATION AND MEDIATION

4.1 Project: Expansion of the wastewater treatment plant in karchelia.

Contract Type: Firm-fixed priced based on drawings prepared by R.C.Shah

Contract Start Date: November, 2013

Contract Completion Date: November 15, 2014.

Actual Completion Date: March 20, 2015

Liquidated Damages Clause: 20000 rupees per day

R.C.Shah he encounter soft soil at site so, shed down the slop and this happen due to lake of awareness of city unanticipated soil condition. City claim work is done as per specification so, liquid damage occur. April, 2016 both party ready to follow arbitration Arbitrator listen both party and after 8 days give award R.C.Shah was not entitled to additional compensation or a time extension under the differing site conditions clause because Jones had failed to establish the conditions at the site were "an unknown physical condition, were of an unusual nature, or that conditions differed materially from those ordinarily encountered. " The arbitrator further ruled the City was entitled to recover liquidated damages.

4.2 Project: Construction of one school building and renovation of an adjoining school building at a university in New York City.
Contractor - Monetary claim for lost labor productivity because of excessive change orders, stacking of trades, defective drawings, and poor planning by respondent's construction manager.
The University - The contract contained a 'No Damage for Delay' clause
Amount of Dispute: $1,000,000 (approximately)
Initial Mediation opening:
Both sides made summary presentations. The contractor's claim consultant put on a dog-and-pony show describing their lost productivity claim. The University's attorney responded with one statement, "No Damage for Delay means no damages, period.
Initial private meeting:
University's attorney was not a construction attorney so the mediator had to explain that lost productivity claims in construction are valid. It was important for the mediator to do this in a delicate manner so as to develop and maintain trust and respect
The mediator had to tactfully. convince the contractor that they would need to come down from their initial position.
Second private meeting:
Mediator explain to university needed a better understanding of construction law, case precedents, and the concept of lost productivity. A review of the project files indicated frequent changes which created contractor inefficiency
Meet with contractor and know excessive changes, defective drawings, hidden conditions, poor performance by other contractors, and a construction manager who created stop and go conditions which delayed the project eight months
Second mediation meeting:
After the debates 'settlement range' was proposed which the contractor agreed to. A private meeting with the University revealed they accepted the legitimacy of lost productivity and were no longer so confident in the No Damage for Delay Clause defence.
The University made an offer which was 1/3 of the low figure of the mediator's settlement range
Final mediation meeting:
The University doubled it offer, but was still not at the low end of the range acceptable to the contractor. The mediator presented it to the contractor and it was rejected; however, the contractor wanted to keep trying. A few weeks later the University made another offer which was at the bottom end of the range and was accepted by the contractor

5. CONCLUSION

ADR is to a certain extent, effectively used in contracts in the construction industry.Mediation is the most frequently used method in resolving disputes in the construction Industry. The majority of construction participants has a moderate knowledge of ADR methods and experiences the methods as not being flexible and somewhat too complex. Apart from the mediation, Conciliation and arbitration, other forms of ADR are also used in the construction industry, such as the negotiation, med-arb, and reconciliation. The majority of respondents would prefer the inclusion of the adjudication as the priority in resolving dispute before arbitration.

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