

REVIEW ON ALTERNATIVE DISPUTE RESOLUTION STRATEGY SELECTION

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Abstract: Dispute is one of the major factor which obstruct the successful completion of the construction projects. Alternative Dispute Resolution 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. The data analyzed by the use of Relative Important Index(RII) method to achieve the research objectives.

Keywords: Alternative Dispute Resolution, Arbitration, Construction Project, Dispute,

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. 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 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. Kersuliene (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 choice 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. ALTERNATIVE DISPUTE RESOLUTION METHODS

The various methods of ADR are as follows:

A. Negotiation: Negotiation is form of communication between two or more persons for the purpose of coming at 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 the 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. Afterwards 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.

IV. CRITERIA FOR SELECTION OF ADR METHOD

The various selection criteria are as follows:

- 1. 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.
- 2. 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.
- 3. 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.
- 4. 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.
- 5. 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.
- 6. 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.
- 7. 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.
- 8. 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.
- 9. 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.
- 10. Lawyer's influence:** In the dispute settlement process, lawyers are possibly to involve by contractors, especially where dispute contain a legal matter.
- 11. Legal system:** Parties want to resolve the dispute through legal system to avoid damage to someone's reputation and conflicts of law.

V. CONCLUSION

- Dispute settlement has been considered as main area that need significant enhancement in the construction project.
- Settling construction dispute is a difficult work, specifically when the feasible sources are finite and the dispute is of a complicated type. Precise choice of an Alternative dispute resolution strategy is demanding for management of dispute.
- Due to an extended and costly legal formal process, the construction industry is inspired to practice Alternative dispute resolution procedures to reduce total cost and the overall time wasted on dispute.
- The various criteria for selection of ADR strategy identified are: Binding decision and enforcement, Confidentiality, Degree of control by the third party neutral, Degree of control by parties, Flexibility in issues, strategy and agreement, Lawyer's influence, Legal system, Neutrality and fairness, Overall duration, Preservation of relationship, Relative cost.

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