

Reviewing the Possibility of Incorporation of Mediation Method for Settlement of Contractual Disputes in the Construction Industry of Sri Lanka

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Abstract— It is crucial to have an effective Alternative Dispute Resolution (ADR) method in the construction sector since disputes adversely affect the performance of construction projects. Studies on ADR practices in Sri Lanka denote that negotiation and adjudication are the preferred and initial ADR methods. Previous studies indicate that arbitration is the most popular construction dispute resolution method despite its disadvantages. Research had a qualitative approach where data collection through 21 semi-structured, expert interviews was analysed via content analysis. The findings indicate that mediation is an effective ADR method because effective outcomes such as cost-effectiveness, time effectiveness, flexibility, and maintenance of relationships could be achieved. Hence mediation could be recommended as the most appropriate initiative as well as throughout ADR method to be attempted rather than adjudication or arbitration. Mediation is recommended here as the most desirable approach to resolve disputes without affecting the relationship between the parties. This study revealed that a limited awareness of mediation within the Sri Lankan construction industry has arisen due to lack of detailed knowledge among industry stakeholders. This was due to a lack of emphasis on construction contracts and the disputant parties' mentality. This had a considerable impact on the limited use of mediation in Sri Lanka. Researchers and practitioners can use the results of this study to understand mediation practices and make suggestions on how to overcome the issues to achieve effective mediation outcomes.

Keywords— Mediation, Alternative Dispute Resolution, Construction Industry

I. INTRODUCTION

Construction projects are defined as activities that have a timeframe from the inception of the process to its completion and involve a large number of parties that, however temporary, must cooperate. Construction work is a difficult process that can confuse even the most complicated management systems, necessitating the coordinated activity of a task force that has been temporarily established.

Conflicts are unavoidable in the construction project environment because of stakeholders' diverse perspectives and frequent competing goals. When the parties to a contract fail to manage a conflict, it turns into an unresolved circumstance and eventually a dispute (Chong & Zin, 2012). Conflicts between any of the contracting parties can lead to disputes, which can have a disastrous impact on construction projects by leading to cost overruns, delays, and loss of productivity (El-Sayegh et al., 2020). Unfortunately, this circumstance has created a negative perception of the construction industry as being ineffective, confrontational, and adversarial (Jayalath, 2018). In the construction sector, disputes have grown to be one of the most serious issues because they disturb the working environment and divert resources from the main goal; which is to deliver on time, on budget and in accordance with the required quality standards. As a result, using Alternative Dispute Resolution (ADR) techniques to settle construction conflicts has grown in popularity. ADR can be mentioned as voluntary act that parties involved in the contract can choose to use to settle disputes outside the court (Jayasena & Kavinda, 2012). Gunasena (2010) stated, the term "Alternative Dispute Resolution" refers to any official or informal process by which parties can resolve their disputes outside of court. Further the above authors describe various benefits of ADR, including flexibility, privacy, cost benefits,

informality, minimal interparty hostility and time savings. ADR procedures are well-structured, formalized and supported most of the time by a neutral third party from outside the dispute (Abeynayake & Weddikkara, 2014). Informed by their inherent merits especially those related to costs and time, ADR approaches are becoming common in settling construction project disputes (Kirimi & Wanjohi, 2019). According to Gunasena (2010), it is stated that rather than cost, time and fairness are the important factors in dispute resolution. As ADR techniques utilized in the construction industry; negotiation, mediation, adjudication and arbitration can be listed out. Mediation, in which a mediator, who is an impartial third party, facilitating the parties to a disagreement in coming up with a solution that all parties may accept.

The aim of this research is to reviewing the possibility of incorporating of mediation method for settling of contractual Disputes in the Construction Industry of Sri Lanka. Based on all this foregoing, this research paper was formulated under the following objectives.

1. To identify the current practice of dispute resolution methods in the Sri Lankan Construction Industry.
2. To review the mediation as an ADR method and its effect on settlement of construction disputes in Sri Lanka.
3. To investigate issues on mediation method and causes behind issues in construction mediation practice in Sri Lanka.
4. To explore the possibility of adopting mediation as an effective ADR method for construction disputes in Sri Lanka.
5. To propose suitable recommendations for the effective implementation of the construction mediation method in Sri Lanka.

Despite Sri Lanka's long history of community mediation in village councils, when adults and monks served as mediators, mediation was only made legally official in Sri Lanka in 1988 with the passage of the Mediation Boards Act. The Commercial Mediation Centre of Sri Lanka Act No.44, which was passed in 2000, created the Mediation Centre of Sri Lanka. According to Section 3 of the Act, this centre's duties include conducting mediation, encouraging parties to adopt mediation as a means of settling commercial disputes and promoting the wider use of mediation in the resolution of commercial disputes. Unfortunately, this mediation centre is not functioning at the moment. Although Dispute Adjudication Board (DAB) and arbitration are included in the normal dispute resolution clause in the contract, both have problems when used in the Sri Lankan setting. Inadequate knowledge, attitudes of the parties, lack of competent

adjudicators, lack of a legislative framework to enforce the decision and the notion that it is expensive in Sri Lanka (Abeynayake & Weddikkara, 2012). "The main criticism is that arbitration has become too similar to court procedures- the very evil that was sought to be overcome by the new act" (Kanag- Isvaran, 2011). The aspiration of the Employer, the Contractor and the beneficiaries of the construction projects is to see the timely completion of work. Realizing the causes for delays and consequent disputes, lawmakers and drafters have taken the maximum effort to shape up clauses and disputes. Surveys reveal that protracted disputes as the foremost reason for delays. In these circumstances, industry experts are vested with a pivotal role to play in harmonizing the situation. Communities across borders have been experiencing the novelties like commercial mediation in the resolution of disputes.

II. LITERATURE REVIEW

A. *Litigation as a dispute resolution method*

The most common way of resolving disputes is court litigation. And in many cases, it's the best choice as well. However, there are alternatives that, depending on the needs and interests of the parties, might be more suitable. Litigation is the process of taking a dispute to a court of law. If parties cannot agree between themselves about the fair and proper outcome of a dispute, they will present their respective cases to a court for its judgment. It is a broad term that describes a long and sometimes complex process.

B. *ADR as a dispute resolution method*

Parties are legally binding to the judgment delivered by the court in traditional litigation. Given the recognition of a number of drawbacks in litigation, such as cost, longer time commitment, stress, rigidity and formality of court proceedings, as well as a limited range of claims and remedies (Abeynayake & Weddikkara, 2012). The United States construction sector started looking for alternatives to litigation because it incurred a huge cost to resolve construction issues through litigation. According to Ashworth and Hogg (2002), evolution of Alternative Dispute Resolution methods originated in the USA and was gradually adopted in the UK United Kingdom) in the 1980s. ADR refers to the different ways people can resolve disputes without a trial resorting to adversarial court proceedings. This statement was supported by Wimalachandra (2007) stating that ADR as any form or procedure, whether formal or informal, whereby parties can resolve their disputes instead of litigation before courts of law. Factors affecting to choose of ADR methods rather than litigation can be listed as overall duration, relative cost, flexibility in issues, strategy and agreement, confidentiality,

preservation of relationship, degree of control by parties, binding decision and enforcement, and degree of control by the neutral third party (Illankoon et al., 2022).

C. Dispute resolution method common in standard forms of conditions of contracts

For national competitive bidding contracts, the Institute for Construction Development and Training (ICTAD) 2007 standard bidding document is commonly used in Sri Lanka, while for international competitive bidding contracts, the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) 1999/2010/2017 conditions of construction contract are used. There are clauses in contracts that allow for the use of different types of tiered ADR, including arbitration, Dispute Adjudication Board (DAB), and adjudication. ICTAD has proposed “ad-hoc” Dispute Adjudication Board as the means of dispute settlement in the Standard Bidding Document (SBD) and in ad-hoc DAB, even if the board is mentioned at the first stage, they will not be called upon until a dispute has developed (Abeynayake & Weddikkara, 2014). In the Sri Lankan context Clause No.19 of SBD 02 and Clause No.14 of SBD 03 is on Dispute Resolution.

D. Mediation as a new trend in the world

Among widespread literature on the theme, definitions are abundant. Definition of Hon. Justice David Brewer (2019) is cited below as it is comprehensive and covers all characteristics of the concept.

“Mediation is a process in which a neutral third party – the mediator – attempts to resolve a dispute between parties in an amicable way. The mediator unlike a judge or arbitrator assists the parties in reaching a settlement agreement on their own, without imposing a decision on them. The process is voluntary and therefore non-binding, even though the parties can agree to put the terms of settlement into a legally binding contract.” In UK, Housing Grants Construction and Regeneration Act 1996 (HGCRA) promoted Adjudication, but it does not fully meet the needs and expectations because of rising expenses and harmful effects on the relationships caused by adjudication process between the disputing parties (Mason, 2013). On the other side, the procedure is dragged out and frequently expensive. With these reasons even some adjudicators themselves started to doubt adjudication's efficacy. Major contractors and construction experts in the UK are keen to participating in mediation (Gregory-Stevens et al., 2016).

Gregory (2016), further mentioned that construction has experienced continued significant growth with the introduction of mediation as an effective dispute

resolution method in 1980s. In the USA, existing research Thomson (2001) stated that according to a survey by the American Bar Association, members of the US Construction Forum have taken part in between 10,000 and 15,000 mediations. In a more recent study in the USA, Brooker (2007) provides data from a nationwide survey conducted by Deloitte and Touche showed that, more than 66% of contractors in the USA had used mediation. India signed the Singapore Mediation Convention in August 2019, which seeks to make mediated settlement agreements easier to enforce and may encourage more people to utilize mediation (Secomb, 2021). Talking about the Indian Scenario, government has enacted various special legislations to refer the parties to Mediation. In Hong-Kong, The General Conditions of Contract say that any issue should first be submitted to mediation; if mediation is unsuccessful or if either party refuses to mediate, the problem shall then be submitted to arbitration. Mediation is preferred in the UAE's construction business because it takes only a few days as opposed to arbitration, which can take up to two years. Contractors are likewise eager to cooperate and develop long-term ties with their employers

E. Statutory provisions for mediation practice in Sri Lanka

In terms of the provisions of the Mediation Act other than community disputes, even commercial disputes where the value of the claim is less than Rupees Five Hundred Thousand the plaintiff first has to seek a settlement in the mediation board. Section 7 provides that no court shall entertain an action without the non-settlement certificate from the relevant mediation board. To provide mediation for commercial disputes over Rupees Five Hundred thousand the government of Sri Lanka once established the Commercial mediation centre by the said Act No. 44 of 2000 and a management board also had been appointed. However, for these reasons the authorities are unwilling to reveal the centre is dead baby at the delivery. Some literature available indicates that the centre had been re- activated in the year 2017 but the function of the centre again is a grey area. The Construction Industry Development Act of 2014, Clause 50 promotes the use of conciliation and mediation as ADR techniques for resolving construction disputes.

Necessarily it is not mandatory to facilitate the mediation solely by the State, but the private sector also is authorised to provide services to promote mediation. The outside jurisdictions show that private sector institutions perform well by facilitating mediation. Asian Countries nearby ours believe government involvement in facilitating mediation results in

partiality and thus the business community does not want institutions ally with the State.

The literature shows that the Minister of Justice on behalf of the government of Sri Lanka signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York Convention) also known as Singapore Convention on 07th August 2019 in Singapore. This means that the Sri Lankan parliament will pass legislation to give effect to the law contained in Singapore Convention. Despite the lapse of three years from the signatory to the convention no enabling law has been passed by the Sri Lankan legislature.

Having experienced the situation, Ceylon Chambers of Commerce (CCC) in collaboration with the Institute for the Development of Commercial Law and Practice (ICLP) has established the “CCC ICLP International ADR Centre in 2018 to facilitate institutional Arbitration as well as Mediation. At a dissemination symposium, the researcher could learn that a draft bill has been prepared by this ADR Centre composing mediation law and submitted to Ministry of Justice for onward actions.

III. METHODOLOGY

A full comprehension and in-depth insight into the research subject are needed due to the limited research and acknowledgment of the field of mediation practice in Sri Lanka. Yin (2009) reveals that a qualitative research technique can provide an obvious benefit when detailed and accurate information is needed. Therefore, a qualitative research approach has been adopted for this research study.

A. Population and Sample

Professionals with involvement in Sri Lanka's construction industry's disputes make up the research's population. Professionals in the Sri Lankan construction industry with more than ten years of experience and actual exposure to disputes were the sampling criterion chosen by the researcher. Due to the reason that stakeholder engagement being a collaborative process, experts from distinctive disciplines were selected as the sample of interviewees to obtain various perspectives regarding the mediation method as an effective and efficient ADR method.

All of the professionals working in the construction industry have limited experience with or involvement in disputes. Therefore, gathering data from a random sample would not really provide useful information. Consequently, the purposive sample approach was used

to choose the participants. This enabled the authors to interview a total of 21 professionals.

B. Data Collection

The semi-structured interviews were conducted to gather primary data, subjectively comprehending areas like applicable theories, individual aspects, recommendations & other practical based data and was conducted with legal practitioners and key personnel in the construction industry profession, focusing reliable and quality data. Hence, the semi – structured interviews were carried out incorporating open – ended questions mainly reflecting to identify the mitigating implementations that could be practiced as a construction industry to mitigate the adverse time impact to the public sector construction projects.

C. Data Analysis and Presentation Methods

The qualitative data collected through the interviews which were open-ended questions were analysed using content data analysis technique.

IV. RESULTS AND DISCUSSION

The participants were from multiple disciplines and were chosen based on their years of expertise in resolving disputes in the building construction sector with the help of known contacts. This selection was very advantageous because it allowed the participants to reply based on their professional backgrounds and experiences, which made it simple to understand. Twenty-one interviews were carried out, however by the seventeenth interview, the responses received from the interviewees were quite uniform and was reaching a saturation point. As the last check to ensure that the data had attained theoretical saturation, four further interviews were done. To support the findings, certain theories from the literature were added.

A. Identifying the current practice of dispute resolution methods in the Sri Lankan Construction Industry.

The first objective was achieved through the comprehensive literature review in chapter 02 where those findings were validated by the ideas expressed by industry experts.

during interviews. It was found that the most frequently used ADR methods in the Sri Lankan construction industry are Negotiation, Adjudication, and Arbitration. There was no literature on using mediation as the very first method of ADR by parties in the process of resolving their construction disputes. It is mainly due to the absence of frequent reviews and improvements necessitated by current challenges.

B. Reviewing the mediation as an ADR method and its effect on settlement of construction disputes in Sri Lanka.

Recent studies demonstrate that the construction community is deviating from arbitration practice due to drawbacks and for the very reason the USA initiated the use of mediation as an ADR. Seemingly, with this trend now many countries, even in the neighboring Asian regions are practicing mediation to achieve effective and efficient resolution of disputes in the construction arena.

C. Investigating issues on mediation method and causes behind those issues in construction mediation practice in Sri Lanka.

To see a proper implementation of mediation practice in the Sri Lankan construction industry, it is necessary to identify the underpinning causes for the low popularity of construction mediation practice in Sri Lanka. Hence, the empirical findings on issues for the establishment of mediation practice in the Sri Lankan construction industry were reviewed in this section. Respondents state that identified issues were due issues are lack of awareness regarding mediation, disputant parties' negative attitudes, lack of competent mediators, no proper prevailing law, lack of specific institutional framework, absence of government recognition, not functioning nature of Commercial Mediation Centre Sri Lanka.

Table 1: Opinions on the lack of popularity of mediation in SL

S/N	Opinion	Frequency
	Negative Perceptions	
1	Belief that mediation could not be used to solve a construction dispute.	07
	People's Attitude	
2	Lack of willingness to compromise.	10
3	Belief that the opposing party would not take part in good faith.	12
4	Unrealistic expectations of disputing parties	15
5	Do not like to take the liability	09
	Awareness	
6	Disputing parties do not understand the true meaning of mediation, neither the procedure nor the process.	18
8	Disputing parties want to know their actual legal rights.	08

Table 1 depicts the opinions stated by interviews regarding the lack of popularity of mediation as an ADR method in Sri Lankan construction industry.

D. Identifying the possibility of adopting mediation as an effective ADR method for construction disputes in Sri Lanka.

The construction works in any jurisdiction in the world is carried out on a contractual basis. The contract is comprised of terms and conditions. Terms and conditions are reached with consensus id idem (with the consent of parties) of contracting parties. Given the situation, if the parties desire to complete the work within the scope as the parties agreed, as well as if the parties desire to resolve their disputes as they wish the parties are at liberty to include in the contract agreement the method of dispute resolution selected according to the wish of parties. Nevertheless, even in absence of a clause for mediation in the original contract if the parties so wish parties are free to amend the original contract by way of an addendum to include a mediation agreement and proceed. Therefore, this fact emphasizes the presence of a neutral third party as the mediator is a must, where both parties can arrive at a win- win solution. Current practice of adjudication has no proper mechanism, and parties are not going to adhere the determination given by the adjudicator since it is not binding. Current arbitration has drawbacks such as involvement of legal practitioners, costly, consumes significant time etc. Majority of dispute resolution experts expressed that, from their experience in dispute resolution and 50% of those disputes have settled by adjudication where other remaining 50% of disputes have been referred to arbitration. This percentage reveals the pitfalls of both adjudication and arbitration. Experts mentioned that there are some instances where disputes had to seek litigation. With these findings it is evident that a new efficient and effective ADR method should be introduced. For a smooth functioning of the project, preservation of relationship is a must. Therefore, arriving at a win-win solution when a dispute arise can help to preserve of long term relationship between parties. With the pitfalls identified in the current ADR practice, mediation will be the best suggestion for this. This is also supported from literature in chapter II. When the question was raised about the suitability of incorporation of mediation into construction contracts, all the interviewees expressed that mediation will be the best method to resolve construction disputes, but with the different perceptions, there is a question whether this will be effective in the Sri Lankan context.

Further, they said that with a proper mechanism it is good to implement mediation.

E. Proposing suitable recommendations for effective implementation of construction mediation method for construction dispute resolution in Sri Lanka.

Mediation for commercial disputes in Sri Lankan context it is still an infant in one hand and on the other hand subject to arguments. At the starting point of the research, some of the respondents had a suspicion as to whether construction disputes coming under commercial sector. Ending remarks prove that majority is not doubtful, and they admit disputes in the construction industry too bears a commercial nature. Discussion with analysis of global situation will justify why Sri Lanka shall struggle to develop the concept. United Nations considered this somewhere in 2018 and agreed to a model law and now there are two conventions for nations to adopt in international level. Some food-for-thought remains if the disputes among countries can resolve through mediation at a central point, the possibility of implementing the same to a domestic dispute through mediation.

As per section 3 of the Act function of the Centre; to promote the wider acceptance of mediation and conciliation for the resolution and settlement of commercial disputes etc, not limiting to the principal law, the government enacted subsidiary law too. The Gazette Extraordinary No. 1216/10 27th December 2001 published the "Mediation (Procedure and Fees) Rules" too. In terms of the Act, the board of management the Centre consists with the members; 01x nominated by Ceylon Chamber of Commerce, 01x nominated by the National Chamber of Commerce, 01x nominated by the Federation of Chambers of Commerce and Industry, 01x nominated by Ceylon National Chamber of Industries, 01x nominated by Minister in charge of the subject of Justice, 01x nominated by Minister of Trade and commerce.

One can argue that there are no members from chamber of Construction Industries, National Construction Association of Sri Lanka, Institute of Engineers, Quantity Surveyors and from other affiliated professional bodies which directly has a strong bearing on construction industry.

The review reveals that chapter II indicate about a re-activation of the Mediation Centre in 2017 and it has called applications too for the appointment of mediators. The researcher could trace only one reason as to why it is not being implemented today is that the Mediation Centre had limited the applicants to be aged over 40 years and no applications were received within the age limit.

The Act and the rules are in progressive state and the luminaries in the Construction Industry still has the opportunity to get the government to push the re-activation for the second round too. This is the correct

time for this purpose as the United States Department of Commerce has stepped forward to assist Sri Lanka to promote commercial mediation.

V. CONCLUSION AND RECOMMENDATIONS

Aligning with the aim of this research, the research study is directed along five objectives stated in chapter I.

The ADR techniques that are widely utilized in Sri Lanka's construction industry can be identified as negotiation, adjudication and arbitration. The industry's stakeholders and professionals have a moderate opinion on adjudication. The industry's stakeholders and professionals have an average opinion on adjudication. Although arbitration is a recognized ADR method, it appears that stakeholders and industry professionals in the construction sector are dissatisfied with the arbitral processes. Respondents stated that arbitration is the only form of ADR that can deliver a decision that is both legally binding and irreversible. However, respondents severely criticized arbitration for its formality, speed, cost, and adversarial nature. It is revealed that construction industry practitioners are highly concerned on non-litigious nature of the process of dispute resolution through the consideration of its benefits. In general, the satisfaction of the disputant parties rises when shifted from harsh and adjudicative approaches to gentle and facilitative ones. Mediation will be the ideal ADR technique that is appropriate when maintaining relationships is vital. Additionally, even if the disagreement is extremely complicated, at least some of the problems might be resolved through mediation. It will eventually result in time and cost savings compared to if the issue was sent to another ADR technique directly. The study revealed several factors that hinder successful mediation outcomes. The barriers that have been identified indicate the immediate necessity for behavioral changes, competency development and mediation skill enhancement among construction professionals. Additionally, the significance of changing legislation to promote mediation as the first ADR approach and correct responsibility delegation could be seen. Therefore, this research proposes that raising the true meaning of mediation among parties and stakeholders in construction projects, passing legislation via parliament to enforce mediation, and creating a legal organization to support and train mediators will indeed increase the practice's efficacy. Further, implementing instructional programs, creating a code of ethics for mediators and changing people's attitudes about mediators are other ideas that could make the practice of mediation an effective ADR method in the construction industry.

The recommended actions are as follows.

- Mediation should be added to the current ADR system which is practiced in Sri Lankan construction industry.
- Help in-house professionals' complete additional coursework or training programs to advance in the competency areas for mediation.
- Young professionals should be trained under experienced professionals who have received mediation training in order to expand the use of mediation practice in the construction industry.
- The mediation training courses should include both instructions for ADR techniques and instructions to boost expertise in areas connected to disputes.
- ADR method awareness campaigns to educate stakeholders and industry professionals on the effects of ADR techniques.
- Promoting ethical behaviour and positive attitudes among apprentices.
- Short-term workshops to empower organization professionals with their mediation skills.

B. Limitations and further research directions

Only information from professionals with experience in the construction industry, such as Project Managers, Architects, Engineers, Quantity Surveyors, Lawyers, Adjudicators and Arbitrators who are practicing in the Western Province were gathered. Additionally, the mediation that occurs after a dispute arises is the only part of this research study; attempts to mediate a dispute before it arises are not considered. It is recommended to conduct more research on mediator competencies and essential features of the mediator's professional development.

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