

Attributes of ADR in the Sri Lankan Construction Industry

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ABSTRACT

Alternative dispute resolution (ADR) methods were introduced to the construction industry to avoid the negative effects of litigation in relation to the cost, time, and business relationships of a construction project. This study focused on identifying the current ADR practices in the Sri Lankan construction industry and examined the specific attributes of each method to create a more effective process. A qualitative research strategy was carried out with interviews with industry professionals working in the Sri Lankan Construction Industry. Content analysis using NVivo software was used to analyse the data. The key findings revealed that the neutral third party has good knowledge of construction. Despite the differences in each ADR method, disputing parties do not have the confidence in the neutral third party or trust in the process. This study also revealed that the unavailability of these key attributes will finally affect the cost and reputation of the ADR methods. Therefore, the research suggests that to improve the ADR process and its success there should be awareness studies on ADR methods and training for ADR practitioners within the Sri Lankan Construction Industry.

KEYWORDS: *Construction industry, ADR, Attributes*

1 INTRODUCTION

This paper is a part of a current research project to evaluate the attributes of Alternative Dispute Resolution (ADR) to develop a cost-effective framework for ADR in the Sri Lankan construction industry. The paper aims to analyse the current ADR practices in Sri Lanka concerning the defined ADR attributes. The study was conducted in three steps. First, the popular ADR methods in the Sri Lankan construction industry were identified. Secondly, the attributes of ADR practices were defined, and finally, the attributes of ADR practices in the Sri Lankan construction industry were analysed. ADR is an alternative method used to resolve disputes by avoiding costly and time-consuming court procedures, which further leads to damaging relationships among the parties (Niriella, 2016). Further, Polinsky and Shavell, (2012) found that the average litigation cost is about two third of the actual damage. However, unlike other commercial disputes, construction disputes involve complex technical issues, several parties, and a large volume of documents (Fadhlullah Ng et al., 2019), and as a consequence, construction professionals prefer ADR to litigation to resolve construction disputes.

Latham, (1994) warned that a fundamental reason for construction project failure is disputes. Nevertheless, due to the complex nature, challenging environment, and the involvement of different knowledge-based professionals in the industry disagreement is inevitable (Cakmak and Cakmak, 2014). Therefore, having a proper dispute resolution method has become a basic requirement in a project.

2 BACKGROUND

Construction disputes could happen at any point during the design or construction phase of the project (Hall, 2002). According to Ume et al., (2014) construction disputes vary in nature, size, and complexity, but they all are costly both in terms of time and money and can often damage a good working relationship. Furthermore, any delay in construction due to construction disputes will also impact owners in terms of loss of investment revenue (Marzouk and Moamen, 2009). Several scholars have examined the causes and categories

of disputes in the Sri Lankan construction industry such as; Abeynayake and Wedikkara, (2012) identified four dispute categories, Halwathura and Ranasinghe (2013) and Perera et. al., (2021) presented disputes in highway projects, Gunarathna et al., (2018), Illankoon et al., (2019) and Edirisinghe et.al., (2020) identified disputes in the construction industry in general.

2.1 Alternative Dispute Resolution methods in the Sri Lankan construction industry

Alternative dispute resolution (ADR) is a term usually used to refer to an informal dispute resolution process in which the parties meet with a professional third party (Hansen, 2019) who helps them resolve their disputes in a way that is less formal and often more consensual than litigation (Abeynayake and Weddikkara, 2012). The out-of-court conflict management and dispute resolution mechanisms are arbitration, mediation, negotiation, village councils, fact-finding, partnering, dispute resolution boards, and other related dispute resolution processes (Nafees and Ayub, 2016). ADR is a dispute resolution process that encourages or facilitates the disputants to solve their disputes having appointed their judges (Ranasinghe and Korale, 2011). Brooker and Lever (1997) further confirm that the most common reasons to refer to ADR methods are their efficiency in terms of speed and cost compared to litigation. However, the frequently used alternative dispute resolution method in the construction industry are negotiation, conciliation, mediation, adjudication, and arbitration (De Zylva, (2006), Abeynayake and Weddikkara, (2013), Abeynayake and Weddikara (2014)). The following paragraphs briefly discuss those ADR methods.

Negotiation - Early settlement in construction disputes will prevent aggravation of negative impact on project performance (Chan and Suen, 2005). Although there are several possible resolution methods, disputes are always negotiated first before other methods are considered (Cheung et al., 2006). Even in the Sri Lankan construction industry negotiation is the initial attempt to resolve construction disputes (Jayasena and Yakupitiyage, 2012; Gunasena, 2010). Moreover, negotiation provides an opportunity for the parties to exchange promises and commitments to aid the resolution of differences (Tucker, 1996). The success of a negotiation is determined by the extent to which the parties are willing to compromise their needs (Hoogenboom and Dale, 2005) without the involvement of a third party (Gulliver, 1979).

Mediation - Mediation is a voluntary nonbinding process in which a neutral third party assists two or more disputing parties to reach an agreement as to how that dispute is to be settled (Morgerman, 2000). The third-party facilitator, who is a mediator does not possess any power to make decisions as to the agreement or to issue decrees but only assists the productive communication between the parties to the dispute (Sarane and Gunathilaka, 2017). Further, mediators have no authority to resolve disputes or to make decisions that are binding on the parties (Silberman, 1997). Today, in Sri Lanka, mediation has become a preferred choice for parties to a dispute (Alexander, 2002). The Construction Industry Development Authority encourages mediation activities by instructing the construction contracting parties to forward their disputes to mediation (Abeynayake and Wedikkara, 2013).

Conciliation - Similarly, in mediation, conciliation involves third-party intervention but requires more active participation of the conciliator rather than in mediation in generating solutions (Ifeanyi, 2000). In mediation, a neutral and independent person assists the disputing parties to reach a mutually acceptable solution, where the conciliator makes his formal recommendations for a settlement which may be either accepted or used as a basis for the parties to further negotiate and reach a settlement (Ranasinghe, 2012). The conciliation process is confidential, and the documents prepared during the process are without prejudice and cannot be referred to or used in any subsequent proceedings (Ramsbotham et.al, 2011). In particular, the content of any recommendation made by a conciliator must not be made known to any arbitrator or judge (Hill and Wall, 2008).

Adjudication - Adjudication is a system by which disputes are referred to the neutral third party, for a decision that is binding on the parties until the dispute is finally resolved by agreement, arbitration, or litigation (Joint contracts tribunal). In Sri Lanka, adjudication is conducted according to the Construction Industry Development Authority (CIDA) and FIDIC conditions of the contract. CIDA introduced the adjudication process to the Sri Lankan construction industry as an immediate step of construction dispute resolution in their first revised edition of the Standard Bidding Document (SBD) in 2007. According to CIDA conditions, the adjudicator shall give his/her determination on the dispute within 28 days, or such other period agreed by the parties of the receipt of such notification of a dispute. However, the adjudication procedure according to FIDIC is when a dispute refers to an adjudication decision, which is to be given within 84 days or such other time as is proposed by the DAB and approved by the parties.

Arbitration- The main difference between arbitration and litigation is that arbitration is consensual and final where the award may treat only those matters that are referred to arbitration by the parties (Fadhlullah Ng et al., 2019). Deffains et al., (2017) claimed several other differences between arbitration and litigation such as; the litigation process follows court procedures based on the Code of Civil Procedures of the jurisdiction, proceedings are open to the general public, councilors do not have expert knowledge in construction or construction disputes. Britain formally introduced Arbitration to Sri Lankan legal system in the 19th Century by enacting two statutes; The Arbitration Ordinance no:15 of 1866 and the civil procedure code of 1889 (Abeynayake and Wedikkara, 2012a). However, both statutes were replaced by the Arbitration Act of Sri Lanka No.11 of 1995, which was inspired by the Swedish Arbitration Act and UNCITRAL model law ((Asouzu and Raghavan, 2000). By enacting the Arbitration Act of Sri Lanka No.11 of 1995 on 30th June 1995 in the Sri Lankan parliament, Sri Lanka became the first country in South Asia to enact an Arbitration Law (Abeynayake and Wedikkara, 2012b).

2.2 Attributes of ADR in the Sri Lankan construction industry

Each ADR process has its attributes that influence the adoption of a specific process in specific circumstances (Cheung, 1999). York(1996)listed ADR attributes such as; confidentiality, degree of control by parties, choice over the identity of a judge or neutral, flexibility in issues and strategy, delay risk, forensic tactics, witness control, consolidation of claims by order, available remedies, binding decision and enforcement, appeals, liability for costs, cost of the tribunal, relative cost, time required of parties, preservation of relationships, overall duration, neutrality, professional behavior, experience in construction and credibility. In contrast, Iltter and Dikbas, (2008) identified attributes of ADR in terms of control by a neutral, wide range of issues, transparency of judgment, enforceability, liabilities to the opponent's cost, voluntariness, and width of remedy. Jayasena and Yakupitiyage, (2012) further categorized the attributes into main and sub-attributes for the Sri Lankan construction industry. By reviewing the scholars' work this study has listed ADR attributes as the main and sub-attributes as demonstrated in Figure 1.

Even though the construction industry professionals have shown a marked preference towards ADR instead of litigation, recently the popularity of ADR practice is diminishing due to several reasons, as an example, current arbitration practice shows adversarial characteristics (Brooker and Lavers, 1997), adjudication decisions are unsuccessful and neither party was satisfied with the outcome (Jayasinghe and Ramachandra, 2016). Similarly, other voluntary processes such as negotiation, mediation, and conciliation have failed and ultimately arbitration had become a costly and a time-consuming process. (Cheung et al., 2002). Therefore, the study aims to revisit the current ADR practices in the Sri Lankan construction industry.

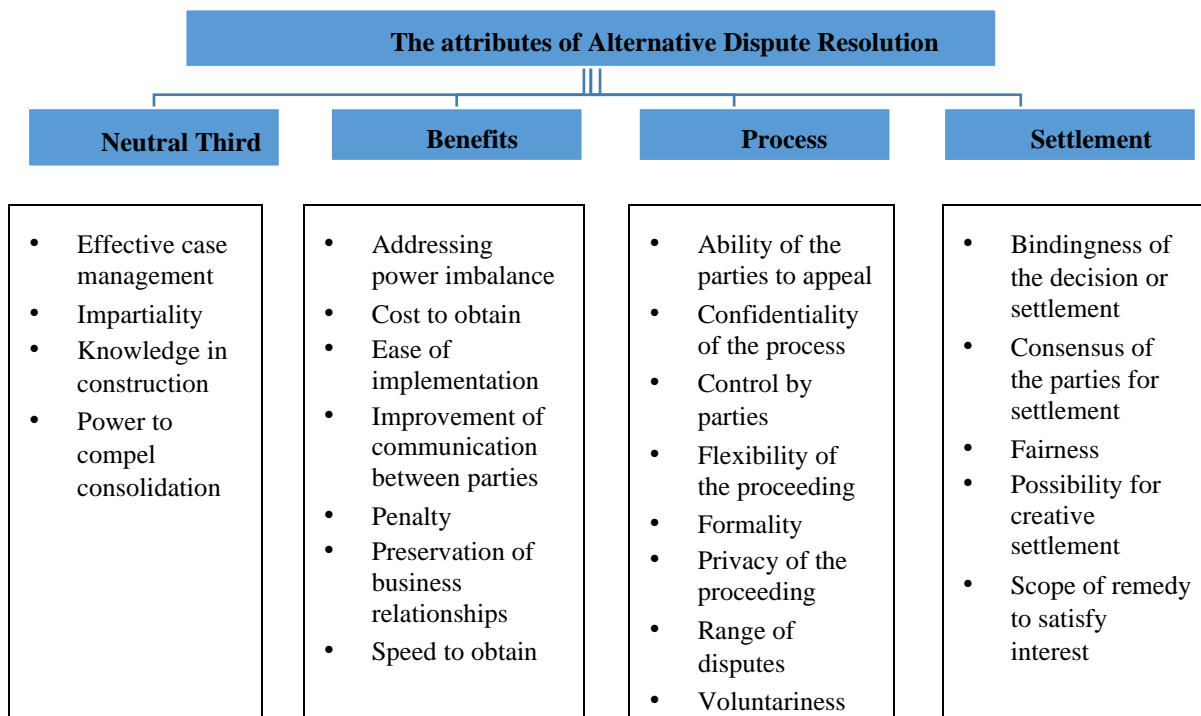


Figure 1 Hierarchy model of ADR attributes (Developed from Literature).

3 METHOD

Semi-structured interview questions developed through an extensive literature survey on the attributes of ADR were used to collect qualitative data. The purpose of the interview was to strengthen and verify the research areas in the Sri Lankan context. The experts were CIDA registered 8 Arbitrators/ Adjudicators (AA), and 12 industry practitioners, representing consultant engineers (CE), consultant quantity surveyors (CQS), consultant architects (CA), and senior engineers (SE). All the participants have 13-56 range of years' experience and work in high-level positions in their construction organizations, in Sri Lanka. The selected arbitrators/adjudicators were popular in resolving disputes in mostly local construction and international construction contracts. Other participants are in very senior positions in construction organizations with more than 5-8 Million Rupees annual turnover.

The duration of the interview was nearly 45-60 minutes, and the recordings were transcribed and entered in NVivo for data analysis.

4 RESULTS AND ANALYSIS

This section focuses on how current industry professionals evaluate the attributes of current ADR practices in the Sri Lankan construction industry. The study involved a qualitative research strategy where the results obtained through the literature review were compared with the current practices and the ideas of the construction industry professionals.

The four main attributes and twenty-four sub-attributes of ADR were presented to 20 construction industry professionals during the semi-structured interviews. The interviewees were requested to explain and comment on each attribute with reference to the current ADR practices in Sri Lanka. This qualitative data was analyzed through NVivo 12 using thematic analysis. Coding in NVivo 12 was conducted in three separate themes such as; ADR methods (high-level themes), main attributes (mid-level themes), and sub-attributes (low-level themes). Then a thematic framework for five different types of interviewees (cases) namely, adjudicator/arbitrator (AA), senior engineer (SE), consultant engineer (CE), consultant quantity surveyor (CQS), and consultant architect (CA) was developed. Additionally, when analyzing the predefined themes, the focus was predominantly on a case rather than the individuals within them. When analyzing the interaction, particular attention was paid to how, and whether, the groups established common grounds. Thus, the analysis

focused on the content of the discussions and the dynamics of interactions within the groups. In that sense, the detailed analysis of five common ADR practices against attributes was discussed in four sections.

4.1 Evaluating Attributes of ADR

By considering the pattern of the results, the interviewees were further categorized into two groups namely Group 1 and Group 2. Group 1 include adjudicators/arbitrators whereas group 2 included CQS, CE, SE, and CA.

In relation to the negotiation, both groups expressed similar thoughts. Negotiation is a nonbinding dispute resolution method conducted without the involvement of an external party (Gulliver, 1979). Therefore, sub-attributes relevant to a neutral third party were not discussed under negotiation. As shown in table 1 negotiation provides many benefits compared to other ADRs as per groups 1 and 2. Nevertheless, those benefits can be achieved if parties positively cooperate within the process.

The mediator who is acting as the neutral third party possesses almost all the attributes according to both groups. Not only that, but it is also a speedy and cost-effective method. However, like in negotiation, parties need to act positively to get the benefits of the method.

Half of the group 1 interviewees claimed that the conciliator is impartial whilst group 2 believed it depends on the personality and integrity of the person (Table 2). The availability of benefits in conciliation is most similar to negotiation and mediation. The speed to obtain the decision is agreed to be faster than adjudication and arbitration. In conciliation, according to group 1, party to the dispute is having 90% control over the process. Furthermore, group 1 further agrees on the conciliator while creating communication between the disputing parties decides with his expert knowledge. However, all three methods are voluntary, non-binding processes with the majority of benefits compared to adjudication and arbitration.

In adjudication, both groups agreed that the adjudicator possesses the required knowledge in construction but disagreed on the ability to effectively manage the referred cases. Interestingly, CQS agrees on group 1 in power to compel consolidation of the adjudicator. Both groups agree that the cost and time spend on the process are higher than the above non-binding methods. But the similarity is in the implementation of the decision where it depends on the parties. Regarding the adjudication process, parties are not allowed to appeal and both groups agreed on that. In addition, the process is formal, flexible, and private as explained in the literature. However, both groups agree that it is not a voluntary process. Group 1 further explained the contract agreement instructs the parties to refer their dispute to adjudication for resolution.

Group 1 is confident in the ability to manage cases effectively by the arbitrator whereas group 2 doubted this (Table 3). Similarly, group 1 believed that impartiality was demonstrated by some arbitrators, however, group 2 did not believe in the impartiality of the arbitrator. Nevertheless, both groups agreed that arbitration is a costly, time-consuming process and is not supported by the human relationships between the parties. Whilst it was agreed that the arbitration award had statutory powers and could be enforced in the courts, group 2 questioned the fairness of the settlement whilst group 1 believed the award given by the arbitrator is fair and creative.

Table 1 Evaluating Attributes – Negotiation and Mediation

		Negotiation		Mediation	
Mid-level themes	Low-level themes	Group 1	Group 2	Group 1	Group 2
Neutral third	Effective case management	Negotiation happens among the disputing parties. There is no external party intervention.		Available	Available
	Impartiality			Available	Available
	Knowledge in construction			Available	Available
	Power to compel consolidation			Not relevant	Not relevant
Benefits	Addressing power imbalance	Available	Available	Not sure	Not sure
	Cost to obtain	Can be considered as zero cost		Low cost	Low cost
	Ease of implementation	Party autonomy	Party autonomy	Party autonomy	Party autonomy
	Improvement of communication between parties	Available	Available	Available	Available
	Penalty	No	No	No	No
	Preservation of business relationships	Yes	Yes	Yes	Yes
	Speed to obtain	Speedy	Speedy	Comparatively high	Comparatively high
Process	Ability of the parties to appeal	No	No	No	No
	Confidentiality of the process	Available	available	available	available
	Control by parties	yes	yes	95% control is there	yes
	Flexibility of the proceeding	available	available	available	available
	Formality	no	no	Few formalities are available	
	Privacy of the proceeding	available	available	available	available
	Range of Disputes	Can resolve any range of dispute		Available but some government policies cannot resolve	
	Voluntariness	yes	yes	Yes, in many instances	
Settlement	Bindingness of the decision/award	Party autonomy	Party autonomy	Party autonomy	Party autonomy
	Consensus of the parties for settlement	Yes	Yes	Yes	Yes
	Fairness	Depends on the parties		Depends on persons	

Possibility for creative settlement	Depends on the parties	Depends on the mediator	
Scope of remedy to satisfy interest	Depends on the parties	Yes	Yes

Table 2 Evaluating Attributes – Conciliation and Adjudication

		Conciliation		Adjudication	
Mid-level themes	Low-level themes	Group 1	Group 2	Group 1	Group 2
Neutral third	Effective case management	Available	Doubtful	Available	-
	Impartiality	50% agreed	This depends on the person	Somewhat available	No
	Knowledge in construction	Available	Available	Available	Available
	Power to compel consolidation	Not relevant	Not relevant	Available	Available
Benefits	Addressing power imbalance	Available	Available	Depends on the adjudicator	
	Cost to obtain	Low cost	Low cost	High cost	High cost
	Ease of implementation	Party autonomy	Party autonomy	Party autonomy	Party autonomy
	Improvement of communication between parties	Available	Available	Did not consider as important	Not sure, but better to have
	Penalty	No	No	No	No
	Preservation of business relationships	Yes	Yes	Not sure	Not sure
	Speed to obtain	Compared to adj/arb high	Compared to adj/arb high	More time	More time
Process	Ability of the parties to appeal	No	No	No	No
	Confidentiality of the process	Available	available	available	available
	Control by parties	90% control is there	yes	Until the adjudicator is appointed	
	Flexibility of the proceeding	available	available	available	available
	Formality	Formal	formal	formal	formal
	Privacy of the proceeding	available	available	available	available
	Range of Disputes	Available but prefer less		Available but prefer less	
	Voluntariness	Yes, in many instances		No	No

Settlement	Bindingness of the decision/award	Party autonomy	Party autonomy	Party autonomy	Party autonomy
	Consensus of the parties for settlement	Yes	Yes	No	No
	Fairness	Depends on the person		Yes	doubtful
	Possibility for creative settlement	Depends on the conciliator		Depends on the adjudicator	
	Scope of remedy to satisfy interest	yes	yes	yes	yes

Table 3 Evaluating Attributes - Arbitration

		Arbitration	
Mid-level themes	Low-level themes	Group 1	Group 2
Neutral third	Effective case management	Available	Doubtful
	Impartiality	Somewhat available	No
	Knowledge in construction	Available	Available
	Power to compel consolidation	Available	Not sure
Benefits	Addressing power imbalance	Not considered	Not considered
	Cost to obtain	High cost	High cost
	Ease of implementation	Since it has statutory powers, a court can enforce	
	Improvement of communication between parties	Did not consider as important	Did not consider as important
	Penalty	Winning party can claim	Even though the winning party can claim the cost for arbitration parties should take only what they are entitled rather than making it a penalty
	Preservation of business relationships	Not sure	Not sure
Process	Speed to obtain	more time	More time
	Ability of the parties to appeal	Disagreeing party can go to court and appeal	
	Confidentiality of the process	Available	available
	Control by parties	Until the arbitrator appointing	
	Flexibility of the proceeding	available	available
Formality	Formal	formal	

	Privacy of the proceeding	available	available
	Range of Disputes	Prefer to have a smaller number of disputes	
	Voluntariness	No	No
Settlement	Bindingness of the decision/award	yes	yes
	Consensus of the parties for settlement	important	No
	Fairness	Yes	doubtful
	Possibility for creative settlement	Depends on the arbitrator	
	Scope of remedy to satisfy interest	yes	yes

5 CONCLUSION

There were both negative and positive comments given for the attributes of ADR discussed above. The neutral third party for ADR resulted in the greatest variance of response (except negotiation) as some of the interviewees were not convinced of the impartiality of the arbitrators and adjudicators. Even though half of AA claimed the conciliator to be impartial, CA explained it is dependent on the person.

The benefits of adjudication and arbitration were similar in addressing power imbalance, the cost to obtain, improvement of communication between parties, preservation of business relationships, and the speed to obtain a decision. Both methods were acknowledged as costly and time-consuming. The decision will depend solely on submitted documents and witness evidence. Even though there is no penalty granted in adjudication, in arbitration the winning party can claim the money for arbitration during the submission of the arbitration claim.

The desirable benefit of arbitration is the ability to implement arbitral awards through the courts. Any other ADR does not have that facility. Concerning conciliation and mediation, the cost and time will be much less. Further, both methods will help to improve the communication between the parties and preserve their business relationship. With regard to benefits, negotiation was identified as the best option. The main reasons behind that are its cost effective and time effective features. The arbitration process is highly adversarial compared to adjudication. Therefore, the parties who do not wish to go ahead with the decision/award in arbitration can go to courts to appeal whereas no other method is allowed. Not only is that in addition, but arbitration is also formal and not voluntary. It is similar to adjudication but different from the other three ADRs. Both groups prefer to have less number of disputes at a time. Flexibility and party autonomy can be more visible in negotiation, and conciliation other than in arbitration and adjudication.

Whilst an arbitral award is binding all other, ADR decisions are binding until the disagreeing party refers the dispute to the next level of ADR. The fairness of the settlement is a major issue as the majority of those interviewed agreed that the outcome of arbitration and adjudication is often not fair. If the disputing parties are willing to come to a fair, creative settlement with the scope of remedy to satisfy interest, negotiation as an ADR appears to be the best option.

Informed by the above findings, the next step of this research will proceed to develop a cost-effective framework for ADR in the Sri Lankan construction industry.

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