

DISPUTE RESOLUTION IN CONSTRUCTION INDUSTRY

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Abstract— Construction industry is one of the major contributor to the development of a nation. The recent development and trends in construction has marked the beginning of a new phase. Traditional method are being transformed and developed to make them more efficient and effective. The growing demands of construction industry have given rise to more dispute, delay and consequently more claims. The study highlighted three type of conflict factors which are conflict due to behavioural problem, contractual problem and technical problem. Meanwhile the factors of conflicts which is due to contractual problem are such as late giving of possession, delay interim payment from client and unclear of contractual terms. In this paper we have referred the three different case and which the help of two method arbitration and conciliation the case are solved. And then both arbitration and conciliation method is compared with litigation method with respect to time and cost and the best method is been identify to solve the dispute in construction industries.

Index Terms— Claim, Dispute, Disagreement, Contract, Qualitative analysis, Quantitative analysis, Arbitration, Conciliation, Litigation

I. INTRODUCTION

India is a developing country. The construction sector of India is growing rapidly. There are many ongoing Infrastructure projects in India of Billions of Dollars where the delay or stoppage of work due to any reason cannot be acceptable. In this rapidly growing construction industry many times claims arise between client and contractors. Construction Claim can be defined as a request by either party to the contract, usually the Contractor, for compensation for damages caused by failure of the other party to fulfil his part of obligations as specified in the contract. The compensation is usually in the form of the additional payment or an extension of time (EOT). During the execution of a project, several issues arise that cannot be resolved among project participants. Such issues typically involve contractor requesting for either time extension or for additional cost, or sometimes both. Such requests by the contractor are referred as Claims.

However if the owner does not agree to the claims put out by the contractor and there are differences in the interpretations, the issue takes the form of dispute. Claims are becoming an inevitable and unavoidable stress in modern projects involving new technology, specifications and high expectations from the owner. There are many reasons for claims time, machinery, material, manpower, money, price escalation, accident on site, change in design and many other are major reasons for dispute between two parties which results into disputes, if the disputes are Claims and Counterclaims.

II. NEED OF STUDY

With the growing competition in jobs, optimum quoting is required, which gives rise to higher risk components. Proper procedure needs to be evolved for stage wise reduction of risk components for ensuring projected profits. In various projects a number of department/agencies, suppliers and sub-contractors are involved which makes the project more complex. Generally no projects get completed in the same stages as it was at the time of the contract, always there are some changes made to the work, or there may arise some unforeseen problems and to add to all these the market fluctuation which may causes the reduction in profit of the contractor. Besides this the contract condition in the tender document are so provided to safeguard the interest of the client. Hence as result of this, there is a need to study claim management so that the contractor dose not lose any venue from where he can make claim for obligations not fulfilled by the other party and safe guard his profit. Though many contractors know the claims to be made but they fail to go through proper claiming process, which ultimately causes the loss of that claim, so there arise a need to study claiming process.

The claims that arise have to be resolved so that both the parties involved do not lose any claim that they deserve. Moreover the contractor as well as the respondents is not aware of a proper method that would that resolve their dispute and as a result of which the dispute is not resolved and a lot of time is involved in doing so. The parties fail to resolves dispute during, or soon after the contractor period, the traditional resolution mechanism, litigation, might be used, which is a very tedious, lengthy & costly affair. Alternatively, disputes can be resolved more quickly and at less cost by applying Alternative Dispute Resolution Methods (ADR). Hence there arise a need to study the various methods of Dispute Resolution and finding the most optimum method to resolve the dispute in different situation.

III. VARIOUS METHODS OF DISPUTE RESOLUTION

Means by which disputes in the construction industry can be brought to their resolution include the following:

1. Negotiation;
2. Litigation;
3. Arbitration;
4. Mediation
5. Adjudication;
6. Conciliation;
7. Dispute review board.

(1) NEGOTIATION

Direct negotiation is a common dispute resolution process in which parties themselves, or their representatives, try to resolve the dispute without involving any neutral third party. It is a voluntary and an unstructured process agreed by both parties, privately and confidentially. The features that contribute to the success of direct negotiation include avoiding taking entrenched positions in the dispute, but rather seeking solutions, which meet the needs and interest of both parties. However, the success of negotiation depends on interpersonal communication skills of the parties during the entire process. Negotiation would be the first port of call when a dispute occurs and should resolve a dispute at this stage.

(2) LITIGATION

Litigation as a means of resolving disputes focuses on the (legal) rights of the parties and tends to be very confrontational and, as some may say, akin to washing dirty linens in public. This is to a large degree unavoidable if one resorts to litigation given the adversarial nature of the (common law) litigation process. However, much as the very point that litigation is the very ultimate and final means of resolving disputes (other than the appellate system within the litigation process itself), the use of litigation as a means of dispute resolution mechanism has in recent years been eroded. It may not be wrong to say that the trend is towards the use of litigation as a means to supervise, or support, other dispute resolution mechanisms and/or as a means of enforcing, or to a lesser degree avoiding, the end result of other dispute resolution mechanisms: it provides a supporting role for the efficient implementation of other methods of resolving disputes. The disadvantages of litigation are rather well known. Backlog of cases and the consequent delay in the parties' own cases are often being heard: the usual adage "justice delayed is justice denied" has very often been invoked. Technical points of law not having direct relevance to the issues in disputes may be raised; technical and complex and some may say inflexible rules of evidence will need to be adhered to; the frequent postponements of cases already fixed for hearing mean further delay; judges are not quite appreciative the facts due to the highly technical nature of the disputes and the issues involved; and many others tend to point to the erosion of litigation as a means of resolving disputes.

(3) ARBITRATION

Arbitration as a means of resolving construction industry dispute will be the subject of the next paper. It may be important however to observe that arbitration, like litigation, focuses on the parties' legal rights and an arbitral proceeding is sometime not much different from a court proceeding except that in the case of arbitration, the principle of privacy is upheld and outsiders are not allowed, unless with the tacit approval of the parties and the arbitrator, to be present during the hearing. It is due to this that arbitration is sometime referred, not with commendation it may be said, as "privatized litigation". The advantages attributed to arbitration, often stated as a comparison *vis-à-vis* litigation, will often include privacy, confidentiality, cost effectiveness, speedy resolution, flexibility, finality and, with special reference to construction contracts, the power of the arbitrator to "open up, review and revise" the (Architect's, Engineer's or S.O.'s) certificates and the decisions of the Architect, Engineer or S.O. The main drawbacks of arbitrations are often stated to be those associated with the question of an arbitrator's jurisdiction and his degree of competence.

(4) MEDIATION

Mediation is a facilitative process in which the disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute.

Mediation as a means of dispute resolution mechanism is thus a consensual process; it is in a sense a "brokered negotiation" or facilitated negotiation between the two parties to the dispute with the mediator being the facilitator. Unlike in arbitration or litigation where the arbitrator or the judge will pronounce the legal rights of the parties in the form of an award or a judgment, a mediator does not make decision for the parties. A mediator thus has no authority to adjudicate or determine the rights or wrongs of the parties and their disputes; the parties themselves have to come to a settlement acceptable to them, or not too unacceptable to them. In this aspect lies the fundamental difference between mediation and arbitration as a means of dispute resolution mechanism.

(5) ADJUDICATION

Very often, arbitration clauses in construction contracts are drafted in such a way that referral to arbitration can only be commenced upon the completion or alleged completion of the works. The reason for this is that due to the adversarial nature of the arbitral process, the conduct of the arbitration may be too disruptive to the continued execution of the works. This reason is not without justification. However, the fact that some disputes have to wait until the completion of the works for their attempt at resolution cannot be said to have justification. These disputes include, for example, the withholding of certificates, deposit of retention monies in a separate bank account and others. Besides, and from the contractors' perspective, their cash flow can be severely and adversely affected. It is in this situation that adjudication can find a useful place as a means of resolving construction disputes.

(6) CONCILIATION

Conciliation is used synonymously with mediation in some references and the same is also used herein. It involves am type of shuttle diplomacy in which an independent third party listens to the disputants and facilitates settlement. He does not meet any of them in private, as usually the case in mediation. Instead he runs formal conciliation proceedings in which all discussion take place when both parties and their representative's legal advisers are present. Based on what goes on during the proceedings, the conciliator puts forward the proposed resolution in writing.

It is clear that for both conciliation and mediation, a neutral adviser who is able to offer an independent assessment is sought. The parties may agree on an acceptable settlement, but they are not obliged to, and they retain the right to refer the cases to arbitration or litigation, if an amicable settlement cannot be reached. Neither the conciliator nor the mediator can be appointed as an arbitrator in any subsequent arbitration relating to any dispute under the questioned contract unless both parties agree in writing.

(7) DISPUTE REVIEW BOARD

The settlement of dispute through Dispute Review Board s, also known as Dispute Resolution Boards, is another method of alternative dispute resolution system. It is common in long- term contracts involving construction works and similar contracts. Resolution of disputes through Dispute Review Board is fast, inexpensive and avoids disruption of the construction work. Dispute Review Board is generally set up or established immediately after the contract is made. It functions with relative informality. The review board, a panel of three experienced, respected, and impartial reviewers, takes in all the facts of a diapute and make recommendation on the basis of those facts and the board's own expertise. This trend in "preventive law" has been taking hold all over the world, saving time, project costs, and legal fees.

The DRB and its procedures are organized before construction begins. The contractor selects one member and the owner another (each must approve the other's choice); and a third is and the board's procedures are spelled out beforehand in the contract.

IV. CASE STUDIES

1. Case Study I

The project is located in INDIA. It involves the construction of road, the project basic information as per following:

- Name of work: construction of road
- Contract type: percentage rate
- Contract period: 1 Year

	1st Dispute	2nd Dispute	3rd Dispute	4th Dispute
Disputing Party	Contractor	Contractor	Contractor	Contractor
Reasons	Not refunds of security deposit	Work done but payment was not paid	Excess on item	Loss of profit in work
Disputed Amount In Cost	32,000 Rs/-	1,00,000 Rs/-	8,747 Rs/-	1,25,000 Rs/-
How The Dispute Was Treated	Settle	Settle	Settle	Settle
Compensation Of Cost	32,000 Rs/-	66,213 Rs/-	Include in dispute 2	Nil

Table 1: Case Study I Disputes Summary

Resolution of dispute by Arbitration

The contractor requested many meetings with the Engineer, and the Employer's representative to discuss the disputed issues. They conducted long meetings and negotiation reviewing the disputes to reach a compromise state then finally they didn't get a solution and had to go to Arbitration as per the contract.

2. Case Study II

The project is located in INDIA. It involves the construction of bridge across river, the project basic information as per following:

- Name of work: construction of bridge across a river
- Contract type: Item Rate
- Contract period: 3 Year

	1 st Dispute	2 nd Dispute	3 rd Dispute	4 th Dispute
Disputing Party	Contractor	Contractor	Contractor	Contractor
Reasons	Not refunds of security deposit	Price escalation of material	Work done but payment was not paid	Loss of profit in work
Disputed Amount In Cost	1,36,900 Rs/-	1,00,000 Rs/-	76,635 Rs/-	7,63,236 Rs/-
How The Dispute Was Treated	Settle	Settle	Settle	Settle
Compensation Of Cost	1,36,900 Rs/-	1,00,000 Rs/-	76,635 Rs/-	Nil

Table 2 Case Study II Dispute Summary

Resolution of dispute by Arbitration

The contractor requested many meetings with the Engineer, and the Employer's representative to discuss the disputed issues. They conducted long meetings and negotiation reviewing the disputes to reach a compromise state then finally they didn't get a solution and had to go to Arbitration as per the contract.

3. Case Study III

The project is located in INDIA. It involves the construction of road, the project basic information as per following:

- Name of work: construction of road
- Contract type: Item Rate
- Contract period: 24 Months

	1 st Dispute	2 nd Dispute	3 rd Dispute	4 th Dispute
Disputing Party	Contractor	Contractor	Contractor	Contractor
Reasons	Not refunds of security deposit	Work done but payment was not paid	Excess establishment of staff and labor	Price escalation of materials
Disputed Amount In Cost	54,312 Rs/-	1,41,173 Rs/-	2,00,000 Rs/-	2,50,000 Rs/-
How The Dispute Was Treated	Settle	Settle	Settle	Settle
Compensation Of Cost	54,312 Rs/-	31,449 Rs/-	41,400 Rs/-	35,000 Rs/-

Table 3 Case Study III Dispute's Summary

Resolution of dispute by Conciliation

The contractor requested many meetings with the Engineer, and the Employer’s representative to discuss the disputed issues. They conducted long meetings and negotiation reviewing the disputes to reach a compromise state then finally they didn’t get a solution and had to go to Conciliation as per the contract.

V. DATA ANALYSIS

Based on the analysis of case studies, time duration comparison of Dispute Resolution Methods with litigation is as follows: (Note: Duration for litigation CASE in GENERAL is 36 months)

Evaluation on Time Saved Basis

Case	Types Of Method Used	Duration (Months)	Percentage (In Comparison To Litigation)
			Note: Duration For Litigation 36 Months
Case 0	Litigation	36	100.00%
Case 1	Arbitration	18	50.00%
Case 2	Arbitration	20	55.56%
Case 3	Conciliation	1	2.78%

Table 4 Time comparison- Litigation with Dispute Resolution Methods

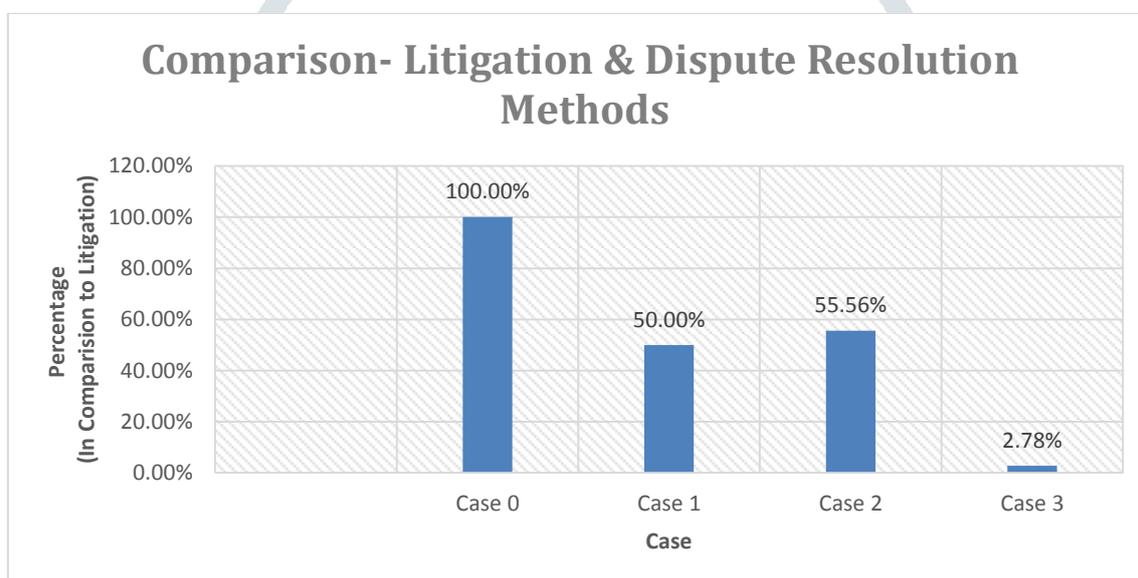


Figure 1: Comparison- Litigation & Dispute Resolution Methods

From the comparison it is clear that dispute resolution methods are less time consuming & a great deal of time is saved by dispute resolution method as compared to litigation.

Evaluation on Cost Saved Basis

From the case studies, it is brought out that the number of hearing per case varies, in methods of dispute resolution. The cost for an entire case depends on a large extent on the number of hearing as well as the time taken for each case. Generally the arbitrators are paid on hearing basis & more the number of hearings more are the costs incurred for the particular case.

From the cases & above analysis it is clearly brought out that the minimum time taken to resolve the dispute is by Mediation, hence the cost incurred for mediation is the least as compared to other methods of ADR.

VI. CONCLUSION

The understanding of disputes in construction gained during the research led to four main conclusion, summarized as follows:

- The industry must change, adopting a comprehensive & systematic approach to prevention & resolution of disputes could reduce conflict & litigation in the construction industry.
- Three key step are required to effect the change. Starting right to prevent problems from arising, staying right to prevent problem from escalating into disagreements & disputes, & providing for resolution to prevent conflicts from developing into disputes that lead to expensive resolution processes such as litigation.
- Dispute Review Boards facilitate the timely onsite resolution of disputes. They emphasize early & continuing involvement of respected efforts.
- Project personnel should remain directly involved. Disputes are best-resolved on-site with the project managers playing a major role. This ensures that those directly involved in the disputes remain involved with resolution. It also helps avoid litigation and returns construction back to track, eliminating the involvement of juristic system.

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