

**CRITICAL ANALYSIS OF ARBITRATION METHOD
USED IN THE
CONSTRUCTION INDUSTRY IN SRI LANKA**

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LIST OF ABBREVIATION

AAA	: American Arbitration Association
ADR	: Alternative Dispute Resolution
BOQ	: Bill of Quantities
DAB	: Dispute Adjudication Board
FIDIC	: Fédération Internationale Des Ingénieurs-Conseils
GDP	: Gross domestic product
ICC	: International Chamber of Commerce
ICTAD	: Institute for Construction Training & Development
LKR	: Lankan Rupees
QS	: Quantity Surveyor
Rs	: Rupees
SBD	: Standard Bidding Document
U.K	: United Kingdom
UNCITRAL	: United Nations Commission International Trade Law

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This research is about the critical analysis of arbitration, which being used in the construction industry in Sri Lanka. It mainly tries to find the answer for the question why Arbitration is not being practiced in an effective manner in the construction industry of Sri Lanka. Hence, this research and its findings will be very much useful for the stakeholders who are worried about the current performances of the Alternative Dispute Resolution and trying to enhance the Arbitration practices in the construction industry which can make a positive impact to the economic development of Sri Lanka.

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ABSTRACT

Disagreement among contracting parties has a rich tradition in the construction industry, which induces of creating and experimenting with alternatives to litigation. Alternative Dispute Resolution (ADR) methods such as adjudication, mediation, negotiation and arbitration, in construction industry have gained numerous positive impacts during the recent years in Sri Lanka. Construction disputes become more technical intensive, multifaceted and multinational interested than other commercial disputes; construction disputes need the enforceable and flexible Alternative Dispute Resolution (ADR) such as Arbitration to resolve disputes efficiently. Arbitration is seen as the final mode of Alternative Dispute Resolution with enforcement mechanism. The Arbitration Act of Sri Lanka No. 11 of 1995 provides for a legislative framework for the effective conduct of arbitration's procedure. However, the use of the Arbitration in the private and public sectors has not been efficiently apparent, probably due to several practical constraints. This paper discusses successful critical attributes behind Arbitration in construction industry and reports on an evaluative study on how effectively these critical success factors are being fulfilled.

Further adverse practical customs also were identified and grouped under the critical attributes as causative of the ineffectiveness of particular attributes. Opinions of the key players of the construction industry also have been included as recommendation and suggestion of the identified problems by the research.

This is the first endeavor for evaluator studies after two decades enacting the Arbitration Law no 11, 1995. Further, this research is the threshold to collect professional perception and the feedback about the performance of the Arbitration in construction industry of Sri Lanka. These findings try to indicate the precise problematic area in the Arbitration.

Key Words: Alternative Dispute Resolution (ADR), Construction Industry, Arbitration. Critical attributes. Critical Success Factors (CSF)

CHAPTER ONE

1.0. INTRODUCTION TO THE RESEARCH

1.1. Background

The construction industry operates in different complex activities. Complexity of the construction industry creates disputes (Cheung, Tam, Ndekugri & Harris, 2000). Furthermore, disputes are a common feature of the construction industry (Ashworth & Hogg, 2002). Disputes widely arise with respect to variations, extensions of time, late payments, project delaying issues, disruption and prolonged on claims and issues related to termination of contracts. Construction disputes and claims tend to be of the most technical nature and in fact, intensive and multifaceted than other commercial and civil disputes.

Construction business becomes more complex; construction disputes are very unique and sophisticated. Further, activities of the construction require a coordinated effort of a temporarily assembled multiple member organizations of many discrete groups, each having different goals and needs and each expecting to maximize its own benefit (Walker, 1996). In addition to that, a study by Brooker and Lavers (1997) reveals that the higher complexity in the construction leads to complex disputes, which predominantly arise from difficulty and magnitude of work, poorly prepared contract documents, financial issues, communication problems and inadequate planning. The number of construction disputes has increased due to the complexity of construction projects during past two decades (Cheung, Suen, & Lam, 2002).

Construction progress cannot be considered as routine operation. Each and every work has its unique challenges with the surrounding environment. Origins of the disputes are always complexly interconnected with technical, site conditions and pure legal matters. Whatever methods have been suggested to resolve these disputes should have tools to detect the rooted courses of these disputes.

Lord Denning in his famous judgment in the Court of Appeal in *Dawnays Ltd Vs Minter Ltd* [1971] 1 B.L.R. 1205 has this to say about resolution of construction disputes: It can be stated as follows: "*There must be cash flow in the building trades. It is the very lifeblood of the enterprise.*" And "*One of the greatest threats to cash flow is the incidences of disputes, resolving them by litigation is frequently lengthy and*

expensive. Arbitration in the construction industry is often as bad or worse". By above opinion court also has the view that construction disputes should be resolved by the fast and inexpensive alternative disputes resolution. The most numbers of stakeholders prefer the Alternative Dispute Resolution to resolve their disputes. Less cost, confidentiality, party autonomy, flexibility, cost savings, informality, low antagonism between the parties and time saving are enumerated as advantages of the Alternative Dispute Resolution compared with litigation. Natures of construction field, above attributes are imperative to operate the business. That is why such huge popularity is given to the Alternative Dispute Resolution particularly in construction industry.

The end of the war attracts more ventures from off shores, big scale of infra-structure developments are required to construct to fulfill these new ventures. Several big construction requirements cannot be fulfilled by local contractors as they do not have relevant experiences and the required capacity. To fulfill and expedite these economic processes, foreign contractors should be invited and attracted. Foreign contracting companies are not very confident and familiar enough with Sri Lanka's legal systems. Jurisdiction of the court's conviction also has been restricted within territory. Further, Sri Lanka's legal system is not competent enough to deal with pure technical disputes and attract these foreign ventures. Therefore, these shortcomings may necessitate the new way of conflict resolution methods alternative to legal procedure.

Alternative Dispute Resolution (ADR) methods are mainly negotiation, mediation, adjudication and arbitration involve in the construction industry. Anyhow, basic attributes to be fulfilled by Alternative Disputes Resolution are proper arrangement to handle the technical matters, ensure the construction expert involvement, fair and fast progress, confidentiality and easiest enforcement by reciprocal forces of the state.

ADR methods have been broadly defined as methods that serve as alternative to traditional litigation method. ADR methods include dispute resolution processes, procedures and techniques that fall outside of the government judicial process. Wimalachandra (2007) defined that ADR method as any form or procedure, whether formal or informal, whereby parties can resolve their disputes instead of litigation before courts of law. Further, definition in ADR method can be stated as a range of procedures that serves as an alternative to litigation for the resolution of disputes,

generally involving the intercession and assistance of a neutral and impartial third party.

In Sri Lankan context several Alternative Dispute Resolution techniques are used for resolving the conflicts which arise in construction business. Initially most of the disputes were being settled by informal meeting at the site. But when the complexity increases this informal and unenforceable way of settling the dispute is not competent to cater the dispute in modern context. To overcome this problem the usual practice had been for the employer to appoint a third party in the caliber of an Engineer or a competent one. The engineer was expected to be an impartial personality between the employer and contractor. However, it is at times not possible for the Engineer to be impartial as a dispute resolver, since he represents and he is paid for by the employer while having the duty to be fair and unbiased in resolving the dispute (De Zylva, 2011).

Another dispute resolution technique is, appointing a mediator. The mediator is a person chosen by both parties who acts as peacemaker between disputants and whose main function is to bring about a mutual settlement in a very informal and friendly manner. Mediation practices are regulated by Mediation Board Act No. 72 of 1988 and its amendments. Further, the Commercial Mediation Center of Sri Lanka Act No. 44 of 2000, Mediation Boards (Special kind of disputes) Act No. 21 of 2003 and its recent amendment Act No 04 of 2011 regulate the given issue. This allows the parties to a dispute to revert to Adjudication, Arbitration or Litigation should the mediation processes fail (De Zylva, 2011).

As another alternative to conservative litigation The Construction Industry Development Authority (CIDA) in Sri Lanka initiated the adjudication process to construction industry as a first approach of construction dispute resolution in their first revised edition of "Standard Bidding Document" in 2007. According to CIDA conditions of contract, the adjudicator is a single person appointed according to consensus between the parties. If parties fail to come into any common terms within 14 days of such request of agreement, the adjudicator would be appointed by CIDA.

The Construction Industry Development Authority (CIDA) has introduced the adjudication and arbitration methods to the Sri Lankan construction industry as an

immediate step of construction dispute resolution in their first revised edition of Standard Bidding Document (SBD) in the year 2006. As per the SBD 02 – 2nd Edition said to proceed with Adjudication first and if not agreed then to go to arbitration. The SBD 02 of ICTAD (under the clause 19.2) stated that Appointment of Dispute Adjudication Board (DAB) has given its first priority for adjudication process as a method of dispute resolution for any kind of dispute arose in the construction project. The parties should appoint an Adjudication Board within 28 days from the date of commencement of the project. The requirement of the qualifications and the number of persons who are to be participated in the DAB has been defined in the document (Under clause 19.2) as same as per the FIDIC red book under clause 20.2. Three qualified persons are required to be appointed, and one of them should serve as the chairman. The termination of a member would be able to enforce by a mutual agreement of both parties.

Complexity of the disputes always is not possible to dissolve by unbinding resolution techniques as described above. Arbitration and litigation only provide the binding the decision that can be enforced by reciprocal forces. At present, District Courts and two Commercial High Courts in Sri Lanka entertain the huge number of contractual disputes. They are unable to cope with the large volumes of cases and core of disputes in the construction industry falls into complicated technical matters, by which Our courts system shows its inability to dispense the effective justice for the construction dispute. Hence construction industry needs a fast and cost effective means for dispute resolution that should have the enforcement mechanism by invoking reciprocal forces of the state. In this regard the Arbitration Act of Sri Lanka was enacted by Parliament of Sri Lanka, which became law on 1st August 1995. Basic expectation of this law is to make the arbitration process more definitive, streamlined and effective. Today arbitration is considered as Alternative to litigation, arbitration is originated to avoid the cumbersome of formality and strict procedure of the court (Abeynayake and Wedikkara, 2012).

In addition to that, Strength and flexibility are the more crucial factors of the suitable Alternative Dispute Resolution in construction industry. Arbitration is the most suitable resolution technique with above two positive attributes. Enforceability of the decision by invoking the reciprocal forces of the state can be considered the strength

of the arbitration. Prime philosophy beneath arbitration is party autonomy by which parties are allowed to choose the procedures, substance of law and even judges to fit the nature of the disputes and requirements (Kangisvaran ,2011).

Arbitration is also a commonly used method to resolve construction disputes in Sri Lanka. Arbitration in the law is a form of alternative dispute resolution specifically a legal alternative to litigation whereby the parties to a dispute agree to submit their respective positions to a neutral third party for solution. For example, most construction contracts contain arbitration clauses requiring the parties to refer to any dispute to arbitration (Cheung, 1999).

Arbitration act of 11 of 1995 was the first Arbitration law in South Asia and it is based on the United Nation Commission on International Trade Law (UNCITRAL), Model Law on international commercial arbitration and inspired by then draft Swedish Arbitration Act (Wijeratne,2011). Unlike other countries even like Singapore, Sri Lankan Arbitration act has very lateral attributes and fully compatible with UNCITRAL rules.

At the time this Arbitration Act no 11 of 1995 was as bill in Parliament on 10th May 1995, Pieris (1995), the Minister of Justice stated that, “This act is targeting the foreign investments as well as expediting the resolution mechanism to suit the fast moving economic trends”.

With respect to the literature found, it is obvious that most of the alternative resolution techniques have shortcomings which sometimes make them look like waste of time, cost and effort. It is manifest clear that our alternative dispute resolution industry does not show any positive record as expected by the minister. Accordingly, it is expected for the Alternative Deputes Resolution’ methods to have drawbacks and pitfalls apart from their respective advantages.

1.2.Problematic Areas of Alternative Deputes Resolution (ADR)

At present, ADR methods are also having drawbacks and pitfalls apart from their respective advantages. Sir Michael Latham (1994) expresses dissatisfaction with the current methods available for resolving disputes in the United Kingdom (UK) construction industry. Also a study by King (2000) reveals that in both the United

State of America (USA) and UK the dissatisfaction not only with the frequency of construction disputes but also with the manner of resolving them seems strong. Accordingly it is obvious that all ADR methods are not universal applications in resolving any kind of construction disputes. Many writers have stated that some ADR methods are non-binding, and this is identified as a weakness in most ADR methods.

Main drawbacks of ADR methods are delaying the process, high cost, and higher involvement of lawyers, less concentration on technical issues, unawareness of methods by professionals, inability to conduct multi-party disputes, limited jurisdiction, impossibility of maintaining the relationship between parties and less satisfaction with the process. Whereas the above reasons, aim of the research is to evaluate ADR methods especially for the arbitration identify the problematic areas and suggest improvements to the arbitration in the Sri Lankan construction industry.

Latham (1994) has reported that arbitration, which has been a favoured method of resolving such disputes, is under attack in the UK because of its perceived complexity, slowness, and expense along with the process. However, out of all above ADR methods, arbitration is the commonly practicing ADR method in Sri Lankan construction industry. Sri Lanka *Arbitration Act No 11 of 1995* stated arbitration principles and UNCITRAL Model Law. Researchers have shown some drawbacks in the Sri Lankan arbitration process like long span of time to resolve the disputes, exorbitant cost, very higher black court fraternity interference, less concentration on technical issues, unawareness of the procedure, commonly not any unanimous opinion or award derived by the tribunal, difficulty in challenging the award, inability to conduct multi-party disputes by invoking arbitration and its limited jurisdictions, very common and unwritten procedures are being followed any sort of the disputes, impossibility of maintaining the relationship between parties and less satisfaction with a process. Accordingly, arbitration, along with its disadvantages, is widely exercised ADR method in Sri Lanka and it has made the stakeholders of the Sri Lankan construction industry dissatisfied and their reluctance to proceed beyond bargaining and enter into the arbitration regime. Jurists reveal that arbitration practice in Sri Lanka also declines because of its drawbacks and disadvantages over arbitration and as a result of its rigid procedure, it makes difficult to handle disputes. (Abeynayake & Dharmawardhana, 2015).

Finally, some researchers criticize the involvement of legal professionals in the arbitration. They argue that philosophy beneath the arbitration may be hijacked by the legal professionals who potentially could lead to the legalism and formalism of its procedures (Brooker et al, 1997). Concurrently stakeholders of Sri Lankan construction industry are proved to be not satisfied on current arbitration practices and their procedures.

At Sri Lankan context our achievement through the arbitration is very minimal. Span of time of conducting the arbitration and stiff procedures jeopardize the basic essence of the arbitration's philosophy. Countries like Singapore and Hong-kong play leading role in arbitration who have very similar arbitration act with the supportive role of the court as same as Sri Lanka's arbitration act. In addition to that Kangisvaran (2011), states when the question was asked performance of the arbitration as so far, "I believe not too well at all, as there is widespread disillusionment with the way in which arbitration is being conducted". Further he stated "I personally know of a proceeding where a single witness was cross examined for three years against before a single arbitrator". Most of our practitioners believe that arbitration in construction industry is not used to resolve the disputes in an efficient manner. A number of reasons and causes are noticed by the practitioners as ramification of the commonly observed ineffectiveness.

1.3.Problem Statement

With regard to the literature findings on arbitration methods in the Sri Lankan construction industry and other countries in the world, it is manifestly clear there are major shortcomings in the practices. There is a high potential to establish the effective arbitration methods in the Sri Lankan construction industry by precisely identifying the shortcomings and taking appropriate action to mitigate these shortcomings. Therefore, this research tends to identify the ineffective parameters of the current arbitration practices and prime causatives for the ineffectiveness.

1.4. Research Problem

Disputes arise in construction industry are multifaceted and technical nature. Disputes might arise at any point during the construction process. Construction claims are most technical in nature and they are intensive and multifaceted than most other

commercial disputes. Even though litigation is the most conservative methods to resolve the contractual disputes, Sri Lanka's court systems are not capable enough to cater to the innovative requirements of construction industry. These drawbacks necessitate the need of alternative Dispute Resolution techniques to meet these requirements. At the time, Sri Lanka's construction industry expands its range to involve the multinational stakeholders; Resolution of the construction disputes should be enforceable by reciprocal forces of the state. Enforceable award through flexible procedure is only possible by arbitration.

In this background, the research problem explored in this research is the effectiveness of arbitration methods for resolving construction disputes in Sri Lanka and the necessary improvements for the dispute resolution practice to make arbitration more effective. Accordingly, research problem can be summarized as "which success attributes of the arbitration is being mostly violated and by which practical shortcomings effectiveness of the arbitration is being aggravated?"

1.4.1. Hypothesis

This research is based on the hypothesis that arbitration method is the most effective method of solving disputes in Sri Lanka, particularly in construction disputes. Thus, current practices should be identified with its shortcomings and they have to be rectified for the effective application in all successful parameters.

Variables can be divided as "dependent variables" and "independent variables". The "dependent variable" represents the output or effect, or is tested to see if it has the effect. For this research, dependent variables are critical factors of arbitration method, advantages and potential solutions of ADR methods. The "independent variables" represent the inputs or causes, or are tested to see if they are the cause. An independent variable is also known as a "predictor variable", "explanatory variable", for this research dependent variables are disadvantages, recommendations, to the arbitration method.

1.5.Aim

The aim of this research is to analysis the arbitration methods used in the Sri Lankan construction industry. To make the arbitration regime in Sri Lanka more effective and

viable, improvements have to be suggested in order to define shortcomings and evaluate their effectiveness.

1.6.Objectives

To achieve the above aim following four objectives are identified. The objectives are as follows:

- i. To identify the problematic areas and practical drawbacks (issues) of arbitration methods in the Sri Lankan construction industry and the reasons behind such problems.
- ii. To evaluate the effectiveness of arbitration methods (through performance measurements of critical attributes) used in the Sri Lankan construction industry.
- iii. To determine required solutions and improvements in arbitration methods for their effective performance in resolving construction disputes.

1.6.1. Research Questions

To achieve the above objectives following research questions are identified. The questions are:

- i. What are the related current issues in arbitration methods?
- ii. What are the successful attributes dispute resolution techniques in construction industry? To what extent the successful attributes of arbitration are fulfilled in Sri Lanka's context?
- iii. By which practical customs effectiveness of arbitration is being severely affected?
- iv. What are the necessary recommendations that should be adopted in order to have an effective and fair arbitration regime?

1.7.Research Methodology

To accomplish the above aim and objectives, a literature survey would be conducted to find out the available literature and extent to which research has been carried out on arbitration. A literature review has to be done to study the effectiveness, critical factors, advantages and disadvantages of the arbitration in the construction industry. However, based on the literature review, arbitration method in the construction

industry had not been fully analyzed. In the Sri Lankan context there are limited publications related to the above research domain.

Semi structured interviews are proposed to identify the effectiveness on arbitration method in Sri Lanka. A survey will be conducted among groups of construction industry stakeholders, professionals and experts who are closely connected to the construction industry. A comprehensive questionnaire is being set out to identify issues in arbitration method.

Methodological approaches adopted for this research study are as follows:

1. A comprehensive literature review and legal research review on the arbitration regime and identify the critical attributes and practical issues of current practices.
2. A structured questionnaire survey to evaluate that how extent these successful attributes are being complied in current practices.
3. A structured questionnaire survey to evaluate the severity of identified practical constrain on hampering the effectiveness of arbitration.
4. Semi structured interviews are proposed on deriving the recommendation and suggestion of above identified shortcoming and rectification of the mostly violated successful attributes.

1.8. Scope and Limitations

Data to be collected from the stakeholders and professionals who have the experience on construction dispute resolution in Sri Lanka. Therefore, this research was mainly concerning about arbitration method, which is currently being used for resolving disputes in the Sri Lankan construction industry. Also the research was limited only to professionals in the construction industry which consists of experienced professionals from clients, consultants and contracting organizations.

Expectation of the response level is very limited because of numbers of individuals who are involved in the arbitration are also very less. The return rate of similar study done in the US was 10.22% (Stipanowich & Henderson 1992) and in Singapore was 46.22% (Lim, 1993). To ensure the minimum number of response from selected group of each category, respondent to be approached directly to fill out the questionnaires as structured interview.

1.9. Research Output/ Dissemination

Even though arbitration is considered the most suitable method for dispute resolution, practical problems and shortcomings are not properly analyzed for further improvements. This research merely targets the shortcomings and practical negative customs of the arbitration. The research aims to fill the lacuna that exists in relation to this subject domain. Simultaneously, the research intends to provide the following outputs:

- i. To find out issues, problematic areas and order those issues in severity basis of arbitration methods in the construction industry in Sri Lanka.
- ii. To evaluate the arbitration's successful attributes through the performance analysis of the philosophies beneath the arbitration are being fulfilled in Sri Lankan construction industry.
- iii. To provide suggestions to the drawbacks in the existing arbitration regime.
- iv. To disseminate knowledge on arbitration methods through publications.

1.10. Structure of the Dissertation

Structure of the research would be divided into the following chapters for easy reference. The main purpose of

Chapter 1 is to provide the background for the research. Accordingly, chapter 1 discusses the aims, objectives, and research problems, scope of the research, its limitations and research outputs/dissemination.

Chapter 2 is to provide literature review. It gives an overview of arbitration and other Alternative Resolution Methods in the construction industry.

Chapter 3 sets out the research framework used to guide the research in order to achieve its aims and objectives. Research philosophy, methodology and the modes of data analysis used for the research were stated.

Chapter 4 provides the findings of the surveys in arbitration methods by identifying problematic areas, and critical attributes of the arbitration method etc.

Chapter 5 presents the conclusions derived from the research findings and recommendations to improve arbitration methods used in the construction industry in Sri Lanka. It also provides limitations and suggestions for further development. Accordingly, the structure of the research would be summarized as per figure No.1.

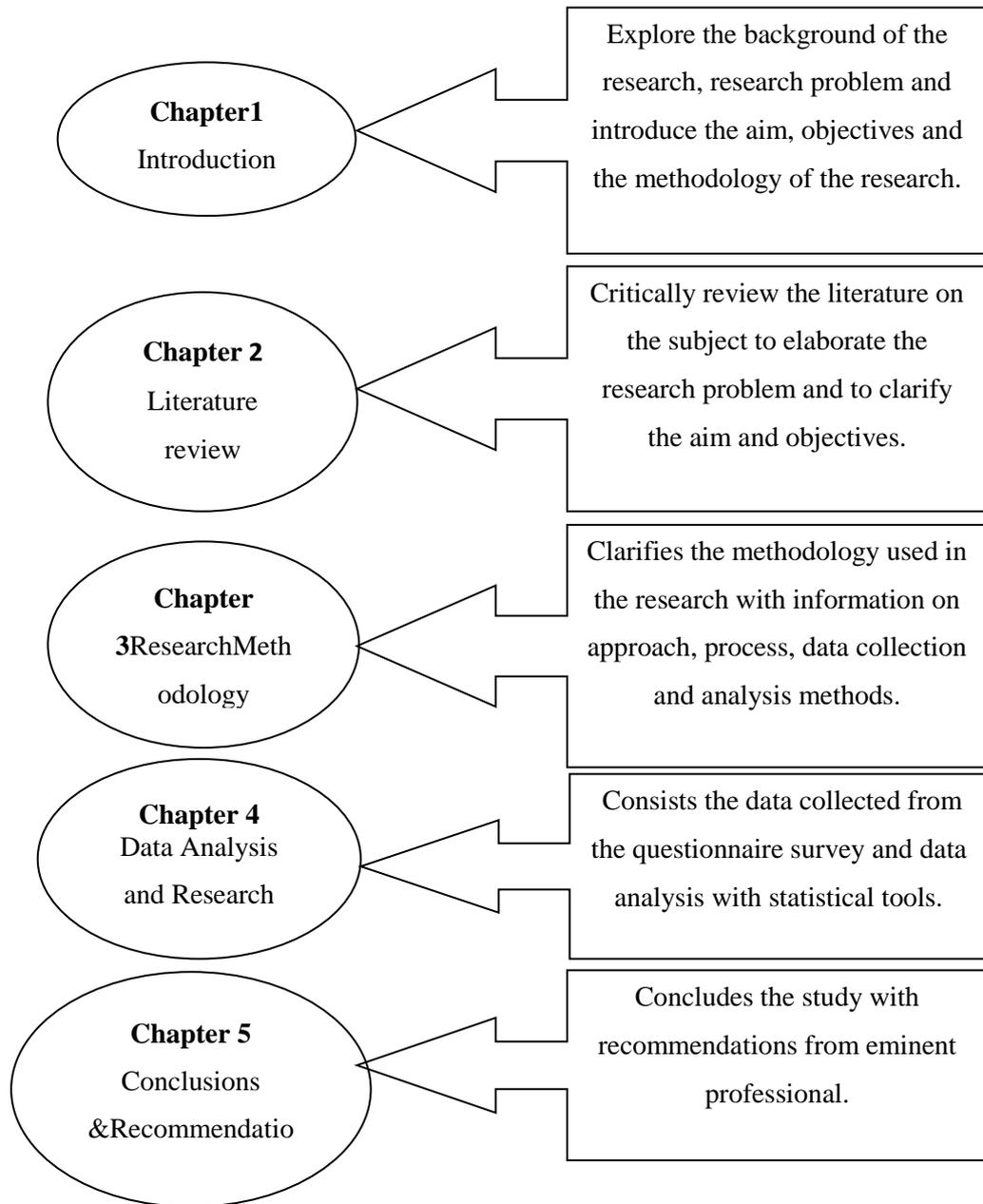


Figure 1.1: Chapter Breakdown

CHAPTER TWO

2.0. LITERATURE REVIEW ON ARBITRATION IN SRI LANKA

2.1. Introduction

In the forgoing pages of literature review, it demonstrates the theoretical works have been done already related to the arbitration, particularly in the construction industry. Generally, numbers of literatures are available; mainly focus on the successive attributes of the appropriate alternative dispute resolution (ADR) for the construction industry. However commonalities of above journals much focus on the success factors of the arbitration and suitable attributes of the alternative dispute resolution. But adequate attention has not been paid to the negative factors and customs, by which effectiveness of the arbitration is being jeopardized in the construction industry. This literature review firstly sum up the existing knowledge not only in the Sri Lankan context but also international perspective and attempt to recognize the factors that drive the arbitration in adverse way.

Firstly, it defines the terms such as arbitration and contractual dispute as used in this report; it explores the existing knowledge that explains the characteristics and the attributes of the arbitration. Secondly critical analyses of the contemporary practices in arbitration especially in the construction industry and rationally enumerate and formulate the possible obstacles of the arbitration. Further, it also reviews the literature that talks about the method of research that could be adopted in this research process.

2.2. Disputes in the Construction Industry

In any country the construction industry has a considerable effect on its economy, and the industry all over the world has proven its significance through the unmatched contribution of GDP. In Sri Lanka increased to 95189 LKR Million in the fourth quarter of 2015 from 89,090 LKR Million in the third quarter of 2015. GDP From Construction in Sri Lanka averaged 47,012.86 LKR Million from 2002 until 2015, reaching an all-time high of 95,189 LKR Million in the fourth quarter of 2015 and a record low of 23,794 LKR Million in the second quarter of 2002. GDP from Construction in Sri Lanka is reported by the Department of Census and Statistics - Sri Lanka. Figure 2.1 clearly elaborates the steep growing of the construction industry in recent years.



Figure 2.1: Sri Lanka's GDP from construction

(Source; www.Tradingeconomics.com Department of statistics)

Above figure 2.1 clearly shows the growing pattern of the construction industry in recent years. With growing the capacity, complexity also increases. This complexity and magnitude create the dispute at any time of the contract.

Disputes can be triggered by numerous reason, primary reasons can be categorized as poor designing and changes, multi-party involvements, complexity and magnitude of the work, varied site conditions, poor planning, incompetent specifications, financial and communication problems. Whatever causative that arise disputes definitely affect the cost, communication and relationship of the parties. The progress and duration of construction projects are severely affected by above reasons and progress holds up by

these disputes definitely causes the huge losses to all the stakeholders in construction industry. Project delays are being induced by disputes, associated with increased materials and labors costs end up with huge variation from original estimate. Finally, both parties are victimized by extended time and additional money merely not resolving the disputes at apt time. Construction disputes are characterized by features that distinguish from other disputes which arise in different commercial nature (Marzouk & Moamen, 2009). In addition to that Disputes are common features of the construction industry (Ashworth et al, 2002). Construction work is a complex process that can confound the most intricate management system requiring the coordinated effort of a temporarily assemble task force; inevitably this complexity creates disputes (Cheung et al, 2000).

Generally disputes are common in engineering contracts. The main reason is that engineering contracts are not like producing a prototype like continuously producing the same item as in a factory. Even if an identical housing unit is reproduced there could be change in construction due various reasons such as unforeseeable ground conditions, exceptionally adverse weather etc. Therefore disputes are inevitable in engineering contracts and it may not necessarily be due to fault of the parties to the contract. No party should be blamed for any dispute arising in a construction contract, but if there is no provision to resolve the dispute within the shortest possible time, engineers or any other professionals who are involved in the construction industry should be blamed, (Ranasinghe,2011). Further, Disputes in the construction industry are inevitable due to complexity and the multi-party involvement of the projects. With the intensifying pattern of construction industry necessitates the fast and cost effective dispute resolution techniques with enforcing mechanism.

Construction is an intricate process that requires integrating many discrete groups, each having different expectation and interest to optimize their profits through the project (Walker, 1996). Conflicts are the common features in construction industry due to the multi-party involvement with different interest and perception. If the conflicts are not treated in effective manners then it becomes as disputes. Dispute is considered form of conflicts comes out from surface for requiring the solution (Brown &Marriott, 1999).The factory production is a line of work going through people and a site production like construction work is a line of people going through work. That

requires the coordinated effort of a multiple member organizations of many discrete groups (Turner & Turner, 1999).

Poor project organisation, lack of attention to the details relating to project structure, poor communication skills, poorly prepared and executed contract documents, inadequate planning and financial issues are the root causes of disputes. Furthermore misunderstandings and tactical miscalculations resulting from poor communication, structure and constitution of project team and goal inflexibility of organizations would escalate those unintentionally occurred disputes. Due to the above causes including its complex nature, in the performance of any construction contract, the disputes between the parties arise in inevitable nature. Delaying the project, bruising the relationship and causing the extra cost are major negative consequences caused by unduly settled disputes (Cheung & suen, 2002).

Disputes involve much of the costs to the construction industry. Increase of the disputes as a downfall of the industry, positive relationship between all members of the project team in United States construction environment is being jeopardised during the half century in finding fault and defective through pure litigating (Latham, 1994). At present, his conversion could be seen in the Sri Lankan construction industry.

Complexity of the construction is analyzed by the court by this case clearly. Un *Emson Eastern Vs. EME Developments Ltd* case (1991). In this case, the court held that “...the building construction is not like the manufacture of goods in a factory. The size of the project, site conditions, use of many materials and the employment of various kinds of operatives make it virtually impossible to achieve the same degree of perfection” This clearly said that disputes are not arises only from short comings of contractual agreements and contractual relationship but also there are some disputes occur with the neighbor of such construction. Some complex requirements of construction industry lead to disputes.

Above discussion clearly indicates that, disputes are inevitable in construction, conventional arrangement to resolve the disputes is not capable enough to resolve these complex conflicts. Alternative Disputes Resolution (ADR) methods are required to manage these disputes in effective manner.

2.3. Dispute Resolution in the Construction Industry

The client and the contractor face number of difficulties in resolving disputes in construction industry. There is no any unique way to select method of dispute resolution to cater their disputes. Alternative dispute resolution methods such as Negotiation; Mediation; Adjudication; Arbitration; Litigation etc., are the very common techniques of alternative dispute resolution in the construction. It is challenging task to select the most suitable alternative dispute resolution techniques for given dispute. However, inadequate exposure in these methods would hold up the agreeing of the stakeholders. Hence, the industry's behaviour in the choosing of dispute resolution techniques has been heavily criticized; as it is decided through the emotional reaction rather than rational approaches (Chan et al., 2002). To define the most suitable method of dispute resolution techniques, proper knowledge is necessary of formal and conventional way of dispute resolution. Following discussion describes about available methods of Dispute Resolution technique in construction industry in Sri Lanka.

2.4. Litigation – A Conventional Way of Dispute Resolution

Litigation is governed by several rigid regulation and procedures which are self-defined by court. By invoking the litigation route parties unconditionally surrendered their autonomy to third party who imposes the control on process and result (Cheung et al, 2002). Sri Lankan court judicial system and courts and their jurisdiction are basically governed by the Construction and the judicature Act No.02 of 1978. According to this governing act contractual matters in the construction industry are vested on District Courts except where the cause of action has arisen out of some commercial transaction of more than five million rupees. The jurisdiction vested in the Commercial High Court established by High Court of Provinces (Special Provisions) Act No. 10 of 1996. According to the procedural law of Sri Lanka the appellate jurisdiction of construction disputes are vested on Civil Appellate High Courts, Court of Appeal and Supreme Court of the Democratic Socialist Republic of Sri Lanka.

With increasing pattern of the construction industry in Sri Lanka needs very cost effective and fast resolution techniques to cater its emerging requirements. But the main problem is identified in litigation system is slow in progress. Sri Lankan court

system is not capable enough to deal with these disputes in the rapidly manner. In the budget speech of 2010 the His Excellency President of Sri Lanka highlighted the fact that 650,000 cases pending before our Courts (Abeynayake et al, 2012).

The whole process of litigation involves when the parties feel that they cannot resolve the dispute on their own and therefore they feel that need to refer the dispute to the Courts of Law. The No Dispute document further adds that if the parties do not have any respect, mutual understanding of the opponent claim and genuine desire to resolve the dispute amicably then, alternative dispute resolution does not bring any fruitful results. It must also be realized that ADR processes are not always the preferred mode of dispute resolution. (National Public Works Conference, 1990)

The litigation process is summarized by Turner (cited by Abeynayake, et al, 2012) in the figure 2.2. It shows that when considering the litigation process after the cases are filed that it is settled before the trial. In the majority of case the courts would require the parties to come to a settlement.

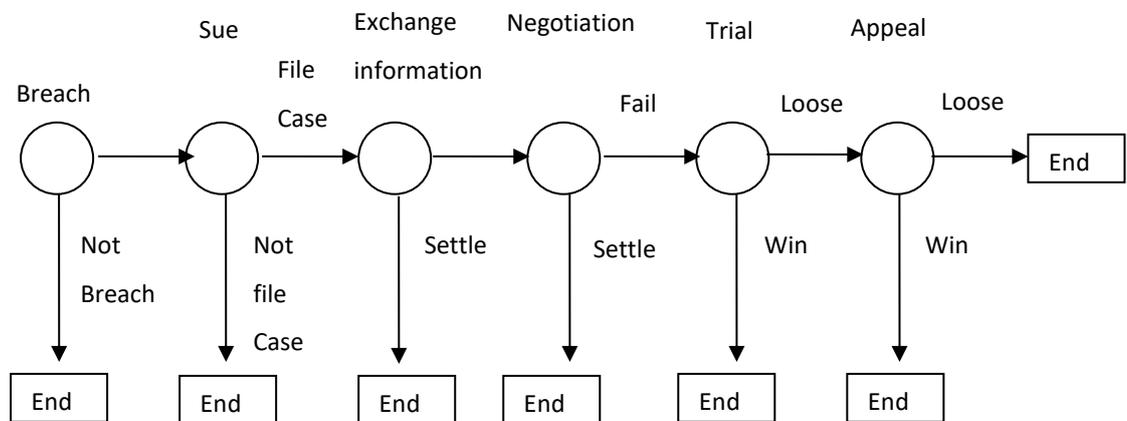


Figure 2.2: The value- process chain of litigation

Once the judgment is delivered the litigation ends. The party in whose favor the judgment is entered will receive the damages. Unhappy party would refer the case to the appellate court on a question of law or fact.

Pengilley (1990) noted that some types of dispute which can be resolved in legal system than ADR:

1. By the disputes social norms or legal precedent are seriously questioned.
2. Some issues will commend themselves for judicial decision if even one party does not have any obligation or willingness to take responsibility on the final decision.
3. Some statement or recognition such as divorce and bankruptcy can only possible to deliver by the courts.
4. One or more parties have not any genuine intention to settle for some personal benefits or the commercial advantages of hindering the procedure.

In some cases, court is only jurisdiction and authority to entertain the disputes. Not all the above are directly applicable to the construction industry. However, if the matter in dispute is about a point of law and legal precedent is sought, then ADR would not be the appropriate method. Obviously, if the disputing parties are not willing to settle, then invoking the ADR methods will not bring any positive results than wasting of the time. (Pengilley,1990)

2.4.1. Critical Appraisal of Litigation as Dispute Resolution Method

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time” (Lincoln, 1809-1865).

This statement is universal and therefore it is appropriate to treat litigation as the last resort. Legal enforceability, conclusiveness of the decision and the involvement of impartial and independent judges from personal and professional relationships can be identified as some of the advantages of litigation. However, Cheung (1999) indicates the salient features of litigation which affect directly to the success of dispute resolution. By analyzing those factors it is not difficult to comprehend the limitation of litigation as a dispute resolution method.

Asworth et al (2002) has identified litigation as an unsuitable method for dispute resolution in the construction industry. It damaged the existing long-standing relationships with project owners, architects, engineers, other contractors and suppliers whose future prospects are severely affected.

2.5. Alternative Ways of Dispute Resolution

If the litigation is considered as the formal way, others can be identified as alternative ways for litigation. Alternative dispute resolution (ADR) generally considered some process to resolve the disputes without having the court trial. Mediation, arbitration, neutral evaluation, and collaborative law can mechanism in ADR to resolve the disputes outside to the court. In addition to that the term "Alternative Dispute Resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of or alternative to full-scale court processes. According to Cheung (1999) most of the ADR methods practicing are private that means no any necessary to enforce the decision except arbitration and litigation, which are statutory controlled can be enforced by the reciprocal forces of the state.

Alternative Dispute Resolution (ADR) is not new to the Sri Lankan Society; even it had been applied in different form compare to the modern commercial application. Our inherited mechanism from very long practiced traditional values has been shaped and altered to contemporary commercial requirements (Abeynayake et al, 2012). In addition to that, Negotiation, Mediation, Adjudication and Arbitration are widely apparent as alternative dispute resolution methods which are being practiced in construction industry for resolving the contractual disputes (De Zylva, 2011).

Alternative dispute resolutions was being necessitated in the last two decades as a response to the consequences such as high cost and lengthy process associated with litigation, which involves the application of strict procedural rules and the involvement of the legal professions. ADR techniques however do not require the involvement of the legal profession. Further provides a comprehensive list of the alternative dispute resolution methods available for use in the construction industry in Australia. These include expedited arbitration, S27 conferences conducted under the Commercial Arbitration Act; structured negotiation; conciliation; mediation; non-binding expert appraisal; expert determination; senior executive appraisal; mini-trial; dispute board of review. Although dissimilar in the details, these methods do exhibit a common theme: advocating a problem-solving approach and break out of the Embrace of the legal profession and the adversarial and confrontational approach. It is general opinion among the professional that arbitration and litigation create the strong

emotions and refute rational discussion, thus amicable resolution is prevented (Abeynayake et al, 2015).

According to the figure 2.2 clearly describe how the final decision is derived with different sort of ADR methods. However, the final way such as violation or vandalism is not appreciated by the civilized society and it cannot be justified as an alternative method of dispute resolution.

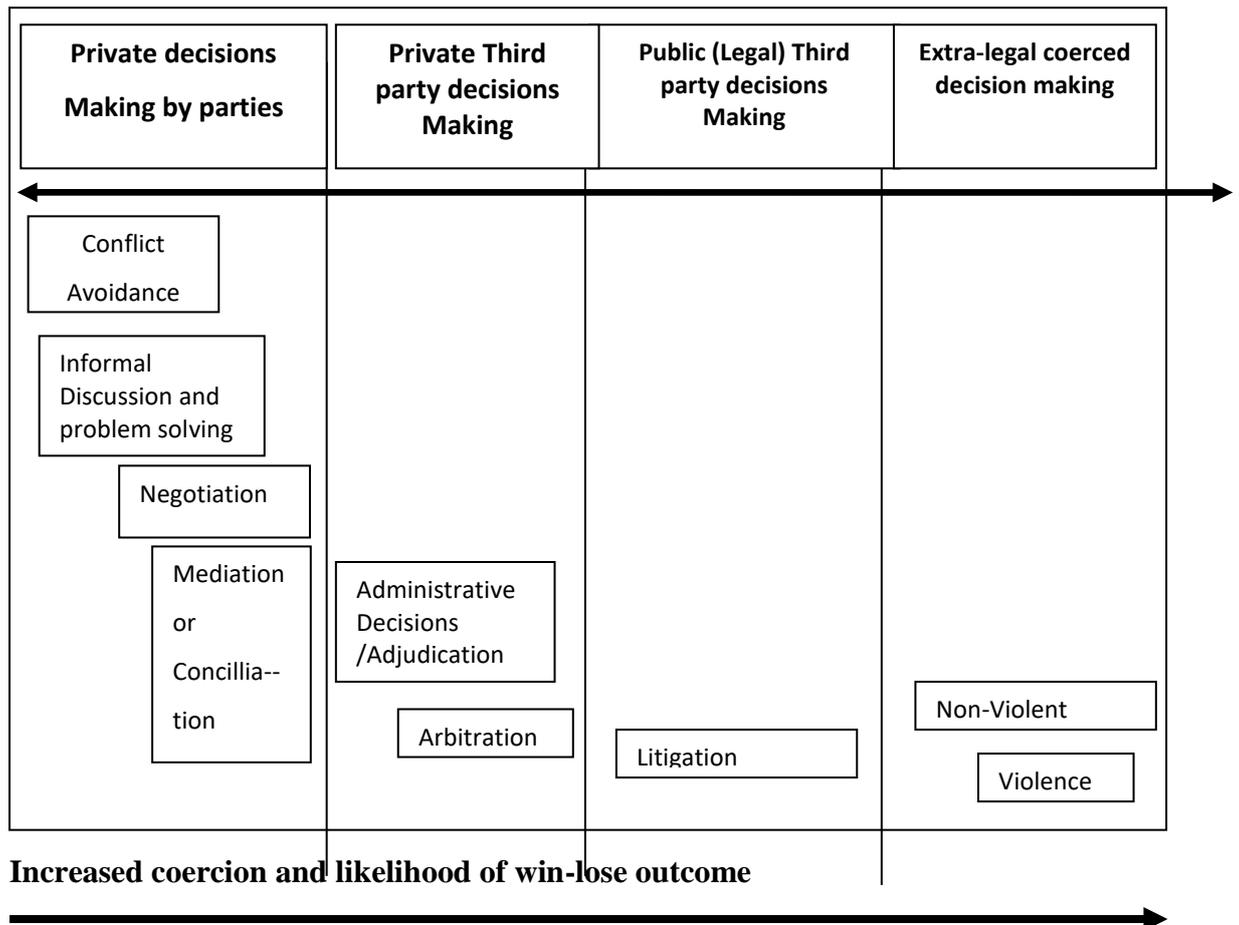


Figure 2.3: Range of Dispute Resolution Approaches

Source: (Abeynayake, et al, 2012)

Desire of the party to deal the dispute in amicable way is the most important prerequisite in ADR method. According to Pengilley (1990) the philosophical prerequisites of ADR can be classified as follows:

- All ADR methods are agreement with mutual understanding.
- ADR methods should bring positive results all the parties that can be call “win/win” solution (actual or perceived).
- Parties should be acknowledged that ADR is the effective substitute of the compromised agreement.

2.6. Critical Appraisal on ADR methods

The advantages of ADR methods can be summarized within the three contexts; cost, relationship and flexibility. Cost of the ADR methods would reduce the procedural fees and optimize earning by expeditious resolution mechanism. ADR methods could be more useful to avoid bitter feelings that may result from the adversarial process of litigation. The third advantage is the flexibility allowed in ADR methods. The procedures to be used in the ADR methods can be modified to suit the parties' requirements. In particular, the methods should be designed to enhance feasibility in communication. The use of ADR methods would enhance the probability of achieving a 'win/win' result for the parties involved and the advantage of having access to experts skilled in all aspects of ADR methods to develop innovative techniques and solutions for dispute resolution. Finally, some writers criticize the involvement of lawyers in ADR practice. They point out that ADR methods may be hijacked by the legal professionals sometimes would lead to legalism and formalism of its procedures (Brooker et al, 1997).

2.7. Available ADR Techniques in Construction Industry in Sri Lanka

Through literature survey, it was understood that there are five ADR methods in Sri Lanka; those can be named as Negotiation, Mediation, Conciliation, Adjudication and Arbitration. According to Cheung (1999), Negotiation is a consensual process; through which willingness of the parties to resolve the disputes is the prime requirement. If the relationship between the parties has broken down beyond this point then negotiation cannot be the suitable mechanism to resolve the dispute through alternative to litigation. Important attributes of a good negotiated settlement have identified by Letham (1994) are: Fairness, Efficiency, Wisdom, Stability. In addition to that Mediation is a process where the third party neutral, whether one person or more, act as a facilitator or mediator to assist in resolving a dispute between two or more parties. The mediation Board Act, No. 72 of 1988 gives statutory recognition to the concept of mediation. According to the section 10 of the aforesaid Act, the Mediation Boards have a duty to attempt to bring the disputants to an amicable settlement by all lawful means and to remove, with their consent and wherever practicable, the real cause of grievance between them. According to the ICTAD conditions of contract, which motivate mediation practice, in construction industry if the contractor doesn't agree with the Engineer or employer that decision

can be referred to the Adjudicator for mediation and the adjudicator should give the outcome of the mediation in writing.

stair step way depicts graphically ADR methods its attribute of developing hostility and increasing the cost (O'reilly & Mawdesley, 1994; Cheung, 1999). According to Chung (1999) rising the datum of the steps represent the level of cost incurred and developing the hostility respective to alternative mechanism named under the steps. Many authors (Omar, 2007; Uff, 2005) agreed following stair step is the suitable explanation of attributes of the ADR that used in construction industry.

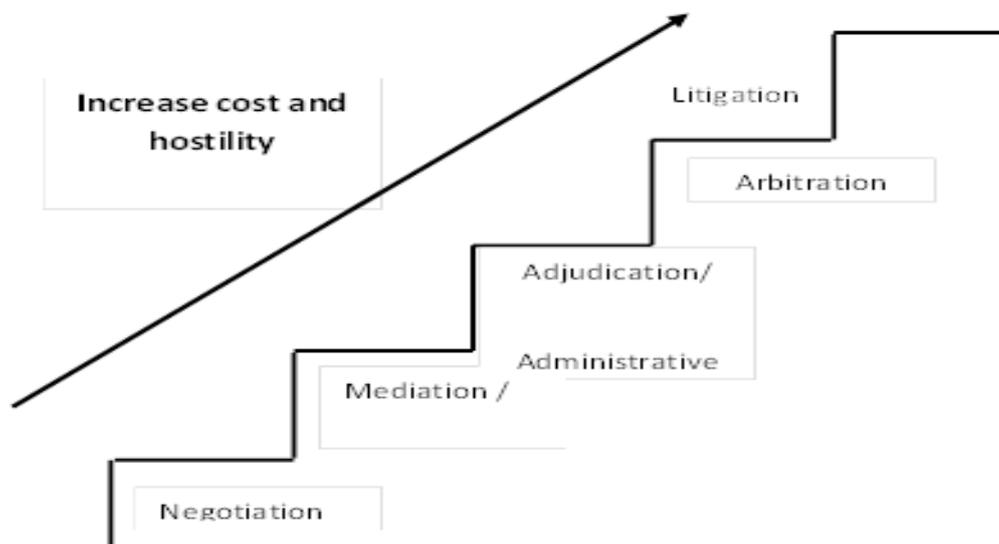


Figure 2.4: Stair step model for Dispute Resolution Process in Construction:

Source: Cheung(1999).

According to O'reilly and Mawdesley (1994) opinion that disputes may be entertained at initial stages through negotiation or it may be preceded through several stages, including mediation, conciliation and arbitration. The flow diagram of ADR methods shown in the figure 3.3 and stair step model of dispute resolution shown in the figure 3.4 indicate the way of resolution of disputes in the construction industry. It can further explain as escalator model of dispute resolution.

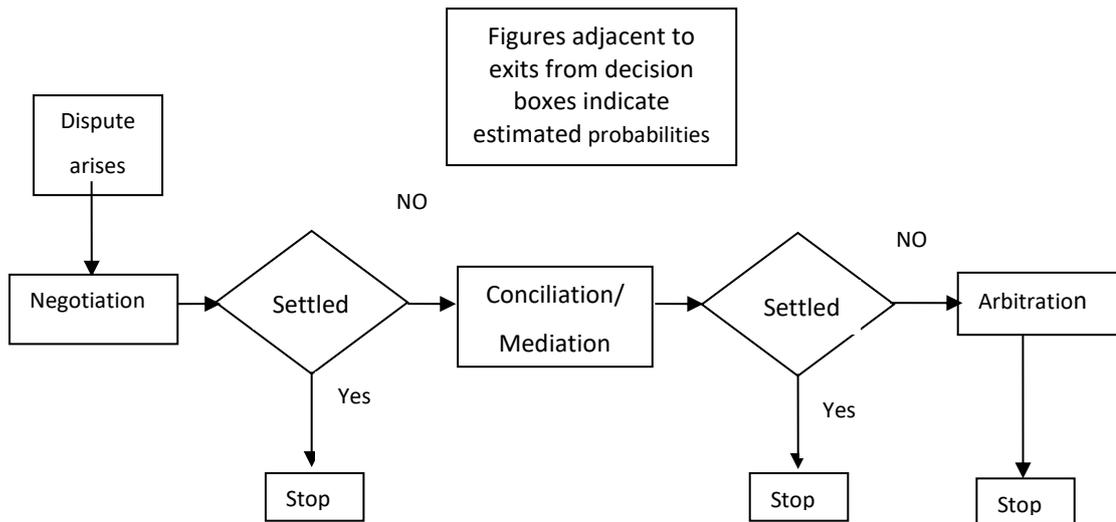


Figure 2.5: Flow diagram of ADR application
Source: O'reilly and Mawdesley (1994)

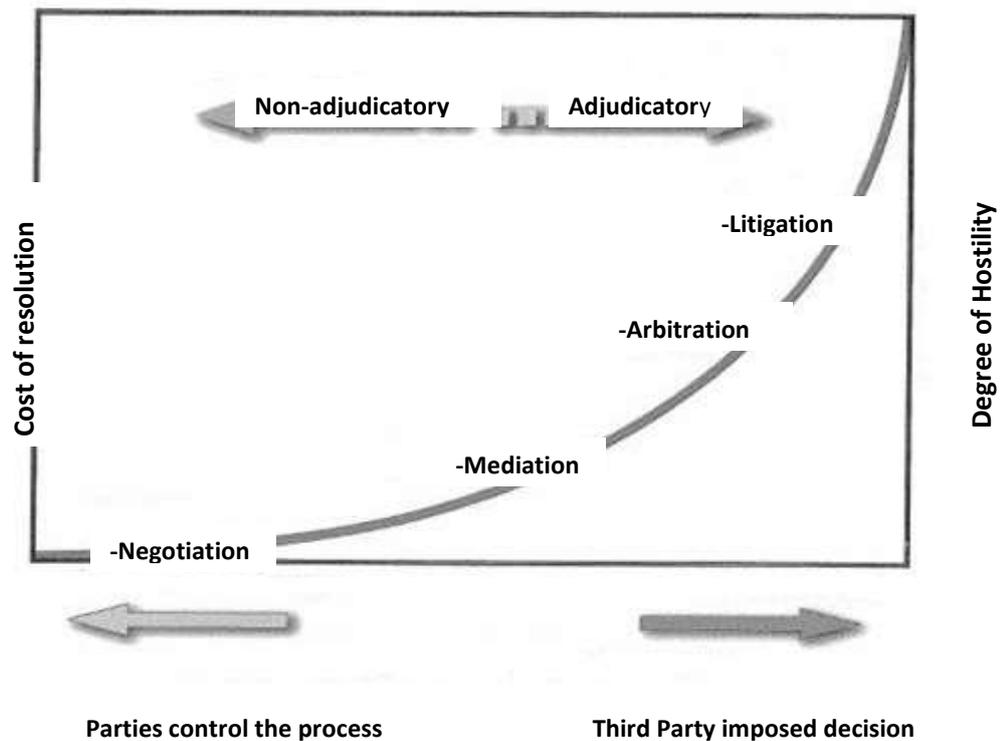


Figure 2.6: Cost of resolution and degree of hostility
Source: Omar (2007)

Figure No.2.5 shows the way of ADR methods apply in the industry and it is convenient to analyze ADR methods.

2.8. Type of Alternative Dispute Resolution

2.8.1. Step One: Negotiation

As Harmon (2003) (cited by Abeynayake et al, 2012) defines the negotiation occurs “whenever people confer, or exchange ideas, to define or redefine the terms of their relationship and respond to their messages”. Further negotiation is a voluntary process is initiated by the consensus of the parties for find the issues of concern and explore options for the resolution of the issues to find mutually agreed stand between the parties’ position.

If negotiation fails, the disputants may pursue the further step and they may select process to derive the assistance form third party. Negotiation can be categorized as two prime ways; the standing neutral and non-binding or the binding resolution. The standing neutral is, the participation of a neutral person adjacent to the construction phase of a project solving problems as the source. This method is relatively inexpensive because problems are entertained relatively informally and with initials facts (Abeynayake et al, 2012).

2.8.2. Step Two: Mediation

Mediation is a process facilitated by an acceptable impartial and neutral third party who has no jurisdiction on making decision but to help the parties to reach self-bound and mutually acceptable settlement of the dispute (Wimalachandra, 2007). This is one way of extension to negotiation.

De Zylva (2011) argues that, mediation helps the parties to move away from their respective positions and re-focus on their interest. It is a problem solving approach that facilitates the parties to negotiate in terms of their needs instead of their contractual entitlements. The mediation process is confidential one.

Mediation is the initial step of the ADR method. If, in mediation, they fail to find an amiable solution, they are bound to submit the dispute to adjudication. This method provides a pressure to settle in the mediation, as the threat of adjudication is ever present. Immediately after an unsuccessful mediation, the adjudication phase starts.

2.8.3. Step Three: Adjudication

Dispute Adjudication Board (DAB) is so popular in construction industry appointed by the agreement between the parties at commencement of the contract to settle the

future dispute, if any arises. The adjudicator is required to be act as impartial expert and not as arbitrators. So it is essential that the adjudicator should be a person suitably qualified to interpret technical and contractual matters. Latham (1994) has recommended referring the disputes which cannot be resolved first by the parties themselves in good faith to the adjudicator for a decision. Further the dispute is referred to the adjudicator within seven days from the appointment of an adjudicator by way of a referral notice. He then decides the procedure to be followed and delivers his decision within 28 days since the referral. The 28-day period can be extended to 42 days with the consent of the referring party and thereafter by agreement.

According to Coutts and Dann (2009) (cited by Abeynayake et al, 2012) the decision is binding and must be complied with subject only to a final determination through legal proceedings, by arbitration between the parties. But it does not avoid the right to appeal. Latham (1994) states that resort to courts should be immediately available if a party refuses to implement the award of an adjudicator. Further Latham (1994) agreed to the fact that dissatisfied party may request that the dispute is heard again by courts or by an arbitrator. However, importantly this procedure doesn't slow down the construction as the appeals are heard only at the completion of the project.

2.8.4. Step Four: Arbitration

Arbitration can be simply defined that shifting the power to third party or the person to resolve the disputes through enforceable decisions. *Arbitration Act No. 11 of 1995* gives for a legislative framework to effectively regulate the Arbitration proceeding in Sri Lanka.

Fast, inexpensive, fair, simple, flexibility, confidentiality and minimum delay are the necessary attributes of arbitration. Consensual in nature and private in character are the main character of the arbitration. District courts in Sri Lanka and the two Commercial High Courts in Colombo entertain the numerous numbers of contractual disputes; capacity and competence of the Sri Lanka court system to manage the huge number of cases and to effectively entertain the technicality of disputes are not matured. Dispute in the construction industry are very technical nature and multi factored can be resolved by the court system in Sri Lanka. Hence construction industry needs a fast, cost effective and binding means for dispute resolution. To cater these requirements of fast, cost effective and binding means of dispute resolution the

Arbitration Act of Sri Lanka was enacted by Parliament of Sri Lanka, which became law on 1st August 1995. By which arbitration procedure is expected to regulate the process with supportive role of the court involvements. Today Arbitration is an alternative to litigation in Sri Lanka. It originated as a method of resolving disputes quickly and without legal formality (Abeynayake et al, 2012)

Sri Lanka *Arbitration Act No 11 of 1995* complies with various concepts or arbitration principles and UNCITRAL Model Law. Even what innovative ideas law has, professional involvement to regulate the practical procedure is very important for successful implementation. According to the Law in Sri Lanka, the parliament act for the arbitration is “*Arbitration Act No 11 of 1995*”. This act describes the rules

Sri Lanka is the pioneer to enact full lateral arbitration law in the south Asian region, by way of the *Arbitration Act No.11 of 1995*. The *Arbitration Act of Sri Lanka No 11 of 1995* regulates the dispute resolution procedure to find the enforceable decision by invoking the reciprocal forces of the state. Very prime objectives of the Arbitration is as follows.

1. To make “comprehensive legal provisions” to execute the arbitration process and subsequently enforcement of the award of arbitration
2. To make legal provision to “give effect” to the convention on the recognition and enforcement of foreign award.

In Sri Lankan construction industry, arbitration and adjudication are very common on their agreements. Most of the construction contracts include Adjudication or Arbitration clauses. The construction industry needs a fast and cost effective means for dispute resolution. The desirable features of Alternative Dispute Resolution (ADR) are being fast, inexpensive uses, simplicity and flexibility. Above attribute are critically emphasized by the Arbitration Act No 11 of 1995 as well as f UNCITRAL Model Law. (Abeynayake, et al, 2012)

Strength and flexibility are the more crucial factor of the suitable Alternative Dispute Resolution in construction industry. Arbitration is the most suitable resolution technique with above two positive attributes. Enforceable decision of arbitration award by invoking cohesive forces of the state can be considered as strength, which strength is the unique attributes of arbitration in ADR. Parties are free to choose their dispute resolution procedure such as selection arbitrators, governing law, substantive

law and even judge's qualification competence of hearing the nature of dispute. Above attributes so common in ADR, are considered as flexibility (Kangisvaran, 2006). Sri Lanka was the pioneer in south Asian region of introducing and enacting such lateral *Arbitration act of 11 of 1995* it is considerably compiled on the "United Nation Commission on International trade Law (UNCITAL)" model Law on international commercial arbitration and inspired by then draft Swedish Arbitration Act (Wijeratne,2011).

2.8.4.1. Legal Definition of Arbitration

Arbitration is the legal arrangements to deal commercial disputes outside of the courts, wherein parties shifting the power by the consensus on having judgments on their disputes: e.g. "arbitrators", "arbiters" or "arbitral tribunal" and the parties to the dispute agree to be bound by the decision or the award (Sullivan, Arthur and Steven, 2003).

In general, arbitration is a procedure in which a dispute is submitted to one or several (usually three) arbitrators who will make a binding decision on the dispute (Karam, 2001). Shortly after the hearing is completed the arbitrator issues an opinion.

Further, the arbitration is conducted in accordance with a set of rules mutually agreed by the parties. According to Kangisvaran,(2011) the tribunal is composed of arbitrators selected on their expertise involved in the matter of the dispute either nominated or approved by the parties. The disputants may choose the procedure by which the tribunal will decide the dispute and also may determine the location, dates of the proceeding and the language or languages of the proceedings. At the commencement of the settlement of dispute the parties may present their evidence to the arbitrator in a manner that is less formal than a court hearing and witnesses may be cross-examined. According to Kanagisvaran (2011) the followings are the basic elements of the Act,

➤ ***Enhancing its finality:***

No review of an arbitral award thus enhancing its finality. There is only a possibility of having it set aside on very narrowly defined grounds as per Section 32 and 34.

➤ ***Waive appeal by exclusion agreement:***

Exclusion agreement is the common terms agreed by the parties give the right to Supreme Court to waive the appeal of questioning law after the award as per section 38.

➤ ***Arbitration agreement bar to court:***

valid arbitration agreement constitutes a bar to court proceedings if so pleaded. Court cannot ignore such agreements as per Section 5.

➤ ***Limited court intervention:***

Once arbitration has commenced, court intervention is limited to specific instances supportive of arbitration Section 05, section 32 34.

➤ ***Party autonomy:***

Party autonomy is prime philosophy in enacting the arbitration law. Number of arbitrators and the procedure can be decided by the parties with any additional stern regulation as per section 6, 7, 16 and 17.

2.8.4.2. Arbitration History of Sri Lanka

Firstly, in the history of Roman law arbitration had been practiced as a method of dispute resolution. But this portion of law was not available in the Roman Dutch Law practice in Sri Lanka. British legal reformers introduced arbitration as a less formal dispute resolution mechanism in 1866 by enacting the Arbitration Ordinance No.15 of 1866.

Before enactment of the Act No 11 of 1995 arbitration had been formally connected to the legal system of Sri Lanka in the last century with the enactment of two statutes viz:

- i. The Arbitration Ordinance No. 15 of 1866
- ii. The Civil Procedure Code of 1889.

Under these two statutes Arbitration was categorized into two groups:

- i. voluntary arbitration
- ii. compulsory arbitration

Above mentioned arbitration ordinance used to deal the compulsory arbitration but civil procedure code used to handle the both arbitration such as voluntary and compulsory arbitration .

The liberalization of economy with the commitment of the Government of Sri Lanka to encourage foreign investment has resulted in a continuous inflow of foreign capital into the country.

The method of litigation being adversarial the parties invariably and increasingly confront each other in such proceedings and try to persuade with every possible means favorable to its point. This is partly due to the inordinate and intolerable delays in the conclusion of litigation. In the modern commercialized world arbitration has been held at high esteem of dispute resolution. Arbitration clauses are being increasingly inserted into commercial contracts.

2.8.4.3. Legal Framework of Arbitration in Sri Lanka

The Arbitration Act of Sri Lanka was enacted in 1995. The Act provides for a legislative framework for effective conduct of arbitration proceedings as well as the most comprehensive and method for the enforcement of arbitral awards and through which arbitration becomes true alternative to the litigation in all means. However, the option with the parties to have entered into an arbitration agreement in order to enforce the Act as the formal means of settling disputes. With the introduction of the Arbitration Act No. 11 of 1995, construction disputes are more likely to move in the lines of the arbitration in Sri Lanka.

Sri Lanka is the pioneer to introduce the full liberal arbitration law in South Asia that enacted an Act to deal with arbitration. The Arbitration Act of Sri Lanka stated how to resolve disputes that arise in any industry. The Act provides that an arbitration agreement shall be in writing

In Sri Lankan context arbitration is conducted according to the Arbitration Act No 11 of 1995. Main contents of the Arbitration Act of Sri Lanka are as follows.

1. Form of arbitration agreement (Sections 2, 3)
2. Appointment of arbitrators (Sections 6-10)
3. Prepare the procedure for arbitration (Sections 6-10)
4. Define the competencies of arbitration tribunal (Sections 11,12)
5. Issue of interim measures of protection (Section 13)
6. Define duties and responsibilities of the arbitral tribunal (Section 15)
7. Notice of place or venue for arbitration (Sections 16)
8. Determination of rules & procedure (Section 17)

9. Commencement of arbitration procedure (Section 18)
10. Submission of the dispute to the arbitration (Section 18)
11. Issuing of summons (Section 20)
12. Issuing of awards (Sections 25, 26)
13. Correction and interpretation of award & additional awards (Section 27)
14. Compensation of arbitrators (Section 29)
15. Application to the High court for enforcement of the award (Section 31)
16. Application for setting aside the award (Section 32)

In Sri Lanka arbitration is the only legally enforceable ADR method covered by the Act No 11 of 1995. The Act was enacted as a comprehensive piece of legislation on arbitration to replace the legislation in existence, which was inadequate to settle disputes through arbitration.

As per Section 14 of the Act encourages the tribunal to settle the dispute in agreed terms with the consensus of the parties . Those agreed resolution can be enforceable through Arbitration Act which encourages the other methods of ADR.

2.8.4.4. Case Law of Sri Lankan Arbitration.

Award of arbitration is entitled to enforce by invoking the reciprocal forces of the state by the Act No 11 of 1995. The act included the most lateral way of implementing UNCITRAL rules with the supportive involvement of the court system are the very unique features of the arbitration act. Some land mark judgments from the supreme courts also legal interpretation of the act, and now those have become a part of arbitration law as a judicial precedent. For an example “Southern Group civil construction private limited vs. Ocean Lanka private limited” (2002) case defined the setting aside the arbitral award and its time limit. Further In “State Timber Corporation vs. MoizGoh (pvt) Ltd case” (2000), court held that put bar of jurisdiction of the district courts to intervene. The arbitration Act does not stipulate any rules for the procedure. Composition of the arbitral tribunal, the jurisdiction of the arbitral tribunal, the conduct of Arbitral proceedings, awards, enforcement of awards, recognition and enforcement of foreign Arbitral awards and grounds for refusing or enforcement of awards are regulated properly by sections of the arbitration Act.

Arbitration law no 11 of 1995 does not imply any stern regulation because of parties are expected to define their rule convenience to them, through which law intends to

provide fully party autonomy. According to the section 32 (1) (a) of the arbitration Act, defined the ground of set aside the arbitration awards, such grounds are as follows.

- i. “A party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law, to which the parties have subjected it or, failing any indication on that question under the law of Sri Lanka”,
- ii. “The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case”,
- iii. “The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration provided. However that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside”,
- iv. “The composition of arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of the Act, Where the High Court find that the subject matter of the disputes not capable of settlement by arbitration under the law of Sri Lanka”,
- v. “Where the High court finds that the arbitral award is in conflict with the public policy of Sri Lanka. Section 14 of the Act states the arbitral tribunal can encourage settlement of the dispute and, with the agreement of the parties by using mediation, conciliation or any other procedure at any time during the arbitral proceedings. That can be identified as a special feature of arbitration Act which encourages the other methods of ADR. Innovative features of the Sri Lankan arbitration Act are as”:
 - i. “A valid agreement for Arbitration constitutes restriction to court proceedings”.
 - ii. “The principle of party autonomy is safeguarded in appointment and determination of the number of arbitrators, the place of arbitration and the procedures to be followed in the arbitration proceedings”.

- iii. “The arbitration awards are final and courts have no jurisdiction to interfere in the merits of an award and the award could be set aside on very narrowly defined grounds”.
- iv. “The exclusion of appeals to the Supreme Court by the agreement of the parties is a unique provision, which is expected to make the arbitration process less litigious and protracted”. (Arbitration Law,1995).

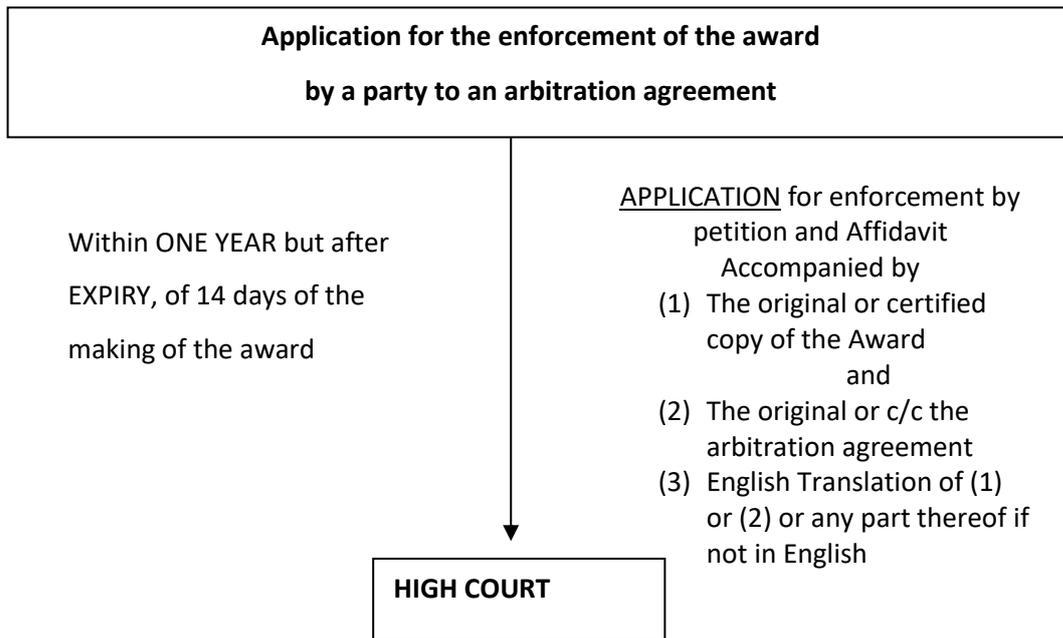


Figure 2.7 – Enforcement of arbitration awards in Sri Lanka

Judgment of the Supreme Court in *Kristley (Pvt) Limited Vs. The State Timber Corporation* (2002) 1SLLR 225 in which it was held, inter alia, that

"On the facts and circumstances of the case, copies of the awards tendered with the claimant's application were duly certified copies within the meaning of section 31(2)(ii) of the Act”.

"Even in a case where the copy of the award filed with the application is not a duly certified copy of the application may not be summarily rejected without giving an opportunity to tender duly certified copies interpreting accompany in section 32(2) purposively and widely."

Grounds on which such an award can be set aside under Sec. 32(1)(a) are;

- (i) “A party to the arbitration agreement was under some incapacity or

the said agreement is not valid under the Law to which the parties have subjected it or, failing any indication on that question, under the law of Sri Lanka; or”

- (ii) “The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or”
- (iii) “The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration: Provided however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions matters not submitted to arbitration may be set aside or”
- (iv) “The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of - the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of the Act: or”
- (v) “Where the High Court finds that the Subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or”
- (vi) “Where the High Court finds that the arbitral award is in conflict with the public policy of Sri Lanka”.
- (vii) “Where the High Court finds that the Subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or”
- (viii) “Where the High Court finds that the arbitral award is in conflict with the public policy of Sri Lanka”.

Oberoi Hotels (Pvt) Limited. Vs. Asian Hotels Corporation Limited (2002)B.L.R 23, the Supreme Court of Sri Lanka has given salutary guideline to the interpretation of the provisions of section 32(1)(a)(iii) as follows:-

It is seen that the touchstone in all situations is, "the submission to arbitration". Therefore the question as to the validity of the award of any decision contained therein has to be decided primarily on the basis of the dispute that has arisen and submitted to arbitration by way of a reference by the parties. This is in keeping with the basic principle that an arbitral tribunal derives jurisdiction solely from the submission to arbitration by the parties.

In the case of southern group Civil Construction (Pvt) Limited. Vs. Ocean Lanka (pvt) Limited (2002), the Supreme Court of Sri Lanka has held that the High Court has no power to set aside an award on the ground stated in Section 32(1)(b) at Arbitration law No 11, 1995 in the absence of material supporting material supporting such a finding being contained in the application and that all grounds of challenge with supporting material on the basis of which a party wishes the High Court to come to a finding in terms of section 32(1)(b) should be adduced by an application in the application under section 32 .

2.8.4.5. Recognition and Enforcement of Foreign Arbitral Awards

A Foreign Award means an award made in an arbitration conducted outside Sri Lanka. foreign arbitral from any country in which it was made shall falls under section 34 be recognized as binding and, upon application by a party under section 31 to the High Court, be enforced by filing the award accordance with the provisions of that section.

No appeal or revision lies in respect of any order, judgment or decree of the High Court in the exercise of its jurisdiction under this Act except from an order, judgment or decree of the High Court under this Part of this Act. However an appeal can lie from such an order, judgment or decree of the High Court to the Supreme Court only on a question of law and with the leave of the Supreme Court first obtained.

The Supreme Court may in the exercise of such jurisdiction affirm, reverse or vary the order, judgment or decree of the High Court, subject to the provisions of this Act. In proceedings before the High Court evidence shall be given by affidavit. But where the courts think it right so to do; it may take evidence viva voce in addition to evidence by affidavit. The High Court should deal with every such application and deliver its determination thereon as expeditiously as possible.

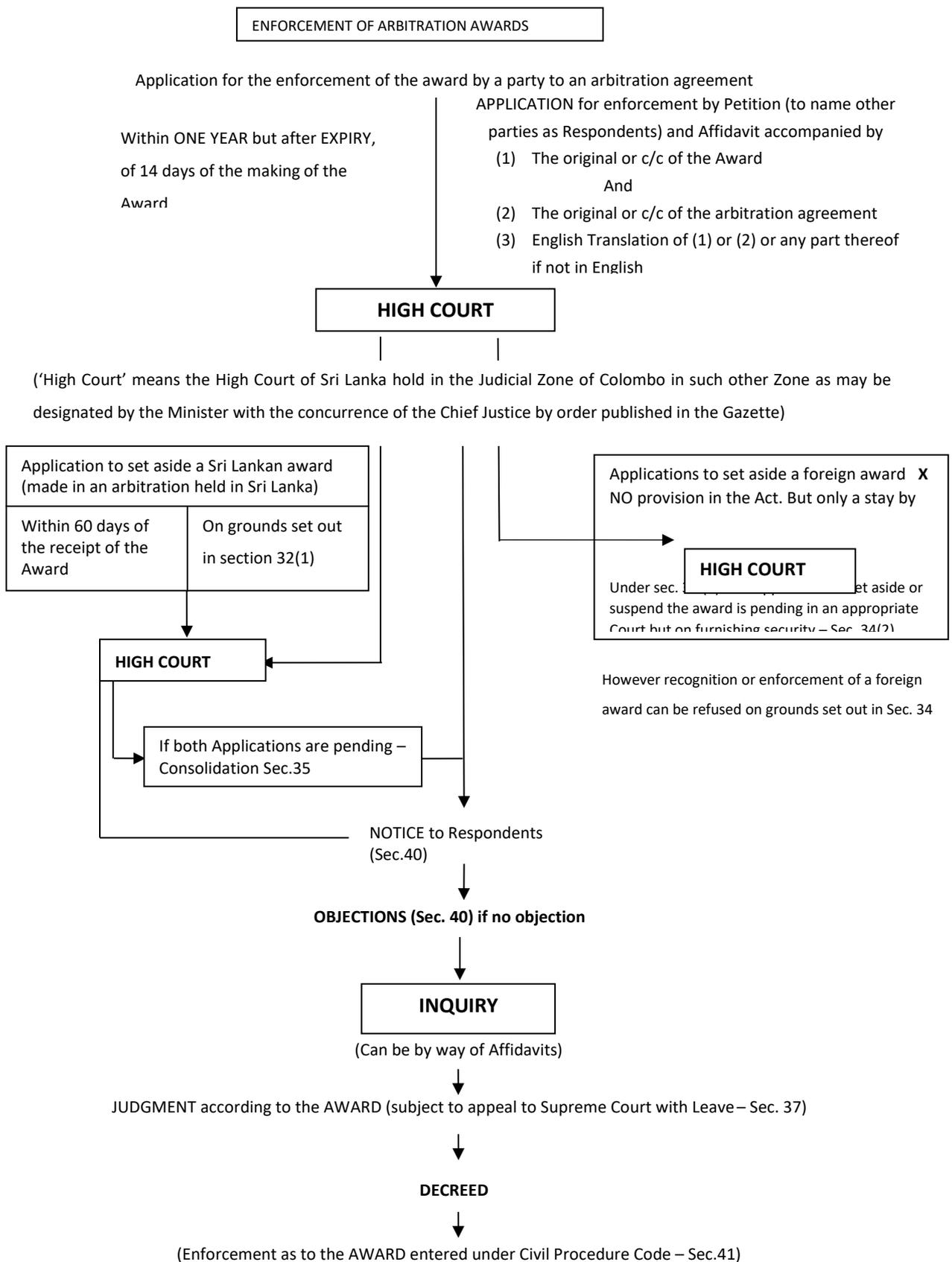


Figure 2.8: Enforcement of arbitration Awards (Abeynayake, et al, 2012)

2.8.4.6. Recognition of Party Autonomy by the Courts in Sri Lanka

Both parties are equally entitled to select the arbitrators and all procedures. Power to resolve the disputes is shifted from party to tribunal by the agreement. The following cases decided in the Sri Lankan courts confirm that the principle of Party Autonomy is recognized by the courts in Sri Lanka.

In the case “Merchant Bank of Sri Lanka Ltd. V. D. V.D.A. Tillekeratne(2001)”, a case decided by the Supreme Court in Sri Lanka (2001), the Supreme Court held that “the Party autonomy as a fundamental principle of arbitration Law and this is given effect to by the legislature in Section 7(1) of the Arbitration Act”.

Accordingly, it is evident that the basic principles of party autonomy as recognized in the international laws and the rules are included in the Arbitration Act No. 11 of 1995. A comparison of the provisions recognizing the principles of party autonomy in our Arbitration Act No. 11 of 1995 with the similar provisions in the UNCITRAL Model Law are shown in Table 2.1.

2.8.4.7. A comparison of the Party Autonomy Provisions; Arbitration Act No. 11 of 1996 and UNCITRAL Model Law

Table 2.1 – Comparison of the party autonomy concept

Provisions of Sri Lankan Arbitration Act No. 11 of 1995	Provisions of UNCITRAL Model Law
6(1) Parties are fully free to choose the number of arbitrator for the tribunal to settle their disputes.	10(1) Parties are entitled on deciding the arbitrators’ numbers.
7(1) Parties can decide the procedure to appointing the arbitrators with consensus	11(1) Parties can decide the procedure to appoint the arbitrator.
16(1) Place of arbitration can be decided by the relevant parties with agreement.	20(1) Place of arbitration can be decided by the relevant parties with agreement.
17(1) Procedure to be complied by tribunal on conducting the proceeding can be decided by the parties with the agreements	19(1) Procedure to be complied by tribunal on conducting the proceeding can be decided by the parties with the agreements.

24(1) An arbitral tribunal shall decide the dispute in accordance with substance of law that can be selected by the parties with agreement.	28(1) An arbitral tribunal shall decide the dispute in accordance with substance of law that can be selected by the parties with agreement.
37(4) Parties can waive the rights to appeal for questioning the law in supreme courts by the exclusion agreement.	No such Provision

The above comparative review reflects that the party autonomy principles as included in the Arbitration Act No. 11 of 1995 are mostly similar to those in the UNCITRAL Model Law. The notable addition in our arbitration Act in comparison with the UNCITRAL Model Law is that the parties, under our Act, can even agree in writing to exclude any right to appeal in relation to the award. Such a provision excluding the court's jurisdiction is not available in the UNCITRAL Model Law.

2.9. Sri Lanka's Potentiality on Arbitration

Sri Lanka being a dualist country, this means that when national courts were faced with an application for recognition and enforcement of foreign arbitral awards, they would refuse to recognize and enforce them on the ground that the Convention had not been implemented by domestic law (*Leelawathie v. Minister of Defense and External Affairs, 1965*). These factors rendered arbitration as an inefficient means of resolving commercial disputes. This was identified as a serious issue in the late 1970s. The Sri Lankan government was trying to encourage the inflow of foreign investment, yet foreign investors were apparently concerned about the absence of an efficient means of resolving commercial disputes. The Arbitration Act of 1995 was drafted in this context, inspired both by a draft of the Swedish arbitration Act submitted to the Swedish government in 1994 and the UNCITRAL Model Law.

Sri Lanka National Arbitration Centre (SLNAC) CEO, Alwis (2010) said that by promoting the Sri Lanka as place of arbitration local professional service can be market and export to foreign disputes will definitely bring good enhancement in the economy. Sri Lanka's potentiality to act as suitable place of Arbitration by means of geographical location as well very supportive arbitration law to develop the economy be inviting business tourism. Legal and construction professional have very unique

opportunity to expose and effectively involve into the multi-million dollar sector towards the community and the economy.

Not only the construction sector but also sport, banking and insurance sectors tend the arbitration as popular way of resolving the disputes with efficient means, it creates the opportunity and the demand to Sri Lanka the country is geographically positive features as well as enacted with fully Arbitration governing law.

Kanagisvaran (2011), an eminent President's Counsel in his address to the said "A modern law of arbitration was a sine qua non for facilitating and promoting arbitration in general and for the promotion and establishment of Sri Lanka as the regional center for arbitration in the emerging South and South East Asian region'.

With the major impediment to peace and economic growth has been cleared the arbitral and legal institutions should focus on developing the infrastructure to achieve global status for the arbitration in Sri Lanka. Direct benefits of setting up the Colombo as an international hub would enhance foreign investments and income flows that generate from professional services and expertise, income from facilitation and hosting services for foreign arbitrations of multi-national companies and spin-off such as business tourism. (Alwis, 2010)

According to experts the need for international dispute resolution will increase with the revival of global trade. Legal services account for about US\$ 1.3 billion of Hong Kong's GDP in 2007 and S\$ 1.3 billion in Singapore the same year. The inter-relation between arbitration and growth of Asian economies is inseparable. The reason for India and China burgeoning is the increase in international commercial disputes. SLNAC hopes to attract international arbitrations to Sri Lanka as a service provider and to make commercial dispute resolution by arbitration expeditious and cost-effective" (Alwis, 2010). Above discussion categorically depicts Sri Lanka's potentiality to develop its status as a popular place of arbitration. Sri Lankan law gives maximum supportive role as governing the law. Geographical location also is very conducive to be a popular place of arbitration.

2.10. Construction Industry and Arbitration in Sri Lanka

In construction contract, disputes are inevitable. Disputes can arise any time for any reasons. But most of the disputes can be categorized as so.

Cause of the dispute may arise due to-

- Breach the contract by any party in the project.
- Variations orders
- Insufficient administration of responsibilities by the owner or the contractor.
- Drawing, plans may contain errors and confusions.

Arbitration in Sri Lankan construction industry has definite advantages over the litigation.

- Arbitration proceedings are quicker than litigation.
- Arbitration is cheaper than litigation in courts.
- Party autonomy is emphasized throughout the procedure.
- Expert opinion can be involved as the arbitrators.

Procedure steps of arbitration can be outlined as follows.

2.10.1. Arbitration Agreement

According to the act single clause in the parent agreement or separate agreement can be accepted as arbitration agreement. Further, Kanagisvaran (2006) stated that most of arbitration agreements are made before a dispute arises as included in many standard conditions of contracts such as SBD, FIDIC, JCT forms. Arbitration act no 11 of 1995, in section 3 clearly defines the agreement as so

3. (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing. An agreement shall be deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement.

2.10.2. Commencement of Proceedings

According to the SBD (Standard Bidding Document) in Sri Lanka any dispute arising out of the agreement with reference to interpretation, party's rights, duties and obligation or liabilities of any party. Further its operation, breach, termination, abandonment, foreclosure or invalidity thereof can be brought to Arbitration Act No.

11 of 1995 to resolve the dispute within the scope of the agreements. However, according to the Arbitration Act, arbitration shall be deemed to have been commenced if a dispute to which the relevant arbitration agreement applies has arisen or if a party receives a notice of the arbitration from another party.

2.10.3. Constitution of the Arbitral Tribunal

According to the SBD, the arbitral tribunal shall consist of a sole arbitrator. The party needs arbitration would be conducted by three arbitrators out of which one to be nominated by the other party within 21 days of the receipt of such nomination. If the other party fails to nominate arbitrator within particular period then the arbitrator shall be appointed in accordance with the Arbitration Act. Further, according to the Arbitration Act, parties are entitled to determine the number of arbitrator, the way of appointment and qualification of arbitrator with consensus agreement between the parties. If parties fail to come to common term of number of arbitrator, the number of arbitrators shall be three. When parties nominate the even number of arbitrator then additional one can be selected by the arbitrators who were nominated by the parties, additional arbitrators selected by the nominated arbitrator may act as chairman of the tribunal. Further, if the parties failed to agree to appoint the arbitrator the arbitrator shall be appointed by the High Court on the application of a party.

2.10.4. The Hearing

The arbitral tribunal should deal any dispute submitted to it by the parties for arbitration in an impartial, practical and expeditious manner. In addition to that, the Arbitration Act states that the arbitral tribunal should ensure that equal opportunity is given to all party to disclose their argument in orally or written and to examine the all document and material prepared by each party. Further, the arbitral tribunal may arrange an oral hearing before its award at the request of a party.

2.10.5. The Award

According to the Arbitration Act, arbitral award should be in writing, and endorsed by the tribunal. The award shall include the reasons for deriving the decision but if the parties are willing so, reasons can be omitted as award in agreed terms. Copy of the award signed by the arbitrators to be delivered to each part by tribunal . Further, the award delivered by the tribunal shall be the final and no any court has any jurisdiction to

question the merit of the award and binding on the parties to the arbitration agreement.

2.10.6. Enforcement of Award

According to the Arbitration Act, a party to an arbitration agreement can take the steps to enforce the award in the High Court, within one year after the expiry of fourteen days from the receipt of the award. In addition to that, an arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court on application made within sixty days of the receipt of the award.

2.11. Advantages of Arbitration

There are numerous advantages in Arbitration compare with litigation in Sri Lankan context.

The principal advantages are,

- a) Cheaper compare with litigation.
- b) Technical experts may be act as Arbitrator with nature of the disputes.
- c) Privacy.
- d) The process is speedier than at courts .
- e) Reasonable time allocation for the arbitrator.

2.12. Critical Success Factors in Arbitration

Several researchers attempted to identify the selection criteria of dispute resolution strategies based on identical factors such as cost, time duration, degree of control and the Success Factors of arbitration. Abeynayake et al (2012) found Comprehensive list of factors affecting to ADR as follows.

Table 2.2 – Critical attributes of arbitration

Success Factor	Explanation of the Factor
Available remedies	Width of outcomes which can be extracted from process proceedings
Choice over the third party	Opportunity for the parties to check the records of alternative third party comparing experience, knowledge and professional back ground
Confidentiality of the information and the process	Parties to the dispute, control the process by avoiding expose any information or material to public
Consensus agreement	Ability of working within a common ground

	throughout the dispute resolution process
Control by parties	Control by parties Degree to control the process, format and the content of the resolution by parties
Control by the third Party	Degree to control the process, format and the content of the resolution by the third party
Cost (Overall)	Total amount of direct indirect and hidden cost
Creative solution	Does the solution satisfy the needs of both parties?
Enforceability of the decision	Binding nature of the decision.
Fairness	Fairness Ability of both parties to disclose the relevant facts
Flexibility in the proceedings	Degree of using strict rules and procedures in the Process.
Knowledge in construction	Involvement of construction experts in the process
Liability of opponent's cost	Parties liability to opponents“ cost of resolution is exist or not?
Overall duration/ Speed	Amount of time taken to resolve the dispute
Participation of all stakeholders	Facilitate the participation of all stakeholders or not?
Power imbalance	Are both parties having balance power in the resolution process or not?
Power to compel consolidation	Degree of power available in the process force the parties to settle
Preservation of relationship	Ability to protect the relationships between the parties after the final decision of the dispute resolution process
Professional culture and ethics of parties	Culture and ethics of the professionals involve in the dispute resolution process
Range of issues	Number of issues having in the dispute and their depth
Time required of parties	Time for submissions, to prepare submissions and to react according to the proceedings is strict or not
Willingness to resolve	Parties willing to settle or not?

The promoters of ADR advocate the use of a problem-solving approach to resolve construction dispute rather than the adversarial point scoring approach as exhibited in arbitration and litigation. Furthermore ADR, by its nature, allows the disputants eligibility to exercise control over the resolution process through a tailor design. One who is left with this design task would acknowledge of dispute process users' real concern of immense value. This investigation seeks to identify the critical attributes of ADR processes from the perspective of the users. ADR facilitators will find the result of the study of great value for their formulation of strategies to bring out the best result. The study also serves the purpose of providing empirical support to the advantages purported by ADR promoters. In these contexts, twelve ADR attributes

were to be evaluated (Cheung, 1999). At his study Cheung (1999) found following attributes are the crucial attribute in the Alternative Dispute Resolution (ADR)

1. “Binding of the decision (Binding)”
2. “The cost involved (Economy)”
3. “Confidentiality of the process (Confidentiality)”
4. “The parties' ability to control over the proceeding (Control)”
5. “Obtaining creative remedies (Remedy)”
6. “Enforceability of the decision (Enforceability)”
7. “Obtaining fairness (Fairness)”
8. “Flexibility of the proceeding (Flexibility)”
9. ‘Privacy of the proceeding (Privacy)’
10. ‘The duration of the proceeding (Speed)’
11. “Preservation of relationship (Relation)”
12. “The width of the remedy (Remedy)”.

2.13. Effectiveness of the Arbitration in Construction Industry

Introducing the arbitration bill in parliament at its second reading, in May 1995 (25 may 1995) then minister of Justice Pieris (1995) had this to say:

“One of the endeavors of this government has been to accelerate the economic development of our countryone of the constrain with regard to foreign investment is the cumbersome procedures relating to the resolution of commercial disputes.... Potential investors are greatly concerned about delays”.

“.....one of salient features of our system is the influence of the adversarial system.....inherited from British system is not appropriate of adequate and we have to focus upon alternative methods for the resolution of these disputes.....we are convincedthat there has to be a fat greater role for arbitration in respect of commercial matters. Dispute resolution will then become quicker, less expensive and less technical”.

“We are placing very considerable emphasis on the concept of party autonomy. We would like the parties to have as much said as possible in regard to the matters that arise in disputes of this kind”(cited by Kanagisvaran 2011).

But after the 20 years completion of enacting this lateral arbitration law, most of the professional who involve in arbitration feel that arbitration is not being practiced in

effective way in construction business. Further, Kanagisvaran (2011) states that “The act was intended to bring about a fundamental change for the better; I believe that this act provides the most exciting of challenges to arbitrators and those practicing around them”. Further he stated that “It was intended to establish arbitration as the alternative from of disputes resolution- indeed, as the preferred mode of dispute resolution. It was hoped that arbitrators and the parties of their representative will spur the old ways mimicked the Civil Procedure Code syndrome and opt for new regime for a flexible, speedy and cost effective resolution of their disputes”.

Further, Kanagisvaran (2011) states “If the question is now asked – has it worked? Or has failed? I would say that the answer is yes and no. no independent study has as yet been undertaken on the subject, as far as I am aware. Therefore in attempting to comment upon the operation of the arbitration act I am compelled to draw from my own experience and exposure to the conduct of arbitration in Sri Lanka and its journey through the judicial process in seeking to have awards enforced and set aside and appeal from decision of the high court on this to the Supreme court. I believe not too well at all, as there is widespread disillusionment with the way in which arbitration is being conducted”.

Kanagisvaran (2011) denoted that “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! Proceedings are often delayed and take much longer than what the parties has hoped when they incorporated arbitration agreement in their contract. I personally know of a proceeding where a single witness was cross- examined for three years, against protest, before single arbitrator”.

Perceived complexity, slowness & expense create the dissatisfaction in arbitration in construction industry. Even arbitration is widely used as dispute resolution for its positive attributes such as enforcement and flexibility. It is noted that several drawbacks and pitfalls are found in several researchers in the construction industry of Sri Lanka. Delaying the process, high cost of the arbitrators and expected fringe benefits, higher involvement of lawyers, less concentration on technical issues, unawareness, different resolutions given by different arbitrators are found as major short comes of the arbitration in Sri Lankan construction industry. Difficulty in challenging the award, inability to conduct multi-party disputes using arbitration and limited

jurisdictions, same procedure apply for all disputes, impossibility of maintaining the relationship between parties, less satisfaction with the process are also further added as observed constrain of effective application in industry . There is no any explicit provision to define the time limit at Arbitration law in Sri Lanka but parties can add that regulation in their agreement as so. But in real practices it is not apparent to use that regulation in practices. Further some countries in the Middle East with which Sri Lankan contractors have entered into construction contracts, are not parties to New York Convention and all have to other regional arrangements such as the Amman convention which requests all arbitral proceedings to be conducted in the Arabic language (Abeyanayaka et al, 2012).

Number of researchers believed that Sri Lankan arbitration process has become adversarial and expensive. Time factor is the most crucially criticized attributes of the arbitration in the Sri Lankan context. The arbitration agreement is guided by ICTAD category of contract (under clause No. 67) define time frame as four month within that period final decision to be awarded from commencement of the process , although the Arbitration Ordinance of 1948 stipulates a period of 3 months. But present Arbitration ACT no 11 of 1995 doesn't stipulate any time frame as previous one did. Present act intents to fix the period by the parties through which party autonomy is expected to emphasized. According to the arbitration agreement recommended by ICTAD the period for commencement of arbitration must take a maximum of 90 days and in accordance with the FIDIC the maximum period to appoint an arbitrator is 154 days. Hence time factor to resolve the disputes is the prime draw back in the arbitration. No any explicit regulation is provided by the act (Abeyanayaka et al, 2012).

2.14. Practical Constrain of the Arbitration

Number of authors and key players in arbitration denote numerous negative practical customs which are being practiced in the industry. These customs are believed by several practitioners as the causative of the ineffectiveness of the arbitration. Those can be categorized as follows.

2.14.1. Unavailability of Fulltime Arbitrator and Hearing

Difficulty in arranging the hearing and finding the Arbitrators for full time basis and daily basis, which directly affects the speed of the procedure. By the part time

professional at evening hours only arbitration is being entertained. Hearing is scheduled to convenient of the Arbitrators and tribunal. But the Arbitration law in Sri Lanka fails to mention the time frame to complete the whole procedure like what is codified in the previous law and regulation.

Even though the span of arbitration period is not stipulated in the act, undue delay of the arbitrator can be questioned by the section 8 (1) of No 11 Arbitration Law 1995.

“The mandate of an arbitrator shall terminate if such arbitrator becomes unable to perform the functions of that office or for any other reason fails to act without undue delay, or dies, or withdraws from office or the parties agree on the termination”.

One of key player in arbitration is Kangisvaran (2011) very clearly states about the contemporary procedures adopted by the industry as so “Sitting are often of short duration, because counsel appearing are busy practitioners and would like to adjourn early to get ready for next day’s court work, most arbitrations start around 4.30 p.m. or 5.00 p.m. and go on for 2 to 3 hours only. Postponements are readily granted, necessitating a greater number of sitting. Parties suffer if they have to pay per sitting on consecutive days in virtually unknown, except in domestically held international arbitration”.

So, above is found by several literatures as the important short come of the practical arbitration.

2.14.2. No Any Stipulation to Limit the Time at Arbitration Act No 11, 1995

According to the ICTAD category of the contract (under the clause No. 67), arbitration agreement says that time span to resolve the dispute is four month from the commencement of the procedure. But current arbitration act in Sri Lanka fails to mention any thing explicitly. But some of researchers argue that parties who are in the agreement can define period with substance of the disputes, but this practices not in apparent in real industry.

Dispute Adjudication Board (DAB) is introduced by FIDIC condition 1999 as system of pre-arbitration requirement. Disputes are firstly entertained by Dispute Adjudication Board (DAB) as a pre-Arbitral step before reference to arbitration according to the clause 20 of FIDIC 1999. The ICTAD contract under clause No. 67 says maximum period for the award should be four months but the Arbitration

Ordinance of 1948 stipulated a period of three months, the present Arbitration Act fails to provide any provision to define the time limit. Parties can agree the time limit at agreement. According to the arbitration agreement recommended by ICTAD the period for commencement of arbitration may take a maximum of 90 days and in accordance with the FIDIC documentation, the maximum period to appoint an arbitrator is 154 days. Hence, the time factor remains a major drawback in the arbitration process. (Abeynayake et al, 2012)

But these time limits can be inserted at individual agreement, but this lacuna would be used to drag the time by the industry.

2.14.3. Emulate the Court's Stringent Procedure.

Part time black court professional and judges try to mimic the court system by which party autonomy is taken away. Party autonomy is the important philosophy behind the arbitration. But most prominent figures in the arbitration field believe that arbitration also emulate the same die hard rules as the court system has. But Arbitration Act No11, 1995 emphasizes the party autonomy by following clauses.

Arbitration act no 11 of 1995, section no 17 says, "Subject to the provisions of this Act, the parties shall be free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, the power and Duties of Arbitral Tribunal and Place of arbitration. Conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, and weight of any evidence".

Arbitration act no 11 of 1995, section no 22 (3) says," unless otherwise agreed upon by the parties, an arbitral tribunal in conducting proceedings in pursuance of an arbitration agreement shall not be bound by the provisions of the Evidence Ordinance". According to the perception of the key players in the field, arbitration practices don't comply with above clauses, and precisely copycat the procedure of conservative court system.

Kanagisvaran (2011) denoted that "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! Proceedings are often delayed and take much longer than what the parties has hoped when they incorporated arbitration agreement in their contract. I personally know of a proceeding where a single witness was cross- examined for three years,

against protest, before single arbitrator. Mostly arbitrators are retired judges- mostly of the Supreme Court. Old habits die hard. They are quite content to let arbitration to be conducted in the same way as court proceedings”.

So this also identified as the prime practical constrain of the arbitration procedure by the available literature.

2.14.4. No Alternative Option for Language and Venue.

No any availability for venue of the arbitration other than Colombo. No any language can be selected by the parties other than English. Arbitration act no 11 of 1995, section no 16 gives completely freedom to select the place of arbitration with the convenient of the party.

Section no16. (1) “The parties to an arbitration proceeding shall be free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties”.

Section no16. (2) “Notwithstanding the provisions of subsection (1) providing for the place of arbitration, the arbitral tribunal may, unless otherwise agreed upon by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents”.

In the practices it is not possible to set the venue as convenient to the party as stipulated in act. A further drawback is that there are no facilities to conduct construction arbitration proceedings besides Colombo.(Abeynayake et al, 2012). Very complex English and law jargons alienate the parties and necessitate law fraternity’s involvement. It is not possible to resolve the dispute in local language which would convenient to the parties to involve directly by themselves.

2.14.5. Exorbitant Cost

High emolument and facilities required by arbitrators is identified as another major concern by several researchers. Nor only the remuneration but also several indirect fringe benefits are expected by the arbitrators. Even though Arbitration Act no 11 of 1995, ensures in several way to get the amble compensation.

Arbitration act no 11 of 1995section no 29 (1) “The parties shall be jointly and severally liable for the payment of reasonable compensation to the arbitrators constituting the arbitral tribunal for their work and disbursements:

Provided however that when the arbitral tribunal declares in its award that it has no jurisdiction to decide the dispute, the party who did not request the arbitration liable for such payment only if there are exceptional circumstances which warrant such payment by him”.

Arbitration act no 11 of 1995section no 29(2) “The final award shall order the payment of compensation to each of the arbitrators constituting the arbitral tribunal in such sum, and with such period, as may be specified in the award, with legal interest on each such sum calculated with effect from the date of expiration of a period of one month from the date on which the award was delivered”.

Arbitration act no 11 of 1995section no 29 (3) “The arbitral tribunal may order the payment of deposit of security by the parties, for the payment of the compensation of the arbitrators constituting the arbitral tribunal, in such sum and within such period as may be specified in the order. Separate deposits of security may be ordered in respect of each prayer for relief”.

Arbitration act no 11 of 1995section no 29(4) “Where a party fails to pay his share of the deposit of security ordered by the arbitral tribunal within the period specified in the order for payment of deposit of security, the other party or parties may pay the whole of the deposit of security ordered”.

Arbitration act no 11 of 1995section no 29(5) “Where none of the parties pay the deposit of security ordered by the arbitral tribunal, within the period specified in the order for the payment of the deposit of security, the arbitral tribunal may terminate the arbitral proceedings”.

Arbitration act no 11 of 1995section no 29(6) “The arbitrators constituting the arbitral tribunal may, during the course of arbitral proceedings, draw on such deposit or security, for the purpose of meeting their expenses”.

But in the current practices are identified that arbitrators expect the huge amount as salary and fringe benefit to act as Arbitrator. Abeynayake et al, (2012) noted that Research findings by researchers have mentioned some drawbacks of Sri Lankan arbitration as delaying the process, high cost of the arbitrators and other facilities.

2.14.6. Limited Jurisdiction.

Lack of jurisdiction of company matters and labor related disputes. Restricted scope of outcomes is possible to extract from arbitration is also considered one of the prime constrain for the effective arbitration. Restricted Width of outcomes only can be extracted from arbitration. Jurisdiction of the tribunal of arbitration is very limited; some commercial disputes come under another the law. So width of remedy and the jurisdiction can be expected is very limited.

At Arbitration Act no 11 of 1995, clearly defines its jurisdiction by following clause, Section 4, “any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the matter in respect of which the arbitration agreement is entered into is contrary to public policy or, is not capable of determination by arbitration”.

Further to this jurisdiction of arbitration is curtailed for the company matters and labor tribunal matters, Section 48, “for the avoidance of doubts, it is hereby declared that nothing in this Act shall apply to arbitral proceedings conducted under the Industrial Dispute Act or any other law, other than the Board of Investment of Sri Lanka Law, No. 4 of 1978, making special provision for arbitration”.

2.14.7. Partiality of the Arbitrator.

Due to lack of impartiality and unfairness, the legal procedures are limited to challenge the Arbitrators. There is a possibility for the eminent arbitration professional to pressurize the tribunal in any indirect way. Eminent arbitration professionals in the field pressure the weak tribunal in indirect way. Arbitration act no 11 of 1995, ensures the impartiality in several way, Section 10 says

- (1) “Where a person is requested to accept appointment as an arbitrator, he shall first disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, and shall, from the time of his appointment

and throughout the arbitral proceedings, disclose without delay any circumstances referred to in this subsection to all the parties and to the other arbitrators, unless they have already been so informed by the arbitrator”.

- (2) “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment was made”.
- (3) “A party who seeks to challenge an arbitrator shall, unless the parties have decided that the decision shall be taken by some other person, first do so before the arbitral tribunal, within thirty days of his becoming aware of the circumstances which give rise to doubts about the arbitrators’ impartiality or independence”.
- (4) “Where a party who makes an application to an arbitral tribunal under this section, is dissatisfied with the order of the tribunal on such application, he may within thirty days of the receipt of the decision, appeals from that order to the High Court”.

Even such stringent clauses have been included, some eminent figure like Kangisvaran, (2011) noted that another very disturbing feature which is in mostly of three panel arbitrators, is complained about some arbitraries that they violate the impartiality act as advocators of relevant party. But this impartiality is very hard to proof in final stage for setting aside the award. Setting aside the aware has only very limited scope base on the New York Convention. It derives the frustration at the end of the process.

Further Kangisvaran (2010) stated that impartiality of the tribunal in not easy to proof, no any professional organization do the monitoring or the behavior of the arbitrator make them comfortable to be impartial due to some benefits. Many people like to resolve their dispute by litigation rather than arbitration because of level of confidentiality it has. After the commercial court, was initiated number of cases tend there to get speedy solution.

2.14.8. Complex Legal Procedure for Enforcement

Arbitral award has not any direct enforcing mechanism; complex legal procedure for enforcement is the one of major drawback identified by several researchers.

Arbitration act no 11 of 1995 has its complex procedure to enforce, called an action to “confirm” an award. Arbitration act no 11 of 1995 section no 31 says,

- (1) “A party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award, apply to the High Court for the enforcement of the award”.
- (2) “An application to enforce the award shall be accompanied by” ---
 - (a) “The original of the award or a duly certified copy of such award: and”
 - (b) “The original arbitration agreement under which the award purports to have been made or a duly certified copy of such agreement”.

For the purposes of this subsection a copy of an award or of the arbitration agreement shall be deemed to have been duly certified if ---

- (i) “It purports to have been certified by the arbitral tribunal or, by a member of that tribunal, and it has not been shown to the Court that it was not in fact so certified : or”
 - (ii) “It has been otherwise certified to the satisfaction of the court”.
- (3) “If a document or part of a document produced under subsection (2) is written in a language other than the official language of the court or other than in English, there shall be produced with the document a translation in such official language, or in the English Language, of that document or that part, as the case may be, certified to be a correct translation”.
 - (4) “For the purposes of subsection (3), a translation shall be certified by an official or a sworn translator or by a diplomatic or a consular agent in Sri Lanka of the country in which the award was made or otherwise to the satisfaction of the Court”.
 - (5) “A document produced to the court in accordance with this section may upon its production be received by the Court as sufficient evidence of the matters to which it relates”.

Like the court judgments, arbitration award themselves are not directly enforceable. A party seeking to enforce an award must resort to judicial remedies, called an action to “confirm” an award.

The FAA provides the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States. Supreme Court decisions over the last several decades ensure that the FAA's 'pro-arbitration mandate' must be broadly interpreted and universally applied by both state and federal courts. Parties seeking to enforce an arbitration agreement or arbitral award in the United States need not be concerned that 'the old [judicial] hostility toward arbitration' or 'the failure of state arbitration statutes to mandate enforcement of arbitration agreements' will thwart their ability to do so. Parties involved in arbitration subject to the New York or Panama Convention should also consider the potential advantages these Conventions provide. (Salomon & Villiers, 2014).

2.14.9. Limited Concern in Technicality of the Dispute

There is a limited concern on technical matters when compared with the pure legal matters and dearth of technical persons to function as Arbitrators also considered one of the major practical hurdler in arbitration.

Arbitration act no 11 of 1995 provides the full lateral in appointing the arbitrators by inserting the requirements in the arbitration agreements. But availability of the technical personality as arbitrator is very limited in construction industry.

Arbitration act no 11 of 1995 section no 7 says

- (1) “The parties shall be free to agree on a procedure for appointing the arbitrators, subject to the provisions of this Act”.
- a) “In arbitration with a sole arbitrator if the parties are unable to agree on the arbitrators, that arbitrators shall be appointed, on the application of a party by the High Court”;
- b) “In an arbitration with three arbitrators, such party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrators; if a party fails to appoint the arbitrator within sixty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within sixty days of their appointment, the appointment shall be made upon the application of a party, by the High Court”.

Arbitration act no 11 of 1995 section no 07 (3) says Where, under an appointment procedure agreed upon by the parties –

- a) “A party fails to act as required under such procedure : or”

- b) “The parties, or the arbitrators are unable to reach an agreement required of them under such procedure: or © a third party, including an institution, fails to perform any function assigned to such third party under such procedure, any party may apply to the High Court to take necessary measures towards the appointment of the arbitrator or arbitrators”.

Arbitration act no 11 of 1995 section no 07 (4) says “the High Court shall in appointing an arbitrator, have due regard to any qualifications required of an arbitrator under the agreement between the parties and to such consideration as are likely to secure the appointment of an independent and impartial arbitrator”.

Research findings have mentioned some drawbacks of Sri Lankan arbitration as delaying the process, high cost of the arbitrators and other facilities, higher involvement of lawyers, less concentration on technical issues, unawareness, different resolutions given by different arbitrators, difficulty in challenging the award, inability to conduct multi-party disputes using arbitration and limited jurisdictions, same procedure apply for all disputes, impossibility of maintaining the relationship between parties, less satisfaction with the process.(Abeyanayake et al, 2015).

2.14.10. Lack of Attention Pay to Reconcile the Parties

Establishing pure legal conviction is found more, than paying attention to reconcile the parties. Also is identified by some researchers as one of the drawbacks in Sri Lankan arbitration practices.

But, Arbitration Act no 11 of 1995 encourages the amicable settlement current practice has been identified the some short comes as not pay any interest to settle the issue other than establishing the pure legal conviction. Arbitration Act no 11 of 1995 section no 14 says

- I. “It shall not be incompatible with arbitration proceedings for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or any other procedure at any time during the arbitral proceedings to encourage settlement”.
- II. “If, during arbitral proceedings the parties’ settle the dispute, the arbitral tribunal shall if requested by the parties, record the settlement in the form of

an arbitral award on agreed terms. Severability of agreement Interim measures of protection Settlement”.

- III. “An arbitral award on agreed terms shall be made in accordance with Section 25 and shall State that it is an arbitral award on agreed terms”.
- IV. “An arbitral award on agreed terms has the same status and effect as any other arbitral award made in respect of the dispute”.

2.14.11. Arbitrator’s Behavior as Advocator of the Each Party.

Arbitration act no 11 of 1995, section 15 clearly emphasized the impartiality of the arbitrators in stringent means, but in common practices arbitrators act as adjudicator and royal to the respected party. So varied opinions are delivered by different arbitrators, favor to the respected parties. Arbitration act no 11 of 1995, section 15 says

- (1) “An arbitral tribunal shall deal with any dispute submitted to it for arbitration in an Impartial, practical and expeditious manner”.
- (2) “An arbitral tribunal shall afford all the parties an opportunity, of presenting their respective cases in writing or orally and to examine all documents and other material furnished to it by the other parties or any other person. The arbitral tribunal may, at the request of a party, have an oral hearing before determining any question before it”.
- (3) “An arbitral tribunal may, notwithstanding the failure of a party without reasonable cause, to appear before it, or to comply with any order made by it, continue the arbitral proceedings and determine the dispute on the material available to it”.
- (4) “Parties may, introduce new prayers for relief provided that such prayers for relief fall within the scope of the arbitration agreement and it is not inappropriate to accept them having regard to the point of time at which they are introduced and to other circumstances. During the course of such proceedings, either party may, on like conditions, amend or supplement prayer for relief introduced earlier and rely on new circumstances in support of their respective cases”.

But no any credible mechanism to ensure the above clauses to be complied, more chances for taking the side by weak tribunal who are not monitored by any impartial body.

2.14.12. Rare Institutional Arbitration Arrangement

Most of the arbitration is conducted in an ad hoc manner. Arrangement for institutional arbitration in the construction industry is rare and is considered as another major constraint in Sri Lankan construction industry.

Kangisvaran (2011) stated that the adoption of the recognized rules of arbitration (i.e. institutionalized arbitration) in the matter of procedure will go a long way towards resolving this problem, as most of the arbitrations are conducted in an ad hoc basis with no direction, so that a weak tribunal is unable to control the proceeding and a compliant tribunal is willing to go along with it, and the arbitration takes place at a pace set by counsel on both sides in a convenient 2-3 hours evening sitting ambling along, most times over years.

This problem affects more attributes partially positively and negatively. For example, by institutionalizing arbitration can regulate the impartiality of the tribunal by monitoring the tribunal behavior by a reputed institute. Delays can be minimized by the definitive rules; expected hidden fringe benefits can be reduced by the reputed institutionalized arbitration.

2.14.13. Maintaining the Relationship

Maintaining a good rapport between the parties during and after the proceeding becomes a far cry. Relationship is the important success factor of the Alternative Dispute Resolution, if the bruise mentality is developed in resolution it will affect the continuous business in negatively in several means. Arbitration act no 11 of 1995 provides the several sections to settle the disputes in amicable way especially in section 14. But in current procedure are accused to developing the victimized mentality through that relation between the parties is jeopardized. Arbitration act no 11 of 1995 section 14 says

- (1) "It shall not be incompatible with arbitration proceedings for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or any other procedure at any time during the arbitral proceedings to encourage settlement".
- (2) "If, during arbitral proceedings the parties settle the dispute, the arbitral tribunal shall if requested by the parties, record the settlement in the form of

an arbitral award on agreed terms. Severability of agreement Interim measures of protection Settlement”.

- (3) “An arbitral award on agreed terms shall be made in accordance with Section 25 and shall State that it is an arbitral award on agreed terms”.
- (4) “An arbitral award on agreed terms has the same status and effect as any other arbitral award made in respect of the dispute”.

2.14.14. Conflict of Interest.

Easy access to resort to bribe and conflict of interest in real practice is also identified as major constrain in arbitration in construction context. Arbitration law no 11 of 1995 provides the precaution measures to avoid the conflicts of interest between the arbitrator and the groups. Arbitration law no 11 of 1995section no 10 says

- (1) “Where a person is requested to accept appointment as an arbitrator, he shall first disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, and shall, from the time of his appointment and throughout the arbitral proceedings, disclose without delay any circumstances referred to in this subsection to all the parties and to the other arbitrators, unless they have already been so informed by the arbitrator”.
- (2) “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment was made”.
- (3) “A party who seeks to challenge an arbitrator shall, unless the parties have decided that the decision shall be taken by some other person, first do so before the arbitral tribunal, within thirty days of his becoming aware of the circumstances which give rise to doubts about the arbitrators’ impartiality or independence”.
- (4) “Where a party who makes an application to an arbitral tribunal under this section, is dissatisfied with the order of the tribunal on such application, he may within thirty days of the receipt of the decision, appeals from that order to the High Court”.

Even though there are enough chances to develop the conflicts of interest, Salomon and Villiers,(2014) say Arbitrators are generally unable to enforce interlocutory

measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees.

2.14.15. Inability to Conduct Multi-Party

Inability to conduct multi-party disputes by invoking the arbitration is considered as another constrain. Unless all the parties accepting the disputes are to be resolved in Arbitration in one agreement, arbitration tribunal has not any jurisdiction of dealing the issues. In the construction industry, multiparty involvement is inevitable. So it is considered as the major drawback in effectiveness of the arbitration process.

Abeyanayake et al,(2015) also identified as the major constrain in arbitration is unable to invoke the multi-party disputes in one hearing unless the combined agreement is not available.

2.14.16. Possibility to Appeal to Supreme Court and Prolonged Legal Procedure.

Possibility to appeal to Supreme Court and prolong legal procedure (without exclusion agreement) that Prolonged legal procedure is the real constrain factor by which parties who facilitated in legal matters can drag the conflict into more complex status. Some particular circumstance it is possible to get writ in Supreme Court for questioning the law of the award. It is used to drag the further time and cost. Even some protection measures is provided in Arbitration Act, those are not applied in practices.

Arbitration law no 11 of 1995 said in section 37 says

- (1) “Subject to subsection (2) of this section no appeal or revision shall lay in respect of any Order, judgment or decree of the High Court in the exercise of its Jurisdiction under this Act except from an order, judgment or decree of the High Court under this Part of this Act”.
- (2) “An appeal shall like from an order, judgment or decree of the High Court referred to in subsection (1) to the Supreme Court only on a question of law and with the leave of the Supreme Court first obtained”.
- (3) “The Supreme Court may in the exercise of its jurisdiction under subsection (2) of this section affirm, reverse or vary the order, judgment or decree of the High Court, subject to the provisions of this Act”.

- (1) “The parties to an arbitration agreement may agree in writing (hereinafter referred to as an “exclusion agreement “) to exclude any right to appeal in relation to the award”.

2.14.17. Impossibility of Keeping the Secrets of Trade Pattern, Accounts.

Not maintaining the confidentiality of keeping the secrets of trade pattern, accounts and other worthy information from reaching the general public and the other opponent party., is identified as the another bottleneck in arbitration procedure. Trade pattern, accounts any other worth full information of the construction business to be kept secret, this is also the prime objective of the Alternative Dispute Resolution. Sri Lankan law no 11 of 1995 having the clause to safe guard business secretes in several ways.

Section no25 (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 14.

All the stakeholders in arbitration comes to a consensus that, arbitration practices is not being practiced in healthiest and effective way as philosophy beneath the arbitration tents to. No any studies are available to measure the effectiveness and the causative for this ineffectiveness. This research tends to fill that research niche. So, practical constrain can be categorized as in following table.

Table2.3 – practical constrain of the arbitration

NO	Factors
01	Difficulty in arranging the hearing and finding the Arbitrators for full time basis and daily basis.
02	No specification to limit the time at Arbitration Act No 11, 1995(like ICTAD clause 67/Arbitration Ordinance 1948)
03	Part time black court professional and judges try to mimic the court system by which party autonomy is taken away.
04	Non availability of place for Arbitration other than Colombo. Other than English no other language can be selected by the parties.
05	High emolument and facilities required by arbitrators.
06	Lack of jurisdiction of company matters and labor related disputes. Restricted scope of outcomes is possible to extract from Arbitration.
07	Due to lack of impartiality and unfairness, the legal procedures are limited to challenge the Arbitrators. There is a possibility for the eminent arbitration professional to pressurize the tribunal in any indirect way.
08	Arbitral award has no direct enforcing mechanism, complex legal procedure for enforcement.

09	There is a limited concern on technical matters when compared with the pure legal matters. Dearth of technical persons to function as Arbitrators.
10	Establishing pure legal conviction is found more, than paying attention to reconcile the parties.
11	Behavior of the Arbitrator of each party as the Advocator violates impartiality.
12	Most of the Arbitration is conducted in an ad hoc manner. Arrangement for institutional arbitration in the construction industry is rare.
13	Maintaining a good rapport between the parties during and after the proceeding becomes a far cry.
14	Easy access to resort to bribe and conflict of interest in real practice.
15	Inability to conduct multi-party disputes by invoking the Arbitration.
16	Possibility to appeal to Supreme Court and prolong legal procedure. (without exclusion agreement)
17	Not maintaining the confidentiality of keeping the secrets of trade pattern, accounts and other worthy information from reaching the general public and the other opponent party.

2.15. Critical Success Factors (CSF)

As the starting point, the definition of Critical Success Factors (CSFs) is introduced by Rochart(1979). He defines Critical Success Factors as “The limited number of areas in which results, if they are satisfactory, will ensure successful competitive performance for the organization. They are the few key areas where things must go right for the business to flourish. If results in these areas are not adequate, the organization’s efforts for the periods will be less than desired”. Boynton and Zmud (1984) opined that Critical Success Factors as one measurement to ensure the success of the one organization’s performance. Further, in the literature there are several definitions of critical success factors. Leidecker and Bruno have described “CSFs as a set of characteristics, conditions and variables which should be adequately sustained, maintained, or managed in order to affect success factors of an organization competing in a specific industry” (Leidecker& Bruno, 1984). Rockart and Bullen (1981) have defined the critical success factors as the restricted number of fields in which positive outcome will result in “successful competitive performance” for an employee, organizational unit, and an organization as a whole.

In the construction industry numerous numbers of researches have been done for measuring the success by analyzing performance of the Critical Success Factor. Kadir, Lee, Jaafar, Sapuan and Ali (2005) used the Importance index to evaluate the factors affecting construction labor productivity for the Malaysian construction

projects. Kamin, Holt, Kometa and Olomolaiye (1995) used a relative importance index to analyze the attributes of clients' organizations, which may influence project consultants' performance. Odeh and Bettaineh (2002) used importance to determine causes of construction delay in traditional contracts. Cheng (2002) used Importance Index in discussing technology 8 The Built & Human Environment Review, Volume 2, 2009 foresight. As a result of its popularity and accuracy, this research also adapts Criticality Index in ranking the CSFs for effective program management.

Having identified variables for project success it is easier for the researcher to determine critical success factor for successful of project management practice. The conceptual framework for this study is shown in Figure 2. Conceptual framework the conceptual framework for this study will be extended in the future research and critical success factor will then be determined after the data collection. This conceptual framework illustrates the variables for project performance which were applied to capture the relevance data. In the conceptual framework, the relationship between variables for project performance, CSF and the project outcome was used in this study (Alias, Zawawi, Yusof and Aris, 2014).

At this research tends to measure the performance measurements of the critical success factors of the arbitration to measure the success of the practices as shown at following figure.

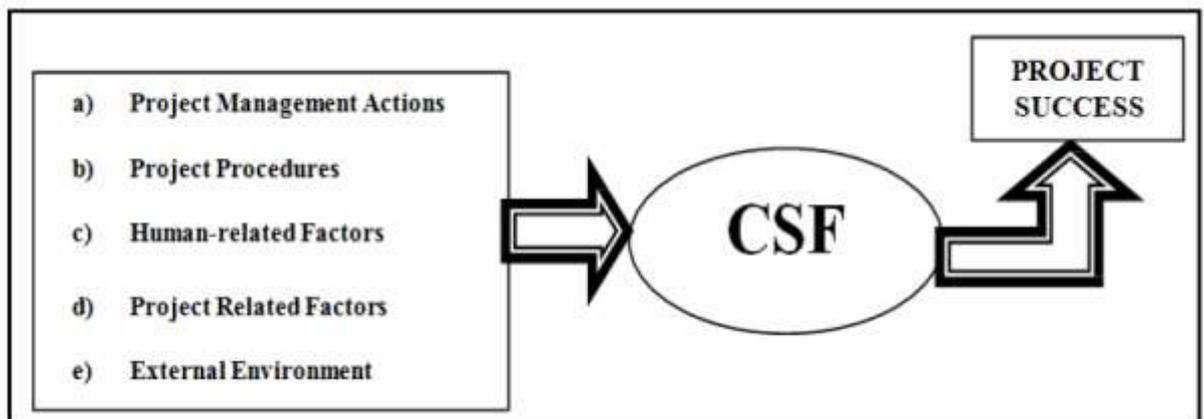


Figure 2.9: Critical success factors and project outcomes

2.16. Effectiveness

According to the Wikipedia, **Effectiveness** is the capability of producing a desired result. When something is effective means it produces desirable deliverable. Efficacy, efficiency, and effectively are terms that use for indicating the effectiveness often can be interchangeable. Effective most of the time is understood as quantity way. However, neither effectiveness, nor effectively, give the picture of the direction whether it goes positive or not. Contrary to the term efficiency, the focus of efficacy is the achievement as such, not the resources spent in achieving the desired effect. (Longman,2011).

In this research desired results can be termed as the effectiveness,

2.17. Identifying the Research Problem

Arbitration methods have been recognized as one of the key areas that requires improvement in the construction industry. Arbitration regime plays a greater role solving disputes in the construction industry. But generally the arbitration has come out with negative perception from all spectrums of the stakeholders. No any scientific studies not yet conducted to assess the successfulness of the arbitration so far.

Previous studies were identified attributes which are critically affected to the experiences and usages of arbitration regime. This research seeks to identify problematic areas of arbitration methods which were synthesized in the literature review. Critical attributes can identify as follows;

- Binding of the decision (Binding)
- The cost involved (Economy)
- Confidentiality of the process (Confidentiality)
- The parties' ability to control over the proceeding (Control)
- Obtaining creative remedies (Remedy)
- Enforceability of the decision (Enforceability)
- Obtaining fairness (Fairness)
- Flexibility of the proceeding (Flexibility)
- Privacy of the proceeding (Privacy)
- The duration of the proceeding (Speed)
- Preservation of relationship (Relation)
- The width of the remedy (Remedy).

Firstly above attributes will be requested among the professional who are closely connected with arbitration in construction industry to rate them in scale factor. Through that it can be identified which attributes is being mostly violated. It may give shorten the remedial action in particular area.

Secondly, practical constrain which were found at literature survey is tabled and requested to respondent to rate them in scale factors. Actual severity of each and every practical constrain can be evaluated by this survey. Remedial action can be more accurate and sharpened towards the actual problems.

As find in literature survey, practical constrain can be grouped in a table as follows.

Table2.4 – practical constrains of the arbitration

No	Factors
01	Difficulty in arranging the hearing and finding the Arbitrators for full time basis and daily basis.
02	No specification to limit the time at Arbitration Act No 11, 1995(like ICTAD clause 67/Arbitration Ordinance 1948)
03	Part time black court professional and judges try to mimic the court system by which party autonomy is taken away.
04	Non availability of place for Arbitration other than Colombo. Other than English no other language can be selected by the parties.
05	High emolument and facilities required by arbitrators.
06	Lack of jurisdiction of company matters and labor related disputes. Restricted scope of outcomes is possible to extract from Arbitration.
07	Due to lack of impartiality and unfairness, the legal procedures are limited to challenge the Arbitrators. There is a possibility for the eminent arbitration professional to pressurize the tribunal in any indirect way.
08	Arbitral award has no direct enforcing mechanism, complex legal procedure for enforcement.
09	There is a limited concern on technical matters when compared with the pure legal matters. Dearth of technical persons to function as Arbitrators.
10	Establishing pure legal conviction is found more, than paying attention to reconcile the parties.
11	Behavior of the Arbitrator of each party as the Advocator violates impartiality.
12	Most of the Arbitration is conducted in an ad hoc manner. Arrangement for institutional arbitration in the construction industry is rare.
13	Maintaining a good rapport between the parties during and after the proceeding becomes a far cry.
14	Easy access to resort to bribe and conflict of interest in real practice.
15	Inability to conduct multi-party disputes by invoking the Arbitration.
16	Possibility to appeal to Supreme Court and prolong legal procedure. (without exclusion agreement)
17	Not maintaining the confidentiality of keeping the secrets of trade pattern, accounts and other worthy information from reaching the general public and the other opponent party.

Further, through the literature survey practical problem are broken down under the critical attributes to find out the accurate reason, why these critical attributes are not practiced in effective way.

Therefore, the research problem is clearly identified as

- 1. What are the most violated attributes of the Arbitration's?**
- 2. What are the practical issues by which effectiveness of Arbitration is aggravated?**
- 3. How can establish the measures to minimize the ineffectiveness?**

2.18. Summary

Litigation is not suitable enough to be as successful dispute resolution technique due to its adverse attributes; e.g. high cost and time waste etc. Most of the Alternative Dispute Resolutions (ADR) have been failed due to lack of legal acceptance of the resolution. arbitration's philosophy basically targets to fill this lacuna in the conservative litigation system and the lack ness of the legal acceptance of the Alternative Dispute resolution (ADR).

It is obvious that arbitration has numerous problems in practice especially in construction industry. Current arbitration's practices show gaps, and faults which sometimes make them looks waste of time, cost and effort as the involved parties couldn't come to an agreement with the decisions. Number of short comes and pitfalls were identified in arbitration in contemporary practical means. Arbitration's awards also are not voluntarily honored by the parties, so it also can be brought again to further litigation. Hence, there is a necessity to review and improve the arbitration law and practices periodically in order to minimize the cost and complexity of the procedure.

This chapter comprehensively discussed problematic areas and issues of the arbitration methods. Problems were identified by literature survey of the elite personalities.

CHAPTER THREE

3.0. RESEARCH

3.1. Methodology

Arbitration is found to be a moderated way between litigation and other Alternative Dispute Resolution techniques which are available in construction industry. Litigation exhibits extreme and adverse approaches and ADR exhibits lack of enforceability of decisions. Whereas, arbitration provides a moderate level of approach between the legal enforceable of decision and flexibility of procedure.

This research paves the way for the Data collection by adopting the following steps:

- A. Through the literature survey. It defines the critical attributes of the successive Alternative Dispute Resolution techniques. These attributes are required to selected respondents to assess by scale rating, those attributes to show how effectively they are being practiced in construction industry in Sri Lanka.
- B. List out the practical constraints and customs which are believed to be the precursors of ineffective way of practicing the arbitration in Sri Lanka through literature survey. Repeatedly respondents are requested to assess each practical constraint and how severity it is for the drawback of arbitration effectiveness.
- C. The above results will help to assess and order the attributes and the practical customs to find the mostly violated attributes and customs in construction industry in the arbitration practices. Further to that, to compare above two finding in one measurement practical customs are grouped under the attributes.
- D. Find the suggestion with recommendation of above findings through the contemporary literature and interview of the elite professional in this field.

Scale rating and standard deviation method are very common in research especially in Alternative Dispute Resolution related studies. The Critical Factors Affecting the Use of Alternative Dispute Resolution Process in Construction (Cheung1999), Performance of Critical Attributes in ADR, Sri Lankan Construction Industry (Gunasena,2010) and A Critical Analysis on Success Factor and arbitration Practices in the Construction Industry in Sri Lanka (Wedikkara&Abeyanayaka,2007) used

above techniques to evaluate the attributes and customs, which are very similar to our research.

This investigation initially seeks to identify the critical attributes of the best alternative dispute resolution techniques. Stakeholders in arbitration process will find the result of this study as a great support to define the problems with accurate formulation. At the time of Sri Lankan government announced to constitute the institutional arbitration centre in Sri Lanka; the finding of this research might have helped the organizers to modify their strategies in future.

Throughout the previous study at Sri Lankan context and international context, following attributes were identified as critical attributes of successful dispute resolution techniques in the construction industry. However, this study seeks the practical observation and perceptions of practitioners in arbitration, how these attributes were fulfilled by real arbitration procedures in the construction industry.

Arbitration has been recognized as one of the key areas that requires improvements in the construction industry. Some previous studies identified the critical factors, by which efficiency of the Alternative Dispute Resolution had been critically affected (Cheung, 1999; Cheung et al, 2002). Among those attributes Cheung (1999) identifies twelve critical attributes which are affecting ADR. This paper seeks to evaluate the performance of those critical attributes along with Sri Lankan arbitration practices in the construction industry.

Those critical attributes can be identified as follows:

1. The duration of the proceeding (Speed)
2. The parties' ability to control over the proceeding (Control)
3. The cost involved (Economy)
4. Confidentiality of the process (Confidentiality)
5. Binding of the decision (Binding)
6. Obtaining creative remedies (Remedy)
7. Enforceability of the decision (Enforceability)
8. Obtaining fairness (Fairness)
9. Flexibility of the proceeding (Flexibility)
10. Privacy of the proceeding (Privacy)

11. Preservation of relationship (Relation)
12. The width of the remedy (Remedy).

By evaluating the performance of those attributes within the Sri Lankan context, this paper tries to find the problematic areas of the arbitration. Since this paper has been compiled based upon a research, aimed at to quantify the performance of critical attributes in ADR, the outcome of the research technique should be easy to analyze, quantify, compare and contrast. Therefore, questionnaire survey was selected as the appropriate technique to carry out the research study. In this research, the questionnaire was framed into three basic sections.

The objective of each section can be identified as follows;

3.2. Section A (optional)

Intended to elicit the background information of the respondent;

In this section, it was asked to fill the respondents' names (optional), name and the type of the organization, their profession and their working experience in the construction industry as well as in arbitration techniques.

3.3 Section B

Intended to evaluate how the efficiently of these critical attributes are being practiced in arbitration;

In this section, the respondents were requested to rate each critical factor which was mentioned in the research problem on a 7-point scale (extreme ineffectiveness to extreme effectiveness).

3.4. Section C

Intended to evaluate the practical constraints, how severely those customs aggravate the efficiency of the arbitration.

In this section, respondents are requested to evaluate the severity of the practical constraints as how much effectiveness of the arbitration is drawn back by respected customs. By using a 5-point scale method (from a very low degree of agreement to a very high degree of agreement) perception of the users is expected to derive.

The purposeful selective sampling was the method of sampling for this research as the information asked from the survey requires in depth knowledge and sound experiences about arbitration methods. The questionnaire was distributed to the

respondents individually. The completed questionnaires were collected by the researcher after the providing the necessary clarification.

3.5. Questionnaire

3.5.1. SECTION B: Scale Rating the Attributes

(How efficiently the following attributes of arbitration are practiced in the construction industry?)

1- Very high ineffective

4- Moderate effective

7- Very high effective

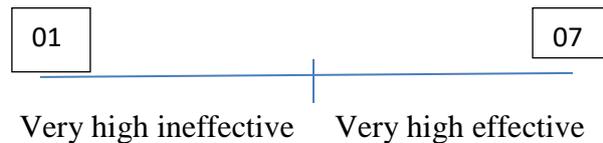


Table 3.1: Successful attributes of the arbitration

No	Attributes in (ADR)	Effectiveness in scale
01	Speed of the procedure	
02	Control (Party Autonomy)	
03	Cost (Economy)	
04	Confidentiality	
05	Binding	
06	Creative Remedies	
07	Enforceability	
08	Fairness	
09	Flexibility	
10	Privacy	
11	Relation (between parties)	
12	Width of the Remedy	

3.5.2. SECTION C: Scale Rating the Negative Factors

(How much following practical factors/customs take part to decrease the arbitration's efficiency?) These attributes are fairly self-explanatory and the name of the variables used in the statistical analysis is shown within brackets. Furthermore, identified practical

customs by which the effectiveness of arbitration is aggravated through literature survey, are again requested to assess by the selected respondent the severity scale of each factor on drawback of the arbitration.

1-Not important reason at all

3-Moderate important reason

5- Very important reason



Table3.2: practical constraint of the arbitration

NO	FACTORS	scale
01	Difficulty in arranging the hearing and finding the Arbitrators for full time basis and daily basis.	
02	No specification to limit the time at Arbitration Act No 11, 1995(like ICTAD clause 67/Arbitration Ordinance 1948)	
03	Part time black court professional and judges try to mimic the court system by which party autonomy is taken away.	
04	Non availability of place for Arbitration other than Colombo. Other than English no other languages can be selected by the parties.	
05	High emolument and facilities required by arbitrators.	
06	Lack of jurisdiction of company matters and labor related disputes. Restricted scope of outcomes is possible to extract from Arbitration.	
07	Due to lack of impartiality and unfairness, the legal procedures are limited to challenge the Arbitrators. There is a possibility for the eminent arbitration professional to pressurize the tribunal in any indirect way.	
08	Arbitral award has no direct enforcing mechanism, complex legal procedure for enforcement.	
09	There is a limited concern on technical matters when compared with the pure legal matters. Dearth of technical persons to function as Arbitrators.	
10	Establishing pure legal conviction is found more, than paying attention to reconcile the parties.	
11	Behaviour of the Arbitrator of each party as the Advocator violates impartiality.	
12	Most of the Arbitration is conducted in an ad hoc manner. Arrangement for institutional Arbitration in the construction industry is rare.	
13	Maintaining a good rapport between the parties during and after the proceeding becomes a far cry.	
14	Easy access to resort to bribe and conflict of interest in real practice.	
15	Inability to conduct multi-party disputes by invoking the Arbitration.	
16	Possibility to appeal to Supreme Court and prolong legal procedure. (without exclusion agreement)	
17	Not maintaining the confidentiality of keeping the secrets of trade pattern, accounts and other worthy information from reaching the general public and the other opponent party.	

The respondents have been carefully selected including clients, consultants and contracting organisations. In addition, the selected organisations all should have involved in projects employing conditions of contract with arbitration provision and reasonable experience in arbitration for their disputes.

In this questionnaire survey, above attributes will be requested to respondent by scale rating to assess above factors' effectiveness in real practices in the industry. Through which, this research tends, to define the most violated practical constraint in order to pay special further analysis.

Furthermore, some respondents may find the confusability while filling out the questionnaire which is actually meant by those particular attributes. At times it may warrant to give direct clarity, if necessary arises.

CHAPTER FOUR

4.0. DATA ANALYSIS AND RESEARCH FINDINGS

4.1. Data Analyses

Data collected from the questionnaire can be grouped and analyzed to correlate two scales rating in one table. Practical negative factors are identified and they are grouped with the attributes of the arbitration to see how and which were aggravated by the practical factor.

The following finding may give the basic ideas to see which part of the arbitration’s philosophy and critical successful factor were mostly violated. Average of the scale factor from selected group is projected into the population by using **T** test. Anyhow the parameter of the variation of population is unknown. Whatever being rated more than 3.5 which is more than 50% of ineffectiveness are planned to separate for emphasizing the result. Data collected from section C in questionnaire can be analyzed to find the most reasoned practical customs by ordering in descending order of the mean value in questionnaire. Practical constraints, severity evaluated by the questionnaire are grouped as shown in table 4.1.

Table 4.1: Data analysis of grouped factors

No	Attributes in (ADR)	Reason for inefficiency	Average severity scale rate	Rank
1	Speed of the procedure	Factor 01		
		Factor 02		
		Factor 04		
2	Control (Party Autonomy)	Factor 03		
		Factor 04		
3	Cost (Economy)	Factor04		
		Factor 05		
4	Confidentiality	Factor 11		
		Factor 14		
		Factor 17		
5	Binding	Factor 08		
		Factor 12		
		Factor 16		
6	Creative Remedies	Factor 09		
		Factor 15		

7	Enforceability	Factor 08		
		Factor 12		
		Factor 16		
8	Fairness	Factor 07		
		Factor 11		
		Factor 12		
		Factor 14		
9	Flexibility	Factor 01		
		Factor 03		
		Factor 04		
10	Privacy	Factor 17		
11	Relation	Factor 10		
		Factor 13		
12	Width of the Remedy	Factor 06		
		Factor 15		

4.2. Methodology Used to Analyze the Survey Results

Following statistical parameters were used to analyze the data obtained from the questionnaire survey.

- Mean Rating
- Standard deviation
- T test

A mean weighted rating for each factor is computed to deliver an indication of the importance of the factor.

4.3. Sample Distribution

The questionnaires were distributed equally among clients, consultants and contracting organizations after communicating to them the aim and the objectives of the study by the researcher. An acceptable number of Responses (30) were given by the respondents (Shown in Table 1).

Table 4.2: Composition of respondents

Organization type	Questionnaire		Response percentage
	Distributed	Responded	
Consultant	50	6	12.00%
Client	50	11	22.00%
Contractor	50	13	26.00%
Total	150	30	20.00%

The respondents were precisely selected, included in clients, consultants and contracting organizations. As precondition of selected organization should have experience at least a contract which has the arbitration clauses. A sample of 150 individual was selected and subsequently approached by the phone call. 20.00% of the total population responded to the study. The 20.00% return rate can be considered as fair and reasonable because of the return rate of this type of study conducted in the United States which received only 10.22% return rates. (Stipanowich et al,1992).

4.4. Demographic Factors of the Respondents

Table 4.3: Composition of respondents according to their profession

Profession	Number of Respondents	Percentage %
Engineer	20	66.66
Quantity surveyor	5	16.66
Lawyer	3	10.00
Architect	2	6.66
Total	30	100

Table 4.3 shows the categorization of respondent with their profession. According to the tables, by Engineers and Quantity Surveyors, major parts of responses (83.32%) are represented. The other professions (Lawyers and Architects) represent 10.00% and 6.66% respectively. This information emphasized the fact that engineers and quantity surveyors are prime fraternity involve in construction business in Sri Lanka. However, lawyers participation is very low because of in-house lawyers in approached construction organization are very limited, that means lawyers are hired only when the need arises.

Another most important factor in collecting the perception is respondent are requested to rate it with their overall experience. Sometime they may reacted with their individual experience. Then results will not represent the real contemporary values of the market's perception.

Therefore, purposefully selected experienced personnel in the construction industry and in ADR were used as respondents.

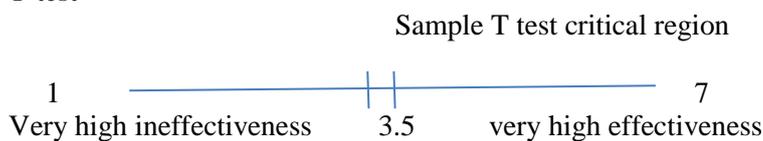
4.5. Performance Analysis of the Critical Factors.

In section 2 of the questionnaire, scale ratings were employed to obtain the most violated attributes of the twelve critical attributes to the ADR process. In this section, the respondents rated each attribute on a 7 point scale (from very high ineffectiveness to very high effectiveness). The mean weighted ratings were calculated and were used as the basis of priority ranking. Table 4.4 gives the results of the importance ranking based on the mean scores.

Table 4.4: efficiency of the critical attributes- The ranking order

Attribute No	Attribute	Mean rating	Rank	Standard deviation
1	Speed of the procedure	2.20	1	1.16
3	Cost (Economy)	2.43	2	1.22
6	Creative Remedies	2.53	3	1.11
9	Flexibility	2.83	4	1.29
11	Relation	3.97	5	1.13
12	Width of the Remedy	4.13	6	1.07
5	Binding	4.67	7	1.54
4	Confidentiality	4.80	8	1.49
8	Fairness	4.93	9	1.31
2	Control (Party Autonomy)	5.00	10	1.17
7	Enforceability	5.37	11	1.38
10	Privacy	5.53	12	1.81

T-test



General population variation is unknown, critical factors which were identified mostly (less than 50% of efficiency) violated in the real practice is selected for further analysis. Violated critical attributes less than 50% are converted into scale factor.

$$\begin{aligned}
 \text{Total range of scale factor} &= 7 \\
 \text{50\% of the scale factor} &= 7 * 0.50 \\
 &= 3.50
 \end{aligned}$$

Attributes which would be rated under the 3.5 in the total population is targeted to separate for further analysis. From thirty numbers of samples, mean value of the sample is adjusted with 95% of confident level.

Convert the sample value to population value

$$T = \frac{\bar{X} - \mu}{S/\sqrt{n}}$$

X- Sample means value

μ - Population means value

S- Standard deviation

n- Sample numbers

At T test chart

Confident level – 95%

Sample no (n) = 30 Two tails,

One sample

T 0.95,30 = 2.045

Calculation for attributes one

$$\bar{x} \pm t_{0.05,95}(s/\sqrt{n}) = 2.20 \pm 2.045(1.16/\sqrt{30})$$

$$\bar{x} \pm t_{0.05,95}(s/\sqrt{n}) = 2.20 \pm 0.433$$

Which simplifies to 2.20 ± 0.433 ? That is, we can be 95% confident that the mean scale rate of the total population is between 1.767 and 2.633

Anyway, the critical region approaches for $\alpha = 0.05$ hypothesis test tells us to reject the null hypothesis that $\mu < 3.5$:

$$\text{if } t = (\bar{x} - \mu_0)/(s/\sqrt{n}) \geq 2.045 \quad \text{or} \quad \text{if } t = (\bar{x} - \mu_0)/s\sqrt{n} \leq -2.045$$

which is equivalent to rejecting:

if

$$(\bar{x} - \mu_0) \geq 2.045 * (s/\sqrt{n})$$

or if

$$(\bar{x} - \mu_0) \leq -2.045 * (s/\sqrt{n})$$

which is equivalent to rejecting:

if

$$\mu_0 \leq \bar{x} - 2.045 * (s\sqrt{n})$$

or if

$$\mu_0 \geq \bar{x} + 2.045 * (s\sqrt{n})$$

which, upon inserting the data for this particular example, is equivalent to rejecting:

if

$$\mu_0 \leq 1.767$$

or if

$$\mu_0 \geq 2.633$$

Which just happens to be the endpoints of the 95% confidence interval for the mean.

Indeed, the results are consistent.

Table 4.5: Importance of critical attributes- The ranking order

Attributes no	Attribute	Mean rating	Population expected mean less than	Standard deviation	Rang of population mean by T test 95% confident level
1	Speed of the procedure	2.20	3.5	1.16	1.768-2.632
3	Cost (Economy)	2.43	3.5	1.22	1.977-2.890
6	Creative Remedies	2.53	3.5	1.11	2.120-2.946
9	Flexibility	2.83	3.5	1.29	2.352-3.315
11	Relation	3.97	3.5	1.13	3.545-4.388
12	Width of the Remedy	4.13	3.5	1.07	3.732-4.534
5	Binding	4.67	3.5	1.54	4.092-5.241
4	Confidentiality	4.80	3.5	1.49	4.242-5.358
8	Fairness	4.93	3.5	1.31	4.444-5.423
2	Control (Party Autonomy)	5.00	3.5	1.17	4.562-5.438
7	Enforceability	5.37	3.5	1.38	4.853-5.881
10	Privacy	5.53	3.5	1.81	4.856-6.211

Attributes which were identified as mostly violated more than 50% effectiveness in 95% confident level is bolded in above table.

4.6. Analysis of the Practical Factors.

Table 4.6: severity of the practical factors- The ranking order

Factors No	Factors	Mean rating	Standard deviation	Rank
3	Part time black court professional and judges try to mimic the court system by which party autonomy is taken away.	3.90	0.96	1
1	Difficulty in arranging the hearing and finding the Arbitrators for full time basis and daily basis.	3.80	1.10	2
9	There is a limited concern on technical matters when compared with the pure legal matters. Dearth of technical persons to function as Arbitrators.	3.47	0.94	3
12	Most of the Arbitration is conducted in an ad hoc manner. Arrangement for institutional arbitration in the construction industry is rare.	3.43	1.01	4
11	Behavior of the Arbitrator of each party as the Advocate violates impartiality.	2.93	0.74	6
2	No specification to limit the time at Arbitration Act No 11, 1995(like ICTAD clause 67/Arbitration Ordinance 1948)	2.83	1.09	8
5	High emolument and facilities required by arbitrators.	2.77	0.86	5
4	Non availability of place for Arbitration other than Colombo. Other than English no other languages can be selected by the parties.	2.77	0.90	7
10	Establishing pure legal conviction is found more, than paying attention to reconcile the parties.	2.60	0.97	9
13	Maintaining a good rapport between the parties during and after the proceeding becomes a far cry.	2.30	0.79	10
14	Easy access to resort to bribe and conflict of interest in real practice.	2.20	0.92	11
8	Arbitral award has no direct enforcing mechanism, complex legal procedure for enforcement.	2.13	1.04	12
6	Lack of jurisdiction of company matters and labor related disputes. Restricted scope of outcomes is possible to extract from Arbitration.	2.00	0.74	13
7	Due to lack of impartiality and unfairness, the legal procedures are limited to challenge the Arbitrators. There is a possibility for the eminent arbitration professional to pressurize the tribunal in any indirect way.	1.97	1.00	14
15	Inability to conduct multi-party disputes by	1.97	0.76	15

μ - Population means value

S- Standard deviation

n- Sample numbers

At T test chart

Confident level – 95%

Sample no (n) = 30

Two tails,

One sample

T 0.95,30 = 2.045

Calculation for factor no 1

$$\bar{x} \pm t_{0.05,95}(s/\sqrt{n}) = 3.9 \pm 2.045(0.96/\sqrt{30})$$

$$\bar{x} \pm t_{0.05,95}(s/\sqrt{n}) = 3.9 \pm 0.359$$

Which simplifies to 3.9 ± 0.359 ? That is, we can be 95% confident that the mean scale rate of the total population is between 3.541 and 4.259

Anyway, the critical region approaches for $\alpha = 0.05$ hypothesis test tells us to reject the null hypothesis that $\mu < 3.5$:

$$\text{if } t = (\bar{x} - \mu_0)/(s/\sqrt{n}) \geq 2.045 \quad \text{or} \quad \text{if } t = (\bar{x} - \mu_0)/s/\sqrt{n} \leq -2.045$$

which is equivalent to rejecting:

if

$$(\bar{x} - \mu_0) \geq 2.045 * (s/\sqrt{n})$$

or if

$$(\bar{x} - \mu_0) \leq -2.045 * (s/\sqrt{n})$$

which is equivalent to rejecting:

if

$$\mu_0 \leq \bar{x} - 2.045 * (s/\sqrt{n})$$

or if

$$\mu_0 \geq \bar{x} + 2.045 * (s/\sqrt{n})$$

which, upon inserting the data for this particular example, is equivalent to rejecting:

if

$$\mu_0 \leq 3.541$$

or if

$$\mu_0 \geq 4.258$$

which just happens to be (!) the endpoints of the 95% confidence interval for the mean. Indeed, the results are consistent.

Table 4.7: severity of the practical factors- The ranking order

Factor no	Factors	Mean rating	Standard deviation	T-test population mean range
3	Part time black court professional and judges try to mimic the court system by which party autonomy is taken away.	3.90	0.96	3.542-4.258
1	Difficulty in arranging the hearing and finding the Arbitrators for full time basis and daily basis.	3.80	1.10	3.391-4.209
9	There is a limited concern on technical matters when compared with the pure legal matters. Dearth of technical persons to function as arbitrators.	3.47	0.94	3.117-3.817
12	Most of the Arbitration is conducted in an ad hoc manner. Arrangement for institutional arbitration in the construction industry is rare.	3.43	1.01	3.058-3.809
11	Behavior of the arbitrator of each party as the advocator violates impartiality.	2.93	0.74	2.657-3.210
2	No specification to limit the time at Arbitration act No 11, 1995(like ICTAD clause 67/Arbitration Ordinance 1948)	2.83	1.09	2.428-3.239
5	High emolument and facilities required by arbitrators.	2.77	0.86	2.446-3.087
4	Non availability of place for Arbitration other than Colombo. Other than English no other languages can be selected by the parties.	2.77	0.90	2.432-3.102
10	Establishing pure legal conviction is found more, than paying attention to reconcile the parties.	2.60	0.97	2.238-2.962
13	Maintaining a good rapport between the parties during and after the proceeding becomes a far cry.	2.30	0.79	2.003-2.597
14	Easy access to resort to bribe and conflict of interest in real practice.	2.20	0.92	1.855-2.545
8	Arbitral award has no direct enforcing mechanism, complex legal procedure for enforcement	2.13	1.04	1.744-2.522
6	Lack of jurisdiction of company matters and labor related disputes. Restricted scope of outcomes is possible to extract from Arbitration.	2.00	0.74	1.723-2.277
7	Due to lack of impartiality and unfairness, the legal procedures are limited to challenge the Arbitrator. There is a possibility for the eminent arbitration professional to pressurize the tribunal in any indirect way.	1.97	1.00	1.594-2.340
15	Inability to conduct multi party disputes by invoking the Arbitration.	1.97	0.76	1.681-2.252
16	Possibility to appeal to Supreme Court and prolong legal procedure. (without exclusion agreement)	1.90	1.16	1.469-2.331
17	Not maintaining the confidentiality of keeping the secrets of trade pattern, accounts and other worthy information from reaching the general public and the other opponent party.	1.90	0.80	1.600-2.200

Practical customs which were identified as mostly sever reason more than 70% through which effectiveness of the arbitration is aggravated in 95% confident level is bolded in above table.

4.7. Correlation between Inefficiency of the Attributes and Negative Factors

Practical negative factors are grouped under the attributes. Inefficiency rate of the attributes and the negative practical factors of severity are compared as follows.

Table 4.8: combination of factors under the attributes

No	Attributes in (ADR)	Reason for inefficiency	Average severity scale rate	Rank
1	Speed of the procedure	Factor 01	3.80	1
		Factor 02	2.83	
		Factor 04	2.77	
2	Control (Party Autonomy)	Factor 03	3.90	10
		Factor 04	2.77	
3	Cost (Economy)	Factor 04	2.77	2
		Factor 05	2.77	
4	Confidentiality	Factor 11	2.93	8
		Factor 14	2.20	
		Factor 17	1.90	
5	Binding	Factor 08	2.13	7
		Factor 16	1.90	
6	Creative Remedies	Factor 09	3.47	3
		Factor 15	1.97	
7	Enforceability	Factor 08	2.13	11
		Factor 12	3.43	
		Factor 16	1.90	
8	Fairness	Factor 07	1.97	9
		Factor 11	2.93	
		Factor 14	2.20	
9	Flexibility	Factor 01	3.80	4
		Factor 03	3.90	
		Factor 04	2.77	
10	Privacy	Factor 17	1.90	12
11	Relation	Factor 10	2.60	5
		Factor 13	2.30	
12	Width of the Remedy	Factor 06	2.00	6
		Factor 15	1.97	

The factors were identified as most sever one derail the effectiveness were bolded

4.8. Most Violated Critical Factors

4.8.1. Speed of the Procedure

Speed of the procedure is popularly accused as the most violated and ineffective parameter of the arbitration. Duration can be prolonged by means of the following practical factors.

Factor 01- Difficulty in arranging the hearing and finding the Arbitrators for full time basis and daily basis.

Factor 02- No specification to limit the time at Arbitration act No 11, 1995 (like ICTAD clause 67/Arbitration Ordinance 1948).

Factor 04- Non availability of place for arbitration other than Colombo. Other than English no other languages can be selected by the parties.

Even speed of the procedure is ranged as first by the research data. Practical constraint that makes it impossible to arrange the hearing and find the Arbitrators at full time and on daily bases (Factor 01) is the prime factor which is enumerated as the third severe factor of the ineffectiveness in factor ranging.

Anyhow, some other customs are also there to aggravate the effectiveness of these attributes. Monopoly of Colombo as the venue and the failure to mention the time limit at our arbitration law also take considerable parts at this induced inefficiency. Though these customs do not show high severity separately yet the combination of these factors bring severe effect in the overall efficiency.

4.8.2. Cost of the Procedure

Cost of the procedure is another most violated attributes of the arbitration. This inefficiency can happen by two factors as follows.

Factor 04- Non availability of place for arbitration other than Colombo. Other than English no other languages can be selected by the parties.

Factor 05- High emolument and facilities required by arbitrators.

Both are very direct factors contributing the cost of the arbitration, but cost cannot be separated with the time factor, especially in the construction field. Even though above direct reasons are not classified as the most severe reasons for overall inefficiency, indirect components of the other customs resolute cost to be classified as second violated attributes in arbitration.

Time is the most interconnected attributes with the cost. The factors which found as causative of prolonged procedure also have effect on cost. Direct reasons like salary and venue are not considered by respondents. But they majorly violated in other indirect means.

4.8.3. Creative Remedy.

Creative remedy is enumerated as the third most violated attributes in the arbitration. Three practical negative factors can be categorized under these attributes as practical limitation.

Factor 09- There is a limited concern on technical matters when compared with the pure legal matters. Dearth of technical persons to function as arbitrators.

Factor 15- Inability to conduct multi- party disputes by invoking the arbitration.

Factor 9 is found by this research as the third most causative practical factor for the ineffectiveness. But inability of conducting the multi-party arbitration (Factor 15) is the considerable negative factor for achieving the creative remedy. Creativeness basically means the technicality of the decision, so the respondent gives significant weight to the technical involvement on the award.

4.8.4. Flexibility

Flexibility is one of prime advantages in the arbitration when comparing with the litigation. Flexibility is listed as the fourth most violated attributes. The ineffectiveness can be caused by following factors.

Factor 01- Difficulty in arranging the hearing and finding the Arbitrators for full time basis and daily basis.

Factor 03- Part time black court professional and judges try to mimic the court system by which party autonomy is taken away.

Factor 04- Non availability of place for arbitration other than Colombo. Other than English no other languages can be selected by the parties.

Factor 3 and Factor 1 are ranked as the first and the second the most severity factors respectively.

Factor 4 also contributes noticeably to reduce the expecting level of flexibility in arbitration.

4.9. Most Causative Factor Not Categorized Under the Most Violated

Attributes

Following factors are categorized as the most severe factors which reduce the overall efficiency. However, they do not affect the most violated attributes.

4.9.1. Factor 03

“Part time black court professional and judges try to mimic the court system by which party autonomy is taken away” is the so called factor 03. It has two negative dimensions. The first dimension violates party autonomy, that is to say that involved parties have no option on selecting the arbitrator and procedure. But severity of this factor really affects the flexibility.

That is the reason for this factor to be grouped under the party Autonomy. However, party autonomy has not been selected as the most violated attributes by respondents. By this Factor, flexibility has strong impact on effectiveness and not in party autonomy. That might be the reason, why this factor is categorized as the most causative factor of effectiveness of arbitration itself.

4.9.2. Factor 12

Factor 12- Most of the arbitration is conducted in an ad hoc manner. Arrangement for the institutional arbitration in the construction industry is rare. Institutional arbitration ensures conclusiveness and enforceable awards by much practiced procedures. Even this factor is found as the prime reason for the ineffectiveness of the arbitration. Enforceability is not categorized as the most affected successful attributes of the arbitration.

Parties may give severity scale more for the institutionalized arbitration than ad-hoc arbitration because of ignoring party can drag into the procedure by well-organized way of institutionalized arbitration. Further, it has very little positive effects on cost and speed. These accumulated effects might be the reason for the results, as this factor is categorized as the most crucial for the ineffectiveness. However, it has negative effects on party autonomy. Institutionalized procedures of arbitration may govern disputes without any options given to the party.

CHAPTER FIVE

5.0. CONCLUSION & RECOMMENDATION

5.1. Discussion

The results showed that Sri Lankan construction industry expects numerous advantages through the Alternative Dispute Resolution. However, several barriers are impeding to gain those advantages from arbitration. Some of those barriers directly affect the critical success attributes of arbitration, and at the same time some factors in combination affect the critical attributes. To consume the optimized advantages, current practices have to be critically evaluated. This study has identified the barriers to implement effective arbitration procedures in Sri Lanka. Drawing from the results of this study, it is presented before three prominent industrialists who have enough experience to verify the results and deliver their recommendation and suggestion.

One of the prominent industrialists is Mr. Wickramasinghe. He holds an M.Sc. in Project Management from the University of Moratuwa and he is a graduate in Quantity Surveying (B. Sc. Hons) of the University of Moratuwa. He is also a fellow Member and current President of the Institute of Quantity Surveyors in Sri Lanka (FIQS- SL) and a Probationer Member of Australian Institute of Quantity Surveyors (AIQS). He has vast experience from several arbitration cases in Sri Lanka. He acts as the senior consultant in the CRES consultant services. He was unhesitant to accept our findings on speed, cost, creative remedies and flexibility which are the crucial attributes to be enhanced in contemporary practices to meet the beneath philosophy of the arbitration. He opined that young engineers and quantity surveyors have to be encouraged by incorporating arbitrating related curriculum in their undergraduate studies. Further, he reiterated that tribunal in the desk should have the basic ideas of the construction and cost which the contractor and the consultant might come across and not to rely on bogus documents.

He stressed the need of two prominent professional bodies' such as IESL's and IQSL's involvement in arbitration agreement to ensure the technicalities to be included in decision process of the disputes. He feels that if institutional arbitration could be conducted under the supervision of the above professional bodies, the fruitful results are certain.

In his perception, Lack of Enforceability of the award is the major shortcoming. To implement enforcement effectively, enforceability should be added to award or jurisdiction of enforcement to be given to special court or the commercial high courts. Monopoly on the key players creates the major issue on the arbitration. By laying favorable side at most of the time to the prominent key player's party, tribunal losses their confidence among the prominent figures. The award must be set aside to high or supreme courts.

According to his perception factor 7- (Due to lack of impartiality and unfairness, the legal procedures are limited to challenge the arbitrator. There is a possibility for eminent arbitration professional to pressurize the tribunal in any indirect way) should be categorized in first reason, apart from that he accepted these findings through this research. But factor 07 was numerated at the 14th position. It might be the reason that, group of above factors may confuse the respondent to find the importance of that factor. Some of them may categorize institutional arbitration to find the accurate way to enforce it without any prejudice. They may accommodate that point into the factor 12 which was identified as the fourth crucial factor.

He noted that the full time arbitration hearing as insisted in Factor 1 which was numerated as the second is not practically possible. It is not pragmatic to find such number of full time arbitrators simultaneously in the field of construction.

R.M Amarasekara, the former Additional Director General (Asset Development) at Road Development Authority is a veteran professional engineer who was engaged in many disputes as Arbitrator, adjudicator and mediator in several constructions related disputes. He produced several research papers in the maintenance of the road sectors. He acts as the member of several Adjudication Boards. His experience for more than four decades in this field and his capability of finding facts have helped us to get his positive remarks on our findings in the research.

He emphasized that, standard bidding documents and specification to be radically changed. He insisted that the role of an engineer is to be strengthened further to deliver his opinion about the disputes. Contractor's rights also to be properly established. There are a plenty of technical personalities in the field to act as the arbitrators. However, they are neglected and ignored by the industry because of the

monopoly of their lawyers. Due to the lawyers have lack of knowledge of the profit and expenditure of the contracts, their thinking is mainly pivoted on their percentage of the award with their contractors. It creates more moral deficits in the industry. IESL and ICTAD should involve in ensuring the proper handling with regard to the technical issues.

He further remarked that some prominent figures in the industry are playing a myriad of roles in several big projects simultaneously with keen involvement. Through the complex requirements, these big giants market their brand names. In his view, these monopolies are the major negative factors. He is satisfied with our findings of this research to be accurate and precious.

Lawyer's attitude is another prime factor through which total flexibility is annihilated. Lawyer's involvement should be regulated by requiring the additional related knowledge and the experience through the arbitration agreement, which should be monitored by IESL. Further, he opined that the most number of disputes would be avoided to bring into the arbitration.

To sum up recommendation and suggestion, they are grouped in the following manner:

5.2. Recommendation and Suggestion

- i. Introduction of Dispute Adjudication Board (DAB) from concerned professional institutions to settle disputes, through which, time and involvement of technicality will be improved. Our research sees that efficient DAB can help to enhance the attributes, time and cost. DAB is the most advanced method, through which disputes can be identified in the early stages, bruising mentality and animosity can be limited while entertaining the disputes at early stages. DAB's active participation is the most crucial one for efficient disputes management. But most of the boards act as silent board with eminent key players without any positive output. In any big project DAB's responsibilities have to be defined and properly monitored. Panel of Arbitrators and adjudicators should be appointed by the regulations of the construction industry.

- ii. Condition of contract is to be rigorously reviewed with our lesson learned from our past history; very direct application of foreign conditions of the contract is the prime reason for the rising of disputes. ICTAD, IESL and IQSL should involve in the modification of the conditions of contract, which is the precursor of arising the disputes. Rights and Responsibilities of the parties have some ambiguity. These should be reviewed with our past case laws in the disputes. So the case law in Sri Lankan construction industry is to be collected through which condition of contract can be radically renovated. Even though privacy is the most important attributes of the arbitration, gist of the disputed case laws which are heard under the ICTAD supervision to be recorded without sensitive information with the concern of the party. Those data would be crucial for the future development of the set of rules.
- iii. In Sri Lanka, only Institute of Commercial Law and Practice (ICLP) has their own set of rules. But Sri Lanka National Arbitration Centre (SLNAC) does not have their own set of rules. It is advisable to have one set of rules for adjudication and arbitration practice. Instead of having several sets of rules by several institutes, for construction disputes, ICTAD must have a dominant set of rules to govern construction dispute resolution using by the arbitration. So these set of the rules would be familiar to all the stakeholders. Procedures would be groomed up by the routine practice of the same rules again and again.
- iv. Introduce well-structured professional courses on dispute resolution, adjudication and arbitration practices in the universities and construction training institutions. ICLP now offers the Diploma courses for Arbitrating, but these courses to be specialized for construction disputes by ICTAD or IESL. Long term solution would be achieved through these educational endeavors. Professionals should be encouraged from their first degree for the dispute resolution field. It will be a good solution for finding of the research as unavailability of technical personality as Arbitrator.

- v. Awareness is the finest way of empowerment. Conduct awareness programs on adjudication and arbitration related to the construction industry regularly. Government institutions to be acknowledged about the arbitration in construction industry. Contractors also should be educated, as the arbitration is the easiest way to pursue the justice than litigation. ICTAD or IESL or any other relevant institution should open the door to initiate the arbitration by any level of contractor easily.

- vi. In the construction industry in Sri Lanka, it does not appear whether much concern is given to show how the fundamentals of engineering and law must be used in the process of managing these disputes. Importance of adopting fundamentals of engineering principles as adopted in other aspects of construction processes must be emphasized in every instance of the dispute management process as well. There has to be a contribution to the industry by way of using scientific methods for programming, monitoring, evaluations, analyses which should form the basis of scientific dispute resolution. The professionals should persuade the stakeholders to adhere to the fundamentals of engineering, law and ethics in the process of dispute management in order to have a more sustainable and healthy construction industry.

- vi. Introduction of sensible dispute management practice is important to negotiate disputes and settle disputes quickly. If a settlement cannot be achieved through negotiation, arbitration or adjudication, methods should be reviewed.

- vii. Partnering works well to prevent disputes. Accordingly best adjudication or arbitration approach for construction projects would be started with partnering and relying on direct negotiation.

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