

Negotiation as an ADR Technique in the Sri Lankan Construction Industry

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ABSTRACT

The construction industry is complex, and disputes are common in this industry. One primary method used in dispute resolution in the Sri Lankan construction industry is negotiation. Negotiation is considered a cost and time-effective alternative dispute resolution method. However, the contracts formed based on Construction Industry Development Authority (CIDA) do not include negotiation as a dispute resolution (DR) method. Therefore, this study aims to find the reasons for the failures in dispute negotiation and develop a framework to improve dispute negotiation in the Sri Lankan construction industry. There were two methods applied in this research. Because to avoid being based on a limited set of construction industry-related disputes. Five interviews were conducted by construction industry professionals to organize the data collection through documentaries and selected construction industry professionals are one projects director, one Chartered quantity surveyor, one engineer, one project manager, and one quantity surveyor to cover management level, chief level, and senior level. Then 250 claims were collected relevant to design changes, payment-related issues, time-related issues, documentation, and work quality. Out of those five types of claims, the majority of payment and time-related disputes were resolved unsuccessfully through negotiation. Reasons for those disputes to fail in resolving through negotiation are negotiation outcome do not have statutory powers, the attitude of disputing parties, lack of negotiation skills, lack of trust towards negotiation, and less documentary information. The study recommends CIDA improve negotiation practices in the Sri Lankan construction industry by providing proper training, including negotiation as a compulsory DR, provide awareness programs to the industry stakeholders on dispute negotiation and its benefits.

KEYWORDS: *Negotiation, disputes, construction industry, Sri Lanka.*

1 INTRODUCTION

In the year 2020, the Sri Lankan construction industry contributed 6.2% of the country's GDP, compared to an average of 7.4% over the preceding decade (Trade.gov, 2022). It implies that the construction industry is a significant section of the country's economy (Mallick and Mahalik, 2008; Thanuja, James, and Raufeen, 2013). Likewise, the construction industry can affect the economy by increasing employment, which in turn increases the gross domestic product (Mallick and Mahalik, 2008). Since the construction industry is mainly depending on people and money, there is a great likelihood that disputes will occur. Therefore, construction industry organizations employ conventional management processes. The process is known as dispute resolution (Thusharika and Abeynayake, 2016).

Alternative Dispute Resolution (ADR) and litigation are the two forms of dispute resolution practices adopted in the construction industry. ADR types include negotiation, mediation, conciliation, adjudication, and arbitration (Saeb et al., 2018) and also Med-Arb, and Arb-Med (Cobo Ordóñez & Mesías Vela, 2018). Out of those ADR methods, negotiation is the cost-effective, discreet, and expedient technique (Dissanayake, Abeynayaka, and Pandithawatta, 2018). Negotiation entails conversation between the parties to achieve an accord. There is no limit to the number of parties ("disputants") that can participate in negotiation; however, the type most frequently studied is two-party negotiation (Peter, Carnevale, and Pruitt, 1992). Alternative terms for negotiation include agreement, deal, concert, and conclusion. The word negotiate derives from the Latin "negtiri", which means "to do business," and it

retains this meaning (Merriam-Webster, 2022). This study is looking at ways to improve negotiation practices and find the reasons for the failures in dispute negotiation and develop a framework to improve dispute negotiation in the Sri Lankan construction industry.

2 LITERATURE REVIEW

2.1 Types of Negotiation

Various types of negotiation can be identified based on the behavior and relationship of the parties involved. Ganesan (1993) identified two negotiating styles, including 'integrative' and 'distributive' negotiations. The negotiation types identified by Pabashini and Amaradiwakara (2016) are 'integrative', 'distributive', and 'principled' negotiations. During negotiations, the term "integrative" refers to persons who work together. This negotiation requires the building of a pleasant connection between the parties and a greater level of trust (Fisher and Shapiro, 2006). Distributive discussions are acknowledged as a challenging form of bargaining. This is also referred to as a win-lose negotiation type. The result of the particular type of negotiation is one side winning over the other (Sandhya and Kariyawasam, 2016). Respecting the value and necessity of ongoing relationships, principled negotiation seeks a just and mutually beneficial resolution of conflicts; it is particularly compatible with the ideals upheld by social workers (Lens, 2004).

2.2 Positive and Negative Aspects of Negotiation.

90 to 95 percent of construction disputes are settled by using negotiations but this statistical data does not reflect according to situations (Yates, 2011). Negotiation is more cost-effective, confidential, and speedy procedure safeguards than other methods (Dissanayake, Abeynayaka, and Pandithawatta, 2018). Further, Pabashini and Amaradiwakara (2016) identified the positive aspects of negotiation as; non-third-party involvement, least cost, speedy resolution, time and cost savings, flexibility, simplicity, and informality, private, preserving the working relationship, Preserving the reputation of the parties and Providing insight into the future dispute resolution. Negative aspects of negotiation include lack of legal binding, need for skilled negotiators, lack of neutral intervention, and non-forced use of parties (Pabashini and Amaradiwakara, 2016).

2.3 Negotiation Practice in the Sri Lankan Construction Industry

Negotiation is essential for every construction project and is a significant tool in helping the project navigate the right path (Abeynayake and Weddikkara, 2014). Although there are a number of possible resolution methods, disputes are always negotiated first before other methods are considered (Cheung et al., 2006; Tam, 1998; Yiu, 2011). Even in Sri Lankan construction, industry negotiation is the initial attempt to resolve construction disputes (Jayasena and Yakupitiyage, 2012; Gunasena, 2010). There are many negotiations that happen almost pre and post-stages of the construction contract to resolve disputes (Ranasinghe and Korale, (2011), Dancaster, (2008)). Marzouk and Moamen in 2009 listed out following attributes for negotiation;

- it prevents dispute(s) amongst project parties
- it keeps good relationships among the project's parties
- it provides flexibility and control in the resolution

Before starting the face-to-face meetings negotiator should define the scope of the negotiation and clearly set up the expectations highlighting the bottom line of the negotiation (Ren et al., 2011). Through case studies, Ren et al., suggested several points adhere during the negotiation process. They are as follows;

- Getting the parties to the negotiating table.
- Without bargaining over positions should work towards the negotiating goals.
- Focus on Interests mainly by identifying shared and compatible interests
- Negotiation should not affect by human behaviors like perception, emotion, and communication

- Innovative solutions for mutual gain
- Insist on Using Objective Criteria like legal or business precedent, expert judgments, lab testing, efficiency, reciprocity, or standard conditions of contract
- Establish the Best Alternative to a Negotiated Agreement
- Choose Appropriate Negotiation Tactics
- Reach a Settlement
- Limitations of Principled Negotiation
- Overemphasized Cooperation
- Assumption of Common Interests
- Culture Issues

Most of the local contracts are developed based on the Standard Bidding Documents (SBD) prepared by the Construction Industry Development Authority in Sri Lanka (CIDA.govt.lk, 2020). The conditions developed through CIDA contract documents do not have negotiation as a DR (SBD, 2007). Throughout the negotiation, process parties will do more discussions to find solutions to disputes and see the possibilities of managing disputes without escalating (Gunaseena, 2010). The whole process is depending on the trust and willingness of both parties to resolve the dispute without leaving the negotiation table until reaching an end or a solution for the dispute (Ren et al., 2002). If the parties fail to succeed in negotiation disputes will refer to a costly, time-consuming proceeding like arbitration or litigation (Chow and Cheung, 2008). Not only the cost but also maintaining the reputation and avoiding emotional stresses better to avoid court proceedings (Cheung et al. 2002; Harmon 2003).

3 RESEARCH METHODOLOGY

The research was based on five semi-structured interviews and 250 construction dispute claims from the Sri Lankan construction industry. Those five interviewees are construction industry professionals having over 15 years of expertise in construction project management and dispute resolution in the Sri Lankan construction industry. Because to avoid being based on limited sets of construction industry-related disputes and cover different management levels. The interview data was utilized as a guide to classify and organize the documentary survey. Since the aim of this exploratory type of research is to produce analytical, rather than statistical, generalizations (Yin, 2014) the claims collected for document analysis will not act as representative data. However, the 250 claims selection was done based on two criteria such as; claims from large-scale construction projects and claims which refer to negotiation as an initial. Most importantly the availability of relevant information about the documents was considered as the initial screening of the selected claims.

A qualitative research strategy was used since the study was focused on an in-depth analysis of the collected data (Bryman, 2012). Semi-structured interviews were used to examine the negotiation strategies and methods adopted in the Sri Lankan construction industry. The claims identified the type of disputes that refer to negotiation and the type of disputes which failed to resolve through negotiation. The collected data was analyzed using content analysis.

4 RESULTS AND DISCUSSION

4.1 Semi-Structured Interview

Interviewees considered negotiation as a voluntary ADR where disputing parties will refer their disputes willingly. It further revealed, that most of the contract documents prepared using CIDA conditions of contracts do not have negotiation as a dispute resolution method. Interviewees explained that the majority of the negotiations conducted are based on the personal strategies adopted by the persons at the negotiation table. Those are scheduling meetings, employing a conflict-specific individual, conducting an analysis using historical data, modifying the project's scope, collecting preliminary information, carrying out site meetings, and proceeding in accordance with the contract documents. As attributes of the negotiation were presented as good communication skills, decision-making capacity, organizational work, listening skills, job awareness, and data management skills. In

practice, three methods of negotiating have been discovered. Those are through telephone, face-to-face, and online forums. The most productive negotiations were identified as the on-site meetings.

Common disputes referred to negotiation were identified as design changes, delays in payments, the extension of time, and construction bill amounts. Other disputes referred to negotiation include day work, variation, new rate proposals, contractor progress, land clearance, and change scope. There are multiple documents used in negotiation. Those are requested for clarification, Drawings, Measurement sheets, Breakdowns, Measurement Guides, Contract Documents, Engineering statements, Previous Practices (Bills, Variations), and IPA documentation.

Identified construction disputes for unsuccessful negotiations are; Lack of knowledge in certain areas, Taking a large scale of time, Social problems, Conflicting opinions from different parties, Time, The failure of contract documents, Government regulations, Unethical behavior of professionals, lack of communication, and Document errors.

4.2 Documentary Survey

5 disputes are highlighted in the documentary survey such as; design changes, payment-related issues, time-related issues, documentation, and work quality. With a ratio of 44%, the majority of disputes involve plan-changers, as depicted by the graph, with a disparity of 8% between time-related and planning-related disputes. These issues have a significant impact on the success or failure of negotiations. Disputes over documentation, work quality, and other issues have a lesser impact. Their combined percentages equal 7% -13% of the factors pertaining to payment-related problems. Lastly, conflicts regarding design are common in design-build projects. Whether or not project disputes may be identified depends on the procurement procedure.

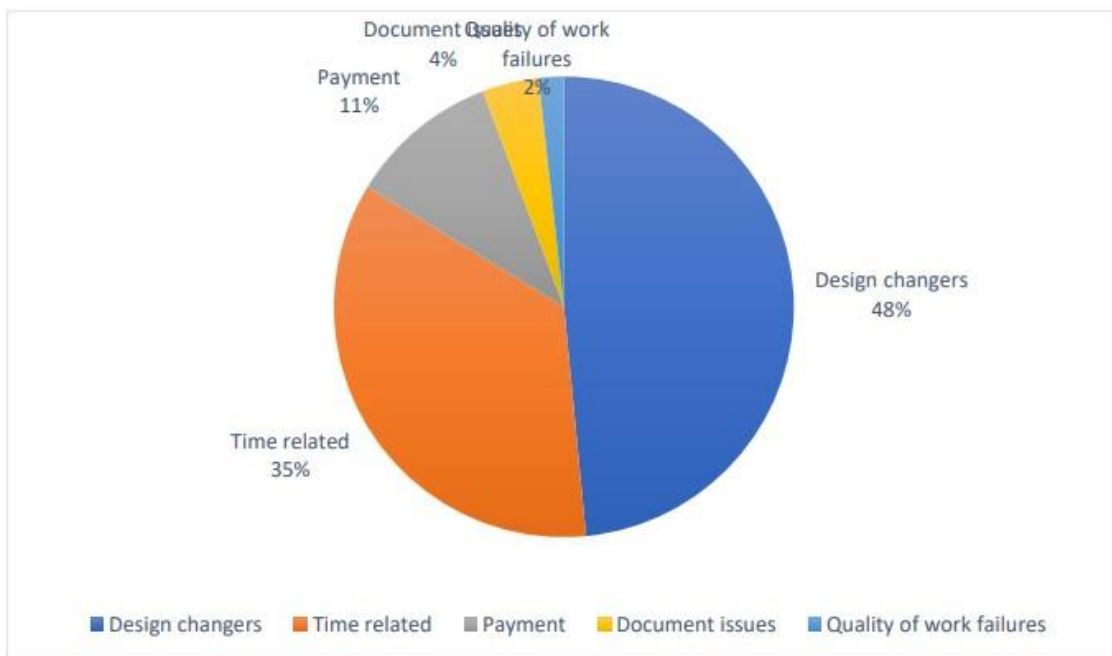


Figure 1- Claim distribution according to the type of dispute

Out of the 250 claims, several disputes relevant to payment, time, and other (design changes, documents, quality of work) issues failed in resolving through negotiation. When comparing Figures 1 and 2 even though there is a larger difference between the number of time and payment-related disputes, when it comes to unsuccessful negotiations both are very much similar (figure 2).

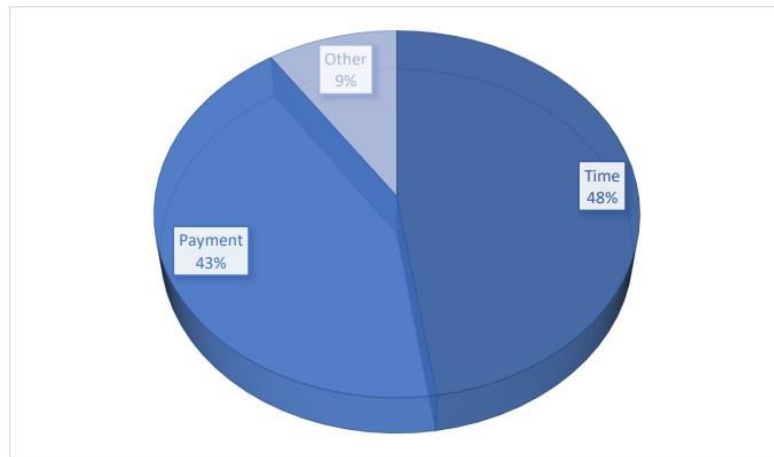


Figure 2- Types of disputes that failed in resolving through negotiation

According to documented data, the majority of time-related disputes arise when the contractor requests an extension to complete the work. The identified reasons for the failure of such talks include the client's activity. The majority of payment-related disputes result from the contractor's loss of earnings, delays, etc. The client is reasonably worried and evaluates its fairness or unfairness. However, most of the failed negotiations are initiated by the contractor.

Reason for the failure in dispute negotiation

Following are the reasons identified for the failures in dispute negotiation from collected data ;

- Negotiation outcomes do not have statutory powers – If parties are willing to accept the negotiation outcome only the negotiation will be successful.
- An attitude of disputing parties – Disputing parties are reluctant to sacrifice to come to an amicable solution.
- Lack of negotiation skills – The representatives of the parties to the dispute do not have enough skills to negotiate.
- Lacks of trust towards negotiation – Disputing parties do not trust the people and the techniques applied in negotiation.
- Less documentary information – Required documents are not available to resolve disputes through negotiation.
- Referring disputes which need expert advice – The disputes which need expert views cannot resolve through negotiation.

Proposed negotiation framework for the Sri Lankan construction industry

Figure 3 presents the proposed negotiation frame developed through this study for the Sri Lankan construction dispute resolution. Before starting the negotiation disputing parties should identify the type of dispute. If the dispute is related to money or time parties should separately study the dispute on the possibilities of resolving it through negotiation.

Then the individual party should find solutions by collecting information relevant to the case within the party. Before starting, negotiation parties should determine the type of negotiation style that will be used in negotiation. Parties should know what the other party is going to claim. Disputing parties together should formulate the negotiation team and organize the date, venue, and other relevant things for negotiation. Finally, negotiation will be conducted, and failing with negotiation parties should refer disputes to the next level of ADR.

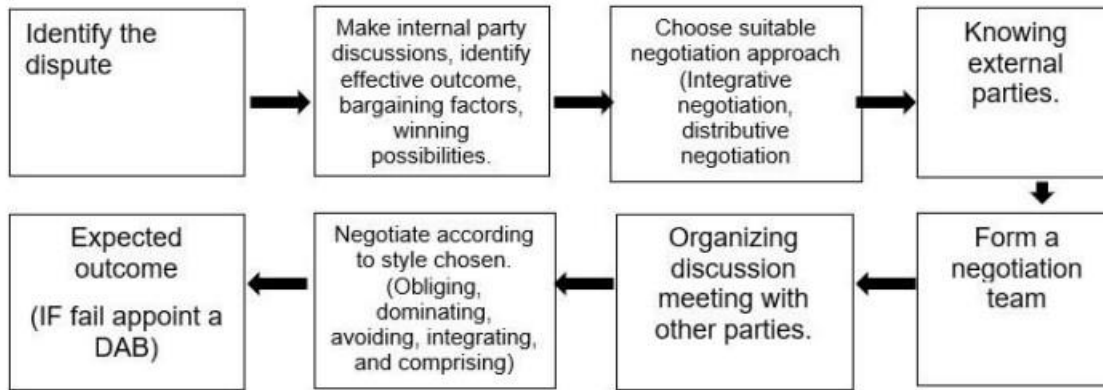


Figure 3 - Proposed Negotiation Procedure

5 CONCLUSIONS AND RECOMMENDATIONS

Negotiating practices used in Sri Lankan construction projects include scheduling meetings, employing a conflict-specific individual, conducting an analysis using historical data, modifying the project's scope, collecting preliminary information, carrying out site meetings, and proceeding in accordance with the contract documents.

According to the data analysis, the most common disputes that refer to negotiation are design changes, payment-related issues, time-related issues, documentation, and work quality. Time and payment-related disputes were identified as the disputes which are difficult to resolve through negotiation. Identified time-related disputes and payment-related disputes are linked. The developed framework can use to resolve disputes amicably.

It was determined that local conditions of the contract document receive less consideration for negotiation. This researcher suggested that CIDA should pay more attention to this section. Promote negotiation-related publications and host workshops on negotiation skill improvement. There is no professional viewpoint on negotiation in the government sector. Further, there is nobody to take responsibility for the failure in negotiation. Therefore, the disputes that failed to resolve through negotiation will immediately be referred to the next level of ADR. Other than negotiation all the other ADR processes take more time and money. This research assists construction industry experts in leading effective conflict resolution practices. To avoid failing a negotiation, one of the most crucial strategies is to develop one's communication skills and engage in team negotiation activities. In addition, it is recommended that, when forming a negotiation team, specialists who are both skilled and responsible are chosen. Following the dispute scale, it is necessary to hold team conversations before the documentation. Getting an overall picture of the various possibilities in the negotiation background might be helpful. Recommends following the negotiation procedure and winning possibility checking chart that was described previously. Checking the chart for winning possibilities, but only for certain types of conflicts.

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