REVIEW OF IMPACT OF JUDICIAL INTERFERENCE TO ENHANCE CONSTRUCTION ARBITRATION IN SRI LANKA

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ABSTRACT

The basic characteristics of built environment activities are complexity and disputability in its own nature. This complexity drives most of the construction projects and contracts towards disputes between parties. Construction contracts in the industry are more complex than all other type of business contracts by its nature. This complexity itself has paved the path for disagreements between parties of such contracts. Although disputes are common in Sri Lankan construction industry as elsewhere in the world, dispute resolution mechanisms are not admired in Sri Lanka. The litigation process is the traditional mode of dispute resolution, drawbacks of litigation process have opened up the 'Alternative Dispute Resolution' (ADR) methods. Literature based on the process of Arbitration in Sri Lanka and other countries reveal that using Arbitration as an alternative method to the court system will be more beneficial than court litigation. It is evident that there would be a high possibility to ensure the efficacy of the process of Arbitration by minimising the interference of the judiciary. At present Arbitration as an ADR method does not efficiently resolve the disputes.

This research examines the usage of Arbitration as an ADR method to resolve the construction disputes instead of traditional litigation. However, the current arbitration method and its practice hinders the advantages by irregular judicial interferences which prolong its efficiency. The aim of this research is to recommend effective amendments for current Arbitration practice in Sri Lanka by reviewing the impact of judicial interference. This research proposes a well-planned Arbitration method which can avoid pitfalls in the current legal regime of the Arbitration practice in Sri Lanka. Further it seeks to suggest positive amendments for the Act to avoid loopholes and minimise the challenging grounds of arbitral awards.

Keywords:*Arbitration; Construction Industry; Dispute Resolution; Judicial Interference.*

1. INTRODUCTION

Construction projects are complex in its own nature as well as its performance. This complexity drives most of the construction projects and contracts to disputes between parties. (Saleem, 2016) Disputes might arise at any scale of a construction and they tend to be more intensive and multifaced in comparison with the ordinary civil disputes. Mustill and Boyed (1989) states, before introducing the Dispute Resolution Methods to the construction field, most of the disputes were solved by mutual agreement between parties or, under court litigation. However, as a result of many technological issues and the complexity of the construction projects. The disputes and their resolution have become a primary focus in the strategic plans of businesses (Kleiner and Mose, 2016). Dart, recommends the best solution is to avoid disputes even though disputes may arise (1994 cited Latham 1994).

Those mutual agreements between disputed parties were not so beneficial and, court litigation also couldn't answer the complexity of those projects as lawyers and judges rarely have the knowledge of the technical aspects of the projects. Alternative Dispute Resolution Methods were introduced in order to answer the pitfalls occurred in the use of traditional litigation. In the case of State of Kerala Vs. Joseph Auchilose (1990), court states that time consuming, interminable, complex and expensive court procedure impelled the jurists to search

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for an alternative and more effective and speedy resolution method. When there's a dispute relating to a business project, litigation sometimes does not provide an expeditious an effective solution. As a result, Alternative Dispute Resolution Methods (ADR) viz. arbitration, mediation, conciliation and negotiation have been developed. They ensure the confidentiality, understanding among the parties, saving cost and consuming technology.

Arbitration does not function completely apart from the judicial system. Justice Wimalachandra (2007) states the court intervention in arbitration can't be refused and court assistance in the process may be sought in many cases like appointment of arbitrator, termination of arbitrator's mandate and removal of arbitrators, grounds for challenge, competence of arbitral tribunal, interim measures of proceedings, obtaining summons, refusal or failure to Attend before Arbitral Tribunal, Application for filling and enforcement of award , remission to arbitral tribunal , appeals and enforcement which depend on the assistance of the courts with regard to Sri Lankan law of arbitration. (Kanag-Isvaran, 2011) There's no arbitration without the assistance and the guidance of the judiciary. What need to be done is moderating the way of this assistance and reducing the duration of time which results as a consequence of the intervention of the judiciary. In order to achieve this, the recommendation is to enhance the way of court intervention to expedite the process and encourage the judiciary to make their decisions regarding the arbitration within a short duration or during the construction period itself, if possible. The Hypothesis of this research is that there is more impact on judicial interference for Arbitration process.

Aim of this research is to review the impact of judicial interference to arbitration method as an effective ADR method to resolve construction disputes in the construction industry in Sri Lanka. It aims to investigate how to improve the arbitration process by encouraging to minimize the judicial interference and allowing process to stand as an independent ADR method. In order to fulfil above aim, objectives of the research would be to;

- Review the features of Arbitration and its conflicting areas in comparison to litigation.
- Identify the impact of judicial interference to enhance the Sri Lankan arbitration method and its practice.
- Review progressive efforts taken by other jurisdictions to enhance the efficiency of Arbitration in the construction industry.
- Make recommendations to enhance the impact of judicial interferences for arbitral awards to improve the efficiency of Arbitration method.

This research is limited to analysing the Arbitration in the construction industry in Sri Lanka based on the developed other jurisdictional efforts which have been taken to enhance the effectively of the Arbitration. And basically, the data has are been collected is limited to the knowledge of professionals who are actively engaged in the Arbitral dispute settlements and also the other stakeholders like engineers, consultants and constructors.

2. LITERATURE REVIEW

ADR methods are recognized as an alternative to the litigation method. Lord Denning in his famous judgment in the Court of Appeal in *Dawnays Ltd Vs Minter Ltd* case, held that "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 worst "([1971] 1 B.L.R. 1205). Justice Wimalachandra has defined ADR method as any form or procedure, whether formal or informal, whereby parties could resolve their disputes instead of litigation before courts of law (Wimalachandra, 2007).

Arbitration was born in England as an Alternative Dispute Resolution. Earlier it was an alternative distinctive from litigation. The US has developed a special Dispute Board concept, involving the appointment of a panel of independent persons who maintain the affairs of project throughout its life. If a dispute arises this panel is called in to make recommendations rather than a decision on the dispute. These recommendations are not binding but would be accepted by the parties. This system has been credited for its nature of saving many hundreds of millions of dollars for project participants. There is a wide general acceptance for the quick and effective methods for the resolution of disputes in business projects. Dispute Adjudication Boards which render decisions that are temporarily binding but pending further procedure have become the standard model without possessing an insight knowledge of formal and conventional way of dispute resolution it is futile understand the alternative ways.

In this research, legal instruments can be widely useful to support progressive enhancements of the Sri Lankan Arbitration. Mainly the Arbitration Act of Sri Lanka No. 11 of 1995 is the basic instrument which was analysed and evaluated based on the above legal instruments. The UNCITRAL model law on International Commercial Arbitration, is the core legal framework which has been implemented by most of the countries all over the world and each and every country which is signatory to this model law is obliged to amend the national law of Arbitration according to this. Proceedings of Construction Industry Arbitration Council 2015 India- With a view to providing an institutional mechanism for resolution of construction and infrastructure related disputes, the Construction Industry Development Council, India (CIDC) in cooperation with the Singapore International Arbitration Centre (SIAC) has set up an Arbitration Centre in India called the Construction Industry Arbitration Council (CIAC). Further, in England the Technology and Construction Court Guide Second Edition Issued 3rd October 2005, third revision with effect from 3 March 2014.

From the interviews with prominent professionals in the construction industry and literature survey it was understood that, there are four ADR methods-Negotiation, Mediation, Adjudication and Arbitration-mainly practicing in Sri Lankan construction industry. The practicing of ADR methods can be indicated as a stair step way (Cheung, 1999; O'reilly and Mawdesley, 1994). It mentioned in Figure 1.

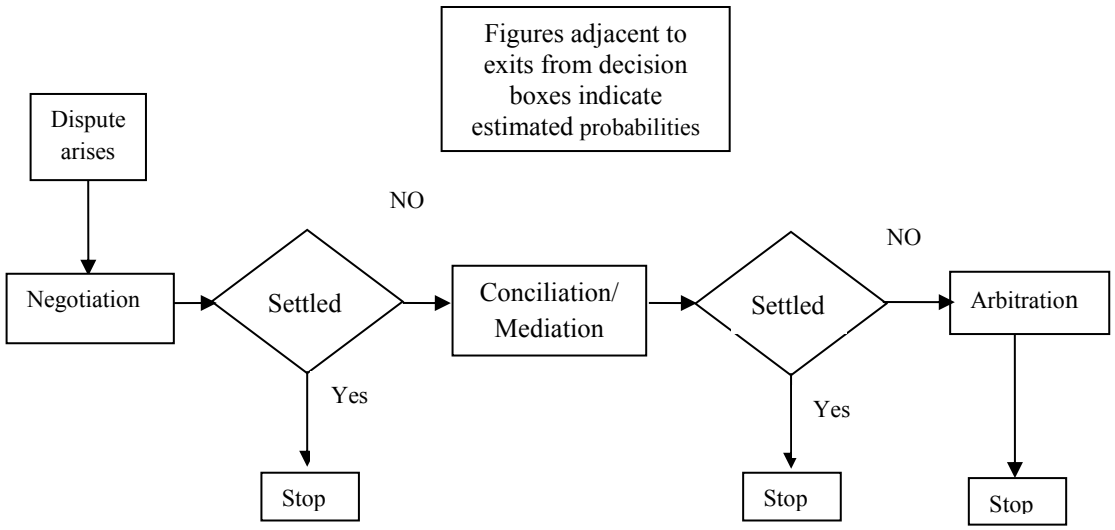

Figure 1: Probabilistic Network or Flow Diagram of ADR Application

Source: O'reilly and Mawdesley (1994)

3. ARBITRATION AS AN ALTERNATIVE DISPUTE RESOLUTION METHOD

Arbitration is considered as a "businessman's" method of resolving disputes and a process much like a trial without a jury (Neale and Kleiner, 2001). The construction industry uses arbitration as its principal final mode of dispute resolution (Sims et al., 2013). It can be considered as a suitable mechanism for many construction industry disputes, but not for all (Goonarathna 2007; Sims et al. 2013). "Despite its decline, arbitration is still the preferred method of final dispute resolution in the construction industry" (Sims et al. 2013).

The Arbitration Act of Sri Lanka No. 11 of 1995 provides for a legislative framework for the effective conduct of arbitration proceedings as well as the most practicable or methodical mechanism for the enforcement of arbitral awards thereby making arbitration a viable and expeditious alternative to litigation for the resolution of commercial disputes. This act describes the rules when resolving a dispute using arbitration. Sri Lanka was the first country in South Asia to enact an arbitration law, by way of the Arbitration Act. The Arbitration Act of Sri Lanka No 11 of 1995 stated how to resolve disputes arise in any industry. The Act provides that an arbitration agreement shall be in writing.

3.1. PERSPECTIVE ON ARBITRATION IN THE CONSTRUCTION INDUSTRY OF SRI LANKA

Until the enactment of the Arbitration in 1995, the Arbitration Law practiced in Sri Lanka was based primarily on three statutes ; Arbitration Ordinance No. 15 of 1856, Civil Procedure Code of No. 2 of 1889, Reciprocal Enforcement of Foreign Judgements Ordinance No. 41 of 1921.The Arbitration Act of 1995 was the first Arbitration law in South Asia to be based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and inspired by the then draft Swedish Arbitration Act. The Parliament of Sri Lanka has enacted statutes to implement the ADR methods. Commercial arbitration proceedings are governed by the Arbitration Act No.11 of 1995. Mediation practices are regulated by Mediation Board Act No. 72 of 1988 and its amendments. Further the Commercial Mediation Centre 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.

According to the aforesaid legal provisions the original civil jurisdiction which heavily affects the contractual matters in the business industry are vested on District Courts except where the cause of action has arisen out of some commercial transactions 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 commercial disputes is vested on Civil Appellate High Courts, Court of Appeal and the Supreme Court. The judicial system is one form of dispute resolution that is available to the parties of dispute. However, in Sri Lanka there is a tendency to assume that litigation is the normal dispute resolution method and there is a concern that people turn too quickly to the courts with their disputes (Wimalachandra, 2007).

The court intervention in arbitration can't be refused and court assistance in the process may be sought in many cases like appointment of arbitrator, termination of arbitrator's mandate and removal of arbitrators, grounds for challenge, competence of arbitral tribunal, interim measures of proceedings, obtaining summons, refusal or failure to Attend before Arbitral Tribunal, Application for filling and enforcement of award , remission to arbitral tribunal , appeals and enforcement which depend on the assistance of the courts with regard to Sri Lankan law of arbitration. (Kanag-Isvaran, 2011) There's no arbitration without the assistance and the guidance of the judiciary. What need to be done is moderating the way of this assistance and reducing the duration of time which results as a consequence of the intervention of the judiciary. In order to achieve this, the recommendation is to enhance the way of court intervention to expedite the process and encourage the judiciary to make their decisions regarding the arbitration within a short duration or during the construction period itself, if possible.

Further there are some cases which were decided by Superior Courts of Sri Lanka and now those have become a part of arbitration law as a judicial precedent. As an example, Southern group civil construction private limited vs. Ocean Lanka private limited case discussed the grounds for setting aside an arbitral award and the time limitation for challenge the arbitrator's award. In State Timber Corporation vs. Moiz Goh (pvt) Ltd case, court held that the district court has no jurisdiction to enter in to the arbitration proceeding. In Sri Lanka the arbitration process is conducted in two ways; Ad-hoc arbitration is conducted when the parties decide on their own procedure to be adopted in the conduct of the arbitration proceedings. It is observed that most domestic construction contracts are conducted on Ad-hoc procedures (De Zylva, 2006). Arbitral institutions under its own rules of arbitral procedure conduct the Institutional arbitration. It provides the framework of rules and such other facilities for entire proceeding. There are three main arbitration institutions in Sri Lanka called as 'International Chamber of Commerce', 'Institute for the Development of Commercial Law and Practice (ICLP)' and 'Sri Lanka National Arbitration Center' which facilitates construction arbitration.

The Arbitration Act in itself does not lay down any rules of Arbitration. But deals with the 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 by sections of the Arbitration Act. Due to the absence of strict rules of Arbitration provided in the Act, the parties are free to choose the rules under which their arbitration should be conducted. According to the section 32 (1) (a) of the arbitration Act, it expressly states the grounds on which such an order can be set aside.

Another drawback in current Arbitration process is unenforceability of arbitral awards. Number of cases are pending in courts due to this reason. Manathunga and Seneviratne (2016) illustrates the categorization of arbitral cases based on the ground for rejection of the arbitral awards as follows;

Table 1: Grounds Leading to Unenforceability of Arbitral Awards

Ground for setting aside or refusal to enforcement	Total for the category
Non-adherence to enforcement procedure	17
Violation of due process	3
Excess of authority	1
Irregular constitution of the arbitral tribunal or irregularity of arbitral procedure	1
Award conflicts with the Public Policy	8

The research illustrates that majority of unenforceable arbitral awards are belonging to non-adherence to enforcement procedure while public policy grounds lie next it. Further they have aimed to find out the reasons for the most common ground leading to the unenforceability of arbitral awards and resulted as follows;

Table 2: Reasons for non-adherence

Reasons for non-adherence	Number of Cases
Performance defects of legal counsel	9
Not understanding the requirements of Section.31of the Arbitration Act	1
Failure of the company strategy on the award	1
Performance defects of the officer in charge of the case	3
Relevant officers are not knowing the actual reason	2

Their findings indicate that majority of unenforced arbitral awards belonging to "non-adherence to enforcement procedure" become unenforceable due to the performance defects of the legal counsel. Performance defects of the relevant officer in charge (to follow up the case) are responsible subsequently. Also least amount of arbitral awards become unenforceable due to failure of the company strategy on the arbitral award and lack of understanding of the requirements of section 31 of the Act.

Based on the literature survey done for the purpose of this research it can be identified that most of the leading arbitrators are of the opinion that arbitration was becoming almost court litigation. In this light, the research explores the effectiveness of Arbitration as an alternative method to resolve construction-based disputes and the necessity to reduce the duration of time by minimizing the court intervention in many stages of Arbitration.

4. RESEARCH METHODOLOGY

To accomplish the above objectives, it was aimed to analyse the literature based review based on commercial Arbitration. The literature review based on this research had done to figure out what are the effective steps which could enhance the purpose of Arbitration method as an alternative to court litigation. The literature review focused about the progressive Arbitration modules which has been taken in other jurisdictions like India, UK and USA. In case the literature review based on this research was only done including other related articles on formal Arbitration process not about the commercial Arbitration and its applicability of recent trends.

5. FINDINGS

The main objective of entering into the arbitration method instead of Court proceeding is to settle the dispute more expeditiously. The Arbitration Act No. 11 of 1995 of Sri Lanka itself facilitate this by ensuring that Courts shall not interfere in arbitration proceedings unless otherwise required by the said Arbitration Act. It clearly states the circumstances where Courts intervene in the Arbitration proceedings. This Act was drafted according to the UNCITRAL Model Laws on Commercial Arbitration and the Article 5 of the Model Law under the heading of "Extent of Court Intervention" states that, "In matters governed by this Law, no court shall intervene except where so provided in this Law".

The section 5 of the Arbitration Act of Sri Lanka also highlights the above fact under the heading of "Jurisdiction", as follows,

"Where a party to an arbitration agreement institutes legal proceeding in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall

have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter".

This is generally known as severability where court cannot interfere when there is an agreement to arbitrate. The major point which has to be specifically understood here is that all of these interventions by the Courts or other Authorities are treated as the level of Assistance and Supervision. Model Law itself do not grant a solely power for Courts to engage in the arbitration proceedings and it ensures the independency of the Arbitration. This kind of assistance from the Court side is a necessary to functioning the Arbitration without any destructions. The minimal interference of the judiciary is a fundamental requirement that it can be more helpful to ensure the efficiency of the arbitration. The principle of this minimal interference of Courts in the arbitration was highly encouraged by the Judgment of McDermott International Inc. vs Burn Standard Co. Ltd (2006) and it was based on the Arbitration and Conciliation Act of 1996 of India. In parallel to the said amendments, article by Rohith, Shishir and Mayank (2016), Dispute Resolution in India in the light of the New Arbitration Act 2015, highlights about the significant increment in the role of domestic and international trade in economic development of India. Further, Considerable increment of the commercial disputes accompanied with that economic growth. Further, in Arbitration Act of 1996 in India was enacted to achieve the twin goals of inexpensive and quick resolution of the disputes.

In the case of Mahawaduge Priyanga Lakshitha Prasad Perera Vs. China National Technical Imports & Export Corporation, under the judgement High Court judge mentioned as follows;

"In this case a preliminary objection was raised to the maintainability of the application on the grounds that the petitioner has no right in law to invoke the jurisdiction of High Court in terms of Section 11 of the Arbitration Act subsequent to both parties inviting the tribunal to decide its jurisdiction and the tribunal ruling that it had no jurisdiction".

According to this judgment delivered by the Commercial High Court under the law of Sri Lanka, any positive decision of the tribunal related to its jurisdiction is subject to challenge only following the making of the award in an application for setting aside an award under the Section 32(1). In the foresaid case commercial high court by analyzing section 11 indicated to which extent can a arbitral tribunal may deal with or dispose of a challenge to its jurisdiction and under this he recognized the preliminary question and decided that it lacks jurisdiction as a negative ruling and also postpone for decision on the award on merits and decide that it lacks jurisdiction also as a negative jurisdiction on ruling, further this case ensures that any party cannot apply to the High Court seeking guidance as to the jurisdiction of the tribunal when the tribunal makes a negative ruling upon invitation of both parties, unless Section 11 or any other section statutorily recognizes that such remedy is available in the Arbitration Act. This has to be argued that the legislation itself secured the powers of the Arbitration Tribunals by determining to reduce unnecessary delays in Arbitration.

Furthermore, in the UK Technology Construction Court have been introduced to investigate technically complex issues in order to have expeditious dispute resolution system consisting experts such as engineers, architects, surveyors, accountants, and other specialized advisors etc.

6. RECOMMENDATIONS

Constriction organizations could maintain a Dispute Management System (DMS) consisting internal and external experts in the field of built environment for minimise judicial interference. Rather than rushing towards litigation or arbitration companies should exercise every possible effort to arbitrate disputes with stakeholders. Parties have to forward their dispute to an independent arbitration institute specialised in construction sector. Institute should have powers to settle the dispute without any court interference. Currently we have only two arbitration centres, ICLP and National Arbitration Centre.

Technology and Construction Courts (TCC) could be introduced in Sri Lanka as the final resort if the matter could not be settled by way of arbitration. The TCC should deal primarily with litigation of disputes arising in the field of technology and construction. If the matter is not settled in the previous levels parties could forward it to the Commercial High Court. However, Government has to make necessary amendments to the law to achieve this level. In addition, government has to take steps to minimise the court interference in arbitration pertaining to business matters and encourage Judges to decide arbitration matters at earliest.

Arbitration Act should be amended as follows:

Amendment to section 8 - where the Court passes an order for any interim measure before the commencement of arbitral proceedings, the arbitral proceedings shall be commenced within a period of 90 days from the date of such order. If further provides that once the arbitral tribunal is constituted, the Court shall not entertain and application for interim measure unless it finds circumstances that may under the remedy provides under section 17 inefficacious. Thus, it restricts the tendency to approach courts for seeking interim relief.

Amendment to section 17- the arbitral tribunal shall have to grant all kinds of interim measures which the Court is empowered to grant under section 9 of the Act. Such interim measures can be granted by the arbitral tribunal during the arbitral proceedings or at any time after making the arbitral award. And also, according to this provision it ensures that any order that any arbitral tribunal issued by the nature of the interim measure shall have to treat as a order given by a Court for all purpose and it is also enforceable before the law as well as any other order grated by the Courts under the Code of Civil Procedure 1980 of India. This provision is to empower and to facilitate the arbitration procedure in the level of the Court practice and also to minimize the court intervention and establish the arbitration in an independent manner.

Amendment to section 24- this provision introduced a progressive provision which can enhance the effectively of the arbitration. According to that in a arbitration it shall hold an oral hearing for the presentation of evidence or oral arguments on a day-to-day basis and shall not grant any adjournments without a sufficient cause which cause unnecessary misunderstanding about the arbitration.

New provision as section 29 A- this provision traduced more enhancing features to the arbitration with a structure of time limits.

- The arbitration shall ensure speedy completion of arbitration proceedings and pass the award within a period of twelve months from the date when the tribunal enters upon the reference.
- Parties may extend such period for a further period not exceeding six months
- If the award is made within a period of six months, the arbitral tribunal shall be entitled to receive additional fee as the parties agree.
- If the award is not made within specified period or extended period, the mandate of the arbitrator shall terminate unless the time is extended by the court.

The professionals involve in the construction industry have the responsibility to increase the effectiveness of the arbitration. The arbitrator needs to possess a strong personality on displaying humility, empathy and understanding for the burdens that the disputing parties have to bear. In addition to the characteristics which should have to a good arbitrator such as confidentiality, availability, voluntariness, conflict of interest, fairness and interpreting ability. The results of this study can be used to increase the effectiveness of arbitration in construction industry of Sri Lanka.

7. CONCLUSIONS

The rapid globalization of the economy and competition has led to exponential problems in arbitration in built environment. This has led the court system overburdened and it would cause the slow adjudication of commercial kind of disputes. Hence, arbitration process become critical for construction sector which could facilitate a prevalent mode of dispute resolution for commercial disputes. The Construction Industry Development Act (CIDA) do not encourages Arbitration as an effective ADR method. Instead Section 50, 52 under Part IX of the Act encourages Adjudication as the ADR method of settlement of disputes. This situation itself discourages a necessity of binding decision towards dispute resolution in construction industry which already requires to be enhanced. In the construction industry of Sri Lanka, no adequate concern given as to how the fundamentals of engineering and law must be used in the process of managing disputes. The 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. If it is organized under a well-designed structure of laws and regulations specially under Arbitration Sri Lanka will be experienced a progressive Arbitration which will encourage the attraction of the construction opportunities.

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