3.1 Introduction

Literature Review has been carried out of various research papers from relevant Journals, papers presented during proceedings of various international conferences, relevant govt. reports, past Research thesis, etc. The review has been carried out to create right scientific thinking & concrete knowledge base, develop focused ideas about the subject of Alternative dispute resolution system in general with specific reference to infrastructure contracts. Thereafter, these ideas have been developed with focus on improving the existing system of dispute resolution system in infrastructure projects for Indian Defence Forces.

Dispute is part and parcel of any commercial transaction. Dispute is any claim which the other party refuses to admit or admits but does not pay. Due to numerous uncertainties attached, infrastructure projects are potentially more prone to development of disputes than any other contract. Broadly there are two modes of Dispute Resolution Mechanism:
(a) Judicial process i.e. Litigation through courts.
(b) Alternative Dispute Resolution (ADR) Methods
3.2 Litigation

Any commercial dispute arising between the parties, if not resolved amicably, may be resolved through the intervention of civil courts. The dispute resolution process through the medium of courts is called litigation.

Litigation takes a long period of time to finally get the dispute resolved specifically in commercial disputes. The delay is even longer in case of disputes which are peculiar to Infrastructure Projects.

There is huge load on the judiciary due to long pending cases of civil as well as criminal nature. As per a recent report\(^1\) in Hindustan Times, New Delhi Edition on 04 Sep 14, there are 3.13 Cr cases pending in various Indian courts. Of this nearly 2.7 Cr are pending in subordinate courts, 43 lakh are pending in various High Courts and nearly 60,000 in the Supreme Court of India. The problem is compounded due to shortage of judges at each level with a combined vacancy of judges of over 4700. Thus existing strength is unable to take on the huge load. Thus, the gravity of the situation of immense load on judiciary is well appreciated by one and all.

The nature of contractual disputes pertaining to infrastructure projects requires specialist technical and engineering knowledge to understand the dispute in its entirety. The judges with only legal knowledge require sufficient time to appreciate the nuances of such technical disputes. Thus, it takes a lot of time to understand the dispute by the judges. Even the respective lawyers of each party take long time to understand and prepare their respective claims & pleadings. The nature of disputes requires lengthy discussions, arguments & explanations at stretch. However, with huge number of cases listed for hearing on a day, the time allotted for the dispute is impractical to have any reasonable discussion. Thus, it takes numerous hearings to put the points across to the judges. There are a lot of bulky technical documentation, drawings, detailing & calculations which is required to be understood & deliberated upon which is impossible within the time allotted to a case on a particular date.

After one hearing the next date may take place after several weeks or even months & some cases even year or so. Thus, lack of continuity on the proceedings also affects the timely completion of the hearings in a civil case. The continuity is also broken with the regular change of roaster or transfer/promotion of judges. Thus, a new judge is again going to take time in appreciating the technical issues involved.

In several cases, the judges require Experts in the field to which the dispute pertains and a lot of time goes into appointing the expert & taking his advice. In some of the cases, the issues can be appreciated better with a visit at the site of dispute. A judge adopts such approach only in rarest of cases, he depends only on documentary evidences to appreciate the issue which takes long time & may even be erroneous affecting the quality of verdict. Then there are various legal & procedural formalities as per The Code of Civil Procedure, 1908 & The Indian Evidence Act, 1872 which further delay the proceedings in litigation. Thus, the delivery of the justice takes a considerable long period of time highlighting that justice delayed is justice denied.

3.3 Alternative Dispute Resolution (ADR) Techniques

As seen above litigation is a complicated, time consuming & costly affair to resolve civil disputes. Moreover, it is not a suitable method to resolve technical disputes as in infrastructure contracts. Further, litigation results in decisions resulting in win-lose situation for the two parties to dispute and leads to further litigation in the form of appeals to the highest courts. It generally leads to disruption of commercial relationships.

A recent study concluded that 70 percent of the “winners” in litigation were unhappy in the end. One can safely assume that close to 100 percent of the “losers” in litigation were also unhappy. Therefore, there is a need to explore techniques other than litigation which can overcome all the demerits of litigation and expeditiously and economically resolve the commercial disputes.

---

Any technique other than litigation used to resolve the disputes can be classified as Alternate dispute resolution technique. However, as per Sir Laurence Street\(^3\), ADR is not truly an “alternative” means of dispute resolution, in that it is not incompatible, or in competition with, the established judicial system. Rather, ADR, according to him, provides an additional range of dispute resolution mechanisms. In fact Sir Laurence Street\(^4\) has described ADR as a holistic concept of a consensus oriented approach to deal with potential and actual disputes or conflict which encompasses conflict avoidance, conflict management and conflict resolution.

As per the research of Professor Chris Field\(^5\), the common elements of ADR are as under:

- ADR includes a range of dispute resolution processes;
- ADR does not include litigation;
- ADR is a structured informal process;
- ADR normally involves the intervention of a neutral third party; and
- ADR processes can be non-adjudicatory.

Some of the advantages of ADR methods over litigation are speed, cost effectiveness, confidentiality, convenience, finality of decision (award/settlement), technically qualified judge (arbitrator/conciliator), continuity, freedom of parties to choose – arbitrator/conciliator/ issues/ venue/ schedule / procedural law/ substantive law, etc. There are several techniques which can be classified under ADR techniques as discussed below.

### 3.3.1 Negotiation

Oxford Dictionary defines Negotiation as “Discussion aimed at reaching an agreement” whereas as per Businessdictionary.com it is defined as “Bargaining (give and take) process between two or more parties (each with its own aims, needs, and

---


viewpoints) seeking to discover a common ground and reach an agreement to settle a matter of mutual concern or resolve a conflict."

Negotiation is a process by which disputants communicate their differences to one another through conference, discussion and compromise, in order to resolve them.\(^6\)

Basically negotiation is a process of resolving disputes by the parties through one to one direct interaction without any involvement of a third party. Strictly speaking, negotiation cannot be considered to be a part of ADR methods as only after negotiations fail, the dispute starts. However, as negotiation can be utilized to resolve disputes at any stage even while other processes like litigation or other ADR processes are on, it is considered as an effective method of ADR.

Negotiation is the best form of dispute settlement as the parties are able to discuss it between themselves and carve out an amicable solution to the issues of conflict through peaceful give and take strategy. John F. Kennedy, former US President, said: “Let us not negotiate with fear but let us not fear to negotiate.”

Negotiation can be considered as first level of dispute resolution. This is the cheapest form of dispute resolution as no expenditure is incurred as in the other formal techniques as discussed below or the litigation. Also, this is the fastest means to resolve disputes. Thus, cost and effectiveness of negation as a technique to resolve commercial disputes is unparalleled. The commercial relationship also does not get hampered and business continues in healthy atmosphere thereafter.

3.3.2 Mediation

Mediation is a way of settling disputes in which a third party, a mediator, helps both sides to come to an agreement considered acceptable by both.\(^7\) Thus,


\(^7\)
Mediation is **amicable settlement** of disputes between the parties through mediator who acts as a facilitator to bring the parties together. There is no imposed decision as in litigation or Arbitration and parties are free to walk out from the process if no possibility exists of an amicable settlement.

Mediation is a voluntary, party-centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.⁸

Abraham Lincoln, former US President, as a young lawyer once said:
"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Mahatma Gandhi advocated conciliation and mediation as a practicing lawyer in South Africa and said:
“It is the duty of every lawyer to make efforts to settle disputes and that by doing so, lawyers would not be losers.”

Mediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them in negotiating a consensual and informed agreement. It can also be said as a confidential process of negotiations and discussions in which a “neutral” third party or mediator assists in resolving a dispute between two or more parties.⁹

Mediation reduces dispute span in a cost effective manner. It is a flexible and confidential technique to resolve disputes. The Mediator does not impose his advice on parties but convinces the parties to reassess their positions by creating an environment for parties to find their own solutions. It provides a win-win solution for both parties without losing their face. The mediator assists the parties to explore their strengths and weaknesses. Time and cost savings are two important assets of Mediation process. Once the settlement agreement is reached after a mediation process, the dispute gets resolved once for all unlike adversarial process of Arbitration or litigation which drags for years. It also helps the parties to re-establish trust and respect in the ongoing relationships.

A skilled mediator does not decide who is right and who is wrong but facilitates a solution to the problem which best fits the needs of both parties.\textsuperscript{10}

3.3.3 Conciliation

Conciliation is a process of amicable settlement of disputes between the parties through a third person i.e. a conciliator who persuades the parties and suggests possible solutions to help achieve settlement. As in mediation there is no imposed decision and parties are free to walk out from the process if no possibility exists of an amicable settlement.\textsuperscript{11} Conciliation process is different from mediation in a way that the conciliator gives his advice, opinion and proposals to resolve the dispute but the mediator plays a strictly neutral role without giving his opinion. However, both terms are used interchangeably in several countries


but the essence of both remains the same that is a neutral third person helps the parties in finding an amicable settlement.

Conciliation involves building a positive relationship between parties to a dispute used as a method of dispute settlement whereby parties clarify issues and narrow differences through the aid of a neutral facilitator who assists parties to establish communication, clarifying misperceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Thus, like mediation, once the settlement agreement is reached after conciliation, the dispute is resolved once for all and the parties re-establish trust and respect in the ongoing relationships. Mediation and conciliation are considered to be the second level of dispute resolution.

3.3.4 Arbitration

Arbitration is defined as “the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law”.

Arbitration is a method of ADR for adjudication of disputes by a private person called arbitrator (judge) appointed with the parties’ own choice. Thus, parties appoint a private judge (or a panel of judges called tribunal) whom they both trust and refer their disputes to him instead of submitting to judges in the courts. Judgment (called ‘award’) given by this private judge (called an Arbitrator) after adjudication of the dispute is final and binding on both the parties.

The appointed arbitrator acts as judge and decides the case by considering the evidence presented by each party before issuing an award. Thus, Arbitration is an alternative to court-based litigation. The Arbitration award is governed by statute and becomes a decree of the court if not successfully challenged in the Court.

---

As per a document\textsuperscript{14} on International Commercial Arbitration on the website of United Nations Conference on Trade and Development (UNCTAD), the principal characteristics of Arbitration are:

- A mechanism for the settlement of disputes;
- Consensual;
- A private procedure;
- Leads to a final and binding determination of the rights and obligations of the parties.

Various advantages of Arbitration as per the above referred document of the UNCTAD are as under:

- \textit{Freedom to choose judge (arbitrator):} Unlike litigation, in Arbitration the parties have freedom to choose persons with specialized knowledge to judge their dispute like in a construction arbitration engineers or architects may serve as arbitrator.

- \textit{Continuity of arbitrator:} There is a continuity of the Arbitrator from commencement to end of the process leading to familiarity with the entire dispute unlike litigation where different judges may handle the dispute at various stages.

- \textit{Flexible procedures:} Procedure of Arbitration is flexible and can be adapted to the needs of the particular dispute and choice of the parties.

- \textit{Finality of award:} There is no appeal on merits of arbitration award. Thus, there is high likelihood of enforcement.

- \textit{Faster and cheaper resolution of disputes:} Traditionally, Arbitration is said to achieve faster dispute resolution at lower costs as compared to litigation.

Apart from above, Arbitration has advantages in that parties can maintain confidentiality by avoiding publicity as is the case in litigation in courts. Then there is convenience of both parties as regards the venue, time and schedule of the arbitration proceedings. The issues to be adjudicated, procedural law, substantive law and most

convenient jurisdiction of court can be decided by mutual consent of the parties. The
evidence, witnesses and site visits can all be scheduled to the convenience of the
parties and arbitrator. Then the form of relief and form of award can be agreed by the
parties in advance.

In the Hague Convention (1899 & 1907), efforts were made to replace
Convention, 1927, agreements to arbitrate ‘future disputes’ in connection with a
contract were recognized as valid Arbitration Agreements and contracting states
agreed to enforce arbitral award made in the territory of another contracting state.
International Chamber of Commerce (ICC) adopted its first rules of arbitration in
1922 and established the International Court of Arbitration in 1923. New York
Convention, 1958 removed the burden of getting the arbitral award recognized in the
country where it was made, before applying for enforcement in another country.

UNCITRAL Arbitration Rules, 1976 specifically designed for ad hoc
arbitrations, received rapid and overwhelming reception from international
community & increasingly used by arbitral organizations as well, as their rules for
institutional arbitration with suitable changes. General Assembly of United Nations
recommended the use of UNCITRAL Conciliation Rules, 1980 where the parties
desire an amicable settlement of the dispute. It also recommended that all countries
give due consideration to the UNCITRAL Model Law on International Commercial
Arbitration, 1985 to have uniformity of the law of arbitral procedures. These Model
Law and Rules have contributed towards establishment of a uniform legal framework
for efficient settlement of disputes arising in international commercial relations.

India has adopted above referred UNCITRAL Model Law and Rules, New
York Convention and Geneva Convention in the Arbitration and Conciliation Act,
1996. Much of India’s success in the post liberalization era can be attributed to the
enactment of the Act which has contributed immensely in building the confidence of
the International business community for investing in India. Sec 89, introduced in the
CPC, 1908 as an amendment in 2002, with court directing parties to any suitable ADR
method is another initiative in efficient and effective resolution of disputes through
alternative methods. Several High Courts framing their mediation rules is another step in this direction.

Procedures used in arbitration are flexible and informal in Ad hoc Arbitration as per the agreement of the parties but may be formal in case of Institutional Arbitration. Both types of arbitration are discussed as under.

**Ad hoc Arbitration**

As per David J Savage,¹⁵ in ad hoc arbitration parties agree upon a form of arbitration that is specific to a particular contract or dispute, without referring to any arbitral institution and its basic features are:

- The proceedings are independent of all institutions thereby giving parties maximum flexibility;
- The parties choose the tribunal themselves (although if agreement cannot be reached the matter may be referred to an appointing authority);
- There is no review of the award by an arbitral institution.

Thus, when the parties agree to get their contractual disputes adjudicated privately by an Arbitrator as well as rules of their own choice without submitting to any institution, they are said to have opted for ad hoc arbitration.

**Institutional Arbitration:**

As per a consultation paper¹⁶ issued by Law Ministry, the Institutional Arbitration is an Arbitration administered by an arbitral institution. These arbitral institutions have their rules, specifically for conducting arbitrations, formulated based on experience to address all possible situations expected during arbitration proceedings. Thus, the arbitration is conducted in accordance with the rules and procedure of the institution which provides arbitration services and its infrastructure. The various advantages of Institutional Arbitration over Ad Hoc Arbitration have been highlighted in this consultation paper as under:


(a) **Professionalism:** Time and cost effective resolution of disputes through conduct of arbitration in a professional manner by experienced arbitrators and competent & professional Secretarial & administrative staff.

(b) **Scrutiny:** There is an experienced committee to scrutinize the awards before publishing by the Arbitral tribunal which minimizes the possibility of court setting it aside.

(b) **Experienced panel of arbitrators to choose from:** Both parties have freedom to choose from an experienced panel of arbitrators maintained by the institution.

(c) **Fixed Reasonable Fee:** The fee of the arbitrators is reasonably fixed by the arbitration institution and parties know their liability before hand.

(d) **Accountability of the Arbitrators:** Arbitrators are more accountable to conduct arbitration as per rules and give justifiable awards, otherwise they run the risk of being removed from the panel. On the contrary in ad hoc the arbitrators have no such accountability.

(e) **Appointment and Substitution of Arbitrators is prompt:** In ad hoc arbitrations, the appointment of arbitrators takes a much longer time whereas in institutional arbitration the initial appointment as well as the substitution in case of vacancy is very prompt.

(f) **Discipline and confidentiality:** More competent & professional Secretarial and administrative staff subject to discipline of the institution serves better and maintains confidentiality of arbitration proceedings.

To briefly sum up, it can be said that in this age of outsourcing, the resolution of disputes can be conveniently outsourced to a professional body for efficient resolution of their commercial disputes. Blatant misuse of power by arbitrator giving patently illegal awards against the provisions of contract or substantive law can be avoided through institutional arbitration. Thus, institutional arbitration brings professionalism to the dispute resolution process.

### 3.3.5 Dispute Boards (DB)

The timing of dispute resolution is crucial and it becomes easier and cheaper to negotiate settlement of disputes at their inception when the project is in progress.
instead of allowing the disputes to accumulate until completion of the project when memories fade and people concerned and records are not available.\textsuperscript{17}

Dispute Board is an independent standing body set up in accordance with the contract clauses right at the commencement of the contract to assist parties to resolve their disputes as they arise during the performance of the contract.

The DRB process helps the parties to solve problems before they escalate into major disputes.\textsuperscript{18} This is apt because the DRB is present right from the start of the project and help in diffusing the conflict as they emerge.

The use of Dispute Board has helped to boost the confidence of contractors in resolving contractual disputes when the role of Engineer under the various standard forms of construction contracts had come under suspicion (Odigie)\textsuperscript{19}. Odigie points out that as the Engineer was employed by the Employer, his impartiality & independence were always under scrutiny. But with independent DB in place, the rate of success in resolving disputes has grown astronomically. Thus, Odigie highlights that majority of the disputes referred have not gone beyond DB to Arbitration or litigation.

In Government contracts, owing to bureaucratic functioning there is delay in appointment of arbitrators by appointing authority leading to litigation by contractors approaching the Courts for such appointment. However, no such provision of the appointing authority is involved in the formation of the DRB\textsuperscript{20}. The paper also points that unlike arbitration, all members of the DRB shall have to be approved by both


parties. Thus, the process of DRB builds a greater confidence in both the parties to help achieve a mutually acceptable dispute resolution.

The basic advantage of DRB is dispute prevention.\textsuperscript{21} The Dispute Resolution Board Foundation (DRBF) states that very presence of a readily available dispute resolution process with mutually selected, technical and neutral experts familiar with the site conditions encourages parties to agree on issues that would ultimately have to be referred to arbitration or litigation after a delay of considerable period. It states that the DRB process facilitates positive relations among the parties to resolve problems amicably. The document states that prompt referral of disputes on individual basis avoid accumulation of unresolved disputes. The DRB process has been dubbed by DRBF as a better-informed dispute analysis method as individuals with first-hand knowledge of the facts are readily available and can actually observe the field condition or construction operation.

Construction Contracts do not define the entitlements of each party with certainty due to the fact that each project is unique.\textsuperscript{22} Chern feels that dispute boards can devise solutions which can avoid win-lose situation within contract boundaries keeping the working relations intact. Chern attributes the reason for huge success of DB as the familiarity of the DB with site conditions, unlike arbitral tribunal, being formed right at the commencement of the contract. Being a job-site dispute adjudication process, it has real time value to positively influence the performance of the parties through regular site visits and active involvement throughout project period. Several international case studies have been cited by Chern to enlighten with the success story of DB. Citing the example of the Ertan Hydroelectric Dam in China (US$ 2 billion), the Hong kong International Airport (US$ 15 billion) and the Katse Dam in South Africa (US$ 2.5 billion) where almost all disputes referred were resolved by DB and solitary dispute each in later two projects even when taken to arbitration, the decision given by DB was withheld. Other examples cited by Chern are of projects where mere presence of DB helped in non-arising of even a single

dispute. These projects of zero-dispute referred are Docklands Light Railway (US$ 500 million) and Saltend Private Gas Turbine Power Plant (US$ 500 million) both in UK.

The reason for less recognition for DRB in India has been the lack of awareness about its usefulness in reducing the ever increasing number of Arbitration cases in India.\textsuperscript{23} The most important advantage of DRB is to provide timely relief to the contractor to encourage him to proceed diligently towards completion of the project avoiding time and cost overrun.