

**B.Sc Civil
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Project & Contract Management CE 206

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Dispute Resolution in Construction Industry

Why do construction disputes occur?

- A combination of environmental and behavioural factors can lead to construction disputes.
- Projects are usually long-term transactions with high uncertainty and complexity, and it is impossible to resolve every detail and foresee every contingency at the outset. As a result, situations often arise that are not clearly addressed by the contract.
- The basic factors that drive the development of construction disputes are uncertainty, contractual problems, and behaviour.

Antecedents of Construction Dispute:

1- Uncertainty

- Uncertainty is the difference between the amount of information required to do the task and the amount of information available. That means, not every detail of a project can be planned before work begins.
- The amount of information required depends on the task complexity and the performance requirements, usually measured in time or to a budget.
- The amount of information available depends on the effectiveness of planning and requires the collection and interpretation of that information for the task.
- When uncertainty is high, initial drawings and specification will almost certainly change and the project members will have to work hard to solve problems as work proceeds if disputes are to be avoided.

Antecedents of Construction Dispute :

2- Contractual problems

- Standard forms of contract clearly prescribe the risks and obligations each party has agreed to take.
- Such rigid agreements may not be appropriate for long-term transactions carried out under conditions of uncertainty.
- It is not uncommon to find amended terms or bespoke contracts (made for a particular purpose not general contract) that shift the risk and obligations of the parties, often to the party least capable of carrying that risk.
- Where amended terms or bespoke contracts are used, they may be unclear and ambiguous. As a consequence, differences may arise in the parties' perception of the risk allocation under the contract.
- Where the parties have agreed to amended or bespoke terms, those conditions take effect in addition to the applicable law of the contract, which is continually evolving and being refined to address new issues.

Antecedents of Construction Dispute :

3- Behaviour

- Since contracts cannot cater for every eventuality, wherever problems arise either party may have an interest in gaining as much as they can from the other. Equally, the parties may have a different perception of the facts. At least one of the parties may have unrealistic expectations, affecting their ability to reach agreement. Alternatively, one party may simply deny responsibility in an attempt to avoid liability.

Common causes of construction disputes:

- Construction is a unique process which can give rise to some unusual and unique disputes.
- However, research in Australia, Canada, Kuwait, the United Kingdom and the United States suggests that a number of common themes occur quite frequently as given in following slides:

Common causes of construction disputes:

1- Acceleration

- It is not uncommon for commercial property owners to insist upon acceleration of a construction project. Such examples might include the completion of a major retail scheme, and the need to meet key opening dates or tenant occupation in an office development. The construction costs associated with acceleration are likely to be less than the commercial risk the developer may face if key dates are missed.
- The circumstances surrounding acceleration are often not properly analysed at the time the decision is made, and that inevitably leads to disputes once the contractor has carried out accelerative measures and incurred additional costs only to find that the developer refuses to pay.
- The construction of facilities in Athens for the Olympic Games 2004 were subject to acceleration, and a wealth of disputes were expected once the facilities were completed and the euphoria of the Games over.

Common causes of construction disputes:

2- Co-ordination

- In complex projects involving many specialist trades, particularly mechanical and electrical installations, co-ordination is key, yet conflict often arises because work is not properly co-ordinated. This inevitably leads to conflict during installation which is often costly and time-consuming to resolve, with each party blaming the other for the problems that have arisen.
- Ineffective management control may result in a reactive defense to problems that arise, rather than a proactive approach to resolve the problems once they become apparent.

Common causes of construction disputes:

3- Culture

- The personnel required to visualise, initiate, plan, design, supply materials and plant, construct, administer, manage, supervise, commission and correct defects throughout the span of a large construction contract is substantial. Such personnel may come from different social classes or ethnic backgrounds.
- Major international construction projects may employ or engage people from different nationalities and cultures. For example, on a major pipeline contract in Kazakhstan the owner was a joint venture comprising Kazakh, Canadian and British companies, and the owner's representatives on the project for day-to-day matters were of Canadian, French, Russian and British nationalities. The contractor was a Greek–Italian joint venture that employed labour from no fewer than 24 different countries throughout central and eastern Europe, the Middle East and the Indian sub continent. Forming a teamwork approach across cultures can be very difficult where each culture has its own values.

Common causes of construction disputes:

3- Differing goals

- Personnel engaged on a large construction contract are likely to be employed by one of many subcontracted firms, including those engaged as suppliers and manufacturers. Each of these firms may have their own commitments and goals, which may not be compatible with each other and could result in disputes.

Common causes of construction disputes:

4- Delays

- Disputes frequently arise in respect of delays and who should bear the responsibility for them. Most construction contracts make provision for extending the time for completion. The sole reason for this is that the owner can keep alive any rights to delay damages recoverable from the contractor.
- Under the FIDIC contracts the contractor is now required to give prompt notice of any circumstances that may cause a delay. If the contractor fails to do so, then any rights to extend the time for completion will be lost, both under the contract and at law.
- This may seem a harsh measure, but a better view is that this approach brings claims to the surface at a very early stage and gives the recipient an opportunity to examine the cause and effect of any delay properly as and when it arises, so that the owner has some say in what can be done to overcome the delay.

Common causes of construction disputes:

5- Design

- Errors in design can lead to delays and additional costs that become the subject of disputes.
- Often no planning or sequencing is given to the release of design information, which then impacts on construction.
- Equally, the design team sometimes abrogate their responsibilities for the design, leaving the contractor to be drawn into solving any design deficiencies by carrying out that part of the work itself to try to avoid delays, and, in doing so, innocently assuming the risk for any subsequent design failures.

Common causes of construction disputes:

6- Engineer and Employer's Representative

- The personality of the Engineer or the Employer's Representative and their approach to the proper and fair administration of the contract on behalf of the Employer is crucial to avoiding disputes, yet a substantial proportion of disputes have been driven by the Engineer or the Employer's Representative exercising an uneven hand in deciding differences in favour of the Employer.
- In domestic and international contracts, the Engineer traditionally had an independent and impartial role. This independence or impartiality was often not properly exercised, and in some cases there was clear evidence of bias by the Engineer towards the Employer. This practice was not limited to third world countries but also existed in developed countries.
- Under the FIDIC contracts the Engineer no longer has an impartial role but expressly acts for the Employer. This does not prevent the Engineer from taking a professional view on the merits of any difference that may be at issue, but in the event of a dispute the mechanism to resolve such matters quickly by independent means has been achieved by the introduction of a dispute adjudication board.

Common causes of construction disputes:

7- Project complexity

- In complex construction projects the need to carry out a proper risk assessment before a contract is entered into is paramount; yet this is often not done.
- There are numerous examples of projects taking much longer than planned and contracted for because there was insufficient appreciation of the risks associated with the project's complexity.
- Inevitably the delay and additional costs the contractor incurs, and the owner's right to claim damages for delay, often develop into bitter disputes.

Common causes of construction disputes:

8- Quality and workmanship

- In traditional construction contracts, disputes often arise as to whether or not the completed work is in accordance with the specifications.
- The specification may be vague on the subject of the dispute in question, and each party to the contract may have a different view on whether the quality and workmanship is acceptable.
- In design and build contracts, perhaps the greatest deficiency is in the contract documentation, particularly the Employer's requirements. This inadequacy inevitably leads to claims by the contractor for additional costs, which, if not resolved, can lead in turn to costly disputes.

Common causes of construction disputes:

9- Site conditions

- If the contract inadequately describes which party is to take the risk for the site conditions, disputes are inevitable when adverse site or ground conditions impede the progress of work or require more expensive engineering solutions.
- Even if the Employer, in good faith, provides detailed information on the site conditions to the contractor, if that information is discovered to be incorrect and the contractor has relied on it and acted upon it to their detriment (causing damages), the Employer may be liable to the contractor for the consequences.

Common causes of construction disputes:

10- Tender

- The time allowed to scrutinise the tender documents, prepare an outline programme and methodology, carry out a risk assessment, calculate the price, and conclude the whole process with a commercial review is often impossibly short.
- Mistakes in this process may have an adverse effect on the successful commercial outcome of the project.

Common causes of construction disputes:

11- Variations

- Variations are a prime cause of construction disputes, particularly where there are a substantial number, or the variations impact on partially completed work or are issued as work is nearing completion.
- The nature and number of variations can transform a relatively straightforward project into one of unmanageable complexity.
- The new Parliament building in Edinburgh is such an example. The building was planned to house 329 people, but through variations the building increased in size and complexity to house 1200 people. It was perhaps not surprising that the total cost of construction exceeded £500 million, almost ten times more than the original budget.

Dispute Resolution Boards

- Dispute Resolution Boards (DRB) administer a type of dispute resolution without any specific description.
- DRBs have evolved over time and can be formulated in a number of different ways. The procedure is based on contract rather than statute, and the parties to a contract are able to agree to a formulation that suits their particular project.
- A few standard contracts have DRBs as part of their terms, of which the most prominent are the FIDIC contracts and the World Bank (Procurement of Works) contract.
- The cost of DRBs is shared between the two parties i.e. client and contractor.
- DRBs are most suited to large, complex construction and engineering projects on an international scale.

Composition of a Dispute Resolution Board

- The DRB is a creature of the contract. Usually the contract will provide for three members, two technical and one legal, usually the chairman. This formulation allows for technical disputes to be fully understood and resolved without the need for external advice, and similarly disputes involving or including legal issues being capable of resolution without external advice. The idea is for the board to be able to deal with any dispute that arises.
- Clearly each Board member needs to be a respected member of their own professions, with qualifications and experience to match the project in hand.
- The three-member DRB will visit the project regularly and deal with any difficulties that have arisen. Occasionally it will have to convene outside of its regular visits if a particular dispute requires it.

Composition of a Dispute Resolution Board

- The advantage to the parties is that the DRB gains an ongoing knowledge of the project as the members are exposed to the facts of any emerging disputes at a very early stage.
- The operational philosophy behind a DRB is to provide interim solutions that are in tune with the interests of the project in a quick and effective manner.
- DRBs are designed to keep the parties working constructively together while finding solutions to problems as they occur, rather than allowing those problems to escalate in an ultimately destructive manner.

Selection of the Dispute Resolution Board :

- The success of a DRB is dependent not only on the procedure that has been put in place but also on the members of the DRB itself. Of course the importance of the willingness of the parties themselves to work constructively with the DRB and make commercial compromises should not be forgotten.
- The selection of the members of the DRB is crucially important to the parties, and therefore an appointment procedure is required within rules set out in the contract. Normally each party nominates one member and those members then choose a third member as chairman.
- This allows each party to have the comfort of a board member who is in tune with their thinking, whilst the chairman is independent of both.

Selection of the Dispute Resolution Board :

- When appointing members for the DRB it is useful to consider their experience not only in construction and engineering but also in contract management and the applicable law of the contract. A mix of all these elements may be required in varying degrees.
- Ideally the Board should not consist entirely of like-minded individuals but be a combination, such as two construction or engineering professionals and a lawyer versed in construction and engineering law as well as the law of the contract.

Enforcement of DRB decision/recommendation :

- The recommendation or decision of a DRB is a contractual matter, and therefore any enforcement will be seen in the light of a breach of contract.
- Enforcement will usually be a matter of the jurisdiction within which the DRB is operating.



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