

Management of Claims and Disputes in Construction Industry

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Abstract: *Construction projects are increasingly complex, resulting in complex contract documents. Complex construction can likewise result in complex claims and disputes. This paper provides an introduction to the claim management and dispute resolution techniques that are frequently encountered in the construction industry. Claim is a legitimate request for achievement of a contractual milestone or additional compensation on account of a change to the contract, if these claims made by contractor are not managed clearly; it gives rise to a disagreement or argument over the validity or quantum of a claim known as disputes. Because of the substantially increasing number of construction claims nowadays, the implementation of the effective construction claim and dispute management is needed. Disputes between the parties to construction projects are of great concern to the industry. Both the study of construction industry disputes, and the causes of those disputes, is essential. It can be concluded that construction disputes are a cause of concern in every construction project and the solution to this problem is to avoid and cautiously manage them for smooth running of construction process.*

Keywords: Claim, Dispute, Disagreement, contract

1. Introduction

The construction industry is a complex and competitive environment in which participants with different views, talents and levels of knowledge of the construction process work together. In this complex environment, participants from various professions, each has its own goals and each expects to make the most of its own benefits. In the construction industry, since differences in perceptions among the participants of the projects, conflicts are inevitable. If conflicts are not well managed, they quickly turn into disputes. Disputes are one of the main factors which prevent the successfully completion of the construction project. Thus, it is important to be aware of the causes of disputes in order to complete the construction project in the desired time, budget and quality. Construction claims are also found in almost every construction project. It is the seeking of consideration or change by one of the parties involved in the construction process. Nowadays, the substantially increasing volume of claims are the result of the rising complexity of the projects, the price structure of the construction industry and the legal approach taken by a lot of owners and contractors. There are several researches that show the order of magnitude of the effects from construction claims on cost and time of the projects. During the past two decades, serious disputes concerning construction contracts have become increasingly common in construction projects. It is common practice for designers, contractors and owners to negotiate small and uncomplicated disputes, but larger and more complex ones frequently hinder the project through involvement with lengthy legal issues^[1].

Typically, if the parties cannot reach a resolution themselves, expensive, time-consuming legal procedures begin, which severely affects all the participants. Disputes are a reality in every construction project. Without the means to address them, minor issues can fester and grow, with crippling

consequences for project participants. The rising cost, delay and risk of litigation in construction disputes has prompted the construction industry to look for new and more efficient ways to resolve these disputes outside the courts. It has been found that when resolution occurs sooner rather than later and when this resolution is relatively confrontational, there is a much better chance that litigation can be avoided. Waiting until the end of a project to address a dispute inevitably makes it harder and more expensive to resolve. Parties involved in a construction dispute, or indeed any commercial dispute, generally prefer to retain control over the outcome and maintain a working business relationship^[2].

2. Contractual Problems in Construction Industry

Constructional project contracts are the agreements made by construction project owners (contract issuing parties) and construction enterprises (contractors) according to basic construction procedures in order to complete specific construction and installation projects and to define the rights and obligations of both parties. The parties assigned to a construction contract are not competitors among themselves, but associates who have different functions to perform to achieve the common goal for accomplishing the prescribed end-product. Despite this fact, differences of opinion leading to conflicts do arise, since in the final analysis, each party has to protect his interests and financial gain. Most of the happenings that could occur during the currency of a contract cannot be foreseen. However their gravity can be diluted by following ethical practices and by performing business in an unemotional and above-board manner. Interpretation of contract clauses, differences of opinion regarding their application, effects of unforeseen subsoil and climatic conditions, riots and strikes, etc. can create contractual problems^[3]. A vast majority of contractual

problems arise from lacunae in and misinterpretation of the clauses, pertaining to the following 13 subjects:

- 1) Changes in Contract work
- 2) Differing in unusual site conditions actually encountered
- 3) Suspension of Work
- 4) Variation in quantities
- 5) Damage due to natural disasters and force-majeure
- 6) Re-inspection and acceptance
- 7) Termination for the convenience of the client
- 8) Possession prior to completion
- 9) Escalation of price due to inflation
- 10) Acceleration of work progress
- 11) Ripple effect
- 12) Currency fluctuation effect
- 13) Ambiguity in specifications and drawings

If these conflicts are not clearly managed, Claims are made by contractor and further if claims did not get clearly resolved disputes arises.

3. Claims in Construction Industry

During the execution of a project, several issues arise that cannot be resolved among project participants. Such issues typically involve contractor requesting for either time extension or reimbursement of an additional cost, or sometimes both. Such requests by the contractor are referred to as 'claim'. If the owner accedes to the claim of contractor and grants him extension of time or reimbursement of additional cost, or both, the issue is sorted out. However, if the owner does not agree to the claim put out by contractor and there are differences in the interpretations, the issue takes the form of a dispute, as explained in fig.1 Claims are becoming an inevitable and unavoidable burden in modern projects involving new technologies, specifications and high expectations from the owner^[4].

The claim mentioned above can also be put up by the owner. It is, therefore, imperative for all the parties to be fully acquainted with the procedures and systems, including resource to certain preventive actions as found necessary and required. Construction claims are found in almost every construction project. They are the seeking of consideration or change by one of the parties involved in the construction process. They have significant effect to project cost and time. A survey done in Western Canada found that the large majority of claims involved some delay and in many cases delay exceeded the original contract duration by over 100%. As to the project cost, more than half of the claims were an additional cost of at least 30% of the original contract values. Other research works done in the United States and in Thailand showed the similar results that the average cost growth causing by claims was about 7% of the original contract value.



Figure 1: Risk, Conflict, Claim and Dispute Continuum Model

In an attempt to reduce the incidence of conflicts and disputes; strategies to build 'trust between parties' and improve 'teamwork', 'communication', 'joint problem solving' and 'inter-organizational relationships' in projects have been utilized including; alliancing, and partnering arrangements. The use of alliancing and partnering arrangements can enable conflict between parties to be managed to the point of preventing a dispute from emerging. Yet claims are unavoidable and necessary to accommodate unforeseen changes in project conditions in a contractual sense. Essentially, claims in this context are the administrative processes required to handle construction events that take place where the contract "leaves off"—changed conditions, design changes, defective specifications, quantity variations, delays, disruptions and accelerations. While many claims can be resolved harmoniously, the prior presence of conflict between parties may initiate an unnecessary dispute. Disputes should not be demonized, as resolution mechanisms have their place in the construction process. This is especially the case when onerous and one-sided amendments to standard forms, often drafted by lawyers with the objective of improving their client's position at the exception of fairness; or when the only way in which a party can actually protect their position because the contract conditions promote conflict. Inappropriate risk allocation through disclaimer clauses in contracts is a significant reason for increasing total construction costs. The most common exculpatory clauses used in construction are uncertainty of work conditions, delaying events, identification, liquidated damages, sufficiency in contract documents^[4].

3.1. Types of Construction Claims

There are a number of ways to classify construction claims. They may be classified by the related parties, rights claimed, legal basis, and characteristics of claims. By determining their relevant legal bases, construction claims can be divided into three categories:

i) Contractual Claim

Contractual claims are the claims that fall within the specific clauses of the contract. In well-accepted standard contracts, there are a lot of provisions which entitle both the contractors and the employers to claim for the appropriate compensation such as ground conditions, valuation, variations, late issue of information, and delay in inspecting finished work.

ii) Extra-contractual Claim

This type of claims has no specific grounds within contract but results from breach of contract that may be expressed or implied, i.e. the extra work incurred as a result of defective material supplied by the client.

iii) Ex-Gratia Claim

Ex-gratia claims are the claims that there is no ground existing in the contract or the law, but the contractor believes that he has the rights on the moral grounds, e.g. additional costs incurred as a result of rapidly increased prices.

iv) Extension of Time Claim

Each construction contract clearly stipulates the date (or period) for the contractor to complete work. The purpose of specifying a date of completion is to facilitate claims for damages by the Employer for any delays created by the contractor in performing their work. The date for completing the project will be specified, either in the tender documents, or otherwise agreed to by the contractor, before the contract is awarded. In the case of no specific date for completion being mentioned in the contract, the law implies that the contractor must complete work within a reasonable time. If the contractor fails to complete the project within the stipulated period or within the reasonable time, and the delays are proven to be caused by the contractor, the employer is entitled to Liquidated and Ascertained Damages (LAD), in order to recover their damages from the contractor. This will be in the form of a charge, which can be based on a daily, weekly, or monthly amount.

3.2. Sources of Claims

The claim may arise due to the owner or the contractor. The claim may be on account of any of the following causes:

- 1) There may be defects and loopholes in the contract document. For example, the contract document may not be clear, may have dual meanings at different places, or may not have sufficient details. Also, an unresponsive contract administration may lead to contractor raising the claim.
- 2) There may be delay in release of areas as per contract. Besides, site conditions differ to a large extent from those described in the contract document.
- 3) The owner may desire to get the work done at a faster pace than is required by the contract document.
- 4) There may be delay in supply of power, water and other materials from the owner.
- 5) There may be hold on works due to delay in release of drawings and other inputs.
- 6) There may be delay in release of payments to the contractor.
- 7) The scope of work may be substantially modified by the owner.
- 8) There may be levy of liquidated damages on the contractor. Other recoveries from bills may also lead to contractor raising the claim.
- 9) There may be delay on the part of contractor in completion of works due to inadequate mobilization of labor, material and plant.
- 10) There may be loss of profit and investment to the owner due to delays caused by the contractor.
- 11) Construction claims can also arise on account of inclement weather.

3.3. Creation of Claims

If contractors request for settling the claim is rejected or not acknowledged within a specified time by the client's representative at the site, the contractor should then promptly address the written appeal to the client's higher authority within the period specified for such action in the contract. This is very important. An appraisal meeting should preferably be held at the time of submitting this appeal so as

to bring home to the client the technicalities involved. This may result in a knowledgeable response through clearer understanding. It may be necessary to make successive appeals to each level of authority in the client's organization to exhaust the bureaucratic barrier until all administrative remedies are tried respectfully. If the matter is still not resolved equitably or receipt of the appeal is not acknowledged by the client in the specified time, notice of the same should be given to the client, asking that the dispute be further considered at the time of settlement of all outstanding.

The supporting documents for all the claims should be meticulously prepared in detail and compiled carefully as soon as possible during the contract period. Depending on the case, the claim may involve the support services of experts in various disciplines, e.g. geotechnical, hydrological, structural, materials, quality control, electrical-mechanical-metallurgical, etc. Where the work is going to be 'covered' as the construction proceeds, due notice of the same should be given to the client to enable him to inspect and check what the experts might be investigating in support of the claim before the work is covered.

3.4. Claims Management

In order to deal with or control the claims effectively, parties concerned with them should establish good construction claim management processes in their organizations. The major issues in claims and disputes are identification of issues and the party responsible for the claims, and ascertaining the time and cost impact of the claim. The party raising the claim has to notify the claims once they have been identified. Further, it is responsibility of the party raising the claim to substantiate the facts. Depending on the decision of the other party against which the claim is made, the claim may be settled amicably or it may take the form of dispute. In the following paragraphs, the claim management process has been explained from the perspective of a contractor:

1) Claim Identification

The contractor studies the instructions in the form of drawings as well as oral or written instructions provided by the owner/engineer. If it contains extra works, the same is read against the provisions of the contract.

2) Claim Notification

After it is established by the contractor that it is an extra work, the contractor is required to inform the engineer within the time frame stipulated and clarify his intention to claim extra rates for the same. This is very important because failure on contractor's part regarding this shall entail its rejection by the engineer.

3) Claim Substantiation

The contractor has to fully establish the claim including his entitlement under the contract, giving reference to the relevant clauses. The claim is supported by necessary backup calculations. Backup documents like letters, vouchers and drawings are also enclosed. For period-related claims such as extended stay costs and interest on delayed payments, it is required to revalidate the claim at periodic intervals and submit the same to the engineer until the end of the relevant period.

- 4) **Analysis of time and cost impacts of the change**
The objective of this sub-process is to determine the impact of the change occurred. The analyzer shall perform schedule analysis to calculate the time impact while break down the cost into various cost components to calculate the cost impact.
- 5) **Pricing of the change**
The purpose of this sub-process is to give the other party in the contract a substantive description and detail of the extra costs incurred or to be incurred due to a contract change. This detailed cost description is necessary for understanding, negotiating, and justifying extra contract costs. There are two types of claim pricing: forward pricing and post pricing.
- 6) **Negotiation of the claim**
This sub-process concerns the process of presenting the claim to the employer, and mutual finding the solution of such claim. If an agreement cannot be reached and any party believed his position is correct, he should propose an alternative dispute resolution method. If this fails, the choice remaining is to implement the contractor's "disputes" mechanism or take the matter to court.
- 7) **Decision of Engineer/Owner**
The Owner/Engineer is supposed to convey his decision on the claim to the contractor within a time frame specified in the contract. If the claim is not allowed, the same needs to be stated along with reasons. The value of claim allowed shall also be stated.
- 8) **Further Action by Contractor**
The contractor has to refer the claim for adjudication if provided, within a specific time frame after receiving the decision from the engineer, if the same is being disallowed. The adjudication process is carried out as per the provisions set out in the contract

4. Disputes in Construction Industry

Given the uncertainties involved in a construction project and the magnitude of funds involved, it is only natural to have disagreement between parties, but these need to be resolved. While most of such day-to-day differences are resolved in an amicable manner, without having to resort to a more formal mechanism, the parties at times agree to disagree and seek redressal through independent intervention. Although, in principle, the discussion falls under the purview of construction law, effort has been made to discuss some of the aspects related to disputes and dispute resolution with as little legalese as possible.

Technically, a dispute implies assertion of a claim by one party and repudiation thereof by another. Thus, neither a mere claim without repudiation, nor a pair of claim and counterclaim, can be called a dispute^[5].

4.1. Causes of Disputes

The genesis of many disputes often lie in the contract document itself-it is often observed that tenders are hastily made and sufficient attention is not paid to ensure that a) all the required information and details are appropriately incorporated in the tender document b) the documents are

internally consistent, i.e., there is no contradiction in the provisions of general conditions, special conditions and drawings, and c) specifications, where required, are available. Of course, incompleteness, inaccuracy and inconsistency of information are only part of the reasons for disputes in a construction project. The following paragraphs briefly discuss some of the common causes of litigation^[6].

1) Incorrect Ground Data

Such data includes information about ground conditions, depth of groundwater table, rainfall and temperature data, availability of power and water, etc. The estimates of a contractor are based on the ground data provided with the tender documents, though depending upon the size of the project and the means of a contractor, the letter also at times carries out an independent assessment of the data provided. Obviously, any difference between the ground reality during execution and the conditions provided in the contract could easily be the reason for disputes.

2) Use of Faulty and Ambiguous Provisions or Language in Contracts

The language of the contract should be clear and such that it is not open to different interpretations. Use of ambiguous language or provisions could open a floodgate of avoidable litigation. It is also important that the contract clearly lays down specific procedures that are to be adopted in the event of contingencies. A well-defined hierarchy of documents that will prevail in the event of a discrepancy often goes a long way in determining the appropriate course of action without having to resort to arbitration. Also, at times, absence of appropriate provisions to handle technical inspections by the client or owner, or third parties, could become a source of litigation, as such inspections themselves require money and at times result in observations that need appropriate rectification action, which may have financial implications or cause avoidable delay.

3) Deviations

The contract should be so designed that there are as few extra items or deviations as possible. In other words, the scope of work in any contract should be unambiguously defined, and this obviously calls for thorough preparation on the part of the client/owner before actually floating an enquiry.

4) Unreasonable Attitudes

It should be born in mind that in order to complete the work professionally, it is important that the parties involved resort to unilateral action to preserve an environment of mutual trust. Thus both the client and the contractor need to have a professional approach to the project, including areas where there could be disagreement on interpretation, etc. Measures such as suspension of the contract or invoking of causes related to imposition of liquidated damages should be resorted to only in the most extreme cases, as they vitiate the atmosphere of the project, and also affect the work on other contracts. Delays in payment of bills should also be avoided to ensure that the contractor does not get cash-strapped, which will obviously affect his ability to perform.

5) Contractor Being of Poor Means

It is important that the contractor identified to do a job possesses the required human, financial and technical resources. In the absence of any of these, it is very likely that the contractor will look for an escape route for leaving the project, and may try to force a suspension or determination of the contract, or take the matter into arbitration/litigation to cut his losses.

6) Unfair Distribution of Risk

This could be a major reason for not only avoidable litigation but also increase in the cost of the project. Indian contracts typically are heavily loaded against the contractor, who obviously tries to cover the risks he is 'forced' to take by either hiking the rates, or taking an approach of 'crossing the bridge when we come to it', and the latter is almost a certain prescription for litigation if adverse conditions are encountered.

4.2. Mechanisms of Dispute Resolution

Apart from the normal legal process, emphasis here is on the alternative dispute resolution mechanisms generally available in construction contracts. Such mechanisms could include negotiation, mediation, conciliation and arbitration. While the first three mechanisms are briefly touched upon in the following paragraphs, the subject of arbitration has been dealt with in greater detail in view of its importance^[7]. Construction Dispute Resolution Steps are as follows:

4.2.1. Prevention

i) Allocating fair contract risk

It is common local practice for architects/engineers (A/E) to prepare construction contract documents simply by adding to or deleting from a set of previously employed contract documents, and while this cut-and-paste method may save time in preparing the construction contract, it often leads to problems, since documents are not read and prepared as a whole for the specific project. Such practices increase the unforeseen risks for the contractor. It comes as no surprise that parties to a contract often include contract language designed to shift risk to the other party so that the bases for claims and disputes are eliminated. For example, making a contractor responsible for the impact of unanticipated site conditions may effectively preclude recovery of additional costs caused by such conditions. Similarly, contract dispute clauses can be drafted so that even the submission of a valid claim is made nearly impossible, a practice which actually encourages litigation. Such contract provisions, however, do not prevent disputes from occurring. Often, they only create fractious relationships among the parties involved in the project. Construction-project owners generally have two concerns when they shift unanticipated risks to a contractor, the contractor will build a contingency into the price to cover the risk or he will not have a contingency and will face financial problems.

Unfair shifting of risk, transferring of all responsibility on a party that is not generally expected to control that risk, can result in that party having to spend time and effort looking for ways to stay alive in the project, usually to the detriment of the project itself. As the costs and risks of construction continue to rise, more construction-industry professionals are turning to a system that fairly distributes risk among all the

parties involved, the architect/engineer, the owner, the contractor and the sub-contractor(s). Fairness is an elusive concept, but the objective as defined here is to allocate the risk to the party best able to control it. An equitable contract serves as the first step in building cooperation and close coordination among the project participants, and providing a strong foundation for working out the inevitable disputes before they lead to divisive claims that can negatively affect the schedule and cost of construction^[7].

ii) Drafting Dispute Resolution Clauses

In addition to identifying responsibilities and allocating risks, a contract should contain language for addressing disputes and claims at the relevant stage in a project. This includes clauses containing explicit provisions and instructions for parties to resolve disputes as they arise, during the course of the project. For example, provision for a binding resolution can include dispute resolution arbitration under the American Arbitration Association (AAA) Construction Arbitration Rules. Contractual provisions should always require that parties first try to settle all disputes by some non-binding techniques, such as mediation. The American Institute of Architects, the Associated General Contractors of America and the American Arbitration Association have each published suggested guidelines and model contract terms for each provision. The guidelines can be helpful in tailoring the dispute-resolution provisions of a contract to each specific need. The contract language can also be drafted in such a way as to emphasize the notice provisions, which are of paramount importance. The essential elements contained in most notice provisions are: the form of communication, the individual or organization to which the notice should be directed, the time limits, and other procedures to be followed. Less frequently the contract may require an assertion that additional compensation or time is expected. Often, the contract will contain references to the change clause for additional guidance.

iii) Team Building

Team building is another dispute-resolution technique that can be instituted at the beginning of a construction project to help allow for better cooperation and coordination among the parties. One such process, partnering, has gained increasing popularity in recent years. It involves an extra contractual understanding among all parties to form a partnership of sorts to achieve mutually determined goals and objectives as well as to minimize disputes and claims. This agreement is often reached through a partnering workshop, wherein all parties agree to take specific steps to work together, fairly allocate risk and responsibilities and recognize their common goal—a successful project. Although partnering may initially require more manpower and effort, its benefits can be invaluable, creating a more harmonious, less confrontational process and, on completion, a successful project free of litigation and claims.

Partnering allows the parties to move from an adversarial relationship to cooperative team work, from a win-lose strategy to a win-win plan, from a stressful project to a satisfying one, from a litigation focus to solutions and accomplishments, and from finger-pointing to a hand-shake mind-set; it also allows bureaucratic inertia to dissolve and

risk-taking to be endorsed. In the past few years, a process called partnering realignment has evolved to help stakeholders deal with problems arising during the project, rather than resolving them in court after the project is completed. This process, when embraced and carried through, has helped turn around troubled projects. Partnering realignment is a corrective process implemented during the project, to help organizations resolve issues, set a new course and maximize the remaining potential for success. It is an attempt to regain and retain control of the project and to plan ways of avoiding future problems.

4.2.2 Negotiation

Negotiation is a “process of working out an agreement by direct communication. It is voluntary and non-binding.” The process may be bilateral (between two parties) or it could be multilateral (many parties). Each party may utilize any form of external expertise it considers necessary, and this is often described as “supported negotiating”. This could refer to a focused discussion on the dispute among the engineers from all interested parties, with the intention of resolving differences without the involvement of third parties, as happens in the case of mediation and arbitration. Indeed, this is an informal process in the legal sense, but if an agreement is reached through the process, it may have the usual legal significance. The negotiation process is fast and does not involve additional expenses. The discussions are held between the parties across the table in a cordial and peaceful atmosphere.

4.2.3. Standing Neutral

i) Dispute Review Board

The concept of the Dispute Review Board appears to have developed in the USA. It is essentially a process where an independent board of three people evaluates disputes as they arise during the project and make settlement recommendations to the parties. The board is constituted at the commencement of the project, much like a panel of three arbitrators. Each party selects one board member. The parties may then agree on the third or, if they fail to do so, the two board members will select the third. The board periodically visits the site and receives project information to ensure familiarity with the project and the parties. The board meets regularly to discuss problems or disputes, hears presentations from the parties and suggests solutions. It seems that the main benefit of the DRB is that its mere existence helps to prevent disputes. The parties themselves become familiar with the board's view on particular issues which then aids the negotiation and settlement process which the parties undertake before presenting their dispute to the board^[8].

ii) Dispute Resolution Adviser

The basic concept of a Dispute Resolution Adviser involves the use of a neutral third person who advises the parties to a disagreement or dispute and suggests possible settlement options. This concept is clearly similar to that of the Early Settlement Adviser. According to Wall the idea stemmed from Clifford Evans who, in 1986, suggested the use of an “independent intervener”. The independent intervener would be paid for equally by the employer and contractor to settle disputes as they emerged, rather than wait until the end of the

contract. The decision would be binding until the end of the project when either party could commence arbitration proceedings. Unlike the independent intervener the DRA does not make interim binding decisions, but advises on the means by which settlement could be achieved. The power to settle ultimately rests with the parties. There are a variety of benefits with such an approach. First, disagreements at site level can be addressed before a full-blown dispute develops. Not only does this avoid the breakdown in working relationships which could then affect the rest of the project's duration, but it also allows the issues to be dealt with whilst they are fresh in the parties' minds. Further, neither the parties nor the adviser are limited to a “legal” outcome in the sense that the settlement could encompass wider solutions mutually beneficial to the parties and the project.

4.2.4. Non-Binding Resolution

i) Mediation and Conciliation

Mediation and conciliation are essentially an informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement. These mediators do not sit in judgment but try to advise and consult impartially with the parties with the object of assisting in bringing about a mutually agreeable solution to the problem. Naturally, under the conditions, they have no power to impose an outcome on disputing parties. Mediation and conciliation are voluntary in that sense that the parties participate of their own free will and a neutral third party simply assists them in reaching a settlement. The process is private, confidential and conducted without prejudice to any legal proceedings. The process is non-binding unless an agreement is reached. Of course, once an agreement is reached, and the parties have signed it, the document is as binding as any other agreement would be.

Although the process is largely informal, the following could be identified as parts or stages in a mediation process. In the pre-mediation stage, there has to be a basic agreement among the parties to the mediation process, including the identification of a mediator. Mediation could be direct or indirect, and could involve meetings with parties, presentations being made by them, putting together of facts, negotiations and a settlement. Finally, a mediator may also like to be involved in the process of compliance with the settlement reached. Given that mediation is an informal process, it has certain inherent advantages over the more formal and legal process. For example, it could be a lot less time-consuming and even involve lesser costs, and the outcome could be more satisfying to the parties, while also minimizing further disputes. It also opens channels of communication, and could contribute greatly to preserving or enhancing a professional relationship. Further, the exercise may be said to empower the parties and give them greater confidence in their ability to handle disputes^[9].

ii) Adjudication

The term adjudication can be misleading. In its general sense it refers to the process by which the judge decides the case before him/her or the manner in which a referee should decide issues before him or her. More specifically, adjudication may be defined as a process where a neutral third party gives a decision, which is binding on the parties

in dispute unless or until revised in arbitration or litigation. This narrow interpretation may refer to the commercial use of an adjudicator to decide issues between parties to a contract. The use of an adjudicator is found in a variety of standard forms of contract used in the construction industry. Until recently, adjudication in the construction industry has displayed certain characteristics. First, the adjudicator is a neutral individual who is not involved in the day-to-day running of the contract. He or she is neither an arbitrator, nor a state-appointed judge. Second, the adjudicator enjoys his or her powers by virtue of the agreement between the parties. In other words, the parties have agreed by contract that the decision of the adjudicator shall decide the matter for them. Third, the adjudicator's decision is binding on the parties, and therefore, unlike mediation, the process does not require the co-operation of both parties. Fourth, adjudicator's decisions are usually expressed as being binding until the end of the contract when either party may seek a review of the decision, most commonly by arbitration. Finally adjudication is not arbitration and is therefore not subject to the Arbitration Act 1996.

4.2.5. Binding Resolution

i) Arbitration

Arbitration is perhaps the most commonly used mechanism for settlement of technical disputes in a construction project. It is a quasi-judicial process to the extent that legal protocol is largely observed, and it is important that the arbitrator, who basically acts as a judge, understands legal procedures. In India, the Arbitration and Conciliation Act, 1996, provides the legal framework for the arbitration process. In principle, collection and interpretation of evidence, examination and cross-examination of witnesses, etc., are some examples of essentially legal matters, which an arbitrator needs to have a sound understanding of. However, a basic belief in principles of natural justice and a practical approach are a hallmark of a successful arbitrator. He should be able to guide and provide a direction to the proceedings, which could be quite tough, especially when the parties to the dispute are represented by professional lawyers. In fact, the law has now added a new dimension to the arbitration process by empowering the arbitrators to conciliate and help the parties in arriving at a fair compromise or an equitable settlement of the case before him. As far as the number of arbitrators is concerned, much like the judicial system, technical disputes can also be resolved by single arbitrators, or a panel of several arbitrators, and though the parties are free to determine the number of arbitrators, it should be ensured that the number is odd, so that a situation of a 'tie' in an award is preempted. Often, one arbitrator each is nominated by the contractor and the owner, and these individuals together choose a third colleague arbitrator, to complete the constitution of a bench of arbitrators.

ii) Provision of Neutral Arbitrator

The most careful planning cannot always prevent disputes and this step is the last chance to resolve a dispute before resorting to a binding settlement. Providing for a neutral party to analyze issues and providing dispute resolution, if negotiations come to an impasse, is an important step towards minimizing the problems caused by disputes. This technique involves a pre-selected independent 'neutral' to

serve the parties as an observer, fact finder and dispute resolver throughout the construction process. Ideally, a neutral is selected at the inception of the construction phase of the project to act immediately in resolving disputes that cannot be otherwise settled. Although procedures for establishing a neutral vary and can be tailored to meet the specific needs of a project, they involve a few basic elements, including the following^[10].

- 1) The neutral must be acceptable to and compensated by both parties and must be both independent and impartial.
- 2) The neutral is initially given an introduction to the nature, scope and purpose of the project and is furnished with the contract documents. The neutral is then required to regularly visit the project site, meet with key project personnel, and attend project meetings thus being kept informed of project progress.
- 3) Whenever the parties are unable to resolve a dispute, it may be immediately referred to the neutral for a prompt non-binding decision.
- 4) If the neutral is empowered to make only non-binding recommendations and his recommendation is challenged by either party, the recommendations can be admissible as evidence in a subsequent Alternative Dispute Resolution (ADR) proceeding or in a court of law.
- 5) Because the neutral is readily available and knowledgeable about the project, he can often help to mediate or encourage the prompt resolution of disputes. In addition, the time and cost saved by immediately addressing disputes can help to preserve the relationships among the parties and keep the project focused on mutual goals.

4.2.6 Litigation

Much distinction can be made between the process of litigation and arbitration. No Dispute commented that there is little procedural difference between the two processes. Litigation is often the final resolution step should previous procedures have failed in achieving a desirable outcome. Although, where either party believe that the law will provide the best form of defense, they may choose to expedite informal/non-binding mechanisms and elect to proceed directly to formal court proceedings should the contract allow. Litigation involves the determination of the dispute in a court before a judge and involves a complex process requiring the use of significant resources generally including the use of legal representation. The court of law in which the dispute is heard depends on the size of the dispute in monetary terms. Additionally the jurisdiction and procedures of each court is governed by a strict set of court rules. Settlement through a court of law is obviously the last resort and this usually takes years and can be frustrating. Courts, usually would like the party concerned to exhaust all other administrative channels for seeking redress before hearing the case. Only if the contractor is extremely confident of his case and honestly believes that he has been wronged at the negotiations and at the arbitration levels, must be embark on court action. Court action will require engaging top legal minds who have some experience in construction industry feuds, and the ensuing long legal battle-which will require prolonged attention and physical presence of the contractors top personnel whose services will thus be diverted away from their usual business-can be

extremely costly and demoralizing. Where the contractor is not a government run enterprise but a private organization answerable on its own strength to its shareholders, the decision to resort to court action should only be made when the gravity of the case is really enormous^[8].

4.3. Alternative Dispute Resolution (ADR)

The term ADR has attracted a great deal of attention in legal and quasi-legal fields since the mid-1980s. However, the 1990s appear to have witnessed an enormous growth in the "ADR debate" with an ever increasing sphere of academics, lawyers and consultants entering the arena. Although the concept of dispute resolution techniques which are an alternative to the court system is not new, the more recent advent of the acronym is essentially taken to describe the use of a third party mediator who assists the parties to arrive at a voluntary, consensual, negotiated settlement. Whilst the origins of mediation may be ancient and Eastern, the recent more formalized technique has principally developed in the USA^[10].

4.4. Advantages of ADR

1) Maintains a business relationship

The proponents of ADR argue that processes such as mediation can maintain existing business relationships as the parties are aided towards a settlement.

2) Speed

The average mediation lasts 1-2 days. The proponents of ADR frequently compare this to a trial lasting years. It is, however, important to remember that the parties may not be in a position to forge a settlement early on in the dispute process and it may in fact take many months or even years before they are in a position to mediate effectively.

3) Lower cost

Clearly a short mediation is a cheaper event than a trial or arbitration. Some argue that lawyers are unnecessary in the process (and therefore a further cost saving is made) while others consider lawyers a valuable addition.

4) Confidentiality

The proceedings of mediation are confidential. Contrastingly, litigation is in the public domain and arbitration may become public if there is an appeal. Confidentiality is an advantage as some clients wish to keep their disputes from the public domain.

5) Flexibility

Arbitration and litigation are based upon the rights and obligations of the parties to the dispute. On the other hand a mediated settlement focuses on the parties' interests and needs. The mediator encourages the parties to search for a commercial solution which meets with both parties' needs.

6) Greater satisfaction

Many proponents of ADR argue that the ADR process and the outcomes are more satisfying for the parties than a trial or arbitration. Apparently the reaching of a settlement by consensus is viewed as producing high levels of satisfaction for the parties. Research has suggested that high levels of satisfaction are not attained. However, a mediated outcome is still more satisfactory

7) Advantages of ADR over Legal Proceedings in a Court

Alternative dispute resolution (ADR) has clear merits over formal legal proceedings in a court of law, and is often preferred over the latter. Though the award has legal sanction and can be imposed, the process is less formal and quasi-judicial in nature, which allows a certain degree of flexibility and ease to the parties. Of course, an arbitrator can always seek expert legal advice on matters of law. The process is ideally suited for technical disputes-for example, the arbitrator can be appropriately selected and a visit to the site made as many be required.

Since the arbitrator works on a lesser number of cases at any given time, the settlement of cases is quicker and less expensive. Also, given the fact that the parties may have their offices at places different from the site of the project, it becomes much more convenient if the time and place of a hearing are fixed based on the mutual convenience of parties. Since the hearings are not open to the public, the overall relationships are less affected. This aspect is important considering the fact that the parties often want to avoid needless publicity as it adversely affects their professional standing and relationships^[11].

5. Conclusions

1. Disputes between the parties to construction projects are of great concern to the industry.
2. An effective claim management process is essential to ensure that any contractual claims arising are dealt with in a way that is fair to each involved party.
3. Better training in the area of contract management to the professionals can be said to be of a great help for better understanding of the contract.
4. The requirement of contractor involvement during the design process can improve constructability and reduce the probability of design changes.
5. The evolution of dispute resolution processes has led to the development of a range of alternative dispute resolution opportunities.

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