

AN EXPLORATORY STUDY OF THE MAJOR CAUSES OF CONSTRUCTION DISPUTES IN THE SOUTH AFRICAN CONSTRUCTION SECTOR

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ABSTRACT

The construction industry is mired in disputes. It is one of the leading industries that is involved in a number of disputes. This paper examines the major causes of disputes in the construction industry and it further identifies the effects disputes have on projects and investigate the forms of minimizing the disputes and how to resolve them. This study was conducted through the use of secondary data from the use of journals, books and internet to achieve the objective for the study. The review of literature looked into details the different views from different scholars about the causes of disputes then deduce from those views the major causes the major causes of dispute in the South Africa construction sector. The findings from the literature review showed that the major causes of disputes revolve around people, process and project characteristics. It was also mostly mentioned that project uncertainty, contractual problems and opportunistic behaviour cause construction disputes. The purpose of this academic paper was to justify the need to know the major causes of disputes in the South African construction industry and to further establish the effects disputes have on construction and to suggest ways to minimize and resolve disputes in projects. It is said that the people, process and projects characteristics are major causes of disputes and so is the project uncertainty, contractual problems and opportunistic behaviours. As a way to resolve disputes, alternative dispute resolutions are put in place and so are adjudication, arbitration and litigation.

Keywords: Dispute, Construction Industry, Project, characteristics, adjudication

INTRODUCTION

According to Oladopo and Onabanjo (2009) disputes are inevitable to all human relationships, whether in construction work, business or personal. A review of construction law literature and research papers revealed that disputes are more common in the construction industry than other industries (Elmarsafi, 2008; Harmon, 2003). Likewise, Cheung et al., (2000) cited from Oladopo and Onabanjo (2009), informs that “the complex nature of construction work can compound even the most intricate management systems”. This coupled with the fact that construction projects require the coordinated efforts of a temporarily assembled task force of many independent participants, each having a different specialty, and each expecting to make a profit; creates problems that make the construction industry adversarial and dispute prone. (Oladopo and Onabanjo, 2009; Rhys Jones, 1994).

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The terms dispute, conflict and claim are often used interchangeably, but their meanings are very different. Examples of how each of these terms are different are evident from how they are defined. For instance, dispute according to Diekmann and Girard (1995) is any contract question or controversy that must be settled beyond the jobsite management. Also, Elmarsafi (2008) states that “construction disputes are disputes that arise under the process of construction claims where a claim or assertion made by one party is rejected by the other party and that rejection is not accepted. A dispute normally arises when negotiation and discussion on a conflict regarding claims break down and party seeks formal resolution of the disagreement. Further, Ayodeji (2009) argues that dispute occurs when parties disagree regarding the content or extent of the assertion. Oladopo and Onabanjo, (2009), further inform that “disputes arise when parties to a contract cannot agree on the interpretation and implementation of contractual clauses during execution of the contract”. On the other hand, conflict according to Elmarsafi (2008) occur when parties to a construction projects disagrees about a particular provision. Similarly, Fenn et al (1997) suggest that “Conflict exist where there are incompatibility of interest”. Whereas, claim is the contention of the right to money and property remedy according to Love et al. (2008). Likewise, Semple et al. (1994) cited from Love et al. (2008) define a claim as a request for compensation for damages incurred by any party to a contract and George and Jergeas (2001) defines a construction claim as a request for additional compensation due to damages or expenses incurred during the performance of a construction contract. Poh (2005) citing Fulton (1989) in there study on the process by which a conflict (or in their terms a ‘grievance’) become a dispute, states that the first step which they identified in the transformation, is that of ‘saying to oneself that a particular experience has been injurious’, which they call ‘naming’. The second step is that of ‘attributing an injury to the fault of another individual or social entity’, this they called blaming’. The third step, that of voicing the grievance to the person or entity believed to be responsible and asking for a remedy, they called ‘claiming’. In this transformation process a claim is only finally formed into a dispute when the party to whom it is directed rejects the claim”. Thus, a careful study of the transformation process is tedious for all parties concerned and as such leads to loss of money, time and eventually good relationships in the construction industry. Generally, the construction industry is mired in disputes. It is one of the leading industries that is involved in a number of disputes. Hence the objective of this paper is to examine the major causes of disputes in the construction industry, the paper further identifies the effects disputes have on projects and investigate the forms of minimizing the disputes and how to resolve them.

Causes of Disputes

Much research has been done on the causes of construction disputes by various scholars. However, Diekmann and Girard (1995) informs that there are three major causes of disputes in the construction industry (CI) namely; people, process and project characteristics. Diekmann and Girard findings concur with El-Mesteckawi, Ibrahim, and Marzouk (2007) findings who inform that that the characteristics that influence disputes can be classified into three main categories also, which are: people issues, process issues and project issues. Howell and Mitropoulos (2001) posit that the basic factors that drive the development of disputes are: project uncertainty; contractual problems and opportunistic behaviour. These factors: uncertainty, contractual problems and opportunist behaviour are also similar to the three causes of disputes identified by the dispute Prevention and Resolution Task Force of the Construction Industry.

Howell & Mitropoulos (2001) and Vorster (1993) notes that project uncertainty which causes change beyond the expectation of the parties; the process problems, including imperfect contracts, and unrealistic performance expectations; and people issues, problems due to poor communication, poor interpersonal skills and opportunistic behaviour are also major causes of dispute in the CI. Younis et al. (n.d) also agrees with the above statement that disputes are caused by uncertainty, contracts and behavior. These three factors are in a broader sense in line with three categories mentioned by Kuramaswamy (1997) of external factors, contract and project teams. Harmon (2003) says that disputes results from factors such as unfair allocation of project risks, multiple prime contracts, unrealistic schedule and expectations, poorly prepared contract documents, variation orders and communication problems, among others. Below is a literature summary of the causes of dispute in the CI according to Fenn et al., (1997).

Table 2.1: A literature summary of the sources of disputes

Authors	Sources of dispute
Bristow and Vasilopoulous (1995)	Six areas: unrealistic expectations; ambiguous contract documents; poor communications; lack of team spirit; and changes
Conlin et al (1996)	Six areas: payment; performance; delay; negligence; quality and administration
Diekmann et al (1994)	Three areas: people process and project
Heath et al (1994)	Seven areas: contract terms; payment; variations; time; renomination; and information
Hewit (1991)	Six area: change of scope; changed conditions; delay; disruption; acceleration; and termination
Kumaraswamy (1996)	Two areas: root causes; and proximate causes
Rhys Jones (1994)	Ten areas: management; culture; communications; design; economics; tendering pressures; law; unrealistic expectations; contracts; and workmanship
Semple et al (1994)	Four areas: acceleration; restricted access; weather; and changes of scope
Sykes (1996)	Two areas: misunderstandings; and unpredictability

Source: Fenn et al. 1997

Furthermore, Bristow and Vasilopoulous (1995) identified five primary causes of claims because disputes usually result if a party to a contract rejects a claim. These sources according to Bristow and Vasilopoulous are: unrealistic expectations by the parties, ambiguous contract documents, poor communications between project participants, lack of team spirit among participants, failure of participants to deal promptly with changes and expected conditions. Poh, (2005) states that, claims can be identified into one of the following main groups:

1. Change conditions – conditions changes, they are different to what they were presented to be in the document or known in the bidding stage; e.g. change in soil condition;
2. Additional work - Disputes over the pricing and timing of additional work required, or even whether a piece of identified work is in the contract or not;
3. Delays – These refer to delays beyond the contractor’s control, they may be caused by the client or the client’s representative; and

4. Contract time – Disputes that occur when a contractor requests for extension of time due to delays, change conditions and additional work or when an instruction of escalation of work is requested.

According to Ren et al (2001) the reason for the rising conflicts and inevitable claims which most lead to dispute in the CI can be analysed from the following perspective:

1. Social factors: the construction industry, as a whole is under increasing pressure from the society to be more competitive in terms of cost, time, quality and environmental issues. As a result, the industry is becoming more risky than ever;
2. Industrial factors: the wide range of participants, the increasing size of projects, enhanced competitive tendering, increasing technological complexity, uncertainty in construction environments, unbalanced risk allocation, and complex and confused interdependent relationships brought about by some project procurement systems, also contribute to construction disputes;
3. Project factors: unforeseeable site conditions, unrealistic planning and specifications, changes by the client, acceleration, unfulfilled duties by project participants and force majeure are the direct causes of claims which sometimes lead to dispute.

Likewise, George and Jergeas (2001) states that the causes of claims which leads to dispute can be categorized into two main areas: misunderstanding of contract intentions, that is contracts tend to be written in general term allowing the contracting parties to interpret the clauses regarding rights and responsibilities in different ways and the owner's desire to reduce costs. Claims are frequently rooted in the owner's desire to save money through inefficient means. The owner's inclination to reduce capital expenditures may result in poor choice in contract, inadequate or rushed project design and poor project planning. However, according to Cheung and Yiu (2006) CI can be categorise into the following: variation due to site conditions; variations due to client change; variations due to design error; unforeseen ground conditions; ambiguities in contract documents; variations due to external events; interferences with utility lines; exceptional inclement weather; delayed design information; delayed site possession.

Effects of Disputes in Construction Projects

At project level, unresolved disputes can lead to programme delays, increase tension and can cause long term relationships (Cheung and Suen, 2002). The occurrences of construction disputes can lead to negative impact towards client organization; thus the construction work progress will become slow due to the conflict and disputes between the contractor and client. Subsequently, the cash flow of the client will slow down. The client organization may suffer losses of time, cost and quality which consequently affects the image and background of the company (Poh, 2005). It is also said that unresolved disputes negatively impact on the client's organization in areas such as in time and cost overruns, diminution of respect between parties – deterioration of relationships and breakdown in co-operation and additional expenses in managerial and administration. Disputes can also cause resource wastage and mistrust in the project (Kumaraswamy, 1998).

The major issues reflected in disputes include late project completion,

defects, project extensions, project overruns, project disruption and non-payment for work down (Elmarsafi, 2008; Harmon, 2003). Nevertheless, Poh, (2005) categories the impact of construction disputes into client organization as follows: additional expense in managerial and administration; possibility of litigation cases; loss of company reputation; loss of profitability and perhaps business viability; time delays and cost overruns; diminution of respect between parties-deterioration of relationship and breakdown in cooperation; higher tender prices; extended and /or more complex award process; rework and relocation costs for men, equipment and materials; loss of professional reputation.

WAY TO MINIMIZED CONSTRUCTION DISPUTES

Disputes can be detrimental in construction procurement if not properly dealt with according to Cheung and Suen (2002). The generating source of disputes is mostly related to the selected procurement system. Partnering forms of contract are intended to avoid disputes by joint working and improved co-operation. The sources for disputes such as claims and litigation may well be minimized according to Gyulay, (n.d) if the client makes every effort at the selection of the contracting system to ensure that his/her interest is being represented in an adequate manner (site inspector and/or management); the contracting parties are after the reasonable share of activities, responsibility and risk – avoiding the power-forced one-sided contracts; the contracting parties are prepared for the immediate solution of recognized disputes and often employ specialized professionals to help them in doing so or may accord the rules of partnership. Also, the dispute prevention and resolution force of the construction industry institute (CII) has adopted a two pronged approach to contract dispute prevention and resolution. This approach proposes that the contracting parties must “start right” and “stay right”. The Start right approach requires that the contracting parties start with suitable contract language and with appropriate alternative dispute resolution (ADR) procedures. While the stay right requires that the parties solve emerging disputes quickly, before they develop into complex legal problems as informed by Diekman and Girard (1995). Likewise, Harmon (2003) proposed that having a dispute review board that will address disputes as they occur and during the course of the contract will go a long way in avoiding prevent dispute in the CI. Should the above fail to avoid disputes then common dispute resolution strategies are to be used. Amongst these are: negotiation, mediation, arbitration and litigation. These can be further categorized under two headings namely; adjudicative like arbitration and litigation, and non-adjudicative, like negotiation and mediation (Cheung and Suen, 2002). The following are a brief explanation of ways how disputes are handled in the construction industry.

Mini-trial

Mini-trial procedure can be voluntary or contractually mandated, and it is a structured settlement procedure, with each side presenting its case before either neutral participants or senior representatives of the disputing parties. One benefit of this process is that the parties can often derive their relative positions without going through the long, drawn-out procedures followed in conventional litigation. The dispute can then be resolved in days or weeks rather than years (Poh, 2005). The main goal of mini-trials is to give the parties a clear understanding of the merits of their case, and predict the results of an actual trial, thereby enabling the parties to come to a business decision to resolve their dispute.

Mini-trials are generally held after other ADR mechanisms have failed, but before an actual trial. They are effective in disputes that mix factual and legal issues and are thought to promise an early “business-decision settlement. Harmon (2003).

Negotiation

Negotiation between the disputants is most often the first attempt in getting disputes resolved. Negotiation has been formally defined as the process of submission and consideration of offers until an acceptable offer is made and accepted. Moreover, transactional costs of negotiation are much lower than other forms of dispute resolution. Negotiation allows the parties the most possible flexibility and control in resolving a dispute according to El-Mesteckawi et al. (2007).

Mediation

Mediation is a widely used technique wherein the parties continue their negotiation with the assistance of a mediator. The mediator serves at the request of the disputing parties and facilitates, but does not dictate, the negotiation. The process may involve joint meetings as well as sequences of separate meetings with each party. The mediator undertakes to clarify each party's concept of the facts, priorities and positions; loosens rigid stances; explores alternative solutions; and seeks tradeoffs. The mediator is an agent of reality, never an advocate for either side. The outcome is either a resolution of the dispute or a step toward other recourse (Poh, 2005)

Adjudication

According to the Construction Industry Development Board of South Africa (2000) adjudication is a rapid and relatively inexpensive procedure, which is conducted by a third party intermediary within the contract period, and results in decision that is binding to the parties in dispute. The decision is final unless and until it is reviewed by either arbitration or court proceedings. Maritz (2009) says that adjudication is often defined by reference to what it is not. Adjudication is not arbitration or litigation, nor is adjudication a decision by the engineer/project manager. The Construction Industry Development Board (CIDB) calls for the introduction of adjudication, as a means of dispute resolution in the South Africa CI, and is recommended in all forms of contract operated by the board. In this process, the adjudicator may be appointed by agreement by both the parties at the time of contract agreement. As a general rule laid down by the CIDB in the South Africa CI, decisions shall be made within 42 days of a dispute being referred to an adjudicator. It is intended that adjudication is a condition precedent to proceeding to either arbitration or litigation. The final resolution of the dispute may only be referred to arbitration or litigation after a “cooling down” period of at least 28 days has lapsed (CIDB, 2005).

Arbitration

Binding arbitration is a process wherein opposing parties submit their dispute or conflict for a binding determination by one or more third parties. Arbitration features procedural flexibility, allows the parties a choice in the selection of the arbitrators, employs arbitrators with knowledge of the construction industry and/or construction law, uses relaxed rules of evidence, and maintains the confidentiality of the proceedings. Arbitration benefits the parties by increasing the likelihood that their business relationship will be preserved, and it is less disruptive and time consuming and can sometimes be more cost-efficient than litigation (El-Mesteckawi et al, 2007)

Litigation

Litigation is “a contest in a court of law for the purpose of enforcing a right or seeking a remedy”. Litigation might fail due to several factors including; high financial cost, long duration, unproven decision makers, irreparable damage to business relationships, and/or diversion of corporate resources and personnel from other projects. Despite these arguments, litigation provides the highest level of legal safe guards. El-Mesteckawi et al, 2007).

CONCLUSION

The purpose of this study was to highlight the major causes of disputes in construction industry and to further find out the effects that disputes have on projects and how these disputes can be minimized. According to the reviewed literatures, the causes of disputes evolve around people, process and project characteristics. However other scholars agree that disputes in the construction are caused by project uncertainty, contractual problems and opportunistic behaviour. The effects that disputes have on construction projects are time and cost overrun, diminution of respect between parties and breakdown of co-operation and relationships. According to the literature reviewed disputes can be minimized by choosing the right procurement system especially partnerships. A number of alternative dispute resolutions were highlighted by a lot of scholars, these being dispute resolution boards, mini trial, negotiation, mediation, adjudication, arbitration and litigation.

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