

# CAUSES OF DISPUTES IN CONSTRUCTION PROJECTS IN SOUTH AFRICA: A CASE OF GAUTENG PROVINCE

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Disputes have become an inherent feature of the construction industry projects. However few research projects have focused on this niche area in South Africa. The purpose of this study was to unearth causes of disputes and their effects on construction projects and to further determine the methods that are used to settle the disputes. In order to determine the objectives of this study, semi-structured interviews were used. Thirty practitioners i.e. professionals in the construction industry were purposively invited to participate. Fourteen practitioners accepted to participate in the interviews which represented 47% response rate. The results of the interviews were analyzed using content analysis that is coding of reoccurring themes from the interviews. The study revealed nine factors that contribute to causes of disputes in construction projects namely; poor communication, poor contract documentation, suspension of work, failure to understand and correctly bid or price the work, bad weather, non-circulation of information, i.e. site instruction, distribution of drawings etc., incomplete tracing mechanism for request of information and delay in extension of time. Furthermore, the effects of disputes identified were; project delays, change in contract cost leading to cost overrun, deterioration of relationships or bad relationships leading to friction, parties do not get information on time and neglecting clients' needs. In order to resolve the disputes the most popular method used was arbitration. However, some respondents opted to use conciliation and mediation. The practicality of the study is that organizations that enter into construction projects should be aware that they may encounter disputes in their projects; hence they should know the methods they can use to resolve them.

Keywords: construction dispute, dispute resolution, Gauteng

## INTRODUCTION

The continuing costly disputes in the construction industry has led to a common interest by researchers in different countries to identify the generic aspects of conflicts, claims, disputes and their resolution (Love et al., 2008). Allen (2011) concurs with the sentiments of Love et al., (2008). Unlike other types of industries where the development and manufacturing of products can be standardized and tested before being purchased, the nature of projects in the construction industry are extremely diverse. Every project in the construction industry is unique. Even where identical buildings are under construction, the site conditions in each project will differ and introduce new challenges. Moreover, it is a multi-party process where numerous specialist parties are involved due to the diversity of skills required and thus

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maintaining teamwork atmosphere and controlling potential conflicts or disputes is important (Asem et al., 2000).

Moreover, construction projects normally span for a long period between the decision to invest and the completion of works. Younis et al., (2008), states that this leads to instability of supply and demand and high sensitivity to economic fluctuation. Completing a construction project is a process and therefore requires a high level of cooperation between parties. According to Love et al., (2008) disputes have become an inherent feature of the construction industry.

This paper undertakes a comprehensive research in the field of construction industry in South Africa to identify the causes of disputes, their effects and the methods used to resolve the disputes in the construction projects.

## LITERATURE REVIEW

### *Causes of Disputes*

In every industry where people have to work together and cooperate there is a possibility of disputes to arise, and construction industry is not an exception. Often there is a lack of understanding about the reasons behind the disputes, but to avoid disputes from occurring and resolving them if they occur, it is vital to understand the causes of disputes (Love et al., 2008).

Table 1 Disputes in construction projects

Location	Factors contributing to disputes
Middle East (2012)	Failure to properly administer the contract Failure to make interim awards on extensions of time and compensation Employer imposed change Contract selection was not a best fit when compared to projects characteristics Third party or Force Majeure events
Asian (2012)	Incomplete and/ or unsubstantiated claims Failure to make interim awards on extensions of time and compensation Differing site conditions Failure to understand and/ or comply with its contractual obligations by the employer/contractor/subcontractor
United States (2012)	Failure to properly administer the contract Incomplete and/ or unsubstantiated claims Errors and/ or omissions in the contract document Failure to understand and/ or comply with its contractual obligations by the employer/contractor/subcontractor Differing site conditions
United kingdom (2012)	Failure to make interim awards on extensions of time and compensation Failure to properly administer the contract Failure to understand and/ or comply with its contractual obligations by the employer/contractor/subcontractor Employer imposed change Conflicting party interests
Mainland Europe (2012)	Incomplete and/ or unsubstantiated claims Failure to understand and/ or comply with its contractual obligations by the employer/contractor/subcontractor Unrealistic risk transfer from employers to contractors Failure to make interim awards on extensions of time and compensation Conflicting party interests Third party or Force Majeure events

Adapted from Allen, M., 2013

Construction is a very complex industry. Every project in construction is unique and most projects span for long period of time. Because of every project being unique a number of things must therefore be considered when undertaking any type of project. This includes, delivery method, type of skills required, type of contract to use and who to employ in the project. These are some of the essentials that are involved in running a successful project.

However, researchers have come up with several lists of the most common causes of disputes. Literature is replete with studies that have examined the causes of disputes and notably the findings are related. Table 1 presents a summary of causes of dispute from previous studies that have been undertaken globally.

### ***The effects of disputes in construction projects***

Younis (2008) stated that the continuing costly disputes in the construction industry has led to a common interest of researchers in different countries to identify the generic effects of conflicts, claims, disputes and their resolution.

From the statement above we acknowledge that dispute may affect the project in a negative way. Disputes are not budgeted for and when they occur may turn to be very costly. Cost is one of the parameters or factors that determine a project's success. Clients seek to get their projects done at a lowest economical cost, while contractors seek to do the job at the lowest possible cost in order to get maximum profit.

Construction disputes, when not resolved in a timely manner, become very expensive – in terms of finances, personnel, time, and opportunity costs. The visible expenses (e.g. attorneys, expert witnesses, the dispute resolution process itself) alone are significant. The less visible costs (e.g. company resources assigned to the dispute, lost business opportunities) and the intangible costs (e.g. damage to business relationships, potential value lost due to inefficient dispute resolution) are also considerable, although difficult or impossible to quantify. It has been estimated that construction litigation expenditures in the United States have increased at an average rate of 10 percent per year over the last decade, nearly \$5 billion annually (Peña-Mora et al., 2002). Disputes can be both business and personal effective. Sometimes you find yourself attaching business assets along the resolution process.

Construction disputes are not only costly but are also time consuming. According to Allen (2011) disputes in the Middle East and Asia, were found to last, on average, 9.1 months from beginning to resolution. Disputes in Asia, however, lasted the longest at 11.4 months, with the UK at 6.75 months. The dispute occurrence in projects has detrimental effect on project performance.

### ***Dispute Resolution methods***

Court processes by means of litigation is traditionally the primary means of dispute resolution in the construction industry. Australia inherited the common law of England and Wales including the English court systems. Of importance is the English Arbitration Act 1697. This Act formalized arbitration in England by providing a procedure which enabled parties to a civil action to refer their matter to arbitration to be resolved as a judgment of the court (Astor and Chinkin, 2002). Over time Australia has adapted to suit the needs of Australian industry and developed specialized courts and tribunal systems for resolving disputes (Fenn et al., 1998).

This historical development of the various strategies in relation to alternative dispute resolution processes such as mediation, arbitration, negotiation and adjudication was developed by the Australians. This method has since been adopted by other or most

counties internationally. The Act provided the first legally enforceable framework for agreements to arbitrate over any 'controversy' (CRC Construction Innovation, 2007). Koh (2005) stated that dispute can be resolved using informal process such as negotiation and alternative dispute resolution method (ADR) or formal resolution methods such as litigation and arbitration. However litigation is known to be very expensive and time consuming. In line with this sentiment the increased levels of litigation experienced in the early 1980s, the U.S. construction industry looked to alternative means of resolving disputes. The different methods of resolving disputes grouped as Alternative Dispute Resolution (ADR) method, include arbitration, negotiation, mediation, mini-trials, Rent-a-Judge, and dispute review boards.

#### ***Arbitration***

Arbitration is a process which is still regarded as an ADR method despite the growing dissatisfaction. According to Koh (2005) it takes too long to reach resolution, and costs too much. However, arbitration is a widely accepted form of alternative dispute resolution outside the courts (Eilenberg, 2003). It is the final process in lieu of litigation, found in most general conditions of contract.

#### ***Negotiation***

Parties may appoint an attorney or a third party to assist them negotiate the dispute or try to resolve the dispute on their behalf. This is usually conducted at an earlier stage of the dispute. If parties may resolve their issues at this stage then they should save time and costs (Koh, 2005).

#### ***Mediation***

According to Koh (2005) 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 recourses.

#### ***Mini-trial***

A mini-trial, which can be voluntary or contractually mandated, is a structured settlement procedure, with each side presenting its case before either neutral participants or senior representatives of the disputing parties. Rules and formats have been developed for these processes, such as those prepared by the American Arbitration Association and the U.S. Army Corps of Engineers. One benefit 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.

#### ***Rent-A-Judge***

The Rent-A-Judge procedure involves a judge (usually a retired state or federal magistrate) who presides over a private litigation. The parties submit their dispute to the judge, with a pre-established consensus that the decision will be binding or non-binding (Koh, 2005).

### ***Dispute Review Boards (DRB)***

Koh (2005) indicated that the objective of the DRB is to be kept abreast of the work as it progresses, through distribution of progress reports and through periodic site visits, whether there is a dispute or not. In this manner, the DRB has an opportunity to hear from all parties how the project is proceeding, and can view the site conditions under "no dispute" conditions.

One significant difference between the DRB process and other ADR methods is that the DRB is used at the beginning of the project. The existence of the board serves to encourage cooperation between the parties, and serves as a deterrent, rather than an incentive, to pursue claims.

### **PROBLEM STATEMENT**

Construction projects are increasingly complex, resulting in complex contract documents. Complex construction can likewise result in disputes. Disputes have become an inherent feature of the construction industry. In order to determine the causes of disputes, their effect and methods used to resolve the disputes in construction projects in South Africa the following specific research questions were formulated.

- What cause(s) dispute in construction projects?
- What effect(s) do disputes have in construction projects?
- What method(s) are used to resolve construction project disputes?

### **RESEARCH METHODOLOGY**

In order to answer the research questions. An inductive approach was used. The method used was semi-structured interview which is qualitative. In this research approach the researcher studies the phenomenon without predetermined expectations or categories and tries to understand the data from the perspective of the participant (Moustakas, 1994). The interview questions for the purpose of the semi-structured interviews were constructed and identified beforehand by using literature study, problem statement and the research questions as a guide. Three research questions were asked, namely, 'What are the main cause(s) of dispute in your projects?', 'What effect(s) do these cause(s) have on your projects?' and 'What method(s) do you use to resolve dispute in your projects?'

The target respondents were based in Gauteng province. This was because the province is more vibrant in construction projects compared to the other nine provinces, therefore more ideal to conduct this study. Furthermore the limited time to complete the study and expenses of conducting the study in other provinces were further reasons to conduct the study in Gauteng province. Thirty respondents were therefore purposively sampled and invited to participate in the interview. Fourteen respondents accepted to take part in the study which represented a response rate of 47%. The duration of the interviews lasted approximately 30 minutes per respondent. The interviews were recorded manually on a writing pad as the interviewees did not want to be recorded using an electronic device. Furthermore, the researcher's attitude was one of unconditional positive regard. Nondirective conversation technique for example minimal encouragement, attentive listening, clarification, paraphrasing, reflecting and summarizing, were used to gather information. A relaxed atmosphere

was created to help the participant to feel at ease. This approach is in line with the study of Van Rooyen et al., (2010).

The data was then analyzed using content analysis. This included identifying recurring themes and coding them in order to analyze, quantify and interpret the research data systematically and objectively. The universe of the content to be analyzed was defined and categorized. The units of analysis, words and themes were determined by reading through the written transcriptions of the data. The themes were coded. Coding can be seen as the process of grouping evidence and labeling ideas so that they reflect increasingly broader perspectives (Creswell and Clark, 2007).

## RESULTS AND DISCUSSIONS

### *Causes of disputes in construction projects*

Table 2 indicates nine factors that contributes to causes of disputes in construction projects namely; poor communication, poor contract documentation, suspension of work, failure to understanding and correctly bid or price the work, bad weather, non-circulation of information, i.e. site instruction, distribution of drawings etc., incomplete tracing mechanism for request of information and delay in extension of time. This finding is in line with the findings indicated by Allen (2013).

Table 2 Overall results from practitioners

Respondents	Cause(s) of dispute	Effect(s) on project	Resolution method
Interview 1	Discrepancy on contract document i.e. drawings	Causes delay on the project	Conciliation
Interview 2	Incomplete drawings and specifications	Causes delay on a project	Conciliation
Interview 3	Delay/Suspension of works	Bad relationship between parties	Arbitration
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Interview 4	Failure to understand and correctly bid or price the works.	Changes in contract amount	Arbitration
Interview 5	Lack of understanding and agreement in contract procurement. Bad weather	Delay Change in contract amount	Arbitration
Interview 6	Inadequate in open and factual communication.	Delays; parties do not get information in time	Mediation
Interview 7	Issuing instructions verbally and not in writing	Delay	Mediation
Interview 8	Non-circulation of information, i.e. distribution of drawings, site instruction etc.	Delay	Arbitration
Interview 9	Poor communication	Neglecting client's want	Arbitration
Interview 10	Discrepancy between drawings and bills of quantity	Changes the contract cost	Conciliation
Interview 11	Design and specification oversights and errors or omissions resulting from uncoordinated civil, structural, architectural, mechanical and electrical designs.	Causes delay and friction between parties	Arbitration
Interview 12	Poor communications between and among the parties involved in the project	Delay	Mediation
Interview 13	Inadequate tracing mechanisms for RFI (Request for information).	Time delay	Arbitration
Interview 14	Delay in execution of works	Delay on a project	Arbitration

### ***Effects of disputes on construction projects***

The effects of disputes are indicated in Table 2. The effects of construction disputes were identified to be:

- Project delay;
- Changes in contract cost leading to cost overrun;
- Deterioration of relationships or bad relationships leading to friction;
- Parties do not get information on time; and
- Neglecting clients' needs.

These findings on the effects of disputes are supported by Allen (2011).

### ***Resolution Methods to handle disputes***

The findings in Table 2 revealed the methods used to resolve disputes. The respondents indicated that arbitration was commonly used. This result concurs with literature that arbitration is the most common resolution methods used around the world. Although it is costly, they are very effective. Despite arbitration being commonly used, mediation and conciliation were also used but not frequently. These findings are not identical to the findings of Allen (2013). Allens' (2013) study indicated that party to party negotiation and meditation were the preferred methods over arbitration. This study in South Africa is an indication that disputes in South Africa could be incurring higher costs. This is because according to Koh, (2005) the process of arbitration is quite expensive.

## **CONCLUSIONS**

The study has unearthed different causes of disputes in the construction industry i.e. poor communication, poor contract documentation, suspension of work, failure to understand and correctly bid or price the work, bad weather, non-circulation of information, i.e. site instruction, distribution of drawings etc., incomplete tracing mechanism for request of information and delay in extension of time. These causes of disputes are in line with the once noted by Allen (2013). This is an indication that South African construction industry is not unique from the global trends in terms of causes of disputes in their projects. Furthermore, the effects of disputes were identified to be; project delay, change in contract cost leading to cost overrun, deterioration of relationships or bad relationships leading to friction, parties do not get information on time and neglecting clients' needs. The effects identified in this study are not unique to the global trends as well. They are in line with the findings of Allen (2011). In order to resolve the construction disputes the most popular method used was arbitration despite literature indicating that it can be very costly when arbitration is used (Koh, 2005). Based on this argument some respondents opted to use conciliation and mediation to resolve their disputes. Allen (2013) indicated that mediation is still one of the most widely used technique to resolve disputes hence there finding is in line with the current findings in South Africa.

## LIMITATIONS OF THE STUDY

The findings of this study are limited because it was mainly a qualitative study; therefore the findings cannot be applied to other contexts for example quantitative study. With regard to the sample, only those in Gauteng province were interviewed which means the results might not be applicable in other provinces.

## RECOMMENDATIONS FOR FURTHER RESEARCH

This study has identified the causes of disputes, the effect it has and resolution methods used in the construction industry. A further research can be undertaken to identify methods that can be used to avoid dispute occurrence in projects. Furthermore, a quantitative research can be undertaken to test the causality of the causes of disputes and the influence it has on the effects of disputes on construction projects.

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