Why dispute avoidance is vital in the high-risk construction sector

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Bill Morrissey explains why we must halt the recent emphasis on the resolution of claims and contested cases and instead focus on early recognition and resolution of problems and disputes on construction projects

Up to recently, the emphasis has been on the resolution of claims and contested cases rather than early recognition and resolution of problems and disputes on construction projects.

We need to get back on track; it is vital to use current and available people and documents which are directly relevant and, where possible, return control of disputes to project level and proactively manage the relationship between risk allocation and behavioural attitudes.

Construction is a high-risk business. Delays and differences between parties are common. By its very nature, the delivery of a construction project is a dynamic process, this requires members of the team to work together to continually fine-tune and adjust the detailed project requirements, designs and construction methods, sequence, resources, and logistics. Project teams are usually created from scratch for each project.

There are many reasons for disputes, the most common being:

- Failure to properly administer the contract;
- Poorly drafted or incomplete and unsubstantiated claims;
- Errors and/or omissions in the contract documents;
- Incomplete design information or employer requirements (for design and build);
- Employer/contractor/subcontractor failing to understand and/or comply with its contractual obligations;
- Unforeseen or differing ground conditions and utility infrastructure relocation issues;
- Actions/inactions of third parties/practice of agencies.

The avoidance of or the fair and timely resolution of construction disputes can reduce administrative and other costs benefiting the public, the employer and the contractor. We need to find ways to settle a higher percentage of disputes on projects at their inception before they become formal adjudications, arbitrations, or lawsuits.

Parties need to identify methods for timely dispute avoidance, recognition, and resolution during the currency of projects.

Unrealistic expectations regarding construction projects

It is not realistic to expect construction projects to run perfectly. The expectation should be that the project manager should identify problems and quickly take appropriate action. Confidence is critical on construction projects and this is a quality that often determines the difference between success and failure.

All too often, projects fail to achieve their goals because of indecision and uncertainty. Unfortunately, not enough project managers are trained or equipped to measure communication effectiveness; technical reporting on its own provides an impersonal one-dimensional view.

Project managers should lean towards people and action; relationships are key. But parties may fail to see eye-to-eye at any point during a contract. We must focus on avoiding disputes in the pre-and post-contract stages.

No two construction projects are alike — drawings, specifications, ground conditions, building methods, the trades involved and the goals of the participating parties all differ. Construction projects are unique, covering a wide spectrum of products and skills, carried out in a profit oriented, commercially aware environment.

Projects are usually executed by organisations with opposing objectives, by individuals with different cultures, experiences and backgrounds, executing complex operations in difficult environments. Decisions are generally made on forecasts of future expectations, more often than not when the information needed to make those decisions is cloudy at best.

The scope for uncertainty and change is high in construction and the risk of conflict and escalating disputes is ever present. Ambiguities and/or discrepancies in the contract documents, design changes, unknown ground conditions, defects, delay and disruption issues may all give rise to conflict.

The ‘handshake agreement’ of the past is rare, replaced today by a complex set of contract documents regulating the parties’ dispute. Regulation of dispute management is seemingly preferred to dispute avoidance!

Why does dispute avoidance matter?

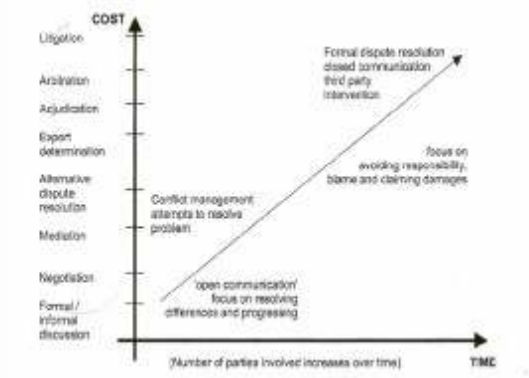
Construction disputes cost money. The costs are direct (legal services, adjudication, arbitration, advisers and in – house resources) and indirect. The direct costs can be substantial and often dwarf the initial claim itself.

Some of the indirect costs include: adverse performance, reduced morale, erosion of confidence and trust in working relationships, delays to the project, negative reputational impact, emotional impact on people involved and the loss of people to the industry because of wasted effort, disillusionment and frustration and lost opportunities for future work due to the destruction of business relationships.

If such unnecessary expense and waste of resources can be avoided the same capital and human resource pool could be released to produce significantly more public and private infrastructure and services.

Risk averse contracts which attempt to transfer risk within the control or influence of the party transferring the risk tend to be entirely counterproductive and can lead directly and indirectly to project inefficiency, quality issues, delays, costs, and disputes; it is preferable that parties remain proactively engaged and in control of risk management throughout the life of a project.

Figure 1 shows the high costs and time involved in formal dispute resolution procedures.



(http://www.engineersjournal.ie/wp-content/uploads/2017/04/Dispute-avoidance-1.jpg)

CLICK TO ENLARGE Fig 1: Contract management strategies against time and cost (source: Fryer et al 2004, p104)

An organisation's underlying policy objective should be:

- Developing realistic plans and schedules, maintaining their accuracy, and dealing with delays and other 'claims' contemporaneously;
- Ensuring that the contract contains a process to resolve issues at project level;
- Ensuring process and procedural fairness at all times;
- If necessary, escalate the conflict or issue to a more senior level;
- Employing every endeavour to resolve issues by negotiation while they are fresh;
- Using skilled facilitators, standing conciliators and dispute boards to assist in resolving issues; and
- If formal dispute resolution is inevitable, selecting the most appropriate method to achieve an early, and non-project disruptive solution.

These matters must be considered at contract formation, not when a conflict or difference arises.

The best solution is to avoid disputes

We have long known that prevention is better than cure; however, the focus of attention on disputes within the industry has been on cure rather than prevention. While disputes are recognised as a prevalent feature of construction projects, it is generally only when a dispute has materialised that parties become engaged.

Consequently, much of the focus of attention in dispute management is focused on cure rather than prevention.

This focus reinforces the adversarial view of an industry that continues to spend substantial amounts of time and money on the resolution of disputes. Until appropriate recognition and resources are deployed to the avoidance of disputes, disputes that could have been avoided will continue to be a significant financial drain on resources.

The **Latham Report (https://en.wikipedia.org/wiki/Latham_Report)**, titled '**Constructing the Team (https://pdfs.semanticscholar.org/bed6/02d037ee26af24746b3021bbaf7184374d12.pdf)**', was an influential report written by **Sir Michael Latham (https://en.wikipedia.org/wiki/Michael_Latham)**, published in July 1994. Latham was commissioned by the UK Government and industry organisations to review procurement and contractual arrangements in the UK construction industry, aiming to tackle controversial issues facing the industry during a period of lapse in growth as a whole.

In the report, Sir Michael advocated that "the best solution is to avoid disputes", but the legislation enacted in 1996 in the UK and the more recent **Construction Contracts Act 2013 (http://www.engineersjournal.ie/2013/09/05/construction-contract-act-2013-what-does-it-mean-for-engineers/)** in Ireland also introducing statutory adjudication have only heightened the focus of attention on cure rather than prevention.

Sir Michael's key recommendation seems to have been lost somewhere along the way; his message needs to be looked at again and maybe also in terms of the **Construction Contracts Act (http://www.engineersjournal.ie/2016/05/03/construction-contracts-act-2013/)**. All too often, the painful lesson for the parties is that the cost of managing a dispute at formal resolution stage is greater than the investment needed at the outset of the project to avoid disputes occurring in the first place.

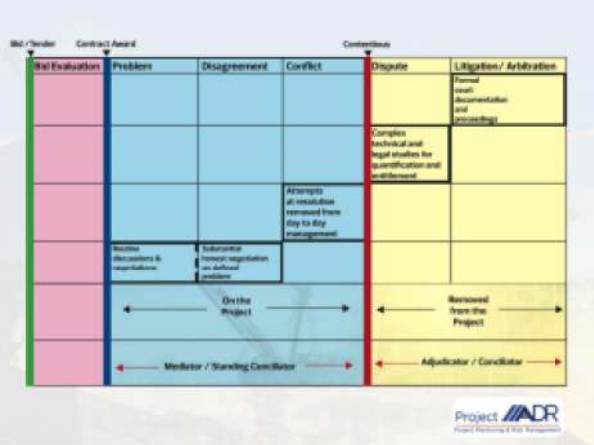
Win-win opportunities at the outset are too frequently replaced with after-the-event situations with no real winners.

Time for cultural change by all industry stakeholders

There are some signs of progress and this is indicated in the blue zone steps in the chart hereunder. The following measures in a project delivery mechanism and contractual framework are critical to the minimisation and avoidance of disputes:

- Recognition that each construction project involves the creation of a new group of people with diverse interests requiring a culture of collaboration which is project oriented and facilitates the building of trust between them;
- In selecting project participants, significant weight should be given to the attitude of a participant, as well as its capacity and pricing (be wary of speculative and opportunistic business partners);
- The early involvement of contractors, designers and specialist subcontractors with the client and end users, financiers and operators;
- Sensible and fair risk allocation. Appropriate delegation of authority, including financial authority to project /site level, to identify and problem-solve issues early.

Mediation and dispute boards are moving further back the construction process to the currency of the project. The recent 'standing conciliator' provision in certain public-works contracts in Ireland is a welcome start in this direction as a progressive dispute-avoidance and resolution provision.



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Investment in this area has proved to be very wise, as evidenced by the success of dispute-avoidance boards internationally under the FIDIC (the International Federation of Consulting Engineers) suite of contracts and others.

Standing conciliators and dispute-avoidance boards have and are already operating successfully on certain larger public contracts in Ireland. This is a rapidly developing area. The Chartered Institute of Arbitrators (CIArb) published Rules for dispute-avoidance boards in 2014, including relevant tripartite agreements. Other professional bodies such as the International Chamber of Commerce, Royal Institutution of Chartrered Surveyors and Institution of Civil Engineers have published similar procedures.

Fundamentally, the different versions of progressive dispute-avoidance measures during projects are similar, each providing early recognition and resolution of differences based on the contractual bargain between the parties.

There has been a surge in the use of mediation in construction disputes and of course Ireland is unique internationally with its successful record of conciliation in construction disputes over the years, as evidenced by recent research published by Dr Brian Bond.

Alternative dispute resolution

As a conciliator and mediator in construction and infrastructure disputes, I regularly see that the parties and their advisors never cease to be surprised and impressed by the power and speed of alternative dispute resolution (ADR) in settling their differences.

It is not feasible to explore this subject fully in this introductory article; there is clearly much that can be done pre-contract and during contracts to reduce the incidence of formal disputes. This will involve efforts to avoid disputes centred around design and pre-construction phases as well as systems to identify emerging problems on projects including human dynamics and resolving them to minimise dispute potential.

The CIArb – Ireland Branch has formed a Special Interest Group (SIG) on Project Mediation and Dispute Avoidance, which is engaging with the professions and the construction sector in general on this developing area and will look at requirements on all projects from small to mega. The Engineers Ireland Dispute Resolution Board is also very active in this area.

Both organisations have collaborated recently by holding very successful conference on dispute avoidance. Expect to hear more from them both – and they would like to hear from you.

Author:
Bill Morrissey BE LLM Dip Adj CEng MIEI FCIArb MDBF MMII is long-standing chartered member of Engineers Ireland (Civil), a CIArb-accredited panel adjudicator, Dispute Board Panel member, and a member of the Engineers Ireland Conciliator Panel. He specialises in project risk management and dispute resolution with Project ADR and is chair of the CIArb Special Interest Group on Project Mediation and Dispute Avoidance. Contact: ***billy@projectadr.com (mailto:billy@projectadr.com)****.*

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