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A Review on Dispute Resolution Methods in UK Construction Industry

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Abstract Disputes and Confusion is common in all aspects of construction industry. Diversity of specialists involved, inconsistencies between design and construction and high risk environment that surrounds this industry often lead to disagreements on the legal obligations and rights of parties involved. Improving communication has been identified as the most effective method of preventing disputes. However in case of disputes happening, methods such as negotiation, arbitration, litigation, etc. are practiced in order to resolve the disagreements. It must be noted that negotiating and making attempt to prevent disputes at an early stage can always alter the path to a less adversarial settlement.

Keywords Construction Contracts, Dispute Resolution , UK Construction Industry

"Construction is a fertile seed bed for disputes." [1]

1. Introduction

Due to the nature of the construction industry, the temperament of the labour force and characteristics of the contracts, it is very expected that reposition a stance or a change in the contract lead into a field of disputes and disagreements. [2] When disputes rise, they are often costly, and time consuming. [3] In these circumstances, various methods have been created to resolve disputes. Preventing disputes is advised to the industry by improving communication and understanding of others objective in culture of the industry. [4] Many stakeholders and participants in construction industry are still unfamiliar with these methods and improvements in prevention of disputes. In order to enhance the knowledge of groups involved in construction industry this paper will attempt to review the definition of dispute, reasons and places it arises. It will also illustrate the vital methods of resolving disputes and demonstrate how various contract formats deal with these approaches.

2. Definition of Dispute

Firstly, it is important to fully comprehend the term dispute. The Oxford Dictionary defines disputes as "Question the truth or validity of (a statement or fact), an argument, a disagreement between management and employees that leads to industrial action". [5]

The meaning of this word differs depending on its purpose. The legal definition of *dispute* is actually a disagreement. However, Housing Grants Construction and Regeneration Act 1996 (HGCRA) has yet to define dispute and views it as *subject of judicial interpretation* for most cases. [6]

The terminology dispute is applied to controversial contract issues disagreed upon and necessitated to be resolved outside the construction arena and contract. [7] Yet it is believed that dispute and conflicts are foreseeable yet distinguished as such: not every conflict is recognized as a dispute and in order to understand the dispute -nature and reasons- must be first recognized. [8]

It is worth to state that when a claim in the industry is proposed, discarded and reassessed, a dispute may occur. Dispute is not an argument with words. [1] An alternative suggestion was made for a legal definition, 'dispute is not when a claim has been submitted but when it has not been admitted'. [6]

3. Reasons and Areas that Disputes Arise

Construction is an extremely unpredictable business. Every project is unique and possesses its own particular conditions and challenged with changes such as cost, design, material; they are confronted with situations waiting to incite disputes even under the best conditions. [9] The construction industry also perceived as huge, adversarial and continually fragmented is under pressure of a controversial ambiance as a result of the new technology, tender costs, and legislative regulations on safety, health and newer methods of procurement. [1]

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Following categories of reasons of dispute identified:

- Today, parties still work without signing contracts; however, disputes are common. It is known that contacts are tools for disagreements or disputes. Vague conditions in the main contracts with subcontractors or other specialists can also incite disputes in a project as a result of the latter's actions. The unbalanced risk factors and not assigning its elements appropriately can provoke disputes as well. Exaggerated expectations in the contract and the creation of the perfectionist field without having studied the plans realistically can aggravate grounds for disputes.
- Recently, in the UK, a new culture has risen due to the low margin of profit in the construction industry. The contractor aims to make false claims in order to generate an extra income; claiming for possibilities and trying to come up with contradictions in the contract.
- The process of tendering has brought contractors to reduce their prices in order to win the tender. It is become prevalent to accept the risk of the incompetent subcontractors' work. In addition, the many parties involved in one project all requiring a range of demands are products of probable upcoming disputes.
- Climate change, design error and legislative acceptance compel contractors to meet the terms with the legislators; they have to revise their standards which result in complications and misinterpretations. [10]

Human behaviour, miscommunication and body language can create conflicts. [10] In a project, many factions are employed and constantly interacting among themselves about their positions. Lack of knowledge or arrogance can be a tool into the shaping of disputes. [8]

Areas of disputes can be subdivided as following:

- General: Poor commendation among parties, propagation of type of contract and warranties.
- Clients: Lack of information and changes in the requirements and conditions of contracts. Intrusion of one party into another, and issuing late payments
- Consultants: Lack of experience, coordination, and design discrepancies Contractors: Deficient site managerial skills
- Subcontractors: Failure to follow agreed contract orders
- Suppliers: Lack of competence in performance and purpose. [9]

4. Resolution of Dispute

When a dispute occurs, different forms of legal proceedings exist that can be applied to dissolve it. [11]

The traditional construction industry reaches a solution either in the court or ministers a mediator by litigation or arbitration. Subsequently, in 1994 following the Latham Report, adjudication developed into a constitutional right under HGCRA 1996; it is prevalent for many situations. [10]

4.1. Negotiation

Negotiation is undoubtedly the universal dispute solution maker. The objective of reasonable dispute should be settled immediately and efficiently in terms of time management, costs and preservation of relationships.

Stipulating that negotiations were not successful, then other methods are available. However negotiations should prevail when other methods are considered to be utilized. [12]

4.2. Litigation

Litigation is the act of a lawsuit. It is the traditional form of resolving dispute in the UK. It is based on law; a doctrine that requires a court follow-up. (County Court, High Court or Technology and Construction court) [8].

Primarily, litigation originates from a claim by the defendant. The issues are tried through a set of documents provided by each party. The court may allow the parties to appoint experts to assist the case. The court proceeds with the parties' opening statements, experts' examinations, witness reports and the closing statements. Following the process, the judge will decide a verdict. The guilty party must comply according to the judge's decisions in the given amount of time. Appeals to a higher court are possible for the "lost" party; however, they are long, costly and the results can be win-lose. [11]

4.3. Arbitration

Arbitration is the process of resolving unresolved disputes by referring to a third party, either agreed on or provided by the law who will make a judgment. The process of arbitration is comparable to litigation with the difference, an arbitrator is appointed mutually between the parties and required to act objectively and his decisions are affix by law. Arbitration Act 1996 conducted in England and Wales allow appeal to be made to a High Court. [11]

Arbitration has many advantages over litigation; it is less costly and time consuming, all hearings are closed and void of negative exposure. The hearing date and location and reliable expert can be chosen by the parties. However, the arbitrator cannot assume the position of a legal judge in the matter of the expert. [9]

JCT 2005 clause 9.3 refers to arbitration: a non-default stance. The parties can settle a dispute arbitrated for them. 9.4 to 9.8 suggest notice and power of arbitration, and its effects. [13] ICE also invokes arbitration, clause 66.9. The appointment of the arbitrator and its proceedings are stated in clause 66.10 and 66.11 respectively and mentions its application procedures for Scotland and Wales in clause 66.10.11 and 67. [14]

4.4. Adjudication

Adjudication is a method of resolving disputes outside the court. [1] It was initially introduced in the mid-1970s in the UK. After the 1994 Latham Report, HGCRA 1996 stated

that parties involved in a construction contract can refer any disputes at any time to an independent third party for adjudication. [15, 16] The adjudicator takes the appropriate contract measures to reach to a suitable verdict and resolve the dispute. The decision can be reached by agreement, arbitration or litigation or on the adjudicator's final decision. The goal of this process is to succeed contractual wronging which is time consuming and costly. [12]

JCT05 clause 9.2 mentions adjudication. This is slightly modified from the 98 version. This calls for the parties to name their adjudicators. Clause 3.18.4, details the stance of the adjudicator.

ICE, clause 66.6: the operation of scheme is slightly amended from JCT98 by the provision that parties may identify their own adjudicators and that adjudicator, clause 3.18.4, must either have special knowledge or appoint an advisor. [17]

NEC3 mentions adjudication in option W1 of dispute resolution provision for situations that do not apply in UK HGCRA1996 does not apply and W2 for those that do apply. [18]

4.5. Ombudsman

Ombudsman is used to define an official appointed to investigate an individual complaint against the public authorities. This system is frequently employed to resolve impending administrative disputes. It has been appointed by Housing Association of Tenants Organization and it is only used as a last resort. [1]

In case of a dispute, parties are not obligated to settle their disagreements in court; nevertheless they prefer handling the issues at stake harmoniously. The settling in the court is unpromising, time consuming, very costly and furthermore, they are in the public domain. [8]

4.6. ADR (Alternate Dispute Resolution)

ADR is the method to solving disputes without the use of the traditional methods. It was first created in the USA, yet employed worldwide. It is recognized as a cost-effective, speedy method with less threatening, less tense and private attributes. [9]

Sometimes the parties in a dispute will attempt to resolve it without recourse to formal proceedings. They may encourage or agreed in their contract doing so when the dispute arises. [11]

- ADR takes into account these factors:

1. The measures are carried out by an unbiased third party
2. The process is unofficial, but confidential and devoid of discrimination
3. The parties' agents must possess the executive authority to settle the matter [1]

If the dispute escalates to the levels of the management system and yet there are no settlements then a third party is brought in to accomplish the process. [11]

However, ADR is not appropriate when the parties do not wish to settle their matter cordially, possess different perspectives or decide to delay a settlement for an indefinite period. [1]

- ADR is defined by three common methods:

1. Conciliation is when a neutral adviser is appointed to listen to the disputed points of one party and then transfer them to another. A solution to the dispute can be found by encouraging comprehension of each party's views. The adviser is the passive facilitator. He cannot counsel. When an agreement is reached, the advisor will foresee the signing of the settlement. [9]

ICE7, clause 66.5 presents conciliation. [17]

2. Meditation is a structured negotiation and is considered the most important method of ADR. [8] The neutral but active adviser listens to both parties versions and then finds an overall solution by suggesting, encouraging dialogues and urging both sides to concentrate on the issues at stake. Private discussions may be held with each party in order to clarify points and formulate a mutually acceptable solution to the problem. [9]

JCT05 clause 9.1 states that parties may resolve their differences by meditation. This did not exist in the 98 version; therefore, it considers meditation a vital component to solving disputes at the early stages which can prevent further incites. [19]

3. Executive tribunal is a formal procedure of understanding. A neutral advisor is authorized to settle issues from each position. The parties hand over their case and clarifications will be by means of questions from one to another. In conclusion, parties attempt to cooperate. [1]

5. Conclusions

Lastly, it is important to understand that issue related to disputes can often jeopardize any given project and prevent the success of project for all parties involved. Understanding the definition of dispute is based upon its purpose and its place. Disputes can arise in various forms and reasons. This paper demonstrated a range of methods to resolve disputes. Contract formats such as JCT, ICE and NEC also include clauses regarding to dispute resolution. However, Sir Latham in the report "Constructing the Team" stated "Nevertheless disputes may arise, despite everyone's best efforts to avoid them", negotiating and attempt to prevent disputes at an early stage can alter the path to a less adversarial settlement. [20]

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