The Concept of Dispute Avoidance by Murray Armes

Introduction

Disputes are costly. On average 50% of the legal costs borne by the construction industry are related to disputes and roughly 10% of projects 10% of the total costs were legal costs. If a dispute proceeds to international arbitration, under the ICC process a 10m dispute will cost about $300,000 in administrative and arbitrator's fees alone and that takes no account of the parties' legal and management costs and of course the hidden costs of lost reputations and goodwill. An ICC arbitration can typically cost as much as 12% of the value of the dispute. Disputes take time and deflect energy and money away from the construction project, resources that could have been spent on the project itself or invested in the industry to provide better margins and performance for its participants.

In medicine it is a well known fact that prevention is better than cure. That is also true of construction and yet every year more is spent on cure rather than prevention and more is spent on legal solutions than is spent on the prevention of disputes in the first place. Then there are the cases where the total legal costs exceed the value of the claim, cases where the cure has cost many times more than prevention would ever have done.

How many times have we looked back on a difficult project and wondered if we could have done things better? It is said that hindsight is an exact science and also that hindsight provides a 20/20 visual perspective on things that have already happened. Clearly hindsight is not the solution and so it follows that proactive dispute avoidance needs to look forwards and to anticipate problems, which in turn will lead to a reduction in the need for hindsight.

For reasons we will discuss later, disagreements or differences in construction projects almost always occur. Disagreement is not always a bad thing and may help to promote discussion and innovation, after all there is almost always more than one way of resolving a problem, and where difficulties arise there are usually two sides to a story. Disagreements and differences occur all the time and we should not shy away from them but if a disagreement has an impact on the interests of one of the participants then we have the beginnings of what might become a fully blown dispute. Dispute avoidance should recognize that differences occur all the time but by monitoring them should enable those that have an impact on the parties' interests to be dealt with before a formal process of dispute resolution is required.

Reasons why disputes arise

Disputes in construction can arise for many reasons. For instance misunderstandings about obligations arise from erroneous contract interpretation, or perhaps the documentation has not been clearly drafted. Issues about progress and quality frequently arise and may originate from the different aims each party to the contract will have. Disputes about the quality or lack of information may have an impact on other aspects of the project: commonly quality and time, and payment is probably the most common issue perhaps because almost all disputes boil

down to money in the end. A construction project involves a number and sometimes many participants, each with different aims and aspirations arising from the project. For instance the Employer will want the highest quality project for the lowest cost to be constructed within a limited time. The Contractor however will be focused on the financial success of the project for its own organization which may mean that quality, time and cost do not have the same meaning. It is therefore not surprising that differences arise between the Employer and Main Contractor, but the complexity of the construction process means that differences may also arise between the Main Contractor and its Sub Contractors and Specialists and at the other end of the process between the Employer and its consultants.

Construction projects are not manufactured products and are subject to difficulties not encountered in manufacturing where a high degree of control can be exercised over the process. Construction projects involve many more unknowns and it is this uncertainty that gives rise to disputes. For instance, even if two identical buildings were to be constructed on two sites in different locations, there would be differences in the physical characteristics of the site and possibly location specific differences that mean that almost all construction projects, even if similar to a previous one, are in effect prototypes. Even if the geotechnical characteristics are the same or similar, location specific differences will arise from weather and climate and the political and economic regimes under which the contract is being carried out.

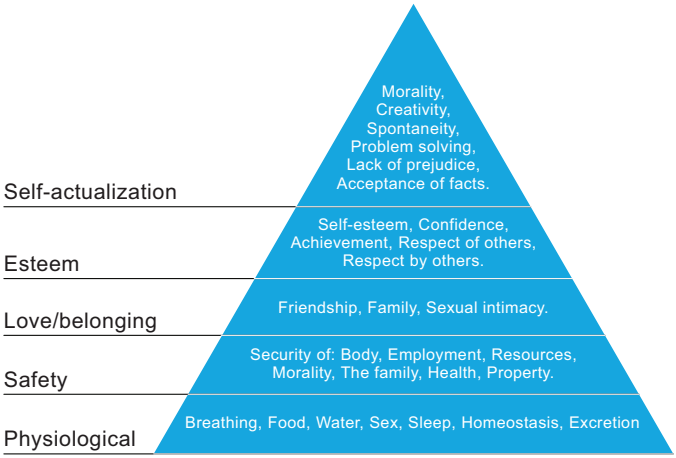
Most manufactured products are fully designed before production begins and often prototypes are built and tested so that performance, buildability and durability can be established. It is seldom possible to design a construction project to the point at which all aspects of the project have been fully resolved prior to commencement of the contract. There is seldom the appetite to pay the design team to even begin to approach this state of completion and in fact it is questionable whether, given the one of nature of construction projects, it is even desirable. Therefore, at the commencement of almost any construction contract, some uncertainty will be inherent in the design and project information and each project is in fact a prototype.

Uncertainty may also arise from an ill considered procurement process that does not properly address the priorities of the participants and the reasonable allocation of risk. Design and build has become a popular method of procurement and may be appropriate for many projects, but it has been used for many others without proper consideration of what is desired of the finished product. The same could be said of the various forms of management contracting and construction management that similarly set aside the greater certainty of traditional procurement, often without proper consideration of the tangible benefits or problems that might arise. Poor project management can be a major contributor to uncertainty and because it usually occurs post contract, later in the whole procurement process it is harder and more costly to rectify.

In any joint venture the ability to communicate is essential. Construction is almost always a joint venture between a team of participants. A lack of communication can be a fertile breeding ground for disputes. This might arise because of insecurity about how a party's interests might be affected by openly discussing an issue, it may arise from cultural differences between the

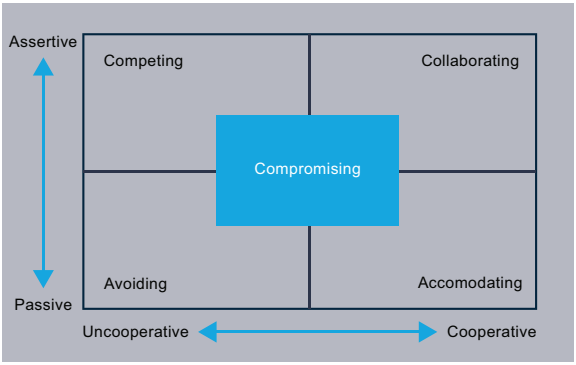
parties or because the team has become dysfunctional with team members simply unable to get on and communicate with each other: a common trait with human beings. Sometimes this may have been prompted by the position of a participant within their organization that might make them hesitant to discuss an issue for fear of blame being attached to them personally. In some countries, government employees could be in fear of their jobs (or worse) if it way demonstrated they were in some way responsible for a loss incurred by their employer.

It is often said of successful projects that it was down a particularly good team of individuals. There have been many attempts to explain human behavior but in respect of conflict management Maslow's Hierarchy of Needs can be represented as a five layer pyramid. At the wide base are the most fundamental and basic needs concerned with physiological well being. Research has show that humans will seek to satisfy their basic needs before moving on to the higher levels that represent esteem and self gratification. In construction disputes we are not normally in a situation where our basic physiological needs are threatened. The next level concerns safety and well being. Again, in most cases personal safety is not normally at stake (although in some parts of the world this is not unheard of!). the final three layers concern status and self esteem and it is these that are likely to have an impact on the ability and motivation of an individual to properly and appropriately communicate. If an issue is likely to impact on someone's needs, at whatever level in the Maslow model these might arise, this is likely to impact on the willingness and ability of that individual to resolve the issue. So, although a lack of communication may be blamed on the project as a whole, it is likely that it has originated from the individuals working on the project.The same model can be adapted to suit companies, with the lowest levels representing he basic survival needs of the company, the upper layers representing reputation and prestige. By understanding how people or companies might react when responding to the influences in each layer can help with the avoidance of disputes because this model provides an understanding of how individual and corporate needs are prioritized.



A lack of communication often means that the parties will resort to legal methods too quickly and before other ways to resolve the problems have been fully explored. Resorting to legal methods normally involves confrontation, at which point the parties each become entrenched in their own positions, focusing primarily on their own interests, ignoring those of the other party (and usually being encouraged to do so by their lawyers) and not considering what might be best for the project and ultimately for everyone involved in it.

Another recognized conflict management model is the Thomas Kilmann Conflict Mode Instrument (TKI) which identified five conflict handling modes measured against assertiveness, or the degree to which a party satisfies its own concerns, and cooperation, the degree to which a party satisfies the other party's concerns. At the four corners of the model are Avoiding, Accommodating, Competing and Collaborating. Avoiding in this case means ignoring and is not related to a means of dispute avoidance that might satisfy both parties. In the centre of the model is "Compromising". Although dispute avoidance may involve some amount of compromise, and it is a feature of mediation, for instance, in my view this is not the best way to avoid disputes. The most appropriate solution may not involve compromise, especially if one party has acted unreasonably, the aim instead should be to find the most appropriate solution, and as we shall see later this may need the services of an independent third party if it is to be done successfully.



In the case of construction projects there are two types of dispute avoidance techniques that can be used on any project[1]. The first are management techniques that are focused on the process. The second are the non escalation methods which are focused on identifying issues and containing them.

Dispute avoidance techniques-management methods

Management methods commence as soon as work on the project begins and should certainly be implemented pre contract, although these methods also crucially extend into the post contact stages as well. A key feature of management methods is to appreciate and consider unpredictable scenarios before they occur. This can be achieved by learning from previous

projects, by accepting that problems will arise and by being realistic about what could go wrong. Some forms of contract even formalize this into a risk register which can be priced to help decision making in the event a problem arises.

A key tool which is part of the management method is risk control. Future problems can be reduced through better and more extensive site information, which comes about through better pre-contract sire investigation. I have mentioned previously the benefits of having well produced contract information, although this is often not achieved in practice but ought to be high on the list of priorities. If the contract information is defective or deficient the project is almost certainly going to run into problems sooner or later.

Different forms of procurement allocate risk in different ways. By choosing the method of procurement which is most satisfactory for the work to be undertaken and by considering the aspirations of the Employer and the likely aspirations of the Contractor, some problems can be avoided. The chosen method of procurement will often result in the selection of the contract. It is important that contract documents are clear and unambiguous and if possible a form of contract that promotes dispute avoidance should ideally be used[2]. It is worth trying to make sure the Contractor has fully understood its obligations and it is not a bad idea for the Employer to make sure it understands its own as well, especially were the contract has been drafted or amended by its lawyers.

The type of contract might also be selected to promote collaboration or partnering. Some projects run under such contracts have been very successful[3] but many have not. In my view to be successful such contracts need to provide for incentives that promote collaboration and cooperation.

During the bidding stage the management methods can be used to help select the most appropriate contractor. Characteristics of a contractor best suited to the project might be that it has a previous track record of similar projects, or least projects of a similar size and complexity and that it has adequate financial standing. Ultimately it is the people carrying out the work that are important and it is prudent to make sure they have been properly trained. As an Employer it is tempting to try to cut costs and reduce the contract price, or to allow the Contractor to under bid for the job. Many contractors are selected on price alone. To some extent that might be prudent, and it is a fine balance, but go too far and you risk entering a contract where the Contractor is not being properly paid. Whilst this might result in a saving it is also likely to promote claims by the Contractor in an attempt to make up the shortfall required by it to make a profit and survive and as John Ruskin wrote *"It's unwise to pay too much but it's worse to pay too little…"*[4]. A contract let in this way is likely not to promote cooperation and is very likely to result in disputes, the cost of which far outweigh any savings the Employer might have thought it had made at the Contractor's expense.

Management methods can be continued right through the post contract stages by ensuring that whatever type of contract has been used, that as much of a collaborative environment as possible is established. In the post contract stages both parties have role to play and

both should do what the contract requires. This requires an understanding of the contract documents which should have been achieved at bidding stage for the Contractor and much earlier than that in the case of the Employer. I have already discussed the possible difficulties that may arise from the differing aims and ambitions of the parties which will become most obvious during and after the works have been completed. Active monitoring of progress will help the Employer to understand how the project is progressing but also acts as a barometer of the Contractor's performance. This is not always welcomed by Contractors and programs are seldom contract documents but a good program which is regularly updated can help to promote a culture where problems are not saved up until later, or heads buried in the sand.

One of the most effective means to avoid disputes during the contract is to establish a dispute board and I will explore this later in this paper.

Dispute avoidance techniques-non escalation methods

Escalation occurs when a disagreement, which could be resolved by party negotiation, evolves into an argument, possibly requiring the assistance of a third party neutral, and then into a fully blown dispute which cannot be resolved without the intervention of an outside party[5]. Somewhere between the second and third stages of escalation a party will consider that its rights are being compromised, hence the frequent recourse to legalistic solutions.

Non escalation attempts to prevent the issue reaching the third stage. The aim of applying non escalation methods is to avoid the dispute and at the first and second stages the outcome is often non binding, whereas at the third stage the inevitable outcome is a binding decision by a third party. That third stage can be included as a final measure in the overall strategy for dispute avoidance, or it can be external to that process where there is recourse to litigation or arbitration.

Non escalation methods rely on their being at least two parties to a contract and at least as far as the Employer and Main contactor are implemented in the post contract stages. Again a realistic attitude and recognition by both parties about the scope for possible disputes is required to make non escalation methods effective.

Non escalation methods start with informal negotiation by the parties themselves. Instead of informal negotiation, parties tend to become entrenched in their own positions early on by asserting themselves which leads to a lack of cooperation. This might all be the result of a defensive stance taken because the issue has been dealt with legalistically at too early a stage. Non escalation relies on the parties not burying their heads in the sands in the hope the problems will go away because they never do.

Alternatively, frequently problems are all left to the end of the project when there is no longer any way to resolve them without arguments about money. The place to start to resolve issue is on site, for instance at regular site meetings. Problems can only be resolved at this level if there is openness which is exposed to a no blame culture. Thus may be difficult to achieve because problems so often result in additional costs

for which someone ultimately has to pay. However, there is no substitute for trying to find out what he problem is and to encourage discussion about possible solutions.

There is no doubt the best way to resolve disputes is at the site level and by the project personnel themselves. Concerns about impacting the financial interests of one party or another or interpersonal relationships may prevent those closest to the project from achieving this. It might be possible for the project manager to take a key role at this stage, but a lot depends on that person's skills and whether they are considered to be partisan, simply because most project managers will be paid fpor by the employer. The next step is to escalate the problem for formal negotiation by managers or senior staff of each of the organizations. This may fail for some of the reasons it failed at site level, although those involved may not have the same close personal relationship with the project. However, at this stage the resolution is entirely in the hands of the parties and solutions which may be outside the terms of the contract but which may nonetheless be regarded as fair can be explored and implemented. Of course self interest and the risk of a loss of face may prevent any form of negotiation, a situation not helped by most current construction contracts which are not drafted to promote such discussions, and that rely principally on contractual and legal rights and remedies.

Although negotiation sometimes works, what is required is the involvement of an independent third party to help resolve the problem. A third party, if engaged throughout the project is also able to stand back and identify issues that might lead to problems and therefore to be more sensitive to the warning signs that things may be heading for a dispute. In some countries government staff are not permitted to take it upon themselves to negotiate, especially in a situation where the government might have to provide the remedy and in this case use of an independent third party can enable the government to distance itself from any recommendation or decision made by that third party. A third party is less likely to have any material interest in the outcome of the project and is in a better position to guide the parties to as fair a decision as possible.

Non escalation methods further subdivide into two categories: reactive and proactive. Most traditional methods are reactive in that they are implemented only after a dispute has arisen and include such things as mediation, adjudication and the ad hoc dispute board[6]. Mediation is (at least in theory) a consensual process, whereas traditionally any form of adjudication is not. Some might argue that mediation is proactive and can be used to avoid disputes but that is rarely the case and mediation tends to be focused on the solution to a problem, not the avoidance of the problem in the first place.

A proactive method of dispute avoidance is one that monitors the project and provides for the parties a means to discuss issues and if necessary for them to seek advice on how the problem might best be resolved. Examples of how this has been achieved are the dispute avoidance panels set up for the 2012 Olympics and for the project known as The Shard in London, which is currently under construction. Such panels have their origins in America which was the breeding ground for the Dispute Review Board, a type of Dispute Board which gives non binding opinions and recommendations[7]. One characteristic of such panels is the lack

of procedural rules which allows the panel to be very flexible, adapting procedures to suit the particular situation and promoting a level of informality. The other characteristic is the close contact with the project by monitoring documents and carrying out regular site visits.

Internationally, the preference has been for the establishment of the Dispute Adjudication Board. As I mentioned above adjudication is traditionally[8] considered to be a non consensual and in fact a highly adversarial procedure which is not conducive to dispute avoidance and this one of the difficulties if the DAB is ad hoc because the only function the board has is one of adjudicating disputes after they have arisen. However, a properly constituted standing board, established at the outset of the contract can provide a powerful tool that allows for dispute avoidance.

The standing Dispute Board

Whether the preference is for a DAB or DRB a full time standing board normally has a duty to monitor the project in ways that enable the warning signs of possible disputes to be recognized. The board should promote discussion and because there is no learning curve the board should be able to do this quickly and effectively and is able to make non binding recommendations to allow the parties to resolve issues. The board should promote party involvement and unlike adjudication and litigation, the parties will have had the chance to influence the selection of the board members.

The Dispute Board is a creature of contract and requires contractual provisions to enable it to function. The provisions will be contained in the contract terms relating to dispute resolution and the powers of the board are normally set out in separate procedural rules. In the case of FIDIC the Dispute Board is obliged to carry out regular site visits (FIDIC procedural Rule 1) and the parties are obliged to provide the bard with documents and reports on a regular basis (Procedural Rule 4). During the site visits the board is expected to hold meetings with the parties at which the concerns of the parties can be raised and also if the board is carrying out its duties proactively the board itself will raise any matters it considers might be of concern, although this needs to be done with some care.

The board is obliged to produce reports of its site visits (procedural Rule 3) in which it should formally set out any matters for concern and any early warnings of possible future problems and disputes. FIDIC has adopted the DAB and some see this as a disadvantage over the DRB which is seen to be more collaborative. However under sub Clause 20.2, the parties are able to refer any matter to the board for an informal non binding opinion prior to seeking a binding decision, therefore used properly a DAB has all the advantages of a DRB but in the event the problem cannot be resolved informally there are provisions for it to be escalated and referred for a binding decision (sub Clause 20.6). However, even after a binding decision has been given, and one party has given a notice of dissatisfaction, there is a period where the parties may seek amicable settlement (sub Clause 20.5) before the dispute is referred to international arbitration, giving another opportunity for the parties to keep control of the decision themselves and for them to resolve their own issues.

One of the reasons why Dispute Boards are not used more widely is the perception they are expensive. So, is dispute avoidance worth it? A typical board costs between 0.05 and 0.26% of the total construction costs[9] and about 99% of disputes are resolved within 90 days, the average cost being about 0.02% of the value of the dispute. 98% of disputes end with a Dispute Board decision or recommendation. Of the remaining 2% half are normally upheld in future proceedings and of the remaining 1%, most are upset because of a procedural irregularity which was not related to the substance of the decision. Then there is the bonus of time. UK based adjudicators may look enviously on the 84 day period to resolve the dispute afforded to a Dispute Board but that time is much, much shorter than it would have been had the dispute been arbitrated. The figures above are related to dispute resolution. One of the big unknowns is just how effective a Dispute Board is in preventing disputes in the first place. The evidence for that can be found from large projects that have had very few or possibly no disputes referred to the board and none that progressed to arbitration either. Now that really is dispute avoidance in action.

The subtitle of this paper was *"How to Stop a Simple Problem Spiraling From a Breeze to a Whirlwind"* which is a quote by Nael Bunni[10] from a paper given at a conference at Kings College, London in 2003. The fact is we have a choice and we can actively implement dispute avoidance if we want to. Just how many simple problems have resulted in major disputes that could have been avoided? By making the choice to implement dispute avoidance procedures it really should be possible to reduce the number of whirlwinds and allow projects to be carried out in a summer breeze.

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__1__ Brewer Dispute Avoidance, (2007) 437 Contract Journal 22, __2__ As far as I am aware the only contract form which actively promotes the avoidance of disputes are to be found in the latest FIDIC suite, published in or after 1999, although in practice almost all contracts could be simply adapted to provide this. __3__ An example being Heathrow T5, __4__ The saying has been attributed to Ruskin but not found in any of his written works, __5__ The three stages of escalation and differences of opinion were suggested by I M Eilenberg in Dispute Resolution in Construction Management, 2003, __6__ They also include expert determination, arbitration and litigation, although we are concerned here with a process that precedes the last two. __7__ Although under some circumstances the recommendations can become binding, particularly where DRBs are used internationally. __8__ Particularly if a comparison is made with UK statutory adjudication. __9__ Data from the DRBF database, __10__ Nael G. Bunni (2003) 'Contract or Cooperation? Insights from the Middle East.'A paper given to a conference organised by the Centre of Construction Law at King's College London, 11th September 2003.