

# Nipping Disputes in the Bud

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# Short History of Dispute Handling



The earliest way in which contract disputes were handled was by seating a panel of tradesmen to decide based on prevailing trade practices and common-sense.



Sometime later, lawyers came along, got involved and suddenly it became a specialized legalistic process.

# Key attribute of Good Contract Lawyers and Good Contracts

- Engineers and technical persons tend to conceive the working arrangements for a contract by focusing on how things can be made to fit and work together perfectly. In this mode, these technical persons tend to wear optimistic lens.
- So, most contract arrangements begin from this optimistic, perfect fit mindset.
- Unfortunately, in the real world, nothing works perfectly. Something is bound to deviate from the perfect will of the technical people.
- Deviation from the perfect design: That is where the problem starts.
- Good Lawyers anticipate most of the departures from the parties' perfect will. Then discuss & include provisions for handling each deviation, Good Contract.

# Why Dispute Management Process and Capability are essential

- The execution of a typical contract is multi-faceted and complex. In addition, site conditions and nature are never totally predictable.
- Furthermore, project stakeholders and contributors can have varying views and interests. Meaning that differences are inevitable.
- So, despite the best efforts of a good Contract Lawyer, **“real life happenings”** always produce some things that were not anticipated.
- That is when a Dispute Management Process or Capability is needed to identify and address the differences that could negatively affect the project outcome.

# Why Dispute Management Process and Capability are essential



**Differences and disputes are a fact of our daily existence with others.  
So all of us must develop some capability to handle them routinely.**

# **Dispute Terminology, Genesis and Evolution**

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# Dispute Terminology, Genesis and Evolution

1. **Differences**, basically arise from varying **Interests**, comprising issues from both:
  - Positive Outlook: Needs, Desires, Hopes, Values, Expectations,
  - Negative Outlook: Concerns, Issues, Beliefs, and Fears
2. **Claims** (in contracting) may arise from varying Interests or differences in expected allocation of Costs, Obligations, Responsibilities, and Risks which are often revealed when external or unexpected events occur.
3. **Disputes** then arise in the absence of an agreed resolution to Claims
4. **Conflicts** are based on absolute and uncompromisable differences in fundamental values and beliefs.

# Dispute Terminology, Genesis and Evolution

**Differences:-** arise from “conflicting” interests



**Claims:-** contract request for what is due



**Disputes:-** firm disagreement over claims



**Conflicts:-** arise from fundamental differences

# Common Causes of Contractual Disputes

- ❖ A summary of recent surveys into causes of construction disputes by Acardis, an engineering, global design and management consulting company, indicates that the most common causes of disputes are:
  - Failing to understand and/or follow contract provisions.
  - Owner directed changes/variations.
  - Poorly documented claims.
  - Omissions or errors in contract documents.
  - Unanticipated events and Changed conditions.
- ❖ 63% of disputes occur during construction and can impact the project outcome.

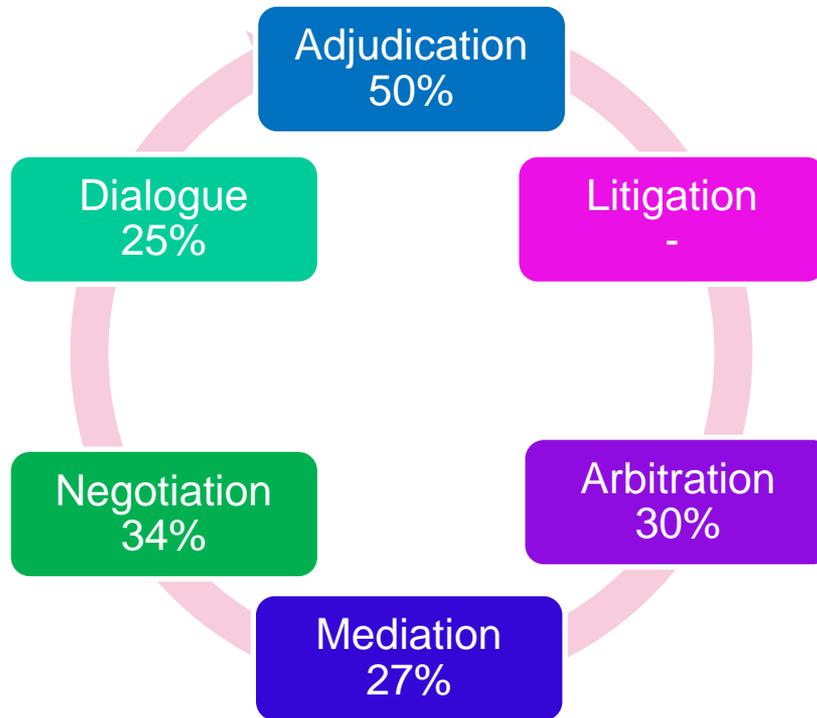
# Prevalence of issues giving rise to Disputes

- ❖ 50% - Extension of time
- ❖ 41% - Defects
- ❖ 31% - Loss and Expense
- ❖ 26% - Valuation of Variations
- ❖ 21% - Payment Issues
- ❖ 20% - Withholding money
- ❖ 20% - Interim Applications.

Source of percentages indicated:  
[Construction Contracts and Law Report 2022](#), RIBA Survey.

# Approaches in use for Dispute Avoidance or Resolution

Source of percentages indicated:  
[\*Construction Contracts and Law Report 2022\*](#), RIBA Survey.



**Less Adversarial**

Guided by trade practices  
and common-sense

**More Adversarial**

Guided more by legal  
principles and procedure

**Nipping Disputes in the Bud:  
Contract and Legal Approaches**

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# The 4 C's for minimising Disputes

Fig 1

## 1. Coverage & Clarity of Contract

To minimise disputes regarding project schedule, objectives, and expectations, the negotiated provisions must adequately cover all aspects.

The negotiated terms and associated procedures must also be made clear to all project team members. (Manuele 1993)



# The 4 C's for minimising Disputes

## 2. *Constant Reference to Contract*

Understand the contract fully and for whatever project team members want to do, they must follow the appropriate provisions of the contract.

Fig 2



# The 4 C's for minimising Disputes

## 3. Comprehensive Records

Per Ebbinghaus's Forgetting Curve, within:

- 1 hour, people will have forgotten an average of 50% of the information;
- 24 hours, they will have forgotten an average of 70% of new information, and,
- 1 week, they will have forgotten about 90% of it.

**Maintain detailed and accurate records of:**

Plans, Discussions, Decisions, Deliveries,  
Site conditions, Equipment, Personnel.

Fig 3



# The 4 C's for minimising Disputes

## 4. *Communicate & Collaborate as Partners*

Implement contractual arrangements as a collaborative partnership effort that deals with issues and problems encountered by coalescing around acknowledged project goals as well as related interests of partners.

### ***Pillars to remember:***

- Existence of common goals
- High cost of the adversarial approach
- Shared benefits of collaborative approach

Fig 4



**Nipping Disputes in the Bud:**

**Practical, Common-sense Approaches**

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# Vital Elements of Practical Approach for Avoiding Disputes.

- **Communication** – Means of ideas and data exchange
- **Interests** – Includes issues, needs, concerns, hopes and fears.
- **Criteria (Legitimacy)** – Fair principle or benchmark.
- **Trusting Relationship** – Aspect giving ability to deal with differences

# Interests:



## Remember that:

- Interests are the silent motivators of people, organisations and nations.
- The basic problem you may be dealing with is “conflicting” interests.
- Interests include needs, expectations, desires, issues, concerns, and fears.
- Look behind any articulated positions for interests that may be compatible.
- To find and understand the interests; ask why, why not, ... ?

# Criteria (Legitimacy)



## Recognise that :

- Principled standards can provide a fair basis for deciding and the legitimacy they bring can withstand later inquiry and so such decisions are durable.
- Objective criteria are powerful forces of persuasion. Think of a range of fair standards. (Precedents, benchmarks, common industry practices, etc)
- Rely on the persuasive power of objective criteria based on their fairness.
- If you cannot find a fair standard for agreeing the substance of negotiation, find a fair standard for the process.

# Trusting Relationship



## Understand that:

- The means to avoid disputes is for the parties to influence one another till they reach an amicable agreement or settlement of the issue.
- Having a relationship also engenders mutual understanding, respect, keeps emotions in balance and enhances communication.
- For two sides to be mutually persuasive, an effective and trusting working relationship is needed. Hence a trusting relationship is helpful and necessary for nipping disputes in the bud.

# Closing Tips

1. Persuasion is the key tool for reaching a mutually acceptable settlement, avoiding, or nipping disputes in the bud.
2. To have a better chance at persuading them when needed, build trusting relationships with individuals on the other side. A reputation for Trust is golden.
3. Communicate effectively. It is the only means you have to persuade the others.
4. Understand the Interests of both sides so you know how to persuade.
5. Beware of the extreme views from “Hawks” and “Spoilers” in your team.
6. Consider all credible principles/criteria that are applicable to guide fair sharing. (e.g. international, independent, or industry adopted)

# Thanks for your Attention

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# Highlights of Background in Contract Administration & Negotiation

- His involvement with contract administration started very early in his professional career when he joined the construction team of the Kpong HEP Project as an Inspector in 1980.
- In 1988 he was appointed Office Engineer with responsibility for the overall administration and management of the National Electrification Project, which was implemented as 15 concurrent construction contracts funded by arrangements with six distinct funding partners.
- Technical Expert – Renegotiation of Ghana-VALCO Agreements
- Lead responsibility for the resolution of the \$ 50m contract dispute with General Electric for the Takoradi Thermal Power Project in 2000.
- Adjunct Lecturer - Negotiations, Executive Masters Program - GIMPA.
- Bui Power Authority CEO during the construction and operations commencement of the \$ 800 m Bui HEP; commissioned in 2014.
- Member, Dispute Adjudication Board – Kasoa Bulk Supply Project 2020