

CHAPTER FOUR

Construction claim and dispute resolution technique

12/17/20
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Objective:

after the end of this chapter able to understand

1. Construction Claims
2. Causes for Claims
3. Requirements for Claims
4. Process of Claims
5. Construction Disputes
6. Dispute Resolution

❖ Construction claim

➤ Claim is legally defined as **declaration** or **assertion to right**.

➤ **is a demand for** payment of additional compensation, adjustment of the parties, Something refers to additional cost or time for construction projects

➤ is a **legitimate request for additional compensation** (cost and / or time) on account of the changes caused as a result of actions and / or directions.

➤ Claim shall be the result of **actions and / or directions** causing changes either to the

Types of claims

Three different types of claims:

- **Time Related Claims:** Claims associated with **delay or in time completion** of projects where either of the following six **Entitlements or Penalties** are subjected to:
 - Time Extension only
 - Liquidated Damages only
 - Time Extension and Cost Compensation
 - Bonus
 - Reliving of Obligation
- **Cost Related Claims:** Claims associated with **monetary compensation** where either of the following **entitlements or penalties** are entertained:
 - Additions requiring rate adjustments
 - Provisional sum adjustments
- **Default by Contracting Parties:** Claims associated with **non performances of contractual obligations** such as:
 - Delay in Payment Certificates
 - Suspensions and Terminations

➤ The basis of claim is either the **contract** and/or the **applicable law** like extra contractual or tort claims, or in case where no contract exists.

➤ **Claims under the Contract are of two types:**
Claims as a result of certain anticipated & specified events & Claims as a result of an event where a certain term of the contract is breached

For example, in case of

- Non-performance or late performance
- Partial performance,
- Defective performance

The remedies in both cases may relate to financial compensation, time extension, & other benefits or remedies.

❖ Causes for Financial compensation:

- With respect to Variation;
- Measurement Changes;
- Adverse Physical Conditions;
- The Employer's Risks;
- Defects & unfulfilled obligations
- Failure to commence, critical or non critical delays, suspension of work,

❖ Causes for Time Extension claims

Delay in supply of documents or drawings; (see FIDIC Clause 6.3 & 6.4)

- Adverse physical conditions; (see FIDIC Clause 12.2)
- Tests required but not provided for; (see FIDIC Clause 36.5)
- Suspension of the progress of the works; (see FIDIC Clause 40.2)
- Failure to give possession of site; (see FIDIC Clause 42.2)
- Suspension of the execution of works:

❖ Remedy under the Law

- It relates to a claim arising out of the contract based on the grounds that a term of contract had been breached but where the remedy is not designated in the contract
- This is specially related to the assessment of damages or specific performance or others.
- With respect to assessment of damages only courts or the arbitral tribunal or the adjudicator is empowered to assess &

Major causes of changes in construction

Can be initiated by Client, Engineer, Contractor or Regulatory bodies, etc
thes are:

- Errors or omissions
- Design
- Construction
- Differing conditions
- ✓ Physical
- ✓ Social
- ✓ Economical, etc
- Defaulting by one of the parties

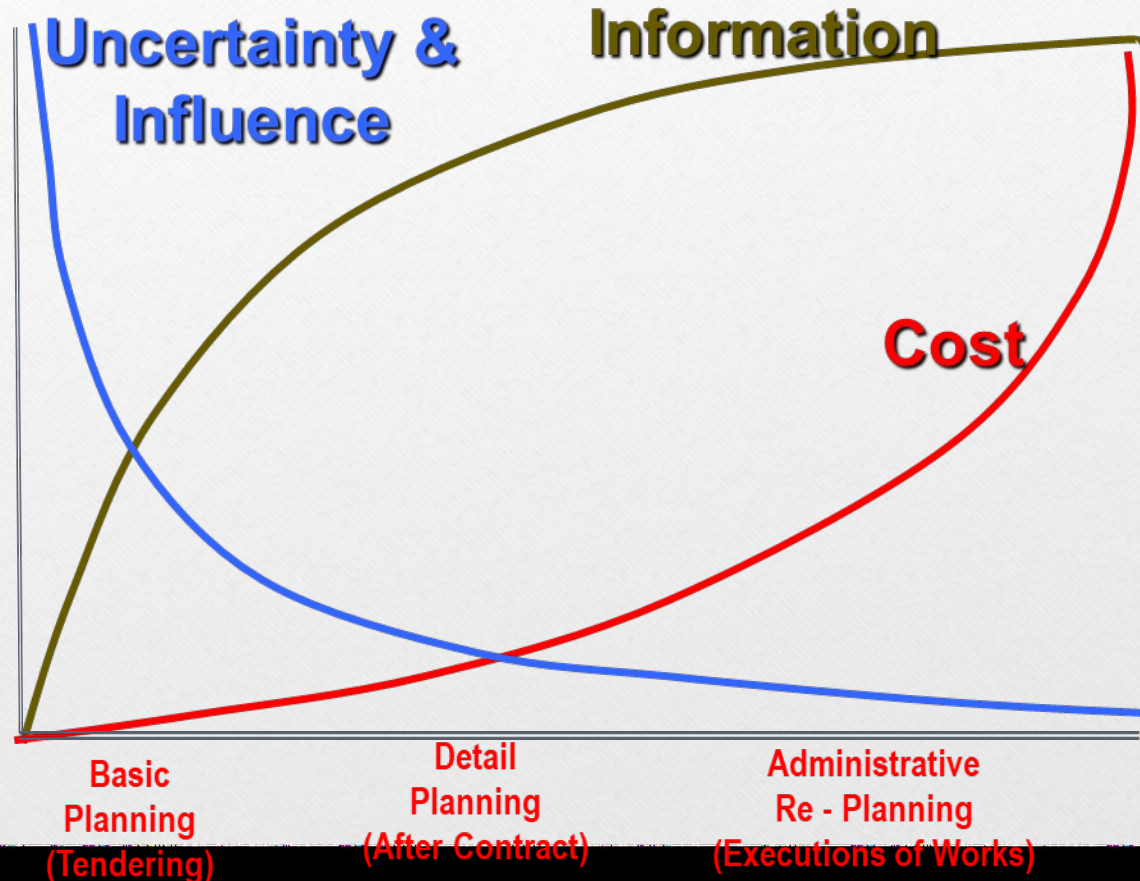
2. Major Causes for Claims

- Causes for claims may be the occurrences of deviations from the promises made under the construction contract during the performance of the Construction Contract.

These deviations(Dr. Wubishet) may reflect themselves in terms of or in relation to :-

- completion time;
- construction cost;
- quality performance; and

Uncertainty / Influence – Information – Cost Interaction Curve



Uncertainties → Changes → Claims

The following factors may also cause claims.

- Poor or unclear tender and/or contract documents;
- Poor or inadequate administration of responsibilities by stakeholders; and
- Unforeseen or vague situations during execution of the Construction Project;
- ❖ The following categories of factors

❖ Requirements for Claims
for the claim to be successful, it has to fulfill certain valid requirements.

These requirements are related to:

- Substantive requirements;
- Procedural requirements; and
- Proof requirements;

substantive requirement we mean supporting or giving justification for the claim by specifically citing or raising the provisions:

- Of the Construction Contract; and/or

Procedural Requirements

it mean the serving of the required prior written notice to the designated party under the contract. This is called intention to claim.

- This prior written notice shall also be given within the contractually designated time scale

Proof Requirements

mean the submission of the relevant documentation, which supports the claim.

- The relevant documentation may relate

In case of disputes the proof requirement, in addition to the relevant documentation, may also include:-

- Factual Witnesses;
- Expert Opinion;
- Site Visit or Inspection;
- Other mode of proof, if any;

4. Process of Claims

- ❖ The claims process generally classified in to the following three phases:
 - Claim Submittal;
 - Claim Processing;
 - Claim Enforcement;

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graph LR; A[Claim Submittal] --> B[Claim Processing]; B --> C[Claim Enforcement];
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Claim Notification
Claim Preparation
Claim Submittal

Claim Compensation
Remedial Rights
Claim Closure

Claim
Submittal

Claim
Processing

Claim
Enforcement

Claim Handling
Dispute Resolution
Claim Approval

Claim submittal

- This is a process by which the claimant is obliged to claim within a reasonable period of time (28-30 days in most contracts) followed by the claimant's preparation for all substantial documents & legal aspects supporting its entitlements for an official submittal.
- This constituted that a claim has been filed for its consideration if all the three sub-processes called

❖ Claim Processing

This phase is classified further in to the following three sub-processes,

1. Claim Handling;
2. Dispute Resolution;
3. Claim Approval;

1. The Claim Handling, this sub-process initiates checking of the claim whether, it is legally or contractually supported or not, documents provided are valid and reliable to substantiate the claim for

After verifying the validity of the claim proper computations & evaluations will be carried out to present the proposed compensation for the contractual parties the claim

- **Checking procedure, legality & substantiation**
- **Re-computation for compensations**

**Claim
Handling**

**Dispute
Resolution**

**Claim
Approval**

**Preventive DRS
Amicable DRS
Judgmental DRS**

**Claim
Accepted
/ Rejected**

Records

- Approved Master Program with Updates
- Resources Plan to meet the programs
- Actual Implementation Records
- Progress Photographs or Video records
- Delivery records
- Evidences proving excepted risks
- Evidences proving adverse weather Condition
- Site Diaries
- Instructions
- New Drawings

Dispute Resolution Systems

- ❖ The contractual parties will pass through different dispute resolution system depending on their acceptance over the proposed compensation varying from the simplest mediation by the consulting engineer to the final court ruling in the form of litigation.
- ❖ Three types of dispute resolution systems are well recognized. These are,
 - **Preventive Dispute Resolution System;** (by use of partnering, dispute resolution advisors, facilitators
 - **Amicable Dispute Resolution System;**
 - **Judgmental Dispute Resolution System**

Where dispute was handled in any form of its resolution System, **termed as Dispute Resolution.**

➤ **Claim Approval**, once the contractual parties agree on the final outcome of the claim process, then they have reached in to a stage where the claim is approved.

➤ **Claim Enforcement**

This phase is sub-divided in to the following two sub-processes

The claim enforcement will entertain the inclusion of the approved **claim in to payment** certificates where their enforcement is due.

- ✓ this compensation or entitlement is due in accordance with the approved claim and its enforcement requirements, then it is concluded for its closure.
- ✓ In order to account for such an administration process contracts

5. Construction Disputes

☐ Construction dispute may take different forms: dispute in relation to **time** or **cost, time** & cost or otherwise.

➤ **Disputes relative to Time**

- ✓ With respect to delay the contractor or the employer may have their own respective claims.
- ✓ The employer's claim is related to liquidated damages.
- ✓ The contractor's claim mostly related to prolongation and/or disruption claims.
- ✓ Prolongation may be defined as a critical

These time claims may include:

- ✓ Direct costs in relation to plant, equipment & labour;
- ✓ On-site overhead costs:

These are referred to as site overheads & consist of the costs of an administrative & supervisory staff including but not limited to:

- Site staff;
- Trades foremen;
- Plant & tools;

Off-site Overhead:

- ✓ The off-site overheads cover contributions by individual contracts to the cost of maintaining the contractor's head office.
- ✓ They are difficult to establish & especially in respect of a period of

❖ **Disruption** may be defined as the effect of an event or a number of events on the efficiency of execution of the works, irrespective of whether or not there had been a delay to a critical activity.

Continuous, extensive & cumulative disruption, however, may end in critical delay & prolongation of the time for completion.

✓ Inefficiency, loss of productivity of labour & uneconomic use of

- ❖ When acceleration of the progress of the works is required, the cost may include the expense of,
- Working additional hour;
 - Providing additional labor;
 - Providing additional or different equipment;
 - Advancing the date of delivery of manufactured elements;
- Programming** involves introducing the parameters of time & resources into

Depute Resolution method

Partnering,
Advisory &
Facilitation

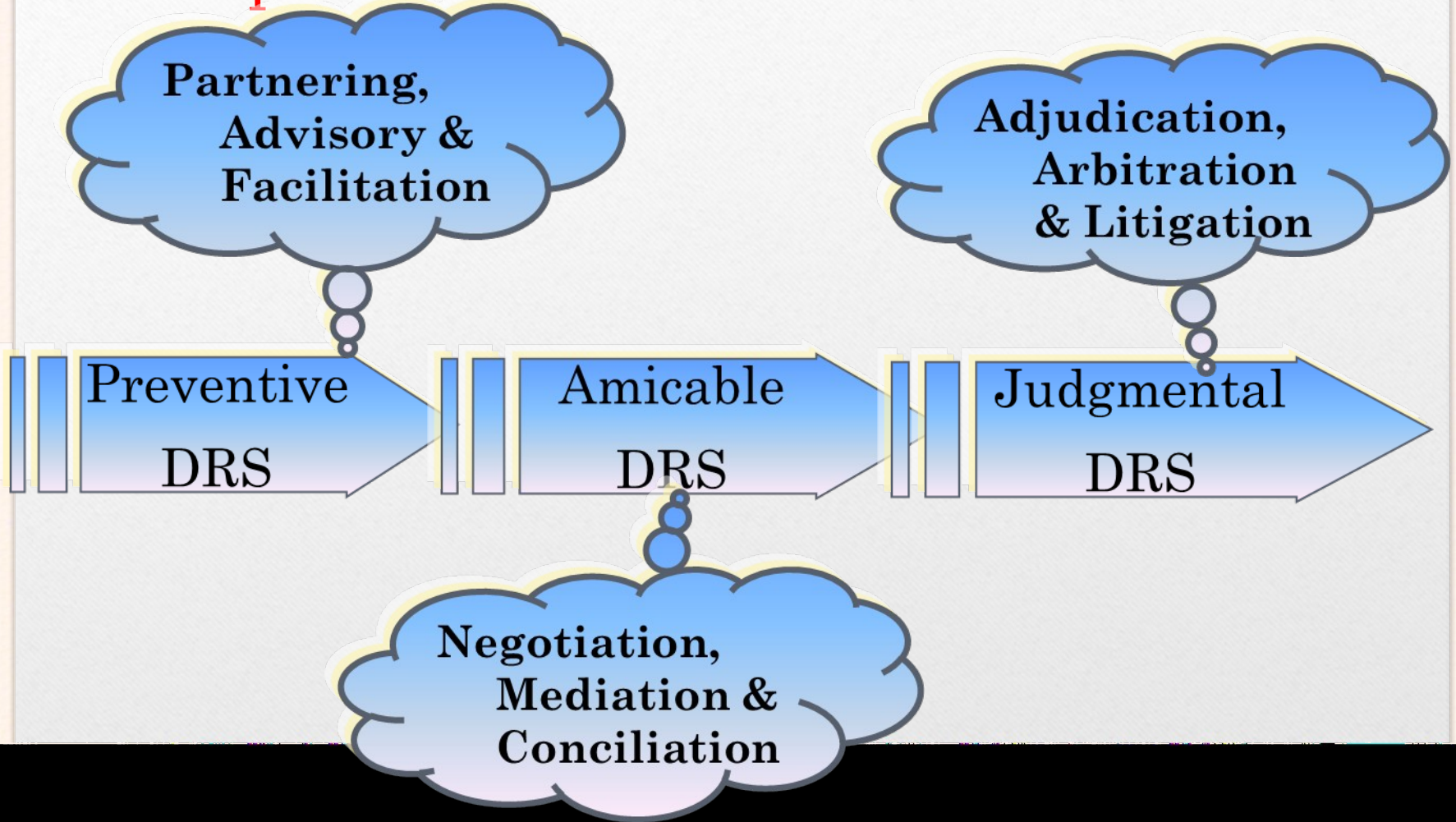
Adjudication,
Arbitration
& Litigation

Preventive
DRS

Amicable
DRS

Judgmental
DRS

Negotiation,
Mediation &
Conciliation



Preventive Aspect

The following aspects may contribute to the prevention of construction disputes.

To mention few of them:-

- To have a well planned project;
- To have a well studied project;
- To have a well designed project;
- To have a clear, accurate & complete tender document;
- To have a clear, accurate & complete contract document;
- To have a balanced (in terms of

□ The following are some of the internationally recognized dispute prevention systems.

- Disputes Potential Index (DPI);
- Intelligent Allocation of Project Risks;
- Incentives to Encourage Cooperation;
- Partnering;
- Others;

➤ Disputes Potential Index (DPI);

DPI identifies the presence of dispute-

Intelligent Allocation of Risks

The most efficient & cost-effective way to structure project relationship is to **assign each risk** to the party who is best able to manage or control the risk.

- o **Incentive to Encourage Cooperation** - to encourage cooperation among all participants in the construction project. By temporarily subordinating their individual interests to the legitimate needs & success of the project as a whole, they

Partnering

Partnering is a team-building effort in which the parties establish cooperative working relationships through a mutually developed, formal strategy of commitment and communication.

- It can be used for long-term relationships or on project-specific basis.
- When used on a project-specific basis, partnering is usually instituted at the beginning of the construction process after the contractor has been selected, by holding a retreat among all project

The basic premise of partnering is seeks to create an environment of good faith, where open & free communication, mutual trust & respect, and team work take the place of adversarial, competitive relations.

- The first cornerstone of partnering is recognizing & developing common goals.
- The second cornerstone of partnering is issue resolution. Of course,
- The third cornerstone of partnering is

Amicable Aspect

The very feature of amicable settlement is that the disputing parties shall have full control both over the process & the outcome.

- There is no third party imposition of solution on the parties to the dispute.

❖ Negotiation

Negotiation is a give & take process, a serious attempt to reach a settlement agreement.

Direct negotiation is held directly between the very parties to the dispute. The parties may, of course, be assisted by their own internal advisors. In case of assisted negotiation, mediation & conciliation come in to picture.

The principled negotiation has seven elements.

- Alternatives;
- Interests;

Negotiation helps to save time & money for the parties in dispute. It maintains also relationship between the parties. It creates a win-win-situation. The settlement is also easily implement able

Mediation

Mediation describes the process of a neutral person helping disputing parties to negotiate a resolution to their dispute.

A mediator facilitates the discussion or negotiation. He will never propose a solution for the settlement of the dispute. The advantages of mediation include **informality, speed & economy**, but more importantly perhaps, it often leads to an agreed settlement between the parties rather than an imposed award or judgment.

□ The **process of mediation** is described as

Conciliation

Similar to mediation, conciliation is a voluntary form of dispute resolution where a neutral party, the is appointed to facilitate negotiation between the parties in dispute & to act as a catalyst for them to reach a resolution of their

- Unlike the mediator, the conciliator under the conciliation process, takes a more active role probing the strengths & weaknesses of the parties' case,
 - Making suggestions;
 - Giving advice;
 - Finding persuasive arguments for & against each of the parties' positions; and
 - Creating new ideas which might induce them to settle their dispute;
- The conciliation service is regulated by specific contract agreement signed

□ Judgmental Dispute resolution

The very feature of judgmental form of dispute resolution is that the third party known as the court judge, the arbitrator or the adjudicator decides the case before him for the parties.

- The parties to the dispute shall have no control over the process (especially in case of the court system)
- following are recognized.

Adjudication ;

✓ Arbitration; and

✓ Litigation;

□ Adjudication

Adjudication can be defined as a process whereby an appointed neutral & impartial party is entrusted to take the initiative in ascertaining the facts & the law relating to a dispute & to reach a decision within a short period of time.

□ Under the FIDIC Conditions of Contract Dispute Board is suggested.

- Dispute Review Board (DRB);
- Dispute Adjudication Board (DAB):

DISPUTE REVIEW BOARDS

-DRB - a representative from the owner, one from the contractor and a third, selected by these two representatives. The third member chairs the board.

-The members usually have experience in the kind of construction work being undertaken and are also familiar and experienced in dispute resolution. It is important that all the board members are independent of any of the contracting parties, although

ARBITRATION



- 'Arbitration' has been defined as: “ is the reference of dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction”.
- **ARBITRATOR**
- He is private in so far as
 - He is chosen and paid by the disputants
 - He does not sit in public



ARBITRATION

- He acts in accordance with privately chosen procedure so far as that is not repugnant to public policy
- So far as the law allows he is set up to the exclusion of the state courts
- His authority and powers are only whatsoever he is given by the disputant's agreement

■ ARBITRATION ADVANTAGES

- There is belief by both parties that Arbitrator is qualified to handle the case
- The Arbitrator is an expert in the field
- The procedures are open to the parties
- Hearing are private
- The decision is binding

Other Advantages of Arbitration

- Neutrality; (of the arbitrators)
- Confidentiality; (no publicity of both the process & the outcome)
- Procedural flexibility; (the parties in dispute are capable of designing their own process)
- Speed & cost;

- Finality of awards; (no appeal, if not always)
- Enforcement of awards; (recognition of the award by national courts)
- Limited powers of arbitrators; (no coercive power)
- Multi-party disputes; (no joinder & no consolidation of third parties without their express consent)

- **The type of arbitration;**
 - Institutional vs. ad hoc;
 - International vs national/domestic;
 - Binding vs. non-binding;

Litigation

Litigation takes place at the court of law having jurisdiction over the case.

- Litigation is the most serious & adversarial method of dispute resolution.
- The procedure before the court is so rigid & not tailor made to the construction dispute resolution.
- The courts are following the standard

- The clear disadvantage of litigation is that it being the most time consuming.
- The clear advantage of litigation is that the court itself enforces its own orders & judgments.

The role of courts, however, very important in terms of:

- Enforcing an agreement to arbitrate;
- Recognizing & enforcing domestic arbitral awards.

Advantage of ADR

- Reduce time to disposition
- Less costly discovery of facts
- More efficient case management
- Increase confidentiality
- Facilitation of early, direct communication and understanding among the parties of the essential issues on each side of the dispute
- Preservation of ongoing party relations

Selection of appropriate resolution method

Depends on many factors:

- Content
- Relationship
- Situation, etc
- ❖ But should be:
 - Fair enough
 - Satisfactory
 - Efficient
 - Effective

END OF CLASS

Thank you for your attention!
and respect overall the semester
I wish a better life
For all

QUIZ- 2 sec-2

1. Draw uncertainty/influence- information-cost interaction curve and explain the relationship?.1pts
2. What are the difference b/n general damage and liquidated damage?1pts
3. What are the difference b/n mediation and conciliation and write the power of conciliator in dispute resolution mechanism?.1pts
4. What are the four major cause of construction claim?1pts

bones

QUIZ- 2 sec-1

1. What are the difference b/n general damage and liquidated damage? Elaborate briefly.1pts
2. What? And what is the causes of disruption claim. Is it the responsibility of contractor or not? 1pts
3. for the claim to be successful, it has to fulfill certain valid requirements. List these three requirement