Towards Dispute Resolution in Construction Contracts in Sri Lanka: What is Quantity Surveyor's role on Dispute Avoidance rather than Dispute Resolution?

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Abstract— *This article considers the Quantity Surveyor's (QS) role from inception to close-out of the final account by achieving holistic approach on commercial, contractual and contract administrative advice from inception to close-out of the project which enhance the completion of the project successfully; obtain value for money; and create sustainable development environment in the local construction industry.*

Unfortunately, projects are in delay as prominent character in the industry and becoming disputes to resolve with additional effort which need allocating additional management time and cost to settle them. End of process of dispute resolution a compensation to be made for victim party by other which had not contributed positively by any kind of activity to complete a project. Therefore, neither of parties would allocate any reservation cost for this component and become unforeseen hidden cost and expenditure only to resolve if arise. The QS does all the commercial calculation since incept to end of the lifecycle of project and participate to resolve dispute. As QS involves both events, it is important that QS to think that the 'dispute avoidance' practices rather than 'dispute resolution' approach during his or her professional practice is very important in every task so that project would mitigate with less number of disputes and paying un-necessary money which could be minimized or avoided of expenditure for the dispute resolution.

The methodology was the reviewing of the Literature Review on the subject (disputer avoidance rather than resolution) and listed out to understand the role of QS on the subject to understand the area which need to improve their knowledge and how preventive action can be possible in competently.

Keywords— **Disputes, construction contracts, resolution, avoidance, QS role**

I. INTRODUCTION

A project defines by Band and Devanport (2012) stated that "construction industry is the project-based and delivery of project by consists of large number of small firms". CEM (2009) describes 'it represents a discrete piece of work with clear start and finish dates, providing specified benefits at accepted cost' and it undertaking by changing requirements, multiple parties, unforeseen developments, changing circumstances and misunderstanding. Therefore, construction projects become more complex in nature and it has lengthy process of designing and building makes construction a process in which disputes are virtually ensured (McManamy, 1994).

A combination of environmental and behavioural factors can lead to **construction disputes**. Projects are usually long-term transactions with high uncertainty and complexity, and it is impossible to resolve every detail and foresee every contingency at the outset. As a result, situations often arise that are not clearly addressed by the contract. The basic factors that drive the development of **construction disputes** are uncertainty, contractual problems, and behaviour (Jaffar, 2011).

RICS (2003) explains that if an inappropriate strategy would not apply on project, it becomes in a failure to meet client objectives, disappointment and potential litigation. Therefore, an owner of the project who is client has keen to take additional measures to avoid pathetic situation.

Hence, Lawrence and Lorsch (1967) illustrated that appointing of an integrator must be deal with conflict and idea has suggested to deal conflict with three approach: confrontation (choosing, after discussion, a solution from those put forward for consideration); smoothing (avoiding conflict); and forcing (the naked use of power) and again further it has summarized as:

The most effective integration was achieved in organizations that used confrontation, supplemented as necessary by forcing behaviour to ensure that issues were properly confronted. ***Smoothing was the least effective method****.*

Clearly, the problem is not merely a question of avoiding conflict and eliminating disputes, but a more definite problem of how to take advantage of the potential benefits of conflict without removing necessary sanctions.

Therefore, research proposed to assembling a team of people from different professions is to harness a variety of views which that each person brings his or her own criteria for decision-making and by participating debate and dialogue so that clear choices can be made. In other words, controlling conflict is not the same as eliminating it. Tjosvold (1920) quoted that:

The idea that conflict is destructive and causes misery is so self-evident that it is seldom debated. Employees fight about many issues, but the wisdom of avoiding conflict is too often not one of them. However, it is the failure to use conflict that causes the distress and low productivity associated with escalating conflict. Conflict avoidance and the failure to develop an organization equipped to manage it, not conflict itself, disrupt. Open, skilful discussion is needed to turn differences into synergistic gains rather than squabbling losses.

II. What is dispute in construction contracts?

A construction contracts are essentially a commercial agreement which include two parties to enforceable in law and based on the promises that two parties make to each other (Turner, 2007). He further stated that a contract must be an **agreement** – which is based on mutuality; **consideration** – which means that both sides are bound to give something to each other; and **intention** – to be legally bound by the terms of the agreement.

If one party question other party's obligation and challenge their rights according to the contract and unable to resolve a dispute exist. Brown (1993) highlighted that conflict is doubt or questioning, opposition, incompatible behavior, controversy or antagonistic interaction and disputes is one of the range of events considered as conflict.

Kumaraswamyand Yogeswarn (1998) explained that dispute can be said to exist when a claim or assertion made is made by one party is rejected by the other party and that rejection is not accepted. This mean that dispute can be settled at early stage by negotiation with parties' interaction as team basis without breaking of separation.
One of features in the conflict is that it may difficult to communicate between individuals, breaks personal and professional relationships and reduces effectiveness. Therefore, conflict produces tension and distracts team members from performing the task (Hackman and Morris, 1975, Wall and Callister, 1995).

After the general understanding the conflict relates in construction defines by numerous scholars' researches. Smith (1992) published that conflict and disputes as an endemic problem in the construction industry.

Construction conflicts affect the interests of many stakeholders in connection with big investments; they reduce profits and are therefore very expensive and unprofitable (AwakulandOgunlana, 2002). However, the stakeholders become increasingly dissatisfied with the legal methods of construction conflict resolution (Stipanowichand Matthews, 1997). As a result, the existing confrontational culture often determines a reduction in labour efficiency and an increase in production costs (Rose, Mac, and Chen, 2002). Finally, Yiu and Cheung (2006) stated that, in the construction industry, conflicts sometimes seem inevitable due to high differences in interests among the participants of construction projects.

III. Causes of disputes in construction industry

Mitropoulos and Howell (2001) explained that in order to prevent a dispute first thing is to find the origin of the problem.Hohns (1979) noted that every projects are in the construction industry is a unique and therefore sources of disputes are vary and listed five primary sources of construction disputes as existence of errors, defects or omissions in the contract documents, failure of someone to count the cost of an undertaking at the beginning, changed condition, consumer reaction and people involved.Diekmann and Girard (1995) has considered 159 construction projects and finding were based on logic regression analysis of data on the frequency and severity of disputes and result concluded that each project has different characteristics which included people, process and project aspects towards the disputes and the 'people' issue held the key to avoiding contract disputes.

The dispute avoidance in construction contracts by their interested parties and Camicheal (2002) confirms that construction disputes and confrontations arise according to the stakeholders' different needs. The contractor's orientation in the project is towards usually money and maximizing a profit to secure. The designer's point of view that the design or building which might be his monument to himself, his reputation, his artistic temperament and the like. The owner is most influential party in the construction and his needs are entirely different to others like a corporate ideas to implement and expect to receive his own mind satisfaction. Therefore, among the parties' needs are ultimately connect to the owner's goal achievement and if something unforeseen and not properly discussed in the contract a goal would jeopardized, communication become strained and to be followed by demands, refusals, harder positions on every mind aspects and there is lack of team spirit and poor communication among the project team and people are a prime cause of construction disputes and the only solution to these disputes as well.

With all explanations above, it is very difficult to identify the root cause of disputes, variables are large to be focused in order to find a solution. Hence, this paper would discuss their root cause of disputes under Williamson (1979) identified that three large root causes of conflict as behavioural problems, contractual problems and technical problems due to uncertainty that would become disputes.

IV. Disputes due to the behavioural cause

The construction is the productivity oriented and in economics, one of main resource category is labour. CEM (2009) stated the meaning of labour as human resources, which include innate human qualities boosted by education, training and experience. Therefore, labour participant in the contract is from unskill labour, semiskill labour, skill labour, charge hand, gang leader, supervisor, engineer, manager, advisor and decision makers are likely to be according to the requirements of the project and thus human factor on dispute become a major component as inbuilt factor. These categories are in the project, would create disputes or worsening further issues by human interaction, personality and professional background among them and Vorster (1993) further categorized that ambition, frustration, dissatisfaction, desire for growth, communication and level of power, fraud and faith are also a reason to cause a dispute.

Since contracts cannot cater for every eventuality, wherever problems arise either party may have an interest in gaining as much as they can from the other. Equally, the parties may have a different perception of the facts. At least one of the parties may have unrealistic expectations, affecting their ability to reach agreement. Alternatively, one party may simply deny responsibility in an attempt to avoid liability (Jaffar, 2011).

The main causes of inter-organizational conflicts are identified as: conflict due to taskinterdependency, conflict due to differentiation, conflict due to differing values,interests andobjectives, conflict due to communication obstacle, conflict due to tension, and conflict due topersonality traits

V. Disputes due to the Contractual problem

The contract in the project governs the entire operation and contract is made by human. Due to the fact that human made documents there are many contractual issues identified as errors and or contradiction of given information and fault of the owner when the contract did not consider in his bid price as unforeseeable amount of money.

The written (or unwritten) contract is what guides the parties' expectations as to payment and performance. The contract must clearly identify the rights and obligations of each player in the process, from developer, to designer, to contractor, to subcontractor and supplier. More problems occur because an incomplete, vague or ambiguous "Scope of Work" in the agreement. A well-written contract that properly analyzes and allocates the risk on the project will often save heartache at the time of completion (Devries, 2010).

Allocating risk to the wrong party makes it difficult to control it. If the event then occurs, the whole project could be affected. If the wrong party has the contractual risk, they may not be equipped to know what to do, or when to manage it effectively. This can lead to ducking for cover (possible concealment of the problem), finger pointing (blame deflection), claims/counterclaims and little co-operation to find and deal with the problem. Irrespective of who has the contractual risk, delays could occur and this is not good news all round (Cakmak. E 2014).

VI. Disputes due to the technical problem

Recent years, clients demand to start projects quickly without adequate preparation. If pre-planning is not done properly there are many technical issues in construction process to start. The main reason is that if the design has not been completed at the tender stage. The tender is prepared based on material prices which are not firm, plant and labour outputs which may not be achieved, waste allowances based on past records, and a figure added for overheads based on last year's cost. A figure is then added to cover for an anticipated profit; with the whole of the work often being carried out in the open and subject to the vagaries of the weather (CEM, 2009).

Technical disputes also basically include engineering clarification which is a part of engineering decision making processes. For example, request for information (RFI) is considered an effective vehicle to clarify differences in understanding during project operations. By utilizing those RFI, most unclarified issues are resolved on site before they develop as a technical dispute and solve the problem of inadequate tracing mechanisms for request of information. These disputes can be solved by project personnel with the appropriate expertise.

A common cause of construction disputes that previously was mentioned. Incomplete contracts, this issue is common to the construction industry and the reasons why contracts are not made properly can be many. Variations and changes in the construction process is almost impossible to avoid and can sometimes have very expensive consequences, change and additional work issues are where most of the disputes relating to the construction process takes play. However, the contractor can prepare for future changes in advance, for instance to create a cost-post for possible things that can occur and have it approved, this can be brought up in the risk-analysis for instance such as "unforeseen" future alterations and additional work. In addition, the contractor can set up "prevention plans" and take extra notice to phase's whit some greater sensitivity, but also taking in account the probability of the many different changes and additional work that may occur during the project life cycle. Changes and additional work is something that does not always arrive from the client but is often the case. For instance the client can suggest another choice of materials, requests concerning the design, or a new project in principle that is fixed to "merge into or belong to" the old project. The consequences can be great unless the participating are careful and understand how to resolve certain issues such as what kind of changes are we to make, the choice of method, what will it cost and do we have even a contract for this additional work. (Potts, 2008).

Disputes over the contract scope of work (*Plans and specifications)* , represented by the plans and specifications (as modified or amended), are some of the most significant areas of dispute on a construction project Many disputes materialize over conflicting utilities and other building structures(Kinger, Moran and Arnold, 2009). They further listed out that *Shop drawings and submittals*; *Change orders/extra or out-of-scope work*; *Differing site conditions; Construction sequencing/project access; Subcontractor substitution; Construction defects*are creates disputes in project.

VII. Procedure on current solutions

It is understood that human factor on project would be a major factor creating on issue, problem, conflict, dispute and the like which has initiated as no solution. There are many reasons behind on that disputed stream and all are depend on human attitude that how they want to address particular circumstance to resolve or make it further complication (WaltonRE, Dutton JM1969).

Issues follow the records to justify and resolve it. When it was with the hand of project team it would have been resolved with less time and additional cost. Once it fails it goes automatically to resolve by independent, neutral third party to give decision by forces (award of arbitration) or processioning to agreed which arrive of acceptable conclusion of discussion on dispute (mediation practice) still it depending on records which the site team had and only the difference is interpreting them as their vested power.

VII. recommendation

The world phenomena on construction is there are disputes arise in every projects and the important factor is to avoid them rather than resolving once arise. Therefore, factors relates to the dispute avoidance is focused on human resources as all other resources, process and delivery methods and the likeare handled by humans. Then it founds that pre-planning activity is prime objective in any project and project team can start the process as a dispute avoiding practices.The highlighted factor on human behavioural activities is that multicultural short term team bonded for particular project and poor communication

among the team would more tended to create reparation of similar conflicts at every projects.

Generally, a design is capable to cater the constructability, clarity and completeness of project successfully and dispute means the set targets are improper. In ***Trebor Bassett Holdings Ltd v ADT Fire and Security Plc, 2011*** said that sign or execute the contract prior to commencing the works and know which terms actually form the basis of the contract and to be tested at early stage of the project. The message given in the case is that record is the testing tool of dispute resolution, hence dispute avoidance is addressing to make records properly which has far less than money require for resolution.

In order to reduce or mitigate thepotentialdisputes to arise, the parties recommit themselves to the principles of good communication and cooperation set out in the Memorandum of Understanding (JMC, UK 2001).Simply improving communication practices by improving information flow with technology or using Computer-Aided-Design will not reduce per se the incidence of disputes in construction. Fundamentally, work processes, policies, and procedures as well behaviours need to change in concert if disputes are to be reduced in construction (Singha M, andWyal A,2002).

Hence, human factor (in this case QS) is the main target to address on dispute avoidance practice as s/he does involving to prepare a contract documents in the construction contractit would possible to initiate to minimizing of arising of dispute(s) in the construction project. Therefore, dispute avoidance is more valuable than resolution in terms of value for client's money.

Jergeas and Hartman (1994) propose approaches such as reference to facts and better understanding of contractual terms that could help the Contractor and the Owner to avoid protracted disputes as effective project management might be more successful than resorting to claim experts.

The time to do so is now! Things fall apart. Dispute resolution should be planned and provided for before and during contract formation, rather than after a dispute has arisen (Brookie,Handrik, and Fletcher,2007) which mean that dispute avoidance is important than dispute resolution.

There are multiple practices is suggested by AAA:

- Act as a neutral third party fact-finder role even you have appointed to one party.
- Familiar sample language for contract clauses, submission agreements or the procedures agreed to by the parties
- Serve as a resource in the design of a programme that incorporates the dispute avoidance which best suited for specific projects
- Provide relevant guidelines, rules and other relevant materials to educate the parties.

VIII. CONCLUSION

The research find out that disputes are more common in construction project anywhere in the world. The client never allows cost to allocate in the project budget for correction of any errors, mistakes and mismanagement as intention with the best team appointment for the project.

Therefore, it is now team members' obligation to fulfil the client's requirement with his satisfaction and obtain value for money including carry out sustainability development in the construction industry.

Hence, students who are in the degree programme must understand the industry requirement and need to competent on dispute management process and adopt best practice as 'dispute avoidance' from the inception of the project as less value need for the requirement.

Finally, this findings would help to develop as your academic carrier guidance and specialisation can be focused accordingly.

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