Improving dispute resolution on construction projects in Kuwait

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Abstract

The number of different parties involved in most construction projects can result in a high risk of conflict which, if not dealt with quickly, could develop into disputes that can take years to settle. These disputes add little value to a construction project but increase the cost burden on different parties when taken to arbitration or litigation. Dispute costs are often in addition to the costs of project delay which together influence the hardening of attitudes of the parties. Dispute avoidance or early dispute resolution is desirable for all parties concerned. The nature of the construction business in the State of Kuwait is probably no different to other countries as one of the most litigious industries. However, improved dispute resolution practices within Kuwait, could result in significantly reduced costs and wastage. This paper presents early findings from a literature review, as a part of PhD researching disputes and different dispute resolution strategies. It aims to determine the ability to employ the current alternative dispute resolutions strategies in the State of Kuwait.

Keywords: construction management, Kuwait, ADR, alternative dispute resolution
1. Introduction

After stability returned to the Gulf area following the Gulf war in 2003, many international companies started to explore the possibility of working in the area, especially in Kuwait. These companies came from different cultures with different legal systems which had their own dispute resolution mechanisms. Sometimes these do not meet the requirements of Kuwaiti civil law, nor its dispute resolution system. As a result, contracting with the Kuwait market may be too risky for some international and domestic companies, especially when it is clear that the most important issue for the Kuwait government, in respect of such contracts, is that they must be under the jurisdiction of Kuwaiti civil law.

At the same time, it is important for the international companies to be able to resolve disputes amicably under the Kuwaiti civil law. However, Kuwaiti civil law does not contain an amicable alternative dispute resolution system. Furthermore, it usually directs contract parties straight to arbitration or litigation directly or both in some other cases, and this is based on the conflict clauses in the contract terms.

1.1 Claims, conflicts and disputes

In this section, the various definitions of claim, conflict and dispute are presented. The most suitable have been selected and adopted as the definitions used in this research Where an appropriate definition cannot be found, an alternative definition has been proposed to suit the needs of the present research.

Levin (1998 p.2) stated that in 1980, a ‘claim’ was defined by the US federal government as ‘a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in sum certain, the adjustment or interpretation of contract terms, or other relief with arising under or related to a given contract’. The 1987 edition of the American Institute of Architects (AIA) standard form construction contract added, ‘a claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of contract terms, payment of money, extension of time or other relief with respect to the terms of the contract’ (Levin 1998). The parties mentioned in both definitions could include owners, designers, main contractors, subcontractors or any other party of contract or their representatives.

From a legal point of view, these two definitions could be considered or interpreted in different ways by different parties, because of the conflict of interests between these parties. Also, in the construction industry, the word ‘claim’, generally, refers to the claims raised by the contractor. That is why some other recent authors have added the word ‘contractor’ to the definition. For example, Uff (2005 p.436) referred to claims as ‘additional payments which may be due to the contractor under provisions other than those covering valuation of the work done’ and ‘the damages for breach of contract’.

Similarly, for Kuwaiti construction projects, Alsabah (1997 p.2) defined ‘claim’ as ‘a statement by the contractor that he believes that he is entitled to extra payment or extra time to complete the works. Such payment may be as prescribed under a clause of the contract, or arise from a breach of the ...
contract or Kuwaiti Civil Code (KC code). In this research, Alsabah’s definition has been chosen as the most suitable one for the Kuwaiti construction industry and the nature of claims in this sector.

The conflict of interests between parties, mentioned in the pervious sub-section, may lead to conflicts or disputes if the parties do not achieve an early agreement on the claim. Conflict has been defined by Collins (1995) as a ‘serious disagreement and argument about something important’ and more specifically, ‘a serious difference between two or more beliefs, ideas or interests’, however, this definition is for conflicts in general. In order to make this definition distinctively applicable to construction projects, and to those in Kuwait in particular, the following definition has been developed and adopted for this research: ‘the first stage disagreement, after the contractor’s unsettled claim statement under a clause of the contract, or in breach of the contract or Kuwaiti Civil Code’.

According to Alsabah (1997 p.2), a dispute is defined as ‘an issue affecting the parties to the contract which they have been unable to resolve without reference to a third party’. Furthermore, construction disputes seem to be an inevitable phenomenon, especially when today’s construction projects are faced with many uncertainties, after the world economic crisis and its effects on the construction industry. Disputes may lead to project disruption, loss in money and time, and detrimental relationships between contractual parties. Lewis et al (1992) advocated that the respective damages could be much alleviated, if construction disputes were be more appropriately and swiftly resolved.

The previously mentioned definition relates to disputes and the inability to resolve problem issues. This definition neglects the conflict stage, which is an important stage after the unsettled claims and during which conflicts can be resolved amicably. Considering this, disputes in the Kuwaiti construction industry may be defined as ‘issues which are not amicably settled during the conflict stage and which need to be referred to a third party to be resolved under the Kuwaiti Civil Code and the terms of the contract’.

1.2 Dispute avoidance

Dispute avoidance is one of the main aims of partnership in construction projects, and one of the main aims to be reached to facilitate success in partnering. In order to achieve this aim, some contract amendments should be made earlier, rather than using standard forms of contract, a measure designed to ensure consistency with the partnering objectives (Partnering in Public Sector, 1997). However, disputes are a reality in every construction project and without the means to address them, minor issues can fester and grow, and it is very difficult to limit them under one contract. Jannadia et al (2000) generalised that different parties to a contract negotiate small and uncomplicated conflicts, while larger and more complex cases commonly delay the project through some lengthy legal issues. Normally, if parties cannot reach an early resolution themselves, legal procedures begin, severely affecting all of the participants concerned.

In the construction industry in Kuwait it is possible to take steps to avoid litigation, and to control disputes, by developing and employing various mechanisms for alternative dispute resolution that can be implemented during almost any stage of a construction project. Jannadia M. et al. (2000) make it clear that rising costs, delays and risks of litigation in construction disputes have prompted the
construction industry to look for new and more efficient ways to resolve these disputes outside the courts, which is one of the intentions of this research.

2. Literature

This review is based on a study of the literature, reinforced with preliminary interviews with a number of experts in the construction industry in Kuwait. The particular focus of this paper is to present the early findings from a literature review, as a part of PhD researching disputes and different dispute resolution strategies. The interviewees represent the construction industry in Kuwait both public and private sectors, however, their views on dispute resolution in Kuwait that it should be improved as it will be shown later on. More interviews would of course be needed to find significant results upon the ability of employing the current alternative dispute resolutions strategies in the state of Kuwait.

‘In a perfect construction world there would be no conflicts, but there is no perfect construction world’ (Acharya and Lee, 2006), therefore, it is clear that conflicts in construction projects are inevitable, exactly like in any other form of human relationship, and Cheung (1999) describes disputes in the construction industry as an ‘endemic problem’. Construction projects involve a variety of different participant groups including owners, designers, general contractors and subcontractors among others. Each of these groups has their individual objectives and concerns in terms of interest conflicts and disputes and the construction industry has gained a reputation for being contentious and litigious, in a manner that often damages the reputation of both parties. Inevitably, such disputes affect quality and punctuality of the construction project progress.

The conflict problems encountered have lead to prolonged delays in implementation, interruptions and sometimes suspension of projects. Due to being attributable to various groups, large investments and low profits, conflict continues to maintain its highly explosive character (Awakul and Ogunlana, 2002). Furthermore, Acharya and Lee (2006) concluded that most of the conflicts are minor in nature in the initial stage, but if not handled well, these could result in claims, counter claims, troubles, and bad relationships between project participants.

Kassab et al. (2006), concluded that ‘it is difficult, if not impossible, to completely avoid construction conflicts’, however, minimising the impact of conflicts brings many advantages and reduces contractual problems. Creating alternative dispute resolution mechanisms and training construction staff to increase their capability to resolve conflicts could be the first two steps to avoiding and resolving dispute in future construction projects.

Alsabah (1997) argued that if the parties are unable themselves to resolve the claim, then the claim becomes a dispute, which must be resolved by a third party. This third party might be a conciliator, a mediator, an adjudicator, an arbitrator or the court, and construction contracts normally specify the procedures for processing claims and disputes.

Despite the potentially unpleasant connotations and consequences of conflict, beneficial aspects of conflict have also been recognized, and conflict management has been said to be a major component in construction project management (Gardiner and Simmons, 1995). Kumaraswamy (1997) shows the
benefits of a properly managed conflict, through an example in which he notes that a conscious shift of conflict occurrences from the construction to the conceptual design stage is seen to contribute to more creative and constructive inputs, in comparison to what may have transpired in the absence of such conflicting views. The cross-fertilization of ideas and the consideration of more alternatives, through such constructive conflicts at the design stage, would usually lead to 'better' designs as well.

2.1 Dispute elements

Figure 1: Circle of Dispute Elements Adapted from Fereig (2007)

Fereig (2007) and Furlong (2005) have discussed dispute elements. They found that the nature and dimensions of any dispute are verified by some elements, identified as: values of parties, the nature of their relationships, external effective factors (moods), available data on the dispute and its sides, individual authority structure in different parties, and also the disputed interests.

Fereig (2007) stated that it is the values and beliefs of various parties that play a part in the occurrence of a dispute. These values include religious values, ethical values, professional ethics and professional conscience. Furlong (2005) added that some simpler day-to-day values are employed in business or work contexts (such as the value of customer service, loyalty to the company, etc.). Disputes are usually the result of differences in viewpoints and understandings of the above-mentioned values, which affect the evaluation of the parties from each other. Some of these include; good and bad; right and wrong; and honesty and corruption.

Value conflicts occur when there is a clash in the differing values of the parties, which either cause or exacerbate the situation, and because values, morals and ethics are so important to human beings, value related conflicts tend to be very heated and personal (Furlong 2005).

Fereig (2007) describes this as the history of interactions between the parties, and if the previous interactions have been of a negative nature, this will result in motivating one party to have a negative perception of the other party. Furthermore, Furlong (2005) concentrated on past relationships and established that the term ‘relationship’ in conflicts identifies specific negative experiences in the past (past history, poor relationship) as a cause of conflict. Relationship conflict occurs when past history or experience with another party creates or drives the current negative situation, and therefore, the relationship is a product of previous experiences between parties. These experiences can weaken communication and have a negative affect on the dispute. Some of these experiences are: general impression; previous failed relationships; repeated negative actions; organisations’ internal responsibilities; history of relationships; and nature of relationships.
Khan (2009) stated that, in conflicts, the term ‘moods’ covers external factors, which are not directly a part of the situation, but still contribute to the clash. In negotiations, a bad mood could drive any issue to a major problem, or make a difficult situation worse as a result of an outside force. Fereig (2007) related ‘externals and moods’ to a wider variety of external factors, such as the general environment in which the dispute occurs, moods of the different sides of the dispute (some could be lenient and others could be intolerant), surrounding factors and the effect of those factors on the dispute, as well as the on-site general conditions, surrounding circumstances (such as weather conditions and the emotional state) and also the parties’ emotional connection to the disputed issue.

The availability of data is an important issue for each party to understand the conflict (Fereig 2007), and any missing information can lead to ambiguity and the ability to understand and solve the problem. Correct data, on its own, is not enough to build common ground, because the understanding and interpretation of such data, as well as how these items of data are linked, and the type of recognition that results from this linkage, may vary.

Accordingly, data is identified by Furlong (2005) as a ‘key driver’ to conflict. The inaccuracy and deficiency of information between working parties cause data conflict or dissimilarity in both access to the information and appreciation of its importance. These data problems often lead to further negative statements and further data problems, while another significant data issue is the question of interpretation, where the same information is understood by different parties in different ways, and this interpretation opens the door to notably different versions of the same information.

The internal responsibility structure and decision-making process of each party is one of the most important defining elements in many disputes. Fereig (2007) and Furlong (2005) believe that misunderstanding of the authority structure triggers a large number of disputes, and exploitation of the authority and the rivalry between the employees of one party could create dispute. Responsibility distribution and limited power of some parties’ representatives restricts the negotiation power of the representative in preventing and solving the problem at an early stage of its occurrence. On the other hand, unlimited power can also cause dispute, especially when this power is not used in a proper manner.

Based on Fereig (2007), interests represents the parties’ welfare and the valuable issues for them. In any construction project, each party works for their own interests, and the party whose interests are threatened will try to stop and regain any losses by making claims. These claims are one of the principle causes of conflicts, project delays and even termination of contracts.

2.2 Dispute origins

Results of the preliminary interviews (some of which are presented in the following section), show that origins of disputes in construction projects in Kuwait could fall within a number of causes including: changes and variation to orders; environmental factors and weather conditions; political circumstances; the economy; parties’ and staff mistakes; different regulations and legal systems; and cultural issues.
Fereig (2007) categorised different types of dispute origins in construction project contracts under nine main categories; origins related to management; origins related to the owner; origins related to the contractor; origins related to the work nature; origins related to the quality of the work, as well as the insurances and guarantees submitted by the contractor; origins related to the site status; origins related to safety issues; origins related to the sub-contractors; and origins related to the workers.

2.3 Dispute resolution strategies

The construction industry continues to struggle to identify ways to resolve disputes equitably and economically. Solutions proposed often focus on defending unilateral benefits or creating _win–win situations_ when disputes go into litigation (Cheng et al., 2009). Consequently, a _win–win situation_ is difficult to achieve, or impossible in some cases. Based on previous known causes of disputes in different cases, some additional clauses could be added to construction project contracts in Kuwait to safeguard the rights of different parties, and to avoid conflicts. So that they could minimize reaching the dispute stage and/or resolve conflicts amicably.

Brooker (1999) regards the construction industry as being _contentious_ as its disputes are widespread. The means of resolving construction disputes traditionally have been through arbitration or litigation, and yet in recent years both procedures have fallen into disrepute, particularly in terms of their costs, delays, procedural complexity and adversarial approach (Latham, 1994; Hoare et al., 1992). The effect of dissatisfaction with the traditional systems of dispute resolution has led to interest in the idea of alternative dispute resolution (ADR) in the United Kingdom, as it has in other comparable jurisdictions, notably the United States (Stipanowich and O’Neal, 1995; Stipanowich and Henderson, 1993). However, it is worth noting that Uff (2005) claims that _the term, ADR, has been in circulation for some years, having been imported from the USA_.

A construction project involves a variety of different participant groups, including owners, designers, general contractors and sub-contractors, among others. Each has its individual objectives and concerns, in terms of interest conflicts and disputes, and according to Cheng et al. (2009), the construction industry has gained a reputation for being contentious and litigious in a manner that often damages the reputation of both parties in dispute. Such disputes affect work quality and delays construction project progress. As a result, Min-Yuan Cheng et al. (2009) added that _the construction industry continues to struggle to identify ways to resolve disputes equitably and economically._

A _win–win situation_ is usually an aim of each party in a conflict (Cheng et al., 2009; Fereig, 2007), but when disputes go into litigation a _win–win situation_ will be very unusual. Based on Fereig (2007), a _lose-win situation_ will be the outcome, or even a _lose-lose situation_ in some cases, due to wasted time and the cost of lawyers. At the same time, _lawyers competent in engineering issues or engineers with legal backgrounds are difficult to find_ (Cheng et al. 2009). Cheung (1999) depicts the escalation of hostility and costs as a result of moving to higher levels in the hierarchy of disputes, in the form of rising steps shown in Figure 2 below.
Andrew (2001) believes that the many ADR processes that have saved time and money, compared to conventional methods, cannot be compared to each other, but ADR techniques rely very much on retaining the parties’ involvement in shaping the solution. Most significantly, they are private, voluntary and non-binding, and there are many different forms of ADR, but the most common in the United States - and the techniques most likely to be adopted here - are mediation and the mini-trial.

ADR is a broad definition incorporating a variety of processes, which are alternative to the formal litigation system, where the parties prove their arguments in court through an adversarial system of examination, cross-examination and challenge. Furthermore, the UK construction industry has a long history of employing other procedures outside the formal system of litigation (Brooker 2007).

According to Andrew (2001), ADR is a spectrum of voluntary, negotiation-based processes, in which representatives of the parties to a current or potential dispute meet together for collaborative problem solving and consensus building, with the goal of achieving a mutually acceptable resolution. The processes are intended to be less adversarial alternatives to traditional conflict resolution pathways.

‘Disputes exist in all building and construction projects. Alternative dispute resolution methods are now commonly used as a means to resolve construction disputes.’ (Yiu, 2005) Alternative dispute resolution techniques are important to be applied for early dispute resolution in construction contracts in Kuwait.

Stipanowich (1997) argues that alternative dispute resolution, such as mediation _is the most popular and familiar of settlement-oriented alternatives among contractors, design professionals and attorneys’, and he adds that _its popularity appears to be a direct reflection of the relatively positive experiences all these groups report with the process. Construction attorneys generally perceived mediation to be the most effective approach for achieving a wide range of goals, including reducing the cost and duration of dispute resolution’, and this is depends on _where parties are able to agree to mediate after disputes arise‘.
Brooker and Lavers (1997) state that "the most clearly voiced perception of the appropriateness of ADR for resolving construction dispute was that it is relatively quick and cheap when contrasted with both litigation and arbitration", and they calculate that "ADR is seen as saving management time by 61%". Nevertheless, they also identified the non-binding nature of ADR as a disadvantage. Ellison and Miller (1995) demonstrated that ADR techniques are becoming increasingly common to resolve disputes in the construction industry. By resolving disputes in a timely fashion, the owner has a better idea of his final costs, and the contractor is more accurately aware of his expenses, as-built schedule and cash flow. Moreover, as the contractor has experience with the concept, the dispute review boards will tend to lower contingencies and legal costs in future bids (Kohnke 1993).

Cheung (1999; p190) states that alternative dispute resolutions arose in the last two decades as a response to the high cost and lengthy process associated with arbitration and litigation. However, ADR procedures tend to be relatively informal, but their range is very wide (Uff 2005; p60). In the United Kingdom different types of ADR mechanisms have been used in order to amicably resolve disputes in construction projects, such as conciliation, mediation, mini-trails and adjudication.

Mediation, involves a neutral person finding middle ground between the position of the parties with the aim of achieving a negotiated solution acceptable to all parties (Uff 2005; p61). However, in North America and Australia mediation is pre-eminent (L. Street; 1992). In Hong Kong mediation is the favoured choice (Cheung; 1999).

Some contracts include recourse to a conciliator empowered or required to express his provisional view on the merits of the case (Uff 2005; p62). Cheung (1999; p.190) states that —Conciliation and Mediation are very similar both in nature and in process”. However, the difference has been positioned on the degree of participation by the neutral person. Street (1992) concluded that Conciliation seems to be the preferred choice in international and European usage. Uff (2005; p62) concludes conciliation as «a form of aided settlement in which each side present a summary of its case, in trail mode and using advocates and experts, before a tribunal composed of a senior representative of each side and natural chairman”.

Statutory adjudication is presently the most widely used form of dispute resolution in the UK construction industry” (Uff 2005; p.63) with the adjudicator's decision binding until the dispute is finally resolved by formal means.

3. Necessity of improving dispute resolution process in Kuwait

Kuwait has been distinguished by rapid growth in development over the last thirty years, with remarkable achievements in various fields: economic, social, educational and construction. The Kuwaiti government has considered the construction industry to be one of its prime considerations, with the highest priority among non-oil sectors. The rapid increase in growth of the population made it essential for the government to concentrate on construction activities, and the construction industry, therefore, occupies a very important place in the economic activities of the country (Alsabah, 1997).
Kuwait’s construction industry sector has been hit by a combination of factors in the last quarter of 2009, resulting in a decrease in forecasted growth to 0.65 billion Kuwaiti dinars. Falling oil prices and new OPEC quotas are set to reduce petroleum production, which accounts for 80% of government revenues. Meanwhile the global credit crisis, along with local political uncertainty, is greatly impacting investor confidence in Kuwait and these factors have lead to an exodus of ex-pat’ workers and mean that some infrastructure projects may be cancelled or postponed until confidence returns. By 2013, the construction industry’s value is set to reach 0.78 billion Kuwaiti Dinars (KD). The country’s construction industry value growth has slipped down marginally from 2.67% growth in 2008, to 2.28% in 2009, and is expected to fall further to 1.03% in 2010. Kuwait’s construction industry growth will recover slightly by 2013, with growth of 1.60% expected by then. There are already signs of delays in several large infrastructure projects, notably the $7 billion metro system for Kuwait City, which is expected to be delayed by 18 months, and the extensive Al-Zour refinery which may be revised. However, there is news that the Kuwaiti government is investigating diversification in energy production, with analysis of nuclear generation potential (Kuwait Infrastructure Report; 2009).

3.1 Existing dispute resolution process in Kuwait

In Kuwait (based on directorate of experts rules and conditions) the process of resolving disputes is depends on the agreement between the parties in the contract, for example if parties have mentioned that they will resolve any dispute under the Kuwaiti civil law at Kuwaiti courts which is litigation step. Otherwise, the contract parties can choose Arbitration which should be mentioned in the contract if both parties wanted to resolve their disputes with arbitrator, the decision of the arbitrator is binding without any further agreements.

By using standard forms of contract, a fairer balance may be achieved in case of dispute. Conversely, if one party imposes his own standard terms on other party. This tend to contain one-side provisions which place the other party at a disadvantage in a dispute. The interviewees made sure that the improving of dispute resolution mechanism in Kuwait is a demand to recuperate the construction industry. However, improving the strategy of dispute resolution is not as easy as adding a clause in the contract. Study the causes, elements and origins of disputes in construction projects should be done before assessing the method of improvement. From the interviewees point of view, the shortage of experience in dispute resolution with ADR for construction projects in Kuwait as well as the lack in training and education, are the significant inconvenience issues against the usage of ADR to resolve construction industry dispute.

4. Summary and conclusion

This paper has highlighted different definitions for claims, conflicts and disputes, in order to adopt suitable definitions fitting the construction industry in Kuwait, which is the main concern of this research, and the principal objective of this section (shown in the Table below).
Table 1: Definitions for Claim, Conflict and Dispute suitable for the construction industry in Kuwait

<table>
<thead>
<tr>
<th>Category</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claim</td>
<td>A statement by the contractor that they believe to be entitled to extra payment or extra time to complete the works. Such payment may be as prescribed under a clause of the contract, or arise from a breach of the contract or Kuwaiti Civil Code (KC code).</td>
</tr>
<tr>
<td>Conflict</td>
<td>The first stage disagreement, after the contractor’s unsettled claim statement under a clause of the contract, or in breach of the contract or Kuwaiti Civil Code.</td>
</tr>
<tr>
<td>Dispute</td>
<td>An issue which is not amicably settled during the conflict stage and needs to be referred to a third party to be resolved under the Kuwaiti Civil Code and the terms of the contract.</td>
</tr>
</tbody>
</table>

A dispute in the construction industry is similar to a dispute in any other industry, or any other human relationship, with few differences. These were discussed in this section by presenting the nature of disputes and dispute resolution, and emphasising the elements of disputes, specifically in the construction industry.

The main causes of disputes depend on different issues, such as one of the parties’ points of view, which makes it very complicated to understand and/or to judge, if the parties do not have the will to resolve the conflict amicably.

Sometimes, it is better for the contract party to neglect its rights in order to achieve his/her interests; it is better to save the costs and time of going through to arbitration and litigation, and to reach a 'win-win situation' with the other party, and to continue amicably during the remainder of the contract period. However, resolving disputes through litigation, arbitration or alternative dispute resolution has different procedures, advantages and disadvantages, which will be studied in further stages in the PhD research.

This article paves the way for the research to concentrate on the main causes of disputes, and on the standard resolution processes based on other experiences, in order to apply the previous experiences to improve the dispute resolution in the construction industry in Kuwait.

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