Claims & Disputes (principle with cases)

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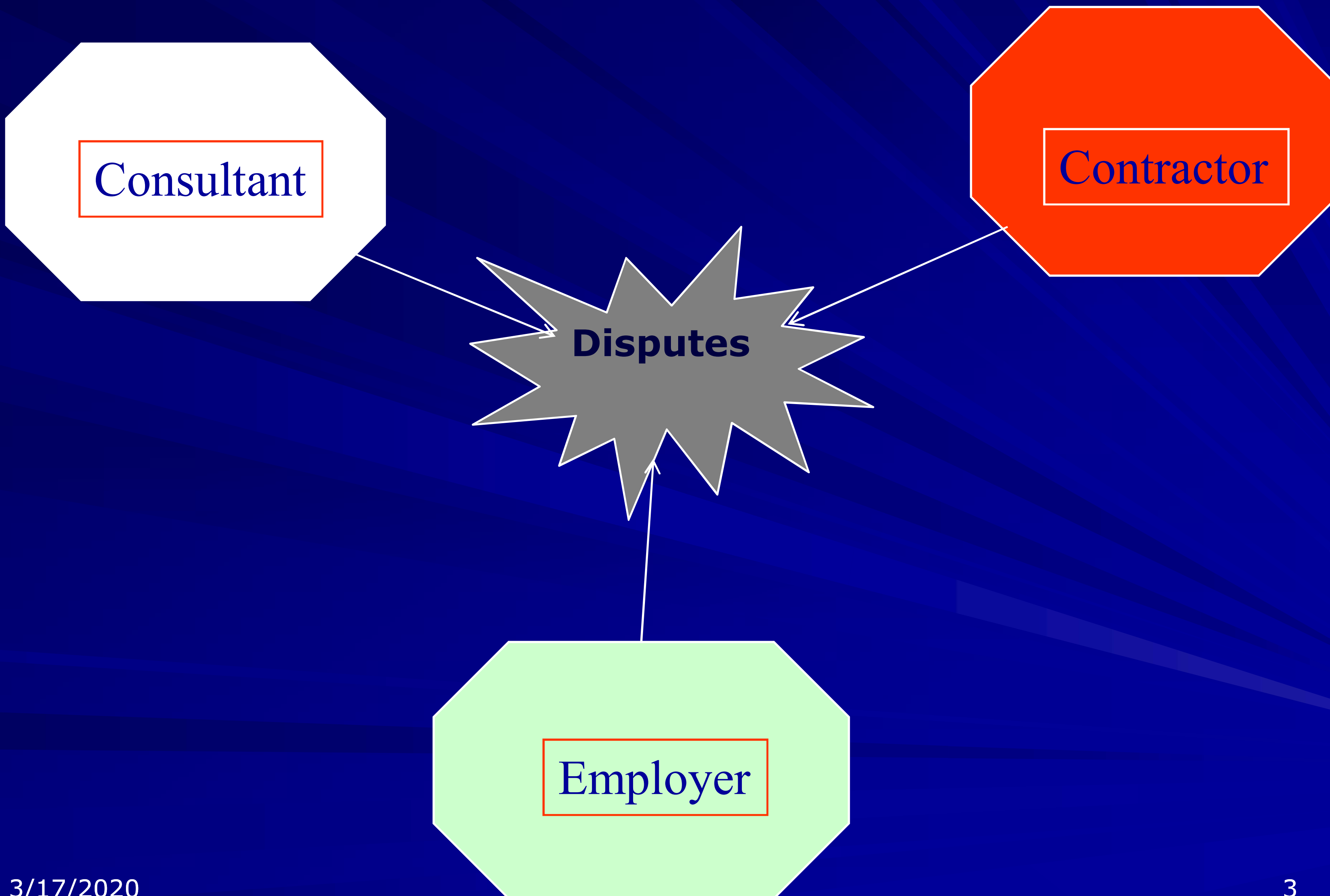
Projects without Disputes

Fantasy or Fact?

Major Players in Contract Implementation



Origin of Disputes

Compensation Events

1) Compensation event: cause to increase or decrease the contract price.

2) Compensation occurs when there a Breach of Contract

Failure to comply is a breach of contract

- **Express Terms**: Follow contractual procedures if there is a breach of an express term and claim contractual entitlements
- **Implied Terms**: If there is a breach of an implied term, there is a potential claim for damages and party must act reasonably and in accordance with general damage law

CLAIMS

Cause – Effect Relationship

ENTITLEMENT/ OBLIGATION

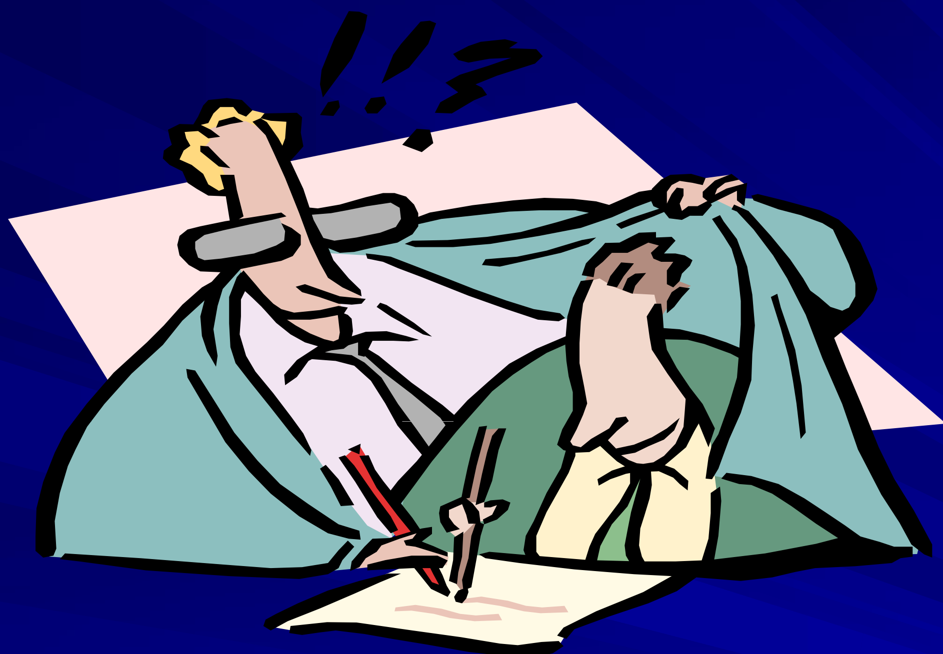
CAUSE

GIVES RISE TO ENTITLEMENT/ BREACH

EFFECT

[THE BURDEN OF PROOF]

CLAIMS



- Achieving a Common Understanding lead to settlement
- Achieving no Understanding lead to:

Disputes

The Processes available to resolve disputes

Adjudication or Dispute Resolution/

Arbitration /

Litigation

These processes are known as

ADR

Alternative Dispute Resolution

Benefits

- Fair
- Quick
- Cost Effective
- Reliable Decision by Experts in the field

Dispute Board (DB)- Nepal

- Nepal introduced use of Adjudication/Dispute Board in PP Act and PP Regulation in 2063/64.
- In 2073 revised version this provision under PPA/PPR 2063/64 was scraped and now no longer exists in Contracts under GON funding.
- Applicable under Donor funding

Extinction of Engineer as Judge and Emergence of Third Party Adjudication

- Many Contracts agreements have clauses that are designed to protect both the parties to the Contract.
- Contracts have remedial clauses. Dispute settlement clause is one of them
- Earlier FIDIC IV, disputes were first referred to the Engineer who is also supervising the Contract.
- The Engineer in FIDIC IV is considered impartial and to act in fair manner

Extinction of Engineer as Judge and Emergence of Third Party Adjudication

- Sub Clause 2.6 – " Engineer to Act Impartially ". As per this clause, the Engineer shall exercise his discretion " impartially within the terms of the Contract and having regard to all the circumstances"
- The Engineer's neutrality and impartiality has often been "QUESTIONED" given the fact that the Engineer is paid by the Employer.

Dispute Board (DB)- Origin

- DRB (Dispute Review Board) first originated in the USA.
- Earliest reported use was on "Boundary Dam in Washington in 1960" in the form of technical JCB (Joint Consulting Board)
- Common use in mid 1970s on civil engineering works particularly tunneling projects
- World Bank in 1995 published World Bank Document that required establishment of DRB in WB funded projects.

Dispute Board (DB)- Origin

- FIDIC in 1996 published an amendment to its standard conditions of Contract recommending DRB's. Used in FIDIC 1987(revised to 1992) version
- Nepal was not far behind. Used DRB's in DOR under Third Road Improvement Projects 1996.
- FIDIC 1999 published new editions using Dispute Board in all three major contracts.
- Born out of Contract

Requirement of Member

- *Fundamental to establish a successful DRB "culture" that Board members are selected for their **neutrality, integrity, experience and expertise and technical expertise**.*
- *And as one writer observed, "the moral authority of [DRB] recommendations seems to lie in the **parties' confidence in their dispute review board members' technical expertise, first-hand understanding of the project conditions, practical judgment, and the overall transparency** of the dispute review board process".*
- *But aside from the technical knowledge required for complex construction, engineering and infrastructure projects, Board members must also have the skill to address **"contract interpretation issues . . . that generate disputes relating to a variety of matters** , such as contractual requirements relating to scope, delays, scheduling and performance issues*

Requirement of Member

- *A DRB's success depends on the degree to which Board members present themselves as **authentic, objective, an unbiased neutrals** who are genuinely committed to the success of the project.*
- DRB acts as a buffer which absorbs all unresolved disputes from negotiation and **prevents their escalation** to a higher, more protracted level of resolutions like arbitration and litigations
  - [inferred from Analysis of DRB application in U.S. Construction Projects (1975 to 2007)]

DRB Statistics

- In North America the DRB process has been used in 1000 projects and out of those 99% of projects were completed without resorting to arbitration or litigation.

  – Ref. John W. Hinchey and Troy L. Harris (2008)

DRBF Statistics

- The average number of disputes referred to DBs is 1.2 percent project, which is less than average number of disputes taken to arbitration, or to court on projects without dispute boards
- 98% of all disputes are resolved at dispute board level
- 0f the remaining 2% that were referred to arbitration, almost all arbitrations supported dispute board’s decision

Alternate Dispute Resolution Mechanism

DRB (Dispute Resolution Board)/ DRP (Dispute Resolution Panel)

Adjudication

Amicable Settlement/ Mediation

Arbitration

Court

Arbitration

Why should we comply with Arbitration??

Dispute Settlement through Arbitration

Arbitration preferred:

- Because of its speed, quality, informality, confidentiality and cost effectiveness

Types

- Institutional and Ad-hoc
- Domestic and International

Ingredients of arbitration

- A written Agreement
- Claims
- Disputes
- Provision of appeal
- Reference to arbitration

Arbitration in procurement of Works

- If after the period as stipulated in the contract the parties have failed to resolve their disputes, either party may give notice of its intention to commence arbitration.
- Purchaser may wish to consider UNCITRAL rules/The rules of conciliation and arbitration of ICC/Rules of the London court of International arbitration/ ICE or NEPCA
- In case of Contractor from Nepal dispute shall be referred to (Arbitration) as per the law of Nepal.
- Indicate the place of arbitration in the Contract Document.

Arbitration Act, 2005

- Act. Incorporates basic principles of UNCITRAL Model law.
- Provides role of contracting parties in the appointment of arbitrators, applicable law, venue of arbitration, language and procedure followed by the arbitrators.
- Provide time frame to reduce delay in court procedures.
- Arbitration is guided as per the conditions of contract.

Arbitration Act, 2005

- The no. of arbitrators, unless otherwise stated in the contract, will be three.
- Unless and otherwise stated in the contract two arbitrators will be appointed by each party and third will be appointed by both appointed members the third member will work as the principal arbitrator.
- If there is no provision regarding the appointment of arbitrators in the contract or failed to appoint arbitrator, either party may apply to Appellate Court for the appointment of the arbitrator.

Arbitration Act, 2055

Arbitration Experience in Nepal

- Respondent normally tend to be passive Decisions normally tend to be awarded to Contractors.
- Documentation and presentation of statements of claims and defense are weak.
- Heavy representation by lawyers dominates the proceedings and prolong the process.
- Very few experienced arbitrators in the country.
- Post award litigation through petition has been common and is extremely time consuming

Cases

Case 1

A Contractor encountered disturbances during performance of his works The event started on June 2 and ended on July 31. The Contractor required that the notice of such and for compensation be given to the Owner at the time "Within 28 days of occurrence of the event leading to Claim" The Contractor submitted his claim and compensation amount on July 30.

The Owner denied the Claim saying that the date of submission already expired and that the time bar had elapsed.

The Contractor registered his appeal in "The U.S. Court – Appellate Court of New Jersey".

– ***Discuss the likely Court Outcome?***

Case 2

Satdobato – Godavari Road – Auction Contract

A Contract clause contained:

If any dispute arises in the Contract, the dispute in the first case will be referred to the Regional Director General of the Department of Roads who shall try to resolve the dispute amicably. In case of disagreement, the dispute may be referred to Arbitration under Arbitration Act 2055.

The Contractor's work was stopped by the Entity instantly after concluding of the Agreement due to complaint on award of Contract.

The Contractor appealed to the Appellate Court Patan stating that the Employer tried to intervene his Contract which he had got on a competitive basis and requested the Court to issue a "Stay Order" and let him continue the works.

Discuss the outcome of the Court?

Case 3

In a yet another case under Kulekhani hydroelectric Project III, an Agreement between Sinohydro and NEA was concluded in NRs. to be paid all in Nepalese currency.

The Contractor was given privilege to import goods required for the Project, importation facilities and an exchange facilities of USD.

The Contract started in 2009 to be completed in 2012. But due to various events the Contract is still not completed as of date. The initial exchange rate of one USD at that time was NRs. 98. The Contractor demanded that he be paid NRs. 117,400,000 as a result of increase of value of USD from NRs. 98 to NRs.116 towards importation facilities. The Employer stated that there was no provision in the Contract to pay the Contractor in USD. Exchange risk is Contractor to bear. Contractor referred to Arbitration.

- Discuss

Case 4

A contract, well into the middle of works, upon the recommendation of the Engineer was divided into two pieces, because of the slow progress in the contract, and the Employer awarded the one piece of work to another Contractor? The original Contractor went to arbitration to claim for the loss he had incurred.

Discuss the merit of the Claim? How should the Engineer have proceeded?

Case 5

A Contract was concluded between Department of Roads and Lumbini-Shanti JV for Construction of Baruwa Khola Bridge along Sagarmatha Lokmarg (Gaighat Diktel Section of Road). During construction, the Contractor encountered that the existing diversion was running adjacent and intersecting the Bridge axis from U/S and DS side. It was impossible to complete construction of Bridge. The Contractor proposed to change the alignment of the said diversion.

The Contractor shifted the alignment saying that the Ground Conditions were adverse as per Sub clause 43.1(f) and claimed NRs. 3,50,000 per year for two years

The Employer stated that the Contract provided all responsibility on the Contractor himself and rejected the Claim. - Discuss

Case 6

A Contract was signed between DOR and Sharma/Rasuwa/Sapana/Himdung JV for Construction of Steel Bridge over Kaligandadi River. Due to occurrence of delay events an extension of time of 2 years was granted. Immediately, the Contractor claimed for Prolongation cost claim of NRs. 22,471,000, price adjustment on prolongation cost, price adjustment beyond 25% of the contract price amounting to NRs. 21,014,000 that was held up by the Employer and interest @ 10% on the above amount.

The Employer denied payment stating that the Contract did not provide any provision of Prolongation Cost and Price Adjustment beyond 25% was not allowed by Law.

The Contractor referred the matter to Arbitration.

Case 7

In yet another case between an International Contractor and the Department of Irrigation, a time extension was granted to the Contractor.

The Contractor was required to give in writing that it will not claim for any costs related to idle or equipment standby costs.

However, after getting EOT, the Contractor referred the matter to dispute Board claiming that he is entitled to be compensated and claimed additional costs for EOT in the form of Prolongation Cost Claim.

Does this fall under the Contractual ethics?

Case 8

The Contractor applied for an EOT on 03 June 2016 and claimed for an EOT of 422 days for time only.

The Employer granted EOT of 365 days on 03 February 2017.

The Contractor gave a notice to claim under Prolongation Cost for overhead and profit amounting to USD 2 million and NRs 300 million on 27 February 2017.

The Respondent rejected the Claim stating that the Contract provision under Sub clause 20.1 states that the notice to claim should have been given within 28 days of occurrence of the event i.e. within 30 June 2016.

Who is correct?

Case 9

UK Builder Vs Govt. of Lesotho – Lesotho Highlands

The party agreement executed by the parties contained a clause that said “The Contractor shall not be provided any interest on late payments made by the Employer.”

The Employer denied payments as per schedule. The Contractor incurred a heavy loss due to late payment. The Contractor however, activated the dispute clause with a view to get interest on the late paid amount. The Dispute Board turned down the request saying that the Contract did not provide any interest for late payments. The Contractor further went to Arbitration.

The Contract spelled that the venue of Arbitration could United Kingdom and the Law of land could be Lesotho.

Discuss the outcome?

Case 10

Canada: Federal Court of Canada, Trial Division (Denault, J.) - 2 November 1987 - Coopers and Lybrand (Contractor)

The charter-party agreement executed by the parties contained an arbitration clause. After the Contractor commenced an action against the Employer in court – The Employer (Canpotech) filed a conditional appearance objecting to the jurisdiction of the court and sought a stay of proceedings in order to allow the objection to be made.

The Employer also sought an order pursuant to section 50(1)(b) of the Federal Court Act seeking a stay of proceedings.

Discuss the outcome of the Court Proceedings.

Case 11 – Upper Trishuli 3A Hydroelectric Project

An Engineering Procurement Construction Contract was signed between the Nepal Electricity Authority and China Gezhouba Group Company as per FIDIC 1999.

Most of the clauses were derived from FIDIC 1999 – Plant Design and Build. The Employer inserted many clauses that were in his favour,

Explain:

-**Discuss on such variations/ modifications?**

-**Is this a natural Contract?**

-**Discuss this situation in the event of Dispute?**

Case 12

CGGC Vs Nepal Electricity Authority – Hydropower Project.

“Interest on Delayed Payment”

Since the Project commenced from 10th January 2007, the Engineer has deliberately not recommended payment. This has resulted in cash flow difficulties , and functioning of the Project. Under the Contract, it is duty of the Engineer to recommend and the Employer to pay in time. Time and again, the Engineer had been informed with a copy to the Employer that late payment entitled them to interest on delayed Payment. Accordingly:

Clause 60.7 (b) of COPA under the heading of Time of Payment and Interest provides- "In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid, in the currencies in which the payments are due.

The Appendix to Bid stated 4% without qualifying anything else.

The Contractor claimed a monthly interest of 4% on a compounded basis.

The Employer denied to pay any interest stating that monthly interest of 4% was not the motive of the Contract.

Discuss this typical situation and the outcome of the Conflict.

Case 13

Delay Damages

A party agreement between German Contractor and US Client contained following Clause:

“For any delay in completion of the Contract, the Contractor will be penalized at the rate of 0.5% of the Contract Price”

The Contractor suffered a huge loss amounting to more than the Contract Price due to delay in completion as a result of imposition of the above clause.

The Contractor without any hope whatsoever, approached the Court in USA stating that they had suffered an huge loss and requested the court to reimburse the amount.

Discuss this situation?

Case 14

CGGC Vs Nepal Electricity Authority – Hydropower Project.

"Application of Discount"

The Contractor had offered a discount of 24% on the Contract price at the time of Bid that amounted to NRs. 3,25,00,00,000/- During the execution of Works the amount increased to NRs. 7,45,00,00,000/- due to variation, tunnel squeezing, increase in BoQ works and other requirements as per the need of the Client.

On each payment (running bill), the client applied a discount of 24% and made payment accordingly. In doing so the Client deducted NRs. 1,78,00,00,000 in total.

The Contractor objected saying that the deduction was a one time offer and the Client should have deducted NRs. 78,00,00,000/- only and asked the Employer to reimburse NRs. 1,00,00,00,000/-
The Employer refused.

The Contractor went to Arbitration.

Discuss this situation??

Case 15 – Variation

In a bridge Contract, 7 piers and 2 abutments were to be excavated below the foundation level to a depth of 4 m as per the drawing. The Contractor started excavation works but was required to go to a depth of 6 m below the foundation. The Contractor stated that due to additional depth of excavation and additional lift to be made he deserved a new rate under Sub clause 37.1 and demanded a Variation to be issued accordingly.

Discuss about the variation process and its considerations?

Case 16 – Respondent's Response

NRCS vs International Contractor

- An ICB contract contained Price Adjustment clause that "stated as per Sub clause 45.1 of COC, the Contract is subject to Price Adjustment for fluctuation in the cost of inputs". The Engineer certified PA till IPC 8 and thereafter no PA was recommended citing PPR Rule 119 does not allow more than 25% of Contract Price be paid towards PA. The Contract was silent on PPR Rule 119.
- The Contractor referred to Arbitration.
- The Respondent responded to the Tribunal stating that:
  - Claimant has registered its claim without providing delegation of authority to represent the submissions.
  - The Claimant is seeking due opportunity to get benefit where the law does not allow and trying to financially burden the Employer.

Thank You