

CHAPTER 1

INTRODUCTION

1.1 Introduction

Nowadays, disputes in construction industry is a common thing and sometimes could not be avoided. Every construction project is bound to have conflict. Conflict would exist when incompatibility of interest happened (Fenn *et al.* 1997). Construction disputes arise from misunderstanding or disagreement between two parties or more, which always arise as assertions for extra money or time in a project. There are many types of methods / techniques to resolve disputes. One of them is arbitration.

Arbitration is one of the popular methods used in the construction industry in Malaysia. According to wikipedia, arbitration is a legal technique for the resolution of disputes outside the courts. Arbitrators are referred to one or more person who involved in a dispute by whose decision they agree to. It is more like a settlement technique in which a third party review the case and makes a decision that is legally benefit for both sides.

However, arbitration can simply classify as a form of fairness dispute resolution. Arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions.

1.2 Background of Problem

Every modern construction place are fill with disputes. Disputes come from conflicts between employees, supervisors and / or management. All these disputes are a regular and an on-going part of every construction place. A survey conducted by the American Management Association revealed that managers spend at least 24 percent of their time at work resolving conflicts. The survey also showed that conflict resolution had become more important over the last 10 years, and that conflict resolution was either more important or equally important with planning, communication, motivation and decision-making (Kenneth Cloke, 2001).

The primary causes of conflict within organizations were identified as: misunderstanding (communication failure), personality clashes, value and goal differences, substandard performance, differences over method, responsibility issues, lack of cooperation, authority issues, frustration and irritability, competition for limited resources, and non-compliance with rules and policies (Kenneth Cloke, 2001).

Conflict are not only viewed in a negative way but also could be viewed in a positive perception. While conflict creates dispute that will lead to decrease in productivity, reduce morale, prevent cooperation between workers, when view in a positive way, dispute can clarify the goals of a project, open communications and resolve problems.

One of the effective method in solving disputes is to let the dispute proceed to arbitration. There could only be one outcome when it comes to the end result. Some way or another, one party will result in a win or lose situation where the truth be uncovered and exposed to both participants. This method will involve a third party and that makes it a fair way to solve the dispute. So, there would be no bias in this method as well.

Arbitration could be use to solve all kinds of dispute in construction which occur in every workplace. For those reasons, arbitration is a valuable technique for the resolution of workplace disputes which aims at increasing employee satisfaction and job productivity, while improving the quality of work life.

1.3 Problem Statement

Although arbitration is expected to solve the dispute within organizations, not all cases are able to be solved smoothly. Sometimes, there are different outcome to a dispute from variety of arbitrators' decisions on the same construction dispute scenario.

There are many disputes in construction involving attorneys, owners, owner representatives, contractors, subcontractors. These are critical disputes where there are many things at stake such as time, money, position and face. When the parties involved could not make a final solution regarding their conflicts, this is where arbitrators comes in. They act as a third party who could solved the problem. Somehow, the arbitration is the person who has the final say at the end of the day. Their decisions are not constant all the time because different arbitrators have different minds.

Arbitrators have different approach when dealing with disputes. Therefore, the objective of this study is to analyze the causes of disputes and its solution techniques in construction industry.

1.4 Objectives

- To study the process and procedures of arbitration as a method for disputes resolution.
- To identify the causes of disputes and its solution techniques in construction industry.
- To analyze the causes of disputes and its solution techniques in construction industry.

1.5 Scope of Study

This study will be carried out based on the literature review and the data collected from the questionnaires given to the selected construction company. Moreover, the study will strictly be done in the Kuala Lumpur and Kuantan area.

1.6 Methodology

The research methodology of this study are as follows (see Figure 1.1):

- i. Identify the topic
- ii. Literature review
- iii. Identifying the problems
- iv. Confirming the topic
- v. Create the objectives and scope of study
- vi. Collection of data
- vii. Analysis of data
- viii. Conclusions and recommendations

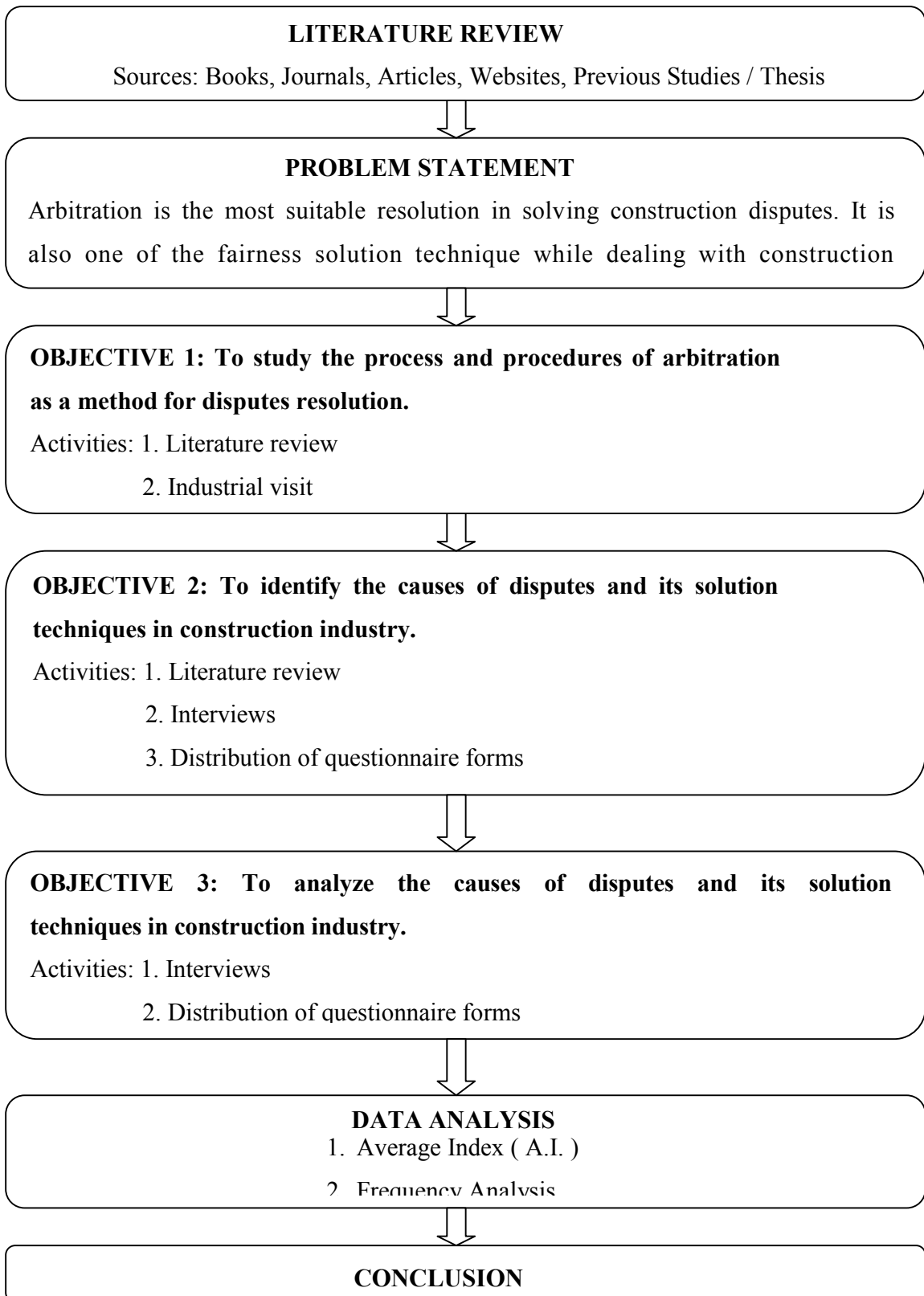


Figure 1.1: Flowchart of Methodology

1.7 Significant of Study

The purpose of this study is to analyze the causes of disputes and its solution techniques in construction industry. From this study, information gathered can be used to help the organizations to run the process and procedures smoothly when resolving the disputes the arbitration way.

1.8 Expected Outcome

The final outcome for this investigation is to give great benefits to the Faculty of Civil Engineering in Universiti Malaysia Pahang in order to help the government or even the private sectors to decide the best way to settle the disputes which is by arbitration. The research of this study hopefully will give good references to those who which to solve disputes by arbitration in the future to come.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

Arbitration is today most commonly used for the resolution of commercial disputes particularly in the context of international commercial transactions. Some disputes are hard to resolve and that's where arbitration act as a resolve technique. Arbitration are traditional methods of dispute resolution for deciding controversies between individuals, businesses and countries. An arbitrator will be the third person to solve the dispute. This arbitrator is either selected directly by the parties or is designated by an arbitration agency. The arbitrator acts as both the judge and the jury in hearing the dispute and issues a decision called an award. The award is final and binding upon the parties.

This chapter gives an overview on the conflicts that leads to disputes which finally overcome by arbitration. This is essential to the first and second objective of this study. It also outlines the advantages and disadvantages of arbitration as a method for disputes resolution.

Furthermore, it reveals the process and procedures of arbitration and not to mention some of the cases that involves arbitration and what are the outcomes of the cases with comparing the similarities or differences of the result outcome. This is important to fulfill the third objective of this study.

2.2 History of Arbitration

Commencing with the word ' arbitration ', the possible definitions to consider are as follows:

Table 2.1: Definitions of Arbitration

SOURCES	DEFINITION
(Teoh, 1992)	“The arbitration with which we are concerned is the settlement of a dispute by a tribunal made up of one, two or three arbitrators whose award is legally binding and enforceable by the courts”
Nolo’s plain-english law dictionary	“A non-court procedure for resolving disputes using one or more neutral third parties”
Law.com dictionary	“A mini-trial, which may be for a lawsuit ready to go to trial, held in an attempt to avoid a court trial and conducted by a person or a panel of people who are not judges. The arbitration may be agreed to by the parties, may be required by a provision in a contract for settling disputes, or may be provided or under statute”

Hence, reading the definitions of the word ' arbitration ', it can be defined as a settlement of a dispute by an arbitrator.

Arbitration is a very old method of settling disputes between people and even settle disputes between different nations. It is not known exactly when formal non-judicial arbitration of disputes first began but it can be said with some certainty that arbitration as a way of resolving disputes predates formal courts. Records from ancient Egypt attest to its use especially with high priests and their interaction with the public. Arbitration was popular both in ancient Greece and in Rome. Under English law, the first law on arbitration was the Arbitration Act 1697, but when it was passed, arbitration was already common. Therefore, arbitration was probably an established method of settling disputes before the king's courts were established in England.

While in the United States, it was labor unions that helped promote the use of grievance arbitration but compulsory arbitration is also now a growing means of dispute resolution in the non-union sector of the United States today (Kellor, 2001). In fact, by 1944 the Bureau of Labor Statistics showed that 73% of all labor contracts in America contained arbitration clauses and by the early 1980's that figure had grown to 95%. Today, 98% of all collective bargaining agreements in the United States contain arbitration clauses (Stern et al. , 1997). Arbitration as a means of dispute resolution has not only been a preferred method by business and labor but has also been supported by the federal government for over a century (Hill et al. 1991).

2.3 Conflicts

Webster's Dictionary (1983) defines conflict as a sharp disagreement or opposition of interests or ideas. In other words, the things that you want does not match what they want. When conflict occurs in a workplace, it can reduce morale, lower work productivity, increase absenteeism, and cause large-scale confrontations that can lead to serious and violent crimes.

Reynolds and Kalish (2002), organizational consultants in mediation, collaboration and conflict resolution, note that managers spend at least 25 percent of their time resolving workplace conflicts. This obviously affects the productivity of both managers and associates (employees) and can have a far-reaching impact on organizational performance. Conflict is a challenge facing both employers and associates.

While conflict is considered counter-productive, it may also be positive and beneficial in that it can clarify goals, relieve tensions, open communications and resolve problems. In its negative form, conflict can direct energy from real tasks, decrease productivity, reduce morale, prevent cooperation, aggravate minor differences, polarize points of view, encourage irresponsible behavior, generate suspicion and mistrust, obstruct communication, increase tension and stress, obscure goals, and result in loss of valuable human resources.

Although conflict is often viewed negatively, it can lead to enlightenment if solutions are reached. The first logical steps in resolving conflict is to identify the problem and then identify what caused the conflict. Art Bell (2002) suggests six reasons for conflict in the workplace: conflicting needs, conflicting styles, conflicting perceptions, conflicting goals, conflicting pressures, and conflicting roles.

Brett Hart (2000) discusses two additional causes of conflict: different personal values and unpredictable policies. This brings the total causes for conflict to eight.

2.3.1 Causes of Conflict

Cause 1: Conflicting Needs

Whenever workers compete for scarce resources, recognition, and power in the company's "pecking order", conflict can occur. Since everyone requires a share of the resources (office space, supplies, the boss's time, or the budget fund) to complete their jobs (Hart, 2002), it should come as no surprise when the "have-nots" gripe and plot against the "haves" (Bell, 2002).

Cause 2: Conflicting Styles

Because individuals are individuals, they differ in the way they approach people and problems. Associates need to understand their own style and learn how to accept conflicting styles. An example of conflicting styles would be where one worker works best in a very structured environment while another worker works best in an unstructured environment. These two workers could easily drive each other crazy if they constantly work in conflict with one another and do not learn to accept one another's work style.

Cause 3: Conflicting Perceptions

Just as two or more workers can have conflicting styles, they can also have conflicting perceptions. They may view the same incident in completely different ways. Bell (2002) gives an example of what might happen if a new administrative assistant were hired in the organization. One associate might see the new hire as an advantage (one more set of hands to get the job done), while another associate might see the same new hire as an insult (a clear message that the current associates are not performing adequately).

Memos, performance reviews, company rumors, hallway comments, and client feedback are sources for conflicting perceptions. Resentment and conflict can also occur when one department is viewed as more valuable to the organization than others (Hart, 2002).

Cause 4: Conflicting Goals

Associates may have different viewpoints about an incident, plan, or goal. Problems in a workplace can occur when associates are responsible for different duties in achieving the same goal. Take for instance the scenario of a patient being admitted to a hospital. The business office is responsible for documenting financial information and getting paid, whereas the nursing staff is responsible for the patient's physical assessment and immediate admission. Both objectives are important and necessary, but may cause conflict (Bell (2002).

Brett Hart (2000) offers another example. Imagine a bank teller's dilemma in a situation where he is being given conflicting responsibilities by two of his managers. The head teller has instructed the staff that rapid service is the top priority, whereas the community relations director has instructed the staff that quality customer service is the top priority. One can imagine how quickly problems could arise between the teller and the head teller if speed is sacrificed for quality time with the customer.

Cause 5: Conflicting Pressures

Conflicting pressures can occur when two or more associates or departments are responsible for separate actions with the same deadline. For example, Manager A needs Associate A to complete a report by 3:00 p.m., which is the same deadline that Associate B needs Associate A to have a machine fixed. In addition,

Manager B (who does not know the machine is broken) now wants Associate B to use the unknown broken machine before 3:00 p.m. What is the best solution? The extent to which we depend on each other to complete our work can contribute greatly to conflict (Hart, 2002).

Cause 6: Conflicting Roles

Conflicting roles can occur when an associate is asked to perform a function that is outside his job requirements or expertise or another associate is assigned to perform the same job. The situation can contribute to power struggles for territory. This causes intentional or unintentional aggressive or passive-aggressive (sabotage) behavior. Everyone has experienced situations where associates have wielded their power in inappropriate ways.

Cause 7: Different Personal Values

Conflict can be caused by differing personal values. Segregation in the workplace leads to gossiping, suspicion, and ultimately, conflict (Hart, 2002). Associates need to learn to accept diversity in the workplace and to work as a team.

Cause 8: Unpredictable Policies

Whenever company policies are changed, inconsistently applied, or non-existent misunderstandings are likely to occur. Associates need to know and understand company rules and policies; they should not have to guess. Otherwise, unpredictable things can occur such as associates dressing inappropriately or giving out wrong information. The absence of clear policies or policies that are constantly changing can create an environment of uncertainty and conflict (Hart, 2002).

2.4 Disputes

According to the Oxford Dictionary, the meaning of the word ‘dispute’ is “ controversy, debate, heated contention, quarrel or difference of opinion ”. In Malaysia, the contract forms used are commonly in JKR 203 series, the PAM form, the ICE form or the FIDIC form or otherwise. The ICE for FIDIC forms if used, are usually in their amended form to suit local conditions and requirements.

From above, it can be deduced that the word dispute when used within the context of building or engineering contract means “ the disagreement between employer (or the architect, engineer or superintending officer) and the contractor on matters concerned the building or engineering contract which they have entered into as the employer and contractor.

Disputes between a contractor or a construction company and a customer are all too common. Disputes often arise out of delays in getting the work down, unsatisfactory work, or a customer’s failure to make payments. Construction-related disputes can consume a lot of time and money on the part of everyone involved. In many cases, the expense involved in pursuing a dispute is far out of proportion to the money actually at stake. An attorney with experience in construction disputes can help you pursue your claim in an efficient, cost-effective manner.

2.4.1 Types of Disputes

When disputes have arisen, they are there to stay unless it is settled or resolved. Disputes which are not settled or resolved can be dealt with many types of resolution techniques. One of them is arbitration. Nonetheless, below are types of disputes.

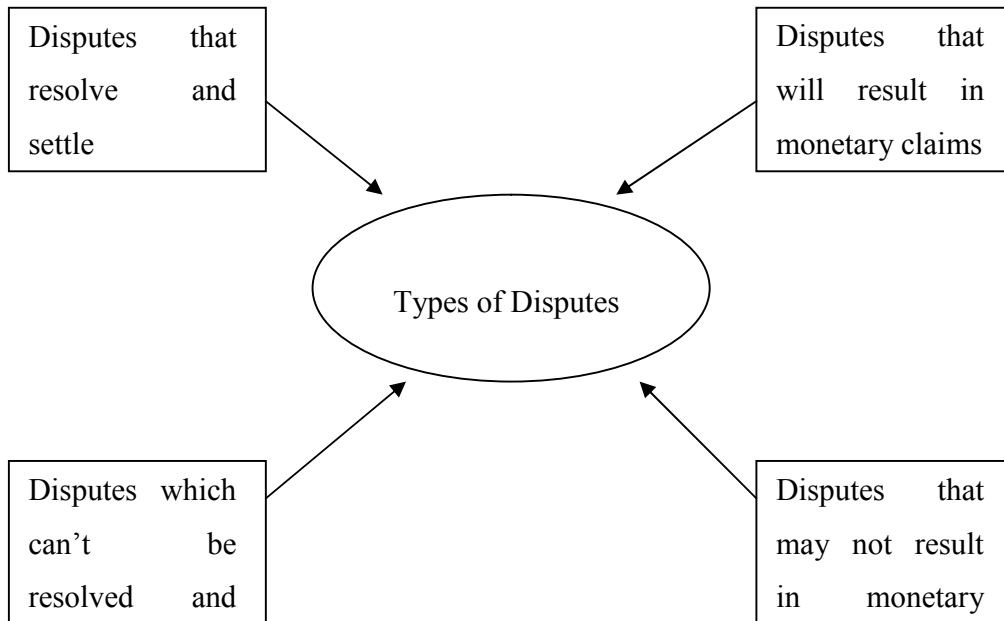


Figure 2.1 : Types of Disputes

Type 1: Disputes that resolve and settle

This type of dispute is the easiest of them all. It can be resolved by confrontation without anything serious happen such as court and money. Usually it is done verbally.

Type 2: Disputes that will result in monetary claims

This type of dispute will involve a lot of money as the outcome of this dispute will ensure that the losing side will lose money as they pay the price of compensation or settlement of the money left in dealing with the business.

Type 3: Disputes that may not result in monetary claims

This type of dispute will have an end result of no decision can be made between the parties involved or there is a winner but no money will involve to the losing side. Therefore, both parties will have to deal that no one will come out as a winner. Some cases can also be that, the losing side will finish where it started and no settlement will have to pay to the winning party.

Type 4: Disputes which can't be resolved and have to refer for arbitration

Some disputes are hard to resolve and therefore the only way to deal with it is by arbitration method because there are no other way better to deal with the dispute than arbitration.

2.4.2 Causes of Disputes

As identified by Assaf et al (1995), there are an extensive list of 56 causes of disputes. There are such as shortage of construction material, changes in types and specifications during construction, slow delivery off material, damage of material in storage, delay in the special manufacture of the building material, unskilled operators, slow delivery of equipment and equipment productivity, financing by contractor during construction, delays in contractor's progress payment by owner, cash problems during construction, design chances by owner or his agent during construction, design errors made by designers, foundation conditions encountered in the field, mistake in soil investigation, water table conditions on site, geological problems on site, obtaining permits from municipality, obtaining permits for labourers, excessive bureaucracy in project owner operation, building code used in the design of the project, preparation of scheduling

networks and revisions, lack of training personnel and management support, lack of database in estimating activity duration and resources, judgement of experience in estimating time and resources, project delivery systems used, hot weather effect on construction activities, insufficient available utilities on site, the relationship between different subcontractor's schedule, the conflict between the consultant and the contractor, uncooperative owners, slowness of the owner decision making process, the joint ownership of the project, poor organization, insufficient communication owner and designer at the design phase, unavailability of professional construction management, inadequate early planning of the project, inspection and testing procedures used in the projects, errors committed during field, application of quality control based on foreign specification, controlling subcontractors by general contractors in the execution of the works, the unavailability of financial incentives for contractor to finish ahead of schedule, negotiations and obtaining of contracts, legal disputes between various parties, social and cultural factors, accidents during construction.

Through a questionnaire survey conducted on 61 contemporary construction projects in Hong Kong, Kumaraswamy (1997) attempts to better understand disputes; he identifies common root causes, proximate causes and confirms the need of further studies to isolate the real root causes of avoidable claims and disputes. A list of the root causes and the proximate causes is shown in Figure 2.1.

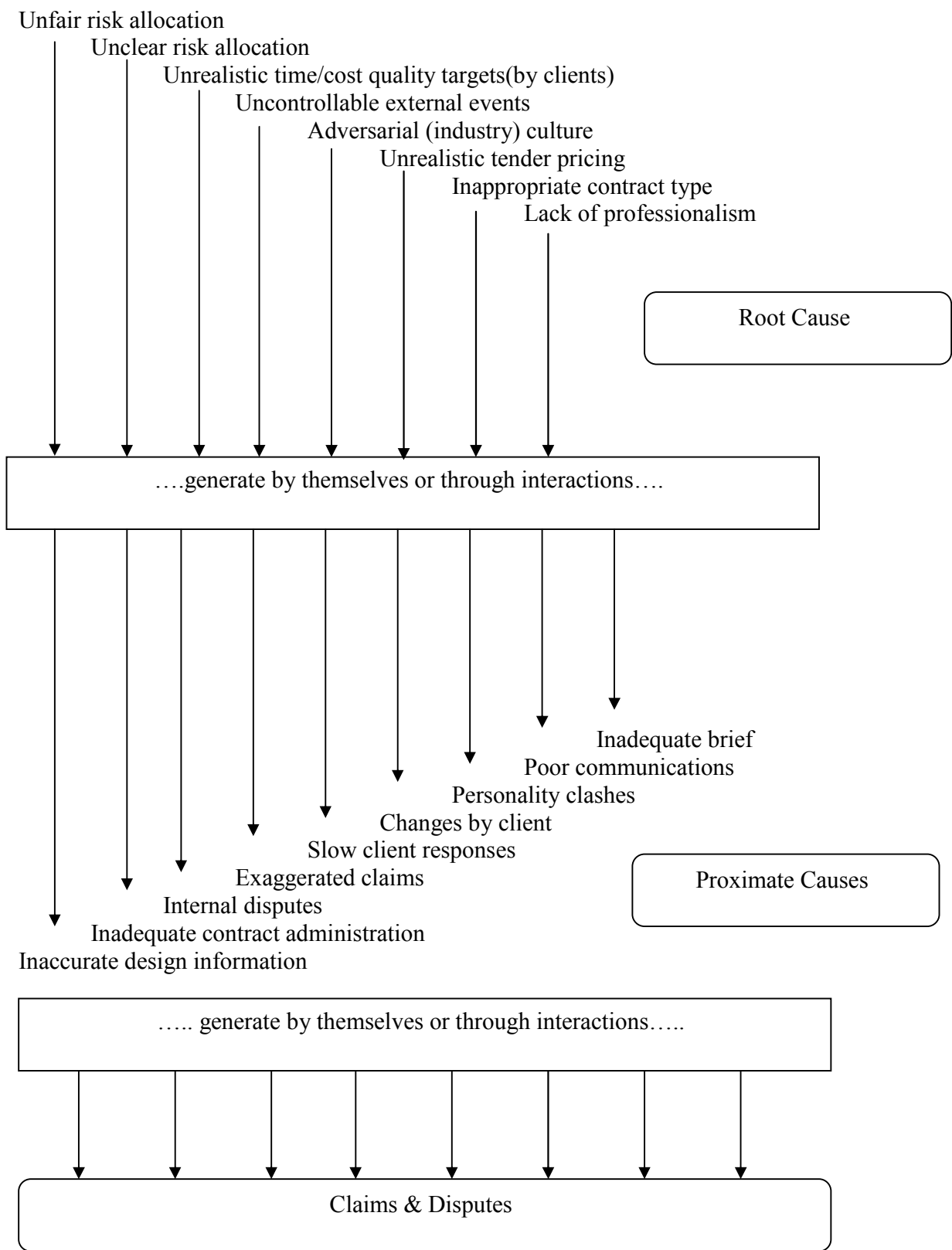


Figure 2.2: Root Causes and Proximate Causes

However, there are other attempts to categorise the causes of disputes. They are shown in Table 2.1.

Table 2.2: Categorising Causes of Dispute (adapted from Fenn (1997), and Fenn (2006))

Al Momani (2000)	Causes of delay: poor design, change orders, weather, site conditions, late delivery, economic conditions, and increase in quantity.
Alkass et al. (1996)	Strikes, rework, poor organization, material shortage, equipment failure, change orders, act of God.
Bristow and Vasilopoulous (1995)	Five areas unrealistic expectations: contract documents, communication lack of team spirit and change.
Colin et al. (1996)	Six areas: payment, performance, delay, negligence, quality and administration.
Diekmann et al. (1996)	Three areas: people, process and product.
Heath et al. (1994)	Seven areas: contract terms, payment, variation, time nomination, re-nomination and information.
Hewit (1991)	Six areas: change of scope change conditions, delay, disruption, acceleration and termination.
Kululanga et al. (2001)	Four sources of dispute: (1) errors, defects and omissions in the contract documents, (2) underestimating the real cost of the project in the beginning, (3) changed conditions

	and (4) stakeholders involved in the project.
Madden (2005)	Three categories: legal, technical and quantum.
Molenaar et al. (2000)	Three categories: people issue, process issue and project issues.
Rhys Jones (1994)	Ten areas: management, culture, communications, design, economics, tendering pressures, lay, unrealistic expectations, contracts and workmanship.
Semple et al. (1994)	Four areas: acceleration, access, weather, and changes.
Sykes (2005)	Two areas: misunderstandings and unpredictability.

Fenn (1997) (2006) conducted exhaustive studies of previous research into causes of disputes and the above table shows a sample from his studies attempts to identify causes of disputes. Mitropoulos and Howell (2001) move beyond individual factors and study the effect of interaction of technical, contractual and behavioural factors on the development of disputes as proposed in a dispute development model.

Fenn et al.'s (1997) research proves that studies conducted to determine dispute causes do not identify the causes that produce the most expensive delays. He concludes that there is a need for research that would investigate the causes of general disputes. In spite of abundant research in the area, the continuing emergence of costly disputes verifies that further studies are needed to identify the causes of these disputes.

2.5 Arbitration as a Method for Disputes Resolution

Most construction contracts set out the manner in which disputes are to be resolved. Usually, those contracts call for use of a means other than litigation, such as arbitration to resolve disputes.

Arbitration is a form of alternative dispute resolution (ADR). Arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is far more controversial in consumer and employment matters, where arbitration is not voluntary but is instead imposed on consumers or employees through fine-print contracts, denying individuals their right to access the courts.

Many construction contracts require that disputes arising under the contract be resolved by arbitration. In addition, many cases occur will order that a case be submitted to arbitration before allowing it to come to trial. Arbitration is like a trial, except that it is usually much less formal. The dispute is heard by one or more arbitrators, who are selected from a panel of neutral arbitrators. Depending on the local practices and rules, the arbitrators may be attorneys, or people with expertise in the construction industry. The arbitrators act like a judge, in that they hear the case and make a final decision based on the evidence presented.

Arbitration may be made binding on the parties, if they so agree. Many construction contracts do require binding arbitration, and if you sign such a contract without removing that provision, you will be deemed to have agreed to binding arbitration. The courts will not overturn the order of an arbitrator in binding arbitration unless the arbitrator made a decision that completely lacked any legal foundation.

Although arbitration is less formal and complex than a regular trial, it still is important that you have legal counsel you can rely on to make your case. An experienced construction law attorney will work hard to present your case in the best manner possible.

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By their nature, the subject matter of some disputes is not capable of arbitration. In general, two groups of legal procedures cannot be subjected to arbitration.

- a) Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon some court procedures lead to judgements which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, antitrust matters were not arbitrable in the United States. Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement, upon these matters is at least restricted. However, most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, but the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.

- b) Some legal orders exclude or restrict the possibility of arbitration for reasons of the protection of weaker members of the public, e.g. consumers. Examples: German law excludes disputes over the rental of living space from any form of arbitration, while arbitration agreements with consumers are only considered valid if they are signed by either party, and if the signed document does not bear any other content than the arbitration agreement.

Agreements to refer disputes to arbitration generally have a special status in the eyes of the law. For example, in disputes on a contract, a common defense is to plead the contract is void and thus any claim based upon it fails. It follows that if a party successfully claims that a contract is void, then each clause contained within the contract, including the arbitration clause, would be void.

2.5.1 Advantages of Arbitration

The following are said to be advantages of arbitration (Mazirow, 2008):

- a) Speedier resolution; however, there can be exceptions due to multiple parties, arbitrators, lawyers and litigation strategy.
- b) Less costly; it is not cheap, but it's much less than court.
- c) Exclusionary rules of evidence don't apply; everything can come into evidence as long as relevant and non-cumulative.
- d) Not a public hearing; there is no public record of the proceedings. Confidentiality is required of the arbitrator of the arbitrator and by agreement the whole dispute and the resolution of it can be subject to confidentiality imposed on the parties, their experts and attorneys by so providing in the arbitration agreement.
- e) From defense point of view, there is less exposure to punitive damages and run away juries.
- f) Can be done without attorney; although it is not advisable to do so.