



Dispute settlement



Need of better construction environment

- Huge infrastructure projects are yet to be designed and implemented for Nepal
- Capability enhancement of project participants is equally vital
- Variations and Disputes are to be addressed properly for better project environment
- Proper handling of claims and dispute management is instrumental

Parties in the Contract -Team work

Client – Consultant – Contactor

- Client should know the project and priorities
- Consultant shall be experienced/qualified and professional
- Contractor shall be capable and equipped

Claims and records

- Contractor shall give notice for claims within 28 days of event
- Engineer shall have opportunity to reduce cost by appropriately handling the event
- Contractor shall take reasonable action to reduce claim amount

Records of claim

- Contractor to keep records and substantiate.
- Engineer may also keep records for verification
- Substantiating records shall be submitted in time as agreed with the engineer

Claim and dispute

- If claims are not settled properly in time, they are likely to turn to dispute and will have to be resolved by ADR - adjudication, arbitration or litigation.
- Dispute is undesirable in projects as they create adverse environment toward project success.
- Inappropriate handling of claim and variation may lead to dispute between the parties.
- Disputes are better to handle at its earlier stage
- Alternate dispute resolution (ADR) shall be practiced to avoid litigation

Settlement of claim

- Fairly and reasonably – realistic assessment of claims
- Assessment by following Contractual basis
- By appropriate mechanism for valuation of claim
- By demonstrating excellent skill for negotiation

Legal and engineering

- Lawyer may understand the world of law but rarely the engineering complications
- Practical problem to persuade the judge should never be under estimated
- Expert opinion may vary – what counts is judge's impression or feeling from expert opinion – winning the case might be a lottery

Alternate dispute resolution (ADR)

ADR is a dispute resolution method that is not the court and includes dispute resolution process and techniques carried out outside of the government judicial process. They are

- Negotiation,
- Mediation/conciliation and
- Collaborative law/expert determination
- Adjudication/Dispute Review Boards and
- Arbitration



Benefits of ADR

- **Imposes fewer cost than litigation**
- **Preference for confidentiality**
- **Greater control over the selection of the individuals who will decide on their dispute**

Types of ADR.....I

They are

- **Negotiation**- Participation is voluntary, No third party who facilitates or imposes the resolution, Coaching both the parties behind the scene by a common friend – ‘helping people help themselves’
- **Mediation/conciliation** - There is a third party called a mediator, Mediator facilitates the resolution process or sometime suggest a resolution as ‘mediator’s proposal’, Mediator does not impose resolution to the parties, Mediation in UK synonymous to ADR

Types of ADR....2

- **Collaborative law/expert determination** - Each party has an attorney who facilitates the resolution process within specially contracted terms, Parties reach to an agreement with support of attorneys and mutually agreed experts.
- **Adjudication/Dispute Review Boards and**
- **Arbitration**

Adjudication and Dispute Boards

- **Negotiation, mediations and expert determination are usually non-binding but they are proactive towards settling the dispute. Decision of Adjudication, Dispute review boards, if not challenged in time, and arbitration are binding upon the parties**
- **Both parties agree to appoint an adjudicator to make decision on disputed issues.**
- **Adjudication is a dispute resolution process that is quicker and less expensive.**
- **Adjudicator's decision is imposed upon the parties, and upon dissatisfaction parties may refer the case to arbitration**



Advantages of adjudication... I

- The parties have liberty to choose a learned adjudicator having expertise in the subject related to dispute.
- Adjudicator imposes a fair and impartial decision like arbitrator or judge.
- It is faster than litigation or arbitration, it could be within 28 days. This would enhance better cash flow in construction if there is an adjudication award.
- Disputes can be resolved while works are still in progress that would give opportunity to the adjudicator for better fact finding and on-site studies and investigations.

Advantages of adjudication...2

- **Rapport and relationships within the participants could be better maintained.**
- **It is cost effective as use of counsel and expensive litigation can be avoided.**
- **Amicable settlement can be done after the adjudication award.**
- **Adjudication is private and confidential.**

Adjudication practices in Nepal and abroad

- **PPA/PPR provisions to keep adjudicator or DRC/DRB/DB mandatorily within the frame of the Contract**
- **Disputed events materialized in projects are usually not found taken up in time or found knowingly postponed to take them up at the end of the project**
- **Success rate of adjudication is very less as compared to the practices in other countries.**
- **The success rate of adjudication is very high in UK, New Zealand, Singapore etc.**

Lesser success rate of adjudication is due to

- The fear of probe by audits, CIAA or other vigilance agencies.
- The tendency of the parties towards postponing the award to avoid responsibility of payment by further introduction of arbitration.
- Consideration of interim and provisional nature of adjudication award with perception that enforcement of Adjudicator's decision is not legally standing, thereby reducing the confidence of parties on what has been decided.
- Lack of study and research of implication resulted by rejection of adjudication award.

Adjudication practice in India

- **DRB or adjudication recommendations were not accepted in 79% of the cases (44% by the Employer and 35% by the Contractors)**
- **A rejection of DRB recommendation almost always resulted to extensive delays in project completion**
- **Contract dispute resolution processes that happen after the rejection of an adjudication recommendation are very lengthy and costly.**

Adjudication scenario in Nepal

- **About 10% success rate, which is very low (DOR)**
- **enforcement of the adjudicator's decision is thus critical to the success of adjudication.**
- **adverse project environment is found aggravated or delay occurred, where adjudication or DRB awards are rejected by the Employer.**



Awards

Adjudication Vs Arbitration

- **Arbitration awards are usually higher may be because**
 - **DAB or adjudication process could reopen the files and analyze the case with available facts even if there is a lack of evidence submitted by the parties, whereas arbitration mainly depends upon the evidences produced by the parties.**
 - **Arbitration mostly involves legal professionals, who in most cases lack the understanding of tacit complications of engineering projects.**

Awards

Adjudication Vs Arbitration.....2

- **Arbitration awards are higher may be because**
 - **Project Employers being government agencies in most of the cases would not be able to produce sufficient evidences of their case and benefit of doubts usually goes to the contractor with higher magnitude of award.**



The Need of provision of correct dispute clauses

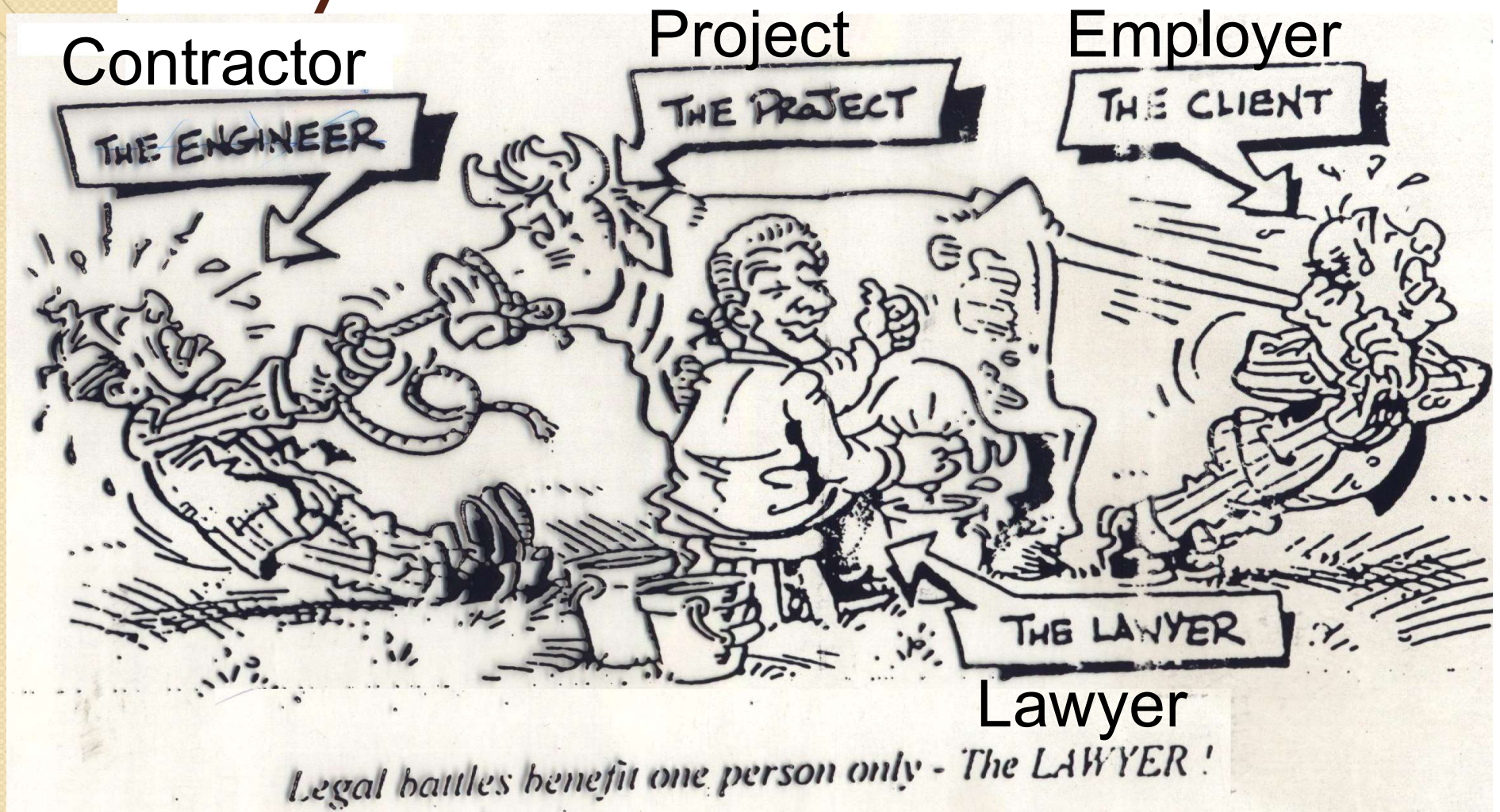
As the dispute resolution mechanism vary considerably, it is very important to carefully draft dispute resolution clauses so that anticipated interpretation of the parties is addressed.

The clauses should consider where and how the disputes are to be heard and ensure that they are enforceable and appropriate in the relevant jurisdiction.



**Confidence between parties counts a lot for success !
Dispute kills confidence between them !**

Legal battles benefit one person only – The lawyer





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Thank you
for your kind attention

Your queries please