Construction Dispute Negotiation: Causes of Uncertainties

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UPDATED ON MARCH 4, 2014 – RIYADH: A study has revealed that 'time pressure', 'difficulties in knowing counterpart's baseline', 'uncertainty about counterpart's preferences', 'lack of references' and 'changing preference during negotiation' are the top five potential root-causes of uncertainty in a construction dispute negotiation.

Even though the study was conducted overseas, its observations and results appear to correlate with my most recent contracts advisory and dispute negotiating experiences in Saudi Arabia.

Negotiation, as we all know is widely adopted to resolve a dispute at its early stage or after disputing parties have realized that litigation or Alternate Dispute Resolution (ADR) may not be worth the effort.

It is an alternative or a pre-dispute resolution method practiced worldwide not only in construction but also in other industries because of least cost/time saved tradeoff.

However, ineffective negotiation affects the success of the construction dispute negotiation – leading to either arbitration or litigation – even at times NATO *(No Action Talk Only).*

It has however emerged that even though negotiation is the least cost/time saved option; influences of uncertainty contribute a major part to the ineffectiveness of a negotiation.

This translates to unpredictable results or unknown consequences.

The objective of the study was to identify the potential root-causes of uncertainties in construction dispute negotiation.

Among the seventeen potential root-causes studied, time pressure and intact relationship proved to be the most important items explaining the maximum potential root-causes of uncertainty in construction dispute negotiation.

Below is a list of potential root-causes of uncertainties in construction dispute negotiation:

1 Difficulties in predicting outcome
2 Difficulties in knowing counterpart's baseline
3 Difficulties in establishing baseline
4 No clear picture of counterpart's goal
5 Lack of trust among the negotiators
6 Lack of references
7 Lack of clear role between team members

8 Conflicts happened between team members
9 A high variety of alternatives
10 Unreal expectations
11 Uncertainty about counterpart's preferences
12 Lack of risk assessment
13 Incompatible preferences between team members
14 Lack of understanding in counter parts
Personality characteristics
15 Changing preference during negotiation
16 Changing baseline
17 Time pressure

Two differing factors emerge from the study as the most potential root cause of uncertainties that influence the negotiation process to resolve disputes:

--- Difficulties in knowing counterpart's baseline
--- Time Pressure

While **"Difficulties in knowing counterpart's baseline"** emerges from lack of critical thinking, absence of analytical tools and studies, prior experience and exposure to such process and environment, social and cultural issues, inherent disconnects in English-to-Arabic and Arabic-to-English communication.

On the other hand, "**Time Pressure"** to negotiate and settle disputes emerges after there has been an absence of or lack of top management willingness to settle issues well within the project delivery cycle. These issues then grow into dispute level on corporate level.

The lack of recognition, ambivalence, indifference, or ignorance of middle management (PMT level) that contractual issues lead to cost-financial issues and therefore need to be resolved to maintain the profitability of the project is one major reason I have detected why normal/standard Variations are not pushed for settlement --- during the normal project delivery cycle. In fact, they are sidelined during the construction operations phase as either "too cumbersome, complicated" or something beyond the domain of project team.

The above observations are based on my findings while providing contract advisory and claims consultancy to several large and medium-sized contractors in the Saudi Kingdom.

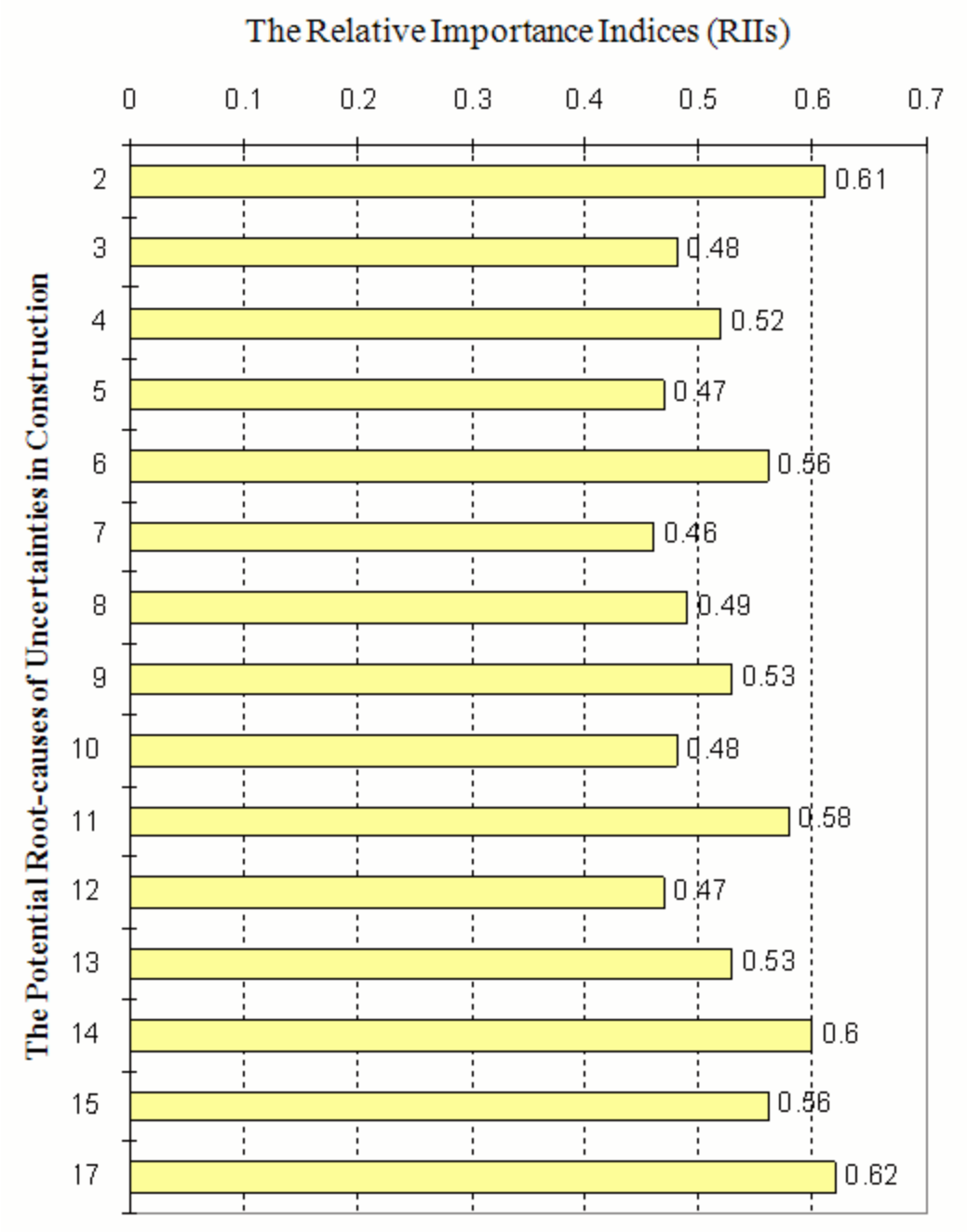
Interestingly the findings and responses given by 76 worldwide construction professionals with experience of negotiating construction disputes therefore seem to be good fit in the kingdom ---- particularly the two major ones discussed above.

A Questionnaire survey was conducted to collect data for the study. Respondents were construction managers, negotiators who participated in the survey on voluntary basis.

They were asked to identify and quantify the degree of agreement of each of the potential root-causes in the specified scale of 1(strongly disagree) to 7 (strongly agree).

The ratings made against the 7-point scale were then converted to relative importance indices (RIIs) for each potential root-cause.

The overall RIIs for each potential root-cause is shown in the Figure below. The higher the relative importance index, the more important the item is.



As we all are familiar with, construction disputes are inevitable by-product of the construction process as well as the overall Project Delivery Cycle (PDC) if and when the equitable paradigm shifts -- most commonly against the contractor.

This is due to the fact that it involves the highly complex albeit unique nature of a project and large amount of parties: Client/Owner; Contractor; Designer/Consultant;

Project Manager/Engineer's Representative, Specialist Consultants, Nominate Contractors, Third Parties such as Utility Companies, Subcontractors, etc.

Hence, resolving disputes effectively and efficiently are the main concern of the industry, always.

Negotiation is often introduced to resolve disputes at first-tier of dispute resolution process. *But hardly any or all of the competing parties realize the negative outcome or consequences of a failed negotiation***.**

During dispute negotiation, uncertainty is crucial in shaping the outcome of negotiation.

It contributes to negative movement of the process. Therefore, investigating the relationship between construction negotiation outcomes and the potential root-causes of uncertainty may help to improve the negotiation process – even help determining the cost/benefit of entering into such a process.

A list of potential root-causes of uncertainty in construction dispute negotiation was one of the products of the study.

The results of the relative importance index point out that the intact relationship and time pressure are the most important items explaining the potential root-causes of uncertainty in construction dispute negotiation.

While "time pressure" issue can be relatively easily addressed by setting aside more quality time and efforts for starting and completing negotiations, the "uncertainties" about the counterpart's and own preferences and goal can be addressed by:

a) Adopting a self-correcting heuristic approach to reduce its effects.

b) Coupling above with establishing realistic outcomes and expectations for self, and

c) Using game theories, what if analysis, holistic techniques – to name a few -- to identify and understand counterpart's minimum and maximum thresholds, limitations and constraints.

Interestingly, the results of this study echo with the work of Stuhlmacher *et al.* (1998) which stated that construction practitioners work under great time pressure to meet deadlines and to balance priorities.

Besides, recommended by Neale & Fragale (2006), the uncertainties about the counterpart's and own preferences and goal, play an important role in shaping negotiation. This study corroborates Neal & Fragale's findings to a great degree.

ABOUT THE AUTHOR: Engr. Irshad Salim is a New York based Construction Contracts & Claims Consultant specializing in Construction Business Strategies, Realism Check of Cost Estimates, Bidding for Profit, Planning & Constructability Review, Value Engineering, Claims, Delays & Contract Administration, Negotiations & Dispute Resolutions, Strategic Decision Making, and Risk Assessment. Mr. Salim has written extensively on the importance of ***"Predictability and Control"*** *as well as on the use and impact of* ***"Strategic Control of Project Elements" (SCOPE)*** *in the Project Delivery Cycle (PDC) from contractor's point of*

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