

WHY CLAIMS FAIL: AN AUTOETHNOGRAPHIC INVESTIGATION OF CLAIMS MANAGEMENT UNDER GCC CONSTRUCTION CONTRACTS

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This paper explores some of the central issues faced by claims management practitioners within contracting organisations in the GCC, from an insider perspective. Through an auto ethnographic study of the author's practice as a claims consultant in the GCC, the paper illustrates how the meanings practitioners attach to claims can lead to recurring patterns of behaviour that are constantly adapted to the changing circumstances of construction projects. It also suggests how these meanings might affect the ways in which claims are acted upon, and the consequences these actions might have on claim management practice. The empirical perspective of this paper therefore has value in an academic setting, by offering a possible explanation for poor claims management practice.

Keywords: construction management, claims management, GCC, autoethnography

INTRODUCTION

The construction industry is a major contributor to the GCC's economy. Projects totalling over \$140bn are likely to be awarded in 2016 alone (MEED, 2015), whilst construction accounts for over 8% of gross domestic production in rapidly developing states like Dubai, UAE (Emirates NBD, 2015). Yet globally, the construction industry is characterized by low efficiency, cost and time overruns, disintegration, and conflict (Aloini, Dulmin, Mininno, & Ponticelli, 2012; Yeo & Ning, 2006). These circumstances result in major inefficiencies and non-productive cost (Latham, 1993, 1994). The Middle East's volatile political and economic landscape and the highly internationalised GCC construction market compound these issues, making the GCC a hot bed for claims and disputes.

Despite the importance of claims within the construction industry, claims management literature has stagnated to consist of broadly two streams. The first examines the causes of claims (Diekmann & Nelson, 1985; O'Connor, Chmaytelli, & Hugo, 1993) or the approaches taken by practitioners in evaluating them (e.g. Arditi & Pattanakitchamroon, 2006; Braimah, 2013; Ndekugri, Braimah, & Gameson, 2008). Literature in this stream typically adopts quantitative methods void of specific context. The second stream proposes normative models to explain how claims administration, management and evaluation might be best achieved on future projects (e.g. Abdul-Malak, El-Saadi, & Abou-Zeid, 2002; Motawa, 2012), but offers little evidence that any of the proposed systems could work in practice. Aside from some limited

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examples (e.g. Rooke, Seymour, & Fellows, 2003, 2004), there has been little focus on the “real” practice of claims management.

In order to address this gap, this paper sets out some initial findings of a doctoral research project in which I utilise Autoethnography to draw on my work life in the GCC as a claims management specialist. In the sections that follow I firstly provide a background to claims management in the construction industry, and I explain the research methods on which this paper is based. I then provide a short auto ethnographic account of three stages of a construction project, in which I attempt to explain how the changing social context of these stages might influence the ways in which contractors approach claims. I conclude the paper with a summary of the principal findings of the study, and the further potential the research in this paper might have.

BACKGROUND

From a construction industry perspective, a claim is simply the “assertion of a right” to additional time or payment sought by the contractor under the terms of a contract (Chappell, Powell-Smith, Marshall, & Cavender, 2008, 70). For example, the FIDIC 1999 suite (FIDIC, 1999) - perhaps the most widely used contract forms in the GCC (Bueno, 2011) - require the contractor to issue an initial notice to the Engineer within 28 days of a claim event, to keep contemporary records as evidence of time and cost incurred, and to present a detailed and reasoned assessment of the entitlement to which it considers itself due for the Engineer’s determination. Often employers amend standard forms to make these requirements even more onerous. This means that for a contractor to present a claim of any complexity timeously and in a format that satisfies the contract, the formation of a claims management team and the development of a methodical approach to dealing with claims is vital (Jaeger & Hök, 2009, 366-367).

The process of making claims, or “claims management”, is the development of a claim from identification of a claim event, to notification, evaluation of its effect and negotiation of any compensation due. Ren, Anumba, and Ugwu (2001, 186) describe this as “the process of employing and co-ordinating resources to progress a claim from identification and analysis through preparation, and presentation, to negotiation and settlement”, including the production of documentary evidence, analysis of effects, and preparing a persuasive written submission setting out the entitlement the contractor seeks.

However, there is also a social perspective to claims management which influences the ways in which practitioner’s act towards claims. For example, Klee (2014) takes the view that claims management is a “business strategy” that is tailored to the particular relationship with the client under the contract. This suggests that contractors may adapt the ways in which claims are managed to the particular social context of a project. In either case, claims management is a specialist function that requires dedicated expertise (Jaeger & Hök, 2009; Ndekugri *et al.*, 2008). Potts and Ankrah (2014) suggest that this expertise includes construction technology, construction law, conditions of contract, contract administration, planning systems and negotiation strategy.

It is therefore unsurprising that several studies confirm that a failure by contractors to properly manage claims diminishes prospects of recovery, reducing project profitability (Ren *et al.*, 2001). For example, British construction consultants

surveyed by Vidogah and Ndekugri (1998) confirm that contractors' failures to establish contractual entitlement, provide adequate information, and properly quantify claims, are common causes of claim failure. Research by Enshassi, Mohamed, and El-Ghandour (2009), Bakhary, Adnan, and Ibrahim (2014), Braimah (2013) and Ndekugri *et al.*, (2008) demonstrate that issues such as poor record keeping, late or absent claim notices and deficiencies in analysis claim events all lead to under recovery, increasing the likelihood of disputes. Whilst studies with a GCC focus are rare, Zanelidin (2006) finds that UAE based contractors can typically expect to receive just 10-15% of the submitted claim value due to poor claims management.

However, whilst demonstrating the importance of claims management, these studies fail to answer two important questions. The first is, how do contractors manage claims in the real world? Without such contextual understanding of claims management, it is difficult to appreciate the various challenges contractors face in practice. The second and related question is; why do contractors fail to consistently adopt robust claims management strategies? An understanding of the circumstances that lead to such failures could provide a basis from which to develop methods to improve practice. In an attempt to address these questions, the remainder of this paper presents an Autoethnography based on my work life experiences as a claims specialist in the GCC.

METHODS

In classic ethnographic investigation, the ethnographer "goes somewhere, observes, returns and reports" (Dourish, 2006, 3). The ethnographer, typically an outsider to the cultural group being studied, collects "data" derived from field notes, observations and participation (Wolfinger, 2002), and reconstructs and analyses that data in terms of social theory (Button, 2000). The auto ethnographic methods utilised in this paper share many of the characteristics of classic ethnography, but with one principal difference. The difference is that I am not an outsider to the society that I have chosen to research. I am an opportunistic researcher reporting from within.

Like all qualitative research strategies, Autoethnography is associated with particular advantages and disadvantages. The obvious advantage is that an insider position brings *a priori* understanding of the culture being studied. As Greenfield (2000, 233) puts it: "When one studies behaviour in one's own culture... one has de facto an insider's cultural perspective..., the insider understands the meanings and motives behind in-group behaviours". However, because insider-researchers are attached to the same messy reality which they are attempting to explain, they might be less able to reconcile the contradictory mixture of observations necessary to explain an essential underlying phenomena (Fay, 1996). This is a problem that Van Ginkel (1998, 257) illustrates as not being unlike "trying to push a car while being inside it, observing a parade whilst marching along, or being a fish and attempting to see the water". Thus the auto ethnographer's challenge is "breaking out' from the taken for grantedness of a particular framework and of creating knowledge" by interpreting the behaviour used by oneself and others from a certain distance (Alvesson, 2003, 176).

This challenge also leads to the common perception that auto ethnographic approaches are synonymous with self-focused "evocative" and post-modern styles of research that largely ignore theoretical analysis and explanation (Ellis & Bochner, 2000). However, in order to minimise the methodological disadvantages my insider status brings with, I adopt an "analytical" style of Autoethnography in this paper. The "analytic" auto ethnographic approach is rooted in a soft-realist (rather than a hard-interpretive)

theoretical tradition. It was first described by Anderson (2006) as research where the researcher is (1) a full member in the research group or setting, (2) visible as a member in reporting, and (3) committed to explanation social phenomena through social theory.

The findings presented in this paper have emerged from analysis of auto ethnographic data derived from three primary sources: from a chronicling of and reflection on my own prominent experiences as a claims manager in the GCC (Chang, 2008), from field notes recording participative-observation of my own practice over a four month period, and from unstructured interviews with four GCC contractor's claims managers to refine the initial data collected. In order to identify salient themes and form a basis for explanation, data was textualised and analysed thematically to identify recurring patterns of behaviour, three of which form the basis of this paper. Finally, symbolic-interactionism - a perspective that assumes individuals act and adapt their behaviour according to the subjective meaning they attach to people, events and social contexts (Blumer, 1986) - was adopted to explain recurring behaviours recorded in the data.

AUTO ETHNOGRAPHIC FINDINGS

The social context of claims

A negative portrayal of “claims culture” has been prevalent in the construction management literature for decades. This is a culture in which contractors are said to emphasise the planning and management of claims as a method of making money (Rooke *et al.*, 2003, 167). Industry commentators lament at the so called “claims conscious” contractor, where the primary motivation for claims is to profit at the expense of employers’ misfortunes (Chappell *et al.*, 2008). However as will be illustrated below, the findings of this paper paint a much more complex picture of the social context surrounding claims, at least from a GCC perspective.

Claims management in the GCC is epitomised by obstinate parties, powerful clients, partial client representatives and contractors who are often unacquainted with the specialist skills and lack the resources needed to settle claims effectively.

It is not abnormal for employers (via their certifiers) to reject claims as a policy irrespective of entitlement, and then to withhold substantial payments pending final settlement of accounts. It is also common for parties to continue negotiating the final account of a complex contract several years after completion of works at site, for contractors to ignore contractual rights to invoke a neutral determination through arbitration, to accept the lack of momentum towards settlement as the status-quo, and rely instead on local agents to reach a settlement outside the framework of the contract.

Above all, the balance of power in the GCC is shifted firmly in the client’s favour, directly contradicting the populist perception of “claims culture” advanced by some commentators. To illustrate how this context relates to practice, I explain in the following sections some of the factors that influence claims managers’ behaviour during three stages of a construction project.

Claims Management at the Outset of the Project

Following award of contract, project teams representing the interests of both employer and the contractor are under pressure to build relationships strong enough to endure for several months or years. Claim managers must face day-to-day social interactions with the employer’s team, including the employer’s representative, a situation which

leads to tension between the need to fulfil mandatory contractual requirements relating to claims, and the desire to build long relationships.

Reluctance to disturb an otherwise harmonious relationship is unsurprising in an industry where clients identify contractor claims as source of mistrust (Kadefors, 2004), and project team integration is recognised by executives as a key performance driver (Baiden, Price, & Dainty, 2006). In consequence, the negative perception of claims during the “honeymoon” period of a project has direct influence on the ways in which claims are approached:

Memory: Renjith [the project manager] and I discussed whether we would raise a claim notice for the delay associated with the utility diversion [on a major retail development]. For my part, the diversion was caused by quite a clear change in conditions and was a claim that would be easy enough to prove. But Renjith was staunchly against raising any “formal” correspondence at these early stages in the project. I suppose he was reluctant to “upset” the engineer by appearing overly aggressive.

The above illustrates how the desire to avoid conflict can control claim managers’ behaviour, despite that this behaviour is neither in the direct interests of the contractor nor in accordance with the contract.

From the claim manager’s perspective, the prospect of formalising a claim by raising notices becomes associated with a deterioration in relationships between contractor and engineer owing to negative experiences of settling claims on previous projects. There is often a belief that an employer’s representative, invested in the knowledge that certain claims could have been raised by the contractor but were not, should extend favours when the contractor is in need later on in the project. As I will illustrate below, owing to subsequent events, this expectation rarely plays out.

Claims Management during the Project

The GCC construction industry places a range of pressures on individuals during the management of projects. These pressures both positively and negatively influence the motivation of contractors to pursue claims against the employer. The first pressure is placed on contractors by the chaotic demands of complex projects and burdensome reporting requirements. Lower paid technical staff in particular face long working hours (Zachariah, Prakash, & Rajan, 2002) where much of the available time is consumed by day to day project requirements:

Journal entry: I visited site... to establish whether there were any further delays in access availability that would require action. It transpired that several areas of the site had were about to stall due to lack of access. But when I asked [the contractor’s de facto claim manager] whether records had been kept documenting the extent of this situation, he responded (belligerently): “how can I keep these all these [tables of access dates] up to date when I have to finish the [payment application] and process all these...variations?”.

In the above example, the contractor’s claim manager faced a conflict between his primary role as quantity surveyor for the project and his secondary role as claims administrator. At the time, he attached relatively more value to his primary role because the ongoing delaying events had yet to significantly impact progress at the site, and acted accordingly.

However, as projects progress, events occur which result in unrecoverable delays and which put profitability at risk. It is in these circumstances that the importance of claims is raised to a level where they are more actively pursued. However, as many of these events are perceived to be caused by the employer’s representative, they tend

also to erode any perceived trust between contractor and employer representative, thus influencing the ways in which claim managers act towards claims:

Journal entry: ...however [the contractor] had quite clear issues surrounding their own contribution to the delay, which I thought [would have been] found by anyone with time to review the records properly. After suggesting we concede and expressly identify these delays in the claim (if only to demonstrate that we were transparent and trustworthy), Mohamed [the contractor's claims manager] responded: "why would we reduce our own claim - surely the engineer [i.e. the employer's representative] should be doing that for us? He does it to everything else!"

In the above example, a build-up of issues including reluctance by the engineer to correct design errors and delays in providing information had not only resulted in a need to raise claims, but also a significant deterioration in relationship between contractor and employer. The contractor's claim manager perceived the engineer's failures as a betrayal of trust, a perception that manifested itself in the way the contractor intended to approach the claim submission.

Claims management at the end of the project

As unresolved claims accumulate towards the end of the project, the initial desire to cooperate with the employer's representative is almost entirely abandoned, and it is at this stage that the contractor's claims manager becomes most willing to submit and pursue spurious claims. The following field note illustrates what is fairly typical behaviour by the contractor's claim manager at the end of a difficult project:

Field note: When Shaik [the contractor's claim manager] and I met today about the final account presentation for [a residential development] ... he proposed that we should concentrate on raising claim notices for "each and every little issue than comes in from now..." He explained further that "...we need to be on the strong side of the table when we do a deal".

As illustrated above, I have found that claim managers adjust their behaviour towards claims in reaction to the (perceived) negative acts of the employer representative's.

However, the above example reveals a further factor that influences behaviour at these later stages of the project. That factor is the belief, based on experiences with previous projects, that "senior management" will eventually do a "deal" (i.e. come to an amicable settlement of all claims through negotiation). Claims are resolved through negotiation because there is a tendency in the GCC for project representatives to avoid making reasoned claim determinations, often due to influence from the employer. Whilst the employer might instruct specialists for advice on the merits of the claim, this information is rarely provided to the contractor.

In consequence, claim managers are denied opportunities to experience rigorous testing of the claims that they prepare. The perceived importance of timely notices, sufficient evidence and detailed analysis reduces, feeding back into the cycle of poor administration and practice on future projects.

DISCUSSION/CONCLUSION

This paper has tentatively illuminated an area of practice that is often met with suspicion and misunderstood. Whilst much existing literature takes an academic view to issues surrounding claims, I have attempted to provide a more "truthful" account of claims management from the viewpoint of a practitioner working in the field.

The nature of issues surrounding claims as reported in existing literature may lead to a presumption that deficiencies in management and project systems might be the

primary cause of poor claims practice. For example, it has been suggested that issues surrounding contractual administration, document control and claims analysis might be best addressed through the implementation of normative process models or project controls (e.g. Abdul-Malak *et al.*, 2002; Motawa, 2012). However, whilst proposals to improve practice through these means might have merit, this paper has suggested that the social context in which claims are made may also contribute to poor practice.

The GCC is characterised by highly complex megaprojects, multi-cultural teams, partial certifiers and onerous contract terms which make for a tense social context, where claims become viewed as symbols of conflict. From this context I have illustrated how claim managers attach meanings to claims, how these meanings affect the ways in which claims are acted upon, and the consequences these actions might have on claim management practice.

I have demonstrated that these meanings can also lead to recurring patterns of behaviour that are constantly adapted to the changing circumstances of the project. However, these patterns of behaviour do not emerge solely from within individuals, rather they are linked to socially constructed norms of acceptable and unacceptable conduct which are themselves subject to change based on how claims managers perceive the acts of others.

The recognition of “people issues” as a barrier to claims management has been raised in previous work (Ren *et al.*, 2001; Vidogah & Ndekugri, 1998), yet specific research in this area remains critically undeveloped, particularly from a GCC perspective. The autoethnography utilised in this paper revealed some initial possible inhibiting factors to claims management practice in the GCC, but there are many more implications that are yet to be explored. Consequently, this paper points towards a new research direction that if perused, could have real implications to practice.

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