Identify Disputes In The Construction Industry: The Way Forward For Innovative Procurement System In Malaysia.

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Abstract

Disputes are common problems in the construction industry. The unclear contract underlines in most practiced procurement systems lead to various disputes among stakeholders. In order to minimise the problem, it is interesting to identify the disputes and conflict arises in the industry. This paper explore the pattern of construction disputes occurrence in Malaysia through legal cases synthesis extracted from available data bases such as Construction Law Report and Building Report. Result identified six (6) categories of disputes happen in the Malaysian construction industry that are people/stakeholders/ organisation, nature of the work and project administration, contractual and procurement, poor workmanship, design and external factors. These factors are worth to be considered in proposing new procurement system for sustainable Malaysian construction industry.

Key words: Malaysia, disputes, construction industry, procurement system, contract, sustainable

Introduction

The construction industry can be considered as a complex industry. There are innumerable factors, and combinations and variations of those factors that influence and control the rights, responsibilities and liabilities of the various parties involved in the process which can cause dispute [1]. Disputes can be considered a persistent feature of the construction industry for past many decades, judging by the growth in publications and reports dealing with construction cases [2]. Nonetheless, adversarial culture in the construction project may prevent smooth cooperation between parties involved in the project and affect project performance. Construction disputes often involve lengthy resolution processes, voluminous documentation and are adversarial and procedural by their very nature [3]. These disputes may affect work quality and delay the progress of the construction process [4], despite the fact that construction industries across the world are striving to identify ways to resolve disputes equitably and economically [5].

A wide range of construction disputes relate to fragmented nature of construction process. These disputes cause money and time to resolve, and can damage the good relationship between parties [6]. Construction disputes draw vital resources from key project success factors, which are typically completion within time, cost and at its highest quality [7]. The cost of construction can be directly and adversely affected by litigation costs and by construction business failures and it may also affect by the way contracts are put together and awarded. Even though various methods of conflict and dispute resolution such as Arbitration, Litigation and Alternative Dispute Resolution (ADR) are available to be adapted, explored and developed, the industry may
not be satisfied with the findings due to tremendous increase in initiation of litigation cases [8]. But in his paper Chin et. al (2011) suggested that innovative procurement method is able to reduce construction conflict and disputes to a significant extend as compared to traditional method which is fragmented in nature [9]. They also pointed out that the implementation of innovative procurement methods, which emphasised in setting the same goals and teamwork are able to act effectively as conflict reduction mechanism in construction industry. This indicates that by reducing the fragmented nature through innovative or single point of procurement may reduce the potential of having conflict and disputes.

Research in the area of construction disputes has identified various factors as causes of disputes including differing site conditions, variations, and delay in payment [10]. It has been said however, that construction disputes are “dominated by anecdote and hearsay” [11]. This may explain why, although disputes are said to be common in the construction industry, there is still a lack of research related to disputes and their causes, particularly in the Malaysian construction industry literature. It is crucial for the related parties to make visible efforts to ensure the projects under the 9th Malaysia Plan and 10th Malaysia Plan successfully implemented since the contribution of the construction industry to the national economy list under these plan is significant. The issues raised that the conflict and disputes are said to be common because of the complex nature of the construction industry itself [12]. The objective of the paper is to identify the disputes and conflict arises through legal cases synthesis extracted from available data bases such as Construction Law Report and Building Report in order to explore the pattern of construction disputes occurrence in Malaysia.

**Causes Of Disputes In The Construction Industry:**

A considerable amount of literature seeking to identify the causes of disputes has been written for the past two decades [13]. It has been suggested that there had been limited empirical evidence that had been structured to justify the theories that had been presented [14]. Root dispute causes identified include: unfair risk allocation, unrealistic time/cost/quality targets by the client, adversarial industry culture, inappropriate contract type, and unrealistic information expectations. Proximate causes identified included: inadequate brief, slow client responses, inaccurate design information, inaccurate design documentation, inappropriate contract form, inadequate contract administration, and inappropriate contractor selection. Additionally, Cheung and Pang [15] suggest contract incompleteness as one of the three sources of disputes. It appears that there is some partiality in the contract when client shift most of the risks to the contractor. While some of these risks are beyond the contractor’s manageable. In addition, ambiguities of contractual agreement may cause interpretational difficulties [16].

It may have be worth noting that in relation to payment disputes alone, findings from a questionnaire survey show that between 2000 and 2005, more than 60% of Malaysian contractors have experienced late payment problems, whether in government or private funded projects [17]. For instance, delay on payment may seriously affect the contractors who are not financially sound, and therefore, the contractors may claim to have right for an interest on late payment or to suspend the works until payment is being made. Accordingly, Sambasivan and Soon [18] have identified the even in cases where responsibilities of the parties have been clearly spelled out in the contract, disputes tends to occur due to various client, relationship and external factors specific to each project.

**Research Approach:**

According to Phillips and Pugh [19] the ‘what’ questions also are the significant parts in doing research. It demands a careful gathering of information and analysis to represent impartial circumstances of the research area. Understanding the research philosophy and deciding on the research stance is essential in any research. This can influence the selection of the appropriate research approach and technique. Lewis et al. [20] inferred that the deductive research approach is for testing theory.

Pursuant to previous studies carried out by Watts and Scrivener [21] this study encompassed reviewing building disputes resolved by litigation and also literature synthesis towards identifying the sources of construction disputes beneficial to fulfil the aforementioned objectives. This study employed a series of thorough literature reviews on bringing the understanding into place for both main themes: construction conflict and disputes and construction procurement. This stage was needed to set the right basis for finding the main causes of conflict and disputes in the construction industry. In addition, researchers also review legal cases from the law journal and legal cases database which available online and extract some of the judgement of the case as to what extent the cause of the litigation cases. The archival study has been conducted towards 60 legal cases from 2005 to 2011. Information was deduced from the case and also from the judgements regardless of whether they were final or interlocutory judgments. Furthermore, in identifying the sources of disputes from the judgements the data includes all claims discussed by the Judge.
RESULTS AND DISCUSSION

From both analyses, it seems that there are some similarities on the causes of conflict and disputes in the existing literature and cases that have been looked into. Following that, all the causes have been categorised into 6 main factors that seem to be appropriate, namely: (1) People/Stakeholders/ Organisation; (2) Nature of the work and Project administration; (3) Contractual and procurement; (4) Poor workmanship; (5) Design; (6) External Factors. These categories can be presumed as the representative cause for the occurrence of conflict and disputes in construction projects. These are presented in Table 1 below and discussed in more detail in the following section. The table has been formulated by analysing and synthesising various literature review as listed in Table 1 and also legal cases as in Appendix. The table is divided into 4 columns:-

<table>
<thead>
<tr>
<th>Main Grouping Causes of Disputes</th>
<th>The sub-grouping of causes of disputes</th>
<th>Causes of Conflict and Disputes From Literature Review</th>
<th>Causes of Conflict and Disputes From Cases Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>People/ Stakeholder</td>
<td>Organisation</td>
<td>Influence of lawyers; Organisational structure; manpower shortage; personal injury.</td>
<td></td>
</tr>
<tr>
<td>Communication</td>
<td></td>
<td>Poor communication; pure cognitive dissonance</td>
<td></td>
</tr>
<tr>
<td>Stakeholders behaviours</td>
<td></td>
<td>Personal variables; justice-inequalities of power &amp; influence; opportunistic behaviour; personality clashes; opportunism; intention to take advantage of other party's vulnerability.</td>
<td></td>
</tr>
<tr>
<td>Cultural</td>
<td></td>
<td>Involvement of stakeholder; adversarial culture</td>
<td></td>
</tr>
<tr>
<td>Expectations</td>
<td></td>
<td>Unrealistic expectations by the parties; different expectation</td>
<td>Overpayment to contractor</td>
</tr>
<tr>
<td>Stakeholders experiences</td>
<td></td>
<td>Failure to capture the real cost at the beginning; rigid application of one person's interpretation of a contract; owner management ability</td>
<td></td>
</tr>
<tr>
<td>Collaborative working</td>
<td></td>
<td>Lack of team spirit</td>
<td></td>
</tr>
<tr>
<td>Nature of the Project</td>
<td>Site conditions</td>
<td>Changed condition; differing site conditions; work in congested area.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Project output</td>
<td>Project uncertainty; project complexity</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Variations</td>
<td>Changes in the scope of work; level of variations</td>
<td>Delay because of the agreed variation</td>
</tr>
<tr>
<td></td>
<td>Site management</td>
<td>Project delay; site administration problem; tender period; in site overheads; cost of disruption interest and finance charges; cost of preparing claim; loss of profit; scheduling &amp; controlling techniques; poor management</td>
<td>Project is not completed due to delay; sub-contractor work programme does not comply with the main contractor work programme result to claims and counter claims</td>
</tr>
<tr>
<td>Contractual</td>
<td>Payment</td>
<td>Payment issues; financing</td>
<td>Non-payment of invoiced fees; Time limit in issuing Final Certificate; lack of capacity to settle claims; additional claim payment for lump sum contract because of the additional work that has been discovered during demolition project</td>
</tr>
<tr>
<td></td>
<td>Contract drafting</td>
<td>Ambiguities of contract document; unrealistic tendering; inadequate contract drafting; contractual relationship</td>
<td></td>
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<td></td>
<td>Procurement selection</td>
<td>Success of employer's advisor on previous projects</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Early stage of contract</td>
<td></td>
<td>No legally binding contract signed by parties; merely depends on letter of intent (LOI) resulted in issues whether there is a contract at all; formal LOI was drawn up to scope of works, staffing and</td>
</tr>
</tbody>
</table>

Table 1: Main factors for causes of disputes
basis of fees and work and work has been carried out has been considered as binding contract even though a proper contract is not signed; termination of contract based on LOI when all the preparation work has been done.

Wrong appointment of construction manager; entitlement to LAD after contract is terminated; wrongfully terminate the contract; main contractor claim LAD due to delay of work by subcontract.

Defective work; poor workmanship; Allegation of defective works; defects on the sewage treatment plant; latent defects in bricks and external wall.

work that not to specification Contractor fails to follow the design; work done is not as in contract; defects on building to the stage that needs to be demolished and rebuilt; defects in water paint and spraying system.

Defective product and defective materials property damage

Technical fault in design; inadequate design ; Poor design Client denied architect fees due to design deficiencies; incomplete design.

Changes implied by client lead to the increase of total cost of project; design changes made by designers to ensure buildability of the project.

Unforeseen events; weather conditions ; economic conditions; inflation of costs; environment

Stakeholders/People:
Newcombe [22] perceived project stakeholders as groups or individuals who have a stake in, or expectation of, the project’s performance and this includes clients, project managers, designers, subcontractors, suppliers, funding bodies, users and the community at large. Motsa [23] also highlighted the events of construction disputes by various stakeholders. From there, it seems that stakeholders/people might be one of the contributors to the occurrence of disputes. Besides that, Walker and Hampson [24] explained that procurement arrangements also might have an impact on issues, not only technical and legal aspects, but also considerations of power, influence, risk acceptance and desired design flexibility.

Nature of the work and Project Administration:
Construction projects are generally unique, accommodating different designs, sites and construction methods. Each has different characteristics influencing how the project is initiated, designed, organised and managed to get the final product as agreed in the contract [25]. Project-related factors have an impact on project success [26]. However, sometimes it can also lead to delays and later increase the cost of a project. By selecting the most appropriate procurement path to cater for the right project might help in reducing the potential upcoming problems and then result in project success.

Contractual and Procurement:
Sometimes disputes may arise between the parties as to whether in fact a legally binding contract had been concluded between them. The task of determining whether a contract is fully binding is then left to the courts. In arriving at its conclusion, the paramount factor that the court takes into consideration is the intention of the parties as evidenced in the written contract or from other relevant facts [27]. A letter of intent is used as part of the formation of an enforceable contract process. An understanding of the process would certainly help to appreciate the role of letters of intent in the creation of valid contracts. However, sometimes it might go wrong and then the question of whether the letter intent be concluded as the contract arise. However, the usage of a letter of intent is not always the case. Usually, the Malaysian construction industry is widely dominated by the traditional structure of contracting, where three distinctive parties are involved, namely the employer, architect
and contractor. The traditional structure of contracting formed the backbone of existing Malaysian building contracts, such as the PAM 1998 Form of building contract, the CIBD standard form of contract for building works (2000 edition) and the PWD Forms [28]. However, there are some problems in regards to the usage of the traditional procurement method in the Malaysian construction industry [29].

Workmanship:
Workmanship can be defined as the levels of quality in the construction project. Poor workmanship can affect the end product of the project. Wells [30] purported that most of the developing countries may experience skilled-labour shortages by means inadequacies in training facilities for the construction industry and need to depend on imported skilled labour. It is believed that most of the constraints exist within the processes of construction procurement in Malaysia which include unavailability, insufficiency or inappropriate use of sources, functions or institutions [31]. In addition to that, the constraints might limit the effectiveness of a procurement process and would subsequently affect the end product. Abd Shukor et al. [32] perceived that the selection of a procurement system might affect the performance of construction projects including the quality or workmanship of the project.

Design:
Designers play a significant role as their works incorporate from inception to completion of a project [33]. There are several factors related to the design team, for example: design team experience; project design complexity and mistakes/delay in producing design documents [34]. It has been considered that design error usually might change the means, methods, environment impact, duration or the condition of the construction process. It is also believed that one of the contributing factors to construction disputes is defective plans/design [23].

External Factor:
The environment of the construction project might be complex [35]. Akinsola et al. [25] agreed that the term ‘environment’ describes all external influences on the construction process. A construction project is also subject to these environmental influences as identified by Hughes [35] which includes economy, cultural, social, political, technological and also financial. These external factors might have also been the source of construction disputes. Due to that, with careful selection of procurement route on a project might help mitigate the external factors to minimise the occurrence of disputes in a construction project.

Conclusion:
Based on the previous research, it can be said that there are various kinds of reasons that cause conflict and disputes occurrence in construction projects. Besides the causes identified by other scholars empirically or theoretically, an archival analysis on construction law cases also has been carried out in a way to support the existing literature. As most building disputes are usually conducted privately, either by arbitration or other alternative dispute resolution, the apparent choice is to collect the primary data using cases that were reported, for example, through law reports. Interestingly, the cause of construction conflict and disputes that has been identified from the data collection is correlated with the critical success factors in a project that has been identified in the literature review. This also accord with the earlier observations that, in order to minimise the occurrence of construction disputes, it is significant to ensure the right selection of procurement strategy as a good project management will eliminate or at least reduce the possibilities of conflict and disputes to occur.

Kumaraswamy [36] argued that many of the root causes of disputes identified in the literature can be managed and controlled using various project management strategies, tools, and techniques. The exception being uncontrollable external events, such as weather, unforeseen ground conditions, and the behaviour of parties. In Malaysia, several procurement methods have been introduced to mitigate the occurrence of disputes in the construction industry such as partnering, Private Initiative Financing (PFI) and alliancing. For example, Crowley and Karim [37] believes, unlike partnering, where there is mutual agreement on the terms of the contract in order to achieve specific objectives, it is hard to see how traditional contract would be able to avoid the risk of dispute when the choice of standard form of contract itself is in the decision of the top management of an organisation. As a result, it seems difficult to have freedom in choosing the type of contract or procurement for each construction project and incapability to negotiate the terms of the contract. It is proposed that future study should focus on producing innovative procurement method which can address the disputes and conflict in considering the current innovative practices by stakeholders in the Malaysian construction industry.

REFERENCES


