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MINIMISING CONSTRUCTION DISPUTES

NORAZIAH BINTI WAHI

A project report submitted in partial fulfilment of the
requirements for the award of the degree of
Master of Sciences (Construction Management)

Faculty of Civil Engineering
Universiti Teknologi Malaysia

NOVEMBER 2008

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To my beloved family and friends,

Thank you for all your support and guidance

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ABSTRACT

Construction industry plays an important role in developing Malaysia and it is a major contributor towards realizing Vision 2020. It is totally different from manufacturing industry whereby the same construction team will not be able to produce the same products even though the projects have similar nature of construction. Owing to the complex, disputes between different parts within these interacting fragments is highly foreseeable. This study was conducted to identify the causes and effects of disputes in construction industry, as well as ways to mitigate disputes. Results from the survey conducted indicated that the causes of disputes in general between major parties involved in construction projects are various, with certain considered as major, others considered as quite significant and up to certain extent, some are considered of less significant but nonetheless could still give birth to disputes. Categorically the major effects of disputes are those that concerns time as well as money, while those consequences from the legal terms was also considered significant as the other potential effects of disputes. However, all parties involved do not seem to care much of the potential effects of disputes on their reputation as well on third parties. Dispute can effectively be avoided or mitigated by adopting certain or series of dispute avoidance activities. Although effective, these dispute avoidance approaches does not guarantee anybody full exclusion from experiencing disputes. Of all the dispute avoidance approach suggested the partnering approach was seen as the most effective but probably the hardest to be adopted. The content as well as the outcome of this study was hoped to be able to serve as a source of reference for various participants of construction industry with regards to the matters of disputes in construction industry.

ABSTRAK

Industri pembinaan penting dalam pembangunan Malaysia dan turut menyumbang ke arah pencapaian Wawasan 2020. Sektor pembinaan adalah berlainan dibandingkan dengan sektor pembuatan, dimana produk yang sama tidak dapat dihasilkan meskipun melalui proses pembinaan yang sama. Disebabkan sifat industri itu sendiri yang agak kompleks, pertelingkahan antara pihak ataupun pecahan yang pelbagai serta berinteraksi ini sering terjadi. Kajian dijalankan bagi mengenalpasti punca-punca serta kesan-kesan pertelingkahan yang wujud dalam industri pembinaan, selain daripada mengetengahkan kaedah-kaedah bagi mengelak berlakunya pertelingkahan. Hasil kaji selidik yang dijalankan menunjukkan secara amnya, punca-punca pertelingkahan antara pelbagai pihak dalam industri tersebut adalah pelbagai, yang mana ada antaranya dianggap sebagai punca utama, ada pula dianggap agak penting dan sebahagian pula dirasakan tidak begitu penting sebagai punca pertelingkahan. Dari segi kesannya pula, ianya boleh dikategorikan ke dalam kesan-kesan yang berkaitan dengan masa dan wang, disamping kesan-kesan yang berkaitan dengan aspek perundangan. Walaubagaimanapun, kebanyakan pihak yang terlibat tidak begitu mengambil berat berkenaan kesan pertelingkahan terhadap reputasi mereka. Pertelingkahan mampu dielakkan dengan mengguna pakai kaedah ataupun kombinasi kaedah-kaedah yang pelbagai. Meskipun berkesan, kaedah-kaedah ini bukanlah jaminan pengecualian sepenuhnya terhadap berlakunya pertelingkahan. Kaedah kerjasama antara dua ataupun pelbagai pihak dilihat sebagai kaedah terbaik namun mungkin yang paling sukar untuk dilaksanakan. Adalah diharapkan, kandungan serta hasil daripada kajian ini dapat digunakan sebagai rujukan bagi pihak-pihak yang terbabit dalam industri pembinaan dari segi perkara yang berkaitan dengan pertelingkahan.

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CHAPTER I

INTRODUCTION

1.1 Introduction

Construction industry plays an important role in developing Malaysia and it is a major contributor towards realising Vision 2020. The industry contribute 3.3 percent of the countries gross domestic product (GDP) in year 2003 and employs more than 500,000 workers in some 54,500 local companies. In year 2003 more than 3000 local contracts have been awarded to contractor with the total value of RM4.8 billion. The housing and infrastructure project has been the biggest contributor to the construction industry which contributes more than 70% of the total value, Yusof; M.A et al. (2007).

Construction is totally different from manufacturing industry where the same products with the same quality are possible to be produced even at a thousand times of its production. In construction, the same construction team will not be able to produce the same products even though the projects have similar nature of construction because there would be differences in regulation, site conditions and market conditions for each project.

Global-wise, the construction industry has been identified as a '*... loosely coupled system ... characterized by ... particular complexity factors owing to industry specific uncertainties and interdependencies, and inefficiency of operations*' stated by Dubois &

Gadde (2002). The separation between the design and construction processes, the fragmentation evident in the management of the construction process by subcontract, and the short term project focus of the contractual relationships between participants results in little incentive or opportunity to improve inter-organizational practices. With respect to this, there are various participants in this industry. These included; clients, regulatory agencies, engineers, quantity surveyors, developers, lawyers, suppliers, contractors, architect and the list goes on. Their obligations and objectives varied, based on their contractual relationship for each projects. Owing to this complex, fragmented nature of this industry, disputes between different parts within these interacting fragments is highly foreseeable.

1.2 Problem Statement

Dispute in construction industry may it be in the form of financial , legal or any other form is an important subject that requires attention of the industry ‘players’. Within the scope of the industry itself, disputes most often than not leads to losses may it be in terms of economic, time, market share as well as reputation, and in certain extreme cases may even lead to the downfall of a construction entity.

According to Groton (1997); Mitropoulos and Howell (2001), J.G Richard (2006), evidence showed that the amount of disputes on construction projects can be reduced through dispute identification. There are many who believe that conflicts, and therefore disputes, injured business relationships. Many considered that disputes in the construction industry are inevitable stated by Cheung and Suen (2002); Stipanowich (1996), J.G Richard (2006). Thus, it essential that all participants within this very fragmented industry must consider and establish a proper and effective mechanism to minimise disputes, to ensure products of total quality and value can be achieved and delivered.

The topic on minimisation construction disputes also dawned from newspaper articles entitled ‘Precinct 11 Housing Project at a Standstill’, published in The STAR

Newspaper dated May 8, 2008. It was about the disputes between the Client, Putrajaya Holdings Sdn Bhd (PJH) and the Contractor, Peremba Jaya Sdn Bhd. The disputes has been kept in silence for the last two years. Out of the total of 259 units offered, 211 units or equivalent to 81.5% has been sold. The project was promised to be delivered to the buyers in 2005. The bulk of the project was originally given by Peremba Jaya Sdn Bhd to its subsidiary, Arif Cerah Sdn Bhd who eventually got into financial difficulties in 2005 which causes the project to be stalled. To date Arif Cerah Sdn Bhd has surrendered the land title back to Putrajaya Holdings to resume the work. As a result, customers who have purchased the house by signing the sales and purchase agreement as early as 2003 has been servicing their housing loan repayment to the bank are the victims of the disputes.

Furthermore, in relation to these negative impacts or consequences that disputes can bear towards the industry, therefore it is vital that participants or ‘the players’ within this industry adopt a serious attitude towards mastering this subject matter, which in turn would assists them in planning, decision-making and implementation of construction projects. This research, will address as much as possible the issues, facts and ideas regarding the matter of disputes in construction industry and its minimization strategies.

1.3 Aim of Study

The aim of this study is to determine the causes of dispute in the local construction industry and to identify strategies to mitigate the disputes. To achieve the above aim, the following objectives have been identified.

1.4 Objective of Study

In order to achieve the above aims, following objectives have been laid out:

- 1) To identify the causes for dispute in the construction industry.
- 2) To study the effect of disputes in the construction industry
- 3) To identify ways to mitigate disputes in construction.

1.5 Scope of Research

With respect to the very vast subject regarding disputes in industry, therefore, this particular work will focus on several types of disputes that are commonly experienced within the industry.

Subsequently, the consequences arising from these disputes will also be addressed, and where possible supported with actual case examples.

Next, the study will also put forward the strategies to minimize these disputes, based on established ideas from various references, journal, articles, working papers and newspapers.

Finally it should also be noted that all the issues, facts, ideas as well as proposal that will be presented in this study will only focused on those related to the scenario of construction industry.

1.6 Significance of Research

The subject matter of disputes is an important subject that participants within construction industry needs to be aware of, and understands as clear as possible, Thus, this study is presumed to bear the significance of compiling the relevant knowledge regarding the minimizations of disputes whereas the final product (the completed work as a literature) may be used as a source of reference for all who are involved in construction industry or the construction processes to enhance their knowledge on the matter of disputes together with strategies to minimize it. This would subsequently assists everyone involved towards a more calculated planning, implementation and decision-making, by taking into account the potential risks of disputes and ways to resolve it if encountered – in short; of how to adopt a proper and effective strategies to minimize and resolve disputes.

1.7 Research Methodology

In order to complete this dissertation, the first and foremost step of the study was identifying research problem which covered the significance, objective and scope of study.

Second step is then followed by exploratory research of the literature. Secondary data sources for literature review are gathered from references books, journals, newspaper articles and relevant magazines. These sources provide lots of data that can help to determine the background of the research.

Primary data gathered for this study are taken from interviews conducted with the expert in this industry. Questionnaires are also distributed among the participants in construction industry. All the data will analysed using statistical method. Figure 1.1 shows methodology flowchart for this research.

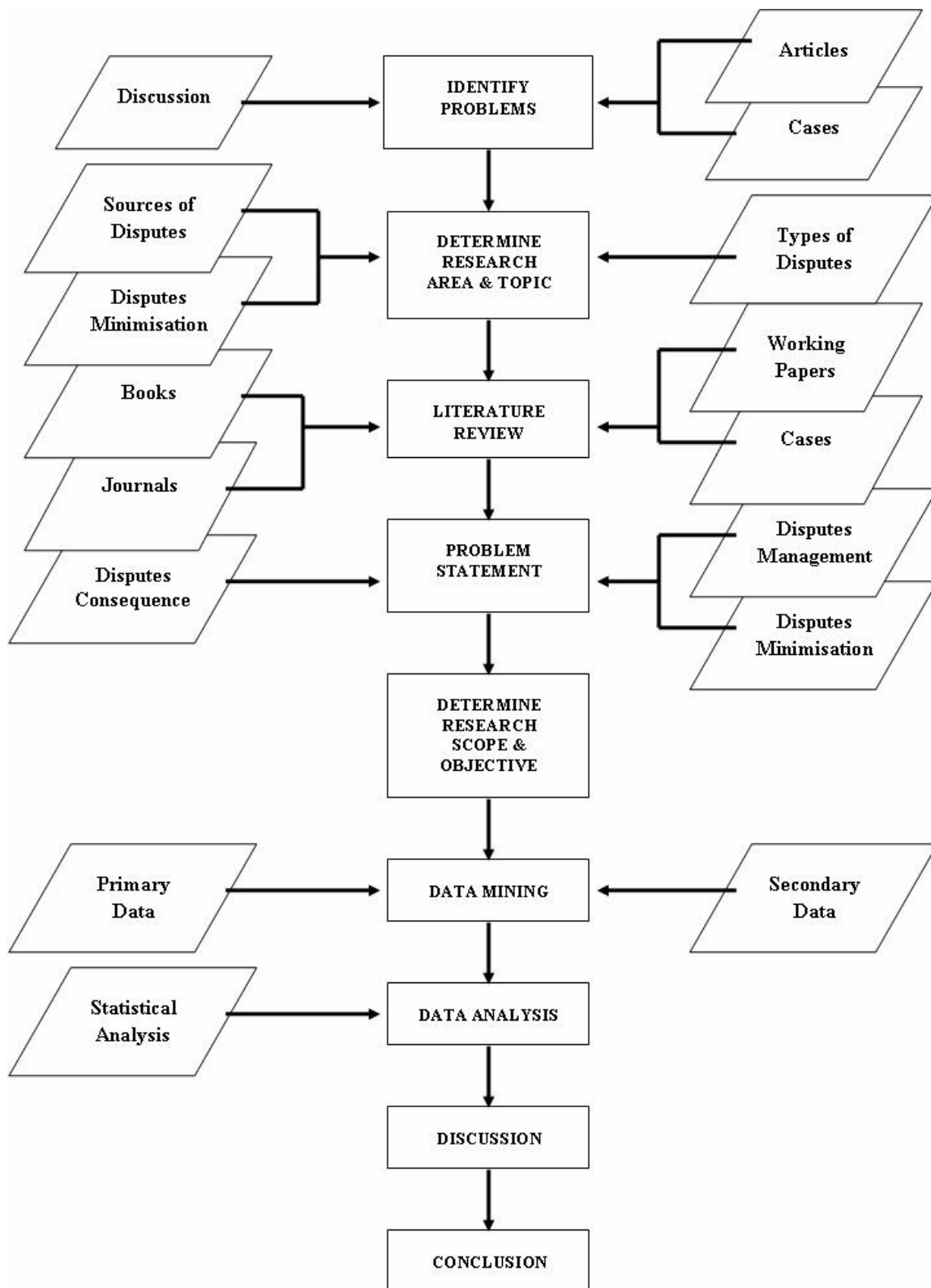


Figure 1.1 Methodology Flowchart

CHAPTER II

MINIMISING CONSTRUCTION DISPUTES

2.1 Introduction

H.S Richard (2002) stated that the construction industry has become known as one of the most adversarial and problem-prone, with claims and disputes on construction projects frequently the rule rather than the exception. Cost overruns and schedule delays can be the subject of expensive and protracted claims and litigation, and pose serious risks for all parties to a construction project.

Meanwhile according to J.G Richard et al (2006), for decades, the construction industry has been mired in adversarial relationships between owners and contractors. Each party's priorities are unsurprisingly at conflict with the others, establishing a repetitive cycle of hostilities.

Construction disputes can begin at any phase of the project from program, design, procurement, during the project, or project close out. The impacts can often have diverse effects on project financing, budget, schedule, quality, maintenance, safety, and client satisfaction stated by F.B Osmond (2003).

2.2 Definition of Disputes

The oxford dictionary defines dispute as a misunderstanding between two parties, either contractual or non contractual but the fact is there is a misunderstanding between the two it becomes a dispute.

Dictionary of Law define disputes as a conflict of claims or rights. Whenever one party to a contract requests something from the other party under the terms of their contract and that request is not complied with; there is a dispute.

Meanwhile, the words “disputes” has been defined by Kumuraswamy as situation when a claim or assertion made by one party is rejected by another party and his rejection is not accepted.

Tillet G (1991) defines that construction dispute as the incompatibility of two (or more) people’s (or groups’) interests, needs, or goals. As they seek to maximize fulfillment of their own interests, or needs, or achievement of their own bargaining or negotiating through compromise, one party may yield to the other on that which is less important. When this happens, the dispute is usually settled.

To conclude disputes in a simplistic way in principle is that it is an event or scenario of which either one or both of the party involve in an agreement failed to deliver the agreed product or outcome.

2.3 Nature of Construction Dispute

Murdoch J and Hughes (2000) stated that the first factor defining the nature of a construction disputes is the term of contract. Basically, a contract is an enforceable promise. And the subject of this enforceable promise is the production of a unique, technical artifact, using temporary management system. There are four nature of construction disputes outline by Murdoch J and Hughes as explained below.

2.3.1 Enforceable Promises

Building contracts, like any other contract, are concerned with making promises, with the expectation that one can be forced to carry them out. A person who has no intention of doing a thing should not sign a contract recording that there is no such an intention.

Of course, it can happen that people enter into contracts that they did not completely intend. A shared mistake is no real problem, as the parties can rectify it by mutual consent. However what sometimes happens is that one party claims, due to oversight or mistake, to have signed a contract that does not accurately reflect his or her attention. If there is a difference of interpretation, then the type contract will be important in term of the way in which it will be interpreted. If it is not a standard form of contract, the principal of 'contra proferentem' will prevail. This means that any ambiguity in the contract will be construed against the party who seeks to benefit by exclusions or limitations in it. This will usually, although not always, be the party which put it forward.

It is during disagreements about the intentions of contracting parties that such details as notes of telephone conversations, minutes of meetings, correspondence and the like may become relevant. These seek to provide evidence to the parties intentions. However, it will in most cases be too late for the dissenting party to alter the contract.

Building contract, as we have seen, are very comprehensive and specific about what is expected of each party, and it is difficult to claim that the obligations arising from entering into such a contract were not properly understood at the time it was made.

2.3.2 Technical Matters

Disagreements often arise over technical questions. The technology involved in construction is idiosyncratic, difficult to understand and subject to change. Added to this is any change that may be associated with the technology of the client organization. The use of different and/or familiar techniques is often the causes arguments and disagreements.

For example, the nature of the site is often source of contention. While the site itself is clearly visible at ground level, it can hold many surprises once excavation starts. It is not enough merely to look at a site in order to ascertain the site condition. Adequate site investigation is a constant source of problem in the industry. Who responsibility is it? In order to answer that question, one must look at the clauses in the contract. Do they represent what is intended? Once the cause is identified, it is a fairly straightforward matter to allocate blame and with it legal responsibility.

2.3.3 Legal Matters

Some disputes are technically simple, and turn on what is the law on a specific point. The law is not infinite. There many day-to-day occurrences that have not previously been decided upon by the courts. There are many spheres of activity not covered by statute. The resolution of a dispute may hinge upon the ascertainment of the law in a previously undefined area.