Negotiation as a means of trade usage to avoid dispute in Malaysian construction industry

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Abstract:
The construction industry plays the most important role in realising the nation vision to be a developed country towards 2020. As the industry keeps moving forward and growing through various types of project, the existence of conflict is common and inevitably to arise. Due to this matter, conflict must be resolved before it generates into a dispute which will cause negative effect to the progress of a project, business relationship and financial condition. Negotiation may be used as an initial step to resolve dispute in any situation where there is a dispute. In addition, in Malaysia negotiation may be accepted as a trade usage or practice which further developed to be a recognised as an implied term in the civil and building construction contracts. In general, it is not easy to convince the court to accept and recognise the existence of a trade usage in deciding a particular case. However, the court has generally accepted the characteristics of trade usage to be notoriety, certainty and reasonable. Hence, the objectives of this research among others are to explore the Malaysian construction industry general practice in the avoidance of construction dispute and to identify other characteristics specific to the construction industry that may be considered by the court in determining a trade usage. The data collection will be carried out through literature reviews, which will then be followed by a nationwide questionnaire survey. Consequently, based on the responses received, interviews will be conducted to realise the current practice being implemented in the construction industry in handling any conflict or dispute. In essence, the research aims to propose the possible ways in which negotiation can be accepted as a trade usage in an attempt to successfully avoid any dispute in the construction industry.

Keywords: alternative dispute resolution, negotiation, trade usage, conflict, dispute
**Introduction**

Disagreement or conflict is every project’s common occurrence, which may eventually turn into a dispute. Due to the fact that dispute is inevitable in the construction industry and brings negative effect on a project, it is vital to focus on detecting and managing conflict at the soonest possible and to avoid it from escalating into a dispute (Ng *et al.*, 2007). Conflicts can be arisen in any condition or situation where people interact, perceive that their interests are opposing (Shamir, 2003) meanwhile, dispute is the result of conflict which has escalated when there is no effort given in to solve when a conflict has detected. Furthermore, conflict or dispute may result in unfavourable condition among disputants, thus affecting the outcome or success of a particular project. In fact, a construction project requires construction players of various ranges of works to engage and cooperate with one another in making sure the project is always on track.

When it comes to dispute, disputants are given the freedom to choose either binding or non-binding resolution in order to resolve disputes, (Chong and Muhamad Zin, 2009). Besides, dispute should be resolved in the economical way to meet both parties’ highest satisfaction (Harmon, 2003); hence overly complicated procedures should be avoided. Rather, resolution of conflicts should be promoted and take place at the lowest possible organisational and procedural level.

Locally in Malaysia, Construction Court has already been implemented in Selangor & Kuala Lumpur starting 1 April 2013 in which it operates to smoothen the administration and instantly resolving any matters for cases regarding construction or connected with construction (Mahkamah Persekutuan Malaysia, 2013). In addition, adjudication practice as alternative dispute resolution (ADR) has been introduced through the Construction Industry Payment and Adjudication Act 2012, although its implementation has not being enforced yet (Government of Malaysia, 2012). In addition, Malaysian bar has established the Malaysian Mediation Centre (MMC) to introduce mediation as an ADR, thus to provide a proper solution for successful dispute resolutions (Mohd Danuri *et al.*, 2012).

The presence of ADR has given the construction industry greater choices for industry players to solve disputes among them. Indeed, ADR mechanism does not involve inconvenience legal processes as in the conventional method in resolving dispute. Under ADR, there lies options such as negotiation, mediation, executive tribunal, expert determination, adjudication, arbitration and mixed processes, med-arb which are made available to be on the disputants’ hands to choose (Gould, 1998). These alternatives provide better conditions in serving the parties towards disputes solving. Moreover, contract forms in Malaysia such as CIDB 2000 and PAM 2006 are provided with dispute resolution mechanism (Mohd Danuri *et al.*, 2012). Selection of ADR, however may vary according to the needs and convenience of the disputants.
Chong and Mohamad Zin (2012) have described some selection factors of dispute resolution among disputants which as the following:

- Non-complex dispute
- Disputing parties control the dispute resolution process
- Guiding the parties to understand each other demands
- Fair treatment of both parties during the negotiation process prior to any official hearing and ruling
- The parties are free to look for the other dispute resolution methods (without liability) if they are not satisfied with the results
- Voluntary process
- Speedy of the process
- Economical
- Preservation of relationship
- Without involving legal profession
- Within the budget and schedule of the process
- Flexibility of the process

However, inappropriate results could be the consequence when lack of good ADR strategy is executed (Umunadi, 2011). In addition, according to Chong and Muhamad Zin (2009), it is a major issue in choosing which dispute resolution to be engaged, rather the efficiency and appreciation of the mechanism is more demanding. Benefits of employing ADR have become the main reason which makes the alternatives to be more preferable than the conventional dispute resolving method.

**The emergence of negotiation as an ADR mechanism and trade usage**

Negotiation is defined as a resolution where there is no involvement of third party to mediate and the disputing parties must have the problem-solving efforts among themselves (Gould, 2012). It is a non-binding method which widely used as bedrock of all settlement (Gould, 2012) and conducted by disputing parties as an initial process towards resolving any disagreements. In addition, negotiation is said to be back and forth communication, as it is about a win-win game thus, disputing parties are better served if their interaction is about increasing the number of choices mutually for better agreements and results (Kamran, 2012).

According to Umunadi (2011), there are two (2) types of negotiation, namely positional negotiation and collaborative negotiation. By definition, positional negotiation is based on the aggressive pursuit of interest by one party and being inconsiderate the demands of the interest and needs of the opposing party. In contrast, collaborative negotiation is where both disputing parties try to educate one another about their needs thus, emphasise on the mutual understanding and feeling.

The method of negotiating involves a direct dialogue and discussion who are facing with a conflict situation of dispute which intended to improve understanding, to result an agreement and to bargain between individual involved, as further described by Umunadi (2011). Practically, the process and the satisfaction of the results are within the disputants’ reach and control.
Figure 1 shows the pattern of dispute resolution options according to their cost, degree of hostility as well as the control of the outcome or results of resolution. As presented, negotiation comes with the lowest cost of resolution with the least degree of hostility. In addition, it is a mechanism where the disputants have the most control of the outcome or results.

Although negotiation may not always be workable and consensus in the end, nevertheless in Malaysia, an initial finding from a preliminary interview illustrates that negotiation is still being favoured if there is any disagreement before taking advice from legal advisers on whether or not to proceed with ADR as described by Mohd Danuri et al. (2008). Usually, the process of negotiating is carried out when the communication among disputants is still cordial or early or at the de-escalation point when communication has been restored (Umunadi 2011). Inefficient negotiation discourages the early settlement and leads the contracting environment to be adversarial (Cheung, et al., 2006). In addition, high cost of dispute resolution, as well as time and increased expense in appointing a neutral third party such as a mediator result in increasing numbers of companies to choose negotiation rather than other ADRs to resolve disputes, as if the disputes arisen under an existing agreement (Galloway, 2013).

In Malaysia, negotiation as one of the options under ADR may be introduced as an accepted trade usage or practice which may eventually be recognised as an implied term in the building contract. In fact, negotiation is known to be speedy, flexible, and voluntary, involves simple and quick procedures, the least expensive procedure, as well as maintains the disputants’ privacy. On the other hand, trade usage is consensual which is defined as the use of a trade or local practice as evidence of the parties’ probable intent in interpreting the terms of an agreement (Levie, 1965).

Generally, it is not easy to convince the court to accept the existence of a trade usage in deciding a particular case. For instance, the courts have generally accepted that the characteristics of such a ‘trade usage’ are notoriety, certainty and reasonable in the case of Bond v CAV Ltd [1983] IRLR 360 par 54. Trade
usage and its acceptance may be varied between different countries or industries. In fact, construction industry itself has its own players to recognise a practice before it turns to be a trade usage. Some case laws are presented exemplify the condition and mode of trade usage. Culture in the forms of trade usage and custom may be accepted as law and recognised as an implied term if it can be properly established in court. Indeed, the following quotes about a different form of usage provide a much needed assistance in the context of this research:

“The law has developed different types of usage. Local usage describes a practice or method of dealing regularly observed in a particular place. Under certain conditions it may be considered by a court when interpreting a document. On the other hand, general usage is a practice that prevails generally throughout the country, or is followed generally by a given profession or trade, and is not local in its nature or observance.” (TheFreeDictionary, 2013)

In this regard, the case in Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30 illustrates that a trade usage can be readily accepted by the court if such a trade usage is a general usage prevalent throughout the country or is followed generally by a given profession or trade, rather than a mere local usage. Other case laws are also included in this research to show that a culture in the forms of trade usage and custom may be accepted as law and recognised an implied term if it can be properly established in court.

Research Methodology

The objectives of this research among others are critically to explore the Malaysian construction industry general practice in the avoidance of construction dispute and identify other characteristics specific to the construction industry that may be considered by the court in determining a trade usage. In essence, this research aims to propose the ways in which negotiation can be accepted as a trade usage in an attempt to successfully avoid any dispute in the Malaysian construction industry. Thus, this will create a significant reason how conflict or dispute could be minimised and prevented from being referred to conventional or other ADR mechanism.

The data collection will be carried out through literature reviews to ensure important variables are not ignored in the questionnaire survey and to capture the knowledge of dispute avoidance and resolution in the construction industry, which will then be followed by a nationwide questionnaire survey. Consequently, interviews will be conducted to realise the current practice being implemented in the construction industry in handling any conflict or dispute arisen. The respondents will be among Malaysian developers and contractors who are basically have involved directly with contract administration practice and might have some knowledge or basic understanding in management, contract and legal issues, as well as having more than 10 years of experience in the construction industry particularly in both civil engineering and building works.
List of developers is archived based on database of the Real Estate and Housing Developers’ Association Malaysia (REHDA) and Ministry of Urban Wellbeing, Housing and Local Government (KPKT). On the other hand, contractors who have registered with Construction Industry Development Board Malaysia (CIDB) and have position of contract from class G7 have been chosen as they are anticipated to have more experience and capability of handling complicated projects locally or abroad which prone to dispute.

**Conclusion**

The emergence of a mechanism to prevent any conflict from flourishing into a dispute is necessary in the Malaysian construction industry to avoid any negative effects towards the success of a particular project. Due to this matter, negotiation could eventually be used as an initial to avoid and resolve dispute. Thus, the implementation of negotiation in avoiding a dispute is to be explored and in addition, other characteristics specific to construction industry that may be considered by the court in determining a trade usage will also be identified. In essence, this study aims to propose the ways in which negotiation can be accepted as a trade usage in an attempt to successfully avoid any dispute in the Malaysian construction industry. Hence, this acceptance may eventually recognise negotiation as an implied term in the building works or civil engineering contracts in making sure that the disputants try to negotiate first before engaging any other dispute resolution.

**Acknowledgement**

This research receives financial support under the University of Malaya Research Grant (UMRG) (Account No: RG196-12SUS).

**References**


