Resolving issues and disputes in Extension of Time (EoT) claim in the Malaysian construction industry

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Abstract. The rapid growth of population in urban areas resulted in a higher amount of waste generated yearly. According to the Solid Waste Management and Public Cleansing Corporation (SWCorp), in 2018, Malaysians generated 38,142 tonnes of waste per day with an average of 0.83 kg/capita/day for a household in the urban area. Malaysia, with a population of 32.4 million, 76% of the entire population are living in urban areas (Department of Statistic, 2018), this figure is worrying. This pilot study explores and evaluates the perspectives of governance on waste management processes and practices for urban residents; in a mixed density housing scheme. A survey was conducted on 30 respondents of a mixed density housing scheme in Section 7, Shah Alam, Selangor. The data then analysed through reliability test analysis. There were four (4) key variables being put forward for this study; services and practices, socio-economic and well-being, stakeholders and environment. The result of the analysis has found out that, the variables for waste management services for mixed density housing scheme are reliable with the respondent’s feedback. However, some questions are not compatible to be analysed in parallel with other questions.

1. Introduction

Disputes are common in the construction industry. The competitive nature of the industry, the complexity of the project and the contractual requirements are among the factors that lead to disputes. According to [1], extension of time (EoT) submissions are a common source of construction disputes. A survey conducted by [2] involving construction industry stakeholders from both the public and private sectors revealed that EoT claims ranked third amongst the most disputed issues in the industry, while the National Construction Contract and Law Survey, 2012 reported that extension of time are the most common issues of dispute between clients and main contractors and is still be the most common issue among those who had been in disputes in 2018. On the other hand, [3] discovered that EoT claims ranked third among eight factors that converting claims into disputes.

The afore-mentioned scenario demonstrates that the claim for extension of time is a burden that has been plaguing the construction industry for many years. A number of problematic issues in relation with EoT claims have been identified through an extensive review of previous publications. The issues found to be the ‘thorny issues’ associated with EoT claims are concurrent delays, the ownership of floats, non-compliance with contract requirement for delay notification, and global claim submissions. Besides that, other disputes and disagreements which are prevalent in many EoT claims are the eligibility of time
extension claims, the choice of method for evaluating the delays, the permissible period of time extension [4] and inadequate efforts in mitigating delay [5]. Among of the common issues disputed in relation to EoT claims are as follows:

a) Conflicts on the ownership of float
The issue of who owns the ‘float’ in a construction programme has been the topic of much debate for many years. Both the owner and the contractor are keen to have access to the float in a programme as it affords them more flexibility in their decision making and use of resources [6]. Three conflicting viewpoints regarding ‘float’ ownership are normally arise, namely whether the float is owned by the contractor, the employer, or by the ‘project’. According to [7], the argument that the ‘float’ belongs to the contractor is based on the premise that the programme was prepared by the contractor, and therefore, it is for him to use, manage and control it to the best of his ability. Contrary to that, an assertion that the owner owns the float may be based on the belief that, as the owner of the project, he is entitled to the ‘float’ as part of the price he has to pay for ‘float’ and can use it as he wishes [7][8]. The third conflicting viewpoint regarding the ownership of the ‘float’ is that the ‘float’ belongs to the project or, in other words, on a ‘first come-first serve’ basis. This concept treats the ‘float’ as a shared commodity in which the ‘float’ is available for use by whoever needs it. Therefore, whichever party comes to utilise the float should have the benefit of it [7][9].

Having examined the fact that the ownership of the ‘float’ is a constant source of dispute in time-related claims, the Society of Construction Law (SCL) Protocol recommends that parties address this issue in their contract. Nevertheless, in the event that there is no such provision stipulated in the contract, the ‘float’ is to be used by whoever needs it first on a first-come-first-serve basis, which means that the ‘float’ belongs to the project [10][11].

b) Failure to establish causal link
This issue was ranked first in a survey by [5] as a matter that lead to dispute over claims for extension of time. This was not surprising as establishing cause-effect relationship is difficult and complicated process especially if it involves multiple delays contributed by various parties [12]. As it become a core ingredient for the claim to succeed, failure by the contractor to demonstrate the link between cause and effect of the delays to the project schedule may result to the failure of the claim submitted. Often, frustration arising from the rejection of such claim will cause a dispute amongst the parties involved.

c) Concurrent delay
Concurrent delay has been, and continues to be a debatable issue. To the owner, a concurrent delay will be a reason for issuing a time extension without additional compensation; while in contrast, the contractor will use a concurrent delay to waive their own delay in order to avoid liquidated damages [13]. Assessing concurrent delay is difficult and often leads to various issues and serious disagreements [14][15] as not all concurrent delays start at the same time and finish at the same time, which would be relatively easy to analyse. [16] contended that the concurrent delay issue becomes more complicated if the delay periods are of different lengths; the delay period is not totally concurrent; or the delay period has different impacts on the activities it affects and the severity of the impact upon the affected activities.

d) The choice of methods for evaluating delays
Various methodologies have been developed over the years as a means of analysing delays to identify its effects on a project schedule and determining the liability for its consequences. As each method has its own strength and flaws, consensus on which method is the best for any situation is impossible. Despite the variety of delay analysis methods, there has been very little guidance until recently, as to how each method should be carried out [17]. Since each method has wide differences as to their capabilities and the accuracy of the result produced [18], which method a party chooses often varies and depends upon their experiences and preferences which sometimes lead to disputes and disagreement if
a particular delay analysis method could not be mutually agreed \[4][19]. Conflicts started arising over which delay analysis method should be used and why \[20]. As no single technique that is universally accepted, there is an urgent need to have a mutually agreeable delay analysis technique to be specified in the contract document or any kind of guidelines to help the contacting parties achieving a better solution \[4][19].

e) Global claims

‘Global claims’ or what are often referred to as ‘rolled up’ claims have been the subject of much controversy associated with time-related claims. Generally, it is a situation where the contractor combines all the different causes of the delay and shows a single effect in which a large number of delay days are claimed without an analysis of the impact of each delay event on the completion date \[5][21]. Such practices appear to be the norm, especially when there are two or more overlapping causes of delay in which the exact length of the delay from each cause might be difficult to assess or it is said to be impractical or impossible to provide a breakdown of the sum claimed between those \[22][23].

f) Conflicting interpretation of contractual provision

Conflicting interpretation of contractual provision regarding time-related matters was found among of the problematic issues in relation to EoT claim in Hong Kong and Singapore construction industry \[5, 24]. As the use of ambiguous language or provision could open a floodgate of avoidable litigation, the language of the contract should be clear and such that it is not open to different interpretation \[25]. They further suggested, training in the area of contract management to the professionals can be said to be of a great help for better understanding of the contract.

2. Research Methods

Recognising the fact that the EoT claim is the most difficult, complex and litigious claim in the construction industry, this research endeavours to assist industry practitioners in dealing with such claim. The questionnaire and semi-structured interviews were therefore formulated to investigate the most contentious issues in relation to EoT claim and how do they dealt with it (specifically from the professional architects and contractors point of views).

2.1. Questionnaire Survey

The questionnaire survey was conducted simultaneously among 1500 respondents, consisting of 500 professional architects and 1000 Grade G7 contractors across Malaysia. The respondents in this research were limited to Grade G7 contractors to represent the claimants, while since architects are named as the claim certifiers for EoT claims in the PAM 2006 form of contract, professional architects were chosen to represent the claim certifiers/assessors. A total of 237 questionnaires returned, giving a response rate of sixteen per cent (16%). Forty-six per cent (46%) of these represented professional architects, while the remaining 54% were professionals engaged in construction companies under the category of Grade G7 contractors in the Construction Industry Development Board (CIDB) registry.

2.2. Semi-structured Interviews

A series of in-depth interviews was conducted involving experienced professionals within the industry, particularly those who have ample experience in dealing with EoT claims. The main thrust of the in-depth interviews was to explore and to study in detail the issues being investigated via the respondents’ knowledge and opinion on several issues with regard to EoT claims based on their experience in the construction industry. This was in tandem with \[26], who emphasised that an in-depth interview is designed to seek “deep” information and knowledge, usually concerning very personal matters, such as an individual’s self, lived experience, values and decisions, occupational ideology, cultural knowledge, or perspectives.

Although 95 questionnaire respondents agreed to participate in the interview, only thirty-four (34) were able to commit themselves to the scheduled interview period. \[27] asserted that there are no pre-set rules on the number of interviews but it depends on the aim of the research and the research questions.
Hence, a total of thirty-four (34) interviews were considered sufficient to address the research questions. In addition to that, the strong professional background and experience of the interviewees justified the credibility and reliability of their input. The 34 interviewees were spread evenly across the two groups of industry participants, i.e. the professional architects and Grade G7 contractors. In terms of experience in the industry, all the interviewees had been in the industry for more than 10 years, with 23 of them having been in the industry for more than 20 years, while the remaining 11 interviewees had been in the industry for 10-20 years. The majority of the interviewees had been involved with EoT claims for more than 10 years. Only five (5) of them had dealt with such claims for less than 10 years. Most of the interviewees from the Grade G7 category of contractors occupied the top positions in their organisation, such as Directors, Associates of the company, project managers, and contract managers. The strong professional background and established practical experience of the interviewees suggest that the information, ideas and insight provided by them were highly valuable for this research. Interviewees from professional architect’s category were coded as ‘A’ while those from contractor’s category were coded as ‘C’.

3. Result and Discussion
3.1. Issues Disputed in relation to EoT Claims
Following the interpretation of the five-point Likert scale, the analysis for the ten (10) most contentious issues associated with EoT claims, ranged from 2.60 to 3.60. The five highest mean scores of 3.60, 3.40, 3.35, 3.29, and 3.28 belonged to ‘concurrent delay’, ‘eligibility of time extension claim, i.e. the permissibility of any specific delay event for justifying a project time extension’, ‘failure by the contractor to comply with the contractual requirements for EoT applications’, ‘inadequate efforts in mitigating delay’, and ‘permissible period of time extension’, in descending order. On the other hand, ‘the choice of method for evaluating delays’, ‘global claim’ and ‘conflicts on the ownership of float’ were the three least disputed issues ranked by the respondents.

‘Concurrent delay’ was ranked as the most contentious issue in relation to EoT claims. [28] contended that the concurrent delay issue becomes more complicated if delay periods are of different lengths, the delay periods are not totally concurrent, the delay periods have different impacts on activities, and the impacts have different degrees of severity upon the affected activities. A clear understanding and mutual agreement are essential if concurrent delays are to be dealt with in the most appropriate way. Unfortunately, in actual practice in the industry, few construction contracts contain specific clauses or definitions of a “concurrent delay” and the extent to which it will affect the contractor’s entitlement to additional time or responsibility for liquidated damages [13]. Ranked second was the ‘eligibility of time extension claim i.e., the permissibility of any specific delay event for justifying a project time extension’. Disputes and disagreements in relation to the eligibility of the time extension claim include the permissibility of any specific delay event for justifying a project time extension [4]. The ‘failure by the contractor to comply with the contractual requirements for EoT applications’ issue ranked third as the most frequently disputed issue associated with EoT claims. Jergeas and Hartman [29] emphasised that knowledge of the contract and preservation of rights should be exercised by every party to help settle claims effectively and to prevent disagreements from escalating.

‘The choice of method for evaluating the delay’, ‘global claim submission’ and ‘conflicts on the ownership of float’ were the last three most contentious issues with regard to EoT claims and received similar rankings from both groups. An interesting finding was that ‘global claim submission’ and ‘conflicts on the ownership of float’ were the least disputed issues in the Malaysian construction industry, despite the fact that these have often been quoted as the most contentious issues associated with EoT claims that continue to pose a great challenge to the construction industry [8][30][31][32].

Subsequent to the identification of the disputed issues associated with EoT claims, it was vital to investigate those issues in-depth from the experience of the interviewees. The interviewees were informed of the survey results that listed the following as the top five (5) most contentious issues associated with EoT claims; (1) concurrent delay; (2) eligibility of time extension claim; (3) failure by contractor to comply with contractual requirements; (4) inadequate efforts in mitigating delays, and; (5)
permissible period of time extension. All the interviewees agreed with these five issues, and were then subsequently asked to elaborate on these issues based on their experience in handling EoT claims.

a) Concurrent delays
The majority of the respondents acknowledged that disputes involving issues of concurrent delays are the most complicated and difficult for all parties. This is because all parties are attempting to establish their version of the truth, while finding problems with the opposing party’s version. According to respondent C10, the biggest challenge presented by concurrent delay is in determining which party is responsible for the overall occurrence of the delay. He further stated that concurrent delays typically do not cause problems if the delays are caused by one party (such as delays caused by the client), but the situation becomes more difficult if the delays are multi-party (such as delays caused by the client and the contractor). Such situations will be difficult to deal with as both parties (owner and contractor) will tend to use concurrent delays as a defensive tool; the owners will protect their interest to collect liquidated damages, while the contractors will try their best to waive their own delays in order to avoid liquidated damages [33]. Respondents C8 and C10 also added that the situation would become more complex when the work programme given by the contractor is not practical or if there are no supporting documents. Attempts to rectify multi-party delays involve both supporting documents and a practical work programme. However, there are also times when contractors try to use concurrent delay to cover their own mistakes. Respondents A13, A15, C3 and C10 stressed that experience and skills are needed when there is a dispute involving concurrent delay. In addition, the consideration and agreement of both parties are needed to deal with such a problem.

b) Eligibility of time extension claim
A further contentious issue related to EoT claims is in terms of the eligibility of the claims. The claims qualification refers to the events entitling the contractor to receive an extension of time. Although the relevant events that are entitled to time extension are listed in the contract documents, disputes may still arise with regard to the qualifying events. The majority of the interviewees stated that delays due to weather conditions are often disputed. These results support the earlier discovery by [34] that time extensions due to unusually severe weather can be difficult to establish, hence, giving rise to costly claims and disputes amongst the contracting parties. They further emphasized that severe weather conditions should be incorporated in all construction contracts, along with a clear distinction between normal and severe weather conditions to avoid any ambiguity.

To demonstrate their claim for exceptionally inclement weather, contractors must prove that the weather conditions experienced are completely unexpected and not the norm for a period usually defined as within 5-10 years. According to respondent A7, contractors will often call rainy weather as ‘exceptionally inclement weather’. Planned construction activities must take into account such factors as poor weather conditions, during which the construction activities such as ground and concrete work should be avoided. However, weaknesses in the planning and preparation of work schedules may cause issues such as these to be overlooked. As a result, when contractors apply for an extension of time for such predictable things and fail to receive an extension of time, a dispute may arise over the issue of eligibility.

c) Failure by the contractor to comply with contractual requirements
The failure of the contractor to comply with the provisions outlined in the contract was ranked third among the disputed issues associated with EoT claims, as discovered through the questionnaire survey. The interviewees from the category of professional architects explained that the failure of a contractor to comply with the terms of a contract when they notice delays often becomes an issue. They also admitted that lack of understanding of contract terms may lead to poor contract management and administration that may, in turn, result in failure to comply with the contract document. [35] noted that as the site staff are the persons who are always at the site and are very familiar with what is happening with the project, they are expected to have a comprehensive understanding of the contract provisions and should be aware of their roles and responsibilities, as stipulated in the contract. [36], on the other
hand, pointed out that regardless of what is provided by the contract language, the owner of the project deserves to be notified of the occurrence of any delays with his project.

Respondents A10, A11, A12, and A13 expressed their concern that most contractors depend on the architects or consultants to remind them of the contract terms. Obviously, the understanding and awareness of the contract does not rest on the shoulders of one party alone, but every contracting party should be aware of what is inside the contract and adhere to it unequivocally. However, as understanding a contract is usually influenced by experience and common sense, the contracting parties frequently interpret the contract from their own perspective in an ad hoc manner and for their own benefit, resulting in the same contract clauses being interpreted differently by the various parties [37]. Such a situation may lead to the failure to comply entirely with the contract requirement which in turn sparks a dispute amongst the contracting parties.

3.2 Method to Resolve Disputes

The questionnaire respondents were also required to indicate their preferred method of dealing with disputes associated with EoT claims. Five dispute resolution methods were listed in order for the respondents to choose the one that they preferred most i.e. negotiation, adjudication, arbitration, mediation and litigation. The survey revealed that, the respondents in this study reached a consensus on their preferred method for resolving disputes associated with EoT claims. Both parties confirmed that ‘negotiation’ was their preferred method for dealing with any arising disputes, while ‘adjudication’ was their last choice of dispute resolution method.

The interviewees on the other hand were asked to what extent the dispute on EoT claims affects both the project and the parties involved. The majority of the respondents stated that EoT claims typically do not pose a serious issue, unless they involve financial implications such as Liquidated Damages or ‘loss and expense’. Based on the experience of almost all the respondents, EoT claims-related issues are typically resolved amicably through negotiation. Although it may be difficult to achieve a just solution for all the parties involved, typically a solution is reached that allows a project to proceed smoothly. Some respondents also stated that the concerned parties are usually not interested in prolonging the dispute, as this not only damages business relationships but may affect the entire project. The respondents also listed three main reasons for the involved parties to decline lengthening a dispute as follows: (1) maintaining a good relationship between the contractor, employer and consultants; (2) weaknesses in contract management and administration/poor contractual knowledge; (3) focusing on work progress.

The majority of the contractors stated that they do not want to prolong any conflict or dispute because they wish to maintain a good relationship with both the employer and the consultants. In addition, the respondents also felt that as Malaysia is a small country, they are likely to work again with the same people on different projects. It is difficult to work together while holding grudges. One of the contractors stated that:

“...We don’t want to burn the bridge...we just want to maintain a cordial relationship with everybody...”

Respondent C8

The majority of the respondents also acknowledged that weaknesses in the management and administration of a contract contribute to a lack of desire to prolong a dispute. This may also be due to a lack of understanding of their rights and their roles, as stated in the contract. Therefore, they choose to downplay disputes and avoid taking them to a higher level. According to respondent A4, contractors with experience in handling large-scale projects usually have a strong team. The administration and management of contracts is a core competency. Usually, they are compliant with the terms and conditions of the contract, and should an issue arise, they are able to properly interpret the contract. However, less-skilled or inexperienced contractors usually prefer to compromise.

The respondents also stated that work progress is more important than disputes. Therefore, they are willing to set aside disputes. Respondent A11 stated that there is no point in arguing because this
will not solve the problem but may instead further complicate the situation and cause more delays. Tolerance and cooperation are the best weapons for combating problems. This was confirmed by respondent A15:

“...In the event of a dispute, not everybody will be 100% satisfied. But tolerance is important. There’s no such thing as a win-win situation, satisfaction is up to a certain level that everybody can accept. We just don’t want to prolong the case because it will be a waste. It will waste everybody’s time, money, etc....”

Respondent A15

When asked about dispute resolution methods, all the respondents said that they preferred to settle disputes through negotiation as it is fast, easy and economical. Although negotiation is preferred to resolve any problems and disputes, respondent A10 expressed concern about the common practices for addressing problems related to EoT claims, such as conditions or offers from the employer to the contractor. It occasionally happens that the contractor will be given an extension of time on the condition that they will not produce any monetary claims due to delays. This was acknowledged by respondents C7, C8, C12, and C15. This scenario was found to be similar with that of the Singapore construction industry, in which a study conducted by [24] revealed that in many cases the contractors were awarded an extension of time on condition that they abandoned any claim for additional costs. According to respondent C7, although disadvantageous deals are occasionally received by the contractor, this may be the best option if an extension of time is needed to avoid incurring the Liquidated and Ascertained Damages (LAD). Respondent C15 also experienced a similar situation; however, normally a company will assess in advance the impact of accepting a particular offer. If it will cause significant loss, the company will not accept it just to avoid the LAD. They will instead appeal for an extension of time and re-submit the application to be evaluated by the architect.

‘...Basically owners don’t want to go through lengthy disputes. They want to get things done. Maybe the contractor prepared their thing to speed up the process. So, as long as they agree, it’s ok. But this is not healthy. But it happens quite often in the industry...”

Respondent A7

4. Conclusion

Extensive reviews on the previous relevant publications formed a sound basis for an industry-wide questionnaire survey, which was later confirmed by the participants in the semi-structured interviews. Ten (10) issues were highlighted from the reviews, which were then evaluated by 237 survey respondents. Concurrent delay, eligibility of EoT claims, failure by contractors to comply with contractual requirements, inadequate efforts to mitigate delays and the allowable time extension period were recognized as the top five (5) issues in relation to EoT claims in the Malaysian construction industry.

The results from the questionnaire survey were used for a series of semi-structured interviews to investigate the topic in detail. The interviews highlighted the fact that: maintaining a good relationship between the contractor, clients and consultants; weaknesses in the administration and management of contracts; and focusing on the progress of works to avoid more delays are the three reasons why industry participants choose not to prolong disputes due to EoT claims. Negotiation was selected as the method to achieve a so-called ‘win-win’ solution to resolve disputes as it is fast, easy and economical, while adjudication was rated as unpopular compared to other dispute resolution methods.

As the occurrence of disputes in relation to EoT claims can have various catastrophic effects, such as financial impact, cause delays to the progress of works and destroy business relationships, hence, it is important for the parties involved to be aware of the matters that may give rise to disputes as these will determine the best mechanisms to be put in place to prevent them from arising and to deal with them in appropriate ways that will benefit all parties. Further, it has to be noted that it is not the responsibility of one party alone to prevent the occurrence of disputes and to minimise the effects of
disputes if they do occur, but it requires the commitment and cooperation of everyone involved in the project as each party may have played a role in contributing to the disputes. Among of the way to avoid disputes is to fully understand the duties and responsibilities set out in the contract and to subsequently comply with them without fail.

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