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Using Dispute Resolution Clause Efficiently in Managing Commercial Contract Cases

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Abstract: *Nowadays, parties generally prefer more efficient and cost-effective dispute resolution mechanisms in resolving commercial disputes. Thus, the shift from adversarial litigation to non-adversarial types of dispute resolution. The main objective of this article is to study the use of a dispute resolution clause in contracts in regulating the way of resolving commercial disputes. The specific objectives of this study are to identify the main content of a dispute resolution clause and to analyze the effects of invoking a dispute resolution clause at the pre-litigation and the initial litigation stages. This study is grounded in doctrinal legal research. The researcher obtained primary and secondary sources via the library and later analyzed them using critical and analytical approaches. This study mainly finds that efficient use of a well-drafted dispute resolution clause may produce intended results with time-saving and effort at the pre-litigation and early litigation stages. This study is significant for promoting non-adversarial dispute resolution mechanisms in resolving issues in commercial and non-commercial contracts via a dispute resolution clause and a multi-tiered dispute resolution clause.*

Keywords: dispute resolution clause, commercial, contracts, Malaysia

1. Introduction

A commercial dispute relates to any disagreement between two or more commercial entities or persons over the terms of a contract mutually agreed upon and signed by both parties. Seemingly, disputes may relate to issues on unmerchantable quality of goods, non-performance of contracts, or delay in rendering services. The civil courts in Malaysia have jurisdiction to hear myriads of civil claims relating to breaches of commercial contracts, housing loans, hire purchases, and disputes involving movable and immovable property (Official Portal, Office of the Chief Registrar of the Federal Court of Malaysia). Legal action in a court of law involves lawyers, judges, and expert witnesses (Carver & Vondra, 2004).

According to Donovan & Ho (2022), it is tempting for an aggrieved person to initiate legal action in a court of law. This situation, however, should not discourage the public from choosing a variety of non-adversarial dispute resolution mechanisms to resolve their disputes.

Recent years have seen the spectacular mushrooming of commercial courts in various jurisdictions around the globe (Alcolea, 2022). The Commercial Court Report 2021-2022 in

the United Kingdom shows an increase in arbitration-interconnected applications (The Commercial Court Report 2021–2022 (Including the Admiralty Court Report) (March 2023).

A party intending to commence legal action in the courts must identify the cause of action, the subject matter, and the remedy sought (Abu Backer, 2019; Rules of Court, 2012, Order 15). The court procedures guide the court in dispensing justice (Abu Backer, 2019). Dobbins (2005) advocates the inclusion of a dispute resolution clause in drafting contracts. However, current court procedures are silent on using a dispute resolution clause in managing the disposal of commercial cases.

Several centers for dispute resolution are promoting the use of dispute resolution clauses to resolve commercial disputes. These centres are the International Centre for Dispute Resolution (ICDR), the Centre for Dispute Resolution (CEDR), and the Asian International Arbitration Centre (AIAC). In some contracts, dispute resolution clauses are made mandatory and incorporated as part of the proceedings (Cortés, 2023). Thus, parties must go through the processes stipulated under a dispute resolution clause before commencing a court action. Currently, many commercial contracts contain a dispute resolution clause (Todorović, & Harges, 2021). Generally, parties to construction and commercial contracts often rely upon a dispute resolution clause to resolve disputes and maintain business relationships (Carter, Newell Lawyers, 2020). This clause may contain requirements that each party must abide by before commencing litigation (or arbitration) against the other party.

Notably, researchers tend to pay less attention to studying the content of a dispute resolution clause in commercial disputes (Freyer, 1998). Thus, this study is significant in discovering the effects of using a dispute resolution clause in managing commercial disputes.

The issues of concern are as follows: Firstly, what is the main content of a dispute resolution clause? Secondly, what are the effects of using a dispute resolution clause in managing commercial contract cases? Accordingly, the main objective of this article is to study the use of a dispute resolution clause in contracts in regulating the way of resolving commercial disputes. The specific objectives of this study are to identify the main content of a dispute resolution clause and to analyze the effects of invoking a dispute resolution clause at the pre-litigation and the initial litigation stages.

2. Research Methodology

The study relied on the qualitative method. The approach employed was a critical analysis of library-based material from printed and electronic sources where the data were analysed and interpreted. A doctrinal study used in legal studies is also employed. Primary data includes relevant Acts, Enactments, court rules, and decided cases. Secondary data includes journal articles, proceeding papers, newspaper reports, and electronic materials. Both types of data were analysed using critical and analytical approaches. The study used the content analysis technique to analyse the effects of using a dispute resolution clause to resolve commercial disputes according to the Rules of Court 2012 (Malaysia).

3. Literature Review

Key Emphasis of a Dispute Resolution Clause

Generally, the dispute resolution clause emphasizes the need for the parties to comply with the requirement to refer to an agreed dispute resolution mechanism prior to initiating court action.

Thus, non-compliance with a dispute resolution provision can be a non-starter to court action. The Federal Court in the case of Juara Serata Sdn Bhd v Alpharich Sdn Bhd [2015] 6 MLJ 773, held that "the condition precedents in dispute resolution clauses are to be upheld and adhered to as parties must be held to their bargain." Several other cases show that parties must negotiate in good faith to resolve disputes via agreed dispute resolution mechanisms (see Emirates Trading Agency LLC v Prime Mineral Exports Private Limited [2014] EWHC 2104 (Comm), United Group Rail Services Limited v Rail Corporation New South Wales [2009] NSWCA 177, and Yong Ah Huat & Anor v Toshiba Corp [2018] MLJU 262).

A multi-tiered dispute resolution clause offers a variety of alternative dispute resolution procedures (ADR) that include arbitration, neutral assessment, conciliation, and mediation. The methods of ADR are different from one another. A multi-tiered dispute resolution clause begins with various alternative dispute resolution (ADR) techniques, and parties should abide by the procedures stated therein (Kayali, 2010; Carter, 2005; Pryles, 2001). Thus, multi-tiered dispute resolution allows the parties to avoid litigation by considering negotiation, mediation, and arbitration (Holland, 1999).

Dispute resolution clauses usually mention that a third-party neutral is involved in the process (Chappe, 2014), and the parties can control the dispute resolution process (Todorović, & Harges, 2021).

Dobbins (2005) emphasizes the need for lawyers to pay attention to the content of the dispute resolution clause and avoid boilerplate contract statements to safeguard their client's interests. In addition, poorly drafted clauses create problems in the future (Lew, Mistelis, & Kröll, 2003) and affect enforceability (Pryles, 2001).

Several dispute resolution centers require the parties to use a specified dispute resolution mechanism before opting for another dispute resolution mechanism if the former fails to resolve their disputes. For instance, the Chartered Institute of Arbitration Dispute Resolution Clauses provides a variety of dispute resolution clauses. Contracting parties can choose the suitable clause in their commercial contract. They consist of the "Catch All" Dispute Resolution Clause, the Suggested Arbitration and Mediation Clause, and the Suggested Construction Adjudication. Under the "Catch All" Dispute Resolution Clause, parties shall attempt negotiation before resorting to the recommended ADR mechanism by the President or the Vice President of the Chartered Institute of Arbitrators. In comparison, the Suggested Arbitration & Mediation Clause requires parties to refer any dispute to a mediator as the initial step for resolution before referring to a single arbitrator if mediation fails to resolve their dispute. The Suggested Construction Adjudication provides the referral of a dispute to an adjudicator who would make a binding decision. However, the adjudicator will not be liable for his actions unless the act or omission is made in bad faith.

Several other dispute resolution clauses emphasize using a specified form of dispute resolution mechanism and abiding by specific rules in resolving disputes. A dispute resolution clause mentioning arbitration as the agreed dispute resolution mechanism must define the facts of the dispute (Coyle, and Drahozal, 2021). **The Bar Council Mediation Committee Circular No 319/2020 Dated 29 Sept 2020** encourages the settlement of differences via mediation at the Malaysian Mediation Centre of the Bar Council (now known as the Malaysian International Mediation Centre). **The Asian International Arbitration Centre (Malaysia) (AIAC) - Arbitration Rules 2021 (AIAC Arbitration Rules)** provides the resolution of disputes by arbitration in accordance with the AIAC Arbitration Rules. **The International Chamber of**

Commerce (ICC) provides that all disputes should be resolved under the Rules of Arbitration of the International Chamber of Commerce by "one or more arbitrators.

Overview of matters in the pre-litigation phase

The timing of dispute resolution referrals can determine the parties' participation in achieving settlements (Cortés, 2023; Voss, 2022). Various steps are involved in the pre-litigation phase. According to the Guidelines from the Office of the Chief Registrar of the Federal Court of Malaysia, prior to filing a civil claim in court, an individual (claimant) should first consider the following: (i) Whether there is a proper basis for cause of action; (ii) Whether limitation periods have set in; (iv) Whether there is sufficient evidence to back up a claim; and (v) The estimated litigation costs.

According to Hashimoto & Shieh (2022), cause of action means the origin of a legal action to take place. It is 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.' (Letang v Cooper [1965] 1 QB 222 at 242, [1964] 2 All ER 929). Lim Kean v Choo Koon [1970] 1 MLJ 158, Nasri v Mesah [1971] 1 MLJ 32, FC; Credit Corp (M) Bhd v Fong Tak Sin [1991] 1 MLJ 509, SC). Under the Rules of Court 2012, the Plaintiff must have a cause of action, failing which the Court will allow the defendant to strike out his claim under O.18, r. 19(1) ROC 2012. Under the Limitation Act 1953 (Malaysia), the law fixes a period for filing a court action to avoid delay by plaintiff. If the Plaintiff fails to do so within the limitation period, the party's action will be "time-barred" or "statute-barred" (Nekoo, 2018).

Overview of matters in the early litigation phase

The commencement of civil action begins with the filing of the writ. This mode is in accordance with the Rules of Court 2012. It involves a stage where parties convince the court that the facts and the applicable law favor them. In this stage, the parties can freely file numerous interlocutory applications to defeat their opponent's case. For instance, a party can file an application for striking out pleading if he believes that the opponent's case discloses no reasonable cause of action or defence, as the case may be (O.18 r. 19 ROC 2012). The court will dismiss aplain and obvious case where there is no prospect of success or, the claims are frivolous or vexatious or an abuse of the court process, or the defences are unarguable (see Duta Arif Sdn Bhd v Chartered Development Corp [2008] 6 MLJ 139, Alliance Investment Bank Sdn Bhd v Good Quantum Sdn Bhd [201] MLJU 1679, Nescajaya Sdn Bhd v Suairah bt Parigula [2011] 9 MLJ 774. Pleadings that are hopeless, baseless or without foundation in law can be struck out (see Sivakumar a/l Varathaju Naidu v Ganesan a/l Retanam [2011] 6 MLJ 70, CA.).

Apart from filing an application for striking out pleading, the parties can file an application for summary judgment (O.14 ROC 2012). The plaintiff can obtain summary judgment against the defendant in very clear-cut cases only as stated in reported cases (See Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183; Gunung Bay Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332, SC. The defendant need not show a complete defence and only needs to show there is a triable issue or question or that for some other reason, there ought to be a trial and leave to defend ought to be given (see Jacobs v Booth's Distillery Co [1901] 85 Lt 262; Manger v Cash [1889] 5 TLR 271). In RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd [2008] 3 MLJ 130, the defendant is allowed to defend based on the issue raised and the circumstances of the case showed that there ought to be a trial. For the defendant, bare denials do not constitute evidence and they are not considered triable issues (Chen Heng Ping

v Intradagang merchant Bankers (M) Bhd [1995] 2 MLJ 363 at 367, per Mahadev Shankar JCA.

4. Results and Discussion

This study mainly finds that efficient use of a well-drafted dispute resolution clause may produce intended results with time-saving and effort, be it at the pre-litigation stage or the early litigation stage. It enables parties to a commercial contract to undertake preliminary evaluations of the legal positions of each other's case and strategize ways to protect their interest. In addition, a dispute resolution clause encourages settlement discussion through non-adversarial dispute resolution mechanisms and avoids protracted litigation. However, inefficient use of a multi-tiered dispute resolution clause may produce unsatisfactory outcomes and delay litigation.

Key Emphasis of a Dispute Resolution Clause

Several court decisions tend to show that the court will require the parties to comply with the dispute resolution clause as a pre-condition prior to initiating court action. This is consistent with the decision made by the Federal Court in the case of Juara Serata Sdn Bhd v Alpharich Sdn Bhd [2015] 6 MLJ 773, Emirates Trading Agency LLC v Prime Mineral Exports Private Limited [2014] EWHC 2104 (Comm), United Group Rail Services Limited v Rail Corporation New South Wales [2009] NSWCA 177, and Yong Ah Huat & Anor v Toshiba Corp [2018] MLJU 262).

The content of a dispute resolution clause must be stated clearly and forsee any future issues that may arise. Ideally, such a clause must **clearly define the rights and obligations of the parties and** the set of disputes that the parties want to submit to arbitration (Coyle and Christopher R. Drahozal (2021). It is also essential for lawyers to take extra care in reusing boilerplate clauses. Thus, lawyers must review standardized sentence structure or steps specified in a dispute resolution clause. Such is consistent with the advice given by Dobbins (2005) that lawyers must spend more time working on the content of the dispute resolution clause when drafting contracts and not rely totally on boilerplate contract language. The main feature of a dispute resolution clause is that it allows the parties to consider a non-adversarial mode of dispute resolution. In addition, a multi-tiered dispute resolution clause provides the parties with various options of dispute resolution mechanisms, thus allowing the parties to negotiate, mediate, and arbitrate while trying to avoid litigation (Holland, 1999).

The findings generally show that trained and neutral dispute resolution practitioners, such as neutral mediators will assist parties in reaching a negotiated agreement.

In addition, the analysis of the content of several dispute resolution provisions shows that many ADR providers offer to provide the parties with substantive and procedural control over the resolution-seeking process, including the convenience of arranging the meeting or hearing per the parties' schedules, needs, and preferences (Todorović, & Harges, 2021). Thus, ADR providers usually highlight to the parties to "really consider the practicalities of the clause, such as whether a pre-condition is necessary, or if it would be more favorable to both parties to allow direct initiation of legal action."

Most dispute resolution clause samples in this study show that a broad and general provision is preferred, thus indicating that a standardized structure of sentences is seen as safeguarding the interests of all parties concerned. Generally, dispute resolution service providers encourage

disputants to use standardized dispute resolution provisions. However, this would not be in the interests of the parties if it is merely a standard contract provision without providing the parties the opportunity to negotiate on terms favorable to them. Contract formation requires mutual agreement. Thus, both parties must agree on all essential terms of the dispute resolution clause.

Effects of invoking a dispute resolution clause at the pre-litigation phase

A well-drafted dispute resolution clause can guide the parties to anticipate future predicaments if the dispute is ill-handled from the early stage. Parties are more willing to consider settlement or propose settlement if they invoke a dispute resolution clause at the pre-litigation stage. Based on the Guidelines from the Office of the Chief Registrar of the Federal Court of Malaysia, parties to an action must consider three important factors before deciding whether to initiate a legal action. These factors are the cause of action, limitation period, and evidence. As opined by Cortés (2023) and Voss (2022), the right timing of dispute resolution referrals is associated with willingness to participate in a settlement discussion.

Thus, it can be safely said that invoking a dispute resolution clause at the pre-litigation stage can bring advantages as follows:

Streamline the dispute resolution hearings or proceedings.

In an arbitration hearing, the parties agree to specify undisputed facts and highlight the applicable law. This enables the arbitrator to rule on disputed matters summarily prior to hearing evidence. The arbitrator should highlight issues that are most likely to cause disputes. Thus, parties gain information and can concentrate on the best way to resolve them. This is consistent with the view of Holland (1999) that a dispute resolution clause allows parties to negotiate, mediate, arbitrate, and predict future proceedings while trying to avoid litigation.

Taking necessary steps to avoid protracted litigation.

Parties will take every step necessary to ensure the existence of a cause of action prior to filing the action in court. In the absence of cause of action, his filing of an action in the court will allow the defendant to strike out his claim under O.18, r. 19(1) ROC 2012. In summary, invoking a dispute resolution clause at the pre-litigation phase assists the parties, especially the claimant, in weighing the strength of his case based on the existence of the Cause of Action. This is consistent with Hashimoto & Shieh (2022) who mention that a cause of action is 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.' (Letang v Cooper [1965] 1 QB 222 at 242, [1964] 2 All ER 929). In the case of Cook v Gill (1873) LR 8 CP 107, the phrase refers to every fact, but not evidence, which the plaintiff must prove, unless admitted, to support his right on the court judgment. This phrase was followed by several Malaysian cases (Lim Kean v Choo Koon [1970] 1 MLJ 158, Nasri v Mesah [1971] 1 MLJ 32, FC; Credit Corp (M) Bhd v Fong Tak Sin [1991] 1 MLJ 509, SC. However, parties might spend to much time fulfilling all the requirements under a multi-tiered dispute resolution clause. This may hamper the plaintiff in initiating an action in a court of law.

Effects of invoking and enforcing a dispute resolution clause at the early litigation phase

A well-drafted dispute resolution clause can guide the parties to **clearly define the rights and obligations of the parties** in the event of a dispute, besides **outlining the process** the parties must follow. The parties who underwent a dispute resolution procedure other than litigation might be able to predict their future in litigation. Thus, each party will take precautionary steps to avoid any untoward incident. For example, a party will not initiate an application for striking out pleadings if the adversary's pleadings disclose a reasonable cause of action or defence (as

the case may be). Clearly, striking out pleadings should only be attempted if a pleading discloses no reasonable cause of action or defence, as the case may be (O.18 r. 19 ROC 2012).

Likewise, a defendant may be interested in negotiating a settlement discussion with the plaintiff if he knows that he does not have a good defence for he knows that the court will not give judgment in his favor if it is found that his defences are unarguable (see Duta Arif Sdn Bhd v Chartered Development Corp [2008] 6 MLJ 139, Alliance Investment Bank Sdn Bhd v Good Quantum Sdn Bhd [201] MLJU 1679, Nescajaya Sdn Bhd v Suairah bt Parigula [2011] 9 MLJ 774.

In addition, the defendant will be willing to negotiate a settlement discussion if his pleadings are entirely hopeless, baseless, or without foundation in law and can be struck out (see Sivakumar a/l Varathaju Naidu v Ganesan a/l Retanam [2011] 6 MLJ 70, CA) and if the plaintiff has a very clear-cut case for entering summary judgment against the defendant under Order 14 ROC 2012. This is based on court cases that emphasize a clear-cut case if the plaintiff intends to enter summary judgment against the defendant. Such principle is clearly stated in reported cases (See Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183; Gunung Bay Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332, SC.) The defendant need not show a complete defence and only needs to show there is a triable issue or question or that for some other reason, there ought to be a trial, and leave to defend ought to be given (see Jacobs v Booth's Distillery Co [1901] 85 Lt 262; Manger v Cash [1889] 5 TLR 271. In RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd [2008] 3 MLJ 130, the defendant is allowed to defend based on the issue raised and the circumstances of the case showed that there ought to be a trial. For the defendant, bare denials do not constitute evidence and they are not considered triable issues (Chen Heng Ping v Intradagang merchant Bankers (M) Bhd [1995] 2 MLJ 363 at 367, per Mahadev Shankar JCA.

The pre-trial case management under the Rules of Court 2012 (Malaysia) requires the disposal of a case in a just, expeditious, and economical manner. Based on referred cases, it is clear that solicitors representing litigants must fully appreciate the summary of their case before trial and consider any possible change in the position of the parties (for example, based on pleadings, discovered documents, and availability of witnesses, the effect of new case law) during the pre-trial case management stage(s) and seize the opportunity to turn it into a negotiation forum for the resolution of a dispute among the parties. A well-drafted dispute resolution clause that outlines the rights of any of the parties to resort to other forms of non-adversarial dispute resolution, such as negotiation and mediation during the litigation process can be a potentially effective settlement plan.

Invoking a dispute resolution clause that allows negotiation and mediation at the early litigation stage helps the parties or their solicitors manage their cases efficiently. Some of the positive attributes of using negotiation or mediation at this stage are as follows: Firstly, it allows the parties to enter a negotiation formally and informally. Negotiation is formal if the court is aware of the disputing parties' intention to have their case adjourned to a further date pending settlement. Negotiation can be informal if disputing parties work their way out with the assistance of their respective solicitors by calling for a round table talk on a 'without prejudice basis'. Secondly, negotiation and mediation help the parties to discuss settlement plans in a non-adversarial manner and thus restore the relationship. Thirdly, an efficient use of the dispute resolution clause can assist the parties in reaching an amicable settlement. The parties can negotiate settlement terms and later have these terms recorded as a consent judgment. In

addition, the parties can tailor their settlement terms with the assistance of their respective solicitors without interference from the court.

7. Conclusion

The efficient use of a well-drafted dispute resolution clause provides more benefits to parties in commercial disputes to resolve their issues by using a single dispute resolution mechanism or a combination of dispute resolution mechanisms. Assistance rendered by a third-party neutral (such as a mediator, evaluator, or arbitrator) can reduce hostility and improve business relationships. It allows both parties to reach an effective settlement plan for resolving their disputes via several effective dispute resolution mechanisms, such as mediation and arbitration. Thus, parties should include a dispute resolution clause in any contract, especially commercial contracts. Notably, a dispute resolution clause is in tandem with the encouragement of resorting to mediation under the Rules of Court 2012 (Malaysia), rule 34. More studies should explore the effectiveness of a dispute resolution clause that incorporates a variety of non-adversarial dispute resolution mechanisms at the pre-litigation stage and during the litigation process.

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