

The Viability of Implementing Dispute Board in Malaysia

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Abstract—This paper is performed mainly to introduce Dispute Board (DB) as the one of the many Alternative Dispute Resolutions (ADRs) to be applied into the Malaysian construction industry to reduce and minimize the amount of disputes. This research is carried out by interviewing nine respondents which consist of registered Quantity Surveyors. Litigation and arbitration has been widely applied in Malaysia for dispute settlement. Both methods, however, do become more tedious and arduous processes to go through to resolve disputes. Mediation, on the other hand, has been a new alternative for dispute settlement in the Malaysian construction industry. Nevertheless, arbitration and mediation have not yet made a big impact in the numbers of disputes arising in the Malaysian construction industry. Therefore, this paper unveils the viability of implementing Dispute Board as a better and more efficient method of ADR that is determined in the outset of the project. Dispute Board is able to reduce the amount of disputes arising in the Malaysian construction industry.

Keywords—Dispute Board (DB), Alternative Dispute Resolution (ADR), Malaysian Construction Industry

I. INTRODUCTION

The Malaysian construction industry is in need of an effective dispute resolution method. In the light of finding a feasible and reliable alternative dispute resolution, the role Dispute Board comes into the picture. This research unveils the concept behind Dispute Board including its pros and cons. Moreover, the viability if this concept in the Malaysian scenario will be determined. In the DRBF Practices and Procedural Manual, Dispute Resolution Board Foundation (DRBF) states that the DRB process has been found to be more successful than any other method of alternative dispute resolution by having resolution rate that is over 98% to date [9].

Therefore, this similar approach shall be utilised in the construction projects in Malaysia. This does not only will benefit the project itself, but also contribute to the Malaysia and its economy as less dispute results to less money and less time. Thus, this will enhance the flow of the construction industry to increase in quantity and of course, quality. Using Dispute Board, the participation of construction players and policy makers will multiply as they are able to maximise profits and maximise the use of Dispute Board in managing disputes in construction.

In addition, the Malaysian standard forms of contract should insert clauses that incorporate the Dispute Board

concept. For instance, in the FIDIC Standard Form of Contract 2006 has incorporated Dispute Board roles in the clauses and also included the General Conditions of the Dispute Board Agreement in order for implementation of Dispute Board in a project that utilizes this standard form. Therefore, the PWD form and the PAM form shall be revised and improvised if Dispute Board concept is to be implemented in the Malaysian construction industry.

II. WHAT IS DISPUTE BOARD?

Dispute Board is a “project specific” dispute avoidance method and also known as a fast track adjudication process [3]. Dispute Board is also a type of Alternative Dispute Resolution (ADR) which is a method of solving disputes without consulting to litigation. Similar to project mediation, dispute board is used to describe a dispute resolution procedure which is normally established at the outset of a project and remains in place throughout the duration of the project [13, p. 44]. A Dispute Board is an independent board which consist of odd numbers panels, usually three experienced, respected, and impartial panels who are elected by both of disputing parties [6].

Hassal and Buchanan [3] have given a few examples of projects that have implemented Dispute Board is the Channel Tunnel Rail Link project which has elected five panels for the Board although quorum given was only three panels and there were a group of seven panels have been elected in the Hong Kong Airport project. Normally, each party will select a panel for the Board. As for the third panel, both parties will have to choose upon agreement. If an agreement of choosing the third panel fails, the two elected panels of the Board will have the power to choose and elect the third panel [6].

The responsibility of a Dispute Board is to evaluate disputes as they arise during the project and produce solutions and recommendations to the parties involved in the project. The Board are obliged to execute regular site visits in order for the Board members to familiarize themselves with the project thus providing them with sufficient information to produce a written recommendation if any dispute arises [7]. When a dispute arises, the Board will be given a period of 84 days to develop a decision with reference to the dispute [4].

Moreover, the decision shall be reasoned. After 28 days from the date of issuance of the decision, the decision will then be final and binding if there is no argument by any of the participating parties on the decision made. If an argument

arises after the period of 28 days, the decision will still be binding and the argument will be disregarded. To challenge the decision, the party who disagree shall issue a certificate of dissatisfaction within 28 days from the date of issuance of the decision. Thus, the decision by the Board will not binding and the parties must attempt amicable settlement prior to the matter being referred to arbitration. If settlement not reached by 56 days, then the dispute may be referred by either party to arbitration [5].

III. ADVANTAGES OF DISPUTE BOARD

Dispute Board have proved to be an effective dispute resolution to be compared with the other alternative dispute resolutions and this can be supported by a statement by Gaitskell [10] that 97% of disputes referred to Dispute Board did not go beyond the Dispute Board procedure into either arbitration or litigation. Chern [2] has distinguished the main idea behind a standing Dispute Board which is the Dispute Board panels will consort the contract throughout its duration and the Board shall be call upon at any time to deal with a problem as soon as it emerges. Moreover, the Board is obliged to conduct a regular site visits and the panels are to continually updated on any of the progresses of the implementation of the contract. The regular site visits will help the Board to be familiarised themselves on every particular issue existed throughout the contract period [6, p.27]

As a result, Dispute Board is able to detect symptoms of dispute that are to arise beforehand and avoid it from emerging into a serious dispute that might disrupt the contract period [14]. A part from avoiding disputes, Dispute Board also holds a role to resolve disputes. Dispute Board is required to make quick, well-structured and appropriate decision on the dispute by using its close knowledge and issues involved in the project. With the involvements from the Board, the contracting parties will also be familiarised with any of the Board's views on particular issues which will aid the negotiation and settlement process which the parties undertake before presenting their dispute to the Board [5, p.27].

In conjunction with the Dispute Board's function to detect and resolve issue in an early stage, this brings to the following advantage of Dispute Board which is it saves cost and time for dispute settlements. Dispute Board saves time as it is permanently installed at project initiation where this allows the Board to give an early attention to the disputes and also address them contemporaneously without the need for the historical reconstruction of events as in arbitration [1]. Not only Dispute Board saves time, it also saves cost as the disagreements are settled within the construction project without hiring a third party. Besides, implementation of the Dispute Board to settle arguments lowers the cost and time to be compared to other method of solving disputes such as litigation and arbitration [11].

Further, Dispute Board benefits the environment of the project as a whole where it brings the contracting parties to focus on the project objective and preserving good working relations between parties [7]. Due to the direct knowledge that the Dispute Board possesses, the Board is able to influence

behaviour, preserving on-site relationships and filtering out and refining disputes. Moreover, having a more confidential and less formal procedure to be compared with litigation and arbitration helps Dispute Board in preserving a good site relationship between parties [12]. In addition, a win-win situation is produced using Dispute Board eliminating dissatisfaction and hatred between conflicting parties.

IV. DISADVANTAGES OF DISPUTE BOARD

Dispute Board is known to be cost-effective for large construction projects as discussed previously, however, the cost to hire the three-person panel for a small project might be costly. This is the first drawback of Dispute Board where the cost of supporting a Dispute Board for small construction projects is prohibitive whereas the one-person Dispute Board might be an option.

The nature of decision making in Dispute Board concept might lead to the next disadvantage. The non-binding decision by the Board implies consequences that disputes may not settled, thus aggravate and disrupts the project [5, pg.27]. Furthermore, the non-binding culture of Dispute Board results to a no concrete means of enforcing recommendations to dispute unless both of the contracting parties agreed on the decided recommendation. If a party does not comply with the decision by the Board, the only remedy is to pursue for litigation or arbitration which is costly and also time consuming [9].

The last disadvantage is Dispute Board is considered as unnecessary additional expenses whereby it requires a monthly retainer as well as a daily fee for time spent visiting site and determining disputes [9, p.2]. Additionally, the Dispute Board payment structure may amount to a relatively high project cost that might not be cost effective if the disputes are eventually referred to arbitration or litigation.

V. VIABILITY OF IMPLEMENTING DISPUTE BOARD IN MALAYSIA

A. Introduction

Semi-structured interviews were held with registered Quantity Surveyors and also claim consultants with a Quantity Surveying background in the Malaysian construction industry. Quantity surveyors are chosen for this research because they are conversant in the documentations and claims processes in a construction project. Moreover, most of the respondents are individuals that play dominant roles in the area of dispute resolution in Malaysia. The purpose of the semi-structured interviews is to identify the level of knowledge on the concept of Dispute Board and its related information within the participants of the construction industry focusing mainly on the Quantity Surveyors.

B. Research Respondents

Nine respondents had participated in the semi-structured interviews where the minimum requirement is a Bachelor of Quantity Surveying. The respondents of this research have at least 11 years of working experience or more in the Malaysian

Construction Industry. Seven respondents representing 78% that had been involved with the semi-structured interviews are highly experienced and at senior management level where they hold Chief Executive Officer (CEO), Principal, Director, Partner or Associate Director posts in their respective companies. On the other hand, 22% represented by two of the respondents each holds a post as a Branch Manager and a Quantity Surveyor in their respective firms. The percentage mentioned above can be referred to Table I.

TABLE I. POSITIONS HELD BY RESPONDENTS

Background	Description	Number of Respondents	Percentage (%)
Position	CEO / Principal / Director / Partner / Associate Director	7	78
	Branch Manager	1	11
	Quantity Surveyor	1	11

Furthermore, the respondents for this research consist of registered Quantity Surveyors by the Board of Quantity Surveyors and Institution of Surveyors Malaysia (ISM) or the Royal Institution of Chartered Surveyors (RICS) which are represented by seven respondents and the other two respondents are individuals whom are not registered Quantity Surveyors but are well acquainted with construction claim consultant field.

C. Involvements in Construction Dispute Settlements

100% of the respondents which is represented by nine out of nine respondents have been involved in dispute settlement or dispute avoidance. Methods of resolving or avoiding disputes are known to be numerous. Therefore, Table II provides the most preferred methods that have been chosen and adapted by the respondents to resolve disputes.

Figure 1 entails the percentage of the most preferred method chosen for dispute settlement which is negotiation. This is due to the fact that negotiation is the fastest, less tedious and the cheapest means of dispute settlement. As for the 44% for mediation counts for the more structured form of negotiation which involves a mediator to mediate and assist disputing parties.

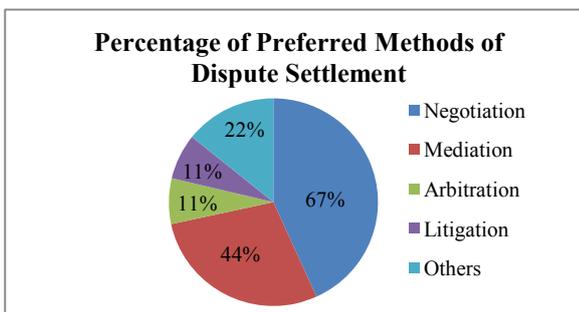


Figure 1. Percentage of Preferred Methods of Dispute Settlement

Mediation is also chosen due to the fact that mediation is much easier and less costly method of to be compared to litigation or arbitration. Litigation and arbitration were voted to be the least preferred on the reasons of being most tedious and most expensive method. Both methods are also known to jeopardise the relationship between contracting parties where it ends with a win-lose situation that might give an impact to the losing party.

D. Knowledge on Dispute Board in general

Among nine respondents that participated in the semi-structured interview, only seven of the respondents are conversant on the topic of Dispute Board. Overall, the seven respondents are able to provide a brief description on the Dispute Board concept and some of them have a profound knowledge on this topic through their own experience.

Most of the respondents have defined Dispute Board as a private set-up functioning as a mechanism to review and decide on disputes on ad-hoc basis. Dispute Board also known to be based on an international contract which is referring to the FIDIC Standard Form of Contracts. Further, Dispute Board was described as a panel consisting of three or more members which is appointed at the outset of the project. It is also known as an informal method of ADR which has fewer rules to be compared with arbitration.

Four respondents (44%) have agreed that Dispute Board has been applied in the Malaysian Construction industry in several of the projects privately. However, it has not been widely and publicly used yet in our industry. According to Respondent 7, Dispute Board has somehow been applied in Malaysia;

“...in a civil engineering project in Malaysia, where it was a confidential contract between the main contractor and the sub-contractor...they have referred the dispute to a Dispute Board...the implementation of the Dispute Board failed and it went to arbitration instead. Besides, there is a Malaysian company which is one of the main energy provider is also currently implementing Dispute Board privately where they have their own panel of members” (Respondent 7).

On the other hand, five other respondents stated that this concept has not yet been implemented directly in the Malaysian construction industry but it has been implemented indirectly through the Construction Industry Payment and Adjudication Act (CIPAA). Furthermore, Respondent 6 has added that;

“Dispute Board is commonly practiced in Hong Kong where Hong Kong International Airport was one of the mega projects that has successfully implemented the Dispute Board concept” (Respondent 6).

Five out of nine respondents have affirmed that Dispute Board’s main advantages are it saves cost, saves time taken and also provides a positive outcome. Dispute Board is said to save time and cost due to its ad-hoc nature whereby it is available at any time and the contracting parties can refer for any matter regarding to the contract without any hesitation. Thus, this saves the time and cost because parties do not have

to wait until the project is completed to resolve the dispute unlike in arbitration and litigation. Besides, having a different means of resolving dispute compared to litigation and arbitration, Dispute Board helps to nurture the relationship between contracting parties. As a result, positive outcomes are produced as decisions are reached in an amicable manner and more importantly, it produces a win-win situation for both parties.

Then again, Dispute Board does have its disadvantages. Two respondents have agreed that the main disadvantage of Dispute Board is the increase in cost if the Dispute Board fails. Respondent 5 reasoned on the increase in cost being the main disadvantage of Dispute Board;

“...cost escalates when Dispute Board fails as additional cost is incurred due to the additional fees for the Board. Moreover, once Dispute Board fails, time taken for the decision made by the Board will be a total waste as it will be referred to arbitration which is normally at the end of the project” (Respondent 5).

There are two additional disadvantages given by Respondent 7 to be added in this research;

“It is dependent on the ability and the experience of the Board member. For instance, when a one-panel of Dispute Board is appointed, all the decision will be on the hands of the one-panel Board, and if the Board gave a wrong decision, it will be unfair for the disputing parties” (Respondent 7).

“There is a reason why FIDIC introduces Dispute Board in their contracts...it is to eliminate the perception of bias. This perception exists due to previous provision where dispute is to be referred to the Engineer which is employed by the Employer. A conflict of interest might arise on the decision-making process by the Engineer and this is the main reason why FIDIC introduces Dispute Board which consist of impartial and independent members” (Respondent 7).

E. Dispute Board in Malaysia

As previously mentioned, the concept of Dispute Board has actually been applied directly in the Malaysian construction industry. Following that statement, Respondent 4 has given his share of experience by elaborating a case involving a Malaysian company and a foreign company using the Malaysian contract. This contract is on a hydroelectric plant project and it involves a dispute on delays and the performance by the Contractor. As a result to the delay, the Employer claimed for compensation on the performance by the Contractor which does not meet the requirement preset in the contract. There was an argument made by the Contractor stating that the delay was unintentional and it was caused by factors that are beyond their control. This dispute then referred to the Dispute Board and the Board analysed the dispute thus produced a recommendation for the parties. The recommendation was then submitted to the parties and the dispute was resolved successfully without referring to arbitration. Respondent 4 added that;

“A fast settlement was achieved upon the review by the Board...the Board serves a mechanism where it ease the job of top management where there is no hassle for them to get into the ‘nitty-gritty’ of the dispute...the Board will submit a review and analysis on the dispute including the details which are crucial for the dispute. Therefore, Dispute Board eases the process of achieving the decision without distressing the board of management and directors unlike litigation” (Respondent 4).

There are two main questions to be answered in this research. The first essential question is can the concept of Dispute Board be applied in our construction industry. From the total of 100%, 78% of the respondents answered ‘Yes’ and another 22% answered ‘Maybe’ to the given question. Figure 2 represents the percentage for the first question in this section.

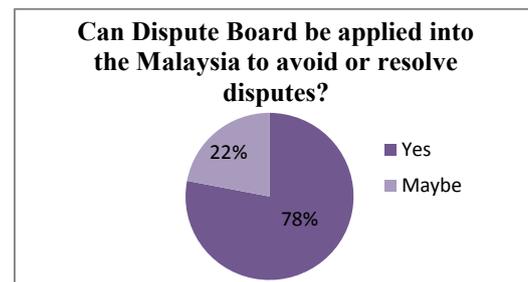


Figure 2. Percentage on the opinion of the respondents towards the application of the Dispute Board into the Malaysian construction industry to avoid or resolve disputes.

Five out of seven respondents that answered ‘Yes’ to the question justified their reasons to the answer given. Three respondents similarly reasoned that the basic concept of Dispute Board has actually been directly and indirectly applied in our construction industry.

As for the other two respondents, they justified their answers differently where Respondent 6, he stated that the Dispute Board can and it should be applied in Malaysia to reduce the number of dispute proceeding to arbitration or litigation. Respondent 6 also engaged that in a recent Malaysian international airport project, clauses on the Dispute Board have been inserted in the Malaysian contract but it has not been used yet. In contrast to Respondent 6, Respondent 7 only justified his answer by describing the nature of the Malaysian construction industry;

“I have to answer ‘Yes’ because to my opinion, Malaysia is a very progressive country and is interested in new procedures and current trends of dispute settlement. Dispute Board could work well in this industry as it have actually came in some internationally used contracts which refers to the FIDIC contracts” (Respondent 7).

On the contrary, the two respondents that answered ‘Maybe’ to the first question justified their answers differently. First, Respondent 5 explained that he answered ‘Maybe’ due to the possibility of overlapping duties of

consultants with the members of the Board if Dispute Board is implemented in a project. Next, Respondent 1 mentioned an issue on the rejection of adjudication to be implemented in Malaysia by the Malaysian Bar Council. The reason being was they feel threaten by adjudication and adjudication might jeopardize their jobs.

Using the views given by Respondent 1 and Respondent 5, the two issues that were mentioned were directed to the other respondents to seek their views. The first issue given was the possibility of overlapping duties of consultants and the Board members. Two respondents have decided to share their opinion on this issue. The views of both respondents are more or less similar on this issue which was the role or function of the Dispute Board is distinct and different from the consultants where the Board are a party that specialises in dispute resolution. The only possible overlap would be the role of Superintending Officer (S.O.) who plays a ‘quasi arbiter’ role for Government’s project. However, such reference can still be made if the Dispute Board cannot resolve the dispute, which is most unlikely. What is likely to happen is the role of S.O. as ‘quasi arbiter’ may be dissolved or made obsolete with introduction of Dispute Board.

The other issue raised was the rejection of adjudication to be implemented in Malaysia by the Malaysian Bar Council. Two respondents regarded that it is a selfish interest of the particular party to promote their own profession instead of focusing on how to resolve disputes in the industry. The party’s concern should be acting in the interest of the industry as a whole, not only upon its own interest.

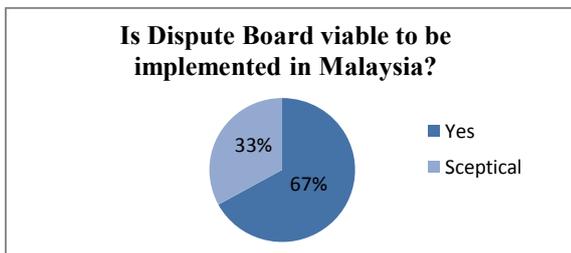


Figure 3. Percentage on the opinion of the respondents towards the viability of Dispute Board to be implemented in Malaysian Construction Industry.

33% of the respondents are quite sceptical for Dispute Board to be implemented in Malaysia. The reasons being are new regulations will have to be introduced to ensure Dispute Board to work efficiently and modifications will be needed for Dispute Board to suit the Malaysian construction environment. In contrast to the 33%, 67% agreed that Dispute Board is viable to be implemented in the Malaysian construction industry. Six respondents that answered ‘Yes’ has their own arguments based on their opinions.

Firstly, Respondent 1 has listed few of his concerns on the Malaysian scenario. One of his concerns is the Malaysian mentality is still not up to par with the mentality in first world countries such as United Kingdom, United States of America and also Japan. The rejection of new methods and the reluctance to change is said to be the kind of mentality that is empowering most of the Malaysian construction players. This

kind of mentality will influence and might sabotage the progress of the Malaysian construction industry. To overcome this issue, Respondent 1 had suggested is to limit an open selection for the construction participants; getting Government to introduce new clauses on Dispute Board in each local standard forms which will limit the choices of avoiding the use of Dispute Board. This might work as adjudication has already been implemented in the industry. Similarly, Respondent 2 has also a quite similar view on this subject where he stated that Dispute Board can be made viable to be implemented into the Malaysian construction industry by having law requirements to compel parties to employ the Dispute Board.

One of the respondents that answered ‘Yes’ to the question state that he is confident that Dispute Board is viable to be implemented to the Malaysian construction industry. Nevertheless, he recommended that only experienced professionals are to make up the Board. He explained that in countries like United Kingdom and Europe, the situation is different as they have more specialized lawyers dealing with construction and most of them have technical background as a construction participant such as a quantity surveyor. Then, this influences the style of thinking of these lawyers because they consider practicality of construction when dealing with dispute, unlike normal lawyers. As a result, implementation of the Board in their construction industry will be much easier to compare to the Malaysian construction industry.

Moreover, in our industry, there is a lack of expertises that have combinations of knowledge on all aspect of dispute resolution, construction law and also technical knowledge such as engineering or architectural knowledge. Consequently, in order to ensure this implementation to be successful, the required skills are to be developed by hiring these few experts to train the others to increase the number of dispute resolution expertises in the industry. This is to strengthen the field of dispute resolution, not to intentionally ignore the services that consultants can offer. Consultants have their own primary duty and they only have a little of supervision element in their duty. Therefore, in terms of dispute resolution, the consultants do not have a structured training on dispute avoidance and dispute settlement. As for claim consultants and dispute resolution expertise, they emphasises more on the approach and the process of resolving a dispute and also creating justice to the disputing parties.

Meanwhile, other respondents believed that Dispute Board is viable and can be successful as it is in United Kingdom provided that an extensive awareness and incorporation of clauses on Dispute Board in the Malaysian standard form of contract can help boost the usage of the Board in projects. One of the respondents debated a comment made on the topic of reluctance to change and accept new methods by the Malaysian construction participants majorly affect on the implementation of the Dispute Board. He explained that;

“It is in human nature to be reluctant to change but somehow, changes do bring better results in mostly anything” (Respondent 7).

The respondent regarded that of course there will be some resistance to changes as in always, but that is not the argument for changes not to be adapted. In this context, if the Government has decided to introduce the concept of Dispute Board as a policy in all standard forms of contract, amendments in the standard forms have to be made. The consensus of authorities who are responsible for the standard form of contract including the public will no longer have any options to not implement it. Consequently, the argument that it would not be a success due to reluctance of people to accept it can be challenged. Therefore, any method that could reduce the cause of disputes and strengthens the industry by avoiding conflict would be very welcome.

Furthermore, a recommendation was given by one of the respondents for the implementation of Dispute Board which was proving to the public that the Dispute Board is very useful. In order to encourage the public to apply Dispute Board for dispute resolution, evidence of the Board being successful has to shown and exhibited. FIDIC can produce and demonstrate how the Board can reduce cost including preventing disputes from expanding. This concept should be launched, marketed, and promoted to the construction participants to improve our industry. Besides, the public should also be educated and explained on the concept of Dispute Board.

In addition, Respondent 7 gave his said that there is no reason to not apply Dispute Board in our industry. He added that the application of Dispute Board can be as successful as it is in every else because Malaysian construction market does is as similar as UK or US's construction market. Moreover, Malaysia has a less litigious environment to be compared to the UK or US. More effort are made in negotiations and finding solutions in Malaysia thus, the implementation of Dispute Board should be a lot easier and quicker in Malaysia rather than elsewhere. Table III lists the summarised suggestions that have been given by the respondents on the implementation of Dispute Board in Malaysia.

TABLE II. SUGGESTIONS FOR THE IMPLEMENTATION OF THE DISPUTE BOARD CONCEPT FOR GOVERNMENT PROJECTS AND PRIVATE PROJECTS IN MALAYSIA

Government Projects	Private Projects
<ul style="list-style-type: none"> ➤ To be included in the Construction Industry Payment and Adjudication Act (CIPAA) ➤ The structure of Dispute Board to be set up by the Government ➤ Modifications on the standard form in Malaysia (PWD form) to insert clauses for Dispute Board 	<ul style="list-style-type: none"> ➤ To be applied into the sizeable or mega projects ➤ Adaptation of own condition of contracts which consist of own Dispute Board mechanism to be stated into the private contracts (PAM form, IEM form and CIDB form)

VI. CONCLUSION

In a nut shell, Malaysia is ready to widely adapt a new alternative dispute resolution which will boost the resolution of dispute in its construction industry. The concept of Dispute Board is viable to be implemented in Malaysia to reduce the number of dispute as it can prevent and resolve conflicts at early stage.

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