MEDIATION: THE BEST PRIVATE DISPUTE RESOLUTION IN THE MALAYSIAN CONSTRUCTION INDUSTRY?

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ABSTRACT

Private dispute resolution (PDR) refers to settlement of disputes “other than litigation” which is not open to the public. This includes mediation, adjudication and arbitration. Of the three PDRs, arbitration and mediation are promoted in the Malaysian construction industry. Notwithstanding the continuing reliance on litigation as the approach to solve construction disputes, arbitration was slowly accepted by the industry. As arbitration is more applied, it was realized that arbitration can be adversarial, and that a more “friendly” approach to solve disputes need to be considered. Consequently, mediation was introduced and promoted. However to date, its application has been poor.

This paper presents the research which investigates what is going on. It was developed on the premise that the poor response in adopting mediation as a form of PDR could be because mediation was poorly conceived and applied. A combined quantitative research method using the survey and qualitative research method using semi-structured interviews were adopted for the research. The variables which can impact on the application of mediation were also investigated. The findings suggest that, while mediation is generally considered appropriate there were concerns on the adequacy of its provisions and practice. Views on how this can be overcome were identified. The conclusions suggest the need for the industry to re-learn its approach in the promotion and the application of mediation if it is to be more effective.

Keywords: Private dispute resolution, mediation, mixed methods and construction industry.

1. INTRODUCTION

Dispute is inevitable in construction projects and it can be regarded as endemic in the construction industry. Disputes predominantly arise due to the complexity and magnitude of activities within construction works, multiple contracting parties, poorly prepared and executed contract documents, inadequacy of planning, financial issues and communication problems. Any of the stated factors can stall a project and lead to disputes and adversarial relationship between the construction participants.

Disputes can either be avoided from the outset by way of efficient risk allocation and management or resolved once it is occurred. The former seems to be more efficient to avoid unnecessary time and cost. However, the latter may be practical for complex issues which require third parties interference (Edwards & Shaoul, 2003). Dispute resolution can be divided into two main categories which are public and private. Public dispute resolution refers to the nature of litigation which focuses on the fair implications of private interactions but open to the public (Stitt, 2004; Forster & Jivan, 2008).

Generally, there is no guarantee of privacy in litigations due to the publication of judgments in law journals. Comparatively, private dispute resolution refers to private mechanism which parties’ autonomy will play bigger roles in dispute resolution and confidentiality characteristic of the overall process. There are three method of private dispute resolution available in major standard form of construction contracts in Malaysia namely arbitration, which is the ultimate dispute resolution for construction disputes,
mediation which has been around for more than ten years and the latest is adjudication which has been introduced in the Persatuan Akitek Malaysia (PAM) latest 2006 form. This paper discusses on the application of mediation in the Malaysian construction industry in comparison to arbitration and how to further utilise and improve the stated method of private dispute resolution.

2. THE THEORITICAL FRAMEWORK

Disputes and Private Dispute Resolution

Traditionally, resolving construction disputes are done through litigation (Leong, 2005; Harrington, 2007). This can be confirmed by 72 cases related to building contract being reported by the Malayan Law Journal between 1997 and 2007 (Asniah, 2007) and the Current Law Journal which reported about 200 cases of construction related issues since 2004. Yet, today the litigation procedures have fallen into disrepute, particularly due to excessive costs, delays, procedural complexity and adversarial approach (Harmon, 2003; Jones, 2006).

The problematic issues in litigation are not new but have been apparent since the last decade and causing distortions in the business community worldwide (James, 2003). In the Malaysia context, it has been reported that as of July 2006 there are more than 300,000 civil cases including construction pending in the Malaysian courts (NST, 18 June 2007). Furthermore, in May 2008, the Minister in the Prime Minister’s Department stated that there are more than 900,000 unresolved cases in the lower courts and more than 91,000 at the High Court. He suggested that alternative methods of private dispute resolution may be the answer to the mounting backlog of civil cases nationwide (NST, 09 May 2008). As opposed to public dispute resolution, out of court or alternative methods of private dispute resolution are seen as the options to ensure efficient settlement of construction disputes (Thaveeporn, 2008). Given that these shortfalls will result in delays, complexity and expense to the litigation process, there is a strong need for assisted settlement or other alternative methods of private dispute resolution apart from arbitration and mediation to be employed in the construction industry.

Due to the distinctive nature of the construction industry, the possibilities of generating disputes are high due to scientific or technical difficulty (Rajoo, 2008; Luen, 2006a; El-adaway, 2008). Thus, the application of dispute resolution in both public and private projects seems to be unavoidable. Looking into the problematic issues in litigation as the public dispute resolution, there is a tendency by the construction industry to apply alternative methods of private dispute resolution (Leong, 2005). However, the application of arbitration in the Malaysian construction industry seems to be uncontested and pragmatically some believed that arbitration is the most suitable and well-known dispute resolution technique for settling Malaysian construction disputes (Rajoo, 2004). The main reason is the nature of the dispute resolution which is final and binding and its track record in the construction industry (Chan & Suen, 2005). Since the establishment of Arbitration Act 1952 and the latest 2005 Act, this mode of private dispute resolution is not new to the industry (Luen, 2006b). Even so, one cannot deny that previous researches confirmed that there is a negative reputation surrounding the practice of arbitration in Malaysia (Che Munaaim & Loh, 2007; Abdul Aziz & Kamal Halili, 2008). Thus, serious efforts are required to make private dispute resolution more effective and efficient.

Arbitration and Mediation in the Malaysian Construction Industry

Compared to the UK construction industry, arbitration started to its lose popularity due to the development of cheaper and non-adversarial dispute resolutions such as adjudication and mediation (Reid & Ellis, 2007; Brooker, 2007) and the development of a dispute board in big scale construction projects (Chapman, 2004; Ndekugri & Russell, 2006). However, other than mediation, other private dispute resolutions are not well publicized and utilized in the Malaysian construction industry.

In comparison to arbitration, other methods of private dispute resolution such as mediation and adjudication are relatively new to the Malaysian construction industry. Mediation has been introduced by PAM in its 1998 standard form and adjudication has been formed as part of its 2006 form. Similarly, CIDB in its 2000 edition form introduced mediation as one of the options for private dispute resolution.
After more than ten years in the industry, mediation is not progressing at the same pace with arbitration; it is evidenced by the number of cases registered with various agencies. Between the year 2000 and 2008, numbers of mediation cases are very low compared to arbitration and no adjudication cases were reported (Table 1).

<table>
<thead>
<tr>
<th>Item</th>
<th>Source</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Malaysian Mediation Centre under the auspices of the Malaysian Bar Council.</td>
<td>Total 155 Mediation cases but only four construction mediation cases.</td>
</tr>
<tr>
<td>2</td>
<td>Malaysian Institute of Architect (PAM).</td>
<td>Total 518 construction arbitration cases including one case in 2008 and no mediation case so far.</td>
</tr>
<tr>
<td>3</td>
<td>Kuala Lumpur Regional Centre for Arbitration (KLRCA).</td>
<td>Total 126 cases including 27 construction cases.</td>
</tr>
<tr>
<td>4</td>
<td>Construction Industry Development Board (CIDB).</td>
<td>No reported case but CIDB is involved with at least five cases acting as a mediator for both government and private disputed projects.</td>
</tr>
<tr>
<td>5</td>
<td>Institution of Engineer Malaysia (IEM).</td>
<td>Total 15 construction arbitration cases until 2007, no registered case in 2008 and no mediation cases.</td>
</tr>
</tbody>
</table>

In developed countries, mediation is very popular and recognised by the courts (Naughton, 2003; Brooker, 2007). Cases such as *Dunnett v Railtrack*¹ where the court stated that “Skilled mediators are now able to achieve results satisfactory to both parties...which are quite beyond the power of lawyers and courts to achieve”, and in the case of *Hurst v Leeming*² where the court described that mediation is “at the heart of today’s civil justice system.” Naughton (2003) clarified that in the UK, those cases opened the floodgates and now the mediation is expressly recognized in the Commercial Court Guide, Chancery Guide, the Queen’s Bench Guide and the Technology and Construction Court Guide.

However, the similar scenario is not happening in Malaysia. The Chairman of the Mediation Committee of the Bar Council once expressed that “mediation has yet to be widely adopted by the business community in Malaysia” and she further confirmed that “greater acceptance of this alternative mechanism would also help clear the backlog of commercial cases waiting to be heard in court” (Bernama August 31, 2005). It has been suggested that the final and binding issues are the main problems in mediation and it would be more popular if mediation is placed on a statutory footing (Seng, 2006). Chapman (2004) clarified that in the United Kingdom, it has been reported that only a small percentage of cases go to arbitration and the remaining large percentage is settled by way of non-adversarial dispute resolution.

A research was conducted by the Centre of Construction Law and Dispute Resolution, King’s College London confirmed that majority of mediation cases was undertaken on the parties’ own initiative; those advising the parties to construction disputes routinely consider mediation to try and bring about a resolution of the dispute; and the cost savings attributed to successful mediations were also significant.

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¹ *Dunnett v Railtrack* [2002] All ER 850.
² *Hurst v Leeming* [2002] EWHC 1051 (Ch).
providing a real incentive for parties to consider mediation (Gould, et al., 2009). Thus, the concept of non-adversarial should be maintained as the best mechanism for dispute settlement.

There are limited research and no comprehensive empirical data on the application of private dispute resolution in the Malaysian construction industry and how to ensure efficient settlement and improve private dispute resolution in the construction industry (El-adaway, 2008; Elmarsafi, 2008; Thaveeporn, 2008; Chen, 2003; Hammad, 2001; Asniah, 2007; Chan & Suen, 2005; Abdul Aziz & Kamal Halili, 2008). As a result the industry continues to struggle to identify ways to resolve disputes equitably and economically. Some suggested that computer based mechanism be developed based on the historical data on construction disputes due to difficulty in finding dispute resolution practitioners (Cheng, Tsai, & Chiu, 2009). Similarly, Brooker (2009) lucidly disclosed that there is still a shortage of empirical data which identifies the suitability and effectiveness of mediation for construction disputes. One of the reasons for such development is the areas of legal practice in the built environment, including construction law and dispute resolution has received little sustained scholarly attention (Chynoweth, 2009).

3. THE RESEARCH

The Research Methodology

Mixed methods consist of quantitative research (cross sectional survey) and qualitative (in-depth semi structured interviews) was adopted for the research. Two research questions drawn for the investigations were:

- What are the construction variables which influence the application of arbitration and mediation?
- To what level is arbitration and mediation applied?
- What are the factors that influence the application of arbitration and mediation and why?

The respondents were G7 Building and Civil Engineering contractors in Malaysia registered with the Construction Industry Development Board (CIDB). (G7 refers to the largest class of contractors allowed to undertake projects in excess of RM10 million). One thousand questionnaires were sent out and the response rate was 23.1% (231 responded). Data were analyzed using non-parametric statistics using the SPSS Version 14 software. Of the 231 respondents, 30 with experience in arbitration and 20 in mediation were identified but only 30 of these were willing to be interviewed (18 with experience arbitration and 12 mediation). The qualitative analysis was carried out using the ATLAS.ti 5.0 software.

Table 2: Sampling Frame

<table>
<thead>
<tr>
<th>State</th>
<th>Potential Respondents</th>
<th>Respondents (stratified sampling)</th>
<th>Actual Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>Percent</td>
<td>N</td>
</tr>
<tr>
<td>1 Johor</td>
<td>144</td>
<td>5%</td>
<td>51</td>
</tr>
<tr>
<td>2 Kedah</td>
<td>125</td>
<td>4%</td>
<td>44</td>
</tr>
<tr>
<td>3 Kelantan</td>
<td>100</td>
<td>4%</td>
<td>35</td>
</tr>
<tr>
<td>4 Kuala Lumpur</td>
<td>716</td>
<td>25%</td>
<td>254</td>
</tr>
<tr>
<td>5 Melaka</td>
<td>37</td>
<td>1%</td>
<td>13</td>
</tr>
<tr>
<td>6 Negeri Sembilan</td>
<td>53</td>
<td>2%</td>
<td>19</td>
</tr>
<tr>
<td>7 Pahang</td>
<td>72</td>
<td>3%</td>
<td>25</td>
</tr>
<tr>
<td>8 Pulau Pinang</td>
<td>116</td>
<td>4%</td>
<td>41</td>
</tr>
</tbody>
</table>

3 Under Construction Industry Development Board (CIDB) contractors registration criteria, G7 contractors are those who have no limitation in tendering capacity, paid up capital worth RM 750,000 and minimum personnel / resources requirement: one Group A (Degree holder in construction related fields) and one Group B (Diploma holder in construction related fields or other degree holder with experience in construction works) both with minimum five years experience or two Group A (one of whom must have 5 years experience) (Source: CIDB, The Construction Industry Directory 2004-2005).
Quantitative Research Findings

Descriptive statistics using the Bivariate analysis using Chi-Square (CS) Tests i.e., the test for independence and correlation analysis (measure of association) using Cramer’s V (CV) together with Contingency coefficient (CC) test for nominal data and Spearman’s Rank (SR) order test for ordinal data were applied.

Out of the total of 231 responses, 10% of the construction organisations reported having applied mediation (Figure 1) and a significant percentage of respondents reported having applied mediation between one or two times throughout their years of establishment. A small percentage reported having applied mediation between three to five times (Figure 2). An almost similar trend was observed for the number of years of experience for individual respondent (Figure 3). There were no significant relationship between the applications of mediation and years of establishment, contract price and project duration (Chi Square $p > \alpha = 0.05$) (Table 4).
The application of mediation was observed to be considerably high for higher contract value and the highest frequency of application is still between one or two cases and the application of mediation was observed to be low for considerably low valued contract. In terms of project duration, respondents with project duration less than three years were observed to be more active in the applying mediation.

Qualitative research findings

Results from semi-structured interviews indicate that the appropriateness of mediation depends on the commitment and consistency of disputed parties to resolve the issue and to “accelerate” the process. The “relationship” between the disputing parties will be the deciding factor to determine whether adversarial or non-adversarial dispute resolution will be appropriate. For instance, if there is tendency of the parties to maintain the current level of relationship mediation may be appropriate. Otherwise, arbitration might appropriate. However, in term of the disputed amount both the quantitative and qualitative analyses indicate no strong relationship with the methods of dispute resolution. It was conceived that, the perception that arbitration is just for disputes which related to large amounts of money and mediation for small amounts might not be accurate.

Most respondents believe that the choice to mediate was right compared to arbitration in most circumstances. Those knowledgeable in law and have won arbitration cases are more in favor of
arbitration and thinks that arbitration was appropriate. In contrast, those who have experienced unsuccessful mediation may not think it is appropriate. Notwithstanding, this depends on the how the PDR was administered and they were able to control and gain confidence of the disputing disputed parties.

As for problems faced by the respondents (Figure 4), two quarters of respondents have experienced mediation without major problems. However, almost a similar portion reports that they have had problems of co-operation by the other party. Comparatively, timing issues were the most problematic in arbitration, together with cost related issues such as amount at stake and fees of the arbitrator. This is consistent with the main reasons for low preference over the dispute resolution.

![Figure 4: Problems in Arbitration and Mediation Process](image)

Time and cost were the main reasons why the respondents felt arbitration was inappropriate compared to mediation. Cases with low quantum disputed and simple issue may not appropriate for arbitration, instead mediation might be the best option. However, not all arbitration cases are expensive and time consuming as many cases were resolved in less than three years. Knowledge in the dispute resolution together and commitment to resolve disputes is crucial to ensure appropriateness of any PDR resolution since there is a tendency to misuse and abuse the process.

The “adversarial” nature of arbitration appears to be more inappropriate for the Malaysian construction industry. In terms of its process, an impartial arbitrator is expected to dispose the issue by looking into both expressed and implied terms of the contract. Professionalism tends to be more demanded in arbitration compared to mediation. Comparatively, a win-win situation is expected in mediation and mediator is regarded as a middle man to facilitate the process. However, non-binding mechanism of mediation emerge as one of the most inappropriate compared to final and binding arbitrator’s award. To avoid risk of inappropriate selection of dispute resolution methods, it is suggested to apply mediation, arbitration and court in stages since there are pros and cons for each of the method.

The findings converge to suggest that PDRs tends to be more successful in settling construction disputes. Mediation tends to be a better proposition to settle the dispute when terms time and cost is the critical element. The factors which contribute to effective PDRs culminated from this research are:

1. Appointment of practitioner such as arbitrator or mediator should be based on the nature of dispute, highly experience and well verse in construction contracts and law and the appointment should be made at the initial stage such as during pre-contract.
2. Pre-dispute resolution preparation, such as to ensure sufficient documentations, determination of appropriate mode either adversarial (arbitration) or non-adversarial (mediation) by looking into the background and attitude of the parties and disputed amount at stake.

3. During dispute resolution process, a reasonable amount of documentation and presentation, spirit of the parties to resolve dispute fast, abide with contractual time, presentation of case by way of chronological events, appointment of experts to assist the process and participation of working level staff is crucial to ensure successful process of dispute resolution.

4. Prior to actual settlement, the parties may predict the outcome and withdraw from the process to avoid further losses.

5. The parties need to be flexible in the sense of accepting the final decision and fulfill obligations apportioned in the settlement.

Recommendations to improve mediation in the construction industry were drawn from the interviews are:

1. An establishment of a framework for efficient dispute resolution to include mediation as one of the main dispute resolution prior to adversarial dispute resolution.

2. Amendment of the standard form of contract by adding mediation as one of the options for private dispute resolution.

3. Upgrade the current practice and procedure of mediation in order to ensure successful outcome and to provide means to settle construction disputes promptly.

4. Active promotion and education by both professional and academic institutions.

5. Impartial and non-profit organization to administer and oversee mediation.

6. Establishment of the Malaysia Construction Industry Courts to dispose issues relating to construction disputes and court-annexed mediation should be encouraged and regulated.

7. Induction course on construction disputes and settlement using mediation to be conducted for Project Managers.

8. Final and binding and enforceable mechanism need to be part of mediation settlement.

4. CONCLUSION

Dispute is common in the construction industry due to complexity and magnitude of works. As a result, the application of dispute resolution is unavoidable. As to the nature of non-adversarial in mediation, most of the construction participants regarded that it is appropriate for the industry. However, this research indicated that very small percentage applied mediation and there is no strong relationship between the applications of mediation in term of number and years of establishment; contract price; project duration; resolved cases and years of experience.

Appropriateness of mediation is largely depending on the disputing parties” commitment and consistency to accelerate the process. The relationship of the disputed parties is the deciding factor to apply mediation. By and large, mediation is cheaper than adversarial private dispute resolution such as arbitration and most respondents believed that the choice to mediate was right compared to arbitrate. To ensure successful process of mediation, careful appointment of mediators; sufficient documents to back-up the claims; spirit to resolve and flexibility are crucial.

In order to improve and utilise mediation in the construction industry, efforts from the government agencies, professional bodies, industry bodies and academic institution are required and further action is needed to further upgrade and make good any potential problems that will or has been arise in all stages of mediation process.
REFERENCES
