

EVALUATING THE EFFECTIVENESS OF MEDIATION AND ARBITRATION PROCESSES IN RESOLVING DISPUTES IN THE MALAYSIAN CONSTRUCTION INDUSTRY

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ABSTRACT

Construction is considered a significant industrial sector. It has a very large and diverse scope of work, ranging from residential building, skyscrapers, dams, tunnels, bridges, rapid transit systems, and highways etc. An expansion in the scale of construction can lead to the participation of many parties, the execution of various phases by separate teams with their own desires and approaches in achieving them. Due to the complex and fragmented nature of construction, conflicts and disputes are an inevitable part that if they cannot be solved within the appropriately time, they may cause non compensable damages such as delays for each project. Traditional and common dispute resolution methods are utilized to reach settlements between parties. Traditional dispute resolution sometimes cannot be effective due to adversarial procedures where one party will win and the other one will lose during the execution of the project. The effect of this may be that the losing party loses their passion for continuing the project efficiently which may create a critical situation and obstructs in improvement of the project. This paper intends to investigate the effectiveness of arbitration method and mediation process as an alternative one in resolving common disputes that occur in the Malaysian construction industry and the extent of their impact on three important factors; cost, time and the overall outcome for construction projects. It concluded that the mediation process is an amicable, most effective and rational way for achieving settlement negotiated between the parties, and which is the only true way to achieve a win-win result whilst maintaining the relationship between the parties for future dealings.

KEYWORDS: Arbitration, Construction Dispute, Dispute Resolution Method, Mediation

INTRODUCTION

The construction industry is an essential part of economic growth in every country especially in Malaysia. However, there are many conflicts and disputes in this industry which may affect economic performance. Satisfaction of various parties involved in the construction project is a key to a project's success requiring more effective resolution of any conflicts which may arise between parties, by the project manager. The management of projects is implemented by the client, contractor, consultant and project manager to generate effectively in according to goals of the whole project. Size and complexity of the project can lead to enhance of ambiguities and intricacy. Construction projects are implemented by various parties; each of them has their own desired objectives and tries to achieve them in conformity with their own purposes without considering benefits of whole parties that this can be the initiation of any disputes. Dispute is common phenomenon in construction industry which can be happened between contractor and client, client and architect and so on that by using proper dispute management as soon as possible, the situation of project will be turned back to the usual condition. Proper understanding of conflicts is essential element for avoiding or preventing from development. Shin, K.

(2002) said that dispute resolving is a part of normal project during the construction phase, since dispute are inevitable event and dispute resolution needs to be occurred without delay on the site [1].

There are enormous dispute's reasons such as existence of mistake, defect in contract, differing site condition, delays, suspension of work, design error, and etc. Vorster, M (1993) mentioned that "a dispute is specified as an agreement about an issue concerning project performances, usually resulting from discuss over distinction between two or more parties comprehending of situation. Disputes in construction have different nature and characteristic, thus the source of them will differ from one project to another.

Best dispute resolution method is good understanding of construction contract and excellent interpretation about each terms of contract, nonetheless dispute is common event that always happens during the executing of project. There are many dispute resolution methods for acquiring good settlements between involved parties such as litigation, arbitration, mediation, and etc, but each of them has its own positive and negative impacts. Many techniques cannot solve dispute entirely but can alleviate or minimize the effect of dispute on the project. If disputes cannot be solved properly, it may cause delays in projects, undetermined team essence, increasing project's cost, and beyond everything else damage constant business relationships. Project manager should reply to conflict with properly experience and training in the past. Managing of conflicts poorly is as same as pools of feather but well versed manager can solve disputes with properly understanding of goals of the whole project. There are some dispute resolution techniques implemented in Malaysian construction industry such as arbitration and mediation process to solve disputes. Arbitration is referred to a legal technique for solving disputes without need of the court but the third party can render decision for the involved parties. Mediator as a neutral advisor listens to the representatives of both parties and helps them to achieve settlement. Mediator have active role by putting suggestion, encouraging the parties to concentrate on the main issues, without rendering decision for disputants. In construction projects, each dispute should be resolved based on a proper and effective method to bring a win-win situation for involved parties. Due to that, choosing an effective dispute resolution method is a substantial issue for overcoming and/or alleviating the negative impacts due to arising disputes in construction projects.

The purpose of this paper is to investigate the effectiveness and impressiveness of arbitration and mediation processes in resolving common disputes occurring in the Malaysian construction industry and the amount of their impact on three important factors such as cost, time and outcome for construction projects.

ARBITRATION PROCESS

Arbitration is formulated for dispute resolution process in similarity to litigation and trial. It has some organization worldwide such as American arbitration society which resolves complaints using arbitrators. Each organization of arbitration has the number of expertise persons who have experience about decision making in term of specific disputes. The choice of arbitrator is many hard, since person may have unconscious bias toward the other side. It should be notified that while writing is obligatory requirement, special form of arbitration clause is not required in the act. Arbitration has been specified as procedures of settlement of disputes between disputants [2]. Capabilities of arbitrators are identified by purpose of parties as contemplation in their contractual agreement [3].

Arbitration pertains to the process of dispute resolution implemented under the law of arbitration without applying any court (Clause 3.4 of the arbitrators of Malaysia). Evolution of arbitration in Malaysia could be followed back to the establishment of ordinance of 1809. The ordinance had been stood for approximately 150 years till it was substituted by the arbitration act 1952 which was exhibited on the basis of the UK arbitration act [4]. And since then Arbitration has been administrated in Malaysia by Arbitration Act 1952 based on the Arbitration Act of UK. This legislation confessedly is

ancient and the government has needed the new document of Act adapted to UNCITRAL Model Law. The Malaysian Bar Council has completed this document and has sent to Attorney General Chambers for their consideration. The Arbitration Act should be implemented until the proposed new document act is enacted by laws.

The disputants liberate usually to agree the process for nomination of arbitrators, how ever if the disputants don't agree to this process for the appointment of arbitrators, the parties could request to the High Court to nominate the specified arbitrator to make resolution of disputes. KLRCA (Kuala Lumpur Regional Center for Arbitration) was established in 1978 carrying on taking decision by the Asian African Legal Consultative Committee. Implementing of Arbitration under the KLRCA principles is a serious concern for disputants that it could be the lack of ability to pursue the interim alleviation from the court where the arbitration has started. Majority of the broad rules sketched in the Model Law to adjust with the most pleasurable aspect of the Malaysian law system was adopted by 2005 Act and also increase the implementation of arbitration in Malaysia. 2005 Act is separated between the domestic arbitration and international arbitration and can reduce the extent of court interferences.

Arbitration process has lost its power due to appearance of the other resolution methods such as mediation that it is cheaper and non adversarial procedure compared arbitration but nowadays it is also widely used in many situations. Nonetheless it has many disadvantages such as: time consuming and uneconomical for achieving resolution which cannot be efficient. It disperses the deteriorated behavior that is developed before its execution.

MEDIATION PROCESS

Mediation is a formalized negotiation by using a neutral party for decisions making. In fact, it is a process which is provided by third party for achieving a settlement between opponent parties. A mediator dose not judge between two parties or prefer one party to another parties. As a replacement, mediator assists parties to comprehend the risk associated with enduring dispute which will lead to binding resolution. It has been introduced by CIDB in 2000 standard form as a technique of private dispute resolution. With regard to numerous advantages of the mediation, however using of mediation in Malaysia has not been considered as well as arbitration. Naughton in 2003 and Brooker in 2007 introduced mediation process as one of the popular techniques of dispute resolution particularly in developed countries [5,6].

Chairman of the Mediation Committee of the Bar Council mentioned that business committee should adopt mediation widely in Malaysia. Hurst and Leeming in 2002 [7] said that Mediation process can help in reducing the agglomeration of commercial cases waiting to be judged in the court for the purpose of expedition in the process of resolution. Extension of empirical evidence does not exist and application of private dispute resolution is limited in Malaysian construction industry.

Construction industry is trying to find an economical and fairly resolution techniques. Cheng, Tsai & chi in 2009 [8] mentioned that computer based system has been suggested to the construction industry for implementing the previous saving data with deducing the same structure dispute. MMC (Malaysian Mediation Center) has been established by the Malaysian Bar Council in 1999 as an implementation of alternative dispute resolution. All sorts of commercial and matrimonial disputes are resolved by MMC in the Malaysia. Bar Council have total responsibilities of proper implementation of the mediators in MMC. Persatuan Insuran Am Malaysia (PIAM), Banking Mediation Bureau (BMB), Housing Buyers Tribunal (HBT), Tribunal for Consumer Claims (CCM), have been also implemented by mediation.

Mediation often leads to deadlock when one party does not consider the merit of other. The process of mediator may use a joint meeting as well as separate meeting with each party. Mediator guarantees to explain the goal of each party and seeks trade off without rendering decision.

COMPARISON OF CHARACTERISTICS BETWEEN ARBITRATION AND MEDIATION PROCESS

Table 1 demonstrates the comparison between arbitration and mediation process in terms of some critical factors such as time, cost, outcome, formality, satisfaction and etc.

Table 1: Comparison between Arbitration and Mediation Based on Various Characteristic

Characteristics	Arbitration	Mediation
Place of hearing	Private/bilateral	Private/bilateral
Hearing	Formal	Informal
Representation	Legal	Legal only if necessary
Resolutions	Award imposed by an arbitrator	Mutually accepted agreement
Time/cost	Can be time consuming and uneconomic	Fast and economic
outcomes	Unsatisfactory	Satisfactory

RESEARCH METHODOLOGY

In construction projects, each dispute should be resolved based on a proper and effective method to bring about a win-win situation for all parties involved. Selecting an effective dispute resolution method is a substantial issue for overcoming, and/or alleviating, the negative impacts due to arising disputes in construction projects.

In this study, gathering of data is implemented through questionnaires. Experience of respondents with petition for facts, and also the content questionnaires are established upon matters distributed in all states of Malaysia between mediators, arbitrators and contractors involved in the master project with regard to dispute resolution by aid of online questionnaire.

The questionnaires concentrated more on the process of using arbitration and mediation which had been designed to answer the question that which of them is more effective and used more in different disputes in Malaysian construction industry.

RESULTS & ANALYSIS

This research used a questionnaire survey of 100 respondents including mediators (N=42), arbitrators (N=38) and contractors (N=20) in the Malaysian construction industry.

Arbitrators were randomly selected from MIArb (The Malaysian Institute of Arbitrators, www.miarb.com), AiA (Association for international Arbitration, www.arbitration-adr.org), KLrcA (Kuala Lumpur Regional Center for Arbitration, www.rcakl.org.my) and PORAM (PERSATUAN PENAPIS MINYAK SAWIT MALAYSIA, www.Poram.org.my).

Mediators were also selected randomly from AiA and KLrcA websites. Contractors were interviewed with the use of a questionnaire.

They were selected in the city of Johor Bahru, Malaysia. A response rate of 50% (17 arbitrators, 15 mediators and 18 contractors) was achieved. The survey considered various matters such as the reasons for disputes, types of disputes and how they were resolved using different methods, degree of satisfaction, effectiveness of the methods etc.

Causes of Disputes

Figure 1 indicates the percentage of agreement of respondents regarding the various reasons causing disputes in the Malaysian construction industry.

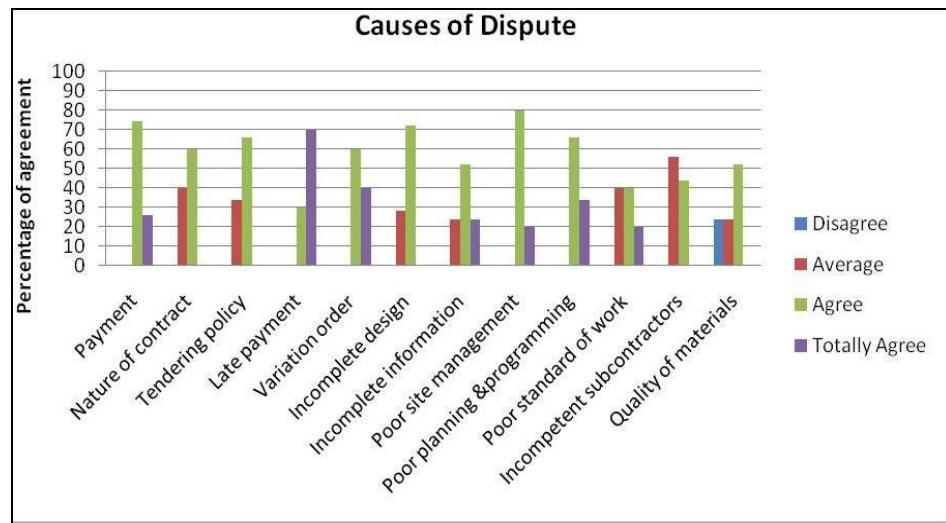


Figure 1: Percentage of Respondent's Agreement Regarding the Reasons of Dispute Appearance

According to Figure 1, late payment is one of the most important issues that about 70% of respondents were totally agree about the arising dispute due to that. In their opinion, late payment is the substantial factor which can lead to disputes in Malaysian construction industry. Beside this, poor site management, payment, incomplete design, poor planning and programming, and variation order with 80, 74, 72, 66 and 60 percentage of agreement are other important reasons lead to the dispute in Malaysian construction industry. Among the considered various reasons of disputes, quality of materials is only the factor that 24 percentages of respondents were disagreed with it.

Types of Disputes Solved through Mediation

In this stage, it is investigated how many percentages of respondents agree and/or disagree about using either mediation or arbitration in resolving occurred disputes. Figure 2 demonstrates the percentage of respondents' agreement regarding the types of disputes solved through mediation process.

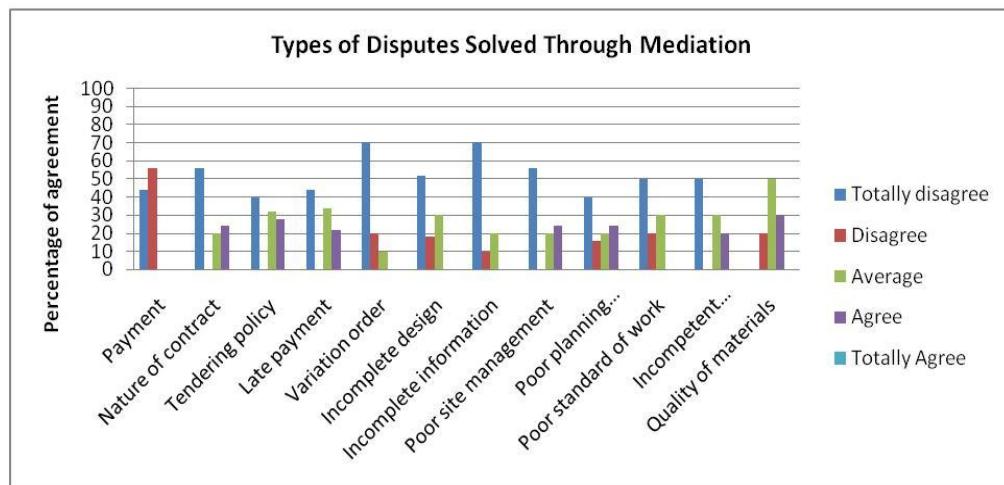


Figure 2: Percentage of Respondent's Agreement Regarding the Various Disputes Solved through Mediation

According to Figure 2, lack of quality of materials can be considered as a main reason which causes. About 30% of respondents focused on mediation to resolve this. Besides quality of materials, some other reasons such as tendering policy, poor site management, poor planning and programming, nature of contract, late payment and incompetent subcontractors with the percentages of 28, 24, 24, 24, 22 and 20 of respondents respectively could be resolved through

mediation process in Malaysian construction industry. According to the Figure 2, payment is the only issue which is not effective to be solved through mediation.

Types of Disputes Solved through Arbitration

Figure 3 indicates the opinion of respondents regarding the types of disputes solved through arbitration process.

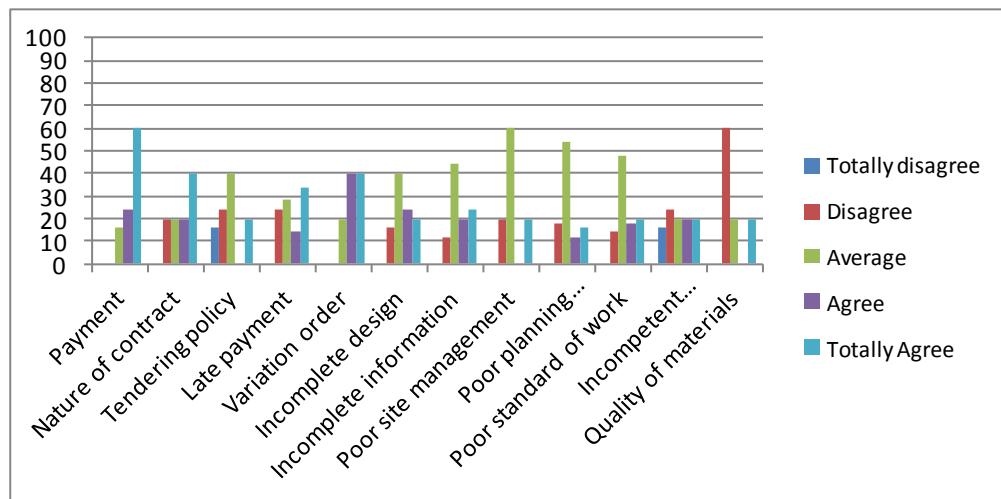


Figure 3: Percentage of Respondent's Agreement Regarding the Various Disputes Solved through Arbitration

As shown in Figure 3, it can be derived that payment is considered as an issue that most of respondents (60%) were totally agreed is best for resolving it by the arbitration process. Indeed, the mediation approach may not be effective for resolving it. Beside payment issue, the arbitration process can be more effective for resolving some other issues such as variation order and nature of contract with 40 percentage agreement by respondents.

Among the considered issues, according to the respondents arbitration may not be effective to resolve the dispute arisen by tendering procedure, incompetent subcontractors and quality of materials in the Malaysian construction industry.

Effectiveness of Mediation & Arbitration in Terms of Cost, Time and Outcome

Figure 4 and 5 shows the effectiveness of mediation and arbitration regarding the cost, time and outcome of construction project in Malaysian construction industry respectively.

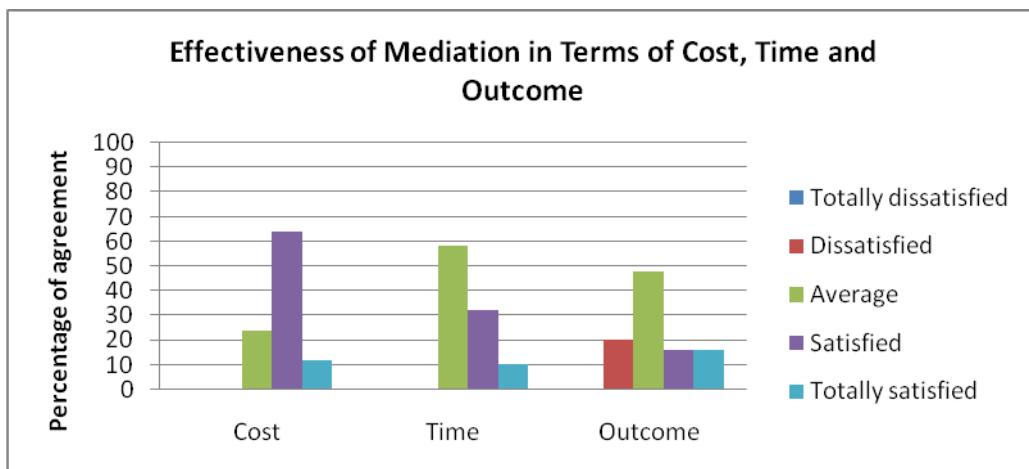


Figure 4: Percentage of Respondent's Agreement Regarding the Effectiveness of Mediation in Terms of Cost, Time and Outcome

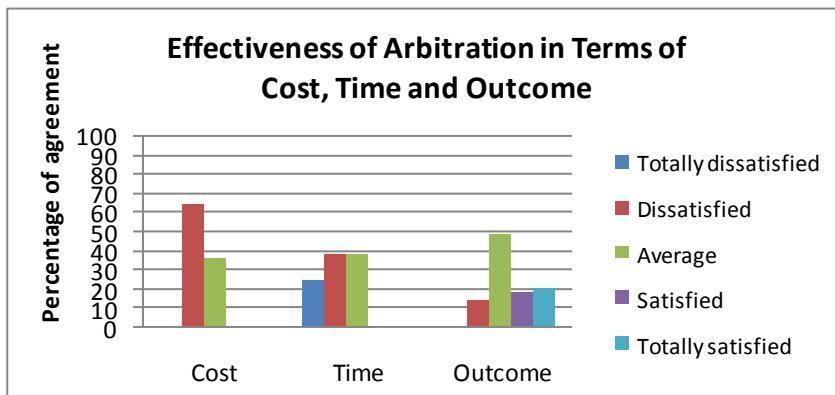


Figure 5: Percentage of Respondent's Agreement Regarding the Effectiveness of Arbitration in Terms of Cost, Time and Outcome

In terms of cost and time, it can be derived from Figure 4 that most of the respondents were satisfied about the high efficiency of mediation in these factors. But regarding the outcome, most of them voted to average and few of them were satisfied about it.

Regarding arbitration, in terms of cost and time, it can be derived from Figure 5 that most of the respondents that are about 64 and 62 percentages in terms of cost and time respectively, were dissatisfied with the efficiency of arbitration regarding these factors. But regarding the outcome, just 14 percentage of respondents were dissatisfied regarding the effectiveness of arbitration. Most of them believed in effectiveness of arbitration process regarding outcome. So based on data gathered, it is obviously indicated that mediation in terms of time and cost is more effective compared to arbitration whilst in term of ultimate outcome, arbitration is more efficient, official and stronger than mediation in dispute resolution in spite of high cost and time consuming.

WHICH IS THE BEST WAY TO RESOLVE THE CONSTRUCTION DISPUTES IN THE MALAYSIAN CONSTRUCTION INDUSTRY?

As the open ended question, respondents gave various responses which are as follows:

The opinion of one of them was that disputes are best resolved amicably by compromise and requires parties to be reasonable and rational. These are absent most of the time as the mind-set of parties is adversarial from the beginning of the contract and continues into the dispute phase. This tends to exacerbate disputes and make it difficult to settle by whatever method of resolution.

The other one believed that the basic element of dispute is payment. In the past, all sort of methods were quite useless, as the main reason was the client refused to pay within time and even sometime the certified amount in full. Arbitration seems to be more effective as the arbitrator is more knowledgeable in the relevant industries than those civil judges in courts. However, the time taken for the process usually is not any quicker than mediation, as it is supposed to be faster. Upon the implementation of CIPAA soon, hopefully these types of disputes will be much reduced and the cash flow of the contractors would be much improved. And these will contribute a positive impact to the project, such as complete on or before time. One of them emphasized on amicable settlement negotiated between the parties, which is only the true way to achieve a win-win result whilst maintaining the relationship between the parties for future dealings.

CONCLUSIONS

Choosing a proper and effective method is critical for dispute resolution in various situations in the construction industry. This paper has investigated the effectiveness of arbitration and mediation as two types of dispute resolution

process in the Malaysian construction industry based on different causes and situations. Based on the statistics, late payment, poor site management and payment, in addition to incomplete design, poor planning and programming, and variation orders are the main causes of disputes in the Malaysian construction industry. Based on the data from our respondents, among these principal causes, disputes arisen due to poor site management, poor planning and programming, and late payment are resolved more effectively through mediation, whereas disputes arising on account of payment, variation orders and nature of contracts should be decided through arbitration.

In terms of cost and time elements, it can be concluded that mediation is more efficient compared to arbitration. However 32% of respondents confirmed the effectiveness of mediation regarding the outcome of projects. More respondents emphasized the arbitration process in achieving an effective outcome. But in terms of cost and time, most of the respondents were dissatisfied with the effectiveness of arbitration. From this, it can be derived that despite the possibility of effectiveness of mediation regarding the outcome of the construction project, it can be more effective and efficient in terms of cost and time compared to arbitration.

However, respondents believed that an amicable way is most effective and rational way for achieving settlement negotiated between the parties which is only the true way to achieve a win-win result whilst maintaining the relationship between the parties for future dealings. Mediation can be used as a way to resolve disputes amicably by compromising between involved parties. Although adversarial attitudes of involved parties from the beginning of the contract is the biggest reason lead to disputes which cannot be solved amicably, fostering the attitude of going through a win-win result among all involved parties can reduce disputes in construction industry.

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