

A revisit on the current practice of dispute resolution and ADR in the Malaysian construction industry

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The current dispute resolution procedures available in the Malaysian construction industry are mainly litigation and arbitration. In addition, the alternative dispute resolutions (ADR), namely mediation and adjudication, have also been introduced as the other methods for resolving disputes. The objective of this study is to examine the current practice of dispute resolution and ADR available in the Malaysian construction industry. The aim of this paper is two-fold: to report the current practice of dispute resolution and ADR, and identify the attributes of successful implementation of both mechanisms based on the perceptions of the Malaysian construction industry players. From the jurisprudence point of view, this study looks into the law as it is, in relation to the current practice of dispute resolution and ADR, by showing how those findings can be used to explain why improvement is needed to promote a successful and well received dispute resolution and ADR, and what lessons can be learnt, towards the formulation of a more viable methods for the Malaysian construction industry. NVivo software has been used to manage and organise the complete interview transcripts and facilitate the data analysis process for this study. Literature review reveals a continuous development of dispute resolution and ADR in the Malaysian construction industry, while, globally the industry has not only embraced ADR but also spearheaded the development of innovative forms of dispute avoidance mechanism. The findings of interviews show that locally, apart from litigation, the common types of ADR are arbitration, mediation and ad hoc mechanism. The findings also lead to the discovery of the following attributes: faster, less procedural, cost effective and enforceable; regulation and government's support; professionalism and ethic; training; and facility, that may promote a successful implementation of dispute resolution and ADR in Malaysia.

Keywords: *dispute, legal culture, legal consciousness, trade custom, trade usage*

1. INTRODUCTION

There are several mechanisms under the heading of dispute resolution procedure. The categorisation of the mechanisms may it be non-binding or binding is subject to finality of its decision (Fenn *et al.*, 1997). The main characteristic of dispute resolution procedure is where it will only come into exist if there is a dispute and reference be made to it (Gerber, 2001). Generally, the mechanisms under dispute resolution procedure can be classified under three (3) main mechanism, i.e., litigation, arbitration and alternative dispute resolution (ADR). In this regard, El-Adaway and Ezeldin (2007) have

labelled both litigation and arbitration as traditional dispute resolution procedures, particularly owing to its availability in the construction industry long before the existence of any other dispute resolution procedures.

However, it has been always the contractual requirements that both contracting parties to achieve settlement of dispute without going to the final and binding resolution method, such as arbitration or litigation, by firstly referring to a multi-tier dispute resolution mechanism either voluntarily or involuntarily. Generally, local contract forms have provided ADR, i.e., mediation (CIDB, 2000) and adjudication (PAM, 2006), as a

mandatory dispute resolution procedure before the parties can proceed to arbitration or even litigation to finally resolve any dispute between them. This paper seeks to report the current practice of dispute resolution and ADR, and the attributes of a successful implementation of both mechanisms based on the perceptions of the Malaysian construction industry players.

2. THE EMERGENCE OF DISPUTE RESOLUTION AND ADR MECHANISM

No doubt that litigation is regarded as the oldest method of resolving disputes. Usually, it involves a lengthy process, voluminous documentation, procedural and adversarial in nature (Feld and Carper, 1997; Merna and Bower, 1997). Due to this nature, disputes over large complex construction projects often result in costly and complex construction litigation (Pinnell, 1999). Although litigation could hand justice and benefits recognised by the law to the innocent party, contractors generally try to “avoid litigation” (Cushman *et al.*, 2001) not only because the issue of cost, but also especially if they realise that by going to the court they could harm and damage their present business relationships and expose to the danger of having other potential business clients and partners stay away from them, which in return depriving their business opportunities and company profits. This is indeed true since litigation is a public process where stories underlying the disputes are made available for public viewing and media scrutiny (Speaight, 2010).

It is also argued that the delay in the settlement of construction dispute through litigation could further damage the relationship of the contracting parties and worsen the financial capacity of the weaker party. The delay in the settlement of cases may be due to the difficulty to obtain a date for court hearing and the complexity of the cases, and of course, delay is unavoidable due to the appeal process itself. A general observation made to three local cases, i.e., *Lec Contractors (M) Sdn Bhd v Castle Inn Sdn Bhd* [2001] 3 CLJ 31, *Kejuruteraan Elektrik Usahamaju Sdn Bhd v Zilatmas (M) Sdn Bhd* [2001] 5 CLJ 563 and *ABB Transmission & Distributions Sdn Bhd v Sri Antan Sdn Bhd & Anor* [2008] 10 CLJ 1, show that the time taken to settle a case can take from a year to as long as 8 years. In this regard, it is very much anticipated that the delay of obtaining a court judgment may cause serious cashflow problem to the main contractor and further down its contractual chain, e.g., the suppliers and the sub-contractors. Thus, Kratzsch (2010) argued that although the court may allow for an interest to be paid on top of the claim in accordance with the construction

contract’s terms, or other legal terms; the damages caused by the cashflow problem are usually much higher than the benefit of having the delay interest paid through the court’s judgment.

In addition, Lord Phillips Of Worth Matravers has pointed out the risk associated with the liability of the unsuccessful party to reimburse both his own legal costs and the “success fee” (on top of the costs of the successful party) which is provided under the U.K.’s Access to Justice Act 1999, is a strong reason why the disputant parties may want to avoid litigation by seeking an alternative dispute resolution (Matravers, 2010). In Malaysia, recently an effort to continuously develop measures for the timely, cost effective and efficient disposal of court cases have sparked the idea to suggest a transformation to the construction justice to introduce a specialised construction court, perhaps like the one exist in the U.K (Ameer Ali, 2009; Davidson, 2009). Perhaps, as suggested by the former Chief Justice of the High Court of Sabah and Sarawak, the late Tan Sri Datuk Amar Lee Hun Hoe (Hoe, 1987), the needs for such specialist court is necessary because:

“...no single body of Judges can be expected to deal efficiently and speedily with all classes of litigation. The streaming of cases into these specialist Courts or into specialist divisions within the judicial system is a common phenomenon. These specialist Courts should be able to determine more speedily issues with which they are familiar. With their greater judicial productivity it is hoped that they will contribute to the elimination of delay in the judicial system.”

A requirement for a specialised construction court is also due to the fact that litigation produces result that is certain and enforceable, despite of some of its disadvantages. Nevertheless, in order to ensure an effective and efficient specialised construction court, it is also observed that ideally the judge should be someone who qualified both technically and legally. It must be noted that, way back in 1987, the court’s delay in the administration of justice apart from the issue of cost, has been recognised as one of the most serious problems encountered by the courts in Malaysia (Hoe, 1987). In short, the drawbacks in litigation have caused the construction players to consider other methods that could provide them with more realistic options in preserving their rights, profits, as well as their present and future business relationships (Battersby, 2002).

However, the introduction of other methods than the judicial system should not be merely viewed as an alternative or method to bypass the normal way

of seeking justice because “bearing in mind that the Constitution and the laws of any country are intended to serve a social purpose” (Hoe, 1987). Indeed, according to Hoe (1987), it has been suggested that:

“The provision of alternative methods to dispute settlements should be regarded as a supplement to the ordinary legal system. They do not demand the destruction of the magnificent edifice which our predecessors have built with vision and perspicacity. What is required is the interpretation of the eternal principles of human freedom to meet the challenging conditions of our times and the application of the fundamental principles of justice to the problems which arise in the complex industrial and commercial life of our era.”

As for arbitration, Powell-Smith (1998) suggests that “arbitration is a process whereby the parties to a dispute agree to have it settled by an independent third party and to be bound by the decision he makes”. Rajoo (1999) defines arbitration as “an alternative process of dispute resolution to litigation by which a neutral third-party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard”. There are a few legislations applicable to regulate arbitration in Malaysia. The Arbitration Act 2005 (*Act 646*) which come in force on 15 March 2006 is the primary legislation repealed the old Arbitration Act 1952 [*Act 93*], and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 [*Act 320*].

Malaysia has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in order to provide a readily enforceable arbitral awards for the parties which engage in international commercial construction contract (UNCITRAL, 2008). The arbitration regime in Malaysia is also reinforced by other legislations such as the Contracts Act 1950, Evidence Act 1950 and Civil Law Act 1956. Recently, amendments to the Arbitration Act 2005 through the Arbitration (Amendment) Act 2011 has been enacted to portray an arbitration-friendly legal framework by limiting the court’s power to intervene, providing the interim measures and likelihood of enforcement of awards by the court, and increase its used in Malaysia, both domestic and international arbitration (Ng, 2012).

In practice, arbitration provisions are provided in all standard form of construction contracts which require the parties to refer a dispute to arbitration first before going to court. The arbitration under

the local standard forms of contract is subject to the institutional rules under which the contract operates. For example, clause 34.7 of PAM2006 standard forms of building contract provides for arbitration which incorporates the PAM Arbitration Rules (PAM, 2006). In addition, the Institution of Engineers Malaysia (IEM) has also published its latest IEM Arbitration Rules to be used for the IEM standard forms of contract (IEM, 2003).

Generally, alternative dispute resolution or its well-recognised abbreviation ADR has been widely used to alternatively facilitate and resolve construction dispute. A survey made by the American Arbitration Association (AAA) shows that close to 90% of the respondents indicated that they had been involved in some form of ADR; a clear indication that ADR process are extensively used in the industry instead of the old-fashioned litigation (AAA, 2007). Apart from arbitration which is also regarded as part of ADR by some scholars and practitioners (Battersby, 2002), ADR consists of other methods namely, mediation, conciliation, adjudication and mini-trial (Fenn *et al.*, 1997).

According to Harmon (2003b), except for adjudication which is binding and regulated by an Act in the U.K., Australia and Singapore, other methods such as mediation, conciliation and mini-trial are predominantly non-binding. There are, however, some inherent disadvantages that have been identified in the previous studies: ADR has been used as delaying tactics, it is costly, adversarial and damaging to the relationships of the parties concerned (Bercovitch and Gartner, 2007; Brooker, 1999; Brooker and Lavers, 1997). Further, it is also suggested that ADR is not suitable if one party shows no real will to settle, and while the use of legal advice could help to discover the weaknesses and strengths of both parties in disputes, some forms of ADR could be expensive (Brooker, 1999).

In Malaysia, Ameer Ali (2010) has identified that although there are efforts to introduce mediation in the construction industry through several standard forms of contract, its usage in Malaysia is exceptionally low. In addition, he highlighted that unfortunately the recent version of standard forms of contract published by the Government of Malaysia for the government projects did not have any form of mediation clause (Ameer Ali, 2010). He anticipates that one of the reasons for not incorporating mediation in the government construction contracts is because “the opportunities for financial decision makers involved in mediations making sole decisions (as opposed to through committees) is very unlikely”

(Ameer Ali, 2010, p. 92). Apart from that, the resistance to mediation among the lawyers have also been identified as one of the reasons why mediation facility is underused and the lawyers' interest remains low in Malaysia (Zariski, 2011).

Apart from the mediation rules provided by PAM2006 and CIDB2000, the Malaysian Bar has in 1999 established the Malaysian Mediation Centre (MMC) to promote mediation "as a means of alternative dispute resolution and to provide a proper avenue for successful dispute resolutions" (Bar, 2008). Through MMC, amongst others the centre provides "mediation services by trained mediators who have been accredited and appointed to the Panel of Mediators of the MMC" (Bar, 2008). In addition, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) also provides mediation services and rules which allows the parties to freely choose their mediator or from its list of accredited mediators, or failing which the director of the Centre shall assist in the appointment of conciliator/mediator (KLRCA, 2010). Under the KLRCA rules, it must be noted that the words 'mediation' and 'conciliation', as well as reference to 'mediator' and 'conciliator' are synonymously and interchangeably used (KLRCA, 2010).

Interestingly, the Malaysian Judiciary has introduced court annexed mediations through the Practice Direction No. 5 of 2010 on 13 August 2010 which came into effect on 16 Aug 2010 (Bar, 2010; Zakaria, 2010). Through this Practice Direction, all Judges of the High Court and its Deputy Registrar, all Judges of the Sessions Court, Magistrates and their Registrars, "may give such directions that the parties facilitate the settlement of a matter before the court by way of mediation" (Bar, 2010). The Practice Direction offers two options for referring to mediation; judge-led mediation, or by a mediator agreeable to by both parties (Bar, 2010). It has been stated that one of the benefits of this court annexed mediation is the finality of the terms of mediation settlement agreement (Bar, 2010). If the said mediation reaches a settlement, a consent judgment will be recorded, but if no settlement has been reached, the matter will then be transferred back to the original presiding Judge for a full hearing (Bar, 2010).

Recently, the Parliament of Malaysia has passed the Mediation Bill 2012 on the 2nd of April 2012, which aims "to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation" (Malaysia, 2012b). Unlike the court annexed mediations through the Practice Direction No. 5 of 2010, sections 5 and 6 of the Mediation Bill 2012

describe that the Bill applies only if the parties voluntarily agree in writing to an invitation to refer the disputes to mediation and there is a written mediation agreement made by the parties (Malaysia, 2012b). Further, in essence section 15(2)(d) of the Mediation Bill 2012 provides that mediation communication may be disclosed in order to implement or enforce a settlement agreement. In other words, a mediation settlement agreement should be admissible only for the purposes of implementation or enforcement of a settlement agreement.

Apart from mediation, PAM2006 Agreement and Conditions of Building Contract (PAM2006) have also introduced adjudication as one of the contractual methods to resolve construction dispute. Interestingly, clause 30.4 and 34.1 of PAM2006 have made it clear that reference to adjudication is made condition precedent to arbitration if there is a set-off dispute between the parties. Under clause 34.4, the adjudicator's decision is binding until practical completion of the project but if there is any objection, the disputant party must issue notice to the other party to refer the dispute to arbitration within 6 weeks from the date of the adjudicator's decision. PAM2006 provides that if there is any dispute (other than set-off dispute under clause 30.4), the matter can be brought to arbitration which cover a very broad subject under clause 34.5.

Further, unlike adjudication in the U.K., Australia, New Zealand and Singapore construction industry which is binding and regulated by an Act, Malaysia is yet to have its own statutory adjudication. However, with recent development, the adjudication is on its way to be made available statutorily for the Malaysian construction industry practitioners. After a series of industry players' consultation forums, on the 15th of July 2009, the Malaysian government has given its approval for the concepts proposed by the CIDB to go-ahead with the development of adjudication through the 'Construction Industry Payment and Adjudication Bill' (Ameer Ali, 2009). The 'Construction Industry Payment and Adjudication Bill' (the Bill) has finally been passed in the Parliament of Malaysia on the 2nd of April 2012 (Malaysia, 2012a).

According to sections 2 and 4, the Bill applies to every construction contract made in writing including consultancy services contract. It also includes procurement of materials, equipments and workers and a broad scope of construction-related works. In essence, sections 28 and 29 of the Bill allow an adjudicator's decision to be enforced as judgment of the High Court and gives several other remedies to the party who obtained the

adjudication decision in his favour, such as to suspend the work in the event if the adjudicated amount pursuant to an adjudication decision has not been paid wholly or partly within the stipulated time. Part V of the Bill also stipulates the functions of KLRCA as the adjudication authority, which among others to set competency standard and criteria of an adjudicator, and to provide administrative support for the conduct of adjudication. Nonetheless, the effectiveness of the Bill to facilitate a regular and timely payment, and speedy dispute resolution mechanism through adjudication is yet to be seen until it comes into operation on a date to be decided by the Minister.

At a global level, it is interesting to highlight that a survey made by the American Arbitration Association (AAA) shows that apart of ADR, more than 30% of respondents have engaged with forms of disputes avoidance like partnering, dispute review boards, and other on-site processes (AAA, 2007). In addition, the construction industry reportedly has not only embraced ADR but also spearheaded the development of innovative forms of conflict management or dispute avoidance (Brewer, 2007; Gerber, 1999). Locally, at present there is a research conducted to look into the viability of dispute avoidance procedure for the Malaysian construction industry (Mohd Danuri *et al.*, 2010).

Past research works reported that dispute has become increasingly common in the construction industry (Chan and Suen, 2005; Jannadia *et al.*, 2000). Anecdotal evidence from two prominent construction professionals in the industry illustrates that the situation is rather no different in Malaysia (Ameer Ali, 2005; Ong, 2005). Further, Cheung and Suen (2002) suggest that there is no optimal way of dealing with disputes owing to the different nature, complexity, parties involved and scale demonstrated between one project and another. Perhaps, due to the above circumstances, the literature review shows the emergence of dispute resolution, ADR and other forms of conflict management or dispute avoidance procedure in the construction industry, both locally and internationally. In relation to this, surprisingly, the construction industry has been regarded as the leader in both dispute occurrences and dispute resolution systems (Groton, 2005; Keil, 1999).

3. RESEARCH METHODOLOGY

The objective of this study is to examine the current practice of dispute resolution and ADR available in the Malaysian construction industry by looking into the perceptions of the construction industry players. According to Sarantakos (2005) it is important to recognize that every researcher

brings some set of assumptions into the research paradigm, which will guide the researcher in adopting an appropriate research approach. From the ontological perspective of qualitative research paradigm, reality is not objective (especially *social reality*) and is socially constructed. The assumption is that there is a need to study how people see the world (not the world itself) because perception governs action and has real consequences (Sarantakos, 2005).

Perceptions of the industry players are also said to be related to culture whereby “culture is a way of perceiving the environment” (Reisinger, 2009). In this regard, Reisinger (2009) acknowledges suggestion made by Samovar *et al.* (1981) that “the similarity in people’s perceptions indicates the existence of similar cultures and the sharing and understanding of meanings”. Further, there is a theoretical position which asserts that law is “a system or body of law tied to specific levels or kinds of culture” (Friedman, 1969). In addition, from the jurisprudence point of view, the philosophers of law seek to find out what the law is and how it works in general, and identify how they can be modified, changed or adapted (D’Amato, 1984).

Friedman (1975) put forward that “what gives life and reality to the legal system is the outside, social world”. Further, Friedman (1975) said that “the legal system is not insulated or isolated” and suggested that “it depends absolutely on inputs from outside”. In addition, Cheung and Suen (2002) believed that “disputes in other geographical locations are different because of differences in social norms and values”. Thus, from the epistemological perspective, this study looks at how people interpret the world, focusing on meanings, trying to understand what is happening and developing ideas through induction from data (Easterby-Smith *et al.*, 1991).

According to Miles and Huberman (1994), there is a need to define the unit of analysis for a research. The unit of analysis for this qualitative research is the construction industry players or the *social reality*, which is the phenomenon to be studied with regards to their perceptions towards the current dispute resolution and ADR available in the industry. The *social reality* in this research includes several respondents ranging from contractors, clients, construction lawyers, consultants and regulators. Interviews have been chosen for this study due to its ability to explore and, acquire lengthy and detailed answers about the issues at hand by entering “the other person’s perspective” (Patton, 1987). The number of respondents set to be limited to that experience, expert and prominent professionals by which a

small number of interviewees will be selected based on a set of criteria. For example, the criteria for the selection of contractors have been developed as the following:

- a. The respondents must have a minimum of ten (10) years experienced in the construction industry. This criteria has been used in a study conducted by Cheung and Suen (2002);
- b. The respondent must be at least the managing director or project manager of the company, or other persons such as the contract manager who are involved in the business administration and familiar with construction contracts. According to Cheung and Suen (2002) respondents who very experience, knowledgeable, possessed good skills and hold senior managerial positions in the industry were essential, so that their views provided a good reflection in the field of research. It is suggested that the respondent's legal backgrounds are crucial for the current study. This has been demonstrated in a study conducted by Rameezdeen and Rajapakse (2007) on the readability of contract clauses, where the sampling was based on selection of professionals from the industry who are routinely involved in the business of administration and working with construction contracts;
- c. The respondents must have been working in a company experienced in both civil engineering, and building works. It is recognisable that construction activities not only involve civil engineering and building works, but may also include activities such as mechanical and electrical works, and other specialised works. However, due to time and cost constraint, it would be difficult for this study to use the entire population in the quest of gaining knowledge about something (Sekaran, 2006). This is also to limit the scope of the study and to ensure a manageable amount of data;
- d. The locality of the chosen respondent is either in Selangor or Kuala Lumpur, and can be in both states. For instance, the majority of registered contractors are located in these two major states in Malaysia (CIDB, 2009). Thus, the purpose of choosing the locality of the respondents is to limit the scope of the study and to ensure a manageable amount of data.

Since dispute involves not only the main contracting parties, this study includes other stakeholders such as the clients, contractors, consultants, construction lawyers and regulators. This approach has been used in quite a number of previous construction disputes related researches, whereby almost similar backgrounds of respondents have been selected for their research

(Chan and Tse, 2003; Harmon, 2003a, 2004). Unlike quantitative research which normally requires the sample to be randomly selected, in qualitative research samples are more often non-random, purposeful and small in numbers (Merriam, 1998). Thus, the choice of interviewees for this study are selected through non-probability sampling designs by means of purposive or judgement sampling.

The list of interviewees are gathered through the respective Malaysia's professional bodies or authorities such as the Board of Quantity Surveyors (BQSM), the Board of Engineers, the Board of Architects, the Construction Industry Development Board (CIDB) and the Professional Services Development Corporation (PSDC). In the event if there is no specific list available to choose the potential respondents or difficult to get hold of a respondent, snowball sampling approach will be used through recommendation or referral made by the initial interviewees. In this regard, snowballing sampling is said to be a common approach in the construction research (Abowitz and Toole, 2010).

A semi-structured interview format has been selected for this study, as it allows the interviewee to answer questions on his/her own terms and offers flexibility in the questioning and answering of questions when compared to a highly structured interview. According to Berg (2004), semi-structured interview lies between the extremes of the standardised (structured) and the unstandardised (semi-structured) interviewing structures. It gives the researcher freedom to probe beyond the initial answers and gave interviewees the opportunity to elaborate on their answers. The topics and issues to be covered are predetermined in an outline form or interview guide to ensure that each of the interviews conducted seeks the same information from the respondents (Lynch, 1996). An interview guide is prepared which contains questions which were developed based on the research questions as well as based on the key points identified in the literature review.

A complete interview transcript is managed and organised by using NVivo, which is software designed for assisting the researcher in qualitative data analysis. The use of NVivo 8 software and a complete interview transcript have also been employed for this study primarily to safeguard the validity and reliability of the data as well as its findings. In short, once all the interviews data have been transcribed, a systematic processes suggested by Boyatzis (1998), Guba (1978) and Patton (1987) have been utilised to initiate the data analysis process for this study which include among others; the development of categories in the forms of main themes and sub-themes,

management of the categories or themes by looking at the regularities or patterns, and interpret the patterns in a way that contributes to the development of knowledge.

The interview sessions were extended over 2 stages. Firstly, it has been conducted between May to November 2009, covering primarily the consultants (quantity surveyors, engineers and architects). The time taken is considered ample enough to extend invitation to participate in the research to a list of consultants which have been identified through purposive sampling. The second stage of the interview session has taken place between February to August 2010 to cover the rest of the respondents comprising of the lawyers, clients, contractors (main contractors and sub-contractors) and regulators. The invitation to participate in the research to the list of respondents, have been sent by post and email, followed by phone calls whenever necessary in order to get the response.

4. THE INTERVIEW RESPONSES

This study attracts 29 interviewees consist of clients, contractors, consultants, construction lawyers and regulators. Figure 1 indicates the number of interviewees who have participated in the interview and their sector of practice. The breakdowns of the nature of practice in descending order are sub-contractor (17.2%), construction lawyer (13.8%), regulator (13.8%), quantity surveying firm (13.8%), public client (10.3%), main contractor (10.3%), private client (6.9%), civil and structural engineering firm (6.9%) and architecture firm (6.9%).

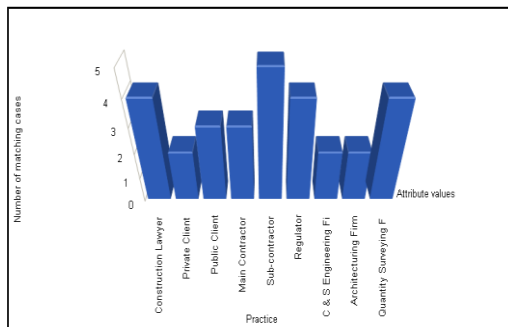


Figure 1: The interviewees' sector of practice

In this study, majority (62.07%) of the interviewees have an experience ranges from 20 years and above, follows by 34.48% of the interviewees who have a work experience of 15 to 19 years and 3.45% interviewees with a work experience of 10 to 14 years.

As shown in the Figure 2, the majority of interviewees have a work experience of more than 20 years. It has to be highlighted that the most experienced interviewees have a work experience

of 35 years and 28 years which are a construction lawyer and a sub-contractor, respectively. Refer to Table 1 for more details. The interviewees' general background is tabulated in the following Table 1 for an easy reference.

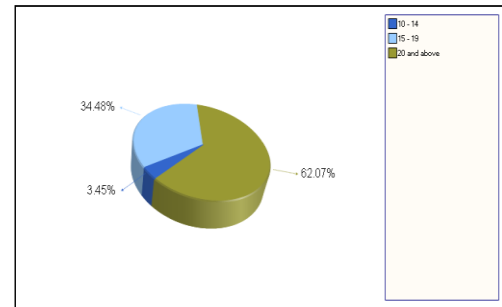


Figure 2: Interviewees' work experience (years)

4.1 The current practice of dispute resolution and ADR

Apart from litigation, according to the interviewees the common types of ADR that they have experienced with are arbitration, mediation and also, ad hoc mechanism. In relation to ADR, arbitration can be considered as trade custom with respect to dispute resolution, primarily due to the availability of the mechanism in all standard forms of contract and recognised by the law through the Arbitration Act 2005. On the other hand, mediation and ad hoc mechanisms can be best viewed as trade usage in relation to the practice of ADR. A legal dictionary described *custom* as "...rule of conduct in society, established by long use and binding those under it" and may "constitute a valid law"; while *usage* is identified as "habit that is yet to gain full acceptance as law" (Nyggh and Butt, 1998). Consistently, an online legal dictionary suggested that "...usage is a repetition of acts whereas *custom* is the law or general rule that arises from such repetition..." (TheFreeDictionary, 2011).

Generally, the interviewees perceive arbitration is effective in resolving construction dispute, since it is regulated by an Act. It is also interesting to find out that usually the interviewees' experience with mediation does not come under such a formal mediation. In other words, mediation has been exercised by the industry but generally it is not through the relevant institution who publishes the standard forms of contract. Ad hoc mechanism on the other hand refers to a mechanism which is not established at the commencement of the project, but is referred to by the disputant parties through a mutual agreement once a dispute arises or at a later stage of a project. From the interviews, it is found that the two commonly referred ad hoc mechanisms are expert determination and government's initiative mechanisms which akin to mediation.

Table 1: Interviewees Details

No.	Label	Position	Years of Experience	Nature of Practice
1	ConstrLaw/01	Arbitrator	20 and above	Construction Lawyers
2	ConstrLaw/02	Partner	20 and above	Construction Lawyers
3	ConstrLaw/03	Director	15 – 19	Construction Lawyers
4	ConstrLaw/04	Partner	20 and above (35 yrs)	Construction Lawyers
5	MC/01	Senior Manager (Procurement)	15 – 19	Main Contractors
6	MC/02	HOD, Claims Department	15 – 19	Main Contractors
7	MC/03	Project Manager	15 – 19	Main Contractors
8	SC/01	Manager	15 – 19	Sub-Contractors
9	SC/02	Manager	15 – 19	Sub-Contractors
10	SC/03	Manager	15 – 19	Sub-Contractors
11	SC/04	Director	15 – 19	Sub-Contractors
12	SC/05	Director	20 and above (28 yrs)	Sub-Contractors
13	SR/01	Director	20 and above	Quantity Surveying Consultants
14	SR/02	Principal	20 and above	Quantity Surveying Consultants
15	SR/03	Principal	20 and above	Quantity Surveying Consultants
16	SR/04	Project Director	20 and above	Quantity Surveying Consultants
17	IR/01	CEO	20 and above	Civil & Structural Engineering Consultants
18	IR/02	Director	20 and above	Civil & Structural Engineering Consultants
19	AR/01	Principal	20 and above	Architectural Consultants
20	AR/02	Associate	20 and above	Architectural Consultants
21	PubCL/01	Director	20 and above	Public client
22	PubCL/02	Quantity Surveyor	15 – 19	Public client
23	PubCL/03	Deputy, Director	20 and above	Public client
24	PriCL/01	General Manager	20 and above	Private client
25	PriCL/02	Deputy Senior Manager (Projects)	15 – 19	Private client
26	Reg/01	Managerial level	20 and above	Regulators
27	Reg/02	Manager	10 – 14	Regulators
28	Reg/03	Director	20 and above	Regulators
29	Reg/04	Managerial level	20 and above	Regulators

This study also manages to capture some opinion on the attempt made by the CIDB of Malaysia to propose Construction Industry Payment and Adjudication Act which by its acronym is called CIPAA.

The findings reveal that it is the industry legal culture to avoid the use of ADR and litigation. Some of the relevant excerpts from the interview responses are provided in this paper to explain the legal culture and legal consciousness of the industry players. Legal culture according to Friedman (1975) refers to “customs, opinions,

ways of doing and thinking-that bend social forces toward or away from the law”. Social forces according to him, “are constantly at work on the law...choosing what parts of ‘law’ will operate, which parts will not” depends on the society’s “judgment about which options are useful or correct” (Friedman, 1975). The society judgment is made through what is thought as legal consciousness which “traces the way in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings” (Anonymous, 2001). In other words, legal culture is built upon the legal

consciousness of the society members or industry players. The legal culture to avoid ADR and litigation is built upon the following legal consciousness of the industry players:

- a) Not less than 18 interviewees have expressly perceived that arbitration and litigation are both tedious and time consuming mechanisms. At times, arbitration can also be costly for resolving disputes depends on the arbitrator; in relation to the conduct of arbitration and professional ethics. The following quotations support the findings:

“Try to avoid arbitration or court because you are involved in massive and tedious process really.”

(Interviewee SR/03)

“I said it is quite tedious. You have to present your case, some time you have to speak, although you got lawyers....You are in the forefront. The lawyer will be just listening. So all these becoming very time consuming and loss of energy bringing all the bundles of documents.”

(Interviewee AR/02)

“...the cost issue. Cost can escalate. We got an arbitration which has gone on for almost 10 years, you know!”

(Interviewee PriCL/01)

“Lunch supposed to be 1 hour end up 2 hours....We need to tackle this. Wasteful of Human Resources. Of course some of them (arbitrators) are happy because they get paid. But at least, that is an unethical way of making money or earning a fee you see! I don't think that was the right thing to do.”

(Interviewee IR/01)

Interestingly, in order to improve arbitration, there has been suggestion: to continuously provide training so that the relevant parties understand the conduct of arbitration and also to improve on the facility. The following excerpt from a construction lawyer who has 30 years of experience and still actively involved in arbitration illustrates this finding:

“I find that people who come to arbitration, lawyers in particular, sad to say do not know the business of arbitration, do not know! In arbitration it is not like in court where you have to prove that the other witness is wrong. No! It is just

to say that this is how the contract is to be and what it is, that's all! Leave it. But they bring irrelevant documents, irrelevant issues up because they are not familiar with what arbitration is. That's, that's the major problem that we have...My suggestions...we must train our Arbitrators properly, we must train our council properly...they may not be legally qualified...I'm not making it to be legally qualified council. Anybody can come but those who want; those who want to participate in the arbitration must be trained.”

(Interviewee ConstrLaw/04)

“...in Malaysia, proper facilities for Arbitration, severely lacking....Visit down to Singapore...You see the facilities they give you...It is like what you are talking, it is reported on the screen. Transcript comes out in the same day, you know! You don't have to wait for 3 days. Because, if you have to wait for 3 days to get your transcript sometimes you can't cross examine!”

(Interviewee ConstrLaw/04)

- b) 11 interviewees perceive that they try to avoid contractual mediation due to unfamiliarity, non-compulsory method, non-genuine dispute and unenforceability issues. The following excerpts illustrate this finding:

“In my opinion, the reason why mediation becomes not popular in Malaysia is because the parties involved are not very familiar with the mediation process.”

(Interviewee ConstrLaw/03)

“Not taken off under PAM because it is not compulsory. They view it as a layer that is not necessary.”

(Interviewee ConstrLaw/01)

“The most important ingredient for a successful mediation is that there must be a genuine dispute. My experience revealed that a lot of construction disputes here are not genuine disputes. A lot where one party short of funds to pay and they create dispute to buy time. Example where, if one party can pay for the V.O. but only the sum cannot be

agreed, the dispute can be mediated. But if one party cannot even pay there is no point to mediate the dispute... Because of the prevalence of non-genuine dispute, mediation is a waste of time.”

(Interviewee ConstrLaw/02)

“...Not effective, there is no enforceability coming out of it, so they have problem with that.”

(Interviewee ConstrLaw/01)

- c) Skeptical views of some of the industry players, especially the lawyers that CIPAA tends to benefit only a group of professionals and not suitable for all type of disputes:

“Sorry to say, actually it is the quantity surveyors (QS) approach to find a role and I am very blunt about this. In a QS conference, I heard one speaker from Singapore said that adjudication is good because QS will be all adjudicators. I was shocked looking at their agenda.”

(Interviewee ConstrLaw/04)

“...if we have this payment Act in which have been practiced in UK and Singapore, so, you will attempt to resolve unjustified prolong payment issue and that is good about it... this payment Act will help the industry but not on the heavy issues or cases.”

(Interviewee ConstrLaw/03)

Interestingly, the findings reveal that ad hoc mechanisms have been successfully and satisfactorily used by the industry players in attempting to resolve the construction disputes. The findings suggest that ad hoc mechanisms can be regarded as a trade usage in an effort to resolve dispute without resorting to the ADR available in the contract. Such an ad hoc mechanism works very well because:

- a) In case of an expert determination, a respected and very experience third party is engaged as an expert to finally resolve the dispute. An engineer with experience of more than 20 years in the industry has said that:

“...and that solved the problems in two meetings only. Two seatings! Done! And they so happy they solved it in two meetings, they say, look you continue to stay as advisor to the team. And that’s how the first job. And subsequently I was

appointed another similar job and it was completed in four meetings. Four meetings means four morning, about two, three hours that’s all.”

(Interviewee IR/01)

- b) On the other hand, the government’s initiative mechanism runs smoothly to help resolve disputes because it is organised and lead by a powerful and influential government’s body.

“Apparently these people also looked high upon us as well...so they see us very powerful, but I keep telling them that we are mediator only...”

(Interviewee Reg/01)

4.2 Attributes of a successful implementation of dispute resolution and ADR

The industry players’ perceptions on the current practice of dispute resolution and ADR mechanism available in the Malaysian construction lead to the discovery of attributes that can promote a successful and well received dispute resolution and ADR in Malaysia. The interviews result reveals that the attributes may exist in the form of combinations of “soft” and “hard” issues (Bresnen and Marshall, 2002; Mustaffa and Bowles, 2005). Table 2 summarises the attributes.

5. CONCLUSION

The literature review reveals a continuous development of ADR and dispute resolution methods in the Malaysian construction industry in addition to the current dispute resolution and ADR practices. For instance, the Malaysian construction industry through CIDB has attempted to introduce an Act called by its acronym as CIPAA, to facilitate a speedy dispute resolution mechanism for payment dispute through a statutory adjudication. In addition, there is also an effort to continuously develop measures for the timely, cost effective and efficient disposal of court cases by introducing a specialised construction court in Malaysia.

Indeed, in accordance with the industry legal culture to avoid the use of ADR and litigation due to several shortcomings of the mechanisms, the transformation for a more speedy, cost effective and efficient legal regime through a continuous development and improvement of ADR and dispute resolution methods for the Malaysian construction industry is much needed. It is interesting to highlight that three of the attributes for a successful implementation of dispute

resolution and ADR identified in this study (refer to Table 2), i.e., regulation and government's support, training and facility, have been recognised as important attributes for the improvement of arbitration in Malaysia. In this regard, according to Ng (2012), the Director of KLRCA has been quoted as saying that:

"...the government has kindly offered us bigger premises in Kuala Lumpur in anticipation of the higher number of arbitration cases in the next few years. It will offer state-of-the-art and modern arbitration facilities as well as supporting

business facilities, and would make us on par with other leading centres in the region. This new premises is expected to open in early 2013.

The first challenge would be to overcome the lack of awareness and visibility of arbitration within the business community. To mitigate this, we have organised educational seminars, workshops and talks. We also organise outreach programmes to the various business associations and industry sectors."

Table 2: Attributes that may promote a successful and well received dispute resolution and ADR

Attributes	Description
1. Faster, less procedural, cost effective & enforceable **	Faster, less procedural, cost effective and enforceable are the preferable characteristics for choosing a dispute resolution or ADR mechanism.
2. Regulation & government's support **	A regulation may help to familiarise the industry players with ADR, just like arbitration. Regulation promotes confidence of the industry players with the mechanism in relation to the enforceability and conduct of the parties. It is also to encourage culture of having genuine intention to resolve dispute and showing respect to the person who has been appointed to help resolve the dispute, and to do this, it requires support and initiative from the government.
3. Professionalism & ethic *	The professionals must focus on helping the disputant's parties to resolve the dispute expediently with less procedural, efficiently and quickly as possible, as to avoid waste of time and resources. The disputant's parties on the other hand should not have an intention of using ADR to prolong the dispute. The appointed third party must be impartial and independent in performing his or her duty, and fully qualified and experience ideally in both legal and technical field, which in turn will help the appointed third party gain respect from both disputant parties.
4. Training **	Training should be continuously provided by the relevant organisation and institutions of higher learning to ensure the industry players are knowledgeable about the conduct and the difference of each ADR mechanism. This will also help to clarify any misconception that the other players may have on a particular mechanism. Training also helps to promote a particular ADR or dispute resolution by familiarising the industry players with its mechanism.
5. Facility **	A proper facility either in the forms of a particular human resource or state-of-the-art technology could facilitate towards an efficient proceeding. For instance, the appointed third party must be allowed to engage a professional transcriber to take verbatim in the hearing. This in turn helps the appointed person to focus on his or her primary duty and to issue a proper written decision or opinion.

Note:

* Soft issue

** Hard issue

In addition, the literature review also shows that the construction industry reportedly has not only embraced ADR but also spearheaded the development of innovative forms of conflict management or dispute avoidance. Thus, looking at the likelihood that Malaysia too may head towards conflict management or dispute avoidance mechanism, this findings complement the research on viability of dispute avoidance procedure for the Malaysian construction industry conducted by Mohd Danuri *et al.* (2010). It is suggested that the findings on the attributes of a successful implementation of ADR and dispute resolution may equally relevant to be considered in the formulation of a viable dispute avoidance procedure. Indeed, the findings are also consistent with the jurisprudence point of view that the philosophers of law seek to find out what the law is and how it works in general, and identify how they can be modified, changed or adapted.

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