APPLICABILITY OF EXPERT DETERMINATION AS ALTERNATIVE DISPUTE RESOLUTION IN THE MALAYSIAN CONSTRUCTION INDUSTRY

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Abstract:

Alternative dispute resolution (ADR) has been made available in all standard forms of construction contracts in Malaysia where arbitration is the most common dispute resolution method in lieu of litigation. Other commonly available ADR mechanisms are mediation and adjudication. In 15 April 2014, Construction Industry Payment and Adjudication Act 2012, come into effect, providing for statutory adjudication of non-payment issues arising from construction contracts. In 11 April 2018, Malaysian Institute of Architects (*Pertubuhan Arkitek Malaysia* - PAM) introduced Expert Determination (ED) as ADR in the Agreement and Conditions of PAM Contract 2018. This new provision is yet to be tested on its efficacy in providing solution to disputes. The aim of this paper is to explore the applicability of ED mechanism as ADR in the Malaysian construction industry. This paper looks into the current major ADR mechanisms in the Malaysian construction industry with reference to the respective statutes, standard conditions of contract and the institutions dealing with construction disputes. Comparative characteristics of each of the ADR methods will be highlighted based on literature reviews. ADR in construction can be improved in terms of speed and cost of settlement of construction disputes. The traditional arbitration and litigation approaches should remain as last resort solutions. Introducing ED as a means of dispute resolution may be a more effective solution to resolve technical disputes as and when it arises. Technical disputes may refer to engineering or construction issues. The construction professionals should be the prime service providers for ED, allowing the experts in the relevant areas to efficiently resolve disputes with the lowest possible costs and within minimal time. ED mechanisms as ADR are widely used in the US, UK and Europe. In the last decade, Hong Kong and Singapore have adopted ED mechanism in their construction industry. Salient aspects to be considered for the inclusion of ED as ADR in the Malaysian construction industry includes the formulation of ED Rules, amendment of current dispute resolution clauses in the Standard Conditions of Contract/ Supplemental to the Contract, identification of the appointing organization (if parties cannot mutually agree to the appointment of an Expert) and reputable organization in establishing and managing the List of Experts. Malaysian construction industry will have a variety of ADR mechanism options for settlement of disputes that arose during the construction period. Immediate dispute resolution mechanism for use should be inexpensive, simple, effective and speedy. The industry will benefit in terms of cost and time when suitable mechanism is chosen in accordance to the nature of the dispute.

Keywords:

Alternative dispute resolution, Dispute resolution, Expert Determination.

INTRODUCTION

Generally, the mechanisms under dispute resolution are litigation, arbitration and alternative dispute resolution (ADR). Some jurisdiction labeled both litigation and arbitration as traditional dispute resolution due to its availability in the construction industry long before the introduction of other dispute resolution mechanism. In the local contract forms, it has been the contractual requirement that both contracting parties to achieve settlement of disputes by referring to a multi-tier dispute resolution mechanism before going to the final and binding resolution method such as arbitration and litigation. However, there has been an emerging trend in the Asian region to include Expert Determination as ADR in the construction industry.

The purpose of this paper is to:

1. Identify the major alternative dispute resolution methods in the Malaysian construction industry.

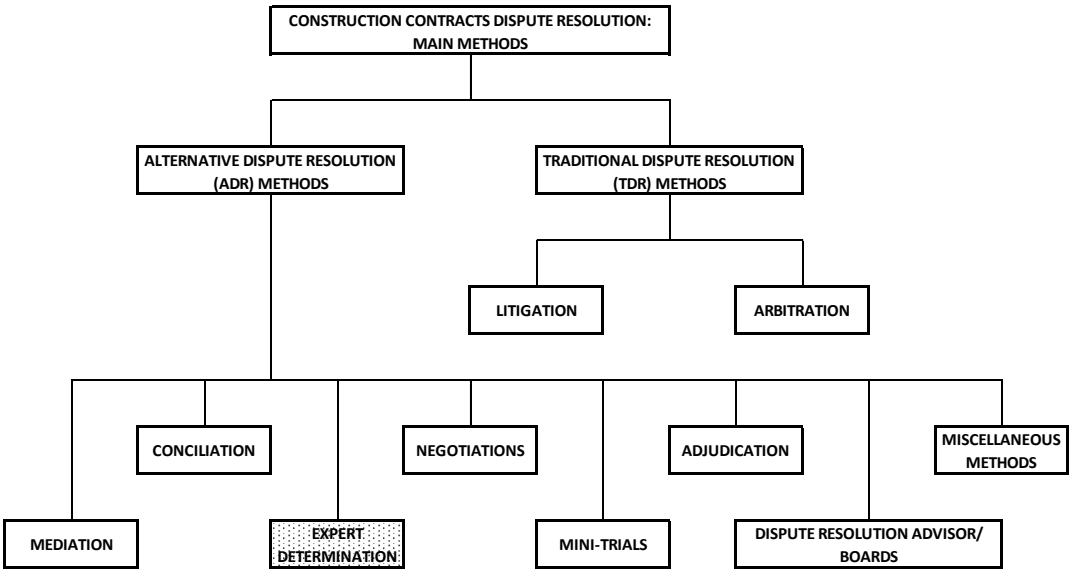
2. Highlight the comparative characteristics of and issues on the said major alternative dispute resolution method.

3. Highlight Expert Determination as an additional alternative dispute resolution method and its future prospect as a dispute resolution of choice.

DISPUTE RESOLUTION METHODS IN THE CONSTRUCTION CONTRACTS

The dispute resolution method can be divided into two (2) main categories i.e. traditional dispute resolution and ADR method. Most jurisdiction labeled litigation and arbitration as traditional dispute resolution, whilst some categorised arbitration as one of ADR method. There are many ADR methods available and practiced in the construction industry worldwide. The overall dispute resolution mechanism available is as depicted in **Figure 1** below.

Figure 1: Dispute resolution methods



MAJOR ALTERNATIVE DISPUTE RESOLUTION METHOD IN THE MALAYSIAN CONSTRUCTION INDUSTRY

ADR is not new and considered to be well accepted in the Malaysian construction industry. This is evidenced by the existence of ADR clauses in all major standard forms of construction contracts such as the Public Works Department (P.W.D. Form 203A (Rev. 1/2010), Malaysian Institute of Architects (PAM Contract 2018) and Construction Industry Development Board (CIDB Standard Form of Contract for Building Works 2000). The P.W.D. Form 203A (Rev. 1/2010) is the main form of contract for all Government projects, while the PAM and CIDB form of contracts are mainly used in private sector projects.

Apart from litigation, there are three (3) major ADR mechanism within the Malaysian construction industry namely mediation, adjudication and arbitration. In April 2018, ED was introduced into PAM Contract 2018.

A general description of each method is as follows:

Mediation

Mediation is a consensual process where an independent third party attempts to resolve the differences between two parties. The mediator will have the task of bringing a settlement to the dispute. He will lead the disputants to reconcile and reduce the differences between the parties. It is dispute specific and any settlement achieved does not establish any precedents of similar situations in subsequent cases.

Mediation under the local standard forms of contract is subject to the institutional rules under which the contract operates. Examples are PAM mediation rules provided by PAM Contract 2018 and CIDB mediation rules by CIDB Standard Form of Contract 2000.

The Malaysian Bar has established the Malaysian Mediation Centre (MMC) in 1999, to promote mediation as a means of dispute resolution and to provide a proper avenue for successful dispute resolutions. The centre provides mediation services by trained mediators who have been accredited and appointed to the Panel of Mediators at MMC.

In June 2012, the Mediation Act 2012 received royal assent and came into force on 1 August 2012. This Act is to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.

The Malaysian judiciary has also introduced Court-annexed Mediation since 2010 as an alternative mode to clear the backlog of cases. In addition, Asian International Arbitration Centre (AIAC) also provides mediation services and rules which allows the parties to choose their mediator or from its list of accredited mediators or failing which the Director of the Centre shall assist in the appointment of the mediator.

Conversely, the construction contracts of Public Works Department (P.W.D. Form 203A (Rev. 1/2010) has no provision for Mediation mechanism. Mohd Danuri (2012) quoted Ameer Ali (2010), that it is anticipated the reasons for not incorporating mediation in the government construction contracts is because “the opportunities for financial decision maker involved in mediations making sole decisions (as opposed to committees) is very unlikely”.

Adjudication

Adjudication mechanism is provided in the PAM Contract 2018 as one of the contractual methods to resolve construction dispute. No similar provision is provided in the P.W.D. and CIDB Form of contracts.

On 15 April 2014, statutory adjudication came into force through the Construction Industry Payment and Adjudication Act (CIPAA 2012). This Act is regulated by the CIPAA Regulations 2014. Like other construction industries in developing nations, the Malaysian industry also has had a long history of lengthy payment times, which has caused many contractors to suffer cash flow problems and thus delaying projects. This legislation therefore provides for compulsory statutory adjudication and remedy for the recovery of payment. Statutory adjudication has gained recognition and popularity since parties will be able to obtain a quick interim decision with regards to progress payment disputes, thereby avoiding potential short-term cash-flow problems during project delivery.

The Director of the AIAC is the default appointing authority for adjudicators in the event no agreement on the appointment of the adjudicator is agreed by the parties to adjudication. In addition, AIAC also provides for the KLRCA adjudication rules and procedures which can be used by agreement between the parties.

Arbitration

In defining Arbitration, Powell-Smith (1998) asserts 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 dispute resolution to litigation by which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have the opportunity to be heard." Rajoo and Singh KS (2012), cited Halsbury's Law of Malaysia (Vol 13) at paragraph 220.001, which defines arbitration as "the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by the arbitral tribunal instead of by a court of law".

Generally, arbitration provisions are provided in all standard form of construction contracts which require parties to refer a dispute to arbitration first before going to court. In all construction contracts in Malaysia, the main legislation governing arbitration is the Arbitration Act 2005. The arbitration regime is also reinforced by other legislations such as the Contract Act (1950), Evidence Act (1950) and Civil Law Act (1956).

One of the main characteristics of arbitration that have made it the most common ADR method throughout the world including the construction industry is that its decision is final and binding on the parties and its confidentiality nature. The Arbitration (amendment) Act 2011 which reduces court intervention has further made it more attractive to the parties.

Expert Determination

One of the definitions of Expert Determination as stated in the Chartered Institute of Arbitrators – Ireland Branch, is "a process and confidential method of dispute resolution whereby the disputing parties appoint an expert to determine a matter of fact, valuation or law, in a final and binding manner; where an expert's decision is not binding but advisory, then this process is known as "Expert Evaluation"".

An expert determination according to Pena-Mora. E. Sosa and McCone (2003) is a binding resolution in which parties agree to refer their differences to an expert and to be bound by the decision on that authority. Although binding, the award by the expert is normally enforced as a contract.

The only conditions of contract in Malaysia which incorporates ED clauses is the PAM Contract 2018.

COMPARATIVE CHARACTERISTICS OF LITIGATION AND THE MAJOR ADR

The characteristics of litigation and major ADR based on literature review are as shown in **Figure 2**, below.

Figure 2: Comparative Characteristic of Litigation and the Major ADR

MECHANISM	FREQUENCY OF USE	SPEED	COST	BINDING	CONFIDENTIALITY	ADVERSARIAL
Mediation	Low	Fast	Low	No (unless agreed by parties)	Yes	No
Expert Determination	Less common (newly introduced)	Fast	Low	Yes (if agreed by parties)	Yes	No
Adjudication (Contractual)	Low	Fast	Low	Yes (until completion or referred to arbitration/ litigation	Yes	Yes
Adjudication (Statutory: CIPAA)	Common	Fast	Low	Yes (until referred to arbitration/ litigation	Yes	Yes
Arbitration	Common	Slow	High	Yes	Yes	Yes
Litigation	Common	Slow	High	Yes	No	Yes

Similar to mediation, expert determination method is not adversarial compared to adjudication (both contractual and statutory), arbitration and litigation. However, ED provides for binding decision if agreed by the parties. Notwithstanding that arbitration is commonly used due to its confidentiality nature, as well as final and binding decision, it can be costly, and the proceedings can take years depending on the scope and complexity of the dispute. Statutory adjudication is fast becoming the dispute resolution of choice due to its speedy nature which can resolve cash-flow problem. The research done by Mazani, Sahab and Ismail (2018) proves the effectiveness of CIPAA in assisting payment disputes occurring in the Malaysian construction industry. Notwithstanding the increase in the number of adjudication cases brought to court, majority of adjudication decisions were upheld by the courts.

PROVISION OF ADR IN MAJOR MALAYSIAN STANDARD FORMS OF CONTRACT

ADR clauses exist in all major standard forms of construction contracts such as P.W.D. Form of Contract, PAM Contract 2018 and CIDB Standard Form of Contract for Building Works 2000. The comparative provisions are as shown in **Figure 3**, below.

Figure 3: ADR in Major Standard Form of Contract

CIDB 2000	PAM CONTRACT 2018	PWD 203A (Rev. 1/2010)
• Refer dispute to **Superintending Officer (S.O.) -** Clause 47.1 If fail to receive a decision within a specified time or dissatisfied with decision then refer to • **Mediation** If decision is disputed, give notice to refer to Arbitration - Clause 47.2 • **Arbitration** can only commence upon completion of works - Clause 47.3	• **Mediation** (as an option) - Clause 34 • **Expert Determination** (as an option) - Clause 35 • **Adjudication** is a condition precedent to Arbitration for dispute under Set-Off by Employer. If decision is disputed, give notice to refer to Arbitration - Clause 36 • **Arbitration** can only commence upon completion of works - Clause 37	• Refer dispute to **Officer Named in the Contract.** Decision of Officer is final until Completion -Clause 66.1 If fail to receive a decision within a specified time or dissatisfied with decision then give notice to refer to Arbitration • **Arbitration** can only commence after completion of Works - Clause 66.4 **Note:** • Several committees empowered to review appeals by contractor. 1. Claim committee 2. Contract Coordination Panel 3. Ministry of Finance

Public Works Department (P.W.D. Form 203A (Rev. 1/2010)

Arbitration is the main option for dispute resolution under clause 66.0 of the P.W.D. Form of Contract. The contract is silent on other ADR such as mediation or contractual adjudication. However, the contract provides for a 2-step dispute resolution process. Any dispute or difference that arises between the Government and the Contractor out of or in connection with the Contract shall be referred to the Officer Named in the Contract for a decision. The decision is binding on the parties until the completion of the Works. If the parties fail to receive a decision from the Officer Named within a specified period or is dissatisfied with any decision of the Officer, then the dispute may be referred to arbitration by giving a notice within a specified time. Arbitration shall not be commenced until after the completion of the Works, unless with the written consent of the Government and the Contractor.

Although no other ADR is provided under the P.W.D. Form of Contract apart from arbitration, the administration of Government projects involves several committees that is empowered to review appeals by the contractor. In the event the S.O. rejects a contractor's contractual claim, the contractor may submit an appeal to the S.O. who makes a recommendation for the consideration of the Claim Committee. In the case of a rejection by the Claim Committee, the contractor may further make an appeal accompanied by further evidence (if any) to justify their claim to the S.O. who makes a recommendation for the consideration of a higher decision-making authority namely the Contract Coordination Panel (CCP). The Ministry of Finance has empowered the CCP to decide on certain issues while making recommendation on other issues to be decided by the Ministry of Finance.

PAM Contract 2018

PAM Contract provides for several ADR methods that may be employed for dispute resolution namely mediation, Expert Determination, adjudication and arbitration (Clauses 34.0, 35.0, 36.0 and 37.0 respectively). Both mediation and ED may be adopted by the parties to settle disputes during the currency of the contract. Mediation and ED are not condition precedent for reference to adjudication or arbitration.

Clause 36.1, however, made it clear that reference to adjudication is made condition precedent to arbitration when it involves dispute regarding set-off by Employer between the parties. Under clause 36.4, the adjudicator's decision is final and 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.

The contract also provides any party may serve written notice on the other party to refer disputes or differences to arbitration. Unless with the written agreement between the Employer and the Contractor, the arbitration proceeding is to commence after practical completion save on issues related to the power to issue instructions in the contract, disputes related to outbreak of hostilities and war damage, whether a certificate has been improperly withheld, or, whether a payment which the contractor claim to be entitled has been improperly withheld. The award of the arbitrator is final and binding on the parties.

CIDB Standard Form of Contract for Building Works 2000

CIDB Form of Contract provides for a 3-step dispute resolution process. In the first place, a dispute or difference of whatsoever kind arising between the Employer or the S.O. and the Contractor in connection with or arising out of the Contract during the currency or after completion of the Works shall be referred to the S.O. for a decision. This decision shall be final and binding. If the S.O. fails to give a decision within the specified time or either party is dissatisfied with the S.O.'s decision, either party may within a specified time give notice to refer the dispute to mediation. The resolution of dispute in mediation shall be recorded as a settlement agreement. If the parties fail to achieve any settlement then upon the termination of the mediation proceedings, either party may refer the dispute to arbitration.

Following the termination of the mediation, a party may give notice within a specified time to the other party of his intention to refer the dispute to arbitration for a final decision. Unless consented in writing by the other party, the arbitration proceedings can only be initiated after the date of practical completion save on matters related to the power to issue instruction, or whether a payment has been improperly withheld, or whether a payment is not in accordance with the contract, or whether a party has withheld, or delayed a consent which is not to be unreasonably withheld or delayed. The award of the arbitrator is final and binding on the parties.

STATUTORY ADJUDICATION UNDER CIPAA

Notwithstanding that statutory adjudication under CIPAA is not expressly provided in any of the standard forms of contract, any party is entitled at any time to refer a dispute to adjudication arising from a payment claim of an unpaid sum in whole or in part made under section 5 of the Act. Payment as defined under the Act means a payment for work done or services rendered under the expressed terms of a construction work contract or construction consultancy contract.

A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court. Hence, a reference to arbitration or the court in respect of a dispute which is being adjudicated does not bring the adjudication proceedings to an end nor affect the proceedings.

The adjudicator's decision can be agreed by the parties to be a settlement agreement in writing. However, if a party is dissatisfied with the adjudicator's decision, the aggrieved party may bring the dispute to be finally decided by arbitration or the court.

EXPERT DETERMINATION AS AN ADDITIONAL ADR METHOD

Overview of Expert Determination

Expert determination is a contractual process by which parties agree to refer a dispute for determination by an independent expert. Unlike litigation and arbitration, expert determination is not governed by legislation or procedural rules (other than those agreed between the parties). This means that the parties may vary the rules and guidelines to suit the circumstances concerned and to choose the type of disputes to be referred to the expert. More importantly, the parties should agree whether the expert's determination is intended to be binding on the parties.

Expert determination can be effective where parties disagree over specific technical or engineering issues or specialized issues, or have different views on what the contract requires, particularly in a long-term contract where there is considerable benefit to the parties to have a determination part-way through the contract to facilitate future discussions on the same issue.

Benefits and limitations of Expert Determination

According to Godwin, Gilmore, Kratochvilova. et al (2017), King (2018) and Toni (2012), several benefits and limitation have been identified for expert determination. A summary of their study are as follows:

Benefits

a) ED offers a speedy, final and binding solution imposed through an informal process to avoid the complexities, delay and associated costs of disputes being decided by legal proceedings or arbitration.
b) The process is not adversarial and not judicial in nature. It is conducive to parties maintaining a relationship and continuing to perform the contract.
c) ED is a private process and confidentiality may be important to parties who may not wish to have their differences be made known to the public.
d) Usually much quicker than formal proceedings (e.g. litigation) and therefore much cheaper.
e) Gives the parties a lot of control over the process compared to more formal proceedings (provided they can agree).
f) If the parties agree that decisions are to be final and binding, then it may well be very difficult to challenge the decision

g) Even when it is not binding, the opinion of an independent expert can nevertheless be helpful in identifying key issues, highlighting weaknesses in arguments and encouraging settlement.

Limitations

a) ED is not governed by any legislature but purely by what the parties have agreed in their contract. This means that it becomes very important to get the drafting of any clause for providing ED correct.
b) ED is less suitable for factual disputes. Often this require disclosure and detailed witness evidence to fully get to the bottom of matter as well the shorter timeframe for ED.
c) The main disadvantage of expert determination is the mirror of one of its strengths. If the decision is agreed to be final and binding, then it can be difficult to overturn even if the expert made a mistake.
d) Contracts commonly provide for a single expert. There is inherently greater risk of a single expert missing an important fact or making a technical or legal error.
e) There is no straightforward system available to enforce an expert's decision. Should the losing side refuse to comply with the result, the victorious party will usually have to sue for breach of the contractual agreement, to be bound by the expert's determination.
f) Limited grounds for appeal.

APPLICABILITY OF EXPERT DETERMINATION

Dispute resolution clauses in contracts that includes an expert determination mechanism to resolve some or all disputes that might arise typically provide for a 'final and binding' determination by an independent expert with specialist knowledge, skill and expertise in the subject matter of dispute (Vozzo, 2012). It is essential for the parties to consider whether expert determination is the right process for resolving their contractual disputes and if so, what is the most appropriate mechanism for resolving disputes which are likely to arise. Parties need to effectively identify the scope of work to be addressed by the chosen expert to arrive at a determination.

In view of the above, issues to be considered when choosing expert determination to resolve disputes are as follows:

a) Whether the likely disputes are suitable for resolution by expert determination;
b) The nature and scope of the specialist knowledge, skill or expertise required for disputes;
c) Whether an expert determination will resolve the dispute or would require relief only available from a court;
d) Whether more than one expert will be required to determine the dispute;
e) Whether the procedure for the conduct of the ED should be specified in detail or whether the appointed expert should decide a suitable procedure once particulars of the dispute are made known;
f) How the expert will be appointed if the parties cannot agree on the identity of the expert and who will pay for the expert's costs; and
g) Whether the successful party should be entitled to recover its cost from the unsuccessful party, and if so the extent of costs recoverable and its basis.

OVERVIEW OF ED IN SINGAPORE AND HONG KONG

ED is a fast-catching ADR method in many jurisdictions including in the Asia Pacific Region. This section is limited to provide an overview of ED in Singapore and Hong Kong.

ED in Singapore

Expert determination is gaining popularity in Singapore and is most commonly seen in disputes concerned with the construction, intellectual property, energy and resources sectors. For example, the Singapore Institute of Architects (SIA) has provided in its Conditions of Contract the option for contracting parties to resolve their disputes via expert determination under the SIA Expert Determination Rules, which are amongst the first of its kind in Asia.

Expert determination is recognised in Singapore as a creature of contract. It has the advantage of being final and binding, resulting in greater certainty of outcome and advantages in cost and speed. Parties are generally free to create their own rules for the determination process. Should a Singapore law contract provide that disputes are to be resolved by expert determination, the courts would recognise and honour such an agreement.

In March 2011, the SIA has introduced an expert determination clause in their standard contract conditions as follows:

> *"Upon the agreement of both parties, they may refer their disputes relating to technical issues ("technical disputes") to Expert Determination under Expert Determination Rules of the SIA (SIA Expert Determination Rules)."*

Technical disputes refer to specific technical engineering issues and construction issues such as those relating to defects or compliance with technical specifications.

ED in Hong Kong

The construction industry has seen a rise in the usage of dispute avoidance measures namely partnering, dispute resolution advisor and dispute resolution board to resolve disagreements before the matters escalate into disputes. The Construction Industry Council (CIC) has proposed a multi-tier dispute resolution mechanism comprising mediation, adjudication, independent expert certifier review, expert determination and short form arbitration. In 2015, CIC produced a document entitled "Reference Material for Application of Dispute Resolution in Construction Industry" where the relevant special conditions of contract for dispute resolution mechanism and rules for each of the dispute resolution methods are proposed.

Expert determination is commonly used in Hong Kong to resolve disputes on narrow technical issues, such as valuation disputes and those relating to defects or compliance to technical specification in construction contracts. It is a final and binding dispute resolution process. The expert has the right to use his own expertise to make a determination which can only be challenged in limited circumstances.

ED IN THE MALAYSIAN CONSTRUCTION INDUSTRY

A presentation prepared by PAM on May 2019 entitled Expert Determination 2018, emphasises that ED is common in many jurisdictions. Amongst the countries within the region that practice ED in their construction industry are Singapore, Hong Kong, Australia and New Zealand. Pursuant to the development in other countries, PAM has recently introduced ED in the PAM Contract 2018.

ED provisions under PAM 2018.

Clause 35 of PAM states the following:

" *35.0 Expert Determination*

35.1 At any time, the parties by written agreement may refer any disputes on all matters for determination by an expert.

35.2 If the parties fail to agree on an expert after fourteen (14) days from the date of the written agreement, any party can apply to the President of Pertubuhan Arkitek Malaysia to appoint an expert. Upon appointment, the expert shall initiate the expert determination in accordance with the current edition of the PAM Expert Determination Rules or any modification or revision to such rules.

35.3 Prior reference of the dispute under clause 35.1 shall not be a condition precedent for its reference to adjudication or arbitration by either the Contractor or the Employer, nor shall any of their rights to refer the disputes to adjudication under Clause 36.0 or arbitration under Clause 37.0 of these Conditions be in any way prejudiced or affected by this clause."

It is observed that clause 35.1 stipulates that by a written agreement, the parties can at any time refer any dispute on all matters for determination by an expert. Notwithstanding this provision, it is argued that the parties need to carefully consider the type and suitability of dispute as well as the availability of experts on the subject matter in dispute.

Pursuant to clause 35.2, the appointed expert is required to initiate the ED process in accordance with the PAM ED Rules. Currently, PAM is in the process of preparing and finalising the PAM ED Rules. Nonetheless, it is viewed that the parties and the expert may agree to vary these Rules at any time.

According to the proposal by PAM, the expert appointment process begins with the parties agreeing to refer their dispute to ED. Thereafter, any of the parties is required to make a written request to the President of PAM. Following this request, the President of PAM shall identify an expert to be appointed from professional institutions (The Royal Institute of Chartered Surveyors Malaysia (RISM), The Institution of Engineers, Malaysia (IEM), Association of Consulting Engineers, Malaysia (ACEM) and Pertubuhan Arkitek Malaysia (PAM)) and notify the parties and the expert in writing. It is viewed that the proposal will include the process to appoint the expert.

Clause 35.3 expressly states that invoking ED shall not be a condition precedent to refer to adjudication or arbitration by any of the parties.

CASE LAW REVIEW ON EXPERT DETERMINATION

Although there are numerous possible benefits of referring a dispute to expert determination (for example, in terms of cost and flexibility), parties need to be prepared to face the consequences if the decision goes against them. The grounds for challenging an expert's decision are generally very narrow and it can be very difficult to overturn the decision. Provided the expert has acted in accordance with the parties' instructions, and the parties have agreed so, even if the determination is wrong, it will be upheld as final and binding.

This section will highlight several judgments from various jurisdictions involving challenges made to expert determination.

The case of **Begum v Hossain [2015] EWCA Civ 717** illustrates that it is essential to ensure the instructions given to the expert are well considered, clear and agreed between the parties to achieve the end result expected. When a dispute ensued, the parties entered an expert determination process whereby Ms Hossain agreed to purchase Ms Begum's shareholding of an Indian restaurant they jointly owned and operated, at a price determined by an independent valuer. The valuation of the expert was to be final and binding on the parties. The parties did not question the valuer's expertise or his overall methodology. However, a subsequent dispute arose because he failed to consider hand written notes of takings achieved by the restaurant which were not included in its accounts. These notes were specifically referred to in his instructions. The Court concluded that, although the hand-written takings had not been disclosed for tax purposes, they would have been considered by a willing buyer and willing seller in respect of the valuation of the shares. In failing to consider the hand-written takings, the Court concluded that the valuer had materially departed from his instructions and the valuation must therefore be set aside.

In **Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No.1256 [2006] SGHC 245**, the plaintiff was engaged by the defendant to carry out alteration works. The plaintiff made a claim on their completed works. The defendant however alleged that some of the works were incomplete/defective and subsequently made a demand on the performance bond. Prior to the commencement of court proceedings initiated by the plaintiff who alleged the defendant owed them money, the parties entered into a compromise which was later embodied in a Settlement Agreement (SA). The terms of the SA provided for the appointment of an independent expert to assess for work done under the contract by the plaintiff and claim for defects and for liquidated damages by the defendant.

The defendant was dissatisfied with the Expert's decision and filed application to set aside the award. One of the challenges was concerning the expert making assumptions without apparent basis that could amount to a *manifest error.* Accordingly, the expert failed to "assess" the plaintiff works.

The court ruled that the only errors that can be corrected by the court are those that appear on the '*face'* of the award or report. The right of review should be confined to correcting apparent mistakes that appear on the face of the report or award (e.g. apparent mathematical miscalculations) and to determining whether the expert has complied with his terms of appointment. If an expert answers the right question in the wrong way his decision will nevertheless be binding. Hence, the court dismissed the defendant's application

Majority of cases reflect that the court is reluctant to set-aside an expert's determination. In **Legal and General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314,** the Australian court will set aside an expert determination only where there is fraud or collusion, or the expert's decision is not 'in accordance with the Contract'. In **Owen Pell Limited v Bindi (London) Limited [2008] EWHC 1420 (TCC)**, an expert's determination has been held to be binding even where the expert made errors in his reasoning.

Unless the parties have provided expressly for grounds of challenge in the relevant clause or agreement (which is rare in practice), an expert's decision can only be challenged in very limited circumstances as illustrated below:

- the expert has not performed the task agreed by the parties and therefore acted outside his authority (for example, by answering the wrong question) as in **Jones v Sherwood Computer Services plc [1992] 1 W.L.R. 277.**

- Actual bias or a real danger of injustice (for example, where the expert has, without good reason, granted one side more time than the other to make submissions) as in **Hickman v Roberts [1913] AC 229.**

- Where there was fraud or collusion as in **Campbell v Edwards [1976] 1 W.L.R. 403 at 407.**

THE WAY FORWARD

To keep in pace with the continuous development of ADR method globally, the Malaysian construction industry with the support from the Government, has taken a step forward by introducing statutory adjudication through CIPAA 2012 which was enforced in 2014. The Arbitration (Amendment) Act 2011 was enacted to portray an arbitration friendly-legal framework by limiting the court's power to intervene arbitral process, increasing the likelihood of enforcement of awards by the courts. In addition, a specialised construction court was also introduced in an effort to develop measures for the timely, cost effective and efficient disposal of construction cases. Recently, ED was introduced into PAM Contract 2018 as an additional avenue to resolve disputes.

The present state of construction procurement and construction industry suggest that there is a need to resolve payment disputes to ensure parties are not deprived of cash flow. The enactment of statutory adjudication has provided a quick and binding decision on the parties until the disputes is finally determined by arbitration, legal proceedings, or settlement agreement. In addition, ED has also provided options to the players in the construction industry to resolve disputes of a specific technical character or specialised kind fast, cost efficient, final and binding.

The introduction of ED into PAM Contract 2018 opens opportunities for professional institutions to widen their services in relation to dispute resolution. Consequently, this also creates a platform for registered professionals particularly the Quantity Surveyors to offer additional services as Experts, besides other existing opportunities as mediators, adjudicators and arbitrators.

Accordingly, other jurisdiction has provided ample guidelines for Malaysia to adopt and adapt the best practices of ED. It is suggested as follows:

1. **Awareness on ED**

Educational seminar, talks, workshops and outreach programs need to be organised to increase awareness among the industry players and business association. This may help the industry players to be familiarize and promote confidence towards the application of ED method. This will help clarify misconception on the dispute resolution method.

2. **Professional Institution to Have List Experts**

   It is essential for all professional institution to upkeep a list of experts with specialist knowledge, skill and expertise in the subject matter of dispute to facilitate selection of expert by interested parties. To develop this, the professional institution may establish appropriate criteria and specialised training modules to be fulfilled by potential candidates. For example, the candidate must be a registered professional, attained fellow membership status with the professional institution and completed a compulsory training course on expert determination.

3. **Expert Determination Rules**

   Rules to govern expert determination are required to ensure that the dispute resolution process can be properly carried out. The rules should provide for simple, user friendly and efficient process. Among the important aspects in the ED rules comprises the scope, appointment of Expert, Role of The Expert, Expert Determination Process, Expert Determination Procedure, Parties to Facilitate Expert Determination, The Determination and Costs.

4. **Amendment of current dispute resolution clauses in the standard form of contract**

   If the standard form of contract does not contain ED clauses, then amendment or separate agreement is necessary in order to operate the ED method.

5. **Appointing Organisation and Management of Panel of Experts**

   The industry needs to identify an organisation to act as appointing organisation in a situation where parties cannot mutually agree on the appointment of an expert or an expert as suggested by the Professional Institutions. It is recognised that AIAC has extensive and diverse experience in establishing accreditation systems and managing panel of mediators, adjudicators and arbitrators. Hence it is suggested that Asian International Centre (AIAC) is a reputable organisation in establishing and managing panel of experts comprising nomination from the professional institutions (PAM, RISM, IEM, and ACEM).

CONCLUSION

Given its support for ADR and the infrastructure already in place, Malaysia is well place to benefit from the future development of ADR. The Malaysian government's enthusiastic support partnered with the backing of the judiciary over recent years, has driven the construction industry to embrace ADR, specifically adjudication. It is worth to consider Expert determination as an option for dispute resolution in construction contracts, particularly where there may be technical issues in dispute during the currency of the projects. The traditional arbitration and litigation approaches should remain as last resort solutions. The industry will benefit in terms of cost and time when suitable mechanism such as is chosen in accordance

to the nature of the dispute. Salient aspects to be considered for the inclusion of ED as ADR in the Malaysian construction industry includes the awareness programmes on ED, formulation of ED Rules, amendment of current dispute resolution clauses in the Standard Conditions of Contract/ Supplemental to the Contract, identification of the appointing organisation (if parties cannot mutually agree to the appointment of an Expert) and reputable organisation in establishing and managing the Panel of Experts.

Future research

Analyses of existing reported/ unreported cases on litigation, arbitration and ADR to clarify issues regarding the applicability and enforceability of the respective methods.

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