

**DISPUTE RESOLUTION METHODS IN
THE CONSTRUCTION INDUSTRY**

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To my beloved parents and family members,

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ABSTRACT

Both Litigation and Arbitration are traditional dispute resolution methods available in our construction industry. Parties in dispute are allowed to opt for litigation as means of dispute resolution unless there is consent and agreement between the parties to resolve their disputes by arbitration. This study will compare both the methods in term of their similarities and differences of their rules and procedures and to draw out their advantages and disadvantages of each method. This study then seeks to determine the suitability and the effectiveness of each method in resolving engineering and construction cases.

Keywords: Disputes, Litigation, Arbitration

ABSTRAK

'Litigation' dan 'Arbitration' merupakan kaedah tradisional untuk mengatasi pertikaian dalam industri pembinaan. Pihak bertelingkah dibenarkan untuk memilih 'litigation' untuk mengatasi pertikaian, kecuali terdapat keizinan dan persetujuan antara pihak terlibat untuk mengatasi pertikaian melalui 'arbitration'. Kajian ini akan membandingkan kedua-dua cara dari segi persamaan dan perbezaan antara peraturan dan prosedurnya dan menghurai kebaikan dan keburukan mereka antara satu sama lain. Kajian ini juga akan menentukan kesesuaian dan keberkesanan setiap cara dalam mengatasi pertikaian bagi kes-kes bidang kejuruteraan dan pembinaan.

Kata isyarat: Pertikaian, 'Litigation', 'Arbitration'

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND OF STUDY

The engineering and construction industry is a risky and specialized trade, which involved various parties and elements. Consequently, all engineering and construction projects are executed in a contractual environment. This is to say that all parties are governed by a contract. Parties to an engineering and construction contract include the client or owner of the project, designer engineers or consultant engineers, contractors, and also sub-contractors if applicable.

A contract has been defined as a legally binding agreement made between two or more parties, by which rights are acquired by one or more to acts or forbearances on the part of the other or others (Ashworth, 1998). These parties are deemed to be working within a “team” or an “organisation” within which

each party has their own rights, obligations, duties and responsibilities in the construction project. The parties are limited by the contract in such the way that it protects their rights and obligations and minimizes the risk taken on. This is to say that an engineering and construction contract has a major function of stating the relationship among the parties to the contract.

For example, the employer may execute himself or hire contractors or persons to execute the work of the project. He should make the payment and recover all cost in employment from any payable sums. The engineer plays the role as the advisor to the employer in supervisory the project's progress and he has direct responsibilities to inspect the contractor's works. The contractor is to carry out and complete with respect to the directions given by the engineers, which may include the design and execution.

Nevertheless, the entire contractual environment of our construction and engineering trade is rather delicate and sensitive as this is a trade with assortment of professionals who have specific skills and opinions. These professionals in the team to an engineering and construction project are individuals with different characters, backgrounds and from different organizations and maybe even from different cultures (Murdoch and Hughes, 1995). They have different interests in the project and are thus motivated differently. Hence, it is very likely they would have different reactions and behaviours pertaining to various specific matters in the project, causing them to be in disagreement.

Furthermore, engineering contract while clearly listing out the rights of the parties involved had also served to emphasize on the obligations and responsibilities of the parties. In many cases, this had caused the parties having uncompromising stance and attitude when it comes to protecting their rights and upholding and amplifying on the other's obligations and responsibilities.

In addition, the contract even though exist to protect all the parties to the contract, it has various flaws and pitfalls due mainly to the matter of interpretations. According to Woo (2003), even though construction contracts in Malaysia has gone as far back as 45 or more years, historical background revealed that the previous contractors knew little of the written contract and its intricate conditions in particular. The contract documents, though attempting to clearly strike the balance between opposing interests are subject to the vagrancies of uncertainties, misconduct, and so forth, due to fluctuation in interpretation of the contract clauses (Singh, 2003). Besides, certain events might not be envisaged by the contracts, which therefore make no mention of them. This may also lead to the misinterpretation and ambiguity (Murdoch and Hughes, 1995).

Combining the many possible pitfalls in engineering and construction contracts and the human factor executing and administrating the contracts, the contracts and their clauses can be a subject of many disagreements and conflicts. Without proper management, co-operation and compromises, conflicts and disagreements could potentially turn into construction disputes. In other words, disputes in engineering and construction industry usually manifested in the form

of difference of opinions between the parties as regards to the interpretation of their rights and obligations under the certain contract clauses in regard to specific matter (Woo, 2003).

There are various attempts to define the terms of ‘dispute’, some of which are as follows:

- The meaning of the word ‘dispute’ according to the OXFORD Dictionary is “*Controversy, debate, heated contention, quarrel or difference of opinion, assertion by one party and the rebuttal of the same by the others*”.
- In a ‘Dictionary of Law’, Curzon defines the word ‘dispute’ as:
A conflict of claims or rights. Whenever one party to a contract requests something from the other party under the terms of their contract and that request is not complied with, there is a dispute.
- According to Kumaraswamy, dispute is defined as:
A situation when a claim or assertion made by one party is rejected by another party and this rejection is not accepted (Kumaraswamy, 1998).

The specific word, which appears in these definitions, is ‘assertion’ or ‘claim’. In construction contract, the word ‘claims’ is used in a very wide sense. Generally, a claim is referred to progress claim on the value of work done, materials and plant on site, preliminaries as well as claims for extra work done and variation orders executed by the contractors (Woo, 2003).

More specifically, the term 'claim' can be defined as below:

- The meaning of the word 'claims' according to the OXFORD Dictionary is *"A demand for something as due, an assertion of a right to do something; a right of claiming, right or title to do something and right to demand on person"*.
- Professor Vincent Powell-Smith in 'An Engineering Contract Dictionary': *'An assertion of a right' and, under standard contracts, it conveys the concept of additional payment which the contract seeks to assert outside the contractual machinery for valuing the works itself* (Smith, 2003).
- By Ir. Harbans Singh K.S: *'The assertion of one's right under the contract or the demanding of something due to a party notwithstanding whether it is contractually teanable or otherwise;* (Singh, 2003)

In other words, a claim is an assertion for compliance from another party to what the former party thinks as non-compliance to the contract. A claim is in fact the main ingredient for dispute. As per Singh (2003), when one party in his position thinks that there is non-compliance of the other party to the construction contract, the former party might request for the compliance of the non-compliance elements of the non-compliance party based on the terms on the contract. Dispute occurs when the other party refused or disagreed with such assertion or claim and the compliance is refused. And all disputes in engineering and construction will invariably lead to a claim, which according to Singh (2003) usually involved cost and time or both.

Continuous dispute in construction might lead to the uncomfortableness in the working environments, usually causing delay in the progress of the project, wasting time and money. In more serious cases, work might be stopped, payment been suspended and the whole project might be put on hold. If full fledged disputes happened, the parties involved usually do not want to communicate. This makes the condition even more difficult to resolve. Despite attempts being done to avoid conflicts and disputes, they are nevertheless do occur. They can or do arise from even the most trivial incidents and construction activities (Woo, 2003). And they have to be dealt with and resolved before they turn sufficiently serious. According to Ting (2004), the disputes should be resolved as soon as reasonably practicable before it blows up into unmanageable altercation. In some of the cases where disputes can not be dealt with among the parties themselves, some kinds of pacification or reconciliation should be obtained through the help and intervention of a third party. With or without the help of this third party, the parties in disputes should invariably need to come out with a set of compromised decision to re-adjust their original positions. This set of compromised decision can be referred as settlement or resolution.

The term Dispute Resolution is the methods or means of obtaining a form of settlement or compromise on the disagreement over issues, usually time and cost which are pre-decided (Singh, 2003). Dispute resolution usually involved the help and intervention by third party. On a broad-brush classification, such methods can be divided into two main categories which are the formal and informal methods, where:

- * Formal = Our Judicial System or Litigation & Arbitration
- * Informal = Mediation, Conciliation, Med-Arb, Negotiation,
Adjudication

Litigation and arbitration are categorized as traditional dispute resolution methods as both the methods have being the initial mechanism selected to settle the disputes in formal basis (Ting, 2004). These are the formal mean of Dispute Resolution methods. However, these two methods have been challenged by few new alternative dispute resolution methods which are informal, such as mediation, conciliation, and so forth, which exist to in fact of improve on the lacking of the formal dispute resolution methods (Singh, 2003).

1.2 SCOPE OF STUDY

Most of these current formal and informal methods had been used to resolve construction disputes in the construction industries in Malaysia. However, this study will confine to the traditional formal means of dispute resolution, that is through our Judicial System, or in short, Litigation and also Arbitration.

Litigation and arbitration are the more commonly favoured and frequently adopted dispute resolution methods by the disputants in an engineering and construction contract. Both litigation and arbitration have been rather common in engineering and construction and their procedures rather developed.

1.2.1 Litigation

Through a research carried by Ting (2004), litigation is the method of resolving dispute through court proceeding or civil procedures based on our Malaysian judicial or legal system, which is the basic route to obtaining a resolution in the majority of construction cases, especially in cases involving monetary claims. A trial is required before the municipal or civil courts, namely the subordinates or high courts, depending on the jurisdiction of the Court. This involved the determination of the relationship among the parties in disputes, which could be contractual, tortuous or statutory. A representative team, usually the legal counsels will do the presentation and to persuade their cases. Judgements are meted out to settle the differences based on our legal system.

1.2.2 Arbitration

According to Ting (2004), arbitration is also a judicial process prescribed to or consented of the parties involved to settle the dispute before a private tribunal. Arbitration is a method of having a dispute between two parties resolved by independent person(s) who are knowledgeable in the area of the specific disputes. Those person(s) are called arbitrator(s). An arbitrator can be a technical, non-legal person chosen by both parties or appointed by the court or institutions. This private tribunal conducted will scrutinize the dispute through documents, evidences, witnesses and sometimes through formal hearing conducted to decide the resolution or settlement route. The procedures for arbitration are governed by the Malaysian Arbitration Act 1952. The arbitrator will then hand down a

determination in the form of a formal award, which is binding on both parties and enforceable at law.

1.3 PROBLEM STATEMENT

In construction, litigation is in actual fact the forerunner of arbitration having being the initial mechanism for disputants to settle their differences on a formal basis. As the cases grew in technical complexity and the courts having to be burdened with a mountain of the other cases, it was predictable for the latter to persuade the claimants or practitioners in specific fields, inclusive of the engineering and construction industry to employ the services of a competent, independent third party conversant in the area of specialization of the dispute to help them settle their dispute. More cases are referred to this third party at a private tribunal rather than the municipal courts. Currently, in our construction industry, arbitration had been set as an alternative to litigation as our dispute resolution method. However, courts are still heavily burdened with construction dispute cases. From the appraisal of the literature, there are some doubts remaining on arbitration in handling the construction cases. The question now remains whether arbitration could effectively take over the role of court in handling the construction disputes and whether it could be a better alternative to resolve construction and engineering disputes as compared to litigation. Therefore, whether arbitration is really suited to resolve construction and engineering disputes, still remains in question.

1.4 AIM AND OBJECTIVE

This study conducted will look into these two dispute resolution methods, which involves looking in details of both methods and comparing both methods, in term of their procedures, effectiveness in handling construction cases, advantages and disadvantages of each method selected as mean of resolving engineering and construction disputes.

The ultimate aim of this study is to determine whether arbitration is suitable for construction and engineering disputes and could ultimately take over litigation in settling construction and engineering cases. The objectives of this study are:

- To compare the procedures and rules of Litigation and Arbitration, currently available in use;
- To draw out the similarities and differences of each method;
- To study the merits of each method in handling construction cases;
- To compare disadvantages and limitations of each method in handling construction cases;
- To compare both their effectiveness in handling construction cases;
- To look into the suitability of these methods for construction cases;
- To make necessary recommendations for arbitration and litigation, if necessary.