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EXPERT DETERMINATION AS AN ALTERNATIVE DISPUTE RESOLUTION: PERCEPTIONS OF CONSTRUCTION PLAYERS IN MALAYSIA

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Abstract:

Disputes are inevitable elements in the construction industry that must be solved within a reasonable time. Expert Determination is one of the alternative dispute resolutions and it is already known in Malaysia. Although it has been proven that litigation and arbitration are time-consuming and costly, but the parties still preferred to choose the traditional resolution method compare to ADR due to the provisions provided in all standard forms of contract. In practice, the types of dispute that are referred to expert determination involve single issues and technical rather than legal questions. Hence, this research aims to identify the perceptions of construction players toward Expert Determination as an Alternative Dispute Resolution. The method used for this research was quantitative research. The respondents participated in this research are construction industry players consisting of contractors, developers, and consultants, which are architect, quantity surveyor and engineer in Klang Valley, Selangor. This research also used random sampling method with total of 380 construction industry players listed by number. 191 construction industry players were selected as according to Krejcie and Morgan to participate in this research by using random number generator and it is completely unbiased as the 380 industry players have an equal chance to be selected. Total of 191 questionnaires were distributed, but only 153 returned the questionnaire. All the data collected were analysed using descriptive statistics. The data received were interpreted using Statistical Packages for Social Science (SPSS) version 20.0. The results revealed that Expert Determination is a private and confidential procedure but it has limited opportunities for appeal once the decision has been made by an expert. While the perceptions from construction industry players towards Expert Determination are Expert Determination can prevent power imbalance in formal proceedings.

Keywords: *Alternative Dispute Resolution, Expert Determination, Perceptions of Construction Players*

1.0 INTRODUCTION

Alternative dispute resolution is a number of techniques for the parties to resolve contractual disputes in order to reach a negotiated settlement. In the Malaysian construction industry, ADR methods are widely used to resolve disputes more efficiently, confidentially, and at a lower cost than litigation. They can also help parties to find practical, commercial solutions to disputes, enabling them to maintain ongoing business relationships. ADR is consensual and therefore an agreement needs to be reached between the parties as disputes will be resolved if everyone agrees to the terms of the settlement. According to Shamsuddin, Ismail and Zafian (2019), ADR is well accepted in the Malaysian construction industry as is evidenced by the existence of ADR clauses in all major standard forms of construction contracts such as 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). There are three most used ADR mechanism within the Malaysian construction industry apart from litigation, namely arbitration, adjudication and mediation. As for Expert Determination, it was introduced into PAM Contract 2018 in April 2018.

1.1 Problem Statement

Disputes are inevitable elements in the construction industry that must be resolved within a reasonable timeframe (Hussin and Ismail, 2015). If not, it may cause non-compensable damage, such as loss of professional reputation. Expert determination as rational, less likely to harm business relationships, speedy and economical means of dispute resolution is therefore needed.

The reason why the practice of Expert Determination is less widely used in construction industry is that there is no provision of Expert Determination in any form of contract. Unlike litigation and arbitration, expert determination is not governed by any legislation or procedural rules other than those agreed upon between the parties (Shamsuddin, Ismail and Zafian, 2019). Meanwhile, Baskaran (2014) said that Expert determination is strictly binding on what the parties have agreed in their contract. If the expert determination is expressly provided for in the contract, it will be compulsory.

It can be concluded that construction players are unaware of the Expert Determination method. This is because not all disputes that arise are suitable for resolution by the use of Expert Determination. According to Tim

McGoldrick (2016), Expert Determination is not suited to major disputes involving complex issues of causation and requiring a large amount of documentation and possibly witness evidence.

However, there is already a provision about Expert Determination in PAM Contract 2018. Parties may, by a written agreement, refer to experts to determine their disputes on all matters. Construction players may use Expert Determination as an alternative to dispute resolution in addition to the use of litigation or arbitration. The need, therefore, to obtain the perception of the construction players and to gather their opinion about Expert Determination as an Alternative dispute resolution method.

1.2 Aim

The aim for this research is to identify the perception of construction players toward Expert Determination as an Alternative Dispute Resolution (ADR).

1.3 Research Objectives

The objectives of this research are to identify the benefits of Expert Determination, to identify challenges in the implementation of Expert Determination, and to acquire the perception of construction player towards Expert Determination as an Alternative Dispute Resolution in Malaysia.

1.4 Scope of Research

The respondents to this research were construction industry players that are contractors with Gred 7 of building works, developers, and consultants in Klang Valley, Selangor. The respondents are, according to Abidin (2007), the most party involved in construction disputes are between the employer and the main contractor. The research was adopted in Klang Valley as there are many construction industry players in Klang Valley especially contractors and developers based on registered organization of Real Estate & Housing Developers' Association (REHDA) and Construction Industry Development Board (CIDB). Moreover, based on the research title, this research focused on information obtained from players in the construction industry who had chosen randomly and were interested in sharing their opinion on Expert Determination as an Alternative Dispute Resolution. Hence, due to a variety of disputes that may occur during the construction phase, or between any parties, opinion regarding disputes resolution is needed between any construction industry players.

2.0 LITERATURE REVIEW

Expert determination is a method that involves an expert who gives a binding decision (Supardi *et al.*, 2019). Expert is someone that parties agree he can act in a relevant way. They can be appointed earlier before the dispute arises. A lawyer also may be selected as an expert, says (Designing Building Wiki, 2019). The expert's decision is legitimate binding by previous agreement of the parties, except the parties agree at the beginning. The most renowned and preferred methods of alternative dispute resolution are arbitration, adjudication and mediation. This is because each method has their own standard of building contract.

In the Malaysian construction contract, there are various types of standard forms that construction parties can refer to, comprise and implement. As for Expert Determination, it was introduced into latest of form, the PAM Contract 2018.

2.1 Benefits of Expert Determination

According to Chris Makin (2019), without anyone else aware of the existence, the dispute is resolved between the parties. Claire King (2019) also stated that expert determination is a useful option for those that want to keep their dispute out of the public as it is more private procedure. Parties to an expert determination can preserve the privacy of their contractual relationship. Thus, handling a dispute privately can increase the viability of an ongoing relationship between the disputing parties.

Meanwhile, Chris Snodin (2016) stated that if a party brings a final and binding Expert Determination provision contract (as is provided in PAM form of contract) and tries to take the matter to the court, the court proceedings will stop to allow the expert to proceed. There is no right of appeal like in the court system if the parties have already agreed by the expert's decision except the determination is not comply with the requirements stated in the contract.

2.2 Challenges in the Implementation of Expert Determination

It is very limited opportunities for appeal an expert's decision, said (Claire King, 2018). Hinge on the position whether the parties won or loss, it can be both advantage and disadvantage. Louise Fisher (2011) stated that, even though expert determination clause provided that an expert may decide his own jurisdiction in a manner that is final and binding, the Court of Appeal has decided that, given such a provision, if it is for the sake of justice, the court can interfere and make that decision first. There are three main reasons for mounting an appeal. First, the decisions made by an expert surpass his jurisdiction and the parties not agreed to be bound by it. Second, the decision is voided by dishonesty or fraud. Third, the expert was biased toward a party when making a decision. Although the expert may decide to make a preliminary decision, all of this will ultimately be a question for the courts to determine. A decision cannot be capsized for obvious error unless the parties have made express provision for it. It would be binding notwithstanding that.

2.3 Perception of Construction Players toward Expert Determination as an Alternative Dispute Resolution in Malaysia

Litigation and arbitration are well known as main methods that use in Malaysia. However, the feeble of arbitration and litigation as formal proceeding makes people find for another alternative. According to Mohd Suhaimi et al. (2012), they managed to apprehend several views on Construction Industry Payment and Adjudication Act (CIPAA). Based on the survey, the results exposed that the construction industry refrain from the use of arbitration and litigation. They stated that arbitration and litigation are both time-consuming methods.

3.0 RESEARCH METHODOLOGY

There are a total of 380 construction industry players consisting contractor, developer and consultant in Klang Valley, Selangor. The target population for this research is the construction industry players which are consultants of the architect, engineer, quantity surveyor, contractors Gred 7, and developers. The respondents are from the registered organization such as the Board of Quantity Surveyors Malaysia (BQSM), Lembaga Arkitek Malaysia (LAM), Board of Engineers Malaysia (BEM), Real Estate & Housing Developers' Association (REHDA), and Construction Industry Development Board (CIDB). However, the total sample needed for the survey is 191 based on Krejcie and Morgan (1970) using random sampling. Random numbers are generated by using random number generator in a computer and the numbers that correspond to it are 191 numbers. Hence, 191 firms are selected as respondents to the survey. This study adopted quantitative research by using questionnaires as the main tool to collect data and it was distributed by email. The emails are obtained by calling the company and asked the person in charge whether they can give the email or not for the research. The data were interpreted using Statistical Packages for Social Science (SPSS) version 20.0. The data collected was analyzed by means of a percentage analysis and ranking analysis was used to rank the level of benefits of ED, challenges in the implementation of ED, and the perception of construction players towards ED as an Alternative Dispute Resolution in Malaysia. Analyzed data was transferred to SPSS software where the descriptive result, such as the standard deviation and mean score for each statement, is generated and ranked by their mean score.

4.0 ANALYSIS AND FINDINGS

One hundred and ninety-one (191) questionnaires were administered, but only 153 (80%) sets of questionnaire were returned and reliable for further analysis. The other of 38 (20%) of the questionnaires were not returned by the respondents. Non-respondents were either refused to participate during the data collection processor do not know about the ED. The reasons why questionnaires were not returned by the respondents are due to Covid-19 pandemic as the players are busy and do not have time to answer the survey. Besides, there are also respondents that do not know about the ED and decide to not answer the survey.

4.1 The Benefits of Expert Determination

The descriptive statistics in Table 1 show the ranking of benefits of Expert Determination. The findings shows private and confidential (4.05) were ranked the highest compared to other benefits. This shows that most respondents agreed that one of the benefits of using Expert Determination is private and confidential. According to Toni Vozzo (2012), some parties may feel that their privacy and confidentiality is important and that they want to prevent the disputes publicly through the court. Next, the cost-effective score was ranked second with a mean score of 3.90. Ashurst (2019) stated that parties can agree to support their own costs in

the expert determination process which including the costs of the expert's time. Experts have no power to make costs awards unless it is provided in the clause. Other than that, the mean score of time savings is 3.85 and ranked third following by final and binding with the mean score is 3.84 at fourth place respectively.

Table 1. Ranking of benefits of Expert Determination (N=153)

Rank	Benefits	Mean	Standard Deviation
1	Private and confidential	4.05	.79
2	Cost effective	3.90	.82
3	Time savings	3.85	.81
4	Final and binding	3.84	.80
5	Less likely to damage commercial relationships	3.83	.82
6	No legislative background	3.81	.86
7	Creature of contract	3.73	.82
8	Suited to technical disputes	3.66	.81

4.2 The Challenges in the Implementation of Expert Determination

Based on Table 2, construction players perceived that among the four (4) challenges in the implementation of ED, limited opportunities for appeal was ranked first with a mean score of 3.83. Next, not supported by statute comes second with a mean score of 3.80. According to Minter Ellison (2021), ED is not controlled by the law or case law. Followed by is less suited to factual disputes and confusion as to status. Although confusion as to status ranked at the bottom of the list with a mean score of 3.75, this challenge must be taken into account because the parties cannot use conflict terminology which may cause the parties to argue whether the expert is an arbitrator or an adjudicator. (Claire King, 2018) argued that disputes could be distracted and the underlying issues between the parties would not be resolved.

Table 2. Ranking of challenges in the implementation of Expert Determination (N=153)

Rank	Challenges	Mean	Standard Deviation
1	Limited opportunities for appeal	3.83	.74
2	Not supported by statute	3.80	.81
3	Less suited to factual disputes	3.78	.76
4	Confusion as to status	3.75	.73

4.3 The Perception of Construction Player towards Expert Determination as an Alternative Dispute Resolution in Malaysia

Table 3 shows findings that the highest mean score for the perception of construction player towards Expert Determination as an ADR is preventing bias and power imbalance in formal proceedings with a mean score of 3.84. This perception was chosen as the most agreeable among the respondents because expert determination helps to ensure fairness for both parties. According to David Yek (n.d.), the expert shall have no bias against the party or any vested interest in the outcome of the matter. Followed by second ranking is as an alternative to litigation and arbitration, with a mean score of 3.82. Based on a survey by Mohd Suhaimi et al. (2012), the findings have shown that the construction industry is refraining from using arbitration and litigation as both methods are time-consuming. Next, ranked third is familiarity with the ED practice with a mean score of 3.81 followed by creation of non-genuine disputes ranked fourth with a mean score of 3.72.

Table 3. Ranking of perceptions of construction players toward ED as an ADR (N=153)

Rank	Perceptions	Mean	Standard Deviation
1	Prevent bias and power imbalance in formal proceedings	3.84	.79
2	As an alternative to litigation and arbitration	3.82	.81
3	Familiarity with the ED practices	3.81	.77
4	Creation of non-genuine disputes	3.71	.82

5.0 CONCLUSION

As a conclusion, construction players agreed that Expert Determination can provide a private and confidential method of dispute resolution that has a degree of finality due to the limited grounds for appeal and can prevent power imbalance in formal proceedings. Expert Determination also can give very much advantage than other methods.

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